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RIGHTS WARNINGS IN THE ARMED SERVICES*

Captain Fredric I. Lederer**

I. INTRODUCTION

The right against self-incrimination has been considered a fundamental principle of American law since at least the ratification of the fifth amendment to the Constitution in 1791.[1] Despite this, it took some 175 years before this right was meaningfully implemented by requiring that persons suspected of crime be warned of their right to remain silent before a custodial police interrogation could take place.2 While the warning requirement burst upon the civilian population in 1966 with the Supreme Court's decision in the case of *Miranda v. Arizona,*[3] a similar and in one sense broader warning requirement had been in effect in the Army since 1948[4] and in the armed services generally since 1951.[5] Indeed, the military requirement was noted with approval in the Supreme Court's opinion in *Miranda.*[6] **As** we near the 10th anniversary of

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[1] For a comprehensive and perhaps definitive analysis of the right against self-incrimination in England and pre-Constitutional America *see* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

[2] Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* also required that an individual in custody be told that he is entitled to the presence of an attorney, and that an attorney will be appointed if he cannot afford one; and that any statement he makes may be used against him in a court of law.

[3] *Id.*

[4] Act of June 24, 1948, ch. 626, § 214, 41 Stat. 792.

[5] Uniform Code of Military Justice, art. 31, 10 U.S.C. § 831 (1970) [hereinafter cited as Article 31]. Article 31 has remained unchanged since its original enactment in Public Law 506 by the Second Session of the Eighty-first Congress on May 5, 1950.

[6] 384 U.S. at 489.

Miranda and perhaps its impending destruction by the Supreme Court,' it seems particularly appropriate to review the nature of the statutorily based warning requirements now in use in the military.

Properly used, the term "right against self-incrimination," refers specifically to the right of an individual to refuse to make an incriminating statement. Strictly speaking, the right does not involve the voluntariness of a statement made when the right is not invoked—an issue that is determined by the law of confessions. Despite this differentiation, the two distinct legal doctrines have tended to merge in the United States if only because the *Miranda* warning requirement both implements the basic right by informing a suspect of its existence and at least in theory tends to make a statement voluntary by interrupting the possibly coercive nature of a custodial interrogation. Accordingly, a proper understanding of the warning requirements in the military requires a brief historical review of both the right against self-incrimination and the voluntariness doctrine in the armed services.

II. HISTORY OF THE MILITARY RIGHT AGAINST SELF-INCRIMINATION

Although it is difficult to find the specific origins of the military right against self-incrimination in the United States,[8] it is clear that aspects of the right existed by 1862 at the latest.[9] Until 1878 the military accused was considered an incompetent witness and unfit to take the witness stand in his own behalf[10] thus rendering the issue academic insofar as formal judicial interrogation of the accused was concerned. When Congress removed the disability by statute, however, it took care to make it clear that the accused did not have to take the stand and that comment as to his failure to do

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See, e.g., Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

[8] The right against self-incrimination was adopted by the British Army prior to 1806. A. TYTLER, AN ESSAY ON MILITARY LAW AND THE PRACTICE OF COURTS MARTIAL 283 (2d ed. 1806). For the American practice, *see* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 277-78, nn.392-396 (1958) [hereinafter cited as Wiener].

[9] For an exposition of this right *see* S. BESET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 310-13 (4th ed. 1864). The voluntariness doctrine, the heart of the law of confessions, was evidently accepted by at least some American military units near the turn of the nineteenth century. *See* MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 43 (1813). This should not be surprising in view of the general dependence of American military law on British practice. Wiener states that the right against self-incrimination was recognized in at least one case in 1795. as well as in Article 6 of the 1786 Articles of War. Wiener, *supra* note 8, at 277.

[10] This rule was changed by statute. Act of March 16, 1878, ch. 37, 20 Stat. 30. *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS 335-36 (2d ed. 1920 reprint) [hereinafter cited as WINTHROP].

so could not be made.[11] The application of the right to witnesses at courts-martial remains unclear until 1916 although there is reason to believe that the fifth amendment right was considered binding.[12] Statutory enactment of the right against self-incrimination appears to stem directly from the Army's attempt to enforce its right to compel attendance of civilian witnesses at trials by court-martial by certifying the witness' refusal to appear or testify to a federal district court for trial of the issue. When Congress enacted the certification provision in 1901, it included the proviso "that no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him."[13] When in 1912 Major General Enoch Crowder, then Judge Advocate General of the Army, presented the first major revision in the Articles of War in over one hundred years, his code lacked any reference to a general right against self-incrimination.[14] However, by 1914 the congressional hearings on the proposed revision contained a new proposed Article of War 25 which declared:

> No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which my tend to incrimina'te or degrade him.[15]

In his testimony before the Senate Committee on Military Affairs, General Crowder explained that because the self-incrimination exemption had originally been attached to the certification act,

> . . . the construction was advanced that this language would not apply to any other witnesses than those named in the act itself. It thus did not protect any and all witness *[sic]* against self-incrimination but only those described in the act in which the proviso appears. So I struck out that proviso and have put it in the next article, where it will be of general application.[16]

Congress accepted General Crowder's self-incrimination provision

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[11] According to the statute, the accused "shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." Act of March 16, 1878, ch. 37, 20 Stat. 30.

[12] Winthrop apparently felt that the Supreme Court's fifth amendment decisions were binding on courts-martial after the statute was adopted. WINTHROP, *supra* note 10, at 336 n.58. *See also* Wiener, *supra* note 8, at 277-78 nn.395, 396 which indicate that warnings were given in an 1808 trial and recognized in part by 1795.

[13] Act of March 2, 1901, ch. 809, § 1, 31 Stat. 951. *See also Hearings on S. 3191 Before the Subcomm. on Military Affairs of the Senate Comm. on Military Affairs*, 64th Cong., 1st Sess. (1916) *as printed in* S. REP. NO. 130, 64th Cong., 1st Sess. 52 (1916) [hereinafter cited as S. REP. No. 130].

[14] *See generally Hearings on H.R. 23628 Before the House Comm. on Military Affairs*, 62d Cong., 2d Sess. 35 (1912).

[15] S. REP. No. 229, 63d Cong., 2d Sess. 4, at art. 25 (1914).

[16] S. REP. NO. 130, *supra* note 13, at 53.

and, renumbered, it became Article of War 24 when the revised Articles of War were enacted in 1916. A minor revision was made in 1320 when the right against self-incrimination was expanded to include witnesses before officers conducting investigations.[17] No other statutory change took place, however, until the Elston Act of 1948.[18] It should be noted that before the Elston Act revision, Article of War 24 dealt only with judicial or quasi-judicial interrogations. The statute was silent as to pretrial police interrogations or their equivalent. The accused seems to have had the right to remain silent and to refuse to cooperate in such an investigation. However, no formal warning of that fact was apparently required although evidence exists that some form of warning was occasionally given by military investigators.[19] The primary check on pretrial interrogation was inserted into the statute only in 1948; until then military due process and the common law requirement that confessions be voluntary and not the product of improper coercion or inducement was the suspect's only protection against abusive questioning.

World War II was fought under the Articles of War of 1916 as revised in 1920. Soon after the close of the war it became evident that substantial dissatisfaction existed with the Articles of War and indeed with military justice in general. Complaints of drumhead justice were frequent and a number of congressional committees as well as the American Bar Association and other legal groups began investigations of military justice during the war.[20]

As a consequence of this dissatisfaction Congress enacted a number of significant changes to the Articles of War, one of which involved the right against self-incrimination.[21] The various investigations into military justice during the Second World War had emphasized displeasure with results caused by differentials in rank. Particularly important in some cases was the potential for commissioned or noncommissioned officers to compel subordinates to incriminate themselves.[22] In an effort to provide more

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[17] Act of June 4, 1920, ch. 227, art. 24, 41 Stat. 792.

[18] Act of June 24, 1948, ch. 625, § 214, 62 Stat. 631.

[19] *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 990-91 (1949) [hereinafter cited as *1949 Hearings*]. Mr. Smart, a House Armed Services Committee Staff member, related his experience of being warned of his rights under Article of War 24. It is unclear whether this warning occurred before the Elston Act; however, it seems most likely that it took place during the Second World War.

[20] *See* T. GENEROUS, SWORDS AND SCALES 14-24 (1973) [hereinafter cited as GENEROUS].

[21] Act of June 24, 1948, ch. 625, § 214, 11 Stat. 792.

[22] *See generally* REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE (1946) [hereinafter cited as VANDERBILT REPORT]. It is interesting to note

fairness in interrogations, Congress amended Article of War 24 by adding an entirely new second paragraph. In many respects the amendment was unique in American law. It indicated:

> The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used as evidence against him in a trial by court-martial.[23]

It is difficult to overestimate the Significance of this amendment. It departed from previous law in three significant ways. First, it adopted by statute the common law exclusionary rule already found in the law of confessions. Second, it adopted a warning requirement for the first time in federal statute, and third, it made the use of coercion or unlawful influence to obtain a statement, admission or confession a criminal offense punishable by court-martial. the expansion of Article of War 24 also made that Article explicitly applicable for the first time to an accused person as well as a witness. Congress did not, however, clearly indicate whether the failure to warn an accused or witness of his rights pursuant to Arti-

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that attached to the *Vanderbilt Report* in the papers of Professor Edmund Morgan, the chairman of the UCMJ Committee which proposed the new Uniform Code of Military Justice, is a press release which stated: "Amendment of the Articles of War will be proposed expressly to forbid coercion in any form in the procurement of admissions and confessions of accused persons and to provide punishments for such coercion or attempts at coercion." War Department Public Relations Division, Press Section at 6, Feb. 20, 1947, on file with the Edmund Morris Morgan Papers. Manuscript Division, Harvard Law School Library [hereinafter cited as Morgan Papers].

The punitive portions of the Elston Act's revision of Article of War 24 were intended to prevent, at the very least, outright physical coercion of confessions. The "third degree" was considered a problem. *See Hearings on H.R. 2575 Before a Subcomm. of the House Comm. on Armed Services*, 80th Cong., 1st Sess. 2043 (1947). In United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164, 170 (1954) the Court of Military Appeals recognized that the effect of superior rank or official position could make the mere asking of a question the equivalent of a command which might be regarded as depriving an individual of his freedom to remain silent.

[23] Act of June 24, 1948, ch. 625, § 214, art. 24, 41 Stat. 792. The warning requirement was added by amendment. Representative Burleson stated:

> . . . I fed that when anyone authorized to take statements from an accused interrogates him for that purpose that he should tell the accused that any statement he makes may be used against him on the trial of the offense with which he is charged.

94 CONG. REC. 184 (1948). Mr. Burleson was apparently motivated, at least in part. by the mistaken belief that warnings were required in "most State jurisdictions." *Id.* However, there is no doubt that he was attempting to achieve greater fairness in interrogations. From the text of his remarks in the *Congressional Record*, one can fairly presume that he was concerned with the problems peculiar to military rank.

cle of War 24 would be punishable by court-martial in the same fashion that coercion or unlawful influence would be. Whether or not failure to warn constituted coercion or unlawful influence was also left open by the statute.

The Elston Act was the immediate result of the post-war attempt to reform Army justice. Its existence, as such, was shortlived. because the decision to unify the services under the Department of Defense carried with it the task of preparing a uniform code of military law.[24] At the time that Professor Morgan of Harvard was appointed to devise such a code for the armed services, defendants and witnesses in Army courts-martial could invoke the statutory right against self-incrimination which had been enacted into law by the Elston Committee's efforts. The Articles for the Government of the United States Navy, however, had no provision equivalent to Article of War 24. According to the Comparative Studies Notebook,[25] a document prepared to aid the codification effort. the only Naval provision dealing with the right against self-incrimination was found not in statute but rather in the Naval Courts and Boards of 1937, the equivalent of the Army's Manual for Courts-Martial. Section 235 of the 1937 Naval Courts and Boards contained the following provision:

> The Constitution provides that no person shall be compelled to give any evidence against himself. The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material.[26]

The committee which prepared the Comparative Studies Notebook rejected the proposed Navy bill that failed to refer specifically to a right against self-incrimination,[27] preferring to adopt the Army rule that preserved the right against self-incrimination in statutory form. Significantly, the committee stated:

> The practice of including in state codes relevant Constitutional provisions in the form of statutes might well be followed in a code for the Government of the Armed Forces. In operations overseas, in time of war, paucity of reference material on courts-martial usually prevails. The code should speak out clearly in every respect. including within its provisions basic constitutional guarantees and limitations. Many who are called up to administer such law are unlearned in the law Unless constitutional provisions are reflected within the code the natural tendency is not to venture beyond the exact language of the code. Reversals by courts and criticisms from the war may be avoided by resort to such a device.[28]

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[24] *See generally* GENEROUS, *supra* note 20, at 34-53.
[25] *Id.* at 37-38.
[26] Comparative Studies Notebook, at A.W. 24.
[27] *Id.*
[28] *Id.*

Ultimately both the Code Committee and the Congress accepted the recommendations of the Comparative Studies Committee.[29] The final result was Article 31 of the Uniform Code of Military Justice, which has remained unaltered from its enactment to date.[30]

Although Professor Morgan's notes at Harvard Law School[31] indicate that the actual language of Article 31 was scrutinized rather closely, there is little evidence that all of the language of Article 31(a) and 31(b) was picked with specific ends in mind.[32] Thus, although the Court of Military Appeals has decided that the coverage of the military right against self-incrimination is a good deal broader than that of the fifth amendment right,[33] relying in part on the differences in language between the two phrasings, there is little indication that Article 31 was intended to differ in its

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[29] *See* note 5 *supra*.

[30] Article 31 reads:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him.
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> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Uniform Code of Military Justice, art. 31, 10 U.S.C. § 831 (1970). *Compare id. with* Act of May 5, 1950, Pub. L. No. 81-506, art. 31, 64 Stat. 118.

[31] The kind assistance of Mrs. Chadbourne of the Harvard Law School Library during my examination of Professor Morgan's papers is gratefully acknowledged.

[32] Professor Morgan's papers indicate a number of handwritten changes in a text of what ultimately became Article 31. As typed, with the handwritten changes shown in brackets, the text reads (deletions are underlined):

> No person subject to this code shall *examine* [interrogate] or *obtain* [request] any statement from, an accused [or a person suspected of an offense (added)] without first informing him of the nature of the accusation and advising him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated and that any statement made by him may be used as evidence against him in a trial by court-martial. (remainder not shown)

A subparagraph (e) was written in under the text as follows: "I would require defense counsel to inform accused of this privilege." The text shown above was designated Proposed Article 43, revised draft. December 6, 1948, on file in Volume II of the Morgan Papers, *supra* note 22. Of the three changes shown above, only one appears truly critical--the addition of suspects to those entitled to rights warnings.

[33] *See, e.g.*, United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958) in which then Chief Judge Quinn stated:

coverage from the fifth amendment. Indeed with the exception of the Article 31(b) warning requirement, such evidence as may exist seems to suggest the opposite conclusion. It is an interesting fact that in the approximately ten pages of legislative hearings devoted to consideration of Article 31,[34] six pages discuss Article 31(c)[35]—an aspect of the Code presently a dead letter.[36] Virtually no discussion was devoted to the substantive coverage of the basic right of self-incrimination found in Article 31(a) and only a few paragraphs on the scope of the rights warning requirements found in Article 31(b).[37] Article 31, as ultimately enacted by Congress did not include language equivalent to that found in the Elston Act's revision of Article of War 24 making the coercion of a confession a crime under the Code. Both Professor Morgan's materials and the congressional hearings make it abundantly clear that this language was eliminated from Article 31 on the grounds that it was unnecessary and superfluous in view of the creation of a new article of the Uniform Code of Military Justice, Article 98.[38] Indeed on March

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Article 31 is wider in scope than the Fifth Amendment. As we pointed out recently in United States v. [illegible], 1 USCMA 525, 527, 4 CMR 117, Article 31 is "intended to protect persons accused or suspected of crime who might otherwise be at a disadvantage because of the military rule of obedience to proper authority."

Id. at 68, 25 C.M.R. at 330.

[34] *See 1949 Hearings*, *supra* note 19, at 983-93. These hearings took place in March 1949.

[35] *See* note 30 *supra*.

Article 31(c) appears useless, for if a matter is not material it is irrelevant and inadmissible. It may be that the increased legalization of military justice has mooted this issue. *See, e.g., 1949 Hearings*, *supra* note 19, at 985.

[36] *See id.* at 990-92.

[37] On March 24, 1949, Mr. Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense, testified:

> [Article 31(a)] incidentally, covers a wider scope in that you can't force a man to incriminate himself before any court or on the trial if you will. And this in addition, since it prohibits any person trying to force any person accused or one suspected would make it a crime for any officer or any person who tries to [illegible].
>
> So we have not only the constitutional protections against self incrimination and this evidentiary [illegible] against degrading yourself unless it is material, but it goes further and provides that if [illegible] tries to get you to incriminate yourself then he has committed an offense.

1949 Hearings, *supra* note 19, at 988.

The revised draft of then proposed Article 43 in Professor Morgan's notes contains a typewritten passage:

> [This] makes Article 31 makes it even clearer that any person who compels self incrimination will be subject to punishment under the proposed punitive article [now Article 98] which makes violation of [illegible] regulations an offense under the code.

Morgan Papers, *supra* note 22, notes for Dec. 6, 1948, at 8.

The typical Article 31 Commentary indicated that Article 31(b) broadened Article of War 24 to [illegible] who were suspected as well as accused and that intentional violation of any of provision Article 31 constituted an offense under Article 98. Morgan Papers, *supra* note 22, Volume II, UCMJ, Text, References and Commentary Based

23, 1949 during the hearings on the Uniform Code of Military Justice before the House Subcommittee considering Article 31, Mr. Robert W. Smart, a staff member, testified that "the international *[sic]* violation of any of the provisons of this article constitutes an offense punishable under Article 98."[39] This would appear to correct the vagueness left in Article of War 24 as to whether or not failure to give the warnings might in itself be a criminal offense. However, the failure to include within Article 31 express language making failure to comply with its provisions an offense must be presumed to be at least one of the explanations for the complete and utter failure of the Article 98 sanction. No recorded case exists in which a member of the military has been prosecuted under Article 98[40] or any other article for coercion of a confession, let alone failure to give the rights warnings.

III. ARTICLE 31

A. A BRIEF OVERVIEW OF ARTICLE 31 AND MIRANDA v. ARIZONA

Before proceeding to further analysis of the law relating to rights warnings in the military, it is important to recognize the interaction between Articles 31(a), 31(b) and the rights accorded by *Miranda v. Arizona*. Although the statutory military right against self-incrimination is found in Article 31(a), which speaks in terms of incrimination, Article 31(b) appears to have a much broader coverage. Whereas the question in 31(a) is the meaning of "incrimination," the question in 31(b) appears to be the definition of the word "statement," for under Article 31(b), warnings, including the right to remain silent, must be given before a "statement" may be requested of a suspect. Indeed, the court of Military Appeals has indicated that the Article 31(b) language goes so far as to outlaw a request without warnings for bodily fluid samples[41] or voice[42] or

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on the Report of the Comm on a Uniform Code of Military Justice to the Secretary of Defense, at 47.

[39] *1949 Hearings*, *supra* note 19, at 95.

[40] Legend has it that a lieutenant colonel was once convicted of violating Article 98 for having negligently or intentionally thrown away some case files. If true, the case is unreported, presumably because the punishment was not sufficiently severe to result in appellate judicial review. Commanders have preferred administrative measures rather than criminal prosecutions to deal with the derelictions that Article 98 was intended to cover. Article 98 remains, however, a theoretically potent weapon to control violations of constitutional rights.

[41] *See, e.g.*, United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974); United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); United States v. Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1947).

[42] *Cf.* United States v. Minnifield, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958).

handwriting[43] exemplars. Thus, Article 31(b) is in fact a substantive right against self-incrimination in and of itself because it has been interpreted to apply to nonverbal acts.

Even the most cursory view of Article 31 will immediately reveal the lack of any right to counsel.[43a] The legislative history reveals no reference whatsoever to a right to counsel within the military right against self-incrimination. The right to counsel does, however, apply to military members just as it does to civilians. Subsequent to *Miranda*, the Court of Military Appeals held in the case of *United States v. Tempia*[44] that *Miranda* applied to all custodial interrogations within the military. Accordingly, while Article 31(b) warnings must be given to any person who is a suspect or an accused, *Miranda* rights to counsel, as set forth in paragraph 140*a*(2) of the Manual for Courts Martial, must be complied with only if the military member is the subject of a custodial interrogation. In military practice then, one must first determine whether or not an individual questioned was a suspect or an accused and if so must then determine whether or not the individual was in custody. With these considerations in mind it is now possible to turn to an analysis of rights warnings in the military.

The very nature of the phrasing of Article 31(b) supplies a framework for analysis. As suggested by Professor Maguire,[45] Article 31(b)'s language can easily be placed against the questions it poses:

Who must warn?	No person subject to this [code] may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is
When is warning required?	
Who must be warned?	
What warning is required?	

[43] *Id. See also* United States v. Penn, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

[43a] Despite this, the Court of Military Appeals has recently found that either Article 27 or Article 31 of the Uniform Code of Military Justice requires that military police notify an accused's defense counsel prior to interrogation. United States v. McOmber, 24 U.S.C.M.A. 207, 51 C.M.R. 452 (1976). This highly confusing opinion creates the possibility that the Court may have found a right to counsel in Article 31.

[44] 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[45] Maguire, *The Warning Requirement of Article 31(b): Who Must Do What To Whom and When?*, 2 MIL. L. REV. 1 (1958) [hereinafter cited as Maguire].

> accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. [46]

While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a "plain meaning." For ease of analysis the major questions are best considered in the following sequence: what warnings are required; who must give warnings; who must be warned; and when must warnings be given.

B. THE CONTENT OF THE WARNINGS

As indicated above, the specific content of the Article 31(b) warning is comparatively simple. However, judicial decisions have refined the meaning of the terms used in the clause. While the Code requires that the individual be informed of the nature of the accusation against him, a requirement not found in *Miranda,* the Code does not indicate the degree of specificity required to satisfy this provision. It now appears settled that as long as the individual being questioned is informed of the general nature of the offense, rather than the specific article of the Code violated or the specific degree of the offense, the interrogator has complied with the 31(b) requirement.[47] Unlike other aspects of Article 31(b), the Court of Military Appeals has held that it may be unnecessary for military police or other persons in authority to inform an accused of the nature of the offense when evidence exists that he is fully aware of the offense and where other important considerations justify the police failure to advise the accused of the specific offense. Thus in *United States v. Nitschke*[48] the accused was involved in an automobile accident in Germany that killed a pedestrian. The accused had been drinking and was asked by criminal investigators to give a blood sample. The CID agent involved did not notify the accused that he was suspected of a homicide because a local doctor had advised against it in light of the accused's mental state after the accident. Throughout the interview, the accused kept repeating, however, that he must have killed someone. On appeal, the Court of Military Appeals found that the agent had simply omitted confirming the fatality and that in view of all the circumstances the ac-

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[46] *Id.* at 4.
[47] *See, e.g.,* Maguire, *supra* note 45, at 28-30.
[48] 12 U.S.C.M.A. 489, 31 C.M.R. 75 (1961).

cused knew of the nature of the offense. While this case should not be interpreted liberally, it appears to remain good authority.

Where an accused is suspected of more than one offense, military police must warn of all offenses or risk total suppression of any statement that the accused may make.[49] When knowledge of a specific offense exists, it is insufficient for the Government to inform a suspect that the agents involved are interested in the activities of the accused over a general period of time. For example, in *United States v. Reynold*[50] the Court of Military Appeals held that where agents of the Air Force's Office of Special Investigations (OSI) informed the accused that they were interested in his activities over a given period of time when he was in fact suspected of both absence without leave and larceny of an officer's vehicle, the Government was held not to have complied with the requirements of Article 31(b) and the suspect's statement was held inadmissible.

While it would appear reasonably simple to adhere to the requirement of Article 31(b) and inform a suspect of his right to remain silent, the case law reflects numerous attempts by military police to avoid complete compliance. Two 1953 cases[51] reversed convictions in which military police had informed the accused that while Article 31 meant that they did not have to incriminate themselves it did not mean that they had a right to remain silent. Perhaps these cases can be explained simply by pointing to their date and the unfamiliarity with the new Article 31, but it is unfortunately true that similar cases have appeared in more recent years.[52] In 1972 for instance, investigators told an accused who was suspected of larceny and murder that if he was not involved and withheld knowledge of the offense, he would be an accessory after the fact and could receive 300 years in jail. The Court of Military Appeals reversed the conviction for failure to comply with Article 31(b).[53] All in all, however, this portion of the Article 31(b) warnings appears to be subject to general compliance by military interrogators.

Relatively few cases involve the third portion of Article 31(b)—that portion which advises the accused or suspect of the fact that anything he says may be used against him in a trial by court-martial.[54] If the suspect being questioned is in custody he must be

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[49] *See, e.g.*, United States v. Johnson, 20 U.S.C.M.A. 320, 43 C.M.R. 160 (1971); United States v. Reynolds, 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966).

[50] 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966).

[51] United States v. Williams, 2 U.S.C.M.A. 430, 9 C.M.R. 60 (1953); United States v. Murray, 11 C.M.R. 495 (ABR 1953).

[52] *See, e.g.*, United States v. Hundley, 21 U.S.C.M.A. 320, 45 C.M.R. 94 (1972).

[53] United States v. Peebles, 21 U.S.C.M.A. 466, 45 C.M.R. 240 (1972). *Cf.* United States v. Greene, 15 U.S.C.M.A. 300, 35 C.M.R. 272 (1965).

warned not only of his Article 31(b) rights but also of those rights conferred by *Miranda*.[55] These rights include the right to remain silent, a warning that anything said may be used against the accused at trial, and the right to have an attorney present at the interrogation with the additional right that if the individual cannot afford an attorney one will be appointed for him. The exact nature of the right to counsel in the military merits detailed discussion and will be so treated later in this article.

C. *WHO MUST WARN?*

Who must give Article 31(b) warnings is perhaps the single most complex question raised by Article 31. In civilian jurisdictions *Miranda* warnings must be given by persons with official status investigating possible criminal conduct. As a practical matter this generally means police officers. To further simplify the situation, *Miranda* warnings are required only during custodial interrogations. On the other hand, Article 31(b) read literally, requires warnings during *any* criminal interrogation of a suspect by a person subject to the Uniform Code of Military Justice. If Article 31(b) were to be interpreted literally, warnings would be required every time an accused or suspect is questioned. Although this possibility does not necessarily appear unreasonable, it raises a number of significant problems.

Many of these difficulties stem directly from the peculiar nature of the military itself. All military personnel have rank and status and virtually every military member is potentially senior to at least one other and thus holds actual or potential disciplinary authority. Even those individuals performing nonpolice duties frequently hold disciplinary or quasi-police powers. Thus an Army doctor who questions a patient may do so for medical purposes just as a civilian doctor might. However, unlike his civilian colleague, the Army doctor is a military officer with the same authority and powers that a military police officer holds.[56] Must Article 31 warnings by given by a military doctor who in the course of performing a medical examination questions a patient known to be a criminal suspect? To date the courts have absolved the medical corps and others from such responsibilities as long as their questions are purely professional or "personal" in nature. This has been the result of

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[55] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[56] While members of the Medical Corps are restricted in their command authority and spared certain responsibilities because of the need for medical specialists, they retain the full powers to question and apprehend that any other officer may have.

what has been called the "official capacity test" applied by the Court of Military Appeals.[57]

Under the test, the court has insisted thot trial courts determine the role or status of an interrogator at the instant of interrogation. Thus who must give warnings frequently becomes a question of fact. Was the JAGC officer who questioned the suspect acting as an attorney or as an officer holding police powers? As can be imagined, the official capacity test has been extremely difficult to implement and has given rise to a great deal of appellate litigation.

The simplistic alternative to the official capacity test would be to hold that Article 31(b)'s literal interpretation is binding. This eminently workable solution has recently been proposed yet again by Senior Judge Ferguson of the Court of Military Appeals in the case of *United States v. Seay*,[58] decided on November 7,1975. Concurring in the result, Judge Ferguson stated:

> I would apply the literal language of Article 31. No plainer nor clearer language may he imagined than "[n]o person subject this chapter. . . ."
>
> This Court's mandate is to apply and. when necessary. to interpret the law. not to ignore statutory language which lends itself to but one meaning. Furthermore, the reason for this broad literal proscription imposed by Congress is illustrated by the case at bar. In the military. unlike civilian society. the exact relationship at any given moment between the ordinary soldier and other service personnel in authority (*i.e.*, commissioned and noncommissioned officers)often is unclear. In the civilian experience, it is unlikely that anyone to whom *Miranda* might apply would question someone else other than in the former's official capacity — that is, as a law enforcement officer. . . . Thus, to simplify matters. and in recognition of the superior 'subordinate atmosphere inherent in the military not present in the civilian structure. the [Article 31] requirement is broader [than *Miranda*'s].
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> . . .[W]e have seen in repeated instances thedifficulty themilitary seems to have in applying a more narrow proscription such as the "official capacity" standard. . . .[T]his case has served to illustrate the wisdom of the Congress in removing from consideration such irrelevant factors as whether the questioner did or did not ask questions in an official capacity. Thus when *any* person subject to the Uniform Code of Military .Justice questions a persnn suspected or accused of a violation of the Code without first advising him of his pertinent rights. he has thereby violated Article 31 and any further inquiry is immaterial to the legal conclusion of inadmissibility of the result of such interrogation.[59]

While a fuller understanding of Judge Ferguson's position and its consequences must await an exposition of the numerous cases within this area, adoption of the Judge's position would bar the use

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[57] The test may have its origins in United States v. Wilson, 2 U.S.C.M.A. 248, 8 C.M.R. 248 (1953). See Maguire, *supra* note 45, at 6-14.

[58] 24 U.S.C.M.A. 7, [illegible] C.M.R. 57 (1975).

[59] *Id.* at 12-13, 51 C.M.R. at 62-63 (citations omitted).

of any unwarned statements taken from a suspect or accused in a criminal prosecution. The difficulties inherent in this proposition may not be readily recognized. On one hand, such a rule would further complicate the already difficult problem of psychiatric evaluations of accused persons[60] and raise new questions about the use of undercover agents;[61] and on the other hand, because of the exclusionary rule and a recent decision of the Court of Military Appeals in the immunity area,[62] it would likely compel the prosecution to prove that unwarned statements were not used in any fashion in preparation for the ultimate prosecution in substantially more cases than at present. The practical burden that this development might place on the prosecution might well be insurmountable[63] depending upon the number of unwarned statements that actually occur. Since there are only a limited number of areas in which the courts have applied the official capacity test, this concern may well be a needless one, however.

1. "Private Citizens"

A question of theoretical importance that has rarely arisen in actual practice is the responsibility of an individual to give rights warnings when he does not in fact hold any form of disciplinary authority. In the usual case, one private informally questions another suspected of barracks theft. In the civilian world a private citizen certainly has no responsibility to give warnings to another citizen. What, however, of Article 31(b)'s intonation that "no person" may interrogate another without giving warnings? In the only two cases on point, the military courts have applied the official capacity test: where a military member is acting in a purely personal capacity and lacks disciplinary authority, warnings are not required. Thus in ***United States v. Bartee,***[64] two Marines returned

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[60] *See* Section III.C.3. *infra*.

[61] There is a serious academic argument about whether Article 31(b) requires even undercover operatives to give warnings while *in* their undercover roles. *See* text accompanying notes 106-126 *infra*.

[62] United States v. Rivera, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975).

[63] The court's holding in *Rivera* is certainly noncontroversial. It requires the prosecution to prove, rather than just represent, that no use has been made of immunized testimony when prosecuting an accused who testified at a prior trial pursuant to a grant of use or testimonial immunity. However, the opinion contains dicta to the effect that such prosecutions of immunized individuals are to be extremely discouraged. *Id.* at 433, 50 C.M.R. at 392. *Rivera* would suggest that the existence of an unwarned statement might be taken by the Court of Military Appeals to have unlawfully narrswed the case or supplied a witness or other evidence. This use of the exclusionary rule is somewhat extreme compared to the general civilian rule.

[64] 50 C.M.R. 51 (NCMR 1974). ***See*** *also* United States v. [illegible]ing, 7 U.S.C.M.A. 482, 484, 22 C.M.R. 272, 274 (1957) apparently in partial contradiction to *Bartee*.

to their squad bay to discover that a tape player and five tapes were missing. The next morning one of the Marines heard one of the stolen tapes being played elsewhere in the squad bay. The Marine called a corporal, walked over to the locker the sound was coming from and told the corporal that his tape was playing within the wall locker. The accused was standing by the locker at the time and the victim informed him that he had his tape in the locker. The accused replied by taking the tape player and tapes from the wall locker and throwing them on a bed. The Navy Court of Military Review, quoting the earlier case of *United States v. Woods*[65] for the principle that where failure to warn is at issue "the ultimate inquiry is whether the individual, in line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to question one whom he suspects of an offense,"[66] found that the Marine victim's initial statement to Bartee was motivated solely by personal considerations and would not have required Article 31(b) warnings. However, the court accepted as binding the testimony of the corporal who added to the victim's statement by saying that he had asked Bartee where the rest of the tapes were and that it was his question that led to Bartee's surrender of the tapes. The court found that the corporal's official position required him to give Article 31 warnings prior to his remark to Bartee and thus reversed Bartee's conviction of that particular specification as having resulted from a violation of Article 31.

In the unique[67] case of *United States u. Trojanowski,*[68] the accused admitted a barracks theft after having been beaten by the victim. On appeal, the Court of Military Appeals held that although the beating of the accused had violated Article 31(a), the theft victim had been acting in a personal capacity and had not been required to give rights warnings prior to questioning the accused.[69]

There appears to be one major caveat to the official-personal capacity test. In 1959 the Court of Military Appeals indicated in

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[65] 22 U.S.C.M.A. **369,** 47 C.M.R. 124 (1973).

[66] 50 C.M.R. at 58-59, *citing* 22 U.S.C.M.A. 369, 371, 47 C.M.R. 124, 126 (1973), *in turn citing* United States v. Beck, 15 U.S.C.M.A. ***333, 338,*** 35 C.M.R. ***305,*** 310 (1965).

[67] Believed to be the only case to include a violation of both Article 31(a) and Article 31(b) in the personal questioning area.

[68] 5 U.S.C.M.A. 305, 17 C.M.R. 305 (1954).

[69] "'Surprisingly the court affirmed Trojanowski's conviction, reasoning that his admissions had been nonprejudicial. Inasmuch as the usual rule is the "automatic reversal" rule which refuses to test erroneous admission of confession evidence for prejudice, *see, e.g.*, United States v. Wagner, 18 U.S.C.M.A. 216, 39 C.M.R. 216 (1969), this aspect of the case must be considered an aberration based perhaps on the court's conclusion that a defendant who is so clearly guilty should not go free, traditionally known as the "bad man" rule.

United States v. Souder[70] that despite an interrogator's lack of official capacity, warnings would be required if the questioner's intention was to perfect a case against the accused. This case was thought to have potentially awesome consequences,[71] but the *Souder* dictum has apparently died stillborn.[72]

2. The Interrogating Guard

The official capacity test was applied consistently by the Court of Military Appeals until November of 1975.[73] While the test was easy to apply in theory, it was particularly difficult to apply in practice calling as it did for a factual determination of an interrogator's intent.[74] Indeed, the application of the test has proved particularly difficult in at least one important area — that of the interrogating guard. When military police themselves become criminal suspects and are placed in confinement, they are usually guarded by members of the military police who are former associates and often friends. A number of cases in the *Court-Martial Reports* deal with admissions made by such an individual to his guard.[75] In such cases the military appellate courts have applied the official capacity test by determining the motivation of the guard at the time that he questioned the suspect. The trial court would thus be forced to determine whether the guard was acting as a personal friend and expressing merely a polite personal interest or was, on the other hand, acting as a policeman interrogating a suspect. As can be anticipated, this determination has been exceedingly difficult for the trial courts. Considering the appellate results, one might also observe that the test has worked almost entirely to the benefit of the Government.76 It was this peculiar result of admitting into

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[70] 11 U.S.C.M.A. 59, 28 C.M.R. **283 (1959).**

[71] Particularly in the undercover agent area. ***See*** Comment, ***Interrogation of Suspects By "Secret" Investigation,*** **12** MIL. L. REV. **269** (1961).

[72] ***Souder*** does not appear to have been cited as binding precedent in any case.

[73] ***See*** United States v. Dohle, **24** U.S.C.M.A. **34, 51** C.M.R. **84 (1975).**

[74] ***See, e.g.,*** United States v. Dandaneau, **5** U.S.C.M.A. **462,** 18 C.M.R. 86 **(1958)** in which the court sustained the admissibility of incriminating admissions made by Sergeant Dandaneau to a captain who had engaged him in a casual "personal" conversation regarding his reasons for missing movement. The "personal" conversation was followed one hour later by an official inquiry by the captain prefaced by Article 31(b) warnings but consisting primarily of the same questions the accused had answered an hour before. The court's determination of the nature of the first conversation was, of course, a factual one. If correct when decided, ***Dandaneau*** is suspect today.

[75] ***See, e.g.,*** United States v. Carlisle, **22** U.S.C.M.A. 564, **48** C.M.R. **71 (1974);** United States **v.** Beck, **15** U.S.C.M.A. **333, 35** C.M.R. **305** (1965).

[76] While the Court in the ***Beck*** case remanded to allow a possible rehearing as to the status of **Beck's** guard during the interrogation, **15** U.S.C.M.A. at 339, 35 C.M.R. at

evidence the results of such custodial questioning by individuals who by happenstance were personal acquaintances of the suspect that led to the case of *United States v. Dohle.*[77]

In *Dohle,* the accused was suspected of the theft of four M-16 rifles and 14 locks. Chief Judge Fletcher rejected the official capacity test, and, attempting to overrule prior decisions, announced a new test that might be called the position of authority test. He stated:

> Where the questioner is in a position of authority, we do not believe that an inquiry into his motives ensures that the protections granted an accused or suspect by Article 31 are observed. While the phrase "interrogate, or request any statement from" in Article 31 may imply some degree of officiality in the questioning before Article 31 becomes operative. . . . the phrase does not also imply that non-personal motives are necessary before the Article becomes applicable. Indeed, in the military setting in which we operate, which depends for its very existence upon superior-subordinate relationships, we must recognize that the position of the questioner, regardless of his motives, may be the moving factor in an accused's or suspect's decision to speak. It is the accused's or suspect's state of mind, then, not the questioner's, that is important.[78]

The effect of the *Dohle* case is unclear. While Judge Fletcher spoke in the plural and announced a new test on behalf of the court, it is clear that his new test was not joined in by his two judicial brethren. Judge Ferguson concurred on the basis that he believed, as in the *Seay* case, that Article 31 should be taken literally. Indeed, Judge Ferguson stated specifically in *Dohle* that he refused to join in the new test "the Chief Judge purports to enunciate in his opinion."[79] Judge Cook concurred in the result on the basis of a prior decision.[80] Until Judge Ferguson's second retirement from the bench[81] the impact of the *Dohle* case was, as a pragmatic matter, easily ascertainable. A specific rule requiring anyone in a position of authority to preface his questions with Article 31(b) warnings had been announced and would certainly affect at least the guard cases.

311, *Carlisle* and other cases have simply found the guard to have been acting in a personal capacity despite what seems to have been official intent insofar as the reported facts are revealed by the appellate cases.

[77] 24 U.S.C.M.A. 34, 51 C.M.R. 84 (1975).

[78] *Id.* at 36-37, 51 C.M.R. at 86-87.

[79] *Id.* at 37, 31 C.M.R. at 87.

[80] *Id.* at 37, 51 C.M.R. at 87, *citing* United States v. Beck. 15 U.S.C.M.A. 333, 339, 35 C.M.R. 305, 311 (1965).

[81] Judge Homer Ferguson became a Senior Judge on May 2, 1971. On February 17, 1974, at the request of then Chief Judge Duncan, Judge Ferguson returned to full active service presumably because of Judge Darden's resignation on December 29, 1973. Judge Ferguson continued to sit as a result of Chief Judge Duncan's resignation on July 11, 1974 and then Judge Quinn's retirement on April 25, 1975. *See* 49 C.M.R. at vii. It has only been with the 1975 appointment of Judge Perry to the court that Judge Ferguson has been able to retire from active status. As of January 1976, the Court's members were: Chief Judge Fletcher (confirmed April 4, 1975); Judge

With Judge Ferguson's retirement, however, this aspect of *Dohle* is clearly in question and it is unclear whether Dohle possesses any precedential value beyond its peculiar facts.[82] Judge Fletcher's language in the case does not appear to do away with the official capacity test. Rather it seems to add an additonal level:[83] if an interrogator is not in an active position of authority the court must then turn to the official capacity test. For example, prior to *Dohle*, the official capacity test was used to hold that individuals serving as Charge of Quarters[84] and as Marine fire watches[85] were required to give Article 31(b) warnings if they intended to question individual suspects about criminal wrongdoing. It seems unlikely that the position of authority test would in any way make a difference in these cases. Although a Charge of Quarters may indeed be said to have authority because he in one sense acts in the place of a company or squadron commander, a Marine fire watch whose sole duty in effect is to be alert for fires or other disturbances would seem to lack any authority in the usual sense. On the other hand, it is certainly true that he is acting in an official capacity. Accordingly, it would seem likely that the official capacity test would be applied.

It seems reasonable, therefore, to believe that the official capacity-personal capacity dichotomy is still alive and well with only a new twist added. However, it is possible that *Dohle* will be expanded greatly in future months and years. Should this be the case, it is likely that a number of different decisions will be called into question, particularly those dealing with undercover operatives. These cases will be discussed in a later section of this article.

Cook (confirmed August 21, 1974); Judge Perry. It should be clear that the makeup of the Court of Military Appeals has changed drastically in a few short years. Accordingly, many legal precedents are now open to question. The next two years should indicate the new court's view of both military law generally and stare decisis particularly.

[82] No one can anticipate the decision of Judge Ferguson's replacement on this issue. However, Judge Perry's record as a civil libertarian does suggest that his decision in such a case might well be similar to Chief Judge Fletcher's opinion in *Dohle*.

[83] It has been suggested that *Dohle* can be viewed as attempting to promulgate a new test that subsumes the "official capacity test." This may be an easier formulation to work with. On the other hand, *Dohle* could be viewed as simply holding that those in authority act in an official capacity.

[84] United States v. Woods, 22 U.S.C.M.A. 369, 47 C.M.R. 124 (1973). A CQ is an individual who has limited responsibility for a company during off-duty hours. His primary responsibilities are administrative, including the notification of superior officers in the event of a situation requiring a decision. CQ's are usually middle grade NCO's.

[85] United States v. Brazzil, NCM 740066 (NCMR 26 Apr. 1974) (unpublished opinion). A Marine fire watch appears to be a low-ranking enlisted man whose primary duty is to be alert for fire or other disturbance during evening off-duty hours.

