

MILITARY LAW

REVIEW

VOL. 65

Articles

DUE PROCESS IN MILITARY PROBATION REVOCATION:
HAS MORRISSEY JOINED THE SERVICE?

LIABILITY OF THE STATIONING FORCES FOR "SCOPE
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MILITARY LAW REVIEW

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DUE PROCESS IN MILITARY PROBATION REVOCAION: HAS *MORRISSEY* JOINED THE SERVICE?*

By Major Rufus C. Young, Jr.**

I. INTRODUCTION

The Supreme Court afforded substantial procedural protections¹ to parolees facing parole revocation when it decided in *Morrissey v. Brewer*² that constitutional due process safeguards were to be applied to parole revocation proceedings. In *Gagnon v. Scarpelli*³ decided on May 14, 1973, less than a year after *Morrissey*, the Supreme Court extended procedural due process protections to probation revocation proceedings. Of the armed services, however, only the Army has determined⁴ that the procedural protections mandated by the Supreme Court in *Morrissey* and *Scarpelli* are available to the military man facing vacation of a suspended court-martial sentence.

The comments prompted by the *Morrissey* decision have been numerous⁵ but none have provided a detailed post-*Morrissey* analy-

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

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¹ The due process protections prescribed by the Court were familiar ones. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

² 408 U.S. 471 (1972).

³ 411 U.S. 778 (1973).

⁴ Department of the Army Message 1972/12992, reprinted in *THE ARMY LAWYER*, Jan. 1973, at 13. (The application of *Morrissey* was limited to vacation of suspended sentences to confinement.) Since this article was prepared, The Judge Advocate General of the Navy has expressed the opinion that the procedural safeguards set forth in *Morrissey* and *Scarpelli* should be applied to the proceedings to vacate the suspended court-martial sentences to confinement. Letter of The Judge Advocate General of the Navy JAGN ltr JAG: 204.2: JAB: mkn ser 1488 of 22 Feb. 1974. Regulations implementing this opinion have not yet been promulgated.

⁵ See, e.g., *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1. 95 (1972); Cohen, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972); Loenstein, *Accelerating Change in Correctional Law: The Impact of Morrissey*, CLEARINGHOUSE REV., Jan. 1974, at 528.

sis of the procedural due process protections now applicable to revocation of parole and probation,⁶ or the termination of military probation.⁷

Present military procedures for vacating more serious suspended court-martial sentences are prescribed by the Manual for Courts-Martial.⁸ The Manual provides general guidance⁹ and sets forth a sample record¹⁰ to be followed when hearings are required.” Because the Manual predates *Morrissey*, it contains no provisions covering some of the matters which merited the Court’s attention in *Morrissey*.¹²

As the significance of the *Morrissey* and *Scarpelli* decisions becomes more widely understood, it appears increasingly likely that the validity of present military probation revocation procedures will be challenged in the federal courts.¹³ Habeas corpus attack in this instance is simplified because the Uniform Code of Military Justice

⁶The American Bar Association’s Commission on Correctional Facilities and Services has surveyed state parole boards to determine compliance with *Morrissey*. ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, SURVEY OF PAROLE REVOCATION PROCEDURES (Jan. 1973).

⁷It is clear that suspension of a court-martial sentence places the accused in the status of a probationer. *United States v. May*, 10 U.S.C.M.A. 358, 27 C.M.R. 432 (1959); *see United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

⁸MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.) [Hereinafter referred to as MANUAL].

⁹MANUAL, para. 97*b*.

¹⁰MANUAL, app. 16. Sample Record of Proceedings to Vacate a Suspended Sentence [Hereinafter referred to as *Sample Report*].

¹¹Hearings incident to vacation are presently required only in cases involving vacation of a suspended sentence of a general Court-martial, or of a special court-martial sentence which includes a bad-conduct discharge. Art. 72, UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ or the CODE. The Uniform Code of Military Justice is codified in 10 U.S.C. §§ 801-9401. While the Manual provides some guidance for the conduct of vacation hearings, there is little other guidance on the subject. Articles that have addressed the subject are *Newsome*, *Vacation of Suspension*, 20 JAG J. 35 (1965); *Johnson*, *Vacation of Suspension*, JAG J., May 1952, at 14; and Comment, *Vacation of Suspended Sentences*, JAG J., Nov.-Dec. 1959, at 15.

¹²For example, there is no Manual requirement for a prompt probable cause hearing upon the suspended probation violator’s reconfinement, as required by *Morrissey*. See section V.A. p. 19 *infra*.

¹³See Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971); Comment, *The Effect of Federal Court Constitutional Law Decisions on Military Law*, 10 SAN DIEGO L. REV. 158 (1972).

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(UCMJ) has no provision for direct review of proceedings held to vacate suspended court-martial sentences.¹⁴

In addition to causing concern on the part of judge advocates, the potential impact of *Morrissey* on the services requires interest at the highest military levels for several reasons. First, it would seem unwise, in the era of the all volunteer force, to deny military men rights granted civilians by the *Morrissey* and *Scarpelli* decisions. Secondly, elimination of the draft and concern for the growth in the military manpower budget suggest that the armed forces will be under increasing pressure to use their trained personnel more effectively. The increased use of probationary suspensions of court-martial sentences, as an alternative to extensive (and expensive) confinement is suggested as one source of manpower conservation.

Before the wide-scale use of military probation is adopted as a partial remedy to manpower problems, however, the full implications of *Morrissey* must be understood. Armed forces policy makers must know what rights must be afforded the probation violator, and what consequences grow from the exercise of those rights,¹⁵ before a policy favoring increased use of probation is adopted.¹⁶

The Supreme Court's recent decisions in *Morrissey* and *Scarpelli* provide an appropriate contemporary framework for an analysis of the validity of military procedures for vacating suspended court-martial sentences. Review of the judicial growth of servicemen's rights and the legislative history of military probation will establish that *Morrissey* and *Scarpelli* are applicable to the armed forces. Once it has been established that the *Morrissey* and *Scarpelli* protections are available to the military probationer, these cases and their progeny in both parole and probation revocation will be more

¹⁴ For a discussion of habeas corpus attack on court-martial proceedings, see *Developments in the Law, Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208-38 (1970).

¹⁵ A Michigan study indicates that granting parolees extensive rights in the revocation process has not resulted in fewer grants of parole. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 194 (1964).

¹⁶ This article will not deal with the procedures for granting and supervising military probation. For a discussion of those subjects, see Bamberger, *Military Probation*, April, 1974 (unpublished thesis presented to The Judge Advocate General's School, Charlottesville, Va.). Military parole, a term used to refer to the early release from federal or military prisons of military prisoners who are not to be returned to duty in the armed forces but who instead are subject to the supervision of the Federal Probation Service, is similarly beyond the scope of this article.

closely examined and compared with present military procedures.” Although military procedures are basically sound, the comparison will reveal deficiencies in military probation revocation procedures. As deficiencies are encountered, methods for bringing military procedures into conformity with the *Morrissey* and *Scarpelli* requirements will be offered.

Finally, a directive which would fully implement *Morrissey* and *Scarpelli* in each of the services will be proposed. With a few modifications the proposed directive could also serve as a change to the Manual for Courts-Martial. A proposal for a change in the Uniform Code of Military Justice to implement *Morrissey* fully, and to streamline present probation revocation procedures, will also be suggested.

II. THE *MORRISSEY* AND *SCARPELLI* CASES

A. THE DECISIONS

The Supreme Court decided *Morrissey v. Brewer*¹⁸ on June 29, 1972. In an opinion by Chief Justice Warren Burger, the Court held that *significant core values* of liberty, within the scope of the fourteenth amendment, were involved in the decision to deprive a parolee of his conditional liberty. Therefore, the due process clause of the fourteenth amendment was held to apply to parole revocation proceedings.¹⁹ The Court specifically held that when a parolee is re-confined pending parole revocation proceedings, he is entitled to a prompt preliminary hearing to determine whether there is probable cause to believe parole has been violated.²⁰ The Court also held that in addition to the preliminary hearing, the parolee is entitled to a final hearing, on the ultimate question of whether, considering all the circumstances, parole should be revoked.²¹

¹⁷Precedents for both parole and probation revocation will be used interchangeably inasmuch as there is no longer a significant due process distinction between the two. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973); *People v. Vickers*, 8 Cal. 3rd 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1973).

¹⁸408 U.S. 471 (1972).

¹⁹*Id.* at 482.

²⁰*Id.* at 485.

²¹*Id.* at 487-88. Justice Brennan, with whom Justice Marshall joined, concurred in the holding and the result, but would have gone further to decide whether the parolee facing revocation was entitled to the assistance of retained counsel. *Id.* at 490. Justice Douglas dissented in part, disagreeing primarily with the Court's approval of confinement of the accused pending the final determination of the ultimate issue of revocation. *Id.* at 491.

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Morrissey had been convicted in Iowa in 1967 for the false drawing and uttering of checks, and sentenced to not more than seven years confinement. He was paroled from the Iowa State Penitentiary in 1968. Seven months later, on the order of his parole officer, Morrissey was arrested at his home and confined in the county jail. His parole officer reported to the state parole board that Morrissey had violated parole by buying a car under an assumed name, operating it without his parole officer's permission, giving false statements to police regarding his address and insurance following a minor accident, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer.

One week after his arrest, and following review of the parole officer's *ex parte* report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the Iowa State Penitentiary. On appeal from the denial of his petition for habeas corpus, Morrissey argued that the revocation of his parole without a hearing denied him due process. Iowa contended that no hearing was required.²²

The Supreme Court agreed with Morrissey, and held that in the typical parole revocation, due process required **two** hearings. The first is an informal preliminary hearing to be held with reasonable promptness at or near the place of the alleged violation, when the parolee is confined pending final revocation action. The purpose of the informal preliminary hearing is to determine whether there is probable cause to believe a parole violation has occurred.²³ The second is a more comprehensive hearing to be held after the parolee is returned to prison. The purpose of the second hearing is to review the probable cause determination, and to determine whether revocation of parole is warranted.²⁴

In *Gagnon v. Scarpelli*,²⁵ the Supreme Court extended the *Morrissey* holding to probation revocation proceedings. Scarpelli had been convicted of armed robbery by a Wisconsin court, and had been sentenced to 15 years in prison. The trial judge suspended the sentence and placed the defendant on probation. Pursuant to an interstate probation supervision compact, Scarpelli was permitted to travel to Illinois, where Illinois authorities were to supervise Scarpelli's probation. They never had the opportunity to do so, for

²² *Id.* at 474. The case involved a co-petitioner, Booher, whose case was consolidated with Morrissey's and which involved facts which were much the same.

²³ *Id.* at 485.

²⁴ *Id.* at 488.

²⁵ 411 U.S. 778 (1973).

within a few days of his arrival Scarpelli was apprehended in the course of a burglary. Wisconsin authorities revoked Scarpelli's probation without a hearing, on the basis of the Illinois report of Scarpelli's involvement in and arrest for the burglary, and for his association with a known criminal, his partner in the burglary.²⁶

When Scarpelli later sought relief, he alleged that revocation of his probation without a hearing denied him due process. The U.S. District Court for the Eastern District of Wisconsin agreed²⁷ and the Seventh Circuit affirmed.²⁸ In an 8-1 decision the Supreme Court held that the revocation of Scarpelli's probation without a hearing constituted a denial of due process.²⁹ The Court extended the *Morrissey* holding to cover revocation of probation as well as parole, noting that the two were, for practical purposes, indistinguishable.³⁰

In addition to holding that the probationer facing revocation was entitled to the hearings prescribed in *Morrissey*, the *Scarpelli* Court reached the issue of the indigent probationer's right to be represented by appointed counsel in revocation hearings. The Supreme Court concluded that while the assistance of counsel may be essential in some cases, revocation proceedings were unlike criminal trials and therefore declined to hold that counsel was required in all revocation cases.³¹ The Court refused to apply a blanket right to counsel rule as it had in *Gideon v. Wainwright*.³² Instead, the Court provided guidelines for probation and parole authorities to use in their *discretionary* action on requests for counsel by probationers and parolees facing revocation.³³

The Court did not decide whether a probationer or parolee who was not indigent, or whose case did not meet the counsel guidelines, had the right to the presence of *retained* counsel.³⁴

Taken together, the *Morrissey* and *Scarpelli* cases establish that a probationer or parolee confined pending final revocation is en-

²⁶ *Id.* at 780.

²⁷ 317 F. Supp. 72 (E.D. Wis. 1970).

²⁸ *Aff'd sub nom.* Gonsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1972).

²⁹ 411 U.S. at 782.

³⁰ *Id.* at 782 n.3.

³¹ *Id.* at 788. In *Mempa v. Rhay*, 389 U.S. 128 (1967) the Court held that a probationer is entitled to counsel in judicial proceedings which combine revocation and sentencing.

³² 372 U.S. 335 (1963).

³³ 411 U.S. at 790-91.

³⁴ *Id.* at 783 n.6.

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titled to two hearings, a preliminary probable cause hearing and a final revocation hearing. At the preliminary hearing the probationer has the following rights:

- [a] notice of the alleged violations of probation or parole,
- [b] an opportunity to appear and present evidence on his own behalf,
- [c] a conditional right to confront adverse witnesses,
- [d] an independent decision maker, and
- [e] a written report of the hearing.³⁵

The Court in *Scarpelli* enumerated the parolee or probationer's rights at the final hearing:

- (a) written notice of the claimed violations of [probation or] parole;
- (b) disclosure to the [probationer] parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.³⁶

B. THE MORRISSEY RATIONALE

In *Morrissey*, the Court analyzed the nature of parole and the nature of the interest of the parolee in continuing his conditional liberty. The Court rejected the notion that the availability of due process protections in the parole revocation context turned on the characterization of parole as a right rather than a **privilege**.³⁷

In *Morrissey*, the Chief Justice cited *Cafeteria & Restaurant Workers Union v. McElroy*³⁸ for the proposition that the determination of the requirements of due process in a given situation must start with an examination of the precise nature of the governmental action in question, and its relation to, and the nature of the private interest affected. The Chief Justice noted that not *all* situations calling for procedural safeguards call for the *same* safeguards.³⁹

³⁵ *Id.* at 786, citing *Morrissey v. Brewer*, 408 U.S.471, 486 (1972).

³⁶ *Id.*, quoting *Morrissey v. Brewer*, 408 U.S. 471,489 (1972).

³⁷ 408 U.S. at 482. The Court thereby overruled *Escoe v. Zerbst*, 295 U.S. 490 (1935), which had held there was no constitutional right to a revocation hearing.

³⁸ 367 U.S.886 (1961).

³⁹ 408 U.S. at 481.

The Chief Justice then addressed the nature of parole. He noted that while the liberty of the parolee is conditional, it does involve many “*core values*” of unqualified liberty.⁴⁰ These “core values” include the right to be employed, the right to be with friends and family and to form the other “enduring attachments of normal life”⁴¹ which are included in the parolee’s conditioned liberty. Termination of the parolee’s conditioned liberty was found by the Court to inflict a “grievous loss” on the parolee and others.⁴² The Chief Justice said that the parolee’s “liberty is valuable and must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal.”⁴³

As to the “informal process” he contemplated, the Chief Justice said that while the state may have an “overwhelming interest” in being able to return a parolee to prison without the necessity of a *formal* trial, it had *no* interest in returning the parolee to prison without *any* hearing.⁴⁴ “A simple factual hearing will not interfere with the exercise of discretion”⁴⁵ the Chief Justice pointed out. He concluded that society, as well as the parolee, has an interest in treating the parolee with basic fairness, not only as a rehabilitative measure, but also for the more fundamental reason of avoiding revocations based on erroneous information..“

111. CONSTITUTIONAL DUE PROCESS AND THE SERVICEMAN

The *Morrissey* and *Scarpelli* hearing requirements are founded on the fair hearing requirements of the due process clause of the fourteenth amendment. There is no question that these requirements are binding on the states, and that equivalent requirements are applicable to the federal government through the due process clause of the fifth amendment. The difficult determination is whether *Morrissey*’s rights are available to the serviceman, since not all constitutional rights are applicable in the military.

⁴⁰ *Id.* at 482 (emphasis added).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 483.

⁴⁵ *Id.*

⁴⁶ *Id.* at 484.

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In *Burns v. Wilson*⁴⁷ the Supreme Court discussed whether constitutional protections are available to servicemen. *Burns* was a 1953 case in which three airmen claimed that a prejudicial atmosphere surrounded their impending general court-martial on rape and murder charges, and the relief sought amounted to trial by a civilian, rather than a military, forum. The Court denied the petition, noting that basic constitutional rights were available to servicemen.⁴⁸ Military courts in that era were reluctant to accept the *Burns* conclusion that the Constitution was applicable to courts-martial, and instead relied on the concept of "military due process" to provide essentially the same protections.

In 1960, however, the United States Court of Military Appeals finally agreed with the Supreme Court, and said that constitutional protections were available in the military justice system, including all except those ". . . expressly or by necessary implication inapplicable"⁴⁹ to the armed forces.

More recently, in *United States v. Tempia*⁵⁰ the Court of Military Appeals held that the fifth amendment *confession* protections announced by the Supreme Court in *Arizona v. Miranda*⁵¹ were applicable to the armed forces, noting that both the Supreme Court and the highest military court were satisfied that *all* constitutional safeguards applied to the military justice system, in the absence of necessary implication that the protection was limited to civilian application.⁵²

With respect to the question of whether the Supreme Court's decisions on due process in parole and probation revocation hearings apply to the armed forces, it should be remembered that the *Morrissey* protections flow not from an express constitutional provision dealing with probation or parole revocation, but from the broader concept of "due process." There is certainly no military exemption either expressed or implied in the due process clause of the fifth amendment. Nor is there any implication in either *Morrissey* or *Scarpelli* that those decisions are limited in their applica-

⁴⁷ 346 U.S. 137 (1953).

⁴⁸ *Id.* at 142. Accord, *Kaufman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Carlson v. Schlesinger*, 364 F. Supp. 626 (D.D.C. 1973).

⁴⁹ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

⁵⁰ 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁵¹ 384 U.S. 436 (1966).

⁵² 16 U.S.C.M.A. at 634. 37 C.M.R. at 254.

bility to civilians. In addition, there is no implication in the nature of military probation that the *Morrissey* and *Scarpelli* holdings are necessarily inapplicable to the armed forces.

The interests of both the civilian and the military probationer in their liberty, the termination of which is at the core of the *Morrissey* holding, are comparable if not identical. Each has a strong interest in leading a normal life and in forming the "enduring attachments of a normal life."⁵³ While both military and civilian probationers are subject to ". . . many restrictions not applicable to other citizens. . ." ⁵⁴, the conditions, in each case, are "very different from that of confinement in a prison."⁵⁵

The interest of military society is not affected with any greater impact than is civilian society by the application of due process protections to probation revocation. Neither society has a defensible interest in revoking probation without fair resolution of factual disputes. Indeed, given the crucial role in military society played by the commanding officer, and his need to treat his subordinates fairly if he is to be able to call upon them in combat situations,⁵⁶ the commander may have an even greater stake in avoiding probation revocations actions based on erroneous information than his civilian counterpart. The civilian parole board has an entirely different relationship to the parolee or probationer facing revocation than the commanding officer has to his men. Also, the need of the services, and the nation, for public confidence in the decisions of military commanders demands that probation not be arbitrarily revoked.⁵⁷

⁵³ *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See, e.g., SUN TZU, *THE ART OF WAR* 128 (S. Griffith transl. 1963); S.L.A. MARSHALL, *MEN AGAINST FIRE* 200 (2d ed. 1961).

⁵⁷ One witness, testifying in favor of the adoption of a hearing requirement, at the hearings leading to the adoption of the Uniform Code of Military Justice, said "Well, I think the matter of a hearing is sound in and of itself, so you do not have this arbitrary business of saying 'off with his head' to some man with a suspended sentence." *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 760 (1949) [hereinafter cited as *Hearings on H.R. 2498*]. In one early probation vacation case, the Secretary of the Navy had suspended a sailor's dishonorable discharge for one year on condition that the sailor conduct himself in a manner to warrant his retention. At the time of this action the sailor was hospitalized. When a medical board recommended that the sailor be discharged from the service, the Secretary vacated the suspension of the dishonorable discharge. The Judge Advocate General of the Navy held this to be permissible, on the theory that it was im-

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Requiring a “simple factual hearing”⁵⁸ incident to military probation revocation should cause no significant inconvenience for the armed forces. Military law already requires hearings in vacation of serious court-martial sentences, and they are suggested in the vacation of nonjudicial punishments.⁵⁹ The sparse literature in the field reveals no complaints that these pre-*Morrissey* hearing requirements have imposed a burden on the armed forces.⁶⁰

It is clear from the legislative history that Congress intended that the military procedure for revoking suspended sentences was to parallel the civilian system for probation revocation. In hearings which led to the adoption of the UCMJ, a House Armed Services Subcommittee considered the following testimony of Felix Larkin, Assistant General Counsel of the Department of Defense, on the subject of proposals for a hearing incident to vacation of suspended court-martial sentences:

Now when he (the Probationer) is back on duty on probation, there are a number of instances where such persons [sic] commit additional offenses or in some way by their conduct violate the standard of good behavior. *In the same fashion as in civilian courts*, upon such violations, they may be returned to serve out the unexpired portion of their sentence [sic]

• • • •

To assure that when a man who has been returned to duty and is charged with violation of this state of probation, that the suspended sentence that he has received is not capriciously revoked or arbitrarily revoked, . . . we have provided this type of hearing so that the . . . *facts* of the conduct which is charged amounts to a violation on his part, are clearly *set* forth.

Mr. deGraffenried: That follows the same system they have in the federal courts now?

possible for the sailor to satisfactorily complete the probationary term. Letter of The Judge Advocate General of the Navy of March 2, 1937, *digested in*, 2 Compilation of Court-Martial Orders, 1916-1937, 2401 (1941). For additional examples of seemingly arbitrary exercise of the vacation power, see Comment, *Vacation of Suspended Sentences, The State of the Law*, JAG J., Nov.-Dec. 1959, at 15.

⁵⁸ *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972).

⁵⁹ UCMJ art. 72; MANUAL, para. 97b and App. 16. Paragraph 134 of the Manual suggests that a commanding officer considering revocation of certain suspended nonjudicial punishments grant the probationer an informal revocation hearing.

⁶⁰ No such complaints have been found in the annual reports submitted to the Committees on Armed Services of the Senate and the House of Representatives by The Judge Advocates General of the armed forces (required by UCMJ art. 67g).

Mr. Larkin: That is right, and I think in most State courts.⁶¹

Congress clearly intended that the military probationer *was to be afforded* the same protections which were then available to the civilian probationer. In view of that clear intent it would be unrealistic to argue that *Morrissey's* intervening expansion of procedural due process rights should apply *only to the civilian* probationer, but should be denied the *military* probationer.

Extrapolations from court decisions and the legislative history clearly indicate that the rights prescribed by *Morrissey* and *Scarpelli* are applicable to proceedings to vacate suspended courts-martial sentences *to confinement*. Unfortunately, however, the Uniform Code and the Manual for Courts-Martial only partially comply with the *Morrissey* requirements. Under present military procedures loss of liberty is not a criteria for holding a hearing. Hearings are required *only* in cases involving the vacation of any suspended sentence of a general court-martial, and of a suspended special court-martial sentence which includes an approved bad-conduct discharge.⁶² No hearing is required incident to the vacation of suspended sentences of special courts-martial which do not include a punitive discharge, or of any suspended sentence of a summary court-martial.⁶³

To determine whether hearings are required in these latter cases, the requirements of *Morrissey* must be closely examined. The fundamental point of *Morrissey* is that neither society nor the parolee has *any* interest in the termination of the parolee's *conditioned liberty* without some sort of minimal factual inquiry.⁶⁴ While both *Morrissey* and *Scarpelli* faced long periods of Confinement upon revocation,⁶⁵ the duration of the deprivation of their liberty was not discussed by the Court. What *was* important was that each case involved a deprivation of liberty, and was therefore within the protections of the due process clause of the fourteenth amendment. Loss of liberty is clearly the touchstone.

⁶¹ *Hearings on H.R. 2498, supra* note 57, at 1208-09 (emphasis added).

⁶² UCMJ art. 72; MANUAL, para. 97b.

⁶³ MANUAL, para. 97b.

⁶⁴ 408 US. at 483.

⁶⁵ *Morrissey's* sentence was seven years confinement; *Scarpelli's* was for fifteen years confinement.

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The deprivation of liberty test for the attachment of constitutional rights as seen in *Morrissey* and *Scarpelli* has a parallel in the Supreme Court's right to counsel cases. In *Gideon v. Wainwright*⁶⁶ the right to appointed counsel for indigents was provided in felony cases,⁶⁷ but in *Argersinger v. Hamlin*⁶⁸ the right to counsel was extended to *all* cases, including misdemeanor prosecutions with a maximum sentence of six months, in which a deprivation of liberty might result.⁶⁹ In *Argersinger* the factor of deprivation of liberty provided a sufficient basis for the applicability of due process parantees.⁷⁰ After *Argersinger*, there is no robm for argument that *Morrissey's* due process guarantees do not apply to all cases involving deprivations of liberty, including *all* military cases involving the vacation of suspended sentences to confinement.”

Having determined that servicemen are entitled to *Morrissey's* due process protection, present military practices must be examined to determine whether they meet constitutional standards.

⁶⁶ 372 U.S. 335 (1963).

⁶⁷ *Id.* at 340.

⁶⁸ 407 U.S. 25 (1972).

⁶⁹ *Id.* at 30-31.

⁷⁰ *But cf.* Daigle v. Warner, 490 F.2d 358 (9th Cir. 1973). This is not to say that *counsel* must be provided in proceedings to vacate suspended summary court-martial sentences to confinement. *Scarpelli* requires that counsel be provided *only* in limited circumstances. See text accompanying note 158 *infra*.

⁷¹ *Morrissey's* guarantees have been applied in other contexts involving deprivations of liberty. For example, in *McDonnell v. Wolff*, 483 F.2d 1059 (8th Cir. 1973) the guarantees prescribed by the Court were held to apply to proceedings involving the loss of a prisoner's good time and to other substantial disciplinary actions. In *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973), *Morrissey* was said to apply to transfers from the general prison population to more severe conditions of administrative segregation, and to loss of good time. In *Sands v. Wainright*, 357 F. Supp. 1062 (M.D. Fla. 1973), *Morrissey* protections were applied to a proceeding for transfer of a prisoner to punitive segregation and loss of 120 days gain time. The case contains an excellent exposition of procedural aspects of prison disciplinary proceedings.

The Code presently requires hearings for the revocation of suspensions of sentences which include *punitive discharges*, whether or not they also include confinement. It is assumed that any alterations to the Code or the Manual necessary to conform the present military scheme to *Morrissey-Scarpelli* requirements, which apply only when a loss of *liberty* is involved in the revocation action, would be applied to all future revocation actions involving sentences to confinement *or discharge*, or both.

IV. MILITARY REVOCATION PROCEDURE

A. THE CODE AND MANUAL PROVISIONS

The statutory basis for the revocation of suspended court-martial sentences is Article 72 of the Uniform Code of Military Justice.⁷² Article 72 provides in pertinent part that:

(a) Before the vacation of the suspension of a special court-martial sentence which ~~as~~ approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at the hearing by counsel if he so desires.

(b) The record of the hearings and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in section 871(c) of this title (article 71(c)). The vacation of the suspension of a dismissal is not effective until approved by the secretary concerned.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

. . . .⁷³

Paragraph 97b of the Manual makes a significant addition to Article 72 by providing in part that "the procedure at the hearing shall be similar to that prescribed for investigations conducted under the provisions of [paragraph] 34 [of the Manual]." ⁷⁴ In addition, a

⁷² Unfortunately, the subject of military probation revocation has been largely ignored by legal writers, probably because the lack of direct review of revocation proceedings results in a dearth of judicial decisions in the area.

⁷³ UCMJ art. 72(a)-(c). Article 72(d), provides that the Secretary of the service in question shall act on cases involving vacations of sentences to dismissal of officers. Suspensions of these sentences are extremely rare and are not treated in this paper.

⁷⁴ In brief, paragraph 976 of the Manual restates and, to a slight degree clarifies, the provisions of Article 72, UCMJ. For example, 97b includes the explanation that the restrictions of article 71(c) refer to the requirements for approval of the Court of Military Review before sentences extending to a punitive discharge or confinement for one year or more may be executed. More significantly, the lack of a hearing requirement in vacating suspensions of lesser sentences which article 72(c) left to implication is clearly expressed in paragraph 976. The Manual provision is that such sentences ". . . may be vacated (without a hearing) by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence."

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“Sample Record of Proceedings to Vacate Suspension” is set forth in Appendix 16 of the **Manual**.⁷⁵

The sample record explicitly incorporates the rights applicable in Article 32, UCMJ pretrial investigations, conducted in accordance with paragraph 34 of the **Manual**. Among the rights provided the military probationer are the right to be advised, at the outset of the hearing, of the nature of the violation of probation,⁷⁶ the name of the person alleging the violation,⁷⁷ the names of adverse witnesses,⁷⁸ and to be advised that a probation violation hearing is about to be held.⁷⁹ In addition, the military probationer is granted the right to be represented at the hearing by retained civilian counsel,⁸⁰ military counsel of his own selection⁸¹ or by appointed military counsel.⁸²

The military probationer also has the right to cross-examine all available witnesses,⁸³ to present evidence on his own behalf,⁸⁴ and a limited right to obtain any available witnesses on his own behalf.⁸⁵

⁷⁵ The probationer's rights are clearly enumerated in the Sample Report found at Appendix 16 of the **Manual**. In this regard, the military probationer enjoys a decided advantage over a civilian federal probationer. See FED. R. CRIM. P. 32(f), which provides only that “the court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.” However, in a letter discussing the impact of *Gagnon v. Scarpelli* and *Morrissey v. Brewer* on federal probation hearings, the Chief of the Division of Probation of the Administrative Office of the United States Courts, recognized that “. . . these requirements formalize the revocation proceeding considerably vis-a-vis the present rather informal hearing on revocation.” Memorandum from Wayne P. Jackson to All Chief Probation Officers and Officers in Charge of Units, August 27, 1973. As of this writing, the Federal Rules have not been amended and no proposed amendments have been submitted to the Chief Justice.

⁷⁶ **MANUAL**, app. 16, Sample Report § 4.

⁷⁷ *Id.* § 4.b.

⁷⁸ *Id.* § 4.c.

⁷⁹ *Id.* § 4.d.

⁸⁰ *Id.* § 4.e.(1).

⁸¹ *Id.* 4.e.(2). See UCMJ art. 38b; **MANUAL**, para. 34c; United States v. Eason, 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972); United States v. Gatewood, 15 U.S.C.M.A. 433, 35 C.M.R. 405 (1965); United States v. Barton, -- C.M.R. -- (NCMR 1973).

⁸² **MANUAL**, app. 16, *Sample Report* § 4.e.(3).

⁸³ *Id.* § 4.f.

⁸⁴ *Id.* § 4.g.

⁸⁵ *Id.* § 10.a.

He also has the right to examine real and documentary evidence⁶⁴ and he enjoys an absolute right to remain silent.⁸⁷

The hearing officer is required to state in his report of the proceedings whether there are grounds to believe that the probationer is at the time of the hearing, or “. . . was, at the time of the commission of the alleged violation of probation, mentally defective, diseased or deranged,”⁸⁸ and if so, what the reasons were for the belief and what actions were taken in that regard.⁸⁹ The hearing officer is also required to include in his report a summary of any explanatory or extenuating circumstances⁹⁰ and a resume of the accused's civilian⁹¹ and military⁹² background.

The officer exercising special court-martial jurisdiction over the probationer may himself serve as the revocation hearing officer³ or he may designate⁹⁴ another qualified⁹⁵ officer to preside. If an-

⁸⁶ *Id.* But see *Id.* § 13: “If certain real evidence which was examined was not shown to the probationer, state the reasons.” (emphasis added.) Note that this section does *not* say that evidence not shown to the probationer may not be considered.

⁸⁷ *Id.* § 4.j.

⁸⁸ *Id.* 4 15.a. This is not the test for insanity as a defense in a court-martial. The test at trial is whether the accused is so far free from mental disease, defect or derangement to distinguish right from wrong, and adhere to the right. MANUAL, para. 120. The Manual does not state whether a mental disease, defect or derangement which diminished, but did not destroy the probationer's ability to distinguish right from wrong or to adhere to the right would constitute a defense in a revocation hearing.

⁸⁹ MANUAL, app. 16. *Sample Report* § 15.b.

⁹⁰ *Id.* § 16.

⁹¹ *Id.* § 18.a.-j.

⁹² *Id.* § 19.k.

⁹³ *Id.* *Introductory note.*

⁹⁴ *Id.* The Code has no specific provision for delegation of the duty to hold the hearing by the special court-martial convening authority to a hearing officer. The Code simply provides “. . . the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation.” UMCJ art. 72(a). No cases have been found which question the Manual's grant of authority to delegate the hearing duty to another officer. Cf. Opinion of The Judge Advocate General of the Air Force (JAGAF) 1953/10 dated 16 Feb. 1953, digested in 2 DIG. OPS. JAG., *Sentence and Punishment* 4 55.11.

⁹⁵ Manual, app. 16, *Introductory note.* While the Manual does not explicitly set forth the qualifications for the designated hearing officer, they would presumably be the same as those required for an investigating officer for an Article 32, UCMJ, pretrial investigation. Paragraph 34 of the Manual indicates that these qualities are possessed by officers of the rank of major or lieutenant commander or above, or those officers with legal training and experience.

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other officer is designated to hold the hearing, it is referred to as a preliminary hearing. After the report of the preliminary hearing has been prepared, the probationer and his counsel have the right to examine the report and may present objections to it at a final hearing held personally by the officer exercising special court-martial jurisdiction. In addition, the probationer and his counsel may, at this final hearing, introduce additional matter in extenuation, mitigation or defense.

If the special court-martial convening authority holds the revocation hearing himself, rather than designating another officer to hold a "preliminary" hearing, the probationer has no right to examine the hearing report, nor is he entitled to a second hearing at which he may present objections and additional evidence. The convening authority's decision to designate an officer to hold the preliminary hearing, or to hold the hearing himself rests solely within the discretion of the officer exercising special court-martial jurisdiction.

After the record is reviewed by the special court-martial convening authority, it is forwarded, with the special court-martial convening authority's recommendations, to the officer exercising general court-martial jurisdiction. The latter makes the revocation decision based solely on the record before him. Neither the probationer nor his counsel has the right to a hearing before the general court-martial convening authority,

B. THE COMPARISON WITH MORRISSEY

The military probationer's rights are substantial and in many respects exceed the rights mandated by *Morrissey* and *Scarpelli*. The services are not without problems, however, since the preexisting military procedures do not contemplate the same steps revealed by the Supreme Court in *Morrissey* as basic to due process. For example, in *Morrissey* the Court contemplated a preliminary hearing which would be tied to the arrest and detention of the parolee prior to his return to prison to await a final revocation hearing.⁹⁶

The Manual version of a preliminary hearing is not preliminary in the *Morrissey* sense. The Manual preliminary hearing is more than a probable cause hearing; it is a broad fact gathering hearing on the entire question of revocation, and its timing is unrelated to reconfinement. The term "final hearing" is used in appendix 16 of

⁹⁶ 408 U.S. 485

the Manual, in a preface to the Sample Report, to refer to the review hearing held by the special court-martial convening authority when he has exercised his option of designating another officer to be the initial fact gatherer. But, unlike the typical civilian parole board, neither the designated officer or the special court-martial convening authority takes final action in the case; they only recommend action to the general court-martial convening authority. He in turn takes action without holding any hearing.

The military preliminary hearing then is analogous to the *Morrissey* final hearing in its breadth. The final hearing in the military is a misnomer in the *Morrissey* sense. When held at all, it is a forum at which objections to the preliminary hearing may be made, and additional evidence introduced, but which does not produce a decision.⁹⁷

The reason the military did not develop a *Morrissey* type preliminary hearing to determine if the parole violator should be confined⁹⁸ pending final revocation action is probably because, until recently, there was no clear cut recognition of the convening authority's power to create broad terms and conditions of parole similar to those in use in civilian jurisdictions. In March of 1973, however, the Court of Military Appeals decision in *United States v. Lallande*⁹⁹ gave judicial sanction to the use of broad probationary terms by convening authorities. Prior to that time there were no "technical" violations of probation to serve as bases for revocation actions. If probation was to be revoked, it was on the basis of independent misconduct. If reconfinement was felt to be necessary, the probationer could be reconfined on the basis of the independent criminal misconduct, and no probable cause hearing was required.

In contrast to military practice prior to the *Lallande* decision, civilian systems give wide recognition to broad conditions of probation and parole,¹⁰⁰ the violation of which could and did serve as the basis for revocation action. Parolees such as *Morrissey* were

⁹⁷ MANUAL, app. 16, *Sample Report*, § 20.

⁹⁸ The essence of the *Morrissey* preliminary hearing requirement is to insure that the probationer's arrest, detention and return to prison pending the final revocation are based on probable cause to believe the accused has violated the terms of parole or probation. 408 U.S. 471. In the armed forces, "no person may be ordered into arrest or confinement except for probable cause." UCMJ art. 10.

⁹⁹ 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

¹⁰⁰ For examples of broad conditions of probation, see ABA STANDARDS RELATING TO PROBATION 4 3.2 and Commentary at 45-50 (Approved Draft 1970); see also, S. 1400, 93d Cong., 1st Sess. § 2103 (1973) (Criminal Code Reform Act of 1973).

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routinely arrested and reconfined solely for breaking parole rules, and not for the commission of any crime.

The military's approach to prbbation revocation has been different than Chief Justice Burger envisioned in *Morrissey*. Military procedures do not parallel the model set forth in *Morrissey* and *Scarpelli*. Deficiencies in military procedures become apparent upon examination of the *Morrissey* minimum standards of due process and the comparison of the Supreme Court's procedure model with the military correlative, when one exists.¹⁰¹

V. THE PRELIMINARY HEARING

A. THE RECONFINEMENT "TRIGGER"

In analyzing due process in parole revocation, Chief Justice Burger in the *Morrissey* opinion envisioned that procedural rights attached to parole revocation as soon as the parolee is "arrested and detained."¹⁰² The Chief Justice's opinion stressed that the parolee who was *reconfined* pending his revocation determination was entitled to a prompt preliminary hearing, a hearing at which the hearing officer

should determine whether there is probable cause to hold the parolee for final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's *continued* detention and return to the state correctional institution pending the final decision.¹⁰³

It may be that a preliminary hearing is not required in all cases. The Court seems to have tied the preliminary hearing requirement to *reconfinement* pending final action. It would therefore appear that if the probationer is not confined pending the final hearing, or if the final hearing is itself promptly held, there is no need for a preliminary hearing.¹⁰⁴ In the absence of these two exceptional cir-

¹⁰¹ The difficulties inherent in this comparison are apparent. If not a comparison of apples to oranges, it is at best a comparison of tangerines to oranges.

¹⁰² 408 U.S. at 485. *Morrissey* is premised on the concept that the conditional liberty enjoyed by the parolee is a valuable right and hence "must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal." *Id.* at 482.

