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ANNUAL PROFESSIONAL WRITING AWARD

I. INTRODUCTION

Each year, the Alumni Association of The Judge Advocate General's School, at Charlottesville, Virginia, gives an award to the author of the best article published in the *Military Law Review* during the previous calendar year. The purposes of this award are to recognize outstanding scholarly achievements in military legal writing, and to encourage further writing.

The award was first given for an article published in 1963, the sixth year of the *Review's* existence. Through 1973, the award consisted of a citation signed by The Judge Advocate General, and a *gift* of *$25.00.* From **1974** onward, a plaque bearing the author's name and the year of publication has been given in place of the cash award. In addition, year by year, each winning author's name is inscribed on a composite plaque on permanent display in the halls of The Judge Advocate General's School.

Criteria for selection of an award winner are difficult to specify with precision, and have undoubtably changed over the years. At the present time, considerable weight is given to the probable usefulness of the article to the readership of the *Review*, and especially to the judge advocate or attorney advisor in the field. Another factor is the extent to which the article contributes to the development of a body of literature on military legal subjects. This may be considered a measure of the long-term value of an article, as usefulness is perhaps an indicator more of its short-term value. More routine standards include the quality of the writing, organization, and analysis, and the depth and breadth of research reflected in the article.

The award-winning article is selected initially by a committee of senior TJAGSA staff and faculty members appointed by the Commandant. The committee examines all articles appearing in the four volumes of the *Review* for the calendar year of the award, and makes a recommendation to the Commandant, who has approval authority. The award is presented to the author of the winning article by a senior judge advocate, sometimes by The Judge Advocate General if convenient.

II. THE AWARD FOR 1978

The award for calendar year 1978 has been presented to Major Gary L. Hopkins, and to Lieutenant Colonel Robert M. Nutt, for their article entitled, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, published in volume 80, the issue for spring, 1978.[1] Lieutenant Colonel Nutt is deputy commandant and director of the Academic Department at The Judge Advocate General's School, and Major Hopkins is chief of the Contract Law Division there.[2]

In this article, the authors provide a comprehensive review of one of the least well understood federal statutes, the Anti-Deficiency Act.[3] The article discusses procedures for recognizing and assigning responsibility for violations of the Act, and other matters. Several other closely related statutes concerning fiscal matters are also reviewed. The authors conclude that violations can be avoided through reasonable staff coordination during the procurement process.

The article helps greatly to clarify a confusing and controversial area of the law which in the past has often proved difficult to apply in practical situations. This type of article is especially helpful to the judge advocate or attorney advisor in field legal offices, where research materials, and also the time to utilize them, are often lacking.

III. THE AWARD IN PAST YEARS

The Alumni Association professional writing award has been given fifteen times before the 1978 award. The award winners are listed below, in reverse chronological order:

1977: Major John S. Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 (1977).

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[1] 80 Mil. L. Rev. 51 (1978).

[2] For biographical information concerning the two authors up to the time of publication of their article, see the starred footnotes at 80 Mil. L. Rev. 51.

[3] This statute, codified at 31 U.S.C. § 665 (1976), is commonly cited to its older source, the Revised Statutes of 1878. Further information on this point may be found at 80 Mil. L. Rev. 55. note 1.

1976: Major Steven P. Gibb, *The Applicability of the Laws of Land Warfare to U S . Army Aviation,* 73 Mil. L. Rev. 25 (1976).

1975: Colonel Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities,* 70 Mil. L. Rev. 1 (1975).

1974: Major Thomas M. Strassburg, *Civilian Judicial Review of Military Criminal Justice,* 66 Mil. L. Rev 1 (1974).

1973: Major William Hays Parks, USMC, *Command Responsibility for War Crimes,* 62 Mil. L. Rev. 1 (1973).

1972: Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future,* 55 Mil. L. Rev. 39 (1972).

1971: Lieutenant Colonel Robert W. Gehring, USMC, *Legal Rules Affecting Military Uses of the Seabed,* 54 Mil. L. Rev. 168 (1971).

1970: Colonel Richard R. Boller, *Pretrial Restraint,* 50 Mil. L. Rev. 71 (1970).

1969: Lieutenant Colonel David C. Davies, *Grievance Arbitration Within Department of the Army Under Executive Order 10988,* 46 Mil. L. Rev. 1 (1969).

1968: Colonel Donald W. Hansen, *Judicial Functions for the Commander,* 41 Mil. L. Rev. 1 (1968).

1967: Colonel Dulaney L. O'Roark, Jr., *The Impact of Labor Disputes on Government Procurement,* 38 Mil. L. Rev. 111 (1967).

1966: Lieutenant Commander Richard J. Grunawalt, USN, *The Acquisition of the Resources of the Sea—A New Frontier of International Law,* 34 Mil. L. Rev. 101 (1966).

1965: Lieutenant Colonel Jabez W. Loane, IV, *Treason and Aiding the Enemy,* 30 Mil. L. Rev. 43 (1965).

1964: Colonel Darrell L. Peck, *The Use of Force to Protect Government Property,* 26 Mil. L. Rev. 81 (1964).

1963: Lieutenant Colonel Joseph B. Kelly, *Legal Aspects of Military Operations in Counterinsurgency,* 21 Mil. L. Rev. 95 (1963).

Authors' ranks stated above are their current ranks or the highest ranks they attained. Up to date information is not available in every case, and apologies are extended for any errors made.

IV. CONCLUSION

Examination of the above list reveals that both Marine Corps and Navy authors have been among the recipients of the award. One person, Colonel Darrell L. Peck, has received the award in two different years. Further examination of the notes to the published articles would reveal that most, but not all were originally written as theses by members of past graduate (advanced) classes.[4]

The 1978 award is the first that has been given to more than one author. It is also the first that has been given for an article on procurement or contract law. Thus, with this award, all four major areas of military practice—criminal, international, administrative, and now contract law—are represented in the list of winning articles.

It is with pride that the *Military Law Review* salutes all the past and the present recipients of the TJAGSA Alumni Association Professional Writing Award. If the *Review* enjoys any stature as a scholarly publication, they have done much to earn that stature for it.

PERCIVAL D. PARK
Major, JAGC, U.S. Army
Editor, *Military Law Review*

[4] The articles which were the subjects of the awards for 1963, 1972, 1974, 1975, 1977, and 1978 were not graduate class theses. (The 1974 and 1975 articles were both LL.M. theses, written respectively for Northwestern University and the University of Virginia.) The other ten award-winning articles were all graduate class theses.

SYMPOSIUM INTRODUCTION:

CRIMINAL LAW

The *Military Law Review* is pleased to present in this issue a new collection of articles pertaining to criminal law in the military services. This volume is one of a series of symposium issues which began with volume 80, and it is the second dealing with criminal law. The first was volume 84, the spring 1979 issue.

The leading article of the present volume is *Open Government and Military Justice*, by Major Paul L. Luedtke. The phrase "open government," referring to the availability of government records to the general public under the Freedom of Information Act, is normally considered an administrative law topic. But here Major Luedtke reviews the application of the FOIA and also the Privacy Act to records pertaining to military justice matters. Discussed are records of trial and appellate proceedings, criminal investigation records, documentation concerning nonjudicial punishment under Article 15, Uniform Code of Military Justice, and also military personnel files. He recommends that the military services index their court-martial records of trial and publish their regulations in the Federal Register, to avoid possible lawsuits under the FOIA in the future.

Under Article 51(d), Uniform Code of Military Justice, a military judge sitting alone is required to render special findings of fact if he or she is requested to do so before general findings are issued. The analogous provision in civilian criminal law is rule 23(c) of the Federal Rules of Criminal Procedure. Captain (P) Lee D. Schinasi has written an article discussing the possible uses and benefits of special findings for both the government and the defense as parties to trials by court-martial. He urges greater use of this tool of advocacy.

Captain (P) David A. Schlueter has provided us with an historical article, discussing the origins and development of the military court, or court-martial, from ancient times and the middle ages to the present day. This is the most recent in a series of historical articles published in the *Review*, the last being Captain Hoffman's article on the Judge Advocate General's civil authority, in volume 85.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

OPEN GOVERNMENT AND MILITARY JUSTICE*

by Major Paul L. Luedtke**

In this article, Major Luedtke discusses the effects which the Freedom of Information Act, 5 U.S.C. § 552 (1976), and the Privacy Act, 5 U.S.C. § 552a (1976), have on the handling of records within the Army's military justice system.

After reviewing the two statutes and their interrelationship, Major Luedtke discusses their effect on the availability of court-martial trial and appellate records, and records of nonjudicial punishment under article 15, UCMJ. He then examines the possible use of the two acts as alternatives to discovery in court-martial proceedings. A review of military discovery law is provided, including the scope of discovery and the standards of relevance and reasonableness.

Major Luedtke also considers briefly several other questions, including the question of whether the failure of the military

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*This article is an adaptation of a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twenty-Sixth Judge Advocate Officer Advanced (Graduate) Class, during academic year 1977-78. Major Luedtke's thesis was briefly noted at 85 Mil. L. Rev. 172 (1979).

The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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services to publish punitive regulations in the Federal Register gives rise to an affirmative defense for persons charged with violating those regulations.

The author discusses this latter group of questions in a hypothetical manner, arguing that they are worth examining because other trends in development of the law may give them practical importance in the future. In particular, Major Luedtke warns that the military services may face challenges of this nature in the future. He recommends publication of regulations and indexing of records as prophylactic measures.

I. INTRODUCTION

Openness-in-government legislation has descended upon the federal practitioner with the ever increasing force of an avalanche. From the initial rumblings of the mid-1960s, there has followed more than a decade of new and amending legislation, implementing regulations, and court interpretation.[1] The Freedom of Information Act,[2] the Federal Advisory

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[1] The date of July 4, 1967, may truly be said to be the dawn of an openness-in-government era. However, the beginnings go back at least 21 years, to the enactment of the public information section of the Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946).

Due to vagueness and other statutory inadequacies, the act was frequently used by government agencies as authority for withholding information. Ultimately its failure to accomplish widespread dissemination of government information gave birth to the new era.

In 1958, Congress passed the first statute devoted solely to freedom of information. It added one sentence to the 1789 "housekeeping" law now codified at 6 U.S.C. § 301 (1976): 'This section does not authorize withholding information from the public or limiting the availability of records to the public." Act of Aug. 12, 1958, Pub. L. No. 85–619, 72 Stat. 547.

It was not until 1966, however, in an act to be effective on July 4, 1967, that Congress amended the public information section of the Administrative Procedure Act. Act of July 4, 1966, Pub. L. No. 89–487, 80 Stat. 250. It was this act that made the initial and crucial transition from a requirement to make matters of official record available "to persons properly and directly concerned," to a requirement to make requested identifiable records "promptly available to any person." As a result of the Act of June 5, 1967, Pub. L. No. 90–23, 81 Stat. 54, also effective on July 4, 1967, the original act amending the public information section of the Administrative Procedure Act was codified as part of title 5, United

Committee Act,[3] the 1974 amendments to the Freedom of Information Act,[4] the privacy Act of 1974,[5] and the Government in the Sunshine Act,[6] are all part of this recent phenomenon.[7] While the majority of ice and snow cascading down the mountainside may have reached the valley, the avalanche has not yet ended,[8] and surely the impact will not be known for years to come.

The military departments are not unlike other elements of the executive branch to which this legislation generally applies. They prepare budgets, procure goods and services, and engage in the full gamut of governmental activities which create records the public frequently seeks to discover. In addition, they maintain employee personnel files, medical

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States Code. See House Comm. on Government Operations, Administration of the Freedom of Information Act, H. R. Rep. No. 1419, 92d Cong., 2d Sess. 1 (1972) [hereinafter cited as H.R. Rep. No. 14191.

[2] There was never an act given the official short title, "Freedom of Information Act," but the act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, has become known as such. In one sense, this is technically incorrect, as, prior to that statute's effective date, it was repealed by the Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 64, which codified the prior statute with only minor changes. In any event, the term "Freedom of Information Act" as used hereinafter refers to the act codified at 5 U.S.C. § 552 (1976), as amended.

[3] Pub. L. No. 92-463, 86 Stat. 770 (1972). The act as amended is *codified* at 5 U.S.C. App. (1976).

[4] Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

[5] Pub. L. No. 93-679, 88 Stat. 1896. Section 3 is codified at 5 U.S.C. § 552a (1976).

[6] Pub. L. No. 94-409, 90 Stat. 1241 (1976). Section 3 is codified at 5 U.S.C. § 552b (1976).

[7] One should not forget that the openness-in-government era has also affected the private sector, *e.g.*, the Fair Credit Reporting Act, Pub. L. No. 91-508, § 601, 84 Stat. 1127 (1970), codified at 15 U.S.C. 1681-1681t (1976). It has also affected state and local governments, *e.g.*, the Family Educational Rights and Privacy Act of 1974, (Buckley Amendments), Pub. L. No. 93-380, § 513, 88 Stat. 571, codified at 20 U.S.C. 1232g (1976).

[8] See, *e.g.*, Omnibus Right to Privacy Act of 1977, H.R. 10076, 95th Cong., 1st Sess. (1977). Perhaps the proposal to amend 5 U.S.C. § 553 (1976) to remove the military's exemption from the rule-making requirements of the Administrative Procedure Act also could be considered an effort to provide more open government. H.R. 10052, 95th Cong., 1st Sess. § 3 (1977).

files, investigatory files, and a host of other records indexed and retrieved by the names of individuals. In these respects, the immediate impact of openness-in-government legislation on the military departments is not substantially different from the impact on the other executive agencies.

The military departments, however, are unique in that they administer a self-contained criminal justice system.[9] None of the other executive agencies contains within itself a system in which the prosecuting attorney, the defense attorney, the trial judge, the jury, the court reporter, the clerk of court, the government and defense appellate attorneys, the appellate judges,[10] the criminal investigators, the prison and rehabilitation personnel, and defendant all are members of the agency. When one adds to this fact that the military justice system includes a nonjudicial means by which punishment can be imposed for minor disciplinary infractions,[11] it is not difficult to understand that the military lawyer will be faced with numerous openness-in-government issues unlike those faced by his business suit counterpart in the executive agencies.

It is the purpose of this article to identify unique issues raised by the application of openness-in-government legislation, in particular the Freedom of Information Act and the Privacy Act of 1974, to the military justice system.[12] These issues can be divided into two general areas: (1) questions pertaining to treatment of military justice records under the acts, and (2) substantive and procedural issues raised by application of the acts to court-martial proceedings. While some issues are susceptible to resolution, most are such that at this time little can be done other than to provide some thoughts to aid in their eventual resolution. It is there-

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[9] Uniform Code of Military Justice arts. 1-140, 10 U.S.C. § § 801-940 (1976) [hereinafter cited as U.C.M.J.]; Manual for Courts-Martial, United States, 1969 (Rev. ed.) bereinafter cited as MCM, 19691.

[10] The highest military appellate tribunal, the Court of Military Appeals, established as an article I court by U.C.M.J. art. 67(a), is not part of a military department, or of the Department of Defense except for administrative purposes. This fact, however, does not detract from the uniqueness of the situation.

[11] U.C.m.J. art. 15.

[12] Many aspects of the total military justice system will not be affected differently from their equivalent outside the military. For example, it is difficult to conceive of any unique issues arising out of a Privacy Act access request for a prisoner's correctional treatment file. The fact that an individual is a prisoner at the United States Disciplinary Barracks rather than a federal prison is irrelevant. Such matters are outside the scope of this article.

fore hoped that this article will serve as the catalyst which will accelerate development of this aspect of the law to its fullest extent.

II. SUMMARY OF THE LEGISLATION

A. *MAJOR FEATURES OF THE FREEDOM OF INFORMATION ACT*

The primary thrust of the Freedom of Information Act is to open the files of the executive branch of the federal government to the public.[13] It accomplishes this through three major requirements: Section (a)(1) which requires agencies to publish certain information in the Federal Register;[14] section (a)(2) which requires that certain materials be made available for public inspection and copying, and that indexes of these materials be published at least quarterly and be made available to the public;[15] and section (a)(3) which requires that all agency records not covered by sections (a)(1) and (a)(2) be made available to any person upon request.[16]

Recognizing that total disclosure could be injurious to the public interest, Congress exempted nine specific categories of records from its mandate. These exemptions are permissive in nature; they permit but do not require withholding of certain information.[17] They range from the not unexpected exemption for information authorized to be kept secret in the interest of national defense or foreign policy (national security information),[18] to the peculiar and rather limited exemption for geological and geophysical information and data concerning wells.[19]

The three major exemptions which will concern the military lawyer in the military justice context are the exemption pertaining to internal

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[13] See Clark, *Foreword* to U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at III (1967) bereinafter cited as Att'y Gen. 1967 Memorandum].

[14] 5 U.S.C. § 552(a)(1) (1976).
[15] 5 U.S.C. § 552(a)(2) (1976).
[16] 5 U.S.C. § 552(a)(3) (1976).

[17] 5 U.S.C. § 552(b) (1976).
[18] 6 U.S.C. § 552(b)(1) (1976).
[19] 5 U.S.C. § 552(b)(9) (1976).

memoranda,[20] the exemption applicable to disclosure of information which would constitute a clearly unwarranted invasion of personal privacy,[21] and the exemption relating to investigatory records compiled for law enforcement purposes.[22]

The Freedom of Information Act empowers the district courts of the United States to review de novo an agency's withholding of records. The burden of proof on any claim of exemption rests with the agency claiming the exemption, not with the requester.[23] The act specifies time limits within which agencies must respond to requests. A requester is deemed to have exhausted his administrative remedies upon agency failure to comply with such limits.[24] The statute also authorizes agencies to charge fees for search and duplication,[25] for the award of attorney fees to a complainant who substantially prevails,[26] and for a proceeding to determine whether disciplinary action is warranted against the responsible individual when a court determines that withholding of records was arbitrary or capricious.[27]

B. *MAJOR FEATURES OF THE PRIVACY ACT OF 1974*

Congressional concern over the harm to individual privacy that can occur from collection and dissemination of personal information led to the passage of the Privacy Act of 1974.[28] In order to curb potential abuses, the act provides a complex system of restrictions and requirements which essentially apply to agency "records"[29] and "systems of records."[30]

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[20] 5 U.S.C. § 552(b)(5) (1976).
[21] 5 U.S.C. § 552(b)(6) (1976).
[22] 5 U.S.C. § 552(b)(7) (1976).

[23] 5 U.S.C. § 552(a)(4)(B) (1976).
[24] 5 U.S.C. § 552(a)(6) (1976).
[25] 5 U.S.C. § 552(a)(4)(A) (1976).

[26] 5 U.S.C. § 552(a)(4)(E) (1976).
[27] 5 U.S.C. § 552(a)(4)(F) (1976).
[28] Pub. L. No. 93–579, § 2, 88 Stat. 1896.

[29] A record is defined as:
> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment his-

The major restriction imposed by the act is that which prohibits disclosure of any record from a system of records without the written request or prior written consent of the individual to whom the record pertains. This prohibition applies to disclosure by any means of communication, and to disclosures to other government agencies as well as to any person.[31] There are, however, eleven enumerated exceptions which permit non-consensual disclosure of personal information. These include exceptions for intra-agency disclosure,[32] disclosure required by the Freedom of Information Act,[33] disclosure pursuant to an established "routine use,"[34] certain disclosures for civil or criminal law enforcement activity,[35] and disclosure pursuant to court order.[36]

The major requirements imposed by the act direct agencies to permit an individual to have access to records pertaining to him or her, and to request amendment of a record which he or she believes is not accurate, relevant, timely, or complete." To aid individuals desiring to make such requests, agencies are required to publish notice of each system of records they maintain.[38] Furthermore, when soliciting information from an in-

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tory and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4) (1976).

[30] A system of records is defined as:

a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. § 552a(a)(5) (1976).

[31] 5 U.S.C. § 552a(b) (1976).
[32] 5 U.S.C. § 552a(b)(1) (1976).
[33] 5 U.S.C. § 552a(b)(2) (1976).

[34] 5 U.S.C. § 552a(b)(3) (1976). A routine use is defined as, "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552(a)(7)(1976).

[35] 5 U.S.C. § 552a(b)(7) (1976).
[36] 5 U.S.C. § 552a(b)(11) (1976).
[37] 5 U.S.C. § 552a(d) (1976).

[38] 5 U.S.C. § 552a(e)(4) (1976). This notice is commonly referred to as a system notice.

dividual, agencies must inform the individual of certain matters which may affect the individual's decision whether to provide the information.[39]

The Privacy Act also empowers the head of an agency to exempt certain systems of records from some of the requirements. A system of records maintained by an agency or component thereof which performs as its principal function any activity pertaining to enforcement of criminal laws may be exempted from the majority of the act's provisions.[40] Other law enforcement investigatory files and certain other categories of records may be exempted from a limited number of specified provisions.[41] Both the general exemption provisions and the specific exemption provisions permit exemption from the access and amendment requirements.[42] Neither category permits exemption from the restrictions on disclosure of records or from the requirement to publish system notices.[43] Criminal law enforcement activities may be exempted from providing a Privacy Act statement when soliciting information from an individual.[44]

Like the Freedom of Information Act, the Privacy Act contains a jurisdictional grant empowering the district courts of the United States to review agency compliance. Unlike the Freedom of Information Act, however, the act provides for money damages against the United States in certain cases.[45] In addition, the act provides criminal penalties for willful violations of some of its provisions.[46]

C. INTERRELATIONSHIP OF THE ACTS

At first glance one might think that a law which seeks to open government files to the public must be at odds with one designed to prevent the harm that can befall an individual by dissemination by the government

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[39] 5 U.S.C. § 552a(e)(3) **(1976).** This is accomplished by a statement commonly referred to as a Privacy Act statement.

[40] 5 U.S.C. § 552a(j) (1976).
[41] 5 U.S.C. § 552a(k) **(1976).**
[42] 5 U.S.C. § § 552a(j), 552a(k) **(1976).**

[43] *Id.*
[44] 5 U.S.C. § 552a(j) **(1976).**

[45] 5 **U.S.C** § 552a(g) (1976).

[46] 5 U.S.C. § 552a(i) **(1976).**

of personal information concerning him. While the general rule of the Freedom of Information Act (mandatory disclosure) conflicts with the general rule of the Privacy Act of 1974 (prohibited disclosure), the statutes, through their respective exemptions and exceptions, represent a careful balancing of competing public interests. Curiously enough, however, this balancing of competing interests did not occur with the passage of the Privacy Act of 1974 as one might expect, but with the passage of the Freedom of Information Act in 1966.

The sixth exemption of the Freedom of Information Act permits agencies to withhold records if disclosure would constitute a clearly unwarranted invasion of personal privacy.[47] It is in the words "clearly unwarranted" that Congress expresses its determination of the appropriate balance between the competing interests. The public does not have total access to government records concerning individuals, and the individual does not have the right to be free of all invasions of privacy.[48] The Privacy Act maintains the status quo through an exception to the general rule of nondisclosure. This exception permits disclosure when it would be required by the Freedom of Information Act.[49] The net effect is that the sixth exemption of the Freedom of Information Act, complete with court interpretation, is incorporated into the Privacy Act.

The Privacy Act, while not altering what Congress deemed to be the appropriate balance between open government and individual privacy, has altered in one respect the Government's practices concerning release of personal information to the public. Prior to the act it was presumably within the discretion of the agency to determine to what extent it would protect the privacy of individuals, as the Freedom of Information Act exemptions permit but do not require withholding. By prohibiting disclosure unless required by the Freedom of Information Act, the Privacy Act has the effect of eliminating agency discretion concerning release of records retrieved by individual identifiers.[50]

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[47] 5 U.S.C. § 552(b)(6) (1976).

[48] For a discussion of the pertinent legislative history and the deliberateness of including the words "clearly unwarranted," *see* Department of the Air Force v. Rose, 425 U.S. 352, 372–73, 378 n. 16 (1976).

[49] 5 U.S.C. § 552a(b)(2) (1976).

[50] *See* Strassburg, *The Public's Right to Know and the Individual's Right of Privacy*, The Army Lawyer, Apr. 1976, at 2.

The question of compatibility of the acts also arises in connection with a request from an individual for records which pertain to himself. It is quite clear that an agency may not rely on an exemption of the Freedom of Information Act to deny access to records which are otherwise accessible to an individual under the Privacy Act.[51] Initially, however, there was a question as to whether access to a record normally releasable under the Freedom of Information Act could be denied if it was contained in a Privacy Act system of records which had been exempted from access by the agency head.[52] The position of the Department of the Army was that access could not be denied,[53] a position which was ultimately supported by the Office of Management and Budget.[54] There must be a basis for denial under both statutes before an individual will be precluded from obtaining records which pertain to himself.[55]

III. EFFECT OF OPEN GOVERNMENT LAWS ON MILITARY JUSTICE RECORDS

The proposed reply to a soldier's parent who has inquired why the soldier is being administratively eliminated from the service states that the soldier has received nonjudicial punishment on three separate occasions for various disciplinary infractions. A newspaper reporter requests a copy of the record of trial from a recent court-martial in which the son of a prominent businessman was acquitted of selling drugs. An attorney representing a soldier who wants to appeal his special court-martial con-

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[51] 5 U.S.C. § 552a(q) (1976).

[52] *See* Senate Comm. on Government Operations & Subcomm. on Government Information and Individual Rights, House Comm. on Government Operations, 94th Cong., 2d Sess., Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), at 1173.

[53] Regulations require, *inter alia*, that the system of records be properly exempted *and* that the record not be required to be disclosed under the Freedom of Information Act. Army Reg. No. 340-21, Office Management—The Army Privacy Program, para. 2-6*b* (27 Aug. 1975) [hereinafter cited as AR 340-21].

[54] Office of Management and Budget, Implementation of the Privacy Act of 1974, Supplementary Guidance, 40 Fed. Reg. 56,741 at 56,742 (1975) [hereinafter cited as OMB Supplementary Guidance].

[55] For another discussion of this point and the procedural problems raised by such requests, see Strassburg, *supra* note 50, at 3-4.

viction under Article 69, Uniform Code of Military Justice, requests copies of all prior appeals in which The Judge Advocate General has granted relief on the basis of newly discovered evidence. A soldier requests that a record of nonjudicial punishment be expunged from his personnel file under the Privacy Act amendment provisions.

The above are but a few of the many openness-in-government issues which potentially face the military lawyer. Their uniqueness arises not from the impact of openness-in-government legislation on military criminal law, but from the unique nature of the records produced by the military criminal justice system—records of trial, records of nonjudicial punishment, and records produced by appellate determinations.

A. FREEDOM OF INFORMATION ACT

1. Release of Records of Trial to Members of the Public

The Freedom of Information Act exemption that immediately comes to mind when considering whether court-martial records of trial must be released to members of the public is that pertaining to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[56] Application of this exemption requires an initial determination whether a record of trial constitutes a file within the scope of exemption, *i.e.*, is it a personnel, medical, or similar file. If the answer is affirmative, a second determination must be made whether disclosure would have the stated effect.[57]

The fist determination of this two-step process is of more academic than practical importance, as the courts have liberally construed the term "similar files." It *can* be argued with merit that the form of the file is irrelevant, and that the only true issue is whether there would be a

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[56] 5 U.S.C. § 552(b)(6) (1976).

[57] The question of whether the sixth exemption provides a blanket exemption for personnel and medical files has been answered by the Supreme Court in the negative. The phrase, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," not only applies to "similar files," but equally applies to "personnel and medical files." Department of the Air Force v. Rose, 425 U.S. 352, 370–76 (1976).

clearly unwarranted invasion of personal privacy.[58] The United States Supreme Court, while rejecting the contention that Air Force Academy case summaries of honor and ethics hearings constituted "personnel files," had little difficulty in concluding that they were "similar files." The major consideration in that conclusion was that disclosure involved privacy values similar to disclosure of personnel files.[59]

The second step in applying the sixth exemption is substantially more difficult than the first. Congress intended to establish objective criteria for the withholding of records so that a requester need not state a reason for wanting the information.[60] Nevertheless, application of the phrase "unwarranted invasion of personal privacy" has frequently necessitated inquiry into a requester's reasons, resulting in a somewhat subjective determination. Thus, in Getman v. NLRB,[61] two "highly qualified specialists in labor law" conducting a voting study were able to obtain the names and addresses of employees eligible to vote in certain labor elections,[62] whereas, in Wine Hobby USA, Inc. v. IRS,[63] a mail order seller

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[58] In a case where the court held a list of names and addresses to be within the meaning of the term "similar files," the court stated:

> A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "files" should not be given an interpretation that would often preclude inquiry into this more crucial question.
>
> Furthermore, we believe the list of names and addresses is a file "similar" to the personnel and medical files specifically referred to in the exemption. The common denominator in "personnel and medical and similar files" is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy. We do not believe that the use of the term "similar" was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy.

Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (3d Cir. 1974) (footnote omitted).

[59] Department of the Air Force v. Rose, 425 U.S. 352, 376–77 (1976).
[60] *See* H.R. Rep. No. 1419, *supra* note 1, at 3.

[61] 450 F.2d 670 (D.C. Cir. 1971).
[62] *Id.*, at 674–77.

[63] 502 F.2d 133 (3d Cir. 1974).

of amateur winemaking equipment and supplies was unable to obtain the names and addresses of individuals registering with the Bureau of Alcohol, Tobacco and Firearms.[64]

Most courts have applied a "balancing of interests'' test in sixth exemption cases,[65] an approach which appears to have won the favor of the United States Supreme Court.[66] While the courts generally inquire into the requester's reasons for wanting the information in order to balance the interests, it is important to note that they do so not to determine the requester's personal interest, but rather to ascertain the public interest in disclosure. In *Getman*, great weight was placed on the potential benefit to be received by the public from an empirical investigation of labor elections,[67] whereas in *Wine Hobby* the court could ascertain no direct or indirect public interest to be served by disclosure.[68] Perhaps the test is best summarized in Campbell v. CSC,[69] where the court stated:

Commercial winemaking is subject to various permit, bonding, and taxation requirements. People who make wine at home for their own household or family use rather than for sale may avoid compliance with these requirements through registration with the Bureau. The plaintiff, Wine Hobby, wanted the registrants' names and addresses to enable it to send them its catalogues describing winemaking equipment and supplies it offers for sale. 502 F.2d 134.

[64] Id., at 136–37.

[65] *See* Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974); Rural Housing Alliance v. Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971). But *see* Robles v. EPA, 484 F.2d 843 (4th Cir. 1973).

[66] Department of the Air Force v. Rose, 425 U.S. 352 (1976). It should be noted that in *Rose* the requester only wanted records with names and identifying data deleted. Thus the Court had no need to actually adopt or reject the approach.

Nevertheless, in considering whether the phrase "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" applied to personnel and medical files as well as similar files, the Court stated: "To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts, 'that will involve a balancing' of the private and public interests." Id., at 373 (footnote omitted). For a case subsequent to *Rose* which applied the balancing test, *see* Campbell v. CSC, 539 F.2d 58 (10th Cir. 1976).

[67] 450 F.2d at 675–76.
[68] 502 F.2d at 137.

[69] 539 F.2d 58 (10th Cir. 1976).

In applying the test, these factors are considered:

1. Would disclosure result in an invasion of privacy and, if so, how serious?

2. The extent or value of the public purpose or object of the individuals seeking disclosure.

3. Whether the information is available from other sources.'"

The first of the three factors enumerated in Campbell and the step-by-step approach used by other courts[71] imply that the courts proceed under an assumption that there *can* be disclosure of information about an individual which does not amount to an invasion of personal privacy.[72] While the courts have not articulated a rationale for such a proposition,[73] at least two can be advanced, each of which lends merit to the position that the public interest need not be balanced against the private interest when considering whether records of trial by court-martial must be disclosed to members of the public.

If one accepts the premise that there *can* be no *invasion* of privacy unless there is a reasonable *expectation* of privacy, a body of information

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[70] *Id.*, at 61.

[71] *E.g.*, Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (1974) in which the court stated,

> To apply the balancing test to the facts of this case we must determine whether release of the names and addresses would constitute an invasion of personal privacy and, if so, balance the seriousness of that invasion with the purpose asserted for release.

Id., at 136.

[72] If this was not the case, there would be no need for the court's initial inquiry, and it would suffice for the court to examine the seriousness of the invasion and balance it against the public interest served by disclosure. The importance of this point, of course, is that if disclosure does not result in an invasion of privacy, it cannot be "clearly unwarranted," and the need for a balancing of interests is eliminated.

[73] The need to articulate a rationale has not arisen, as the courts applying the balancing test have always found, as is to be expected in a litigated case, that some invasion of privacy would be caused by disclosure. Thus they have needed only to address the issue of the seriousness of the invasion.

exists which *can* be freely disclosed in spite of the appearance that privacy is being invaded. Examples of such information might include matters such as one's sex, general description, or other matters which are open for the world to see.[74] In addition, in the area of state and local matters, it is doubtful that one has a reasonable expectation of privacy in certain public records which have traditionally been open to public scrutiny such as marriage certificates, birth records, and recorded real estate transactions. This "public record'' concept is easily extended to court-martial records of trial due to similar treatment of their civilian counterpart. More importantly, however, the public nature of criminal proceedings, civilian or military, would certainly seem to preclude an accused from entertaining any expectation of privacy other than that afforded by the rules of evidence pertaining to relevancy and materiality.

The second basis with potential to support the assumption that there *can* be disclosure of information about an individual which does not constitute an invasion of privacy focuses on the causal relationship between the disclosure and the invasion. In other words, does disclosure of the record cause the invasion, or is the invasion caused by something other than the disclosure? Arguably, in the court-martial context, it is the public event which causes the loss of an accused's privacy, and not the subsequent disclosure of the record which preserves that event. Admittedly, disclosure of the record has the potential of broadening or perpetuating that loss of privacy, but there is a certain appeal to the position that disclosures made in the course of a public trial or other public event are forever in the public domain.

Other than the proposition that disclosure of a record of trial does not constitute a prima facie invasion of privacy, the only alternative favoring disclosure is that the invasion is not clearly unwarranted. This brings into consideration the full balancing test which, as previously noted, requires that the public interest served by disclosure be weighed against the seriousness of the invasion of privacy. While it is clear that the courts permit examination of an individual's reasons for requesting records in order to determine whether a public interest will be served,[75] it would seem preferable, where possible, to rely on a general public interest. "his would not only ease the administrative task of inquiring into a

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[74] For military members this could include matters discerned from one's uniform, such as rank, awards, and decorations.

[75] *E.g.*, Campbell v. CSC, 539 F.2d 58 (10th Cir. 1976); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

requester's reasons but would also foster the general intent of Congress that requesters need not state a reason for wanting information and that all requesters are to be on an equal footing.[76]

In one sense, despite the fact that the burden of proof rests with the government, a criminal trial is a proceeding in which an individual is called upon to answer to society for alleged misconduct. Such an individual, regardless of the ultimate finding of guilt or innocence, is required in the public interest to surrender many rights, not the least of which is a degree of his personal privacy. The public interest in such a proceeding, especially when the trial ends with a conviction, does not cease at the termination of the proceeding. There is a continuing public interest in knowing whether justice was done, both from the viewpoint of the individual and of society. This is particularly true of courts-martial, which have a disciplinary function affecting the national defense.[77] This public interest, coupled with the factors previously discussed—lack of an expectation of privacy, public trial, and the "public record" concept—make a substantial case for tipping the scales in favor of disclosure.

Is the public interest sufficient to offset the individual harm that could befall individuals by disclosure of records of trial? Only a court can ultimately decide, but until such time, the Army judge advocate can rely on regulatory guidance.[78] Further, there exists an administrative opinion

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[76] See H.R. Rep. No. 1419, *supra* note 1, at 3. See also 1 K. Davis, Administrative Law Treatise § 3A.4 (Supp. 1970).

[77] *Cf.* Department of the Air Force v. Rose, 425 U.S. 352, 367–69 (1976). In that case, the Court discusses the interest of the public in the discipline of cadets at the Air Force Academy.

[78] Army Reg. No. 340–17, Office Management — Release of Information and Records from Army Files, para. 2–12*f*(2) (C1, 24 Jan. 1975) [hereinafter cited as AR 340–17]. This regulation states that unclassified portions of records of trial should always be released after completion of appellate review, and that they may be made available earlier "if to do so, in the judgment of The Judge Advocate General, would not adversely affect the appellate process." Properly classified portions of a record of trial are exempt pursuant to 5 U.S.C. § 552(b)(1) (1976).

The only justification under the Freedom of Information Act for withholding a record of trial prior to completion of appellate review is 5 U.S.C. § 552(b)(7)(A) (1976), which permits withholding of investigatory records compiled for law en-

which leaves little doubt as to the position of The Judge Advocate General.

In the case which gave rise to the opinion, the custodian of a record of trial reflecting an acquittal questioned whether the record should be released. The case involved an Army officer who had been charged with conduct unbecoming an officer by committing certain lewd and lascivious acts with a male soldier. Although the record was over ten years old and arguably very damaging even though it showed an acquittal, The Judge Advocate General concluded that neither the sixth nor the seventh[79] Freedom of Information Act exemptions was applicable, and that the record must be released.[80] In light of such precedent, it is difficult to conceive of any record of trial which would be withheld merely to protect personal privacy.

2. *Disclosure of Records of Nonjudicial Punishment*

Assuming that nonjudicial punishment imposed under article 15, Uniform Code of Military Justice, is less stigmatizing than conviction by court-martial, it is ironic that the conclusion is more difficult to reach that records of nonjudicial punishment must always be released under

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forcement purposes to the extent that disclosure would interfere with enforcement proceedings.

Conceding the threshold issue, this author is hard pressed to conceive of a situation where the appellate process would be adversely affected by disclosure. It is certainly not like the situation where pretrial publicity could complicate the prosecution or prejudice the accused.

[79] The seventh exemption applies to investigatory records compiled for law enforcement purposes to the extent, *inter alia*, that disclosure would constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C) (1976). Significantly, the word "clearly" preceding the word "unwarranted" in the sixth exemption is omitted in the seventh exemption, creating, in theory, a greater right of privacy in the latter.

[80] DAJA–CL 1977/1872, 6 May 1977. The record of trial was specifically requested by name of the accused and so the option of deleting name and identifying data was not available. Furthermore, it is clear that the record was released based on a general public interest rather than a public interest peculiar to the specific requester. The requester gratuitously advised that he desired the record for use in an appeal of an officer efficiency report which had been subsequently rendered on him by the accused.

the Freedom of Information Act. Yet that is precisely the case, primarily because the procedure for imposing nonjudicial punishment is more private in nature.[81] While The Judge Advocate General of the Army has concluded that records of nonjudicial punishment introduced at a court-martial are releasable as a part of the record of trial, the opinion falls short of concluding that the public interest served by disclosure always outweighs the invasion of privacy that occurs.[82]

Thus there is no definitive administrative precedent favoring disclosure as in the case of records of trial. Rather, the regulatory guidance and the administrative precedent, at least by implication, indicate that determinations of releasability of records of nonjudicial punishment not contained in records of trial must be made on a case-by-case basis.

Regulatory guidance concerning disclosure of disciplinary type information is as follows:

> In determining whether the release of information would result in a clearly unwarranted invasion of privacy, consideration should be given, in cases involving alleged misconduct, to the relationship of the alleged misconduct to an individual's official duties, the amount of time which has passed since the alleged misconduct, and the degree to which the individual's privacy has already been invaded by any investigation or proceedings which have taken place.[83]

The only example provided is that pertaining to court-martial records of trial.[84] The lack of a similar example for records of nonjudicial punishment

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[81] Army Reg. No. 27–10, Legal Services — Military Justice, paras. 3–12*a*, 3–14b (C17, 15 Aug. 1977) bereinafter cited as AR 27–10]. This regulation provides that a service member may request that article 15 proceedings be open to the public, and that such a request shall ordinarily be granted.

Nevertheless, it is clear that nonjudicial punishment is intended to be a disciplinary measure between commander and subordinate rather than a trial between the public and an alleged criminal offender. Furthermore, to give any consideration to whether an article 15 proceeding was open to the public in determining whether the record is releasable under the Freedom of Information Act, would result in a dual standard where the individual who exercises his right is penalized by risking that his file will be subject to public disclosure.

[82] DAJA–CL 1977/1729, 4 Mar. 1977. *See also* DAJA–AL 1977/3792, 9 Mar. 1977.

[83] AR 340–17, para. 2–12*f*(2)(C1).

[84] *See* note 78, *supra.*

could be interpreted as hesitance to be as definitive, one way or the other, regarding the latter.

In October 1975, The Judge Advocate General was asked to determine whether the regulatory provision regarding announcement of article 15 dispositions on unit bulletin boards[85] violated the recently implemented Privacy Act. A negative conclusion could have been based on either of two exceptions to the act's prohibition against disclosures from systems of records, either the exception pertaining to disclosure "to those officers and employees of the agency . . . who have a need for the record in the performance of their duties,"[86] or the exception for records required to be disclosed under the Freedom of Information Act.[87] Use of the second exception, of course, would require a determination that disclosure would not constitute a "clearly unwarranted invasion of personal privacy."[88] The conclusion of The Judge Advocate General that the Privacy Act was not violated by posting summaries of article 15 proceedings on unit bulletin boards was based on the first exception.[89] Implicit in that choice is that it was the better of the two alternatives.

Use of the intra-agency exception as the basis for posting article 15 summaries is questionable for two reasons. First of all, it ignores the fact that unit bulletin boards are generally open to public viewing. Secondly, the exception does not permit unlimited disclosure within the agency. It embodies a "need to know" concept, and while it should be liberally interpreted so that the orderly conduct of business will not be impeded, it does impose some constraints on intra-agency disclosure.[90]

The rationale proffered to support the proposition that unit members have a "need to know" the disciplinary actions taken against fellow unit members is based on the assumption that posting article 15 summaries

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[85] AR 27–10, para. 3–13*b*(C17).
[86] 5 U.S.C. § 552a(b)(1)(1976).

[87] 5 U.S.C. § 552a(b)(2) (1976). The Judge Advocate General has opined on numerous occasions that there need not be an actual Freedom of Information Act request seeking disclosure of records pursuant to this exception. The test is whether therecords "would be required" to be disclosed. *E.g.*, DAJA–AL 1976/3752, 10 Mar. 1976. *See* Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28,949 at 28,954 (1975) [hereinafter cited as OMB Guidelines].

[88] 5 U.S.C. § 552(b)(6) (1976). *See* text at notes 47–49, *supra*.
[89] DAJA–CL 1975/2544, 25 Nov. 1975.
[90] OMB Guidelines, *supm* note 87, at 28,954.

has a deterrent effect and promotes morale.[91] If this assumption is correct a general benefit would devolve to the Army. It is difficult, however, to equate that benefit to the purpose for the exception, *i.e.*, to permit disclosures necessary for the agency to conduct its business in an orderly fashion. The fact that this questionable position was deemed to be the better of the two choices may indicate an extreme reluctance or total unwillingness to take the position necessary to adopt the alternative basis, namely, that disclosure of records of article 15 punishments is not a clearly unwarranted invasion of personal privacy.

The hesitancy, reluctance, or unwillingness implicit in the regulatory guidance and the administrative precedent is probably well founded. Unlike records of trial, it is difficult to conceive of a general public interest favoring disclosure of records of nonjudicial punishment. Perhaps there is a general public interest in the functioning of a disciplinary system affecting the national defense[92] or in the duty performance of public employees.[93] The Judge Advocate General, however, absent the additional factors present in courts-martial, namely, lack of an expectation of privacy, public trial, and the "public record" concept, has been unwilling on three occasions to conclude that such interests were sufficient.[94] In view of that unwillingness and of cases such as Campbell v. CSC[95] and Vaughn

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[91] DNA–CL 1975/2544, 25 Nov. 1975.

[92] *See* text at note 77, *supra*.

[93] *See* text at note 83, *supm.*

[94] DNA–CL 1975/2544, 25 Nov. 1975; DAJA–CL 1976/2673, 10 Dec. 1976; DAJA–CL 1977/1729, 4 Mar. 1977.

[95] *Campbell* involved a request for a Civil Service Commission report on personnel management which included an appendix listing employees erroneously classified too high in the General Service for the duties they were performing, and an appendix which named an employee who had apparently been promoted contrary to Civil Service Commission regulations.

The court upheld denial of the appendices based on exemption six of the Freedom of Information Act. There was no indication of any wrongdoing on the part of the named employees. Nevertheless, the court deemed the invasion of privacy to be serious because of the potential for embarrassment. The court recognized the public interest in "efficient and lawful personnel management," but said that such interest "is better served by disclosure of general agency performance rather than by specific revelation of individual problems such as overclassification." 539 F.2d at 62.

v. Rosen,[96] the judge advocate is well advised to severely question disclosure of records of nonjudicial punishment whether the disclosure be of the record itself or mere mention in a piece of correspondence that punishment was imposed. The judge advocate must search for a public interest to be served by disclosure. If he finds none that outweighs the invasion of privacy, he should recommend that disclosure be denied."

3. Effect on Appellate Records

So far only the third category of records under the Freedom of Information Act[98] has been considered. But the military justice system also produces various records of appellate determinations, including the decisions of the Courts of Military Review, and dispositions of appeals pursuant to article 69 of the Uniform Code. If these records constitute final opinions or orders "made in the adjudication of cases,"[99] they come within the second category of Freedom of Information Act records and must be made available for public inspection and copying.[100] More im-

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[96] 383 F. Supp. 1049 (D.D.C. 1974), *aff'd on other grounds*, 523 F.2d 1136 (D.C. Cir. 1975). *Vaughn* involved a request for reports identical to the report in *Campbell*, but the relevant issue involved textual references to specific agency officials, usually in personnel management, and evaluations of the job performance of those officials. Denying disclosure, the court stated: "Whatever interest the public has in these matters is for the most part met by disclosure of evaluations of agency personnel management performance, not by evaluations of particular individuals." *Id.* at 1055.

[97] An example where disclosure might be justified is the situation where the subject "goes public" with complaints of unfairness, discrimination, or other agency mistreatment and thereby creates a public interest in his particular case. It would seem unreasonable that the agency could not respond to the public's demand for an explanation even though the response might include more personal information than the subject himself made public. *See* DAJA–AL 1976/5258, 24 Aug. 1976.

The judge advocate, however, should be wary of poorly intentioned disclosures in such situations as they could be a critical factor in subsequent litigation.

[98] 5 U.S.C. § 552(a)(3) (1976). These are records which must be made available to any person upon request but do not have to be published in the Federal Register, or indexed and made available for public inspection and copying.

[99] 5 U.S.C. § 552(a)(2)(A) (1976).