3. *The Medical Profession*

The most significant problem in the area of who must give warnnings involves the medical profession, and significantly different considerations are raised by the differing roles of psychiatrists and nonpsychiatrists. The problem is relatively simple when dealing with nonpsychiatrist members of the medical profession. Depending upon the ***Dohle*** case,[86] the question is the "traditional" one of the intent of the doctor who questions the suspect. If his intent is a medical one and he is questioning for diagnostic purposes, the cases indicate that there is no requirement that the doctor must give rights warnings. For example, in ***United States v. Fisher,***[87] when the accused was brought into an emergency room with respiratory depression, it was proper for the doctor to question him without warnings as to the cause of the depression.[88] The accused's admissions as to the use of cocaine were held admissible at his subsequent trial. However, as all members of the Medical Corps are officers with the same responsibilities and powers held by any other military officer, if ***Dohle*** is to have any meaning beyond its narrow facts, then perhaps "in authority" means that a questioner, including a doctor, who outranks the individual being interrogated must give warnings when that individual is a criminal suspect regardless of any other motivation he might have for asking the question.

If so, such a formulation would present difficulties when dealing with the medical profession. While the military doctor does have law enforcement powers, his primary duty is to maintain health and to heal the sick. Requiring rights warnings of military doctors when their sole intent is to perform their medical duty would clearly chill the replies given by some patients and could make health care for suspects difficult if not impossible. One could well urge that for public policy reasons members of the medical profession should be exempted from the responsibility of giving warnings when they **act** in a medical capacity.

The major problem in this area deals, however, not with members

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[86] Since members of the Medical Corps are commissioned officers, the Court of Military Appeals could easily find that they are in a "position of authority" when questioning a known suspect regardless of their intent in questioning.

[87] 21 U.S.C.M.A. **223, 44** C.M.R. 277 (1972).

[88] *See also* United States v. Baker, 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960) in which the court sustained the admissibility of incriminating remarks made by Baker to **a** Navy doctor who questioned him regarding "tracks" on his arm when the doctor **ap**parently suspected him of illegal narcotics use. The court justified its decision by relying on the fact that the admissions were made at a second meeting after Baker had requested help for an insomnia problem.

[89] Of course, individuals other than those in the medical profession may also be confronted with this problem. For a unique case involving testimony by a military

of the medical profession generally[89] but with psychiatrists in particular. The tension between the right against self-incrimination and the presentation of psychiatric evidence by the defense at trial is substantial, particularly in the military which lacks a doctor-patient privilege.[90] Having been given notice of a psychiatric defense, the prosecution will usually desire to have the accused submit to an examination by a government psychiatrist.[91] To allow the accused to refuse to cooperate would seem to create an unsupportable and unfair burden for the prosecution while forcing cooperation would seem to nullify the right against self-incrimination. In the civilian courts, this problem has yet to be adequately dealt with[92] although statutory privilege[93] occasionally resolves the matter when dealing with a question of competency to stand trial rather than competency at the time of the offense. A limited waiver of the right against self-incrimination has been found in a number of the civilian jurisdictions[94] and a substantial amount of critical comment has been engendered.[95]

In the military this situation has given rise to what is known as the ***Bubbidge*** Rule. In ***Babbidge,***[96] the Court of Military Appeals held that when the accused raises a defense of insanity, he can be compelled to undergo a limited government psychiatric evaluation. The court found that a defense of insanity constituted an implied

lawyer of information gained from an interview of a co-accused (not his client), see United States v. Marshall, 45 C.M.R. 802 (NCMK 1972).

[90] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 151c(2) [hereinafter cited as MCM, 1969].

[91] While the usual procedure in a civilian jurisdiction would be for the accused to be examined by his own expert who would usually be an entirely different individual than the expert used by the prosecution, the military practice is frequently different. The normal military situation in which the accused lacks funds to hire a civilian psychiatrist would be for the accused to be examined by a military psychiatrist in the first place. Examination by another psychiatrist will often not be possible for the Government. Thus self-incrimination problems plague the defense from the very start as the military psychiatrist is by no means a "defense" psychiatrist. Of course proper procedure will likely require an accused who is raising a defense of insanity to submit to a miltiary sanity board. See generally MCM, 1969, para. 121.

[92] For civilian cases discussing the issue see, *e.g.*, United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. McCracken, 488 F.2d 406 (5th Cir. 1974); United States v. Barrera, 486 F.2d 333 (2d Cir. 1973), *cert. denied,* 416 U.S. 940 (1974); United States v. Julian, 469 F.2d 371 (10th Cir. 1972); United States ex rel. Smith v. Yeager, 451 F.2d 164 (3d Cir. 1971); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[93] See, *e.g.*, 18 U.S.C. § 4244 (1970).

[94] See United States v. McCracken, 488 F.2d 406 (5th Cir. 1974); United States v. Barrera, 486 F.2d 333 (2d Cir. 1973), *cert. denied,* 416 U.S. 940 (1974); United States v. Julian, 469 F.2d 371 (10th Cir. 1972): F. R. CRIM. P. 12.2.

[95] See, *e.g.*, Danforth, Death Knell for Pre-Trial Mental Examination?, 19 RUT. L. REV. 489 (1965); Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric *Examination: An* Invasion of the Privilege Against *Self-Incrimination*, 83 HARV. L. REV. 648 (1970).

[96] United States v. Babbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969).

waiver of the accused's rights against self-incrimination.[97] *Babbidge* represents a compromise between the government's need for proof and the accused's rights against self-incrimination. Although the accused can be compelled to submit to a government psychiatric evaluation on pain of having any defense expert testimony suppressed at trial,[98] the government psychiatrist in theory may testify at trial only to his ultimate conclusions as to the accused's sanity, either at trial or at the time of the offense. He may not testify to any specific details given during the psychiatric interviews.[99]

The numerous problems of administration[100] and trial procedure[101] instigated by *Bubbidge* arise only when a psychiatrist

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[97] *Id.* at 332, 40 C.M.R. at 44 *See generally* Holladay, *Pretrial Mental Examinations Under Military Law: A Re-Examination,* 16 A.F.L. REV. 14 (1974).

[98] *Babbidge* suggested that an accused who refused to submit to a government evaluation could be estopped from presenting a defense. If such is the case, this sanction is similar to that imposed on the person who refuses to testify upon cross-examination. There the result of such a refusal may result in the striking of direct testimony. United States v. Colon-Atienza, 22 U.S.C.M.A. 399, 47 C.M.R. 336 (1973). However, *Babbidge* did not make it clear whether it was the *entire* defense of insanity that could be estopped (or struck) or if it was only the expert psychiatric testimony that was involved.

[99] *Cf.* United States v. Johnson, 22 U.S.C.M.A. 424, 47 C.M.R. 402, 407-08 (1973); United States v. Babbidge, 18 U.S.C.M.A. 327, 332-33, 40 C.M.R. 39, 44-45 (1969).

[100] Primary among the difficult questions spawned by *Bahbidge* are the procedural details that surround the so-called "trigger problem." These questions include whether the Government may compel an accused to submit to a psychiatric examination if the defense chooses to raise the defense of insanity through lay rather than expert psychiatric testimony, *see* MCM, 1969, para. 122*c*, which unlike some civilian jurisdictions does not require expert evidence to either raise or rebut a defense of insanity; at what point in the pretrial or trial proceedings the Government may require such an examination; and whether the failure of an accused to submit to such an examination would be grounds for precluding the use of such a defense. The 1975 revision of the Manual for Courts-Martial attempted to solve some of these problems. After the defense has presented expert psychiatric testimony at trial, the Government may compel the defendant to submit to a government psychiatric examination. The sanction for defense refusal to cooperate is the suppression or striking of the defense expert testimony. MCM. 1969, paras. 140*a*, 122*b*, 150*b*, *as amended*, 49 Fed. Reg. 4247 (1975).

United States v. Johnson. 22 U.S.C.M.A. 424, 42 C.M.R. 402 (1973), exhibits one possible solution to correct some of the noted difficulties. There the trial court issued an order prohibiting any disclosure of the results of a psychiatric interview of the accused outside medical channels and the defense. The judge made it clear that he would personally review the findings and that no material would be disclosed to the prosecution pending his final determination, *see id.* at 426. 47 C.M.R. at 404. The Court of Military Appeals sustained this use of the court order although Judge Duncan in his concurrence voiced his strong doubts as to the legality of the protective order and the judge's power to issue it. *Id.* at 428-30, 47 C.M.R. at 406-08.

[101] Even the use of a court order, *see* note 100 *supra*, does not address the essential difficulty. At trial the defense would usually present its evidence on the issue of sanity by calling its expert witness. If the defense counsel attempts to ask its expert witness for anything more than his ultimate conclusion on the defendant's sanity, he risks "opening the door" to more probing questions by the trial counsel on cross-

fails to give Article 31(b) warnings. If the psychiatrist chooses to comply with that Article, he has negated ***Babbidge's*** premise because the Article 31(b) warning specifically informs the suspect or accused that he has the right to remain silent. Should a suspect so warned knowingly waive his **rights,**[102] then there is no ***Babbidge*** issue. The armed services have combined to issue what is known as a technical manual[103] that specifically deals with psychiatric issues in the criminal law area. Interestingly enough, a specific section of that pamphlet addresses the topic of performing pretrial psychiatric evaluations of a criminal accused[104] and specifically requires a government psychiatrist to give Article 31(b) **warnings.**[105] Query the effect of compliance with this particular paragraph? If a suspect is so warned by a psychiatrist and says that he wishes to exercise his right to remain silent, may a psychiatrist tell him that the warnings were purely ritualistic and that he in fact has no rights? Could the defense counsel in a case successfully argue that regardless of ***Babbidge,*** the joint effort of the armed services of including this language in its technical manual specifically modifies the ***Babbidge*** case by creating a broader right for the accused? It should be evident that the entire issue of the sanity of the accused and the right against self-incrimination is an exceedingly difficult one not susceptible of easy solution. Further clarification must await the future litigation which is all too probable.

4. Undercover Agents

The other major problem in this area of Article 31(b) concerns undercover agents and their responsibility, if any, to give Article 31(b) warnings. While the mere suggestion that undercover agents might be covered by Article 31(b) may appear somewhat amusing, the language of Article 31(b) taken literally would require military personnel acting in an undercover capacity to give Article 31(b)

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examination (or indeed on direct examination of an expert witness selected by the prosecution) which while revealing the basis of the ultimate conclusion also contain the definite possibility of revealing incriminating statements given by the accused during the conduct of the interview.

[102] There remains the argument that the suspect is so mentally ill that he could not give an intelligent knowing waiver.

[103] U.S. DEP'T OF ARMY, TECHNICAL MANUAL NO. 8-240, PSYCHIATRY IN MILITARY LAW (1968) [hereinafter cited as TM 8-240]. This manual was published as a joint services manual under the auspices of the Departments of the Air Force and Navy, as well as the Department of the Army.

[104] *Id.* at ch. 4.

[105] *Id.*, para. 4-4f. Note that while the accused is to he told he can consult with counsel, paragraph 4-4g states that "[n]ormally, there will he no third party witnesses to the examination. Good rapport is best established when the psychiatric examination is conducted with only the medical officer and the patient present."

warnings prior to asking questions of suspects. Indeed, Judge Ferguson's position in *Seay*[106] would seem to support this. Unless a literal meaning is ascribed to Article 31(b),[107] however, this interpretation appears hardly justifiable.[108] The *Miranda* decision was based in large part on the theory that the very presence in a police station or involvement in a custodial interrogation could not help but involve some form of psychological coercion. Article 31(b), enacted for many of the same general reasons that underlie *Miranda*,[109] stems in part from a congressional desire for fairness in interrogations. An undercover police setting, however, appears to lack any of the traditional forms of police coercion.

The cases in this area accordingly support use of undercover interrogation.[110] Unfortunately, the cases may support it to an unjustifiable extent thereby raising questions of fairness and infringement of a suspect's right to counsel. *United States v. French*[111] is typical of one type of case involving undercover agents. Captain French, an Air Force officer, sent a message to the Soviet Embassy in Washington that he was willing to sell certain classified weapons information to the Soviet Union in return for cash to settle some gambling debts. The message was retrieved by the FBI and some time later an FBI agent, accompanied by an Air Force Office of Special Investigation agent knocked on Captain French's door in New York. Upon entry they identified themselves as Russian agents and engaged in a short conversation with Captain French. As soon as they had secured sufficient incriminatory information to make it clear that Captain French was indeed offer-

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[106] United States v. Seay, 24 U.S.C.M.A. 7, 51 C.M.R. 57 (1975).

[107] Interestingly enough, there are unconfirmed reports that a military judge sitting at a general court-martial in Norfolk, Virginia, in the summer of 1975 accepted this theory. Finding that an undercover Naval Investigative Service agent should have given Article 31(b) warnings while attempting to make an undercover purchase of narcotics, he suppressed the resulting evidence.

[108] Chief Judge Quinn stated in *United States v. Gibson*:

> Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation. . . . Careful consideration of the history of the requirement of warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self incrimination.

3 U.S.C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

[109] *Compare* Miranda v. Arizona, 384 U.S. 436, 448-62 *with* United States v. Gibson, 3 U.S.C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

[110] *See, e.g.*, United States v. Hinkson, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967); United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954); United States v. Cartledge, NCM 742257 (NCMR 17 Sept. 1975) (unpublished opinion); United States v. French, 25 C.M.R. 851 (AFBR 1958). The civilian position appears identical. *See, e.g.*, United States v. Gardner, 516 F.2d 334, 339-40 (7th Cir. 1975).

[111] 25 C.M.R. 851 (AFBR 1958), *aff'd in part, rev'd in part*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959).

ing to sell classified data, they apprehended him and informed him of his rights under Article 31(b). At trial and on appeal his defense counsel's suggestion that the agents should have read Article 31(b) as soon as the door was opened was summarily dismissed.[112]

In United States *v.* Gibson[113] the Court of Military Appeals dealt with another type of undercover agent case. There the court held admissible certain admissions gathered from the accused, then in pretrial confinement, by a fellow prisoner—termed "a good reliable rat"—who had agreed to act as a CID informant. The acknowledged intent in Gibson was to obtain information from an individual who would not otherwise have talked. The court found that Article 31(b) was not literal in meaning, that the "rat's" conduct was not official action,[114] and that deceit was lawful when not calculated to result in untrue statements.[115] In a similar vein, the Court of Military Appeals allowed the introduction into evidence of admissions made in United States *v. Hinkson*.[116] In Hinkson, the accused was placed outside a Naval Investigation Service agent's office. A fellow Marine who had been acting as an informant was placed in a seat next to him and initiated a conversation. Hinkson made incriminating remarks. The court based its finding that the admissions were properly placed before the court on the ground that the accused must bear the risk of any discussion that he may choose to have with others.[117] It must be conceded that in both the Gibson and Hinkson cases the possibility of the type of coercion that motivated both Miranda and Article 31(b) was absent. However, Article 31(b) arguably establishes what might be called a rule of fairness,[118] one that specifically prevents official interrogations of suspects without supplying warnings. While review of the congressional hearings leading to Article 31's enactment is not of particular value, it does indicate that it was more than mere coercion that troubled Congress.

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[112] 25 C.M.R. at 865. During sentencing French testified that he had sold the plans to settle gambling debts but that he was not morally guilty because he intended to capture the Russian agents via a suicide plan. The trial and appellate courts rejected his explanation. 25 C.M.R. at 868. It could well be that his extenuation and mitigation assisted the courts in rejecting his Article 31 claims.

[113] U.S.C.M.A. 746, 14 C.M.R. 164 (1964).

[114] *Id.* at 752, 14 C.M.R. at 170; *cf.* Hoffa v. United States, 385 U.S. 293 (1966).

[115] United States v. Gibson, 3 U.S.C.M.A. 746, 753, 14 C.M.R. 164, 171 (1954).

[116] 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967).

[117] *Id.*, 37 C.M.R. 390 (1967). The court's reasoning is similar to that of the Supreme Court in Hoffa v. United States, 385 U.S. 293 (1966).

[118] The decision of the Court of Military Appeals in Souder v. United States, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959), seems primarily to stem from a feeling that fairness should predominate in military justice.

If there is some substance to the concept of fairness which motivated the court's decision in ***Souder,*** it may well be that the concept is in harmony with a deeper congressional concern. Although the coercion of rank that may have concerned Congress is absent in cases such as ***Gibson*** and ***Hinkson,*** cases of that type raise questions of fairness. It seems at least arguable that Congress was attempting to partially redress the imbalance of skill and resources between the individual and the military establishment when it enacted Article 31(b). If this premise is accepted, it can be suggested that there is a point in the process of bringing a man to trial beyond which the Government cannot interrogate a suspect, directly or indirectly, without notice.

The Supreme Court dealt with this very issue in 1964 when it decided the case of *Massiah v.* ***United States.***[119] In *Massiah,* the accused was a merchant seaman who had been arrested for violation of federal narcotics laws. Indicted, Massiah was released on bail. He had already retained an attorney who had assisted him in his arraignment and his plea of not guilty. Subsequent to the indictment and unknown to Massiah, a co-accused turned government informant and cooperated with the Government in placing a radio transmitter under his car. Subsequently, the co-accused and Massiah held a lengthy conversation while sitting in co-accused's automobile. The entire conversation was monitored by government agents, conduct which the Supreme Court found to be unacceptable. Quoting with approval from a New York case,[120] the Court stated, "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."[121] The Supreme Court went on to find that the bugging of Massiah was a violation of the sixth amendment right to counsel in that he had been interrogated after indictment and in the absence of his already retained attorney.

While *Massiah* concerned an individual who already had an attorney—unlike Gibson and Hinkson—it appears to stand for basic proposition that an individual[122] who has been indicted may not be interrogated by police or police agents without being informed of his right to counsel. The reasoning of the Court in *Massiah* would support the argument that in the military Article

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[119] 377 U.S. 201 (1964).

[120] People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

[121] 377 U.S. at 205, *quoting from* People v. Waterman, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448.

[122] Perhaps limited to an individual with counsel.

31(b) warnings should be required even of alleged undercover operatives at some particular point in the criminal justice process.[123] A number of specific points could be identified where this could be done: identification as a suspect; apprehension, restriction, or pretrial confinement; the date that charges are formally preferred; the date of formal referral; or the date of the trial itself. While the term "indictment" has no formal equivalent in military terminology, it is generally accepted to be the rough equivalent of **referral.**[124] However, it seems more appropriate in this area to consider indictment the equivalent of the point at which the accused is either formally charged or his liberty is infringed upon. At both those steps the accused is clearly placed well within the criminal process and the system is on notice that he is accused of the specific offense.

There is even some support in contemporary military law for this particular view. The Court of Military Appeals condemned an indirect interrogation in the case of United States *v.* ***Borodzik***,[125] decided in 1971. In *Borodzik,* the accused was suspected of theft of aviation watches. After two Naval agents visited the accused in his civilian apartment and informed him of his rights, he exercised his right to remain silent and requested an attorney. As he packed to accompany the agents, they advised his wife that things would go better for him if the watches were turned over to them. The wife spoke to the accused out of the presence of the agents and her husband then turned over eight aviation watches. The court held that this was nothing more than an indirect interrogation of Borodzik by the Naval **agents**[126] and that the questioning was improper without specific warnings. The opinion also implies that the agents violated the defendant's already exercised rights to remain silent and to have an attorney present. While in one sense *Borodzik* could be held to have overruled Gibson and Hinkson sub silentio, such a conclusion seems difficult to support. Indeed, in the *Dohle* decision, Chief Judge Fletcher specifically referred to the Gibson **case,** indicating that Dohle did not ***go*** so far (in his opinion) as to affect the

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[123] Jimmy Hoffa was held not to have a right to be arrested as soon as a prima facie case was available. However, ***Hoffa*** is highly distinguishable from this argument; Hoffa was not involved in the criminal law process until his arrest (other than being identified as an accused or prospective defendant). Hoffa v. United States, **385 U.S. 293 (1966).**

[124] Indictment is of course the formal decision that sends a case to trial. Referral in the military criminal process has the identical result. While the Article **32** investigation, ***see*** UCMJ, art. 32, 10 U.S.C. **§ 832** (1970), fulfills much the same investigatory function as the grand jury, only the general court-martial convening authority has the power that a grand jury has to send a case to trial.

[125] 21 U.S.C.M.A. **95, 44** C.M.R. **149 (1974).**

[126] *Id.* at 97, **44** C.M.R. at 151.

undercover agent problem.[127] ***Souder,*** *Borodzik,* and *Massiah* together, however, would appear to make a strong argument that at some step in the military criminal process prior to trial, the accused can no longer be questioned by an undercover agent without rights warnings being given. While this conclusion is far from radical, it appears to lack specific supporting precedent at this time.

5. Civilian Police

The question arose in the early 1950's as to the responsibility of civilian police to advise military suspects of their rights pursuant to Article 31. The question had in fact arisen during the legislative hearings concerning the then proposed Uniforn Code of Military Justice. On Tuesday, March 24, 1949, during the hearings before the House of Representatives Committee on Armed Services, Subcommittee Number 1, the following interchange took place:

> Mr. Smart (Professional Staff Member): [T]his particular article refers only to persons subject to this code, so that if a military person is apprehended by authorities other than military authorities they may likewise extract a statement from the accused or suspect which is in violation of the provisions of this artiole.
>
> Now I think the record should clearly show that any statements obtained under those circumstances would likewise be inadmissible.
>
> Mr. Larkin. I think there ought to be a distinction pointed out there, Mr. Chairman. In many State jurisdictions the local authorities have no obligation to inform a person suspected of an offense that any answers they ***[sic]*** make may be used against them.
>
> I don't think if a confession is obtained by the civilian authorities that it should be inadmissible because the civilian authorities neglected to inform the man in advance of his rights.
>
> . . . .
>
> But you would face this situation if you required the civilians—whom you can't require by this code—to inform a suspect in advance as provided in subsection (b): A man may voluntarily walk into the local civilian authorities or a police station and make a confession and they won't know what it is all about and not having any obligation to inform him or not seeing any reason to, why you would then not be able under the construction presented here to use such a statement or such a confession against the man.[128]

The final rule in this area as expressed by the Court of Military Appeals can be summarized as follows: Unless the scope and character of cooperative efforts between civilian and military personnel demonstrate that the two investigations have merged into an indivisible entity or the civilian investigator acts in furtherance of a military investigation or in any sense as an instrument of the

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[127] 24 U.S.C.M.A. 34. 36. 51 C.M.R. 84, 86 (1975)

[128] *Hearings. supra* note 19. at 991-92.

military, civilian police will not have to give Article 31(b) warnings[129] although they remain bound by the Miranda rules. Thus civilian police working on a civilian offense involving a military service member will almost never have to give Article 31(b) warnings. Only in those cases in which military and civilian police are working in close cooperation with each other and arguably only in cases in which the civilians are totally subordinated to military control, will Article 31(b) apply to civilian law officers.

Representative of this view are United States *v. Holder*[130] and United States *u. Temperly*[131] in which the Court of Military Appeals in both 1959 and 1973 held that FBI agents engaged in the arrest of military deserters were sufficiently independent from military control (despite the purely military justification for the arrests) to be immune from the requirement of giving Article 31(b) warnings. The law is similar for cases involving foreign police;[132] when acting independently of military authorities they are not required to give Article 31 warnings.[133] This general doctrine is based in significant part on the rationale expressed in the 1949 congressional hearings. If it is sufficiently difficult to have American civilian police comply with the requirements of the Miranda decision, how much more difficult would it be for civilian police to attempt to comply with military rules?

D. WHO MUST RECEIVE ARTICLE 31(b) WARNINGS

Although not specifically stated in Article 31(b), the warning requirements would appear to apply only to members of the armed forces or perhaps those subject to military law.[134] There would seem

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[129] *See, e.g.*, United States v. Temperly, 22 U.S.C.M.A. 383, 47 C.M.R. 235 (1973); United States v. Penn, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969); United States v. Holder, 10 U.S.C.M.A. 448, 28 C.M.R. 14 (1959).

[130] 10 U.S.C.M.A. 448, 28 C.M.R. 14 (1959).

[131] 22 U.S.C.M.A. 383, 47 C.M.R. 235 (1973).

[132] *See, e.g.*, United States v. Swift. 17 U.S.C.M.A. 227, 38 C.M.R. 25 (1967):United States v. Grisham, 4 U.S.C.M.A.' 694, 16 C.M.R. 268 (1964). Should, however, military authorities carry out an intertwined investigation with foreign police, foreign police will have to give Article 31(b) warnings for any statements to be admissible at an American court-martial. *Cf.* United States v. Schnell, 23 U.S.C.M.A. 464, 50 C.M.R. 483 (1975).

[133] In 1975, the Court of Military Appeals decided the *Schnell* case, indicating its willingness to require foreign police working with Americans to comply with American fourth amendment standards. However, the court's track record in cases involving the application of Article 31 to civilian police suggests the existence of an informal presumption that makes it unnecessary for civilian police to give Article 31 warnings. This situation may change with the "new" court

[134] *See* UCMJ, art. 2, 10 U.S.C. § 802 (1970). For a general discussion of this problem, *see* Horbaly & Mullin, *Extraterritorial Jurisdiction . . . and its Effect on the Administration of Military Criminal Justice Overseas*, 71 [illegible] L. REV. 1, 20-32 (1976).

to be little justification to extend Article 31(b) rights to civilians not subject to the potential authority of the military criminal law system.[135] Certainly what little justification may exist—primarily the argument that fairness and voluntariness require warnings—would seem to be mooted so long as Miranda retains some vitality. Clearly a custodial interrogation of a civilian by a military policeman, somewhat rare in any event because of the Posse Comitatus Act,[136] would require Miranda warnings. What standard must be used, however, by the military policeman who apprehends an individual in civilian clothes who may or may not be a civilian? Research indicates only one military case that has even remotely considered the issue.

In United States *v. Zeigler*,[137] a Marine warrant officer interrogated a suspect in civilian clothes whom he, erroneously, believed to be a civilian "hippie" because of his clothes and disheveled appearance. Although the Court of Military Appeals found that the warrant officer's inquiry into the suspect's identity "was not, in our opinion, the kind of interrogation into the commission of a criminal offense which requires threshold advice as to the right against self-incrimination and the right to counsel,"[138] both the majority and dissenting[139] opinions seemed to recognize the inapplicability of Article 31(b) to apparent civilians. An issue the case did not address, however, is the standard to be used in reviewing the interrogator's decision. Shall it be an objective one or simply a good faith subjective belief by the military questioner? The question remains unresolved.

While there has been little or no appellate litigation over the term "accused" as used in Article 31(b), there has been a significant amount of controversy over the word "suspect."[140] The issue, of

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[135] While there are numerous civilian employees in the Department of Defense whose livelihood could be affected by any incriminating remarks and who could also be subject to a form of rank inspired psychological coercion, the coercion present in the uniformed forces comes from the possibility of direct punishment. Only those persons directly liable to court-martial should be covered by Article 31(b).

[136] 18 U.S.C. § 1345 (1970). This act sharply limits the use of military personnel for civilian law enforcement purposes. *See, e.g.*, United States. v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed,* 510 F.2d 808 (8th Cir. 1975).

[137] 20 U.S.C.M.A. 523.43 C.M.R. 363 (1971). *See also* United States v. Camacho, 506 F.2d 594 (9th Cir. 1974) (identification required of possible civilian without Article 31(b) warnings although he claimed military status: Article 31 not discussed).

[138] 20 U.S.C.M.A. at 526, 43 C.M.R. at 366.

[139] Judge Ferguson dissented, apparently believing that the warrant officer believed Zeigler to be a Marine rather than a civilian.

[140] *See generally* Maguire. *supra* note 45, at 15-18.

course, relates not to the academic definition of the word, but rather to the factual determination that must be made in each case to determine whether a sufficient quantum of evidence existed at the time of the interrogation for the individual questioned to have been a suspect. It is clear that an individual may be questioned by a policeman without being a suspect in either Article 31 or Miranda terms. Even where a law enforcement officer is concerned about possible criminal conduct, his "hunch" that a crime has been committed need not rise to the level of suspicion necessary to trigger Article 31(b).

In the illustrative case of United States *v. Ballard,*[141] an air policeman on night patrol saw tool boxes being placed in a private car at the Base Equipment Management Office. The air policeman investigated and asked Ballard his identity and place of duty. Ballard replied with a bribe attempt. The Court of Military Appeals held that the air policeman was simply performing his duty to inquire of anything out of the ordinary and did not at the time suspect Ballard in the Article 31(b) sense. Similarly, in United States *v. Henry,*[142] the accused shot into a hooch in Vietnam killing a soldier. Hearing the shot, an officer rushed to the scene and inquired of the small crowd in front of the hooch who had shot whom. The accused confessed from the crowd. The Court of Military Appeals held that Article 31(b) warnings were not required of the officer prior to asking the crowd what had occurred.[143] What is unclear, of course, is what level of suspicion is necessary before Article 31(b) warnings are required and specifically, perhaps, how close the finger of suspicion must point to a specific individual before he or she becomes an Article 31(b) suspect.

The question of imputed knowledge has arisen occasionally. Where one government agency is aware that the individual to be questioned is a criminal suspect but the questioner—the actual interrogator—is unaware of that fact, no Article 31(b) warnings are required.[144] The difficulty with this imputed knowledge result is that it seems to penalize good police work and good intra-government communications and reward inefficiency. If one government agent fails to inform another of the status of a case, then Article 31(b) warnings are not required. Surely this conclusion

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[141] 17 U.S.C.M.A. 96, 37 C.M.R. 360 (1967).
[142] 21 U.S.C.M.A. 98, 44 C.M.R. 152 (1971).
[143] *Accord,* United States v. Shafer, 384 F. Supp. 486 (N.D. Ohio 1974) (involving inquiries made to National Guard personnel after shootings during a protest demonstration at Kent State University).
[144] *See, e.g.*, United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); United States v. Brown. 48 C.M.R. 181 (ACMR 1973).

is questionable. One can easily postulate a set of facts which would present the defense with an excellent argument to estop the Government from relying upon its own gross negligence to escape the failure to give rights warnings.

E. WHEN MUST WARNINGS BE GIVEN?

The traditional phrasing is that Article 31(b) warnings must be given whenever questioning or conversation designed to elicit a response takes place.[145] This formulation is, however, too simplistic although it more than adequately makes it clear that Article 31(b) warnings need not be given in cases of spontaneous remarks by a suspect. The military has followed the general civilian rule that an individual who volunteers an incriminating admission need not be stopped and given rights warnings.[146] Whether an individual suspect who begins in spontaneous fashion may be encouraged to finish his statement without being warned of his rights is unclear. To the extent that authority may exist, it appears likely that a witness to such a spontaneous admission is allowed to add follow-up questions to complete a statement.[147]

The difficulty with the "elicit a response" formulation is that it does not adequately deal with the problem of preliminary or administrative questions and "caught in the act" questioning. The majority civilian rule in the *Miranda* area has been that questions asked of the accused not intended to elicit incriminating admissions but rather intended to elicit purely administrative information—in short, preliminary questions—need not be prefaced with *Miranda* rights warnings.[148] The ultimate[149] position of the military courts on the same issue is as yet unknown.'"[150]

The authors of Article 31 intentionally changed the language from the phraseology found in Article of War **24** so as to eliminate Article 24's absolute ban on any solicitation of any information

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[145] *See, e.g.*, United States v. Borodzik, 21 U.S.C.M.A. 95, 44 C.M.R. 149 (1971).
[146] United States v. Vogel, 18 U.S.C.M.A. 160, 39 C.M.R. 160 (1968).
[147] *Id.*
[148] *See, e.g.*, United States v. LaVallee, 521 F.2d 1109 (2d Cir. 1975); Owens V. United States, ___ F.2d ___ (D.C. Cir. 1975). Numerous cases supporting this proposition are cited in United States v. LaVallee, *supra* at 1109, n.1. *Miranda* could be interpreted as applying only to station house interrogations. *Cf.* Schneckloth v. Bustamonte, 312 U.S. 218. 247 (1973).
[149] There is authority to believe that Article 31(b) may have been extended to *any* questioning. ***See*** United States v. Hundley, 21 U.S.C.M.A. 320, 45 C.M.R. 94 (1972), *citing* United States v. Williams, 2 U.S.C.M.A. 430, 9 C.M.R. 60 (1953); *cf.* United States v. Pruitt, 48 C.M.R. 495 (AFCMR 1974). ***See*** *also* Maguire, *supra* note 45, at 31.
[150] The cases in the area have not truly come to grips with the question. ***See*** United States v. Vail, 11 U.S.C.M.A. 134, 28 C.M.R. 358 (1960). now almost a legal oddity with its "caught in the act" exception.

and to replace it with a ban on solicitation of incriminating information.[151] Despite this history, it seems likely that Article 31(b)'s intent may have been to prohibit any official, unwarned questioning of a suspect whatsoever.[152] This suggestion cannot be taken literally. A company commander who wishes to inquire of an individual suspected of or being investigated for an offense as to whether or not he has finished an assigned military task certainly will not have his question banned by Article 31(b). However, any question posed to a suspect as part of an intended interrogation into an alleged criminal offense may well be banned.

A related issue is the difficulty of "caught in the act" questioning. This difficulty can arise when an individual surprises a suspect in the midst of apparent criminal activity. In the civilian jurisdictions the issue is a good deal simpler, for Miranda applies only to custodial interrogations. Most questions asked by a police officer of a suspect prior to an arrest will not be covered by Miranda or by any other form of rights warnings. In the military, on the other hand, so long as the military policeman is convinced that the individual is a suspect, Article 31(b)'s literal language would require warnings. The principal military case dealing with this issue is United States *v. Vail.*[153] Vail and two others were suspected of an attempt to steal arms from an Air Force warehouse in Morocco. At the time of their apprehension the Provost Marshal asked one of Vail's co-accuseds to show him the location of the weapons which had been removed from the warehouse. The weapons were produced in response to the demand. The Court of Military Appeals chose not to decide the issue of standing and decided that the production of the weapons constituted a verbal act, an equivalent of an oral response. The court stated: "The real question is whether an accused apprehended in the very commission of a larceny must be advised of his rights under Article 31 as a condition to the admission of testimony of his reply to a demand to produce stolen weapons."[154] The late Judge Quinn answered his own question in the following fashion:

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[151] The revised draft of the UCMJ states that Article of War **24** made all improperly obtained statements inadmissible against anyone. 'This is changed," the draft continues, "Article of War **24** forbids the use of coercion to obtain any statement whether or not self incriminating. Proposed article **43** [Article 31] forbids compulsion to obtain self-incriminating statements." **2** Morgan Papers, ***supra*** note *22,* revised draft of December 6, **1948,** at page **3.**

[152] **See** note **149** ***supra.***

[153] 11 U.S.C.M.A. **134,** 28 C.M.R. **358** (1960).

[154] *Id.* at **135,** 28 C.M.R. at **359.**

> Common sense tells us the arresting officer cannot be expected to stop everything in order to inform the accused of his rights under Article 31. On the contrary, in such a situation he is naturally and logically expected to ask the criminal to turn over the property he has just stolen.. . .In our opinion. Article 31 is inapplicable to the situation presented in this case.[155]

Judge Ferguson, on the other hand, in a well written and seemingly correct dissent, argued that *Vuil* was contrary to both earlier decisions and congressional intent. Judge Latimer, concurring in the court's holding, believed that Article 31 was not applicable at all.

Although there is substantial civilian authority in the *Miranda* area to suggest that *Vuil* is a correctly decided case, the actual validity of *Vuil* as a military precedent is highly uncertain. Research indicates that *Vuil* has been followed only once, and that in a general court-martial case affirmed in an unpublished opinion[156] by the Army Court of Military Review that found any Article 31 violation to be de minimis.[157] In view of the legislative history of Article 31 and its peculiar phrasing, it can be suggested that Article 31(b) should apply specifically to the case of an individual caught in the act. In such a case the interrogator simply must stop the individual, apprehend him should he choose, and inform him of his rights. This should not be as difficult or as an absurd a suggestion as it might appear, for if the interrogator is not convinced that the individual is responsible for criminal wrongdoing, the individual is most likely not a "suspect" in the Article 31(b) sense and accordingly Article 31 warnings would not be required.

A never-ending Article 31(b) problem is determining if warnings must be repeated when warnings have already been given to a suspect at a prior interrogation. The general rule is that if the warnings were given properly at the first interrogation session and that the time elapsed between the first and subsequent sessions is sufficiently short as to constitute one entire continuous interrogation, separate warnings need not be given.[158] On the other hand, if the

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[155] *Id.* at 136, 28 C.M.R. at 360.

[156] United States v. Williams, CM 431074 (ACMR 22 July 1975) (unpublished opinion).

[157] *Id.* The court found that any prejudice was minimal in view of a full confession made later after proper warnings. The decision of the Court of Military Review is at odds with the automatic reversal rule usually applied in the Article 31 area.

[158] *See, e.g.*, United States v. Schultz, 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970) (interrogations separated by seven hours found to be one continuous session); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967) (interrogations separated by one day found to be continuous); United States v. Boster, 38 C.M.R. 681 (ABR 1968) (interrogations separated by 10 days found to be separate sessions).

time interval is long enough to create separate and distinct interrogation sessions, then each individual session must be prefaced by Article 31(b) warnings.[159] No firm guidance can be given as to what minimum time interval between sessions will result in a determination that the sessions constituted a continuing interrogation. The Court of Military Appeals and its subordinate courts have decided each case on an individual basis.[160]

Occasionally an individual taking part in an investigation as a witness becomes a suspect.[161] In such a case, it is the responsibility of the individual questioning the witness to inform him of his rights before proceeding further.[162] This rule does not, however, apply to witnesses at trial[163] although there is strong support[164] for the proposition that the trial judge should himself interrupt the witness and advise him of his rights.[165]

IV. THE VERBAL ACTS DOCTRINE

One of the most perplexing questions surrounding Article 31(b) concerns what has been called the verbal acts doctrine. The express phrasing of Article 31(b) is that "no person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him.. .."The verbal acts doctrine originates in the definition of the word "statement." There is no doubt that a testimonial verbal utterance is included within the definition of "statement." However, the Court of Military Appeals has indicated time and time again that the word "statement" in Article 31(b) must be interpreted in a more expansive manner.[166] It is because of the court's unusually wide defini-

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[159] See, *e.g.*, United States v. Weston, 51 C.M.R. ___ (AFCMR 1976); United States v. Boster, 38 C.M.R. 681 (ABR 1968).

[160] See note 158 supra.

[161] See, *e.g.*, United States v. Doyle, 9 U.S.C.M.A. 302, 26 C.M.R. 82 (1958).

[162] Id.

[163] MCM, 1969, para. 140*a*(2); United States v. Howard, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954).

[164] See MCM, 1969, para. 150*b*; *cf*. United States v. Jorn, 400 U.S. 470 (1971).

[165] Note that such a warning may have the effect of deterring a witness from testifying. A fascinating ethical question is raised if either the defense or trial counsel (prosecutor) asks the judge to warn a witness of his rights (especially when the request is made in open court). Is such an inquiry ethical if it is made with an "improper intent"? Attempts to protect a witness can backfire. See United States v. Jorn, 400 U.S. 470 (1971), in which the Court held that a mistrial declared to allow proper warning of witnesses' rights against self-incrimination was without manifest necessity and resulted in attachment of jeopardy to the defendant's first mistried case.

[166] The Court of Military Appeals has stated: "It seems to us that to say a handwriting specimen does not constitute a 'statement' within the meaning of Article 31 is to give that Article the most restricted interpretation possible." United States v. Minnifield, 9 U.S.C.M.A. 373, 378, 26 C.M.R. 153, 158 (1958).

tion of the word "statement" that the right against self-incrimination in the military is to a large extent so very much greater than in civilian jurisdictions covered only by the constitutional right.

Clearly both the fifth amendment and Article **31** cover some types of physical acts that must be considered equivalent to speech. Surely no one would argue that an individual suspect would not be covered by the requirements of *Miranda* if his interrogator told him not to speak but to respond by nodding his head. For ease of analysis, it is best to consider verbal acts in two general classifications — acts not involving bodily fluids and acts involving bodily fluids.

Verbal acts may be loosely defined as physical acts which produce results similar to testimonial utterances — in short, verbal acts are considered speech analogs. The acts usually discussed in the cases involve identification cards,[167] surrender of a wallet168 or of stolen goods, or possession of contraband.[169] In the case of *United States v. Corson,*[170] for example, a Navy Chief Petty Officer suspecting Corson of possession of marihuana cigarettes told the accused, "You know what I want, give them to me.. ."; the accused replied by turning the contraband over to him. The Court of Military Appeals held that the Chief Petty Officer's command was the equivalent of a request for a verbal admission of possession and that, accordingly, Article 31(b) warnings were necessary.

There are numerous military cases which have involved the verbal acts[171] doctrine and any effort to attempt to bring them all into line with any particular theory of the doctrine is doomed to failure. Unfortunately, it appears that the various military appellate courts are not, as it is occasionally said, "reading off the same sheet of music." A theory can, however, be postulated for the nonbodily fluid cases — a theory that appears to explain most of the cases. The key to the synthesis is the cohcept that the surrender of an item under circumstances indicating prior knowledge of its possession, thereby fulfilling a key element of proof where possession is an element of the offense, is the equivalent to a spoken admission.[172]

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[167] United States **v.** Nowling, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958).
[168] United States v. Pyatt, 22 U.S.C.M.A. 84, 46 C.M.R. 84 (1972).
[169] ***See, e.g.***, United States v. Davis, NCM 741757 (NCMR 30 Jan. 1975)(unpublished opinion).
[170] 18 U.S.C.M.A. 34, 39 C.M.R. 34 (1968).
[171] ***See, e.g.***, notes 166-169 ***supra;*** United States v. Morris, 24 U.S.C.M.A. 176, 51 C.M.R. 395 (1976); United States v. Rehm, 19 U.S.C.M.A. 559, 42 C.M.R. 161 (1970); United States v. Mann, 51 C.M.R. 20 (ACMH 1975).
[172] It should also be enough if the information obtained is important to the case. In Professor Maguire's formulation, unimportant information would not constitute a "statement" in the Article 31(b) sense. Maguire, ***supra*** note 45, at 21.

Thus, where a soldier is suspected of possession of heroin and is ordered to take ***everything*** out of his pocket, Article 31(b) warnings will not be required because farfetched as it may appear in practice, the accused is entitled to react with surprise and denial should he pull from his pocket the traditional glassene bag of white powder. On the other hand, where, as in the ***Corson*** case, the suspect is ordered to "take it out of your pocket, you know what I want," the specific surrender of the item in question in response to the demand indicates knowledge by the suspect of exactly what is demanded. Thus, Article 31(b) warnings would be required because the discretionary surrender of the object would be the equivalent of a verbal admission of knowing possession.