¹⁰³ *Id.* at 487 (emphasis added).

¹⁰⁴ *People v. Crowell*, 53 Ill. 2d 447, 292 N.E.2d 721 (1973); *Richardson v. Board of Paroles*, 41 App. Div. 2d 179, 341 N.Y.S.2d 825 (1973). It is suggested that it be made clear to the military probationer who is not confined pending revocation proceedings that in a trial for desertion the prosecution will be permitted to introduce evidence of the accused's prior conviction and the suspension

cumstances, however, *Morrissey* makes it clear that a prompt preliminary hearing is required following the probationer's reconfinement.

When military procedures are examined in the light of the *Morrissey* requirement for a prompt hearing upon reconfinement, an oversight in the Uniform Code becomes readily apparent. The drafters of the Code made no provision for the imposition of confinement based *solely* on a probation violation. Despite this lack of express statutory authority, it appears that prerevocation confinement can be justified. Paragraph 20*d* of the Manual provides for restraint

necessary for the administration of military justice, such as arrest, restriction, or confinement to insure the presence of the accused for impending execution of a punitive discharge.¹⁰⁵

Clearly suspensions of sentences, and vacation of suspensions are integral parts of military justice, and, in that contest, reconfinement pending revocation is essential to the administration of military justice.

In addition, reconfinement pending the final revocation hearing may be justified when the violation of probation is itself a violation of the Uniform Code. This frequently may be the case following the approval of broad terms of probation by the Court of Military Appeals in *United States v. Lallande*.¹⁰⁶ It now is clear that the suspension orders may embrace broad terms of probation. Violation of a broad probation order would constitute violation of a lawful order, in violation of Article 92, UCMJ.

The probation order may not only be broad, but its reach may extend into the civilian community, beyond the usual reach of court-martial jurisdiction. In *O'Callahan v. Parker*¹⁰⁷ the Supreme

of the resulting sentence as evidence of the accused's intent to remain away permanently. The rationale is that knowledge that the prior sentence will almost certainly be vacated upon return to military service indicates that the absent probationer had no intent to return. *United States v. Fisher*. 7 U.S.C.M.A. 270, ¶ C.M.R. 60 (1956).

¹⁰⁵ MANUAL, para. 20*d*(1). The requirement of this subparagraph that unless required because of the seriousness of the offense confinement not be imposed pending *trial* is not applicable (by its very terms) to confinement *otherwise* necessary to the administration of military justice. The example of confinement necessary to insure the accused's availability for the execution of a punitive discharge is not seen as restricting confinement to punitive discharge situations only.

¹⁰⁶ 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

¹⁰⁷ 295 U.S. 258 (1969).

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Court placed substantial constraints on the exercise of court-martial jurisdiction, in the absence of a showing that the offense was service connected. But because court-martial jurisdiction has been limited it does not follow that the power to revoke military probation has been similarly restricted. At the core of the *O'Callahan* decision was Justice Douglas' belief that the exercise of court-martial jurisdiction based solely on service *status*, was an unwarranted denial of the right to indictment by grand jury and trial by petit jury. Revocation of probation and parole, however, is not part of a criminal prosecution;¹⁰⁸ there is no right to a grand or petit jury in parole or probation revocation proceedings.

The differences between revocation proceedings and criminal trials were reemphasized in *Scarpelli*. There the Supreme Court had no difficulty with the concept that Scarpelli's probation could be revoked by Wisconsin authorities based on conduct occurring in Illinois. The probationer's *status*, not the *situs* of his misconduct is the factor which provides the basis for revocation action. *Service status* therefore provides a sufficient basis for military exercise of probation revocation action, without regard to the *situs* of the misconduct. Resort to other service connection tests such as those prescribed in *Relford v. Commandant*¹⁰⁹ is not necessary.

Regardless of whether the misconduct forming the basis for the revocation action occurs in the civilian community or on a military base, *Morrissey* requires a prompt preliminary hearing "at or near reasonably the place of the alleged parole violation . . ." ¹¹⁰

This requirement applies whenever the probationer is reconfinned pending the final revocation hearing, and it makes no difference whether the probation violation is substantive or "merely" technical.¹¹¹

B. SUBSTITUTES AND DELAYS

While the Court in *Morrissey* did direct a prompt preliminary hearing, a substitute for the hearing prescribed by the court may be permissible. The Chief Justice stated almost in passing that "[o]bvi-

¹⁰⁸ *Gagnon v. Scarpelli*, 411 U.S. 778,782 (1973).

¹⁰⁹ 401 U.S. 355 (1971).

¹¹⁰ 408 U.S. at 485.

¹¹¹ Probation terms proscribing otherwise lawful conduct must bear some reasonable relationship to the offense for which the probationer was originally convicted if the rehabilitative theory of probation is to have any validity. See ABA STANDARDS RELATING TO PROBATION § 3.2(b), Commentary at 47 (Approved Draft, 1970).

ously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime."¹¹² It is not clear whether this language means that no preliminary hearing is required when a new criminal conviction is asserted as the basis for the revocation action.

Divergent results have been reached by the courts which have considered the matter. One California appellate court concluded that *Morrissey's* preliminary hearing requirements are satisfied when a probationer is afforded the protections of a pretrial probable cause hearing incident to a criminal prosecution, and no separate *Morrissey* preliminary hearing is required.¹¹³ However, another California appellate court reached an opposite result in the habeas corpus case of *In re LaCroix*.¹¹⁴ The court in *In re LaCroix* held that a parolee should be accorded a modified *Morrissey* preliminary hearing in addition to the pretrial preliminary hearing. The *Morrissey* hearing would provide the probationer the opportunity to show that the offense urged as the basis for revocation was not the same as the offense prosecuted independently. The court also noted that the probationer should be permitted an opportunity to show that he is not the person referred to in the abstract of the conviction.¹¹⁵

The California Supreme Court, in approving the revocation of a forger's parole, based on a subsequent conviction for auto theft, suggested that the pretrial and *Morrissey* preliminary hearings could be combined, provided that the parolee receives notice of the dual nature of the hearings.¹¹⁶

The California Supreme Court's suggestion has merit and it could easily be adopted by the armed forces. Preliminary inquiry and Article 32 investigating officers could be designated as *Morrissey* preliminary hearing officers, and required to combine their investigations and complete them expeditiously.¹¹⁷

¹¹² 408 U.S. at 490.

¹¹³ *In re Scott*, 32 Cal. App. 3d 124, 108 Cal. Rptr. 49 (1973); *accord*, *In re Law*, 10 Cal.3d 21, 513 P.2d 621, 109 Cal. Rptr. 573 (1973); *In re Edge*, 33 Cal. App. 3d 149, 108 Cal. Rptr. 757 (1973); *Bernhardt v. State*, 280 So.2d 490 (Fla. 1974).

¹¹⁴ 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (1973).

¹¹⁵ *Id.* at 324, 108 Cal. Rptr. at 98.

¹¹⁶ *In re Law*, 10 Cal.3d 21, 25, 513 P.2d 621, 625, 109 Cal. Rptr. 573, 577 (1973).

¹¹⁷ No conceptual difficulties are perceived in requiring the preliminary inquiry officer appointed to conduct an investigation in accordance with paragraph 32b of

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Whether or not merged with a pretrial hearing, the Morrissey preliminary hearing must be promptly held if probation revocation is to be a viable option. Failure to hold a prompt Morrissey preliminary hearing may eliminate the revocation option, if the analogous rules requiring dismissal of criminal charges when the right to speedy trial *is denied*¹¹⁸ are applied to probation revocation. Thus, even when prosecution appears to be desirable, revocation proceedings should not be ignored, for if problems of proof are later encountered, revocation may appear more desirable because the degree of proof required in revocation is less than that required in criminal trials.¹¹⁹ In addition, admissibility problems which effectively bar prosecution may be encountered which do not affect vacation proceedings.¹²⁰ Thus, if probation revocation procedures are pursued

the Manual to also ascertain whether there is probable cause for probation revocation. In more serious cases the article 32 investigating officer could submit as part of his report or as a separate interim report, the preliminary hearing report required by Morrissey.

¹¹⁸ See *In re La Croix*, 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (1973). *Morrissey* indicated that a two-month delay in holding the final revocation hearing was not unreasonable. 408 U.S. at 488. *Accord*, *United States ex. rel. Buono v. Kenton*, 287 F.2d 534 (2d Cir. 1961), *cert. denied*, 368 U.S. 846 (1961) (113 day delay excessive). Taking an unusual tack, a parolee, in *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968), sought an injunction to delay his parole revocation hearing until his trial for the same misconduct was completed. Melson claimed that permitting the parole revocation proceedings to commence in advance of trial forced him into a dilemma. If he explained his involvement in a felony murder at his parole revocation hearing, Melson's testimony could be used against him at trial; if he preserved his fifth amendment trial right by not making a statement at his revocation hearing, Melson faced the danger that his parole on a robbery sentence would be revoked. The court solved Melson's dilemma by ruling that in these circumstances, a statement made by a parolee at a revocation hearing held in advance of trial for the same misconduct would, in effect, be coerced and the statement would therefore be inadmissible at the subsequent trial. The injunction Melson sought was denied. *Cf. State v. Hughes*, 200 N.W.2d 559 (Ia. 1972).

¹¹⁹ *United States v. D'Amato*, 429 F.2d 1284 (3d Cir. 1970); *Amaya v. Beto*, 424 F.2d 363, 364 (5th Cir. 1970); *United States v. Nagelberg*, 413 F.2d 708 (2d Cir. 1969), *cert. denied*, 3% U.S. 1010 (1970); *People v. Crowell*, 53 Ill. 2d 447, 292 N.E.2d 721 (1973).

¹²⁰ For example, it has been held that illegally seized evidence may be used to establish a parole violation. *United States ex. rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex. rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. Fla. 1970), *aff'd*, 438 F.2d 1027 (5th Cir. 1971), *cert. denied*, 404 U.S. 880 (1971); *In re Martinez*, 1 Cal.3d 641, 463 P.2d 734, 83 Cal. Rptr. 382, (1970), *cert. denied*, 400 U.S. 851 (1970) (illegal search and bad confession).

concurrently with prosecution, the government will be able to preserve its options.”

Congress, in enacting the UCMJ anticipated a requirement for a factual inquiry incident to probation revocation. What it did not anticipate was the need for a *Morrissey* type preliminary inquiry, and no provision was made for one. Fortunately none need be provided if the accused is not confined pending ‘the final revocation determination, or if the final hearing is promptly held.’” If, however, the probationer is confined pending the final revocation hearing and that hearing is delayed for any reason, a prompt preliminary hearing must be granted the probationer if the requirements of *Morrissey* are to be met.¹²³

C. THE NATURE OF THE PRELIMINARY HEARING

Clearly if the armed forces are to be able to exercise the important option of confining probation violators pending final revocation hearings, as will surely be necessary in many cases, the services will have to make provision for preliminary hearings in compliance with *Morrissey*'s requirements. Examination of the *Morrissey* and *Scarpelli* opinions indicates that there are six significant aspects to the preliminary hearing.

1. The Location of the Hearing

Morrissey requires “some minimal inquiry . . . conducted at or reasonably near the place of the alleged parole violation or arrest while information is fresh and sources are available.”¹²⁴ While the term “at or reasonably near” poses no problems in construction, the requirement for a hearing at the situs of the violation could pose great practical problems in administration. A probation violation

¹²¹As a collateral benefit, the revocation may relieve the government from the strict speedy trial requirements established in *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). *Burton* established the rule in the military that pretrial confinement in excess of ninety days gives rise to an inference of a denial of speedy trial. The assumption implicit in the argument that the revocation of suspended confinement relieves the government is correctly characterized as serving the earlier sentence, and is not pretrial restraint.

¹²²*People v. Crowell*, 53 Ill.2d 447, 292 N.E.2d 721 (1973).

¹²³See note 118 *supra*.

¹²⁴408 U.S. at 485 (emphasis added). In federal civilian parole revocations, a local hearing is provided upon request of the parolee if the parolee has not actually been convicted in connection with the alleged violation of parole and the parolee denies that he has violated any condition of his release. 28 C.F.R. § 2.40 (1973)

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might occur hundreds or thousands of miles from the probationer's command, which will be charged with the responsibility of supervision and the conduct of revocation hearings. The practical solution to the distance problem may be the appointment of a preliminary hearing officer from a command near the situs of the violation, or the transfer of the probationer on temporary orders to a command nearer the situs of the violation. If the probationer is in the hands of civilian authorities, it may be necessary to issue temporary additional duty orders to the officer directed to conduct the preliminary hearing to permit his expeditious travel to the area where the preliminary hearing must be held.¹²⁵

2. *The Hearing Officer*

Morrissey requires that the officer who conducts the preliminary hearing be someone not directly involved in the case.¹²⁶ He must be someone other than the parole or probation officer who made the recommendation to revoke parole or who reported the violation.¹²⁷ The hearing officer need not, however, be a judicial officer. In fact, he may even be a parole officer other than the one assigned to supervise the parolee.¹²⁸

The appointment of a military officer as a probation officer, charged with the duty of supervision and rehabilitation of military prisoners, has been judicially approved.¹²⁹ When military probation officers are utilized, the probationer's commanding officer would appear to be a logical choice as hearing officer. If the commanding officer is not directly supervising the probationer, he would in most instances be sufficiently isolated from the probationer to satisfy *Morrissey's* requirement that the hearing officer be someone not directly involved in the supervision of the parolee. Of course, as was suggested in *Morrissey*, another officer, even another probation officer, may serve as the preliminary hearing officer, if he has not

¹²⁵ It will require prompt coordination with the command to which the alleged violator is assigned to determine the terms of probation. Speed will be essential because the hearing must be promptly held and should be conducted in the area where the alleged violation is alleged to have occurred. Economy will obviously result if the hearing is conducted before the alleged violator is returned to the command to which he is assigned, only to be sent back to the area of the alleged violation for the preliminary hearing.

¹²⁶ 408 U.S. at 486.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ United States v. Figueroa, 47 C.M.R. 212 (NCMR 1973).

been directly involved in the probationer's supervision. The commanding officer may desire to designate a military judge as preliminary hearing officer and it would be entirely consistent with *Morrissey* for him to do so.

If the commanding officer has himself become involved in the case, he will, under *Morrissey*, be disqualified from acting in the case.¹³¹ In the event of the convening authority's disqualification, the case should be referred to a superior convening authority for action.¹³²

3. *The Notice Requirement*

Morrissey directs that the parolee be given notice that the hearing will take place and that its purpose is to determine probable cause to believe that a probation violation has been committed.¹³³ The notice is required to state what violations are alleged.¹³⁴ Neither *Morrissey* or *Scarpelli* indicate how far in advance of the hearing the notice must be furnished.¹³⁵ The implication is clear that notice must be furnished sufficiently in advance of the hearing to permit

¹³⁰ Paragraph 34a of the Manual suggests that officers assigned the duty of conducting formal pretrial investigations have legal training and experience. These qualifications are also applicable to officers designated to conduct revocation hearings. See MANUAL, para. 97b.

¹³¹ See 408 U.S. 471, 484-85 (1972). Cf. UCMJ art. 1(9); MANUAL, para. 5a(4). The Manual provides that it is unlawful for an accuser, i.e., a person having other than an official interest in the prosecution, to convene a general court-martial. This principle has been extended to special courts-martial as well. *United States v. Bloomer*, 21 U.S.C.M.A. 28, 44 C.M.R. 82 (1971). The basis for the rule is the desirability of avoiding any doubts as to the impartiality of the convening authority. One application of the accuser-disqualification rule has been to regard an officer whose order has been violated as an accuser and hence disqualified from convening a court-martial for the trial of the alleged violator. *United States v. Marsh*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953). It would appear that the same rule might operate to disqualify a convening authority from taking revocation action when his own revocation order has been violated. *Accord, Edwardsen v. Gray*, 352 F. Supp. 839 (E.D. Wis. 1972).

¹³² See MANUAL, para 5a(3).

¹³³ 408 U.S. at 486-87.

¹³⁴ *Id.* at 487. The procedural guide for military proceedings to vacate suspended sentences does not require that the probationer be informed of the nature of the allegation any sooner than the outset of the hearing. Manual, app. 16, Sample Report, § 4.a.

¹³⁵ Apparently no cases have addressed this point. Thompson, *Effective Advocacy in a Probation Hearing*, 17 PRAC. LAW 69, 71 (1971).

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preparation, which may include interview of witnesses and analysis of the allegations.¹³⁶

Morrissey provides that the notice should state what violations have been alleged. The opinion unfortunately did not discuss how specific the notice should be. Courts which have addressed the specificity requirement have apparently construed the Supreme Court's lack of precision as permitting a similar lack of precision in the notice. For example, in *Dempsey v. State*,¹³⁷ a Texas case in which a shoplifting allegation provided the basis for revocation action, notice which alleged the date, county and elements of the violation, but not the name, address, type of retail establishment, owner's name, or the type of merchandise involved, was approved as providing adequate notice.¹³⁸

A similar lack of a clear-cut requirement for specificity in the notice to be provided military probationers has resulted from the Manual's failure to address the matter. The Manual has no rule for the specificity of the notice in revocation proceedings, nor does it require that notice be furnished the probationer in advance of the hearing. The Manual only provides an example of an allegation of probation, "[M]isconduct by escape from confinement on or about 10 November 1967 in violation of Article 95 as alleged in the charges attached hereto (exhibit 2)."¹³⁹ Unfortunately, the example provided by the Manual in the Sample Record is a poor one. In the example, the probationer's discharge, but not his confinement, had been suspended. A better example would have been presented had the probationer's confinement been suspended. If this had been the case, the location which was not alleged, of the violation, and therefore the identity of possible witnesses, alibi verification, and other defenses would have been more critical.

¹³⁶ *Kuentsler v. State*, 486 S.W.2d 367 n.17 (Tex. Crim. App. 1972).

¹³⁷ 496 S.W.2d 49 (Tex. Crim. App. 1973).

¹³⁸ *Id.* at 52. *Accord*, *Kuentsler v. State*, 486 S.W.2d 367 (Tex. Crim. App. 1972). The ABA Standards Relating to Probation provided that "[t]he probationer should be notified sufficiently in advance of the proceeding so as to be able to prepare any response he would care to make." ABA STANDARDS RELATING TO PROBATION § 5.4a, Commentary, at 67 (Approved Draft 1970). The General Council of the Administrative Office of the United States Courts is of the opinion that "[m]inimally the probationer should be given, in addition to the warrant, the petition for the warrant attached thereto which sets forth the allegations relied on for revocation." Memorandum from Wayne P. Jackson to All Chief Probation Officers and Officers in Charge of Units, Aug. 27, 1973.

¹³⁹ *Dempsey v. State*, 496 S.W.2d 49, 52 (Tex. Crim. App. 1973).

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Problems in the matter of the adequacy of the notice are resolved if the Manual's example of a reference to "attached" charges is construed as *requiring* that charges be drafted in *all* cases. However, the Manual does not direct or suggest that charges be preferred in all cases, and the example should therefore be regarded merely as permitting their incorporation by reference in appropriate cases. To require formal pleading runs counter to *Morrissey's* notion that an informal hearing (and not a criminal trial) is what is required by due process. An appropriate balance can be struck as to the adequacy of the notice by providing opportunity for the probationer, if he entertains any doubts about the matter, to request that the notice be made more definite and certain. Formal pleading, however, should not be required.

To correct the Manual's failure to require notice in *advance* of the hearing, as *Morrissey* directs, the Manual should be modified to require advance notice. A period of advance notice equal to that required for the court-martial which imposed the sentence being vacated is suggested as reasonable.'''

4. *The Probationer's Right to Present Evidence*

With respect to the probationer's right to present evidence at the preliminary hearing, *Morrissey* provides that:

At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents or individuals who can give relevant information to the hearing officer.¹⁴¹

Unfortunately, the *Morrissey* Court did not elaborate on the probationer's right to appear and speak.

The Manual however provides that the rules of paragraph 34 relative to Article 32 pretrial investigations apply to revocation proceedings.¹⁴² The military probationer therefore not only has the right to speak on his own behalf, he may do so in any form. He may make a sworn statement, an unsworn statement, or he may have his counsel deliver a statement for him. If the probationer elects to testify under oath he will be subject to cross-examination. If the alleged violation of probation is an offense under the Code, a warn-

¹⁴⁰ One day's notice is apparently insufficient. See *Brannum v. United States Board of Parole*, 361 F. Supp. 394 (N.D. Ga. 1973).

¹⁴¹ 408 U.S. at 487.

¹⁴² MANUAL, para. 97b.

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ing of the right to silence is required by Article 31(b) UCMJ,¹⁴³ In spite of the requirement for a warning, a probationer's statement at a revocation hearing probably cannot be used against him in a subsequent trial. The theory is that a statement at the revocation hearing is compelled by the likelihood of revocation if the probationer remains silent and does not explain his conduct and his attitude toward rehabilitation.¹⁴⁴

The probationer's right to bring letters and documents, and to have them considered by the hearing officer is clear and self-explanatory. In addition to letters and documents, the probationer has the right "to bring . . . individuals"¹⁴⁵ who can give relevant information to the preliminary hearing officer. It is not clear whether the right "to bring" witnesses means that the probationer has the right to compulsory process at the preliminary hearing. However, the requirement that the preliminary hearing be held at or near the situs of the misconduct, and the Chief Justice's choice, in *Morrissey*, of the words "*the parolee may . . . bring . . . individuals*" suggests that the burden of securing the presence of witnesses on his own behalf is upon the probationer.

5. *Confrontation and Cross-Examination*

The *Morrissey* court provided clear and detailed guidance regarding the probationer's right to confrontation and cross-examination. At the parolee's request, "Persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence."¹⁴⁶ The only ex-

¹⁴³ UCMJ art. 31(b) provides:

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 a 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.

(emphasis added)

This section imposes an affirmative duty to warn, regardless of the use to which a statement is to be put. Thus, Article 31 produces a result somewhat different than the exclusionary rule of *Arizona v. Miranda*, 384 U.S. 436 (1966), made applicable to the military by *United States v. Tempia*, 16 U.S.C.M. 2629, 37 C.M.R. 249 (1967). *Tempia* limits the use of statements taken in violation of the *Miranda* requirement to warn an accused of his right to remain silent and of his right to counsel.

¹⁴⁴ *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968).

¹⁴⁵ 408 U.S. at 487.

¹⁴⁶ *Id.*

ception to the parolee's right to confrontation is when the hearing officer determines that disclosure of the informant's identity would subject the informant to a risk of harm. The Manual, while not requiring *confrontation*, does require that the *identity* of *all* adverse witnesses be disclosed to the probationer.¹⁴⁷ Combining the *Morrissey* requirement of confrontation with the Manual requirement for complete disclosure would give the military probationer the right to confront *all* adverse witnesses.

The majority in *Scarpelli* recognized the practical difficulties inherent in the application of the right to confrontation. The Court noted the difficulty and expense of "procuring witnesses from perhaps thousands of miles away"¹⁴⁸ but pointed out that in "some cases there is simply no adequate alternative to live testimony."¹⁴⁹ The Court, however, suggested that in appropriate cases affidavits, depositions,¹⁵⁰ and change of situs of the hearing could be solutions to *Morrissey's* requirements.

The Manual permits consideration of the sworn statements of unavailable witnesses in pretrial hearings,¹⁵¹ the rules relative to which are applicable to revocation hearings. The unavailable witness exception conflicts with *Morrissey's* grant of an absolute right to confrontation, unless the hearing officer finds that confrontation may subject the informant to a risk of harm. Unfortunately, military authorities may be unable to grant the constitutional right of confrontation because authority to compel the attendance of civilian witnesses has not been provided in military revocation hearings.¹⁵² Therefore, if an essential civilian witness will not voluntarily attend a revocation hearing, his statement must be excluded.¹⁵³

¹⁴⁷ MANUAL, para. 34d and app. 16, *Sample Report*, § 4.c.

¹⁴⁸ 411 U.S. at 782-83 n.5. The rule applicable to trials by courts-martial is that a showing of distance alone does not constitute a showing of unavailability. *United States v. Davis*, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).

¹⁴⁹ 411 U.S. at 782-83 n.5.

¹⁵⁰ The accused in the military has the right to be present at the taking of a deposition. Manual, para. 117b(2). The probationer would seem to enjoy the same right. For a detailed discussion of the deposition in military law, see McGovern, *The Military Oral Deposition and Modern Communication*, 45 MIL. L. REV. 43 (1969).

¹⁵¹ MANUAL, para. 34d. The determination of the availability of a military witness is made by his commanding officer. *Id.*

¹⁵² *Id.*

¹⁵³ See *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 n.5 (1973).

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6. *The Hearing Report*

The final *Morrissey* preliminary hearing right concerns the report of the hearing. With respect to the preliminary hearing report *Morrissey* provides that:

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position As in *Goldberg*, "the decision maker should state the reasons for his determination and indicate the evidence he relied on . . ." but it should be remembered that this is not a final determination calling for "formal findings of fact and conclusions of law." 397 U.S., at 271. No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.¹⁵⁴

Application of this *Morrissey* requirement to the military presents only one new feature. The officer holding the preliminary hearing now will be required to support, in writing, his determination that probable cause exists to reconfine the probationer. This written statement, indicating what evidence was relied on, will be required whenever a probationer is reconfined pending final revocation action.

Finally, the probationer has an absolute right to a copy of the preliminary hearing report, and he is entitled to receive it prior to the final revocation hearing.¹⁵⁵

D. THE RIGHT TO COUNSEL

The matter of the probationer's right to be represented by counsel at the revocation hearings was not presented in *Morrissey*¹⁵⁶ but it was addressed in *Scarpelli*. In *Scarpelli* the Court considered the narrow question of the indigent probationer's right to appointed counsel. The Court in the *Scarpelli* case analyzed the technical adversarial nature of a criminal trial and contrasted it with the informal nature of a revocation hearing at which members of the hearing body, such as a parole board were experienced and familiar with the problems of probation or parole. The Court determined that the nature of revocation hearings does not give rise to an absolute requirement for counsel, but conceded that counsel might be

¹⁵⁴ 408 U.S. at 487.

¹⁵⁵ *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), citing *Morrissey v. Brewer*, 408 U.S. 471,487 (1972).

¹⁵⁶ 408 U.S. at 489.

needed in certain cases.¹⁵⁷ While refusing to formulate a detailed set of guidelines for provision of counsel, the Court did say that:

[C]ounsel should be provided in cases where after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel the responsible agency should also consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.¹⁵⁸

Scarpelli's adoption of the case-by-case approach in providing counsel is significantly different than the military rule in vacation proceedings. First, *Scarpelli* held only that the state must provide counsel to an *indigent* probationer and *only* in cases in which the assistance of counsel was essential.¹⁵⁹ The military practice is to provide counsel upon the probationer's request in *all* cases in which a revocation hearing is presently required. Indigency is not a test for the appointment of counsel for the military probationer.¹⁶⁰ Secondly, military practice permits the probationer to provide his own counsel.¹⁶¹ Finally, the military probationer does not have the burden of justifying his request for counsel.¹⁶²

The military rule requiring that counsel must be provided to *all* probationers in *all* cases in which hearings are presently required is easy to apply and is in consonance with the ABA Standards Relating to Probation.¹⁶³ The *Scarpelli* opinion recognized the simplicity of a rule requiring that counsel should be provided the probationer in all cases,¹⁶⁴ and conceded that under the case-by-case

¹⁵⁷ 411 U.S. at 789. See text accompanying note 31 *supra*.

¹⁵⁸ 411 U.S. at 790-91.

¹⁵⁹ *Id.* at 783 n.6.

¹⁶⁰ Injecting an indigency test into the probation revocation context would be contrary to the military rule in other areas; ordinarily indigency is not a factor in the provision of legal services. *Contra*, United States v. Clark, 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1973) (preinterrogation advice that right to appointed counsel was conditioned on indigency not erroneous).

¹⁶¹ MANUAL, app. 16, *Sample Report*, § 4.e.

¹⁶² *Contra*, Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

¹⁶³ ABA STANDARDS RELATING TO PROBATION § 5.4(a), Commentary, at 68 (Approved Draft 1970).

¹⁶⁴ 411 U.S. at 787.

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approach adopted by the Court there might be situations in which an arguable defense could be uncovered only by a lawyer.¹⁶⁵ The Court sought to answer potential criticisms of its approach by pointing out that

we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.¹⁶⁶

Congress rejected a case-by-case approach when it enacted article 72(a) UCMJ, which provides that “the probationer shall be represented at the hearing by counsel if he so desires.” The same rule, coupled with an indigency test, applies in federal civilian probation violation hearings.¹⁶⁷

While Congress did not provide for a *Morrissey* type preliminary hearing when it enacted the Code, no logical basis exists for concluding that the military probationer’s broad right to counsel should apply only to the final revocation hearing, and not to the preliminary hearing. The Court in *Scarpelli* clearly provided that the right to counsel, when it existed, applies not only to the final revocation hearing, but also to the preliminary hearing as well.¹⁶⁸

Therefore, in view of *Morrissey* and *Scarpelli* and the Congressional mandate in Article 72, the military must now provide counsel at both constitutionally required hearings, the *Morrissey* preliminary, and the *Morrissey* final revocation hearings. The military—*Scarpelli* right to counsel should apply however, only in the sort of case in which counsel was previously furnished, that is, when the probationer faces vacation of a suspended sentence of a general court-martial, or of a suspended special court-martial sentence which includes a bad-conduct discharge.

The right of the probationer to the assistance of counsel in hearings for the vacation of a suspended summary court-martial sentence, or a suspended non-BCD special court-martial sentence to confinement is less clear. Congress made no provision for hearings in these less serious cases, so, unlike the more serious cases, there

¹⁶⁵ *Id.* at 789.

¹⁶⁶ *Id.*

¹⁶⁷ 18 U.S.C.3006A(b) provides:

In every criminal case in which the defendant is charged . . . with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel.

¹⁶⁸ 411 U.S. at 790-91.

was no pre-Scarpelli right to counsel in these minor cases. Morrissey, however, requires hearings in *all* cases involving the termination of the probationer's liberty. Scarpelli does not require that counsel be appointed in all cases, *only* those in which the probationer is indigent and the assistance of counsel is essential. Heretofore the military has not required counsel *or* hearings in less serious cases.¹⁶⁹

Must the military now provide counsel in a hearing which meets the Scarpelli guidelines, that is, which involves resolution of complicated issues, but in which only a suspended sentence to four months confinement, adjudged by a special court-martial, is at stake? *Morrissey* and *Scarpelli* taken together clearly indicate that the answer is yes. But the military should not extend its liberal right to counsel rule to these less serious cases.

Instead, the minor cases which do not involve the uniquely military punishment of a punitive discharge provide an appropriate point for the application of the Scarpelli guidelines. Counsel should be provided in cases involving the vacation of a suspended sentence to confinement of a summary court-martial and of a special court-martial which did not adjudge a punitive discharge *only* when *Scarpelli* would require that counsel must be provided the civilian. Application of the Scarpelli guidelines to less serious cases is not a retreat from the military's broad grant of the right to counsel. Not only has there been no previous right to counsel in the less serious case, there has been no right to a hearing at all. Adoption of the Scarpelli guidelines for the provision of counsel in vacation proceedings involving the less serious sentences to confinement, that is those adjudged by a summary court, or a special court-martial which did not adjudge a bad-conduct discharge, should be regarded as compliance with the Court's Scarpelli mandate, not a withholding of the right to counsel. Of course *Morrissey* is based on the concept that the parolee's loss of liberty is protected by the due process clause. Neither hearings nor counsel are required by *Morrissey* or *Scarpelli* if the revocation of the sentence in question will not result in a loss of liberty.

Regardless of whether counsel is provided as a result of a blanket right to counsel rule, or as a result of application of the Scarpelli guidelines, counsel should be made available sufficiently in advance of the preliminary hearing to provide adequate preparation time.¹⁷⁰

¹⁶⁹ Cf. *Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1973).

¹⁷⁰ Cf. Thompson, *supra* note 135, at 72. The General Counsel of the Administrative Office of the United States Courts construes 18 U.S.C. 3006A(b),

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However, since the hearing is to be conducted as promptly as convenient following the probationer's reconfinement, the hearing should not be unreasonably delayed by counsel. Delay of no more than a minimal period should be permitted at the instance of the probationer. Requests for lengthy delays should be regarded as a waiver of the right to a preliminary hearing, and the final hearing should be conducted following the delay. The purpose of the preliminary hearing is to protect the probationer from lengthy unjustified confinement pending the revocation hearing. When that purpose is frustrated, by the probationer himself, he should forfeit his right to a preliminary hearing. The probationer would still be entitled to a final hearing on the ultimate issue of whether probation revocation is warranted.

VI. THE REVOCATION HEARING

In addition to requiring a preliminary hearing upon the parolee's reconfinement, the Supreme Court in *Morrissey* also directed that the parolee is to be afforded a revocation hearing. The purpose of the revocation hearing is to review the initial probable cause determination made at the preliminary hearing and to determine the ultimate issue of whether, considering all circumstances, parole revocation is appropriate. The minimum requisites of due process at the final hearing prescribed by the court include

(a) written notice of the claimed violation of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds a good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.¹⁷¹

When the Army apparently concluded that *Morrissey* applied to the armed forces, a message was sent to all Army commands requiring that hearings be held incident to vacation of all court-

together with *Morrissey* and *Scarpelli*, to mean "that at the preliminary hearing the probationer must be advised of his right to representation on final revocation hearing, but we do not conceive that the appointment itself need be made prior to the preliminary hearing." Memorandum from Wayne P. Jackson, Chief of the Division of Probation, Administrative Office of the United States Courts, to All Chief Probation Officers and Officers in Charge of Units, Aug. 27, 1973.

¹⁷¹ 408 U.S. at 489 (emphasis added).

martial sentences to confinement.¹⁷² The message indicated that “[h]earings pursuant to Article 72, UCMJ are considered to provide due process to the probationer.”¹⁷³ Interestingly, however, the message did not directly state that Article 72, UCMJ hearings satisfied *Morrissey*’s requirements. Careful comparison of military procedures and the minimum standards of due process prescribed *Morrissey* will reveal serious shortcomings in military procedures.

A. WRITTEN NOTICE OF THE CLAIMED VIOLATIONS

Under the *Morrissey* decision, the parolee or probationer is entitled to written notice of the claimed violation of parole or probation. The notice furnished the probationer at the final hearing has the same character and purpose as the notice provided at the preliminary hearing. In practice, the notice might well be the same notice furnished at the earlier hearing.¹⁷⁴

B. DISCLOSURE TO THE PROBATIONER OF THE EVIDENCE AGAINST HIM

Morrissey provides that the probationer is entitled to government disclosure of the evidence against him. Implicit in *Morrissey*’s requirement of disclosure is the concept that discovery of adverse evidence is to be permitted sufficiently *in advance* of the final hearing to permit adequate preparation by the probationer or his counsel. Provision for advance discovery would prevent the final hearing from becoming a contest of surprise. While the Manual’s Sample Record of Proceedings to Vacate Suspension provides for examination of government evidence by the probationer, the Manual has no requirement that evidence be disclosed or made available to the probationer or his counsel in advance of the hearing. This deficiency can be corrected by providing that evidence to be used against the probationer at the revocation hearing should be made available for inspection by the probationer when he is served with notice of the claimed violation prior to the final hearing.

¹⁷² Department of the Army Message 1972/12992, *reprinted in* THE ARMY LAWYER, Jan. 1973, at 13. (The application of *Morrissey* was limited to vacation of suspended sentences to *confinement*.)

¹⁷³ *Id.*

¹⁷⁴ The notice requirement has been fully developed in the text accompanying notes 133-40 *supra*.

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C. RIGHTS OF THE PROBATIONER

1. *The Opportunity to be Heard in Person.*

Morrissey grants the probationer the “opportunity to be heard in person.”¹⁷⁵ In contrast, Article 72 of the Uniform Code of Military Justice does not require *any* hearing in less serious cases. However, a hearing *is* required incident to the vacation of suspended general courts-martial sentences, and of suspended special courts-martial sentences which include punitive discharges. The hearing required in these more serious cases is before a third party, *not* the decision maker who is the officer exercising general court-martial jurisdiction over the probationer.

It is not clear from the Court’s opinion in *Morrissey* whether the term “opportunity to appear in person” means that the probationer has the right to appear in person before the decision maker, or merely before a third party hearing officer. Significantly, the Chief Justice listed the right to appear in person separately from the right to confront and cross-examine adverse witnesses.¹⁷⁶ It is suggested that the right to appear in person is of little consequence if it is deemed satisfied by a hearing before the vacation hearing officer who lacks the power to render a decision and who can only attempt to convey the impressions he gained during the hearing to the inaccessible (to the probationer) decision maker, the general court-martial convening authority.

In *Rambeau v. Rundle*¹⁷⁷ the Pennsylvania Supreme Court addressed, in the *Morrissey* context, the inadequacy of a third party hearing. The Pennsylvania court had little difficulty reaching the conclusion that the *Morrissey* term “opportunity to be heard in person” meant a right to appear before the decision maker:

It seems elementary that the right to be heard in person becomes meaningless unless the convicted parole violator is *heard personally by the people who must make the decision* regarding his recommitment, i.e., the entire parole board, not by some third party, or by only one member, who then relates the convicted violator’s case, second hand, to the rest of the board.¹⁷⁸

¹⁷⁵ 408 U.S. at 489.

¹⁷⁶ *Id.*

¹⁷⁷ 13 Crim. L. Rptr. 2104 (Mar. 16, 1973), *petition for reargument filed*, Mar. 26, 1973.

¹⁷⁸ *Id.* (emphasis added). In addition to the opinion of the court in *Rambeau v. Rundle*, there was one concurring opinion and two **opinions** which concurred

The Pennsylvania Court is apparently the only appellate court to have considered the personal hearing point, but the Pennsylvania Justices were in unanimous agreement that compliance with *Morrissey* requires a hearing held personally by the decision maker.

If *Morrissey* applies to the military,¹⁷⁹ and the probationer has the right to be heard in person by the authority exercising the revocation power, the military probationer's right is denied by present military practices. In cases involving suspended general court-martial sentences, and sentences of special courts-martial which include a bad-conduct discharge, revocation authority is exercised by the general court-martial convening authority. The general court-martial convening authority acts following third party hearings held by the special court-martial convening authority, but the probationer has no opportunity to appear before the general court-martial authority. A worse situation is presented by Manual procedures which permit the vacation, without any hearing, of suspended sentences of summary courts-martial and of suspended sentences of special courts-martial which do not include punitive discharges.¹⁷⁹

Morrissey's hearing requirement in the military setting is that the probationer has a right to personally appear before the convening authority rendering the revocation decision. In the context of the serious case, this would entitle the probationer to a hearing before the general court-martial convening authority. Some may assert, with justification, that it is simply unworkable to require a general court-martial convening authority to personally conduct revocation hearings. Unfortunately, no statistics have been gathered relative to the number or percentage of military cases in which vacation action is necessary. Nor is any information available regarding the length of time taken by the average hearing.

A distinction can be made between the general and special court-martial convening authority. The requirement that the convening

and dissented. All Justices, however, agreed that the parolee had the right to be heard in person by a quorum of the parole board.