[100] 5 U.S.C. § 552(a)(2) (1976). The requirement does not apply if the records are promptly published and copies are offered for sale.

portantly, however, "(a)(2)" records must be indexed for the public.[101] Furthermore, such records may be relied on, used, or cited as precedent by an agency only if the agency has complied with the requirements, or the affected party has actual and timely notice of the terms of the records.[102]

In determining what records must be indexed and made available under subsection (a)(2)(A), it is first necessary to turn to the definition section of the Administrative Procedure Act. "Adjudication" is defined as the "agency process for the formulation of an order."[103] "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[104] Combining these definitions, the conclusion is that "final opinions, . . . as well as orders, made in the adjudication of cases"[105] include, in essence, the product of an agency final disposition in any matter other than the process for formulating rules and regulations.[106]

The major case applying subsection (a)(2)(A) is NLRB v. Sears, Roe-

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[101] Id. The index must be published at least quarterly and distributed or, if the agency determines that this would be unnecessary and impracticable, it may provide copies of the index upon request at a cost not to exceed the direct cost of duplication.

[102] Id.

[103] 5 U.S.C. § 551(7) (1976).

[104] 5 U.S.C. § 551(6) (1976).

[105] 5 U.S.C. § 552(a)(2)(A) (1976).

[106] The Attorney General took a narrow view of this provision in his memorandum on the Freedom of Information Act when he stated that the act does not contemplate "the public availability of every 'order' as thus defined. The expression 'orders made in the adjudication of cases' is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding." Att'y Gen. 1967 Memorandum, *supra* note 13, at 15.

Professor Davis, however, criticizes this view. He states that, as "adjudication" means an agency process for the formulation of an order, "every order is issued as part of the final disposition of an adjudication." He also points out: "An 'order' may say no more than 'application granted' or 'application denied,' but that much has to be open to public inspection; whether that much may be meaningful has to depend upon the application of the Information Act to the other papers in the case.'' 1 K. Davis, *supra* note 76, at § 3A.8.

buck & Co.[107] in which the Supreme Court held that certain advice and appeals memoranda of the general counsel of the National Labor Relations Board constituted final opinions made in the adjudication of cases.

Unfair labor practice charges are initially filed with a regional director who has authority to determine whether to issue a complaint. The decision not to issue a complaint is appealable by the charging party to the general counsel. The decision to sustain or overrule the regional director is set forth with supporting reasons in an appeals memorandum. The general counsel also issues advice memoranda in certain cases which the regional director is required to forward before decision, or in cases which the regional director elects to forward for advice. Both types of memoranda are binding on the regional director.

The Supreme Court held that advice and appeals memoranda in cases where a complaint was not ultimately issued came within subsection (a)(2)(A) and are not exempt under the Freedom of Information Act internal memorandum exemption,[108] but that memoranda issued in cases where a complaint is filed are not "final opinions" and are exempt under exemption five.[109] In the former instance, a memorandum represents "an unreviewable rejection of the charge filed by the private party."[110] In the latter instance the filing of the complaint does not finally dispose of the matter."[111]

The *Sears* case, however, should not be interpreted to mean that a

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[107] 421 U.S. 132 (1975).

[108] Id. at 155–59. It should be noted that the exemptions apply to all three categories of records covered by the act. It is not essential at this point to explore the fifth exemption (5 U.S.C. § 552(b)(5) (1976)) in depth. In brief, the exemption is limited to internal memoranda of a pre-decisional nature and does not cover memoranda which explain the reasons for a particular decision. Thus, exemption five can never apply to final opinions and orders made in the adjudication of cases. They are mutually exclusive. Id. at 150–54.

[109] Id. at 159–60.

[110] *Id.* at 155.

[111] Id. at 159. The real purpose of the indexing requirement is to make public the "secret" law which develops within an agency in the course of disposing of matters before the agency. Id. at 155–56. The "law" of the cases in which a complaint is issued is not made by the General Counsel, but by the National Labor Relations Board, which ultimately decides the cases. *Id.* at 160.

decision which is appealable is necessarily not ('final." In a subsequent case of a similar nature, a court of appeals expressed its belief that the regional director's initial decisions on whether to file a complaint "possess the 'finality' demanded by subsection (a)(2)(A), notwithstanding the charging party's right to appeal a dismissal to the General Counsel's office."[112] This proposition can find support in a second Supreme Court case decided contemporaneously with *Sears.*

In Renegotiation Board v. Grumman Aircraft Engineering Corp.,[113] the Court concluded that determinations of a regional board were not required to be indexed and made available under subsection (a)(2)(A), as they were only recommendations to the Renegotiation Board. The regional board had no authority to finally decide cases before it.[114] In so holding, the Court contrasted the case before it with the facts in *Sears,* where the decision of the general counsel had "real operative effect," and, like a lower court decision, had "the force of law," absent appeal by one of the parties.[115]

While the case law does not clarify whether subsection (a)(2)(A) extends to the broadest possible limits suggested by Professor Kenneth C. Davis,[116] it is sufficiently enlightening to conclude without much hesitancy that it at least encompasses decisions of The Judge Advocate General made under article 69, Uniform Code of Military Justice.[117] These should be indexed and made available pursuant to subsection (a)(2). It is also quite clear that decisions of military appellate courts also fall within the scope of subsection (a)(2)(A). There is, however, at least a viable argu-

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[112] Kent *Corp.* v. NLRB, 530 F.2d 612, 618-19 (1976).
[113] 421 U.S. 168 (1975).

[114] *Id.* at 183–88.
[115] *Id.* at 186.
[116] *See* note 106, *supra.*

[117] Under U.C.M.J. art. 69, The Judge Advocate General has authority to vacate or modify, in whole or in part, the findings or sentence, or both, in a court-martial case which has been finally reviewed, but not reviewed by a Court of Military Review. The grounds for such action are: (1) newly discovered evidence; (2) fraud on the court; (3) lack of jurisdiction over the accused or the offense; or (4) error prejudicial to the substantial rights of the accused.

The article also requires The Judge Advocate General to review every record of trial by general court-martial in which there has been a finding of guilty and a sentence if appellate review is not provided for by U.C.M.J. art. 66.

ment that the courts of military review are not required to index and make available their unpublished decisions.

The Administrative Procedure Act defines "agency" as each authority of the United States government, whether or not it is within another agency, but specifically excludes "the courts of the United States" and, except for Freedom of Information Act purposes, "courts-martial and military commissions."[118] If the courts of military review are "courts of the United States" as used within the definition of "agency," the Freedom of Information Act does not apply to them. If they are not, they are an authority of the United States to which the act applies.

There is currently no answer to the above question. The courts of military review certainly perform a judicial function, but then so do courts-martial, and it is clear that courts-martial are subject to the act.[119] Another factor to be considered is that the courts are clearly part of the military departments, organizations which are subject to the act.[120] If one looks at the whole of section 551(1), it can be argued that Congress,

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[118] 5 U.S.C. § 551(1) (1976). This was the definition of "agency" which governed the Freedom of Information Act until the 1974 amendments, which added a definition of "agency" to the act itself. That definition states:

> For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e) (1976).

It is the author's opinion, however, that this amendment does not affect the present issue. The amendment is essentially a clarification and expansion of the phrase "each authority" in the basic portion of the definition, but does not in any way alter the specific exceptions to the definition. See generally U.S. Dep't of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act at 24–26 (1975) bereinafter cited as Att'y Gen. 1974 Memorandum].

[119] 5 U.S.C. § 551(1) (1976).

[120] U.C.M.J. art. 66(a) states: "Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges."

by the four general exclusions from the definition,[121] is limiting the term "each authority" to the executive branch of the federal government. Therefore, "courts of the United States" should be limited to those within the judicial branch of the government.

What use can be made of the "remedy" contained within subsection (a)(2)[122] for failure to index required records is left to the ingenuity of defense counsel at the trial and appellate levels. From the wording of the act's jurisdictional grant,[123] it would appear that the consequences of failing to maintain a required index are limited to this self-contained remedy. The plain language of the grant led Professor Kenneth C. Davis to conclude that "the act's judicial enforcement provision does not reach indexing."[124] This, however, has not proved to be the case.[125] Thus in the

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This is in sharp contrast with the establishment of the Court of Military Appeals: "There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located *for administrative purposes only* in the Department of Defense." U.C.M.J. *art.* 67(a)(1) (emphasis added).

For this reason, it would seem that the Court of Military Appeals is in a stronger position to claim that it is a "court of the United States" and thereby exempt from the Freedom of Information Act.

[121] In addition to excluding "courts of the United States," the definition also excludes "the Congress," "the governments of the territories or possessions of the United States," and "the government of the District of Columbia." 5 U.S.C. § 551(1) (1976).

[122] *See* text at note 102, *supra*.

[123] The act says that the district courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

[124] 1 K. Davis, *supra* note 76, at § 3A.14.

[125] In a recent case the Army was ordered to prepare and make available an index to dispositions of complaints made pursuant to U.C.M.J. art. 138. Hodge v. Alexander, Civil No. 77-288 (D.D.C., order filed May 13, 1977). The headings of the index prepared pursuant to the order were published in The Army Lawyer, Dec. 1977, at 29-31.

Regarding indexing of decisions of the Discharge Review Boards and the Boards for the Correction of Military Records, *see* Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civil No. 76-630 (D.D.C., stipulation of dismissal approved Jan. 31, 1977).

appellate records area, the Army has left itself vulnerable to being compelled to establish the indexes required by the act.

B. PRIVACY ACT OF 1974

1. Effect on Records of Trial

The Judge Advocate General of the Army originally adopted the position that the privacy Act does not apply to courts-martial. The position was first adopted in response to a tasking to prepare a system notice for court-martial records of trial and was subsequently advanced on several occasions in this connection.[126] The Department of Defense, however, recognizing the fact that courts-martial are transitory in nature and that their records are maintained by the military departments long after they cease to function, determined that system notices were required.[127]

The conclusion that flows from this position is that all privacy Act provisions pertaining to record maintenance will apply to the maintenance of court-martial records. In addition to publication of a system notice, the other major record maintenance provisions of the Privacy Act concern disclosure of records from systems of records, and access to and amendment of records by the individual to whom the records pertain.

Disclosure of records from a system of records to third parties, as previously discussed, is essentially a Freedom of Information Act issue. In view of the strong administrative precedent, this issue should pose no problems to the military lawyer.[128] As to disclosure and use within the agency, the first exception to the prohibition against disclosures should prove to be more than adequate.[129] Furthermore, there appears

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[126] DAJA-CL 1975/2613, 12 Dec. 1976; DAJA-CL 1975/2650, 29 Dec. 1975; DAJA-CL 1976/1968, 28 Apr. 1976; DATA-CL 1976/1992, 17 May 1976.

[127] Memorandum from William T. Cavaney, Executive Secretary, Defense Privacy Board, to Richard V. Kearney, Office of the General Counsel, Department of the Army (21 Dec. 1976) (copy attached to DAJA-CL 1977/1532, 19 Jan. 1977).

[128] See text at notes 78–79, *supra*.

[129] The first exception permits disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1) (1976). *See* OMB Guidelines, *supra* note 87, at 28,954.

to be no rational basis to restrict intra-agency or interagency disclosure once there is a determination that disclosure to the public is always required and never constitutes a clearly unwarranted invasion of personal privacy.[130]

Under the Uniform Code of Military Justice, an accused is entitled to a copy of the record of trial in general and special courts-martial.[131] A similar right is provided by regulation in summary courts-martial.[132] Accordingly, the impact of the Privacy Act regarding access is negligible. The amendment provisions, however, provide a different problem, one that has evoked the concern of The Judge Advocate General.

The Court of Military Appeals recently stressed the importance of insuring that records of trial are accurate.[133] Thus, the concern of The Judge Advocate General in this respect is not that the Privacy Act imposes a standard with which the military departments must comply. Rather, his concern relates to the effect of the intrusion of administrative procedures on the criminal justice process.[134] Administrative procedures pertaining to amendment of records, by their very nature, conflict with the recently reiterated rule "that the records and judgments of the trial court import absolute verity and may not, in the absence of a charge of fraud, be challenged."[135]

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[130] This, of course, would not be the case where disclosure was based on special reasons advanced by the requester. See, *e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971). But see, *e.g.*, Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974).

[131] U.C.M.J. art. 54(c).
[132] AR 27–10, para. 2–9*b* (C12, 12 Dec. 1973).
[133] United States v. Cruz-Rijos, 1 M.J. 429 (C.M.A. 1976).

[134] DAJA–CL 1976/2104, 26 July 1976. Among the adverse consequences of publishing a system notice for records of trial noted by The Judge Advocate General is:

> The use of the Privacy Act to attack court-martial convictions prior to completion of final appellate action would be disruptive of the normal appellate process. Moreover, to the extent that Privacy Act litigation is commenced prior to completion of appellate review, it would tend to diminish the degree of autonomy recently gained by the court-martial system in such cases as *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). Id.

[135] United States v. Cruz-Rijos, 1 M.J. 429, 431 (C.M.A. 1976), citing United States v. Galloway, 2 C.M.A. 433, 435, 9 C.M.R. 63, 65 (1953)

The Privacy Act, however, provides a means by which the impending clash can be avoided. As previously noted, it provides that the head of an agency may exempt any system of records from most of the provisions of the act, including the amendment provisions, if it is:

> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of. . .(C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.[136]

There can be little doubt that a Privacy Act system of records encompassing court-martial records of trial would qualify for exemption from amendment,[137] and the traditional sanctity of records of criminal proceedings and potential interference with the appellate process would certainly seem to justify claiming the exemption.[138]

2. *Effect on Records of Nonjudicial Punishment*

Like records of trial by court-martial, the effect of the Privacy Act access provision on records of nonjudicial punishment is negligible,[139] and

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[136] 5 U.S.C. § 552a(j) (1976).

[137] The Army is studying the question of publication of a system notice for records of trial. Telephone conversation with Captain (P) James J. Smith, Criminal Law Division, Office of the Judge Advocate General, at the Pentagon (Nov. 20, 1979).

[138] There are other record management provisions of a less significant nature than those discussed. Like the provisions pertaining to amendment of records, some of these are subject to exemption by the head of the agency. Others appear to pose no significant problems. For example, section 552a(e)(7) prohibits agencies from maintaining records describing how an individual exercises rights guaranteed by the First Amendment. A record of a court-martial pertaining to distribution of pornography would likely contain such information, but the prohibition does not apply if maintenance of the record is "pertinent to and within the scope of an authorized law enforcement activity."

For a case applying this provision, see American Federation of Government Employees v. Schlesinger, 443 F. Supp. 431 (D.D.C. 1978).

[139] The punished soldier receives a copy of the record. AR 27–10, para. 3–15*b* (C17).

there should be few problems associated with intra-agency disclosure.[140] While disclosure of records of nonjudicial punishment from a system of records to third parties presents certain problems for the military lawyer, it too is essentially a Freedom of Information Act issue and has been previously discussed.

Unlike records of trial, however, the opportunity to exempt records of nonjudicial punishment from the amendment provisions of the act does not exist.[141] Accordingly, amendment of such records is an issue which may face military lawyers from time to time. Unfortunately, there is little to assist the judge advocate in dealing with the issue. As yet, there are no reported cases involving the amendment provisions of the Privacy Act. Even the major commentator on administrative law makes only passing remarks on the Privacy Act,[142] and the guidelines issued by the Office of Management and Budget make little comment on the difficult issues of the amendment provisions.[143]

Specifically, the Privacy Act provides that agencies must permit individuals to request amendment of their records. In response to such requests, agencies must either correct any portion of the record "which the individual believes is not accurate, relevant, timely, or complete," or inform the individual of its reasons for failing to amend.'" The Army implementation of the act provides that amendments will be physically accomplished, as circumstances warrant, through the addition of supplementary information, or by means of annotations, alteration, obliteration, deletion, or destruction of the record or a portion of it."[145] Assuming an

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[140] *See* note 129, *supra*.

[141] AR 27–10, para. 3–15b (C17) provides for filing records of nonjudicial punishment in various personnel files. These systems of records certainly do not qualify for a general exemption. *See* text at note 136, *supra*. While the specific exemption provisions also permit exemption from the amendment provisions, none of the seven categories presents a viable possibility of application.

[142] K. Davis, Administrative Law of the Seventies § 3A.38 (1976 & Supp. 1977).

[143] OMB Guidelines, *supra* note 87, at 28,958–60.

[144] 5 U.S.C. § 552a(d)(2) (1976). A denial must also advise the individual of the procedures by which he can appeal the refusal to amend to the head of the agency or his designee.

[145] AR 340–21, note 53, *supra*, para. 2–9a(3).

individual is entitled to amendment, it is clear, for example, that removal of an entire record of nonjudicial punishment might be required.

The Office of Management and Budget offers some general guidance with which to begin an inquiry into amendment requests. It states:

> In reviewing a record in response to a request to amend it, the agency should assess the accuracy, relevance, timeliness, or completenessof the record in terms of the criteria established in subsection (e)(5), i.e., to assure fairness to the individual to whom the record pertains in any determination about that individual which may be made on the basis of the record.[146]

This guidance would seem to establish a criterion which is not substantially different from that which should be used in the initial imposition of punishment and in taking action on appeals from punishment.[147]

As to specific grounds, the Office of Management and Budget provides some helpful guidance regarding accuracy and completeness. The guidelines state that the amendment provisions "are not intended to permit the alteration of evidence presented in the course of judicial, quasi-judicial, or quasi-legislative proceedings,"[148] and that they "are not designed to permit collateral attack upon that which has already been the subject of a judicial or quasi-judicial action."[149]

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[146] OMB Guidelines, supra note 87, at 28,958. Subsection (e)(5) requires an agency to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5) (1976).

[147] *See* generally AR 27–10, note 81, *supm,* chap. 3 (C17).

[148] OMB Guidelines, *supm* note 87, at 28,958.

[149] *Id.* The guidelines continue:

> For example, these provisions are not designed to permit an individual to challenge a conviction for a criminal offense received in another forum or to reopen the assessment of a tax liability, but the individual would be able to challenge the fact that the conviction or liability has been inaccurately recorded in his records.

Id.

The guidelines state that changes in records of quasi-judicial proceedings should be "through the established procedures consistent with the adversary process,"'" thus indicating that the essence of a quasi-judicial proceeding is its adversary nature. While punishment imposed pursuant to article 15, Uniform Code of Military Justice, is technically "nonjudicial," it can be fairly categorized as quasi-judicial.[151] Furthermore, the Army's implementation of the Privacy Act interprets the accuracy requirement as relating to "facts" rather than matters of "judgment."[152] While the distinction between "fact" and "judgment" is not always clear, the decision to impose punishment is discretionary and is likely to escape reversal.

If the Office of Management and Budget guidelines and the Army's implementation withstand attack, amendment of records of nonjudicial punishment on the basis of inaccuracy, and to some extent incompleteness, will be fairly well precluded. However, the other grounds for amendment, relevance and timeliness, present a greater problem. For even though the underlying disciplinary action may withstand Privacy Act attack, the evidence of that action maintained in personnel files may not meet Privacy Act standards.

The minimal guidance in this area states that requests must be considered in light of subsection (e)(1) of the act[153] which limits an agency to maintaining "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President."[154] One can readily see that if the limitation was literally and strictly construed, few records could be retained, as many activities of agencies are conducted under a specific or general grant of authority[155] rather than a statutory or Presidential requirement. It is therefore necessary, if a reasonable interpretation is to be rendered, to look to the broadest statutory purpose of an agency and then, to justify maintenance of particular

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[150] *Id.*

[151] See generally AR 27–10, note 81, supra, chap. 3 (C17).

[152] AR 340–21, note 53, supra, para. 2–8c.

[153] OMB Guidelines, supra note 87, at 28,958.

[154] 5 U.S.C. § 552a(e)(1) (1976).

[155] The general grant of authority for actions of the Secretary of the Army is 10 U.S.C. § 3012 (1976). This statute is frequently cited on Privacy Act statements as the authority for collection of personal information.

records, show the relevance and necessity of the records to accomplishment of that broad purpose.[156]

As the guidelines point out, the determination of what is relevant and necessary is, "in the final analysis, judgmental,"[157] and therefore agencies should have a fair amount of discretion. But the guidelines also set forth various questions that should be considered in the determination. One of these is, "At what point will the information have satisfied the purpose for which it was collected; i.e. how long is it necessary to retain the information?"[158] The question suggests that perhaps the individual whose personnel file reflects an isolated incident of misconduct of some past time may have a viable argument that the record is no longer timely. Such a fact situation, however, is probably the only one which has a reasonable possibility of success for one seeking to expunge a record of nonjudicial punishment.

IV. EFFECT OF OPEN GOVERNMENT LAWS ON COURT-MARTIAL PROCEEDINGS

While many issues arise from the application of openness-in-government legislation to the unique records produced by the military justice system, the eventual resolution of those issues will not primarily depend on the efforts of military lawyers. Resolution will come largely through the general development of openness-in-government law in litigation in federal courts involving all federal agencies. On the other hand, the issues that arise from seeking to apply these statutes to military criminal law will be advanced primarily by military lawyers in military trial and appellate courts. Their resolution will depend largely on the efforts and ingenuity of trial and defense counsel in day to day advocacy at the many installations throughout the world.

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[156] The Office of Management and Budget states that, pursuant to subsection (e)(1), an agency derives authority to collect information about individuals by explicit authorization or direction of the Constitution, a statute, or Executive Order; or by constitutional, statutory, or presidential authorization or direction to perform a function, the discharging of which requires the maintenance of a system of records. OMB Guidelines, *supra* note 87, at 28,960.

[157] *Id.*

[158] *Id.*

A. ALTERNATIVES TO DISCOVERY

It is axiomatic that discovery is an important aspect of the practice of law. It is commonly provided for by court rule[159] or statute[160] in civil[161] and criminal[162] proceedings. The Administrative Procedure Act, however, fails to provide for discovery, and thus, discovery in administrative proceedings is a piecemeal, often inadequate, combination of specific statute, agency regulation, and judge-made law.[163] It is not surprising, therefore, that parties to agency proceedings have frequently attempted to use the Freedom of Information Act as a means of discovery. Openness in government legislation need not be limited to overcoming the inadequacies of discovery in administrative proceedings. Its potential as a

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[159] *E.g.*, Fed. Rules Crim. Proc. rule 16, 18 U.S.C. App. (1976).

In general, rule 16 allows a criminal defendant to obtain disclosure of evidence concerning him which is in the hands of the government. This includes statements made by the defendant; the defendant's prior criminal record; documentary evidence and tangible objects pertaining to the case; and reports or results of examinations or scientific tests pertaining to the case. (Rule 16(a)(1).)

The government's right to require disclosure by the defendant is much more limited, extending only to documentary evidence and tangible objects, and to reports or results of examinations or tests, and only if the defendant intends to introduce them as evidence, or to call as a witness the person who prepared them. (Rule 16(b)(1).) Documents internal to a party to the case, in the nature of attorneys' work product, are of course not discoverable. (Rule 16(a)(2) and 16(b)(2).)

The right of discovery in federal criminal trials is narrowly limited. For extensive discussion of Rule 16, its recent legislative history, and its purposes, see the various notes following the text of the rule in Title 18, Appendix, especially the notes of the Advisory Committee on Rules.

[160] *E.g.*, 18 U.S.C. § 3500 (1976), commonly referred to as the Jencks Act.

This statute, enacted in 1957 and amended in 1970, will be discussed at length in notes 188, 190, and 192 through 195, *infra*, and the surrounding text.

[161] *E.g.*, Fed. Rules Civ. Proc. rule 26, 28 U.S.C. App. (1976).

In contrast with rule 16 of the Federal Rules of Criminal Procedure, *supra* note 159, discovery in civil trials is practically unlimited (Rule 26(b)), except for attorneys' work product (Rule 26(b)(3)).

[162] *See* notes 159 and 160, *supra*.

[163] See *generally* 1 *K.* Davis, *supra* note 76, at § 8.15 (1958 & Supp. 1970).

substitute or supplement to criminal law discovery must be considered.[164] Proper assessment of that potential, however, should be made against a background of the current law of discovery.

1. *The Military Law of Discovery*

a. *The Code and Manual Provisions*

The Uniform Code of Military Justice provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."[165] Implementing that provision, the Manual for Courts-Martial prescribes the duties of the trial counsel. Among these is the requirement to permit the defense to examine any paper accompanying the charges, including the report of investigation. In addition, he is responsible for advising the defense of the probable witnesses for the prosecution.[166]

The initial right of discovery is further supplemented by paragraph 115*c* of the Manual, which provides that, upon reasonable request, documents or other evidentiary materials in the custody and control of military authorities, 1) will be produced for use in evidence, and 2) within any applicable limitations, made available to the defense for examination or use, as appropriate under the circumstances.[167]

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[164] For a comparison of the FOIA with the Federal Rules of Criminal Procedure, *see* Note, ***The Freedom of Information Act—A Potential Alternative to Conventional Criminal* Discovery, 14 *Am.* Crim. L. Rev. 73 (1976).**

[165] U.C.M.J. art. 46.
[166] MCM, 1969, para. 44*h*.

[167] MCM, 1969, para. 115*c*. Regarding the language "within any applicable limitations" in the second requirement, the Manual references the evidentiary provisions pertaining to privileged communications in paras. 151*b*(1) and (3).

The rules of evidence applicable to courts-martial are set forth in chapter XXVII of the Manual for Courts-Martial. This chapter, which is being completely revised, is presently comprised of paragraphs 136 through 154, including certain provisions affecting discovery.

The revised chapter XXVII will be titled "Military Rules of Evidence." It is largely a copy of the Federal Rules of Evidence, or "Rules of Evidence for United States Courts and Magistrates," found in the appendix to Title 28, United States

b. Scope of the *Right* of Discovery

The drafters of the Manual for Courts-Martial went beyond the literal reading of Article 46 of the Code in one respect. They concluded that the right of a defense counsel to equal opportunity "to prepare his case" was embodied in the right to equal opportunity to obtain witnesses and other evidence. Accordingly, the intent of paragraph 115*c* of the Manual was to broaden the right of discovery to provide for the use of documents or other evidentiary materials.[168]

Code (1976). The Federal Rules of Evidence were enacted on 2 January 1975. Pub. L. No. 93-595, 93d Cong., 2d Sess., 88 Stat. 1926.

Preparation of the Military Rules of Evidence was coordinated by the Office of the General Counsel of the Department of Defense. Adoption of the Federal Rules by the military services was endorsed by the House of Delegates of the American Bar Association at its annual meeting on August 14–15, 1979, at Dallas, Texas. The proposed Military Rules were sent to the Office of Management and Budget for review, together with a draft executive order to effect the amendment, under a covering letter from the DOD General Counsel, D/D E.O. Doc. 241, dated 12 September 1979.

The provision of the Military (and Federal) Rules of Evidence which has most relevance to a discussion of open government laws and discovery procedures is Rule 613, Prior Statements of Witnesses, which is analogous with paragraph 153(c), Inconsistent Statements, in the Manual for Courts-Martial. The new military rule is identical with the federal rule except for substitution of "the witness" for "him" in two places.

Under the new rule, the impeaching party will no longer be required to acquaint the witness with the prior statement, and to give the witness an opportunity to confirm or deny it, before the statement is admissible. As an exception, however, this foundation is required if the party wants to use "extrinsic evidence," evidence other than the witness's own testimony on cross-examinations, to prove the prior statement.

For analysis and discussion of Rule 613 and the other federal rules, *see* the notes of the Advisory Committee on Rules, which follow the text of each of the rules set forth in the appendix to Title 28, United States Code. *See also* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual (2d ed. 1977). There also exists in draft form a short analysis of the military version of the rules.

[168] U.S. Dep't of Army, Pamphlet No. 27–2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised Edition) 23–1 (1970) hereinafter cited as DA Pam 27–21.

The concept that article 46 of the Code implies an "equal opportunity" to prepare the defense case was derived from United States v. Enloe, 15 C.M.A. 256, 35 C.M.R. 228 (1965). *Enloe* was not a discovery case, but did involve the

A superficial reading of paragraph 115c might lead to the conclusion that the drafters of the Manual broadened the right of discovery in a second respect. While the Manual refers to "documents. . . in the custody and control of military authorities," and thus appears broader than the term "evidence" in article 46 of the Code, such is not the case. The term "documents" must be read in conjunction with the words, "or other evidentiary materials." Inclusion of the word "other" makes it clear that only evidentiary documents need be made available for examination or use.

Thus the only change made by the drafters of the Manual was one of timing. A defense counsel is not only entitled to have documents produced for introduction into evidence, but is also entitled to advance use of the documents to prepare his case. His right, however, is still limited to discovery of documents of an evidentiary nature. He is not entitled to documents of a general nature to use in order to simplify preparation of his case.[169] In addition, the right to advance examination and use of documents is further limited by the condition preserving the government's right to withhold privileged communications.[170]

c. *The Judicial Standard of Relevance*

The limitation of discovery to documents of an evidentiary nature is embodied in the Court of Military Appeals standard of "relevance and reasonableness" announced in United States v. Franchia,[171] in which the defense counsel had requested the correctional treatment files of his clients for use in the sentencing portion of a subsequent trial.[172] Portions

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"witness" provision of article 46. The case concerned the validity of an Air Force regulation which conditioned defense counsel's right to interview OSI agents (criminal investigators) on the presence of a third party.

[169] The drafters of the Manual stated it was not their intent to allow "fishing expeditions" or access to "work product" of the prosecutor. DA Pam 27-2, note 168, *supra,* at 23–2.

[170] See note 167, *supra.*

[171] 13 C.M.A. 315, 32 C.M.R. 315 (1962). The drafters of the Manual stated it was not their intent to abandon this standard. DA Pam 27-2, note 168, *supra,* at 23–1.

[172] 13 C.M.A. at 317, 32 C.M.R. at 317. The accused in Fmnchia were two sentenced prisoners who pleaded guilty to offenses committed while assigned to a parolee unit.

of the files were denied on a claim of privilege, as the contributing sources "expected their cooperation with the Department of the Army to be so protected."[173]

In upholding the trial judge's denial of defense counsel's motion to bar imposition of sentence until the complete files were made available, the majority of the court assumed that the documents were relevant to the sentencing issue but held the request to be unreasonable. In making their assumption of relevance, the majority noted that the rules of evidence may be relaxed during sentencing procedure and that the documents therefore may have been admissible.'" The Court thus indicated that "relevance" was not used in its broad sense of merely related to or connected with the issue under consideration. Rather, the standard of relevance relates to the evidentiary nature of the documents, *i.e.*, whether they provide evidence which tends to prove or disprove the issue under consideration.[175]

The connection between the Court of Military Appeals standard of relevance and the code and manual limitation of discovery to "evidentiary documents" was further illustrated two months later by the Army Board of Review in an almost identical case, except that the defense counsel also requested the correctional treatment files of prisoners expected to be witnesses against the accused.[176]

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[173] *Id.* at 318, 32 C.M.R. at 318.
[174] *Id.* at 320, 32 C.M.R. at 320.

[175] The concurring opinion of Judge Ferguson in *Franchia* better illustrates the point.

Judge Ferguson rejected the holding of the court, stating, "I am unable to agree that considerations of reasonableness and protection of the confidentiality of the Government's sources of evidence justify its claim of privilege against an accused's right to discovery." He concurred, however, in upholding the trial judge's denial of the records, noting that, while the rules of evidence are relaxed in sentencing procedures, they are not abolished. The requested records were at least hearsay twice removed. Judge Ferguson concluded, "The immateriality of the 'evidence' thus sought . . . leads inevitably to the conclusion that the law officer acted well within proper bounds in refusing to require discovery of the desired files." *Id.* at 321, 32 C.M.R. at 321.

For a case concerning the identity of an informant where the court found the identity to be immaterial, see United States v. French, 10 C.M.A. 171, 27 C.M.R. 245 (1959).

[176] United States v. Ragan, 32 C.M.R. 913 (A.B.R. 1962), *aff'd on other grounds*, 14 C.M.A. 119, 33 C.M.R. 331 (1963).

After affirming the trial court's denial of the records pertaining to the accused on the basis of *Franchia*,[177] the board addressed the request for the correctional treatment files of the potential witnesses. In contrast with the Court of Military Appeals' comment on the relaxed evidentiary rules in sentencing procedures, the board noted that the request was for documents for potential impeachment purposes, where the strict rules of evidence would apply. The documents not being capable of admission "as evidence prior to findings," and there being no indication that the cross-examination of the witnesses suffered from the lack of disclosure, the board upheld the government's claim of privilege.[178]

d. The Judicial Standard of Reasonableness

The concept of reasonableness of a discovery request is more elusive than the standard of relevance. It was mentioned, albeit in connection with materiality and relevance, in a case in which the defense counsel made numerous voluminous requests for documents and witnesses.[179]

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[177] It is not clear from the facts of the case whether the factors which led the Court of Military Appeals to conclude that the request was unreasonable in *Franchia* were present in *Ragan*. Rather, it appears the board merely looked at the similarity of the documents and concluded that Frawhia was dispositive. *Id.* at 923.

[178] Id. at 924–26. It appears that the board in *Ragan* not only found the requested documents not relevant, but also tested for prejudice and found none.

For a case in which the court found a request to have been relevant and reasonable, and therefore erroneously denied, but denied relief on the basis that the error was not prejudicial, see United States v. Brakefield, 43 C.M.R. 828 (A.C.M.R. 1971). Accord, United States v. Batchelor, 19 C.M.R. 452 (A.B.R. 1955), *aff'd on other grounds*, 7 C.M.A. 354, 22 C.M.R. 144 (1956). *Batchelor* also appears to place an affirmative burden on the defense to establish materiality or necessity of requested witnesses or evidence.

[179] United States v. Batchelor, 19 C.M.R. 452, (A.B.R. 1955), *aff'd on other grounds*, 7 C.M.A. 354, 22 C.M.R. 144 (1966).

Batchelor was a prisoner of war during the Korean conflict who, upon his ultimate return to military control in January 1954, was tried for various offenses involving cooperation with his captors. One of his defenses was that he was "brainwashed." In one letter defense counsel stated his position that "the government had the responsibility of initiative in developing evidence respecting defensive theories."

After categorizing the requests as "covering every subject remotely related, if related at all, to the issues in the case," the Board stated:

Rather than relating to mere volume, however, it appears more directly related to the overall manner in which a request is made, the willingness or lack thereof of the defense counsel to accept or cooperate in alternate proposals, and the general need or necessity for the information to prepare the defense case.[180] The concept of reasonableness is sometimes equated with the commonly used expression "fishing expedition,'' but in this respect seems difficult to segregate from materiality and relevance.[181]

As previously noted, the decision of the Court of Military Appeals in *Fmnchia* was based on reasonableness rather than on relevance. In that case, the principal information in the denied records was "obtained from sources immediately and directly available to the accused," and the court notes that "this circumstance obviously impressed the law officer in regard to the reasonableness of the defense request for production of the reports." Thus the court categorized the request as an attempt by the defense "to use the work product of the confinement officials as a substitute for their own efforts to assemble and select relevant admissible evidence in mitigation." In addition, the court found indications in the record that the defense was engaged in an "impermissible general 'fishing expedition,' -- but indicated that, even if such was not the case, the "absence of particularity of need bears directly upon the reasonableness of the defense's demand for discovery."[182]

> The unreasonableness and unduly burdensome character of the over-all requests is manifest, as is the obvious immateriality and irrelevance of a number of them. Indeed, the nature and character of the requests is such as to make it extremely difficult to even ferret out such items as, upon proper foundation, might conceivably have merit.

Id. at 513.

[180] *Id.* *See also* United States v. Johnson, 28 C.M.R. 662 (N.B.R. 1959). Johnson does not specifically mention reasonableness, but the concept pervades the opinion. The defense moved to dismiss because the accused had not been afforded a reasonable opportunity to prepare his defense. The motion was denied at trial, and the denial was upheld on appeal.

In holding that the accused was not denied an opportunity to prepare for trial, the court noted the government's attitude of cooperation, including an offer to fly the defense counsel to the Pacific to interview witnesses deployed aboard ship, and the defense counsel's failure to avail himself of the government's alternative proposals.

[181] United States v. Batchelor, 19 C.M.R. 452, 515–17 (A.B.R. 1955), *aff'd* on *other grounds*, 7 C.M.A. 354, 22 C.M.R. 144 (1956).

[182] 13 C.M.A. at 320, 32 C.M.R. at 320.

This older case law thus indicates that the standard of reasonableness presents many aspects. In light of recent cases concerning the government's obligation to make a witness available,[183] however, one must seriously question whether the concurring opinion in *Franchia* has not become the law,[184] at least to the extent that "reasonableness'' includes aspects other than materiality, relevance, and character of a request as part of a "fishing expedition."

In United States v. Carpenter,[185] the Court of Military Appeals held that, while the right to the presence of a witness was conditioned on relevance and materiality of expected testimony, "once materiality has been shown the Government must either produce the witness or abate the proceedings." The court clearly rejected the concept of "military necessity'' other than as a factor in determining when the testimony can be presented.[186]

While "military necessity" may not be the same as "reasonableness," it is clear that the only criteria for production of a witness are relevance and materiality. If such is the case for witnesses, it should also be the case for "other evidence." If so, the standard of reasonableness no longer includes such concepts as particularity of need, or willingness to accept, take 'advantage of, or cooperate in alternative proposals.[187] Reasonableness would be limited to prohibiting "fishing expeditions'' to the extent that expression indicates a failure to establish relevance and materiality.

e. *The Jencks Act in the Military*

The Court of Military Appeals first applied the holding of Jencks v. United States[188] in United States v. Heinel.[189] Five years later, the court

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[183] One must recall that article 46 of the Code states that the defense counsel's right of equal opportunity extends to "witnesses and other evidence."

[184] *See* note 175, *supra.*

[185] 1 M.J. 384 (C.M.A. 1976).

[186] *Id.* at 385–86.

[187] In *Carpenter,* it would appear that it was the government, or at least the military judge, that exhibited an unwillingness to cooperate in alternative proposals. "he requested witness was the accused's former commanding officer who had been reassigned to a military school. The expected testimony related to the character of the accused, and the materiality was not questioned. The trial judge rejected a defense request to depose the witness and declined to hold a weekend session to eliminate any conflict with the witness' school schedule. *Id.* at 385.

[188] 353 U.S. 657 (1957). *Jencks* essentially held that the government is required

ruled that the Jencks Act,[190] an outgrowth of the *Jencks* case, applied to the military.[191] The act specifies that, after a government witness has testified, on motion of the defendant, the government must produce any statement of the witness in its possession which relates to the subject matter of the witness' testimony.[192] A statement includes a written statement made by the witness (either signed or otherwise adopted or approved by him) as well as a stenographic, mechanical, electrical or other recording (or transcription thereof) which is a substantially verbatim recital of an oral statement.[193] While the Jencks Act appears to be a

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to disclose to the defense, for impeachment purposes, a prior statement of a government witness which relates to the direct testimony of the witness.

Mr. Jencks was a labor union official who was indicted on a charge of falsely swearing that he was not a member of, nor affiliated with, the Communist Party. At trial he moved for discovery of reports made to the Federal Bureau of Investigation by two witnesses concerning matters as to which they had testified. The motion was denied, and he was found guilty. The Fifth Circuit affirmed. The Supreme Court reversed, saying that Mr. Jencks was entitled to the requested discovery.

[189] 9 C.M.A. 259, 26 C.M.R. 39 (1958). In *Heinel*, government witnesses at trial had previously testified at an Inspector General's investigation.

[190] 18 U.S.C. § 3500 (1976).

The Supreme Court's decision in the *Jencks* case was issued with a date of 3 June 1957. The Jencks Act was enacted barely three months later, on 2 Sept. 1957. The legislative history of S. 2377, the bill which became the act, makes clear that Congress was greatly concerned, apparently with some basis in fact, that lower courts would apply the decision so broadly as to cripple law enforcement efforts. The act limits the application of the decision to the facts of the *Jencks* case. S. Rep, No. 981, 85th Cong., 1st Sess., *reprinted in* [1957] U.S. Code Cong. & Ad. News 1861, 1862.

[191] United States v. Walbert, 14 C.M.A. 34, 33 C.M.R. 246 (1963).

[192] 18 U.S.C. § 3500(b) (1976).

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement , . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .

Id.

[193] 18 U.S.C. § 3500(e) (1976). A statement also includes prior testimony to a grand jury, however taken or recorded.

disclosure statute, given its progenitor, it can also be viewed as a statute restricting disclosure as it is primarily a congressional proscription of the types of statements to be disclosed and the timing of such disclosure.[194]

Not surprisingly, much of the Jencks Act litigation has concerned what constitutes a prior statement that must be disclosed.[195] Four decisions of the Court of Military Appeals involving the act also pertain to this issue.

(e) The term "statement" . . . means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Id.

[194] *See* Palermo v. United States, 360 U.S. 343 (1959). The act, however, also prescribes procedures, including in camera inspection, and a remedy for noncompliance.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. . . .

18 U.S.C. § 3500(c) (1976).

(d) If the United States elects not to comply with an order of the court . . . to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

18 U.S.C. § 3500(d) (1976).

[195] *E.g.*, 360 U.S. 351–54. In the course of determining in *Palermo* whether an agent's memorandum of a conference constituted a statement within the meaning of the Jencks Act, the Supreme Court noted that "the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree." *Id.* at 349.

In a 1963 decision, United States v. Walbert,[196] the court held that a tape recording of an interrogation at which the accused signed a confession was subject to the Jencks Act and should have been disclosed once the interrogating agent testified to matters regarding the admissibility of the confession.[197] Subsequent to *Walbert,* the court held in a 1972 decision, United States v. Albo, that case activity notes from which two criminal investigators had refreshed their memories prior to testifying at trial came within the Jencks Act definition of "statement," and should have been examined by the trial judge to determine what portions related to the agent's testimony.[198]

Until 1978, the Court of Military Appeals did not again have occasion to consider the implementation of the Jencks Act in the military justice system, Two relevant cases were decided within two months of each other during that year.

The case of United States v. Herndon has a long and complex history not relevant here.[199] Sergeant Herndon was convicted of rape in 1973. The Court of Military Appeals summarily reversed on the question of whether the military judge erred to the substantial prejudice of the accused by failing to order the production of the CID case activity notes, despite making a specific finding that the notes were required to be made available to the defense pursuant to the provisions of the Jencks Act. The court relied in part[200] on its decision in *Albo* six years previously.[201]

Judge Cook, concurring in the result, would have sent *Herndon* back for a limited rehearing to determine the relevance of the documents and whether failure to produce them was prejudicial to the accused.[202]

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[196] 14 C.M.A. 34, 33 C.M.R. 246 (1963).

[197] *Id.* at 37, 33 C.M.R. 249. The court also held, however, that the error was not prejudicial as the accused's own testimony established the confession's admissibility. Id. at 37–38, 33 C.M.R. 249-50.

[198] United States v. Albo, 22 C.M.A. 30, 46 C.M.R. 30 (1972).

[199] 5 M.J. 175 (C.M.A. 1978); 2 M.J. 875 (A.C.M.R. 1976); 50 C.M.R. 166 (A.C.M.R. 1975). The two cited decisions of the Army Court of Military Review did not involve consideration of any Jencks Act issue.

[200] 5 M.J. at 175.
[201] 22 C.M.A. 30, 46 C.M.R. 30 (1972).
[202] 5 M.J. at 176.

In United States v. Jarrie, a drug case, the investigating agent made handwritten notes concerning an oral statement made to him by an informant. Two weeks later, the agent contacted the informant and obtained the latter's verification of the correctness of the notes. Nine months later, the agent prepared a formal, written statement based on the notes, obtained the informant's signature thereon, and destroyed the notes. The formal statement omitted matter considered extraneous by the agent, including the names of two eyewitnesses. At trial one of these witnesses testified for the defense and contradicted the informant's testimony. Neither the informant nor the agent could remember the name of the other witness. The accused was convicted.[203] The Air Force Court of Military Review affirmed, holding that the destruction of the notes was in good faith, not intended to deprive the defense of anything of value; that the accused was given all the information contained in the notes; and that he was not prejudiced by their destruction.[204]

Reversing, the Court of Military Appeals held that the "act of verification by the informant transformed the agent's written notes into the informant's own statement for purposes of the Jencks Act." The court held further that the judicially-created good faith exception to the Jencks Act did not apply to the facts in ***Jarrie,*** and that the lower court's finding of lack of prejudice was incorrect as a matter of law.[205]

Herndon and *Jarrie* are consistent with ***Albo*** and add little to the law on discovery of investigators' case notes. ***Jarrie*** illustrates one situation in which such notes may be considered the statement of the witness himself.

During 1979, the Army Court of Military Review decided two cases involving Jencks Act issues. Both were appealed to the Court of Military Appeals.

In United States v. Dixon,[206] the accused was charged with housebreaking, larceny, and robbery. The government's case depended heavily on the testimony of one CID agent. The accused requested that the

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[203] 5 M.J. 193, 194 (1978).
[204] *Id.* Apparently the AFCMR decision was not published.
[205] 5 M.J. at 195.

[206] 8 M.J. 149 (C.M.A. 1979), *affirming* the decision of the Army Court of Military Review at 7 M.J. 556.

"agent activity summary" forms completed by this agent be made available. These forms contained the date and time of the interview and other similar administrative information, apparently somewhat like time cards. The forms were in the agent's office in Mainz, Germany, and were not available at the trial which was held at Fort Leavenworth, Kansas. The military judge denied the request; apparently he considered that the forms were not notes or statements within the meaning of the Jencks Act.[207]

The Army Court of Military Review held that the military judge should have ordered the forms produced, holding that "it is only necessary that the agent's notes relate *generally* to the events as to which he has testified." (Emphasis added.) The Court of Military Review ordered the forms produced, examined them, and concluded that the defense suffered no prejudice as a result of the judge's error. The court justified this action by analogy between its powers and those of the United States courts of appeal, which apparently have the power to issue such orders. The court felt, also, that remand to the original military judge would be impracticable and unnecessary.[208]

The Court of Military Appeals upheld the decision of the Army Court of Military Review. Specifically, the high court agreed with the intermediate court that the trial judge's interpretation of the Jencks Act was too narrow, and that his denial of the defense request for the case summaries was erroneous. Most important, the court agreed that a court of military review can order the production of documents to carry out "its appellate responsibility to test for prejudice." The Court of Military Appeals emphasized that, under the Jencks Act, the judge had no discretion to deny production of the case summaries. The fact that such production might delay the proceedings is irrelevant, and the usefulness of the summaries is a matter for determination by the defense alone, not the judge.[209]

The case of United States v. Thomas[210] is primarily concerned with issues of availability of witnesses not here relevant. During the investigative hearing conducted in the case under article 32, U.C.M.J., defense

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[207] 8 M.J. at 150–151; 7 M.J. at 558.
[208] 7 M.J. at 559–60.

[209] 8 M.J. 149 (C.M.A. 1979).