Article 31, like the fifth amendment, interacts of course with the fourth amendment prohibition against unreasonable search and seizure. In most cases a demand for an object will involve fourth amendment as well as Article 31 issues. The oft-used "give me what I want" demand raises both such issues. A search illegal under the fourth amendment remains illegal even if the particular demand would not run afoul of the verbal acts doctrine. It is also quite possible for a demand to be illegal in terms of both Article 31 and the fourth amendment. The cases involving these issues run together, and many cases which would develop a clearer theory of the verbal acts doctrine if decided on Article 31 grounds are in fact decided on the grounds of illegal search and seizure. The key element within the area of verbal acts is discretion by the individual being interrogated. These specific possibilities result:

> (1) Where a lawful search is being conducted and the suspect lacks any discretion, Article 31 does not apply.
> (2) Where a search is unlawful and the accused is required to perform a nondiscretionary act, the evidence will be inadmissible on fourth amendment grounds and possibly on Article 31 grounds as well.
> (3) Where a lawful or unlawful search occurs and the suspect is required to perform a discretionary act that is incriminating, the evidence will be excluded because of Article 31.[172a]

Under this analysis a lawful search overcomes the argument that the mere act of surrender of contraband, for example, is incriminating. While such a surrender may well be incriminating in

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[172a] **The Court of Military Appeals appears to have accepted this reasoning.** *See* **United States v. Kinane, 24 U.S.C.M.A.120, 122 n.1, 51 C.M.R.** 310, 312 n.1 (1976)

the literal sense of the word, the fourth amendment right to searcn would predominate over any arguable application' of Article 31 to searches generally. Where, however, the individual's mind—and consequently an act of discretion—is involved, the situation changes and Article 31 and the right against self-incrimination become dominant. Note, for example, the case of *United States v. Pyatt*.[173] Suspecting Pyatt of theft, the unit executive officer ordered him to remove his wallet and count out his money. The Court of Military Appeals held that the officer's order to count the money, although it resulted in a physical act, violated Article 31. In this particular case, probable cause for what was clearly a search was lacking and it can be suggested that the order resulted in both an illegal search under the fourth amendment and an Article 31 violation.

There are few verbal act cases of the "pure" possession type. Both *Corson* and *Pyatt* are decisions of the Court of Military Appeals and fit within the theoretical model suggested above. Other cases of the same type are decisions of the subordinate military appellate courts and, generally speaking, do not fit within the model. The case of *United States v. Davis*[174] is illustrative. Davis was a sailor on liberty in Ismir, Turkey, who was suspected of possession of contraband. Like virtually all other members of the crew, he was stopped for inspection before being allowed to board his ship. The ship's captain, concerned that his crew might easily obtain drugs, had ordered what amounted to a border search of all returning personnel. Davis was asked by the Master at Arms, "What do you have? Come on, what have you got?" Davis replied, "Please let me throw it overboard."[175] The trial court suppressed Davis' oral reply as a violation of Article 31(b), however, it did allow testimony that Davis had surrendered a bag of marihuana. According to the theory that has been suggested above, the evidence of Davis' knowing surrender of the bag in response to a demand for it should have been suppressed as well. There is no evidence that the Navy Court of Military Review which decided the unpublished case ever considered the element of possession as a critical feature. Rather, the court reasoned that Davis, like all other sailors coming aboard, would have been searched by order of the captain and that the detection of the marihuana would have been inevitable. The court therefore presumably felt that to distinguish between a simple

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[173] 2%C.S.C.M.A.84, 46 C.M.K. 84 (1972).

[174] NCM 741737 (NCMR 30 Jan. 1975) (unpublished opinion). *See also* United States v. Mann, 51 C.M.R. 20 (ACMR 1975).

[175] NCM **741757** (NCMR 30 Jan. 1975) (unpublished opinion).

search and the fact that Davis had personally surrendered the marihuana was unnecessary. In *Davis* it is unlikely that a different result would have followed even had the evidence shown that Davis was found with marihuana.

The reason for the failure of the courts of review to follow what seem to be the holdings of *Corson* and *Pyatt* is unclear. However, both *Davis* and *Munn* are cases in which the ultimate result appears to have been unavoidable. Perhaps the courts have been applying some unarticulated harmless error rule. Whatever the reason, there is little doubt that the theoretical structure expressed above fails to comply with *all* of the relevant holdings. Only future cases will demonstrate the ultimate viability of the theory.

Another line of cases involves suspects who are ordered to point out their locker or certain belongings. In the usual case, a criminal investigator demands that the accused point out the clothes he wore the night before or point out his locker. The courts have consistently taken the position that the act of pointing is the equivalent of a verbal act. The Army[176] and the Air Force[177] Courts of Military Review have, however, held that where the act of pointing is merely what they have termed "preliminary assistance," Article 31(b) warnings are not required. What the cases really appear to be saying is that when the question of knowing possession is neither an element of the case nor of any particular significance, any Article 31 issue is de minimis. In short, no one cares whether or not the accused knew the locker involved, for example, was his, These cases are to be distinguished from those in which the element of knowing possession is critical; for example, the case in which the suspect is asked to point out the clothes he wore the night of the alleged robbery. Here identification of a jacket similar to that worn by the robber is clearly a critical element of the case. In such an instance the suspect is not merely being asked to give preliminary assistance and Article 31(b) warnings must be given. Although verbal acts are involved in all of these cases, it appears more relevant to simply ask whether or not the specific "admission" being litigated is truly material to the case. The precedents do appear to suggest that Article 31(b) bars any statement taken in violation of the Article[178] and this doctrine of preliminary assistance appears

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[176] United States v. Dickinson, 38 C.M.R. 463 (ABR 1968). *See also* United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954) in which a military policeman's request that Taylor point out his clothing was held improper in the absence of Article 31 warnings, because more than preliminary assistance was involved.

[177] United States v. Neely, 47 C.M.R. 780 (AFCMR 1973), *overruling* United States v. Guggenheim, 37 C.M.R. 936 (AFBR 1967).

[178] *See* notes 147-149 *supra*.

to be contrary to this rule. At best, one can suggest that this line of cases creates a judicial exception akin to "inevitable discovery" in order to avoid "unnecessary" suppression of evidence.

The key question in the verbal acts area is, of course, the definition of "statement." As discussed, there is a line of cases involving the physical act of surrendering an object. Much more difficult than the mere surrender of a physical object is the question of requesting an individual's identification. In 1958 the Court of Military Appeals in United States *v. Nowling*[179] held that an air policeman who suspected an individual of being off base without a pass should have informed the individual suspect of his rights under Article 31(b) prior to requesting the individual's pass. The pass which the defendant surrendered had another man's name on it and was used to prove possession of an unauthorized pass. The court held that the pass was the equivalent of a verbal statement and covered by Article 31(b) because Nowling was a suspect. The reaction to the Nowling case was vehement; indeed, it may have been one of the primary reasons that the Powell Committee,[180] an Army committee which analyzed the Uniform Code and recommended[181] major Code changes in 1960, was appointed.[182]

While Nowling can be distinguished on the grounds that physical surrender of the written pass was no different from surrender of marihuana or heroin, the basic question of identification remains. Few procedures are as common to military life as the requirement to identify oneself. Yet the identification requirement in the case of a criminal suspect is a difficult question not yet resolved. Whether the request is for a verbal statement or for an identification card, the usual military police request clearly is a request for a statement within the usual meaning of Article 31(b). However, the effect of Article 31(b) is completely unclear. There is some sup-

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[179] 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958).

[180] ***See generally*** GENEROUS, *supra* note 20, at 133-45 (1973).

[181] The Committee's recommendations died stillborn, largely because of the refusal of the Air Force and Navy to cooperate. *Id.*

[182] The Committee's Article 31 recommendations can be found in COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 87-89, 101-103 (1960). In the area of verbal acts, the Committee recommended the addition of a section (e) to Article 31 which would have read:

> This Article extends only to oral and written statements and does not extend to --
> (1) physical acts which do not require the active and conscious use of the mental facilities of an accused, or
> (2) documents, tokens or papers furnished a person for identification or status determination purposes and the acts necessary to display them upon demand.

Id. at 102-03. The Committee also recommended that the failure to give Article 31(b) warnings should not result in the exclusion of the "statement" from evidence.

port[183] for the conclusion that, as in the preliminary assistance cases, because an individual's identity is not generally an element of the offense, identification is not within the ambit of Article 31(b). Despite this, the issue has not as yet been fully resolved by the military courts.

The civilian courts are split with the majority rule being that *Miranda* does not cover "noninvestigative questioning" including a suspect's identity.[184] The Ninth Circuit considered a similar question in *United States v. Camacho*.[185] Camacho, an ex-soldier, had retained his identification card and was using it to illegally obtain services at a Naval station which was not open to the general public. The authorities, suspecting that Camacho was an ex-serviceman in illegal possession of an identification card, approached Camacho and asked him to identify himself. He replied by showing the identification card. The court of appeals held the Navy was acting properly in checking the individual's identity if only to ensure the base's security. The Ninth Circuit did not, however, discuss Article 31 at all. What, then is the answer to the identification quandry? As in the preliminary assistance cases, it is suggested that Article 31(b) warnings must be given before requesting identity when the individual's identity is involved in the offense. Thus in a desertion case where the suspect may be using an alias, the military police should warn a suspect before asking him his name. If, however, the suspect's identity is neither an element of the offense nor reasonably believed to be significant, the issue should be considered mere preliminary assistance not requiring Article 31(b) warnings.

The other major area in the verbal acts doctrine consists of the bodily fluid cases. As indicated earlier in this article, the Court of Military Appeals has consistently held that Article 31(b)'s right against self-incrimination is more extensive than the fifth amendment constitutional right.[186] The primary means by which the court of Military Appeals has extended Article 31 coverage is through its

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[183] *See, e.g.*, United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178, 181 (1954) (dictum); United States v. Jackson, 1 C.M.R. 764, 767 (AFBR 1951) and cases cited therein. According to *Jackson*, ". . . it is well established that an admission by an accused of his identity . . . is not 'an admission against interest' and consequently evidence of such an admission may be received by a court 'without proof of its voluntary nature'." Query the validity of this conclusion. *See also* United States v. Zeigler, 20 U.S.C.M.A. 529, 52626, 43 C.M.R. 363, 365-66 (1971).

[184] *See* note 148 *supra*. *See also* United States v. Menichino, 497 F.2d 935, 939-42 (5th Cir. 1974); United States v. LaMonica, 472 F.2d 580 (9th Cir. 1972); Proctor v. United States, 304 F.2d 819 (D.C. Cir. 1968); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(5) (1975).

[185] 506 F.2d 594 (9th Cir. 1974). *See* text accompanying note 137 *supra*.

[186] *See, e.g.*, note 166 *supra*.

interpretation of the term "statement." The court has held, for instance, that both handwriting[187] and voice exemplars[188] are the equivalents of verbal admissions and are therefore covered by Article 31(b). More difficult to rationalize, however, has been the bodily fluid problem. The issue arose[189] soon after the enactment of the Uniform Code as to whether blood or urine samples could be o b tained from a service member without giving Article 31(b) warnings.[190] Prior to 1974, most military lawyers were under the impression that Article 31(b) warnings where, in fact, required prior to taking such samples for criminal investigatory purposes. However, the reason for the requirement of the warnings was totally unclear. While a number of cases had been decided that held Article 31(b) warnings to be required,[191] the cases predated the decision of the United States Supreme Court in Schmerber *u. California*[192] and it was generally believed that the Court of Military Appeals had simply adopted a constitutional interpretation of the fifth amendment contrary to that ultimately adopted by the Supreme Court. It was, therefore, to the great amazement of many in the military legal community that the Court of Military Appeals extended the scope of Article 31(b) in the case of United States *v. Ruiz*[193] in 1974. Private Ruiz had been enrolled in a drug abuse program in Vietnam which specifically forbade use of the results of urinalysis tests for criminal prosecution purposes.[194] Indeed, the pertinent regulation also forbade use of any results to discharge an individual with a less than general discharge.[195] Ruiz was ordered to submit to a urinalysis test to determine the success of his participation in the program. He refused and was given a second order to submit. He subsequently was court-martialed for disobedience of a lawful order. On appeal, the Court of Military Appeals held that Ruiz was properly within his rights to refuse the order because it was in viola-

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[187] *Id.*
[188] *See, e.g.*, United States v. Mewborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).
[189] *See. e.g.*, United States v. Williamson, 4 U.S.C.M.A.320, 15 C.M.R.320 (1954); United States v. Rosato. 3 U.S.C.M.A.143, 11 C.M.R. 143(1953).
[190] As already discussed, if bodily fluids are statements in the Article 31 (b) sense, the suspect has an automatic right to refuse to cooperate. Further, Article 31 would likely har involuntary sample acquisition despite United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R.320 (1954).
[191] United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); United States v. Jordan. 7 U.S.C.M.A. 352, 22 C.M.R. 242 (1957).
[192] 384 U.S. 757 (1967).
[193] 23 U.S.C.M.A 181, 48 C.M.R. 797 (1974).
[194] UNITED SATES ARMY, VIETNAM MANUAL NO. 600.10, USARV DRUG ABUSE AND REHABILITATION PROGRAM, at para. 3 (1971) *cited in* 23 U.S.C.M.A. at 183 n.2, 48 C.M.R. at 799 n.2.
[195] *Id.*

tion of Article 31 and consequently illegal. The rationale of the Court in *Ruiz* is puzzling. As Ruiz could neither have been court-martialed had the sample proven positive, nor been discharged with a less than general discharge,[196] it is difficult to discover any "incrimination" which would justify the assertion of Article 31.[197] The likely basis of the court's holding is that it found that a general discharge from the United States Army smacked of incrimination because it may have much the same practical effect as a bad conduct discharge.[198] Indeed, the court did cite a number of Supreme Court opinions199 involving discharge of public employees for refusal to testify. However, it is difficult to extend those cases to the *Ruiz* situation where there was no possibility of prosecution.

Prior to *Ruiz*, there had been some indication that Article 31 rather than the fifth amendment would itself be used to bar urine or blood tests for criminal prosecution, purposes.[200] The reasoning of the Court of Military Appeals in those cases appeared to be that whenever the individual was forced to create evidence that did not exist beforehand, or to make use of his mind to create the equivalent of a verbal intelligent utterance, Article 31(b) would be invoked. This was generally summed up by what was known as the passive-active test. If the evidence could be obtained from a passive suspect who did not affirmatively cooperate in any fashion, Article 31(b)

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[196] A general discharge is one level "lower" than an honorable discharge. A recipient of a general discharge is entitled to the same veterans' benefits as the recipient of an honorable discharge. However, the public, particularly employers, may believe a general discharge to be a stigma. See generally Jones, The Gravity of *Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973) [hereinafter cited as Jones].

[197] Major Dennis Coupe of The Judge Advocate General's School has suggested an interesting alternative theory. He suggests that underlying *Ruiz* is the court's decision to extend Article 31 to bodily fluids obtained for prosecutorial purposes. Assuming this, Ruiz could have refused to supply the urine sample but for the regulation which granted him immunity. The court could have decided that in view of this and in the absence of formal notice of immunity from criminal prosecution, Ruiz was in effect claiming a good faith belief in the right against self-incrimination. Thus, the court may have been requiring the Government to inform Ruiz of his immunity (to moot a possible affirmative defense in advance). While this interpretation is possible, the court's efforts to backstop its decision with fifth amendment decisions of the Supreme Court makes this theory unlikely. Using either of these theories still leaves one with the conclusion that the court believes bodily fluids to be "statements."

[198] Jones, *supra* note 196. The Jones study confirms that a recipient of a general discharge may be prejudiced in obtaining future employment, although to a lesser extent than one who has received a bad-conduct discharge. See *also* Lance, A Punitive Discharge—An Effective Punishment?, THE ARMY LAWYER, July 1976, at 25.

[199] Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967).

[200] See note 191 *supra*.

would not be involved.[201] On the other hand, if the individual's cooperation was required to secure the evidence, the result was the equivalent of a verbal statement and Article 31(b) warnings were to be given. It is difficult to harmonize even this theory with the process of obtaining a blood or urine sample. The bodily fluids are, of course, already in existence. The subject's cooperation is physical only and his mind and its contents are totally irrelevant to the desired sample. Thus, the very justification that gave rise to the right against self-incrimination in England would appear to allow, as the Supreme Court itself determined in ***Schmerber,*** taking blood or urine samples.

What then motivated the Court of Military Appeals to decide *Ruiz* as it did? The court appears to have found that discharge from the armed services with a less than honorable discharge is the equivalent of incrimination. More importantly, it also seems to have determined finally that supplying a bodily fluid sample is a verbal act. Although to rule otherwise would have been to partially overrule a number of prior cases, it seems likely that the Court of Military Appeals could easily have determined that blood or urine samples fell under the due process clause of the fifth amendment, the fourth amendment, and paragraph 152 of the Manual for Courts-Martial, rather than Article 31. In light of the fact that no cases of major import had been decided since the ***Schmerber*** case, this would not have damaged the court's adherence to the doctrine of stare decisis. It must be concluded then that ***Ruiz*** was decided as it was basically as a determination of public policy.

Due process and search and seizure both involve balancing tests of one type or the other. Article 31 and the right against self-incrimination, however, are generally absolute matters;[202] either a topic is covered within the ambit of the right and is therefore protected or it is not. By placing bodily fluid sampling under the right against self-incrimination, the court neatly guaranteed that military personnel would not be compelled to submit to blood or urine tests that could have any form of adverse consequence other than the possiblity of being honorably discharged from the service. The judges may have presumed that once they had eliminated the major reason for requiring random urine analysis or blood testing, the service member would be spared the necessity of submitting to unnecessary and vexatious exams. It is questionable whether or

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[201] ***See,*** *e.g.*, United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954) (extraction of urine via catheter from an unconscious suspect).

[202] The only exceptions to this may be in the preliminary assistance areas in which a de minimis rule seems to be at work.

not this conclusion, in fact, follows.[203] While the legislative history is unclear, it seems highly unlikely that Congress truly intended the right against self-incrimination in the military to be interpreted in such an expansive manner. Despite the probability of this conclusion, the Court of Military Appeals has consistently interpreted Article 31(b) in such a broad manner. One of the questions that faces the new court will be not only the continued vitality of the *Ruiz* case but, indeed, the continued widening definition of the word "statement." *Ruiz* could, for example, logically be extended to hold that an honorable discharge from the armed services under other than voluntary circumstances is akin to a general discharge and thus incrimination. Such a holding could significantly impair military administration and morale. This particular means of protecting a service member appears to be legally questionable, and the long term position of the Court of Military Appeals on the issue is an open question.

V. MIRANDA-TEMPIA WARNINGS

While Article 31 supplies the unique element in military rights warnings, any survey of the law of warnings in the armed services would be incomplete if it did not at least touch upon the military's implementation of the *Miranda* decision.[204] As Article 31 is broader in scope than *Miranda* in all areas save that of the right to counsel,[205] it is the right to counsel portion of *Miranda* which is critical to military practice.

A. WHAT WARNINGS ARE REQUIRED?

The *Miranda* warnings may be phrased:

> You have the right to remain silent;
>
> Any statement that you do make may be used as evidence against you at trial;

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[203] *See, e.g.,* United States v. McFarland, 49 C.M.R. 834 (ACMR 1975) in which Judge Alley affirmed the conviction of McFarland for refusing to give a urine sample. Judge Alley distinguished *Ruiz* on the grounds that McFarland was suspected (and enrolled in a drug control program) only of marihuana usage which could not be detected by urinalysis. The judge found that the (in one sense) useless urinalysis had a proper military purpose in that it tended to deter improper drug use.

[204] *See generally* Hansen, *Miranda and the Military Development of a Constitutional Right*, 42 MIL. L. REV. 55 (1968) [hereinafter cited as Hansen].

[205] Prior to United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), there was no right to counsel in the military prior to preferral of charges and investigation. United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1975); United States v. Moore, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954); Hansen, *supra* note 204, at 57-59.

> You have a right to consult with a lawyer and to have a lawyer present during this interrogation and if you cannot afford an attorney, one will be appointed for you free of charge.[206]

There are other warnings given by police which have their origins in ***Miranda*** but which are not expressly required. Notable among these is the right to stop making a statement at any time.[207] Prior to **1974,** the right to counsel warnings of ***Miranda*** had been incorporated into military practice in a peculiarly military fashion. Incorporated not only by the decision of the United States Court of Military Appeals in ***United States v. Tempia,***[208] but also by paragraph 140*a*(2) of the Manual for Courts-Martial,[209] the right to counsel statement that military interrogators felt obliged to recite, and indeed which is normally read to individuals today is:

> You have a right to talk to a lawyer before and after questioning or have a lawyer present with you during questioning. This lawyer can be a civilian lawyer of your own choice at your own expense or a military lawyer detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if his superiors determine he is reasonably available.[210]

No specific authority exists anywhere for the part of the warning that suggests that an individual may request specific military counsel by name and that that individual will be supplied free of charge if reasonably available. This aspect of the warning appears to come from the standard rights to counsel given an individual pending trial by court-martial[211] and even then that right is subject to certain specific limitations.[212] However, until **1974** there was no doubt that the Manual for Courts-Martial had adopted the ***Tempia***

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[206] Miranda **v.** Arizona, 384 U.S. 436, 444.
[207] *Id.* at 444-45 (semble).
[208] 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).
[209] The Manual states:

> An accused or suspect in custody has a right to have at the interrogation civilian counsel provided by him (or, when entitled thereto, civilian counsel provided for him) or, if the interrogation is a United States military interrogation, military counsel assigned to his case for the purpose.

MCM, 1969, para. 140*a*(2).
[210] U.S. Dep't of Army, GTA 16-9-2 (July 1972)(rights warning card).
[211] ***See*** UCMJ, art. 38(b), 10 U.S.C. § 838(b) (1970).
[212] ***See*** United States **v.** Jordan, 22 U.S.C.M.A. 164, 46 C.M.R. 164 (1973); United States **v.** Johnson, 47 C.M.R. 885 (CGCMR 1973).

decision in such a fashion as to supply all military personnel with an absolute right to free military counsel regardless of their economic situation. The Court of Military Appeals held that this assumption was erroneous in the case of ***United States v. Clark***.[213] In ***Clark,*** the military interrogator had given a ***Miranda*** warning which failed to meet the requirements of paragraph 140*a*(2).[214] The Court of Military Appeals, interpreting that paragraph of the Manual for Coui-ts-Martial, nullified its clear and plain meaning and held that the writers of the Manual had intended to incorporate only the decision in ***Miranda*** and not to extend the *Miranda* rights to counsel in any way.[215] The ***Clark*** case appears erroneous[216] and suspect. The court in ***Clark*** also failed to consider the difficulty of applying a pure ***Miranda*** standard to military practice. Except for the expanded legal assistance program, rights to legal assistance in the military cut across all ranks and all economic classifications. If the pure ***Miranda*** warning were to be given in the military, someone would be compelled to determine whether or not the individual claiming indigency was in fact too poor to retain a civilian attorney. Notoriously difficult within civilian practice, this would be a good deal more difficult in the military unless arbitrary pay grades were to be used.[217] Despite this, the ***Clark*** case remains a valuable precedent for the prosecutor whose witness indicates that he failed to comply fully with the military rights warnings. Due to doubt of ***Clark's*** inherent validity, few prosecutors suggest that routine counsel warnings should be truncated and replaced with a pure ***Miranda*** warning.

There is some argument that the military has in effect created a new right to counsel. The standard rights warnings given in military practice[218] appear in one sense to be broader than any requirement in either the Code or Manual, and broader than the re-

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[213] 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1974).

[214] ***See*** note 209 ***supra.***

[215] 22 U.S.C.M.A. at 570-71, 48 C.M.R. at 77-78. *But see* United States v. McOmber, 24 U.S.C.M.A. 207, 51 C.M.R. 452 (1976).

[216] ***See*** Judge Duncan's dissent in United States v. Clark, 22 U.S.C.M.A. at 571-75, 48 C.M.R. at 78-82. Military reference sources ambiguously state that paragraph 140*a*(2) sets forth "rules [which] are a result of the decision in Miranda. . . ." which is substantially different from saying that they are identical to the ***Miranda*** rules. U.S. DEPT OF ARMY, PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION 27-28 (1970).

[217] Procedural details to enforce this system can be imagined. The suspect could be required to file a Pauper's Oath, which could be difficult to impeach in light of the intent behind the Privacy Act, Act of Dec. 31, 1974, Pub. L. 93-579, 88 Stat. 1896. And even if a suspect perjured himself in his Pauper's Oath, a court-martial for having given a false official statement would appear to be an unnecessary source of useless litigation that is best ignored.

[218] ***See*** text accompanying note 210 ***supra.***

quirements of *Miranda* in their failure to consider an individual's financial resources. May the defense successfully argue that the governmental adoption of rights warning cards and certificates—forms that are required to be read whenever possible—have expanded the right to counsel as expressed in the Manual for Courts-Martial and created a new right? Clarification of this issue awaits a case with the required factual circumstances.

B. WHO MUST WARN?

As indicated earlier[219] police officials or individuals performing police duties in civilian jurisdictions are required to give *Miranda* warnings. In the military, the same individuals who must give Article 31(b) warnings must give *Miranda* warnings if *Miranda* is applicable to the situation, in other words, if a custodial interrogation is taking place. There seems no reason to believe that any difference exists between civilian and military practice as to who must give *Miranda* warnings.[220]

C. WHO MUST BE GIVEN MIRANDA WARNINGS?

Both *Miranda* and its military analog, *United States v. Tempia,* require that *Miranda* warnings be given to suspects undergoing custodial interrogation. The difficulty in practice is determining if a suspect is in fact in custody[221] when he is .being questioned. A number of different tests have been adopted by various jurisdictions. These include focus, subjective intent of the police officer, the subjective belief of the person being questioned, and the objective test. Under the focus test, which has its origins in *Escobedo v. Illinois*[222] the question to be asked is whether the police have so narrowed the investigation process so as to "focus" on a particular suspect. In the now famous footnote 4 of the *Miranda* opinion[223] the Supreme Court attempted to indicate that the *Miranda* requirement that rights be given during custodial interrogations was what it had meant earlier by the term "focus" in the *Escobedo* case. This seems unlikely although possible.[224]

It is conceivable that focus remains a viable rule in cases where

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[219] See Section III.C. *supra.*
[220] *See* MCM, 1969, para. 140*a*(2).
[221] Custody is usually defined as any deprivation of freedom of action in any significant way. Miranda v. Arizona, 384 U.S. 436, 477 (1966).
[222] 374 U.S. 478 (1964).
[223] 384 U.S. at 444 n.4.
[224] Clearly, Escobedo was in a custodial situation when interrogated. *See* Mr. Justice Goldberg's opinion for the Court.

custodial interrogation is lacking but focus exists.[225] It is beyond the scope of this article to discuss with any depth the various tests that have in fact been enunciated by civilian courts to determine the existence of custody. Within military practice, however, the Court of Military Appeals has apparently adopted a modified objective belief test. Under this test, set forth in dictum in *United States v. Temperly*,[226] the primary issue is: was the suspect objectively in a custodial situation? The court's language would seem to indicate that this objective test is modified to some extent by the individual's own subjective experience.[227] It is theoretically possible to have a case in which a suspect was objectively in custody but did not himself think so. In such a case the individual being questioned would not be subject to any form of psychological coercion for he would not believe himself deprived of his liberty.[228] While this test, if it is indeed the military test, appears preferable to either the subjective intent of the accused or the subjective intent of the police officer, both of which are particularly susceptible to the bias of the individual witness, the military test is not fully in accord with the American Law Institute Model Code of Prearraignment Procedure, which would have the rights attach before any questioning of a suspect takes place at a police station.[229] However, the military rule seems eminently satisfactory.

D. EFFECTS OF THE WARNING REQUIREMENTS

The exclusionary rule is a basic part of military jurisprudence having its origins both in the *Miranda* decision and in Article 31(d)

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[225] *But see* United States v. Gardner, 516 F.2d 334, 339-40 (7th Cir. 1975)

[226] 22 U.S.C.M.A. 383, 47 C.M.R. 235 (1973).

[227] After seeming to reject the opportunity of deciding the issue on the basis of the objective intent of the interrogating officers because it would "go beyond one of the reasons for the *Miranda-Tempia* requirements [which was to counter] the potential for coercion inherent in custodial situations" the court distinguished an earlier case, United States v. Phifer, 18 U.S.C.M.A. 508, 40 C.M.R. 220 (1969), because "[u]nder either an objective or subjective test, a person [like Phifer] is subjected to a more significant deprivation of freedom than a person [like Temperly]." United States v. Temperly, 22 U.S.C.M.A. at 386, 47 C.M.R. at 238. The court concluded that:

> The purpose of *Miranda-Tempia* was to protect persons against abusive interrogations. Where the accused is still free from police control, we see no interest that would be served by extending to him a right designed only to protect him against abuse of that control.

Id. The court never clearly defined whether the determination of "freedom from police control" should be determined objectively, or in the subjective view of the individual interrogated. *See also* United States v. Dohle, 24 U.S.C.M.A. 34, 36-37, 51 C.M.R. 84, 86-87 (1975).

[228] A rule of fairness might apply in part to prevent improper police conduct--one of the traditional underpinnings of the exclusionary rule.

[229] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1(2) (1975).

of the Uniform Code of Military Justice. Failure to comply with the Article 31(b) warning requirements[230] automatically triggers the exclusionary rule found in Article 31(d) which forbids admission into evidence at any criminal proceeding of any statements taken in violation of the Article. Under military law, knowledge of one's rights is insufficient to cure a defect in the warnings.[231] This conclusion would appear to parallel the reasoning that the Supreme Court followed in announcing the *Miranda* decision—if the atmosphere of a custodial interrogation may be considered as presumptively coercive, even an individual fully aware of his rights needs to be reminded of them. Of course, Article 31(d)'s prohibition concerns only the warning requirements found in Article 31(b) and not the *Miranda* requirements, However, *Miranda's* own exclusionary rule and the Manual for Courts-Martial[232] combine to extend the military exclusionary rule into the right to counsel area.

There are significant differences, however, between the military and civilian exclusionary rules. The military, like civilian jurisdic tions throughout the nation, has both the primary exclusionary rule and the fruit of the poisonous tree or derivative evidence rule as well. However, the military rule is absolute while the developing civilian law takes cognizance of a number of major exceptions. Note, for example, that under the Supreme Court's recent decisions[233] statements obtained in violation of *Miranda v. Arizona* may be used for purposes of impeaching an accused who testifies at trial. The Court of Military Appeals has rejected this position,[234] basing its conclusion on Article 31, and has indicated that statements taken in violation of Article 31 are inadmissible for any purpose whatsoever. This does allow an accused who has given a complete though improperly warned confession prior to trial to take the stand and perjure himself without any possiblility of impeachment or perjury prosecution. Again, the court's reasoning is presumably that Congress created a statutory right greater in

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[230] To overcome Article 31 and *Miranda,* an intelligent, affirmative and voluntary waiver is needed. ***See, e.g.***, United States v. Long, 37 C.M.R. 696 (ABR 1967).

[231] MCM, 1969, para. 140*a*(2). ***But see*** United States v. Hart, 19 U.S.C.M.A. 438, 42 C.M.R. 40 (1970); United States v. Goldman, 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969), both of which should be regarded as nearly unique aberrations. ***See also*** United States v. Stanley, 17 U.S.C.M.A. 384, 38 C.M.R. 182 (1968) holding that *Miranda* bars circumstantial proof that a suspect knew his rights.

[232] ***See*** MCM, 1969, para. 140*a*(2), 140*a*(6); ***see also*** United States v. McOmber, 24 U.S.C.M.A. 207.51 C.M.R. 452 (1976).

[233] Oregon v. Haas, ___ U.S. ___, (1975); Harris v. New York, 401 U.S. 222 (1971).

[234] *See, e.g.*, United States v. Girard, 23 U.S.C.M.A. 263, 40 C.M.R. 438 (1975); United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971).

scope than the constitutionally demanded minimum rights.[235] The court has certainly indulged in this form of reasoning in a number of areas.

The Supreme Court has, for example, recognized the possibility of applying the harmless error rule to improperly admitted confessions at trial, but the Court of Military Appeals has strongly indicated that it will not apply the harmless error rule to cases involving an Article 31 violation.[236] The court has stated that where evidence complained of is in violation of the statutory provision "The test to be applied and the remedy tendered may be more beneficial to the accused than otherwise under standards enunciated by the United States Supreme Court."[237] Recently, the Supreme Court acknowledged that where an accused refused police efforts at interrogation, the law enforcement officers could properly question the accused at a later time about an entirely new offense not considered at the time of the first interrogation.[238]

The position of the Court of Military Appeals is unclear in this area. It seems likely that the court would recognize the police or command right to ask an individual to reconsider his prior decision.[239] Such an attempt would be more likely to succeed where the second attempt involves an offense completely unrelated to the first. However, it does seem likely that the court would hold any resulting evidence inadmissible if any form of coercion or strong persuasion were used to obtain consent at the second or subsequent interrogation. How many attempts to convince a suspect to change his mind and make a statement will be allowed is unclear and the Court of Military Appeals has indicated it will decide the issue on a case by case basis.[240]

The problem of subsequent interrogations has plagued both the civilian and the military courts alike. The general rule is, of course, that no suspect or accused may be compelled to make a statement against his will and that he must make a knowing, intelligent waiver of his rights before a statement will be admissible at trial.[241] Frequently military investigators determine that they have improperly complied with the warning requirements of Article 31 or *Miranda*. They usually then endeavor to reinterrogate the accused,

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[235] *See* United States v. Hall, 23 U.S.C.M.A. 549, 50 C.M.R. 720 (1975).
[236] *Id.*
[237] United States v. Ward, 23 U.S.C.M.A. 572, 575 n.3, 50 C.M.R. 837, 840 n.3 (1975).
[238] Michigan v. Mosley, 423 U.S. 96 (1975).
[239] *See* United States v. Collier, 24 U.S.C.M.A. 183, 51 C.M.R. 429 (1976) in which Judge Cook (Judges Fletcher and Ferguson concurring in the result) attempted to adopt an expanded view of Mosely.
[240] *See, e.g.*, United States v. Attebury, 18 U.S.C.M.A. 531, 40 C.M.R. 243 (1969).
[241] *See, e.g.*, MCM, 1969, para. 140*a*(2); Miranda v. Arizona, 384 U.S. 436 (1966).

hoping to correct the error at the first interrogation. While the Court of Military Appeals has indicated that it will look at *each* case to determine whether or not the statement given at the second or subsequent interrogation was in fact voluntary and will look to factors such as elapsed time, the presence or absence of new rights warnings, and the specific physical circumstances surrounding the second or later interrogation, the court has also stated quite clearly that

> . . . only the strongest combination of these factors would be sufficient to overcome the presumptive taint which attaches once the Government improperly has secured incriminating statements or other evidence.. . .In addition to rewarning the accused, the preferable course in seeking an additional statement would include advice that prior illegal admissions or other improperly obtained evidence which incriminated the accused cannot be used against him.[242]

Thus, within military practice at least, not only must the warnings be properly complied with, but a failure to comply with Article 31 and Miranda-Tempia creates a prosecution burden that is virtually impossible to overcome.

VI. THE FUTURE OF THE WARNING REQUIREMENTS

The Supreme Court seems to have embarked on a course of consistently undercutting its decision in Miranda. Certainly recent cases[243] indicate quite strongly that Miranda's significance is increasingly on the wane. While it seems probable that the Court will never explicitly overrule Miranda, it seems likely that it will no longer require that a failure to comply with the *Miranda* warning requirements will in itself result in the exclusion of any resulting evidence. If this is correct, the *Miranda* decision will continue to retain some vitality; police will still be required in one sense to give Miranda warnings. However, 'in the event that the police fail to comply fully with Miranda, that failure will constitute simply one factor amongst many in the determination of the voluntariness of any resulting statement. In short, the Supreme Court is likely to return to the pre-*Miranda* days when voluntariness in the common law meaning of the term was the key issue for a trial judge to determine prior to admitting confessions and admissions into evidence.[244]

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[242] United States v. Seay, 24 U.S.C.M.A. 7, 10, 51 C.M.R. 57, 60 (1975).
[243] *See, e.g.*, Oregon v. Hass. 420 U.S. 714 (1975);Michigan v. Tucker, 417 U.S. 433 (1974);Harris v. New York, 401 U S . 222 (1971). ***But see*** Doyle v. Ohio, 44 U.S.L.W. 4902 (U.S. June 17, 1976).
[244] ***See generally*** Hansen, ***supra*** note **204.**

Such a decision would not necessarily change military law. That Congress enacted the forerunner of Article 31 in 1948 is a fact not easily ignored. It is improbable that the United States Congress would at this late date attempt to nullify a statutory right of the service member although there would be no constitutional inhibition against doing so. Nullification of Article 31 would simply leave the service member with his fifth amendment protections. Although it was unclear that the constitutional right against self-incrimination applied to the serviceman even in 1951, decisions of the United States Court of Military Appeals make it apparent that the court's view is that this right, among others, does apply today.[245] Thus, elimination of Article 31 would result in a distinct change[246] in the rights of a service member but not necessarily an unacceptable one.

It is impossible to appraise the effects that Article 31(b) rules may have on criminal investigations generally.[247] There is a definite, although difficult to document, conviction among military lawyers that the rights warnings in fact have no significant effect whatsoever on criminal investigations and that criminal suspects frequently make statements regardless of the warnings. If this be the case, it should not be particularly suprising. If, as *Miranda* suggests, custodial situations are inherently coercive and engender in a suspect an intense desire to cooperate with interrogators to make things go easier for him, it can be suggested that regardless of any rights warnings, the suspect continues to believe that things will be worse for him if he does not cooperate. While one could suggest that this feeling should be encouraged in order to increase the number of admissions which could lead to independent evidence of an offense,[248] it may well be that this is additional evidence to support the proposition that confessions and admissions should be banned from criminal trials except under the most unusual circumstances.

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[245] ***See, e.g.,*** United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[246] At a minimum the following changes would result:

> Only suspects in custody would be warned;
>
> Suspects would not be warned of the specific offense violated;
>
> The scope of the right against self-incrimination would narrow sharply and would no longer include blood and urine, voice, or handwriting exemplars.

[247] A number of civilian studies evaluating *Miranda* suggest that the negative effects of the decision have been minimal. ***See*** Note, ***Interrogations in New Haven: The Impact of Miranda,*** 76 YALE L.J. 1521 (1967); Note, ***A Postscript to the*** *Miranda* ***Project: Interrogation of Draft Protestors,*** 77 YALE L.J. 300 (1967).

[248] The fear of unreliable confessions could be met by allowing use only of derivative evidence with independent validity,

Any overview of the rights warnings situatibn in military law would have to indicate that the system apparently works. Certainly no hard evidence appears to exist to suggest that the Article 31(b) requirements as augmented by *Miranda* cause any particular difficulties to military criminal investigators. Although confessions and admissions are ruled inadmissible because of erroneous rights warnings and "unnecessary" acquittals may result. However, the general use of standard warning cards and waiver certificates during military interrogations would support the perceived view that most military confessions are voluntary and admissible.

While the current Supreme Court's apparent desire to undercut *Miranda* seems at odds with the *Miranda* Court's assessment of human nature, the congressional decision to require rights warnings because of the inherent coercion involved in a military interrogation appears valid. The Article 31(b) warnings are, in terms of content, fair and include notice of the offense, a requirement not found in *Miranda;* notice that the individual has the right to be silent; and notice that if he chooses to speak there may well be adverse consequences. The problems that exist with the utilization of the rights warnings[249] within military practice do not appear to go to the essential issue of whether or not there ought to be such warnings, but rather address specific problems that could be resolved. All in all, the Article 31(b) warnings appear to be a workable solution to ensure the reliablility of military confessions and admissions and to implement one of the fundamental rules of Anglo-American jurisprudence. It would be particularly ironic if in America's bicentennial year, the military, which ensured its members greater procedural protections than the civilian community at large in 1948 and 1951, is left at the forefront of American civil rights as the Supreme Court effectively nullifies, after one decade, the general expansion of these rights to all citizens.

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[249] Virtually all of these problems could be resolved by educating police and public alike to the reasons for *Miranda* and Article 31, and their employment. Simplification of the warnings would also be useful.

FEDERAL ENCLAVES: THE IMPACT OF EXCLUSIVE LEGISLATIVE JURISDICTION UPON CIVIL LITIGATION*

Captain Richard T. Altieri**

I. INTRODUCTION

A decade ago, it was estimated that one million' persons were residing on federally owned land within the states that was subject to "exclusive federal legislative jurisdiction."[2] Although more recent population statistics are unavailable, the unique jurisdictional status continues to pose a hardship for significant numbers of "enclave"[3] residents who seek a forum in which to pursue civil litigation.[4] The problems these individuals encounter are especially acute where the litigation arises from acts occurring upon the enclave itself. For example, enclave residents desiring to obtain judicial solutions for minor contract, tort or domestic relations problems arising on post often experience difficulty finding a court possessing jurisdiction appropriate to resolve the controversy. It is apparent that relief for most civil actions would require access to a

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[1] Note, ***Federal Enclaves. Through the Looking Class- Darkly,*** 15 SYRACUSE L. REV. 154 n.1 (1964), ***citing Adjustment of Legislative Jurisdiction on Federal Enclaves, Hearings on S. 815 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations,*** 88th Cong., 1st Sess. 18 (1963).

[2] The term applies in those situations where the state has made no reservation of authority in its cession of jurisdiction to the federal government except the right to serve civil and criminal process for activities occurring off the land involved. The term also applies notwithstanding the fact that the state may exercise certain authority by virtue of the express permission of a federal statute. U.S. ATT'Y GEN. REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 10 (1957) [hereinafter cited as REPORT].

[3] The term "enclave" will be used to refer to those areas subject to exclusive federal legislative jurisdiction.

[4] ***See generally*** REPORT, ***supra*** note 2, at 215-48.

state, rather than federal court;[5] but it is indeed possible that a remedy in the host[6] state's courts will be difficult if not impossible to obtain for most simple civil suits.

The difficulty is caused by the confusion in the law surrounding such key areas of enclave-based litigation as service of process, subject matter jurisdiction, and applicable substantive law. For example, there is confusion and a consequent lack of predictability for the attorney on such basic issues as whether judicial process of the host state may be served within enclave boundaries to obtain in personam jurisdiction if the cause has arisen there; whether the host state's extraterritorial service statutes operate when each of the "contacts"[7] occurs upon the enclave; whether the local state court has subject matter jurisdiction to entertain domiciliary actions on behalf of enclave residents; whether an ensuing judgment could withstand collateral attack; and what substantive law would govern the action.

Surprisingly, the answers to these basic questions are unclear, largely as a result of the vacillating manner with which courts have viewed the effect of exclusive legislative jurisdiction.[8] However, recent cases have suggested a new interpretation of the term and have moved away from the "enclave" or "state within a state"[9] concept. Increasingly, state jurisdiction over private matters arising upon areas subject to exclusive legislative jurisdiction is being recognized.[10] Although rules regarding the proper application of procedural and substantive law have not kept pace with this emerging trend, the recent opinions do offer a measure of predictability to the attorney seeking to litigate an enclave-based action.

It is the purpose of this article to provide a base upon which to

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[5] Federal jurisdiction over most service persons' actions in contract and tort would in all probability be unavailable as the amount in controversy would not exceed the requisite $10,000 jurisdictional threshold. 28 U.S.C. § 1331 (1970). In actions of a local domiciliary nature such as divorce, adoption and probate, no federal jurisdiction whatever is available. Simms v. Simms, 175 U.S. 162 (1899).

[6] The term "host state" is used to refer to the state within whose boundaries the federal enclave lies.

[7] Where a relationship with a forum state exists by virtue of the fact that acts giving rise to a cause of action occurred within that state, that state may subject a nonresident to in personam jurisdiction by process served outside the forum state without offending due process. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[8] *See* the cases discussed in Section II *infra*.