¹⁷⁹The Army, following *Morrissey*, requires hearings in all proceedings to vacate suspended court-martial sentences to confinement. See note 4, *supra* and accompanying text. The Navy Department has not promulgated any directives regarding the applicability of *Morrissey*, but the matter is under review in the Office of the Judge Advocate General of the Navy, at the request of the Commandant of the Marine Corps. The Air Force has issued no directives on *Morrissey* although it recommends, but does not require, hearings incident to the vacation of all nonjudicial punishments. The Coast Guard relies on action by Judge Advocates in the field to implement *Morrissey*.

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authority hold hearings personally should pose no serious problem for the special court-martial convening authority, who at least in the serious cases, is already required to personally conduct either a preliminary or final hearing, as those terms are used in the Manual. Compliance with *Morrissey* however *will require* the special court-martial convening authority to conduct hearings in cases in which none is presently necessary.

The more serious difficulty is presented in engrafting the *Morrissey* personal hearing requirements onto the model now prescribed by the Manual for the more serious cases. When the vacation of a suspended sentence which includes a punitive discharge, or which was adjudged by a general court-martial is involved, the Code and the Manual direct that the case is to be forwarded to the general court-martial authority for action. Requiring general court-martial convening authorities to hold personal hearings could impose a serious burden on these officers, usually installation or division commanders of flag or general officer rank, whose duties are more nearly akin to those of corporate presidents or state governors than they are to those of civilian members of parole boards.

If permissible, delegation of the decision making power from the general court-martial convening authority to a special court-martial authority, a principal staff officer, or a military judge would free a busy general from an onerous burden. Because revocation proceedings are not part of the criminal process, but are essentially administrative in nature,¹⁸⁰ delegation of decision making authority to an officer who *can* hold a personal hearing would not encounter *constitutional* objections. However, because the Code directs that serious cases be forwarded to the general court-martial authority for decision,¹⁸¹ delegation of decision making authority may not be permissible without amendment to the Code.

The alternative under the Code as it now stands may be to retain the hearing officer concept, but to grant the probationer an additional hearing, before the general court-martial authority. At the additional personal hearing, the probationer could *personally* present his arguments against vacation.

2. *The Opportunity to Present Witnesses.*

The probationer has the right, under *Morrissey*, to present witnesses at the final revocation hearing. It follows that the proba-

¹⁸⁰ *Morrissey v. Brewer*, 408 US 471, 480 (1972).

¹⁸¹ UCMJ art. 72.

tioner has the right to compulsory process.¹⁸² In recognition of the problems posed by the new right to present witnesses in revocation hearings, Justice Powell, in the principal *Scarpelli* opinion, elaborated on the point:

Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. *While in some cases there is simply no adequate alternative to live testimony*, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the states from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.¹⁸³

The problem created by the remote witness may frequently be encountered in the military. Most witnesses, however, are likely to be military persons, who can be required to appear as witnesses at revocation hearings as part of their duties.

Civilian witnesses pose greater problems. While there is no subpoena power at either pretrial investigations¹⁸⁴ or revocation hearings, the Comptroller General has ruled that public funds may be expended for the travel expenses of civilian witnesses who testify at pretrial investigations.¹⁸⁵ The Comptroller General based his opinion on the premise that pretrial investigations are essential to the administration of military justice. He ruled that the expenditure of funds incidental to pretrial investigations was therefore legitimate, notwithstanding lack of subpoena power. Because revocation hearings are also essential to the administration of military justice, the same rationale should be applicable with regard to revocation hearings, and the same result reached. This point should be clarified at the earliest opportunity by request from one of the Judge Advocates General for a ruling by the Comptroller General.

3. *The Right to Present Documentary Evidence.*

The probationer has a clear right to present documentary evidence at the final revocation hearing. *Morrissey* directs that "the

¹⁸² At preliminary hearings the probationer is required to bring his witness himself. See note 145 *supra*.

¹⁸³ 411 U.S. at 782-83 n.5 (emphasis added).

¹⁸⁴ *United States v. Fairson*, 10 U.S.C.M.A. 220, 27 C.M.R. 294 (1959); **MANUAL**, para. 34d.

¹⁸⁵ 50 COMP. GEN. 810 (1971).

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process should be flexible enough to consider evidence including letters, affidavits and other material that would not be admissible at an adversary criminal trial.”¹⁸⁶

D. THE RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES

Mowissey granted the probationer the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation.¹⁸⁷ The only example of good cause given in *Morrissey* was the situation in which an informant might be exposed to risk of harm if his identity were disclosed.¹⁸⁸

As noted previously,¹⁸⁹ comment was made in the *Scarpelli* opinion regarding possible substitutes for live testimony, including affidavits, depositions and documentary evidence. Unfortunately, the majority opinion in *Scarpelli*, while providing examples of substitutes for live testimony, did not say when the substitutes could be used in lieu of live testimony. The *Scarpelli* opinion indicates only that, “in some cases there is simply no adequate alternative to live testimony.”¹⁹⁰ Similarly, absent risk of harm to the informant, there will, in all but the exceptional case, be no adequate substitute for confrontation and cross-examination.

To permit the exercise of the right to live appearance of witnesses, the following is submitted. Essential military witnesses whom the probationer believes it essential to confront and cross-examine may be *ordered* to appear. Civilian witnesses cannot be subpoenaed, but they may be *invited* to appear, perhaps at government expense. If necessary, the situs of the hearing may be changed to permit the probationer to exercise his right of confrontation and cross-examination, in cases in which no substitute is found for the exercise of these rights.

E. THE NEUTRAL AND DETACHED HEARING BODY

The probationer’s fundamental right to an impartial decision maker presents no problem to the military. As is the case with the civilian parole board, the special court-martial convening authority

¹⁸⁶ 408 US .at 489.

¹⁸⁷ Id.

¹⁸⁸ Id. at 487.

¹⁸⁹ See text accompanying note 183 supra.

¹⁹⁰ 411 U.S. 782-83 n.5.

ordinarily is sufficiently insulated from the actual supervision of the individual probationer to retain his independence. In those cases in which the convening authority is the victim of the misconduct forming the basis for the revocation action, or in any other respect has other than an official interest in the revocation, he should be disqualified from acting, and the case transferred to a different convening authority.¹⁹¹

*F. THE WRITTEN STATEMENT OF EVIDENCE
RELIED ON AND THE REASON FOR
REVOCATION*

Morrissey requires the decision maker to state the evidence he relied on and the reasons for revocation.¹⁹² The requirement for an expressed rationalization of the decision, and the evidence relied on has not heretofore been required of the decision maker. The Manual does provide that the hearing officer *assemble* the evidence, but there is no requirement for him to resolve conflicts in the evidence, or to make a recommendation as to the revocation decision.¹⁹³ The special court-martial convening authority is required to recommend action, but not to resolve conflicts in the evidence, or to rationalize his recommendation.¹⁹⁴

As indicated earlier¹⁹⁵ in this paper, compliance with *Morrissey* appears to require that the revocation hearing be held by the convening authority/decisionmaker. He will now be required to state his resolution of conflicts in the evidence and to state the reasons for his actions, inasmuch as no guidance is furnished to the decision-maker regarding the standard of persuasion involved in revocation matters,¹⁹⁶ the requirement that the convening authority state the

¹⁹¹ See p. 26 & note 131 *supra*.

¹⁹² 408 U.S. at 489; *Zizzo v. United States*, 470 F.2d 105 (7th Cir. 1972) (dictum).

¹⁹³ MANUAL, app. 16.

¹⁹⁴ *Id.* at § 21.

¹⁹⁵ See pp. 37-39 & notes 175-76 and 179 *supra*.

¹⁹⁶ The Illinois Supreme Court recently held that in the absence of statutory guidelines, violation of probation may be proved by a preponderance of the evidence, and the more rigid showing of clear and convincing evidence is not required. *People v. Corwell*, 53 Ill.2d 447, 292 N.E.2d 721 (1973). Cf. *People v. Ruelas*, 30 Cal. App. 3d 71, 106 Cal. Rptr. 132 (1973) (clear and convincing evidence required). For a discussion of the role of the exercise of discretion in probation revocation, see Dicerbo, *When Should Probation be Revoked?*, in **SELECTED READINGS IN PROBATION AND PAROLE** 11 (R. Carter ed. 1970).

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reason for his actions“” should help eliminate doubts that the action was arbitrary.

VII. SUMMARY, SUGGESTIONS AND CONCLUSIONS

The requirements of due process in parole and probation revocation prescribed by the Supreme Court apply to the armed forces.¹⁹⁸ Military probationers facing proceedings to vacate suspended court-martial sentences to confinement or the unique military punishment of a punitive discharge must now be accorded the following rights:

- (a) written notice of the claimed violation . . . ; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a “neutral and detached” hearing body . . . ; (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.¹⁹⁹

In addition, a military probationer must now also be granted a prompt preliminary hearing which incorporates these rights, when he is confined pending revocation action.²⁰⁰

The procedures prescribed by the Manual for Courts-Martial and the Uniform Code of Military Justice do not measure up to what Chief Justice Burger described in *Morrissey* as “[t]he basic requirements . . . of due process applicable to future revocations.”²⁰¹ Therefore present military practices in vacating suspended sentences to confinement and to punitive discharges must be modified.

Change in this area of military law can be brought about by direct judicial mandate, congressional amendment of Article 72, UCMJ, or by executive action. The fastest way to bring all the services into full compliance with *Morrissey* is by service directive, followed by change in the Manual.²⁰² Unfortunately, the scope of change that can be accomplished by directive or Manual change is limited. For example, compulsory process over civilian witnesses at revocation hearings can be provided only by legislative action.

¹⁹⁷ No statement of reasons for revocation is required if a transcript of the revocation hearing is prepared and the trier of fact entered findings of controverted facts on the record. *People v. Scott*, 34 Cal. App. 3d 702, 110 Cal. Rptr. 402 (1973).

¹⁹⁸ See Section III, p. 8 *supra*.

¹⁹⁹ *Morrissey v. Brewer*, 408 U.S. 471,489 (1972).

²⁰⁰ *Id.* at 485. See Section V.A. p. 19 *supra*.

²⁰¹ *Morrissey v. Brewer*, 408 U.S. 471,490 (1972).

²⁰² Although the current edition of the Manual was published in loose-leaf, no changes have been made in the Manual since its promulgation in 1969. This

Because much of what the Supreme Court required in *Morrissey* can be implemented by regulation, it is suggested that the services take the initiative and promulgate directives, and propose changes in the Manual to bring military procedures into compliance with the *Morrissey* requirements. Statutory amendment must remain as the ultimate objective.

A. IMPLEMENTING MORRISSEY BY DIRECTIVE
AND CHANGE IN THE MANUAL
FOR COURTS-MARTIAL

The changes necessary to implement *Morrissey* in the services can, for the most part, be accomplished by service directives²⁰³ within the framework of present Manual and Code provisions. For example, general court-martial authorities could be *directed* to afford probationers the opportunity to appear in person to rebut allegations of misconduct and to 'state why probation should not be revoked. The substance of directives implementing *Morrissey* could also be incorporated into paragraph 97b of the Manual. Finally, the opportunity to streamline military procedures by providing for *waiver* of revocation proceedings should no longer be overlooked. A suggested directive is found at Appendix A.

Many of the proposals contained in the suggested regulation/Manual change are relatively minor, but they are necessary to bring military procedures into compliance with *Morrissey's* requirements.

In addition, portion of the regulation limiting the right to counsel in minor cases to the situations in which counsel would be required by *Scarpelli* simply prevents the military's broad right to counsel from extending far beyond what was required by the Supreme Court in *Scarpelli*.²⁰⁴ The provision regarding waiver of hearing rights is designed to obviate the necessity for a hearing when one is neither needed nor desired.

B. PROPOSAL FOR AMENDMENT OF
ARTICLE 72, UCMJ

Unfortunately, not all changes necessary or desirable can be provided by regulation or Manual change. For changes, a statutory

would seem to indicate that change cannot be brought about as rapidly as was envisioned at the time the Manual was published.

²⁰³ Compare Department of the Army Message 1972/12992, reprinted in, THE ARMY LAWYER, Jan. 1973, at 13, with JAGN ltr JAG:204.2:JAB: mkn Ser 1488 of 22 Feb. 1974.

²⁰⁴ See pp. 33-34 *supra*.

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amendment will be required. A proposed Amendment to Article 72 of the Uniform Code of Military Justice is found at Appendix B.

C. CONCLUSION

The armed services can be justifiably proud of the fact that the court-martial system provided many procedural advantages to military accuseds well before the same protections were available to civilians.²⁰⁵ Similarly, military procedures for vacating suspended sentences provided significant due process protections to military probationers well before many of those protections became available to civilian probationers and parolees. However, military probation revocation procedures have remained constant as civilian concepts of procedural due process have evolved. Now, due process protections declared by the Supreme Court to be essential to a fair factfinding hearing exceed the protections available to the military probationer.

The services should not wait for Congress or the courts to force full military implementation of *Morrissey* and *Scarpelli*. The services should take the initiative and, to the extent possible, provide the same due process protections to the serviceman now enjoyed by the civilian parolee. But adoption of a regulation or a Manual change is not enough. Mr. Justice Powell said in *Scarpelli* "we [did not] intend to foreclose . . . creative solutions to the practical difficulties of the *Morrissey* requirements."²⁰⁶ Judge advocates and commanders must accept *Morrissey's* military role and create those practical solutions.

APPENDIX A

The following suggestions for a directive, and later a Manual change, are listed in tabular form together with the shortcomings in present procedures they are designed to overcome.

PRESENT DEFICIENCY PROPOSED DIRECTIVE/MANUAL CHANGE

Failure to recognize *Morrissey's* applicability to the armed forces.

1. GENERAL

1.1 *Purpose.* This regulation establishes minimum standards of due process applicable to vacation of suspended court-martial sentences

²⁰⁵ Staring, *Foreword to Due Process in the Military*, 10 SAN DIEGO L. REV. 1 (1972); Moyer, *Procedural Rights of Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

²⁰⁶ Gagnon v. Scarpelli, 411 U.S. 778,782-83 n.5 (1973).

to confinement or punitive discharge. This regulation supplements art. 72, UCMJ and para. 97*b*, Manual for Courts-Martial, U.S. 1969 (Rev. ed.) and implements the Supreme Court decisions of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 311 U.S. 778 (1973).

Failure to provide prompt preliminary hearing

2. PRELIMINARY HEARING

2.1. *Prompt Hearing Upon Reconfinement.*

In all cases in which a military probationer (a person in the service with a suspended court-martial sentence to confinement or a punitive discharge) is confined on the basis of an allegation of a violation of the conditions of probation, the probationer shall be accorded a revocation hearing within ten (10) days following confinement. If it appears that a revocation hearing cannot be held within that period, the probationer shall be accorded the opportunity for a preliminary hearing to determine whether probable cause exists to warrant Confinement pending the revocation hearing.²⁰⁷ The preliminary hearing shall ordinarily be held at or near the location where probation is alleged to have been violated," unless arrangements are made for the travel of witnesses to another hearing location.

2.2. The minimum requirements of due process at the preliminary hearing include:

— notice

a. *Notice.* The probationer is entitled to notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe the conditions of probation have been violated.²⁰⁹ The probationer

²⁰⁷ *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); see Section V.A. p. 19 *supra*.

²⁰⁸ *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); see Section V.C.1 p. 24 *supra*

²⁰⁹ *Morrissey v. Brewer*. 408 C.S. 471, 486-87 (1972); see Section V.C.3 p. 26 *supra*.

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is entitled to at least five days advance notice in the case of vacation of a suspended general court-martial sentence, three days notice in advance of the hearing when a suspended special court-martial sentence is involved, and at least one day's notice in advance of a hearing to vacate a suspended sentence (to confinement) of a summary court-martial. The probationer may waive these waiting periods. The notice should state in clear and concise terms what violations are alleged,²¹⁰ although formal pleading is not required.

— right to appear and present evidence

b. *Right to appear and present evidence.* The probationer has the right to appear and speak in his own behalf.²¹¹ He may make a statement under oath, an unsworn statement, or may make a statement through counsel if he has one. The probationer may bring letters, documents, or individuals who can give relevant information to the hearing officer.²¹² There is no right to compulsory process of civilian witnesses at the preliminary hearing.²¹³

— confrontation and cross-examination

c. *Confrontation and Cross-Examination.* On the request of the probationer, persons who have given adverse information on which revocation is to be based are to be made available for examination in his presence,²¹⁴ unless the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, in which case the informant need not be subjected to confrontation and cross-examination.²¹⁵

²¹⁰ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.3 p. 26 *supra*.

²¹¹ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.4 p. 28 *supra*.

²¹² *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.4 p. 28 *supra*.

²¹³ See page 29 *supra*.

²¹⁴ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.5 p. 29 *supra*.

²¹⁵ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.5 p. 29 *supra*.

— independent hearing officer

d. *Independent Hearing Officer.* The special court-martial convening authority shall appoint an officer to serve as preliminary hearing officer. The preliminary hearing officer shall be authorized to order the probationer's release from confinement if no probable cause is found to warrant confinement pending revocation. The preliminary hearing officer shall be a person not directly involved in the supervision of the probationer,²¹⁶ and may, but need not be, an officer qualified as a military judge.²¹⁷

— report

e. *Report.* The hearing officer shall make a summary, or digest of what occurs at the hearing, and shall include the responses of the probationer to the allegation and the substance of any evidence presented by him.²¹⁸ The hearing officer should determine if there is probable cause to hold the probationer for a final hearing, and should state the evidence he relied on.²¹⁹ The probationer is entitled to a copy of this report.²²⁰

3. REVOCATION HEARING

Hearing in cases involving confinement, but not discharge:

3.1. *Final Revocation Hearing.* In all cases involving the vacation of a suspended sentence of a general court-martial, or of a special court-martial sentence which includes confinement or a punitive discharge, or of a summary court-martial sentence which includes confinement, the probationer shall be afforded a revocation hearing on the issue of whether probation has been violated, and if so, wheth-

²¹⁶ *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see Section V.C.2 p. 25 *supra*.
²¹⁷ See *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see *also* text accompanying note 130 *supra*.

²¹⁸ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.6 p. 31 *supra*.

²¹⁹ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972), quoting *Goldberg v. Kelley*, 398 U.S. 254, 271 (1970); see Section V.C.6 p. 31 *supra*.

²²⁰ *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); see text accompanying note 155 *supra*.

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er vacation of the suspended sentence, or a portion of it, is warranted.'" No hearing is required in other cases. Rights at the revocation hearing include:

Opportunity to be heard in person by decision-making authority.

a. *Opportunity to be Heard in Person.* The officer exercising the revocation authority shall personally conduct a hearing on the issue of whether the conditions of probation have been violated²²² and if so whether, considering all the circumstances, revocation of probation, (vacation of suspension) is warranted. However, the officer exercising revocation authority may appoint a hearing officer to gather all relevant facts, *provided that* the probationer is afforded the opportunity to appear in person before the officer exercising the revocation authority and given the opportunity to personally rebut the allegations of probation violation and to explain why probation should not be revoked.²²³

— Notice of claimed violation (s)

b. *Advance Notice of Claimed Violation.* The probationer shall be furnished notice, in writing, of the claimed violations of probation.²²⁴ Notice shall be furnished at least five days in advance of a hearing to vacate a suspended general court-martial sentence, three days for a suspended special court-martial sentence, and one day in advance of a hearing to vacate a suspended summary court-martial sentence to confinement, The notice period may be waived by the probationer.

— disclosure of evidence

c. *Notice of Evidence to be Relied On.* At the time notice is furnished to the probationer of the claimed violation, the probationer shall

²²¹ *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972); see p. 35 *supra*.

²²² *See* *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see also* Section VI.C.1 p. 37 *supra*.

²²³ *See* *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see also* p. 39 *supra*.

²²⁴ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see* Section V.A.p. 19 *supra*.

also be furnished with notice of the names of witnesses to be called, and the probationer shall be allowed to inspect copies of any statements made by witnesses. In addition, the probationer shall be allowed to inspect any real or documentary evidence to be used or considered.²²⁵

– confrontation and cross-examination

d. *Confrontation and Cross-Examination.* While the use of affidavits and depositions is encouraged, there are some cases in which the presence of witnesses will be essential.²²⁶ These include cases in which the allegation of the only witness against the probationer is uncorroborated and contradictory, and the allegation is denied by the probationer. In such cases the probationer shall have the right to confront and cross-examine the witness. If a civilian witness will not attend the revocation hearing, the statement of the witness cannot be considered.

– hearing officer

e. *Hearing Officer.* The officer exercising revocation authority shall be the officer exercising court-martial jurisdiction over the probationer equivalent to the court-martial which imposed the sentence to be vacated. If the sentence includes a suspended punitive discharge awarded by a special court-martial, the revocation authority shall be exercised by the general court-martial convening authority. No officer shall act as revocation authority if he is directly involved in the supervision of the probationer or has other than an official interest in the revocation proceeding.²²⁷ If an officer is disqualified from acting in a case, the case shall be forwarded to the next superior authority in the chain of command.

²²⁵ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see Section V.B. p. 21 *supra*.

²²⁶ *Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 n.5 (1973); see Section VI.C.2 p. 39 *supra*.

²²⁷ *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see Section VI.E. pp. 41-42 *supra*.

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– statement of evidence and reasons for revoking probation

f. *Written Statement of Action.* In all cases in which probation is revoked, the officer exercising revocation authority shall prepare a written statement of the evidence relied on and the reasons for revoking probation.²²⁸

4. WAIVER

– waiver

4.1. *Waiver.* Any right provided by Article 72, UCMJ, or the Manual for Courts-Martial or this regulation may be waived by the probationer, upon his being informed of his right to and the nature of the hearings required incident to vacation of suspension.²²⁹ All such waivers shall be in writing.

5. COUNSEL

– Right to counsel

5.1. *Counsel.* The probationer shall have the right to counsel at preliminary and final revocation hearings, upon his request, when the sentence to be vacated is a general court-martial sentence, or a special court-martial sentence which includes a bad-conduct discharge.²³⁰ In all other cases the probationer shall be provided counsel if (a) the probationer claims he did not commit the alleged violation of probation or (b) the probationer admits the violation, or it is a matter of public record but he claims there are substantial reasons which justified or mitigated the violation and the reasons are complex or difficult to develop. In passing on a request for counsel, the probationer's ability to speak effectively for himself may be considered. If counsel is denied at a preliminary or final hearing, the grounds for refusal should be stated succinctly in the record.²³¹

– limitation on right

²²⁸ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see Section VI.F p. 42 *supra*.

²²⁹ See Cohen, *supra* note 5, at 620.

²³⁰ See p. 12 and note 71 *supra*.

²³¹ *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973); see Section V.D p. 31 *supra*.

APPENDIX B

At the conclusion of the *Morrissey* opinion, the Chief of Justice denied that the Court had written a code of procedure.²³² Nevertheless, in setting forth the minimum requirements of due process in parole revocation, Chief Justice Burger did provide an excellent formula for statutory amendment. In drafting statutory modifications, however, it is appropriate to consider not only the Chief Justice's guidelines, but also the practical problems in the administration of military justice.

In addition to providing the statutory framework for the implementation of *Morrissey*, amendment to the UCMJ should also provide the following:

- (1) compulsory process for witnesses at preliminary and final hearings,²³³
- (2) express statutory authority for confinement of probationers pending the revocation determination,²³⁴
- (3) delegation of revocation authority by the court-martial convening authority,²³⁵ and
- (4) an express provision for the probationer's waiver of hearing rights.

It is submitted that the following proposed amendment will not only provide a statutory framework for the implementation of *Morrissey*, it will also provide solutions to the more serious practical problems in the administration of vacation proceedings.

ARTICLE 72, UCMJ (PROPOSED)

Hearings, when required	(a) before the vacation of the suspension of any sentence of a court-martial which includes dismissal, a punitive discharge or confinement, the officer having court-martial jurisdiction over the accused for the type of court which imposed the suspended sentence shall cause a hearing to be held on the alleged violation of probation. ²³⁶ In cases of vacation of general court-martial sentences, the general court-martial convening authority may hold the hear-
Hearings, who conducts	
Hearings, dele-	

²³² 408 U.S. at 488.

²³³ See text accompanying note 153 & pp. 39-41 *supra*.

²³⁴ See p. 20 *supra*.

²³⁵ See pp. 37-39 *supra*.

²³⁶ See *Morrissey v. Brewer*, 408 U.S. 471, 487-99 (1972); see also pp. 34-35 *supra*.

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gation of
authority

ing²³⁷ or may delegate that responsibility, together with revocation authority, to a subordinate court-martial convening authority or to a military judge. In cases of vacation of special court-martial sentences, the special court-martial convening authority may personally conduct the revocation hearing, or may delegate hearing responsibility, together with revocation authority, to a military judge. If the convening authority has been directly involved in the supervision of the conduct of the probationer, or has other than an official interest in the case, he shall forward the case to the next higher authority.²³⁸ The next higher authority may hold the revocation hearing himself, or he may appoint another subordinate convening authority, or a military judge, to act in the case.

Convening authority, disqualification

Conduct of
hearing:

(b) The following procedures shall apply to the conduct of revocation hearings required by section (a) of this article. The probationer shall be notified of the alleged violations **five** days in advance of a hearing to vacate suspension of a sentence of a general court-martial, three days in advance of a hearing to vacate suspension of a sentence of a special court-martial, and one day in advance of a hearing to vacate a suspended summary court-martial sentence. Notice of the alleged violations of probation, and that a revocation hearing is to be held, shall be furnished in **writing**.²³⁹ The probationer shall have the right to disclosure of the evidence against him in advance of the **hearing**.²⁴⁰ The probationer shall be afforded

— notice

— disclosure of
evidence

²³⁷ See text accompanying note 151 *supra*.

²³⁸ See *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see also p. 42 *supra*.

²³⁹ See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see also Section **VIA**

p. 36 *supra*.

²⁴⁰ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see Section **VI.B** p. 36 *supra*.

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- opportunity- to be heard in person and present evidence
 - confrontation, cross-examination
 - Reconfinement authorized
 - prompt hearing required
 - Preliminary hearing required in certain cases
 - location
 - notice
 - opportunity to appear and present evidence
 - confrontation and cross-
- the opportunity to be heard in person and to present witnesses and documentary evidence.*'
- The probationer shall have the right to confront and cross examine adverse witnesses, unless good cause is found for not allowing confrontation.*''
- (c) a probationer may be confined on the basis of an allegation of breach of the conditions of probation.²⁴³ If a probationer is confined pending vacation action, the revocation hearing shall be promptly held.²⁴⁴ If it appears that a revocation hearing cannot be held within ten days of the imposition of confinement, the probationer shall be afforded a prompt preliminary hearing within that period to determine whether probable cause exists to warrant continued confinement pending the revocation hearing. Ordinarily the preliminary hearing shall be held at or near the place of the alleged breach of probation, to facilitate attendance and presentation of witnesses.²⁴⁵ The probationer shall be given advance notice that the hearing is to take place and that its purpose is to determine whether there is probable cause to believe he has committed a violation of the conditions of probation.²⁴⁶ At the preliminary hearing the probationer may appear and speak in his own behalf and may present relevant witnesses, documents and letters for the consideration of the hearing officer.²⁴⁷ On request of the probationer, persons who have given adverse infor-

²⁴¹ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see *also* Section VI.C.1-3 pp. 37-41 *supra*.

²⁴² *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); see *also* Section VI.D p. 41 *supra*.

²⁴³ See p. 19 *supra*.

²⁴⁴ *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); see Section V.A p. 19 *supra*.

²⁴⁵ *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); see Section V.C.1 p. 24 *supra*.

²⁴⁶ *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); see Section V.C.3 p. 26 *supra*.

²⁴⁷ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.4 p. 28 *supra*.

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examination
Hearing officer,
qualifications

mation on which revocation may be based are to be made available for questioning in the probationer's presence.²⁴⁸ The hearing officer is to be an officer not directly involved in the supervision of the probationer, nor having other than an official interest in the case.²⁴⁹ The hearing officer may be the special court-martial convening authority with jurisdiction over the accused, or any officer designated by the special court-martial convening authority to hold the hearing, to whom authority to release the probationer from confinement has been delegated.

(d) the probationer shall have the right to be represented by counsel certified in accordance with 827 (c) of this title (Article 27 (c)) when the sentence to be vacated is a general court-martial sentence or a special court-martial sentence which includes a bad-conduct discharge.²⁵⁰ In all other cases the probationer shall be provided counsel upon his request if (i) the probationer claims he did not commit the alleged violation of probation or (ii) the probationer admits the violation or it is a matter of public record, but the probationer claims that there are substantial reasons which justified or mitigated the violation and the reasons are complex or difficult to develop.²⁵¹ In passing on a request for counsel, the revocation authority shall consider the probationer's ability to speak effectively for himself.²⁵² If counsel is denied at a preliminary or final revocation hearing, the grounds for the refusal to provide counsel should be stated in the record of the hearing.²⁵³

²⁴⁸ *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); see Section V.C.2 p. 25 *supra*.

²⁴⁹ *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see Section V.C.2 p. 25 *supra*.

²⁵⁰ See pp. 33-34 *supra*.

²⁵¹ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); see Section V.D p. 31 *supra*.

²⁵² *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

²⁵³ *Id.* at 791.

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- Subpoena power (e) Preliminary and revocation hearing officers shall have the power to issue subpoenas to compel the attendance of witnesses, and to compel the production of documents or other written or real evidence at the hearings provided for by this section.²⁵⁴
- Execution of sentence
– limitations (f) If a suspension is ordered vacated by the revocation hearing officer, any unexecuted portion of a sentence shall be promptly executed, subject to the applicable restrictions in section 871(c) of this title, (Article 71(c)).
- Other sentences (g) the suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the probationer is serving or assigned, a court of the kind that imposed the sentence.
- (h) Any right provided by this article may be waived by a probationer.

²⁵⁴ See p. 40 *supra*.

LIABILITY OF THE STATIONING FORCES FOR “SCOPE CLAIMS” AND “EX GRATIA CLAIMS” IN THE FEDERAL REPUBLIC OF GERMANY*

Edmund H. Schwenk**

I. INTRODUCTION

The provisions of the NATO Status of Forces Agreement concerning the settlement of damages caused by members of a force or civilian component are contained in Article VIII, as implemented in the Federal Republic of Germany by Article 41, Supplementary Agreement to the NATO Status of Forces Agreement, and by Re Article 41, Protocol of Signature. These damages have been divided into three categories:

1. “Scope claims,” that is, damages other than maneuver damages or requisition damages that have been caused by members of a force or civilian component and for which the force is legally responsible;

2. “Maneuver claims,” that is, damages caused by maneuvers or other exercises;

3. “Requisition damages,” that is, damages caused to property made available to a force or civilian component for their exclusive use as a result of a requisition order.

II. RECOGNIZED CLAIMS ARISING FROM TORTS

A. GENERAL

Pursuant to paragraphs 5 and 6 of Article VIII of the NATO Status of Forces Agreement, two types of claims are recognized: (1) “Scope claims,” that is, claims arising out of acts or omissions of members of a force or civilian component that are committed in the performance of official duty, or out of any other act, omission or

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

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occurrence for which a force or civilian component is legally responsible and that causes damage in the territory of the Federal Republic of Germany to third parties other than any of the Contracting Parties; and (2) "Nonscope claims," that is, claims against members of a force or civilian component arising out of tortious acts or omissions in the Federal Republic of Germany not committed in the performance of official duty.

Both scope claims and nonscope claims are claims for damages, therefore, restraining actions as a result of slander, libel, or nuisance committed by a member of a force or civilian component in the performance of official duty or by the force itself cannot be predicated upon the provisions of paragraph 5 of Article VIII, NATO Status of Forces Agreement.¹ Moreover, a restraining order against the sending State would be in violation of international law in view of the sovereignty of that foreign state.

B. SCOPE CLAIMS

1. *Claims against the Forces in the Federal Republic of Germany*

Scope claims may be based upon paragraph 5 of Article VIII, NATO Status of Forces Agreement, as implemented by Article 41, Supplementary- Agreement to the NATO Status of Forces Agreement, in connection with the German legal provisions concerning the liability for torts or special statutes. Article 41, Supplementary Agreement, provides that the settlement of claims with respect to damages caused by acts or omissions of a force, a civilian component or their members, or by other occurrences for which a force or a civilian component is legally responsible, shall be governed by the provisions of Article VIII of the NATO Status of Forces Agreement and the provisions of Article 41, Supplementary Agreement. Paragraph 5 of Article VIII, NATO Status of Forces Agreement, establishes two separate and distinct grounds for claims: (1) Claims arising out of acts or omissions of members of a force or civilian component done in the performance of official duty and causing damage in the territory of the receiving State to third parties; and (2) Claims arising out of an act, omission or occurrence for which a force or civilian component is legally responsible and causing damage in the territory of the receiving State to third parties.

¹ German Supreme Court decision of July 11, 1963, 1963 BETRIEBSBERATER [BB] 1077, 1963 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 220, 1963 DEUTSCHE OEFENTLICHE VERWALTUNG [DÖV] 855.

The damage to third parties must have occurred in the territory of the receiving State, in this case the Federal Republic of Germany. The decisive issue is whether the damage actually took place within the territory of the Federal Republic of Germany. This is true regardless of whether the act or omission which ultimately causes the damage occurred outside the Federal Republic of Germany. It should be noted that West Berlin is not regarded as part of the territory of the Federal Republic of Germany with respect to damages caused by the stationing forces because of its continuing military occupation status.

2. Claims for Damages Arising out of Acts or Omissions Done by Members of a Force or Civilian Component

Pursuant to paragraph 5(a) of Article VIII, NATO Status of Forces Agreement, the assertion, examination, and settlement of claims arising out of damage caused by the forces, or the decision by a court, is made pursuant to the laws and regulations of the Federal Republic of Germany that apply to its own armed forces. Accordingly, German laws apply in those cases where the "Bundeswehr," German Armed Forces, would be liable under the same circumstances. In view of the equal treatment of foreign forces and those of the "Bundeswehr" it follows that, with respect to acts and omissions of members of a force or civilian component done in the performance of official duty, the provisions of Section 839, German Civil Code, in connection with Article 34, Basic Law, are applicable.² Application of Article 34, Basic Law, requires violation of an official duty of a sovereign nature. While the official activity of a member of the stationing forces may not appear to be of a sovereign nature,³ in case of a soldier driving a military vehicle in the performance of official duty the required connection between the armed services' mission and the particular travel is ordinarily so

² German Supreme Court decision of October 24, 1960, 1961 NJW 457, 1961 MONATSSCHRIFT FÜR DRUTSCHES RECHT [MDR] 210; German Supreme Court decision of April 17, 1961, 35 BGHZ 95, 1961 NJW 1529, 1961 ZEITSCHRIFT FÜR VERSICHERUNGSRECHT [VERS'R] 665; Art. VIII, para 5(a) NATO Status of Forces Agreement [hereinafter referred to as NATO SOFA]; See also German Supreme Court decision of January 29, 1968, 49 BGHZ 267, 273, 1968 BB 401, 1968 NJW 6%.

³ German Supreme Court decision of June 5, 1961, 35 BGHZ 185, 187; 1961 BB 772; 1961 NJW 1532; German Supreme Court decision of October 14, 1963, 1964 BB 109, 1964 NJW 104; German Supreme Court decision of April 16, 1964, 42 BGHZ 176, 1964 NJW 1895.

apparent that the sovereign nature of such a travel should be presumed. Consequently, if the defendant, the Federal Republic of Germany invokes such prima facie evidence, the plaintiff should bear the burden of proving that the travel did not serve sovereign purposes; the German Supreme Court's opinion to the contrary is hardly understandable. On the other hand, unauthorized driving of an Army vehicle, "Schwarzfahrt," by a member of the stationing forces constitutes an official activity despite the fact that such action is prohibited by Army regulations.⁶ Where a member of a force or civilian component uses his private vehicle for official travels, such use may, depending on the particular circumstances, constitute official activity.⁷ A claim for damages against the stationing forces for willful violation of an official duty by one of their members does not exist pursuant to Section 839, German Civil Code, in connection with Article 34, Basic Law, if, and to the extent that, a social insurance carrier is bound to make compensation to the injured person,⁸ since Section 839, German Civil Code, prescribes that the liability of the tortfeasor and, hence, pursuant to Article 34, Basic Law, that of the government, is secondary. This secondary liability would be defeated if the social insurance carrier could recover the social security payments from the armed forces.⁹ Furthermore, the stationing forces cannot invoke as a defense the special provisions excluding liability which are contained in the German (Bavarian) civil service law, since those provisions are limited to the relationship between civil servants and their em-

⁴ German Supreme Court decision of April 16, 1964, 42 BGHZ 176, 1964 NJW 1895; German Supreme Court decision of June 5, 1961, 35 BGHZ 185; German Supreme Court decision of October 14, 1963, 1964 BB 109, 1964 NJW 104; German Supreme Court decision of January 29, 1968, 49 BGHZ 267, 273, 1968 BB 401, 1968 NJW 6%.

⁵ German Supreme Court decision of April 28, 1966, 1966 NJW 1263 with annot. by Schneider; German Supreme Court decision of April 16, 1964, 42 BGHZ 176, 1964 NJW 1895; German Supreme Court decision of January 29, 1968, 49 BGHZ 267, 1968 BB 401, 1968 NJW 696.

⁶ German Supreme Court decision of November 25, 1968, 1969 NJW 421.

⁷ German Supreme Court decision of December 8, 1958, 29 BGHZ 38.

⁸ German Supreme Court decision of November 9, 1959, 31 BGHZ 148, 1960 NJW 241; German Supreme Court decision of January 29, 1968, 49 BGHZ 267, 273, 1968 BB 401, 1968 NJW 696.

⁹ German Supreme Court decision of January 29, 1968, 49 BGHZ 267, 273, 1968 BB 401, 1968 NJW 6%; see *also* German Supreme Court decision of November 9, 1959, 31 BGHZ, 1960 NJW 241.

ployers and are not designed for the benefit of third parties.¹⁰ Insofar as acts or omissions of members of a force or civilian component done in the performance of official duty are concerned, liability for damages pursuant to Section 839, German Civil Code, arises only if the member of a force or civilian component violates his official duty towards a third party. The provisions of the “Strassenverkehrsordnung,” Road Traffic Ordinance, constitute provisions imposing an official duty toward third parties within the meaning of Section 839, German Civil Code. This, however, becomes more questionable where internal Army traffic regulations are violated by the drivers of Army vehicles, for example, rules prescribing more stringent speed limits than those prescribed by the “Strassenverkehrsordnung.” Whether the violation of such an Army regulation also constitutes a violation of official duty towards a “third party” depends on the purpose of such internal regulations, whether they are specifically intended for the protection of third parties.¹¹ Pursuant to paragraph 4(a) of Article 57 of the Supplementary Agreement, deviations by a force from German regulations governing road traffic conduct shall be permitted only in cases of military exigency and then only with due regard to public safety and order. Paragraph 8 of Article 41 of the Supplementary Agreement provides that the liability of a force or of a civilian component shall not be affected by the fact that such force or civilian component enjoys exemption from German regulations. However, such compensation shall be payable by the forces of the sending State only if and to the extent compensation would be payable for similar damages if caused by the “Bundeswehr.” Therefore, the violation of traffic rules by a member of a force or civilian component acting in the performance of official duty can be regarded as a violation of Section 839, German Civil Code, even if such conduct is permissible under paragraph 4(a) of Article 57 of the Supplementary Agreement, unless the “Bundeswehr” would not be liable in such a case.¹² Such liability, however will always be found to exist where deviations from the road traffic rules occur without any military exigency or if, in case of deviation, public safety and order are not sufficiently observed.¹³

¹⁰ German Supreme Court decision of April 17, 1961, 35 BGHZ 95, 1961 NJW 1529, 1961 VRSR 665.