[210] 7 M.J. 655 (1979).

counsel requested the investigating officer to preserve the tape recordings of testimony taken at the hearing. The request was granted, but the court reporter's supervisor failed to pass the instructions along, and the tapes were routinely erased by being used again to record testimony in another hearing. Subsequently, the accused was tried and convicted. On appeal to the Army Court of Military Review, the accused argued that he had been denied access to evidence because of the government's improper destruction of the recorded testimony.[211]

The Army Court of Military Review held "that the Jencks Act is applicable to testimony given at an article 32 investigative hearing," by analogy with the grand jury testimony mentioned in 18 U.S.C. § 3500(e)(3). However, the court found no prejudice to the accused in the destruction of the recordings. All three of accused's defense counsel were present at the hearing and "had the opportunity to cross-examine, observe, and listen to the two witnesses involved." Moreover, the defense had a copy of the hearing transcript. Although it was a summarized rather than verbatim record of the hearing, the presence of counsel at the hearing was sufficient to protect the interests of the accused against possible harm arising from any slight variances there might have been between the recorded testimony and the transcript.[212] The case has been appealed to the Court of Military Appeals.[213]

The affirmance of *Dixon* is not surprising. The case concerned a point of appellate procedure on which the Court of Military Appeals could be expected to be sympathetic, in view of its past favorable reaction to assertion by courts of military review of the power to issue extraordinary writs.[214] As for the lower court's application of the harmless error rule, the important fact in *Dixon* is that a court did order production of the requested documents, visually examined them, and concluded on the

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[211] 7 M.J. at 668.

[212] 7 M.J. at 668-59.

[213] United Sates v. Thomas, No. 37648/AR (ACMR, filed 25 June 1979), 8 M.J. 138. The issues to be considered by the Court of Military Appeals are whether the appellant "was prejudicially denied the production of witnesses in his behalf," and whether "the petitioner is entitled to a new trial based on the newly discovered evidence of CID Special Agent Walters' past criminal misconduct and conviction for making false official statements." *Id.*

[214] For a brief discussion and relevant case citations, *see* Pavlick, *Extraordinary Writs in the Military Justice System: A Different Perspective*, 84 Mil. L. Rev. 7, 16-18 (1979).

merits that they did not add anything to the evidence considered by the trial court.

Predictions of the actions of courts are always risky. However, if *Thomas* is reversed, it is likely to be on the basis that the defense and the courts did not hear the requested tapes, but saw only a summarized transcript thereof.

2. *The Two Alternatives*

The access provision of the Privacy Act of 1974 and the disclosure requirement of the Freedom of Information Act provide two separate alternatives to discovery. The judge advocate must keep in mind that exemption under one of the statutes will not necessarily preclude him from obtaining release under the other.[215]

a. The Privacy Act

The scope of the Privacy Act acts as its single biggest limitation as an alternative to discovery. The access provisions only permit an individual to obtain records pertaining to himself.[216] Thus, the act cannot be used to discover information on court members or witnesses, records pertaining to the training and past performance of a marihuana dog, records pertaining to the reliability of an informant, or the many other types of records of a similar nature which could be helpful to a defense counsel.

Second, the records must be maintained in a system of records, that is, they must be retrieved by reference to the requester's (client's) name or other identifying particular assigned to the individual, such as the social security or service number.[217] While it is difficult to conceive that criminal investigation records pertaining to an offense in which there is a suspect would not be in a system of records, it is conceivable that other investigatory records may be filed only by the subject matter of the investigation.[218]

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[215] See text at notes 51-55, *supra*.
[216] 5 U.S.C. § 552a(d)(1) (1976).
[217] *Id.*; 5 U.S.C. § 552a(a)(5) (1976).

[218] Inspector General investigations are frequently filed in this manner. The mere fact that a record about an individual can be retrieved from a subject matter file based on memory is insufficient to make the Privacy Act applicable. The system must have a built-in retrieval capability using identifying particulars, and the agency must in fact retrieve records about individuals by using that capability. See OMB Guidelines, *supra* note 87, at 28,952.

Finally, the records must be under the control of the agency. The act does not extend to nonagency records maintained personally by employees of the agency. Thus, the personal notes of an accused's commanding officer, maintained and utilized in his discretion as a memory aid, would not be accessible under the act.[219]

The judge advocate attempting to use the Privacy Act as an alternative to discovery may be confronted with subsection (d)(5), which provides that nothing in the act shall allow access to "any information compiled in reasonable anticipation of a civil action or proceeding."[220] While courts-martial are not "civil actions," if the word "civil" does not also modify "proceedings," the provision could be construed to encompass courts-martial. The intent of the provision was to preclude the act from being used as a basis for obtaining access to material prepared for litigation. Congress intended to restrict access to such material to such means as traditional discovery or the Freedom of Information Act. The provision applies to cases where the government is prosecuting or seeking enforcement of its laws as well as when it is a defendant. The Office of Management and Budget guidelines, however, in discussing the meaning of "proceeding," use the words "civil proceeding." They further state that the term was intended to cover certain processes in the civil sphere which are the counterpart of criminal proceedings as opposed to criminal litigation.[221] Thus, this provision should not pose a limitation when using the Privacy Act as an alternative to criminal discovery.

While there are no automatic exemptions from the provisions of the Privacy Act,[222] Congress did grant agency heads the power to exempt certain types of records from the access provision.[223] The Secretary of the Army has exercised this authority and granted exemptions to systems

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[219] *Id.*; DAJA-AL 1976/3752, 10 Mar. 1976.
[220] 5 U.S.C. § 552a(d)(5) 1976).
[221] OMB Guidelines, *supra* note 87, at 28,960.

[222] Subsection (d)(5) pertaining to records compiled in reasonable anticipation of a civil action or proceeding is not considered to be an exemption in spite of the fact that it may operate to preclude access in certain cases.

[223] 5 U.S.C. § § 552a(j) and (k). The exemption for criminal law enforcement record is quoted at note 136, *supra*.

of records containing military police and Criminal Investigation Command investigatory records.[224] The fact that exemptions have been claimed for the various Army law enforcement systems of records does not mean that the individual is completely precluded from access to the files. The Army's implementing regulation provides that, before access can be denied, the system of records must not only be properly exempt, but also there must be a significant and legitimate governmental purpose for denial.[225] Practically, however, it would seem that the defense attorney cannot reasonably expect to obtain information from criminal investigatory files that he could not get through the discovery process.

b. The Freedom of Information Act

Depending on the type of records being sought, various exemptions of the Freedom of Information Act come into play. These exemptions operate to limit the usefulness of the act as an alternative to discovery. It is impossible to consider every type of record a defense counsel might seek under the act. Therefore, only a few will be discussed in connection with the exemptions which are most likely to affect a defense counsel's request. Accordingly, requests for other types of records will have to be considered on a case-by-case basis in light of the general principles discussed and the rapidly expanding body of Freedom of Information Act case law.

The first exemption likely to affect a defense counsel's request for records to assist in case preparation is the fifth exemption pertaining to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[226] In essence, the exemption adopts the principles of discovery, so that "the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[227] The public, however, is

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[224] See Army Reg. No. 340–21–5, Office Management—The Army Privacy Program—System Notices and Exemption Rules for Intelligence, Security, Military Police, and Mapping Functions, App. (25 Feb. 1977).

[225] AR 340–21, note 53, *supra*, para. 2–6*b*.

[226] 5 U.S.C. § 552(b)(5) (1976).

[227] EPA v. *Mink*, 410 U.S. 73, 86 (1973). The court noted, however, that "the discovery rules *can* only be applied under Exemption 5 by way of rough analogies." *Id*.

not entitled to those documents which might be disclosed pursuant to a particular need of a party in actual litigation.[228] Thus it is the general discovery privileges which are embodied in the exemption.

The Supreme Court has recognized, in the context of Freedom of Information Act litigation, the executive or deliberative process privilege, and the attorney-client and attorney work product privileges.[229] But the exemption is not limited solely to those. It goes beyond, even to the point where it reaches matters which have nothing to do with internal deliberations.[230] Any recognized privilege is cognizable under the exemption.

The correlation between the fifth exemption and discovery privileges would seem to fairly well preclude the defense attorney from obtaining records under the Freedom of Information Act that he could not receive through the discovery process. One must recall, however, that even though records might be generally discoverable, the military criminal law of discovery requires a showing of relevance. Thus the advantage of using the Freedom of Information Act is that it relieves the defense counsel of establishing the connection between the requested records and the issues in his case. It will not, however, permit him to overcome established discovery privileges such as the attorney work product rule.[231]

In civilian practice, it is unusual for the government to possess personnel, medical, finance and other files of a similar nature on witnesses and jury members. The military, being somewhat of a closed society, always possesses such files on its "jury" members, and usually on its witnesses. Such files obviously make an attractive target for military

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[228] Id.; *accord,* NLRB v. Sears, 421 U.S. 132, 148–49 (1976).
[229] NLRB v. Sears, 421 U.S. 132, 149 (1976).

[230] 1 K. Davis, *supra* note 76, at § 3A.21; *accord,* Brockway v. Dep't of the Air Force, 618 F.2d 1184 (8th Cir. 1976). *Brockway* permitted withholding of witness statements in an aircraft accident safety investigation despite the well-established distinction between factual and deliberative materials. Normally factual information is not exempt from discovery and, therefore, not exempt under the fifth exemption. The exemption in *Brockway* was based on a discovery privilege which had been previously recognized for the specific type of records involved.

[231] For an excellent case concerning the scope of the deliberative process privilege and the attorney-client privilege, see Meade Data Central, Inc. v. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977), and in particular, the comparison of the two privileges in footnote 28.

defense counsel, either to assist in voir dire preparation or for possible impeachment purposes. A Freedom of Information Act request for such files brings into consideration the sixth exemption,[232] which has been previously discussed in connection with release of records of trial and records of nonjudicial punishment to the public. Accordingly, the remaining task is to apply those principles to the present context.

Army regulations specify certain items of information on military members which is normally disclosable without causing an unwarranted invasion of privacy.[233] This information should be available to the defense counsel as a matter of routine. Beyond that, whether the defense counsel is able to obtain additional personal information depends on the outcome of the balancing test which weighs the public interest served by disclosure against the individual's right to privacy.

The Judge Advocate General of the Army has issued an administrative law opinion concerning the issue of a counsel's right of access to personnel files under the Freedom of Information Act. In the opinion it was noted that usually the only public interest to be served by disclosure in such cases is "the public interest of ensuring that those accused of crime receive a fair trial."[234] Operating on the premise that existing criminal

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> With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component. The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process. . . .

556 F.2d at 254.

[232] 5 U.S.C. § 552(b)(6) (1976). The exemption permits withholding where disclosure "would constitute a clearly unwarranted invasion of personal privacy."

[233] AR 340–21, note 53, *supra,* para. 3–2b (C1, 14 June 1977). The items include: "Name, grade, date of birth, date of rank, salary, present and past duty assignments, future assignments which have been approved, unit or office address and telephone number, source of commission, military and civilian educational level and promotion sequence number."

[234] DAJA–AL 1977/3889, 8 Apr. 1977.

procedural law, *i.e.*, the law of discovery, dictates what is necessary to ensure a fair trial, the opinion concludes that, other than information which must be disclosed to any member of the public, only information which is discoverable is required to be released under the Freedom of Information Act.[235] In other words, to satisfy the public interest of ensuring a fair trial, only evidentiary information relevant to the case need be disclosed. If such is the case, the sixth exemption operates to preclude the Freedom of Information Act from being a viable alternative when counsel is seeking personal information on parties other than the accused.

Under the Manual for Courts-Martial, an accused is entitled to examine any papers accompanying the charges, including the report of investigation.[236] When coupled with the right to obtain all evidentiary materials relevant to the case, an accused substantially receives all records of an investigatory nature which bear on the merits of his case. There may be occasions, however, when the government withholds, either temporarily or permanently, information of an investigatory nature, For example, the government may withhold a prior statement of a witness under the Jencks Act or the identity of an informant in the case. The disposition of a Freedom of Information Act request for such information may depend on the applicability of the seventh exemption.

The seventh exemption applies to "investigatory records compiled for law enforcement purposes," if disclosure involves one or more of six specified interests.[237] There has not been a substantial amount of litigation concerning five of the six bases since the exemption's revision in 1974,

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[235] *Id.*

[236] MCM, 1969, para. 44*h*.

[237] 5 U.S.C. § 552(b)(7) (1976). There are six bases for invoking the exemption. The record is exempt if disclosure would:

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trail or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Id.

and thus the primary authority for interpretation of the exemption is the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act. Generally, " 'investigatory records' are those which reflect or result from investigatory efforts," and " 'law enforcement' includes not merely the detection and punishment of law violation, but also its prevention."[238]

Most of the six bases for invoking the exemption are fairly self-explanatory. There should be little doubt, for example, that the identity of an informant can be protected under subsection 552(b)(7)(D). There is a split in authority, however, on the scope of application of subsection 552(b)(7)(A), which permits withholding of investigatory records when disclosure would interfere with enforcement proceedings.

In two cases involving the National Labor Relations Board, the parties to unfair labor practice hearings requested statements of prospective witnesses under the Freedom of Information Act. The discovery procedures established by the board for unfair labor enforcement proceedings did not permit discovery of the statements.

In one of the cases, the Court of Appeals for the Second Circuit held, in essence, that disclosure of nondiscoverable records automatically interferes with enforcement proceedings.[239] In the other case, the Fifth Circuit rejected the practice of tying the meaning of "interfere with enforcement proceedings" to what cannot be obtained through discovery. In its view, the 1974 amendments to the seventh exemption require a specific showing of harm that would result from disclosure.[240] The ulti-

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[238] Att'y Gen. 1974 Memorandum, *supra* note 118, at 6.

[239] Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976), *cert. denied,* 429 U.S. 834 (1976). Accord, Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (1st Cir. 1976) (per curiam), cert. denied, 429 U.S. 895 (1976).

In Title *Guarantee,* the court stated that it could not "envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA," when it could have amended the National Labor Relations Act or passed a blanket enactment providing discovery in administrative proceedings. 534 F.2d at 491. If this is the case when the discovery rules are established by the agency, it should be more so when the rules are set by court rule or by statute as is the case in criminal proceedings.

[240] Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 730 (1977), *cert. granted.*

mate resolution of this split will be crucial to the issue of whether the seventh exemption precludes "discovery" of records which are otherwise nondiscoverable under the current military criminal law of discovery.

If the position of the Second Circuit prevails, and the opinion of The Judge Advocate General on the sixth exemption withstands judicial scrutiny, the value of the Freedom of Information Act as an alternative to discovery will be extremely limited. It is already well established that the fifth exemption protects attorney-client communications and attorney work product. In addition, other discovery privileges that can be found in the law are preserved in the Freedom of Information Act by the fifth exemption. There may be situations where records desired by defense counsel may be obtained under the Freedom of Information Act when they cannot be obtained through discovery, but they will be the exception rather than the rule.

B. THE FOIA: AN AFFIRMATIVE DEFENSE TO PROSECUTION FOR VIOLATION OF REGULATIONS?

1. The Publication Requirement of Subsection (a)(1)

Subsection (a)(1) of the Freedom of Information Act requires that certain items, including "substantive rules of general applicability adopted as authorized by law," be published in the Federal Register for the guidance of the public.[241] Assuming for the moment that punitive regulations must be published pursuant to this provision, failure to publish could preclude the military departments from enforcing such regulations through article 92 of the Uniform Code. The failure could be viewed either as affecting the "lawfulness" of the regulation, or as bringing into play the remedial portion of subsection (a)(1). That portion provides that a person may not in any manner be adversely affected by a matter required to be published unless it is published, or unless he has actual and timely notice of the terms thereof.[242] The fact that an individual is accountable for matters of which he has actual and timely notice suggests that failure to publish would not void the regulation per se, and therefore would not be a matter affecting the "lawfulness" of a punitive regulation. Assuming that punitive regulations must be published, it is

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[241] 5 U.S.C. § 552(a)(1) (1976).
[242] *Id.*

more likely that failure to publish would necessitate proof of actual and timely notice.[243]

Despite the fact that subsection (a)(1) has existed for more than twelve years, it was only in 1977 that the Army's implementation achieved the status of a regulation.[244] Army Regulation 310–4, however, is of little assistance to those responsible for implementation of subsection (a)(1) or to the lawyer who must advise those who are responsible. While the regulation assigns responsibility and establishes procedures for publishing certain matters in the Federal Register, it merely regurgitates the statutory requirements of subsection (a)(1) without analysis or guidance.[245] Even in that minimum undertaking, it may have made a crucial error affecting the question of whether punitive regulations must be published.

2. *The Need to Publish Punitive Regulations*

While subsection (a)(1) is the source of considerable confusion, the controversy and litigation surrounding it are largely irrelevant to the question at hand.[246] Nevertheless, the question of whether punitive regulations must be published is not at all a simple one. The issue, however, is easily divisible for purposes of analysis into four elements.

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[243] *See* Att'y Gen. 1967 Memorandum, *supra* note 13, at 11–12.

[244] Army Reg. No. 310–4, Military Publications—Publication in the Federal Register of Rules Affecting the Public (22 Jul. 1977) [hereinafter cited as AR 310–4]. Prior to promulgation of AR 310–4, the Army's implementation languished in an Army circular, which, in the author's experience, was largely unnoticed.

[245] AR 310–4, note 244, *supra*, chap. 2.

[246] 5 U.S.C. § 552(a)(1)(D) (1976). This statute, which requires publication of substantive rules, also requires publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency." It is this latter provision which has caused considerable confusion in light of the requirement of subsection (a)(2) of the act to index and make available (rather than publish) "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." *See generally* 1 K. Davis, *supra* note 76, at § 3A.7; K. Davis, *supra* note 142, at § 3A.7.

The controversy over what must be published under (a)(1) and what needs to be indexed and made available under (a)(2) is only one of passing curiosity, however, as it is assumed that punitive regulations are not "statements of policy" or "interpretations" but, rather, would come under the category of "substantive rules."

a. For the Guidance of the Public

All matters required to be published under subsection (a)(1) are required to be published "for the guidance of the public." As punitive regulations are intended to regulate the conduct of service members,[247] one must consider whether "substantive rules" of an internal nature are required to be published. This determination is best made by comparison of the Freedom of Information Act with its predecessor, the public information section of the Administrative Procedure Act.

Subsection (a) of the public information section contained the identical words "for the guidance of the public," but they were contained in the body of the provision.[248] When read in connection with the exception for rules addressed to and served upon named persons, the words indicated an intent to require publication of rules which *affected* the public rather than an intent to require publication of rules for general public information.

The Freedom of Information Act, however, relocated the words to the heading of the provision.[249] So moved, the words apply to all matters that are to be published, including, for example, organizational descriptions, location of established places of business, and statements of the general course and method by which business is conducted. Thus the words no longer indicate an intent to limit publication to rules which *affect* the public. Rather, they indicate an intent to require publication of various

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[247] Such regulations may also regulate the conduct of civilian employees who are not subject to court-martial. To the extent that such a regulation forms the basis of an adverse administrative action against either civilian or military personnel, an analogous issue arises.

[248] Section 3(a) of the APA provided: "Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law."

[249] 6 U.S.C. § 552(a)(1) (1976). This statute provides: "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public. . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

items for general public consumption.[250] For this reason, Army Regulation 310–4 erroneously states that only "substantive rules of applicability to the public" need be published.%'The requirement is significantly broader, and while the second exemption may permit nonpublication of some internal matters, the phrase "for the guidance of the public" is not so intended.

b. Substantive Rules

Only "substantive rules" need be published pursuant to subsection 552(a)(1)(D),[252] and the second issue is whether a punitive regulation constitutes a "rule" as defined in the Administrative Procedure Act.[253] The concept of "rules" is treated at length by Professor Kenneth C. Davis, who points out the problems of describing precisely the perimeters of the concept.[254] His conclusion which likens "rule making" to enactment of legislation is sufficiently descriptive for present purposes.[255]

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[250] Professor Kenneth C. Davis is often critical of the Attorney General's 1967 Memorandum, but as to this matter he expresses no disagreement. 1 K. Davis, *supra* note 76, at § 3A.7.

The memorandum states: "Deletion of the latter phrase ["for the guidance of the public"] at this point [and moving it to the heading] is designed to require agencies to disclose general policies which should be known to the public, whether or not they are adopted for public guidance.'' Att'y Gen. 1967 Memorandum, *supra* note 13, at 10.

[251] AR 310–4, note 244, *supra,* para. 2–2d.

[252] 5 U.S.C. § 552(a)(1)(C) (1976). This statute requires publication of "procedural rules."

[253] A "rule" includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1976).

[254] 1 K. Davis, *supra* note 76, at § § 5.01 et seq.

[255] *Id.* at § 5.11, wherein Professor Davis states: "A 'rule' or a 'regulation' is the product of administrative legislation. Perhaps the best guide to distinguishing rule making from adjudication is the simple observation that rule making resembles the enactment of a statute and adjudication resembles what a court does when it decides a case."

Thus described, it is difficult to conceive how a regulation which seeks to prescribe or proscribe the conduct of service members could be anything but a rule.[256] While the military is generally exempt from the rule making requirements of 5 U.S.C. § 553, it does not follow that the Army does not make rules. Section 553 is procedural in nature, and thus the only exemption is from the procedures imposed on other agencies. The Freedom of Information Act requirement to publish rules for the general information of the public should apply regardless of the procedures used in adopting the rules.

c. *Of General Applicability*

Neither the Attorney General nor Professor Davis make significant comment on the addition of the words "of general applicability" to the requirement to publish substantive rules.[257] For present purposes, however, it is sufficient to say that the requirement that substantive rules be of general applicability probably equates with the requirement of article 92 of the Uniform Code that a lawful order or regulation be "general," that is, that it be generally applicable throughout the command, or subdivision thereof, of the officer promulgating the order or regulation.[258] It can be stated with certainty that the term "of general applicability" does not mean that the substantive rule must affect all, or even a majority, of the public.[259] Rather, the term distinguishes those rules

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[256] Perhaps an analogy from the military justice setting can be drawn. Promulgation of a punitive regulation is rule making. Appellate court decisions which, for example, hold certain conduct to be proscribed by article 134 of the code, equate to administrative adjudication.

[257] Compare the text of the public information section of the Administrative Procedure Act with the Freedom of Information Act at notes 232–233, *supra.* The Attorney General states that this change was a formality. Att'y Gen. 1967 Memorandum, *supra* note 13, at 10.

Professor Davis' comments relate to similar language in the context of the requirement to publish statements of general policy and interpretations of general applicability. 1 K. Davis, *supra* note 76, at § 3A.7.

[258] MCM, 1969, para. 171*a*.

[259] The statute at 5 U.S.C. § 552(a)(1) (1976) permits incorporation by reference in the Federal Register of matter reasonably available to the class of persons affected thereby. This provision implies that not all the public need be affected.

from rules that are directed at a particular named party,[260] much like a lawful order other than a lawful general order.

d. Adopted as Authorized by Law

Professor Davis states, without further explanation or analysis, that this element "probably means" pursuant to the rule making procedures of 5 U.S.C. § 553.[261] The problem with this view is that not all rules must be promulgated pursuant to the rule making procedures of section 553.[262] He gives no reason why the language should not be given its plain meaning, that is, as long as the official promulgating the rule has the authority to promulgate the rule, and as long as prescribed procedures, if any, are followed, the rule is adopted as authorized by law. A better interpretation of this element would be that it merely relates to the validity of the rule rather than restricts the publication requirements to rules subject to the rule making procedure.

3. ***The*** *Second Exemption Issue*

The nine enumerated exemptions in the Freedom of Information Act apply not only to requests for records under subsection (a)(3), but to all of section 552 to include the publication and the indexing/availability provisions.[263] Thus, assuming that punitive regulations as a general proposition must be published as "substantive rules of general applicability adopted as authorized by law," the defense counsel must still face the hurdle posed by the second exemption which exempts matters that are "related solely to the internal personnel rules and practices of an agency."[264]

It is difficult to imagine that regulations which prescribe or proscribe conduct of service members do not relate solely to the internal personnel rules of a military department. Nevertheless, it can be fairly said that the Supreme Court has sapped the second exemption of any significant vitality. In Department of the Air Force v. Rose,[265] the Court specifically

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[260] See 1 K. Davis, *supra* note 76, at § 3A.7.
[261] *Id.*

[262] Of particular interest is the fact that 5 U.S.C. § 553 (1976) does not apply to the extent that there is involved, *inter* alia, a military or foreign affairs function of the United States.

[263] 5 U.S.C. § 552(b) (1976).
[264] 5 U.S.C. § 552(b)(2) (1976).
[265] 425 U.S. 352 (1976).

disapproved of the trial court's basing its denial of access on the determination that the Air Force Academy Honor and Ethics Codes were meant to control only people within the agency and that they could not possibly affect anyone outside the agency. "Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."[266]

The Court specifically expressed agreement with the court of appeals' position that the requested records had a substantial potential for public interest outside the government.[267] Thus, the determining factor in the present instance is not the fact that punitive regulations do not affect people outside the agency. Applicability of the second exemption turns on whether the public has an interest in disclosure. If it does, the exemption does not generally apply, and in the present case, much of that to which the Supreme Court points as representing the public interest in Honor Code records is equally applicable to punitive regulations.[268]

4. Consequences of Failure to Publish

From the foregoing it can be seen that there are many hurdles to overcome before a defense counsel can establish that punitive regulations are required to be published in the Federal Register. The argument is viable, however, and certainly merits a defense counsel's attention, considering the possible consequences. If successful, it would appear that the burden would be shifted to the government to establish that the accused had actual and timely notice of the regulation, certainly a difficult task in most situations. If the government fails in that task, it is difficult to see how the accused would not be "adversely affected" by a regulation of which he had no notice. Considering the many regulations which are not published, particularly those promulgated at the local level, the potential consequences for the Army are obvious.

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[266] *Id.* at 369-70. In so stating, the Court had in mind the examples specified in the Senate Report on the Freedom of Information Act, *i.e.*, rules regarding use of parking facilities, regulation of lunch hours, and statements of policy as to sick leave.

[267] *Id.* at 367

[268] *Id.*, at 367-69. The Court stated: "The importance of these considerations [discipline and superior/subordinate relationship] to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military."

C. *PRIVACY ACT STATEMENTS: ANOTHER MIRANDA?*

The Privacy Act requires that an agency maintaining a system of records give information concerning certain matters to individuals it asks to supply information.[269] The purpose of this requirement is to allow the individual to make an informed decision whether to furnish the information.[270] The requirement applies whether the information is solicited on a form or by interview,[271] and, as currently implemented by the Army, regardless of whether the information will be maintained in a system of records.[272]

The head of an agency may exempt a criminal law enforcement activity from the requirement to provide a Privacy Act statement,[273] and the Secretary of the Army has exercised that authority.[274] Thus, military police and Criminal Investigation Command agents need only concern themselves with warnings required by *Miranda* and article 31 of the Uniform Code. Company commanders, fist sergeants, and other supervisory personnel, however, frequently act in an investigative capacity. The issue thus arises whether failure to provide the advice required by the Privacy Act might form the basis for an exclusionary rule similar to *Miranda*.

It is doubtful that it does, but the possibility should not be totally discounted. Most important, the Privacy Act provides its own remedy for violation of its provisions.[275] In a sense, the essence of *Miranda* is that it provides a remedy where none existed. In the Privacy Act situ-

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[269] 5 U.S.C. § 552a(e)(3) (1976). In particular, the individual must be informed of the authority which authorizes solicitation of the information, and whether disclosure is mandatory or voluntary, the principal purposes for which the information is intended to be used, the routine uses which may be made of the information, and the effects on the individual, if any, of not providing the information.

[270] OMB Guidelines, *supra* note 87, at 28,961.
[271] *Id.*

[272] AR 340-21, note 53, *supra*, para. 4-3*a*.
[273] 5 U.S.C. § 552a(j) (1976).

[274] See generally AR 340-21-5, note 224, *supra*, App.
[275] 5 U.S.C. § 552a(g) (1976).

ation, there is no need for a judicially supplied remedy. In addition, pending development of judicial authority, the prosecution can point to the guidelines issued by the Office of Management and Budget which state that the intent of this provision was not "to create a right the nonobservance of which would preclude the use of the information or void an action taken on the basis of that information."[276]

A small ray of hope, however, exists for the defense counsel. It is possible that a judicial remedy would be provided if a court found the statutory remedy to be inadequate. Unlike the remedies provided by *Miranda* and article 31 of the Uniform Code, the Privacy Act only provides a remedy for intentional or willful conduct.[277] There is no provision for negligent omission of a Privacy Act statement.

In addition, the example cited in the guidelines raises some doubt as to the true meaning of the conclusion of the Office of Management and Budget. After stating that failure to provide a statement does not preclude the use of the information, the guidelines state that failure to provide the statement to a farmer when collecting crop yield data would not violate a crop import quota based upon the information.[278] A crop import quota is not a use of the information against the individual to whom the statement should have been provided analogous with use of information against an individual in a criminal or administrative proceeding.

Thus it is not entirely clear that the Office of Management and Budget intended to say that information collected in violation of the Privacy Act can be used against the individual who was thus deprived of the opportunity to made an informed decision whether to provide the information. The crop yield data example is similar to saying that a statement obtained in violation of *Miranda* can still be used as the basis for closing the investigative file regardless of its admissibility in evidence,

D. POLLING OF COURT MEMBERS

The Freedom of Information Act contains a fourth disclosure requirement of lesser significance and notoriety which provides for maintaining

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[276] OMB Guidelines, *supra* note 87, at 28,961–62.
[277] 5 U.S.C. § 552a(g)(4) (1976).

[278] OMB Guidelines, *supra* note 87, at 28,962.

and making available for public inspection "a record of the final votes of each member in every agency proceeding."[279] While polling of court members may not be the leading legal controversy of the day, this seemingly innocuous provision provides an excellent example of an issue created by application of the Freedom of Information Act to the military justice system.

Polling a court is unknown to military law and has been held to be unauthorized and improper.[280] The basis for this holding is the provision of the Code for voting by secret written ballot,[281] and the provision prohibiting disclosure of one's vote contained in the oath administered to court members.[282] If, however, a court-martial is an "agency proceeding," subsection (a)(5) of the Freedom of Information Act and the Code's secret ballot provision come into direct conflict.

Section 551 defines "agency proceeding" for purposes of the Administrative Procedure Act. Specifically, "agency proceeding" means an agency process for rule making, licensing, or adjudication.[283] "Adjudication" is the process for the formulation "of a final disposition . . . of an agency in a *matter* other than rulemaking but including licensing."[284] This broad sweeping definition could include a court-martial proceeding, and thus there is an arguable issue.

Many considerations could go into the final resolution of the issue, such as which statute is later in time, whether the general or the more specific governs, or whether the two statutes could be interpreted in such a

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[279] 5 U.S.C. § 552(a)(5) (1976).

[280] United States v. Tolbert, 14 C.M.R. 613 (A.F.B.R. 1953); United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957).

[281] U.C.M.J. art. 51(a).

[282] MCM, 1969, para. 114*b*. The relevant part of the current oath provides: "and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law." *Id.* At the time of the cases previously cited, the oath provided for nondisclosure "unless required to do so before a court of justice in due course of law." *See* United States v. Connors, 23 C.M.R. 636, 639 (A.B.R. 1957).

[283] 5 U.S.C. § 551(12) (1976).
[284] 5 U.S.C. § § 551(6) and (7) (1976) (emphasis added).

manner as to remove the apparent conflict.[285] The relative importance of the issue does not warrant a full discussion of all these possibilities, particularly as the issue is presented here primarily as an example of the unexpected consequences of applying open government legislation to military criminal law. The results can be both challenging and interesting.

V. CONCLUSION

Even though records produced by the military justice system are unique, the case law pertaining to other types of records generally provides a firm basis upon which to formulate answers to openness-in-government issues concerning records of trial, records of nonjudicial punishment, and records of appellate determinations. When this case law is coupled with regulatory guidance and opinions of The Judge Advocate General, the combination represents ample authority upon which the judge advocate will be able to recommend courses of action. The one notable exception is the issue of whether records of nonjudicial punishment will be subject to expungement under the Privacy Act amendment provisions, particularly on the basis of timeliness. The administrative guidance in this area is insufficient, and the case law has yet to develop.

On the other hand, issues created by application of openness-in-government legislation to military criminal law are largely speculative in nature. The possibility of significant impact is present, and the issues present an unusual opportunity for innovative advocacy. Furthermore, as the openness-in-government area develops and matures, other issues are likely to present themselves to those who enjoy facing the challenge of plowing new ground.

In summary, the two issues which represent the greatest likelihood of significant impact on the military justice system are those which arise from the Army's apparent failure to fully implement the publication and the indexing requirements of the Freedom of Information Act. Far too little attention has been paid to these requirements. If the issues have in fact been considered but rejected, the matters should be reconsidered

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[285] For example, it is conceivable that article 51(a) could be interpreted to require secrecy only in the course of the balloting, and that the provision of the oath permitting disclosure when "required to do so in due course of law" would permit subsection 552(a)(5) to operate.

with a view towards a more liberal implementation. Failure to do so in the immediate future will set the stage for a confrontation in the military justice arena. On the other hand, a more liberal implementation will minimize the impact of openness-in-government legislation on the military justice system.

SPECIAL FINDINGS: THEIR USE AT TRIAL AND ON APPEAL*

by Captain (P) Lee D. Schinasi**

Under Article 51(d) of the Uniform Code of Military Justice, counsel before courts-martial may request the trial judge to make special findings of fact, if he or she is hearing the case alone without a panel of members. This provision of military law is derived from rule 23(c) of the Federal Rules of Criminal Procedure, used in the United States district courts. Captain (P) Schinasi, drawing upon the body of law concerning special findings which has been developed by the civilian courts, explains how special findings can be used in a military setting.

Requests for special findings are loosely analogous to instructions to a jury. Special findings can help the defense on appeal by uncovering errors in a judge's understanding of the law and its application to the facts of a case. Counsel for the government, on the other hand, can protect the record by requesting special findings to show that the judge decided the case correctly after all.

Captain (P) Schinusi notes that military practitioners make less use of special findings than do their civilian counterparts

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in the federal civilian courts. He recommends that judge advocates become familiar with special findings procedures, and add this useful tool of litigation to their arsenal.

I. INTRODUCTION

This article deals with the provisions of the Uniform Code of Military Justice for obtaining special findings at courts-martial conducted by a judge sitting alone without a panel of members. Special findings are defined by the Code in the following terms:

> The military judge . . . shall make a general finding and shall in addition on request find the facts specifically. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.[1]

Stated another way, special findings are a tool counsel can employ to ensure that their trial presentations will be properly interpreted and applied by the military judge, and that any error in law or judgment made by the judge will be preserved for appeal. Observed in this light, special findings serve many of the same functions as do jury instructions in trials before a court with members.

Unfortunately, special findings have rarely been used by military counsel, although civilian, particularly federal, litigators have made wide use of them.[2] The disparity between federal and military practice seems

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[1] Uniform Code of Military Justice, art. 51(d), 10 U.S.C. § 851 (1976) [hereinafter cited as Article 51(d)].

[2] *See* United States v. Falin, 43 C.M.R. 702 (A.C.M.R. 1971).

In the *Falin* case, the accused was tried by a judge sitting alone and was convicted of two periods of unauthorized absence. The trial defense counsel requested special findings concerning jurisdictional matters. The trial judge refused, stating that, in his opinion, special findings need be made only as to matters pertaining to guilt or innocence, and not as to the facts relevant to a motion. The Army Court of Military Review disagreed, and sent the case back to the trial judge for preparation of special findings. Writing for the court, Judge Finkelstein observed that "[t]he paucity of military cases on [special findings]" compelled the court to turn to federal civilian authority to resolve the matter. 43 C.M.R. at 703.

particularly difficult to explain as article 51(d) is derived principally from rule 23(c) of the Federal Rules of Criminal Procedure.[3]

The primary objective of this article is to acquaint military attorneys with special findings, compare the federal practice with our own, and present various alternative means of implementing special findings creatively. Because so little military legal authority addresses these topics, great reliance will initially be placed upon federal cases for establishing parameters. Once this foundational material has been presented, a detailed discussion of military practice will follow.

II. RULE 23(C): THE FEDERAL EXPERIENCE WITH SPECIAL FINDINGS

A. DEVELOPMENT OF THE FEDERAL RULE

American jurisprudence has long recognized the need for special findings in judge-alone cases, both criminal and civil. The need to have trial judges set forth their conclusions of law and determinations of fact has always been viewed as a method of insuring compliance with the law, and for effecting justice.[4] Legislative history mirrors this concern, and has instigated the development of special findings.[5] Recent legislative

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[3] The text of rule 23 originally appeared at 18 U.S.C. § 3441. It now appears, with other provisions, in an appendix to Title 18, "Rules of Criminal Procedure for the United States District Courts." Under rule 60, the authorized short title of this compilation is "Federal Rules of Criminal Procedure," which will be used throughout this article.

[4] *See* Norris v. Jackson, 76 U. S. 125 (1870).

[5] *See* United States v. Hussey, 1 M.J. 804 (A.F.C.M.R. 1976).

In the *Hussey* case, an Air Force sergeant was convicted of various drug offenses by a judge sitting alone. Trial defense counsel requested special findings concerning evidence corroborating certain admissions of the accused. The judge granted the request, saying that he would attach his special findings to the record when he authenticated it. In fact, the findings apparently were never made, and the Air Force Court of Military Review sent the case back to the judge for completion of this task. Concerning the purposes of special findings, the court stated:

activity has continued this trend[6] and caused rule 23(c) to be the model mechanism for implementing special findings.

By merely making the request prior to general findings, a federal litigator can compel the bench to set forth its reasoning on each vital issue at bar. Other amendments to rule 23(c) facilitate counsel's ability to obtain special findings by allowing the trial judge to render them orally.[7] This removes the burden of reducing his conclusions to written form, a past source of substantial displeasure among federal judges. Naturally, trial judges can still explain their findings through memorandum decisions or opinions, but are no longer required to.

Federal judges have generally accepted the burden imposed upon them by rule 23(c) without criticism. District courts recognize that the need to analyze and articulate the grounds upon which their decisions have been based has at least two desirable consequences: It not only protects the accused's right to a fair trial, but also increases the likelihood of an affirmance if the case is appealed.

Even with this large body of civil and criminal law encouraging the use of special findings, the concept is not without its detractors. Judge Jerome Frank once said of special findings:

> A trial judge's decision is a unique composite reaction to the oral testimony, a composite which ought not—or, rather, cannot without artificiality, be broken down into findings of fact and legal conclusions.*

Reinforcing Judge Franks' philosophy, Judge McClellan of the Advisory Committee on special findings declared:

> [S]pecial findings enable the appellate court to determine the legal significance attributed to particular facts by the military judge, and to determine whether the judge correctly applied any presumption of law, or used appropriate legal standards.

1 M.J. at 808–809.

[6] See 8A Moore's Federal Practice ¶ 23.05 at 23–25 (2d ed. 1978). Rule 23(c), Fed. R. Crim. Proc., was last amended in 1977. Pub. L. No. 95–78, § 2(b), 95th Cong., 1st Sess., 91 Stat. 320 (1977).

[7] 8A Moore's Federal Practice ¶ 23.05 at 23–26.

[8] Skidmore v. Baltimore and Ohio R.R., 167 F.2d 54, 68 (2nd Cir. 1948).

> We all know, don't we, that when we hear a criminal case tried we get convinced of the guilt of the defendant or we don't; and isn't it enough if we say guilty or not guilty, without going through the form of making special findings of facts designed by the judge—unconsciously of course—to support the conclusions at which he has arrived.[9]

Much more recently, the Third Circuit offered the following practical objection to mandatory special findings:

> It is common knowledge among trial judges that the task of making detailed findings in either civil or criminal cases is often tedious, and one that frequently consumes as much time as might otherwise be saved in the course of dispensing with a jury trial. Requiring such findings may well have a negative effect on the willingness of trial judges to conduct non-jury criminal trials.
>
> Our function is to correct error which affects substantial rights of litigants. It is beyond our province to sit back like school teachers and grade every ruling of a lower court—produced often with great dispatch and during the strain and tension of a trial —— if it were a test paper. Although we are a superior court in the judicial schema, we do not have license to substitute our judgment for that of the lower courts absent prejudicial error. To reverse a ruling made in good faith with which counselled parties were satisfied, in the absence of plain error, displays an insensitivity to the realities of litigation in the judicial system.
>
> As noted above, the direct impact of today's holding will be to discourage trial judges from granting non-jury trials in criminal cases. An equally disturbing although less direct result might be to encourage lawyers to refrain from voicing objection to questionable decisions in the hope of luring district courts into reversible error. Litigation is an attempt to arrive at truth, not a game of wits in which the participants are attorneys and judges and the prize is reversal."[10]

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[9] **6 Proceedings, N.Y.D. Institute on Federal Rules of Criminal Procedure, 173 (1946).** *Cf.* **United States v. Ginzburg, 338 F.2d 12 (3rd Cir. 1964).**

[10] **United States v. Livingston, 459 F.2d 797, 800 (3rd Cir. 1972) (Adams, J., dissenting).**

The problems noted in the quoted statements are typical of those resulting from overcrowded trial and appellate forums. But these difficulties do not arise so much from rule 23(c), as from the trial courts' failure to apply the law properly."

Indicative of the displeasure special findings have created are the subtle changes which have been effected by judicial administrative circles. Typical of this are the alterations made in the American Bar Association's Code of Professional Responsibility, and Code of Judicial Conduct." As late as 1972, the ABA standards offered the following guidance with respect to judicial opinions:

> In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.
>
> It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.
>
> But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above."

" *See* United States v. Snow, 484 F.2d 811 (D.C. Cir. 1973).

12 **ABA** Code of Professional Responsibility (1975), and **ABA** Code of Judicial Conduct (1975).

13 **ABA** Code of Professional Responsibility (1969), and **ABA** Canons of Judicial Ethics (1969).

The current Code of Judicial Conduct has dropped this advice entirely.[14]

While the merchants of efficiency may be most effective in computing docket backlogs and the number of hours required for special findings preparation, the importance of special findings, and their close relationship to justice in the federal criminal courtroom, remains unchanged. In Howard v. United States,[15] the United States Supreme Court chided trial judges for pressuring the accused into waiving special findings because of the trial bench's philosophy against their use.[16]

In United States v. Snow,[17] Judge Bazelon perceived additional merit to this position. Viewing the criminal courtroom and its confusing, often impersonal atmosphere from society's vantage point, he highlighted the need for fairness, clarity, and a reasoned, publicized explanation for what transpired there. The practical importance of Judge Bazelon's insight is vital in a society which often doubts the wisdom of its criminal justice system.[18] If the public does not perceive the criminal process as fair, both financial and emotional support will wane.

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[14] The importance of Canon 19 can be seen in the great deference paid it in United States v. Livingston, 459 F.2d 797 (3rd Cir. 1972); and United States v. Clark, 123 F. Supp. 608 (S.D. Cal 1954); *cf.* Orfield, ***Trial by Jury in Federal Criminal Procedure,*** 29 Duke Law **J.** 66 (1962).

[15] 423 F.2d 1102 (9th Cir. 1970).

[16]

> On our own motion we notice that the district court refused to accept the waiver of jury trial both by the Government and by the defendant, unless and until the defendant signed a waiver of his earlier requested special findings. Under Rule 23(c) of the Federal Rules of Criminal Procedure the defendant was entitled to those findings, and it would have been reversible error to have refused his timely request for them. [Citation omitted.] We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on a waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court. [Citations omitted.]

423 F.2d at 1104. ***See also*** United States v. Figueroa, 337 F. Supp. 645 (S.D.N.Y. 1971).

[17] 484 F.2d 811 (D.C. Cir. 1973).

[18] ***See*** United States v. Perry, 2 M.J. 113, 116 (C.M.A. 1977), (Fletcher, C.J. concurring).

Similarly, if criminal proceedings are to have any rehabilitative or deterrent effect upon a person convicted of crime, he or she must understand not only what has occurred, but why it has occurred. Perhaps the best articulation of this philosophy is contained in Judge M.E. Frankle's words: "The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reason is a hallmark of injustice."[19]

Extending Judge Frankle's conclusions, special findings justify themselves not only in averting an unjust act, but also in highlighting to the public, and the particular accused involved, that no injustice occurred. This is vital because any controversial action taken in silence may appear arbitrary, but one explained and publicized cannot similarly suffer.[20] Also, any actual injustice in a publicized decision cannot be hidden, and appellate intervention once begun can satisfy society's interests in re-establishing justice.

Many courts have characterized these considerations as crucial,[21] striking down convictions violating rule 23(c). This has often happened when substantial guilt was not really in question.[22]

B. IMPLEMENTING RULE 23(C): OVERCOMING THE JUDICIAL AND PROCEDURAL BARRIERS

As discussed above, an accused's right to special findings is guaranteed by law.[23] All counsel need do to obtain special findings is request them of the trial judge. While this situation has not always been the law, it

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[19] Marvin E. Frankle, Criminal Sentences (1972).
[20] See Goldberg v. Kelly, 397 U.S. 254 (1970).

[21] See United States v. Snow, 484 F.2d 811 (D.C. Cir. 1973).

[22] See United States v. Pepe, 512 F.2d 1135 (3rd Cir. 1975).

[23] The Federal Rules of Criminal Procedure, or "Rules of Criminal Procedure for the United States District Courts," are promulgated by the Supreme Court with congressional oversight under the explicit command of 18 U.S.C. § § 3771 and 3772 (1976). Thus, rule 23(c), which provides that "the court shall . . . on request find the facts specially," has the force and effect of law. Courts-martial are governed by Article 51(d) of the Uniform Code of Military Justice, codified at 10 U.S.C. 851(d) (1976), which contains the same language.

has always been the subject of substantial debate.[24] Even today, more than one authority believes the right to special findings should be qualified, with ultimate discretion vested in the trial court.[25] Such an opinion is not the law at the present time.

Once the right to special findings is recognized, the question most often raised is how, procedurally, does counsel exercise the right. The overwhelming weight of authority now agrees that all counsel need do is clearly request special findings at any time before general findings are announced. The 1977 amendment to rule 23(c) has been interpreted as codifying this result.[26]

The right to special findings, however, is not vested exclusively in counsel. Recalling the public policy considerations stimulating fair and informed judgments, the trial bench may, *sua sponte*, prepare special findings in any case deemed appropriate. In United States v. Figueroa,[27] appellant unsuccessfully contended that the trial judge erred by producing special findings *sua sponte*, findings which clarified and insured that Figueroa's conviction would be affirmed on appeal. In United States v. Seagraves,[28] the converse occurred. There, even though appellate failed to request special findings, the trial court prepared them, and after reasoning through appellant's assertions, determined that guilt had not been proved beyond a reasonable doubt, acquitting Seagraves.