[9] Early precedent likened land areas subject to exclusive legislative jurisdiction to federal islands or enclaves, such that a "state within a state" was said to exist. Sinks v. Reese, 19 Ohio St. 306 (1869). However, recent authority has abandoned that analogy, Howard v. Comm'rs, 344 U.S. 624 (1953).

[10] Board of Chosen Freeholders v. McCorkle, 98 N.J. Super. 474, 237 A.2d 640 (Super. Ct. L. Div. 1968).

ground that predictability. Recent authority will be examined and its reinterpretation of the meaning of exclusive legislative jurisdiction will be presented. This recent interpretation will then be applied to the practical issues of service of process, subject matter jurisdiction, and choice of substantive law. This search for predictability in civil law principles applicable to enclave-based litigation must begin with an examination of the federal power of exclusive legislative jurisdiction itself.

11. EXCLUSIVE FEDERAL LEGISLATIVE JURISDICTION

A. CONSTITUTIONAL BASIS

Article I of the Constitution of the United States gives Congress the power to exercise "exclusive legislation" over land areas acquired within the states for federal purposes:

> The Congress shall have Power . . . to exercise exclusive legislation in all cases whatsoever, . . . over all Places purchased. by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings . . . .[11]

This section will attempt to define the nature and limits of this power of "exclusive legislation.'' Although judicial opinion has consistently equated it with "jurisdiction,"[12] its *exclusivity* is in doubt.[13] The issue is this: Does a measure of state authority continue over enclave areas, or does state authority cease within those lands by virtue of the constitutional language of clause 17? A starting point in the resolution of this question is the history of the enactment of the clause itself.

B. HISTORY OF THE ENACTMENT OF THE "EXCLUSIVE LEGISLATION" CLAUSE

In June of 1783 the Continental Congress, meeting in Philadelphia, was subjected to four days of harassment by soldiers

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[11] U.S. CONST. art. I, § 8, cl. 17.

[12] Howard v. Comm'rs, 344 U.S. 624 (1953); Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).

[13] For example, it has been stated that in properly interpreting the meaning of exclusive legislative jurisdiction, "Broader or clearer language [in the U.S. Constitution] could not be used to exclude all other authority than that of Congress." Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885). Yet in *Howard v. Commissioners* the Court held that a state might exercise its power over federal enclaves provided it did not interfere with the jurisdiction asserted by the federal government. It stated that a dual relationship existed, that the sovereign rights in that relationship were not antagonistic but that accommodation and cooperation were their aim. 344 U.S. 624, 626 (1953).

demanding their pay. Although there was no physical violence, the proceedings were disrupted and the Congress was forced to leave the city. The inability of the local government to control the rioting was a matter of serious concern to the legislators.[14] As a result of this incident, during the Constitutional Convention of 1787, Madison proposed that land be acquired for a permanent seat of government where jurisdiction would be exclusively federal. In that way the security and integrity of the new government would be protected from the interference and undue influence of any state.[15] It clearly appears throughout the early legislative history that this idea of prevention of state interference with governmental activities was the primary concern of the framers in considering the need for exclusive jurisdiction.[16]

During the ensuing Convention discussions, it was also suggested by Madison that the executive branch be authorized to acquire land within the states for forts and other purposes.[17] However, the question of the jurisdictional status of those lands did not attract much attention during the Convention debates.[18] It was, rather, the question of the advisability of acquiring jurisdiction over what is now the District of Columbia that seems to have drawn the majority of the attention.[19]

Notably, the initial proposals concerning acquiring land for forts did not include any provision relating to the acquisition of jurisdiction over such areas.[20] The absence of such a provision stands in contrast to proposals which did include a provision for the exercise of jurisdiction over the seat of government.[21] The inference appears to be that the framers viewed the possibility of state intrusion into the affairs of enclave areas as being more remote than the possibility of interference with the seat of government.

However, after these initial proposals had been referred to committee, a draft constitutional clause emerged which combined the power to acquire land for the seat of government and outlying

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[14] U.S. DEPT OF JUSTICE, FEDERAL LEGISLATIVE JURISDICTION: A REPORT PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION 4 (1969) [hereinafter cited as D.O.J. STUDY].

[15] REPORT, *supra* note 2, at 18.

[16] *Id.* at 15-27.

[17] *Id.* at 19.

[18] *Id.* at 21.

[19] It has been suggested that because the question of the desirability of exclusive jurisdiction is essentially the same as to both the seat of government and outlying enclave areas, this theory probably explains the lack of a separate treatment for the enclave situation. *Id.* at 27.

[20] *Id.* at 19

[21] *Id.*

enclave areas, and provided for a power of "exclusive legislation" over all these areas:

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and acceptance of the legislature become the seat of government of the United States; and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.[22]

The debate concerning the draft clause was brief, and no attention apparently was directed at its inclusion of the federal jurisdictional power over the outlying enclave areas.[23]

It was not until the state ratifying conventions that the power of exclusive legislation over enclave areas was questioned. In answer to criticisms raised during these ratifying conventions, Madison in The *Federalist Papers* explained the need for such federal power:

> The necessity of a like authority over forte, magazines, etc. established by the General Government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular state. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment. . . .[24]

Madison's explanation for the necessity of exclusive jurisdiction seems to be clearly based upon a perceived need to protect federal functions in enclave areas from the interference of any state. It should be observed in this connection that federal activities at this point in history had not yet been declared immune from state interference.[25] Thus the exemption from state authority to which Madison referred would seem at first glance to guarantee federal immunity by excluding all state authority within the enclave.[26]

However, Madison's remarks contain what this author views as an important qualification. In the remarks quoted above, he explained that "all objections and scruples' were obviated by requiring the concurrence of the states in establishing federal enclaves. At the time of his remarks, severe criticism was being leveled at the draft clause in the state ratifying conventions.[27] Patrick Henry in Virginia and others elsewhere urged that the exclusive federal power would result in the destruction of the private rights of

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[22] Id.
[23] Id. at 20.
[24] THE FEDERALIST NO. 42 (J. Madision).
[25] Such immunity had to await the Supreme Court's decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[26] REPORT, supra note 2, at 21.
[27] *Id.* at 23.

residents of areas subject to that power.[28] In reply, advocates of the provision countered that a state was free to condition its cession of jurisdiction to the federal government. The state was free to make any stipulation it chose to protect these private rights.[29]

The point is, therefore, that when Madison spoke of the exclusion of state authority over enclave areas it was with the qualification that the exclusion was not to be total. As to matters involving private rights, those involved in the ratification process anticipated that some residual state authority would be retained by the state concerned, through stipulation or condition, in their cession of jurisdiction to the federal government. Arguably, therefore, no truly "exclusive" jurisdiction was intended from the outset.

One of the major reasons residents of federal enclaves encounter obstacles when they attempt to utilize state courts today is that the expected stipulations and reservations of state jurisdiction as to private matters failed to materialize.[30] Insofar as the early acquisitions of exclusive areas were concerned, only in the case of the Virginia cession of land for the District of Columbia[31] was an effort made by the Virginia legislature to preserve its jurisdiction with respect to the private rights of residents within that ceded area:

> And provided also, that the jurisdiction of the laws of this Commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law provide for the government thereof, under their jurisdiction, in the manner provided by the article of the Constitution before recited.[32]

Despite the failure of the states to make such stipulations and reservations of jurisdiction, one would have expected the courts to recognize the apparent expectation of the framers that the power of exclusive jurisdiction would not be strictly viewed, and that a residual state jurisdiction could continue within the enclave as to private matters not interfering with federal functions. However, just the opposite approach was taken, generating confusion within the entire body of law affecting federal enclaves.

C. EARLY COURT DECISIONS INTERPRETING EXCLUSIVE LEGISLATIVE JURISDICTION

The early decisions held that when the power of exclusive legisla-

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[28] *Id.* at 23, 25.
[29] *Id.* at 22, 24, 26.
[30] *Id.* at 36.
[31] *Id.* at 36.
[32] D.C. CODE ANN at XXII (1951); REPORT. *supra* note 2, at *36.*

tion was acquired by the federal government all state jurisdiction ceased within the enclave: "the national and municipal powers of government of every description" were held to be merged in the federal government.[33] It was seen to be of the "highest public importance that the jurisdiction of the state should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress by the Constitution."[34]

In Fort Leavenworth ***R.R.Co.v. Lowe***[35] the Court reaffirmed that the word "exclusive" was to be interpreted literally. All authority of the state over places ceded to the federal government, unless reserved by the state in its deed of cession, was to cease:

> When the title is acquired by purchase by consent of the legislatures of the States, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys General.[36]

Moreover, the Court indicated that the use of the word "legislative" was misleading because all authority, judicial, executive and legislative was vested in the federal government when such status existed.[37] This broad interpretation, particularly in its exclusion of all state judicial power over enclave areas, had a major impact upon the development of both substantive and procedural law, areas reserved for discussion in subsequent sections of this article.

D. RECENT COURT DECISIONS REINTERPRETING THE NATURE OF EXCLUSIVE LEGISLATIVE JURISDICTION

Although the early decisions may have been unnecessarily broad in their total exclusion of state jurisdiction over private matters, they did have the virtue of consistency. Recently, however, the exclusive jurisdiction concept has been reconsidered by the courts, and a different meaning of the term has been suggested. These cases have attempted to accommodate the federal and state interests within the enclave and in so doing suggest that state jurisdiction continues within the area, provided the exercise of that

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[33] Pollard v. Hagan, **44** U.S. **(3** How.) **212, 223 (1845).**
[34] Western Union Tel. Co. v. Chiles, **214** U.S. **274, 278** (1909)
[35] **114** U.S. **525 (1885).**
[36] *Id.* at **532.**
[37] Simms v. Simms, **175** US. **162** (1889).

jurisdiction does not involve interference with federal activities.

1. Extinguishment of the Extraterritoriality Doctrine

While the early holdings established the concept of "extraterritoriality"[38] which held that once legislative jurisdiction was acquired by the federal government the property was no longer a part of the state, more recent decisions have abandoned that concept. Under that theory not only did state authority cease, but the state was not required to grant to enclave residents the rights exercised by its own citizens.[39]

The Supreme Court reconsidered the extraterritoriality doctrine in *Howard v. Commissioners*[40] where the question presented was whether a state had the right to annex an area of exclusive federal legislative jurisdiction when it changed its municipal boundaries. The Court allowed the annexation, rejecting the argument that upon the assumption of exclusive legislative jurisdiction the area ceased to be a part of the state of Kentucky:

> The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property . . . [it] did not cease to be a part of Kentucky. . . . A state may conform its municipal structure to its own plan, as long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States.
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> . . . .
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> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction to which we must give heed.[41]

This language and the inferences which flow from it are especially important in several respects.

First, *Howard* clearly extinguished the extraterritoriality or "state within a state" concept. The fact that the federal government exercises exclusive jurisdiction is not to be interpreted as meaning that the enclave ceases to be within the state in the

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[38] D.O.J. STUDY, *supra* note 14, at 70.

[39] Such a denial of rights was confirmed in Sinks v. Reese, 19 Ohio St. 306 (1869) where Ohio voting rights were denied to residents of a veterans' asylum subject to exclusive legislative jurisdiction. The exclusive area was said to be as foreign to Ohio as would be any sister state, notwithstanding its location within Ohio. As such, asylum residents were thereby freed of obligations imposed upon Ohio residents. They could not, therefore, claim the benefits of residency.

[40] 344 U.S. 624 (1953).

[41] *Id.* at 626.

territorial or ***geographical*** sense. Thus the former analogy likening enclave areas to foreign states is no longer valid. The early precedents denying state privileges to enclave residents were based upon this foreign state fiction.[42] The opinion therefore undercut the rationale of those decisions and rendered the term "enclave" conceptually invalid. However, because the cases continue to utilize that erroneous term, this article will likewise perpetuate its use.

2. Recognition of Coexisting State Authority Over the Enclave

Second, and of vital importance to this inquiry concerning civil litigation, the ***Howard*** Court seems to have returned to a definition of exclusive jurisdiction similar to that suggested by the framers of the Constitution and those who advocated its ratification. The framers' predisposition to allow state retention of jurisdiction over private matters[43] seems to be echoed by the ***Howard*** Court. Provided no interference with the exercise of jurisdiction by the federal government is involved, a state is free to exert its authority over the enclave. A federal-state dual power relationship exists, but it is one based upon accommodation and cooperation. The problem the attorney faces, if this view of state jurisdictional authority is valid, is that of predicting what will amount to interference with the exercise of federal jurisdiction. For example, in the domestic relations realm, the federal courts are without subject matter jurisdiction and Congress has expressed no legislative interest.[44] May the host state court fill this jurisdictional void and entertain domestic relations causes of action for enclave residents? Under the ***Howard*** "interference test," there would seem to be no interference involved by such action because the federal government has never asserted its authority in this area. The same reasoning could be applied to state legislation regarding these matters.

The recent case law appears to show a trend in favor of such void-filling state action and appears to support the exercise of state jurisdiction as to matters typically within the province of the state rather than the federal government.[45] For example, in ***Adams v. Londree,***[46] a state exercise of jurisdiction within the enclave was sanctioned on the rationale that

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[42] Commonwealth v. Clary, 8 Mass. 72 (1811); Opinion of the Justices, 1 Metc. 580 (Mass. 1841).
[43] See Section I.B. ***supra.***
[44] Simms v. Simms, 175 U.S. 162 (1899).
[45] Evans v. Cornman, 398 U.S. 419 (1970); Board of Chosen Freeholders v. McCorkle, 98 N.J. Super. 451, 237 A.2d 640 (Super. Ct. L. Div. 1968).
[46] 139 W.Va. 748, 83 S.E.2d 127 (1954).

> . . . our American form of government is not two separate and distinct sovereigns. It is, in fact, as all recognize, a single sovereign. of dual aspect. Within its own field the Federal Government is absolutely sovereign. It is just as true, however, that a state within its own field is absolutely sovereign. It is also true that the sovereign power of the United States and of the different states, respectively, is concurrently exercised over all the territory of the several states. . . . [I]s there any reason or necessity for holding that the Federal Government must necessarily oust the state of its sovereignty as to those matters constituting no impediment or interference with the use by the Federal Government of the land for the purpose or purposes for which it is acquired pursuant to the provisions of Clause 17?[47]

The court concluded therefore, that even upon acquisition of exclusive jurisdiction, residual jurisdiction remained in the state for purposes which did not conflict or interfere with the purposes for which the United States acquired the land. It stated that any other holding would deny to enclave residents the benefit of laws in fields where the federal government cannot, or has not legislated, citing local domiciliary actions in particular. It held that such a denial was never intended and no necessity for it ever existed.[48]

The *Adams* case seems to indicate that merely because the federal government obtains jurisdiction, that fact will not "necessarily oust the state of its sovereignty as to those matters constituting no impediment or interference" with federal activities. Under *Adams*, as indicated in *Howard*, federal legislative jurisdiction over an enclave is not exclusive, but rather predominant. Likewise in areas where there has been no exercise of jurisdiction by the federal government, state jurisdiction could "enter" the enclave to provide relief.

Two dissenting opinions in *Pacific Coast Dairy, Inc. v. Dept. of Agriculture*[49] lend additional support to this view. That case involved an attempt by the state of California to regulate the price of milk sold to the Army on the enclave area by a dealer. The majority held in essence that the power of exclusive legislation rendered state regulations passed after federal jurisdiction was acquired ineffective within the enclave. The power to exclusively legislate for the enclave was thus given literal interpretation.[50]

Justice Murphy in his dissent spoke of the nature of exclusive jurisdiction as follows:

> The "exclusive legislation" clause has not been regarded as absolutely exclusory and no convincing reason has been advanced why the nature of the federal power is such that it demands that all state legislation adopted subsequent to the acquisition of an enclave must have no application in the area. . . .[51]

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[47] *Id.* at 761, 83 S.E.2d at 135.
[48] *Id.* at 769, 83 S.E.2d at 139.
[49] 318 U.S. 285 (1943).
[50] *Id.* at 295.
[51] *Id.* at 305 (Murphy, J., dissenting).

Justice Frankfurter, also dissenting, categorized the power of exclusive legislation in similar terms:

> . . .[T]he doctrine of "exclusive jurisdiction" over federal enclaves is not an imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally-owned lands within a state — problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves. If Congress makes the law of the state in which there is a federal site as foreign there as is the law of China then federal jurisdiction would really be exclusive. But short of such constitutional assertion of overriding authority, the phrase "exclusive jurisdiction" more often confounds than solves problems due to our federal system.[52]

Despite the apparent congruence of the Murphy and Frankfurter dissents with the ***Howard*** Court's philosophy, even the application of the ***Howard*** interference test would not have reversed the outcome of ***Pacific Coast Dairy.*** For example, an attempt to raise the price at which a federal agency procures goods clearly represents the kind of interference with federal functions on enclave property which ***Howard*** indicated would be impermissible.

3. Extension of State Jurisdiction Within the Enclave

Howard and ***Adams*** represent a judicial trend which upholds state jurisdiction over enclave areas in matters not interfering with federal activities. However, the most recent decisions have not treated this extension of jurisdiction in a uniform manner. As will be demonstrated, where a federal interest is to be protected, the courts have been inclined to seize upon the word "exclusive" to bar state action. On the other hand, if a direct burden upon federal activities is not involved, the jurisdictional status will be treated as only being predominantly federal.[53] Coupled with this judicial inconsistency, Congress' action has in many significant aspects returned legislative authority over enclave areas to the states as to private civil matters, creating more confusion in the theory of exclusive legislative jurisdiction.[54] This latter action seems to strengthen the argument against a literal interpretation of exclusive jurisdiction.

a. Extension of state jurisdiction within the enclave by federal statute

In ***James v. Drauo Contracting Co.***[55] the Court upheld the con-

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[52] *Id.* at 300 (Frankfurter, J., dissenting).
[53] ***Compare*** Paul v. United States, 371 U.S. 245 (1963) ***with*** United States v. Mississippi Tax Comm., 412 U.S. 363 (1973).
[54] Evans v. Cornman, 398 U.S. 419, 423 (1970). ***See*** notes 58-65 ***infra.***
[55] 302 U.S. 134 (1937).

stitutionality of a reservation of concurrent jurisdiction by the state in lands the Government had acquired for a dam site. The state's retention of jurisdiction was permissible only insofar as the state's exercise of jurisdiction would not be inconsistent with the federal government's uses. In the course of its decision the Court commented that the importance of reserving to the state jurisdiction for local purposes involving no interference with the performance of governmental functions was becoming more clear as the activities of the Government expanded and large state areas were acquired.[56] After *Drauo* established that a state could reserve portions of its preexisting jurisdiction not inconsistent with federal uses of the property, it likewise became settled that Congress may retrocede or return to a state any jurisdiction not required for federal use of the land.[57]

Following *Drauo,* Congress enacted a number of statutes designed to harmonize the law applicable on the enclave with that in force in the host state. State laws governing actions for personal injury,[58] wrongful death,[59] workmen's compensation,[60] and claims for unemployment compensation,[61] have been made applicable to federal enclaves. Similarly, substantial taxing authority has been returned to the states to levy and collect personal income,[62] fuel,[63] and use and sales taxes.[64]

Significantly, the state law extended to the enclave includes the changes enacted from time to time by the state legislature, a facet which finds precedent in the Assimilative Crimes Act.[65] Although there is conflicting opinion as to whether Congress has retroceded jurisdiction in these areas to the states, or merely adopted state law as federal law,[66] the significant point is that the states are now, in actuality, legislating as to private civil law matters within areas of

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[56] *Id.* at 148.
[57] U.S. DEPARTMENT OF ARMY. PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK, para. 6.9b at 6-58 (1973) [hereinafter cited as ADMINISTRATIVE LAW HANDBOOK].
[58] 16 U.S.C. § 457 (1970).
[59] *Id.*
[60] 40 U.S.C. § 290 (1970).
[61] 26 U.S.C. § 3305 (d) (1970).
[62] 4 U.S.C. § 106 (1970).
[63] 4 U.S.C. § 104 (1970).
[64] 4 U.S.C. § 105 (1970).
[65] 18 U.S.C. § 14 (1970).
[66] ***Compare*** Offut Housing Co. v. Sarpy County, 351 U.S. 253, 260 (1956) *with* Arapaiolu v. McMenamin 133 Cal. 2d 824, 828, 249 P.2d 318, 322 (1952). It has been suggested that as jurisdiction ,in this context means authority to legislate, the federal government has not surrendered its basic legislative authority but merely permits states to apply their laws on a temporary basis. ADMINISTRATIVE LAW HANDBOOK, ***supra*** note 57, para. 6.9e at 6-65.

exclusive legislative jurisdiction. This reality challenges the viability of the "international law" rule67 which was developed by the courts to fill voids in the applicable federal law. Further, this adoption of changes by state legislatures evinces congressional acquiescence in the proposition that state legislation respecting private civil matters on federal enclaves is not offensive to the federal power of exclusive jurisdiction.

b. Extension of state legislative authority over the enclave in absence of statutory permission

In ***Paul v. United States68*** the Supreme Court was again presented with the question of whether California could enforce state minimum price regulations regarding milk sold on three federal enclaves. The federal milk purchases were of two types, those purchased with appropriated funds and those purchased with nonappropriated funds. As to the appropriated fund contracting, Congress had provided a federal procurement policy stating that contracts were to be awarded on a competitive basis to ensure that the lowest price available would be obtained. A clear conflict therefore existed between the federal policy and the state minimum price regulations. Thus, California law was denied effect as to appropriated fund purchases, interfering as it did with governing federal regulations.69

However, as to nonappropriated fund purchases, the Court remanded the case for a determination of whether the basic state regulatory scheme predated the transfer of exclusive legislative jurisdiction. If it did, the ***current*** regulations could be given effect.[70]

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[67] ***See*** Section V. ***infra.*** The "international law" rule was espoused in the ***case*** of Chicago, Rock Island & Pacific Ry. v. McGlinn, 114 U.S. 542 (1885), and thus is also referred to as the ***"McGlinn*** doctrine." Under early precedents, a state was said to be incapable of enacting legislation for the enclave after the United States acquired exclusive jurisdiction. In order to fill existing voids in the law where Congress had not yet provided legislation for the enclave, the Court held that state law existing at the time of such federal acquisition of jurisdiction would continue until abrogated by Congress. The rule is based upon a similar rule of international law applicable where one sovereign assumes control over the territory of another, thus the name. However, it is important to observe that under the rule, only that state law in existence at the time of federal acquisition of jurisdiction is assimilated as federal law. Thus changes in state law enacted after federal acquisition of jurisdiction are not given effect within the enclave. REPORT, ***supra*** note 2, at 156.

[68] 371 U.S. 245 (1963).

[69] ***Id.*** at 262.

[70] The ***Paul*** case therefore marked a departure from the traditional international law rule. The Court in ***Paul*** would allow current state law to apply if a basic price-control scheme had been in effect at the time the federal government acquired legislative jurisdiction. Under the traditional international law rule, only that law in effect at the time of acquisition of jurisdiction may apply. Subsequent changes in state law are ineffective. ***See*** note 67 ***supra.***

As the federal procurement regulations had no application to non-appropriated fund purchases, no interference with federal authority was said to bepresent.

After ***Paul,*** it appears that a state can enforceitsregulations over an enclave, and thus, in effect *legislate* for the enclave, provided no interference with federal law or regulation is involved. A *Howard* interference test will seemingly be applied to determine whether and to what degree state legislative power could govern the enclave. It should be noted that ***Paul*** appears to have overruled ***Pacific Coast Dairy***[71] where the majority interpreted the word "exclusive" so as to exclude all state legislative power from operating upon the enclave.

However, in ***United States v. Mississippi Tax Commission***[72] the Court retreated from the position in ***Paul*** and its application **of** the ***Howard*** interference test. In ***Mississippi Tax Commission*** the **state** attempted to impose a tax upon liquor sold on two military in stallations subject to exclusive legislative jurisdiction. The **Court** read ***Paul*** as not sanctioning the extension of current state legislation into the enclave and emphasized ita earlier statement that:

> The cases make clear that the grant of "exclusive" legislative power to Congress over enclaves that meet the requirements of **Art.** I, § 8, cl. **17,** by its own weight, bars state regulation without specific congressional action.[73]

Moreover, the Court quoted the position of the majority in ***Pacific Coast Dairy*** strictly construing the federal power to exclusively legislate for the enclave:

> It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that "This Constitution, and the laws of the United States which shall be made in Pursuance Thereof, — shall be the supreme Law of the Land; — "It would be a denial of the federal power to "exercise exclusive legislation." **As** respects such federal territory, Congress has the combined powers of a general and **a** state government."

Although the ***Mississippi Tax Commission*** case does represent a return to the early precedents by giving a literal interpretation **to** the word "exclusive," it should be noted that as in ***Pacific Coast Dairy,*** direct interference with federal activity was involved. Here the state through the use of ita taxing powers would have created a direct burden on federal activities. As suggested earlier, the case represents the tendency of courts to seize upon the term "exclusive" to settle argument where clear interference with federal activities is

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[71] ***See*** text accompanying note 50 ***supra.***
[72] **412 U.S. 363 (1973).**
[73] *Id.* at **370.**
[74] *Id.* at **369.**

present.[75] Also, as in *Pacific Coast Dairy*, it should be noted that an application of the *Howard* interference test would have yielded the same result.

c. Extension of state judicial power within the enclave in absence of statutory permission

Unlike the concern manifested when state legislative power is imposed within the enclave, extension of state judicial power within the area has not received equivalent attention. Rather, it seems to have become accepted that state and federal judicial power may coexist within the enclave.[76] The Supreme Court's opinion in *Evans v. Cornman*[77] affirms this conclusion.

There the Court faced the question of whether Maryland could constitutionally deny an enclave resident the right to vote in local elections, In holding that it could not, the Court opined that the state's treatment of enclave residents as state residents for other purposes, on balance, rendered the denial discriminatory and violative of the equal protection clause.[78]

For the purpose of this discussion, the opinion is significant because the Court noted the fact that the relationship between states and federal enclaves has changed since the time of the early decisions.[79] Factors relevant in this balancing test included the fact that Maryland permitted enclave residents to use its courts in divorce and child adoption proceedings.[80] Although earlier law[81] would have considered such action inconsistent with exclusive jurisdiction, in *Evans*, local courts' practice of entertaining enclave residents' divorce and adoption suits was accepted. In sanctioning

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[75] Similarly, when the case was appealed to the Supreme Court a second time, United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975), the Court reasserted its position from the earlier *Mississippi Tax* case that the Twenty-first Amendment did not permit the imposition of tax on "exclusively federal enclaves." *id.* at 603; held that the legal incidence of the tax rested on a federal instrumentality. *id.* at 609; that because the Buck Act did not permit the imposition of such a tax (with respect to the exclusive jurisdiction bases) the regulatory scheme was unconstitutional, *id.* at 613; and that the Twenty-first Amendment did not abolish federal immunity from local taxation on the areas of concurrent jurisdiction. *Id.* at 614. The case turned on an "instrumentality" argument, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), rather than the jurisdictional status of the areas.

[76] Knott Corporation v. Furman, 163 F.2d 199 (4th Cir. 1947) (corporations doing business upon federal enclaves are subject to the in personam jurisdiction of the host state's courts); Craig v. Craig, **143** Kan. 624, 56 P.2d 464 (1936) (exercise of subject matter jurisdiction as to enclave domiciliary matters does not encroach upon exclusive jurisdiction).

[77] **398 U.S. 419** (1970).

[78] *Id.* at **424.**

[79] *Id.* at **423.**

[80] *Id.* at **424.**

[81] ***See*** Section IV. *infra.*

the ability of host state courts to exercise subject matter jurisdiction in domestic relations matters, *Evans* merely illustrates an application of the *Howard* "interference" test. Because no interference with federal power is involved in such a private matter, the state judicial power may "enter" the enclave and provide relief in domestic relations matters.

However, at this point another question surfaces. Where a state court provides a forum for a divorce action, under conflict of laws principles its substantive law is deemed "procedural" so that the forum state's law governs the action.[82] In effect, therefore, where a host state provides a divorce forum for the enclave resident, is the state court not extending state legislation regarding divorce into the enclave? This appears to be the case, and such a practice was accepted by the *Evans* court giving further support to the *Paul* and *Howard* trend. The imposition of state substantive law over an enclave, at least in such a case, serves as an example of a situation where no interference with the exercise of federal legislative authority is present. As a result, the state would be free to act.

E. SUMMARY

The preceding discussion has shown that the recent opinions which attempt to define the meaning of "exclusive jurisdiction" have increasingly indicated that a literal interpretation of the word "exclusive" does not yield satisfying results.[83] Rather, because a dual sovereignty is seen to exist over the enclave,[84] the current judicial approach has tended to lean toward an examination of the type of authority a state seeks to exert within the enclave, and to determine whether that exercise interferes with federal sovereignty.[85] The end product of such an approach is an emerging view of legislative jurisdiction as being more *primary* or *predominant* than "exclusive."[86] Such a trend has support in the history of the enactment of the Constitution as the framers from the outset apparently envisioned a federal jurisdiction which would be less than ex-

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[82] Differently stated, the power of a court to apply its law in a divorce action is based. traditionally, upon the domicile of one of the parties within the court's jurisdiction. By virtue of a state's command over its domiciliaries and because it has a significant interest in the institution of marriage, it may apply its law to alter the marital status of the spouse domiciled there. *Cf.* Williams v. North Carolina, 317 U.S. 287 (1942). *But see* Rosensteil v. Rosensteil, 16 N.Y.2d 64, 209 N.E. 2d 709 (1965), indicating that domicile is not intrinsically an indispensible prerequisite to jurisdiction.

[83] Pacific Coast Dairy, Inc. v. Dep't of Agriculture. 318 U.S. 285, 300 (1943) (Frankfurter, J., dissenting); Adams v. Londree, 139 W. Va. 748, 83 S.E.2d 127 (1954)

[84] Howard v. Comm'rs, 344 U S . 624 (1953).

[85] Paul v. United States, 371 U.S. 245 (1963).

[86] Howard v. Comm.'rs, 344 U.S. 624 (1953); Pacific Coast Dairy v. Dep't of Agriculture, 318 U.S. 285, 305 (1945) (Murphy, J., dissenting).

clusive by virtue of state reservations of jurisdiction as to private matters.[87] Moreover, in a geographical or territorial sense, enclaves are considered to be within and a part of the state in which they lie and the practice of analogizing enclaves to foreign states has been repudiated.[88]

Unfortunately, the procedural and substantive rules governing enclave-based litigation have not kept pace with this emerging view of legislative jurisdiction. As such, they have become suspect. In searching for predictability in litigating the enclave-based action, one must examine the current rules in light of this emerging view. A properstarting point is to examine the rulesrelating to service of process.

III. SERVICE OF PROCESS

The reservation by a state of authority to serve its judicial processes within exclusive jurisdiction areas was accepted practice at an early date. Such reservation was not seen as inconsistent with exclusive legislative jurisdiction,[89] rather, it was viewed as necessary to prevent those lands from becoming sanctuaries for fugitives from justice.[90] As a result, most states consenting to the acquisition of federal legislative jurisdiction reserved such a right.[91] However, an important qualification was placed upon the right to execute a host state's process on the enclave. It was said that the reservation was valid only as to acts committed within the acknowledged jurisdiction of the state.[92] That is, if the acts giving rise to a cause of action occurred on the enclave, state process could not be served upon the enclave.[93]

This qualification was based upon the concept that enclave property was separate from and no longer within the host state. As a state court had no authority within that area, it could not purport to take cognizance of offenses committed there.[94] While this limitation has arisen most frequently in connection with criminal process,[95] it has been said to apply to civil process as well.[96]

If this limitation continues to apply despite the recent reinter-

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* *See* Section II.B. *supra*.

[88] Howard v. Comm'rs, 344 U.S. 624 (1953).

[89] United States v. Travers, 28 Fed. Cas. 204 (No. 16,537) (C.C.D. Mass. 1814).

[90] Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 534 (1885).

[91] D.O.J. STUDY, *supra* note 14, at 56.

[92] United States v. Cornell, 25 Fed. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819).

[93] Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 534 (1885).

[94] *Id.*

[95] *See* People v. Mouse, 203 Cal. 782, 265 P. 944 (1928); People v. Krause, 212 App. Div. 397, 207 N.Y.S. 877 (1924); Lasher v. State, 30 Tex. Cr. App. 387, 17 S.W. 1064 (1891).

[96] Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 534 (1885).

pretation of the nature of exclusive legislative jurisdiction, a prospective litigant whose cause of action arises upon the enclave faces significant problems. Unless he can serve the defendant with process outside the exclusive area, he will be deprived of access to a state court. Further, assuming he cannot, access to a federal court may be denied because of inability to meet the requisite jurisdictional amount.[97] In such a case he could be effectively deprived of a remedy.[98]

The problem is greater than mere inability to execute personal service. Because the limitation proscribes personal service of state process on the enclave for acts occurring on the enclave, a process of attachment to gain jurisdiction quasi in rem against property located on the enclave would seem to be similarly barred. Nor would substituted service statutes afford assistance. For example, most states provide that the operator of a vehicle will be held to have appointed a state official as his agent to accept process when he is involved in an accident "within" the state.[99] Such a statute appears inoperative when an accident occurs upon the enclave, for under the early cases, it could not be said to have occurred "within" the state.[100]

Moreover, when a cause of action arises from acts occurring on the enclave, can it be said that sufficient "contacts"'" exist to justify a state in asserting its "long arm" jurisdiction? If the host state is foreclosed from using its extraterritorial service statutes, would the local federal court be similarly barred from adopting the state extraterritorial service statutes to effect service?[102]

The recent cases that have considered these questions have departed from the strict position of the early cases. The current majority makes no distinction between causes of action arising upon the enclave and those arising within the host state. The same service of process rules are being applied to both situations. Confusion persists, however, in the rationale of these cases as the following review will demonstrate.

In *Knott Corporation v. Furman*[103] the plaintiff instituted suit in a federal court for injuries sustained upon an exclusive area. Furman alleged that the corporate defendant's negligent operation

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[97] *28* U.S.C. § 1331 (1970).
[98] REPORT, *supra* note 2, at 166.
[99] *See, e.g.*, N.Y. VEH. & TRAFFIC LAW § 253 (McKinney 1970).
[100] For an in-depth discussion of the variance in the courts' treatment of the question of whether enclaves are "within" the host state, *see* Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283 (1966).
[101] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[102] FED. R. CIV. P. 4.
[103] 163 F.2d 199 (4th Cir. 1947).

of a hotel resulted in a fire which injured him. The question presented was whether the corporate activities on the enclave constituted doing business "within" the state. If so, the corporation would be amenable to state service of process under an implied consent statute designating the state Secretary of State as agent to accept process on behalf of the corporation. Valid federal in personam jurisdiction would therefore be present under the Federal Rule of Civil Procedure which adopts state methods of service of process.[104] The court held that the corporation's activities occurred "within" the state notwithstanding the fact that they occurred on the enclave, and that in personam jurisdiction was therefore present

Moreover, the federal court clearly stated that a state court could also have obtained in personam jurisdiction:

> Corporations doing business on the reservation come in contact with the citizens of Virginia and do business with them in the same way as foreign corporations doing business elsewhere within the state, and there is the same reason for making them amenable to process in the local courts. Since the state has retained the right to serve process on foreign corporations as well as on others within the reservation and has the power to say what shall constitute such service, it follows that any act which may he legally taken as *in* acceptance of service elsewhere within the state may he so taken within the reservation. This necessarily means that the doing of business by a foreign corporation within therrservation has the same effect, so far as submitting itself to the local jurisdiction as far as the service of process is concerned, as doing business elsewhere within the state.'[5]

The decision rests upon the court's view that the power the state reserved in retaining the right to serve its process upon the enclave included more than the power to merely *serve* process there; it reserved the power to apply all state laws dealing with service of process to the enclave. Thus. under the power reserved, the state could provide how service on corporations should be made within that area. It followed, said the court, that corporations doing business within enclaves must therefore be presumed to consent to the consequences of state laws with respect to service of process.[106]

More recently *Swanson Painting* Co. *v. Painters Local Union*[107] followed *Furman* to the same result. In *Swanson*, the union brought suit in federal district court to recover damages for violation **of** a union contract upon an exclusive area. Process was served under a state "long arm" statute, borrowed by the federal court,[108] allowing extraterritorial service where a cause of action arose from

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[5] FED. R. CIV. P. 4(e).
[6] 163 F.2d at 206.
[7] *Id.*
[8] 391 F.2d 523 (9th Cir. 1968).
[9] FED. R. CIV. P. 4(e).

an in-state business transaction. The court sustained service and jurisdiction. The fact that the acts relied upon to invoke the statute occurred only within the enclave was considered "wholly irrelevant"[109] by the court. It stated that the fact that business is transacted only within an enclave does not immunize the persons engaged in that business from liability for the breach of any duty, citing *Furman* as persuasive authority for this conclusion.[110]

The defendant argued further that because its activities occurred for the most part within the enclave, they could not be considered in determining whether it had sufficient contacts with the host state to justify extraterritorial service under the "fair play and substantial justice"[111] standard. It contended that the test could only be met by a showing that it had "purposely availed itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws."[112] Concluding that such a standard was not intended to apply to federal enclave problems, the court summarily rejected the argument. The Ninth Circuit intimated that even if the *International Shoe* and *Hanson* tests did apply, the result would not be affected because the defendant had state benefits and protections available to it through its employment of local workmen, registration of its construction job with local officials, and because state process applied within the enclave."[113]

In *Brennan v. Shipe*[114] the Supreme Court of Pennsylvania stated that for the purposes of the Pennsylvania nonresident motorist statute the words "within the Commonwealth" were intended to encompass all territory within the geographical borders of Pennsylvania, including the territory of any federal enclave.[115] There, the defendant was sued in tort for personal injuries resulting from an automobile accident on the enclave. Service of process was made upon the Secretary of the Commonwealth under the provisions of the statute and was sustained despite the defendant's claim that such a procedure was unconstitutional.

The court relied on the current federal statute[116] providing that in personal injury actions arising upon enclaves the "rights of the parties" are to be governed by the laws of the host state, and held that because the Pennsylvania statute by its own terms governed

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[109] 391 F.2d at 525.
[110] *Id.*
[111] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[112] Hanson v. Denckla, 357 U.S. 235 (1958).
[113] 391 F.2d at 525, 526.
[114] 414 Pa. 258, 199 A.2d 467 (1964).
[115] *Id.* at 262, 199 A.2d at 470.
[116] 16 U.S.C. § 457 (1970).

the "rights of the parties," its method of service of process also applied. It also noted but did not rely upon the fact that a more liberal reading of the federal statute would support use of the state implied consent statute to gain in personam jurisdiction. In actions for wrongful death the federal statute specifies that "such right of action shall exist as though the place [the enclave] were under the jurisdiction of the state within whose exterior boundaries the same shall be."[117] A reading of the entire statutory provision strongly implies that both wrongful death and personal injury actions were to be treated without distinction, providing further support for the court's holding.'[118]

In ***Ackerly u. Commercial Credit Co.***[119] a federal district court sitting in New Jersey relied upon ***Knott Corporation u. Furman***[120] and held that in determining whether a defendant was doing business within the host state, it would consider activities which occurred exclusively upon federal enclaves. However, as the defendant's commercial activities within the state were numerous, enclave contacts were not determinative.

While these cases represent the majority view, sustaining service even though the cause of action arose upon the enclave, there are cases to the contrary. ***Berube u. White Plains Iron Works***[121] is an example. There a corporate defendant's activities upon an enclave did not support a finding that it was "doing business" within the state so as to justify substituted service under a state implied consent statute. The court noted, without discussion, that such a holding was necessitated by a decision of the forum state's highest court in ***Brooks Hardware Company v. Greer.***[122] That decision followed the early view that an enclave was not part of the state, and therefore activities there did not take place within the state.

The recognition and application of the judicial extinguishment of the "state within a state" fiction and the reinterpretation of the meaning of exclusive legislative jurisdiction to mean "predomi-

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[117] *Id.*

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> In case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the state within the exterior boundaries of which it may be.

16 U.S.C. § 457 (1970).

[119] 111 F. Supp. 92 (D.N.J. 1963).

[120] *See* text accompanying notes 102-105 *supra.*

[121] 211 F. Supp. 457 (N.D. Me. 1962).

[122] 111 Me. 78, 87 A. 889 (1911).

nant federal jurisdiction" would have significantly altered the court's position in ***Berube.*** Moreover, a general recognition and application of these trends would eliminate much of the confusion and uncertainty in this area.

In order for a state to validly execute its process, two requirements must be met. First, the process must satisfy the demands of procedural due process by affording adequate notice and an opportunity to be heard.[123] Second, and relevant here, a jurisdictional basis must be present. That is, there must be a sufficient nexus between the actor and the state for a court to assert its power over the person of a party to an action.[124]

Historically, this second criterion was available only when a party was physically present within the jurisdiction of a court. The scope of that jurisdiction was expressed in territorial terms, as the court's jurisdiction was coextensive with its state's boundaries.[125] Under this concept the situs of the cause of action is irrelevant. Physical presence within the acknowledged area of the court's jurisdiction when service of process is made is the only relevant concern.[126]

An extension of this theory can be found in state statutes that subject legal personalities, such as corporations, to jurisdiction on a "doing business" test. Only when a corporation's activities within the forum state rise to a certain level can it be said to be "doing business" within that state and thus fictionally "present" within the court's jurisdiction under due process principles.[127] As in the case of a natural person, when a corporation is found to be fictionally present, the situs of the action's origin is irrelevant.[128]

Applying these principles to federal enclaves, if the jurisdictional basis asserted is an individual's physical presence, the only question is whether the host state's judicial power extends over the enclave. Is the enclave an area within the acknowledged jurisdiction of the local state court?

The previous discussion of the ***Howard*** and *Paul* opinions spoke in terms of dual sovereignty within the enclave: "accommodation and cooperation" was the aim in defining the respective state and federal powers existing within the enclave and "interference and friction" was to be eliminated. The ***Adams*** decision noted the harmonious concurrent exercise of federal and state legislative and

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[123] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
[124] Pennoyer v. Neff, 95 U.S. 714 (1877).
[125] *Id.*
[126] Zacharakis v. Bunker Hill Mut. Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1953).
[127] Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 NE. 915 (1917).
[128] *Id.*

judicial power and urged that this same duality could exist within the enclave. Similarly, *Evans* cited the extension of state judicial power within the enclave as a reason why the State of Maryland could not deny enclave residents the benefits of other laws.

The trend of these cases and the traditionally extensive jurisdiction of state courts, which has been buttressed by Congress' jurisdictional limitations on access to the federal courts,[129] argue against finding that the existence of state judicial power constitutes an interference with the exercise of federal jurisdiction and consequently cannot extend over an enclave. It follows that state court process may be executed upon an enclave to obtain in personam jurisdiction over a natural person or a corporation doing business there. This is true regardless of where the cause itself arose.

The other basis of jurisdiction proceeds upon a "contacts" theory. There, no physical presence within the court's jurisdiction is required at the time of service. It is only necessary that subjecting a party to a forum's judicial power does not offend traditional notions of fair play and substantial justice.[130] Of course, this theory of jurisdiction is the basis for the wide variety of "long arm" statutes currently in force.[131]

When jurisdiction is based on a party's contacts with the forum state, the contacts or relationship with that state justifies jurisdiction. Unlike the situation where jurisdiction is asserted on the basis of the party's mere presence, the place of the acts giving rise to the cause of action is highly relevant when the propriety of the court's assertion of power is based on a contacts theory. In the latter case the occurrence of the act "within" the state establishes the relationship needed to satisfy due process.[132] The question therefore is whether acts committed upon the enclave have any relationship with the host state. Do they occur "within" it? If so, is a relationship with the forum created by their occurrence within it?