¹¹ German Supreme Court decision of June 5, 1961, 35 BGHZ 185, 187, 1961 BB 772, 1961 NJW 1532.

¹² German Supreme Court decision of September 17, 1962, 1962 BB 1355.

¹³ As to similar rights-of-way of the German police and fire department,

Insofar as members of a force or civilian component are acting in "private" matters of the force when performing their official duty, the sending State's liability is not predicated upon Section 839, German Civil Code, in connection with Article 34, Basic Law, but upon Section 831, or Sections 89 and 31, German Civil Code, respectively. It is questionable¹⁴ whether in case of the liability of the stationing forces for members of a force or civilian component pursuant to Section 831, German Civil Code (i.e., "respondeat superior rule"), the possibility of exoneration provided in Section 831, German Civil Code, is applicable for two reasons: first, in case of successful exoneration the stationing forces would not assume liability for damages and, second, because a judgment rendered against the responsible member of a force or civilian component could not be executed. However, it is the author's opinion that the sending State should not be deprived of the right of exoneration because a judgment rendered against the member of a force or civilian component cannot be executed. In this respect, the basic problem does not lie with paragraph 5 (g) of Article VIII, but rather in the right of exoneration provided by Section 831, German Civil Code.

3. *Claims Arising out of an Act, Omission, or Occurrence for which a Force or Civilian Component is Responsible*

The sending State is not only liable for acts or omissions of members of a force or civilian component in the performance of official duty, but also for other acts, omissions, or occurrences for which a force or civilian component is legally responsible. In accordance with the unanimous view of the Contracting Parties,¹⁵ the language "or out of another act, omission, or occurrence, for which a force or civilian component is legally responsible" establishes responsibility of the sending State for acts, omissions and occurrences pursuant to the "law of the receiving State," the Federal Republic of Germany. Such liability exists in cases of liability without fault. In general, such liability may be predicated upon one of the following provisions:

- a. Section 831, German Civil Code ("respondeat superior rule");

see German Supreme Court decision of April 23, 1956, 20 BGHZ 290 and German Supreme Court decision of November 18, 1957, 26 BGHZ 69.

¹⁴ See Graefe, 1961 NJW 1843; Haupt and Graefe, 1960 NJW 458.

¹⁵ COLLECTIONS OF EXTRACTS FROM THE SUMMARY RECORDS OF THE NEGOTIATIONS ON THE SUPPLEMENTARY ARRANGEMENTS TO THE NATO STATUS OF FORCES AGREEMENT, RE ART. 41, SA, p. 32.

- b. Section 833, German Civil Code (animal keeper's liability for military horses, messenger and watch dogs, etc.);
- c. Sections 836, 838, German Civil Code (liability for collapse of a building or another device connected with real estate or for dismantling of parts of a building or device);
- d. Sections 7, 8, 8a, "Strassenverkehrsgesetz" (Road Traffic Law) (liability of the holder of a vehicle);
- e. Sections 33, 53, paragraph 1, "Luftverkehrsgesetz" (Air Traffic Law) (liability of the holder of an aircraft);
- f. Section 1a, "Reichshaftpflichtgesetz" (Law pertaining to Reich Liability Insurance) (liability for railway accidents);
- g. Section 22, "Wasserhaushaltsgesetz" (Water Economy Law) (liability for water pollution).

Moreover, the Contracting Parties agreed¹⁶ that the force or the civilian component is liable for damages caused by local national employees according to the same principle under which the receiving State is liable for the acts and omissions of local national employees of its own armed forces, that is, under which the Federal Republic of Germany is liable for local national employees of the "Bundeswehr." Thus, if a local national employee of a force or civilian component drives an official vehicle of the force or civilian component and causes damage while in the performance of official duty, the same provisions that would be applied had an employee of the "Bundeswehr" caused damages in the performance of official duty should be applicable. It follows that the stationing forces' liability for local employees is dependent upon whether the local employee acted in the performance of official duty, Section 839, German Civil Code, Article 34, Basic Law or not, Section 831, German Civil Code. However, the sending State is also liable for acts done by a force in case of eminent domain, expropriation, for example, if timber stored at a training area has been destroyed by a forest fire which was caused by the Force's training exercise,¹⁷ or if police action is required, because fuel leaking out of a vehicle of the force as the result of an accident threatens to pollute the groundwater of an adjacent meadow.¹⁸ Under the German law of nuisance, the force of the sending State is liable because of the operation of an Air Force club which produces noise and odors be-

¹⁶ *Id.*

¹⁷ German Supreme Court decision of March 18, 1962, 37 BGHZ 44, 1962 NJW 1439.

¹⁸ German Supreme Court decision of April 27, 1970, 1970 NJW 1416.

yond the locally customary level and substantially affects the neighbors in a residential section.¹⁹ These cases, however, must be distinguished from those involving claims directed against the Federal Republic of Germany itself rather than against the stationing forces, for example, if the Federal Republic of Germany makes a defective training area available to the stationing forces and, as a result of such defect, large quantities of sand are driven onto the neighboring real estate as the result of a flood, thus causing damage to the real estate.²⁰

A special procedure has been established with respect to liability of the stationing forces for so-called "Unauthorized trips," "Schwarzfahrten." Pursuant to paragraph 7 of Article VIII, NATO SOFA, claims arising out of the unauthorized use of any vehicle of the armed services of a sending State shall be dealt with in accordance with paragraph 6 of Article VIII, NATO SOFA, that is, as so-called "ex gratia claims," unless the force or civilian component is legally responsible. The force or the civilian component is legally responsible for liability defined in paragraph 3 of Section 7, Road Traffic Law, StVG, for example, if the unauthorized use of the vehicle was facilitated by the negligence of the force itself, such as by parking it on a public road without taking the necessary security measures.²¹ However, in such a case there might also exist an independent legal basis for liability pursuant to Section 839, German Civil Code, and Article 34, Basic Law, providing for a claim for pain and suffering pursuant to Section 847, German Civil Code, in addition to a claim for damages for personal injury or damage to property.²²

4. *Liability of the Federal Republic of Germany and the Stationing Forces*

Frequently, damage is caused by a military vehicle, truck or aircraft in instances in which the injured or damaged victim is unable

¹⁹ German Supreme Court decision of July 11, 1963, 1963 BB 1077, 1963 NJW 2020, 1963 DÖV 855; compare Schach, *Entschae digungsansprueche ohne Ruecksicht auf Verschulden im Immissionsbereich* (Claims for Damages regardless of Fault in the Area of Environmental Protection), 1965 BB 342, n.24.

²⁰ German Supreme Court decision of November 24, 1967, 49 BGHZ 340, 1968 BB 485, 975, 1968 NJW 1281.

²¹ With regard to the liability of a holder of a vehicle in case of an unauthorized travel culpably facilitated, see German Supreme Court decision of December 15, 1970, 1971 BB 244, 1971 NJW 459, 1971 MDR 288.

²² See footnote 20 *supra* and accompanying text.

to determine whether it was a vehicle of the "Bundeswehr" or of a certain sending State. In such a situation, the full amount of damages is awarded and paid to the claimant. However, reimbursement by the sending States and the Federal Republic of Germany, if involved, is exclusively determined by paragraph 5 (e) (iii) of Article VIII, NATO SOFA, rather than by Section 830, German Civil Code.²³

5. Attorney Fees

The question arises whether a claimant who solicits the services of an attorney for the purpose of asserting a "scope claim" is entitled to the refund of the attorney fees which he incurred. This question was affirmatively resolved by the German Supreme Court in its judgment of 1 June 1959,²⁴ in which it was held a claim for refund of attorney fees may be asserted as a part of the claim for damages. In this connection, the factual and legal difficulties of a case must be considered from the point of view of the claimant at the date the claim was filed rather than retrospectively from the point of view of the result of the compensation procedure. In the opinion of the German Supreme Court the fact that the asserted claim has been recognized by the adjudicating office does not permit the automatic conclusion that the factual situation was so simple that consultation with an attorney had been unnecessary. Furthermore, a claim for reimbursement of attorney fees cannot be rejected on the ground that in adjudicating the claim it is the duty of the Defense Costs Office to ensure on its own initiative that the claimant receives just and fair compensation. The German Supreme Court correctly stated that "by virtue of the argument that the authorities will properly dispose of the claim, reimbursement of costs of legal advice could be denied in many instances, even though such reimbursement has been recognized in court decisions without any doubt."²⁵ As regards the amount of attorney fees, the attorney is entitled to a "business fee," "Geschaeftsgebuehr" pursuant to paragraph 1, No. 1, of Section 118, "Bundesrechtsanwaltgebuehrenordnung," Federal Fee Schedule for Attorneys and, in case of a compromise settlement, to a settlement fee, "Vergleichsgebuehr," pur-

²³ Decision of the "Obelanesgericht" [Court of Appeals] Stuttgart of May 22, 1968, 1968 NJW 2202.

²⁴ German Supreme Court decision of January 31, 1963, 39 BGHZ 60, 1963 BB 210; German Supreme Court decision of January 31, 1963, 39 BGHZ 73.

²⁵ For instance with respect to tax advisors see 21 BGHZ 359, 364.

suant to Section 23, "Bundesrechtsanwaltsgebuehrenordnung." The fees are predicated upon the amount of compensation awarded rather than upon those asserted in the application.²⁶

6. *Damages Resulting from the Delay of Payment*

Pursuant to Sections 286 and 288, German Civil Code, the claimant is entitled to 4 percent interest resulting from the delays in the payment of a debt, provided the prerequisites of Section 286, German Civil Code, exist. According to paragraph 1 of Section 286, German Civil Code, the debtor is "in delay" after the debt has become due and the creditor has "admonished" the debtor to pay the debt. The filing of an application for compensation constitutes "an admonition." Thus, a claim for interest would be justified unless Section 285, German Civil Code, is applicable, that is, unless the debtor can claim that payment was not made because of circumstances beyond his control. These principles were already recognized by the German Supreme Court in its judgment of 26 June 1961²⁷ when Article 8, Finance Convention, still formed the basis for the settlement of claims against the stationing forces. The claimant was awarded 4 percent interest resulting from the delay of payment for the period beginning three months subsequent to receipt of the application for compensation by the Defense Costs Office. It would appear that similar considerations are applicable to the question of damages that result from the delay of payment of compensation under the NATO Status of Forces Agreement.

7. *Persons Entitled to Claim Compensation*

As a rule, any person authorized to claim compensation pursuant to the provisions of paragraph 5 of Article VIII of NATO SOFA is entitled to assert damages in accordance with the prescribed procedure. However, pursuant to paragraph 6 of Article 41, Supplementary Agreement, paragraph 5 of Article VIII, NATO SOFA, shall not apply to damage suffered by members of a force or of a civilian component and caused by acts or omissions of other members of the *same* force or the *same* civilian component for which such force or such civilian component is legally responsible. It follows that *dependents* of members of a force or of a civilian component

²⁶ German Supreme Court decision of June 1, 1959, 30 BGHZ 154; German Supreme Court decision of January 31, 1963, 39 BGHZ 73.

²⁷ 1961BB 771, 1961 NJW 1531.

and local national employees are not precluded from claiming damages. However, pursuant to Sections 898 and 899, "Reichsversicherungsordnung," Reich Social Security Law, local national employees who suffer a work accident caused by a member of a force cannot assert claims for damages exceeding the payment provided by the accident insurance.²⁸ Members of *another* force or its civilian component and their dependents may, however, claim damages. Finally, carriers of social security or private insurance may assert claims for damages pursuant to paragraph 5 of Article VIII, NATO SOFA, to the extent to which the injured person's claim has been subrogated to the insurance carrier pursuant to Section 1542, "Reichsversicherungsordnung," or Section 67, "Versicherungsvertragsgesetz," Statute pertaining to Insurance Contracts. In the opinion of the Oberlandesgericht Zweibruecken²⁹ even a third party who satisfied the damaged or injured person in lieu of the stationing forces as a result of a judgment rendered against him, may claim refund of his expenses.

8. *Legal Action against the Tortfeasor*

To the extent to which damage has been caused in the performance of official duty, the question arises whether damages may be asserted against the tortfeasor in addition to the assertion of damages against the sending State. According to the earlier law on this subject, Article 8, paragraph 1, Finance Convention, the tortfeasor could not be held personally liable regardless of whether he was a member or local national employee of a force or a civilian component.³⁰ According to present law the following rules apply:

a. Legal Action against Local National Employees. In the event the local national employee acts in the performance of sovereign authority, for example, as driver of a truck of a force, the provisions of Section 839, German Civil Code, and Article 34, Basic Law, preclude personal liability of the employee; in the event he does not act in the performance of sovereign authority, he may be personally liable pursuant to Section 18, "Strassenverkehrsgesetz," and Section 823, German Civil Code, respectively. The local national employee

²⁸ German Supreme Court decision of October 24, 1960, 33 BGHZ 339, 1961 NJW 457.

²⁹ Decision of the "Oberlandesgericht" [Court of Appeals] Zweibruecken of June 21, 1965, 1965 JURISLENZERTUNG [JZ] 646.

³⁰ German Supreme Court decision of October 14, 1963, 1964 BB 109, 1964 NJW 104.

held personally liable for damages may have a claim for relief against the sending State in accordance with principles of German labor law that concern the employer's obligation to relieve the employee in the case of hazardous jobs involving risk of damage to the employer's property, the so-called principle of "gefahr geneigte" or "schadens geneigte Arbeit."³¹ In the event a local national employee of the force or civilian component injures another local national employee of the force or of the civilian component, the principles developed by the "Grosser Senat of the Bundesarbeitsgericht." Grand Senate of the Supreme Labor Court, in the decision of 25 September 1957³² must be observed. Consequently, an employee who negligently causes the work accident of another employee of the same establishment or enterprise is not personally liable for damages to the injured or damaged person, if and to the extent he cannot be reasonably expected to bear the burden of such damages, because his negligence is minor in the light of the hazard involved in his job under the particular circumstances of the case. In the opinion of the German Supreme Labor Court,³³ however, an insured local national employee is personally liable up to the amount of the coverage provided by his insurance policy, even though his fault is minor under the circumstances.

b. Legal Action Against Members of a Force or Civilian Component. Since in case of damage caused by a member of a force or civilian component in the performance of sovereign activity, the stationing forces are liable pursuant to Section 839, German Civil Code, and Article 34, Basic Law, personal liability of the member of the force or the civilian component is precluded 'pursuant to Article 34, Basic Law. Moreover, execution of a judgment rendered against him is prohibited pursuant to paragraph 5(g) of Article VIII, NATO SOFA. Finally, a legal interest in filing a suit against a member of a force or civilian component appears to be lacking,"

³¹ Decision of the German Supreme Labor Court of March 19, 1959, 7 BArbG 290, 1959 BB 884; German Supreme Court decision of January 10, 1955, 16 BGHZ 111, 1955 BB 163, 1955 NJW 458.

³² Decision of the German Supreme Labor Court of September 25, 1957, 5 BArbG 1, 1958 BB 80, 1958 NJW 235.

³³ Decision of the German Supreme Labor Court of February 14, 1958, 1958 BB 520; Decision of the German Supreme Court of May 19, 1961, 1961 BB 826; Decision of the German Supreme Labor Court of March 24, 1961, 1961 BB 826; see *also* German Supreme Court decision of April 1, 1958, 27 BGHZ 62, 1958 BB 629.

³⁴ See *also* annotation No. 33 of "Erlaeuterungen zum Entschadigungsrecht der

unless the claimant failed to assert the claim in due time against the stationing forces and, as a result, has only the possibility of suing the member of the force or the civilian component in his individual private capacity. However, even in this case a favorable judgment would only burden the claimant with attorney fees and court costs without providing any advantage because of the lack of enforceability.

Another question is whether the claim of a person fatally injured as a result of an accident for which the stationing forces are responsible should file a complaint in due time, that is, before his death against a member of the force or the civilian component in order to ensure that the claim for pain and suffering pursuant to Section 847, paragraph 1, second sentence, German Civil Code, the death statute, will be subrogated to his heirs. In such a case, notification of the claim to the Defense Costs Office should be sufficient to meet the requirement that "the case is pending before the court" for purposes of enabling the heirs to enforce the deceased's claim for pain and suffering.³⁵

9. Procedure of Notification

a. Form of the Application. Pursuant to Article 9, German Statute Implementing NATO SOFA, claims must be asserted by filing a written application for compensation. The reasons underlying the claim must be stated in the application. However, the estimated amount of the claim need be indicated only as far as this is possible. The application must contain all pertinent information with respect to compensation and make reference to available evidence to the extent to which such evidence is not attached to the application. Consequently, it is not sufficient if the claimant simply informs the Defense Costs Office of the event causing the damage or notifies the Defense Costs Office pursuant to Section 15, "Strassenverkehrsgesetz," of the accident.

Truppenschaedin (Artikel VIII des NTS)" [Comments on the Law Governing Compensation for Damage Caused by the Forces (Art. VIII of NATO SOFA)], published by the Federal Ministry of Finance, Circular of June 4, 1963.

³⁵ Decision of the "Obrriandesgericht" [Court of Appeals] Nuernberg of September 16, 1964, 1964 VERSR 626:

The Senate confirms the reasons contained in the appealed judgment. It is of the opinion that in all cases in which the claim for pain and suffering has been asserted with the Defense Costa Office in due time, the defendant cannot invoke the fact that no court action was pending or no recognition has been obtained, because the statutory provisions enacted by defendant prevented plaintiff from filing a complaint in due time, Section 242. German Civil Code.

b. Notification in Due Time. In order to avoid loss of potential claims for damages, such claims must be asserted, pursuant to paragraph 1 of Article 6 of the German Statute Implementing NATO SOFA, with the appropriate German authority within a period of three months from the date on which the claimant obtained knowledge of the damage or injury and of the circumstances establishing the fact that a force or civilian component was either liable for, or caused, the damage. Failure to notify the competent authority within the three-month period results in the loss of claims for compensation as a matter of substantive law, that is, dismissal of the legal action for lack of merit.³⁶ Pursuant to Article 8 of the German Statute Implementing NATO SOFA, the competent German authorities are the lower authorities of the Defense Costs Administration, that is, the so-called Defense Costs Offices. Venue rests with the Defense Costs Office of that district in which the incident causing the damage occurred. According to the decision of the "Bundesverfassungsgericht," Federal Constitutional Court, of 16 June 1959,³⁷ the requirement of filing claims within 90 days pursuant to paragraph 6, first sentence, of Article 8, Finance Convention, does not constitute a violation of paragraph 1 of Article 3, Basic Law. There can hardly be any doubt that the same applies to the three-month term of Article 6 of the German Statute Implementing NATO SOFA.

Where several members of a force or civilian component share involvement in the same incident, but in varying degree, a separate period of notification will apply to each separate claim which is generated.³⁸ Contrary to previous law, the three-month period is now deemed to have been observed if the claim was filed within such period with the agency of the force or the civilian component which is generally in charge of settlement of claims for compensation, or which supervises the members of the civilian component or the force or local nationals involved in the incident. Thus, the time limit has been observed in cases involving damage caused by members of the United States Forces or the civilian component when the claim has been filed with the United States Army Claims Service, Europe, located in Mannheim, Germany, or with the head-

³⁶ German Supreme Court decision of May 30, 1968, 1968 NJW 2009. Also already German Supreme Court decision of October 24, 1960, 33 BGHZ 353, 1961 BB 21, 1961 NJW 310, on the basis of Art. 8, Finance Convention.

³⁷ 1959 BB 762, 1959 NJW 1627, see *also* German Supreme Court decision of October 24, 1960, 33 BGHZ 353, 1961 BB 21, 1961 NJW 310.

³⁸ German Supreme Court decision of January 24, 1963, 1963 BB 372

quarters to which the member or the employee of the force or the civilian component was assigned. Contrary to the previous law under which the three-month period was exclusionary, the provisions of the German Code of Civil Procedure relating to “restitutio in integrum”, reinstatement in previous position, will be applied by analogy. Accordingly, in case of failure to comply with the period of notification, paragraph 2 of Section 232, German Code of Civil Procedure, no reinstatement is available in the case of the agent’s fault, and paragraphs 1 and 2 of Section 234, German Code of Civil Procedure, “Wiedereinsetzungsfrist,” the period for restoration of the filing period for excusable reasons, are applicable. While under previous law filing of damage claims was precluded after one year from the date on which the damage or injury occurred, this period has now been extended to two years pursuant to paragraph 4 of Article 6, German Statute Implementing NATO SOFA. Had the damage claim not been recognizable prior to the expiration of the two-year period, the two-year period begins to run, pursuant to the same provision, on the date on which the damaged or injured party could or should have obtained knowledge of the damage by applying the necessary care. The provision of paragraph 4 of Article 6, German Statute Implementing NATO SOFA, according to which “paragraph 1, second sentence, of Section 852, German Civil Code, remains in effect” means that, even in the absence of such knowledge, the assertion of a claim for damages will be forever barred after 30 years. If the request for damages has been asserted prior to the expiration of the three-month period, the amount requested may be increased according to the German Supreme Court,³⁹ the public interest is sufficiently protected if the notification of the damage enables the forces and the Federal Republic of Germany to obtain an approximate idea of the damage so as to roughly estimate the amount which will presumably have to be paid. Consequently, the amount of the claim may be increased even during the litigation. However, by accepting the adjudicated claim the claimant loses the right to assert in the future additional claims concerning the same matter.⁴⁰ Moreover, the German Su-

³⁹ German Supreme Court decision of February 6, 1961, 34 BGHZ 230, 131 BB 434, 1961 NJW 1014, 1961 MDR 488; German Supreme Court decision of April 17, 1961, 35 BGHZ 95, 1961 NJW 1529, 1961 VERSR 655; German Supreme Court decision of January 31, 1961, 39 BGHZ 60, 1963 BB 210.

⁴⁰ German Supreme Court decision of December 19, 1963, 134 BB 108.

preme Court⁴¹ has ruled that if the claimant gives notice in due time of the total damage together with all the possible consequences, such notification of the total damage will also be effective in favor of the social insurance carrier to which the claims for damages are subrogated pursuant to Section 1542, "Reichsversicherungsordnung," up to the amount of compensation payable. On the other hand, the German Supreme Court⁴² also has held that with respect to a social insurance carrier the time limit for filing the claim for damages subrogated pursuant to Section 1542, "Reichsversicherungsordnung," begins to run only upon the carrier's knowledge of circumstances furnishing the basis for subrogation. According to another ruling of the German Supreme Court,⁴³ however, no different period of notification runs with respect to private insurance companies to which the insured's claim for damages is subrogated in accordance with legal provisions as a result of compensation paid by the insurance company.⁴⁴ As soon as the application for compensation has been received by the Defense Costs Office, it must confirm the receipt and the date of receipt in writing pursuant to paragraph 1 of Article 10, German Statute Implementing NATO SOFA. This confirmation is important because the "reasonable period" upon the expiration of which the claimant may file a mandamus action begins to run if the Defense Costs Office has not informed the claimant within that period about its decision.

10. Certification Procedure

The Defense Costs Office will inform the appropriate agency of the force as soon as possible, but not later than within two weeks, of the receipt of the application for compensation..” If the claim for compensation is based on the argument that the damage was caused by an act or omission of a member of a force or civilian component

⁴¹ German Supreme Court decision of November 16, 1961; 1962 BB 390, 1962 NJW 390, 1962 MDR 118.

⁴² German Supreme Court decision of February 26, 1962, 1962 NJW 960.

⁴³ German Supreme Court decision December 20, 1962, 1963 BB 170, 1963 NJW 490.

⁴⁴ See Section 67, "Versicherungsvertragsgesetz" [Insurance Contract Law].

⁴⁵ Section 7, German-American Administrative Agreement concerning the Procedure for the Settlement of Damage Claims (Except Requisition Damage Claims) pursuant to Article VIII of the NATO Status of Forces Agreement, in conjunction with Article 41 of the Supplementary Agreement to that Agreement, as well as for the Assertion of Claims pursuant to Paragraph 9, Article 41, of the Supplementary Agreement.

in the performance of official duty, or in connection with the use of a vehicle of the force, respectively, the Defense Costs Office will at the same time file a request with the appropriate authority of the sending State for issuance of a certificate stating whether the act or omission occurred in the performance of duty or not, or whether the use of the vehicle was authorized or unauthorized.⁴⁶ If the German authority requests issuance of a certificate, the appropriate authority of the force will investigate, pursuant to paragraph 11(a) of Article 41 of the Supplementary Agreement, whether the act or omission occurred in the performance of duty or whether the use of the force's vehicle was authorized or unauthorized and, depending upon the result of the investigation, will issue a positive or negative certificate.⁴⁷ Pursuant to paragraph 11(a) of Article 41 of the Supplementary Agreement, in connection with paragraph 8 of Article VIII, NATO Status of Forces Agreement, the agency of the force will confine its investigation to the question of "whether a tortious act or omission of a member of a force or civilian component was done in the performance of official duty" or "whether the use of any vehicle of the armed services of a sending State was unauthorized," respectively. If the sending State responds to the inquiry of the Defense Costs Office that involvement of the force in the incident causing the damage cannot be ascertained, such a statement is binding upon German authorities and courts according to a ruling of the German Supreme Court.⁴⁸ Under that ruling an action for damages against the Federal Republic of Germany acting on behalf of the sending State is procedurally permissible, but will be dismissed as a matter of substantive law. On the other hand, in a preceding ruling the German Supreme Court⁴⁹ held that in case of claims against the holder of an aircraft under the procedure prescribed by the "Finance convention," German courts were not restricted or bound by a statement of the armed forces to the effect that "it cannot be ascertained that an aircraft of the forces was involved." Furthermore, pursuant to paragraph 8 of Article VIII, NATO SOFA, a certificate of the force is required only if a dispute arises as to whether a tortious act or omission of a member of a force or civilian component occurred in the performance of

⁴⁶ *Id.* § 8.

⁴⁷ *Id.* § 9.

⁴⁸ German Supreme Court decision of March 14, 1968, 1968 BB 1097, 1968 NJW1044.

⁴⁹ German Supreme Court decision of December 10, 1964, 1965 VersR 337.

official duty or whether the use of any vehicle of the armed services of a sending State was unauthorized. Consequently, no such certificate is required if a dispute arises as to whether damages were caused "by an act, omission or occurrence for which a force or civilian component is legally responsible." Pursuant to paragraph 11(a) of Article 41 of the Supplementary Agreement, the force will review the negative certificate upon request of the Defense Costs Office, if during the investigation of a claim it appears to the German authority that circumstances exist which would lead to a conclusion different from that stated in the certificate. Where agreement cannot be reached between the force and the Defense Costs Office, and if this difference of opinion between the two parties cannot be resolved at a higher level, the procedure provided in paragraph 8 of Article VIII, NATO SOFA, must be applied pursuant to paragraph 11(b) of Article 41 of the Supplementary Agreement, that is, the question must be submitted to an arbitrator appointed in accordance with paragraph 2(b) of Article VIII, NATO SOFA, whose decision will be final and conclusive. According to paragraph 2(b) of Article VIII, NATO SOFA, this arbitrator shall be selected from among the nationals of the receiving State, the Federal Republic of Germany, who hold or have held high judicial office. If the Contracting Parties are unable to agree upon an arbitrator within two months, either party may request the Chairman of the North Atlantic Council of Deputies to select a person with the requisite qualifications as arbitrator. Pursuant to paragraph 2 of Article 10 of the German Statute Implementing NATO SOFA, the Defense Costs Office shall inform the claimant, in writing and without delay, of the result of the procedure, and shall state the day on which the procedure was terminated or on which the Defense Costs Office received the arbitrator's decision, unless the Defense Costs Office informs the claimant immediately about the merits of the claim. Pursuant to paragraph 11(c) of Article 41 of the Supplementary Agreement, the Defense Costs Office shall render its decision in conformity with the certificate issued by the force or the arbitrator. If a positive certificate has been issued, the German authorities and courts are not restricted in their judgment and they alone will determine the legal consequences thereof.⁵⁰

⁵⁰ German Supreme Court decision June 5, 1961, 35 BGHZ 185, 187, 1961 BB 772, 1961 NJW 1532.

11. *Complaint upon Refusal to Allow Claim*

a. General Remarks. Pursuant to Article 11 of the German Statute Implementing NATO SOFA, the Defense Costs Office must notify the claimant of the decision as to whether, and to what extent, a claim has been allowed. If the claim has not been allowed or if it has not been allowed in full, the claimant must be notified of the reasons underlying the authority's decision. The notification of the decision must contain information regarding the claimant's right to file a legal action in German court and must be served upon the claimant. Notification of the agency's decision is not required if and to the extent to which an agreement has been reached between the agency and the claimant about the compensation to be paid.

b. Jurisdiction for Filing Complaints. In the event the Defense Costs Office has not allowed a claim or has not allowed it in full, the claimant may file a complaint against the Federal Republic of Germany with the ordinary German court pursuant to paragraph 1 of Article 12, German Statute Implementing NATO SOFA, in which case the Federal Republic of Germany will conduct the litigation in its own name on behalf of the sending State, as provided by paragraph 2 of Article 12, German Statute Implementing NATO SOFA. In this connection, jurisdiction over the subject matter with respect to complaints predicated upon Section 839, German Civil Code, and Article 34, Basic Law, is determined by paragraph 2, No. 2 of Section 71, German Court Organization Law, "Gerichtsverfassungsgesetz," to the effect that the "Landgericht" has exclusive jurisdiction, irrespective of the amount involved in the litigation.⁵¹ However, to the extent to which the complaint is predicated upon other provisions, for example, Section 7, Road Traffic Law, Sections 31, 831, German Civil Code, the action must be filed with the German civil court having jurisdiction over the amount involved in the litigation.⁵² In those instances in which compensation for pain and suffering is claimed, liability can be derived only from the applica-

⁵¹ Decision of the "Oberlandesgericht" [Court of Appeals] Nuernberg of April 19, 1960, 1961 *VERS*R 570; Decision of the "Landgericht" Amberg of December 11, 1957, 1958 *NJW* 506; Decision of the "Landgericht" Wiesbaden of June 6, 1958, 1958 *NJW* 1499; Palandt, *Buergerliches Gesetzbuch* [German Civil Code], 30th ed., *Truppenschaiden, NTS-AG* [Damage Caused by the Sending States' Forces, German Statute Implementing NATO SOFA] Article 12, annot. 4b; Arnolds, 1961 *DEUTSCHE RICHTERZEITUNG* [DRIZ] 84; opposite view, Schmitt, 1958 *NJW* 756 *et. seq.*

⁵² Palandt, *supra* note 51.

tion of Section 839, German Civil Code, and Article 34, Basic Law, to the effect that the "Landgericht" has exclusive jurisdiction. Pursuant to Section 32, German Code of Civil Procedure, venue lies in the "Landgericht" of that district in which the act was committed, or pursuant to Section 18, German Code of Civil Procedure, in the "Landgericht" of the district in which the authority representing the Federal Republic of Germany is located. When a claim for damages is asserted by an employee of the force against the sending State as a result of damage inflicted by another employee of the force, the German labor courts have jurisdiction.⁵³

c. Period for Filing Complaints. Pursuant to paragraph 3 of Article 12, German Statute Implementing NATO SOFA, the complaint must be filed within a period of two months after service of the agency's decision, whereby the provisions of the German Code of Civil Procedure on "restitutio in integrum" shall be applied *mutatis mutandis* to the period required for the filing of the complaint. Pursuant to paragraph 2 of Section 261b, German Code of Civil Procedure, service "demnaechst," that is, service in the immediate future after expiration of the period—provided the complaint had reached the court within the required period—is sufficient.⁵⁴ However, the complaint is not to be regarded to have been served "demnaechst" if the complainant negligently failed to pay the required court fees within a reasonable time and, as a result, service of the complaint was delayed.⁵⁵ It is questionable whether the period for filing a complaint has been complied with when the complaint was filed with a court that had no jurisdiction over the subject matter or that lacked venue. However, it is the opinion of the German Supreme Court that the two-month period for filing the complaint has been observed regardless of whether the complaint was filed with a court which lacks venue" or which has no jurisdiction over the subject matter.⁵⁷ By filing a petition for leave to sue *in form pauperis*, the requirement of filing the complaint within two months is met only if the complaint filed at the same

⁵³ Decision of the German Supreme Labor Court of January 24, 1958, 5 BArbG 196.

⁵⁴ German Supreme Court decision of November 30, 1959, 1960 NJW 481.

⁵⁵ German Supreme Court decision of June 5, 1961, 1961 BB 919.

⁵⁶ German Supreme Court decision of February 6, 1961, 34 BGHZ 230, 1961 BB 434, 1961 NJW 1014, 1961 MDR 488.

⁵⁷ German Supreme Court decision of September 21, 1961, 35 BGHZ 374, 1961 BB 1184, 1961 NJW 225, 1962 JZ 27, 1962 MDR 36.

time is independent of the petition for leave to sue *in forma pauperis* and thus initiates the ordinary proceedings." All rejected claims must be asserted in the complaint within the two-month period regardless of whether they were rejected generally or individually.⁵⁸ However, a claim for payment of interest may be submitted after expiration of the period for filing the complaint, provided the claim for interest was not previously rejected explicitly.⁶⁰

d. Prayer in Complaint. The prayer is directed towards payment of a certain amount of money or annuity, respectively. In this connection, the question arises whether the claimant has a legal interest in suing for the payment of the total damages if he does not accept the lesser compensation offered by the Defense Costs Office. The Oberlandesgericht Frankfurt/Main⁶¹ at first supported the view that the claimant may sue for the full amount of the asserted amount of compensation, whereas the Oberlandesgericht Bamberg⁶² expressed the opinion that the legal interest to sue does not exist to the extent to which the claimant's claim had been allowed by the agency. In the event a suit for payment of damages is not possible because the amount of damages is uncertain, an action for a declaratory judgment may be filed pursuant to Section 256, German Code of Civil Procedure. However, pursuant to Article 25, German Statute Implementing NATO SOFA, in both cases the judgment must state that the "Federal Republic of Germany shall pay on behalf of the sending State obligated to make such payment." In conformity with the decision of the "Grosser Senat fuer Zivilsachen," Great Senate in Civil Matters, of 19 December 1960,⁶³ the liability for damages pursuant to Section 839, German Civil Code, and Article 34, Basic Law, can result only in the payment of money and not, for instance, an order restraining officials from making slanderous statements in the performance of duty. The rationale given by the German Supreme Court for this decision is that Section 839, German Civil Code, does not grant a claim for restitution against the defendant and that Article 34, Basic Law, is only "roped" to Section 839, Ger-

⁵⁸ Arnolds, 1961 DRiZ 84.

⁵⁹ Arnold, 1962 NJW 1234.

⁶⁰ Arnold, 1962 NJW 1235.

⁶¹ Decision of the "Oberlandesgericht" [Court of Appeals] Frankfurt/Main of December 24, 1957, 1958 NJW 1305.

⁶² Arnolds, 1961 DRiZ 82; see also Reieger, 1957 NJW 1133.

⁶³ 1961 BB 228 and 266, 1961 NJW 658.

man Civil Code.⁶⁴ Furthermore, paragraph 5 of Article VIII, NATO SOFA, speaks in the English test of "claims" and in the French test even more clearly of "les demandes d'indemnité," that is, claims for damages. This conclusion is in conformity with the language of Article 41 of the Supplementary Agreement which refers to "settlement of claims" or "compensation," respectively. Accordingly, the claimant who has suffered damage caused by the stationing forces cannot combine a prayer for the payment of past damages with a prayer for refraining from similar acts in the future.

12. Procedure

The Civil Code procedure before the competent court is the same as usual. However, if members of the force or the civilian component of the sending State are indispensable witnesses, it will have to be taken into consideration whether proceedings for taking evidence should not be instituted together with the filing of the complaint, or even prior to the filing of the complaint, in order to secure the testimony of those witnesses, so-called "Beweissicherungsverfahren." As a matter of fact, members of a force involved in accident cases remain only for a limited period of time within the territory of the receiving State, that is, the Federal Republic of Germany. As soon as they return to the country of origin, and, possibly, to civilian life, it will be difficult to obtain their testimony. Pursuant to Section 485, German Code of Civil Procedure, the motion for taking the testimony of witnesses prior to trial for the purpose of securing evidence may be predicated upon the fact that the taking of the evidence will be rendered more difficult once the witness has left the territory of the Federal Republic of Germany. If a member of the force has returned to the sending State without such proceedings, the testimony of the witness must be obtained on the basis of international agreements or international practice. Even before the court enters into consideration of the merits of the case, it must examine whether the case involves a scope or nonscope claim. If the court has any doubts as to whether the certificate issued by the force is correct, it may request that the force of the sending State review the certificate, as provided by paragraph 11(a) of Article 41 of the Supplementary Agreement. However, pursuant to paragraph 11(c) of Article 41, the court must not deviate from the certificate. Fur-

⁶⁴ See Rupp, *Widerruf amtlicher ehrenkraenkender Bekaupungen* [Revocation of Insulting Statements Made in Office]. 1961 NJW 811.

thermore, if the court doubts the correctness of the contents of the certificate, it may express those doubts and request that the Defense Costs Office seek a ruling from the arbitrator pursuant to paragraph 8 of Article VIII, NATO SOFA. The binding effect of the arbitrator's ruling, as previously noted, is final. In particular, in case of accidents involving motor vehicles, the sending State might file a counterclaim for the purpose of a setoff against the original claim on the ground that plaintiff caused damage to the U.S. Government's vehicle. While under previous legal provisions the Federal Republic of Germany, acting as defendant, had not been able to set off such counterclaims unless they had been assigned to the Federal Republic of Germany, the Republic is now entitled pursuant to paragraph 9(a) of Article 41 of the Supplementary Agreement, to set off the sending State's claim for damages against the plaintiff's claim for damages. Moreover, pursuant to paragraph 9(b) of Article 41, and in conformity with the appropriate "Administrative Agreement between the U.S. Forces and the Federal Republic of Germany Implementing Article VIII, NATO SOFA, and Article 41, Supplementary Agreement," the Federal Republic of Germany may file a counteraction, "Widerklage," upon the sending State's request, in the event it is of the opinion that plaintiff's claim is unwarranted and the sending State's counterclaim is considered meritorious.