Extending *Seagraves* and *Figueroa*, United States v. Pepe[29] established that special findings *can* be considered *sua sponte* on appeal even though defense counsel failed to allege an error concerning them. Not-

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[24] 8A Moore's Federal Practice ¶ 23.05 at 23–26 note 7 (2d ed. 1978).

[25] *Cf.* Orfield, *Trial by Jury in Federal Criminal* Procedure, 29 Duke Law Journal 66 (1962).

[26] In the case of United States v. Rivera, 444 F.2d 136 (2d Cir. 1977), the defendant did not request special findings until a day after imposition of sentence. In the 1977 amendment, rule 23(c) was revised to read, in relevant part, "shall . . ., on request made before the general finding, find the facts specially." The notes of the Advisory Committee on Rules make clear that this change was intended to deal with the *Rivera* situation.

[27] 337 F. Supp. 645 (S.D.N.Y 1970).

[28] 100 F. Supp. 424 (D.C. Guam 1951).

[29] 512 F.2d 1135 (3rd Cir. 1975).

withstanding the government's strenuous objection to this procedure, the court reversed the conviction solely because of the now visible error, an error which would not have required appellate treatment had it not been for the special findings.

By far the most fertile area producing litigation concerning special findings is the improper activity of some trial judges in coercing defendants into waiving their rights to special findings.[30] The leading case prohibiting such conduct is the *en banc* decision of the Third Circuit in United States v. Livingston.[31] In that case the trial bench informed Livingston that trial by judge alone would be permitted only if Livingston waived his right to special findings.[32] Even though defense counsel failed to object to this tactic, the appellate court soundly condemned it. Relying on the public policy and statutory predicates to rule 23(c), as well as the then viable Canon 19, the court discussed this trial judge's actions in ethical terms.[33] As a result, such overbearing by trial judges will not be tolerated in federal courts.

Similarly, in Howard v. United States,[34] the Ninth Circuit reversed conviction because, without special findings attached to the record, the court could not determine whether the trial bench had relied on an impermissible presumption to convict Howard.[35] Discussing the importance of special findings to criminal appeals, the court censured the trial judge for forcing appellant to waive his right to special findings merely to receive a trial by judge alone.

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[30] *See* United States v. Schall, 371 F. Supp. 912 (W.D. Pa. 1974).

[31] 459 F.2d 797 (3rd Cir. 1972) (*en banc*).

[32] It is well accepted in the federal courts that accused do not have an absolute right to a trial before judge alone. Depending on the circumstances at bar, both the prosecution and trial judge will have an equal voice in the decision making process. *See* Singer v. United States, 380 U. S. 24 (1965).

[33] 459 F.2d at 798.

[34] 423 F.2d 1102 (9th Cir. 1970).

[35] Howard was originally charged with violating 21 U.S.C. 176(a), transporting illegally imported marijuana, and 21 U.S.C. 174, transporting illegally imported heroin. Conviction was reversed because the court on appeal could not determine whether the trial judge improperly relied on the presumption that possession of such contraband implies knowledge of its illegal importation. See note 61, *infra*. Use of this presumption was rejected in Leary v. United States, 395 U.S. 5 (1969); *see* U.S. v. Scott, 425 F.2d 55 (9th Cir. 1970).

Of course, the crucial issue here, disclosed in United States v. Masri,[36] is not appellant's waiver of his right to special findings, but the trial bench's coercion in effecting that waiver. In *Masri*, appellant waived his right to a jury and special findings by using a single form.[37] Initially, the court applauded the use of a written document to verify such waivers, but went on to criticize this particular document's organization as ambiguous, suggesting it might confuse appellants into believing they were forced to waive both rights to obtain a judge-alone trial. Having established the ***possible*** evil attendant upon this procedure, the court affirmed

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[36] 547 F.2d 932 (5th Cir. 1977).

[37] The Florida district court's Form 20 which was condemned is set out below:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

) Case No. _____

UNITED STATES OF AMERICA,)
Plaintiff,)

vs.)

_____,)
Defendant

WAIVER OF JURY AND SPECIAL FINDINGS

The undersigned Defendant, having been fully advised in the premises, hereby waives the right to a trial by Jury and requests the Court to try all charges against him in this case without a Jury.

The undersigned Defendant further waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

_____ _____
(Date) (Defendant)

The undersigned attorney represents that prior to the signing of the foregoing Waiver, the Defendant above named was fully advised as to the rights of an accused under the Constitution and the law to a speedy and public trial by an impartial Jury, and the right to request special findings in a case tried without a Jury; and counsel further represents that, in his opinion, the above waiver of

the conviction, determing that actual coercion was not evident, and that future waivers should be accomplished by using separate forms.[38]

C. JUDICIAL ALTERNATIVES: HOW BEST TO RENDER SPECIAL FINDINGS

Once counsel has properly requested special findings, and such request has been accepted, the question becomes what format will be best suited to the judge's announcement. One common method employed is that exemplified by United States v. Bellville,[39] a memorandum decision discussing each issue raised at trial. This technique is explicitly mentioned in rule 23(c).[40]

But such a lengthy and detailed finding as is set forth in *Bellville* is not always required or justified. In less complex cases simplicity and

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trial by jury and special findings is voluntarily and understandingly made, and recommends to the Court that said Waiver be approved.

(Date) (Attorney for Defendant)

The United States Attorney hereby consents that the case be tried without a Jury and waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

(Date) (Assistant United States Attorney)

Approved this _____ day of

UNITED STATES DISTRICT JUDGE

[38] Although the Court did not specify any particular format to be used in the future, several are available. Those which have received the most recognition are contained in ***West's Federal Forms*** § 7455–7462 (1971), published by the West Publishing Company, St. Paul, Minnesota.

[39] 82 F.Supp. 650 (S.D.W. **Va.** 1949).

[40] "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein." Fed. R. Crim. P. § 23(c).

conciseness are the paramount goals. As a result, shorter, more summary treatment of the relevant issues and facts should suffice.

Even more practical and important to the trial bench is rule 23(c)'s new provision for rendering oral special findings.[41] The advantages here are obvious. A trial judge's time is limited at best, and requiring written special findings in every trial would be an intolerable burden. Oral findings thus are highly expedient. As long as they appear in the record of trial, oral findings will be sufficient to comply with rule 23(c). Oral special findings generally possess the added benefit of reducing the period required for record certification, and as a result, appellate processing time can be reduced.*

The establishment of an adequate balance between preparation of sufficiently detailed special findings, and avoidance of an unreasonable monopolization of the trial judge's time, is vital to quelling criticism of rule 23(c).[43] The possibility for reaching this result now exists with the advent of oral special findings.

D. TACTICAL CONSIDERATIONS APPLICABLE TO REQUESTS FOR SPECIAL FINDINGS

Heretofore we have examined the basic procedure for obtaining special findings, and the legislative as well as judicial foundation upon which they rest. It is now appropriate to examine the tactical considerations in their use. Viewed pragmatically, request or lack of request for special findings is a function of the requesting party's trial objectives. Government and defense counsel, as well as the trial judge acting *sua sponte*, are all motivated by different stimuli.

Notwithstanding these differences in philosophy, a common thread can be traced through the cases in this area. It has been described as follows:

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[41] **"Such findings may be oral." Fed. R. Crim. P. § 23(c) (1977). This amendment was initiated by order of the United States Supreme Court dated Apr. 26, 1976, and was approved by Congress in Pub. L. No. 95–78, 95th Cong., 1st Sess., 91 Stat. 319. Its effective date was Oct. 1, 1977.**

[42] ***See* Bryan,** *For a Swifter Criminal Appeal— To Protect The Public as Well as the Accused,* **Washington and Lee Law Review, Fall 1968, p. 181.**

[43] ***See* note 10** *supra.*

> It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law.
>
> . . . .
>
> It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria. But the significance of this matter is all the more accentuated in a factual context where the question is a close one.[44]

The "right way" alluded to above assumes procedural and substantive guarantees, yet it connotes even more. In a judge-alone trial, there is an extra requirement for a reasoned and supportable verdict. Stated another way: 'Whenever the government and the defendant in a criminal case waive a **jury,** they are entitled to not just a verdict one way or the other, but to the reasons behind it."[45]

For well over one hundred years, the United States Supreme Court has advocated this philosophy. In Burr v. Des Moines Railroad Company, Mr. Justice Miller reinforced the importance of special findings, stating:

> The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by

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[44] Wilson v. United States, 250 F.2d 312, 324 (9th Cir. 1957). ***See*** also Bollenback v. United States, 326 U.S. 607 (1946); Pearson v. United States, 192 F.2d 681 (6th Cir. 1951).

[45] United States v. Clark, 123 F. Supp. 608 (S.D. Cal. 1954).

> this court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon.[46]

In another context the Supreme Court cautioned counsel and trial judges that special findings should not confuse the evidence of fact with the facts themselves.[47] This contention is important to a proper understanding of how special findings are to be used. They will be of no value to an appellant, or an appellant court, if they merely identify the evidence of record, rather than analyze and apply it to the law at bar.

Reduced to more pragmatic terms, current judicial opinion analogizes special findings with a jury's findings, and the trial judge's deliberative processes to those required of court members. The basic consideration here is that the concept of reasonable doubt must be viewed by the bench as it would be by a jury[48] The nobility of this contention is often scoffed at by legal scholars.[49] Many trial judges feel that the mechanical deliberative process pressed upon them by special findings is of little utility in assisting them to arrive at difficult decisions.[50] Yet virtually all trial

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[46] *68* U.S. 99, 100 (1964). *See also* Norris v. Jackson, **76** U.S. **(9** Wall.) 125, 126 (1870), where Mr. Justice Miller speaking for the court stated:

> This special finding has often been considered and described by this Court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.

[47] *See* Norris v. Jackson, **76** U.S. 125 (1870).

[48] United States **v.** Winters, 389 F. Supp. 1392 (S.D.N.Y. 1975).

[49] On the one hand, the appellate judge's conception of reasonable doubt is more apt to coincide with the trial judge's conception than with the jurors'. On the other hand, appellate judges are doubtless less reluctant to set aside the verdict of a single judge than that of twelve jurors. In practice, these factors probably tend to balance out.

8A Moore's Federal Practice § *23.05* at **23–28** (2d ed. 1979).

[50] United States **v.** Ginzburg, 338 F.2d 12 (3rd Cir. 1964).

judges agree that special findings help clarify those determinations, once made.[51]

While the trial bench may still be debating the merit behind special findings, government and defense counsel generally recognize their value, *albeit* for different reasons. Among defense counsel's primary motivations for requesting special findings are those noted in United States v. Livingston.[52] "Findings of fact in non-jury criminal cases primarily aid the defendant in preserving questions for appeal and aid the appellate court in delineating the factual bases on which the trial court's decision rested."

Similarly, special findings also insure that the trial court properly appreciates the issues raised by defense counsel, and has resolved or at least considered those issues in reaching its verdict.[53] One commentator indicates that defense counsel should employ special findings "if there is any inkling that the judge is laboring under a misapprehension of law or fact which may be revealed by his findings.""

Although not the subject of as much litigation or legal discussion, the government's use of special findings is as valuable to the interests of justice as defense counsel's. The prosecutor must insure that conflicting and often confusing evidence is thoroughly evaluated by the trial court, and that the law is properly applied to the facts, protecting the record from inconsistent appellant review. Appellate courts occasionally strive to find a justifiable basis upon which to affirm convictions. Special findings when properly implemented can provide the necessary hook upon which conviction can be hung.[55]

In United States v. Johnson,[56] appellant's conviction was challenged on grounds of insufficiency of the evidence. Affirming the district court's determination, Judge Gervin stated that, as a result of the trial judge's oral special findings, the record demonstrated that "a reasonably minded

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[51] **United States** v. **Johnson, 496** F.2d **1131 (5th Cir. 1974).**

[52] **459** F.2d **797, 798 (3rd** Cir. **1972)** *(en banc).*

[53] **United States** v. **Bishop, 469** F.2d **1337 (1st Cir. 1972).**

[54] **8A Moore's Federal Practice ¶ 23.05 at 23–24, –25.**

[55] **Howard** v. **United States, 423** F.2d **1102 (9th** *Cir.* **1970).**

[56] **496** F.2d **1131 (5th Cir. 1974).**

trier of fact could conclude that appellant was guilty beyond a reasonable doubt. . . ."[57] It is important to note here that even though the trial judge's special findings were described as sketchy, they provided the basis for affirmance. Further, this appellate court was willing to interpret more generously the trial judge's oral special findings, than would the case have been with *written* ones. Nonetheless, had no special findings been rendered, the conviction may well have been reversed.

United States v. Bishop[58] highlights the necessity for a trial court to produce some form of special findings in every case. There appellant contended he did not have the requisite *mens rea* to commit the charged offense. Although the issue was litigated at trial, formal special findings were not requested nor provided. On appeal, the government contended that, without a defense request for special findings, the issue had not been preserved.

Although the court voiced passing credence to this argument, the issue was litigated. Notwithstanding the fact that traditional special findings were absent, the circuit court adopted the trial judge's informal conclusions on the issues under consideration, rationalizing them into special findings. The appellate court complemented the trial judge for providing this vehicle to affirmance, and characterized his actions as the product of a "commendable abundance of caution."[59] Again it is evident that an appellate court will reach for any rationale which can fairly justify upholding a conviction.

In some cases such a result is not possible because the record fails to contain special findings, and leaves no room for rationalizing them into existence. In such cases, many appellate courts red flag the deficiency, encouraging trial judges and government counsel to make use of rule 23(c) to protect the record. Howard v. United States[60] is an excellent example of this situation. There, appellant was convicted on several specifications concerning drug trafficking, yet the trial court's verdict left substantial uncertainty as to whether an impermissible presumption had

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[57] *Id.* at 1133. *See also* Glasser v. United States, 315 U.S. 60 (1942).

[58] 469 F.2d 1337 (1st Cir. 1972).
[59] *Id.* at 1346.

[60] 423 F.2d 1102 (9th Cir. 1970).

been employed.[61] Highlighting the importance of rule 23(c), the appellate court indicated affirmance might have been possible had special findings been supplied.

A virtually identical result was reached in Andrews v. United States.[62] In that case appellant also contended that the trial court relied on an improper presumption in evaluating the evidence against him.[63] Because the evidence of record was contradictory on this point, the court was unable to specify with certainty whether proper legal standards were used to convict appellant. Reversal here is a monument to the importance of rule 23(c). Had government counsel, or the trial judge *sua sponte,* produced special findings, the record would have been clear, and the conviction sustained.

E. OBTAINING SPECIAL FINDINGS: WHEN THEY MUST BE PROVIDED

The question arises under what circumstances a trial court may properly refuse to grant special findings, and conversely, when counsel can justifiably insist on their production. Rule 23(c) itself fails to answer this question, a result which has prompted substantial litigation concerning the rule's parameters.

One commentator, weighing the available cases on the point, suggests that special findings must be provided on all questions of fact and law, whether presented by a motion, or during the case in chief.[64] A large number of federal cases adopt this philosophy, some going so far as to suggest that at least an abbreviated form of special findings should be

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[61] Although some of the district court's remarks at the close of trial suggest that it could have found knowledge of illegal importation without regard to the presumption, other remarks suggest to the contrary. Adding to that ambiguity is the court's express refusal at the beginning of trial to make special findings.

423 F.2d at 1104. *See* note **34,** ***supra,*** for factual predicate.

[62] 426 F.2d 1304 (9th Cir. 1970).

[63] The prohibition discussed in note 44 *supra,* concerning Leary v. United States, 395 U.S. 6 (1969), is also at bar in ***Andrews.***

[64] ***See*** 8A Moore's Federal Practice ¶ 23.05 at 23–26.

rendered in every criminal case.[65] Similarly, even issues which are recognized to be mixed questions of fact and law are seen to require special findings.[66]

Despite this apparent broad brush approach, obvious and justifiable limitations have arisen. In United States v. Harris,[67] the central issue both at trail and on appeal concerned witness credibility. Trial defense counsel appreciated how important this question might be to the trial's outcome and its possible appeal, and requested special findings. The trial judge complied but failed to set forth what weight he gave the evidence in question. Upholding the district court's partial special findings, the appellate court apparently recognized the amorphous nature of credibility evidence, and the lack of standards available to resolve such questions.[68] The court went on to reason: "As a jury is at liberty to make findings of credibility without a reasoned explanation so may a judge sitting as a fact finder. We do not suggest that the law requires more."[69]

Some federal courts have built limitations into special findings practice by requiring defense counsel to submit proposed special findings as a condition for compliance with rule 23(c).[70] Those courts implementing this process justify it by holding that proposed special findings are the only means for insuring compliance with counsel's specific requests. Generally, the bench will allow counsel to proffer special findings orally, thus saving time. Even when the standards discussed above have been satisfied, no requirement for special findings arises if counsel's request lacks specificity, or is unintelligible.[71]

Similarly, special findings are not required when counsel desires to know what evidence was considered unimportant by the trial judge.[72] Most courts find no utility in requiring the judge to discuss evidence

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[65] United States v. Rivera, 444 F.2d 136 (2d Cir. 1971).

[66] United States v. Watson, 459 F.2d 588, 591 (8th Cir. 1972).

[67] 507 F.2d 197 (3rd Cir. 1975).

[68] *See* Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1975).

[69] United States v. **Harris,** 507 F.2d 197, 198 (3d Cir. 1975).

[70] *See* United States v. Rivera, 444 F.2d 136 (2d Cir. 1972).

[71] *Id.*

[72] *See* United States v. Peterson, 338 F.2d 595 (7th Cir. 1964).

which had no effect upon the litigation's outcome.[73] In United States v. Peterson,[74] the Seventh Circuit ruled that special findings were not required on "evidence the judge thought had no bearing . . ." on any issue under consideration. Another variation on this theme concerns cases where counsel and the bench disagree on whether certain evidence was ever before the court[75] Typically, where the record is silent on an issue of fact, special findings will not be required to establish that conclusion.[76]

Federal circuit courts have also refused to compel special findings when it appeared defense counsel was unsure what they should contain. In such cases, counsel may have tried to apply in the special-findings context theories which properly are applicable to jury instructions. In Cesario v. United States[77] the First Circuit rejected defense counsel's contention that the trial judge must give instructions to himself before rendering a verdict. An important *caveat* to this holding states that, even though "self instructions" will not be required under most circumstances, an appellate court may rationalize defense counsel's efforts into requests for special findings, holding that the trial judge should have complied with rule 23(c), possibly reversing conviction as a result." Counsel can almost anticipate this conclusion if the case is complicated, conviction is a close question, or defense counsel's competence is uncertain.

Counsel will also be unable to compel special findings in areas traditionally not involving participation of a jury.[79] For example, parole or probation revocation, although conducted before a judge alone, do not come within rule 23(c)'s scope.[80] The proceeding involved here is properly labeled a hearing, as opposed to a trial, and issues of guilt or innocence are not at stake. In such situations Congress has decided to withhold the availability of special findings by limiting rule 23(c)'s applicability. This

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[73] *See* **18 West Federal Practice Digest 2d, Criminal Law § 254, p. 653 (1976).**

[74] **338 F.2d 595, 598 (7th Cir. 1964).**
[75] *See* **United States** v. **Lloyd, 431 F.2d 160 (9th Cir. 1970).**

[76] *Id.*
[77] **200 F.2d 232 (1st Cir. 1952).**

[78] *Id.*
[79] *See* **United States v. Weber, 437 F.2d 1218 (7th Cir. 1971).**
[80] *Id.*

policy seems appropriate in light of the lower standards of proof and admissability of evidence which apply at such hearings.[81]

A corollary to this prohibition concerns counsel's requests for special findings during *jury trials,* when the issue being litigated is purely legal in nature. For example, if defense counsel challenges the court's jurisdiction over an accused, the resolution of this matter will generally not involve participation of the jury, as it is handled out of their presence. In this regard, counsel have argued that the proceeding in question is so similar to a judge-alone trial that special findings are appropriate. While the creativity of this position has been recognized, circuit courts continue to reject it, relying on rule 23(c)'s requirement for a judge-alone trial.[82]

Similarly, United States v. Benchwick[83] presents another twist in the issue of when special findings are required. Here defense counsel moved for a finding of not guilty at the close of the government's case in chief. Counsel wanted the trial judge to produce special findings concerning the resolution of his motion and, if the motion was ultimately denied and the defendant convicted, on the verdict. Affirming the trial judge's decision to submit special findings only after conviction, the court reasoned that rule 23(c) contemplates one set of special findings, those produced after conviction or acquittal. If defense counsel is not satisfied with thisresult, his alternative is to move for relief, then rest. While the court recognized this to be a difficult choice, they held it to be the one required by the law.

F. FEDERAL, APPELLATE TREATMENT OF SPECIAL FINDINGS

Having established the tactical justifications for using special findings in complex judge-alone trials, and having explored the procedural hurdles counsel must satisfy before special findings will be rendered, we will now

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[81] **See Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnan v. Searpelli, 411 U.S. 278 (1973) for the Supreme Court's most definitive statements on the issue. United States v. Bingham, 3 M.J. 119 (C.M.A. 1977), and United States v. Rozycki, 3** M.J. **127 (C.M.A. 1977), adopt this rationale for the** military.

[82] **See United States v. Lloyd, 431 F.2d 160 (9th Cir. 1970).**

[83] **297 F.2d 330 (9th Cir. 1961).**

examine what use will be made of them on appeal. It should be remembered that allegations of error concerning special findings must be distinguished from every other substantive or procedural difficulty raised on appeal.[84] For example, an appellate court considering a special finding issue will not focus on whether the accused's alibi defense should have been successful at trial, as much as it will on whether the trial judge properly understood its legal and factual consequences. Stated another way, even if appellant's defense was meritless, appellate relief may be available simply because the special findings indicated that the trial judge did not understand the law involved, and was therefore unable to properly resolve appellant's factual contentions. This philosophy buttresses one of the primary motivations for using special findings: to inform an appellate court concerning all "outcome determinative" issues.[85]

The following principles will be implemented by appellate courts in evaluating the adequacy of special findings:

> **A.** Are the special findings sufficiently replete for the appellate court to discern the legal and factual basis of the trial court's verdict?
>
> B. Has the accused's ability to appeal all assignments of error been adversely affected by the special findings in question?
>
> C. Do the prepared special findings evidence substantial legal or factual miscalculations by the trial judge?[86]

As a general rule, if the trial judge's rendition satisfies all three standards, conviction will be affirmed;[87] if it does not, conviction may be reversed, or modified.[88]

In most instances, the appellate courts will evaluate allegations of error in special findings as they would those produced in other procedural or substantive areas. The leading contrary situation concerns inconsistent verdicts, *i.e.*, those trial results where general and special findings di-

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[84] *See* State v. Chapman, 101 F. Supp. 335 (D. Md. 1951).

[85] *See* Haywood v. United States, 393 F.2d 780 (5th Cir. 1968).
[86] *See* United States v. Bohn, 508 F.2d 1145 (8th Cir. 1975).

[87] *See* United States v. Johnson, 496 F.2d 1131 (5th Cir. 1974).
[88] *See* United States v. Morris, 263 F.2d 594 (7th Cir. 1959).

verge, or where the trial judge returned mixed findings of guilt and innocence or virtually the same evidence. Appellate courts have consistently allowed juries this latitude, reasoning that it is an important part of our criminal justice system's concept of leniency.[89] But trial judges sitting alone are not allowed this generosity, and conviction will be reversed if a compromise verdict, or inconsistent special and general findings are returned.[90]

Two other interrelated issues apply to the appellate review of special findings which are generally absent in other areas. The first concerns whether or not counsel's failure to request special findings will be deemed a waiver of any trial issue on appeal. The second is whether counsel waives an issue touching upon the special findings themselves if he does not challenge those findings at trial. It is important to note that no uniform rule exists in this area, and many courts will only weigh these matters into the merit of counsel's other substantive allegations of error.

Looking first at whether a failure to request special findings is a waiver of any trial error, it can be argued that this is actually not a special findings topic at all, but one concerned only with appellate procedures. On the other hand, it has been suggested that the relationship between appellate litigation and the trial court's obligation to properly preside over the trial may require *sua sponte* special findings.[91]

The most widely cited case setting forth this philosophy is Wilson v. United States.[92] There, appellate challenged the trial judge's use of the legal standard employed to measure his guilt. Even though counsel failed to request special findings, and the substantive evidence of guilt was overwhelming, the circuit court reversed conviction because the trial judge's theory *may* have been incorrect.

Alternatively, in United States v. Bommarito,[93] appellant was tried on conspiracy charges. Although that issue was thoroughly litigated at trial, defense counsel failed to request special findings on the identity of

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[89] *See* **Dunn v. United States, 284** U.S. **390 (1931); McElheny v. United States, 146 F.2d 932 (9th Cir. 1944).**

[90] *See* **United States** v. Maybury, **274 F.2d 899 (2nd Cir. 1960).**
[91] *See* **United States** v. **Graves, 1 M.J. 50 (C.M.A. 1975).**

[92] **250 F.2d 312 (9th Cir. 1958).**
[93] **524 F.2d 140 (2d Cir. 1975).**

any co-conspirators. When defense counsel attempted to raise this matter on review, the Second Circuit rejected the allegation of error due to the absence of special findings—a drastic result.

In United States v. Livingston,[94] the legal justifications for *Bommurito* were discussed in the following terms:

> Indeed, it has been suggested that findings under rule 23(c) are a prerequisite to preserving for appeal issues concerning the significance or existence of a particular fact. . . . Findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial.

Attempting to modify the strict rule announced in *Bommurito,* the First Circuit in United States v. Bishop," took a logical middle ground. There, appellant contended he lacked the requisite *mens rea* to commit the charged offense. Yet defense counsel failed to request special findings on the issue. In response to appellant's allegation of error, government counsel contended the question had not been preserved for appeal, as special findings were absent. While the court agreed with the government's argument in substance, finding that the record was not sufficiently replete, the court nonetheless conducted an independent investigation. Relying on the trial judge's limited *sua sponte* "findings," the court affirmed the conviction.

Applying the related issue of whether defense counsel need challenge the special findings at trial in order to succeed on appeal, a more uniform approach has been taken. Here the weight of authority agrees that no attack is required. In both United States v. Livingston,[96] and United States v. Pepe,[97] the Third Circuit found no merit in needlessly extending the trial litigation in this fashion. This result reinforces the appellate value of special findings.

G. SPECIFIC APPLICATIONS OF SPECIAL FINDINGS TO ALLEGATIONS OF ERROR

As a conceptual matter it is important to realize, as suggested above, that appellate courts will often treat those cases where special findings

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[94] 459 F.2d 797, 798 (3d Cir. 1972) (en *banc*).
[95] 469 F.2d 1337 (1st Cir. 1972).

[96] 459 F.2d 797 (3d Cir. 1972) (*en banc*).
[97] 512 F.2d 1135 (3d Cir. 1975).

have been rendered differently from those cases without special findings. A good example of this situation is found in Lustinger v. United States.[98] There, appellant challenged the sufficiency of the evidence against him. Affirming conviction, the court held: "It follows that we must assume that the trial court found in favor of the government with respect to each and every alleged statement or concealment relied upon by the government.'" Adding to this logic, the court went on to suggest that appellant might have been more successful on appeal had he requested special findings which would have detailed the particular inconsistency or insufficiency now troubling him.

On the other side of this coin, United States v. Snow[100] discusses what are the results when defense counsel requests special findings, and the trial judge agrees with the request, but findings are never completed. Writing for the majority, Judge Bazelon opined that this delict frustrates adequate appellate review, and that the weight of the evidence against the appellant is irrelevant. Judge Bazelon indicated that an appellate forum cannot satisfactorily resolve allegations of error without knowing the facts and law relied upon by the trial judge. Further, the court must know to what extent the trial judge understood and considered appellant's defense in relation to the facts at bar. The result here was that the court refused to guess at the trial judge's logic, and conviction was reversed.[101]

Such a result is not surprising but actually predictable when counsel appreciate the lofty position special findings occupy in appellate practice. As Judge Friendly opined: "It is exceedingly desirable that, before pronouncing judgment against a defendant, a judge to whom a criminal case has been tried should make findings, whether oral or written, rather than simply announce a conclusion of guilt."[102]

The very basic distinction between judge-alone cases and jury cases has stimulated one authority to highlight the difference as follows: On

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[98] 386 F.2d 132 (9th Cir. 1967).
[99] *Id.* at 135.

[100] 484 F.2d 811 (D.C. Cir. 1973).

[101] *See* dissenting opinion where clear evidence of guilt is posited as sufficient to justify affirmance, and further review conceptualized as being a waste of judicial resources.

[102] United States v. Jones, 360 F.2d 92, 96 (2d Cir. 1966). *See also* United States v. Rosengarten, 357 F.2d 263, 266 n. 4 (2d Cir. 1966).

the one hand, an "appellate judge's conception of reasonable doubt is more apt to coincide with the trial judge's conception than with the jurors'."[103] Yet on the other hand, "appellate judges are doubtless less reluctant to set aside the verdict of a single judge than that of twelve jurors."[104] The actual legal standard employed in this balancing test is rarely defined on appeal in exactly the same manner. What is important here is the realization that processes similar to these are being implemented by appellate courts. Counsel must be sensitive to these distinctions if success is to be obtained at trial, and maintained on appeal.

Similarly, the standard for evaluating the sufficiency of special findings has been the subject of much concern, inconsistency, and litigation. In United States v. Tallman,[105] the court was uncertain how to gauge the trial court's special findings, initially seeking to adopt the rule applicable in civil proceedings.[106] Ultimately rejecting the strict civil standard for criminal trials, the Seventh Circuit agreed that conviction would not be reversed unless the special findings were "clearly erroneous."[107] In Kilcrease v. United States," the court phrased this result in these terms: "Factual findings made by the trial court in a criminal case must stand unless clearly erroneous, at least where such findings concern matters other than the ultimate question of guilt."

More recently, in United States v. Vaughan,[109] the Fourth Circuit applied the "clearly erroneous" standard to appellant's allegation that the government's prosecution of him had been vindictive. Rejecting this argument, the majority held: "The trial court expressly found there was no retaliatory motivation on the part of the government . . . [S]ince this

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[103] 8A Moore Federal Practice, ¶ 23.05 at 23–28.

[104] *Id*. *See also* Deluna v. United States, 288 F.2d 114 (5th Cir. 1955).

[105] 437 F.2d 1103 (7th Cir. 1971).
[106] *See* Fed. R. Civ. P. 52(a), codified at 28 U.S.C. Appendix.

[107] *See* Campbell v. United States, 373 U.S. 487 (1960); United States v. Cadillac Overall Supply Company, 568 F.2d 1078 (5th Cir. 1978); United States v. Richard, 471 F.2d 105 (8th Cir. 1973); United States v. Watson, 459 F.2d 588 (8th Cir. 1972); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967).

[108] 457 F.2d 1328, 1331 (8th Cir. 1972).
[109] 565 F.2d 283 (4th Cir. 1977).

finding is amply supported in the record and not clearly erroneous. . . there has been no violation of the . . . [legal] standard."[110]

In United States v. Carrillo,[111] the Fifth circuit reached the same result with respect to a Jencks Act issue. The court there held that a determination that evidence is subject to the Jencks Act is similar to every other factual determination made at trial. Such a determination cannot be disturbed unless clearly erroneous. Similarly, in United States v. Watson,[112] the clearly erroneous standard was applied to a search and seizure issue. The court there found that questions concerning the existence and voluntariness of a government search were determinations for the district court judge to make, the validity of which could not be overturned unless clearly erroneous.

In most other areas, appellate courts will evaluate allegations of error in cases with special findings as they would jury trials.[113] Specific allegations of error leveled at the special findings themselves generally are considered in much the same light as are issues concerning jury instructions. In fact, some courts have gone so far as to indicate that the finder of fact in a bench trial should deliberate under the same principles as do juries.[114] Scope of review questions in special findings cases also parrot jury trial determinations. In both instances appellate courts will view the evidence in the light most favorable to the government, affirming when substantial evidence of guilt is contained in the record of trial.[115]

H. APPELLATE REMEDIES WHEN SPECIAL FINDING ERRORS ARE ESTABLISHED

When an appellate court determines that error has been made, and specifically that the trial court's special findings are deficient, improperly

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[110] *Id.* at 285.
[111] 561 F.2d 1125 (5th Cir. 1977).

[112] 459 F.2d 588 (8th Cir. 1972).

[113] *See* United States v. Tutino, 269 F.2d 488 (2d Cir. 1959); United States v. Dudley, 260 F.2d 439 (2d Cir. 1958).

[114] *See* United States v. Herrera, 407 F. Supp. 766 (N.D. Ill. 1975).

[115] *See* Blunden v. United States, 169 F.2d 991 (6th Cir. 1948).

written, or absent, the question becomes what relief can counsel expect. In these circumstances the government will usually argue that the error was harmless, and that, due to the overwhelming evidence of guilt, conviction should be affirmed. Rarely will a court accept this contention. More likely the circuit court will find that appellant's requests for special findings were untimely, insufficiently specific, or inappropriate under the circumstances.[116]

The more common result in this situation is for an appellate court to reverse conviction and remand the case"' or, in the alternative, request that the special findings be corrected and submitted pursuant to the court's order.[118] While no particular guidelines exist concerning when either alternative will be imposed, general concepts can be gleaned.

The most commonly cited authority in this area is United States v. Morris.[119] There, appellant's request for special findings was deined. On appeal the government confessed error, and moved to remand so that special findings could be rendered. In response, appellate defense counsel contended the government's position was unsatisfactory as it would not produce an adequate remedy. Defense counsel demanded reversal.

After balancing both contentions, the court adopted defense counsel's arguments, opining that merely remanding the case for special findings, when the government was already aware of appellant's allegations of error, would vitiate the defense's appeal. Such a compromise of defense counsel's appellate case was rejected. In sum, counsel relied on the mandatory nature of rule 23(c) and its value in preserving issue for appeal, not in supporting attempts to correct errors after appeal. The court went on to emphasize that this result was linked to the particular facts at bar, hinting relief in this area would only be on a case by case basis:

> Without deciding whether the procedure suggested by the Government, that is, ordering the appeal held in abeyance pending

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[116] *See* United States v. Rivera, 444 F.2d 136 (2d Cir. 1971); United States v. Jones, 360 F.2d 92 (2d Cir. 1966); United States v. Rosengarten, 357 F.2d 263 (2d Cir. 1966).

[117] *See* United States v. Snow, 484 F.2d 811 (D.C. Cir. 1973).

[118] *See* United States v. Morris, 263 F.2d 594 (7th Cir. 1959).

[119] 263 F.2d 594 (7th Cir. 1959).

> such findings would be proper in another case, or whether, in a proper case, the judgment of conviction should be vacated and the case remanded for findings and a judgment entered in conformity therewith, we have concluded that in this case the substantial rights of *all* parties will be best served by a new trial.[120]

In Wilson v. United States,[121] the Ninth Circuit applied similar logic. Analogizing special findings to jury instructions, Judge Barnes stated that, if the special findings were defective or improperly omitted, such error would require the same relief that deleterious jury instructions obtained: reversal.[122] In the vast majority of cases in which the court determines that special findings were improperly omitted, reversal will occur without concern for the substantive weight of evidence against appellant. But *Wilson* carries the result even further. Here, although trial defense counsel made no formal request for special findings, and thus none were prepared, Judge Barnes extended his reasoning to protect that appellant as follows:

> Another point requires discussion. Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule *23* . . . No such formal request was made in the instant case. However, counsel for appellant repeatedly called the trial court's attention to this matter, and, as indicated previously, the trial court's remarks at the time of verdict bore on it. Moreover, counsel for the Government did not raise the point of Rule *23* on this appeal. Therefore, while we believe resort to Rule *23* ordinarily must be made to preserve such an issue on appeal, we also believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.[123]

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[120] *Id.* at 596.

[121] 250 F.2d 312 (9th Cir. 1958).

[122] *See also* United States v. Snow, 484 F.2d 811 (D.C. Cir. 1973); Howard v. United States, 423 F.2d 1102 (9th Cir. 1970); Haywood v. United States, 393 F.2d 780 (5th *Cir.* 1968).

[123] Wilson v. United States, 250 F.2d 312, 325 (9th *Cir.* 1958).

I. FEDERAL, SUMMARY

From what has been discussed to this point, it is clear that special findings play an important role in federal criminal litigation, both at trial and on appeal. Legislative history indicates Congress intended this result when rule 23(c) was promulgated. While trial defense counsel have made the most dramatic use of special findings, successfully implementing them to educate district court judges and gain appellate relief, the Government has similarly benefitted. Prosecutors are now aware that they can *protect* the trial record from appellate intervention by requiring the trial judge to clearly establish the factual and legal predicate upon which conviction will be based. This procedure has proven so successful that district court judges often provide special findings *sua sponte,* with appellate courts depending on them as a means of appreciating the lower court's resolutions.

With this model of efficient special findings practice in mind, we can hope to produce some interesting comparisons and distinctions through examination of how Article 51(d) is employed. Perhaps the most important aspect of this analysis resides in the fact that virtually every military court which has addressed Article 51(d) recognizes that it is based upon rule 23(c), and attempts, as best it can, to adopt the federal practice. To a great extent military appellate courts have been successful in this endeavor, but as we will find, a great distance remains to be travelled.

III. ARTICLE 51(d): SPECIAL FINDINGS IN THE MILITARY

A. INTRODUCTION TO ARTICLE 51(d) AND PARAGRAPH 74i

Prior to the Military Justice Act of 1968,[124] discussion of special findings in the military was done mostly at a whisper. Without trial judges to conduct criminal proceedings, the concept simply did not apply. In fact, the Uniform Code of Military Justice did not even provide for their use. This reality may be the explanation for the fact that today's counsel

[124] Uniform Code of Military Justice arts. 1–140, 10 U.S.C. § 801–940 (1976) [hereinafter cited as the Code in text, and the U.C.M.J. in footnotes].

almost uniformly ignore the concept. Because precedent is sparse,[125] and the little which does exist fails to advocate use of special findings, the decade following amendment to the Code has had only a negligible effect on reversing the trend.

In part this article is designed to encourage the use of special findings by highlighting the valuable benefits they offer to both government and defense counsel. The previous discussion of federal practice should act as a model for accomplishing that result. In fact, legislative history indicates that Article 51(d) was styled directly after rule 23(c) and designed to be applied in the same way. Judge Finkelstein, in United States v. Falin,[126] recognized this connection and characterized Article 51(d) and rule 23(c) as being "congruent," and in fact they are.

Virtually all military judicial authority agrees on this point. In United States v. Baker,[127] Judge Thomas established the same procedural guidelines for implementing special findings that apply in federal courts. While ultimate discretion concerning form and content reside with the military judge, the basic requirements for substance are set forth in the Manual For Courts-Martial.[128] The Manual requires the trial judge to cover all factual matters reasonably before the court, the elements of the charged offense, mental responsibility issues if raised by the evidence, other defenses reasonably in issue, and similar matters. The Manual also provides that counsel must specify the issue he or she wants determined, a requirement not present in federal practice.

Notwithstanding these statutory similarities, the Manual for Courts-Martial and judicial implementation together have carved out large dif-

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[125] *See* United States **v.** Hussey, 1 M.J. 804 (A.F.C.M.R. 1976). ***See also*** note 5, ***supra.***

[126] 43 C.M.R. 702, 703 (A.C.M.R. 1971). ***See*** *also* note 2, *supra.*

[127] **47** C.M.R. **506** (A.C.M.R. 1973).

In the ***Baker*** case, the Army Court of Military Review observed, "The wording of our Article 51(d), U.C.M.J., and F.R.C.P. 23c are identical. Accordingly, federal decisions interpreting this rule provide adequate guidance." The court then sets forth the guidelines for requesting and issuing special findings found in **various** federal cases, and in secondary authorities on federal civilian law, i.e., Moore's Federal Practice, Wright's Federal Practice and Procedure, and C.J.S.

[128] ***See*** Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. **74i** [hereinafter cited as paragraph 74*i*, or the Manual].

ferences between military and federal practice. These differences will be discussed after examining current military practice.

B. APPLYING THE MILITARY PROCEDURES TO COURT-MARTIALS

Procedurally, requesting special findings at a court-martial is accomplished in the same fashion as in federal courts;[129] either counsel need simply request them. Yet, in United States v. Robertson,[130] an unusual situation arose with respect to this rule. There appellant pleaded guilty to a lengthy absence without leave, before a court with members. After trial counsel read the first page of the charge sheet into evidence, testimony was presented indicating that Private Robertson may have voluntarily returned from AWOL, contrary to the charged forcible return. Uncertain how to treat this development, the military judge instructed the court members that, during their deliberation on sentence, they should specifically determine whether appellant was apprehended, or voluntarily returned to military control.

In a *per curium* opinion, the Army Court of Military Review condemned the trial judge's action, highlighting his lack of familiarity with the subject matter. However, despite this unusual procedure, conviction was affirmed, because the court members found that appellant had voluntarily returned, thereby vitiating any possible prejudice.

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[129] See United States v. Kressin, 2 M.J. 283 (A.F.C.M.R. 1976).

In the *Kressin* case, concerning a marijuana conviction, the Air Force Court of Military Review was primarily concerned with whether a military judge is always obliged to make special findings concerning admittedly disputed issues of fact. The court assumed without discussion that counsel's request for special findings will at least be entertained by the trial judge. (The court decided that special findings are entirely analogous with jury instructions, and that a judge need not render special findings on a matter which would not be decided by a jury anyway.) 2 M.J. at 285–286.

[130] 41 C.M.R. 457 (A.C.M.R. 1969).

The unusual action of the trial judge in this case was deemed error because the Army Court of Military Review could "find no legal basis for such procedure" in the Manual for Courts-Martial. Specifically, the court determined that "no provision exists which allows the members of the court-martial to make such special findings involving solely collateral issues in the area of sentencing." The court felt that the matter was one that could have been dealt with through normal jury instructions concerning sentencing. 41 C.M.R. at 459.

1. *Tactical Considerations*

The tactical and pragmatic justifications for requesting special findings in federal courts apply equally in courts-martial. Relying again upon Judge Finkelstein's decision in United States v. Falin,[131] the Army Court of Military Review summarized as follows the justifications for implementing Article 51(d):

> Special findings are to a bench trial as instructions are to a trial before members. Such procedure is designed to preserve for appeal questions of law. Cesario v. United States, 200 F2d 232, 233 (1st Cir. 1952). It is the remedy designed to rectify misconceptions regarding: the significance of a particular fact, Wilson v. United States, 250 F2d 312,325 (9th Cir. 1958); the application of any presumption, **Howard** v. United States, 423 F2d 1102, 1104 (9th Cir. 1970); or the appropriate legal standard, United States v. **Morris,** 263 F2d 594 (7th Cir. 1959).[132]

More recently, the Air Force Court of Military Review, in United States v. **Hussey,**[133] applied Judge Finkelstein's logic to a case where the military judge granted appellant's request for special findings, but failed to make them. Finding error, the court held that special findings are as vital to proper criminal litigation in judge-alone trials, as jury instructions are in trials before a court with members. Continuing, the court found that without special findings it could not determine whether the finder of fact properly understood and applied the law.

An even stronger motivation than that displayed in *Hussey* for defense counsel's use of special findings was revealed in United States v. Quick.[134] There appellant attempted to win reversal by challenging an allegedly

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[131] 43 C.M.R. 702 (A.C.M.R. 1971).

[132] *Id.* at 703.

[133] 1 M.J. 804 (A.F.C.M.R. 1976).

[134] 3 M.J. 70 (C.M.A. 1977).

In *Quick,* an Army case concerning rape and burglary, the trial judge excluded the line-up identification from evidence, but did not explain why he did so, and counsel did not request special findings on the point. However, there was apparently sufficient evidence to support a conclusion that the complaining witness could identify her attacker in court from having seen his face at the time of the attack, independently of the intervening lineup. 3 M.J. at 71.

improper pretrial line-up. Speaking for the Court of Military Appeals, Judge Cook failed to grant relief, indicating that the record had not fully developed the issue, and without special findings appellant could not sustain the burden of establishing error.

2. *When Must Special Findings be Provided?*

Consistent with federal practice, military accused are not entitled to special findings merely because they have been requested.[135] In fact, experience indicates that the Manual's application of Article 51(d) may be more restrictive than its federal counterparts. Paragraph *74i* obligates the requesting counsel to specify those areas upon which he desires determinations, although the Code does not impose any such requirement.

Notwithstanding this limitation, military courts have strictly applied the Code's requirement against trial judges who refused to comply with a timely request for special findings. This result was demonstrated in United States v. Hussey,[136] where the military judge failed to render special findings. The government, on appeal, argued that this omission constituted only harmless error.

In rejecting that contention, the Air Force Court of Military Review determined that there were extremely convoluted factual and legal issues present in appellant's entrapment defense which would have benefitted from special findings.[137] Extending this logic, the court held that, even if this were not the case, it was not in a position to second-guess appellant, or the Congress which had provided the *right* to special findings. The court also stated that, even if it appeared from the record of trial that all issues had been satisfactorily resolved at trial, that fact would not alter their view concerning this appellant's right to special findings.

United States v. Falin[138] also deals with the question of when special findings must be provided. There the trial judge opined that special findings were not necessary on jurisdictional issues. Rejecting that decision, the Army Court of Military Review adopted the more traditional approach:

> Appropriate special findings are not only findings on elements of offenses, but also on all factual questions placed reasonably

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[135] **Paragraph** 74*i*.
[136] 1 M.J. 804 (A.F.C.M.R. 1976).

[137] *Id.* **at** 810.
[138] **43** C.M.R. **702** (A.C.M.R. **1971).**

> in issue prior to findings as well as controverted issues of fact which are deemed relevant to the sentencing decision. Jurisdictional facts must be found when they ***are*** controverted, and conclusions concerning [the] issue of jurisdiction should be set forth.[139]

On the other side of this question, United States v. Burke[140] upheld a trial judge's determination that special findings are not required on facts which are irrelevant, immaterial, or so remote as to have no effect on the trial's outcome. This was so despite appellant's contention that possible criminal involvement by a key prosecution witness was vital to the trial's resolution, and thus justified special findings.

Similarly, in United States v. Baker,"' the trial judge failed to provide

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[139] *Id.* at **703.**

[140] **4** M.J. 530 (N.C.M.R. 1977).

The ***Burke*** case concerns conviction of an accused who, with others, committed assault and battery in the course of a fight. One of the witnesses against the accused had been an accomplice of the accused in the fight. The Navy Court of Military Appeal commended the trial judge for declining to make a special finding **as** to the guilt of this witness, who had not been charged with any offense. The court said:

> The criminal guilt of the witness in the assault is so remotely related to the instant case **as** to be unnecessary of determination. The military judge clearly indicated, that for purposes of assessing that witness' credibility, he was considered to be an accomplice. The credibility issues were resolved against the witness.