In a territorial sense it is settled that acts occurring on an enclave do occur "within" the state. For example, in *First Hardin National Bank v. Fort Knox National Bank*,[133] the issue presented was whether the construction of a bank upon an enclave was construction "within" the county encompassing the military reservation. Citing *Howard*, the court held that it was. In *Beagle v. Motor Vehi-*

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[129] Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 499 (1974).
[130] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[131] *See, e.g.*, N.Y. CPLR § 302 (McKinney 1972).
[132] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
[133] 361 F.2d 276 (6th Cir. 1966).

cle Accident Indemnity Corporation,[134] the parties disputed whether an accident occurring on an enclave took place "within" the state; if so the petitioner would be entitled to indemnity from a state uninsured motorist fund. The court held that the accident did occur "within" the state, regarding the question as settled by ***Howard.***

Is a "contact" or-relationship with the host state created by virtue of the act's occurrence on an enclave within the state? The answer to this question must be yes. In ***Beagle,*** the court saw a sufficient relationship with the state when an accident occurred on the enclave to justify payment of state insurance funds to the petitioner. In ***Furman,*** the court saw no distinction between a corporation's conducting business on or off the enclave insofar as its obligations under state laws were concerned. The conclusion must be that a state may use acts occurring on the enclave to justify extraterritorial service. It follows that a federal court may do likewise under the borrowing statute.[135]

From the preceding discussion, it appears that the emerging trend extending state judicial power within the enclave and eliminating the "state within a state" fiction will solve the remaining problems in the service of process area. In the future, it can be expected that courts will draw no distinction between the enclave-based action, and that arising within the host state, insofar as gaining jurisdiction over the parties is concerned. State service statutes should apply equally in both situations.

In order to obtain a remedy, however, it is necessary that the forum also have jurisdiction over the subject matter of the litigation. This inquiry is related to the preceding discussion in that, once again, the jurisdiction of state courts over matters arising on the enclave is involved.

IV. SUBJECT MATTER JURISDICTION OF STATE COURTS

Where a cause of action arises on land subject to exclusive legislative jurisdiction, a litigant will encounter substantial difficulty in finding a federal forum in which to litigate his claim.[136] In actions of a transitory nature such as those in contract or tort, in order for a federal court to accept jurisdiction the amount in controversy must exceed $10,000.[137] In actions of a local nature such as

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[134] 26 **App. Div.** 2d 313, **274** N.Y.S.2d 60 (1966).
[135] **FED** R. CIV P. 4(3).
[136] ADMINISTRATIVE **LAW** HANDBOOK, ***supra*** note ***57,*** para. 6.10d at 6-81
[137] 28 U.S.C. § 1331 (1970)

divorce, adoption, and probate, no federal jurisdiction whatever is available.[138] Therefore, in minor transitory actions and in all local actions of a domiciliary nature, access to a state forum is a necessity. Whether host state courts can entertain such suits without encroaching upon the federal government's exclusive legislative jurisdiction and whether a state court has subject matter jurisdiction to grant relief are questions which stand in need of clarification.

A. TRANSITORY ACTIONS

Transitory actions are by definition those which may take place anywhere.[139] The place of occurrence is considered irrelevant to the question of which court may hear the claim;[140] and because the right of action is said to follow the person of the defendant wherever he goes, any court having in personam jurisdiction over the defendant also has subject matter jurisdiction.[141] Even though the cause arises upon territory subject to exclusive legislative jurisdiction, any state court having in personam jurisdiction over the parties can grant relief inasmuch as the place of occurrence is irrelevant.[142]

This rule was applied in the case of ***Muter v. Holly***[143] where the Fifth Circuit held that the district court had jurisdiction to entertain a suit for damages resulting from an accident which had occurred upon an exclusive area. Such federal jurisdiction was said to be concurrent with that existing in the state courts as the suit, in tort, was a transitory one. The court remarked:

> The Supreme Court has held that an action for personal injuries suffered on a reservation under exclusive jurisdiction of the United States being transitory, may be maintained in a state court which has personal jurisdiction of the defendant.[144]

In ***Red Top Cub Co. v. Capps***[145] a plaintiff who had been injured in an automobile accident on a military reservation subject to exclusive jurisdiction was permitted to bring suit for damages in state court over the defendant's objection that the court lacked subject matter jurisdiction. The court based its assertion of jurisdiction on *Muter v.* Holly. These cases illustrate that state courts clearly

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[138] Simms v. Simms, 175 U.S. 162 (1899).
[139] BLACK'S **LAW** DICTIONARY 50 (4th ed. 1968).
[140] 31 C.J.S. ***Estates*** §§ 41-42 (1964).
[141] Ohio River Contract Co. v. Gordon, 244 U.S. 68 (1917); Mater v. Holley, 200 F.2d 123 (5th Cir. 1952); **Red** Top Cab Co. v. Capps, 270 S.W.2d 273 (Tex. Civ. App. 1954).
[142] ADMINISTRATIVE **LAW** HANDBOOK, ***supra*** note 57, para. 6.10d at 6-81.
[143] 200 F.2d 123 (5th Cir. 1952).
[144] ***Id., citing*** Ohio River Contract Co. v. Gordon, 244 U.S. 68 (1917).
[145] 270 S.W.2d 273 (Tex. Civ. App. 1954).

possess subject matter jurisdiction to hear transitory actions arising on areas subject to exclusive jurisdiction. If the $10,000 jurisdictional requirement can be met, access to federal courts also finds support in case law. Moreover, if federal substantive law applies to the action by virtue of its occurrence on an exclusive area, the jurisdictional requirement of diversity of citizenship is inapplicable because the cause is considered to be one arising under federal law.[146]

B. LOCAL ACTIONS

In sharp contrast to transitory actions, local actions have presented serious problems, primarily in the context of divorce and probate actions where enclave residents have sought relief before host state courts. Unlike transitory actions which may be brought in any court of general jurisdiction having jurisdiction over the *person* of the defendant, local actions must be brought in the court having jurisdiction of the place where the subject matter of the litigation lies or where the cause arose.[147] Actions in rem, and those in divorce, adoption, probate and lunacy are examples.[148]

State courts may normally assert subject matter jurisdiction over these types of actions only if one or more of the parties are domiciled, or reside within the state, or are present within the jurisdiction of the court.[149] Therefore, the first issue is whether enclave residency will suffice to give a host state's court subject matter jurisdiction. Second, if it is sufficient, does the assertion of jurisdiction constitute an encroachment upon exclusive legislative jurisdiction? That is, where a state court entertains a probate or divorce action arising upon the enclave, does the state unlawfully extend its judicial power within the enclave? Would such a state court judgment withstand collateral attack? While the cases which have dealt with these precise issues have not been uniform, the emerging trend of decisions discussed earlier forms a basis for resolving this dilemma.

State statutes generally require residence or domicile "within" the state as a condition precedent to their courts' entertaining such

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[146] Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959). Under the international law rule fiction, upon cession of jurisdiction, state law including its common law is assimilated as federal law. Thus federal jurisdiction is available as the cause of action arises under federal law. *Id.* at 665 (upholding jurisdiction under 28 U.S.C. § 1331). *See also* Mater v. Holley, 200 F.2d 123 (5th Cir. 1952). *Contra,* Hill v. Gentry, 182 F. Supp. 500 (W.D. Mo. 1960), *rev'd on other grounds,* 280 F.2d 88 (8th Cir. 1960) (holding that diversity jurisdiction is required).

[147] 92 C.J.S. *Venue* § 7 (1955).

[148] Sewell, *supra* note 99, at 298.

[149] *Id.* at 300.

local actions. Whether enclave residency would be sufficient to meet this requirement was considered by Maryland's highest court in *Lowe v. Lowe*[150] where the court relied on early precedents and the doctrine of extraterritoriality[151] to hold that an enclave resident could not bring an action for divorce in a state court. The court concluded that because the enclave ceased to be a part of the state when jurisdiction was ceded to the federal government, its residents could not meet the state statutory requirement limiting divorce to Maryland residents. The court suggested that the only relief from the acknowledgedly unfortunate situation could come from Congress. Moreover, as in the early precedents, the court did not consider its holding unreasonable. Because enclave residents were not treated as state residents when the burdens of taxation were imposed, it was not inequitable for the court to exclude enclave residents from the benefits which state law restricted to state residents.[152]

Following *Lowe*, the Supreme Court of New Mexico in *Chuney v. Chaney*[153] reached the same result. Again for the purposes of a state divorce statute, the court determined that upon cession the enclave had ceased to be a part of the state. Therefore, persons living on the enclave were not legal residents for the purpose of using the state courts for divorce proceedings.[154]

As a consequence of the hardships imposed by the *Lowe* and *Chuney* cases each of the states concerned amended its divorce statute to provide that enclave residency was the equivalent of state residency for divorce purposes.[155] Most states have enacted similar legislation.[156] Therefore, insofar as establishing the condition precedent of state residency for divorce purposes, the problems have largely been solved.

Even if such a state statute is not available, the principles established by *Evans v. Cornman*[157] should be dispositive of the matter. There it was argued that the right to vote could be denied enclave personnel on the grounds that they did not meet state residency requirements. That argument was quickly rejected:

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[150] 150 Md. 592, 133 A. 729 (1926).
[151] *See* Section II.D. *supra*.
[152] 150 Md. at 601, 133 A. at 733.
[153] 33 N.M. 66, 201 P.2d 732 (1949).
[154] *Id.* at 69, 201 P.2d at 784.
[155] REPORT, *supra* note 2, at 227.
[156] D.O.J. STUDY, *supra* note 14, at 69
[157] 398 U.S. 419 (1970).

> Appellees clearly live within the geographical boundaries of the state of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the [enclave] grounds ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this court . . . and it cannot be resurrected here to deny appellees the right to vote.[158]

Although it is settled that enclave residency is residency "within" the state under *Evans*, the question of which state benefits must constitutionally flow from that residency is not so clear. *Evans* suggested use of a balancing test in each case.[159] Fortunately, states do not appear to have attempted to foreclose access to state courts in local domiciliary actions to enclave residents, if such a conclusion can be inferred from the absence of reported cases. Just the opposite situation has prevailed. States have, in general, permitted enclave residents free access in these matters recognizing that a remedy before a federal court is not available.[160]

Does this opening of state courts to enclave residents constitute encroachment upon exclusive legislative jurisdiction? Does a state court have jurisdiction over the ***res*** in these local domiciliary actions so that its judgment would withstand collateral attack? Earlier discussion161 has indicated that the weight of recent authority supports the existence of state judicial power within the enclave, to the extent that it does not interfere with federal jurisdiction. While the rationales vary, the majority of cases reach that same result.

For example, in *Divine v. Unaka National* ***Bank***[162] the ability of a host state court to grant probate relief to enclave residents was upheld. Following the international law rule,[163] the court applied the fiction that the municipal and private laws of the host state continue after acquisition of legislative jurisdiction until changed by the federal government. It therefore followed that since the state had probate laws in effect at the time of cession, those laws continued in effect as federal law within the acquired land. The court noted that the federal government had not acted to either change the law or confer probate jurisdiction upon the federal court,[164] and held that it had the power to act to give effect to a cause of action existing under federal law. The probate situation was seen as analagous to that situation where a federal cause of action exists but where no federal court jurisdiction is available because of the

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158 **Id.** at **421.**
159 **Id.** at **424.**
160 REPORT, *supra* note **2,** at **57.**
161 **See** Section II. *supra.*
162 **125** Tenn. 98, **140** S.W. **747 (1911).**
163 **See** note **67** *supra.*
164 **125** Tenn. at **108, 140** S.W. at **749.**

litigant's inability to meet the federal monetary requirement:

> If jurisdiction is not given by federal law to assert and protect the private rights conceded to exist within the newly acquired territory, they must remain outside the pale of the law unless they can be asserted in the courts of the states. The federal government and the governments of the several states are not foreign to each other but together constitute one complete system. . . . If the state courts can exercise [concurrent jurisdiction in cases not restricted to the federal courts by statute or necessary implication] in the enforcement of causes of action growing out of federal laws, we can see no reason why they cannot enforce causes of action **recognized** by federal law as continuing to exist in territory ceded by the states, but which the federal government has provided no means of enforcing through its own courts.[165]

The ***Divine*** case illustrates, in a probate context, the emerging view that state judicial power can coexist with federal judicial power within the enclave. **As** there was no interference with any federal function, the court had the power to affect the estate or ***res*** within the enclave.

Similarly, in ***Craig v. Craig***,[166] the court held that providing a state forum for a divorce action did not constitute an encroachment upon exclusive legislative jurisdiction.[167] Because divorce statutes were in force at the time of cession and the federal government had not acted to repeal those laws, a state court could give effect to the laws as federal law by providing a convenient forum. The substantive law of divorce applied by the court was that which applied at the time of cession.[168]

In ***Matter of Kernan***,[169] the court held that it had jurisdiction to entertain a habeas corpus petition involving the custody **of** a child held by her father upon a federal enclave. The opinion reached the same result as the cases above, but on a different basis. Emphasizing that domestic relations matters have traditionally been within the province of the states and not the federal government, the court implied that affirmative action would be required by the federal government before a state court would be divested of jurisdiction within the enclave:

> As already seen, authority in a federal court for granting of the writ of habeas corpus to determine the custody of a child is not to be found either in the constitution or the laws of the United States. Moreover, Congress

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[165] *Id.*
[166] 143 Kan. 624, 56 P.2d 464 (1936).
[167] Accord, Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954) (holding that a New Mexico statute enabling federal enclave residents to sue for divorce after one year of continuous residency did not unlawfully encroach upon federal jurisdiction); *cf.* Langdon v. Jaramillo, 80 N.M. 255, 260, 454 P.2d 269, 274 (1969) (Moise, J., dissenting).
[168] 143 Kan. at 631, 56 P.2d at 468.
[169] 247 App. Div. 664, 288 N.Y.S. 329 (1936).

> having failed to pass a statute granting jurisdiction, the federal courts in proceedings of this sort arising in territory ceded by a state to the United States the federal courts have no such jurisdiction. It follows that as jurisdiction to grant such relief rests in *the* first place in the courts of the ceding states in this case the state of New **York,** within the boundaries of which the child whose custody is here sought to be determined, was found there it remains

Given the traditional concern courts have shown for the welfare: of children as wards of the court,[171] the opinion is not surprising

Board v. McCorkle[172] is a recent example of a court sustaining its subject matter jurisdiction over enclave-based local actions. The opinion is significant because the court justified its exercise of jurisdiction over a situation arising on an enclave upon the "noninterference" rationale which has been suggested as the proper approach. In *McCorkle*, New Jersey had ceded exclusive jurisdiction over the Fort Dix military reservation and McGuire Air Force Base to the federal government. The parties questioned the extent to which New Jersey could use the courts to enforce certain of its public welfare laws on the installation, particularly those relating to the care of dependent children and commitment of the mentally ill. Plaintiffs sought a declaratory judgment precluding application of those laws to enclave residents arguing that the exclusive legislative status of the property placed its residents beyond the power of both the New Jersey courts and legislature. Plaintiffs asserted that such application of New Jersey benefits was an improper burden upon state taxpayers. If a remedy was required, the plaintiffs contended that the federal government was responsible to provide the means to effect that remedy. Significantly, the United States Attorney General fiied an amicus curiae brief joining the defendants in supporting the enforcement of the ***New Jersey*** laws through the *state* courts, and *denying* that any invasion of federal sovereignty would result from such action.[173]

The court held that it would have the jurisdiction to commit mentally ill enclave residents if the need arose and to provide for the welfare of enclave dependent children It considered the principle that cession of jurisdiction *did not* create an absolute, exclusive sovereignty as settled by the modern authorities. Rather, the term "exclusive" was viewed to relate to the protection of the federal government against conflicting regulations:

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[170] *Id.* at 667, 288 N.Y.S. at 133.
[171] Falco v. Grills, 209 Va. 115, 161 S.E.2d 713 (1968); Berlin v. Berlin, 21 N.Y.2d 371, *233* N.E.2d 109 (1967); Bachman v. Mejas, 1 N.Y.2d 575, 136 N.E.2d 866 (1956).
[172] 98 N.J. Super 451 *237* A.2d 640 (Super. Ct. I. Div. 1968).
[173] *Id.* at 455, 237 A.2d at 642.

> The fact that the United States acquires exclusive jurisdiction over property it purchases with the consent of a state does not necessarily divest the state of all power with respect to it; on the contrary, so long as it in no way interferes with the jurisdiction asserted by the Federal Government, the state may continue to exercise its power.[174]

Citing ***James v. Dravo Contracting Co.***,[175] the court considered an interference test regarding the application of judicial power to be the proper approach:

> The desirability of permitting the state to retain jurisdiction for local purposes involving no interference with performance of governmental duties is becoming more and more evident as the activities of the Federal Government expand; the United States should not be compelled to exercise exclusive jurisdiction over all property it acquires.[176]

The opinion also dealt with the international law rule and its current application, a context in which the case will be discussed further.

These cases represent the majority view that state jurisdiction does exist over local actions with an enclave subject matter. The question of whether they would withstand collateral attack is of course only a question of whether the court had jurisdiction to grant relief.[177] The recent trend answers that question affirmatively. An ouster of state jurisdiction within the enclave may be based only upon interference with the exercise of federal jurisdiction. The fact that Congress has not given jurisdiction to the federal courts to hear local matters such as divorce, lunacy, adoption and the like serves as evidence that no interference is present and that state jurisdiction continues.

To this point in the analysis, it has been seen that application of the emerging trend, which reinterprets the nature of legislative jurisdiction, offers a cure for the existing confusion in the areas of service of process and subject matter jurisdiction. A remaining prublem area exists, however. The litigant may well find that the substantive law applicable to his actions will be that state law in existence at the time the federal government acquired jurisdiction. As such it will very likely be outdated and obsolete. This result obtains in many areas in which Congress has not provided current civil law for the enclave. The judicial treatment of this situation, where a gap exists in the federal substantive law, has likewise been the subject of judicial consideration.

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174 *Id.* at 461, 237 A.2d at 645.
175 302 U.S. 134 (1937).
176 98 N.J. Super. at 461, 237 A.2d at 645.
177 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 105 (1971); Thompson v. Whitman, 85 U.S. 457 (1874); Aldrich v. Aldrich, 378 U.S. 540 (1964).

V. SUBSTANTIVE LAW APPLICABLE ON THE ENCLAVE

Unlike the criminal law field where Congress has provided a comprehensive criminal code[178] for federal enclaves, legislation providing a substantive civil law for these areas contains serious gaps.[179] For example, there is no legislation covering such common occurrences as breach of contract or liability for damage to property.[180]

It is possible that by using current conflict of laws principles and adopting a governmental interests type analysis,[181] enclave law may not govern the action despite the fact that it may have occurred upon an exclusive area. However, where enclave law is applicable, a serious problem is presented if a gap in the law exists. To cure this statutory void, courts have adopted an "international law" rule.[182] Through its application, both state statutory and common law are considered to be federalized[183] until inconsistent laws are passed by Congress.[184] The concept is based upon a rule of international law, thus the name, that when one sovereign takes control of the territory of another, the latter's law continues until changed by the new sovereign.[185] In this way, no area is left without a developed legal system.

This international law rule was first applied to the enclave situation in Chicago, Rock Island & Pacific Ry. v. *McGlinn*,[186] giving rise to the so-called "McGlinn doctrine." In that case a cow was injured on a railroad right-of-way traversing the Fort Leavenworth military reservation, an exclusive area. When legislative jurisdiction was acquired, the host state had a statute in force which provided that railroad companies would be liable for damages without regard to negligence, if animals were killed or injured on unfenced rights-of-way. The United States Supreme Court affirmed a judgment for the owner of the injured animal, and held that the statute continued to apply within the enclave, even though jurisdiction had been acquired by the federal government:

> It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any

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178 18 U.S.C. § 7 (1970).
179 ADMINISTRATIVE LAW HANDBOOK, *supra* note 57, para. 6.11d at 6-91.
180 *Id.*
181 Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).
182 Chicago, Rock Island & Pacific Ry. Co. v. McGlinn, 114 U.S. 542 (1885).
183 REPORT, *supra* note 2, at 158.
184 *Id.* at 6.
185 *Id.*
186 114 U.S. 542 (1885).

> territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in forceuntil abrogated or changed by the new sovereign . . . . As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action by the new government, they are altered or repealed.[187]

It should be observed that the *McGlinn* opinion is based upon the early view of legislative jurisdiction. The court analogized the acquisition of jurisdiction to that of territory. A new sovereign was said to exist within the acquired land and its authority completely excluded that of the old. However, by necessity, the municipal law of the state's former sovereign could continue until abrogated.

The *McGlinn* doctrine would have cured the statuatory void problem but for one limitation. Only those laws in existence at the time of acquisition of legislative jurisdiction could become federal law.[188] Subsequent changes in the state's statutory law, for example, would not apply. This limitation was said to follow from the nature of exclusive legislative jurisdiction. To allow state law as amended after such acquisition to apply upon the enclave would, in essence, be allowing a state to enact general municipal legislation for the area. The state was said to be as unable to enact new legislation for the federal government as was the old sovereign unable to enact laws for the new government which now controlled its territory. The end result of the application of this fiction is that because the federal government has not seen fit to enact a complete body of substantive law for enclaves, the areas in the law in which it has not acted become more obsolete as time passes.[189]

Such obsolescence was illustrated in *Arlington Hotel Co. v. Fant*.[190] There an innkeeper on a federal enclave was held liable under the Arkansas common law in effect at the time legislative jurisdiction was acquired. Under that law an innkeeper was considered an insurer of his guests' personalty against fire. That rule was applied to the action, notwithstanding the fact that in the interim Arkansas had changed its law to require proof of negligence.[191]

There are additional aspects to the *McGlinn* doctrine which

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[187] *Id.* at 546.
[188] REPORT, *supra* note 2, at 158.
[189] *Id.* at 6.
[190] 278 US. 439 (1929).
[191] REPORT, *supra* note 2, at 159.

make it difficult to apply in practical terms. For example, most enclave areas are composed of tracts of land acquired at different times. The acquisition dates of legislative jurisdiction over these separate tracts may also vary. Thus the substantive law governing each tract may be different, as it is the substantive law in existence at the date of acquisition of jurisdiction which is assimilated as federal law.[192] This fact compounds and confuses research as to the governing law and can become particularly troublesome where the cause of action has no fixed situs, but arises over several tracts, as for example, a suit for breach of contract.

In light of the emerging trend, does the *McGlinn* doctrine remain viable? The recent judicial opinions have weakened the foundation of the rule, and should indicate that it will not be applied in the future. The *McGlinn* doctrine is premised upon the idea that acquisition of legislative jurisdiction is analagous to a new sovereign assuming control of territory, excluding the authority of the former sovereign.[193] Yet the *Howard* court rejected this fiction and suggested that both the state and federal governments retain authority within the enclave:

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries so long as there is no interference with the jurisdiction asserted by the Federal Government. The Sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction to which we must give heed.[194]

The court in *Adams v. Londree* expressed disfavor with the rule and categorized its premise as "inept." In discussing the early precedents, including *McGlinn*, the court observed:

> The reasoning usually followed in the cases was that the ceding of land to the United States ousted the State as a sovereign as to such territory, following by analogy, the ceding of territory by one nation to another nation, whereby the laws of the ceding nation were superseded entirely by the laws of the nation to which the territory was ceded. Is not the analogy inept? Our American form of government is not two separate and distinct sovereigns. It is as all recognize a single sovereign of dual aspect.[195]

In *Paul v. United States* the Supreme Court markedly departed from strict application of the *McGlinn* doctrine. There the Court found that California's current milk price control scheme could be given effect upon the enclave as to purchases made with nonappropriated funds. In contrast to appropriated fund purchases, there was no federal policy which would make application of the

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[192] ADMINISTRATIVE LAW HANDBOOK, *supra* note 57, para. 6.11d at 6-92

[193] 114 U.S. at 546.

[194] 344 U.S. at 626.

[195] 139 W. Va. at 761, 83 S.E.2d at 135 (citation omitted).

minimum price scheme inconsistent with federal law or regulation. The Court therefore held that, provided California's basic law had been in effect before legislative jurisdiction was acquired, the current price control legislation could be applied within the enclave.[196] Strict application of the McGZinn doctrine would permit only the law in existence at the time of the acquisition of legislative jurisdiction to be given effect.

Contrary to the *McGlinn* doctrine, the Colorado Supreme Court in ***Board v. Donoho***[197] held that its current state welfare legislation could be applied to enclave residents, thus permitting their receipt of welfare payments. In the court's view, legislative jurisdiction was designed only to prevent state interference with federal sovereignty. State laws intended for the public benefit would therefore not be barred:

> . . .[I]n view of the fact that "exclusive jurisdiction" does not operate as an absolute prohibition against state laws but has for its purpose protection of federal sovereignty, we conclude that it does not operate to prohibit the payment of relief to a resident of Fort Logan. The confemng of a benefit required by federal law cannot be construed as an act which undermines federal sovereignty. Indeed, by paying relief in these circumstances the federal policy to recognize citizens of the United States is fostered and promoted.[198]

The opinion in ***Board v. McCorkle***[199] also is a recent example of a court declining to apply the McGZinn doctrine. As mentioned earlier, there the plaintiffs sought to enjoin the application of New Jersey welfare legislation to Fort Dix and McGuire Air Force Base. They argued that state laws relating to the care of dependent children and the mentally ill could have no force within the enclave because the McGZinn doctrine barred their application, the law having been passed long after the federal government acquired legislative jurisdiction. That argument was summarily rejected as unpersuasive. The court held that as New Jersey had traditionally been concerned with the fate of such persons, the current laws for their protection could be enforced. Federal legislative jurisdiction was said not to compel an opposite conclusion:

> The fact that the United States acquires exclusive jurisdiction over property purchased with the consent of a state does not necessarily divest the state of all power with respect to it; on the contrary, so long as it in no way interferes with the jurisdiction asserted by the federal government, the state may continue to exercise its power.
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[196] 371 U.S. at 269.
[197] 144 Colo. 321, 356 P.2d 267 (1960).
[198] *Id.* at 332, 356 P.2d at 273.
[199] 98 N.J. Super. 451, 237 A.2d 640 (1968).

> It seems that state laws passed for the public welfare should be applied to federal enclaves within the state, for the state is best fitted to know the requirements of its particular locality and to deal with them. Such measures, it appears, would not interfere with the function of the Federal Government.[200]

The foregoing trend presages even further departures from the *McGlinn* doctrine. As the nature of legislative jurisdiction changes in concept from exclusive to predominant federal jurisdiction, there seems to be no need for the continued use of this fiction. In matters involving no interference with federal sovereignty the preceding cases express the conclusion that a state may extend its current legislation within the enclave.

It should be observed that this judicial trend is consistent with the apparent intent of Congress. In those areas where Congress has acted, as in providing a substantive law for personal injury and wrongful death actions, the federal legislation has in each case merely applied the current state law within the enclave.[201] Moreover, the federal legislation automatically assimilates changes made in state statutory and common law.[202] It seems inconsistent, therefore, to sanction the application of obsolete law to the enclave under the *McGlinn* doctrine where gaps in the law appear, especially in light of congressional policy that current state law be applied. Finally, it should be remembered that the *McGlinn* doctrine, which was adopted as a curative measure,[203] no longer has. that curative effect but today sanctions the application of obsolete law. In light of these facts, the more recent decisions have, and will continue to properly displace *McGlinn* as sound doctrine.

VI. CONCLUSION

In recent years the term "exclusive legislative jurisdiction" has been redefined in a way which ameliorates many of the hardships facing those who seek a forum in which to litigate an enclave-based action. Clearly, the great weight of recent authority demonstrates that state jurisdiction continues within the enclave as to matters of private civil litigation involving no interference with federal sovereignty. Those rules of law which were based upon a different view of legislative jurisdiction have fallen into disfavor and disuse. The preceding discussion has shown that the judicial approach has become one of applying the same procedural and substantive law to the enclave action as to one arising within the host state.

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[200] *Id.* at 461, 237 A.2d at 645.

[201] *See, e.g.*, 16 U.S.C. § 457 (1970) relating to actions for personal injury and wrongful death reproduced at note 117 ***supra.***

[202] *Id.*

[203] Hoard v. Donoho, 144 Colo. 321, **328,** 356 P.2d 267, 271 (1960).

There is a great deal of practical significance for the enclave resident and the attorney in this result. As a consequence of these recent opinions, an enclave resident can invoke the local court's jurisdiction to settle contract, tort or domestic relations actions arising on the enclave. He can obtain in personam jurisdiction by service of process on the enclave for a contract action despite the fact that it arose there; likewise a writ of attachment to obtain quasi in rem jurisdiction would be available. Current substantive law would apply to the claim. If available, a small claims court remedy would be a viable alternative. A property damage claim would also be governed by current law, and jurisdiction over a nonresident defendant by extraterritorial service could be obtained. Finally, the host state's courts would have subject matter jurisdiction to grant a divorce or separation to an enclave resident which would be immune from collateral attack on the basis of the court's assertion of jurisdiction over the parties.

Just as the interests of the enclave resident are advanced by this redefinition of legislative jurisdiction, so too are the interests of the federal government protected. If state action should constitute interference with the federal exercise of jurisdiction or with federal use of the land, such action would be denied effect. As federal jurisdiction remains predominant, Congress would be free to override state authority in any particular. This is an eminently reasonable, as well as necessary, construction of the constitutional power of "exclusive legislation." What remains to be done now is to ensure that attorneys, especially military attorneys, recognize this current judicial reinterpretation and utilize its implications for the benefit of their clients.

PROPOSED CODIFICATION OF GOVERNMENTAL IMMUNITIES AND ITS EFFECT ON ECONOMIC PRIVILEGES EXTENDED UNITED STATES FORCES ABROAD*

Major Gerald C. Coleman**

I. INTRODUCTION

In the past two and a half decades, a profound re-evaluation of the role of the United States in foreign affairs has resulted in the projection of the nation and its citizens into the world. American interests have expanded in many spheres of influences, but most noticeably in political economic and military matters. In the military sphere, the United States spends approximately thirteen billion dollars annually in paying, training, and supporting United States forces deployed aboard under our mutual security commitments to **NATO** and our six multilateral and bilateral security treaties in Asia.[1] Over 400,000 United States military members are stationed overseas[2] and hundreds of thousands of civilian employees and dependents accompany these. forces.

It should be immediately apparent that the status of our forces abroad is a matter of utmost importance, not only in terms of our international relations with the host nations, but also with respect to the impact that maintaining such forces has on the nation's economy. It is for these reasons that the United States has endeavored to conclude agreements with those nations where large numbers of United States troops are stationed in order to regularize

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

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[1] Ingersoll, *Economic Interdependence and Common Defense*, 71 DEPT STATE BULL. 473, 475 (1974).

[2] *Id.*

their status and secure economic privileges which decrease the financial burden of maintaining such forces overseas. The enormous cost of maintaining troops abroad has also been lessened to some degree by the principle of sovereign immunity before foreign courts.

This article will first examine the development of the concept of governmental immunity as well as the nature of the economic privileges extended United States forces abroad. It will then analyze prospective trends in the application of the immunity doctrine, including the proposed codification of immunity standards which will serve to jeopardize the benefits which the economic privileges presently provide. In conclusion, an addition to the proposed codification of immunity standards will be suggested which recognizes recent developments in the area of governmental immunities, but still protects the legal position of American forces abroad.

II. GOVERNMENTAL IMMUNITIES UNDER LAW

A. DEVELOPMENT OF THE CONCEPT

The development of legal immunities enjoyed by a government in its contacts with other governments can be traced to Roman law. It is interesting to note that, according to Roman law, the relations of the Romans with a foreign state depended upon whether or not a treaty of friendship, existed between Rome and that state.[3] When no such treaty existed, persons or goods coming from a foreign land into the land of the Romans and likewise persons and goods going from Rome into a foreign land, enjoyed no legal protection. With the development of the Roman Empire, the number of foreigners entering Rome was so numerous that a system of law developed regarding these individuals and their relations with Roman citizens. This system was known as the ***jus gentium,*** or law of nations.[4] Within the framework of precise legal rules, certain unfriendly acts by foreign states, such as the violation of ambassadors or the violation of treaties, would give rise to a ***causa belli*** in the event that satisfaction was not given by the foreign state.[5]

State immunities as recognized today began to broaden during the Medieval period with the rise of the nation states. Throughout history most societies have considered the state and its govern-

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3 1 L. OPPENHEIM, INTERNATIONAL LAW: PEACE 76 (8th Lauterpacht *ed.* 1955) [hereinafter cited as OPPENHEIM].
4 *Id.*
5 *Id.* at 77.

ment, the source of law and of justice, as nut properly subject to the same liabilities, procedures, and penalties as private persons. This theory has particular appeal when the governmental functions involve military affairs, police matters, and the administration of justice.6 Likewise, the view that nations are not subject to the same judicial exposure as individuals also applies to foreign nations in their dealings in another country. The justification for this treatment springs from the concept that all states are equal and independent: consequently, submission of one state to the jurisdiction of another would be derogatory of the former's dignity and independence; additionally, foreign relations could not be properly conducted by the executive authorities if the judiciary could impinge upon the practice of diplomacy by entertaining suits.' Thus, a theory of absolute sovereign immunity developed which provided that a sovereign cannot, without its consent, be made respondent in the courts of another sovereign.

This theory was satisfactory prior to the twentieth century because most of the sovereign states of the world concerned themselves more or less exclusively with the government of their own territories and the protection of their sovereign interests. With the great increase in foreign trade and world economic activity during the twentieth century, and the increasing participation by states themselves in economic and commercial activities, a restricted theory of governmental immunity developed. This restrictive theory, as opposed to the absolute theory of governmental immunity, recognizes as immune from suit only those acts of the state which are sovereign or public acts, ***jure imperii,*** but not private acts of the state, ***jure gestionis.***[8]

B. THE COMMON LAW APPROACH TO GOVERNMENTAL IMMUNITY

British and American courts have traditionally adhered to-a rigid interpretation of the principle of jurisdictional 'immunity, prompting one commentator to eloquently exclaim:

> Only in democratic England and republican America can we find the absolutist metaphysics of divine right and sovereign immunity arrayed in the full regalia of their theological vestments, reincarnating for a twentieth century society the ancient credo of Bodin and Hobbes.[9]

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[6] Setser, ***The Immunities of the State and Government Economic Activities,*** 24 LAW & CONTEMP. PROB. 291, 293 (1959) [hereinafter cited as Setser].

[7] ***Id.*** at 295.

[8] Statement by Vice Admiral Colclough, Member, United States Delegation, Law of the Sea Conference, Geneva, 1958, ***reported in 6*** M. **WHITEMAN,** DIGEST OF INTERNATIONAL. LAW 553 (1968).

[9] ***See*** Setser, ***supra*** note 6, at 294.

The British courts have long followed the absolute theory of governmental immunity holding that the principle is a rule of customary law rather than one of mere comity and that a foreign sovereign state, its public property and its official agents are in general immune from local jurisdiction unless the foreign state consents to its exercise.[10] A number of reasons have been advanced as the basis of the immunity from jurisdiction of a foreign state, including:

> 1. Since all states are independent and equally sovereign, no state is amenable to the courts of another state;
> 2. To implead a foreign state would tend to vex the peace of nations;
> 3. Such immunity is also based on the principle of comity—in return for a concession of immunity, other states make mutual concessions of immunity within their territory;
> 4. To attempt to enforce a judgment against a foreign state would be an unfriendly act;
> 5. The very fact that a state allows a foreign state to function within its territory signifies a concession of immunity, as no foreign state would enter such state on any other basis.[11]

Professors Oppenheim and H. Lauterpacht describe the modern British position on immunities as "fluid," adhering to the doctrine of immunity less in cases involving public vessels engaged in commerce than in other situations.[12]

The United States has generally recognized the absolute theory of sovereign immunity since Chief Justice Marshall's opinion in the case of ***Schooner Exchange v. McFaddon***[13] which found American courts to have no jurisdiction over a public vessel of a foreign power. Recognizing, however, the developing world trend toward the restrictive theory of immunity and noting that the Government of the United States has subjected itself to suit in United States courts in both contract and tort, the United States Department of State announced a new policy in a letter dated 19 May 1952 addressed to the Acting Attorney General and signed by the Acting Legal Advisor to the Department of State, Jack B. Tate.[14] In the Tate Letter, the Department set forth as United States government policy its intention to recognize only claims made in connection with the public or sovereign acts of foreign

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[10] J. BRIERLY, THE LAW OF NATIONS 243 (6th ed. 1963). These principles have been consistently stated in cases before British Commonwealth courts, including The *Parlement Belge*, 5 P.D. 197 (1880); The *Porto Alexandre*, [1920] P. 30; The *Cristina*, [1938] A.C. 485; Dessaulles v. The Republic of Poland, [1944] 4 D.L.R. 1; Mehr v. The Republic of China, [1956] Ont. W.N. 218.

[11] Castel, *Exemption from the Jurisdiction of Canadian courts*, 11 ANNUAIRE CANADIEN DE DROIT INTERNATIONAL 159 (1971).

[12] *See* OPPENHEIM, *supra* note 3, at 273.

[13] 11 U.S. (7 Cranch) 116 (1812).

[14] 26 DEPT STATE BULL. 984-85 (1952).

states and not those claims connected with their private or commercial acts.15

C. DEVELOPMENT OF THE RESTRICTNE THEORY UNDER AMERICAN LAW

The executive having decided that the United States would follow such a policy, it remained for the judiciary to give the policy practical application. In ***Victory Transport,*** Inc. *v.* ***Cornisaria General,***[16] the United States Court of Appeals for the Second Circuit maintained that in the absence of State Department advice to the court that immunity should be 'granted, sovereign immunity should be granted only in clear cases involving strictly political or public acts about which sovereigns have traditionally been quite sensitive." These acts are:

1. Internal administrative acts, such as expulsion of an alien;
2. Legislative acts, such as nationalization;
3. Acts concerning the armed forces;
4. Acts concerning diplomatic activity; and
5. Public loans.[18]

Because sovereign immunity is intended to avoid possible embarrassment in the conduct of foreign relations, the court indicated that the delimitation of the doctrine should fall within the purview of the State Department:

> Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the Court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement.[19]

It is readily apparent that the courts have followed this view and have deferred to the executive on the question of immunity. Two recent examples are illustrative of such a policy. On September 14, 1974, the Department of State made a suggestion of immunity in the case of a vessel of the Soviet Union engaged in a program of scientific research at Woods Hole, Massachusetts. The vessel ***Belogorsk*** had been attached in an action instituted in the United

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15 Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L L. 93 (1953).

16 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965). *See* Note, Victory *Transport, Inc. v. Cornisaria General,* 53 GEO. L. J. 837 (1965).

17 "[W]e are disposed to deny a claim of sovereign immunity that has not been recognized and allowed by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political acts. . . ." 336 F.2d at 360.

18 *Id., citing* Lalive, *L'Immunite de Jurisdiction Des Etats et Des Organisations Internationales,* 3 HAGUE RECUEIL DES COURS 205, 259-60 (1953).

19 336 F.2d at 360.

States District Court for the District of Massachusetts in which plaintiffs were seeking compensation for damages to fishing gear allegedly caused by Soviet fishing vessels.[20] The State Department concluded that the ***Belogorsk*** was engaged in functions which should be considered "public" rather than "private" and therefore came within the category of acts ***jure imperii.*** On this basis the State Department requested the Attorney General to cause an appropriate suggestion of immunity to be filed with the united States District Court for the District of Columbia.[21] The attachment was released on the same day the suggestion of immunity was filed and the vessel left Woods Hole the following day.

In a more difficult case, the Department of State suggested immunity on October 25, 1973 for the Cuban merchant ship *M. N. Imias* which was placed under attachment by order of the United States District Court for the Canal Zone.[22] The order was issued in connection with legal proceedings brought by attorneys for two Chilean corporations, one of which was 99 percent owned by the Government of Chile, against Empresa Navagacion Mambisa, the Cuban state shipping line. The plaintiffs' claim was based on the fact that another vessel operated by Mambisa departed from Chile during the September 1973 military coup without unloading a cargo of 9,000 tons of sugar for which the Chilean corporations had paid in advance. Further, the plaintiffs alleged, cranes owned by one of them had been carried away with the vessel. Although one might conclude that this matter involved private acts by Mambisa within the concept ***jure gestionis*** and therefore beyond immunity under the Tate Letter's guidelines, other factors were considered by the State Department:

> 1. The Cuban vessel was fired upon by Chilean forces as it left port;
>
> 2. Its departure was evidently necessitated by concern for the safety of the crew and vessel due to the Chilean coup;
>
> 3. The Cuban Government had immediately protested this incident before the United Nations Security Council and
>
> 4. The Government of Chile stated that the vessel had departed illegally without the necessary port clearances.

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[20] Deep, Deep Ocean Products, Inc. v. Union of Soviet Socialist Republics and Sovryflot, Civil No. 73-2887-T (D. Mass. 1973).

[21] The correspondence relating to this action is set forth in A. ROVINE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 224-25 (1974) [hereinafter cited as A. ROVINE].

[22] Industria Azucarera Nacional, S.A. & Companin de Refineria de Azucar de Vina del Mar v. Empresa Navagacion Mambisa, Civil No. 7902 (D.C.Z., filed Nov. 1, 1973).

On the basis of these considerations, the Acting Legal Advisor to the Department of State concluded that the case was sui generis and should not be viewed as a departure from the restrictive theory of immunity as set forth in the Tate Letter.[23] The holding of the District Court ordering the dismissal of the suit with prejudice was appealed to the Fifth Circuit by the Chilean plaintiffs. However, attorneys for Cuba sought and secured from the Fifth Circuit a writ of mandamus directing the district court to release the vessel.[24]

The viability of the theory that acts concerning the armed forces of a foreign state are entitled to immunity can be observed in the recent decision *Aerotrade v. Republic of Haiti*.[25] The case involved, among other claims, a demand for damages arising from nonpayment for military hardware delivered under military procurement contracts entered into by the Republic of Haiti in the United States. In his decision, Judge Weinfield indicated that if the contract sued upon and the performance thereunder fell within one of the categories of public or political acts set forth in *Victory Transport*, the contracting nation would be entitled to a grant of immunity. In footnote nine of the decision, he stated, "Moreover, goods need not be of an exclusively military nature (*i.e.*; weapons) for the contracting sovereign to be entitled to a grant of immunity, as long as they are for the use of its armed forces."[26] Guided by the logic of the Second Circuit in Victory *Transport* and other decisions, the court reasserted what has become the principal test for determining whether sovereign immunity should attach.

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[23] A. ROVINE, *supra* note 21, at 226.