13. Complaint in Case the Defense Costs Office Fails to Take Action

While under previous legal provisions there was no way of filing a complaint if the Defense Costs Office delayed settlement of the claim for compensation without good reason, paragraph 4 of Article 12 of the German Statute Implementing NATO SOFA provides that legal action against the Federal Republic of Germany, like mandamus action, is permissible if the Defense Costs Office has not notified the claimant of its decision within a "reasonable period" upon receipt of the claim which, however, must not be less than five months. The German Statute Implementing NATO SOFA does not define "reasonable period." Pursuant to paragraph 4, sentence 1, of Article 12, German Statute Implementing NATO SOFA, the reasonable period begins to run upon receipt of the application by the Defense Costs Office. In instances, however, in which a procedure involving review of the scope certificate pursuant to paragraph 11 of Article 41 has taken place, the date of receipt of the claim by the

notification authority will be replaced by the date "on which the procedure for obtaining a certificate by the force has been terminated or the decision of the arbitrator has been received by the agency" according to the second sentence of paragraph 4 of Article 12, German Statute Implementing NATO SOFA. It follows from the above that in cases in which the Defense Costs Office requests the appropriate agency of the force to furnish a certificate and such certificate is furnished within a reasonable time, the five-months' term will begin to run upon receipt of the certificate by the Defense Costs Office, regardless of whether upon issuance of the certificate a difference of opinion exists between the force and the Defense Costs Office regarding the contents of the certificate.⁶⁵ As a rule, the reasonableness of the period will be determined by the extent of the damage and the difficulties involved in investigating the facts. It appears to be wise to approach the Defense Costs Office prior to the filing of a complaint for failure to act in order to ascertain the reasons why the Defense Costs Office has been delaying a decision.⁶⁶ In this connection, it must be taken into account that the Defense Costs Office can make a decision only upon issuance of a positive or negative certificate by the force and that the force on its part may also encounter difficulties in determining whether the incident causing the damage occurred in the performance of duty or not. Therefore, the reasonableness of the period will also depend on the difficulties in ascertaining the facts of the particular incident. It is true that the administrative agreement concluded between the United States Forces and the Federal Republic of Germany provides that the force must furnish the German agency a positive or negative certificate as soon as possible, but not later than within 42 days after receipt of the application for compensation. However, as mentioned before, it may well be that the force will be unable to furnish a certificate within that period in a particular case. An additional delay may result from the fact that the force must investigate the facts in order to provide the Defense Costs Office with pertinent information and evidence. In this case, too, the administrative agreement requires that within a period of 21 days after receipt of the application for damages the force furnish the Defense Costs Office all

⁶⁵ German Supreme Court decision of December 16, 1968, 1969 NJW 982.

⁶⁶ Graefe, *Die Abgeltung von Truppenschäden nach dem NTS in der Bundesrepublik Deutschland* [Payment of Compensation under NATO SOFA in the Federal Republic of Germany for Damage Caused by the Sending States' Forces], 1961 NJW 1845.

available appropriate facts. Again, the force may not be able to do so. As a rule, though, the above-mentioned periods are sufficient to enable the force to determine whether the incident causing the damage occurred in the performance of duty or whether the use of an official vehicle was unauthorized, respectively, and to provide the Defense Costs Office with all available information and evidence. A further delay may occur if the force and the Defense Costs Office disagree as to whether the act or omission involved in the incident occurred in the performance of official duty, so that a procedure pursuant to paragraph 11 of Article 41 of the Supplementary Agreement, must be initiated, that is a review of the certificate by the force upon the Defense Costs Office request followed by negotiations on a higher level and possibly by resorting to an arbitrator pursuant to paragraph 8 of Article VIII, NATO SOFA. In this case, paragraph 4 of Article 12, German Statute Implementing NATO SOFA, provides that the minimum period of five months for filing of a complaint for inaction begins to run on the date on which the procedure for obtaining the force's certificate has expired or the arbitrator's decision has been received by the Defense Costs Office.

14. Claim for Refund of Overpayments by the Defense Costs Office as the Result of an Erroneous Decision

It would appear to be logical under German law to regard the Defense Costs Office's erroneous decision resulting in overpayment to the claimant as an "administrative act" and thus to apply the principles developed in German administrative law with regard to errors and mistakes. However, by judgment of 20 November 1969,⁶⁷ the German Supreme Court held that such a decision is neither an administrative act nor another sovereign act, but rather that it is made within the framework of fiscal activity and, therefore, must be attributed to the field of civil law, even though the legal relations towards the foreign forces are a matter of public law; that it is a legal act of a particular nature which is subject to the principles of equitable consideration prescribed by Section 242, German Civil Code; that, therefore, the decision of the Defense Costs Office will constitute a violation of that principle only in those instances in which a final judgment would constitute a violation of

⁶⁷ 1970 NJW 1418, 1971 MDR 34, see also Decision of the "Oberlandesgericht" (Court of Appeals) Munich, 1970 VRSR 231.

Section 826, German Civil Code, claim for damages resulting from violation of good morals. Under German law, the legal nature of the "decision" of the Defense Costs Office may be questionable," since outright denial of the "decision" as an administrative act by the German Supreme Court for the reason that "it is made within the framework of fiscal activity" appears to be questionable.

C. NONSCOPE CLAIMS

1. Legal Basis

Under general principles of law, the sending States are not liable for claims arising out of torts committed by members of the force or the civilian component not done in the performance of official duty. However, in order to maintain good relations between the forces of the sending States and the population of the receiving State, the Finance Convention already provided for an arrangement according to which the sending State assumed liability towards "the inhabitants of the territory of the Federal Republic of Germany" for such torts. Those voluntary payments made by the sending States are called "ex gratia payments." Pursuant to paragraph 6 of Article VIII, NATO SOFA, the sending State's liability is limited to claims arising out of acts or omissions of members of a force or a civilian component not done in the performance of official duty. Therefore) an ex gratia payment will not be made if local national employees of a force or a civilian component or dependents of a member of a force or civilian component are the tortfeasors. Furthermore, it follows from the English text, "arising out of tortious acts or omissions," though not from the German, "aus zu Schadenersatz verpflichtenden Handlungen oder Unterlassungen," or French text, "sur des actes dommageables ou des negligences," that such claims are strictly based upon torts rather than upon contract or unjust enrichment. The act or omission must have taken place in the "receiving State." Pursuant to paragraph 7 of Article VIII, NATO SOFA, claims arising out of unauthorized use of vehicles of the forces of a sending State are also treated as nonscope claims, unless the force or civilian component is legally responsible pursuant

⁶⁸ Rieger, *Stationierungsschaderecht* [Law Pertaining to Damage Caused by the Sending States' Forces], 1963, Art. 11 of the German Statute Implementing NATO SOFA ANDOT, 5Tz. 85 of Comments on the Law Governing Compensation for Damage Caused by the Forces (Art. VIII of NATO SOFA) contained in Federal Ministry of Finance Circular, dated June 4, 1963.

to paragraph 3 of Section 7, “Strassenverkehrsgesetz.” In the event the claimant asserts a scope claim and the appropriate agency of the force issues a negative certificate, the German authority, that is, the Defense Costs Office, will inform the claimant accordingly, pointing out that his claim will be adjudicated by the appropriate agency of the force pursuant to paragraph 6 of Article VIII, NATO SOFA, that is, as a nonscope claim.

2. Procedure

Pursuant to paragraph 6(a), (b), (c) of Article VIII, NATO SOFA, the procedure in case of nonscope claims is as follows: the authorities of the receiving State, namely the Defense Costs Offices, shall consider the claim and assess compensation in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, for example, contributory negligence, and shall prepare a report on the matter. The report will be forwarded to the authorities of the sending State, who will decide without delay whether they will offer an *ex gratia* payment. If an offer of an *ex gratia* payment is made and accepted by the claimant in full satisfaction of his claim, the authorities of the sending State will make the payment themselves and inform the authorities of the receiving State of their decision and of the amount paid. The claimant does not have a legal right for damages or for a certain amount of damages. In other words, the payment of an *ex gratia* claim and the amount paid are entirely matters of discretion on the part of the sending State.

Neither paragraph 6 of Article VIII, NATO SOFA, the Supplementary Agreement, nor the German Statute Implementing NATO SOFA provides an answer as regards the question how and with whom the claim for an *ex gratia* payment must be filed. In doubtful cases, i.e., in cases in which it is not certain whether the tortious act or omission occurred in performance of official duty or not, the claimants should always follow the procedural provisions pertaining to scope claims. The considerations for making *ex gratia* payments depend on the sending States' internal policy. The same rule applies to the deadlines within which claims for *ex gratia* payments must be filed. In case of the United States Forces, for instance, provisions of the “Foreign Claims Act,”⁶⁹ and United States Army Regulation 27-20”⁷⁰ are pertinent. Therefore, with respect to the

⁶⁹ 10 U.S.C. § 2734.

⁷⁰ Army Reg. No. 27-20, Ch. 10 (18 September 1970).

United States Forces at least, claims for ex gratia payments must be filed within two years after the incident. Claims up to an amount of \$15,000 will be adjudicated by the United States Claims Commission, Mannheim, Germany, which is staffed with one or three officials, depending on whether or not the claim exceeds \$500. Claims exceeding \$15,000 must be submitted to Congress by the Secretary of the Army, if judged meritorious. Claimant can be any natural person or legal entity, provided they are an "inhabitant" of the Federal Republic of Germany, that is, they have their usual residence in the Federal Republic of Germany. The nationality of the claimant is irrelevant. In cases of hardship an advance payment may be made. In the event the claimant is not satisfied with the offered ex gratia payment, he is free to furnish reasons for his objections. The case will then be reviewed in the light of those objections.

3. *Complaint against the Person Causing the Damage*

The claimant is free to file a complaint against the tortfeasor as is explicitly provided in paragraph 6(d) of Article VIII, NATO SOFA. However, the same provision prescribes that the German courts no longer have jurisdiction over the complaint if the claimant has accepted an ex gratia payment in full satisfaction of the claim.

CONCLUSIONS

The provisions of Article VIII, NATO SOFA, and Article 41, Supplementary Agreement to NATO SOFA, involving claims against the U.S. Forces and against the Forces of other sending States stationed in the Federal Republic of Germany are not particularly complex. Nevertheless, the German authorities, if confronted with certain factual situations, must interpret those provisions for or against the U.S. Forces. In case of scope claims, the sending State must bear 25 percent of the amount awarded or adjudged as damages. Thus, the receiving State assumes a portion of damages if a decision is rendered *against* the forces of the sending State. As a result, it can be concluded that the implementation of Article VIII, NATO SOFA, by the local German authorities, administrative and judicial, as far as it concerns scope claims, has been fair and just. It has led to a special body of judicial law. In case of nonscope claims, the decisions made by the forces of the sending States, or the delegated German authority, are not subject to judicial review, since the payments of nonscope claims constitute ex gratia payments.

PERSPECTIVE

DETERMINANTS OF MILITARY JUDICIAL DECISIONS*

Colonel Wayne E. Alley**

“Better to know the judge than know the law.”

I. THE NATURE OF AMERICAS LEGAL REALISM

Predictability of judicial decisions is the main desideratum in any legal system. There are others, of course; efficiency, responsiveness to the felt needs of the community, incorruptibility, and the appearance of concern for justice are examples. All other desiderata are subordinate to predictability because people can better adjust to other failings in the system than to the anxiety of not knowing what to expect. Consider the old-fashioned southern speed trap. A sojourner apprehended by the constable and fined by the justice of the peace, all in a corrupt legal charade offensive to elementary measures of justice, seldom harbored feelings more distressing than transient chagrin. Paying tribute to the trolls of southern highways was, thirty or forty years ago, an anticipated travel cost. The very certainty of the injustice permitted, or indeed even made necessary, its toleration by individual travellers. Further, as the certain injustice of an individual speed trap became known, travellers were able to plan for it or to avoid it by balancing the nuisances of paying or taking circuitous routes.

Lawyers make their living and laymen achieve security in their affairs by virtue of their skills in predicting how the government will react to what they say and do. In 1974, it should be abundantly clear that success in prediction is more a function of studying particular judges, or commissioners, or “czars” of this and that, than studying the rule books that they consult. “What these officials do about disputes, is . . . the law itself.”¹ Of course, they consult

*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. This article is adapted from a research paper presented by the author to the Industrial College of the Armed Forces in 1974.

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¹LLEWELLYN, THE BRAMBLE BUSH 3 (1930).

the rule books so that the rules have effect upon them; occasionally a judge will look up a rule and then recite it verbatim as the basis for his decision, explaining that he perceives no need for any interpretation or exegetical opinion. The rules are important determinants of judicial decisions, not *in vacuo* but to the extent and only to the extent they influence decision makers.² The warrant for that statement is that 'cases may be erroneously but finally decided without possibility of further recourse by 'the losers,' where the researches of counsel and the court were deficient and never led them to the pertinent rule. Further, even the omniscient judge" applies the rules because he decides to. He may decide to out of habit, a philosophy, inculcation in his education, fear of reversal or of embarrassment if he does not, fear of being the target of extraordinary writs, or in elective jurisdictions even concern about retaining his office. What does it matter? His will is in any event the proper subject of study for prediction purposes.

Anyone interested in predicting the outcome of a military criminal case had therefore better take a close **look** at the trial and appellate military judges who will participate in it, and view them as in a dynamic process. What specifically should he look for? Clues may be found in the teachings of the American legal realism school of jurisprudence.

Perhaps speaking of a single school is an error, for better known individuals of the American legal realism school of jurisprudence, Professors Herman Oliphant, Walter Wheeler Cook, and Karl Llewellyn, and Judges Charles E. Clark and Jerome Frank, entertained different views of the nature of law. However, all perceived what was for them a central truth: What law is may only be induced from the operations of legal systems. Law is immanent, not transcendent. As the concept of transcendence is often traced to Platonism, a brief discussion of Plato's views of law is in order for purposes of comparison.

Plato was much offended by tyrannical pretensions of the sort which confused power with justice, or the commands of rulers with the welfare of the state. One reason for the confusion was a primitive level of thinking which permitted cognizance of particulars only, without capacity for abstraction. He derided people

² Inflated claims of legal realists that the rules are not important determinants were popped in the influential article, Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L. J.* 1240 (1934).

³ A legal fiction.

who believe that truth **only** “exists in a bodily form, which a man may touch and see and taste. . . .”⁴ A strictly positivist conception of law is equally deficient; indeed, Plato referred to logical positivists as “aborigines.”⁵ The primary deficiency of strict positivism is discernible even by empirical examination, for everyone agrees that some legal systems work better than others, and some counselors are wiser than others.⁶ In *Laws*, Plato’s proposed codes for a newly formed colony, he analyzes some Hellenic city-states’ laws to determine if they are “expedient” or not. To the extent laws are harmful to the citizens, they are departures from an abstract state of the law which does not have undesirable characteristics; that is, any law which is imperfect must be so by reference to that which is perfect.

Law as an ideal may never obtain on earth, but Plato granted men sufficient credit to recognize their ability not only to strive for the ideal but actually to approach it. Thus the ideal is both model and inspiration, and in either characteristic it satisfies practical purposes. As model, the ideal of law permits simultaneous recognition of the power of rulers and philosophical as opposed to selfish dissent from specific rules and judgments.⁷ The great examples in our literature are *Crito* and the *Apology*, in which Plato cites Socrates’ abhorrence of the unjust judgment against him coupled with his acceptance of that judgment as a citizen’s *legal* obligation.

Legal realism deals with the law that is and not the transcendent ideal because laymen and practitioners have to live with the system at hand. If, however, a counsel perceives that the judge before whom he is practicing is touched by a glimpse of the transcendent ideal,⁸ he may profitably ask himself, “How should I conduct my case so as to take advantage?” The answer, of course, is to cloak the case with nobility and couch the issues in terms of eternal verities.

The transcendent ideal may logically be equated with the concept of justice without distorting the meaning of that word, so long as one recognizes that justice has two different definitions. One, which disregards the ideal, is operational and systematic: whatever the governing body has determined to be the proper disposition of legal disputes is justice. Justice so regarded is entirely immanent. A sys-

⁴ PLATO, PHAEDO § 81b.

⁵ PLATO, SOPHIST § 247d.

⁶ PLATO, THEAETETUS §§ 172a, 177c and 177d.

⁷ PLATO, REPUBLIC §§ 499d, 502c, and 540d.

⁸ **Caveat:** A judge who gives this impression may be merely sentimental.

tem of justice is designed to do justice; *ergo*, what it actually does is justice so long as the participants follow the rules. By the immanent view, injustices occur because of mistakes in the operation of the system and not because of its design. Even though he commits a quibble in the last two paragraphs quoted below, the novelist Alan Paton puts the immanent view well:

At the head of the Court is a high seat where the Judge sits. Down below it is a table for officers of the Court, and to the left and to the right of the table are other seats. Some of these seats form a block that is enclosed, and they are for the jury if there is a jury. In front of the table are other seats, arranged in arcs of circles, with curved tables in front of the seats and it is there that the lawyers sit. And behind them is the dock, with a passage leading to some place that is underground, and from this place that is underground will be brought the men that are to be judged. At the back of the Court there are seats rising in tiers, those on the right for Europeans, those on the left for non-Europeans, according to the custom.

You may not smoke in this Court, you may not whisper or speak or laugh. You must dress decently, and if you are a man, you may not wear your hat unless such is your religion. This is in honour of the Judge and in honour of the King whose officer he is; and in honour of the Law behind the Judge, and in honour of the People behind the Law. When the Judge enters you will stand, and you will not sit till he is seated. When the Judge leaves you will stand, and you will not move till he has left you. This is in honour of the Judge, and of the things behind the Judge.

For to the Judge is entrusted a great duty, to judge and to pronounce sentence, even sentence of death. Because of their high office. Judges are called Honourable, and precede most other men on great occasions. And they are held in great honour by men both white and black. Because the land [South Africa] is a land of fear, a Judge must be without fear, so that justice may be done according to the Law; therefore a Judge must be incorruptible.

The Judge does not make the Law. It is the People that make the Law. Therefore if a Law is unjust, and if the Judge judges according to the Law, that is justice, even if it is not just.

It is the duty of a Judge to do justice, but it is only the People that can be just. Therefore if justice be not just, that is not to be laid at the door of the Judge, but at the door of the people . . .⁹

An immanent view of justice comports well with the observation that predictability of judicial decisions in the main desideratum in any legal system: If justice is as justice does and has been doing, a careful student of the system will ordinarily know what to expect from it in the next case. It is characteristic of the transcendent view

⁹ PATON, *CRY THE BELOVED COUNTRY* 154-55 (1953).

that an Ideal of justice is invoked as impelling a decision maker *not* to apply a statute or follow a precedent because to do so would be violative of some higher values. Transcendent justice is unsettling. It is “unrealistic,” so therefore is not espoused by positivists and legal realists. It is a “fundamental fact, always true, but so often ignored by legal philosophers eager to prove the truth of their political conviction, that no ideal of justice can at once be theoretically valid and have a specific content.”¹⁰

That the content of a legal corpus, which means its application, is the proper focus of inquiry into the nature of law was succinctly put by Holmes:

Take the fundamental question, what constitutes the law You will find some textwriters telling you . . . that it is a system of reason, that it is a deduction from principles of ethics or admitted actions, or what not, which may or may not coincide with the decision. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.¹¹

The importance of theory for Holmes was as it was acted out in actual governance:

We have too little theory in the law, rather than too much The danger is that the able and practical-minded should look with indifference or distrust upon ideas the connection of which with their business is remote To an imagination of any scope, the most far-reaching form of power is not money, it is the command of ideas. If you want great examples, read Mr. Leslie Stephen's *History of English Thought in the Eighteenth Century*, and see how 100 years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte.¹²

Theory as “practical force” is theory on the move. Applied law is always in flux. Particular theories have their day and pass away. Some are applied almost faddishly. In American federalism, the primacy of the Supreme Court over all American systems is a feature through which pet theories of a small number of justices are

¹⁰ FRIEDMANN, *LEGAL THEORY* 10 (1967).

¹¹ Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897).

¹² *Id.* at 476.

applied for a time. Then deaths, retirements, and new appointments to the Court elevate new theories. The same processes work out in the highest courts of our states. One result is that legal realism cannot be a monolithic school of jurisprudence wherein fixed dogma is the subject of study. Karl Llewellyn made the following apposite points:

(1) There is no realist school: realism means a movement in thought and work about law.

(2) Realism means a conception of law in flux and as a means to social ends, so that any part is to be examined for its purpose and effect. It implies a concept of society which changes faster than the law.

(3) Realism assumes a temporary divorce of IS and OUGHT for purposes of study. Value judgments must always be appealed to in order to set an objective for any inquiry, but during the inquiry the description has to remain as largely as possible uncontaminated by the desires of the observer or by ethical aims.

(4) Realism distrusts traditional legal rules and concepts in so far as they purport to describe what either courts or people are actually doing. It accepts the definition of rules as 'generalised prediction of what the courts will do.' In accordance with this belief, realism groups cases and legal situations into narrower categories than ~~was~~ the practice in the past.

(5) Realism insists on the evolution of any parts of the law in terms of its effects.¹³

Llewellyn's five points provide us the jurisprudential vectors for looking into the nature of military justice. Military justice is a legal system in flux to an extent far beyond American civil systems, even taking into account the activism of the Warren Court. In only twenty-five years, the very foundations of military justice have three times been fundamentally altered, first by the Elston Act, then the Uniform Code of Military Justice, then the Military Justice Act of 1968.¹⁴ The overriding importance of what courts will in fact do is well illustrated in the early years of the United States Court of Military Appeals, when its members molded and altered military law in unexpected ways and to an unanticipated extent.¹⁵ The course of military law has since 1951 been charted out primarily by the seven men who have sat on that court. Finally, there is a certain romanticism affecting courts-martial which impedes

¹³ Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

¹⁴ Respectively 62 Stat. 627 (1948), 64 Stat. 108 (1950), and 82 Stat. 1335 (1968).

¹⁵ See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

analysis and which, as Llewellyn instructs, must be disregarded if one is to see the true nature of military justice in its operation.

In the chapters below, the activities of military judges at the trial and appellate (service Courts of Military Review) levels will be examined with a view to isolating influences on judicial decisions, and actual determinants of decisions. The examples and data used will be from the United States Army Judiciary. There are no apparent differences among the several services which would render the observations inapposite in any other one of them, especially after the creation of an independent judiciary in each service by The Military Justice Act of 1968.

11. DETERMINANTS OF JUDICIAL DECISIONS AT THE TRIAL LEVEL

At the trial level, the determinants of a military judge's decisions include the milieu in which he lives and works, 'factors peculiar to him, and of course the Constitution, statutes, cases and other sources of the rules.

The trial milieu is one of constant press of time. American civil criminal justice systems are even more afflicted by an overwhelming crush of cases, but in busy military jurisdictions the pace is also quick. Cases are ground out, in Kruschew's colorful description of Soviet missile-making capacity, "like sausages from an automatic machine." In Army jurisdictions, the automatic machine is exemplified at those installations at which unauthorized absentees are collected, processed and tried. Although AWOL cases occasionally pose intricate issues,¹⁶ in the main they are of numbing similarity. Trying scores of them consecutively challenges a judge to move his docket quickly, with concomitant tendencies to view the cases as units of judicial production rather than as instances wherein each accused ought to be accorded individual treatment. Under these circumstances the majority of decisions, and sentences especially, seem to be stamped out of a common mold. This situation may not comport with the highest conceptions of individualized justice, but at least the desideratum of predictability is present.

Press of time has other effects. Because military pleading rules permit virtually unlimited joinder," charge sheets can be prolix and

¹⁶ *E.g.*, United States v. Lynch, 22 U.S.C.M.A. 257, 47 C.M.R. 498 (1973); United States v. Reeder, 22 U.S.C.M.A. 11, 46 C.M.R. 11 (1972).

¹⁷ *Compare* Article 30, UNIFORM CODE OF MILITARY JUSTICE [hereinafter referred to as UCMJ or CODE], 10 U.S.C. § 830, and MANUAL FOR COURTS-MARTIAL,

rife with multiplicity.” A degree of prolisits- tolerable in a leisurely jurisdiction may be intolerable in a busv one. In the latter, a judge may be more inclined on motion to dismiss the chaff. Query: is the quality of justice therebv diminished? There is much to be said for the lean charge sheet. Indeed, the judge who will predictably-narrow the issues to those which are fundamental, who refuses to founder in a sea of charges, ought to be appreciated by counsel and those commands he serves.

The dimension of time affects one’s very method of thought. The traditional view of a judge’s thought process is that it is essentially syllogistic; he utilizes the rules of law as major premises, the facts of a particular case as minor premises, issue by issue, and in Aristotelian logic derives his conclusions. Where the issues are several or where a single issue is complicated and must be broken out into constituent parts, this view of decision-making is linear in nature, the judge moving in orderly sequence.

It is doubtful that this view accurately reflects what happens at the trial level under press of time. John Den-ev distinguished two kinds of thinking:

Human conduct, broadly viewed, falls into two sorts. Particular cases overlap, but the difference is discernible on any large scale consideration of conduct. Sometimes human beings act with a minimum of foresight, without examination of what they are doing and of probable consequences. They act not upon deliberation but from routine, instinct, the direct pressure of appetite, or a blind ‘hunch’. It would be a mistake to suppose that such behavior is always inefficient or unsuccessful. When we do not like it, we condemn it as capricious, arbitrary, careless, negligent. But in other cases, we praise the marvellous rectitude of instinct or intuition; we are inclined to accept the offhand appraisal of an expert in preference to elaborately calculated conclusions of a man who is ill-informed. There is the old story of the layman who was appointed to a position in India where he would have to pass in his official capacity on various matters in controversy between natives. Upon consulting a legal friend, he was told to use his common-sense and announce his decisions firmly; in the majority of cases his natural decision as to what was fair and reasonable would suffice. But, his friend added: ‘Never **try** to give reasons, for they will usually be wrong.’

In the other sort of case, action follows upon a decision, and the decision is the outcome of inquiry, comparison of alternatives, weighing of facts, deliberation or thinking has intervened. Considerations which have weight in reaching the conclusion as to what is to be done, or which are employed

UNITED STATES, 1969 (Rev. ed.) [hereinafter referred to as MANUAL or MCM], para. 30g, *with* Rule 8(a), FED. R. CRIM. P.

¹⁸ See, e.g., *United States v. Wright*, 47 C.M.R. 309 (ACMR 1973).

to justify it when it is questioned, are called 'reasons.' If they are stated in sufficiently general terms they are 'principles.' When the operation is formulated in a compact way, the decision is called a conclusion, and the considerations which led up to it are called the premises. Decisions of the first type may be reasonable: that is, they may be adapted to good results; those of the second type are reasoned or rational, increasingly **so**, in the degree of care and thoroughness with which inquiry has been conducted and the order in which connections have been established between the considerations dealt with. . . .¹⁹

Under press of time, or even as a matter of temperamental preference, a trial judge may proceed by hunch-conclusion rather than linear reflection. And why not? As Dewey states, hunch-conclusions drawn by an experienced and trained professional are not unsound just by virtue of the mode of their derivation. However, and this is crucial, the hunch should operate only with respect to omitting the formulation of the major premise or *rule* of decision and not the minor premise or particular circumstances. The latter is "fact-finding," which should always engage the conscious faculties.²⁰ In a criminal case, the burden of proof, namely proof beyond reasonable doubt, is so stringent that deliberate consideration of facts in dispute is essential. When a trial judge sits alone at the request of an accused, he as fact-finder is under a duty to make evidentiary evaluations. As to interlocutory issues, where the military trial judge routinely engages in fact-finding under a "preponderance of the evidence;" standard²¹ whether or not he is presiding over a court with members, the same careful evaluation is required although the standard is less stringent. As to the rules of decision, in contrast, the hunch-conclusion admits of drawing on formal instruction which lies below the level of conscious recollection, patterns of decision in prior similar cases in which the judge has sat or participated as counsel, deeply held values or attitudes about fairness and justice, or sheer intuition. It should be recognized that a hunch-conclusion inverts the syllogistic mode of thought. When

¹⁹ Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924).

²⁰ Of course, if an accused requests a special findings of a military trial judge under circumstances where making the findings is obligatory, see UCMJ article 51(d), 10 U.S.C. § 851(d); para. 74i, MCM, the requirement that he articulate his findings by issue will force him into linear reflection. Records of trial in custody of the Clerk of Court, United States Army Court of Military Review, include very few records in which requests for special **findings** were made. One conclusion which may be drawn is that the defense bar perceives little advantage in judicial linear reflection.

²¹ UCMJ art. 51(b), 10 U.S.C. § 851(b); para. 57, MCM.

formulation of the major premise is omitted, no derived conclusion is possible in logic. Rather, the process is one of leaping from facts to result. If the direction of the leap is determined by the judge's value system, the hunch-conclusion process is an axiological teleology.

Closely related to the impact of press of time on the military trial bench is the bench's reliance on counsel. An old adage in the profession is that a sound bar makes a sound bench. Perhaps the corollary is even more true; poor performance by counsel degrades the quality of judicial work. A primary objective influence over judicial decisions at trial is therefore the caliber of counsels' performances in presenting the facts and arguing the law concerning each issue.

The obligations of trial and defense counsel are not identical²² and the Uniform Code of Military Justice generally establishes an adversary system of justice under which counsel are responsible to their clients and the court for presenting their respective contentions.

Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate. It is part of his role to accept these possible disappointments.²³

Although it is not the role of a trial judge to accept the disappointment of poor performance by counsel, that is all too often the judge's lot. These are the kinds of occasions which moved the author to observe, in an appellate opinion:

. . . . At this point, we [the U.S. Army Court of Military Review] interject words of sympathy for the trial judge, who had to make rulings and formulate submission of the case to the members without benefit of lucid theory articulated by counsel. The case was exceptionally confused. . .²⁴

As is pointed out in the General Introduction to the American Bar Association's 1970 Draft of Standards Relating to the Prosecution Function and the Defense Function, the adversary system, with its atmosphere of contention, has deservedly been subject to

²² Compare para. 44 with paras. 46 and 48, MCM.

²³ REPORT OF THE JOINT CONFERENCE OF THE AMERICAN BAR ASSOCIATION AND THE AMERICAN ASSOCIATION OF LAW SCHOOLS ON PROFESSIONAL RESPONSIBILITY, 44 A.B.A.J.1159, 1160 (1958).

²⁴ United States v. Watson, Ms. Op. p. 6 (ACMR, 19 March 1973).

searching criticism, on grounds *inter alia* of the paramount role of the counsel and the relative passivity of trial judges. The counter to this criticism is that a more accurate reconstruction of past facts and greater illumination on the policies of the law are fostered by the presentation of opposing views in a vigorous debate than by unilateral inquiry even by a capable, neutral and dispassionate public authority. This is a value judgment underlying legal systems all over the English-speaking world. It is doubtful whether the judgment is susceptible of proof. In any event, the satisfactory functioning of an adversary system requires counsel to be competent, both by training and experience, and to be able to devote sufficient time to each case.

In the Report of a Conference on Legal Manpower Needs of Criminal Law, held at Airlie House, Virginia in 1966,²⁵ whose conferees included such luminaries as then-Judge Warren Burger of the United States Court of Appeals for the District of Columbia, Robert Carter, long-time general counsel for the NAACP, Frank Hogan, district attorney in New York County, New York, and Samuel Dash, later counsel to the Senate's so-called Watergate Committee, estimates were presented that a full-time experienced prosecutor could process perhaps 250 felony cases in a year; that a full-time experienced public defender could appear in perhaps 150 felony cases in a year. These figures take into account dispositions of all kinds including reduction of charges, guilty pleas, dismissal on motion, and trials. Although the report does not so state, presumably the figures were estimated in consideration of strict civilian rules as to joinder of charges limiting any one case to a single charge or very closely related charges. If the figures took into account the military rules permitting virtually unlimited joinder of unrelated charges, rules discussed critically *supra*, the estimates of 250 and 150 cases respectively would have to be substantially lower.

The Airlie House conferees estimated an experienced, full-time prosecutor's maximum capacity for misdemeanor cases to be 1,000 per year; a similarly qualified defender's capacity to range from 300 to 1,000 depending on local circumstances. In these estimates, the conferees took into account minor traffic, drunk in public, solicitation and other offenses which are ordinarily disposed of on guilty pleas at a rate of 15-20 per hour of in-court time. There is no parallel to this type of practice in military courts.

²⁵ Reported at 41 F.R.D. 389 (1967).

In Fiscal Year 1973, 15,472 general and special court-martial cases were tried in the Army.²⁶ According to a study recently conducted in connection with proposals to institute a separately organized defense bar in the Army,²⁷ the equivalent of 292 man-years of defense counsel time is consumed annually in defending Army court-martial cases, counselling alleged offenders concerning offers of nonjudicial punishment, and counselling clients about and monitoring the administration of the clients' requests for discharge "for the good of the service" in view of pending serious court-martial charges. These requests have become known as "Chapter 10" proceedings.²⁸ Department of Army records recite that 18,352 such discharges were approved and issued in FY 1973. A defense counsel who is engaged in Chapter 10 negotiations must if he is at all conscientious devote as much or more time to the case pretrial as he would if no Chapter 10 proceedings were extant. Because approval of a Chapter 10 request is discretionary with the general court-martial convening authority, counsel must be prepared to try the case if his negotiations fail. He also has a duty to prepare an extenuation and mitigation presentation so as to obtain for his client as high a category of discharge as he can.²⁹

Also, the trial counsel cannot ignore a case merely because a Chapter 10 request is pending. He also must be prepared to prosecute it if the request is denied, and speedily.³⁰

The significance of the statistics to our present inquiry is this: counsel must have adequate time for their work in order to present an orderly, organized case for efficient use of judicial time. One should recall that, in the Army, there are not 292 identifiable judge advocates who are responsible full-time for all defense work. Rather, the equivalent of 292 man-years of lawyer time is expended on this

²⁶ Figures provided by Chief, Criminal Law Division, Office of The Judge Advocate General, Department of the Army.

²⁷ Conducted in principal part by the Office of Personnel, Plans and Training, Office of The Judge Advocate General, Department of the Army.

²⁸ Chapter 10, Army Reg. S.o. 635-200, (14 Dec. 1973).

²⁹ *Id.* at para. 10-8. This paragraph provides that an undesirable discharge will normally be issued, although an honorable or general discharge may be issued "if warranted."

³⁰ Speedy disposition of cases receives even-greater emphasis as a result of case law, *e.g.*, *United States v. Stevenson*, 22 U.S.C.M.A. 454, 47 C.M.R. 495 (1973); *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), and administrative promulgations, *e.g.*, Army Reg. No. 27-10, para. 2-33 (12 Dec. 1973); U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, MILITARY JUDGE'S GUIDE, APP. H (19 Jan. 1973), UNIFORM RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL.

work by a larger number of judge advocates who have this and other duties. The Airlie House conference confirmed the obvious, that there is a loss of efficiency when prosecutors or defense counsel are not engaged in those functions exclusively.

Thus in the Army we see an inefficient "equivalent" of **292** full-time defense counsel responsible for **33,824** trials and Chapter **10** proceedings in **1973**. The average load per "equivalent" defense counsel is **115** cases in a year. This is less than the conferees' estimated maximum of **150** felonies. However, in addition to the inefficiency of assigning multiple duties to defense counsel³¹ it will be recalled that the military system permits joining all kinds of charges in a single case. Further, common observation of trials or review of records of trials reveals that many defense counsel are not experienced. Each new case can require research into what is for counsel a virgin territory which permits his devoting far less time to individual cases.

One is led to the conclusion that counsel in the Army are, as a whole, working at the fringe of their collective capacities.³² From this conclusion another follows, namely, that the indispensable reliance of the trial bench on the trial bar, inherent in our system, is a precarious reliance. That is, the high degree of reliance is necessarily present but the collective effect of the military bar on the collective soundness of judicial decisions at the trial level is questionable.³³

A third influence upon trial judges' decisions is not so clearly exogenous as the press of time or the work of counsel. This influence is the expectations of the community in which the trial judge lives and experiences most social relationships. An appreciation of this influence depends on an understanding of the development of the trial judiciary in the last two decades and of the continuing nature of the military community.

³¹ In this context, the attribution of inefficiency is with respect to the trial of cases, and dispositions in lieu thereof, only. Nothing pejorative is meant. It may well be that other considerations, such as broadening the experience of young judge advocates, override efficiency in a scale of relative importance, or that the overall efficiency of a judge advocate office, taking into account its peculiar workload and mix of functions, is enhanced by the assignment of several duties to each member.

³² Although Chapter **10** proceedings consume substantial lawyer time, as noted p. **96** *supra*, one can visualize the paralysis of our system if the **18,352** Chapter **10** cases in **1973** had all gone to trial.

³³ This observation is not confined to the military. See Shields, *Let's Do Something About the Trial Bar*, **54** JUDICATURE **24** (1970).

The Uniform Code of Military Justice created the position of "law officer," a judge advocate responsible for deciding the legal interlocutory questions that arose during a general court-martial trial and for instructing court members in the applicable law that should govern in their deliberations. Given lawyers' pendants for analogizing, it is not surprising that in the literature treating American military law the law officer's position began to be referred to as akin to that of a federal judge. A coldly objective observer could make a strong case that law officers resembled federal judges very little.³⁴ Some dissimilarities were in functions and powers. For example, a law officer under the unamended Code could not himself finally dispose of challenges or motions for directed verdicts. Some dissimilarities were in the area of relative status or prestige. Under the unamended Code the senior member, not the law officer, formally presided at trial and the latter was not even formally responsible for calling recesses or adjournments. A primary dissimilarity concerned the circumstances of appointment, tenure, and independence. Federal District Court judges are appointed by the President, ordinarily upon recommendation by a Senator from the state in which the District is located and after examination into qualifications by the Department of Justice, with the advice and consent of the Senate, for life. Under the unamended Code, a law officer was certified for the performance of those duties by the judge advocate general of his service, and then detailed to serve on particular general courts-martial by convening authorities in the field. For several years after enactment of the Code, law officers in all services were drawn from the staffs of the local staff judge advocate offices. They were ordinarily fairly low-ranking career judge advocates who performed judicial duties as a part-time secondary occupation. Most performed well and conscientiously, but without any sense of the prestige and independence characteristic of the federal judiciary.

After a pilot program in the late 1950's, the Army administratively created a centrally assigned trial judiciary separating all law officers from the command of convening authorities in the field, elevating the authorized grade for the position to colonel, and making the performance of the trial judicial function an exclusive, full-time responsibility. The Army's practice was the model for the creation of a statutory military judiciary in the Military Justice Act of 1968. That same Act granted to military trial judges extended powers

³⁴ Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 89 (1959).

more similar to but still far short of those exercised by federal judges, and enhanced the prestige of the military trial bench both in the title of "military judge" and the designation of the judge as the officer presiding during open sessions of court.

Both under the predecessor U. S. Army Judiciary organization and the statutory organization contemplated by the Military Justice Act of 1968, local commands were obliged to provide office space, telephone service, and other business necessities to the trial judges.³⁵ Significantly, the posts at which the trial judges principally sat were obliged to furnish housing on the same basis and of the same type as afforded to officers of the garrison of the same grade.

The Army trial bench has therefore evolved from a part-time function done by officers whose primary attachments were to judge advocate staff functions into a more independent judiciary, not under local command. However, trial judges remain dependent on local commands for the wherewithal of their work and for post housing where it is available. The word dependent is not used in the sense that a local commander could as an exercise of his sole discretion oust a trial judge from his office and evict him from his quarters. Rather, the dependence is in the sense of necessary reliance on a third party source of essential resources. The very consciousness of dependence abases independence, which is largely a subjective conception.