4 M.J. at **535.** Apparently the court considered that a special finding of guilt would have been improper since the witness had not been charged and was not on trial. But the trial judge's evaluation of that witness' testimony serves the same purpose as would such a finding.

[141] **47** C.M.R. 506 (A.C.M.R. 1973).

In the ***Baker*** case, the accused requested "that the military judge make special findings of all factual matters reasonably in issue." **47** C.M.R. at **508-509.** It is part of one of the elements of proof of the crime of rape that the victim not be the wife of the accused. Manual for Courts-Martial United States, 1969 (Rev. ed.), para. 199*a*. In this case, the victim testified that she had never been married. **47** C.M.R. at 508. The question was not otherwise raised at trial by the defense, **i.e.,** defense counsel did not specifically request a finding on this point, and did not object when no such finding was rendered. No evidence was offered to contradict the victim's testimony. Accordingly, the appellate court considered that the fact was not "reasonably in issue." **47** C.M.R. at 510.

special findings concerning whether an accused, charged with rape, was married to the prosecutrix. Although the Army Court of Military Review agreed that special findings should generally be provided on all elements of the charged offense, reversible error had not been established. Defense counsel had failed to specifically request special findings, the issue was not reasonably raised by the evidence, and the record justified finding no marriage. In sum, the court adopted the federal rule, which does not require special findings on issues having no relation to the trial's outcome, or concerning uncontroverted facts.[142] When these circumstances are present, most appellate courts will presume that the military judge knew and correctly applied the law to the facts.[143]

More recently, in United States v. Kressin,[144] the issue of when special findings must be provided was applied to a search and seizure issue. While the military judge there ruled that special findings are required on all issues not "superfluous", he termed the one at bar to be of an interlocutory nature, and as such not subject to Article 51(d), or paragraph 74*i*. The Air Force Court of Military Review agreed with the trial judge. But the decision appears inconsistent with prevailing authority, especially as the court recognized that other interlocutory issues, such as sanity determinations, require special findings.

Under all the circumstances, it is difficult to rationalize the court's determination in the face of existing federal authority. This disparate treatment is particularly hard to accept since the court offered no justification for it. As a result, it is submitted that the better rule would be to emulate the federal practice and provide special findings on interlocutory issues. This position appears to be required by the Code, which fails to distinguish between interlocutory and ultimate issues, or juris-

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[142] *See* United States v. Peterson, 338 F.2d 595 (7th Cir. 1964).

[143] *See* United States v. Montgomery, 20 C.M.A. 35, 42 C.M.R. 227 (1970); United States v. Hamilton, 20 C.M.A. 518, 43 C.M.R. 358 (1971).

[144] 2 M.J. 283 (A.F.C.M.R. 1976).

In the *Kressin* case, the Air Force Court of Military Review upheld the trial judge's refusal to grant special findings on the ground that the matter in issue, the legality of a search, was a question of law and would not be submitted to a jury anyway, as "such questions are for the exclusive determination of the military judge." Mental responsibility, in contrast, involves primarily factual issues. 2 M.J. at 286.

dictional and search and seizure issues (the former explicitly permitting special findings in paragraph 74*i*).

Alternatively, conviction in ***Kreskin*** could have been affirmed if that court would have adopted a logic similar to that employed in United States v. **Lohr.**[145] There appellant contended that the military judge's special findings were insufficient as they failed to specify of which of several sodomy specifications he had been acquitted, and how the facts pertaining thereto affected the remaining findings of guilty. In rejecting appellant's contention that the findings were inconsistent, the court stated that, while it would have been better practice for the trial judge to spell out his findings, those that were provided justified the verdict. As a result, it can be inferred that even partial special findings will be sufficient to justify affirmance where trial defense counsel fails to request special findings concerning the *particular* delect alleged as error on appeal.

Closely related to this type of error are allegations raising discrepancies between the military judge's general findings, and his special findings. Usually military treatment of this issue will follow the federal rule. In United States v. **Lohr,**[146] the conflict concerning which charges had resulted in acquittal, and which in conviction, was resolved by the appellate court's holding that, where the special and general findings are susceptible of two different constructions, one upholding conviction, and the other reversing conviction, the former will control.[147] Conversely, if an irreconcilable conflict exists, requiring compromise of the general finding, reversal is mandated.[148]

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[145] 43 C.M.R. 1017 (A.F.C.M.R. 1970).

In this case, an Air Force sergeant was accused and convicted of attempted sodomy on his nine-year-old daughter. Another eight-year-old girl, a neighbor's child, was a witness to the occurrence. "he testimony of this witness was made very confusing because of her active imagination. Two judges, dissenting from the majority holding of the Air Force Court of Military Review, felt that the trial judge's special findings did not eliminate the confusion, and would have reversed. 43 C.M.R. at 10261028.

[146] *Id.*

[147] See Larkin v. Upton, 144 U.S. 19 (1892). It is not certain whether this would in all cases be the result under the present Court of Military Appeals.

[148] *See* Bass v. Dehner, 103 F.2d 28 (10th Cir. 1939).

C. MILITARY APPELLATE TREATMENT OF ERRORS IN SPECIAL FINDINGS

1. Statutory Basis.

To a large extent, the Uniform Code of Military Justice[149] as well as recent Court of Military Appeals policies vitiate any similarities between criminal appeals in the federal sector, and those in the military. This general result applies with equal validity to special findings. Two threshold matters account for a majority of the dissimilarities. First, Article 66(c)[150] requires the Courts of Military Review to conduct appellate trials *de novo* over all court-martials within their jurisdiction. This means that proof beyond a reasonable doubt, and similar evidentiary standards and related matters generally shunned in federal appellate litigation, are required practice in the military. Article 66(c) orders:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It 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 credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[151]

Unfortunately, the Court of Military Appeals has ignored its statutory limitations against similar conduct, and entertained numerous cases, often of landmark significance, without allowing those important allegations of error and attendant facts to first be thoroughly reviewed by a lower court.[152] This is the second source of differences from federal practice. Article 67(d) specifically states:

> In any case reviewed by it, the Court of Military Appeals may act only with respect to findings and sentence as approved by

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[149] U.C.M.J. arts. 66(c), 66(d), 67(b), 67(d).

[150] U.C.M.J. art. 66(c).

[151] *Id.*

[152] *See* United States v. Green, 1 M.J. 453 (C.M.A. 1975); United States v. Booker, 5 M.J. 238 (C.M.A. 1977).

> the convening authority and as affirmed or set aside as incorrect in law by the board [sic] of review. . . . The Court of Military Appeals shall take action only with respect to matters of law.[153]

2. *Judicial Basis*

While little can be done to alter the statutory requirement for the Military Courts of Review to act as trial forums, substantial reform at the Court of Military Appeals is required.[154] That court's current activity is in direct conflict with its own prior authority. In fact, the very fist case decided by the Court, United States v. McCrary,[155] established the framework within which further cases were to be reviewed. Discussing its guiding principles, Justice Latimer opined:

> It is the cardinal rule of law that questions of fact are determined in forums of original jurisdiction or by those which are expressly granted the authority by constitution or statutes. Usually, appellate tribunals are limited to correction of errors of law.[156]

This mandate is vital to special findings practice, for if the appellate courts can ignore trial results, and create a new record on appeal, Article 51(d)'s provisions are worthless, and the trial forum's product is no more than a case name upon which to hang appellate revisions to the criminal justice system. In United States v. Roberts,[157] Judge Ferguson recognized this possibility and adopted the *McCrary* philosophy. Concerned with the then board of review's consideration of an extra-record affidavit from an involved convening authority, Judge Ferguson stated:

> In connection with appellate exhibits generally, we feel it appropriate to point out that certain distinctions must necessarily be drawn. Where such an exhibit contains new evidence or new matter which was not before or was not considered by the trial

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[153] *Art.* 67(d), U.C.M.J.

[154] In United States v. Hurd, 7 M.J. 18 (C.M.A. 1979), the Court of Military Appeals specified an issue for resolution which would have helped clarify this difficulty. Unfortunately the court decided against ruling on that matter.

[155] 1 C.M.A. 1, 1 C.M.R. 1 (1954).
[156] Id. at 2, 1 C.M.R. 2.

[157] 7 C.M.A. 322, 22 C.M.R. 112 (1956).

> court or the reviewing agencies, this Court follows the almost uniform civil practice and generally will not consider it. Ordinarily appellate courts review claimed errors only on the basis of the error as presented to the lower courts, Hovland v. Smith, 22 F2d 769 (CA 9th Cir. 1927); however, this Court will review material outside the record having to do with insanity, United States v. Bell, 6 USCMA 392, 20 CMR 108, and jurisdiction, United States v. Dickenson, 6 USCMA 438, 20 CMR 154.[158]

Further qualifying the appellate court's ability to compromise a trial record, Judge Ferguson explained that extra-record matters may also be considered when they are "supplemental or additional designations of record."[159] But even under these *exceptional* circumstances, Judge Ferguson opined that the evidence should still initially be considered by a fact finding forum.

Applying this rational to the military courts of review, Judge Latimer voiced the following guidance:

> The general rule in appellate criminal practice is that an appellate tribunal passes merely upon the errors allegedly made in the lower court. That rule prohibits a trial *de novo* in the appellate body or the interjection of new issues after the trial phase has been completed and it prevents the use of evidence not considered in the original hearing.[160]

Strict application of Judge Latimer's opinion would breathe added life into Article 51(d), emphasizing its function in determining what facts are to be considered on appeal, and at the same time encouraging the courts of review to act as appellate courts by relying on special findings, and rejecting extra-record evidence.

Continuing in this vein, Judge Ferguson, in United States v. Fagnon,[161] indicated that Article 66 should not expand the concept of a trial record to include facts produced only on appeal. Here Judge Ferguson contended that the courts of review could properly reject any appellate compromise

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[158] Id. at 325, 22 C.M.R. 115.

[159] *Id.*

[160] United States v. Ferguson, 5 C.M.A. 68, 71, 17 C.M.R. 68, 71 (1954).

[161] 12 C.M.A. 192, 30 C.M.R. 192 (1961).

of the trial record. They should rely instead, apparently, upon the trial court's special findings to resolve the legal and factual questions presented.[162] The sole exceptions to this general rule remain the traditional issues of sanity and matters affecting jurisdiction, though this latter category is broadly defined.[163]

Judge Ferguson's contentions are best expressed in United States v. Gladden,[164] where he collected all the prior authority on point, and established a simple pattern for military appellate courts to follow when evaluating facts or issues not previously litigated. In ***Gladden,*** the court was concerned with whether the composition of appellant's court-martial panel was proper.

Before the Army Court of Military Review, the government introduced extra-record affidavits to bolster its position. Realizing more information would aid a proper resolution, the court on its own solicited evidence from the trial jurisdiction. At this point, appellate defense counsel attempted to gain discovery of the court's actions, but was unsuccessful. The Army court finally affirmed conviction without explanation.

The Court of Military Appeals disagreed with the Army court. Judge Ferguson's opinion reversing conviction is particularly enlightening. In principle, he approved of the intermediate court's investigation of the issue, as well as its desire to engage in fact finding. But on the other hand, Judge Ferguson felt that such a procedure must be fair, as well

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[162] *Cf.* United States v. Justice, **13** C.M.A. **31, 32** C.M.R. **31 (1962).**

[163] ***See*** United States v. Phillips, **22** C.M.A. **4, 46** C.M.R. **4 (1972);** United States v. Coleman, **17** C.M.A. **524, 42** C.M.R. **126 (1970);** United States v. Sayer, **26** C.M.A. **462, 43** C.M.R. **302 (1971);** United States v. Henn, **12** C.M.A. **124, 32** C.M.R. **124 (1962); cf.** United States v. Norton, **22** C.M.A. **213, 46** C.M.R. **213 (1973);** United States v. Triplett, **21** C.M.A. **497, 45** C.M.R. **271 (1972).**

[164] **23** C.M.A. **381, 50** C.M.R. **158 (1975).**

In a court with enlisted members, one sergeant was orally appointed on the day of trial. This was not documented in the record of trial, and appellate defense counsel challenged the presence of the sergeant on the panel as improper. A written appointing order was subsequently promulgated. The responsible staff judge advocate also submitted an affidavit to establish that the appointment was correctly effected. The problem, as seen by the Court of Military Appeals, was not with any of these procedures, but with the failure of the Army Court of Military Review to give the accused an opportunity to rebut the factual representations in the affidavit. **50** C.M.R. at **159.**

as open. In his view this requires the courts of review to inform all parties to the litigation of their activities, and of its fruits.[165] Obviously, had special findings been employed in this context, such appellate gymnastics would not have been necessary.

From Chief Judge Fletcher's landmark decision in United States v. Alef,[166] it may be inferred that the high court is abandoning its past practice of considering new evidence or issues on appeal. In *Alef*, Judge Fletcher held that the court would not consider extra-record matters even in resolving jurisdictional issues, preferring that trial courts control their own litigation: "Evidence bearing upon the jurisdiction of a court-martial should be subject to cross-examination before it is adopted by an appellate tribunal to dispose of a ***contested*** issue absent a stipulation (court's emphasis)."[167]

The court's brief notation here seems to reinforce the position that it does not want to be a fact-finding body. This break with its recent past encourages the use of special findings to bracket appellate issues. This limits all levels of military practice to the record before the parties and the judges, excluding what can later be manufactured. Certainly, Chief Judge Fletcher's opinion in United States v. King cements this position: "we decline . . . to attempt to 'fill in' a record left silent. . . ."[168]

If the Court of Military Appeals continues to exercise this philosophy, it will be consistent with the United States Supreme Court's more traditional approach to appellate action on the trial record.[169] For example, in Morales v. State,[170] the Court held that, where appellant raised an issue for the first time on appeal, it would not be resolved at the appellate

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[165] Judge Ferguson added also, "the requirements of law and the demands of fundamental fairness will not tolerate 'infinite delay' in correction of a jurisdictional defect of the kind present in this case". 50 C.M.R. at 160. See United States v. Hunt, 9 C.M.A. 735, 27 C.M.R. 3; United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974); United States v. Long, 5 C.M.A. 572, 18 C.M.R. 196 (1955).

[166] 3 M.J. 414 (C.M.A. 1977).
[167] *Id.* at 417.

[168] 3 M.J. 458, 459 (C.M.A. 1977).
[169] *See* 24(A) C.J.S. ***Criminal Law*** 1797 (1962).

[170] 396 U.S. 102 (1968).

level. Instead, the case would be returned to a trial court for further proceedings. Naturally, the Supreme Court would not admit new extra-record evidence on this issue, although clearly it would rely on properly prepared special findings to resolve the matter, particularly where the record did not warrant intervention. The same rule can also be gleaned from Ciucco v. Illinois,[171] and Tanner v. United States,[172] where it was held that an appellate court cannot concern itself with anything that does not appear in the record of trial.[173]

Because of the glaring distinctions between military and civilian appellate practice, military counsel must be even more forceful in their implementation of special findings than counsel appearing before federal courts. Unless trial level attorneys desire to have the issues and facts they litigate ignored, impeached, replaced, or compromised on appeal, special findings must be exercised to solidify those matters deemed crucial to counsel's case.

3. Waiver

Once these important qualifications on military appellate practice are appreciated, consideration can be trained on the other more traditional aspects of obtaining success on review through the aggressive implementation of special findings. Typical of these issues is whether trial level counsel will be deemed to have waived possible errors in special findings by failing to object to them at trial, or before the convening authority.

The Court of Military Appeals has recently treated a similar matter in United States v. Morrison,[174] and United States v. Barnes.[175] There, the question concerned whether trial defense counsel's lack of challenge to the staff judge advocate's post trial review[176] prohibited appellate consideration of the errors contained therein. Extending United States

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[171] 356 U.S. 571 (1958).

[172] 401 F.2d 281 (8th Cir. 1968).

[173] *See* United States v. Harris, 542 F.2d 1283 (7th Cir. 1976).

[174] 3 M.J. 408 (C.M.A.. 1977).
[175] 3 M.J. 406 (C.M.A. 1977).

[176] See Articles 61, 65(b) U.C.M.J.

v. Goode,[177] the court held that counsel must voice virtually all objections to the post trial review before the convening authority takes his final action,[178] or else they will be considered waived. In so holding, the court recognized the inefficiency which had grown up around the procedure it originally created with *Goode,* particularly the appellate litigation of errors which should have been rectified at the trial forum.[179] Of course, this result is only indicative of how the Court of Military Appeals might treat the typical special finding waiver issue today.

Prior military authority clearly indicates a split on the precise question of whether counsel must object to special findings at trial, or be deemed to have waived them on appeal. In United States v. Baker,[180] the Army Court of Military Review indicated that, if defense counsel does not agree with the bench's special findings, he or she must object, or else the error will be treated as waived.[181] Much more recently, in United States v. Hussey,[182] the Air Force Court of Military Review reached the opposite result, contending that defense counsel must object at trial in order to perfect his right to appeal special findings errors. The opinion in *Hussey* appears to be the better rule, though possibly inconsistent with United States v. Barnes,[183] and United States v. Morrison.[184]

4. Appellate Remedies for Defective Special Findings

Military practice is similar to its federal counterpart concerning what remedies are available to an appellate court when it determines that an error in special findings has occurred. A typical treatment of this issue occurred in United States v. Hussey,[185] where defense counsel's request for special findings was granted, but never carried out by the trial judge. The court of review found this to be error, but set aside only the convening

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[177] 1 M.J. 3 (C.M.A. 1976).

[178] See Articles 60, 64, U.C.M.J.
[179] See notes 174 and 175 *supra.*

[180] 47 C.M.R. 506 (A.C.M.R. 1973).

[181] *Cf.* United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1950).

[182] 1 M.J. 804 (A.F.C.M.R. 1976).
[183] 3 M.J. 406 (C.M.A. 1977).

[184] 3 M.J. 408 (C.M.A. 1977).
[185] 1 M.J. 804 (A.F.C.M.R. 1976).

authority's action, returning the matter to the trial judge for belated special findings.

Advocating the opposite result under slightly different circumstances, the Court of Military Appeals, per Judge Cook, reversed conviction in United States v. Raymo.[186] Here the Court found, after analyzing the bench's special findings, that the military judge had misapplied the law to the facts. Faced with this result, Judge Cook opined that new special findings would be of no value to appellant or the appellate courts, and reasoned that a new trial was required.

The Army Court of Military Review adopted the logic of the Court of Military Appeals, *sub **silentio,*** in United States v. King,[187] reversing a murder conviction when it was obvious from the trial court's special findings that appellant's self-defense contentions were either ignored or misunderstood by the bench. Summarizing the applicable law as follows, Judge Donahue stated:

> One of the purposes of special findings is to enable an appellate court to determine whether the trial judge applied correct legal principles in making his findings. United States v. Baker, **47** CMR **506** (ACMR **1973);** United States v. Pople, **45** CMR **872** (NCMR **1971).** The military judge's special findings leave us in doubt as to whether he correctly understood the law involving the defense of self-defense. Reversal is required.[188]

Evaluation of the law of appellate relief espoused by both military and federal courts with respect to errors in special findings reveals no clear uniformity as to choice of remedy. But if a case by case approach is applied which weighs in all other substantive allegations of error, what logic is available can be summarized as follows: If the trial judge's mistake in rendering special findings is merely procedural, most appellate courts will return the case for compliance with the statutory requirements.[189] But where the trial judge's special findings disclose that he has misper-

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[186] **1** M.J. **31, 23 C.M.A. 408, 50** C.M.R. **290 (1975).**

[187] CM **433456 (A.C.M.R. 22 Apr. 1976) (unpublished).**

[188] *Id.* **at slip opinion page 3.**

[189] **See Rule 23(c), and Article 51(d).**

ceived, ignored, or confused the law or the facts, reversal will be the result.[190]

D. SPECIAL FINDINGS AND THE PROPOSED MILITARY RULES OF EVIDENCE

While Article 51(d) and paragraph 74i currently control the use of special findings, the proposed Military Rules of Evidence[191] promise to add new significance to their use. The new rules will not only adopt the existing Federal Rules of Evidence[192] virtually *in toto,* but will also add a "codification" of several other substantive areas of the law now spread throughout the Manual. Several of the new rules vitally affect special findings practice. Rule 304[193] is an excellent example. It treats the use of confessions and admissions at courts-martial. In subparagraph (d)(4) of the rule, the framers specified, "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record."

Clearly, special findings under the Military Rules of Evidence will now be required whenever defense counsel moves to suppress his client's statement. The rule provides no latitude for the trial judge in this respect, and counsel's failure to make a specific request for these interlocutory[194]

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[190] *See* United States v. Pople, 45 C.M.R. 872 (N.C.M.R. 1971); Haywood v. United States, 393 F.2d 780 (5th Cir. 1968).

[191] Proposed Military Rules of Evidence, 12 Sept. 1979.

[192] Pub. L. No. 93-595, 93d Cong., 2d Sess., 88 Stat. 1926 (1975). This is codified as an appendix to Title 28, U.S. Code (1976).

[193] Mil. R. Evid. 304(d)(4).

> (4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

[194] It is interesting to note that the new rules fail to provide any time limitation with respect to when the interlocutory special finding must actually be rendered. While an argument could be made for awaiting announcement of general findings,

special findings appears to be irrelevant. A similar result obtains with respect to issues touching upon search and seizure, rule 311(d)(4),[195] and eyewitness identification, rule 321(g).[196]

Trial judges should be very cautious in drafting these interlocutory special findings, and bring the same attention to bear upon them as they do when preparing jury instructions. Failure to adequately treat an important factual matter may well result in appellate relief.

Procedurally, there seems to be no requirement that these special findings be reduced to written form. As a result, oral special findings which are transcribed *verbatim* into the record should satisfy the rule's mandate, and the concern of appellate courts.

It appears that the motivation for adoption of these new rules is parallel with the concern for special findings expressed in this article. The editors of the new rules recognize that issues concerning search and seizure, confessions, and eyewitness identification are often vital to the outcome of criminal litigation, and that the trial judge's decision in these matters should not be cloaked in uncertainty. The new requirements for special findings will go a long way toward clarifying the basis upon which evidence is excluded or admitted, lending predictability to the system, aiding

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it seems much more effective to require them prior to pleas. In this manner counsel will be better informed, and thus able to provide a better service for his client.

[195] Mil. R. Evid. 311(d)(4).

> (4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

[196] Mil. R. Evid. 321(g).

> (g) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

appellate courts in accurately evaluating the trial record, and perhaps most important, educating counsel at the trial level.

While the particular provisions of the Military Rules of Evidence discussed above are absent in the analogous federal compilation, federal circuit courts may be creating them *sua sponte.* United States v. Cavender[197] is an excellent example of this. This case concerned the proper implementation of rule 609(b)'s[198] prohibition against using prior convictions more than ten years old for impeachment purposes.

Reversing conviction, the circuit court determined that rule 609(b) requires the trial judge to make explicit findings on the record of the facts and circumstances justifying admission of any such conviction. While no specific language in rule 609(b) directs such a result, the court believed its determination was justified by the phrase, "unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Such a decision again underlines the importance of special findings, and the trend toward their greater use.

IV. OBSERVATIONS AND RECOMMENDATIONS

Having established the technical and procedural aspects of special findings, we now consider an advocate's implementation of them as a tool both for planning and for litigating. For defense counsel this means cre-

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[197] 578 F.2d 528 (4th Cir. 1978). Cavender was charged with possession of an unregistered firearm. His past criminal record included convictions for sodomy 25 years before, probation violation 21 years before, forgery 15 years before, and interstate transportation of a stolen motor vehicle 7 years before.

[198] Fed. R. Evid. 609(b).

> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

atively designing special findings to insure that the trial judge fully understands the defense's position. It also means building into the defense's case and the special findings themselves "outcome determinative" issues which if improperly evaluated by the military judge will result in appellate relief.

For government counsel, special findings present the opportunity to clarify, on the record, those uncertain issues which an appellate court might have difficulty understanding. It is an opportunity to establish which inferences the military judge employed in the government's favor, what defense evidence was accepted and rejected, and why. Special findings, from the government's view, should be used as a road map to direct the trial judge from the inception of the government's case, through the defense's contentions, to a conviction. Each element of the charged offense, and each unsuccessful defense contention should be set out and discussed in so logical a fashion that conviction will be the only result consistent with the interests of justice. Viewed together, special findings can ***make*** a record for appellant, or ***protect*** it for the government. Only counsel's ingenuity will determine which alternative will succeed.

From the government's position, United States v. Cockerel[199] presents a classic example of the use of special findings to protect the record, and to facilitate affirmance on appeal. Appellant there was charged with several serious offenses, including two specifications of attempted murder and seven specifications of aggravated assault.[200] The defense presented voluminous mental responsibility evidence,[201] and numerous motions, some challenging the bench itself.[202] To deal with the complex legal and factual questions presented, the military judge prepared special findings in the form of a memorandum decision linking the facts and legal theories together to facilitate appellate review. The meaningless matters were stripped away, and those which were important to the ultimate resolution were highlighted. As a result, the Army Court of Military Review was

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[199] **49 C.M.R. 567 (A.C.M.R. 1974).**
[200] ***See*** **Articles 128 and 80, U.C.M.J.**

[201] ***See*** **para. 122*a*, Manual. Cockerell's specific defense was that because he suffered from pathologic intoxication he was not mentally responsible for his actions. *See* United States v. Soule, 27 C.M.A. 706 (ABR 1959); United States v. Burkle, 24 C.M.R. 558 (ABR 1957); United States v. Thompson, 11 C.M.R. 762 (AFBR 1953).**

[202] ***See*** **para. 62*f*(1), Manual, dealing with recusal of the trial judge.**

able to thoroughly appreciate the trial judge's view on each issue at bar, and either adopt or supplement his logic in affirming conviction.

The critical point here is that the interests of justice are often served by the trial counsel or military judge initiating special findings, and not simply waiting for defense counsel to request them. At times the only tactic available to defense counsel is to obscure the issues in such a way that the prosecution will be unable to establish guilt beyond a reasonable doubt, or have it sustained on appeal. In this situation, defense counsel most likely will not request special findings, as they would be counter-productive. Special findings have the inherent ability to clarify complex or convoluted cases, the last result a defense counsel may desire.

The government's need to protect the record and solidify factual and legal questions is particularly important when mental responsibility and jurisdictional[204] issues are litigated. Applicable authority here squarely places responsibility upon the government to make a record.[205] Special findings provide a concise format for establishing what evidence was considered by the bench and, more important, what legal theory was employed to support the ultimate decision. Used in this fashion, special findings prohibit an appellate court from "discovering" variant interpretations or irregularities in the trial record which could be used to justify reversing conviction.

Of course, when special findings are implemented by the government or military judge, a risk is always assumed. If the special findings contain an error which would not have been evident from the trial record itself, as in United States v. King,[206] reversal will occur. The risks of this error can be greatly reduced if the military judge first requests trial counsel to prepare proposed special findings, a procedure suggested in United States v. Snow.[207] Then the military judge can compare his work product with trial counsel's thus eliminating possible errors. Additionally, defense counsel should be served with the special findings,[208] as he is with the

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[203] *See* para. 122*a*, Manual.

[204] *See* United States v. Alef, 3 M.J. 414 (C.M.A. 1977).
[205] *Id.*

[206] CM 433455 (A.C.M.R. 23 Apr. 1976) (unpublished).
[207] 484 F.2d 811 (D.C. Cir. 1973).

[208] *Cf.* United States v. Baker, 47 C.M.R. 506 (A.C.M.R. 1973).

staff judge advocate's post trial review, so any comments or objections he has may be aired, and corrected if necessary. Under this system the possibility for error is substantially reduced, and as a result appellant's right to a fair trial has been enhanced.[209]

The best known use of special findings is that of defense counsel. As has been discussed earlier, special findings preserve errors for appeal, and insure that the trial judge properly understood the issues and facts at bar. While not an appropriate tool for every case, special findings should be requested as often as defense counsel has complicated or convoluted cases justifying them. Special findings must therefore be an integral part of defense counsel's pretrial preparation.

The decision to raise certain issues, make appropriate motions, and present material witnesses and other evidence, has to be built into the defense's case during the conceptualization stage in order to be effectively reflected in requests for special findings. Knowing that the bench will have to render special findings on all non-frivolous issues and facts, counsel should build his record as thoroughly as possible, packing it with matters the trial judge will have to treat. In this vein, defense counsel is creating a new legal barrier for the government with each issue raised. A judicial or prosecutorial error at this stage could be sufficient to justify a new trial, or similar relief. Of course building the record for appeal, and insuring that the trial judge understood each issue and fact, is also important to defense counsel, but the primary objective for aggressive implementation of special findings at trial is creating a favorable environment for appellant on appeal.

Naturally, the government will be aware of this tactic, and will attempt to dissuade defense counsel from using special findings in the manner suggested above. The government's primary weapon in this respect is paragraph **74i** of the Manual, which provides: "The military judge may require that a request for special findings be submitted in writing." This provision is interpreted as follows: "In order to insure orderly procedure, requests for special findings must be submitted prior to announcement of general findings and *must* be specific as to the issue which is sought to be answered" (emphasis supplied).[210]

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[209] ***See*** United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975); United States v. Heflin, 1 M.J. 133 (C.M.A. 1975).

[210] U.S. Dep't of Army, Pamphlet No. 27–9, Military Judges Guide, G1 (1969).

The theory advocated above is that the trial court can incumber defense counsel's request for special findings by requiring him to set out these requests in specific detail. This can extend to the point of having defense counsel prepare proposed special findings. Obviously the framers of paragraph 74i did not want defense counsel to have ***carte blanche*** access to special findings.

The various courts of military review have adopted paragraph 74i's limitations, and have sought to impose them upon defense counsel who make generalized requests for special findings. Typical of such efforts is United States v. Hussey.[211] There the trial court failed to render special findings after agreeing they would be prepared. Irritated by the trial court's failure to limit defense counsel's requests in any way, and apparently attempting to insure such conduct would not be repeated, Senior Judge Roberts, writing for a unanimous Air Force Court of Military Review, opined:

> We would not hesitate to hold that the military judge could correctly have required counsel to be more specific in his request or to deny the particular request made. But, from the record it appears that the military judge understood the nature of the request and was satisfied with its form when he granted it. If there was a misunderstanding as to the specific matter defense counsel wished to be determined, or if the import of his request was unclear, the military judge should have called the deficiency to his attention and permitted him to restate the request. In this connection, we would commend that practice of requiring requests for special findings to be put in writing so that any misunderstanding might be avoided.[212]

Similarly, in United States v. Baker,[213] appellant contended that the military judge's special findings were insufficient, although appellant had made only a generalized request for them at trial. Refusing to grant relief on this alleged error, Senior Judge Thomas stated:

> It is particularly important that the Manual requirement for the request for special findings "specify the matter to be determined" be followed. It was not complied with in the case *sub*

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[211] 1 M.J. 804 (A.F.C.M.R. 1976).
[212] ***Id.*** at 809.

[213] 47 C.M.R. 506 (A.C.M.R. 1973).

> *judice.* The inevitable result of a general request is a general finding. Then, appellate bodies must consider the inevitable complaint that what defendant really wanted was a finding on the one issue that the judge did not reach.[214]

Attempting to maximize the prospective impact of his decision, Judge Thomas went on to detail a failsafe method for dealing with the defense's generalized requests for special findings. First, counsel should be required to set forth his requested special findings as a series of individual questions. Then, at a pre-findings session, the military judge should discuss each special finding with counsel to clarify any ambiguities involved. Finally, after announcing the special findings, but before general findings, the military judge should question defense counsel to insure compliance, and determine whether any additional questions need resolution. Judge Thomas viewed the special findings procedure as similar to that used in requesting or proposing jury instructions. As special findings are in theory supposed to act as a substitute for jury instructions, no objection to the procedure should exist.

Going the final step, applying his philosophy to appellant's claim of error, Judge Thomas opined:

> We find that where the uncontroverted evidence of record establishes a fact that was omitted from the military judge's special findings, and where there was no specific request for a finding as to that fact and no objection at the trial to its omission, then there was no prejudice to the appellant from the absence of a finding as to that fact.[215]

The logical response to Judge Thomas' contentions on implementing Article 51(d) through paragraph 74*i*, is that his interpretation is not consistent with the congressional mandate. Article 51(d) fails to impose any limits whatsoever on defense counsel's right to special findings. The Code simply states that special findings *shall* be provided whenever requested.

A similar position was adopted by Senior Judge Roberts in United States v. Hussey.[216] Dealing with the Manual's requirement that counsel

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[214] *Id.* at 509.

[215] *Id.* at 510.

[216] 1 M.J. 804 (A.F.C.M.R. 1976).

must specify the matter to be determined before special findings would be rendered, he stated:

> [T]he provision is arguably contrary to the entitlement granted to the accused in Article 51(d) of the Code, which in no way obliges counsel or the accused to so limit the area of proposed special findings. . . . As noted above, Article 51(d) is taken from Rule 23c of the Federal Rules of Criminal Procedure, and the practice in the Federal courts is that a general request for special findings will trigger the operation of that Rule.[217]

Comparison of *Hussey* and ***Baker*** indicates that the battle has been joined, and higher authority will be forced to mediate. What the Court of Military Appeals is likely to do in this area remains to be seen, but defense counsel should make the most of the issue while they can. In requesting special findings, counsel should be aware that a difficult choice must now be made. Failure to be as specific as Judge Thomas desires may only preserve an appellate error, and not get counsel his special findings. On the other hand, compliance with requests for specificity, particularly if proposed special findings are required, may vitiate any possibility for an appellate finding of judicial error, as well as waive the issue addressed above. In any event the important consideration here is for defense counsel to raise this question at trial, and force an appellate determination of it.

There is another matter with which defense counsel should be concerned in the application of special findings law. The issue originated with United States v. Johnson.[218] There the Fifth Circuit was concerned with whether the trial court had improperly limited appellant's right to special findings. Determining that no reversible error occurred, the court went on to discuss the importance of special findings in trial and appellate litigation. Of primary concern here was the fact that trial judges and counsel often fail to properly inform defendants of their right to special findings in judge-alone courts-martial, as an alternative to instructions in jury trials. Various reasons exist for this phenomenon, ranging from unfamiliarity with the topic, to bias against special findings.

To cure this unfortunate situation, the court suggested that trial judges be required to specifically inform each accused, on the record, of his right

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[217] *Id.* at *809*.
[218] 496 F.2d 1131 (5th Cir. 1974).

to special findings. Viewed objectively, this suggestion could go a long way to fostering aggressive use of special findings. It would require defense counsel to discuss special findings with their clients, explaining how special findings factor into the judge or jury decision-making process. This would aid the defense's case both at trial and on appeal. It would also require the trial bench to assume a more neutral position with respect to special findings, and to insure that each accused is knowledgeable about this right he or she might be inadvertantly waiving.

A procedure for implementing this suggestion already exists in paragraph **61g** of the **Manual.**[219] All the military judge need do to carry it out is add a question concerning special findings to his required colloquy with the accused at the time a choice of fact-finder is made.

Issues such as those presented above are vital to effective trial litigation, and the maintenance of a viable criminal justice system. The failure to implement important procedural tools long recognized by our civilian counterparts could suggest a short-sightedness on the part of those working under the military justice system. To the greatest extent possible we should eliminate that possibility by enhancing the quality of our court-martial representations, and by adopting those techniques properly employed by other jurisdictions.

V. CONCLUSION

Special findings are perhaps the least complicated tool available to trial litigators, yet the most effective. They allow counsel to probe a trial judge's mind, discovering all outcome-determinative issues recognized by the judge, and how they were resolved. Most important, special findings insure that this process is formalized, made a part of the record, and preserved for appeal. Special findings more clearly demonstrate what occurred in the criminal courtroom than any other procedural mechanism available to counsel. But even beyond this, they are a means to affect the outcome of the trial itself. Both defense and government counsel have the opportunity to use special findings to either make a record for appeal, or protect it on appeal.

While counsel's opportunities to use special findings are unrestricted, the military judicial atmosphere is slightly different. The various courts

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[219] *See* **para. 61***g*, **Manual.**

of review have taken divergent approaches with respect to the use of Article 51(d), notwithstanding Congress' clear mandate to model the Code's provision after rule 23(c) of the Federal Rules of Criminal Procedure. The Court of Military Appeals has yet to hear a case which will set policy in this area. The court appears satisfied with allowing the current trend toward narrowness to continue, a trend which often requires defense counsel to prepare the special findings himself and then be forced to comment upon them, either correcting any error, or waiving it.

In response, it is suggested that military counsel test the judicial philosophies discussed above, and require the Court of Military Appeals to interpret the legislative intent in this area. By doing so counsel will not only improve the service rendered to his or her client, but also further the interests of justice and military practice in general.

THE COURT-MARTIAL: AN HISTORICAL SURVEY*

by Captain (P) David A. Schlueter**

In this article, Captain (P) Schlueter describes the development of the legal tribunal known as the court-martial. Beginning with the use of this form of trial in the armies of imperial Rome two thousand years ago, the author traces its evolution through the Middle Ages, to Britain from the Renaissance to the American Revolution. The focus then shifts to the United States, and the focus then shifts to the present day.

I. INTRODUCTION

The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence. Yet, the dictates of individual liberty clearly require some check on military authority in the conduct of courts-martial. The provisions of the UCMJ with respect to court-martial proceed-

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> ings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other.[1]

With these closing words the United States Court of Appeals for the District of Columbia affirmed the general court-martial conviction of Private Curry. He had argued first that the present structure of the court-martial is fundamentally incompatible with the fifth amendment guarantee of due process and would be prohibited in a civilian context. Secondly, he argued that the military had failed to produce any justification for the military justice system.

Curry's arguments are not innovative; they typify the objections, past and present, to the forum of law commonly referred to as the "court-martial". As such they provide a convenient and timely catalyst for discussing the historical traces of the court-martial. A study of the historical foundations of the present system reveals the continuing threads, among others, of "due process" and the justification for a special, separate forum for administering justice in the military.

The subject is broad and deep. Time and space prevent a more thorough historical analysis here of the court-martial. In some instances the development of the court-martial during several centuries must of necessity be summarized in a few short paragraphs. Also omitted is discussion of the system of courts-martial employed by naval forces. But the flavor remains. The chief contributing factors or personalities are discussed. It is not the purpose of this article to defend the court-martial, but rather to briefly reflect on its development through literally centuries of development. The discussion is primarily three-fold and centers on the statutory changes which most affect the court-martial. We will examine first the early origins of the court-martial in the European countries, then the development of the court-martial under the British system, and finally the maturation of that forum in the American system.

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[1] Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979) at 880. Curry had exhausted his military remedies though the Army Court of Military Review and the United States Court of Military Appeals. See arts. 66 & 67, Uniform Code of Military Justice, 10 U.S.C. § § 866 and 867 (1970) [hereinafter cited as U.C.M.J.].

11. THE EARLY EUROPEAN MODELS

The roots of the court-martial run deep. They predate written military codes designed to bring order and discipline to an armed, sometimes barbarous fighting force. Although some form of enforcement of discipline has always been a part of every military system, for our purposes we trace the roots only as far back as the Roman system.

In the Roman armies, justice was normally dispensed by the *magistri militum* or by the legionary tribunes who acted either as sole judges or with the assistance of councils.[2] The punishable offenses included cowardice, mutiny, desertion and doing violence to a superior. While these offenses or their permutations have been carried forward to contemporary settings, many of the punishments imposed upon the guilty have long since been abandoned: decimation, denial of sepulture, maiming, and exposure to the elements. Other punishments remain, such as dishonorable discharge.[3]

The Roman model was no doubt employed or observed by the later continental armies and is credited by most commentators as the template for later military codes. For example, the military code of the Salic chieftains, circa fifth century, contained phrases closely approximating those in the Roman Twelve Tables. By the ninth century the Western Goths, Lombards, and Bavarians were also using written military codes.[4]

The early European courts-martial took on a variety of forms and usages. Typically, the early tribunals operated both in War and in peacetime conditions, the former occupying the greater part of an army's time. The Germans, in peacetime, conducted their proceedings before a count who was assisted by assemblages of freeman, and in war before a duke or military chief. Later, courts of regiments, the "regiment" being a mace or staff serving as a symbol of judicial authority, were held by the commander or his delegate. For proceedings involving high-ranking commanders, the King formed courts composed of bishops and nobles.[5]

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[2] See W. Winthrop, Military Law and Precedents **17, 45** (2d ed. **1920** reprint). *See also G.* Squibb, The High Court of Chivalry **(1959).**

[3] Wmthrop, *supra* note **2,** at **17.**

[4] Winthrop, *supra* note **2,** at 18. *See also* W. Aycock and S. Wurfel, Military **Law** Under the Uniform Code of Military Justice **4 (1955).**

[5] J. Snedeker, A Brief History of Courts-Martial 7 (1954).

In Germany, courts-martial, or *militargerichts*, were formally established by Emperor Frederick III in 1487, specifically provided for in the penal code of Charles V in 1533, and refined still further under Maximillian II in 1570.[6] In France, although a military code existed as early as 1378, courts-martial, *conseils de guerre*, were not formally instituted by *ordonnance* until 1655.[7]

But the contribution of the German and French systems to the overall development of the court-martial is overshadowed by two contributions which were very different and yet very similar: the age of chivalry and the written military code of King Gustavus Adolphus.

Of elusive origins, the age of chivalry is most often linked with the middle ages—those centuries after the fall of the Roman empire and before the Renaissance. Amidst the intense rivalries for land and power and the usual accompanying dishonorable practices, "chevaliers" vowed to maintain order, and to uphold the values of honor, virtue, loyalty, and courage. The position and power of the chevalier rendered him an arbiter in matters affecting his peers, and also his dependents who held his estates under the feudal system. From this informal system arose the more formal court of chivalry.

The Duke of Normandy (William the Conqueror) vested the power and authority of his court of chivalry in his high officials; the particulars of this court will be discussed later. It was this system of military justice which he carried to England in the 11th century.[8]

The second contributing factor, the written military code of King Gustavus Adolphus of Sweden in 1621, was grounded on the need for honor, high morals, order, and discipline in a time when soldiers were generally considered barbarians and opportunists seeking the booty of war. King Adolphus was a born leader, deeply religious, and a man of modern thought. During the siege of Riga, Poland, in 1621, he issued his 167 articles for the maintenance of order.[9] These provided for a regimental

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[6] Winthrop, ***supra*** note **2,** at **18.**

[7] *Id.*

[8] Aycock and Wurfel, ***supra*** note **4,** at **4.**

[9] ***See*** Winthrop, ***supra*** note **2,** at 19. The entire code is printed as an appendix to Winthrop's work. Winthrop points out, and other writers alude to the point,

("lower") court-martial. The president of this tribunal was the regimental commander, and the court's members were elected individuals from the regiment.

The standing court-martial (the "higher court") was presided over by the commanding general, and its members consisted of high ranking officers." If a gentleman or any officer was summoned before the lower court to answer for a matter affecting his life or his honor, the issue was referred to the higher, or standing court, for litigation."

The code provided a detailed guide for conducting the courts[12] and

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that the code of Adolphus contributes in large part to later codes. He also notes that many English soldiers had served under Adolphus. *Id.*, at 19, n. 15.

[10] Article 142 provided:

> In our highest Marshall Court, shall our General be President; in his absence our Field Marshall; when our Generall is present, his associates shall be our Field Marshall first, next him our General of the Ordnance, Serjeant Major Generall, Generall of the Horse, Quarter-Master-General; next to them shal sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie.

[11] Article 152. In this provision we see one of many references throughout military history to a distinction between "officers" and "soldiers," the former presumably men of "honor" and entitled to greater privileges.

[12] *See* article 143, which reads:

> Whensoever this highest Court is to be holden they shall observe this order; our great Generall as President, shall sit alone at the head of the Table, on his right hand our Field Marshall, on his left hand the Generall of the Ordnance, on the right hand next our Serjeant-Major-Generall, on the left hand againe the Generall of the Horse, and then the Quarter-Master-General on one hand, and the Muster-Master-General1 on the other; after them shall every Colonell sit according to his place as here follows; first the Colonell of our Life Regiment, or the Guards of our owne person; then every Colonell according to their places of antiquity. If there happen to be any great men in the Army of our subjects, that be of good understanding, they shall cause them to sit next these Officers; after these shall sit all of the Colonells of strange Nations, every one according to his antiquity of service.

Further, an oath was required of the participants:

> All these Judges both of higher and lower Courts, shall under the blue Skies thus swear before Almighty God, that they will inviolably keep

contained a number of provisions for due process.[13] The regimental, lower, court tried cases of theft, insubordination, and other minor offenses, and also exercised jurisdiction over minor civil issues.[14] The standing, higher, court exercised jurisdiction over treason, conspiracy, and other serious offenses.[15]

Those found guilty of misdemeanors were punished uniformly, without regard to status. If a regiment ran from a battle, its troops forfeited their goods or were decimated by hanging.[16] Other more common methods of dealing with the recalcitrants included confinement on bread and water,[17] being placed in shackles,[18] riding the wooden horses,[19] and forfeitures.[20]

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this following oath unto us: I.R.W. doe here promise before God upon his holy Gospell, that I both will and shall Judge uprightly in all things according to the Lawes of God, or our Nation, and these Articles of Warre, so farre forth as it pleaseth Almight God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly.

Article 144.

[13] For example, an appeal could be had to the higher court if the lower court was suspected of being partial. Articles 151, 153.

[14] Article 153.

[15] Article 150.

[16] See articles 60, 66. Those lucky enough to survive were destined to "carry all the filth out of the Leaguer, until such time as they perform some exploit that is worthy to procure their pardon, after which time they shall be clear of their former disgrace." If any man could show through the testimony of ten men that he was not guilty of the charged cowardice, he would go free.

While punishment for minor crimes and cowardice was harsh, rewards were specifically in store for those who served honorably. *See* article 69.

[17] Article 49.

[18] Article 94.

[19] Article 49. In this punishment, the miscreant was placed on a block or frame, with his back exposed, and was flogged. The block or frame resembled a sawhorse.

[20] Article 80.

One cannot help but be impressed with the details and precise formula of the code and its intent of preserving the welfare of "our Native Countrey."[21] In many respects, then, its foundation rested alongside the roots of the court of chivalry—a need to recognize honor, loyalty, and high morals, not just raw military discipline. In one notable respect the code of King Adolphus differed from the Norman court of chivalry. Whereas the latter sanctioned trial by combat—the innocent being the victor—, the former expressly forbade dueling.[22]

These two important factors, the development of the court of chivalry and the code of King Adolphus, marked significant benchmarks in the growth of the court-martial. Both recognized the need to maintain discipline and honor and both recognized the requirements of the concept now labeled "due process".