[24] Circuit Judge Wisdom stated that "the Executive's decision to recognize and allow a claim of foreign sovereign immunity binds the judiciary and that no further review of the executive's action is dictated by the Administrative Procedures Act." Spacil v. Crowe, No. 733599 (5th Cir., filed Feb. 13, 1974). The State Department action in granting immunity was criticized in a Note on the case by Monroe Leigh in the *American Journal of International Law* as a retreat from the Tate Letter principles. *See* Leigh, *Sovereign Immunity—The Cases of the "Zmias,"* 68 AM. J. INT'L L. 280 (1974). It is submitted, however, that the case properly falls within the scope of those "political or public acts about which sovereigns have traditionally been quite sensitive." Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 US. 934 (1965).

[25] 376 F. Supp. 1281 (S.D.N.Y.1974), *reprinted in* 13 INT'L LEGAL MATERIALS 969 (1974).

[26] 376 F. Supp. at 1284, 13 INT'L LEGAL MATERIALS at 972. The court also considered and rejected as irrelevant the plaintiffs' claim that the helicopters were uaed by Haitian leaders for personal, nonmilitary purposes.

III. ECONOMIC PRIVILEGES EXTENDED TO UNITED STATES FORCES ABROAD UNDER STATUS OF FORCES AGREEMENTS

A. DEVELOPMENT OF STATUS OF FORCES AGREEMENTS[27]

As a result of Chief Justice Marshall's decision in Schooner Exchange *v.* *McFaddon*,[28] and in conformity with generally accepted international law, the United States recognizes the sovereignty of foreign governments over United States forces stationed in friendly nations abroad and the consequent desirability of seeking agreements with the foreign governments regarding the status of such forces. Originating with the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of *Their* Forces (NATO SOFA)[29] signed in London in 1951, the concept of providing a legal basis by international agreement for the presence of our forces abroad has resulted in a number of similar agreements with countries outside the NATO bloc in which large numbers of U.S. troops are stationed.30 The original treaty of this nature, the NATO SOFA, is a multilateral treaty among the original twelve nations of the North Atlantic Treaty Organization (NATO),[31] whereas the other international agreements have been concluded as executive agreements by the President of the United States as Commander in Chief of the United States Armed Forces and pursuant to security treaties in effect with the countries concerned.32

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[27] A complete survey of how such agreements developed is, of course, beyond the purview of this article. Only relevant highlights will be noted.

[28] 11 U.S. 7 (Cranch) 116 (1812).

[29] June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter cited as and referred to as NATO SOFA].

[30] Principal agreements in addition to the NATO SOFA are with Iceland, May 8, 1951, [1951] 2 U.S.T. 1533, T.I.A.S. No. 2295; Japan, Jan. 19, 1960, [1960] 2 U.S.T. 1652, T.I.A.S. No. 4510; Australia, May 9, 1963, [1963] 1 U.S.T. 506, T.I.A.S. No. 5349; Germany, Aug. 3, 1959, [1963] 1 U.S.T. 531, T.I.A.S. No. 5351; Philippines, Aug. 10, 1965, [1965] 2 U.S.T. 1090, T.I.A.S. No. 5851; Korea, July 9, 1966, [1966] 2 U.S.T. 1677, T.I.A.S. No. 6127; China, Aug. 31, 1965, [1966] 1 U.S.T. 373, T.I.A.S. No. 5986; Spain, Sept. 25, 1970, [1970] 3 U.S.T. 2259, T.I.A.S. No. 6977 [hereinafter cited as Japan SOFA, China SOFA, *etc.*].

[31] T.I.A.S. No. 1964 (Apr. 4, 1949). The original twelve were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States. Three other nations have since become members of NATO: Greece and Turkey by accession, (Oct 17, 1951, [1952] 1 U.S.T. 43, T.I.A.S. No. 2390); and the Federal Republic of Germany (Bonn Convention, 5 May 1955).

[32] *See* Philippines-United States Military Bases Agreement entered into pursuant to Joint Resolution of the Congress of the United States, Mar. 26, 1947, 61 Stat. 4019, T.I.A.S. No. 1775; Security Treaty Between Australia, New Zealand and the United

B. ECONOMIC PRIVILEGES EXTENDED UNITED STATES FORCES UNDER STATUS OF FORCES AGREEMENTS

Although the fundamental purpose of the various Status of Forces Agreements (SOFA) and similar international agreements is to establish a comprehensive system for the exercise of criminal jurisdiction by both the host nation and the sending state,[33] these agreements contain certain provisions which extend far-reaching economic privileges to United States forces abroad. These economic benefits are to be found in provisions relating to customs exemptions; tax relief; the status of nonappropriated fund activities established for the use of United States forces, the civilian component and their dependents (such as post exchanges, Navy exchanges, messes, social clubs and theaters); and the status of designated contractors who work exclusively for the United States forces in the country concerned. The following grants of economic privileges are typical of the provisions found in most SOFA's.

1. Customs Exemptions

The basic customs exemption provision which is applicable in one form or another under virtually all Status of Forces Agreements is contained in Article XI, paragraph 4, of the NATO SOFA:

> A force may import free of duty the equipment for the force and reasonable quantities of provisions, supplies and other goods for the exclusive use of the force and, in cases where such use is permitted by the receiving State, its civilian component and dependents.[34]

The utilization of this provision requires a certificate in a form agreed upon between the receiving State and the sending State signed by a person authorized by the sending State for such pur-

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States, Apr. 29, 1952, [1952] 3 U.S.T. 3420, T.I.A.S. No. 2493; Mutual Defense Treaty Between the United States and the Republic of Korea, Nov. 17, 1954, [1954] 3 U.S.T. 2368, T.I.A.S. No. 3097; Mutual Defense Treaty Between the United States and the Republic of China, Dec. 10, 1954, [1955] 1 U.S.T. 433, T.I.A.S. No. 3178; Treaty of Mutual Cooperation and Security Between the United States and Japan, June 23, 1960, [1960] 2 U.S.T. 1632, T.I.A.S. No. 4509. The SOFA with Spain is in implementation of Chapter VIII of the Agreement of Friendship and Cooperation Between the United States and Spain, Aug. 6, 1970, [1970] 2 U.S.T. 1677, T.I.A.S. No. 6924.

[33] *See, e.g.*, G. STAMBUK, AMERICAN MILITARY FORCES ABROAD: THEIR IMPACT UPON THE WESTERN STATE SYSTEM (1963).

[34] NATO SOFA, art. XI, para. 4. In his treatise on the status of military forces, Lazareff points out that "[t]his article [Art. XI] deals both with the facilities granted to the force and the civilian component, and with the facilities granted to the personnel. It [paragraph 4] is the only paragraph of Article XI which was really argued upon during the negotiations. It allows indeed the force to import goods and to either sell them or give them to its personnel." S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT 'INTERNATIONAL LAW 404 (1971).

pose.[35] The pertinent provisions of the cited Article also provide that the designation of the persons authorized to sign the certificate, as well as specimens of the signatures and stamps to be used, shall be sent to the customs administration of the receiving State. This provision is virtually identical to the original Article 13, paragraph 4, adopted at Brussels on December 21, 1949 and which served as the basis for the original United States draft of the NATO SOFA.[36] The original draft of this Article excluded imports effected personally by "members of a foreign force." The draft tabled by the United States representative on January 23, 1951 included exemption for items "for the exclusive use of a contingent and its members and their dependents" while it retaihed the language relating to the scope of the items covered and the method of securing the exemption.[37] Subsequently, with slight modifications, these provisions were included as Article XI in a draft of an Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces[38] which forms the basis of the final provisions quoted above.

The basic customs exemptions contained in Article XI of the NATO SOFA have been carried forward in other international agreements relating to the status of United States forces abroad, and have generally been broadened.[39] In Article 65, paragraph 1a, of the Supplementary Agreement to the NATO Status of Forces Agreement With Respect to Forces Stationed in the Federal Republic of Germany, it is provided:

> The relief from customs duties referred to in paragraph 4 of Article XI of the NATO Status of Forces Agreement shall be granted not only in respect of goods which at the time of their importation are the property of a force or a civilian component, but also in respect to goods delivered to a force or a civilian component in fulfillment of contracts concluded by the force or the civilian component directly with a person or persons not domiciled in the Federal Republic or Berlin (West).[40]

In substance, United States forces stationed abroad pursuant to a Status of Forces Agreement or similar international agreement enjoy customs exemption for all materials, supplies and equipment imported for the official use of such armed forces subject only to appropriate certification by a duly authorized official of the force.

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[35] NATO SOFA, art. XI, para. 4.
[36] *See generally* J. SNEE, U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES: NATO AGREEMENTS ON STATUS OF FORCES: TRAVAUX PREPARATOIRE (1961) [hereinafter referred to as TRAVAUX PREPARATOIRE].
[37] *See* art. X, para. 4, Privileges and Immunities of Personnel of the North Atlantic Treaty Nations Subject to Military Law. TRAVAUX PREPARATOIRE, *supra* note 36, at 352.
[38] Revised Draft, Apr. 27, 1951; TRAVAUX PREPARATOIRE, *supra* note 36, at 502.
[39] *See, e.g.*, Japan SOFA, art. XI; China SOFA, art. VIII; Korea SOFA, art. IX.
[40] [1963] 1 U.S.T. 331, T.I.A.S. No. 5351 [hereinafter cited as German Supplement]

2. *Tax Relief*

The extent to which United States forces are relieved from taxes under the various Status of Forces Agreements is more complex. The NATO SOFA, while exempting members of the force or civilian component from forms of taxation in the receiving State based upon residence or domicile,[41] only partially treats exemption for the United States forces in their official capacity. Specified exemptions exist for service vehicles of a force or civilian component in respect to use of vehicles on the roads,[42] and special arrangements are provided so that fuel, oil and lubricants for use in service vehicles, aircraft and vessels of a force or civilian component may be delivered free of all taxes.[43]

Comprehensive tax exemption provisions have been developed in supplementary agreements to the NATO SOFA and in subsequent Status of Forces Agreements.[44] The agreement with Japan45 exemplifies the extent of tax relief enjoyed by United States forces abroad under status of forces agreements. Under the Japanese agreement, commodities procured by the United States armed forces or by authorized procurement agencies of United States armed forces for official purposes are exempt from the Japanese commodity tax.[46] Gasoline procured by the United States armed forces or their authorized procurement agencies is exempt from gasoline taxes.[47] Tax exemptions exist for real property procured by the United States armed forces[48] and electricity and gas procured by the forces or authorized procurement agencies of the forces.[49] United States forces official vehicles are also exempt from the automobile tax[50] and all expressway toll charges.[51]

The German Supplementary Agreement provides that a force shall not be subject to taxation in respect of matters falling exclusively within the scope of its official activities nor in respect of property devoted to such activities.[52] The above cited provisions serve to indicate the scope of the tax exemption enjoyed by United States forces abroad under Status of Forces Agreements.

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[41] **NATO SOFA, art. X, para. 1.**
[42] **Id., art. XI, para. 2(c).**
[43] **Id., art. XI, para. 11.**
[44] **See, *e.g.*, Japan SOFA, arts. XII, XIII; German Supplement, art. 67; China SOFA. art. X; Korea SOFA, art. IX.**
[45] **[1960] 2 U.S.T. 1652, T.I.A.S. No. 4510 [hereinafter cited as U.S.-GOJ SOFA].**
[46] **Id., art. XII, para. 3.**
[47] *Id.*
[48] **Id., art. XXIV, para. 2.**
[49] **Id., art. XII, para. 3.**
[50] **U.S.-GOJ SOFA, Joint Committee Agreement of June 18, 1952, art. X.**
[51] **U.S.-GOJ SOFA, art. V, para. 3.**
[52] **German Supplement, art. 67.**

3. Status of Nonappropriated Fund Activities

An important economic privilege enjoyed by United States forces abroad is the extension of customs and tax advantages to nonappropriated fund activities used by such forces in the countries where they are stationed. These activities usually include military exchanges, messes, social clubs, theaters, newspapers, and other such organizations authorized and regulated by the United States military authorities.",' This status is extended to such organizations established within the facilities and areas in use by the United States forces and for the use of members of the force, the civilian component, and their dependents. Such organizations, except as explicitly agreed otherwise, are not subject to local governmental regulations, licensing, fees, taxes or similar control.

The economic privileges enjoyed by nonappropriated fund organizations are extended to certain commercial enterprises as specified in pertinent agreements. For example, the American Express Co., Incorporated, and the Chase Manhattan Bank (Heidelberg) are listed in paragraph 1 of the Section in the Protocol of Signature referring to Article 72 of the German Supplementary Agreement. On this basis, these commercial entities enjoy the exemptions accorded to a force by the NATO SOFA and the German Supplementary Agreement from customs, taxes, import and reexport restrictions and foreign exchange control to the extent necessary for the fulfillment of their purposes under the agreements cited.[54] Such exemptions, however, are predicated on the conditions that the enterprise exclusively serve the force, the civilian component, their members and dependents, and that the activities of the enterprise be restricted to business transactions which cannot be undertaken by host country enterprises without prejudice to the military requirements of the force.[55]

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[54] *See, e.g.*, Japan SOFA, art. XV; Australia SOFA, art. I; China SOFA, art. XIII; Korea SOFA, art. XIII; Spain SOFA, art. XII. It is interesting to note in considering the legal status of nonappropriated fund activities overseas that most bilateral treaties of friendship, commerce and navigation between the United States and the major industrialized countries of the world (which in many cases are also host nations to U.S. Forces abroad) contain a clause similar to the following:

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein

Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, art. XVIII, para. 2, [1953] 2 U.S.T. 2066, T.I.A.S. No. 2863, 206 U.N.T.S. 143.

[54] German Supplement, art. 72, para. 1.

[55] *Id.*, art. 72, para. 2.

4. Status of Designated Contractors

Another important economic privilege enjoyed by United States forces abroad under Status of Forces Agreements is the status extended to certain civilian contractors meeting the requirements of the agreement.[56] This status is acquired either by inclusion of such personnel as members of the civilian component[57] or by compliance with specific provisions set forth in the agreement itself.[58]

Persons, including juridical persons such as corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States, are entitled to designated contractor status if they meet certain conditions. These conditions provide that their presence in the foreign country is solely for the purpose of executing contracts for the benefit of the United States Armed Forces. Further, they must be designated in accordance with the terms of the agreement. Upon certification of the United States forces as to their identity, such persons and their employees are accorded the following benefits:

> a. Rights of accession and movement similar to those extended members of the force and the civilian component;
> b. Entry into the foreign country on the same basis as members of the force and civilian component;
> c. The exemption from customs duties, and other such charges as provided in the pertinent Status of Forces Agreement for members of the force, the civilian component and dependents;
> d. The right, if authorized by the Government of the United States, to use the services of the nonappropriated fund organizations;
> e. The right to use United States currency on the same basis as members of the force, the civilian component, and their dependents;
> f. The use of United States postal facilities; and
> g. Exemption from the laws and regulations of the host country with respect to terms and conditione of employment.[59]

The designation of a contractor for the purpose of executing contracts with the United States under the provisions of the pertinent status of forces agreement is usually restricted to cases where security considerations preclude open competitive bidding, the technical qualifications of the contractors involved are unique, the materials or services required by United States standards are unavailable, or there are limitations of United States law which require a United States contractor.[60] Further, such designation is made only upon consultation with the host government,[61] insuring

[56] **See,** *e.g.*, Australia SOFA, art. I; China SOFA, art. XII; Korea SOFA, art. XV; Spain SOFA, art. XIII; Japan SOFA, art. XIV. In Japan the policies and procedures for acquiring invited contractor status are set out in USFJ Policy Letter 70-2.
[57] ***See,*** *e.g.*, German Supplement, art. 73.
[58] *See*, *e.g.*, U.S.-GOJ SOFA, art. XIV.
[59] *Id.*
[60] *Id.*, art. XIV, para. 2.
[61] *Id.*

that it is in a position to severely restrict the designation of invited contractors if it is of the opinion that contractor services are readily available on the local economy.[62] Experience has shown, however, that the number of designated contractors under the provisions of status of forces agreements is destined to decline as local governments attempt to secure such contracts for their own contractors.

C. LITIGATION INVOLVING UNITED STATES FORCES ABROAD

The governmental immunities extended to United States forces abroad have generally protected such forces from litigation. A review of certain selected cases will serve to demonstrate the basic principles utilized by foreign courts in granting the United States forces exemption from their jurisdiction. In Syquia *v. Lopez*,[63] the plaintiffs leased three apartment buildings to the United States Army in the Philippines to house American military personnel. The lease was to run for the duration of the Second World War and six months thereafter unless sooner terminated by the United States. The apartments were vacated in 1948. However, in March 1947, after several demands for the return of the property had been refused, the plaintiffs brought suit seeking the vacation of the apartments and a rent greater than that provided in the leases. The Supreme Court of the Philippines held that the case must be dismissed.[64] In its opinion, the court indicated that while courts normally have jurisdiction to hear actions for the recovery of property in the possession of officers of a foreign government, they could not entertain such a suit without the consent of the defendant government if the judgment would also require the payment of damages.[65] The court further stated that the principles of law behind this rule were so elementary and of such general acceptance that it was unnecessary to cite authorities in support of its dismissal of the suit.

In another case emanating from the Philippines, Johnson *v.* *Major* General *Howard M. Turner*,[66] the plaintiff, a former civilian employee of the United States Army in Okinawa, attempted to convert $3,713 in Military Payment Certificates into dollars in violation of local regulations. The certificates were confiscated by the Provost Marshal of the United States Military Port of Manila.

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[62] *E.g.*, following the reversion of Okinawa to Japan on 15 May 1972, many contractors sought Article XIV status, but virtually no contractors were granted such status.

[63] [1951] Ann. Dig. 228 (No. 55) (Supreme Court, Philippines 1949).

[64] Id. at 229.

[65] Id. at 230.

[66] [1954] Ann. Dig. 103 (Supreme Court, Philippines 1954).

Shortly thereafter, a new series of certificates was issued and the old series declared worthless. Plaintiff brought suit to recover new certificates of the same value as those confiscated and prevailed in the Court of First Instance of Manila. On appeal to the Supreme Court of the Philippines, the decision was reversed on the ground that the relief would have to be given in dollars and would thus be a charge against the United States. The court held that such an action could not be maintained against a foreign government without its consent.[67]

The significance of security treaties in strengthening claims of immunity can be clearly discerned in ***Department of the Army of the United States of America u. Savellini.***[68] There a former civilian employee of the United States military base at Livorno, Italy, brought an action against the Department of the Army for wages alleged to be due to him under his contract of employment. On appeal, the Italian court recognized the Department's immunity from the jurisdiction of the Italian courts. The court held that Italy, by ratifying the North Atlantic Treaty, impliedly recognized the immunity of forces entering Italy under the treaty provisions, and thus there was no need for a specific treaty recognizing such immunity:

> As far as exemption from the jurisdiction of the Italian courtsisconcemed, it is sufficient to state that the exercise of the functions appertaining to the base [Livorno] falls within the framework of the provisions of the [NATO] treaty, which is necessarily elastic.[69]

The Italian Court of Cassation subsequently reversed this position in ***Government of U.S. v. Bellotto,***[70] decided in November 1963. However, the treatment of personnel claims against the United States by Italian courts must be viewed as sui generis.[71]

In a case interpreting the status of a nonappropriated fund activity under the United States-Government of Japan Status of Forces Agreement, ***Masato Shi Suzuki et al v. Tokyo Civilian Open***

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[67] ***Id.***

[68] **23** I.L.R. **201** (Court of Cassation, Italy **1955).**

[69] *Id.* at 202.

[70] Gov't of U.S. v. Bellotto (unreported in English).

[71] Although Savellini was employed by a nonappropriated fund activity, United States legal authorities in Italy indicate that the Italian courts have held that the United States Government, as an employer, is fully subject to Italian labor laws. This policy was also alluded to by representatives of the Office of The Judge Advocate General, United States Air Force, in a recent conference at Homestead Air Force Base, Florida. In commenting on thisissue, aconferee stated that the "Justice Department prefers not to make further argument on this point [rejection of U.S. immunity by Italian courts in labor cases], and to devote maximum effort to prompt response on the merits of the case." JAG Reporter, Nov.-Dec. 1975, at 16 [hereinafter cited as AF JAG Reporter].

Mess,[72] the Tokyo District Court held that an action for wages and reinstatement by former employees of the Tokyo Civilian Open Mess must fail, as the Mess was exempt from Japanese jurisdiction. The Mess was held to be an organization of a kind which is recognized by United States courts as an instrumentality of the Government and therefore comity required that the Japanese courts should similarly so recognize it. The court further held as a general rule that a state is not subject to the jurisdiction of a foreign state unless it voluntarily submits itself to such jurisdiction.[73]

Although the number of reported cases involving the status of military forces abroad with respect to matters which appear incidental to their military mission is small, several principles can be discerned:

1. Foreign courts are reluctant to assume jurisdiction in matters involving armed forces on the basis that the acts of such forces are viewed as ***jure imperii,*** even when associated with such mundane activities as leasing privately owned apartments or hiring local nationals to work in the mess.

2. Foreign courts, on the basis of comity, are apt to look at the way United States courts treat similar activity by United States instrumentalities at home.

3. A foreign court will consider the issue of implied immunity for United States forces activity abroad, even under the restrictive immunity theory, where such activity is pursuant to a mutual security treaty.

IV. PROSPECTIVE TRENDS IN GOVERNMENTAL IMMUNITY FOR UNITED STATES FORCES ECONOMIC ACTIVITY ABROAD

A. STATE DEPARTMENT STANDARDS FOR CLAIMING IMMUNITY

Based upon the principles of the Tate Letter[74] the United States

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[72] **24** I.L.R. ***226*** (District Court of Tokyo, Japan 1957).

[73] ***Id.*** at ***227.*** In a comprehensive survey of cases arising from U.S. military procurement outside the United States, Major Norman Roberts concluded that in those countries where the traditional theory of sovereign immunity was followed, or where provisions of various international agreements implicitly extend such immunity, foreign courts will recognize the immunity of the U.S. from suit. These countries include: France, Germany, Greece, Iceland, Morocco, Spain and Turkey. Austria and Italy are cited as refusing to recognize U.S. immunity in disputes arising out of offshore contracts, characterizing such contracts as ***jure gestwnis.*** Roberts, ***Private and Public International Law Aspects of Government Contracts,*** **36** MIL. L. REV. 1, ***37*** (1967).

[74] ***See*** text accompanying note **14** ***supra.***

Department of State appears determined to base future assertions of immunity abroad on the nature of the activity undertaken rather than its character as an instrumentality of the United States. In response to a request for clarification of its policy, the Department of State indicated to the American Embassy at Manila that:

> . . .[I]t is immaterial whether the Association is an instrumentality of the United States Government if it is engaged in commercial or private type activities as distinguished from activities of a governmental character. The Department follows the restrictive theory of sovereign immunity, and it is its practice to deny claims of sovereign immunity made by foreign governments in behalf of themselves or their agencies engaged in activities of a private or commercial character. Furthermore, it is the practice not to assert claims of sovereign immunity in similar cases in foreign courts in which the United States or its agencies, may be parties defendant.[75]

The main focus of determining entitlement to immunity as set forth in this reaffirmation of Tate Letter principles is the nature of the activity engaged in by the governmental instrumentality, not its status or its purpose. Thus, if the economic activities set forth in Section III of this article are viewed as commercial in nature, the immunities now enjoyed by United States forces abroad are in jeopardy.

B. PROPOSED LEGISLATION TO CODIFY THE CONCEPT OF IMMUNITY

Legislation to codify immunity standards was submitted to both Houses of the Ninety-third Congress by the Department of State and Department of Justice in January 1973.[76] The legislation failed of passage in the Ninety-third Congress, but has been submitted in revised form to the Ninety-fourth Congress.[77]

The purpose of the legislation, according to the Department of Justice, is to create a comprehensive statutory regimen for determining sovereign immunity issues, and to give guidance to United

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[75] Instruction No. W-50, Department of State to the American Embassy in Manila, Sept. 15, 1961, Ms. Department of State, file 120-296/1161, ***reproduced in part in*** 6M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 610 (1968).

[76] The draft bill was introduced in the Senate by Senators Roman Hruska and Hugh Scott as S. 566, 93d Cong., 1st Sess. (1973), and by Senator William Fulbright as S. 771, 93d Cong., 1st Sess. (1973). The draft bill was introduced in the House of Representatives by Congressman Peter W. Rodino, Jr. and Edward Hutchinson as H.R. 3493, 93d Cong., 1st Sess. (1973).

[77] On Dec. 19, 1975, Mr. Rodino, for himself and Mr. Hutchinson, by request, introduced the "Foreign Sovereign Immunities Act of 1975," H.R. 11313, 94th Cong., 1st Sess. (1975). The bill [hereinafter referred to and cited as H.R. 11315] was referred to the Committee on the Judiciary. The revised draft bill with a revised section-by-section analysis is reproduced at 15 INT'L LEGAL MATERIALS 90 (1976). Communication's with committee counsel indicate hearings on the bill were held in late spring 1976.

States courts on the standards to be employed in adjudicating cases under the restrictive theory of immunity.[78] The Department of Justice further indicated that in representing the United States and ita agencies and instrumentalities before foreign tribunals, the Department would be guided by the principles set forth in the proposed legislation in determining whether to raise immunity as a defense to an action.[79]

The proposed legislation deals with several important aspects of the law of sovereign immunity including service of process, execution on a judgment obtained against a foreign state, and the determination as to whether a foreign state is entitled to immunity.[80] This latter function would be transferred to the courts and the Department of State would no longer make suggestions of sovereign immunity to the courts.

There are two areas of the proposed legislation which, if not further clarified, could expose the United States forces abroad to far-ranging and unforeseen liabilities in foreign courts. The first area concerns the definition of "commercial activity." In the proposed legislation, such activity is defined as follows:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conductor particular transaction or act rather than by reference to its purpose.[81]

Considering the widespread commercial type activity of the United States forces abroad, including extensive local procurement, operation of nonappropriated fund activities and designated contractor operations, great potential exposure to foreign litigation exists which could have a deleterious impact on the defense capabilities of American forces overseas. For example, employees of military messes could institute suit against the messes for back wages while the real issue might be security.[82] Disappointed con-

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[78] Letter dated Mar. 19, 1973 from Harlington Wood, Jr., Assistant Attorney General, Civil Division, Dep't of Justice, to The Judge Advocate General of the Army, on file in the International Affairs Division, Office of The Judge Advocate General of the Army.

[79] *Id.*

[80] The text of the proposed legislation as originally submitted to Congress is set forth in A. ROVINE, *supra* note 21, at 213.

[81] H.R. 11315, 94th Cong., 1st Sess. § 1603(d).

[82] An unreported case discussed at the recent Air Force conference show8 the potential danger of a loss of immunity. In the *Marino* case from Italy, a Rase Exchange employee terminated for cause obtained a court order requiring retroactive reinstatement. The case is being appealed by the United States on the basis of alleged violation of Italian procedural requirements by the trial judge. See AF JAG Reporter, *supra* note 71, at 16. The implication for baee security and control, if the U.S. commander is forced to accept an employee on the base who has been terminated for cause, should be readily apparent.

tractors could frustrate completion of needed facilities while protesting the award of a contract to a competitor. Important resources might be diverted from the mission to defend such suits and, undoubtedly, certain activities deemed essential to the morale and welfare of our forces would have to be curtailed.[83] As a matter of fact, although the defense of sovereign immunity has enjoyed varying degrees of efficacy abroad, the policy of failing to raise the defense in military support activity matters has resulted in an increase in litigation involving United States forces abroad.[84] The increase has been minor thus far, except for Italy where the change in judicial authority by Italian courts has resulted in approximately 70 personnel claims against the United States. However, with the loss of the sovereign immunity defense in support activity cases before foreign courts, a large number of suits by personnel who formerly worked for the United States or its instrumentalities is expected.

Assuming foreign states will look to the manner in which the United States treats foreign activities in this country in order to determine what procedures comity requires when dealing with United States activities in their territory, Section 1610 of the proposed legislation raises potential problems. That section permits certain foreign government assets in the United States to be attached for execution of a judgment, including those used for the commercial activity out of which the claim arises.[85] Given the proposed definition of "commercial activity" set forth above, certain classes of

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[83] There is no record of a foreign litigant attempting to claim that the provisions of Treaties of Friendship, Commerce and Navigation, *see* note **53** *supra,* constitute a waiver by the United States of whatever immunity the U.S. forces' support activities abroad might possess. This circumstance probably stems from the fact that host nations look upon such support activities as incidental to the presence of the U.S. forces and, thus, do not constitute "doing business" in the host nation.

[84] In a comprehensive article on nonappropriated fund activities, the author states: "It may be coincidental, but the volume of suits brought against American nonappropriated funds overseas increased greatly after publication of the Tate Letter." Noone, ***Legal Aspects of Non-Appropriated Funds, Hearings on S. 3163 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,*** 90th Cong., 2d Sess., App **1,** at **201 (1968).** In Chapter **V** of his paper, Air Force Colonel Noone traces the experience of United States nonappropriated fund activities before foreign courts. His conclusions attempt to equate stateside and foreign nonappropriated fund instrumentalities. He implicitly criticizes the United States for claiming "[s]uddenly, [overseas] non-appropriated fund contracts are acts of a foreign sovereign, not challengeable in local courts. The results are as ludicrous as the position adopted. . . ." ***Id.*** at **259.** But in the next paragraph he concedes ". . . that non-appropriated funds are integral parts of the Government and there can be no doubt that their contracts and torts are sovereign acts." *Id.* This author believes that they are indeed sovereign acts and a renunciation of immunity could affect the status of such organizations abroad in regard to matters such as local government regulation, licensing, fees, taxes or similar controls.

[85] H.R. **11315,** 94th Cong., **1st** Sess. **§ 1610** (a)(2).

government property which formerly enjoyed immunity would be subject to execution. For example, in the past nonappropriated fund assets overseas have been protected by the United States government's sovereign immunity as they rightfully should since they serve an important military purpose in maintaining the morale of our forces overseas. If immunity is to be determined not by the purpose of the activity, but by the activity's admittedly commercial-resembling course of conduct, those assets may quickly be tied up and perhaps dissipated in the execution of suits by aggrieved local suppliers or employees.[86]

Section 1611 of the proposed legislation purports to protect some assets used in connection with military activities. It provides in revised form:

> (b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if. . .
> (2) the property is, or is intended to he, used in connection with a military activity and
> (a) is of a military character, or
> (b) is under the control of a military authority or defense agency.[87]

The problem of such a narrow exclusion can be ascertained if one envisions a contract between a regional military exchange and a local gasoline refinery whereby the refinery is holding a quantity of gasoline purchased by the exchange but not yet delivered. In a suit by local employees of the exchange, the gasoline would possibly be subject to attachment for execution in the event of reciprocal application of the proposed legislation.[88] Such attachment presents as much a threat to the military mission as the attachment of fuel that has passed completely into military control.

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[86] A similar observation was made by the Deputy Assistant Judge Advocate General of the Navy for International Law in a memorandum on Sovereign Immunity dated May 15. 1974 for the General Counsel of the Department of Defense. In *Canberk v. U.S.A.F.*, a Turkish owner of real property leased by the Air Force attached a USAF hank account in a Turkish bank in Istanbul. The U.S. admitted a debt to the plaintiff, hut disputed the amount and protested the attachment of the account. Counsel employed by the U.S. Justice Department defended the suit on the basis of sovereign immunity. The conference reporter indicated that, after multiple appeals, the Turkish High Court of Appeals held that the U.S. Government is immune from execution, as a matter of Turkish law. AF JAG Reporter, ***supra*** note 71, at 16.

[87] H.R. 11315, 94th Cong., 1st Sess. § 1611.

[88] In the section-by-section analysis of Section 1611(b)(2)(B), the proponents of this legislation indicate that "control" is intended to include authority over disposition and use of property intended to be used in connection with a military activity, in addition to physical control, 15 INT'L LEGAL MATERIALS 116 (1976). Without discussing the interpretive problem of such clause under the Uniform Commercial Code, it is apparent that whatever authority over disposition and use of such property is possessed by the military command concerned will be determined by a court hearing a particular case, including foreign courts in the event of reciprocal application of the statute.

An alternative procedure suggested by the United States Air Force[89] which is consistent with developments in this area of the law, would be to include in such legislation a provision similar to Article 31 of the European Convention on State Immunity of 1972 which provides:

> Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done or in relation to its armed forces when on the territory of another Contracting State.[90]

Such a clause granting immunity would serve to recognize the peculiarly sensitive status of a nation's armed forces, particularly while located in a friendly foreign nation.

C. AN ALTERNATIVE TO DOMESTIC LEGISLATION

In his landmark article on immunities, The Problem *of* Jurisdictional Immunities *of* Foreign *States,*[91] Professor Hersch Lauterpacht considered the question of domestic codification of governmental immunities. He indicated that "[i]t is in the long run undesirable that the modification of any such doctrine should take place by way of national action which is unilateral, sporadic, and uncoordinated. The resulting lack of uniformity would be bound to contribute to friction and confusion."[92] He further noted that the topic of jurisdictional immunities of states is among those which the International Law Commission has included within its program of codification. This conclusion is also supported by Doctor Schwenk, Attorney-Advisor to the United States **Army,** Europe and Seventh Army.[93] It is his opinion that a final solution to the problem may very well be reached through an international convention prepared by the United Nations Law Commission.[94]

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[89] Memorandum to General Counsel, Dep't of Defense, dated Apr. 23, 1974, from Chief, International **Law** Division, Office of the Judge Advocate General, U.S. Air Force, Subject: Sovereign Immunity.

[90] European Convention of State Immunity and Additional Protocols, **art.** 31, E.T.S. No. 74.

[91] Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States, 28* BRIT. *Y.B.* INT'L **L.** 220 (1951). The possibility of such a circumstance is recognized by the proponents of the legislation. In the section-by-section analysis for Section 1604 of the Act, it is stated that "[t]he immunity provisions are also subject to 'future' international agreements. Included in this concept is the possibility of a future international convention on sovereign immunity, just as there are in existence at present international conventions on diplomatic and consular immunity." 15 INT'L **LEGAL** MATERIALS 106 (1976).

[92] Lauterpacht, ***supra*** note 91, at 248.

[93] Schwenk, *Immunity of the United States From Suits Abroad,* 45 MIL. L. REV. 23 (1969).

[94] *Id.* at 41.

In that the concept of governmental immunities abroad is generally considered to form part of international law, and considering the worldwide trend toward a restrictive theory of governmental immunity, it is apparent that the most logical and beneficial method of delineating governmental immunity before foreign courts is by international agreement. However, until such a solution is achieved, it is important that the immunity currently extended to matters involving the armed forces of a state be preserved.

V. CONCLUSIONS

As indicated above, the United States, in support of its own interests and world peace, has adopted policies which require the stationing of large numbers of military and civilian personnel abroad. These policies, while generally supported by our people and our leaders, will be subject to closer scrutiny as the economic burden becomes less acceptable in today's economic milieu. The economic privileges enjoyed by our forces abroad under status of forces agreements are important and serve to appreciably decrease the costs of maintaining such forces abroad. Further, the existence of a viable theory of governmental immunity which serves to protect the effective utilization of these economic privileges is essential to the continued presence of our forces abroad under present standards.

It is recognized that the growing tendency of states to assume and to discharge functions which in the formative period of international law were considered to be private in nature requires adjustments in the concept of sovereign immunity which will subject such private functions to the processes of our courts. However, those support activities which are incidental to the presence of foreign troops in the United States should be immune from the jurisdiction of United States courts as falling within those public acts about which sovereigns have traditionally been quite sensitive. Such treatment would, of course, redound to the benefit of the support activities of United States forces abroad and preclude the objections of the Department of Justice in raising the defense of sovereign immunity to suits against such activities abroad. Further, the proponents of the Act have indicated in their section-by-section analysis that nothing in the Act will in any way alter the rights or duties of the United States under the status of forces agreements for NATO or other countries having military forces in the United States.[95] Thus, the Act should make explicit that which

[95] 15 INT'L LEGAL MATERIALS 106 (1976).

is presently considered implicit. On this basis it is recommended that the following clause be added to the proposed revision of subject legislation as paragraph (d) of section 1605:

> Nothing in this chapter shall be construed as permitting suit against foreign states having military forces regularly stationed in the United States for any actions arising from military related support activities incidental to the presence of such forces in the United States; further, nothing in this chapter is intended to alter the provisions of commercial contracts calling for exclusive nonjudicial remedies through arbitration or other procedures for dispute settlement concluded by such forces in the United States.

RECENT DEVELOPMENTS IN COURT-MARTIAL JURISDICTION: THE DEMISE OF CONSTRUCTIVE ENLISTMENT*

Captain Brett L. Grayson**

I. INTRODUCTION

Well-intentioned civilian judges, law enforcement officers, and reform school personnel have, with the occasional cooperation of some recruiters, frequently urged youthful offenders to enlist in the Army in lieu of trial or punishment for civilian crimes or juvenile offenses. These officials generally encourage such offenders to join the Army out of altruistic motives, hoping that military service and discipline will rehabilitate and transform them into useful and law-abiding members of the community. Some commanders, if not sympathetic with this view, find it difficult to process such personnel for discharge when the basis of their enlistment comes to light. Nonetheless, it is doubtful that the military can either rehabilitate or afford to make the effort to rehabilitate juvenile or youthful offenders where parents and civil authorities have failed.

One who joins the armed forces as an alternative to civilian confinement neither desires to become a professional soldier nor really submits himself to the special requirements and standards of conduct demanded of those who enter the military service. Lack of desire, and a consequent lack of motivation, give these "forced. volunteers" an unusually high potential for difficulties in the service. These difficulties are often manifested in conflicts with military authority and must be resolved through administrative sanctions or through procedures authorized by the Uniform Code of Military Justice. Many of the behavioral irregularities exhibited by "forced volunteers" are also displayed by individuals who are

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

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unable to satisfactorily perform their military dutjes because some physical, mental or educational disability prohibits them from performing the duties expected of the average soldier. Like the lack of motivation, this incapability to satisfactorily meet expected requirements causes confusion and frustration which often find their release in conduct detrimental to the requirements of military discipline.

Fortunately both the Court of Military Appeals and the Courts of Military Review have in recent years interpreted military regulations and administrative policy to insure that the "forced volunteer," with his unusually high potential for exhibiting behavioral problems in the military, is not recruited. Moreover, the Court of Military Appeals has also considered the plight of enlistees who are unable to perform military duties as the result of physical, mental or educational disabilities.

Traditionally, for the military to have court-martial jurisdiction over a person, not only must he have been subject to the Uniform Code of Military Justice at the time of the alleged offense, but there must not have been a valid termination of that status between the commission of the offense and the date charges were preferred.[1] One of the methods a person can become subject to the Code is by enlistment in the regular forces, or in the reserve forces with a concurrent or subsequent call to active duty. Another, but related, method is called "constructive enlistment."[2] If for some reason an enlistment or reenlistment is defective, the military appellate courts have often found an implied contract of enlistment when the enlisted person manifests his intention to be a member of the military by voluntarily performing military duties and accepting military benefits after the defect is cured.[3]

Recent military appellate cases have sharply altered the law regarding enlistments in violation of statute or regulation, and constructive enlistments arising from such enlistments. Invoking military regulations and administrative policies which attempt to discourage the recruitment of persons likely to have trouble in the military, the courts have begun to deny court-martial jurisdiction over those who have been illegally enlisted, dismissing military charges against them and returning them to civilian life. This article will explain the rationale of these holdings, and will also consider their possible effect on Selective Service induction.

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[1] United States ex *rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[2] United States v. Graham, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972); United States v. Brodigan, 50 C.M.R. 4, 19 (NCMR 1975). Time spent in confinement, United States v. Graves, 39 C.M.R. 438 (ACMR 1968), in other forms of restraint or in an unauthorized absence cannot be considered as "voluntary service" so as to manifest such an in-

11. UNDERAGE (MINORITY) ENLISTMENT

Both men and women who are at least 18 years old[3] and meet the other standards[4] may enlist. The Secretaries of the respective services may accept enlistments in the regular forces of persons at least 17 but less than 18 years old, but only with the written consent of a parent or guardian if one exists. A person less than 17 years old lacks the competence to acquire military status, and consequently cannot become a valid member of the military?

Judicial explanation of these general rules had created a relatively settled doctrine of constructive enlistment which established the limits of court-martial jurisdiction over those who had entered the service prior to their 18th birthday. For example, where a person entered the service before attaining the age of 17, but had already passed 17 when his deception was brought to the attention of military authorities, he was held to have constructively enlisted by accepting the benefits of the military and voluntarily performing military duties.[6] Such entry of a 16-year-old, or entry of a 17-year-old without parental consent, had traditionally been held to be merely voidable at the option of the Government, or at the option of a parent or guardian requesting the enlistee's release within 90 days after the enlistment.[7] The enlistee retained military status until either option was exercised.[8]

Where a parent or guardian attempted to secure release of such a 17-year-old enlistee from the military, a court-martial lacked jurisdiction to try the soldier for an offense committed after the parent's request had been made.[9] However, where the request for release was made after the commission of an offense, it did not defeat court-martial jurisdiction over the soldier.[10] Even if the

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tent. United States v. Hrodigan. *supra* at 421.

[3] 10 U.S.C.A. § *505* (1975). A higher enlistment age for women was removed by the Act of May 24, 1974, Pub. L,. No. 93-290, § 1, 88 Stat. 173.

[4] Army Reg. No. 601-210, chapt. 2 (15 Jan. 1975) [hereinafter cited as AR 601-210] sets forth age, citizenship, trainability, educntional, physical. moral and administrative requirements, among others.

[5] United States v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957); Army Keg. No. 635-200, chapt. 7 (27 Aug. 1975) [hereinafter cited as AR 635-200]. Where a minimum age is prescribed by a regulation implementing a statute, it is a minimum age "prescribed by law."

[6] United States v. Fant. *25* C.M.R. 643 (ABR 1958).

[7] 10 U.S.C. § 1170 (1970); AR 635-200, para. 7-5; *cf. In re* Morrisey, 137 U.S. 157 (1890).

[8] *Cf.* Dep't of Army Message, Subject: Personnel Separation—Enlisted Personnel, 28 May 1973, issued in clarification of AR 635-200.

[9] United States v. Graham. *22* U.S.C.M.A. *75.* 46 C.M.K. 75 (1972).

[10] United States v. Bean, 13 U.S.C.M.A. 203, 32 C.M.K. 203 (1962). *Hut see* AK 635-200, para. 7-8 (ordinarily desirable to avoid board action or court-martial where enlistee is eligible for minority discharge). *See also* United States v. Garback, *50* C.M.R. *673* (ACMK 1975) (extension of enlistment before 18th birthday without

enlistee's parent or guardian had not consented to his enlistment, he may have waived his right to demand the minor's release if he was aware of and has acquiesced in the enlistment." Similarly, if an individual remains on active duty beyond his 18th birthday despite his failure to obtain parental consent for his minority enlistment, no separation action is to be taken regardless of the fact that the enlistment took place in violation of statute.[12]

The Army Court of Military Review followed these principles in the case of Private John R. Brown.[13] Brown enlisted 49 days before his 17th birthday, using a forged birth certificate and forging his father's name to the parental consent form.[14] During basic training he disclosed his minority status to his platoon sergeant and company commander, but whether he also disclosed that he lacked parental consent and that he wanted to get out of the military were disputed at trial. The accused asserted that shortly after beginning advanced individual training he had informed his new company commander of his minority enlistment and desire to be released, but this allegation was denied by that officer.