In their post quarters, trial judges live among and mingle with commanders and staff officers. General court-martial judges, who are colonels and lieutenant colonels,³⁶ are neighbors of senior commanders and key staff officers. Seldom has any dissonance arisen because these judges have extensive prior experience in other types of assignments. They are seasoned in the Army, as are their neighbors.

From their background, their reliance on local commands, and their residential-social environment, one would expect that at least the senior trial judges certified to hear general court-martial cases would be responsive to the perceived needs of a particular military constituency, namely, their neighbors and contemporaries. This constituency represents authority, responsibility, dedication, the punctilious personal standards of the officer corps, and the honor of

³⁵ See para. 9-9, Army Reg. No. 27-10 (26 Nov. 1968).

³⁶ Because The Judge Advocate General's Corps has far fewer field grade officers than its authorized distribution, it has not been possible to appoint only officers in the authorized grade of colonel as general court-martial trial judges.

their chosen profession of arms. These are all noble characteristics." This constituency collectively recalls the hardship of depression and the perils of a war of survival; it recalls times when not to work was not to eat, and a time when United States soil and waters were perfidiously attacked. It lived through the wrenching post-war reevaluation of our relations with the Soviet Union and the shock of being the target of extravagantly hostile propaganda from the new regime in China. Many members of it fought the Chinese in Korea and subsequently observed or at least thought they observed two decades of Chinese expansionism in Asia, during which Tibet was overrun, the border war with India was fought, the mysterious border clashes with the Soviets continued, the Formosa straits crises recurred, Burma was intimidated, and Malaya was wracked by a revolution of ethnic Chinese. These experiences leave their mark. Although a nonpsychologist should not attempt a *gestalt* of a real, much less typified, middle-aged colonel, common observation permits the conclusion that the constituency amid which a senior Army trial judge lives, the class of society from which he was called to arms and commissioned,³⁸ and the whole generation which shared his experiences have some characteristics and share some values in common. Absenting one's self without authority, being disrespectful or disobedient, shirking or malingering, mocking patriotism, and advocating unrestrained self-expression at the expense of public order are affronts to the values. Judicial decisions may be predicted to be consistent with the values and sensitive to the affronts.

Obviously these influences of background and present environment are not at all the same as the influence of specific illegal command pressures toward particular decisions, so often denounced in case law³⁹ and sought to be further obviated by the Military Justice Act of 1968.⁴⁰ Every lawyer has a background. None can eradicate it upon elevation to the bench so as to don black robes with a

³⁷ A determined legal realist would point out that any writer who deems these characteristics noble is himself a product of the same influences which shaped the constituency, and thus is not qualified to judge its characteristics objectively.

³⁸ It is not implied that military judges come from any one economic class. They do share class characteristics of education, ethical system, and aspirations. Otherwise they would not be lawyers, judges and officers in the first place.

³⁹ *E.g.*, *United States v. Cole*, 17 U.S.C.M.A. 296, 38 C.M.R. 93 (1964), and cases therein cited.

⁴⁰ The legislative history recites that one purpose of the Act is increasing protection against unlawful command influence. 3 U.S. Cong. & Admin. News 4501, 4504 (90th Cong. 1968).

tabula rasa. In all jurisdictions it is commonplace for the lawyers whose values replicate those of the predominant group in society, or at least in the political life of society, to become judges. The William Kunstlers and Terry Hallinans of the bar have no hope of judgeship. Lawyers of that ilk are not often even found in the ranks of professional judge advocates, the group from whom senior military judges are appointed. A military judge has been called from a practice in which he has been engaged in conserving the interests of commanders and staff officers, by being their adviser. They have expectations of him; he assumes a role.⁴¹

Even though the positions of military judge and Supreme Court justice are qualitatively different in the 'demands and prestige of the positions, the following observations about the role of justices are, with a qualification discussed *infra*, apposite to military judges, in fact to any judges in English-speaking jurisdictions:

The concept of 'role' is here defined as the general or specific expectations of proper behavior associated with the position of Supreme Court justice, and the concept of 'role behavior' is here defined as those patterns of activity which reflect a justice's perceptions of the proper role of a Supreme Court justice, including his adjustment of personal values and perceived role expectations. Behavior which is substantially incongruous with the role definition may be referred to as deviant role behavior.

The sources of role definers or role expectations of Supreme Court justices are many; they include the general public, the political world; the history and traditions of the Court, and perhaps most important, the articulate portions of the bench and bar, whose views are communicated to the incumbent justices in a variety of ways. As much as anyone, the latter can be said to form the Court's 'constituency,' from whom cues may be most appropriate and most heeded. Of course, not all cues come from these sources; and not all judges hold them in equal favor. . . .⁴²

The "cues" a military judge receives from the constituency amid which he lives and works, namely commanders and staff officers, blend in with those he receives from other lawyers and judges to form a different amalgam from that which shapes the conception of a civilian judge's role. In the military, the cues from commanders

⁴¹ For analysis of "role theory" applied to the judiciary, see James, *Role Theory and the Supreme Court*, 30 J. POL. 160 (1968); Jaros and Mendelsohn, *The Judicial Role and Sentencing Behavior*, 11 MIDWEST J. POL. SCI. 471 (1967). For an interesting analysis of "role-strain" affecting military defense counsel, see Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233 (1961).

⁴² Grossman, *Dissenting Blocs on the Warren Court: A Study in Judicial Role Behavior*, 30 J. POL. 1070 (1968).

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and staff officers are derived from the axiology of command, which includes the following properties:

1. Command is exercised toward the accomplishment of a mission.
2. Personal comfort, convenience, expressions of idiosyncratic behavior, and even safety are subordinated to that purpose.
3. A high state of discipline within the command is a prerequisite for the accomplishment of its mission.
4. Discipline is exacted in small and symbolic ways routinely so that it may confidently be expected to exist in crisis.

In addition, it may be assumed that the constituency amid which a military judge lives and works is as much opposed to murder, rape, robbery, theft, and the like as is any other predominantly middle-aged middle class element of American society.

Do military judges share the command axiology, or are they more influenced by the libertarianism, individualism and contentiousness so often espoused and displayed by lawyers in civilian life? The firmest clue is found in the area of greatest sensitivity in the practice of criminal law, sentencing. After enactment of the Military Justice Act of 1968, accused persons began to request trial by military judge alone in large numbers of cases. Presumably these requests were based in part on expectations by defense counsel that their clients would fare better in a bench trial than before a court with members. The practice became so commonplace and the expectation so general that the realities of the situation were lost from view. In August 1972, the editors of a newsletter for Army defense counsel⁴³ for the third time cautioned those counsel that Army-wide statistics indicated the wisdom of going to trial before a court with members. Four illuminating tables were presented in the newsletter.

TABLE 1

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Contested Cases)
1 April 1971—1 October 1971

	Court Members	Military Judge Alone
Persons tried	141	468
Persons convicted	92 (65%)	422 (90%)
Punitive discharge adjudged***	51 (55%)	371 (88%)
Confinement adjudged**	75 (82%)	375 (89%)

⁴³ The Advocate (Defense Appellate Division, USALSA), July-August 1972.

TABLE 2

ARMY-WIDE GENERAL COURT-MARTIAL DATA' (Contested Cases)
1 October 1971-1 April 1972

	Court Members	Military Judge Alone
Persons tried	224	405
Persons convicted	160 (71%)	357 (88%)
Punitive discharge adjudged**	111 (69%)	318 (89%)
Confinement adjudged**	145 (91%)	328 (92%)

TABLE 3

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Guilty Plea Cases)
1 April 1971-1 October 1971

	Court Members	Military Judge Alone
Persons pleading guilty	75	522
Punitive discharge adjudged	56 (75%)	495 (95%)
Confinement adjudged	62 (83%)	495 (95%)

TABLE 4

ARMY-WIDE GENERAL COURT-MARTIAL DATA* (Guilty Plea Cases)
1 October 1971-1 April 1972

	Court Members	Military Judge Alone
Persons pleading guilty	100	503
Punitive discharge adjudged	78 (78%)	468 (93%)
Confinement adjudged	80 (80%)	482 (96%)

• Data compiled and based on all GCM records received in the US Army Judiciary during the period indicated. Figures do not include any cases that were tried prior to 1 August 1969, the effective date of the Military Justice Act of 1968.

** Percentages based on number convicted.

Since the publication of the tables, general court-martial records received in the United States Army Judiciary show a gradual diminution in bench trials.

Obviously the Army-wide statistics are valueless for predicting the behavior of an individual military judge. Their dispositions of cases vary in consonance with their own personalities, philosophies, and conditions within their several circuits. However, our interest is in the question whether senior military judges corporately share the axiology of the constituency amid which they live and work. Actual dispositions of cases have provided evidence that the answer is affirmative. Military judges have corporately been more inclined to convict, more inclined to confine, and more inclined to impose punitive discharges than have courts with members. The latter are typically made up of a cross section of officers, and occasionally upon an accused's request, of some enlisted members also. Given the

make-up of the typical court and the age and grade of general court-martial military judges, most members are considerably younger and have substantially less service than the judge. Statistics cannot tell us whether the axiology is more firmly inculcated over time, or whether judges perceive it more keenly and are more influenced by it because of their current associations, or simply whether judges are less easily flummoxed than court members. And whether or not the axiology directly moulds judges' conceptions of their roles, their roles as actually played out are consistent with that part of the axiology concerned with discipline and the exercise of authority in commands.

We have noted that a military judge is influenced in the discharge of his duties to make judicial decisions by the constraint of time, which tends towards emphasis on the production of a certain volume of decisions as well as or perhaps even instead of a reflective deliberation upon the subject matter of decisions; by reliance upon the respective presentations of counsel, a feature of the Anglo-American adversary concept of litigation which precludes even an activist judge from developing the case as he would if he were conducting a unilateral investigation; and by the concept of role, which takes into account the subtle communications of expectation from that group in the military most concerned with the maintenance of order, discipline, and authority. Given these influences, what is the effect of the rules of law, the precedents and principles which are supposed to be applied no matter who is judge, who are counsel, and who is being tried?

From a practice in civilian life, two assignments as military trial and defense counsel, and two assignments as trial judge in the U.S. Army Judiciary, the author's personal conclusion is that there is no judicial decision at the trial level which relates to a pure question of law divorced from fact-finding. The fact-finding ingredient may vary but it is always present. The degree of variance ranges from resolving disputed questions of fact going directly to guilt or innocence when the military judge sits alone at an accused's request, through hearing evidence on a motion, through accepting a stipulation presented by the parties, to the evidence of one's eyes as when a judge looks over to the members' box and perceives that a quorum is not present. In the last two of these instances, the absence of a dispute as to the facts does not do away with the necessity mentally to settle on a certain state of facts material to the legal dispute. Even when the facts are not in dispute, having for example been presented by stipulation or by uncontradicted testimony of an unimpeached

witness, the judge in the very nature of his task must determine which facts are material, which are weighty, and which facts give rise to what inferences. The simplest objection to a question obliges the judge at a minimum to decide what was the meaning of the question. Ordinarily he can intelligently rule on an objection only in light of the factual issues already developed and further anticipated at the trial.

Because legal rules are statements of particular consequences which attach to a particular state of facts, the role of rules at a trial is entirely inchoate until a foundation is laid for the application of a rule. The eminent jurist, prolific writer, and leader of American legal realism Judge Jerome Frank put the rules in perspective:

[The Facts which lead to the decision are] unknown—and unknowable—in advance of the decision . . . at which the court arrives in that very case. The F [facts] which leads to the D [decision] is not something which existed before the lawsuit began. The ‘facts’ of a ‘contested’ case, for judicial purposes, are not what actually happened between the parties but what the court thinks happened . . . [The] operative, effective F is what the court thinks (or says) it is⁴⁴

Thirty years after Judge Frank wrote, it is commonplace for a judge to be asked to make decisions not only on the basis of Judge Frank’s “operative, effective F” but also on the basis of a state of legally relevant facts which the judge affirmatively knows is not true in the real world. One situation is where key evidence was seized as a result of a legally impermissible search and thus is inadmissible under the exclusionary rule.⁴⁵ Here counsel will argue, “There is no evidence that my client possessed heroin,” after a day long suppression hearing at which everyone agreed that the actual state of facts is that it was found in his pocket. Another example is where a confession is held inadmissible because it was involuntary or not preceded by the requisite warnings and advices.⁴⁶ Here counsel will argue, “There is no evidence that my client was the perpetrator of the crime,” even though the judge knows from litigating the confession issues that the accused admitted guilt and is entirely convinced, although immaterially, that his confession was truthful.

It follows that the role of the rules at trial is unpredictable unless one knows in advance what state of facts is selectively going to be accepted by the judge as legally material and dispositive and in most

⁴⁴ Frank, *What Courts DO in Fact*, 26 ILL. L. REV. 645,649 (1932)

⁴⁵ Codified in military law in para. 152, MCM.

⁴⁶ See para. 140a, MCM.

instances what weight he will give to arid inferences he draws from these "facts."

It follows from this that the role of the rules is subject to all those influences upon a judge discussed *supra*, which limit and predispose him.

III. DETERMINANTS AT THE APPELLATE LEVEL

Exogenous determinants of or influences upon judicial decisions at the Court of Military Review appellate level are different from those at trial, some because of differences in function, others because of differences in environment.

Service Courts of Military Review were created in each Armed Force by the Military Justice Act of 1968 to supplant the prior appellate tribunals, the service boards of review. Before the Act if a service had enough appellate business to require more than one board of review, each board appointed was a discrete tribunal rather than part of a unitary appellate court, as a Court of Military Review in theory is.

Even slight reflection upon appellate cases and appellate procedures as reported in any set, be it the Court-Martial Reports or United States Reports, leads one to separate two distinct appellate functions. These are error correction and law announcement. The first is related more closely to the court's decision and the second to its opinion. Each of the primary functions may be subdivided into more refined categories. Nonexclusive examples under error correction include: error identification, weighing the effect of error to determine whether or not it was harmless, determining remedies for specific errors, drafting mandates to put specific remedies into effect, and in military practice, ameliorating sentences. Under law announcement the primary constituent functions would be researching and announcing already settled law, and where necessary charting out and announcing new rules in cases where no settled law has theretofore been made.

Any appellate court which issues mandates and opinions necessarily performs both error correction and law announcement, but the respective emphasis is obviously not everywhere the same. At the poles, one could say, are the United States Supreme Court and a Court of Military Review. The appellate jurisdiction of the Supreme Court is limited and for the most part discretionary; it decides what cases it does and does not want to hear by either issuing writs of certiorari upon petition of losing litigants in lower courts or by

denying petitions for the writs. It pronounces authoritatively the great Constitutional interpretations and decides those issues which are laden with public policy, often laden with conflicting fundamental policies. This is law announcement of the highest order. In the field of criminal law, the great recent Supreme Court cases are *Gideon v. Wainwright*, *Escobedo v. Illinois*, and *Miranda v. Arizona*.⁴⁷ In different ways they all dealt with extensions of the right to counsel, and the last two with the privilege against self-incrimination. Clearly the subject matter of the cases was the Court's concern, and not the individual defendants or their relatively insignificant cases below. What happened to them was not in essence a personal vindication of their individual rights; rather, they represented large groups of persons similarly situated and almost by happenstance became the victorious litigants in the great Constitutional cases. Reversal of their convictions was for them individually more an instance of serendipity than a result of general and systematic review by the Supreme Court of cases like theirs.

At the opposite pole, a Court of Military Review must by statute engage in appellate review of all court-martial cases which resulted in sentences to punitive discharge or to confinement at hard labor for one year or more,⁴⁸ other cases sent before the Court for review by the decision of the service's Judge Advocate General or his designee,⁴⁹ and some other lesser categories of cases.⁵⁰ There is no provision of law which grants a Court of Military Review discretion in selecting the business which comes before it. However, as to those cases which are before it a Court of Military Review may exercise discretion in individual dispositions to an extent unparalleled in American civilian jurisdictions. First, it has fact-finding power, an anomaly among American appellate courts, so that it may and indeed should set aside findings of guilty unless the sitting appellate judges (or a majority of them) are themselves persuaded of guilt beyond reasonable doubt.⁵¹ This is quite a different proposition from deciding whether the record contains sufficient evidence to support

⁴⁷ 372 U.S. 335 (1963), 378 U.S. 478 (1964), and 384 U.S. 436 (1966) respectively.

⁴⁸ UCMJ art. 66, 10 U.S.C. § 866.

⁴⁹ UCMJ art. 69, 10 U.S.C. § 869.

⁵⁰ UCMJ art. 66(b), 10 U.S.C. § 866(b).

⁵¹ UCMJ art. 66(c), 10 U.S.C. § 866(c). The "reasonable doubt" standard as applied to Court of Military Review (formerly boards of review) proceedings is not found in the statutory language but has many times been held to be implied in the statute. See *e.g.* *United States v. Powell*, 29 C.M.R. 688 (NBR 1959).

the decision at trial, as is the norm in civilian life. Second, a Court of Military Review may ameliorate or set aside sentences.”

A combination of automatic review and discretionary powers over fact-finding and sentencing impels Court of Military Review functions towards error correction and away from law announcement, to include announcing new principles or applications of principles. Courts of Military Review do deliver opinions in many cases, some of which are published in the Court-Martial Reports; but these tend to be less discursive and jurisprudential and certainly less seminal than opinions of major American courts of last resort.

The function of error correction is the undoing of what someone else has already done. It is a second look, a reflective look, a look from a distance. How do the differences between trial and review functions affect the respective impingement of exogenous influences upon judicial decision-making:

One major difference is in the factor of time. Appellate practice is not characterized by feverish activity. Before Courts of Military Review, cases move at stately pace. Appellate counsel for an accused have thirty days after notification of receipt of the record of trial in The Office of The Judge Advocate General in which to submit the defense brief. If the Government is represented, its counsel has thirty days after filing of the defense brief in which to file a reply brief.⁵³ Motions for enlargements of the time periods⁵⁴ are often submitted and are generously granted. The author recently selected at random five case files from those cases ready for disposition before the U.S. Army Court of Military Review. In each of the five, appellate defense counsel had moved for an enlargement of time in which to submit briefs. The periods ranged from one to four months. In two of the cases the Government had moved for an enlargement of time for one month. In all, in the five cases six-

⁵³ UCMJ art. 66(c), 10 U.S.C. § 866(c). Whether appellate courts should engage in review of sentences has been a controversial subject in American civilian jurisdictions. Most judges seem to oppose proposals for legislation which would permit the practice. See Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1965). The author attended a luncheon at the Federal Judicial Center, Washington, D.C., in May, 1973, at which Chief Justice Burger informally addressed about thirty federal and military judges. He castigated the practice of appellate review of sentences, calling it “vicious.” Despite opinions such as his, the military legal community continues to live comfortably with the practice, which has for centuries been a feature of military jurisprudence in one form or another.

⁵³ RULE 16c, COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE (1969).

⁵⁴ See *id.* RULES 21 and 22.

teen separate motions for enlargement were submitted. Every one was routinely granted. These figures are entirely consistent with the observations of the author when he was a judge of the Court in 1972-73. A contested case in which both appellate counsel rigidly adhered to the standard time limit of thirty days each for filing briefs seldom if ever came before the Court.

One would conclude from the standard practice of requesting enlargements of time for briefing a case that counsel have had ample time for reflection upon its issues. The briefs themselves support this conclusion, although counsel may be heard to complain about their workloads. Almost all are thorough in their treatment of the facts and research into the law. The contrast with what occurs at trial is stark.

Another major difference, pertaining to time as it is utilized by the judge himself rather than by counsel, is that at trial judicial rulings and decisions are usually announced on the spot. Protracted recesses for research and deliberation upon interlocutory matters are rare. Protracted deliberation upon findings and sentence in bench trials is only slightly less rare, in the author's experience sitting as trial judge and reviewing records as appellate judge. Within a half-hour or so after an issue is submitted, a trial judge is almost always ready to announce his decision and get on with other work. He may not feel ready in the sense that he is certain he is right or has exhausted all possible research; but he is ready in the sense that he is willing to act, tolerating the disquiet of some degree of uncertainty. The mode of decision under these circumstances is likely to be the educated hunch described by John Dewey.⁵⁵

Appellate decisions, in contrast to those below, are rendered if not at leisure at least after as much study and reflection as is necessary in the author judges' own exercise of discretion. In a case in which an opinion is written, the time devoted to drafting the opinion is invariably greater than the time required for mentally deciding the ultimate result, *e.g.*, affirmance, reversal, affirmance of findings of guilty of a lesser degree than was found at trial.

So much has been written about judicial opinion writing⁵⁶ that little could be added here to the analytical literature. In a more personal vein the author's experiences as appellate judge provide some grounds for observations about the relationship between decision making and opinion writing, and whether the process of pre-

⁵⁵ See Dewey, *supra* note 19 and accompanying text.

⁵⁶ *E.g.*, Levitan, *A Dissertation on Writing Legal Opinions*, 1960 WIS. L. REV.

paring an opinion for articulating particular decisions affects the substance of the decisions.

In an ideal world the judge assigned responsibility for a case on appeal would read the record of trial, and thereby be certain of what the facts were as decided at trial; study the parties' appellate briefs, and thereby be informed clearly and precisely what their respective contentions were; note all the constitutional provisions, statutes, cases and other material cited by counsel, in confidence that counsel have so thoroughly done their research that no additional library endeavors are required of the judge, and that counsel have not cited any case in support of a proposition for which it really does not stand or imputed to any statute an intendment not really there; listen attentively to oral argument by counsel, interrupting them infrequently only to pose questions in a courteous manner seeking additional elucidation which would always be forthcoming responsively and without evasion; mentally formulate a decision, confident that there is but one correct decision; ascertain from the other participating judges in conference that all are in perfect agreement both as to the author judge's suggested disposition and his rationale; quickly draft a scholarly and lucid opinion which would provide unambiguous answers to all major contentions of the parties while avoiding all *obiter dicta*; and secure without necessity for further discussion the unqualified concurrence of the other participating judges in every section of the opinion.

Query, whether an appellate judge could read that paragraphing without laughing. The real world, even in the quiet grave atmosphere of appellate chambers, is messy and uncertain. The force of personality, impact of reputation of colleagues, and debits and credits accumulated from past compromises often have effects greater than the play of abstractions.

What follows is not a history of appellate management of any particular case, but a composite drawn from the author's experiences as one member of one three-judge panel of one service's Court of Military Review. The composite is about a contested case with substantial issues, and in which oral argument has been requested before the Court of Military Review.

The case has come to issue after disposition of all motions, most of which are simple motions for enlargements of time for filing briefs, and submission of the defense and Government briefs. Prior

22; Qua, *A Few Reflections from the Experience of Twenty-two Years*, 1 BOSTON B. J. 9 (1957); Beardsley, *Judicial Draftsmanship*, 26 A.B.A.J. 3 (1940).

to oral argument the conscientious judge will have read the record of trial to learn the pertinent facts. All that follows is built upon the foundation of his thorough understanding of the facts. Alas, the foundation is so often faulty. If the case was tried before a court with members, their general findings do not recite factual determinations issue by issue. General findings can be a mask over the specific facts presented on closely contested issues. For example, in the author's most significant case as appellate judge, *United States v. Calley*,⁵⁷ a foremost issue was whether the appellant had killed Vietnamese villagers obediently to orders from his unit commander, Captain Medina. Many witnesses, including Calley and Medina, testified respectively that the latter gave or did not give orders to kill the villagers. A related issue was, assuming the orders were given, was the illegality of such orders apparent to a man of ordinary sense and understanding? If the court members answered that question affirmatively the orders would be no defense even if given. Appellate review was greatly complicated by the existence in the record of two different, mutually exclusive bases for finding against appellant on the issue and the absence of any indication in the record as to which basis persuaded the court-martial.

The alternative basis problem arises any time that more than one prosecution theory is advanced, *e.g.*, in a multi-party robbery guilt either as perpetrator or as aider and abettor, or multiple defenses are unsuccessfully interposed, *e.g.*, consent and nonpenetration in a rape case; and the findings are general findings,

Other situations which make the facts elusive on appellate review are poor presentations by counsel below, inarticulate and forgetful witnesses, sloppy court-reporting, and failure of counsel in summation to point out the inferences supportive of their theories.

On appeal, each party may include in his brief a factual "statement of the case" for the assistance of the court. Unfortunately at times the two versions are so disparate that one wonders if all counsel have been reading the same record. An unfortunate consequence, in the author's opinion, is a tendency for the resulting opinion to recite the facts in a way which is a compromise between disparate contentions rather than in a way which, in the appellate court's best judgment, the trial court actually found.

Next, in discussion of the composite case on appeal, the judge will read the briefs and do independent research on the state of the law. This is how he derives his major premises in the syllogistic

⁵⁷ 46 C.M.R.1131 (ACMR 1973), *aff'd*, 22 U.S.C.M.A. 19, 48 C.M.R. 534 (1973).

process of decision. On some issues the law is clear, simple, and accepted without cavil in the profession. On other issues the law is in flux, or is disordered by conflicting decisions from different appellate courts, or is under attack by activist counsel even when it seems to be settled, or is settled but vague. American law abounds with vague standards such as due process, reasonable searches, proximate cause, and even "conduct prejudicial to good order and discipline." When a major premise of syllogistic decision making includes vague terms, the syllogism is squishy and the decision maker can try to make it come but where he wishes.

Sometimes oral argument before appellate courts clarifies and illuminates the law for appellate judges and sometimes not. In our hypothetical composite case, the oral argument will satisfy a lesser purpose, namely, it will only provide the judges hints about what the counsel feel are the important issues and help identify those which are afterthoughts or trailers. The latter will not be given substantial treatment in the resulting opinion.

After oral argument and a brief conference among the judges for the purposes of reviewing the case and obtaining tentative opinions about its disposition, the case must be assigned to one judge. A host of exogenous factors enter at this stage: comparative workloads, specialized interests, desires on the part of a particular judge to seize a vehicle for writing about a favorite theory, and even such matters as vacation plans or apprehensions about writing in unfamiliar areas and coining a cropper.

The judge assigned the case will then draft an opinion and circulate it to his colleagues. These will only be the other members of his panel (The Army Court of Military Review ordinarily sits in panels of three judges) unless the case was so exceptional that the appellate tribunal heard it *en banc*. As a general proposition, the smaller the number of judges participating in decisions, the greater the influence each has on the other's opinions. The reasons are that discussions of a case among three judges can be piercing and critical, while discussion among a dozen judges is diffuse and affords any one of them less time for pressing his point of view, and that in the larger group one judge may ignore the views of another in the hopes he can subsequently obtain majority backing for his opinion from the rest. It is also difficult to reassemble the larger group for a second or third discussion of a case. Finally, the more judges participating, the more likely their positions will be separated by nuance even though the actual disposition of the case is agreed to by almost all. An example, in the author's own experience, was

United States v. Thompson,⁵⁸ in which the four opinions (an opinion of the court by Hodson, C. J., a concurring opinion, an opinion concurring in the result, and a dissent) in the Court of Military Review represented four points of view which crystallized early and which were never subject to the give-and-take of a conference of the court *en banc* after the circulation of draft opinions.

Within a panel of three judges, there is more of an ongoing interplay of the judges' points of view. Formal case conferences are supplemented by informal discussions. The result is more likely to be an opinion which, although subscribed by one author judge, represents a convergence of the views of the three. It should be emphasized that the interplay is of primary effect on the opinion, not the decision, in other words on the law-announcing rather than the error-correction function.

From the above abbreviated description of appellate case management, both in its ideal and its mundane aspects, one can easily identify the major differences between trial and appellate environments of decision-making. The trial judge is more a captive of time and of the talents and efforts of counsel. The appellate judge is better situated to do and rely upon his own researches. Because he works from a completed record of trial, he is seldom able to reopen or expand upon factual inquiries.⁵⁹ However, within his review of a record of trial he is free virtually to ignore what he considers trivial or frivolous issues. Only a minority of assignments of error are even discussed in Court of Military Review opinions.

The greatest difference, in the author's opinion drawn from experience at both levels, is that appellate decision-making is affected by collegiality. The trial judge sits alone. The appellate judge sits with and shares the responsibility of decision with other judges. The others instruct him from their knowledge, restrain him from mere idiosyncracies, counsel with him on issues of pure judgment, *e.g.*, adequacy of evidence in close cases and hyperseverity of sentences, and point out to him any illogic or lacunae in the reasoning in his written opinions. The natural effect of collegiality is to bring about a convergence of opinions at the expense of individualism. The concept of collegiality is far broader than the influence of two

⁵⁸ 47 C.M.R. 134 (ACMR 1973), *aff'd*, 22 U.S.C.M.A. 448, 47 C.M.R. 489 (1973).

⁵⁹ There are exceptions. See United States v. Triplett, 21 U.S.C.M.A. 497, 45 C.M.R. 271 (1972); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

other judges on a panel, or even all other judges on a court. Appellate opinions are written for distribution throughout the profession and many for publication. There are always higher or cognate appellate courts which can reverse or criticize one's work. -Approval and disapproval throughout the entire network of the American judiciary are effective stimuli to keep one's work within the mainstream of American jurisprudence. This is but another way of saying that the *concept of role* impinges on a theoretical state of perfect freedom of appellate decision-making, as it does at the trial level. However, at the trial level the role is more shaped by the expectations of the people among whom judges live and work while at the appellate level it is shaped by professional colleagues.

IV. CONCLUSION

Neither at the trial nor appellate level does a military judge live and work so as to be encapsulated in a way which limits determinants of judicial decisions to the "facts and the law." The facts and the law, in other words all that is endogenous in a case, have great effect obviously; but their effect is shaped and tempered by exogenous factors which can predispose one's opinion one way or another. Direct command interference in military judicial processes is rightly denounced as a pernicious influence which undermines the whole system. However, there are other exogenous factors which, though they influence military decisions powerfully, are not denounced, at least not to the same extent. Rather, they are accepted as normal and natural incidents of legal work or at worst as the kinds of drawbacks one expects to find in an imperfect world.

These exogenous factors include the press of time, the influence of and reliance on counsel, "role" expectations, one's social and professional environment, and the conventional axiology of the military profession. To these, at the appellate level, should be added the powerful effects of collegiality.

The value of careful study of these exogenous factors as they operate on particular judges and courts is that by such study one can better predict judicial behavior.

LAWYERS' FORUM

ATTACKING THE PROBABLE CAUSE EQUATION*

Major Francis A. Gilligan**

I. INTRODUCTION

When faced with the question of the legality of a search and seizure, during trial, a military judge may be called upon to decide whether a search warrant was issued upon a proper showing of probable cause. The complexity inherent in resolving this issue may be compounded, especially when the search warrant has been issued by a military judge. These judicially issued search warrants direct the search of a person or place specified in the warrant by either a military policeman, a Criminal Investigation Detachment agent, or the accused's commanding officer.² If the warrant is executed,³ the warrant, together with a required inventory of any property seized, should be returned to the issuing military judge.⁴ The military judge transmits the warrant and the required inventory to the installation staff judge advocate. Thus, they are available for any future litigation or proceedings in which the results of the search are relevant.⁵

When the validity of a search conducted pursuant to a judicially issued warrant is raised in court-martial proceedings, the military judge must determine whether the warrant was issued upon a proper

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

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¹ Army Regulation 27-10, para. 14-1 (12 Dec. 1973) [hereinafter cited as AR 27-10]. A military judge may, upon a proper showing of probable cause, issue search warrants with respect to military persons on military property within the judicial circuit to which the military judge is assigned or on temporary duty.

² *Id.* para. 14-5.

³ *Id.* para. 14-6.

⁴ *Id.*

⁵ *Id.* para. 14-8.

showing of probable cause. In making this determination at trial, the military judge must initially decide what evidence he may consider in resolving this question: May he consider only the information presented to the issuing judge in the affidavit? Or may he also consider oral testimony presented to the issuing judge but not included in the affidavit? Additionally, may he consider evidence not presented to the issuing judge, evidence presented at trial prior to his ruling on the issue?

Many of these same issues are present when a search is authorized by a commanding officer. A not too hypothetical case presents these problems more vividly than discussing sterile issues. Although the hypothetical deals with a search authorized by a commanding officer, substantially identical issues are raised if the information present in this hypothetical were presented to a military judge in the form of an affidavit.

A. THE HYPOTHETICAL

PFC Elverton Roadcap, an informant, tells a criminal investigator that he saw SP4 Crutchhorse with 100 tablets of LSD in his cubicle last night. Roadcap also tells the investigator that he recognized the LSD because of his past training by the CID. All this information was presented in a written statement to SP4 Crutchhorse's commanding officer. Additionally, the written statement contained the investigator's assertion that, on four different occasions in the past, information supplied by Roadcap had resulted in the seizure of heroin. The CID agent had also orally related to the commander that another informant, K-2, saw Crutchhorse with LSD in his living area two days prior to the search. The agent told the commander that K-2 had furnished information in the past about possession of LSD and that the information was subsequently proven reliable. Based on this information, the commander orally authorized a search of Crutchhorse's living area in the barracks for LSD.

At trial, Crutchhorse's defense counsel makes a motion for appropriate relief in the form of a motion to suppress. In support of the motion, the defense counsel calls Roadcap as a witness. Roadcap, whose term of service has expired, testifies that he neither saw LSD in the defendant's cubicle nor had he taken any classes on the identification of drugs. The trial counsel counters by calling an undercover CID agent who testifies that he saw LSD in Crutchhorse's cubicle two days prior to the day the commanding officer authorized the search.

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B. THE ISSUES

The hypothetical presents several issues for the military judge to resolve before he ultimately determines the admissibility of the real evidence. The threshold question that must be answered is whether a defendant may challenge information given to the commanding officer who authorized the search, information that is sufficient to establish probable cause to search? If this threshold question is answered in the affirmative, the military judge must determine whether:

- (1) the testimony of the undercover CID agent may be considered in determining probable cause to search,
- (2) the oral information given to the commanding officer may be considered in determining if probable cause to search existed, and
- (3) the intentional misstatements by the informant, Roadcap, necessitate exclusion of the real evidence seized from Crutch-horse's possession.

11. CHALLENGING AN AFFIDAVIT SUFFICIENT ON ITS FACE

The Supreme Court has not determined to what extent, if any, an accused may go beyond the facts contained in an affidavit to challenge the accuracy of the affidavit's contents.⁶ A majority of state courts' and, in the past, some federal courts have been reluc-

⁶ *Rugendorf v. United States*, 376 U.S. 528, 531-32 (1964). "Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a Court may permit such examination when the search warrant is valid on its face, and when the allegation of the underlying affidavits establishes 'probable cause'; however, assuming for the purpose of this decision that such attack may be made, we are of the opinion that the search warrant here is valid. . . . The factual inaccuracies depended upon by petitioner to destroy probable cause . . . were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

⁷ *See, e.g.*, *People v. Bak*, 45 Ill.2d 140, 258, N.E.2d 341, cert. *denied*, 400 U.S. 882 (1970); *Bowen v. Commonwealth*, 199 Ky. 400, 251 S.W. 625 (1923); *Scarborough v. State*, 3 Md. App. 207, 238 A.2d 297 (1968); *Petillo v. State*, 61 N.J. 165, 293 A.2d 649 (1972), cert. *denied*, 410 U.S. 945 (1973); *Ray v. State*, 43 Okla. Crim. 1, 276 P. 785 (1929); *State v. Seymour*, 46 R.I. 257, 126 A. 755 (1924); *Owens v. State*, 217 Tenn. 544, 399 S.W.2d 507 (1966); *Ware v. State*, 110 Tex. Crim. 90, 7 S.W.2d 551 (1928); *State v. Shaffer*, 120 Wash. 345, 207 P. 229 (1922). But *see Theodor v. Superior Court*, 77 Cal.3d 501, P.2d 234, 104 Cal. Rptr. 226

tant to conduct a hearing on inaccuracies in the affidavit.* However, later cases have indicated that such a hearing may be required when there is a "strong and substantial showing" of error in the affidavit.⁹

The federal and state courts that have denied a hearing usually do so based on the rationale that the issuance of a warrant is a judicial act and the magistrate's exercise of authority should be respected.¹⁰ To shift the final responsibility from the magistrate to the trial judge would reduce the function of the magistrate to a mere formality." Moreover, a hearing at trial on the accuracy of the affidavit may cause the issue of the defendant's guilt to be confused with an issue of the affiant's perjury.¹² It can also be argued that there is no justification for allowing a *de novo* trial on the issue of the magistrate's determination.¹³ If the defense is not allowed to challenge a facially sufficient affidavit without an initial showing of some potential infirmities, the government would only be required to introduce the affidavit and the warrant to sustain its burden where the defense has made a motion to suppress on the basis of the insufficiency of the

(1972); *People v. Burt*, 236 Mich. 62, 210 N.Y. 97 (1926); *O'Bean v. State*, 184 So.2d 635 (Miss. 1966); *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 267 N.Y.S.2d 243 (1965).

⁸ See, e.g., *Carney v. United States*, 163 F.2d 784, 786 (9th Cir. 1947), quoting from *Dumbra v. United States*, 268 U.S. 435, 441 (1925): "[T]he *apparent* facts set out in the affidavit are such that a reasonably discreet prudent man would be led to believe that there was a commission of the offense." (emphasis added.) See also *United States v. Bridges*, 419 F.2d 963, 966 n.4 (8th Cir. 1969) (dictum); *United States v. Bowling*, 351 F.2d 236 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); *Kenney v. United States*, 157 F.2d 442 (1964); *United States v. Gianaris*, 25 F.R.D. 194 (D.D.C. 1964).

⁹ *United States v. Bolton*, 458 F.2d 377, 378 (9th Cir. 1972) (dictum); *United States v. Dunning*, 425 F.2d 836, 840 (2d Cir. 1969) (dictum) (hearing required when there has been "an initial showing of falsehood or other imposition on the magistrate"); *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967) (no hearing is required if the allegation in the defense counsel's affidavit is not based on personal knowledge); *United States v. Roth*, 285 F. Supp. 364, 366 (S.D.N.Y. 1968) ("mere demand" does not require a hearing); *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966) (no hearing required until the accused "has at least made some initial showing of some potential infirmities"). See also *ALI A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE* § 8.03(b) (Tent. Draft No. 4, 1971).

¹⁰ See, e.g., *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *United States v. Burnett*, 53 F.2d 212 (W.D. Mo. 1931).

¹¹ See *Rosencranz v. United States*, 356 F.2d 310, 317 (1st Cir. 1966).

¹² See, e.g., *Burrell v. State*, 207 Md. 278, 280, 113 A.2d 884, 885 (1955).

¹³ *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966).