III. THE BRITISH SYSTEM

A. *INTRODUCTION*

The contribution of the British to the development of the court-martial is rich with tradition. As pointed out in the preceding section, the early European models of military courts contributed in some respects to our

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[21] The closing article, which was article **167,** read:

> These Articles of warre we have made and ordained for the welfare of our Native Countrey, and doe command that they be read every moneth publickly before every Regiment, to the end that no man shall pretend ignorance. We further will and command all, whatsoever Officers higher or lower, and all our common souldiers, and all others that come into our Leaguer amongst the souldiers, that none presume to doe the contrary hereof upon paine of rebellion, and the incurring of our highest displeasure; For the firmer confirmation whereof, we have hereunto set our hand and seale.

[22] Article 84 provided:

> No Duell or Combat shall be permitted to bee fought either in the Leaguer or place of Strength: if any offereth to wrong others, it shall bee decided by the Officers of the Regiment; he that challengeth the field of another shall answer it before the Marshal's Court. If any Captain, Lieutenant, Ancient, or other inferior officer, shall either give leave or permission unto any under their command, to enter combat, and doth not rather hinder them, [he] shall be presently cashiered from their charges, and serve afterwards as a Reformado or common souldier; but if any harm be done he shall answer it as deeply as he that did it.

modern system. But it is to the British models that commentators most often turn in discussing the history of the present court-martial. Indeed, as we shall see later, the British system served as the first pattern for the American military justice system.

Because the British contribution is so complex and multi-faceted, discussion here is limited to three general points or stages: the court of chivalry (or constable's court); the era of martial law and councils of war; and the Mutiny Act. These three highlights of the British model will provide ample footing for later discussions of the American court-martial system. We turn our attention first to the court of chivalry.

B. THE COURT OF CHIVALRY: THE CONSTABLE'S COURT

In the preceding discussion on the early European court-martial model, we noted the rise of the courts of honor, the court of chivalry, *curia militaris*. With his armies, William the Conqueror carried that system of justice to England and established it as his forum for administering military justice.[23]

The court is often referred to as the constable's or marshal's court the name deriving from the titles of the principle participants in the court. William's supreme court, the *Aula* ***Regis,*** included within its jurisdiction, in its early years, the jurisdiction of the court of chivalry.[24] The court moved with the king, and thus proved to be an awkward and bulky affair until the reign of Edward I. He subdivided the court to provide a separate forum for litigation of matters concerned primarily with military discipline.[25]

The commander of the royal armies was the lord high constable. When he sat as the superior judge, he was assisted by the earl marshal, three

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[23] ***See*** Aycock and Wurfel, *supra* note 4, at 4. For discussions of the court of chivalry, see ***generally*** S. C. Pratt, Military Law: Its Procedure and Practice (1915); C. Fairman, The Law of Martial Rule (1943); and G. Squibb, *supra* note 2. An interesting account of a court of chivalry proceeding can be found at 3 Corbett's Complete Collection of State Trials, 483 (1809). A chapter on procedure is included in Squibb's book.

[24] Pratt, *supra* note 23, at 6; Fairman, *supra* note 23 at 1.

[25] Winthrop, *supra* note 2, at 46.

doctors of civil law, and a clerk (who served as prosecutor. This court exercised jurisdiction over civil and criminal matters involving soldiers and camp followers. The court also exercised jurisdiction over criminal acts which were subversive of discipline.[26]

The earl marshal was next in rank to the constable and bore the responsibility for managing the army's personnel. When he presided, the "constable's court" was considered a court of honor or military court. This arrangement survived until 1521, when Edward, Duke of Buckingham, constable during the reign of Henry VIII, was executed for treason.[27] The office of constable reverted to the Crown and the constable's court became the "marshal's court.'' The office of marshal derived from royal appointment until 1533 when it became hereditary.[28]

The court was much more mobile than the *Aula Regis* and during periods of war followed the Army. In its early forms, the court became somewhat of a standing or permanent forum, rendering summary punishment in accordance with the existing military code or articles of war.[29]

The court's supposed strength, that is, its jurisdictional powers over a wide range of civil and criminal matters, eventually became its Achilles' heel. At several points in its history, limitations, both royal and legis-

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[26] Fairman, *supra* note 23, at 2 to 4.

[27] Aycock and Wurfel, *supra* note 4, at 6.

[28] *Id.*

[29] *See* Pratt, *supra* note 23, at 6. The various articles of war promulgated by the crown during conflicts were drawn with the advice of the constable and marshal. For example, the preamble to Richard II's articles reads:

> These are the Statutes, Ordinances, and Customs, to be observed in the Army, ordained and made by good consultation and deliberation of our Most Excellent Lord the King Richard, John Duke of Lancaster, Seneschall of England, Thomas Earl of Essex and Buckingham, Constable of England, and Thomas de Mowbray, Earl of Notingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts, and experienced Knights, whom they have thought proper to call unto them; then being at Durham the 17th day of the Month of July, in the ninth year of the Reign of our Lord the King Richard 11.

The whole of Richard II's articles are reprinted in Winthrop, *supra* note 2, at 904.

lative, were imposed to restrict its growing infringements upon the common law courts.[30] The court eventually fell into disuse and by the 18th century ceased to exist as a military court.[31]

C. *THE "COUNCIL OF WAR"*

With the decline of the court of chivalry (the constable's court or the marshal's court), the martial courts or councils held under the various articles or codes of war became more prominent.[32] Long before the court

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[30] Fairman notes that it was inherent in the nature of the military court to expand its jurisdiction whenever possible. Civil jurisdiction was restricted in **1384:**

> And because divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and discussed, are of late drawn before the Constable and Marshal of England, to the great Damage and Disquietness of the People; it is agreed and ordained, that all Pleas and Suits touching the Common Law, and which ought to be examined and discussed at the Common Law, shall not hereafter be drawn or holden by any Means before the foresaid Constable and Marshal, but that the court of the same Constable and Marshal shall have that which belongeth to the same Court, and that the Common Law shall be executed and used and have that which to it belongeth, and the same shall be executed and used as it was accustomed to be used in the Time of King Edward.

8 Richard 11, stat. **1,** c. **2.** ***See*** Fairman, *supra* note **23,** at **4,** n. **13.**

Criminal jurisdiction was limited in **1399** by **1** Henry IV, **c. 14** and in **1439** punishment for desertion was also limited to the common law courts. **18** Henry VI, c. **19.** ***See*** Fairman, *supra* note **23,** at **4.**

[31] After the fall of the Constable's Court in **1521,** the Marshal's Court normally consisted of deputies assigned to hear cases. In **1640** Parliament resolved that the Marshal's Court was a "grievance". No formal act ended the Court; it simply, as Fairman notes, suffered from atrophy. Winthrop notes that the last case was apparently tried in **1737.** Winthrop, *supra* note **3** at **46.** n. **9** (Chambers v. Sir John Jennings, **7** Mod. **127).** However, one writer states that the Court of Chivalry (court of honor) was used as recently as **1954,** in the case of Manchester Corporation v. Manchester Palace of Varieties Ltd. [1955] p. **133.** ***See*** Stuart-Smith, Military Law: Its History, Administration and Practice, **85** L.Q. Rev. **478 (1969).** The case is discussed in detail in Squibb, *supra* note **2** at **123.**

[32] The more commonly cited articles of war, under a variety of titles, are those of Richard I, Richard 11, Henry V, Henry VII, Charles 11, and James 11. ***See generally*** Winthrop, *supra* note **2** at **18, 19.** Several of these codes are included as appendices in his work and are noted elsewhere in this article. The individual codes are thoroughly discussed in Clode, Military and Martial Law (London **1872).**

of chivalry had faded, the problem of maintaining military discipline in a widely dispersed army had prompted the formation of military courts by issuance of royal commissions, or through inclusion of special enabling clauses in the commissions of high-ranking commanders.[33] These tribunals, which eventually became the modern courts-martial, were convened by a general who also sat as presiding judge or president. The courts' powers were plenary, and were limited to wartime. Sentences were carried into execution without confirmation by higher authorities.[34]

As with the court of chivalry, the emerging councils of war or courts-martial frequently fell into abuse. More than once, royal perogative expanded, or attempted to expand, the jurisdiction of these tribunals over civilians or over soldiers in peacetime armies. For example, during the reigns of Edward VI, Mary, Elizabeth I, and Charles I, certain offenses, normally recognized only at common law in the civilian courts, could be punished under military law before courts-martial similar to those employed during times of war.[35] Parliament was rightfully very sensitive about these and other attempted encroachments upon the civilian populace. The struggle over court-martial jurisdiction simply fueled the fires. The only legislative aid to enforcing military discipline was found in various statutes which could be enforced only before civil courts.

From 1625 to 1628, Charles I attempted to use court-martial jurisdiction as a lever on the populace in hope of obtaining supplies. He failed and, in seeking the needed money from Parliament, he was forced to

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[33] ***See generally*** Pratt, ***supra*** note **23** at **7;** Aycock and Wurfel, ***supra*** note **4** at **5.** One of these "commissions" cited often is that given to *Sir* Thomas Baskerville, June 10, **1597:** ". . . to execute marshal1 law, and, upon trial by an orderly court, . . . to inflict punishment. . . ." Cited in Aycock and Wurfel, ***supra*** note **4** at 6, and Fairman, ***supra*** note **23** at 6. **A** good discussion of the workings of the British courts-martial during this period is found in Clode, ***supra*** note **32** at chapter **11.**

[34] The exact origin of the term "court-martial" is open to some interpretation. Pratt states:

> The true derivation of the word 'martial' opens out an interesting field of inquiry. Simmons and others hold that courts-martial derive their name from the Court of the Marshal; **but** there is a good deal to be said against this view, as the words 'martial' and 'military' are in some of the old records synonymous.

Pratt, *supra* note **23,** at **7.**

[35] ***See generally,*** Fairman, ***supra*** note **23,** at 6.

assent to a Petition of Rights (1628), which, among other things, dissolved the commissions proceeding under military law. Charles agreed to imprison no one except with due process of law, and never again to subject the people to courts-martial.[36]

From the continuing struggle for control of the military, Parliament slowly gained a foothold on control of the conduct of military trials. In 1642 the first direct legislation affecting military law authorized the formation of military courts. A commanding general and 56 other officers were appointed as "commissioners" to execute military law. Twelve or

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[36] 3 Charles I, c. 1. The petition provided in part:

> Sec. VII. And whereas also by Authority of Parliament, in the five and twentieth Year of the Reign of King Edward the Third, it is declared and enacted, That no man should be forejudged of Life or Limb against the Form of the Great Charter and the Law of the land; (2) and by the said Great Charter and other the Laws and Statutes of this your Realm, no Man ought to be adjudged to Death but by the laws established in this your Realm, either by the Customs of the same Realm, or by the Acts of Parliament: (3) And whereas no Offender of what Kind soever is exempted from the Proceedings to be used, and Punishments to be inflicted by the Laws and Statutes of this your Realm: Nevertheless of late Time divers Commissions under your Majesty's Great Seal have issued forth, by which certain Persons have been assigned and appointed Commissioners, with Power and Authority to proceed within the land, according to the Justice of Martial Law, against such Soldiers or Mariners, or other dissolute Persons joining with them, as should commit any Murther, Robbery, Felony, Mutiny or other Outrage or Misdemeanor whatsoever, and by such summary Course and Order as is agreeable to Martial Law, and as is used in Armies in Time of War, to proceed to the Trial and Condemnation of such Offenders, and them to cause to be executed and put to Death according to the Law Martial:
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> Sec. VIII. By Pretext whereof some of your Majesty's Subjects have been by some of the said Commissioners put to Death, when and where, if by the Laws and Statutes of the Land they had deserved Death, by the same Laws and Statutes also they might, and by no other ought to have been judged and executed.
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> Sec. X. . . . (5) And that the aforesaid Commissions, for proceeding by Martial Law, may be revoked and annulled; and that hereafter no Commissions of like Nature may issue forth to any Person or Persons whatsoever to be executed as aforesaid, lest by Colour of them any of your Majesty's Subjects be destroyed, or put to death contrary to the Laws and Franchise of the Land.

more constituted a quorum and the body was empowered to appoint a judge advocate, provost marshal, and other necessary officers.[37]

Beginning in 1662 with articles of war issued by Charles II, there was a general recognition that a standing army" needed power to maintain peacetime discipline. There was also an increased interest in military due process as evidenced in various provisions of the myriad articles of war. For example, the 1686 code of "English Military Discipline'' of James II included the following description of the procedure to be followed in conducting a "Councel of War":

> If the Councel of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places and the Prisoner being brought before them, And the Information read, The President Interrogates the Prisoner about all the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the Care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordinances or Articles of War. The Sentence is framed according to the Plurality of Votes, and the Criminal being brought in again. The Sentence is Pronounced to him in the name of the Councel of War, or Court Martial.
>
> When a Criminal is Condemned to any Punishment, the Provost Martial causes the Sentence to be put in Execution; And if it be a publick Punishment, the Regiment ought to be drawn together to see it, that thereby the Souldiers may be deterred from offending. Before a Souldier be punished for any infamous Crime, he is to be publickly Degraded from his Arms, and his coat stript over his ears.
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> A Councel of War or Court Martial is to consist of Seven at least with the President, when so many Officers can be brought to-

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[37] The act, Lord Essex's Code, established a Parliamentary Army. See D. Jones, Notes on Military Law (London 1881) at 15. See also Snedeker, *supra* note 5 at 16, and Fairman, *supra* note 23 at 12.

[38] The Parliament of the Restoration (1660) allowed Charles II to maintain an armed force of some 8,000 at his own expense. Parliament for fear of being bound to support the army declined to legislatively create courts-martial. Thus Charles was left to govern his troops. See Clode, *supra* note 32; See also Jones, *supra* note 37, at 14.

> gether; And if it so happen that there be no Captains enough to make up that Number, the inferior Officers may be called in.[39]

More detailed rules were set out two years later in the Articles of War of James II (1688), which also placed a limitation on certain punishments:

> All other faults, misdemeanours and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War.[40]

It was this closing phrase of the 1688 Articles of War, concerning limited punishments during peacetime, that in some part no doubt led to the enactment of the Mutiny Act.

D. THE MUTINY ACT

The scene was set. Parliament had a firm hold on the conduct of court-martial. In 1689, while William and Mary were asking the House of Commons to consider a bill which would allow the army to punish deserters and mutineers during peacetime and thereby insure some degree of discipline,[41] there was a massive desertion of 800 English and Scotch dragoons who had received orders to proceed to Holland. Instead, they headed northward from Ipswich and sided with the recently deposed James II, who had recruited them.

No further royal pleading was required. Parliament quickly passed the bill known as the First Mutiny Act.[42] The bill added teeth to military

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[39] Reprinted as an appendix to Winthrop's book, *supra* note 2, at 919.

[40] Article LXIV, in the Rules and Articles for the Better Government of His Majesties Land Forces in Pay (1688), *reprinted in* Winthrop, *supra* note 2, at 920.

[41] Jones notes that at this point the soldiers were considered citizens and subject only to civil tribunals. *Supra* note 37, at 15. *See also* Clode, *supra* note 32.

[42] 1 William and Mary, c. 5, *reprinted in* Winthrop, *supra* note 2, at 929.

discipline. The death penalty was allowed for the offenses of mutiny or desertion, with the proviso that:

> And noe Sentence of Death shall be given against any offender in such case by any Court Martial1 unlesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the hours of eight in the morning and one in the afternoone.[43]

Interestingly, the existing articles of war, which had been promulgated under James 11, were not abrogated. Nor was any change made in the Crown's perogative to issue articles of war or to authorize the death penalty for offenses committed abroad.[44] The act, at first limited to seven months' effective duration, simply provided for the death penalty for mutineers and deserters at home.

Until **1712,** the successive Mutiny Acts did not cover offenses committed abroad. In the years that followed, the Act was extended to Ireland, and to the colonies. In the **1717** Mutiny Act, the Parliament approved the practices of the crown in issuing articles of war to extend the jurisdiction of the court-martial within the Kingdom.[45] In **1803** the Mutiny Act and the Articles of War were broadened to apply both at home and abroad.[46] A general statutory basis of authority was thus given to the Articles of War, which had to that point existed only by exercise of the royal perogative. With the exception of a brief interval from **1698** to **1701,** annual Mutiny Acts were passed until they, along with the Articles of War, were replaced in **1879** by the Army Discipline and Regulation Act, and finally, in **1881,** by the Army Act.[47]

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[43] **Winthrop,** *supm* **note 2, at 930.**

[44] **Aycock and Wurfel,** *supm* **note 4, at 8.**

[45] **See** *generally,* **Jones,** *supra* **note 37, at 17.**

[46] **Aycock and Wurfel,** *supm* **note 4, at 8.**

[47] For **discussions** of **the act, see Jones,** *supra* **note 37, at 18, and Clode,** *supm* note **32, at 43.**

We leave the development of the British system at this point to briefly summarize some key themes that have run through the British court-martial system.

First, the struggle between the Crown on the one hand, and the Parliament on the other, over control of the military justice system, was classic. The British model typifies the reluctance of a populace to vest, or allow to be vested, too much control in the military courts. In the British model we see the metamorphosis from a forum serving under total royal perogative, the court of chivalry, to one acting pursuant to a legislative enactment—a blessing, of sorts, from the populace.

Second, over a period of approximately seven hundred years, the British court-martial developed a system of military due process. From the court of chivalry with its trial by combat, the system evolved to one which accorded more sophisticated rights to an accused, the rights to receive notice, to present his defense, and to argue his cause.

Third, the jurisdiction of the court-martial was gradually restricted to exercising its powers over soldiers only, as opposed to the general populace. When expansion of those powers was attempted, at least in later years, legislative limiting action was taken.

The formative years, actually centuries, in the British system served as a firm stepping stone for the American system which thereby got a running start in 1775.

IV. THE AMERICAN COURT-MARTIAL

A. INTRODUCTION

We must give great credit to the British military system for the development of the court-martial in America. In its inception, the American court-martial drew from centuries of proud tradition, trial and error, and a keen sense of justice.[48]

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[48] Not all would agree. Note the language from an article written by Brigadier General Samuel T. Ansell in 1919:

> I contend-and I have gratifying evidence of support not only from the public generally but from the profession—that the existing system of Military Justice is un-American, having come to us by inheritance and

In this section we will briefly examine several key periods in the development of the American court-martial. These are, first, the period from 1775 to 1800; second, the period from 1800 to 1900; and last, the period from 1900 to the present. As in the preceding sections, the discussion here will center on the court-martial system for the land forces. We turn our attention first to the inception of the American court-martial.

B. THE FORMATNE YEARS: 1775 to 1800

The British system of military justice was an unwitting midwife to the American court-martial. At the outbreak of the Revolutionary War, the British soldiers were operating under the 1774 Articles of War. Ironically, even as American troops were fighting for independence—a break from British rule—, colonial leaders were embracing the British system of rendering military justice.

In April 1775, the Provisional Congress of Massachusetts Bay adopted, with little change, the 1774 British Articles of War, a detailed prescription for conducting courts-martial and for otherwise maintaining military dis-

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> rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it.

S.T. Ansell, *Military Justice,* 5 Cornel1 L.Q. (Nov. 1919), *reprinted at* Mil. L. Rev. Bicent. Issue 53, 55 (1975).

General Ansell was acting judge advocate general from 1917 to 1919, and compaigned vigorously for extensive revision of the Articles of War of 1916. His views were a generation ahead of their time; only minor changes were made in the military justice system until the present Uniform Code of Military Justice came into being with the Act of 5 May 1950, ch. 169, § 1, 64 Stat. 108. For accounts of General Ansell's struggle for reform, *see* T. W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 Mil. L. Rev. 1 (1967); U.S. Dep't. of the Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 114–15 (1975).

cipline.[49] The American military was thus presented with its first written military code—the Massachusetts Articles of War."

This code provided for two military courts: the "general" court-martial, to consist of at least 13 officers,[51] and a "regimental" court-martial, to consist of not less than five officers "except when that number cannot be conveniently assembled, when three shall be sufficient".[52] Other provisions included an eight-day confinement rule, a limitation on the number of "stripes" to be meted out as punishment,[53] and an admonition that "all the Members of a Court-Martial are to behave with calmness, decency, and impartiality, and in the giving of their votes are to begin with the youngest or lowest in commission."[54] Also included was a provision which survives, in form at least, to this day, that "No Officer or Soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a Court-Martial can be conveniently assembled.""[55]

The Continental Congress appointed a committee in June 1775 to author rules for the regulation of the Continental Army.[56] The committee

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[49] *See* Aycock and Wurfel, *supra* note 4, at 9; S. T. Ansell, *supra* note 48.

[50] Similar articles were adopted within the following months by the Provincial Assemblies of Connecticut, and Rhode Island, the Congress of New Hampshire, the Pennsylvania Assembly, and the Convention of South Carolina. *See* Winthrop, *supra* note 2, at 22, n. 32. The Massachusetts Articles of War are printed in Winthrop, *supra* note 2, at 947.

[51] Article 32.
[52] Article 37.

[53] Article 50. The number was limited to thirty-nine.
[54] Article 34.

[55] Article 41. The current U.C.M.J. provides:

> Art. 33. Forwarding of charges. When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or Confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

[56] The committee was composed of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. It was tasked with preparing "rules and regulations for the government of the Army". Winthrop, *supra* note 2, at 21.

presented its report, and on June 30, 1775, the Congress adopted 69 articles based upon the British Articles of War of 1774 and the 1775 Massachusetts Articles of War.[57] In November of that same year, the articles were amended.[58] And again in 1776 the Articles of War were revised to reflect the growing American tradition of military justice.[59] The 1776 Articles of War were arranged in a manner similar to the British Articles of War, by sections according to specific topics.[60] These articles continued in force, with some minor amendments, until 1786, when some major revisions were accomplished.

The section dealing with the composition of general courts-martial was changed to reflect the need for smaller detachments to convene a general court with less than 13 members, the requisite number under the 1776

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[57] *See* Aycock and Wurfel, *supra* note 4, at 10.

[58] *Id.*

[59] The revision in 1776 resulted from a suggestion by General Washington. The revising committee included John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R.R. Livingston. S.T. Ansell, acting Judge Advocate General of the Army from 1917 to 1919, harshly critized the American system of military justice. See note 48, *supra*. According to Ansell, discussing the articles of War of 1776, John Adams "was responsible for their hasty adoption . . . to meet an emergency." Ansell also offers the following illuminating quotation from the writings of John Adams:

> There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis****. So undigested were the notices of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

3 J. Adams, History of the Adoption of the British Articles of 1774 by the Continental Congress: Life and Works of John Adams 68–82, *quoted in* S.T. Ansell, *supra* note 48, at 55–56.

[60] For the first time in the American articles, no mention was made of the "Crown".

Articles. The new provision, Section 14, Administration of Justice, allowed a minimum of five officers.[61]

These early courts-martial were of three forms: general, regimental, and garrison. The general court-martial could be convened by a general officer or an "officer commanding the troops".[62] No sentence could be carried into execution until after review by the convening authority. In the case of a punishment in time of peace involving loss of life, or "dismission" of a commissioned officer or a general officer (war or peace), congressional review was required.[63]

The "regiment" (or *corps)* court-martial could be convened by any officer commanding a regiment or corps.[64] Likewise, the commander of a "garrison, fort, barracks, or other place where the troops consist of different *corps"* could convene a "garrison" court-martial.[65] The membership of these two latter courts consisted of three officers, and the jurisdictional limits were as follows:

> No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put

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[61] Article 1, sec. XIV. *See* Aycock and Wurfel, *supra* note 4, at 11, and Winthrop, *supra* note 2, at 23. The preamble to the resolution adopting the revisions stated:

> Whereas, crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service;
>
> Resolved, That the 14th Section of the Rules and Articles for the better government of the troops of the United States, and such other Articles as relate to the holding of courts-martial and the confirmation of the sentences thereof, be and they are hereby repealed;
>
> Resolved, That the following Rules and Articles for the administration of justice, and the holding of courts-martial, and the confirmation of the sentences thereof, be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the armies of the United States.

[62] Article 2, sec. XIV.
[63] *Id.*

[64] Article 3, sec. XIV.
[65] *Id.*

> to hard labor, any non-commissioned officer or soldier, for a longer time than one month.[66]

A judge advocate (lawyer) or his deputy was assigned to the court to prosecute in the name of the United States *and* to act as a counsel for the accused, object to leading questions (of any witness), and object to questions of the accused which might incriminate him.[67] And no trials were to be held except between the hours of "8 in the morning and 3 in the afternoon, except in cases which, in the opinion of the officer appointing the court, require immediate example."[68]

It was this system of courts-martial that was in existence when the framers of the Constitution met to decide the fate of the military justice system itself. Congress did not create the court-martial—it simply permitted its existence to continue. In effect, the court-martial is older than the Constitution and predates any other court authorized or instituted by the Constitution.

Of significance here is the point that the Constitution's framers provided that Congress, not the President, would "make rules for the Government and Regulation of the land and naval forces".[69] The President was named as "Commander in Chief of the Army and Navy of the United States. . . ."[70] With these parameters drawn, the framers avoided much of the political-military power struggle which typified so much of the early history of the British court-martial system.[71] And in 1797 the sep-

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[66] Article 4, sec. XIV.

[67] Article 6. Winthrop discusses the dual role of counsel in these early proceedings and points out that the judge advocate could not act in a "personal" capacity as counsel for the accused—that would be inconsistent with his role as a prosecutor. Rather, the relationship was "official". Winthrop, *supra* note 2, at 197. This provision was carried forward to the 1874 Articles of War, under which the role of counsel was to exercise "paternal-like" *care* over an accused. See S. Ulmer, Military Justice and the Right to Counsel at 28 (1970).

[68] Article 11, sec. XIV.

[69] U.S. Const., *art.* 1, § 8, cl. 14.

[70] U.S. Const., art. 2, § 2, cl. 1.

[71] An early Supreme Court decision noted the effect of these Constitutional provisions:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then

arateness of the military system of justice was further recognized in the fifth amendment provision which drew a distinction between civil and military offenses.[72]

C. THE PERIOD FROM 1800 TO 1900: QUIET GROWTH

The articles of War of 1776 (with amendments in 1789) remained in effect until 1806, when 101 articles were enacted by the Congress.[73] The composition and procedure for the court-martial changed little with the revised articles. The three courts, general, regimental, and garrison, remained, but some minor changes affected the power to convene a general court, Whereas the 1786 amendment had allowed a general or other officer commanding the troops to convene a general court, the 1806 articles established the more particular requirement that "[a]ny general officer commanding an army, or [c]olonel commanding a separate department" could convene a general court.[74] The composition and jurisdictional limits of the three courts remained without change.

Further developments included a clause barring double jeopardy,[75] a two-year statute of limitations,[76] a provision allowing the accused to challenge members of the court-martial,[77] and a provision that a prisoner standing mute would be presumed to plead innocent.[78] Admidst these

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and now practiced by civilized nations; and that 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, that the two powers are entirely independent of each other.

Dynes v. Hoover, 61 U.S. 65, 79 (1851).

[72] The fifth amendment states in part: "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

[73] 2 Stat. L. 359 (1806). Reprinted in Winthrop, *supra* note 2, at 976.

[74] Article 65.
[75] Article 87.

[76] Article 88.
[77] Article 71.

[78] Article 70.

progressive procedural and substantive safeguards, one finds the provision: "The President of the United States shall have power to prescribe the uniform of the army."[79]

The next seven decades were marked with relatively little change to the composition of the court-martial or the procedures to be employed.[80] The relatively quiet movement of the court-martial as a tribunal was in contrast to the lusty growth of the United States and the attendant tensions which led in part to the Civil War.

1. Courts-Martial in the Confederacy.

Having established a government and army, the Congress of the Confederate States in October 1862 promulgated "An Act to organize Military Courts to attend the Army of the Confederate States in the Field and to define the Powers of Said Courts."[81] The court-martial under the Con-

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[79] Article 100.

[80] As we shall see in later discussion, periods of war during the 1700's and 1900's usually spurred prompt and major revisions to the Articles of War. Such was not the case in the 1800's, at least prior to 1874, when the country went through the War of 1812, the Mexican War, the Civil, and part of the Indian Wars. During that century, only minor changes were made to the governing articles.

[81] Act of Oct. 9, 1862, *reprinted in* Winthrop, *supra* note 2, at 1006, *and also in* 2 Journal of the Congress of the C.S.A. 1861-1865, at 452 (1905). For a very good discussion of courts-martial within the Confederate system, *see* Robinson, Justice in Grey 362-82 (1941).

See also J.D. Peppers, Confederate Military Justice: A Statutory and Procedural Approach (May 1976) (unpublished M.A. thesis in library of Rice University, Houston, Texas). Mr. Peppers was concurrently pursuing a J.D. degree at the University of Houston College of Law when he wrote this master's thesis.

Mr. Peppers notes that the officer corps of the Confederate forces included many professional soldiers and sailors who had served in the United States Army or Navy. Because of this, the organization of the Confederate Army and Navy, including the Confederate system of military justice, for the most part was like that of the Union Forces. *Id.*, at 7.

The Confederate constitution, like that of the United States, empowered the congress "to make rules for the government and regulation of the land and naval forces." *Id.* The Confederate congress exercised this power in its Act of March 6, 1861, establishing "Rules and Articles for the Government of the Confederate States." *Id.* at 17.

federate States model was a permanent tribunal, not like the traditional (and modern) temporary forum which was formed only for a specific case.

Each court consisted of three members, two constituting a **quorum,** a judge advocate,[82] a provost marshal, and a clerk. Initially, a **court** accompanied each army ***corps*** in the field and by later amendments courts were authorized for **military** departments,[83] "North Alabama",[84] any di-

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[82] Trial judge advocates in the field were supposed to have knowledge of the law and also of military life. They were not explicitly required to be attorneys. J.D. Peppers, note **81,** ***supra,*** at **48.**

The Confederate forces had no judge advocate general's corps, nor even a judge advocate general. President Jefferson Davis recommended to the Confederate congress the creation of both, but no action was taken. The work of reviewing records of trial was performed by an assistant secretary of war, and other work was handled by a "judge advocate's office" created within the office of the adjutant general, and headed by an assistant adjutant general. Id., at **57–59.**

[83] **Act** of May **1, 1863,** Winthrop, ***supra*** note **2,** at **1007,** and 3 Journal of the Congress of the C.S.A. **1861-1865,** at **417 (1905).**

The original creation of the new permanent courts-martial by the Act of Oct. **9, 1862,** ***supra*** note **82,** and subsequent expansions of their jurisdiction, were necessary to strengthen the military justice system of the Confederacy. J.D. Peppers, ***supra*** note **82,** at **40.** Although the Confederate military tactical leadership was very able, the Union army **as** a whole was better disciplined, better equipped, and better organized by far than the Confederate forces. Id., at 37. In the geographic areas of active military operations, the civil courts, intended to supplement the work of the military courts, often were not functioning, and the high mobility required of the Confederate forces made it difficult to convene courts-martial. Moreover, when courts-martial were convened, they apparently were prone to be very lenient toward accused, which was displeasing to senior commanders. Id., at **38-40.**

The new military courts were permanent in the sense that they were required to be open for business continuously, not merely case by case. Id., at **41.** Jurisdiction of the new courts **as** to **persons** accused and **as** to punishments authorized apparently was similar to that of general courts-martial. The major difference was that jurisdiction extended not only to offenses recognized under military law, but also to all offenses defined as crimes by the laws of the Confederacy and of the various Confederate states, **as** well **as** certain common-law offenses committed outside the boundaries of the Confederacy. Id., at 42–43.

The old ***ad hoc*** courts-martial were not abolished by the act creating the new permanent courts, however, and the Confederate congress later had to define the boundaries between the courts' jurisdiction more precisely.

vision of cavalry in the field, and one for each State within a military department.[85] The legislative foundation also provided:

> Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the final decisions and sentences of said courts in convictions shall be subject to review, mitigation, and suspension, as now provided by the Rules and Articles of war in cases of courts-martial.[86]

With the conclusion of the war, the short-lived era of the permanent court-martial faded.

2. Post-Civil War Developments.

The next major contribution to the development of the court-martial occurred in the American Articles of War of 1874.[87] The original three courts (general, regimental, garrison) were expanded to include a "field officer" court:

> In time of war a field-officer may be detailed in every regiment, to try soldiers thereof for offenses not capital; and no soldier serving with his regiment, shall be tried by a regimental or garrison court-martial when a field-officer of his regiment may be so detailed.[88]

The authority to convene a general court-martial was further delineated. A general officer commanding an "army, a Territorial Division or a Department, or colonel commanding a separate Department," could

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This was done in the Act of Oct. 13, 1862, 2 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Series IV, at 1003–1004 (1880–1901); and also in the Act of May 1, 1863, 3 Journal of the Congress of the C.S.A. 1861–1865, at 417 (1905).

[84] Act of Feb. 13, 1864. Winthrop, *supra* note 2, at 1007.

[85] Act of Feb. 16, 1864, Winthrop, *supra* note 2, at 1007, and 3 Journal of the Congress of the C.S.A. 1861–1866, at 754 (1906).

[86] Section 5 of the original Act. See note 81, *supra*.
[87] 18 Stat. 228 (1874).
[88] Article 80.

appoint a general court.[89] In time of war, the commander of a division or of a separate brigade could likewise convene a general court.[90]

In addition to new and expanded jurisdictional bounds applicable to certain offenses in time of war,[91] procedural changes included a provision allowing for the appointment of a judge advocate to any court-martial,[92] and a provision allowing for continuances:

> A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often as may appear to be just: Provided, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.[93]

These 1874 changes marked to some extent an increased realization by Congress that due process considerations should apply. But the court-martial, at least to this point, was considered primarily as a function or

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[89] Article 72. However, that article also placed a restriction on the authority to appoint a general court:

> But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

[90] Article 73.

[91] Article 58 provided:

> In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed.

[92] Article 74. But the role of the counsel remains unchanged from that espoused in the 1806 Articles. See Article 90, See *also* note 67, *supra.*

[93] This provision originated with the Act of March 3, 1863, ch. 75, sec. 29. See Winthrop, *supm* note 2, at 239.

instrument of the executive department to be used in maintaining discipline in the armed forces. It was therefore not a "court", as that term is normally used. There seemed to be a general reluctance to expand the accused's rights liberally. A feeling prevailed, and still prevails, that discipline would suffer as a result of any such expansion. If the court-martial were viewed as a judicial body, this would certainly have raised the problem of implementation of burdensome procedural and substantive rules. The truth is that, viewed in their entirety over time, the regulations and general orders were slowly converting the court-martial into a proceeding convened and conducted with meticulous care, sensitive to the individual's rights as well as to the need for discipline. The statutory language looks barren but, in practice, the court-martial during this period seems to have been considered by observers to be a fair and just means of litigating guilt and assessing appropriate punishment."

A few statutory changes to court-martial practice between 1879 and 1900 are worthy of note. First, in 1890, Congress established the "summary" court-martial, which in time of peace was to replace the regimental or garrison court-martial in the trial of enlisted men for minor offenses.[95] Within twenty-four hours of arrest the individual was brought before a one-officer court which determined guilt and appropriate punishments. But this trial was a consent proceeding. The accused could object to trial by summary court and as a matter of right have his case heard by a higher level court-martial where greater due process protections were available.

Another important step was taken in 1895 when, by executive order, a table of maximum punishments was promulgated.[96] Specific maximum sentences were made applicable to each punitive article or offense. Other specific guidance was given for considering prior convictions, assessing punitive discharges, and determining equivalent punishments.

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[94] *See generally* Winthrop, *supra* note 2. *See also* Benet, A Treatise on Military Law and the Practice of Courts-Martial (1862); J. Regan, The Judge Advocate Recorder's Guide (1877). Both of these sources provide fascinating reading and insight into the court-martial practice of the late 1800's.

[95] Act of October 1, 1890. Reprinted in Winthrop, *supra* note 2 at 999. Traditionally, officers could be tried only by general court-martial.

[96] The Executive Order (by President Cleveland) was published as General Orders No. 16. *Reprinted in* Winthrop, *supra* note 2, at 1001.

C. THE PERIOD FROM 1900 TO THE PRESENT: A TIME OF RAPID CHANGE

If the nineteenth century was a time of relatively quiet changes in the American court-martial, the innovations marked by the twentieth century are by comparison revolutionary. Periods of drastic change occurred in 1916, 1920, 1948, 1951, and 1968.

Congress undertook a major revision of the Articles of War in 1916,[97] and for the fist time we see the three courts-martial which exist today: the general court-martial; the special court-martial, which replaced the regimental or garrison court; and the summary court,[98] which replaced the field officer's court which had been established in 1874.

The authority of a commander to convene a court was expanded. For example, a general court could be convened by the President and commanding officers down to the level of brigade commanders.[99] However, only commanding officers could convene special and summary courts.[100] Other important changes included:

1. Mandatory appointment of a judge advocate to general and special

2. The right of the accused to be represented by counsel at general and special courts;[102]

3. Explicit prohibition of compulsory self-incrimination; [103] and

4. Addition of a speedy trial provision, according to which the accused was to be tried within ten days,[104] and no person could be tried over

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[97] 39 Stat. L. 619 at 650–670 (1916).
[98] Article 3.
[99] Article 8.
[100] Articles 9, 10.
[101] Article 11.
[102] Article 17.
[103] Article 24.

[104] Article 70. The provision stated that the accused was to be served with a copy of the charges within eight days of his arrest, and tried within ten days thereafter, unless the necessities of the service prevented such. In that case, trial was required within 30 days after the expiration of the ten-day period. Compare this with present speedy trial rules. *See* note 134, *infra*.

objection (in peacetime) by a general court-martial within a period of five days subsequent to service of charges.[105]

The 1916 revisions did not wholly stand the testing fires of the global World War 1. Troops, officers and soldiers alike, returned with bitter complaints about military justice. In the heated debates which followed in the press, in the halls of Congress, and in the War Department,[106] the whole system was re-examined. As a result, in 1920 the Congress enacted a new set of 121 articles of war.[107] Key features included the following:

1. A general court-martial would consist of any number of officers not less than five.[108]

2. A trial judge advocate and defense counsel would be appointed for each general and special court-martial. (An accused could be represented by either a civilian counsel, reasonably available military counsel or appointed counsel).[109]

3. A general court-martial convening authority could send the case to a special court-martial if it was in the interest of the service to do so.[110]

4. A thorough pretrial investigation was to be conducted. The accused was to be given full opportunity for cross-examination and to present matters in defense or mitigation.[111]

5. A board of review, consisting of three officers assigned to the office of the judge advocate general, was tasked with reviewing courts-martial, subject to presidential confirmation.[112]

Notwithstanding these charges, which most agreed represented a fair effort to improve military due process, a troublesome aspect remained. A single commander could prefer charges, convene the court, select the members and counsel, and review the case.[113] The spectre of unlawful

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[105] *Id.*
[106] See generally, Ulmer, *supra* note 67, at 39 to 45; Ansell, *supra* note 60.

[107] 41 Stat. L. 787 (1920).
[108] Article 4.
[109] Articles 11, 17.
[110] Article 12.
[111] Article 70.
[112] Article 50.
[113] *See e.g.* Articles 70, 8, 11, 17, and 46.

command influence lingered. But in the quiet, peacetime years which followed the 1920 revision, this caused little concern. The citizen soldier returned to his work, the regular forces were involved in no major discipline problems, and the 1920 Articles of War seemed to function smoothly. With only minor amendments, these articles were those used by courts-martial during World War 11.

Again, the massive influx of citizens into the armed forces, the widely scattered courts-martial, inexperienced leaders, and many reported instances of military "injustice," greatly concerned Congress. Again, there were hearings and reports of advisory committees.[114] Again, there was a major revision, this time as an amendment to the Selective Service Act of 1948.[115] A number of changes, designed to rectify the growing complaints about the court-martial, were enacted.

For the first time, under the new provisions, the accused was entitled to be represented by counsel at all pretrial investigations.[116] To insure that at least one member of the general court-martial was familiar with the judicial process, a provision was inserted which required that a member of the judge advocate general's department or an officer who was a member of the federal bar, or the bar of the highest court of a state, certified by the judge advocate general, be appointed to all general courts-martial."[117] For the first time, enlisted men and warrant officers were authorized to serve as members of general and special courts-martial."[118]

But before the new act could cool, a move was under way to establish a code of military justice to apply to all the services, not just the Army.

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[114] A War Department Advisory Committee on Military Justice noted that under the system of military justice ". . . the innocent are almost never convicted and the guilty seldom acquitted." The committee, known as the Vanderbilt Committed, included in its membership, Chief Justice Arthur T. Vanderbilt (New Jersey), Judge Morris A. Soper of the United States Court of Appeals (4th Cir.), Justice Holtsoff (District of Columbia), and Judge Frederick Crane (New York). **See** Aycock and Wurfel, *supra* note **4,** at **14,** n. 78.

[115] 62 Stat. L. 604 at 627–644 (1948) (The "Elston Act").
[116] Article 46.
[117] Article 8.

[118] Article 4. The accused had to specifically request in writing, prior to the convening of the Court, that enlisted soldiers be appointed to the Court. The provision has been carried forward as a jurisdictional prerequisite in the present U.C.M.J. ***See*** note 133 ***infra*** and art. 25(c)(1), U.C.M.J.

Under the leadership of Professor Edmund M. Morgan, Jr.,[119] the "Uniform Code of Military Justice" was approved by Congress in 1950.[120] With some amendments, made in the Military Justice Act in 1968,[121] the U.C.M.J. is the current statutory template for military justice and the conduct of courts-martial.[122]

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[119] ***See generally,*** Morgan, ***The Background of the Uniform Code of Military Justice,*** **6** Vand. L. Rev. **169 (1953).** A biographical sketch of Professor Morgan appears at **28** Mil. L. Rev. **3 (1965).**

[120] **64** Stat. **108 (1950).**

[121] **82** Stat. **1335 (1968).** The provisions of the U.C.M.J. had been earlier codified at **10** U.S.C. **§ 801–940.** Thus, article **1** of the U.C.M.J. is **10** U.S.C. **§ 801 (1976);** article **140** is **10** U.S.C. § **940 (1976);** and so on. In military practice, provisions of the code are more commonly cited to the U.C.M.J. than to the United States Code. They are so cited hereafter in this article.

[122] It should be emphasized that the U.C.M.J. provides only a statutory framework. The Manual for Courts-Martial, United States **(1960)** provides a detailed guide for conducting courts-martial. Where, however, the procedural guidance of the Manual conflicts with provisions in the U.C.M.J., the former will fall. The President's authority to promulgate the Manual stems from article **36,** U.C.M.J. In United States, v. Ware, **1** M.J. **282, 285** n. **10** (1976), C.M.A. questioned the authority of the President to promulgate Manual rules of procedure. Recent legislation clarified the President's authority. Article **36** now reads.

> (a) Pretrial, trial, and post-trial procedures including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Amendments to Article **36** were passed as a part of the Defense Authorization Act, Pub. L. No. 96–107, 96th Cong., 1st Sess. (Nov. **1979).** In proposing this language, the Senate Armed Services Committee noted:

> The second Subsection of Section **801** amends Article **36** of the UCMJ to clarify the authority of the President to promulgate an authoritative manual of procedure for the military justice system covering not only trial procedures, but all pre- and post-trial procedures relating to an offense as well. This amendment is made necessary by a recent decision of the Court of Military Appeals. ***United States*** v. ***Ware,*** **1** M.J. **282**

(1976), where the view was expressed in dicta that the President's authority to promulgate the *Manual for Courts Martial* was restricted by the language of Article 36 to actual trial procedures only. The committee believes that this interpretation flies in the face of history; if adopted, it would severely threaten the integrity of the military justice system and undermine the authority of the President as Commander-in-Chief. The committee's amendment clarifies what it believes Congress has always intended by enacting Article 36 and its predecessors. While Congress retains the power to amend the UCMJ to alter the military justice system, it entrusts to the President the promulgation of regulations designed to implement the Code and operate the system. The committee made a technical amendment to the legislative proposal, printed below, to clarify the intent of the amendment.

See Senate Rep. 96–197, Defense Authorizations Act, 1980 (S. 428) at 123. In a Department of Defense recommendation for amendment to Article 36, Ms. Deanne C. Siemer. General Counsel, noted in pertinent part:

In a recent case, the United States Court of Military Appeals suggested that the phrase "cases before courts-martial" in Article 36 refers to those aspects of a case concerned only with the conduct of the trial and excluded, by inference, pretrial and post-trial procedures. *United States v. Ware*. 1 M.J. 282, 285 n. 10 (1976) (dicta); *United States v. Newcomb*, 5 M.J. 4, 10 (CMA 1978) (Fletcher, C.J., dissenting opinion). *See also United States* v. *Larneard*, 3 M.J. 76, 80, 83 (1977); *United States v. Heard*, 3 M.J. 14, 20 n. 12 (1977); *United States v. Hawkins*, 2 M.J. 23 (1976); *United States v. Washington*, 1 M.J. 473, 475 n. 6 (1976). *But see United States v. Newcomb*, 5 M.J. 4, 7 (CMA 1978) (Cook, J., concurring opinion).

This interpretation is wrong and has no basis, but the Court might attempt to impose that limitation by judicial decision. Because the government has no avenue of appeal from a decision by the Court of Military Appeals, this interpretation could not be dislodged, even though wrong, other than by legislation. The legislation proposal is necessary to prevent the disruption that would occur if the Court imposed that limitation by judicial decision.

The proposal neither changes nor expands the existing power under which the President promulgates the Manual for Courts-Martial. The language of the present Article 36 may be traced to Article 38 of the Articles of War of August 29, 1916, Chapter 418, § 1342, 39 Stat. 656, which provided:

> The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: Provided, that nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*. That all rules made in pursuance of this article shall be laid before Congress annually.

The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary, nor is it subject to direct federal judicial review.[123] But it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts.[124]

The present system is fair. It does provide ample due process for the military servicemember who is accused of a crime. In some points the court-martial provides greater safeguards than its civilian counterparts, and a brief survey of the U.C.M.J. and its current implementation bears this out.

Before preferring and swearing to charges, a company commander is tasked with conducting a thorough and impartial inquiry into the charged offenses.[125] This almost always involves obtaining legal advice from a judge advocate. Most commanders do not want to send a weak case to court. In an environment where law and lawyers are playing an increasingly vital role in military justice, few commanders are willing to run the risk of an acquitted servicemember returning to the unit and flaunting his "victory" over the command.

The current trend is to use administrative discharges and other remedies rather than a court-martial. But if a case goes to trial, the convening authority does select court members,[126] counsel[127] and the military

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This provision has remained virtually unchanged in pertinent part through successive amendments of the Articles of War and incorporation into Article 36 of the Uniform Code of Military Justice. It has provided the statutory authority for coverage of pretrial and post-trial procedures in every edition of the Manual for Courts-Martial issued by the President since 1928.