The Army Court of Military Review found that the appellant's first company commander and sergeant had been informed of his minority entry, but that the appellant had told them that he had parental consent and that he desired to remain in the Army. It also found that Brown's father learned of the enlistment approximately one month before the appellant's 17th birthday, but did nothing to obtain his release.

After making these factual determinations the court held that Brown had constructively enlisted by his conduct and by his father's knowing acquiescence in his military service after his 17th birthday.[15] The fact that the recruiter had failed to follow an Army regulation[16] in attesting to the signature of the consenting parent and the failure of the appellant's company commander to take affirmative action were held not to be determinative."[17]

The Court of Military Appeals disagreed. It held that the Army had a duty to act reasonably, and that the inaction of the appellant's company commander did not satisfy that duty.[18] It also declared that if during the period required to verify a member's true

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parental consent).
[11] United States v. Scott, 11 U.S.C.M.A. 655, 29 C.M.R. 471 (1960).
[12] AR 635-200, chapt. 7.
[13] United States v. Brown, 47 C.M.R. 748 (ACMR 1973).
[14] Dep't of Defense Form No. 373
[15] 47 C.M.R. at 751.
[16] Army Reg. No. 601-210, para. 4-8, (Change No. 6, 29 May 1970).
[17] 47 C.M.R. at 751.
[18] United States v. Brown, 23 U.S.C.M.A. 162, 48 C.M.R. 778 (1974).

age he attains the age of 17 and "continues to receive benefits of service, a constructive enlistment does not arise."[19] Hence, the government's failure to make an inquiry when placed on notice of a minority enlistment, together with the agent's failure to follow lawful recruiting practices, was held to estop the Government from basing its jurisdiction on a constructive enlistment.[20]

The duty of a unit commander to act upon receiving notice that the enlistment of one of his subordinates is defective is not based solely on the duty of the Government to act reasonably. Upon discovery that an individual's enlistment was "erroneous" because he failed to meet qualifications for enlistment or re-enlistment, a unit commander must initiate an action to obtain authority to retain the member or to discharge or release him from active duty.[21] The commanders having discharge authority[22] are directed to order separation in all cases where the disqualification is nonwaivable.[23] Where the disqualification is waivable, the discharge authority is to be exercised in the best interest of the Government.[24]

If a person's enlistment is discovered to be defective before his departure from an Armed Forces Entrance and Examination Station (AFEES), the enlistment is to be voided by the AFEES commander.[25] In such a case no discharge certificate or Report of Transfer or Discharge[26] is to be issued.[27]

III. ENLISTMENT TO AVOID CIVILIAN CONFINEMENT— "FORCED VOLUNTEERS"

Except for prohibitions on the enlistment of legally incompetent or underage persons, disqualifications prescribed by statute[28] or regulation[29] have been held not to void an enlistment but merely to make it voidable at the option of the Government.[30] On the other hand, dictum in the venerable Supreme Court case *United States v. Grimley*[31] indicates that the enlistment of a person while he is un-

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[19] *Id.* at 165, 48 C.M.R. at 781.
[20] *Id.* at 165, 48 C.M.R. at 7111.
[21] AR 635-200, para. 5-31*a*.
[22] *Id.*, para. 2-17.
[23] *Id.*, para. 5-31*b*(2).
[24] *Id.*, para. 5-31*b*(3)-(4).
[25] *Id.*, para. 5-31*d*.
[26] Dep't of Defense Form No. 214.
[27] AR 635-200, para. 5-31*d*.
[28] 10 U.S.C.A. § 505 (1975); 10 U.S.C. §§ 504, 3253 (1970).
[29] *E.g.*, AR 601-210, app. A.
[30] United States v. Parker, 47 C.M.R. 762 (CGCMR 1973); United States v. Julian, 45 C.M.R. 876 (NCMR 1971).
[31] 137 U.S. 147 (1890).

der duress, ignorance, intoxication, or "any other disability which, in its nature, disables a party from changing his status or entering into new relations"[32] could render the enlistment void *ab initio*. When the Army Court of Military Review considered the appeal of Private Thomas W. Catlow these principles were well settled.

In *United States v. Catlow*[33] the appellate court was confronted with an appellant who, before his enlistment, had charges for loitering, resisting arrest, carrying a concealed weapon, and assault pending against him in a civilian court. The judge of that court gave the appellant the option between trial on these charges which could have resulted in five years' imprisonment, and enlistment in the Army. After being contacted by an Army recruiter who apparently knew of the judge's offer, the appellant decided to enlist. Catlow was only 17 years old at the time of his enlistment, so the parental consent required by statute[34] was given by his mother. Eight days after his enlistment the civilian charges were formally dismissed.

However, the appellant, allegedly to obtain his elimination from the military, accumulated a record of offenses. At trial the defense counsel's motion for dismissal of the charges for lack of jurisdiction was denied. The principal basis for the motion was that an Army regulation[35] absolutely disqualified for enlistment applicants who had criminal or juvenile charges pending against them in civilian courts. A footnote to that regulation specifically covered persons who were released from charges or further proceedings on the charges on condition that they seek or be accepted for enlistment in the Army.[36]

The Court of Military Review held this disqualification to be solely for the benefit of the Army, and that Catlow's enlistment was voidable at the option of the Army. The court declared that the "absoluteness" of this supposedly "nonwaivable" disqualification was removed by another regulation which permitted retention in the Army after such a disqualification is discovered.[37] The court further stated, citing various authorities, that even if the appellant's enlistment were void, nevertheless when the civilian charges were dismissed the appellant's enlistment was validated.[38] The appellant's failure to seek proper administrative relief was

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[32] *Id.* at 152-53.
[33] 47 C.M.R. 617 (1973).
[34] 10 U.S.C. § 505 (1970).
[35] AR 601-210, para. 2-6 (1 May 1968), *now implemented as* AR 601-210, app. A, line k (15 Jan. 1975).
[36] AR 601-210, para. 2-12, n.2 (1 May 1968).
[37] AR 635-200, para. 3-51*b*(2) (15 July 1966).
[38] 47 C.M.R. at 619.

held to foreclose his complaint, and his assertion that his misconduct gave Army authorities notice of his desire to be released from the military was rejected.[39]

The Court of Military Appeals reversed.[40] Relying on a letter by The Judge Advocate General of the Army to the Chief Justices of various appellate courts regarding such "forced volunteers,"[41] the court held, in light of the high potential for difficulties in the military and the lack of opportunity for rehabilitation such applicants face, that the prohibition of the regulation is also for the benefit of the individual. The court therefore concluded that the accused's enlistment was void *ab initio.*

This conclusion is only logical when one recalls that an enlistment is a contract[42] and requires an unfettered exercise of the will. Anything that disables an applicant from so exercising his volition obviously should make his enlistment void. But it was not this rationale on which the court apparently based its ruling, but rather on ita interpretation of the terms of the Army Regulation.

Assuming for purposes of the appeal that the appellant could have effected a constructive enlistment after the civilian charges against him had been dismissed, the court held that the inference arising from his acceptance of pay and other benefits of service did not negate his forced enlistment and "active and varied 'protestations against continued service'."[43] Clearly the court accepted the appellant's acts of misconduct as "protests" and as an expression of his desire to be released from the military, negating any intent to be a member of the armed forces once the charges had been dropped. This construction seems to require considerable imagination, but the opinion indicates that "protestations" are not necessary to negate a constructive enlistment through the court's holding that the forced enlistment was void from its inception and its observation that "the nature of the disqualification to enlist suggests that it is continuously disabling."[44]

Current Army regulations direct recruiting personnel not to participate directly or indirectly in the "release of an individual from a pending charge in order that he may enlist in the Army as an alternative to further prosecution or further juvenile court proceedings."[45] Recruiting personnel are also prohibited from act-

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[39] **Id.** at **620.**
[40] United States **v.** Catlow, **23** U.S.C.M.A. **142, 48** C.M.R. **758 (1974).**
[41] The **court** reproduced the letter as an appendix to its opinion. **Id.** at **146, 48 C.M.R.** at **762.**
[42] United States **v.** Grimley, **137** U.S. **147** (1890).
[43] **23** U.S.C.M.A. at **146, 48** C.M.R. at **762.**
[44] **Id.** at **145, 48** C.M.R. at **761.**
[45] AR **601-210,** para. **3-13d.**

ing to secure the release of an individual from any form of "civil restraint," defined as "confinement, probation, parole, and suspended sentence," so that he may enlist or accomplish enlistment processing.[46] The regulation further states that persons under charges or restraint are not only ineligible for enlistment, but are ineligible for pre-enlistment processing to determine their mental and medical eligibility for enlistment.[47] Only after civil restraint is terminated and there is "substantial evidence of rehabilitation as a law-abiding member of a civil community" is the applicant eligible for enlistment.[48]

Recent cases have generally followed *Catlow*. In ***United States v. Dumas,***[49] the appellant was 17 both when he enlisted and when he was court-martialed. Dumas had enlisted to avoid confinement in a civilian juvenile detention camp as the result of the collaboration of an Army recruiter, the appellant's probation officer, and a civilian judge. The appellant's mother was his legal guardian, but she was not aware of the enlistment. The Court of Military Appeals held that the enlistment was void and there was no basis for finding that a constructive enlistment could have been effected. Significantly absent from the court's opinion was any requirement of "protestations."

In ***United States v. McNeal,***[50] the Army Court of Military Review applied the *Catlow* rationale retroactively. There a recruiting sergeant and a reform school counselor told the accused that he would remain in reform school more than a year unless he enlisted. Because the appellant enlisted only a few days after his 17th birthday, the parental consent form was necessary and was signed by his counselor as his legal guardian and witnessed by the recruiter. The Army court dismissed the charges, saying that as a matter of fairness it could not allow the Government to claim a constructive enlistment despite the fact that McNeal had accepted pay and benefits after having reached 18 years of age.

McNeal could be argued to contain "protestations," for the appellant testified that he frequently asked his officers and sergeant to assist him in obtaining a discharge, but was always told that "there was nothing they could do."[51] Another pertinent feature is that the Army court laid its holding of defective enlistment and lack of jurisdiction on a disqualification different from

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[46] *Id.* para. 3-13e.
[47] *Id.* para. 313d & *e.*
[48] *Id.* para. 3-13*c.*
[49] 23 U.S.C.M.A. 278, 49 C.M.R. 453 (1975).
[50] 49 C.M.R. 668 (ACMR 1974).
[51] *Id.* at 669.

that found in *Catlow*. The record of trial did not disclose why the appellant was in reform school, but the court refused to assume that he was eligible for enlistment because he was a "forced volunteer." Despite these factors which distinguish the case from *Catlow*, it is clear that the Army court was referring to disqualifications arising out of juvenile adjudications, for it cited the regulatory prohibition on the enlistment of persons with such adjudications.[52] Thus one panel of the Army Court of Military Review has read *Catlow* as precluding a constructive enlistment of a "forced volunteer."

An interesting issue arising out of these new cases is whether the enlistee's desire to remain in the service, even though his initial enlistment was defective, can serve as a basis, or at least as one of the factual supports, for a constructive enlistment. Apparently this would not be the case. In *Brown*, the Court of Military Appeals said:

> The proscription of the law is that there should not be 16-year-old persons in the Army. The age barrier is not to be negotiated by the wishes of the enlistee or his superiors.[53]

Such language affirms the proposition that underage enlistments cannot serve as the basis for a constructive enlistment.

A similar rule should apply to persons ineligible as a result of criminal charges or adjudications. In *Catlow*, the court of Military Appeals assumed *for the purposes of the appeal only* that the appellant could have constructively enlisted after the civilian charges against him were dismissed.[54] However, this proposition is made doubtful by the court's observation that the nature of the disqualification of a "forced volunteer" suggests that it is "continuously disabling" and renders the enlistment void from its inception. This characterization of the disability and the lack of any "protestations" in *Dumas* seem to indicate that the desire of such "volunteers" to stay in the military should not affect the issue of jurisdiction—if such enlistments are absolutely void rather than merely voidable.

Two recent Court of Military Review cases have construed *Catlow* differently. In *United States v. Barksdale*[55] the Navy court affirmed the appellant's conviction after finding "ample evidence of record to show. . . a constructive enlistment after the civilian charges were dropped."[56] This finding necessarily interprets *Catlow* as standing for the proposition that enlistments violating regulatory provisions concerning civil confinement records are

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[52] *Id.* at **670,** *citing* AR **601-210,** para. **2-6** (Change No. **6,** 29 May **1970).**
[53] United States v. Brown, **23** U.S.C.M.A. **162, 165, 48** C.M.R. **778, 781 (1974).**
[54] **23** U.S.C.M.A. at **146, 48** C.M.R. at **762.**
[55] **50** C.M.R. **430** (NCMR **1975).**
[56] *Id.* at **431.**

voidable at the instance of the Government. *United States v. Frye*[57] refused to read *Catlow* as standing "for the proposition that a void enlistment, even when the result of judicial coercion, may not ripen into a constructive enlistment."[58] While the results of these cases may be explained by the fact that this jurisdictional issue was raised for the first time only during extenuation and mitigation in the former case, and during the post-trial interview in the latter, one need only review the language in *Catlow* to know that their interpretations are incorrect:

> Unlike Grimley, therefore, this accused did not of his "own volition. . .[go] to the recuiting officer and" enlist, and there was in the situation confronting him unlike that facing Grimley, an "inherent vice" that affected his acquisition of the status of a member of the Army. Paraphrasing *United States v. Robinson,* . . . "we do not believe that [the accused] volunteer[ed] to violate. . .[the law] and thereby cloak the proscribed act with legality." We conclude that the accused's enlistment was void at its inception.[59]

While the Court of Military Appeals' opinions have not been exemplars of precision[60] or clarity, the clear import of *Dumas* and *Catlow* is that both underage enlistments and those which violate the regulations and administrative policies on "forced volunteers" are void, and cannot serve as the basis for a constructive enlistment.

IV. ENLISTMENT IN VIOLATION OF OTHER DISABILITIES

The most recent change to the Army Regulation delineating disqualifications for enlistment lists a total of 16 conditions that are "nonwaivable."[61] Although not all of these could be considered to be for the benefit of the applicant as well as the Army, several can be so viewed. Applicants under various forms of civil restraint[62] or subject to criminal convictions or juvenile adjudications[63] would appear to face a "high potential for difficulties in service" and to risk "grave impairment" of their chances for rehabilitation,[64] con-

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[57] 49 C.M.R. 703 (ACMR 1975).
[58] *Id.* at 704 n.3.
[59] 23 U.S.C.M.A. at 145, 48 C.M.R. at 761 (citation omitted).
[60] *Compare id. with* United States v. Barrett, 23 U.S.C.M.A. 474, 50 C.M.R. 493 (1975), a per curiam opinion which states:

> [F]airness prevents the Government from now relying upon a constructive enlistment as a jurisdictional base. Additionally, the absence of evidence that the juvenile charges against appellant were dismissed following his enlistment would preclude reliance upon a constructive enlistment.

23 U.S.C.M.A. at 475, 50 C.M.R. at 494 (citations ommitted).
[61] AR 601-210, app. A.
[62] *Id.*, app. A, line L.
[63] *Id.*, app. A, lines M & N.
[64] United States v. Catlow. 23 U.S.C.M.A. 142, 145, 48 C.M.R. 758, 761 (1974).

cerns which led the Court of Military Appeals to recognize certain disqualifications to be for the benefit of the individual as well as the service.[65] This same theory could be applied to the "waivable" disqualifications of involvement in court or criminal proceedings[66] in light of the Army Regulation's statement that the disqualification of persons with records of court convictions or adverse adjudications is "designed to screen out persons who are likely to become serious disciplinary cases. . . ."[67] An argument that some of the waivable disqualifications are also for the benefit of the applicant can be based on the regulatory requirement of evidence of satisfactory rehabilitation,[68] and on the premise that only after rehabilitation has an individual reduced his potential to become a "serious disciplinary case."

This conclusion is strongly supported by a recent case from the Court of Military Appeals, *United States v. Russo*.[69] An applicant advised a recruiter that he suffered from dyslexia, a medical disorder which makes reading very difficult. The recruiter provided him with a list of answers for the Armed Forces Qualifications Test so he could enlist despite his inability to read. In an opinion written by Chief Judge Fletcher, the court rejected government counsel's argument that the reading requirement is solely for the benefit of the military, and held that the armed forces had no jurisdiction over the appellant:

> The various enlistment disqualifications evidence not only a desire to assure an effective fighting force for the country but also a commendable attempt to minimize future administrative and disciplinary difficulties with recruits by qualitatively reducing the class of eligible enlistees. The latter objective is not solely for the benefit of the armed services. It is also a means of protecting applicants who do not meet specific mental, physical, and moral standards for enlistment by barring their access to an environment in which they may be incapable of functioning effectively. . . . The result we reach will have the salutary effect of encouraging recruiters to observe recruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices.[70]

This recognition of the individual's interest in not being placed in an environment in which he cannot effectively function opens broad areas for attack on asserted "constructive enlistments."

V. RECRUITER MALPRACTICE

A number of states have procedures for "expunging" a criminal

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[65] *Id* at **145,** 48 **C.M.R.** at 761.
[66] **AR** 601-210, app. **C,** lines **C-H.**
[67] **Id.,** para. 3-9.
[68] *Id.*, para. 3-10.
[69] 23 **U.S.C.M.A.** 511, 50 **C.M.R.** 650 (1975).
[70] *Id.* at 512, 50 **C.M.R.** at 651 (citation omitted).

record upon evidence of an offender's rehabilitation or the lapse of a probationary period so that an applicant will have no record, under state law, of convictions or adverse juvenile adjudications. However, the Army requires the applicant to reveal such expunged records and does not recognize the effect the state legislatures intended." Therefore, the disqualification will stand and can arguably serve to make an enlistment void if the recruiter conceals it or civil authorities have previously used it to compel the accused's enlistment.

Presently, if an applicant puts a recuiter on notice that he has a criminal record, the enlistment action must be held in abeyance until a complete investigation can be made.[72] Such an investigation is required to include a variety of documents, some depending on the offense.[73] One of them is a "Police Records Check,"[74] which must be sent to municipal, county or parish, and state law enforcement agencies in the communities where the applicant alleges or other sources reveal the applicant was charged with minor traffic violations.[75] When more serious offenses are involved the Police Records Check is considerably more extensive.[76]

One of the two rationales contained in the *Brown* decision finding a void enlistment was the recuiter's failure to follow "proper and lawful recruiting practices."[77] Whenever a disqualified person is enlisted because a recruiter ignores pertinent facts, and arguably when such disqualifying facts are not discovered through recruiter misfeasance, the Government will be estopped from asserting the existence of a constructive enlistment. Chief Judge Fletcher's sweeping statement in *United States u. Russo*[78] that "the Government would be obligated to terminate an enlistment where a recruiter knowingly enlisted or aided in enlisting an individual who had given timely notice that he would be disqualified from military service"[79] affirms this position. Although prior to the decision in *Russo,* a decision of one panel of the Army Court of Military Review obviously reflects this interpretation of *Brown.* In *United States v. Bunnell*[80] recruiters actively participated in assisting the applicant to conceal civilian convictions, including one for a

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[71] AR 601-219, para. 3-11*b*(1).
[72] *Id.*, para. 3-13.
[73] *Id.*
[74] Dep't of Defense Form No. 369.
[75] AR 601-210, para. 3-13*b*.
[76] *Id.*
[77] 23 U.S.C.M.A. 165, 48 C.M.R. 781 (1974).
[78] 23 U.S.C.M.A. 511, 50 C.M.R. 650 (1975).
[79] *Id.* at 513, 50 C.M.R at 762, *citing* United States v. Brown, 23 U.S.C.M.A.162, 48 C.M.R. 778 (1974).
[80] 49 C.M.R. 64 (ACMR 1974)

felony. The court ruled the enlistment void on the authority of *Brown.*

The Court of Military Appeals' opinion in *Russo* was based in part on traditional principles of contract law. Although an enlistment contract, unlike most others, creates a change in a person's legal status from civilian to soldier, the application of contract law should determine its validity. Because the contract is with the Government it has been held to be

> a transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State. But this discretion can be exercised only by the legislative body, or under an authority which that body has conferred?)

Enlistment contracts are entered into under the constitutional power of Congress to raise and support armies.[82] Therefore, the terms and conditions of such contracts are within the plenary and exclusive control of Congress. The President and the respective Secretaries have no power to vary the contract of enlistment without express statutory authority.[83]

An application of basic common law contract principles to the formation of enlistment contracts that are tainted by recruiter noncompliance with statute or regulation indicates that no valid contract can be formed in such cases. A number of rationales support this contention.

A. COMPLIANCE WITH STATUTES AND REGULATIONS

Arguably neither the Secretaries of the respective services nor their recruiters have authority to enlist or induct any person in contravention of the qualifications and procedures set out in their own regulations. Clearly Congress has delegated to the Secretaries the authority to enlist and induct "qualified" persons.[84] Except for the provisions dealing with the minimum age of applicants and mental competence,[85] the disqualifications prescribed by statute[86] and regulation[87] have previously been held not to void an enlistment,

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[81] WINTHROP, MILITARY LAW AND PRECEDENTS 538-39 (2d ed. 1920 reprint).
[82] U.S. CONST. art. I, § 8, cl. 12.
[83] 4 OP. ATT'Y GEN. 537 (1846).
[84] *See* 10 U.S.C.A. § 505(a) (1975); Military Selective Service Act of 1967, 50 U.S.C. APP. §§ 451-473 (1970).
[85] 10 U.S.C. § 504 (1970). Note that this same statutory provision prohibits the enlistment of deserters or convicted felons, although the Secretary concerned may waive these two disqualifications in meritorious cases.
[86] 10 U.S.C.A. § 505 (1975); 10 U.S.C. §§ 504, 3253 (1970).
[87] *E.g.*, AR 601-210, app. A.

but merely to make it voidable.[88] But while the Secretaries have broad discretion in promulgating regulations, once promulgated and until modified or rescinded these regulations should have force of law, binding even the Secretaries. This principle was recognized by the Army Court of Military Review when it said:

> It is well established that where a government agency promulgates rules or regulations to guide its actions, the courts will insist that the agency follow them. This principle was stated most succinctly by the Court of Appeals of the Fourth Circuit . . . : "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so. its action cannot stand and the courts will strike it down. . . ."[89]

Since the military services are government agencies, before they may assert jurisdiction in a court-martial there must be strict compliance with their own regulations.[90] Therefore administrative due process requires the services and their Secretaries to act within their own regulations. It also appears that the Secretaries are statutorily bound by limitations set out in their regulations, and in the absence of statutory authority to enlist, no authority exists.[91] Consequently, enlistments in violation of their rules, regulations or procedures are of no effect.

B. EXTENT OF RECRUITERS' AUTHORITY

A recruiter, acting as the Secretary's agent, is bound by the regulations prescribed by his principal, and when he intentionally or willfully disregards those limitations he is acting outside the scope of his authority. The controlling principles of the law of agency are explained in the following quotation:

> "Authority" . . . is the power of the agent to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestations to him. There is no authority unless there is power to affect the legal relations of the principal. Thus there is no authority unless the principal has capacity to enter into the legal relation sought to be created by the agent. Likewise there is no authority unless, as to the principal, the agent is privileged.[92]

Hence, an enlistment contract resulting from recruiter misfeasance is not an agreement between an applicant and the respective

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[88] United States v. Parker, 47 C.M.R. 762 (CGCMR 1973); United states v. Julian, 45 C.M.R. 876 (NCMR 1971).
[89] United States v. Walker, 47 C.M.R. 288 at 290 (ACMR 1973), *citing* among other cases, Vitarelli v. Seaton, 359 U.S. 535 (1959); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).
[90] United States v. Kilbreth, 22 U.S.C.M.A. 390, 47 C.M.R. 327 (1973).
[91] *See* 10 U.S.C.A. § 505 (1975).
[92] RESTATEMENT (SECOND) OF AGENCY § 7 (1958).

Secretary, and cannot result in a valid enlistment.

If the enlistment applicant does not misrepresent the situation to the recruiter or if the recruiter is otherwise put on notice of the applicant's disqualification, the applicant's acceptance and use of the results of the illegal and fraudulent recruiting practices should not remedy the lack of a valid contract. The service may "waive the fraud and ratify the contract" only in the absence of compulsion, solicitation, or misrepresentation to the enlistee by the Government,[93] but this situation would not arise where the recruiter solicited the enlistment of, or misrepresented the ability to enlist to, a prospective soldier. The invalidity of the enlistment should continue even if the applicant intentionally sought to enter the service fraudulently, because there would be no mutuality of intent between the applicant and the respective Secretary.[94]

The general agency principles that delegated authority must be strictly construed and that an agent's acts in excess of his authority are null and void have apparently been applied without limitation by military appellate courts in recruiter misconduct cases.[95] To affirm a sentence rendered by a court-martial when the accused's enlistment was defective because of recruiter misconduct is to condone such conduct.

C. FRAUDULENT CONDUCT BY RECRUITERS

In addition, when recruiting personnel intentionally conceal a disqualification for enlistment or agree to correct the disqualifying condition in return for the individual's enlistment, they may be acting in violation of military law, hence committing a criminal act.[96] If such is the case, the enlistment contract would contemplate a violation of a prohibitive statute and would be absolutely unenforceable.[97] In *Hartman v. Lubar*[98] the Court of Appeals for the District of Columbia Circuit declared that:

> The general rule is that an illegal contract made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer.[99]

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[93] United States v. King, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959).
[94] *See* United States v. Grimley, 137 U.S. 147 (1890).
[95] United States v. Brown, 23 U.S.C.M.A. 162, 48 C.M.R. 778 (1974); United States v. Bunnell, 49 C.M.R. 64 (ACMR 1974).
[96] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1970); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed), para. 127c.
[97] Gibbs v. Cons. Gas Co., 134 U.S. 396 (1899) (all contracts made to promote that which a statute declares wrong are null and void); Hall v. Coppell, 74 U.S. (7 Wall.) 542 (1868) (the law will not lend its support to a claim founded in its violation); Kenneth v. Chambers, 55 U.S. (14 How.) 38 (1852) (no contract can be enforced in the courts of the United States if it violates the law of the United States).
[98] 133 F.2d 33 (D.C. Cir. 1942), *cert. denied,* 319 U.S. 767 (1943).
[99] *Id.* at 45.

It is well settled in law that "a bargain is illegal. . .if either its formation or its performance is criminal, tortious or otherwise opposed to public policy."[100]

The Government has no more right than a private person to come into a court-martial or any other court and plead a case based on an illegal contract. Yet every time a trial counsel asserts jurisdiction over a serviceman whose enlistment is defective because of recruiter misconduct, regardless of whether the disqualification is waivable, that is exactly what happens. Unless recruiters are held to have the discretion to decide not to comply with enlistment regulations, all failures to comply with such provisions taint the resulting enlistments with illegality and render them void from the beginning. Consequently, as recognized in *Bunnell,*[101] when recruiter misfeasance results in the enlistment of a person who is disqualified, regardless of whether the disqualification is deemed waivable or not, there is no military jurisdiction to try him.

In United States *v. Russo*[102] the Chief Judge's opinion indicated the direction in which the military criminal law is evolving on the subject of illegal enlistment. The opinion stated that "common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute . . . the resulting enlistment is void as contrary to public policy."[103] This language puts military judges and counsel on notice that they should review contract law and be prepared to apply its principles in courts-martial.

VI. ACCUSED'S LACK OF KNOWLEDGE AS A DEFENSE?

Recently a panel of the Army Court of Military Review was confronted with an appellant who had been a member of the Vermont National Guard, but because of "continued and willful absences" was discharged from that body and assigned to an Army Reserve Unit.[104] Shortly thereafter the appellant was classified 4-F by the local office of the Selective Service System; and some two years later he was called to active duty.

Subsequent to reporting for duty as ordered, receiving pay and allowances, and being promoted, the appellant absented himself

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[100] RESTATEMENT OF CONTRACTS § 512 (1932).
[101] 49 C.M.R. 64 (ACMR 1974).
[102] 23 U.S.C.M.A. 511, 50 C.M.R. 650 (1975). *See also* United States v. Muniz, 23 U.S.C.M.A. 530, 50 C.M.R. 669 (1975).
[103] 23 U.S.C.M.A. at 513, 50 C.M.R. at 652.
[104] United States v. Goodrich, CM 431385 (ACMR 23 July 1975)(unpublished opinion).

from his unit on two occasions. At his court-martial for these offenses, the appellant challenged the court's jurisdiction over him on the ground of irregularities in the procedure by which he was called to active duty. The applicable regulation[105] required that before a member of a state National Guard could be discharged and called to active duty for unauthorized absence, certain letters of instruction and warning must have been sent the Reservist by his unit commander.

The appeliant asserted that he had never received the required letters concerning his absences; and indeed the trial counsel stipulated that his personnel records did not contain them. The Army court held that the filing of letters in a personnel jacket is required as evidence that the procedural requirements for the benefit of the Reservist have been followed. Therefore, the Government was held to have invalidly called the appellant to active duty.

Although this case deals with an area of jurisdiction different from enlistment, the author believes the court's reason for refusing to find a constructive enlistment is relevant to the enlistment area. The court applied the rationale contained in a similar case that procedural deficiencies in calling reservists to active duty can be cured if there is "a knowing and voluntary waiver of one's right to challenge his status as a person subject to the Code."[106] In applying this standard the appellate court applied an interesting twist by asking whether the evidence showed that the "appellant knew of the deficiencies in his call to involuntary duty.'' Concluding that he did not, the Court of Military Review held that since the appellant did not know that he had a basis for resisting military jurisdiction, he could not be held to have waived his right to challenge it.

Since it is doubtful that any enlisted service member except one with some legal training would have sufficient legal sophistication to suspect that a disqualification gave him a basis for challenging his enlistment, the rationale of this case would make a constructive enlistment a thing of the past. The government's burden of showing that the accused knew he had a basis for resisting military jurisdiction would be almost impossible.

VII. ILLEGAL INDUCTION

The law regulating induction is quite different from the traditional law of enlistment. Induction in violation of a statute or regulation is void,[107] and a person having some disqualification

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[105] Army Reg. No. 135-90, para. 16 (Change No. 9, 1 Oct. 1963), *now* ***implemented*** *as* **Army** Reg. No. 135-90, para. 1-10 (14 June 1972).
[106] United States v. Kilbreth, 22 U.S.C.M.A. 390, 47 C.M.R. 327 (1973).
[107] United States ***ex rel.*** Weidman v. Sweeney, 117 F. Supp. 739 (E.D. Pa. 1953).

that should have kept him from being inducted may obtain his release from military service by a writ of habeas corpus or administrative request.[108]

Previously, mere irregularities in the induction were generally held to void an induction only if they were judged to have violated the substantial rights of the inductee.[109] By using the rationale of *Brown*[110] it could be argued that the failure of induction personnel to abide by a processing regulation, resulting in the induction of a disqualified person, does cause the individual harm. Many of these disqualified persons are, because of the condition that disqualifies them, unable to cope with the demands of military life. Such inductees are likely to become frustrated and hostile as a result of their inability to succeed in the military, and may react by committing offenses to their own and the military's detriment.

Such reasoning was accepted by the Court of Military Appeals recently in United States *v. Burden*[111] where the appellant was inducted into the Armed Forces even though he could not pass the Armed Forces Qualifications Test. Burden also was nonliterate in English, which at the time produced a nonwaivable bar to induction.[112] He testified at trial, without contradiction, that an induction official who knew of his disability told him to sign the test and the official would "take care of it."[113] Citing *Russo*,[114] the court held that the appellant was illegally inducted and that the military had no jurisdiction over him. The Court also stated pointedly that "[f]raudulent induction is a criminal offense under Article 134, Uniform Code of Military Justice, 10 U.S.C. 934, as well as under the Selective Service Act, 50 U.S.C. App. § 462 (1968)."[115]

VIII. THE TRIAL COUNSEL'S BURDEN

In the recent decisions cited in this article, the Court of Military Appeals has made it clear that trial counsel cannot sustain jurisdiction if they do not introduce some evidence to rebut the contentions in the accused's sworn testimony at trial. Because the Government has an affirmative obligation to establish jurisdiction over the accused, the Court held in both *Russo*[116] and *Barrett*[117] that the failure of the Government to introduce controverting evidence on

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[108] AR 635-200, para. 5-9; Army Reg. No. 40-3, para. 6-5*e*(3) (27 Aug. 1975)
[109] Lipsitz v. Perez, 372 F.2d 468 (4th Cir. 1967).
[110] United States v. Brown, 23 U.S.C.M.A. 162, 48 C.M.R. 778 (1974).
[111] 23 U.S.C.M.A. 510, 50 C.M.R. 649 (1975).
[112] Army Reg. No. 601-270, para. 4-12 (18 Mar. 1969).
[113] 23 U.S.C.M.A. at 510, 50 C.M.R. at 649.
[114] *See* text accompanying note 102 *supra*.
[115] 23 U.S.C.M.A. at 510 n.2, 50 C.M.R. at 649 n.2.
[116] 23 U.S.C.M.A. 511, 313, 50 C.M.R. 650, 652 (1975).
[117] 23 U.S.C.M.A. 474, 50 C.M.R. 493 (1975).

the jurisdictional issue at trial or during appeal obviated the necessity of even a limited rehearing and justified reversal of the conviction and dismissal of the charges.

If courts-martial are to abide by the same rationale at the trial level, military judges will be compelled to grant motions for dismissal for lack of jurisdiction if an accused's testimony revealing one of the previously discussed bases for attack stands uncontroverted. Hence, trial counsel would be well advised to make an attempt in every such case to have any available rebuttal evidence admitted — at least until this area of the law is stabilized by the appellate courts.

IX. CONCLUSION

Until the rationale of these new jurisdiction cases is more clearly delineated, the competent defense counsel would be well advised to obtain a copy of the last and present recruiting regulations and to make a detailed inquiry into the enlistment or induction of his clients. Each disqualification for entry into military service should be reviewed and considered as to whether it arguably exists for the benefit of the applicant as well as the Government.

On the other hand, unless an opinion directly on point has found no jurisdiction, the trial counsel should react to motions to dismiss for lack of jurisdiction based on a disqualification not yet considered by the appellate courts or on an allegation of recruiter malpractice by requesting a continuance to investigate the accused's assertions. At a minimum, trial counsel must present controverting evidence to buttress his case on appeal.

In view of the confusion that the various and inconsistent decisions in this expanding area of the jurisprudence have engendered, military appellate courts must attempt to develop their basis for decision in a detailed and logical manner in order to educate counsel, judge and recruiter. Moreover, the courts must more carefully delineate the precise basis of their holdings. Such efforts would quickly lend stability to this area of the law and result in the conservation of time, effort and funds wasted in unnecessary appeals and rehearings.

PERSPECTIVE: MILITARY ADMINISTRATIVE DUE PROCESS OF LAW AS TAUGHT BY THE *MAXFIELD* LITIGATION*

Lieutenant Colonel Dulaney L. O'Roark**

I. INTRODUCTION

It is frequently said that Military Administrative Law (Military Affairs to some) is simply a label to cover a variety of unrelated military legal subjects such as military and civilian personnel law, installation law, environmental law, and the latest — government informdtion practices (freedom of information and privacy). While this is the perception of many, in fact, there is a common legal method which justifies grouping these apparently diverse legal subjects as a single discipline. This methodology is epitomized in the concept of "Military Administrative Due Process of Law." In addressing the legal issues posed in an Army administrative action concerning any of the subjects listed above, judge advocates should analyze the action in terms of compliance with the following due process standards:

(a) Has there been ctimpliance with applicable federal statutes?
(b) Have Army regulations been followed? If not, what was the effect on any individual concerned?
(c) Do the procedures followed in reaching adverse personnel determinations contain protections proportionate to the individual rights at stake and the government's interest?
(d) Has there been an abuse of discretion by the decision maker? If so, what remedial action, if any, is required?

While the significance of these due process inquiries varies with the case, a judge advocate must, whether reviewing a proposed

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

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The author wishes to acknowledge the work of Professor Donald N. Zillman, College of Law, Arizona State University, in developing the basic four-part framework of Military Administrative Due Process of Law while serving as a member of the faculty of The Judge Advocate General's School in 1973.

regulation for legal sufficiency or advising the command on an adverse personnel action, take each into careful consideration before rendering his legal opinion.

Interestingly, the current litigation concerning the Army officer promotion system provides a vehicle for closer examination of these four major aspects of military administrative due process of law. For purposes of this examination, each of the following four sections of this article is keyed to one of the four military administrative due process of law standards. Each section begins with the alleged specific administrative due process of law deficiency in the officer promotion system and is followed by a general discussion of the military administrative due process of law standard that applies to that allegation. It should be noted that most of the allegations are derived from the best known case challenging the promotion system, ***Maxfield*** *v. Callaway.*[1] Using editorial license, one important due process criticism of the promotion system is included even though it is not specifically part of the ***Maxfield*** litigation.[2] The reader is left to his own expertise to apply the law to the ***Maxfield*** allegations and decide the merits.[3]

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[1] Civil No. K 75-501 (D. Md., filed Apr. 21, 1973).

[2] ***See*** note 27 and accompanying text *infra.*

[3] The essential facts of the promotion litigation are contained in Supplemental Brief for Defendant at 1, Maxfield v. Callaway, Civil No. K 75501 (D. Md., Sept. 24, 1975):

> Plaintiffs, present and former Captains in the United States Army, brought this action alleging that the actions [*sic*] of the Secretary of the Army in promoting certain Captains to the rank of Major while plaintiffs failed of promotion to the same rank, was unlawful and an abuse of discretion. The plaintiffs seek promotion to the rank of Major, U.S. Army with retroactive back pay and allowances. The facts which led to the plaintiffs' complaint may be simply stated.
>
> On January 16, 1971 the Secretary of the Army convened a Promotion Board for the purpose of considering certain Captains for temporary promotion to the grade of Major. By letter of instruction, the Secretary instructed the Board that a maximum number of 1,662 Captains could be recommended for promotion. This letter of instruction also authorized 15% of the promotions to come from the secondary zone.
>
> Zones are established on the basis of seniority in grade in order to give regard to age and seniority of applicants for promotion. The Board convened to recommend Captains for promotion was instructed to consider two zones. The so-called primary zone consisted of Captains with seven or more years [*sic*] seniority in rank. The Board was instructed to choose 1,413 of the 1,663 [*sic*] recommendations from this primary zone of most senior Captains. A secondary zone consisting of Captains with between approximately six to seven years [*sic*] time in grade was also established by the Secretary's letter of instruction. The letter of instruction provided that 15%, or a total of 249 officers, could be recommended from this secondary zone. In addition, there were other groups of Captains, more junior in seniority who were not even considered for promotion.
>
> This Selection Board recommended for promotion 1,538 officers from the primary zone and 123 officers from the secondary zone or 7.4% of the authorized promotions from the secondary zone. The Secretary did not adopt the recommendations of this Selection Board, and shortly thereafter on March 20, 1974 a second Selection Board was convened and given more precise instructions by the Secretary. This second Board recommended that 1,538 Captains from the primary zone and 249 Captains from the secondary zone be promoted to the rank of Major. This second Board applied the "best qualified" criterion in determining their recommendations for promotion.
>
> Those Captains who were not promoted by the Secretary received passover letters. A passover letter becomes a permanent part of each officer's personnel file and basically advises the officer that he has been considered for promotion but not promoted to the next higher grade. Under current Army standards an officer is separated from the Army upon receipt of *two* passover letters.

II. FAILURE TO FOLLOW STATUTES

THE MAXFIELD ALLEGATIONS:

1. The Secretary of the Army's instructions to the March 1974 Majors Promotion Selection Board which provided that ". . . youth is, in itself, a major asset and a primary consideration for promotion from the secondary zone" violated 10 U.S.C. § 3442(c) (1970) which requires that "Selection shall be based upon ability and efficiency with regard being given to seniority and age."[4]

2. The promotion selection board was illegally constituted because no reserve officer served as a Member of the board as required by 10 U.S.C. § 266(a) (1970).[5]

THE RULE:

Military officials have no discretion to ignore federal statutes. Violation of statutes in making administrative determinations is a denial of administrative dueprocess of law.

While this rule may not be surprising today, it should be noted that not too many years ago the view was held by many that military officials had virtually absolute discretion over how they managed the internal operations of the Army. This view was buttressed by opinions from the Supreme Court which contained language to the effect that "To those in the military service . . . military law is due process"[6] and the so-called "Nonreviewability Doctrine" which held that the federal courts should not intervene in military matters by reviewing challenges to military authority.[7]

Whatever vitality that view had was severely altered by the Supreme Court in 1958in *Harmon v. Brucker*[8] when the Court held

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[4] Brief for Plaintiff at 3, Maxfield v. Callaway, Civil No. K 75-501 (D. Md., Sept. 24, 1975).

[5] 10 U.S.C. § 266(a) (1970) provides in pertinent part that: "Each board convenedfor the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include a n appropriate number of Reserves

Interestingly this alleged error was not raised by plaintiffs until they had been required by court order to exhaust their administrative remedies before the Army Board for Correction of Military Records (ABCMR), Maxfield v. Callaway, Civil No. K 75-501 (D. Md., Sept. 24, 1975). For the first time on October 28, 1975 plaintiffs requested the ABCMR to correct their records on the basis of theviolation of 10U.S.C. § 266(a).

[6] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

[7] For an in-depth discussion of the "Nonreviewability Doctrine" *see* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975).

[8] 355U.S. 579 (1958).

that the Army had given a soldier a less than honorable discharge which, contrary to statute, was based on conduct prior to his military service. The Court specifically noted that when an official exceeds his statutory powers administrative discretion is no longer involved, but rather an illegal act for which there is judicial relief.[9]

Not too surprisingly, there have been relatively few cases involving a direct violation of federal statutes by military officials. In *Curter v. United States,*[10] the Air Force tripped over the cumbersome officer elimination statutory scheme by incorrectly mixing in the implementing regulations the reserve officer and regular officer statutory standards for elimination. By statute reserve officers may be administratively eliminated under procedures which allow a less than honorable discharge, but the burden of proof is on the Government to establish the basis for elimination. Regular officers have the burden of proof to "show cause" why they should not be eliminated, but do not risk less than honorable discharge. The Air Force regulation gave the reserve officer the regular officer burden of proof to "show cause" for retention, but retained the reserve officer risk of a less than honorable discharge—the worst of both worlds and a clear statutory violation. Finding the petitioner's less than honorable discharge illegal, the court ordered the character of the discharge corrected and the case remanded for a determination of the damages due Carter.