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affidavit.¹⁴ This allows the criminal charges to be reached on the merits with some expedition. Of course, this factor should never be controlling. Another practical factor is that this rule allows some division of work:

If the pressure of time and physical limitations did not exist, we might want to check on everyone's judgment; we might, for example, make a preliminary test of every indictment to be sure that the grand jury had something to go on. But the morality of men among other things, counsel against that.¹⁵

Some argue that if searches based on warrants may be controverted the same as warrantless searches, there will be no incentive to get warrants. The strength of this argument has been questioned. Even if one assumes the argument is true, police noncompliance with such requirements should not be controlling; otherwise, there would be police management of supervisory rules and constitutional principles. Neither is satisfactory. Still another reason for denying a hearing on the affidavits would be based on the test to be applied at the time of a motion to suppress. The test is "whether the Commissioner acted properly, not whether . . . [the officer] did."¹⁶ As stated by the New Jersey Supreme Court, "the issue is not whether the information which reached the officer was true or false but only whether the officer was unreasonable in accepting the information as true."¹⁷ This is in keeping with the very nature of probable cause—something quite less than prima facie proof.¹⁸

The rule denying a hearing to the defense is consistent with the holdings that probable cause for a search is to be tested by the evidence originally presented to the authorizing officer, and that the prosecution is precluded from offering supplemental information to sustain a showing of probable cause. Indeed, the Supreme Court has held it to be elementary that in passing on the validity of a warrant, the reviewing court may consider only the information brought to the magistrate's attention at the time the warrant was issued.

There are, however, a number of arguments in favor of allowing an attack on the affidavit, at least after the defense has made a strong

¹⁴ Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 137 [hereinafter referred to as MCM] with MCM para. 139.

¹⁵ *United States v. Halsey*, 257 F. Supp. 1002, 1006 (S.D.N.Y.1966).

¹⁶ *Jones v. United States*, 362 U.S. 257, 272 (1960).

¹⁷ *State v. Bumett*, 42 N.J.377, 201 A.2d 39, 45 (1964).

¹⁸ *Brinegar v. United States*, 338 US. 160 (1949); *Locke v. United States*, 11 U.S. 212 (1818).

and substantial showing of error. First, such a hearing would further the deterrence rationale of the exclusionary rule. If no hearing is required, there would be no protection against "policy laxity or bad faith. A temptation for officers to include unjustified recitals of informants' reliability would be reduced."¹⁹ Secondly, the hearing would be a deterrent against perjury. In the military, the perjury prosecution is ineffective. Most applications to search are oral and unsworn.²⁰ Additionally, many servicemen are released before trial through the administrative discharge process after they have given information.²¹ Third, experience indicates there are few perjury prosecutions. However, an individual who gives false information to his commanding officer may be prosecuted under Article 107, UCMJ, for making a false official statement.²² Fourth, the solemnity of the process and respect for the magistrate is not protected in the military since the official authorizing the search is a layman with little schooling in probable cause.²³ However, commanders are often instructed not to authorize searches, absent a need for immediate action, without consulting with the staff judge advocate.

Foremost, the objections against a hearing should be balanced against the reason for a hearing, a hearing that would only be held after a strong and substantial showing of probable error. Thus, the solemnity of the process, the respect for the magistrate, judicial economy, and the encouragement of the use of warrants would all be satisfied if hearings are held only under limited circumstances. In the hypothetical, the defense counsel presented substantial evidence concerning erroneous information presented by Roadcap. On the basis of this information a hearing would be required to determine what facts were relied upon by the commander in his finding that probable cause to search existed.

¹⁹ *United States v. Freeman*, 358 F.2d 459, 463 n.4 (2d Cir. 1966).

²⁰ *See, e.g., United States v. Offerdahl*, No. 73-1365 (NCMR 1973).

²¹ *United States v. Salatino*, 22 U.S.C.M.A. 530, 48 C.M.R. 15 (1973). Many informants have already been apprehended for the wrongful use, possession or sale of drugs and have requested administrative discharges in lieu of court-martial. The informant's commander may agree to recommend that the defendant's request for administrative discharge be accepted if he cooperates with the law enforcement authorities. The informant cooperates, turns in information on a number of individuals, resulting in the seizure of drugs and their subsequent prosecution. Before these individuals are prosecuted, the informant is discharged from the service.

²² *United States v. Collier*, 22 U.S.C.M.A. 173, 48 C.M.R. 789 (1974)

²³ *Cf. Shadwick v. Tampa*, 407 U.S. 345 (1972).

III. CONSIDERATION OF EVIDENCE NOT
PRESENTED TO ISSUING MAGISTRATE

Since the question before the trial judge is whether the authorizing official acted properly in issuing the warrant, the trial judge may not consider evidence known to the affiant but not presented to authorizing official.²⁴ In the hypothetical, the trial counsel cannot resuscitate the written statement on the basis of the CID agent's testimony at the hearing on a motion to suppress. In *United States v. Roth*,²⁵ the Seventh Circuit Court of Appeals said, "If an affidavit is the only matter presented to the issuing magistrate . . . the warrant must stand or fall solely on the contents of the affidavit."²⁶ Whether the converse of this statement is true, that is, whether all testimony made at the time of issuance, as well as the evidence presented in the affidavit, may be considered in determining whether there is probable cause depends on the Constitution and federal" and state rules.²⁸

IV. USE OF ORAL TESTIMONY TO RESUSCITATE,
AN AFFIDAVIT OR INFORMATION PRESENTED
TO COMMANDING OFFICER

A. GENERAL PRINCIPLES

The Supreme Court has considered, but not decided, the constitutional question of whether the use of oral testimony may resuscitate an affidavit. In reversing the conviction in *Aguilar v. Texas*,²⁹ the Court noted:

²⁴ *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964); *Giordenello v. United States*, 357 U.S. 480, 487 (1958); *Iverson v. North Dakota*, 480 F.2d 414, 418 n.1 (8th Cir. 1973), *cert. denied*, — U.S.— (1974); *United States v. Cobb*, 432 F.2d 716 (4th Cir. 1970); *McGreary v. Sigler*, 406 F.2d 1264 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969); *United States ex rel. DeRosa v. Lavalley*, 406 F.2d 807, 808 (2d Cir.), *cert. denied*, 395 U.S. 854 (1969); *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967).

²⁵ 391 F.2d 507 (7th Cir. 1967).

²⁶ *Id.* at 509.

²⁷ Rule 41(c), Fed. R. Crim. P., is as follows: "A warrant shall issue only on . . . affidavits sworn to before the federal magistrate or state judge and establishing grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that the grounds for the application exists or that there is probable cause to believe that they exist, he shall issue the warrant . . ."

²⁸ *See, e.g., ARIZ. REV. STAT. § 13-1444* (1971).

²⁹ 378 U.S. 108 (1964).

It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. . . . If facts [other than those contained in the affidavit] had been appropriately presented to the magistrate this would, of course, present an entirely different case.³⁰

Likewise, in *Whitely v. Warden*,³¹ the Court inferentially noted that "[a]n . . . insufficient affidavit may be rehabilitated by testimony disclosed to the issuing magistrate." And the federal appellate courts who have considered the constitutional issue have stated the same rule.³²

The fourth amendment requires only that "no Warrant shall issue . . . supported by Oath or affirmation."³³ It does not require that the information furnished the magistrate be in writing to be considered at a probable cause hearing. However, Rule 41(c) of the Federal Rules of Criminal Procedure provides that "[a] warrant shall issue only on affidavits sworn to . . . and establishing the grounds for issuing the warrant."³⁴ However, the Federal Rules of Criminal Procedure are not constitutional imperatives,³⁵ nor do they extend to state prosecutions.

Even though some of the federal courts hold that the federal rules are not constitutional imperatives,³⁶ some federal courts hold that the reviewing judge is limited to the four corners of the affidavit because of Rule 41(c).³⁷ Military cases dealing with the use of oral

³⁰ *Id.* at 109, n.1 (emphasis in original). See also *State v. Chakos*, 74 Wash.2d 154, 443 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090 (1969).

³¹ 401 U.S. 560, 565 n.8 (1971).

³² *Campbell v. Minnesota*, 487 F.2d 1 (8th Cir. 1973); *Boyer v. Arizona*, 455 F.2d 804 (9th Cir. 1972); *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971); *United States ex rel. Pugach v. Mancusi*, 411 F.2d 177 (2d Cir.), *cert. denied*, 396 U.S. 889 (1969); *Sherrich v. Eyman*, 389 F.2d 648 (9th Cir.), *cert. denied*, 391 U.S. 874 (1968); *Miller v. Sigler*, 353 F.2d 424 (8th Cir. 1965), *cert. denied*, 384 U.S. 980 (1966); *United States v. Marihart*, 472 F.2d 809, 814 (8th Cir. 1972).

³³ U.S. CONST. amend. IV.

³⁴ An excellent summary on the historical basis of Rule 41(c) appears in Comment, *The Outwardly Sufficient Search Warrant Affidavit: What if it's False?*, 19 U.C.L.A.L. REV. 96, 103-06 (1971).

³⁵ *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516 (3d Cir. 1973); *United States v. Schwartz*, 372 F.2d 678, 682 (4th Cir. 1967).

³⁶ *Id.*

³⁷ See, e.g., *United States v. Anderson*, 453 F.2d 174, 177, n.3 (9th Cir. 1971), citing five other circuits in which the court has indicated in *dictum* that the reviewing judge may not go beyond the four corners of the affidavit. *But see Campbell v. Minnesota*, 487 F.2d 1 (8th Cir. 1973); *Leeper v. United States*, 446 F.2d 281 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972); *United States v.*

testimony to resuscitate a written affidavit presented to a commanding officer, uniformly state that oral testimony is admissible to determine whether there was probable cause for the search.³⁸

B. NEED FOR A WRITTEN RECORD

In *Commonwealth v. Milliken*,³⁹ the Pennsylvania Supreme Court set forth two reasons, one in the majority opinion and one in the dissenting opinion, why oral testimony should not be considered if no written record is made contemporaneously with the issuance of the warrant.

1. *Intentional or Innocent Misstatements.* First, there may be either innocent or intentional misstatements. These innocent misstatements may be made because of the passage of time between the time the warrant was issued and the time when the motion to suppress is made and heard by the trial judge. For this exact reason, the Court of Military Appeals has suggested that authorizations to search should be in writing.⁴⁰ There may be intentional misrepresentation because some officers disapprove of the exclusionary rule. Disliking the rule, they feel that it is not unethical to exaggerate the facts, thus insuring a finding of probable cause when a motion to suppress has been made.⁴¹

2. *Record on Appeal.* Second, there is a need for a record on appeal. The due process clause of the fourteenth amendment and the prohibition in the fourth amendment against unreasonable searches and seizures prohibit the introduction of oral testimony. The rationale is that if a record of trial is necessary in order to preserve a defendant's claims for appellate review concerning the findings and sentence, a written record is also required so that the issuance of a warrant may be reviewed on appeal.⁴²

Berkus, 428 F.2d 1148 (8th Cir. 1970); *United States ex rel. Boyance v. Meyers*, 270 F. Supp. 734 (E.D. Pa. 1967).

³⁸ *United States v. Fleener*, 21 U.S.C.M.A. 174, 182, 44 C.M.R. 228, 236 (1972) (Quinn, J., dissenting); *United States v. Philpot*, 47 C.M.R. 705 (NCMR 1973); *United States v. Williams*, No. 71 2994 (NCMR, 26 July 1972).

³⁹ 224 Pa. 708, 300 A.2d 78 (1973).

⁴⁰ See, e.g., *United States v. Hartsook*, 15 U.S.C.M.A. 291, 298, 35 C.M.R. 270, 277 (1965).

⁴¹ See *Amicus Curiae Brief of State of Illinois, Krivda v. California*, 409 U.S. 33 (1972).

⁴² *Commonwealth v. Milliken*, 224 Pa. 708, 300 A.2d 78, 82-85 (1973) (dissenting opinion).

There are several reasons why a requirement for a record on appeal is impractical or unnecessary. First, a rule of constitutional dimensions, or for that matter a supervisory rule of a court, should not be based on an assumption that the police officer will intentionally or unintentionally misstate the facts. If this assumption is made, it would seem that all witnesses to a crime should be required to make some writing contemporaneous with the event, otherwise they would not be allowed to testify at trial. Witnesses are not required to make a contemporaneous recording of the events that transpired and their testimony goes to a finding which must be beyond a reasonable doubt. Thus, it would seem that the testimony of an individual before a magistrate prior to issuance of a warrant should not be required to reduce his testimony to writing. This argument seems to have been the moving factor behind the California experiment with the use of telephone search warrants and the proposed changes to Rule 41(c) of the Federal Rules of Criminal Procedure.⁴³ Second, the rules that allow oral testimony to be presented to a magistrate prior to the issuance of warrants encourage the use of warrants since on many occasions time will be of the essence or it will be temporarily inconvenient to secure a warrant from a magistrate. Third, the requirement that written affidavits be presented to a magistrate does not allow modern electronic equipment, such as the telephone or radio, to be used to obtain search warrants.⁴⁴ Fourth, a primary reason that warrants are not used is the administrative difficulties involved in obtaining a warrant, including the time consumed in preparing appropriate affidavits.⁴⁵ Another reason for allowing oral evidence is, assuming that some police officers do believe that it is ethical to testify to facts that were not presented to the magistrate that the prosecution has the duty under ABA Standards not to allow a witness to perjure himself at a suppression hearing or at the trial.⁴⁶ The passage of time argu-

⁴³ CAL. PENAL CODE § 1526(b) (West, 1970); Proposed Amendments to the Federal Rules of Criminal Procedure Governing Habeas Corpus Proceedings, Proposed Rules Governing Habeas Corpus Proceedings and Proposed Rules Governing 42255 Proceedings for the United States District Courts, and Proposed Amendment to the Federal Rules of Appellate Procedure 27-33 (Preliminary Draft, 1973).

⁴⁴ CAL. PENAL CODE § 1526(b) (West, 1970).

⁴⁵ See L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME 105-116 (1967); LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, 411 (1965).

⁴⁶ ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION § 1.7 (1971).

ment has less applicability to military proceedings because of the 90-day rule announced in *United States v. Burton*.⁴⁷

V. CONSEQUENCES OF ERRONEOUS STATEMENT
IN AFFIDAVIT OR STATEMENT TO
COMMANDING OFFICER

A. OPTIONS

Assuming that the defense counsel shows that the affidavit or the information given to the commander is inaccurate, should evidence obtained as a result of the seizure pursuant to the warrant be admissible? Misstatements may fall generally into three categories: reasonable errors made in good faith, negligent misstatements, or intentional misstatements. The misinformation may be in the form of inaccurate personal observation by the law enforcement officials seeking the warrant, the affiant's miscalculation as to the reliability of an informant, or inaccurate information gathered by the informant. In determining whether the evidence is admissible there are a number of approaches that might be taken.⁴⁸ First the court may, depending upon a number of factors, exclude the evidence: (a) whether any misstatement was made,⁴⁹ (b) the materiality of the misrepresentation,⁵⁰ (c) who made the misstatement, for example, a government agent or an ordinary citizen," and (d) the nature of culpability concerning the misstatement. Applying these criteria,

⁴⁷ 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). Where an individual who has been charged with an offense or placed in confinement must be tried within 90 days of either the charges or confinement or an explanation be furnished for any further delay.

⁴⁸ See generally Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Note, *The Outwardly Sufficient Search Warrant Affidavit: What if it's False?*, 19 U.C.L.A.L. REV. 96 (1971); Note, *Controverting Probable Cause in Facially Sufficient Affidavits*, 63 J. CRIM. L. & P. S. 41 (1972); Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529 (1967).

⁴⁹ *King v. United States*, 282 F.2d 398, 400 n.4 (4th Cir. 1960). The court indicated in dictum that "false facts given by the affiant will vitiate the warrant and the search."

⁵⁰ *United States v. Bozza*, 365 F.2d 206, 222-24 (2d Cir. 1966). The court indicated that an immaterial error in the affidavit even if intentionally misstated by the law enforcement official seeking the warrant would not vitiate the warrant.

⁵¹ Compare *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973), with *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973). The court in *Thomas* would vitiate the warrant where there material erroneous misstatements even if "nonintentional." A second basis for excluding evidence is where the misrepresentation

the court would determine whether to exclude the evidence. Another procedure that might be used is a bifurcated approach. The first step of this procedure would be (1) to determine if there has been any misrepresentation and (2) if so, to determine if the residue of the affidavit established probable cause.⁵² A third procedure is a mixture of the two. Applying the bifurcated procedure the court would initially determine if there was a misrepresentation. If the court determines that the misrepresentation was an intentional misrepresentation, the court would then exclude the evidence. If, however, the court finds that the misrepresentation was innocent, it should not excise the misstatement. But if the court finds that the misrepresentation was based upon an unreasonable assumption by the person seeking the warrant, it should excise the misstatement from the affidavit and determine if the remainder of the affidavit establishes probable cause.

B. THE EXCLUSIONARY RULE

The exclusionary rule is based upon two assumptions. First, that certain types of misconduct can be deterred and, secondly, that there is no reasonable alternative to the exclusionary rule. Because of these two assumptions, the first question that should be examined is what type of conduct can be deterred. Secondly, is there a reasonable alternative to the exclusionary rule. One commentator has argued that even good faith misstatements by a law enforcement official can be deterred.⁵³ The bias or tunnel vision of police officers may be expressed in unintentional as well as deliberate ways. Given the "often competitive enterprise of ferreting out of crime,"⁵⁴ and the fact that the business may become emotional, a police officer may innocently misstate the facts. If the exclusionary rule is applied to good faith misstatements, its application might encourage more

was made with the "intent to deceive the magistrate, whether or not the error is material to the showing of probable cause." See also *United States v. Turck*, 49 C.M.R. 49 (AFCMR 1974).

⁵² *United States v. Morris*, 477 F.2d 657 (5th Cir.), cert. denied, 414 U.S. 852 (1973); *United States v. Jones*, 475 F.2d 723 (5th Cir.), cert. denied, 414 U.S. 841 (1973); *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972).

⁵³ Note, *Outwardly Sufficient Search Warrant Affidavit: What if it's False?*, 19 U.C.L.A. L. REV. 96 (1971). But see *Michigan v. Tucker*, 42 U.S.L.W. 4887, 4891 (U.S. June 10, 1974). "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

⁵⁴ *Johnson v. United States*, 333 U.S. 10, 14 (1968).

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thorough investigatory conduct by inducing independent investigations. Although the price in manpower and time would be high, this would greatly strengthen privacy in the community. Assuming, then, that good faith misconduct can be deterred, logically then the exclusionary rule should apply even to innocent misrepresentations of immaterial facts. *A fortiori* negligent, reckless, intentional misstatements would result in the exclusion of evidence. The exclusionary rule, however, has not always been applied to such logical extremes. The Court has not extended standing to co-defendants or accomplices if the individual objecting to the search does not otherwise have standing under traditional concepts.⁵⁵ Nor has the court extended the "fruit of the poisonous tree" rule to grand jury proceedings.⁵⁶

C. COURT OF MILITARY APPEALS POSITION

What procedure, as well as what rules, the Court of Military Appeals will apply to the consequences resulting from misstatements is unclear. A partial guideline in the form of the rules the court will *not apply* in excluding evidence have been set forth in cases decided in 1972-73.

In *United States v. Sam*,⁵⁷ the commanding officer misunderstood the information presented to him by the investigator who had requested authority to search. The investigator told the commander that a wallet taken from the defendant had been identified by the victim of the robbery as the wallet that he was carrying when robbed. Additionally, the investigator told the commander that the defendant was wearing a jacket similar to that worn by one of the three robbers and that the defendant was seen before the robbery with two other individuals who were chased into a building shortly after the robbery. The commanding officer erroneously understood that the defendant "was seen after the robbery in an area with others who probably fled from the area when the crime occurred."⁵⁸ Second, it was not shown that the commander knew that the wallet taken from the defendant did not reveal anything that would link him with the alleged robbery. The court indicated that these mistakes were not so

⁵⁵ *Alderman v. United States*, 394 U.S. 165 (1969).

⁵⁶ *United States v. Calandra*, 414 U.S. 338 (1974).

⁵⁷ 22 U.S.C.M.A. 124, 46 C.M.R. 124 (1972).

⁵⁸ *Id.* at 128, 46 C.M.R. at 128.

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infectious that it debilitates the other correctly understood information presented concerning Sam's possession of the wallet to such an extreme that probable cause cannot be found.⁵⁹

In *United States v. Salatino*,⁶⁰ the court held that immaterial erroneous statements by an informant who was awaiting trial did not affect the validity of the search. The court did not reach the issue as to whether the erroneous misstatement was innocently or deliberately made. The defendant's commanding officer, Captain Duck, authorized the search of the defendant's wall locker, bunk and barracks area based on the information received from an informant. The informant told Captain Duck that he saw the defendant in an orange Volkswagen the previous evening using a small silver scale to weigh a white powdery substance that he believed to be a drug. The informant also told Captain Duck that the defendant then placed portions of the substance in tinfoil and hid them in specific places in the car. The informant also saw the defendant place a gun which he described in detail into the car's glove compartment. A search of the car resulted in the seizure of a gun and some amphetamines.

During the defendant's trial, the informant testified that he was now sure that it was not the defendant who he saw weighing drugs in the car—the person he saw at the car had blond hair, the defendant did not. The informant said that he did not know this before trial, because the accused, like other soldiers, normally wore a baseball cap. Even so, the informant admitted that he had seen the defendant in the barracks and lied to his commander. He justified his misrepresentation on the grounds that he was scared by a criminal investigator who told him he would receive a light sentence if he cooperated with the police. The court, in deciding that the evidence found in the car was admissible because the discrepancy in the statement by the informant was immaterial, opined:

[E]ven though the occupant may have been misidentified . . . the identity of the occupant was irrelevant to the search of the automobile for contraband drugs and the firearm.⁶¹

A third case decided by the court was *United States v. Carlisle*.⁶² On the basis of information from an informant named Cheatam,

⁵⁹ *Id.*

⁶⁰ 22 U.S.C.M.A. 530, 48 C.M.R. 15 (1973).

⁶¹ *Id.* at 532, 48 C.M.R. at 17.

⁶² 22 U.S.C.M.A. 564, 48 C.M.R. 71 (1973), *rev'g* 46 C.M.R. 1250 (ACMR 1973).

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a battalion commander authorized the search of the defendant's person. Cheatam had informed the battalion commander that the defendant had LSD tablets in his breast pocket. The informant's information was based on the fact that he had just purchased LSD from the defendant. The search of the defendant revealed LSD just as the informant had indicated. At the time of trial, however, Cheatam had been administratively discharged from the service. Called as a defense witness, Cheatam said that he had planted the drugs on the defendant. The Court of Military Appeals in affirming the conviction stated that the trial judge correctly admitted the real evidence found on the defendant since Cheatam's testimony "did not affect the sufficiency of the facts justifying the search that were before" the battalion commander.⁶³

In all three cases, the court indicated that it will not vitiate a search because of a misstatement in an affidavit,⁶⁴ or an intentional misstatement of immaterial facts.⁶⁵ The court did not, however, indicate whether it is necessary to determine if the erroneous misstatement was made by the affiant or government agent nor did it indicate what rationale it would use in future cases.

VI. CONCLUSIONS

Negligent, grossly negligent, and intentional acts can be deterred. In many instances, good faith beliefs of the arresting officer resulting in a violation of the fourth amendment can also be deterred. As to the latter, an arresting officer may have obtained information from a reliable informant concerning criminal activities. The past reliability of the informant justified the officer's reliance upon his statement in his affidavit in support of a search warrant. Had the officer conducted an independent investigation on his own, the fallacies in the informant's statement would have been revealed. Except for the increased workload and the loss of time, such independent investigation should always be encouraged. Careful application of the exclusionary rule can be a positive incentive encouraging meaningful police investigation.

Apart from deterring misconduct, a monstrous price is paid when the exclusionary rule is applied. The cost can be summarized as

⁶³ *Id.* at 566, 48 C.M.R. at 73.

⁶⁴ *United States v. Sam*, 22 U.S.C.M.A. 124, 46 C.M.R. 124 (1972).

⁶⁵ *United States v. Carlisle*, 22 U.S.C.M.A. 564, 48 C.M.R. 71 (1973).

follows.⁶⁶ First, reliable evidence is suppressed. The fact that policy slips or drugs are obtained unconstitutionally from an individual does not make them unreliable. This type of real evidence enhances trial advocacy. It differs from a confession that may be obtained from an individual by pressure or an eyewitness identification that may be the result of a suggestive or unfair lineup. Second, a tremendous amount of time is devoted to motions to suppress. In some cases, 30 to 40 per cent of a criminal court's docket is devoted to resolution of these motions. Third, there is a loss of public confidence in the law because it results in the loss of reliable evidence which offends the sense of justice as it exists in the United States today. Fourth, it encourages false testimony by the police and less than admirable police practices. Some police feel that they may distort the truth to insure that the exclusionary rule does not come into play. This has been reflected in dropsey cases, the plain view doctrine, and what has commonly been referred to as the "rush" technique. As to the latter, police officials are instructed to rush the individual who is a suspected pusher of drugs hoping that they will "abandon" the property. Fifth, the rule creates a haven for corrupt policemen since the policeman himself can, in fact, grant immunity in some cases. Sixth, the most serious effect is that the rule results in the acquittal of a person who is guilty and, absent any deterrent effect upon police misconduct, it does not benefit individuals who are not under charges.

There is little support for the conclusion that the rule deters police misconduct. Professor Oakes, now President of Brigham Young University, concluded that the data he has examined neither supports nor refutes the fact that the exclusionary rule deters illegal police misconduct.⁶⁷ Most of the studies that have been conducted reach the same conclusion except for one study by Mr. James Spiotto. However, examination of the facts in his own investigation do not support his conclusion.⁶⁸

There is a common misconception that the more illegally obtained evidence is excluded from a criminal trial, the more the police will be deterred. This is probably a false assumption. The fact that all illegally obtained evidence is excluded may not deter the police

⁶⁶ See generally *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

⁶⁷ Oakes, *Studying the Exclusionary Rule on Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970).

⁶⁸ Amsterdam, *Perspective on the Fourth Amendment*, 58 MICH. L. REV. 349, 430 n. 593 (1974).

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any more than if 50 per cent of the evidence illegally obtained is excluded, especially if there is public support for this exclusion. Additionally, staff judge advocates and the various service schools are constantly educating commanders and military police on the fourth amendment. This type of instruction will deter illegal misconduct. The single inflexible approach we have now should be abandoned by changing the Manual for Courts-Martial. It would be better to adopt a more flexible approach to the exclusionary rule, especially in the light of other alternatives that are available and could be more widely used.⁶⁹ The other alternatives that are available are first, a federal common law cause of action against individuals who violate fourth amendment rights or a cause of action under section 1 of the Civil Rights Act of 1871.⁷⁰ The latter came into play in 1961 and since that period of time the courts have expanded upon this cause of action to allow punitive damages and in some cases attorneys' fees. Second, the Ervin Amendment now allows the federal government to be sued under the Federal Tort Claims Act, where there are violations of the fourth amendment.⁷¹ Third, administrative and criminal sanctions could be imposed where there are fourth amendment violations. For these reasons, evidence should only be excluded where there is an intentional misstatement⁷² in an affidavit or in information given to the commanding officer by a law enforcement official or by a person who has been continually working for a law enforcement agency or official. Absent this type of violation which can be deterred and which does have public support, no evidence should be excluded.

⁶⁹ 42 U.S.C. § 1983 (1970).

⁷⁰ See Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

⁷¹ Pub. L. No. 93-253, § 2 (March 16, 1974).

⁷² Cf. *Michigan v. Tucker*, 42 U.S.L.W. 4887, 4891 (U.S. June 10, 1974). "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right."

COMMENT

THE DETERMINATION OF DOMICILE*

Captain Mack Borgen**

I. INTRODUCTION

Domicile, despite the existence of modern and possibly more sensible tests for the determination of the nexus between the parties and/or the cause of action and the jurisdiction of the court, is still the fundamental and traditional choice of law rule in American jurisdictions. It is still used by courts in many types of litigation to determine which state law is applicable and by state officers and agencies to determine the respective rights and obligations of state residents.

Because of the mobility inherent in and allegedly demanded by a military career, it is oftentimes extremely difficult and frustrating to ascertain the domicile of a service member and his dependents. In some areas of the law, such as state and local taxation and domestic relations, many of the legal issues arise not so much from the substantive law of those respective subjects but rather from the choice of law rules which pervade them. It is of only limited comfort to know that some courts at least recognize the particular problem with regard to service members,' since inevitably the determinations of domicile must still be made.

Domicile is relevant to many areas of civil law. The domicile of one of the parties remains the basis for jurisdiction of state courts to grant divorce,² and is relevant, if not controlling, in the application of certain sections of the Soldiers' and Sailors' Civil Relief Act,³

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

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¹ See, e.g., *Codagnone v. Perrin*, 351 F. Supp. 1126, 1129 (D.R.I. 1972) ("In the highly transient society of the military, determinations of state citizenship are difficult and must turn on a complex of factors.").

² *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) ("Under our system of law, judicial power to grant divorce—jurisdiction, strictly speaking—is founded upon domicile.") (J. Frankfurter); *accord*, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955); *but see* text p. 136 *infra*.

³ 54 Stat. 1178 (1940), as amended, 50 U.S.C. § 574 (1964).

for determining eligibility for voting,⁴ for the imposition or avoidance of income, personal property, and inheritance taxes, for the determination of diversity of citizenship⁵ and venue,⁶ for determining descent and distribution of property, for determining eligibility for resident-tuition rates at state universities and colleges,⁷ for the characterization of property as separate or community property,⁸ to determine amenability to suit,⁹ and for determining a party's capacity to sue or be sued.¹⁰

There are other situations when the domicile of the parties is relevant, but never determinative. In considering whether a case should be transferred to another court or dismissed on the grounds of *forum non conveniens*," a court may consider the domicile of the parties.¹² Furthermore, in some limited situations the domicile of the petitioner is relevant in determining the proper jurisdiction in which to bring a habeas corpus action.¹³

This article shall analyze the general subject of domicile and attempt to define and evaluate those factors which should be con-

⁴ See, e.g., *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972).

⁵ *Gilbert v. David*, 235 U.S. 561 (1914); *Wolfe v. Hartford Life and Annuity Co.*, 148 U.S. 389 (1893); *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973) ("... [C]itizenship for purposes of 28 U.S.C. § 1332(a) [Diversity Jurisdiction] means domicile rather than residence . . .") (citations omitted); *Krasnor v. Dinan*, 465 F.2d 1298 (3d Cir. 1972); *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954) ("With respect to the diversity jurisdiction of the federal courts, citizenship has the same meaning as domicile."); *Reynolds v. Banta*, 362 F. Supp. 333 (W.D. Penn. 1973); See generally D. CURRIE, *FEDERAL COURTS* (1968).

⁶ *Johnson v. Zarefoss*, 198 F. Supp. 548 (E.D. Penn. 1961).

⁷ See text p. 142 *infra*.

⁸ See, e.g., *Commissioner v. Wilkerson*, 368 F.2d 552 (9th Cir. 1966) (Service-man's retirement pay); See generally Annot., 14 A.L.R.3d 404 (1967).

⁹ See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 464 (1940) ("One [of the incidents] of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.").

¹⁰ Rule 17(b), Federal Rules of Civil Procedure states that "[t]he capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." Note that, on its face, the rule appears applicable to suits brought by individuals whether based on either state or federal law. See Note, *Capacity to Sue: The Developing 42 U.S.C.A. § 1983 Exception to the Federal Rule 17(b) Domicile Principle*, 30 WASH. & LEE L. REV. 329 (1973).

¹¹ 28 U.S.C. § 1404(a) (1970).

¹² See, e.g., *Hyde Construction Co. v. Koehring Co.*, 321 F. Supp. 1193 (S.D. Miss. 1969).

¹³ *Strait v. Laird*, 406 U.S. 341 (1972); *Eisel v. Secretary of the Army*, 477 F.2d 1251 (D.C. Cir. 1973).

sidered in ascertaining an individual's domicile.¹⁴ Attention is given to those considerations, factors, and cases which may have particular relevance to the determination of domicile of a person in the armed forces.

II. DEFINITION OF DOMICILE

With varying degrees of success, if not confusion, many courts have tried to define the term "domicile."¹⁵ One of the more frequently used definitions is that an individual's domicile is "[t]hat place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning." Speaking in the colloquia of the Second Circuit, domicile has been defined as "the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."¹⁷ The third frequently used definition, the "nexus" definition, was announced by the United States Supreme Court in *Williams v. North Carolina*.¹⁸ The Court in that case defined domicile as "[a] nexus between a person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."

Frequently the terms domicile and residence are used synonymously and are said to be the same,¹⁹ however, when used accu-

¹⁴ This article shall deal only with the determination of the domicile of natural persons. Determinations of the "principal place of business" of corporations and associations raise different problems and issues beyond the scope of this paper.

¹⁵ See, e.g., *Johnson v. Harvey*, 88 S.W.2d 42, 46 (1936) (" . . . that place to which a man's rights and obligations are referred and by which his legal status, public and private, is determined. . . ."); *Minick v. Minick*, 111 Fla. 469 (1933) (" . . . a habitation fixed in some place, with the intention of remaining, there always"); *Pope v. Pope*, 116 Okla. 188, 190 (1925) ("In a sense domicile is synonymous with . . . the house of usual abode."). Many courts define domicile in terms of an individual's social, economic, and political ties to the state or other jurisdiction in question. See, e.g., *McHenry v. State*, 119 Miss. 289 (1919) ("[T]he place which a man selects, or describes, or deems to be his home, or which appears to be the center of his affairs, or where he votes, or exercises the rights and duties of a citizen.").

¹⁶ BLACK'S LAW DICTIONARY 572, (4th Ed. rev. 1972). See also U.S. DEP'T OF ARMY, PAMPHLET NO. 27-12, LEGAL ASSISTANCE HANDBOOK, p. 24-1 (1970).

¹⁷ *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (Mr. J. Holmes); accord, *Texas v. Florida*, 306 U.S. 398 (1938).

¹⁸ 325 U.S. 226, 229 (1945).

¹⁹ See, e.g., *Willenbrock v. Rogers*, 255 F.2d 236, 237 (3rd Cir. 1958) ("The words 'resident' and 'residence' have no precise legal meaning although they are

rately and precisely, they are not convertible terms. Domicile is a "larger term" and connotes an enduring connection, while residence connotes a more temporary- and/or mere physical presence without implying an intention to remain indefinitely or permanently. Residence is by no means, of course, irrelevant to defining one's personal rights, duties, and obligations; however, it does appropriately imply a more "qualified" relationship between the individual and the jurisdiction in question." This distinction may be well-exemplified by the fact that a person may have his residence in one place but his domicile in another and that a person may have more than one residence at any time.

In deference to the distinction, or possibly to the confusion, between domicile and residence, the courts and legislatures have created hyphenated compromises in their attempts to imply the meaning of "domicile." Consequently, many statutes refer to "bona fide residence," "legal residence," and "fixed place of residence." Usually the term "residence" will be construed as a requirement for domicile, but in some cases—especially with regard to taxation and voting—it is essential to examine the purpose of the statute, the nature of the subject matter, and the context in which the term is used.

To a considerable extent the degree of synonymy is a function of the subject matter in question. With regard to divorce litigation for example, while the Supreme Court has never decided whether relationships other than domicile would suffice as a basis of subject matter jurisdiction, it did rule in *Williams v. North Carolina*²¹ that the domicile of one of the parties is essential in order for the judgment to be recognized outside of the rendering state. The Court stated that

. . . it seems clear that the provision of the Nevada statute that a plaintiff in [a divorce] case must "reside" in the State for the required period requires him to have a domicile as distinguished from a mere residence in the state.²²

favorite words of the legislators. Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile.").

²⁰ See generally 28 C.J.S. *Domicile* § 2 (1941).

²¹ 317 U.S. 287 (1942).

²² *Id.* at 298 (footnotes omitted).

Because of this ruling and the long tradition it reflects, the term "residence" as used in divorce statutes is generally construed to mean domicile.²³

As will be discussed later, some states by statute and/or judicial decisions have limited the ease, and arguably the legal capacity, with which a service member may establish domicile within a jurisdiction when he is physically residing in the state pursuant to military

As with divorce, the term "residence" as used in tax statutes is generally intended to mean "domicile"; however, unlike the divorce statutes, there clearly are tax statutes which use the term "residence" as a place of actual abode rather than as a place of established domicile.²⁵ With regard to voting, once again, residence usually means "domicile," but in effect the residence-domicile question is left at times to the unchallenged declaration of intention of the party seeking to register.

III. BASIC PRINCIPLES

There are a number of long-established and recognized principles relevant to the subject of domicile. It is clear that everyone has a domicile somewhere²⁶ and that any person, including a service member, has a right to change his domicile.²⁷ The question of

²³ With regard to divorce jurisdiction it is necessary to distinguish between this independent and separable jurisdictional requirement of domicile from the state durational residency requirements imposed by the states. All states presently have such requirements varying in length from six weeks to two years, although they have been under considerable attack in the last several years, in part, because of the major Supreme Court cases in the area of right to travel, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), and access to the courts, *e.g.*, Boddie v. State of Connecticut, 401 U.S. 371 (1971). In light of the litmus paper ease with which residency requirements may be tested, as opposed to the considerably more difficult evaluation of domicile, and in light of the fact that nearly four-fifths of the divorces in this country are uncontested, it is at least arguable that the courts look primarily, if not in some cases exclusively, at whether or not the durational residency requirement of the jurisdiction has been met. Nevertheless, it is clear that at the present time domicile ordinarily remains a separate requirement.

²⁴ See text p. 145 *infra*. (Servicemen's Statutes). *But* see text p. 144 *infra* (On-Post/Off-Post distinction). See *also* Robinson v. Robinson, 235 S.W.2d 228 (1950); Annot. 21 A.L.R.2d 1163 (1952) ("Residence or domicile, for purpose of divorce action, of one in the armed forces.").

²⁵ See *generally* 84 C.J.S. Taxation 4 309 (1954).

²⁶ *Desmare v. United States*, 93 U.S. 605 (1876); RESTATEMENT OF CONFLICT OF LAWS § 11 (1934).

²⁷ *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973); *Ellis v. S.E. Construction*

whether an individual may have more than one domicile is more difficult.²⁸ More exactly, the principle is that a person can have only one domicile at the same time for the same purpose, however, in light of the many legal and political relationships a citizen has with different jurisdictions, he may technically have separate domiciles for different purposes: "The net result is that an individual may be a 'resident of' or 'domiciled in' a state for one purpose, but not necessarily for other purposes."²⁹

IV. BASIC PRESUMPTIONS

In determining one's domicile there are some basic presumptions. All the presumptions discussed herein are rebuttable rather than conclusive and the burden of proof in overcoming a presumption is, not surprisingly, upon the party contending the contrary.

Possibly the most significant is the general presumption that domicile follows residence.³⁰ Since residence is obviously only one of the circumstances contributing to the establishment of domicile,³¹ the presumption, as noted above, is rebuttable not conclusive. Of extreme importance in the military community is the fact that this presumption is inapplicable to service members. In fact there is a contrary presumption.

The 'service member's domicile at the time of entry onto active duty is presumed to continue throughout his period of active service. Ordinarily the presumption works to the advantage of the service member, however, there clearly are instances in which the service member desires to change his domicile. To do so he must accept an affirmative burden of showing that change. "Ordinarily, it is a presumption of law that where a person actually lives is his domicile, such presumption of course being rebuttable; but no such presumption could arise in the case of a soldier in active service."³² The service member has no real choice of residence, and thus his domicile

Co., 260 F.2d 280 (8th Cir. 1958); *Ferrara v. Ibach*, 285 F. Supp. 1017 (D.S.C. 1968); *Smith v. Smith*, 311 S.W.2d 947 (1958); *See generally* 25 AM. JUR.2d *Domicile* § 19 (1966). See text p. 144 *infra*. (On-Post/Off-Post Distinction).