The fair and efficient operation of the military justice system is dependent upon the authoritative legal guidance provided to members of the armed forces by the Manual for Courts-Martial. Enactment of the proposed legislation will reaffirm the power exercised by the President for more than fifty years to prescribe a comprehensive and effective Manual for Courts-Martial.

Senate Rep. 96–197, *supra* at 124.

[123] Burns & Wilson, 346 U.S. 137 (1953); Hyatt v. Brown, 339 U.S. 103 (1950).
[124] *See* art. 76, U.C.M.J..
[125] Art. 30, U.C.M.J.
[126] Art. 25, U.C.M.J.
[127] Art. 27, U.C.M.J.

judge.[128] However, specific provisions within the U.C.M.J. prohibit attempts to control the proceedings.[129] At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court.[130]

The government must first establish that jurisdiction exists over the person,[131] and the subject matter,[132] and that the court is properly convened.[133]

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[128] Art. **26,** U.C.M.J. The "law officer" of the earlier Articles of War has been replaced by a military judge, certified by the Judge Advocate General of each service. The "president" of the court, for all practical purposes, is now the foreman of the jury. The accused may request trial before judge alone. Art. **16,** U.C.M.J.

[129] Arts. **37, 98,** U.C.M.J. The military judicial community is extremely sensitive to even the appearance of evil. The current military appellate courts will not hesitate to reverse a case if it appears that a superior commander has intentionally or unintentionally influenced the members of the court, the fact finders. ***See,*** *e.g.*, United States v. Howard, **23** C.M.A. **187, 48** C.M.R. **939 (1974);** United States v. Jackson, **3** M.J. **153 (1977).**

The role of the convening authority was in issue in Curry v. Secretary of the Army, **595 F.2d 873** (D.C. Cir. **1979).** The court reviewed the reports of the legislative hearings on the matter, and examined the statutory protections designed to check unlawful command influence. The court found justification to reject Curry's arguments. **595** F.2d at **880.** For an historical discussion of the commander's role, see West, ***A*** *History* of *Command Influence on the Military Judicial* ***System,*** **18** U.C.L.A. L. Rev. **1 (1970).**

[130] An exception of course would be the right to a preliminary grand jury proceeding. See note **73,** *supra.* At least one experienced civilian trial attorney prefers the court-martial over the existing civilian system. Speech by F. Lee Bailey reported in The Commercial Appeal (Memphis), March **29, 1979** at 34–C.

[131] *Art.* **2,** U.C.M.J.; Coleman v. Tennessee, **97** U.S. **509 (1897).**

[132] O'Callahan v. Parker, **395** U.S. **258 (1969).** Provisions describing offenses which may be tried by court-martial are listed as "punitive" articles in the U.C.M.J. Seearts. **77–134,** U.C.M.J.

[133] The court-martial is considered to be a "creature of statute." If proper statutory procedures are not followed in appointing the Court, the proceedings may be declared void *ab initio*. ***See*** *e.g.* United States v. White, **21** C.M.A. **583, 45** C.M.R. **351 (1972).** In that case, the accused failed to properly execute a written request for enlisted court-members who sat on his court. This was a violation of art. 25(c)(1), U.C.M.J.

The accused is entitled to a speedy trial[134] and carte blanche discovery rights. If the case is to be referred to a general court-martial, an intensive pretrial investigation is conducted. The accused is entitled to counsel (civilian, selected individual military counsel, or appointed counsel), to present a defense, and to cross-examine witnesses. A copy of the record of the proceedings is presented to the accused.[135]

One provision of particular note is the right to defense witnesses,[136]

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[134] Art. 10, U.C.M.J. provides in part:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and try him or to dismiss the charges and release him.

To put teeth into this provision, the United States Court of Military Appeals, in United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971), imposed a "90-day" speedy trial rule on the military. Whenever the accused's pretrial confinement exceeds 90 days, in the absence of a defense request for delays, the government bears a heavy burden of showing diligence in proceeding to trial. Failure to do so may result in dismissal of the charges. *See, e.g.*, United States v. Henderson, 1 M.J. 421 (C.M.A. 1976) (contract murder case dismissed). Local regulations may provide for even more stringent speedy trial provisions. For example, soldiers stationed in Europe have the benefit of a 45-day speedy trial mandate. USAREUR Supplement 2 to Army Regulation 27-10, Military Justice (1963).

[135] Art. 32, U.C.M.J. *See also* paragraph 34, Manual for Courts-Martial, United States (1969).

[136] Art. 46, U.C.M.J., provides:

> *Opportunity to obtain witnesses and other evidence.* The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

a procedure much more liberal than found in most civilian jurisdictions.[137] And maximum limitations on punishments are specified.[138]

The appellate review system is unique and usually outside the critic's gaze. If the accused is convicted and sentenced, the convening authority reviews the case. Before approving a court-martial conviction and sentence, he must be satisfied beyond a reasonable doubt that the findings are supported by the evidence.[139] If the case was tried before a general court-martial he may not act without first obtaining the written legal opinion of his judge advocate.[140]

Certain cases are automatically forwarded for appeal to the various courts of military review, where specialized appellate counsel, at no cost to the accused, review the record for errors and present written and oral arguments.[141] A case may be further appealed to the military's highest court, the United States Court of Military Appeals.[142]

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[137] See, *e.g.*, United States v. Daniels, 48 C.M.R. 666 (C.M.A. 1974). In that case, the charges were dismissed because of a material defense witness, the victim, was not produced. The line of cases supporting this rule obviously expands the sixth amendment right to present a defense to limits beyond those now reached by most state and federal decisions.

[138] See para. 127, Manual for Courts-Martial, United States (1969). Authority of the President to prescribe maximum punishments is found in *art.* 56, U.C.M.J.

[139] *Arts.* 60, 64, U.C.M.J.

[140] Art. 61, U.C.M.J. In all cases the accused is given a copy, without charge, of the transcript or record of proceedings of the court-martial. Art. 54, U.C.M.J.

[141] Art. 66, U.C.M.J. The various service courts of military review are composed of senior judge advocates who exercise fact-finding powers and may approve, or disapprove, wholly or in part, court-martial findings or sentences. Until the 1968 amendments, these courts were called "boards of military review."

[142] *Art.* 67. U.C.M.J. Although the United States Court of Military Appeals is the highest court in the military system of courts, it is not itself a military court, but a federal civilian court created by Congress under article I of the Constitution. *Id.*

Since its inception in 1951, the Court of Military Appeals, composed of three civilian judges, has played an expanding role in shaping the form and substance of courts-martial. Most recently, the court has acted in a manner not unlike the Supreme Court of the 1960's under Chief Justice Earl Warren. *See, e.g.*, Cooke, The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43 (1977).

One can readily see that throughout the entire process, lawyers are actively involved in either advising the commanders, representing the accused, reviewing records, or writing appellate opinions. On the whole, the changes in this century to the American court-martial system have kept pace with similar innovations in the civilian courts and as noted have often led the way for further changes.

V. CONCLUSION

So we finish where we began. Was the United States Court of Appeals for the District of Columbia correct when it decided, as noted in the introduction to this article, that Private Curry[143] was not deprived of due process when he was tried by a court-martial and that there is a sound justification for the present court-martial system? These two themes have run as a constant thread through the history of the court-martial.

Granted, that elusive and complex concept of due process today in no way compares with the minimal protections of due process recognized, for example, in the comparatively progressive military code of King Gustavus Adolphus. But the comparison should not be between what is now and what existed over three hundred years ago. Rather, the test should be directed toward comparing the contemporary civilian legal forums which have existed concurrently along with, or in competition with, the court-martial.

In all stages, the court-martial, more often than not, reflected the current view toward justice, civil and military. This point is borne out by the historical thread of struggle between the populace (parliament or Congress) and the monarch or the military itself. When the military courts stepped out of bounds or otherwise unduly infringed on individual rights, limitations, in the form of resolutions or enactments, curtailed the unwarranted excursions. Often these acts resulted in greater procedural protection for the accused soldier.[144]

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[143] Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979). See note 1, *supm*, and accompanying text.

[144] The revisions of the United States Articles of War of 1916, 1920, and 1948, and the Uniform Code of Military Justice are examples of congressional response to public reaction to injustices in the military justice system.

What of the justification for the court-martial with its unique procedural concerns? Few courts have rejected the need for a separate system of military justice. As evidenced by the Constitution itself, the system is separate, and most would agree that military discipline is necessary. History confirms this. But is a separate court, a military court, necessary to enforce that discipline? Consider the comments of Judge Tamm, writing of the military court in *Curry*, discussed above:

> We begin with the unassailable principal that the fundamental function of the armed forces is "to fight or be ready to fight wars." Toth v. Quarles, 350 U.S. 11, 17 (1955). Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.[145]

The court-martial presents a viable means of implementing military justice in a "practical, efficient, and flexible" manner. To ignore that fact is to ignore history.

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[145] 595 F.2d at 877.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review.* With volume *80,* the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review.*

Notes are set forth in Section V, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section III, Authors or Editors of Publications Noted, and in Section IV, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section V. For books having more than one principal author or editor, all authors and editors are listed in Section III.

In Section II, Publishers or Printers of Publications Noted, all firms or organizations are listed whose names are displayed on the cover or on or near the title page of a noted publication. Excluded from this list are institutional authors and editors who are listed in Section III. No distinction is made in Section II among copyright owners, licensees, distributers, or printers for hire.

The opinions and conclusions expressed in the notes in Section V are those of the editor of the *Military Law Review.* They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. PUBLISHERS OR PRINTERS OF PUBLICATIONS NOTED

Allen Smith Company, Indianapolis, Indiana (No. **26).**

Anchor Press/Doubleday & Company, Inc., Garden City, N.Y. (Nos. **5,** 6, and **7).**

Army, ***see*** U.S. Army.

Bobbs-Merrill Company and Michie Company, Charlottesville, Virginia (No. **14).**

Brassey's Publishers Ltd., London, United Kingdom (No. **17).**

Bureau of National Affairs, Inc., Washington, D.C. (Nos. **1, 2, 3, 4,** and **19).**

CBS, Inc., and Holt, Rinehart & Winston (Praeger Publishers), New York, N.Y. (Nos. **10** and **22).**

Crane, Russak & Co., Inc., New York, N.Y. (Nos. **17, 24,** and **25).**

Department of Defense, Washington, D.C. (No. 8).

Department of the Army, Washington, D.C. (Nos. 9 and 15).

Dolphin/Doubleday & Company, Inc., New York, N.Y. (No. **23).**

Doubleday & Company, Inc. (including Anchor Press and Dolphin), Garden City, N.Y. (Nos. 5, **6, 7, 21,** and **23).**

Facts on File, Inc., New York, N.Y. (Nos. **16** and **18).**

Government, ***see*** U.S. Government.

Holt, Rinehart & Winston/CBS, Inc. (Praeger Publishers), New York, N.Y. (Nos. **10** and **22).**

Lawyers Co-operative Publishing Company, Rochester, N.Y. (No. **28).**

Michie Company/Bobbs-Merrill Company, Inc., Charlottesville, Va. (No. **14).**

New Jersey Law Journal, Newark, N.J. (No. **31).**

Practicing Law Institute, New York, N.Y. (Nos. **20** and **29).**

Praeger Publishers, Div. of Holt, Rinehart & Winston/CBS, Inc., New York, N.Y. (Nos. **10** and **22).**

Seven *Arts* Press, Inc., Hollywood, California (Nos. **11, 12,** and **13).**

Stockholm International Peace Research Institute, Stockholm, Sweden **(No. 27).**

Taylor & Francis, Ltd., London, U.K. (No. **27).**

Toronto, University of, Press, Toronto, Ontario, Canada (No. **30).**

U.S. Army AG Publications Center, Baltimore, Maryland (No. **9).** *See also* Department of the Army; Department of Defense.

U.S. Government Printing Office, Washington, D.C. (Nos. 8 and **15).**

University of Toronto Press, Toronto, Ontario, Canada (No. **30).**

111. AUTHORS OR EDITORS OF' PUBLICATIONS NOTED

Aaron, Benjamin, Joseph R. Grodin, and James L. Stern, editors, *Public Sector Bargaining* (No. **1).**

Blake, George P., and Peter G. Nash, editors, *Appropriate Units for Collective Bargaining* (No. **20).**

Bureau of National Affairs, *Labor Relations Yearbook—1978* (No. **2).**

Bureau of National Affairs, and Sanford **M.** Morse, *Reporter Services and Their Use* (No. **3).**

Cappalli, Richard B., *Rights and Remedies Under Federal Grants* (No. **4**).

Coakley, Robert W., and John E. Jessup, Jr., *A Guide to the Study and Use of Military History* (No. **15).**

Conway, Mimi, *Rise Gonna Rise: A Portrait of Southern Textile Workers* (No. 5.).

Cottin, Lou, *Elders in Rebellion; A Guide to Senior Activism* (No. 6).

Crowe, Kenneth C., *America for Sale* (No. 7).

Department of Defense, *Selling to the Military: Army, Navy, Air Force, Defense Logistics Agency* (No. 8).

Department of the Army, *Pamphlet No. 690–11, Guide to Civilian Personnel Management* for *Key Military Personnel* (No. 9).

Dougherty, James E., Paul H. Nitze, and Francis X. Kane, *Fateful Ends and Shades of SALT: Past . . . Present . . . and Yet to Come?* (No. 24).

Grodin, Joseph R., Benjamin Aaron, and James L. Stern, editors, *Public Sector Bargaining* (No. 1).

Harkavy, Robert E., and Stephanie G. Neuman, editors, *Arms Transfers in the Modern World* (No. 22).

Hope, Richard O., *Racial Strife in the U.S. Military: Toward the Elimination of Discrimination* (No. 10).

Hurst, Walter E., and Sharon Marshall, editors, *Copyright Registration Forms P A & S R* (No. 11).

Hurst, Walter E., and Don Rico, *How to be a Music Publisher* (No. 12).

Hurst, Walter E., and Sharon Marshall, editors, *The Record Industry Book* (No. 13).

Jacobs, James J., *Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools, and Military* (No. 14).

Jessup, John E., Jr., and Robert W. Coakley, editors, *A Guide to the Study and Use of Military History* (No. 15).

Judge, Clark S., *The Book of American Rankings* (No. 16).

Kane, Francis X., Paul H. Nitze, and James E. Dougherty, *Fateful Ends and Shades of SALT: Past . . . Present. . . and Yet to Come?* (No. 24).

Klepsch, Egon, *Future Arms Procurement: USA-Europe Arms Procurement (The Klepsch Report)* (No. **17).**

Kramer, Nancy, and Stephen Newman, *Getting What You Deserve: A Handbook* for *the Assertive Consumer* (No. **23).**

Kurian, George T., *The Book of World Rankings* (No. 18).

Latman, Alan, *The Copyright Law: Howell's Copyright Law Revised and the 1976 Act* (No. 19).

Marshall, Sharon, and Walter E. Hurst, editors, *Copyright Registration Forms P A & SR* (No. **11).**

Marshall, Sharon, and Walter E. Hurst, editors, *The Record Industry Book* (No. **13).**

Morse, Sanford M., and Bureau of National Affairs, *Reporter Services and Their Use* (No. **3).**

Nash, Peter G., and George P. Blake, editors, *Appropriate Units for Collective Bargaining* (No. **20).**

Nathanson, Bernard N., with Richard N. Ostling, *Aborting America* (No. **21).**

Neuman, Stephanie G., and Robert E. Harkavy, editors, *Arms Transfers in the Modern World* (No. **22).**

Newman, Stephen, and Nancy Kramer, *Getting What You Deserve: A Handbook for the Assertive Consumer* (No. **23).**

Nitze, Paul H., James E. Dougherty, and Francis X. Kane, *Fateful Ends and Shades of SALT: Past . . . Present. . . and Yet to Come?* (No. **24).**

Ostling, Richard N., and Bernard N. Nathanson, *Aborting America* (No. **21).**

Rico, Don, and Walter E. Hurst, *How to be a Music Publisher* (No. 12).

Royal United Services Institute for Defence Studies, *Ten Years of Terrorism: Collected Views* (No. 25).

Scalf, Robert A., editor, Volume 28, *Defense Law Journal* (No. 26).

Stern, James L., Benjamin Aaron, and Joseph R. Grodin, editors, *Public Sector Bargaining* (No. 1).

Stockholm International Peace Research Institute, *Nuclear Energy and Nuclear Weapon Proliferation* (No. 27).

Torcia, Charles E., *Wharton's Criminal Law,* 14th Edition, Volumes 1 & 2 (No. *28).*

Werner, Raymond J., *Real Estate Closings* (No. 29).

Willoughby, William R., *The Joint Organizations of Canada and the United States* (No. 30).

Zeichner, Irving B., editor, 1980 *Law Enforcement Reference Manual and Police Official Diary* (No. 31).

IV. TITLES NOTED

Aborting America, *by Bernard N. Nathanson with Richard N. Ostling* (No. 21).

America for Sale, *by Kenneth* C. *Crowe* (No. 7).

Appropriate Units for Collective Bargaining, *edited by Peter G. Nash and George P. Blake* (No. 20).

Arms Transfers in the Modern World, *edited by Stephanie G. Neuman and Robert E. Harkavy* (No. 22).

Book of American Rankings, *by Clark* S. *Judge* (No. 16).

Book of World Rankings, *by George T. Kurian* (No. 18).

Copyright Law: Howell's Copyright Law Revised and the 1976 Act, *by Alan Latmun* (No. 19).

Copyright Registration Forms PA & SR, *edited by Walter E. Hurst and Sharon Marshall* (No. 11).

Defense Law Journal, Volume 28, *edited by Robert* **A.** *Scalf* (No. 26).

Edlers in Rebellion: A Guide to Senior Activism, *by Lou Cottin* (No. 6).

Fateful Ends and Shades of SALT: Past . . . Present . . . and Yet to Come? *by Paul H. Nitxe, James E. Dougherty, and Francis X. Kane* (No. 24).

Future Arms Procurement: USA-Europe *Arms* Procurement (The Klepsch Report), *by Egon Klepsch* (No. 17).

Getting What You Deserve: A Handbook for the Assertive Consumer, *by Stephen Newman and Nancy Kramer* (No. 23).

Guide to the Study and Use of Military History, *edited by John E. Jessup, Jr., and Roberet W. Coakley* (No. 15).

How to be a Music Publisher, *by Walter E. Hurst and Don Rico* (No. 12).

Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools, and Military, *by James J. Jacobs* (No. 14).

Joint Organizatins of Canada and the United States, *by William R. Willoughby* (No. 30).

Labor Relations Yearbook—1978, *by Bureau* of *National Affairs* (No. 2).

Law Enforcement Reference Manual and Police Official Diary, 1980, *edited by Irving B. Zeichner* (No. 31).

Nuclear Energy and Nuclear Weapon Proliferation, *by Stockholm International Peace Research Institute* (No. 27).

Pamphlet No. 690–11, Guide to Civilian Personnel Management for Key Military Personnel, *by Department of the Army* (No. 9).

Public-Sector Bargaining, *edited by Benjamin Aaron, Joseph R. Grodin, and James L. Stern* (No. 1).

Racial Strife in the U.S. Military: Toward the Elimination of Discrimination, *by Richard O. Hope* (No. 10).

Real Estate Closings, *by Raymond J. Werner* (No. 29).

Record Industry Book, *edited by Walter E. Hurst and Sharon Marshall* (No. 13).

Reporter Services and Their Use, *by Bureau of National Affairs and Sanford M. Morse* (No. 3).

Rights and Remedies Under Federal Grants, *by Richard B. Cappalli* (No. 4).

Rise Gonna Rise: A Portrait of Southern Textile Workers, *by Mimi Conway* (No. *5).*

Selling to the Military: Army, Navy, Air Force, Defense Logistics Agency, *by Department of Defense* (No. 8).

Ten Years of Terrorism: Collected Views, *by Royal United Services Institute for Defence Studies* (No. 25).

Wharton's Criminal Law, 14th Edition, Volumes 1 & 2, *by Charles E. Torcia* (No. 28).

V. PUBLICATION NOTES

1. Aaron, Benjamin, Joseph R. Grodin, and James L. Stern, editors, *Public-Sector Bargaining*. Washington, D. C.: Bureau of National Affairs, Inc., 1979. Pp. vii, 327, Price: $12.50.

This book, a collection of nine essays on various aspects of collective bargaining between government agencies and government employee unions, is one of a series of studies sponsored by an organization called the Industrial Relations Research Association. The purposes of this book

may be described as historical in nature: to sum up the issues, past developments and future trends affecting public-sector collective bargaining.

The nine essays, written by nine different authors (including the three editors), are organized as numbered chapters. The first three chapters are introductory in nature, providing an overview of the subject. The first one, "The Extent of Collective Bargaining in the Public Sector," was written by John F. Burton, Jr., associated with the University of Chicago and Cornell University. Chapter 2, "Unionism in the Public Sector," was prepared by Editor James L. Stern. "Management Organization for Collective Bargaining in the Public Sector" was written by Milton Derber, associated with the University of Illinois at Urbana-Champaign.

The next two chapters also form a loose group, dealing with specific aspects of public-sector bargaining. Chapter 4, "The Impact of Collective Bargaining on Compensation in the Public Sector," was written by Daniel J. B. Mitchell of the University of California at Los Angeles and the Brookings Institution, Washington, D. C. "Dynamics of Dispute Resolution in the Public Sector" was prepared by Thomas A. Kochan of Cornell University.

Chapters 6 and 7 concern the responses of branches of government other than the executive branch to public-sector collective bargaining. "Public-Sector Labor Legislation — An Evolutionary Analysis" was written by B.V.H. Schneider of the University of California at Berkeley. "Judicial Response to Public-Sector Arbitration" has been prepared by Editor Joseph R. Grodin.

The eighth chapter, "Public-Sector Labor Relations in Canada," was prepared by Shirley B. Goldenberg of McGill University. The final chapter, "Future of Collective Bargaining in the Public Sector," by Editor Benjamin Aaron, is the book's conclusion.

For the use of readers, the book offers a preface, a table of contents, and a subject matter index. Footnotes are numbered consecutively within each chapter separately, and they appear at the bottoms of the pages to which they pertain.

Benjamin Aaron is a professor at the School of Law of the University of California at Los Angeles. Joseph R. Grodin is a professor at the Hastings College of Law of the University of California, San Francisco, California. James L. Stern is associated with the University of Wisconsin.

2. Bureau of National Affairs, *Labor Relations Yearbook—1978*. Washington, D.C.: Bureau of National Affairs, Inc., 1979. Pp. xi, 544. Cost: $16.00.

This volume provides a record of developments in labor-management relations during calendar year 1978. The fourteenth in a series of annual volumes, it describes or summarizes major contract settlements and their implications; conferences, studies, and meetings concerning all aspects of labor-management relations; and activities of various agencies of the federal government affecting labor-management relations.

The book is organized in three parts. Part I, filling about two thirds of the book, is divided into six unnumbered subparts. One of them is the short foreword. This is followed by "News Developments in Labor Relations," a chronology of major events reported in the news media during 1978.

The third subpart of Part I, "Collective Bargaining and Industrial Practices," opens with a state-by-state list of major contract settlements effected during the year. This is followed by sections on general bargaining information, employee fringe benefits, problems and techniques of bargaining, and trends and documents concerning employment and unemployment.

The fourth subpart of Section I, on labor relations conferences and studies, is the largest section of the book, filling almost two hundred pages. A significant portion of this subpart is devoted to reprints or summaries of lectures, panel discussions, and the like sponsored by the American Bar Association's Section of Labor Relations Law. Shorter portions set forth the proceedings of the Federal Bar Association, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, and the Association of Labor Mediation Agencies. A further portion describes eleven university-sponsored meetings. The fourth subpart concludes with a final, miscellaneous portion dealing with all other meetings and studies.

The fifth subpart, like the fourth, contains reports of conferences, meetings, and conventions. This subpart, however, focuses on such activities conducted by unions. The AFL-CIO, United Steelworkers, United Autoworkers, and other unions are represented. This subpart concludes with a short section describing various reports concerning the progress of and events affecting unionization efforts and prospects.

The sixth and last subpart is entitled, "Federal Government in Labor Relations." Most of this is devoted to activities and reports of the National Labor Relations Board. Statistics compiled by the NLRB are set forth, and memoranda of the general counsel of the NLRB are reprinted. Other portions of the sixth subpart are devoted to developments in implementation of the Equal Employment Opportunity program. Government's role in labor negotiation is the subject of a few pages. A variety of Labor Department activities, including General Accounting Office reports thereon, are described at the end of the subpart.

Part 11, Selected Analyses, consists of reprints of eighteen analyses of cases and other developments published during the year 1978 as parts or numbers of the BNA Labor Relations Reporter. Analyzed are decisions of the NLRB and the federal courts and also new regulations and other administrative developments affecting labor-management relations. Each analysis consists of a description of the new development analyzed, the background of the development, and its significance.

Part 111, Tables of Economic Data, consists of twenty-seven statistical tables, charts, and lists, with explanatory notes. These tables cover a wide range of subjects, such as contract expirations due in 1979, deferred wage-increases, an employment cost index, labor turnover rates, selected unemployment rates, hours of work and earnings, family budgets, the gross national product, and consumer and producer prices.

For the use of the reader, the book offers a foreword, a table of contents, a detailed topical index, and a table of cases cited.

The Bureau of National Affairs, Inc., is a private-sector commercial publisher of legal periodicals and reporters. As BNA expresses it, the major concerns of the organization are "reporting, analyzing, and explaining the activities of the federal government to those who are materially affected by the laws, decisions, policies, and orders that flow from government each day." Located in Washington, D. C., it began business in 1929 with the publication of the *United States Patent Quarterly*. In 1933, *the United States Law Week* began publication. Dozens of other specialized reports and services have been added to the list of BNA publications since then. In recent years, reporters of developments in environmental and consumer law and other new areas have been issued.

3. Bureau of National Affairs, and Sanford M. Morse, *Reporter Services*

and Their Use. Washington, D.C.: Bureau of National Affairs, Inc., 1979. Pp. 161. Price: $5.00. Paperback.

This book is designed primarily for use by law students. It explains the use of commercially published legal reporter services as a means of obtaining updated information on new developments, particularly in the area of administrative law. Research methods are explained, with examples, and numerous specific reporter services are described. Not surprisingly, most of the examples presented and services described are BNA publications. The book is thus an advertising medium for one publishing firm. But brief mention is made of some publications of other firms and organizations as well.

The book is organized in seven chapters, or parts, designated by roman numerals. The first part, "Student Use of Reporter Services," explains what are reporter services in terms of their organization and contents. Indices, finding aids, forms of citation, and other topics are also discussed in this part. Part 11, "Methods of Research," illustrates legal research by use of two BNA publications, the Labor Relations Reporter, and United States Law Week. Sample pages from these publications are displayed, with notes pointing out special features.

Part III lists and describes, with illustrations, fourteen services or reporters published by BNA. The fourth part mentions briefly several dozen other BNA publications concerning the specialized aspects of economic, labor, environmental, and safety regulation. Part V lists the various reporter services under sixty different headings approximating law school course names. The sixth part is largely a history of BNA's publishing efforts, and part VII is the subject matter index.

For the convenience of the user, the book offers a table of contents, a preface, and an introduction. The table of contents is fairly detailed, presenting an outline of the contents, but it offers very few page numbers, which limits its usefulness. The subject matter index is quite detailed, and includes references to BNA's rival publishers.

Sanford M. Morse, author of the book's preface, is a BNA employee, with the title "associate counsel editorial." He is apparently the author or compiler of the book. For a description of BNA itself, the reader should see the last paragraph of the note describing BNA's *Labor Relations Yearbook—1978*, above.

4. Cappalli, Richard B., *Rights and Remedies Under Federal Grants.* Washington, D. *C.:* Bureau of National Affairs, Inc., 1979. Pp. xiv, **400.** Price: $25.00.

The United States Government carries out many of its programs through grants of money to state and local governments and to other organizations, public and private. The administration of these grants is carried out by many federal agencies, acting in accordance with often complex statutes. The process of administration has been accompanied by the issuance of agency regulations and administrative decisions and occasionally by court decisions. This book pulls together some of this material, the relatively new and steadily growing law of federal grants.

This is not a casebook, but a treatise. It is organized in sixteen numbered chapters. Roughly the first half of the book describes what grants are and how they are administered. The second half focuses on the rights of grantees, applicants for federal funds, and others concerned with grant procedure and management.

The first chapter, an introduction, is followed by chapters on "The Theory and Structure of Grants," "Agency Enforcement of Grant Conditions," and "Expanding Bases of Judicial Intervention." Chapter **5** is entitled, "Legal and Practical Limits on the Judicial Role," and chapter **6,** "The Federal Grant: A Unique Legal Creation." These are the descriptive chapters.

The rest of the book emphasizes rights of grantees and others who receive or would like to receive federal funds. Chapter **7,** "Due Process and Federal Grants," is followed by chapters on "The Right of States to **Fair** Process," "Grantee Hearing Rights: Withholding of Entitlements," and "Terminations of Competitive Grants." The book proceeds with chapter **11,** "Grant Suspensions," and the twelfth chapter, "Rights of Applicants for Federal Funds." These are followed by a chapter on subgrantees, and another discussing various types of unlawful discrimination, and special problems affecting holders of fellowships.

The final two chapters are the book's conclusion. Chapter **15,** "Guideposts for Reform," discusses proposals for a grantee "bill of procedural rights," and a grant disputes board. Chapter **16,** "No Man's Land," is a prediction of more litigation in the future.

The book offers a table of contents, and a list of abbreviations for the

names of various federal agencies and programs. At the back of the book are a bibliography and tables of statutes, federal regulations, and cases cited. The book closes with a subject matter index.

The author, Richard B. Cappalli, is a professor of law at the Temple University School of Law, Philadelphia, Pennsylvania. For a description of the publisher, BNA, the reader should see the last paragraph of the note describing BNA's ***Labor Relations Yearbook—1978***, above.

5. Conway, Mimi, ***Rise Gonna Rise: A Portrait of Southern Textile Workers***, Garden City, New York: Anchor Press/Doubleday & Co., Inc., **1979.** Pp. **ix, 228.** Cost: **$5.95.** Paperback.

This book tells of the efforts of textile workers to unionize the J. P. Stevens cotton mills at Roanoke Rapids, North Carolina, and of the working conditions and company policies which made unionization necessary. The story is told from the point of view of the workers themselves, through interviews and descriptions. There is considerable discussion of the disease known as brown lung, and of other health and economic problems of the workers.

The book is organized in eight numbered parts and twenty unnumbered chapters. Groups of photographs of the workers and other subjects are scattered throughout the book. For readers' convenience, the book has a table of contents, a list of the photographs, and a subject-matter index.

The author, Mimi Conway, is an investigative reporter who has published articles on the southern textile industry and workers' health problem in the Washington Post, the New York Times, and other periodicals. Earl Dotter, a photojournalist specializing in labor topics, provided the photographs used in the book.

6. Cottin, Lou, *Elders **in Rebellion: A Guide** to **Senior Activism.*** Garden City, New York: Anchor Press/Doubleday, **1979.** Pp. xv, **224.** Price: **$8.95.**

In this book, the author describes the problems that face elderly people in our society, in regard to health care, housing, employment, and the like. He sets forth information on legal rights, programs, and organizations that pertain to or deal with these problems. Finally, the author sets forth proposals for reforms and political action for the benefit of the elderly.

The book is organized in twenty-two chapters. It opens with a preface by Congressman Claude Pepper, chairman of the House Select Committee on Aging, followed by the author's introduction. The book is written in an informal, conversational style, urging the elderly to make themselves heard on the issues of importance to them.

The first three chapters are introductory, providing an overview of problems of poor image, declining status, and uncertain health that are the lot of elderly and retired people generally. Other chapters deal with the deficiencies of government programs for the elderly, housing, retirement, employment opportunities, volunteer activities, and other topics. Two chapters discuss public and private institutional homes for the elderly, and three are devoted to health care at home. Other chapters cover problems of the handicapped, and crimes against elderly persons. Chapters on problems of minority status, and the pitfalls of mobile homes, complete the book. Scattered throughout the book are autobiographical chapters. These provide glimpses of the author's developing thoughts, inspired in part by conversations with his wife as he was writing the book.

Before his retirement, the author, Lou Cottin, was a freelance journalist specializing in the uses of computers in business. More recently he has become a columnist, writing for *Newsday* and, through syndication, for **475** newspapers throughout the country.

7. Crowe, Kenneth C., ***America for Sale.*** Garden City, New York: Anchor Press/Doubleday & Co., Inc., 1980. Pp. xi, **297.** Price: **$5.95.** Paperback.

In this book, the author outlines the manner and extent to which European and Arab financiers, both governmental and private, are buying American corporations. At the end of 1976, foreign ownership of United States business assets totalled $480 billion. While the proportion of foreign to American ownership of American firms is not large, it is concentrated in certain key industries, such as banking and oil.

In addition, foreign investment is continually growing. In the case of some Arab countries, the United States is a logical place to put excess money to work. Western European businessmen find America an attractive place to invest because their own governments are pursuing increasingly socialistic policies.

The author definitely considers this flow of foreign investment to be

a threat to the national sovereignty of the United States. He describes the tentative efforts of the government to collect data on foreign investment, and the lack of any change in the open-door policy of the past. The author urges that this is a mistake; that "the United States must formulate an economic equivalent of the Monroe Doctrine" (p. 271). Under such a policy, foreign governments would be clearly prohibited from acquiring controlling interests (defined as 10 percent or more) in American corporations. The present information gathering efforts would be consolidated in the Commerce Department, together with new functions of "continuous monitoring, analysis, and disclosure of the impact of all foreign investments, private and government, on the nation's economy."

The book is organized in four parts and nineteen chapters. Part I consists of one chapter, "Is America for Sale?" (Mr. Crowe's answer is, "yes.") The second part contains nine chapters on Arab investment, banking manuvers, public relations efforts, and the like. This section is partly outdated, as it mentions the Shah of Iran as still being in power; an anachronism explained by the fact that this paperback edition is an unrevised reprint of a hard cover edition published in 1978.

Part III offers seven chapters on a mixture of subjects, such as Japanese ownership of property in Hawaii and Australian ownership of newspapers and magazines in New York. The investment activities of the various Western European countries are discussed here also. There is a historical chapter, "The Patron Saint of Foreign," on Alexander Hamilton, first Secretary of the Treasury, who welcomed foreign investment in the United States.

The final part contains two concluding chapters. The first of these, "The Ugly Canadian," describes the rebellion of Canada against extensive American investment, and the formation by the Canadian government of the Canada Development Corporation to buy back Canadian assets owned by Americans. The second chapter explains that Canada presents an example of what America can expect to face if steps are not taken to regulate foreign investment now.

The author, Kenneth C. Crowe, is a Pulitzer-prize winning journalist. He is employed by *Newsday* magazine, and spent two years studying foreign investment on an Alicia Patterson Foundation fellowship.

8. Department of Defense, ***Selling to the Military: Army, Navy, Air Force, Defense Logistics Agency.*** Washington, D. C.: U.S. Government Printing Office, 1979. Pp. 109. Paperback.

This government pamphlet explains to would-be government contractors the mechanics of doing business with the Department of Defense and its subordinate agencies. Its emphasis is on providing the type of information needed by a small firm that has not previously done business with the government: what types of things the various defense agencies buy, where to go to obtain information about specific procurements, and what are some of the major features of government procurement that differ markedly from private-sector purchasing.

The booklet, with pages measuring 8 by 10½ inches, is organized in eight parts. Part I, "How To Get Started," tells briefly about bidders' mailing lists, sources of information concerning proposed procurements, special provisions for socially and economically disadvantaged small business firms, and certain special procurements, such as audio-visual products, computer systems, and commissary supplies.

Part 11, "Major Buying Offices," is perhaps the heart of the book. This part is simply a list, filling more than forty pages, of all the Army, Navy, Air Force, and DLA purchasing offices, with descriptions of the goods for which they have purchasing responsibility.

Part 111, "Coordinated Procurement Commodity Assignments," sets forth a list of common items which are purchased by specified agencies for use by all agencies. Part IV, "Research and Development," is a catalogue of addresses of the research and development activities of the various services and agencies, with descriptions of areas of interest.

The last four parts are all short. They deal with government specifications, buying government property, military exchanges, and field offices of the Small Business Administration.

For the convenience of the reader, there are a table of contents, and, at the end, a table of acronyms and abbreviations.

9. Department of the Army, *Pamphlet No. 690–11, Guide to Civilian Personnel Management for Keg Military Personnel.* Baltimore, Maryland: U.S. Army AG Publications Center, 1979. Pp. iii, 20.

This government publication describes the "major features of civilian personnel management in the Department of the Army" (p. i). It is intended for use by newly assigned commanders and other military managers who supervise civilian employees. The pamphlet is designed as a

convenient first source of general information. The pamphlet applies to the Active Army and the Army Reserve, but not to the Army National Guard.

The pamphlet is organized in five chapters. The first two chapters, "The Civilian in the Army," and "Structure of Civilian Personnel Management," are introductory. Chapter 3, "Organization and Functions of the Civilian Personnel Office," is the largest chapter. The booklet closes with "Personnel Management and the Supervisor," and "Nonappropriated Funds Personnel Management."

For the convenience of users, the booklet offers an explanatory foreword and a table of contents. Pages and paragraphs are numbered consecutively within chapters.

The pamphlet was prepared by personnel of the Directorate of Civilian Personnel within the Office of the Deputy Chief of Staff for Personnel, at the Pentagon.

10. Hope, Richard O., *Racial Strife in the U.S. Military: Toward the Elimination of Discrimination.* New York, N.Y.: Praeger Publishers, Div. of Holt, Rinehart & Winston/CBS, Inc., 1979. Pp. xiii, 130.

This book discusses the establishment, organization, and early operation of the Defense Race Relations Institute. The overall purpose of the Institute "is to change behavior through education" (p. 4). To this end, the Institute, located at Patrick Air Force Base, Florida, trains race relations instructors, develops and disseminates to the field educational materials on race relations, conducts research on race relations, evaluates the effectiveness of command race relations programs, and carries out other similar tasks. The technique used by the Institute in training its instructors, and used by those instructors in the field, is small group discussion.

The author, a professional sociologist, was one of the original organizers of the Institute within the Department of Defense, and was on the Institute's staff from 1971 to 1974. He evaluates the Institute and its efforts favorably, and regards it as a model for affirmative action by organizations other than the military services.

The book is organized in seven chapters. The introductory chapter is followed by a chapter entitled, "Blacks in Military History and Racial

Unrest." This provides a brief account of the performance of blacks in the various wars of the United States, and their treatment, good and bad. A picture of frequently oscillating public policies toward blacks is drawn: Blacks were wanted in the military services during wartime, and not welcomed after the wars were over. An account is given of award policies, major racial incidents, investigations of racial unrest, and other matters.

Chapters 3, 4, and 5 review the origins of the Institute during the Vietnam war, its formal establishment in September of 1971, early problems of lack of acceptance of the Institute and its graduates and programs by commanders and other military personnel in the field, the gradual broadening of the Institute's area of interest from black-white problems to other social problems, and the shift away from a confrontation style to one emphasizing cooperation and support. An important part of the Institute's work, described in chapter 5, is evaluation of its own work, the performance of its graduates in the field, and the effectiveness of race relations programs in changing attitudes. The author directed this evaluation effort during his years with the Institute.

Chapter 6, "The Problems of a Change Agent," reviews role conflicts, pressures from various sectors of the military population, and methods of resolving role conflicts. The final chapter, "Toward a Theory of Human Relations Training," presents the author's overall conclusions about the implications of efforts, such as that of the Institute, to change group attitudes.

For the convenience of readers, the book offers a preface, a detailed table of contents, a list of the statistical tables used in the book, and an appendix containing four of these tables. A fairly lengthy bibliography and a short subject-matter index are also provided. Eight statistical tables are presented in all. Footnotes are grouped at the ends of the chapters, and are numbered consecutively within each chapter separately.

The author, Dr. Richard O. Hope, has been with Morgan State University, Baltimore, Maryland, since 1974, where he is currently a professor of sociology. As noted above, he was with the Institute from 1971 to 1974, serving as its fist Director of Research and Evaluation. He has done research and has written various publications on race relations programs in the military services.

11. Hurst, Walter E., and Sharon Marshall, editors, *Copyright Registration Forms PA & SR.* Hollywood, California: Seven Arts Press, Inc., 1979. PP. xviii, 73. Price: $15.00 (hardcover); $10.00 (softcover).

When the average attorney thinks of copyright, he probably thinks in terms of books and articles. However, a number of other things can be copyrighted, including works of the performing arts and sound recordings. This book sets forth the mechanical procedures to be followed in registering works of these types. This is a practical, how-to-do it manual. It is not a legal treatise, although it touches upon copyright law at many points. Nor is it a scholarly or reflective work. It is directed to both lawyers and authors who may not be familiarwith registration procedures under the Copyright Act of 1976.

The phrase '(work of the performing arts" is somewhat broader in application under the 1976 law than it was under the Copyright Act of 1909 and its amendments. At present it includes music, lyrics, choreography, pantomime, motion pictures, and other audiovisual works. "Sound recordings" are works resulting from the fixing of a series of sounds on some medium from which they can be played back. This concept includes phonograph records, tapes, and the like, but not the audio portion of a film. The two forms PA and SR used for registering these works are issued by the Copyright Office (now Copyright and Trademark Office).

The book is organized in ten chapters. Most of the text consists of reproductions of pages from the Copyright Act of 1976, the instruction pages pertaining to the forms, copyright regulations, and sample copies of the forms themselves, both blank and filled in. These reproductions are linked together by explanatory notes and supplemental instructions provided by the editors.

For use of readers, the book offers an explanatory foreword by Sharon Marshall, a table of contents, an introduction in the form of a set of questions and answers, definitions taken from the statute, and a set of instructions for form PA used by the editors in a seminar. The book closes with a subject-matter index and reproductions of various book reviews favorable to this book.

The primary author, Walter E. Hurst, is an attorney in Hollywood, California, specializing in the law of the entertainment industry. His organization, Seven Arts Press, Inc., publishes a number of other book-

lets on various aspects of the music, record, film, and television industries.

12. Hurst, Walter E., and Don Rico, *How to be a Music Publisher* (2d ed.). Hollywood, California: Seven Arts Press, Inc., 1979. Pp. vi, 74. Price: $15.00 (hardcover); $10.00 (paperback).

This book is a practical manual describing the mechanics of obtaining the performance and reproduction rights to songs, and of exploiting those rights for profit. It is a how-to-do-it manual, directed at songwriters, and at businessmen or would-be businessmen in the music industry. It is not a legal treatise or a work of scholarship and reflection.

The book is organized in thirty-three chapters, most of them one or two pages in length. There are chapters discussing financial needs of music publishers, contacts, the various organizations such as ASCAP which license radio stations to perform music, record-keeping on songwriters, tax considerations, the alphanumeric system for classification of recordings, the mechanics of obtaining copyright coverage for a song, and a host of other administrative and clerical tasks inherent in the business of publishing music.

The text is written in a chatty, informal style apparently intended for fast reading. There are sample forms, letters, and business records. No footnotes are used. Toward the close of the book there are ten pages of cartoon-type drawings describing the music industry from the perspective of a music publisher. These drawings are the contribution of co-author Don Rico to the book.

For the convenience of readers, the book offers a preface, "Invitation to Readers," and a table of contents and subject-matter index, The book closes with reproductions of reviews favorable to the book.

The primary author, Walter E. Hurst, is an attorney specializing in the law of the entertainment industry, in Hollywood, California. He has sometimes used the pseudonym 'William Storm Hale" on his publications. His publishing organization, Seven Arts Press, Inc., offers a series of sixteen books or pamphlets describing various aspects of the music, recording, film, and television industries.

13. Hurst, Walter E., and Sharon Marshall, *The Record Industry Book* (7th ed.). Hollywood, California: Seven Arts Press, Inc., 1979. Pp. 101. Price: $15.00 (hardcover); $10.00 (paperback).

This small book provides practical suggestions on how to enter and succeed in the business of producing and selling phonograph records of popular music. It is not a legal treatise, nor a scholarly work on business practices. The style is informal and chatty, and the text carries the reader along from idea to idea at the pace of a machine gun. The book is directed to the novice in the record business; it raises questions and presents choices, without resolving them.

The book is organized in seventy-eight chapters, mostly one page or less in length, on every conceivable aspect of the record industry. Covered are topics such as "The Songwriter," "Record Companies," "Pressing Plant," "Advertising," "Merchandizing," "Booking Agents," "Pre-Recorded Tape," "Minimum Recording Obligation," "The Group Name," "Tour Planning," "The Tax Bites," and many others.

Chapter 39 discusses the armed forces in two-thirds of a page. The possibilities of selling records through post exchanges are outlined in a few short paragraphs. Mention is made of the desirability of having records performed on armed forces radio networks. The chapter closes with the observation, "Service personnel are good spenders for albums and records."

The book offers a short introduction by Sharon Marshall, identified as the editor. There are a table of contents and an index. Reviews and a letter praising the book are reprinted.

Walter E. Hurst, the author, is an attorney in Hollywood specializing in the law of the entertainment industry. His organization, Seven Arts Press, Inc., has published a number of books on various aspects of the record, music, film, and television industries.

14. Jacobs, James J., *Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools, and Military*. Indianapolis, Indiana, and Charlottesville, Virginia: Michie/Bobbs-Merrill Co., Inc., **1979.** Pp. xli, **475.** Price: $18.50.

This casebook sets forth federal decisions, notes, and other materials dealing with the law concerning the four major institutions mentioned in the book's title. These four areas of law are combined for economy, and to make explicit "the insights into both law and institutional processes which the comparative approach provides" (preface). The focus of the work is federal constitutional law. The author explains that "the most

important legal battles between the heads of institutions and their subordinates and inmates have been waged in the federal courts where jurisdiction is predicated upon alleged deprivations of rights guaranteed by the Constitution or federal law."

The book is organized in fourteen chapters dealing with various constitutional rights and issues. For the most part, each chapter discusses all four of the institutions covered by the book. For example, the first chapter is entitled "Religious Values in Public Institutions." This chapter has four sections. The first of these, "Religious Freedom in the Prsions," consists of four cases plus notes. The second section is labeled, "Compulsory Chapel Attendance and the Military Chaplaincy." Included are a citation to and a long quotation from the article "Religion, Conscience and Military Discipline," by Lieutenant Colonel LeRoy F. Foreman, published at **52** ***Mil. L. Rev.*** **77 (1971).** Section C, "Religious Values in the Public Schools," and section D, "Religious Objections to Psychiatric Treatment," complete the first chapter. They consist of cases and notes concerning state statutes and other items.