In *Frazier v. Callaway*[11] the issue concerned whether section **3258** of title 10[12] permitted Army reserve officers relieved from active duty with any prior Regular Army enlisted service to reenlist; or whether only those officers whose Regular Army enlisted service immediately preceded their commissioning had a statutory right to reenlist. The statute seemed clear enough, providing that "Any former enlisted member of the Regular Army who has served on active duty as a Reserve Officer. . . is entitled to be reenlisted.. . ."[13], and for years the Army had allowed all relieved officers with any prior enlisted service to reenlist without regard to whether they had assumed commissioned status immediately upon giving up enlisted status. With a large officer reduction in force **(RIF)** in the **offing,** however, a personnel policy change was implemented allowing only those RIF'd officers whose enlisted service had immediately preceded commissioning to reenlist. The purpose of the change was to avoid filling the top enlisted grades with former of-

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[9] *Id.* at 582.
[10] 509 F.2d 1150 (Ct. Cl. 1975).
[11] 504 F.2d 960 (5th Cir. 1974).
[12] 10 U.S.C. § 3258 (1970).
[13] *Id.*

ficers thus stifling promotions in the lower enlisted grades. This change was considered legally permissible because the legislative history of the statute supported the narrower interpretation of the reenlistment entitlement.14 Although the Army lost the *Frazier* case at the district court level, on appeal the limited interpretation of the reenlistment entitlement given by the Army was ruled correct. It is equally clear from the decision that had the court disagreed with the "new" intepretation, a denial of due process of law would have been found.

Administrative law judge advocates must scrupulously observe and never underestimate the seemingly simple rule of following statutes. In ***Harmon*** the Supreme Court reached its conclusion based on a "harmonious reading" of two separate statutes, the relationship of which was far from obvious. In ***Carter*** the Air Force contended with a statutory scheme that is a lawyer's nightmare. Finally, in *Frazier* the "plain meaning of the words" of the statute was overcome by resort to the statute's legislative history. Thus, the rule involved may be easy, but its application requires considerable legal skill.

III. FAILURE TO FOLLOW REGULATIONS

THE MAXFIELD ALLEGATIONS:

> 1. **Army** Regulation (AR) 624-100 requires that promotion selection boards for Major determine which officers are "not fully qualified," which are "fully qualified," and which are "best qualified." Only "best qualified" officers are selected for promotion and reserve officers twice identified by a selection board as "not fully qualified" (passed over) for Major are mandatorily relieved from active duty.[15] Recent promotion selection boards for Major have only determined which officers are "best qualified" and have not identified officers not selected for promotion as "fully qualified" or "not fully qualified" as the regulation contemplates. Subsequent to board action, all reserve of-

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[14] The statute had been enacted in response to the need to encourage enlisted members of the Army to accept commissions during the build-up of the officer corps during World War I. The court found that:

> **The purpose of the Act of March 30, 1918, was not to provide preferential treatment for any officer who was at some time in his career an enlisted man, but to satisfy the Army's need for officers with military experience by providing an incentive for enlisted men then in the service to accept temporary reserve commissions.**

504 F.2d at 962.

[15] Army Reg. No. 624-100, paras. 2, 18 & 36 (29 July 1966) [hereinafter cited as AR 624-1001.

ficers not found "best qualified" (*i.e.*, not selected for promotion) have automatically been treated as "not fully qualified" although the selection board never made that specific determination.[16]

2. AR 624-100 provides that "Selection board action is administratively final."[17] This provision was violated by the Secretary of the Army when he "administratively" voided the action of the January 1974 Majors selection board for not selecting enough officers for promotion from the secondary zone.[18]

THE RULE:

Military officials must follow service regulations which bestow a right, benefit, or privilege on an individual, even if the requirement is self-imposed and not in implementation of law.

Numerous federal decisions are available to support the general administrative due process of law rule that the Army is bound by its regulations.[19] Typical examples include the situations where the Army was ordered to reconsider a hardship discharge request because it had not sought an advisory recommendation from the State Director of Selective Service as the regulation required;[20] where an order recalling a reservist to active duty was revoked because the reserve unit had not followed the regulation prescribing the proper determination of unsatisfactory participation in reserve meetings;[21] and where the Army was required to reconsider a military doctor's request for relief from orders to Vietnam because in processing his request lower commanders merely recommended that The Surgeon General deny the request without giving reasons for their recommendations as the regulations required.[22]

Undeniably the rule is broad and considering the sheer number of Army regulations, the opportunity for denial of administrative due process of law by not observing a regulation is immense. The judge advocate's responsibility in legal review of administrative determinations based on regulations is correspondingly great.

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[16] Brief for Plaintiff at 13, Maxfield v. Callaway, Civil No. K 75501 (D. Md., Sept. 24, 1975).
[17] **AR** 624-100, at para. 18*b*.
[18] Brief for Plaintiff at 11, Maxfield v. Callaway, Civil No. K 75-501 (D. Md., Sept. 24, 1975).
[19] Mindes v. Seaman, 453 F.2d 197, 200 (5th Cir. 1971).
[20] Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970).
[21] Konn v. Laird, 460 F.2d 1318 (7th Cir. 1972).
[22] Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970).

In spite of the breadth of the rule, however, certain exceptions do exist which modify its severity. The individual must demonstrate that the failure to follow regulations worked to his prejudice. This rule is well illustrated by the case of the Army doctor who had requested relief from orders to Vietnam for hardship reasons. Lower commanders, by failing to provide reasons for their recommended denial of the request to The Surgeon General as the regulation required, manifestly prejudiced the doctor's opportunity for an informed administrative determination by The Surgeon General.[23] On the other hand, a sailor who claimed his enlistment contract was void because he had been administered the oath by a warrant officer instead of a commissioned officer as required by regulation was unsuccessful. The court reasoned that this was ". . . a mere formal defect . . . which in no way prejudiced him, [and] does not present adequate grounds to cancel an otherwise valid agreement."[24]

In addition, it has been recognized that all regulations do not "bestow rights, benefits, or privileges" on service members. Some regulations are for the benefit of the service and cannot be invoked by the individual. The best example of such regulations appears in connection with the administrative elimination of enlisted personnel. The charge is made frequently that the Army has failed to follow its regulations when a soldier apparently of the quality appropriate for administrative elimination is not so processed. The typical case is when an Army doctor, after completing a routine mental and physical examination of a soldier under criminal charges, recommends administrative elimination. The commander, however, chooses to refer the case to court-martial. The federal courts have consistently ruled that the enlisted elimination regulations exist for the benefit of the Army and that soldiers have no right to "apply" for administrative elimination. It is solely within the commander's discretion, notwithstanding medical or other staff recommendations, to determine whether to initiate administrative elimination proceedings.[25]

A relatively new exception to the due process requirement of following regulations concerns those situations in which the service member acts in bad faith in a personnel determination and then attempts to take advantage of alleged regulatory omissions. One soldier successfully obtained an administrative discharge for homosexuality based on a false admission to his commander of acts committed prior to his entry into the armed services. This ad-

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[23] *Id.* at 1072.
[24] Johnson v. Chafee, 469 F.2d 1216, 1219 (9th Cir. 1973).
[25] Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972).

mission was followed by a medical examination in which the soldier was able to convince an Army psychiatrist as well that he was a homosexual. After encountering problems in civilian life because of the nature of his discharge, he attempted to void it in federal court by claiming that Army regulations required an investigation of his military associates and prior-to-service associations to corroborate his admission. Since this had not been done before his discharge, the Army failed to follow its regulatidns and he asserted that his discharge was invalid. Calling this charge "chutzpah to the nth degree" the court rapidly applied the principle of estoppel.[26]

IV. INADEQUATE PROCEDURES FOR MAKING ADMINISTRATIVE DETERMINATIONS

THE MAXFIELD ALLEGATIONS:

> The officer's evaluation report (OER) appeal system denies procedural due process of law. Specifically, the Department of Army Special Review Board in ruling on claimed substantive errors in OER's does not allow for the personal appearance of the appellant and does not release the basis for its decision to the appellant.[27]

THE RULE:

> *If the individual rights at stake in an administrative determination are constitutionally protected by the due process clause, then the applicable procedures for reaching the determination must at least provide for timely notice and an opportunity to be heard. Procedures more elaborate than this minimum due process may be required in appropriate circumstances.*

"Procedural" administrative due process of law is one of the most difficult legal concepts with which any lawyer works today. Any effort to treat the subject as briefly as in this article must be somewhat suspect and views expressed should be recognized as the

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[26] Wier v. United States, 474 F.2d 617 (Ct. C1. 1973); *accord*, Alston v. Schlesinger, 368 F. Supp. 537 (D. Mass. 1974); Steiier v. United States, No. 174-72 (Ct. Cl., June 25, 1975).

[27] This allegation is not part of the ***Maxfield*** litigation, however, in Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975), an officer discharged for twice failing to be selected for promotion challenged the promotion system on the basis of inadequate procedures before the Department of Army Special Review Board. The procedures for Special Review Boards are set forth in Army Reg. No. 625-105, para. 8-5 (15 May 1974).

generalizations they are. This very difficulty, however, has led to numerous legal articles which usually conclude with the following quotation from the Supreme Court: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[28] This approach epitomizes the difficulty of developing a legal methodology in this area and results in dealing with procedural due process in administrative determinations virtually on a case-by-case basis.[29] The following two-step approach is offered as a guide for analysis of procedural due process issues for military lawyers.

Step one concerns the fundamental inquiry whether the administrative determination concerns a constitutionally protected individual right. Court decisions currently identify three categories of protected individual rights:

(a) property rights (*e.g.*, welfare payments,[30] monthly payments to the next-of-kin of soldiers missing in action (MIA"));
(b) liberty rights—custody (*e.g.*, parole revocation,[32] suspended sentence ordered executed");
(c) liberty rights—stigmatizing result (*e.g.*, suspension from school," characterization of a person as an excessive drinker by publicly posting his name,[35] characterization of military service as less than honorable on a discharge certificate";).

While this first step is usually referred to as a balancing of public interest and private interest, it seems more accurate to view this as an assessment of the fundamental nature of the individual right rather than a comparison of values between what the individual has at stake and what it costs the Government to provide at least minimum procedural protections. If the legal analysis shows that the nature of the administrative determination involves constitutionally protected property or liberty rights, then some form of procedural due process is required and a summary determination by the decision maker will not satisfy the constitutional require

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[28] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961).
[29] For a massive treatment of the "case by case" approach to procedural due process of law in administrative determinations *see* Rogge, ***An Overview of Administrative Due Process,*** 19 VILL. L. REV. 1 (1973).
[30] Goldberg v. Kelly, 397 U.S. 254 (1970).
[31] McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974) (three judge court).
[32] Morrissey v. Brewer, 408 US. 471 (1972).
[33] ***See generally*** Young, ***Due Process in Military Probation Revocation: Has Morrissey Joined the Service?,*** 65 MIL. L. REV. 1 (1974).
[34] Goss v. Lopez, 419 U.S. 565 (1975).
[35] 'Wisconsin v. Constantineau, 400 U.S. 433 (1971). ***But c.f.*** Paul v. Davis, 96 S.Ct. 1155 (1976).
[36] Sims v. Fox. 492 F.2d 1088 (5th Cir. 1974).

ment.

Once it is concluded that a protected private right is involved in the administrative determination, then the second step in the analysis is to determine what process is "due." Part of this analysis is easy. Once a protected right is in issue, then at least "minimum due process" as defined by the Supreme Court is required. This consists of timely notice and an opportunity to be heard by personal appearance before the decision maker.[37] Whether more than minimum due process is required is a more difficult matter. The considerations and policy factors that enter into this analysis are more truly a balancing of the competing private and public interests. Listed below are the five key policy considerations that apply to this balancing of interests. Each is followed by comparative illustrations of the basic nature of the consideration in a military context. The first example for each policy consideration describes a situation mitigating toward fewer procedural protections. The second introduces factors that indicate that greater procedural rights are appropriate:

(a) Nature *of* private right—revocation of post exchange privileges as compared to revocation of entitlement to payments made to MIA dependents.
(b) Status *of* respondent—college student/commissioned officer as compared to welfare recipient/low-ranking enlisted person.
(c) Type *of* procedure applied—an adjudicatory or fact-finding proceeding such as a line-of-duty determination as compared to adversary procedures such as enlisted administrative elimination for misconduct.
(d) Necessity *for* prompt action—relief from command during combat as compared to expulsion of a West Point cadet in peacetime.

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[37] Goss v. Lopez, 419 U.S. 365 (1975). It is safe to conclude that minimum procedural due process consists of notice and an opportunity to be heard. Whether the "hearing" requirement means personal appearance or can be satisfied by merely allowing the individual to submit a written statement is open to argument. In Goss it is clear that hearing means face to face confrontation between the individual and the decision maker. Whether the Goss definition of hearing is a true minimum due process right or restricted to the facts of the case cannot be categorically determined at this time. In Rew v. Ward, 402 F. Supp. 331 (D.N.M. 1975), Air Force procedures which allowed a servicemember only to comment in writing on administrative elimination proceedings pending against the member were held adequate and consistent with Goss. It is difficult to follow this interpretation. In Goss the Supreme Court held that a student merely facing a 10-day suspension is entitled to a personal appearance. It seems obvious that there is much more at stake for a service member facing administrative elimination from the service than for a student merely facing temporary suspension. Accordingly, the service member should be entitled to at least the same 'minimum due process as a suspended high school student—notice and per-

(e) Cost *or* burden on the Government—providing notice and an opportunity to submit a written statement prior to a bar to reenlistment as compared to providing notice and opportunity to be heard with counsel prior to determination that MIA dependents are no longer entitled to pay and allowances.[38]

After assessing the foregoing factors the due process options are considered and the appropriate level of procedural due process applied to the facts. While by no means the exclusive way of organizing due process options, the following is submitted as one way of viewing increasing procedural options that could be provided for administrative determinations involving protected individual rights:

Option I —"minimum due process'' (timely notice and opportunity to be heard).
Option II —I plus right to call witnesses and introduce evidence.
Option III—I and II plus right to counsel.
Option IV—I, II and III plus formal hearing before an impartial decision maker (to include record, review, appeal).

This two-step analysis of procedural due process should serve as a framework within which to analyze most conceivable situations which will require a judge advocate to render a legal opinion. A matrix of several adverse administrative determinations affecting enlisted personnel which contains key information on the procedures for each type of action is noted.[39] It is interesting to ponder how many of these provide procedures that are adequate based on the foregoing analysis. For example, considering what is at stake for the military member in a security clearance revocation determination, are the current procedures which do not afford even "minimum due process of law" as defined in this article ade-

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sonal appearance.

[38] A particularly good demonstration of the application of this balancing test and these five policy considerations in the context of a military case is Hagopian v. Knowlton. 470 F.2d 201 (2d Cir. 1972).

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	DISCHARGE FOR UNSUITABILITY	DISCHARGE FOR CONSCIENTIOUS OBJECTION	REDUCTION FOR INEFFICIENCY	ADMONITION REPRIMAND	REVOCATION OF SECURITY CLEARANCE
Grounds for action	Inaptitude; apathy; behavior disorder; alcoholism; homosexual tendencies.	Religious, moral or ethical opposition to all wars.	Technical incompetence or job-related misconduct	Minor misconduct	Misconduct; improper activities or conduct
Who initiates action?	Immediate unit commander	Individual officer or EM	Reduction authority	Commander; general officer	Commanders specified in para. I-6a. AR 604.5

quate?[40]

One of the most interesting implications of the promotion litigation is that it concerns a relatively new area of individual rights—those that concern employment status. It is one thing to protect individual rights when an agency takes administrative action essentially punitive in nature (*e.g.*, reduction for inefficiency, administrative reprimand, adverse efficiency report), but altogether

Is case heard by board of officers?	Yes, but may be waived in writing	No; interviewed by chaplain & psychiatrist; hearing before CPT or higher.	Only in cases involving E.5 or higher. NCOs on board.	No	No
Governing regulations	AR 635-200, Chap 13; AR 15-6	AR 600-43 (Officers & EM)	AR 600-200 Chap. 7	AR 27-10 Chap. 3; AR 600.7	AR 604-5
Entitled to Counsel?	Consulting JAG Counsel. Representing Lay Counsel before board.	No, but may have civilian counsel at own expense at hearing.	In board cases, rep. lawyer or lay counsel if reasonably available.	NO	NO
Does SJA review?	No, unless requested by discharge authority.	Yes	No	NO	No
Who is final discharg authority	SPCM convening authority	Final approval authority -GCM C/A Disapproval authority - HQDA	Reduction authority (if no appeal).	Initiating officer.	Commanders specified in para. 1-6a, AR 604-5.
Least favorable result	General discharge	Honorable or General Discharge (EM); Under Honorable Conditions (Officers)			
To whom appealed	Discharge Review Bd Army Board for Correction of Military Records.	Army Board for Correction of Military Records; Federal District	Next higher reduction authority.	DCSPER (if Gen Off acted) Art 138, UCMJ.	No formal appeal.
Ultimate result			Reduction of one grade.	Filed in OMPF (if Gen Off so directs).	Security clearance revoked.

This matrix is an abstract of a thorough compilation developed by Major Jack F. Lane, Jr. while a member of the faculty of The Judge Advocate General's School (TJAGSA). It has been revised substantially by Captain Charles A. Zimmerman while a member of the 23d Judge Advocate Officer Advanced Class, and Captain Gregory O. Varo, who as a member of TJAGSA faculty uses the matrix in his instruction.

[40] *Cf.* Greene v. McElroy, *360* U.S. 474 (1959).

another when the issue borders on a right to government employment and active participation in the promotion selection process. The notion of a guaranteed job and advancement on the job is a new one in this society and a highly questionable area for the courts to attempt to control through the due process clause.

V. ABUSE OF DISCRETION

THE MAXFIELD ALLEGATION:

> The Secretary of the Army abused his discretion when he voided the Majors list recommended by the promotion selection board convened in January 1974 and convened a second board to reconsider promotion selections with an emphasis on youth.[41]

THE RULE:

> ***Administrative determinations which are within the discretionary authority of military officials generally are not violative of administrative due process of law as abusive simply because the individual concerned disagrees with the result, or a different determination is more logically sustained by the facts. Only if the determination is arbitrary and capricious or concerns a question of the military status of an individual will due process standards be applied.***

Abuse of discretion as a violation of administrative due process of law is the newest concept in fairness in reaching administrative determinations. As such it is the least well defined aspect of administrative due process of law and is further confused by the frequently cited proposition that purely discretionary actions of military officials are not subject to review by the federal courts.[42] The question then becomes: If a putative right is not enforceable at law, is it a right at all?

While no one has very clearly answered the question whether individuals are entitled to be protected from abuse of discretion under the guise of administrative due process of law, certain broad principles can be identified for the purposes of analysis of military administrative determinations.

First, the federal courts are sensitive to any situation in which the plaintiff alleges that the military is illegally exercising jurisdic-

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[41] Brief for the Plaintiff at 14, Maxfield v. Callaway, Civil No. K 75501 (D. Md., Sept. 24, 1975).

[42] *E.g.*, Mindes v. Seaman, 501 F.2d 175 (5th Cir. 1974). *See generally* Peck, *supra* note 7.

tion over him. The well established procedure of collaterally attacking the jurisdiction of a court-martial through habeas corpus petition is the best example of this sensitivity.[43] This judicial attitude is also applied to noncriminal situations when the individual alleges that he is illegally being forced to serve as a soldier (*i.e.*, he claims to have no military status).[44] The current situation in which administrative discretion is most frequently challenged on a jurisdictional theory concerns alleged unfulfilled recruiting promises in enlistment contracts.[45] It is well established that if the plaintiff can show that the military officials have erred in their administrative interpretation of the enlistment contract, the courts will order the military to release the individual from military control and jurisdiction. The administrative due process of law standard applied for abuse of discretion in these situations is de novo review of the facts in terms of standard contract law.[46]

Conscientious objector applications are the second situation in which abuse of discretion has been successfully asserted as a standard of administrative due process of law.[47] It too is fundamentally jurisdictional in nature in that the applicant is resisting a military service obligation. The "any basis in fact" standard is the well established test for abuse of discretion in evaluating an administrative determination to deny a conscientious objector application. At one point prior to the Vietnam War era this test was literally applied by the courts. If there seemed to be any reason at all to support the denial of the application by the military officials, it was sustained by the courts. By the end of the Vietnam War the "any basis in fact" standard for evaluation of the exercise of discretion had become considerably more strict. No longer was the military successful in cases in which the conscientious objector application was administratively denied because the religious conviction had been recently acquired, had occurred shortly after the receipt of orders to the combat zone, or the applicant had received considerable educational benefits at military expense prior to acquiring religious convictions incompatible with military service. It became necessary to base administrative determinations on a logically connected and factually supported finding relating directly to the sincerity of the professed religious beliefs.[48]

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[43] *See generally* Strassburg, *Civilian Judicial Review of Military Criminal Justice*, *66* MIL. L. REV. 1 (1974).

[44] Schlanger v. Seaman, 401 U.S. 487 (1971). *See generally* THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, SCHOOL TEXT, JUDICIAL REVIEW OF MILITARY ACTIVITIES, paras. 5.10-.12 (Aug. 1975).

[45] *E.g.*, Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974).

[46] *Id.* at 750.

[47] *E.g.*, Negre v. Larsen, 401 U.S. 437 (1971).

[48] *See generally* Zillman, *In-Service Conscientious Objection: Courts, Boards and*

While this higher discretionary due process standard imposed by the courts may not seem unreasonable upon first consideration, in the context of the typical conscientious objector case it was extremely difficult for the military authorities to prevent fraudulent applications. What was intended to protect a minute element of our society became with the higher standard for review of abuse of administrative discretion a convenient way to avoid military service. Under the stricter administrative reyuirement a mildly clever individual could easily fabricate a religious conviction entitling him to conscientious objector status. "Circumstantial evidence," experience, common sense, and evaluation of an applicant's demeanor were all severely diminished as factors that could legitimately be relied upon by a military official in exercising discretion. The transformation of the "any basis in fact" test into a plenary review of the factual basis of an administrative decision exemplifies how the application of due process rights to discretionary determinations can effectively make the judicial, rather than the executive branch, the decision maker.

The third situation in which the courts have been willing to enforce a due process right to protection from abuse of discretion concerns those cases in which the Government has so abused its position as to make the result of its actions unconscionable. A classic case is *Robinson v. Resor*[49] where the Army accepted a resignation from a warrant officer hospitalized with known mental problems and separated him from the service with a discharge under other than honorable conditions. Upon judicial challenge the court found this to be such a flagrant abuse of discretion as to become an ". . . overreaching leap into the abritrary and inequitable"'[50] and a denial of due process of law.[51] Simply stated, the courts will not ignore a blatant abuse of discretion, and judge advocates must at times protect a commander from himself by pointing out administrative determinations vulnerable to attack as abusive.'?

While sweeping conclusions cannot be reached in abuse of discretion cases, the situation may be summarized as follows. The courts have not been eager to review the exercise of discretion by military authorities and to date have enforced an administrative due

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the Basis In Fact. 10 SAN DIEGO L. REV. 108 (1972).

[49] 469 F.2d 944 (D.C. Cir. 1972).

[50] *Id.* at 951.

[51] *Id.* at 949.

[52] ***See also*** Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970) where a commander's decision to bar a civilian from a military installation (causing the loss of her job on the installation) simply because political leaflets were found in the trunk of her automobile during a routine gate search (with no indication of any plans to distribute the leaflets on post) was considered abusive and subject to judicial relief.

process of law right consistently only in those discretionary situations in which the determination concerned military status (jurisdiction) and when the court felt the determination was in error to the point of becoming arbitrary and capricious. If there is a trend, it is to a broader scope of review of discretionary actions and correspondingly a greater administrative due process of law protection from erroneous administrative determinations.[53]

VI. CONCLUSION

The litigation challenging the Army promotion system is currently at a standstill while the Army Board for Correction of Military Records (ABCMR) attempts to apply an administrative remedy to the situation.[54] Whether the ABCMR will be able to moot this litigation is probably the greatest challenge it has ever had. Regardless of the outcome of the ***Maxfield*** case, however, all military lawyers can apply the administrative due process of law principles raised in this litigation as a useful methodology for reviewing Army administrative determinations. When properly followed, these military administrative due process of law standards assure that administrative determinations serve the official purpose intended yet honor the fundamental right of all soldiers to be treated fairly.[55]

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[53] *See* Denton v. Secretary, 483 F.2d 21 (9th Cir. 1973), for an example of federal court review of an administrative determination not involving jurisdiction or blatant abuse of discretion. Should this standard of review become the rule, it is difficult to think of an administrative determination involving discretion that would not be reviewable.

[54] Maxfield v. Callaway, Civil **No.** K 75-501 (D. Md., Sept. **24, 1975).**

[55] Ironically, Maxfield was selected for promotion by the next Majors promotion selection board. For obvious reasons, this does not satisfy Major Maxfield's complaints with the system.

NOTE
REQUESTS FOR TRIAL BY MILITARY JUDGE ALONE UNDER ARTICLE 16(1)(B) OF THE UNIFORM CODE OF MILITARY JUSTICE*

The accused in a court-martial may choose to be tried by judge alone,[1] waiving his right to trial by a court composed of members, just as his civilian counterpart may waive his right to a jury trial in a federal district court.[2] Article 16 of the Uniform Code of Military Justice provides that an accused may be tried by military judge alone

> . . . if before the court is assembled the accused, knowing the identity of the militiiry judge and after consulting with defense counsel, requests in writing a court composed only of a military judge and the military judge approves [the request].[3]

Despite its apparent simplicity, this portion of Article 16 has been the subject of much litigation.

In interpreting this statutory language, military courts have concluded that courts-martial lacked jurisdiction to try cases where no written request for trial by military judge alone was submitted,[4]

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

[1] Uniform Code of Military .Justice. art. 16(1)(B), 10 U.S.C. § 816(1)(B) (1970) [hereinafter cited as UCMJ].

[2] FED. K. CRIM. P. 23. This similarity between the federal and military practice is not surprising in light of the fact that one of the stated purposes of the Military Justice Act of 1968 was to "streamline court-martial procedures in line with procedures in U.S. district courts." S. REP. NO. 1601, 90th Cong., 2d Sess. (1968), ***reprinted in*** U.S. CODE CONG. & AD. NEWS, 90th Cong.. 2d Sess. 4503 (1968).

[3] UCMJ, art. 16(1)(B). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 53*d*(2).

[4] United States v. Dean, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970). ***See also*** United States v. Nix, 21 U.S.C.M.A. 76, 44 C.M.R. 130 (1974); United States v. Fife, 20 U.S.C.M.A. 218, 43 C.M.R. 58 (1970). ***Dean*** was given retroactive effect in Belicheshy v. Bowman, 21 U.S.C.M.A. 146, 44 C.M.R. 200 (1972). Failure to submit a written request is jurisdictional error requiring expungrnent of the conviction from accused's record even after sentence has been executed and the accused discharged from the service. Del Prado v. United States. 23 U.S.C.M.A. 132, 48 C.M.R. 478 (1974). However, the mere absence from the record of the written request is not jurisdictional error, when the existence and sufficiency of the request is established by other portions of the record. United States v. Randolph, 49 C.M.R. 336 (NCMR 1974); United States v. Cummings, 46 C.M.R. 1093 (ACMR 1973), ***petition denied.*** ____ U.S.C.M.A. ____, 46 C.M.R. 1323 (1973); United States v. Colonna, 46 C.M.R. 687

where the request inadvertently contained either the name of the accused" or the name of the defense counsel[6] in place of the name of the military judge, or where the name of the military judge was left blank on the request form throughout the trial.[7] Courts-martial have also been found to lack jurisdiction where the request contained the uncorrected name of a military judge other than the name of the judge who actually tried the case.[8] In addition, the failure to comply with the specific provisions of Article 16 has resulted in findings that the court-martial lacked jurisdiction to try an accused."

To this extent, the law is clear. Confusion exists, however, when there is a request in which the name of the originally detailed judge has been changed to that of the judge who actually tried the case, or when the name of the judge initially has been left blank but is added correctly at a later date. A literal reading of Article 16 indicates all that is required for compliance is a correct and completed request by the accused prior to assembly of the court.]" However, the United States Court of Military Appeals may have rejected such a literal reading in *United States v. Rountree*[11] where the court found jurisdictional error when "the military judge who functions is different from the one named in the accused's request."[12] At trial, after the military judge satisfied himself that the accused understood the significance of a request for trial by military judge

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(ACMR 1972).

[5] United States v. Owens, SPCM 9595 (ACMR 2 May 1974)(unpublished opinion).

[6] United States v. Thomas, 49 C.M.R. 266 (ACMR 1974).

[7] United States v. Montanez-Carrion, 22 U.S.C.M.A.418, 47 C.M.R.355 (1973); United States v. Grote, 21 U.S.C.M.A519, 45 C.M.R.293 (1972); United States v. Brown, 21 U.S.C.M.A. 516, 45 C.M.R. 290 (1972); United States v. Johnson, 46 C.M.R. 464 (ACMR 1972). Failure of the military judge to approve the request in writing is not jurisdictional error. United States v. Campbell, 47 C.M.R.963 (ACMR 1973).

[8] *See* United States v. Hountree, 21 U.S.C.M.A. 62, 44 C.M.R. 116 (1971).

[9] *See* United States v. Dean, 20 U.S.C.M.A. 212, 215, 43 C.M.R. 52, 35 (1970), where the court stated "[W]e are not free to alter a plain requirement of the law, even though in this instance [no prejudice resulted to the accused]." *But cf.* United States v. Morris, 23 U.S.C.M.A. 319, 49 C.M.H.653 (1975), where the court found the Article 16 requirement that the request be submitted prior to assembly to be nonjurisdictional in nature.

In United States v. Morris. 23 U.S.C.M.A. 319, 323, 49 C.M.R.653, 657 (1975), the Court of Military Appeals found that, for purposes of Article 16, a court-martial is assembled "after the court's preliminary organization and just before the challenge to the court members." The court found the requirement of requesting prior to assembly to he nonjurisdictional in nature. thus a request for trial by military judge alone may be made and approved after assembly. The military judge must "balance the interests of the accused against the Government's loss of the contemplated benefits of Article 16 [*i.e.*, availability of court members to perform normal military duties when trial is to military judge alone]." *id.* at 324, 49 C.M.R. at 658.

[10] 21 U.S.C.M.A. 62, 44 C.M.R. 116 (1971).

[11] *Id*

alone, he struck the previous name from the written request and substituted his own. The appellate court reversed, and noted that under the circumstances the accused should have executed a new written request to meet the jurisdictional requirements of Article 16. Although it is not clear from the case, it appears that the change was made during a preassembly Article 39(a) session. Additionally, there was no contention by the accused that he did not acquiesce in the change. Thus, under this interpretation, ***Rountree*** does not support a literal reading of Article 16.

The nonliteral interpretation of Article 16 was adopted by the Army Court of Military Review in ***United States v. Muller.***[13] In ***Muller,*** the name of the military judge in the request for trial by military judge alone had been left blank. During the Article 39(a) session, the military judge filled the blank with his name after determining the accused knew who was to serve as military judge. The court analogized the incomplete request in ***Muller*** to the incorrect request in ***Rountree*** and concluded that reversal was merited. Similarly, in ***United States v. Finstad***[14] the Army Court of Military Review found jurisdictional error because the name of the new military judge was penned over that of the initially detailed judge.

However, in ***United States v. Paschall***[15] the Army Court of Military Review approved a change of the name of the military judge by defense counsel, after consultation with the accused, as the "legal equivalent of a new request for trial by military judge alone"[16] required by ***Rountree.*** The court distinguished *Paschall* from ***Finstad,*** and sustained the conviction, because unlike the situation in ***Finstad,*** there was information available as to "when, by whom, and under what circumstances the appellant's request was changed."'[17] Although in *Paschall* the court distinguished

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[13] 46 C.M.R. 889 (ACMR 1972); *accord,* United States v. Robinson, 46 C.M.R. 846 (ACMR 1972), where the court relied upon ***Rountree*** as authority to find lack of jurisdiction when the name of the military judge was lined out and the new name inserted. Although the accused had initiated the change, the court stated that Robinson should have executed a new request. Id. at 847.

[14] 45 C.M.H. 613 (ACMR 1972).

[15] 49 C.M.R. 181 (ACMR 1974).

[16] *Id.* at 182.

[17] Id. Although in *Finstad* the court intimated that part of the reason for reversal was the military judge's failure to inquire into the circumstances of the change, 45 C.M.R. at 614, and although this intimation was repeated in Paschall, 49 C.M.R. at 182, it is suggested that what must have been determinative was not the judge's inquiry or his failure to inquire, but rather the availability of information relating to the circumstances of the change. This conclusion necessarily follows because Paschall elsewhere plainly states that at trial "no mention was made of the alteration" by the military judge. United States v. Paschall, 49 C.M.R. 181, 182 (ACMR 1974).

Finstad, it made no mention of ***Muller,*** despite the fact that in ***Muller*** the information as to "when, by whom, and under what circumstances the appellant's request was changed" was fully available. The ***Paschall*** and ***Muller*** cases thus appear contradictory.[18]

The Navy Court of Military Review also has attempted to deal with the issue of whether a military judge has been properly identified on the request for bench trial. In ***United States v. Sigala,***[19] the Navy Court, in dictum,[20] found no legal significance in whether the name of the military judge was entered before or after the accused signed the request, so long as the completed request was submitted before assembly of court. But in ***United States u. Boatwright,***[21] the Navy Court of Military Review found jurisdictional error when the military judge corrected the name of the judge on the request, although this was done during the Article 39(a) session with the approval of the accused, and despite the accused's acknowledgment that he knew who was to be judge when he signed the request. Thus, as with the Army Court of Military Review, decisions of the Navy Court of Military Review on the issue are not entirely in accord.

It is doubtful that the issue of what constitutes proper identification of the military judge on the request for trial by judge alone will be fully settled until the Court of Military Appeals addresses the issue directly. Until such time, the following proposal is suggested as the best resolution of the issue. According to the Senate Report which accompanied the Military Justice Act of 1968, when waiving trial by military jury under Article 16 "the accused is entitled to know the identity of the military judge and to have the advice of counsel" before he makes the **request.**[22] Where the request for trial by military judge alone does not reflect that the **accused** knows the

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[18] That in Paschall there was a change in the name, and in Muller the addition of the name to a blank, should not be distinguishing. In United States v. Brown, 21 U.S.C.M.A. 516, 518, 45 C.M.R. 290, 292 (1972), the Court of Military Appeals noted that "[r]ather plainly stated there is no manifest difference between entering the name of a different judge than that erroneously set forth in the written request, as in Rountree, and failing to enter the name of the judge at all."

Likewise, there should be no manifest difference if the judge's name is entered in a blank. That in Paschall the defense counsel made the change, and in ***Muller*** the judge acted, should also not distinguish the cases, especially since in both instances the accused was aware of what was transpiring and in both instances the actions occurred prior to assembly.

[19] 47 C.M.R. 19 (NCMR 1973). The Army Court of Military Review followed *Sigala* in United States v. Turner, SPCM 10141 (ACMR 23 May 1975) (unpublished opinion).

[20] This was dictum because the court found that, even prior to the Article 39(a) session. the request had been completely filled out. 47 C.M.R. at 21. However. the implication of the court is clear.

[21] NCM 73-0198 (NCMR 15 Nov. 1972) (unpublished opinion).

[22] S. REP. No. 1601, 90th Cong., 2d Sess. (1968), reprinted in U.S. CODE CONG. & AD.

identity of the military judge, there is clear jurisdictional error if the military judge nevertheless accepts the request and then assembles the court. However, if the military judge, with the approval of the accused (who has counsel available to him) corrects the request, and then accepts the request and assembles the court, it seems plain that the requirements of Article 16 and the Senate Report have been met. There is nothing in either Article 16 or its legislative history which would indicate that more than one request is impermissible. Furthermore, since the Court of Military Appeals stated in ***United States v. Dean***[23] that it is "not free to alter a plain requirement of the law [which requires a written request for trial by judge alone],"[24] neither should this other equally plain requirement of correct submission prior to assembly be altered. Since the military judge has been vested with discretion to either accept or deny the request, and with discretion to deny withdrawal of a request previously made,[25] it follows that he has the discretion to accept a request after it has been previously denied. If the military judge accepts a faulty request without correction, jurisdictional error results; the proceedings are void, and no prejudice can result to the accused. If the military judge accepts the request after making appropriate changes, then he is not only acceding to the desires of the accused, but he is also furthering one of the principal purposes for making bench trials available, that is, permitting soldiers who would otherwise serve on the court to perform their normal military duties.[26] Jurisdictional objection to this approach would risk elevation of form over substance.

If this is the best resolution of the issue, then ***Rountree*** should be reexamined to determine if any amelioration is possible. In ***Rountree,*** the military judge apparently unilaterally corrected the name of the judge on the request without consulting the accused."[27] If this is viewed as the true ground for reversal, then the decision in ***Rountree*** is entirely compatible with the suggested resolution, although the intimations of the opinion would be somewhat narrowed. The Navy and Army Courts of Military Review decisions in ***Sigala*** and ***Paschall*** are entirely compatible with this approach, although the decisions in ***Boatwright*** and ***Muller*** are

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NEWS, 90th Cong., 2d Sess. 4504 (1968).

[23] 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).

[24] ***Id.*** at 215, 43 C.M.R. at 55.

[25] United States v. Bryant, 23 U.S.C.M.A. 326, 49 C.M.R. 660 (1975); ***see*** United States v. Winn, 46 C.M.K. 871 (ACMR 1972), *petition denied*, ___ U.S.C.M.A. ___, 46 C.M.R. 1324 (1973).

[26] United States v. Morris, 23 U.S.C.M.A. 319, 324, 49 C.M.K. 658, 658 (1975).

[27] The military judge did satisfy himself that Kountree understood the significance of a request for trial by military judge alone. United States v. Rountree, 21 U.S.C.M.A. 62, 44 C.M.R. 116 (1971).

not. In *United States v. Dean*,[28] where there was no written request of any kind, the Court of Military Appeals stated that if the election to waive trial by a court composed of members were made after the court was called to order, the proper procedure would be to recess the court while the request was executed in writing.[29] A recess is entirely appropriate when there is no written request. In *Rountree*, however, this cautionary advice apparently was used as authority for the proposition that when the judge who functions is different than the judge named on the request, the accused must execute a new request.[30] Again, there is minimal conflict. Under the suggested view, the accused has effectively executed a new request when the military judge or the defense counsel makes the appropriate corrections prior to assembly and with the approval of the accused.[31] Here, unlike where there is no written request, there should be no need for a recess.

Of course, the best approach to the problem is to avoid it completely by ensuring that the request for trial by military judge alone is correct prior to the first session of court. If this is not possible, a completely new request executed during recess would also clearly meet jurisdictional requirements. But, if fairness to the accused and the wording of Article 16 are controlling, there is no reason why, assuming the accused approves and has counsel available, the military judge should not be able to correct the request in open court.

WILLIAM R. BALDWIN III**

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[28] 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).
[29] *Id.* at 215, 43 C.M.R. at 55 (1970).
[30] 21 U.S.C.M.A. 62, 44 C.M.R. 116.
[31] If need be, analogy can be made to agency law where the military judge and defense counsel would become agents of the accused in executing a new request.
**Captain, JAGC, U.S. Army. B.S., 1971, United States Military Academy. Captain Baldwin is currently on excess leave and is attending law school at Washington and Lee University.

BOOKS RECEIVED AND BRIEFLY NOTED

Alexander, Yonah, ed. *International Terrorism: National, Regional and Global Perspectives.* New York, London, and Washington: Praeger Publishers, 1976. Pp. **348,** bibliography and index. **$22.50.**

International Terrorism, edited by Yonah Alexander, is a collection of original essays written by a group of academicians teaching in United States and Canadian universities who have joined to express opinions on what constitutes terrorism, its causes, and how society should deal with terrorism. As stated by Arthur Goldberg in the Foreword, the purpose of the book is to give a comprehensive account of the problem of terrorism in today's world. It is not a description of the status of international law on the subject of terrorism, nor does it present any novel solutions to this political problem. It does, however, make a comprehensive study of terrorism in all of its various aspects, and its perspective of the problem and approach to dealing with it should be taken into account by lawyers and political theorists.

The essays consider terrorism from various perspectives. Part I of the book concerns North and South America. It begins with a description of Canada's approach to international terrorism in supporting, to whatever extent possible, the adoption of conventions aimed at defining terrorism and providing measures for control, and at the same time trying to achieve these objectives on a bilateral basis where global or regional cooperation is impossible. The United States perspective addresses the problem not on an international scale but from United States experience with terrorism from the Ku Klux Klan to the Weathermen and the Symbionese Liberation Army. There then follows a discussion of terrorism in Latin America. Part 11, concerning Europe and the Soviet Union, is devoted mainly to the problem of Northern Ireland and Soviet support of Palestinian terrorism. Part III of the book is devoted to Asia and Africa and Part IV to the Middle East. The final part gives a perspective of states addressing the problem of terrorism in the United Nations.

The problem, as is indicated by the presentation of these various perspectives in one book, is that if international terrorism is addressed as a whole from such divergent viewpoints, there will never be any agreement on how to control it. Terrorism is intimately connected with the Laswellian formula of who gets what, where and when. States will support or denounce terrorism to meet their own needs and follow their own political convictions. Western states with a particularly high regard for individual human life, may pay

terrorists to rescue kidnapping victims. Third World states permit acts of terrorism as "self-determination" or "anti-colonialism." Socialist states find terrorism a natural part of their theory of revolution. If there is to be success in limiting terrorism or making it less brutal, it is by not trying to approach it in its widest sense where there may never be any international agreement. It is better to seek particular limits in areas where agreement may be found, as in an agreement outlawing the mailing in the international postal system of bombs or explosivesor the limitationof access to materials which might be used to construct atomic weapons. This is the suggestion made in the last chapter of the book, and it might well sum **up** the convictions of all the contributing writers. All the views of the various states in the international community must be considered before anything can be accomplished to regulate terrorism. Given a broad understanding of the divergent views, the international community must then attack those specific areas in which a consensus can be achieved.

Bailey, Thomas A., and Ryan, Paul B., *The Lusitania Disaster*. New York: The Free Press, 1975. Pp. 372, bibliography and index. $10.95.

Thomas A. Bailey, and Captain Paul B. Ryan, U.S. Navy Retired, have combined their energies to refute recently revived contentions that the *Lusitania* sank in only .eighteen minutes because she carried a cargo of secret explosives; that she was an offensively armed British ship of war (after all her silhouette had appeared in the 1914 version of *Jane's Fighting Ships);* that Winston Churchill conspired to have her sunk in order that the United States would be drawn into the World War, and others. Both authors are presently associated with Stanford University, Bailey is Byrne Professor of American History, Emeritus, and the author of books on diplomatic history and Ryan is a Research Associate at the Hoover Institution on War, Revolution and Peace. In the preparation of this exhaustively researched and well documented work (copious notation guides readers to the authors' sources),the authors consulted British Admirality records, briefs and other records from the liability litigation spawned by the *Lusitania's* sinking, and a collection of correspondence and archival materials collected by the Hoover Institution.

While the primary focus of the book is the debunking of the myths which surround the ship's destruction, readers with an interest in international law will appreciate the authors' treatment of the complimentary illegalities of the British practice of mining large portions of the North Sea and the German interdiction of the waters surrounding Great Britain and Ireland by the threat of sinking

even unarmed enemy merchantmen which ventured into that area. These international law problems are not viewed in isolation, but rather are tied to the warring states' preceived economic and military requirements. In conclusion, the authors somewhat sadly remind us that the system which provoked the sinking of the ***Lusitania*** on May 7, 1915 did not vanish with the Treaty of Versailles; a rough equivalent reappeared in the conduct of World War II submarine operations against merchant ships. Through their analysis of both the situation out of which the Lusitania's sinking arose and the particular facts of that tragedy, the authors give us cause to ponder the future of conventional rules for submarine warfare.

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