The remaining chapters are organized much like chapter **1,** except for the fourteenth and last chapter, concerning injunctions and award of monetary damages. Also, chapter **3** has no section on hospitals, chapter 8 has no military section, and chapter **9** contains nothing on schools, because these institutions are not relevant to discussion of the topics of those three chapters, or are similar to the institutions discussed therein.

The long second chapter, "Freedom of Speech," is organized in two parts. Part I, "Political Protest," is followed by Part 11, "The Duty of Institutional Loyalty." The sections pertaining to **military** law are "Dissent on the Battlefield," with a discussion of Carlson v. Schlesinger, **511** F.2d **1327** (D.C. Cir. **1975),** and "The Serviceman's Duty of Loyalty," concerning United States v. Howe, **17** C.M.A. **165, 37** C.M.R. **429 (1967).**

Chapter **3,** "The Challenge of Group Organization," contains a section on military unions. The fourth chapter, "Personal Privacy v. Bureaucratic Necessity," includes a section entitled, "Military Discipline and Individuality," which contains citations to various articles published in the ***Mil***itary ***Law Review*** and other publications.

Chapter **5,** "Personal Privacy and Public Space," includes a section called, "Military Inspections and Searches," which prominently cites, "Discharge and Dismissal as Punishment in the Armed Services," by

Brigadier General Richard J. Bednar, published at 16 *Mil. L. Rev.* 1 (1962). Several other *Military Law Review* articles are also cited in the notes to this section. The sixth chapter is "Refusal to Cooperate with Administrative Procedures." The military section therein is "Compelled Urinalysis," which includes United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974). Conspiciously cited is "The Gravity of Administrative Discharges: A Legal and Empirical Evaluation," by Major Bradley K. Jones, published at 59 *Mil. L. Rev.* 1 (1973), and other *Military Law Review* articles.

The seventh chapter, "Lawyers and Institutional Life," contains a section, "The 'Judicialization' of Military Law," which sets forth the case of Middendorfv. Henry, 425 U.S. 25 (1976), upholding the denial of assigned defense counsel at trials before summary courts-martial. Chapter 8, "The Limits on Discipline and Control," contains no military section. It deals with prison conditions, the right to treatment for the mentally ill, and corporal punishment for students.

"he ninth chapter, "Freedom from Peonage," deals primarily with patient and prison labor, but includes a short section on compulsory military service. Chapter 10, "Specificity Requirements of Institutional Law," contains a section on "The Customary Law of the Military," setting forth the case of Parker v. Levy, 417 U.S. 733 (1974). The eleventh chapter, "The Details of Administrative Due Process," includes a short military section, "Military Separations," dealing with Sims v. Fox, 505 F.2d 857 (5th Cir. 1974), *cert. denied,* 421 U.S. 1011 (1975).

Chapter 12, "Equality Among Subordinates," includes a military section, "Exclusion of Women from Combat." This section prominently cites and quotes from "Sex Discrimination in the Military," by Lieutenant Colonel Harry C. Beans, published at 67 *Mil. L. Rev.* 19 (1975). The thirteenth chapter, "Voting Rights," contains a section called "Extending the Franchise to Military Personnel," discussing voting and other types of political activity of members of the uniformed services. The fourteenth and last chapter, "Enforcing Judicial Decisions," contains two sections, on injunctions and on monetary damages, setting forth the case law on remedies applicable to the claims discussed in all the earlier chapters.

The Jacobs book offers a number of aids to the reader. It opens with a preface, summary table of contents, detailed table of contents, and introduction. Also placed near the front of the book are copies of the United States Constitution, the Civil Rights Act of 1871, and the statute

concerning jurisdiction of federal courts in civil rights cases. The book closes with a table of names of cases cited in the text, and a detailed subject-matter index.

The author, James B. Jacobs, is an associate professor of law and sociology at Cornel1 University Law School, Ithaca, New York. Born in 1947, he was educated at the Johns Hopkins University and the University of Chicago. He became a member of the Illinois bar in 1973, and has been associated with Cornel1 since 1975.

15. Jessup, John E., Jr., and Robert W. Coakley, editors, *A Guide to the Study and Use of Military History*. Washington, D.C.: Department of the Army, 1979. Pages: xv, 507. Paperback.

The stated purpose of this official government publication is to encourage awareness of and reliance on military history by today's Army officer corps, especially new officers just beginning their service. In form, the book is a collection of essays on military history prepared by numerous authors from government service and the academic community. These essays are woven together by the editors to explain what is military history, where it can be found, and how it is used in the Army.

The material of the book is organized in twenty-three chapters, each of these by different authors, arranged in four parts. Part One, "Military History, Its Nature and Use," opens with a chapter entitled, "The Nature of History," by Dr. Maurice Matloff, chief historian of the U.S. Army Center of Military History, the proponent agency for this book, described below. Two additional chapters provide an overview of military history in general.

The second chapter, "Bibliographical Guide," consists of seven chapters, or essays, explaining what books have been written on various aspects or portions of American and world military history. It opens with chapter 4, "The Great Military Historians and Philosophers," by Professor Jay Luvass, of Allegheny College, Meadville, Pennsylvania. The next two chapters deal with military history in general, and chapters 7 through 10 focus on four major periods of American military history. Two of these latter chapters were written or partly written by Editor Coakley.

Part three, "Army Programs, Activities, and Uses," contains ten chapters, or essays, on various topics. The Army Military History Institute and its work are described. There are chapters on the Army art program

and military museums. Other topics covered are the place of military history in the Army school system, the use of military history in Army staff work, and writing of history for publication. Several other subjects axe discussed as well. The two editors together prepared chapter 11, "A Century of Army Historical Work," summarizing what the Army has done since the post-Civil War period to preserve records of its own history.

Part Four, "History Outside the U.S. Army," contains three chapters discussing military history elsewhere in the Department of Defense, in foreign countries, and in the academic community. This part is followed by two appendices listing relevant reference works, historical journals, and societies. The appendices were compiled by Thomas E. Kelly, 111, who is employed in the Current History Branch of the Center of Military History.

For the convenience of readers, the book offers a table of contents, a foreword, and a preface, as well as the two appendices mentioned above and a highly detailed subject-matter index. The chapters or essays are not heavily footnoted; most citations are inserted directly in the text. Each chapter is followed by a specialized bibliography pertaining to its subject matter, some of them several pages in length.

The U.S. Army Center of Military History is a field operating agency of the Army General Staff, under the staff supervision of the Deputy Chief of Staff for Operations and Plans. The Center was created in 1973 and is headed by a brigadier general as Chief of Military History and commander. The Center operates out of the Forrestal Building, Washington, D.C., and consists of two substantive divisions, the Histories Division and the Historical Services Division, both headed by full colonels.

Editor John E. Jessup, Jr., is a retired Army colonel and was chief of the Histories Division from 1969 until 1974. He has published articles on Soviet military history, and at time of publication of the volume here noted was president of the US. Commission on Military History. He holds a Ph.D. from Georgetown University.

Editor Robert W. Coakley is a civilian employee of the government, as deputy chief historian of the Center of Military History. He has a Ph.D. from the University of Virginia, and has been co-author of books on World War II and the American Revolution.

The book is sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. 20402. Its stock number is 008–029–00105–5.

16. Judge, Clark S., *The Book of American Rankings.* New York, N.Y.: Facts on File, Inc., 1979. Pp. iii, 324. Price: $24.95.

This book compares the various states and cities of the United States on more than three hundred statistical indices or scales. It is a companion to *The Book of World Rankings,* noted elsewhere in this issue.

The book is organized in thirty-two unnumbered chapters and 325 consecutively numbered sections. The opening chapters are entitled, "Geography," "Climate," "Population," "Mobility," "Immigration," and "Ethnicity." The book continues with chapters on "The American Family," "Religion," and "The Elderly." Chapters dealing with economic matters are "Poverty and Welfare," "The Labor Force," "Agriculture," "Income and Cost of Living," "Taxation," and "The Tax Revolt."

A variety of topics are covered in the next five chapters, "Health and Health Care," "Education," "Crime," "Energy," and "Pollution," The next several chapters describe personal interests, hobbies, and pastimes: "Foreign Travel," "Arts and Artists," "Sports," "Newspapers, Magazines and Books," "Radio and Television," and "Drink." The book concludes with chapters on "Transportation," "Government," "Politics," "Banking, Finance and Retail Trade," and "The Supernatural." The final chapter is entitled "State Summaries," containing a description of each state in terms of its place on the various tables or rankings.

The book offers a table of contents, an introduction, a glossary of terms used in the book, a bibliography, and a short subject matter index.

The author, Clark S. Judge, is a freelance writer living in New York. This is his first book.

17. Klepsch, Egon, *Future Arms Procurement: USA—Europe Arms Procurement (The Klepsch Report).* New York, New York: Crane, Russak & Co., Inc.; London, United Kingdom: Brassey's Publishers Ltd., 1979. Pp. 95. Price: $14.50 (paperback).

Weapons production and procurement are important elements in the budgets and gross national products of most modern nations, both in-

dustrialized and developing. This small book expresses the concern of the Western European nations that they may not be realizing their potential in this regard.

The author, a German member of the European Parliament, makes several points: Competition among the member states of the European Community has involved wasteful, inefficient duplication of effort in the development and production of weapons. This has led to an erosion of the technological capabilities of these nations, and an excessive dependence on the United States for supplies of weapons. The Soviets, because of their centralized control over weapons development and production, have been able to produce far more weaponry even though they have far less economic, technological, and industrial strength than the Western European countries considered together. The European Community should be able to develop and implement policies through cooperation of its member states which would solve these problems and provide for a more effective defence.

The book is organized in four parts. The original Klepsch Report a p parently consists of Part I, "Political Aspects,'' and Part IV, "Data," a set of four appendices supplementing the text in the fist part. Chapter 4 of Part I, "The US Challenge," describes the interest of the United States in developing a two-way flow of arms technology, so that United States and Western European weapons systems are at least interoperable. It may be noted that the book is not anti-American in tone or purpose. In part, it does suggest that European states buy less military hardware from the United States; but the principal thrust is toward promoting efficient development and production of European-made weapons through pooling of the resources of, and reduction of competition among, the Western European states themselves.

Part II, "The Industrial Dimension," was written by Thomas Normanton, a member of the European Parliament from the United Kingdom. This seven-chapter part discusses procurement policies and structures. Mr. Normanton is a member of the European Parliament's Committee on Economic and Monetary Affairs, and this essay is his committee's report. It complements the Klepsch Report in Part I, which is a report of the Parliament's Political Affairs Committee, of which Dr. Klepsch is a member.

The very short third part is the text of a resolution of the European Parliament on European armaments procurement, which was adopted

at Strasbourg, France, on June 14, 1978. This resolution was based on the work of Dr. Klepsch and Mr. Normanton, which had started more than a year before. The resolution calls for development of "a European action programme for the development and production of conventional armaments within the framework of the common industrial policy."

The book offers a preface, "History of the Klepsch Report," followed by biographical sketches of Dr. Klepsch and Mr. Normanton. There is also a table of contents and a foreword by Geoffrey Rippon, another British member of the European Parliament.

Members of the European Parliament are also members of the national parliaments of their states of origin. Dr. Klepsch has been a member of the German Bundestag for Koblenz since 1965, in the Christian Democrat party. In the past he has been a university lecturer on international politics. Mr. Normanton is a member of the British Parliament. He is of the Conservative Party, and is an industrialist. Among other things, he was president of the International Textiles Manufacturers Federation at time of publication.

18. Kurian, George T., *The Book of World Rankings.* New York, N.Y.: Facts on File, Inc., 1979. Pp. xiii, 430. Price: $24.96.

This book compares the world's nations on more than three hundred statistical indices or scales. It is a companion to *The Book of American Rankings,* noted elsewhere in this issue.

The book is organized in twenty-three chapters and 326 consecutively numbered sections. The first chapter deals with statistics on geography. The next three describe the world's people, under the headings "Vital Statistics," "Population Dynamics & the Family," and "Race & Religion." Chapter V sets forth statistics on various political matters, and chapters VI and VII pertain to foreign relations, under the headings, "Foreign Aid" and "Defense."

Chapters VIII through XVI deal with a wide variety of economic indicators. The first of them, "Economy," covers such matters as gross national product and consumer price indices. The chapters following focus on "Finance & Banking," "Trade," "Agriculture," "Industry and Mining," "Energy," "Labor," "Transportation & Communication," and "Consumption." Three topics related to economics are discussed in the next three chapters, "Housing," "Health & Food," and "Education." The book closes

with four chapters on miscellaneous topics, "Crime," "The Media," "The World's Cities," and "Culture & Sports."

Even a listing of the chapter headings scarcely gives an adequate picture of the coverage of the book. Of course, statistics are not available for all countries for inclusion in every table, and the accuracy and significance of many of the statistics presented is debatable. Even so, the range of information presented is very wide.

For the convenience of the user, the book offers a table of contents, an introduction, a bibliography, and a short subject-matter index. After the last chapter there are "country summaries," or descriptions of each of the world's countries in terms of their ranking in the various tables and charts. These are arranged in alphabetical order by name of country.

The author, George Thomas Kurian, has published a number of dictionaries and other reference works. He was originally from India, where he served as editor-in-chief of the Indian Universities Press and as executive director of the Indo-British Historical Society.

19. Latman, Alan, *The Copyright Law: Howell's Copyright Law Revised and the 1976 Act* (5th ed.). Washington, D.C.: Bureau of National Affairs, Inc., 1979. Pp. xvii, 560.

The federal law of copyright is found in Title 17, United States Code, and in cases interpreting and applying the provisions there. As the United States Constitution explicitly authorizes Congress to legislate concerning copyright (U.S. Const. art. I, sec. 8, cl. 8), federal statutes on the subject go back to 1790. However, no comprehensive treatment of the subject came into being until enactment of the Copyright Act of 1909. Substantially all the modern American law of copyright developed under this Act, until it was replaced by the Copyright Act of 1976. Parts of the pre-1976 law are still relevant to the copyright practitioner; other parts are not; and the resulting combination of old and new law forms the subject of the book here noted.

The treatise is organized in eleven chapters, which fill slightly more than the first half of the book. This portion is followed by seven appendices which set forth the text of statutes, regulations, and treaties pertaining to or affecting the copyright law of the United States.

The opening introductory chapter is followed by separate chapters on

the concept of copyrightability, duration of copyright, and ownership of copyright. Chapters 5 and 6 cover procedural matters, specifically, publication and notice, and registration and deposit. These are followed by chapters on the rights secured by copyright and infringement thereof, and remedies for infringement. The Copyright Office (now Copyright and Trademark Office) and the Copyright Royalty Tribunal are described in the ninth chapter. Chapter 10 concerns international copyright matters, and chapter 11, taxation of copyrights.

The seven appendices are important parts of the book. Appendices A and B set forth the 1976 and 1909 Copyright Acts, respectively; and the next two appendices contain regulations issued by the Copyright Office under the two Acts. Appendix E contains three statutes concerning jurisdiction of the federal courts in copyright suits, and rules of court. Appendix F contains the texts of four treaties or conventions concerning copyright protection to which the United States is a party. The final appendix contains the current text of the Berne Convention for the Protection of Literary and Artistic Works. Most recently revised in 1971, this convention was first published in 1886. It established the International Copyright Union in that year. Although the United States is not a member of the union, American authors, composers, etc., enjoy certain rights under the convention.

The book says little about government publications, which in general are not copyrightable (pp. 43–44). This is an important exception to the general rule, considering the great volume of government publications. Unfortunately the book does not cite "Copyright in Government Publications: Historical Background, Judicial Interpretation, and Legislation," by Brian R. Price, published at 74 Mil. L. Rev. 19 (1976). Mr. Price, a former Army JAGC captain, now practicing law in Doylestown, Pennsylvania, was publications specialist at The Judge Advocate General's School, Charlottesville, Virginia, from 1973 to 1975, and was editor of the *Military Law Review* from 1975 to 1977.

For the convenience of users, the book offers a preface, a summary of contents, and a detailed table of contents. There are no footnotes, as such; all citations are given in the text, in the manner of a brief. The seven appendices have already been mentioned. They are followed by a table of cases cited, and a subject-matter index.

The author, Alan Latman, is a professor of law at the New York University School of Law. He was also responsible for the fourth edition

of this work, published by Bureau of National Affairs in 1962. The title of the book refers to Herbert Allen Howell, a former assistant registrar of copyrights, who prepared the first edition, published by Bureau of National Affairs in 1942, and also the second edition (1948), and the third edition (1952).

20. Nash, Peter G., and George P. Blake, editors, ***Appropriate** Units for **Collective** Bargaining.* New York, New York: Practicing Law Institute, 1979. Pp. xiii, 459. Price: $35.00.

Among the many types of disagreements between labor and management which are resolved by decision of the National Labor Relations Board, one of the most complex and varied is the question of what is an appropriate bargaining unit of employees to select a representing union. The answer varies from industry to industry, plant to plant, and department to department within one plant. This book is a collection of eleven essays, organized as chapters, discussing the appropriate unit rule and its practical application in various situations.

The first three chapters are introductory in nature, providing a view of the problem overall. The last eight chapters consider what constitutes an appropriate bargaining unit in various specified industries. The chapters are written by different authors, all of them labor law practitioners associated with various law firms throughout the country.

The first chapter is, "Overview of the Law, and the Basic Manufacturing Unit." This is followed by "Multi-Employer Bargaining Units," and a short chapter called "Accretions and Craft Severance.''

The industry-by-industry coverage of the book begins with chapters on the construction industry and on retail stores. Chapter 6 deals with hotels, motels, and restaurants. The next three chapters cover the hospital industry, insurance and banking, and educational units. The tenth chapter considers the performing arts and nonprofit legal organizations. The final chapter examines public sector employee units.

For use by readers, the book offers a preface and a detailed table of contents. After the last chapter there appears an appendix setting forth the text of relevant provisions of the National Labor Relations Act, codified in its entirety at 29 **U.S.C.** 151–169 (1976). The book also contains a table of cases cited and a subject-matter index. Footnotes are numbered consecutively within each chapter separately, and they appear at the bottom of the pages to which they pertain.

Peter G. Nash is a partner in the firm of Vedder, Price, Kaufman, Kammholz, & Day, of Washington and New York. He is a former general counsel of the National Labor Relations Board, and a former solicitor of the Department of Labor. George P. Blake is a partner in the firm of Vedder, Price, Kaufman & Kammholz in Chicago, and has practiced extensively in various areas of labor law. As practitioners, both editors represent management in labor law matters.

21. Nathanson, Bernard N., with Richard N. Ostling, ***Aborting America.*** Garden City, N.Y.: Doubleday & Co., Inc., **1979.** Pp. xi, **321.** Cost: **$10.00.**

In this book, a physician who was formerly a leader of the movement to legalize abortion explains how he came to believe that abortion on request is wrong. Partly autobiography and partly personal philosphy, the book is designed for the intelligent layman, neither lawyer nor doctor, who is interested in the abortion issue.

Dr. Nathanson first became an advocate of legalization of abortion as a result of having to obtain an abortion for his girlfriend while he was in medical school. He went on to specialize in obstetrics and gynecology. Dr. Nathanson ultimately became head of the Center for Reproductive and Sexual Health, in Greenwich Village, New York City. This organization, which came into being after legalization of abortion in New York State, is described as "the largest and busiest abortion clinic in the world."

Subsequently, in **1973,** the Supreme Court upheld the legality of abortion in a series of cases then before it. Dr. Nathanson says little about the decision, except that it was based on medically unsound arguments. It was coincidentally during this time that his views on abortion were undergoing reversal.

In **1973,** Dr. Nathanson became Chief of Obstetrical Services at St. Luke's Hospital, New York City. This hospital had a lot of sophisticated equipment for monitoring and studying fetuses in the womb. Through his work, he gradually came to the conclusion that the unborn fetus is physically much the same as the child born alive, and that life does indeed exist from the moment of conception.

The description of the intellectual odyssey fills the first half of the book. The second half is an extended discussion, in nontechnical language, of the many arguments for and against abortion.

For the reader's use, the book has a table of contents, a bibliography, and a subject-matter index. Two appendices set forth Dr. Nathanson's proposals for reform of abortion law and practice, and the positions of the various churches and other religious groups concerning abortion.

22. Neuman, Stephanie G., and Robert E. Harkavy, editors, ***Arms Transfers in the Modern World.*** New York, N.Y.: Praeger Publishers, 1979. Pp. xxii, 375.

This work is a collection of seventeen essays whose overall purpose is to contribute to the development of a new political science subspecialty, the field of arms supply diplomacy. While it has long been accepted that arms transfers and arms controls have diplomatic significance, the editors of this work contend that the global significance of such transactions has not yet been given proper attention. In particular, the complex "national, international, regional, and transnational linkages involved have not been subjected to systematic, sustained, and comparative inquiry." (Preface, p. vii.) This collection of essays makes a start toward filling this gap.

The book is organized in five parts, and also in eighteen consecutively-numbered chapters. Part One, Methodological and Theoretical Problems, consists of three chapters, or essays, The titles are, "Arms Transfers and International Politics: The Interdependence of Independence"; "Twixt Cup and Lips: Some Problems in Applying Arms Controls"; and "Understanding Arms Transfers and Military Expenditures: Data Problems."

The second part, entitled, "The International Systems Level,'' has five chapters. These are entitled, "Supplier-Client Patterns in Arms Transfers: The Developing Countries, 1967–76"; "The Impact of Precision Guided Munitions on Arms Transfers and International Stability"; "Nuclear Proliferation and the Spread of New Conventional Weapons Technology"; "The Proliferation of New Land-Based Technologies: Implications for Local Military Balances"; and "The New Geopolitics: Arms Transfers and the Major Powers' Competition for Overseas Bases."

Parts Three and Four are two subparts comprising one large part entitled, "The Nation State Level." Part Three is concerned with supplier states, and Part Four, with recipient states.

The four chapters of Part Three are, "How the United States Makes Foreign Military Sales," "The Economics of Arms Transfers," "Political

Influence: The Diminished Capacity," and "Arms Deals: When, Why, and How?" The fourth part consists of five chapters. These are, "Arms Transfers and Economic Development: Some Research and Policy Issues"; "Dependent Militarism in the Periphery and Possible Alternative Concepts"; "Arms Transfers and the 'Back-End' Problem in Developing Countries"; "Arms Transfers, Military Training, and Domestic Politics," and "Defense Industries in the Third World: Problems and Promises."

Part Five, the editors' conclusion to the work, consists of one chapter, "The Road to Further Research and Theory in Arms Transfers."

The *Military Law Review* has often noted the publications of the Stockholm International Peace Research Institute, which deal largely with military weaponry, its development, production, procurement, deployment, and use by the world's military forces. How does ***Arms Transfers*** compare with SIPRI publications? The latter tend to be primarily factual, emphasizing presentation of large quantities of statistical data and other descriptive material. **Arms** *Transfers*, in contrast, is more theoretical, a work of political science, consisting primarily of analytical material.

This is not to say that the SIPRI publications do not analyze the data they present. Indeed they do. And **Arms** *Transfers* contains many tables and charts, and whole chapters describing the performance of various types of weapons, the mechanics of the arms trade, and so forth. Nor is it to say that the SIPRI publications are superior to **Arms** *Transfers*, or vice versa; they are merely different in their emphasis.

Chapter 3 of ***Arms Transfers***, titled "Understanding Arms Transfers and Military Expenditures: Data Problems," compares SIPRI's statistics with those of the **U.S.** Arms Control and Disarmament Agency, and those of the International Institute for Strategic Studies.

For the convenience of the reader, the book offers a fairly long preface explaining the authors' aims. This is followed by a detailed table of contents, and lists of tables, figures, and acronyms. Charts and tables of data are liberally sprinkled throughout the book. The conclusion of the work is followed by a selected bibliography on the arms trade, with its own table of contents. The book also offers a subject-matter index, and a section consisting of biographical sketches of the editors and contributors.

Stephanie G. Neuman is a senior research associate at the Institute

of War and Peace Studies, Columbia University, and an instructor in international relations at the New School for Social Research. Robert E. Harkavy is an associate professor of political science at the Pennsylvania State University. The sixteen other scholars who have written the various essays, or chapters of the book, come from a variety of backgrounds in business, government service, and the academic world.

23. Newman, Stephen, and Nancy Kramer, ***Getting What You Deserve: A Handbook for the Assertive*** *Consumer*. New York, N.Y.: Dolphin/ Doubleday & Co., Inc., 1979. Pp.xv, **328.** Cost: $8.95. Paperback.

This large paperback offers many practical suggestions for consumers of many types of products and services on how to enter contracts, ensure their proper performance, and wind up matters satisfactorily at the end. Humorously illustrated, this work is intended for the layman without any particular business or legal expertise.

The book is organized in six parts and thirty-one chapters. The first part, "Into the Fray," consists of three chapters on advertising, contracts and warranties, and techniques of complaint. Part 11, "Pitfalls, Rip-offs, Frauds, and Other Dangers," contains fifteen chapters dealing with car buying, confidence games, door-to-door solicitation, food purchasing, funeral expenses, health clubs, construction, moving, realty, mail-order purchases, repairs, business opportunities, travel, and schooling. This second part comprises almost half the book.

The next three parts consider at length the pitfalls and problems of credit dealings, health care, and legal services. These parts discuss a number of commonly encountered problems, such as billing errors, mistakes of credit bureaus, costs of drugs, difficulties with hearing aids, exorbitant legal fees, and small claims procedures.

Part VI, "Direct Action," is a three-chapter conclusion to the book. It covers organization of consumer action groups, publicity, market surveys, picketing, leafleting, boycotting, and joining cooperatives.

For use of readers, the book opens with a detailed table of contents and an introduction. The book closes with an appendix, "Directory of Federal Consumer Offices," which is a list of addresses arranged alphabetically by name of product or service. The appendix closes with a list of telephone numbers for Federal Information Centers nationwide.

Stephen A. Newman is a professor of law at the New York Law School, and Nancy Kramer is a senior attorney with the New York Public Interest Research Group, Inc. The artwork and illustrations, which are an important part of the book, were done by Melissa Gordon Newman.

24. Nitze, Paul H., James E. Dougherty, and Francis X. Kane, ***The Fateful Ends*** *and* ***Shades*** *of* ***SALT:*** *Past . . . Present . . . and Yet to Come?* New York, New York Crane, Russak & Co., Inc., 1979. Pp. **xviii,** 137. Price $5.95 (paperback).

This small book is a collection of three essays generally unfavorable to the recently negotiated but as yet unratified agreement growing out of the second series of Strategic Arms Limitation Talks (SALT II). At the time of writing of this note, in **January** of 1980, the Washington Post and other periodicals have declared that the SALT II agreement is dead, and will never be ratified by the Senate, in view of Soviet military action in Afghanistan. Nevertheless, a book such as this one may be of historical interest, especially as, if indeed SALT II really is dead, the views it expresses place it on the successful side of the controversy surrounding the agreement.

The book opens with a long preface by Frank R. Barnett, president of an organization called the National Strategy Information Center, Inc., which has sponsored the volume. This is followed by the first essay, "SALT: An Introduction to the Substance and Politics of the Negotiations," by James E. Dougherty. The second essay, by Paul H. Nitze, is entitled, "The Merits and Demerits of a SALT II Agreement," and the final essay, by Francis X. Kane, is "Safeguards from SALT: U.S. Technological Strategy in an Era of Arms Control."

The book offers a short table of contents, as well as the preface mentioned. Footnotes are grouped together at the ends of the first and third chapters. Eleven pages of charts and graphs follow the second chapter, and several other charts and graphs are scattered throughout the third chapter. The book closes with a list of publications on SALT and other national security topics published by the National Strategy Information Center. These are divided into "Agenda Papers," "Strategy Papers," and all other publications.

James E. Dougherty is a professor of political science at St. Joseph's University, Philadelphia, Pennsylvania, and is senior staff member of the Institute for Foreign Policy Analysis at Cambridge, Massachusetts.

He has published a number of books and articles. Paul H. Nitze has served as Deputy Secretary of Defense from 1967 to 1969, and as Secretary of the Navy from 1963 to 1967, and has held other high positions in government service. From 1969 to 1974 he was a member of the U.S. delegation to the SALT negotiations. At present he is chairman of the Advisory Council of The Johns Hopkins School of Advanced International Studies, Washington, D.C. Francis X. Kane is a scientist specializing in ballistic missile systems and space technology. He is a member of the professional staff of TRW Defense and Space Systems Group, at Redondo Beach, California. He has taught at various universities and is a graduate of the Military Academy at West Point.

The National Strategy Information Center, Inc., is a private organization and identifies itself as "a nonpartisan tax-exempt institution organized in 1962 to conduct educational programs in national defense." The organization "espouses no political causes,'' but its personnel are united by "the conviction that neither isolationism nor pacifism provides realistic solutions to the challenge of 20th century totalitarianism." The Center's purpose is to inform the American public concerning the vital issues of the day affecting United States defense.

25. Royal United Services Institute for Defence Studies, ***Ten Years of Terrorism: Collected*** *Views.* New York, New York Crane, Russak & Co., Inc., **1979, *Pp*. 192.** Price: **$14.95.**

This work is a collection of ten essays on various aspects of terrorism today, primarily as experienced in Western Europe. The writings originated as the proceedings of a symposium sponsored by the Royal United Services Institute, a British organization, beginning on 19 January 1977. The fourteen contributors to the volume are from many different fields of work and study.

A preface and an introduction are followed by an introductory chapter, "The Anatomy of Terrorism." Chapter 11, "The Response to Terrorism," and chapter III, "Political Problems of Terrorism and Society," complete the introductory portion of the book. Chapters on specialized topics follow. "Terrorism: A Soldier's View," is followed by two chapters on the role and significance of news and communications media in terrorism. Chapter VII, "Terrorism and the People," is followed by ("Terrorism and Security Force Requirements." The ninth chapter focusses on international law, and the final chapter discusses some specific instances of terrorist activity.

Many terrorist occurrences are discussed or at least briefly mentioned. Primary attention is given to the continuing problems in Northern Ireland, and certain short-term disturbances, such as the student revolt in Paris of 1968, and the 1977 hijacking of a train in Holland and a Lufthansa airliner in Somalia.

The book offers a table of contents, and a list of the plates, or pictures, which are inserted after page 172. These pictures portray various terrorist activities of the past decade. The book closes with biographical sketches of the contributors.

The backgrounds of the essayists are diverse. They include lawyers, professors, and Army officers, as well as one member of the British Parliament. Journalists, police officials, government administrators, and specialized scholars are also among their number. Several of the contributors have personally witnessed some of the major terrorist events of our time, and some have participated in governmental efforts to suppress or control terrorist activities. Most of the contributors are British, but Holland and West Germany are also represented.

26. Scalf, Robert A., editor, Volume *28, Defense Law Journal.* Indianapolis, Indiana: The Allen Smith Company, 1979, Pp. viii, 529. Price: $50.00 for one-year subscription, which includes five current service issues and binder, plus index volume and annual supplement thereto.

The *Defense Law Journal* provides information on current developments in tort law and litigation from the point of view of the civil defendant. It is published in the form of five current service issues annually. Each such issue contains one or two lead articles, and sections entitled, "Practical Trial Suggestions," "Cases Won by the Defense," "Significant Court Decisions," and "Damage Awards." With each one-year subscription a looseleaf binder is provided for collection of the year's issues.

The book here noted is a hardcover bound volume containing the current service issues for the year 1979. In the past, issuance of such bound volumes has been the normal practice of the publisher. Thus, through 1979, subscribers would receive, in effect, two copies of the year's issues, first in the form of the five current service issues (but with no binder), and again in the form of the annual bound volume. Apparently this practice is being discontinued, and preservation of the five separate issues in the annual binder will take the place of the bound volume. Volume 27, for the year 1978, was briefly noted at 82 *Mil. L. Rev.* 222 (1979).

A wide range of tort law topics is covered. Most people, perhaps including lawyers who do not practice in the area, think of automobile accidents as the primary subject of tort law. This subject is covered, but it is only one among several. There are articles and notes on malpractice by lawyers and doctors, products liability cases, "slip and fall" cases, and various types of commercial torts more or less close to the boundaries of contract law. Various aspects and types of negligence and liability are covered, as are the law of evidence and trial procedure. Trial tactics, in particular, are emphasized in this periodical.

Each issue, and the bound volume, contain tables of contents and subject-matter indices. In addition, each article and each section are preceded by a table of contents showing the topics covered in the text, with page numbers.

With volume 28 comes the 1979 Pocket Supplement to the cumulative index volume published during 1979. That volume, covering material published in volumes 18 through 27, was briefly noted at 83 *Mil.* L. *Rev.* 186 (1979). The pocket supplement, thirty pages in length, contains references to volume **28,** and is in fact identical with the index in the back of volume **28.** With each new one-year subscription, a copy of the bound cumulative index volume is provided at no extra charge. The annual pocket supplement is also included as part of the annual subscription.

The current price for a one-year subscription is **$50.00,** up **$5.00** from last year's price of **$45.00** noted at **85** *Mil.* L. *Rev.* 187–188 (1979). For this price, the subscriber receives five current service issues, a binder to put them in, and an annual pocket supplement to the bound index volume issued in 1979. New subscribers receive a copy of the index volume at no extra charge.

27. Stockholm International Peace Research Institute, ***Nuclear** Energy and **Nuclear Weapon Proliferation.*** London, U.K.: Taylor & Francis, Ltd., **1979.** Pp. xxv, **462.** Price: U.K. pounds **14.00.**

This book is a collection of twenty-one papers presented at a week-long symposium sponsored by SIPRI in Stockholm, Sweden, during October of 1978. The papers deal with various aspects of nuclear power generation, types of reactors, problems of waste disposal, possible use of by-products in producing weaponry, peaceful uses for nuclear explosions, possible methods of limiting the spread of nuclear power, and other matters. Twenty-six experts, mostly from the United States and Sweden

but also from countries such as the Soviet Union, France, and Germany, participated in the symposium and prepared and presented the papers.

The stated purpose of the symposium, and the publication of its proceedings in the volume here noted, is to prepare for an international diplomatic conference scheduled to take place in Geneva during mid-1980. The purpose of this conference will be to review the Nuclear Non-Proliferation Treaty of 1968. The text of this treaty, consisting of a preamble and eleven articles, is set forth at pages 352-356 of the book.

The book is organized in five parts and fourteen chapters. Part I contains five chapters, and sets forth seven of the symposium papers. This part is introductory in character, explaining the mechanics of fuel cycles, uranium enrichment, reprocessing, and waste disposal. The part concludes with a short and moderately pessimistic chapter reviewing the various means of preventing plutonium from being used for weapons construction.

The second part discusses in two chapters and four papers the various types of reactors, breeder reactors and various hybrid types, fusion, fission, and laser fusion reactors. Emphasis is placed on their significance in nuclear proliferation.

The third part, the largest of the five parts, covers safeguards technology, exporting policies, and multinational and international controls. The safeguards technology of the International Atomic Energy Agency is discussed. Exporting policies of the United States are discussed in the ninth chapter, in a paper with sixteen appendices summarizing various United States statutes and regulations, especially the Nuclear Non-Proliferation Act of 1978. A second short paper discusses briefly the exportation policies of countries other than the United States in general terms. Consideration is given to the program known as International Fuel Cycle Evaluation, the possibility of a nuclear fuel supply cooperative, and other arrangements for international control,

The fourth part discusses peaceful nuclear explosions, and also reactors in satellites. Part V considers implementation of the Non-Proliferation Treaty. It is supplemented by three appendices containing the text of the treaty and other relevant information. The book closes with a chapter summarizing the current status of nuclear energy and weapons proliferation. The possibilities of control through concerted international effort are urged.

The volume opens with a preface and a detailed table of contents, followed by a list of the several dozen statistical tables and figures scattered throughout the book. Next comes a list of the names and office addresses of the twenty-six participants in the October 1978 symposium. A list of abbreviations and acronyms, units of measurement, and conversion formulae, is provided for the use in wading through the often highly technical discussion in the various papers presented. The book closes with a section containing abstracts of each of the papers included in the volume, followed by a glossary of terms and a subject-matter index.

The Stockholm International Peace Research Institute, or SIPRI, was established in 1966. Though its activities are financed by appropriations of the Swedish Parliament, it describes itself as "an independent institute." With an international governing board and staff, SIPRI conducts "research into problems of peace and conflict, especially those of disarmament and arms regulation." The present director of the Institute is Dr. Frank Barnaby, from the United Kingdom. SIPRI publishes an annual yearbook reviewing weapons trends, and dozens of other books on various aspects of weapons development, distribution, deployment, and control. Particular attention is focussed on nuclear weaponry.

28. Torcia, Charles E., *Wharton's Criminal Law, 14th edition,* vols. 1 and 2. Rochester, New York: The Lawyers Co-Operative Publishing Company. Volume I, 1978, pp. viii, 438. Volume 11, 1979, pp. ix, 492. Price: $40.00 per volume. Cumulative pocket supplements available. Cumulative supplement for vol. I, March 1979, pp. 46, $7.50. Supplement for vol. II, interim index for vols. I and 11, 1979, pp. 45. Volumes III and IV yet to be published.

This work, a description of the whole of substantive criminal law in America today, is intended to replace the thirteenth edition, written by Robert A. Anderson and published in five volumes in 1957. At present, volumes 1 and 2 of the Torcia edition replace volumes 1, 2, and 3 of the Anderson editions.

The preface to volume I explains that this new edition was considered necessary because, despite the fact that many states have reformed their criminal law statutes under the impetus of the publication of the American Law Institute's Model Penal Code, case law—the subject of the work—is still useful. This is said to be especially so in states that have not yet revised their penal codes, but it is also true of states that have reformed their laws. The reason assigned is that the impact of the Supreme Court's

decisions has not been as great in substantive criminal law as in the areas of evidence and procedure.

The two volumes published thus far are organzied in three large parts. Part I, General Principles, fills all of volume I and a small part of volume 11. Part II, Offenses Against the Person, is complete in volume 11, and is followed by Part III, Offenses Against Morals.

In addition, the work is also organized in consecutively numbered sections. Volume I is comprised of sections 1 through 98; the second volume, sections 99 through 282. Finally, the work is organized in chapters, numbered consecutively throughout both volumes.

Under the heading "General Principles," the first volume discusses the purposes of criminal law; the definition, analysis, and classification of crimes; the criminal act and relevant states of mind; and parties to criminal acts. The greater part of volume I, however, is devoted to defenses to criminal charges. The various defenses are considered in alphabetical order, from "act of public officer or soldier," to "youth and infancy." (The table of contents for volume I is incomplete, going only through section 95, "want of revenue stamp," while the book itself concludes with section 98, "youth offenders.")

Volume II concludes part I with a chapter on capacity to commit crimes. Part 11, "Offenses Against the Person," examines homicide in general, and murder and manslaughter in particular. This is followed by chapters on battery, assault, mayhem, false imprisonment, kidnapping, and related offenses. Part 111, "Offenses Against Morals," reviews adultery and related offenses, bigamy, incest, and abortion, and concludes with prostitution and related offenses.

Each volume has its own table of contents. The subject-matter index for both volumes is at present a pocket part in the back of volume 11. The work is intended to be supplemented by new updating pocket parts in the future. Copious footnotes are offered, page by page.

Charles E. Torcia, the author, has been a law professor at the New York University School of Law, Dickinson School of Law, and the Marshall-Wythe School of Law of the College of William and Mary. He is author also of the thirteenth edition of Wharton's Criminal Evidence, published in four volumes, 1972–1973, and the twelfth edition of Wharton's Criminal Procedure, published in four volumes, 1974–1976.

The work here noted takes its name from Francis Wharton (1820–1889), who was author of the first nine editions, through 1885. Wharton was a very prolific writer on legal and other subjects. In addition to his several works on criminal law, he also has to his credit books on negligence, medical jurisprudence, and conflict of laws, among others. He taught legal subjects at Boston University. From 1885 until his death in 1889, he held the post of solicitor, or examiner of claims, in the Department of State. In this capacity he edited the monumental *Digest of the International Law of the United States,* published in eight volumes in 1886.

29. Werner, Raymond J., *Real Estate Closings.* New York, New York: Practicing Law Institute, 1979. Pp. xvii, 290. Price: $30.00.

This book is a treatise on the practical details and mechanics of real estate transactions, with emphasis on the formalities of closing. Mortgages, insurance, taxation, and many other pertinent matters are mentioned at least briefly. While not a dictionary, the book bears some resemblance to such a work; within each chapter, the text is organized under words or phrases, arranged partly in alphabetical order. The table of contents makes possible the use of the book as a desk reference.

The book has eight chapters. The introductory chapter discusses the role of the attorney in general, and other threshold matters. Chapter 2, "Title Matters," discusses title insurance, quality of title, objections to title, and other related topics. The third chapter, "Closing Documents," lists the many different papers commonly needed for real estate closings. Included are deeds, insurance policies, mortgages, and tax documents, and many others less well known.

Chapter 4 considers one document, the closing statement. Mention is made particularly of the different types of charges and other figures that appear on such statements. This is followed by short chapters describing other preclosing activities, and the closing itself. Chapter 7 discusses the loan closing, and the eighth chapter concludes with a review of postclosing activities.

The book offers a foreword, and a detailed table of contents which amounts to an outline. After the closing chapter there appear tables of cases, statutes, and secondary authorities cited in the text. A subject-matter index is also provided.

The author, Raymond J. Werner, has been employed by the Chicago Title Insurance Company since 1972. He presently bears the title of assistant general counsel. Mr. Werner has published a number of articles and books dealing with real estate law, mortgages, and other matters.

30. Willoughby, William R., *The Joint Organizations of Canada and the United States.* Toronto, Ontario, Canada: University of Toronto Press, 1979. Pp. xi, 289. Price: $25.00.

This book provides a description of the major international organizations or agencies, permanent and temporary, that Canada and the United States have developed to deal with disputes and proposals concerning matters of common interest to them. Attention is focussed primarily on agencies dealing with waterways and fisheries located along the boundary between the two countries, and also on defence planning. The book presents the history, origins, structure, and achievements of the organizations studied, with evaluation of their success or failure.

The book is organized in twenty chapters. After a foreword by one John W. Holmes, the book is introduced by the fist chapter, "Pervasive Interrelationships and Joint Institutions." This is followed by four chapters on the International Joint Commission, an agency established under the Boundary Waters Treaty of 1909 as a mechanism "to resolve promptly and equitably disputes involving the use of boundary and trans-boundary waters" (p. **17).** The author concludes that the commission has been successful in carrying out its mission, and further that, although the 1909 treaty could be updated in certain respects, the operation of the Commission has been kept current through conclusion of various implementing executive agreements.

Chapters **6, 7,** and 8 deal with the important subject of fisheries, the agreements and arrangements pertaining to them, and the organization, procedures, activities, and performance of the various fishery commissions. This is followed by a series of chapters on defence activities, filling most of the remaining pages of the book.

Chapters 9 and 10 discuss the Permanent Joint Board on Defence. A chapter on cold-war defence cooperation leads to three chapters on NORAD, the North American Air Defence Command, created in 1957. In that organization the Canadian and American military organizations are merged for certain purposes, under American leadership. The origins, functions, organization, and arguable obsolescence of NORAD are dis-

cussed. Chapter 15 deals with defence production sharing, and chapter 16, with civil defence and emergency preparedness.

Chapters 17 and 18 consider two Canada-United States ministerial committees, one on joint defence and the other on trade and economic affairs. Finally, the nineteenth chapter deals with the Canada-United States Interparliamentary Group, a unique organization comprised of 24 members each from both the Canadian and American national legislatures. The Group meets once or twice each year in different locations to discuss problems of Canadian-American relations from the legislative point of view. This organization was formally established in 1959, and it claims to have been successful on a number of occasions in influencing legislative action to the benefit of both the United States and Canada.

Mr. Willoughby concludes that the overall picture is a mixed one: Some of the agencies discussed have been relatively or totally inactive in recent years, while others have seen increased activity. The Canadians seem to have real equality with or even superiority over the United States in regard to some of the business conducted by the joint organizations, and a merely subordinate role in other business, such as defence. After a few years of somewhat strained relations, the two countries are lately getting along better. The joint organizations in existence, and perhaps others which could be established in the future, should continue to be useful.

For the use of the reader, the book offers a foreword, a table of contents, and a preface, as well as a fairly detailed subject-matter index. Footnotes are numbered consecutively within each chapter separately, and are collected together at the end of the book, before the index.

The author, William R. Willoughby, is a Canadian scholar. Unfortunately we are not given much information about him; but in his preface he explains that, during the academic year 1970–71, he was a visiting research associate at the Center for Canadian Studies of the Johns Hopkins University, while working on this book. The work was completed under grants from the Social Science Federation of Canada.

31. Zeichner, Irving B., editor, 1980*Law **Enforcement Reference Manual** **and Police Official** Diary*. Newark, N.J.: New Jersey Law Journal, 1979. Pp. approx. 700. Cost: $19.50.

This remarkable book is designed to be an all-purpose resource for police officials and departments. The first half of the volume is an en-

cyclopedia of information on every aspect of police operations. The second half consists of hundreds of pages of blank forms—planning calendars, a business diary, financial records, and so forth.

The encyclopedia portion, in excess of three hundred pages, consists of more than a hundred unnumbered chapters or sections, each providing a brief overview or thumbnail sketch of some topic. For example, the section, "What is a Police Officer?" is a collection of excerpts from court decisions which attempt a definition. There are collections of short abstracts of court decisions concerning such topics as search and seizure, police conduct, and tort liability. These legal sketches are designed for laymen, not attorneys.

Race relations, photographic identification, search warrants, public relations, release of information, and fingerprinting are discussed. Also covered in brief are identification and registration of weapons, terrorism, drug and alcohol abuse, customs and immigration procedures, prison systems, automobiles, radio procedures, and terminology pertaining to betting and horse racing. Many other topics are reviewed as well.

More than half the book consists of the blank pages of the 1980 daily diary, the 1980 and 1981 monthly planning calendars, forms for keeping track of motor vehicle maintenance, monthly expenses, and cash flow, and frequently called telephone numbers. A metric conversion table is included.

For the convenience of the reader, a preface, table of contents, and subject-matter index are provided at the beginning of the book. The usefulness of the encyclopedic section would be enhanced if the many short sections were organized into numbered chapters.

The editor, Irving B. Zeichner, was a state court judge in New Jersey for over twenty years. He was a Lasker Fellow in Civil Rights and Civil Liberties, and writes a column for the monthly periodical, *Law and order.*

INDEX FOR VOLUME 87

I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review.* That index was continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in four parts, of which this introduction is the first. Part 11, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part 111, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order by title under the various subject headings. The subject matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

All titles are indexed in alphabetical order by first important word in the title, excluding *a, an,* and *the.*

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any governmental agency.

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By Order of **the Secretary of the Army:**

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Chief of Staff

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