²⁸ *See, e.g., Texas v. Florida*, 306 U.S. 398 (1938).

²⁹ Sanftner, *The Serviceman's Legal Residence: Some Practical Suggestions*, 16 JAG J. 87, 89 (Fall 1971) (Very good general discussion regarding domicile problems of military personnel and families).

³⁰ *District of Columbia v. Murphy*, 314 U.S. 441 (1941); *Mitchell v. United States*, 21 Wall 350 (1875); *Krasnov v. Dinan*, 465 F.2d 1298 (3rd Cir. 1972).

³¹ *See* text p. 146 *infra*.

³² *Grywolski v. Grywolski*, 263 S.W.2d 684, 687 (1953).

remains the same as that which he had when he entered the service unless he shows change by proof of clear and unequivocal intention.³³

Although ordinarily the service member's presumption has been judicially decreed, a few states have constitutional provisions which bar the acquisition of domicile by mere residence by an individual in the military service who is residing in the state pursuant to military orders.³⁴ Furthermore, it should be noted that for purposes of state taxation of income and personal property, the Soldiers' and Sailors' Civil Relief Act provides that a service member is not deemed to have changed his domicile *solely* because he is present in or absent from a state pursuant to military service.³⁵

Another basic presumption is that of continuance. Domicile once established is presumed to continue until such time as a change is shown.³⁶ As with the other presumptions, it is rebuttable and may be overcome by evidence proffered by the party alleging the contrary.

A married man is presumed to be domiciled where his family resides³⁷ and a married woman is presumed to take the domicile of her husband.³⁸ It is equally clear, however, that the married man may establish a domicile apart from that of his family,³⁹ and a mar-

³³ *Ellis v. S.E. Construction Co.*, 260 F.2d 280 (8th Cir. 1958) ("clear and convincing proof"); *Willenbrock v. Rogers*, 255 F.2d 236 (3rd Cir. 1958) ("clearest and most unequivocal proof"); *Prudential Insurance Company of America v. Lewis*, 306 F. Supp. 1177 (N.D. Ala. 1969) ("clear manifestation"); *Bowman v. Dubose*, 267 F. Supp. 312 (D.S.C. 1967) ("clear and unequivocal"); *Detroit Automobile Inter-Insurance Exchange v. Feyes*, 205 F. Supp. 42 (N.D. Cal. 1962).

³⁴ See, e.g., ARK. CONST. art. 3, 4 7 ("No soldier, sailor or marine in the military or naval service of the United States shall acquire a residence by reason of being stationed on duty in this State,"),

3550 U.S.C. App. § 574(1) (1970) ("For the purpose of taxation in respect of any person, or of his personal property, income, or gross income, by any State . . . such person shall not be deemed to have lost [or gained] a residence or domicile in any State . . . solely by reason of being absent therefrom [or present therein] in compliance with military or naval orders. . .").

³⁶ *District of Columbia v. Murphy*, 314 U.S. 441 (1941); *Allen v. Maryland Casualty Company*, 259 F. Supp. 505 (W.D.Va. 1966).

³⁷ See, e.g., *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261 (S.D.N.Y. 1962).

³⁸ See, e.g., *Anderson v. Watt*, 138 U.S. 694 (1890).

³⁹ See, e.g., *Grable v. City of Detroit*, — Mich. — (Mich. Ct. of App. 1973). In that case the City of Detroit had an ordinance which required municipal employees to live within the city limits. In order to retain his job the plaintiff rented and lived in an apartment within the city while his family remained in a

ried woman may establish a domicile separate and apart from her husband.⁴⁰

V. TYPES OF DOMICILE

Although this article focuses primarily upon domicile by choice, it should be recognized that there are two other primary types of domicile; domicile of origin, and domicile by operation of law, or "consequential domicile."

A. DOMICILE OF ORIGIN

The law attributes to every child at birth a "domicile of origin." Generally it is that of his parents, of the head of the family, or of the person on whom the child is legally dependent "at the time of birth." Ordinarily the child's domicile will follow that of his parents throughout his minority except in cases where he has been legally emancipated either formally or as a result of marriage. The child born of United States parents⁴¹ will obtain this domicile of origin even if he is born overseas. If the child is illegitimate, he will ordinarily take the domicile of his mother.

B. DOMICILE BY OPERATION OF LAW

In some situations an individual's domicile is determined by operation of law. Consequential domicile is that domicile which the law attributes to a person independent of his own intention or actual physical residence. Consequential domicile is primarily relevant with regard to married women and students.

The traditional rule, as noted above, is that a woman takes the domicile of her husband, and that she has no right to a "separate" domicile.⁴² While fortunately and finally this early absolutist rule

nearby suburb. The City administratively determined that for purposes of this ordinance he still remained a nonresident. Plaintiff brought suit. The court in ordering reinstatement recognized that if a person has a family, his domicile is "generally where one's family resides," but it also recognized that the "determination of domicile is essentially a question of intent Although . . . the residence of one's family is relevant . . . , it is not the sole determining factor. It is not impossible for a married man to establish residence apart from his family.>").

⁴⁰ See, e.g., *Boardman v. Boardman*, 62 A.2d 520 (1948). See note 42 *infra*.

⁴¹ Children born outside the United States obtain American citizenship derivatively where at least one of the parents is a United States citizen.

⁴² At common law the "legal existence" of the married woman was said to be "suspended" during her marriage. Whatever legal rights she had prior to her marriage were "incorporated into" the legal rights of her husband. One conse-

has been eased so that it is recognized that a married woman clearly has the "legal capacity" to establish an independent domicile,⁴³ the burden of proof upon the woman is still considerable. Despite the relevant influence of the women's rights movement, married women still face possible legal consequences from establishing that independent domicile and face a reluctant, if not, at times, hostile bench.

The general rebuttable presumption that a wife's domicile follows that of her husband is not affected by mere separation; instead, it appears that there must be a judicial separation or a divorce decree. Although an interlocutory decree of divorce ordinarily does not affect a woman's legal rights unless express provision is made to the contrary, it would seem that such a decree, albeit interlocutory, would be very strong evidence of the woman's desire to establish a separate life and separate domicile. In light of the fact that the law now clearly recognizes that a married woman has the legal capacity to establish a separate domicile, and in light of the fact that

quence of this strict rule was, of course, her loss of the right to establish an independent domicile of choice.

This is still the rule in Great Britain, although it has been noted that to the extent jurisdiction is based upon domicile, such an absolute rule would cause great hardship upon the woman. Consequently, at least with regard to divorce litigation, the British have avoided the problem by basing divorce jurisdiction upon residence. Matrimonial Causes Act, 1950, Sec. 18(1)(b).

While it is generally beyond the scope of this paper to examine the legal capacity in the United States of a married woman to establish an independent domicile, it is clear that she presently does have that right. While American courts have long recognized that a married woman in certain circumstances could establish an independent domicile, *Haddock v. Haddock*, 201 U.S. 562 (1905) (Abandonment by the husband); *Cheever v. Wilson*, 9 Wall 108 (1869) (Wherever "necessary or proper"); *Barber v. Barber*, 21 How. 582 (1859) (Wife already under a judicial sentence of separation for bed and board), the modern rule does not place the married woman's legal capacity to do so upon proof of "fault" of the husband. See *also* *Williamson v. Osenton*, 232 U.S. 619 (1913); *Gonzales v. Gonzales*, 74 F. Supp. 883 (1947) (When the purpose of the marriage is destroyed, the reason for the traditional rule of "family domicile" ends.); *Devon v. Devon*, 214 N.Y.S.2d 109 (1961) (Wife may establish her own domicile if her husband unreasonably refuses or neglects to do so.). There are of course situations in which a wife seeks to establish her "consequential" domicile. See, e.g., *Furman v. General Dynamics Corp.*, 377 F. Supp. 37 (S.D.N.Y. 1974) (Widow of Air Force Major in wrongful death action).

Furthermore, it appears that with the further development and legal recognition of the women's rights movement and with the possible passage of the Equal Rights Amendment to the Constitution, the very presumption relating to the married woman may be illegal and/or unconstitutional.

⁴³ *Armstrong v. Armstrong*, 350 U.S. 568 (1955); *Boardman v. Boardman*, 62 A.2d 520 (1948).

a divorced woman has an independent right to establish a domicile of choice, for purposes of determining domicile, the "interlocutory" nature of the decree should not be interposed so as to invoke the married woman's presumption of consequential domicile.

Upon the death of her husband, the wife, of course, has the right to elect her own domicile.⁴⁴

As previously stated, a minor, unless legally emancipated by law or by marriage,⁴⁵ may not change his domicile independently' from that of his father or guardian. Regardless of where the child actually resides, the domicile of the legitimate child during minority follows the father's domicile while his father is alive.⁴⁶ There may be no effect if his parents separate,⁴⁷ however, the general rule does not apply in two situations. If his parents become judicially separated or divorced, then the minor's domicile becomes that of the "custodial parent."⁴⁸ Furthermore, if his father abandons his mother, then the child shall take and follow the domicile of his mother.

After his father's death, the power to fix the child's domicile devolves to his mother until her remarriage. In the case of remarriage there appears to be a split of authority. Some courts state that the remarriage of his mother has no effect upon the analysis, but other courts insist that the domicile of the child is fixed as that of the mother immediately prior to her remarriage.

As noted, the domicile of an illegitimate child is that of his mother. If at any time, however, the child is legitimated by the marriage of the parents or by acknowledgement by the father, then the child's domicile follows that of the father.

The general rule with regard to a student is that he does not acquire a legal domicile at school, if he intends to return to his original home.⁴⁹ This student's presumption applies equally to both minor and adult students, however, an adult student independent of parental control and support clearly has the legal capacity to acquire a separate domicile, if he in fact does regard the jurisdiction in which the school is located as the place in which he intends to live either per-

⁴⁴ *Cheely v. Clayton*, 110 U.S. 701 (1883).

⁴⁵ The marriage of a minor affects a legal emancipation, and consequently the two youthful spouses would follow the traditional rules for the obtaining or ascertaining domicile.

⁴⁶ The domicile of an adopted child is determined with reference to that of his adoptive parents.

⁴⁷ *Yarborough v. Tarborough*, 290 U.S. 202 (1933).

⁴⁸ *Id.* at 210-211.

⁴⁹ See generally 25 A.M.JUR.2d *Domicile*, § 43 (1966).

manently or indefinitely.⁵⁰ Unlike many other rules and principles of domicile, the student rule is codified in many states. Although the courts are relatively intolerant regarding a nonresidency presumption for students with regard to voting,⁵¹ it conversely appears that they are willing to let stand such a presumption with regard to other student-related rights such as differential tuition fees.⁵²

The most common inquiry made by individuals and the courts is to determine what an individual's domicile "of choice" is. Domicile of choice is merely that place which a person has elected and chosen for himself to displace his previous domicile. It is necessary to be physically present in the state with an intent to remain permanently or indefinitely and to abandon one's old domicile.⁵³

VI. DOMICILE OF CHOICE

The underlying principle is that every person of requisite legal capacity is at liberty to change his domicile and to acquire a new domicile at any time. Both physical presence within the jurisdiction⁵⁴ and intent to establish domicile are required.⁵⁵ They are separate requirements. The Supreme Court has stated that "[w]hile one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply

⁵⁰ *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973); *Kelm v. Karlson*, 473 F.2d 1267 (6th Cir. 1973); *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973); *Gordon v. Steele*, 376 F. Supp. 575 (W.D. Pa. 1974); *Johnson v. Cordell Sational Bank*, 421 F.2d 1310 (10th Cir. 1970); *Wehrle v. Brooks*, 269 F. Supp. 785 (W.D.N.C. 1966), *aff'd*, 379 F.2d 288 (4th Cir. 1967); *Clarke v. Bedeker*, 259 F. Supp. 117 (S.D. Iowa 1966); *Milliken v. Tri-County Electric Cooperative, Inc.*, 254 F. Supp. 302 (D.S.C. 1966). *See generally* Note, *Student Domicile: Some New Concepts*, 25 *BAYLOR L. REV.* 481 (1973).

⁵¹ *See, e.g.*, *Bright v. Baeslar*, 336 F. Supp. 527 (E.D.Ky. 1971); *Wilkens v. Bently*, 385 Mich. 670 (1971); *cf.* *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974) (voting registrar may use questionnaire to determine domicile).

⁵² *Vlandis v. Kline*, 409 U.S. 1036 (1973).

⁵³ *Texas v. Florida*, 306 U.S. 398 (1938).

⁵⁴ The individual asserting domicile must be present in the state himself. There can be no presence in the state "through the agency" of another person or through the presence of one's family within the jurisdiction.

⁵⁵ *Texas v. Florida*, 306 U.S. 398 (1938). *Morris v. Gilmer*, 129 U.S. 315 (1889); *Eisel v. Secretary of the Army*, 477 F.2d 1251 (D.C. Cir. 1973); *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973); *Krasnov v. Dinan*, 465 F.2d 1291 (3rd Cir. 1972); *Prudential Insurance Company of America v. Lewis*, 306 F. Supp. 1177 (N.D. Ala. 1969). *See generally* C. WRIGHT, *LAW OF FEDERAL COURTS* §§ 26 and 31 (2d ed. 1970).

the fact of residence there,"⁵⁶ and therefore a person must be physically present in the state at the time he wishes to acquire the new domicile.⁵⁷

The requisite physical presence within the jurisdiction must, however, be "voluntary." "Residence in a place by constraint, or otherwise involuntarily, will not give the party a domicile there; but his antecedent domicile remains."⁵⁸ Thus, a person cannot acquire a domicile of choice in a place if he is there by virtue of legal or physical compulsion.⁵⁹ This principle has been applied not only to servicemen⁶⁰ but also to political refugees,⁶¹ persons living in forced exile,⁶² evacuees,⁶³ and inmates in penal institutions.⁶⁴

Some courts have unfortunately, if not also irrationally, previously distinguished between residence on-post and off-post. They have held that a service member who lives on-post "by order of his commanding officer" may not acquire a domicile within that state.⁶⁵ The distinction is weak and is increasingly rarely noted since courts are cognizant of the fact that residing both on-post and off-post is done only with the permission of "his superiors."

It might also be observed that a serviceman who lives off-base does so only by permission of his superior officers, and thus, although the fact of his

⁵⁶ *Texas v. Florida*, 306 U.S. 398,425 (1938).

⁵⁷ *Gilbert v. Davis*, 235 U.S. 561, 569 (1915). See generally 1 J. MOORE, FEDERAL PRACTICE 4 0.74[3.-3], at 707.53 (2d ed. 1972); C. WRIGHT, LAW OF FEDERAL COURTS § 26, at 86 n.4 (2d ed. 1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 16, comment o (1971); Cf. Note, *Evidentiary Factors in the Determination of Domicile*, 61 HARV. L. REV. 1232, 1233-34 (1948).

⁵⁸ Hogan, *Joseph Story's Essay on "Domicile,"* 35 B.U.L. REV. 215, 221 (1955)

⁵⁹ *Stifel v. Hopkins*, 477 F.2d 1116, 1121 (6th Cir. 1973); See 1 J. BEALE, THE CONFLICT OF LAWS § 21.1 (1935); 1 J. MOORE, FEDERAL PRACTICE § 0.74(3.-3), at 707.67 (2d Ed. 1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 (1971); Note, *Domicile as Affected by Compulsion*, 13 U. PITT. L. REV. 697 (1952).

⁶⁰ *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973); *Deese v. Hundley*, 232 F. Supp. 848 (W.D.S.C. 1954); *Kinsel v. Pickens*, 25 F. Supp. 455 (W.D. Tex. 1938); *Radford v. Radford*, 82 SW 391 (1904); See generally 1 J. MOORE, *supra* note 57, 4 0.74(6.-4) at 708.-62; Annot. A.L.R.2d 1163, 1168 (1952).

⁶¹ *White v. Burnley*, 61 U.S. 235 (1858).

⁶² *Neuberger v. United States*, 13 F.2d 541 (2d Cir. 1926).

⁶³ *Hiramatsu v. Phillips*, 50 F. Supp. 167 (S.D. Cal. 1943).

⁶⁴ *Cohen v. United States*, 297 F.2d 760 (9th Cir.), *cert. den'd*, 369 U.S. 865 (1962); *United States v. Stabler*, 169 F.2d 995 (3d Cir. 1948); *Dreyer v. Jalet*, 349 F. Supp. 452 (S.D. Tex. 1972); *White v. Fawcett Publications*, 324 F. Supp. 403 (W.D. Mo. 1970).

⁶⁵ See, e.g., *Deese v. Hundley*, 232 F. Supp. (W.D.S.C. 1954); *Wallace v. Wallace*, 89 A.2d 769 (1952); *Sasse v. Sasse*, 249 P.2d 380 (1952); *Harris v. Harris*,

living off-post may lend substance to a claimed **intention**, it can hardly be distinguished in terms of the exercise of volition from the situation of the serviceman who is allowed to live on base at the pleasure of his commander.⁶⁶

The on-post/off-post distinction is now recognized by very few jurisdictions for the reason stated in *Stifel*.

Because of the difficulties which a service member faces in establishing a new domicile such as the presumption of domicile at date of entry,⁶⁷ the requirement that he prove a change of domicile by "clear and convincing evidence,"⁶⁸ and the lingering on-post/off-post distinction,⁶⁹ some states have enacted statutes known as "servicemen's statutes."⁷⁰

Such statutes are of two kinds. Some provide that if a service member is stationed on a military base or installation within a state for a specified period of time, ordinarily one year, he shall be presumed, either rebuttably⁷¹ or conclusively,⁷² a domiciliary of that state. Some states rather than enacting broad presumption statutes merely remove the requirement of domicile for the service member with regard to certain types of litigation such as divorce. At least one state has broadened the waiver of traditional domicile requirements with regard to divorce action to all residents of the jurisdiction; however, there does not appear to be a general movement to do so by other states.⁷³

205 Iowa 108 (1927). *See generally* *Stifel v. Hopkins*, 477 F.2d 1116, 1122-23 (6th Cir. 1973); Annot. 21 A.L.R.2d.

⁶⁶ *Stifel v. Hopkins*, 477 F.2d 1116, 1122-23 (6th Cir. 1973).

⁶⁷ See text p. 138 *supra*.

⁶⁸ See text p. 139 *supra*.

⁶⁹ See text p. 144 *supra*.

⁷⁰ See Annot. 21 A.L.R.2d 1163, 1179-1180 (1952).

⁷¹ *See, e.g.*, Florida Statutes Ann. § 47.081 (1967) ("Any person in any branch of service of the United States . . ., and the husband or the wife of any such person, if he or she is living within the borders of the state, shall be prima facie a resident of the state for the purpose of maintaining any action.").

⁷² *See, e.g.*, NEW MEXICO STATUTES ANN. § 22-7-4 (1973) (" . . . [P]ersons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in New Mexico for such period of six (6) months, shall for the purposes hereof [Jurisdiction for dissolution of marriage], be deemed to have been a domiciliary of the state and county where such military base or installation is located.").

⁷³ HAWAII REV. STATUTES § 580-1 (1973) (Jurisdiction regarding matters of annulment, divorce, and separation is recognized when the applicant "has been domiciled *or has been physically present* for a continuous period of at least three months next preceding the application therefor." (emphasis added)).

VIII. PROOF OF INTENT

In the absence of a serviceman's statute, the individual must satisfy the requirements of physical presence and intent as discussed previously. Statements of intent made by the individual are clearly relevant, but they are rarely sufficient to prove that domiciliary intent. "Pure intention" is not enough. There ordinarily must be supportive actions manifesting and "harmonizing with the intent."⁷⁴

. . . [T]he actual fact as to the place of residence and decedent's real attitude and intention with regard to it as is disclosed by his *entire course of conduct* are the controlling factors in ascertaining his domicile.⁷⁵

The courts will not scrutinize the motive(s) and purpose(s) for one's desire to change his domicile if the requisite actual intention to change is established.⁷⁶ Furthermore, the courts will honor an actual change of domicile even though the individual may have a "floating intention" of returning to his original domicile at some indefinite and future time. There is no requirement that an individual asserting domicile intend to remain in that jurisdiction permanently. The "floating intention," however, cannot be tied to the happening of a reasonably anticipated event. If, for example, a service member intended to return to his original state of domicile upon retirement or release from the military service, albeit to some this may appear futuristic if not illusory and elusive, he could not establish domicile in his state of station. Regardless of whether the present intention is "floating" or permanent, all courts require more indicia of that intent than mere statements.

The courts will consider many different "manifestations" of intent. The following list is not exhaustive, but it itemizes those factors most frequently considered by the courts.

1. *Voting*: Although not conclusive, courts deem where one is registered and/or last voted as "highly relevant,"⁷⁷ and such regis-

⁷⁴ *Brown v. Hows*, 163 Tenn. 138, 140, 42 S.W.2d 210, 212 (1931); *accord*, District of Columbia v. Murphy, 314 U.S. 441 (1941); *Teague v. District Court*, 289 P.2d 331 (1955) (Good discussion regarding "minimum requirements" necessary to establish a service member's change of domicile.).

⁷⁵ *Texas v. Florida*, 306 U.S. 398, 425 (1938) (emphasis added).

⁷⁶ *See, e.g.*, *Ellis v. S.E. Construction Company*, 260 F.2d 289 (8th Cir. 1958); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 15 and 22 (1971).

⁷⁷ *District of Columbia v. Murphy*, 314 U.S. 441, 456 (1941).

tration may raise a rebuttable presumption of domicile within the jurisdiction.⁷⁸

2. *Civic or Political Action*: The holding of appointive or political office,⁷⁹ the political or civic actions of dependents, jury duty.⁸⁰

3. *Taxation*: Where the individual has paid or proposes to pay income and personal property taxes.

4. *Social Ties and Relations*: Club memberships, church attendance and/or membership, membership or activity in local charity, conservation, or public interest groups.

5. *Business Affairs*: The location of bank accounts, addresses on charge accounts, the opening of local charge accounts, loan obligations with local banks or savings and loan association.

6. *House or Apartment*: Purchase or sale of a home, including attempts or refusals to sell; rental arrangements such as the type of lease and existence of options to buy; additions and improvements made; the physical characteristics of the house or apartment; the proportionate amount of time spent there; the things the individual does there; the presence or absence of the individual's family; his mental attitude towards the home; the existence of other dwelling places and their relative characteristics.⁸¹

7. *Home of Record*: State officials and judges oftentimes erroneously assume that the Home of Record entry reflects an administrative determination by the Armed Services that the listed jurisdiction is the member's domicile. This is incorrect. Although the service member may change his domicile during his term of service,

⁷⁸ *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261 (S.D.N.Y. 1962) (Voting raises a "rebuttable presumption" of domicile) (dicta); *Lyons v. Borden*, 200 F. Supp. 956, 958 (D. Haw. 1961) ("A careful study of the authorities indicates that even the solemn acts of registering under oath to vote, and voting in a new jurisdiction, do not have a conclusive effect—do not constitute the absolute estoppel to claim retention of the previous domicile."). Contra, *DeMarcos v. Overholser*, 122 F.2d 16 (D.C. Cir. 1941); *McHaney v. Cunningham*, 4 F.2d 725 (W.D. La. 1925).

⁷⁹ The restrictions of the Hatch Act, 80 Stat. 378, 62 Stat. 683, as upheld in *U.S. Civil Service Commission v. National Association of Letter Carriers, et al.* 413 U.S. 538 (1973), should be drawn to the attention of the court if they are relevant in explaining the service members probable noninvolvement in local political affairs.

⁸⁰ Members of the active army are exempted from federal jury service pursuant to 28 U.S.C.A. 4 1863 (1972), however many states have no parallel military exemption from state jury service. As a general rule, though military personnel may be called for jury service, they may request and are often granted excuse from such service.

⁸¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12 (1971).

absent initial error or fraud, a member's home of record may generally not be changed except by an enlisted man at the time of a new enlistment contract. Although there is proposed legislation to ease this limitation, presently the home of record, ordinarily, rarely is or can be changed during an individual's military career.

8. *Application for Professional Licenses*.⁸² Applicable with regard to any profession subject to state licensing requirements, e.g., doctors, lawyers, barbers, veterinarians.

9. *Registration of Automobile and Obtaining of Local Driver's License*.

10. *Purchase or Sale of Burial Lot*.

11. *Filing of Declaration of Domicile Form*: Presently Florida is the only state which has such a procedure and requirement.⁸³

12. *Execution of Will or Codicil*: Note that in some states this is prima facie evidence of domicile for probate and inheritance purposes.

13. *Notification to Credit Companies and Publishers of New Permanent Address*: Gas companies, magazine subscriptions, insurance companies, etc.

While all of these indicia of intent may be considered by the courts in ascertaining one's present domicile of choice, it appears, not surprisingly, that different courts place different emphasis on different factors. All courts, however, particularly focus upon three factors: where the individual is registered to vote, where he pays his taxes, and whether he owns any real property within the jurisdiction.

This entire inquiry is one of both law and fact. By law the individual must have been physically present within the jurisdiction and have intended to establish domicile. Governed by the general rules of evidence he must submit proof, clear and convincing proof, of both those requirements. In determining the amount of proof that will in fact be required, it is relevant to consider the purpose for which one is attempting to establish domicile in a jurisdiction. Compare, for example, an individual asserting domicile in an uncontested divorce proceeding with an assertion of foreign domicile by a wealthy individual hoping thereby to avoid the imposition of income taxes. The degree to which the assertion of domicile will be

⁸² See, e.g., *Percy v. Percy*, 188 Cal. 765, 207 P. 369 (1922).

⁸³ FLA. STAT. ANN. § 222.17 (1970).

challenged, either by the state or by a private party, oftentimes a function of the subject matter and amount in controversy.

VIII. CONCLUSION

Proof of domicile is the threshold issue in many types of litigation or in the assertion of many types of legal rights and privileges, but the issue may be complex and the evidence scant. Because of the mobility which is inherent in the military community, service members and their dependents face the issue proportionately more often than do other groups of individuals within society. Defining one's domicile is too often a retrospective explanation or legal justification. With proper planning and guidance, service members and their dependents can purposely establish the domicile of their choice. In making the determination between competing jurisdictions, it is necessary for the individual to understand the requirements for and consequences of establishing domicile and to know those factors which the courts and state agencies or officers will consider. It has been the purpose of this article to hopefully elucidate those requirements, consequences, and factors.

BOOK REVIEW*

Swords and Scales: The Development of the Uniform Code of Military Justice. William T. Generous, Jr., Kennikat Press, 1973.

Justice Under Fire: A Study of Military Law. Joseph W. Bishop, Jr., Charterhouse, 1974.

Doctor Generous has written a political and historical analysis of the development of one part of military law, its criminal code. His emphasis is upon those men and forces which brought about the great statutory changes of 1920, 1951 and 1968. *Justice Under Fire*, on the other hand, is more than a history of the Army's system of criminal law. Professor Bishop undertakes to explain almost all of military jurisprudence.

History and military buffs will find richness and color in both books. Those previously unfamiliar with the diversity and challenges of military law will encounter more than enough to satisfy serious inquiry. In addition to their utility, these books are "good reading." Generous is meticulous in research, but free and easy in exposition; Bishop's muse leaps grandly from mountain to mountain, but his writing is earthy and clear.

Professor Bishop and Doctor Generous both show some appreciation of the special problem of maintaining an efficient fighting force and both are "easy" on the Army, even where criticism is warranted. Indeed, Professor Bishop is counted an old friend by many professional officers of wide experience in legislative and academic disputes about law in the Army. Thus, loyalty or a sense of relief at receiving a favorable word would suggest a kind reception of their work. However, the same high sense of scholarship that produced these works must admit that further inquiry is possible and useful. An author always risks the review that looks beyond or behind his thesis, a procedure which is particularly warranted in this case.

Simultaneous review of these books is appropriate because they proceed from certain common assumptions and fall short of their conception in similar ways. The assumptions are hidden by the

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

terms "military government," "military commission," "martial law," and "military justice," none of which communicates the foundations for the custody and exercise of various governmental powers by the Army. Those foundations are quite rational and acceptable, but the abrasive terms are constantly used by practitioners and critics without exposition of their rationale. Both Professor Bishop and Doctor Generous use the terms as ultimates; Bishop in direct defense of the custody of power, Generous in defense of one method of its application. Bishop simply takes the classic enumeration of types of military legal activity and uses them as chapter headings;¹ Generous makes no appeal 'deeper than the Constitution in acceptance of the exercise of criminal justice powers by the Army.'²

Sondisclosure of the foundations for an allocation of governmental power to the Army has permitted popular critics of the methods of Army action to posture as discoverers of great wrongs in the national scheme for the protection of personal liberties. Those wrongs, it is said, are perpetrated by power-mad martinets acting in utter disregard of individual rights established by our fundamental law.³ Bishop inveighs against those critics and Generous undertakes a certain balancing of the evidence to illustrate that the violence of the attack is unwarranted and that there were "reforms" within the system. Both miss the mark. Bishop's cry that he, not they, understands "the facts" and Generous' expressed admiration for "reformers" within the system meet the attack where it is the strongest: on the level of appearance and contrast with some ideal form of justice as it is said to be administered in civilian courts of the United States.

The most frequent criticism of the traditional structure for the administration of criminal justice in the Army attacks the influential position of the commander at several decision points during the process. The commander's duties under the Uniform Code of Military Justice have no significant equivalent in civilian practice except possibly the Chief Executive's pardon power. Consequently, if military practice must be the same as the civilian, the Army is out of step; but if that imperative does not exist, systemic differences may be well defended. The ground for argument then is not comparative law but jurisprudence. For reasons to be stated, I favor

¹ BISHOP, *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW IX* (1974).

² GENEROUS, *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 200* (1974).

³ Both authors cite these critics adequately. Bishop calls them "popular polemics," "worthless," and "unscholarly." BISHOP, *supra* note 1, at XII-XIV.

retention of the traditional structure, but believe that its defense has not been well conducted in the past. Principal among the weaknesses of that defense has been the failure to expose the “why” of military legal powers.

These authors begin in the middle because of the influence of a historical school of military jurisprudence which is led by Frederick Bernays Wiener and includes Bishop, Fairman and some others? The school is characterized by acceptance of traditional structures for military criminal law, an assumption that military discipline is the absence of troop misbehavior, and an emphasis upon historio-legal context.

Particularly difficult to accept is the Historical School’s implicit—though sometimes explicit—assertion that only fear of a 20-year jail sentence will compel grown men to charge uphill and overrun the machine guns. Birnbaum has observed with some force that “history does not record that any poorly disciplined force has ever prevailed on the field of combat.”⁵ That is far different from saying as did Wiener in his review of Generous’ book “. . . the object of a criminal code for an armed force is to send men obediently to their death in conflict with the public foe.”⁶ Bishop is not far from that position; his own Introduction speaks twice of “. . . the court-martial system by which the armed services enforce discipline among their own members.” Generous is less doctrinaire but says that the “tension” between the discipline regarded as indispensable in a military force and the justice similarly regarded by the civilian community will help define the boundaries between the two legal systems.⁸

Generous is not deliberately a member of this Historical School, in that he uses the forceful, learned Wiener as a protagonist for the traditional military values he found rejected by the framers and enactors of the 1950 Uniform Code of Military Justice. Nevertheless, in those parts of his book not concerned with analysis of legal changes through personal political power, he consistently expresses admiration for those in the Services who tried to preserve the traditional structure though encouraging adjustment to changing civilian

⁴ Wiener, especially, is prolific, but his *Martial Law Today*, 55 A.B.X.J. 723 (1969), is a fair sample. Fairman is well represented by *The Supreme Court on Military Jurisdiction*, 59 HARV. L. REV. 833 (1946).

⁵ Birnbaum, *Military Justice*, 1972, 31 FED. B. J. 3 (1972).

⁶ Wiener, Book Review, 59 CORNELL L. REV. 748 (1974).

⁷ BISHOP, *supra* note 1, at xv.

⁸ GENEROUS, *supra* note 2, at 4.

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values within that structure. He also assumes that discipline is a product of criminal sanction and he uniformly accepts the legal force of ancient practices such as the Navy's shipboard special courts and punishments and the commander's participation in the process. (He approves Wiener's classic argument that if you trust a commander to invade Europe with a million men, you must trust him to convene a court.) Generous offers some recommendations in his Epilogue which show a total failure to understand the law he chronicled; he would permit commanders to jail soldiers, but "only" for the period of their obligated service!

Flogging and incarceration in irons pursuant to sentence by court-martial were rejected as motivators of troop conduct before 1860 and all such punishments were abandoned well before 1960, yet for the Historical School, it seems that the last 15 years never happened. In 1960 Secretary Brucker received the Powell Report from a committee of prominent generals, a report which appalled the civilian judges of the United States Court of Military Appeals because of its attacks on court-imposed modifications of the structure of criminal justice in the Army. Traditionalist as it was, the Powell Committee defined its first problem to be "To study and report on the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army."⁹ Clearly, the framers of this problem envisioned no equation between discipline and the criminal code, although they perceived some relationship. The Committee's caution about soldier motivation reflected study-products from the Army's Human Resources Research Units published as early as 1954 and 1958.¹⁰

From and after the same period, the Army's senior schools, such as the Command and General Staff College, had their students reading Maslow and Herzog on the same subject; younger officers took civilian degrees in personnel management and the sociologists, including Moskos, poured out masses of data concerning soldier behavior and its determinants. During the mid-60's Vietnam was both a testing ground for new responses to new behavior and a motivator for official action which crystallized in the candy-coated "Modern Volunteer Army" concept in 1970. A more lasting outcome was

⁹ "REPORT TO HONORABLE WILBUR M. BRUCKER" BY THE COMMITTEE OF THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY 1 (1960).

¹⁰ Egbert, *et al.*, *The Characteristics of Fighters and Nonfighters*, HUMRRO No. 2 (Fort Ord, CA, 1954); ---- *A Study of Effective and Ineffective Combat Performers*, SPECIAL REPORT So. 13, HUMRRO (Presidio of Monterey, CA, 1958).

the Infantry School's Field Manual 22-100, "Military Leadership," which continued an older definition of "discipline" as to the individual or group attitude that insures prompt obedience to orders and initiation of appropriate actions in the absence of orders." Even the 1965 version of that Manual called the commander's attention to the effects of individuality, human needs and stress, but the 1973 version contained the flowering of 15 or 20 years of Army "rethinking" about contemporary human problems.¹¹

Field Manuals express "doctrine" (best current thought) and are for application by leaders at all echelons. These editions of the Manual envisage a self-starting, thinking soldier, not a cipher to be forced into a mold. Thus, one critical premise from which the Historical School defends the Army's criminal justice system has been abjured by the Army itself.

This failure of historiography on the part of those influenced by the Historical School is not the primary quarrel with the two books under review. The major objection is to an excess of legalism. Characteristically, the work of authors identified with the School consists of the analysis of present practices in terms of developments in history and law, the "historio-legal context" listed above. There is considerable comfort to be derived from an awareness of ancient, valued practices and the continuity of such practices is not without legal significance. However, the problem these authors address, the public defense of the exercise of certain governmental powers by the Army, is not susceptible to the same analysis as is appropriate to a legal brief or judicial opinion. Saving certain courtroom debates on constitutional issues, the warrant for an exercise of governmental power is appraised under broader than "legal" considerations in the United States.

The judicial and police powers of the Army are, as Fairman has stated, divided under four titles: the law of belligerent occupation (military government), trials under the law of war (the military commission), martial law, and military justice. Wiener acknowledges that these groupings are derived from the separate opinion by Chief Justice Chase in the 1866 martial law case, *Ex Parte Milligan*.¹² Instances of activities by the U.S. Army in these categories can be traced to the Revolution and earlier, but these "heads" of jurisdiction formulated in 1866 are solidly enshrined in the literature and in

¹¹ U.S. DEP'T OF ARMY FIELD MANUAL NO. 22-100, **MILITARY LEADERSHIP** 4-2 (1973).

¹² Wiener, *supra* note 4.

more formal sources. Every one of the four editions of the Manual for Courts-Martial since 1928 has had an identical first page stating those classifications; earlier editions from 1905 had the same material in slightly different paragraphing.

These headings have become the test for the presence or absence of what is called "military jurisdiction." An action by members of the Army is deemed lawful if it can be brought within the historical limits of one of these four groupings. Bishop uses them in the traditional way, four of his principal chapters are direct invocations; Generous, because his emphasis is on criminal justice, relies primarily on one.

The utility of these categories for practice within the Services and for judicial review of military actions is that of any scholarly, accurate classification. Teaching, review and daily decisions are made easier while uniformity and predictability are fostered by such groupings. In schools and courts, the issues of conformity to law and practice are paramount and such Positivism has its place. The judge, teacher or administrative reviewer can say how an action in question complies with law established within the system. These uses are legalism at its best.

The legalistic approach is inadequate when the attack on particular actions is broader than the confines of the legal system within which action was taken. The critics of martial law in Hawaii, of the military commission convened to try the German saboteurs, and of the Levy or Presidio Mutiny courts-martial were not complaining of military failure to follow military law. Their attack was upon the allocation of powers under the Constitution, really a statement that the Army is not an appropriate repository of that share of governmental power. The reiteration of cherished taxonomies, no matter how well buttressed by historical allusion, is an inadequate response to attacks made on the level of jurisprudence or theory of government.

The first step against such a broad criticism should be establishment of the source of each element of government power, rather than recitation of constitutional phrases which in many cases are but signals that the power exists. Thus the Army conducts a government, courts and all, in conquered territory abroad. While in one sense an exercise of power, the real nature of that action is the fulfillment of a legal obligation imposed upon the United States by international law. That obligation flows from treaties and usages of nations which operate upon governments regardless of the terms of their internal law. Similarly the trial by military commission of

those who violate the law of war is a duty incurred by one government as a consequence of international law.

The third of the traditional categories of military jurisdiction is martial law, the assertion of military power by the Executive Branch within its own territory when normal agencies of government have fallen apart as a result of natural or military disaster. This action by the Chief of State is an effort to insure the survival of the state, to reestablish conditions under which the usual laws and customs of that state may prevail. As an action in self-defense it is an extra-legal procedure.

Military justice, *i.e.*, the invocation and administration of criminal law by the Army, involves the exercise of judicial and legislative powers unusual within the Executive Branch. Both the Constitution and Congress have given the President significant rule-making authority and the UCMJ creates a complex order of courts and related procedures. These conform to time-honored practice in the governance of armies and comprise the one branch of military jurisdiction founded primarily in the constitutional history of the United States.

There are several points to be made from these distinctions among the categories of jurisdiction. The first three types of jurisdiction are nonconstitutional in that the obligation of the United States to conduct those activities flows from the existence of a government rather than of one government with a particular charter. As a member of the family of nations, the United States has the obligation to conduct warfare in accordance with international law, including the duty to treat fairly the population and resources of occupied territory by establishing military government. In the same capacity, it has the duty to help enforce the law of war by punishing violators who come into its hands (military commission). As a government it has the duty to ensure its own existence and may do so with force and violence if required (martial law). These three obligations exist for all governments and without regard to the form of such governments or their internal law.

The fourth head of jurisdiction, military justice, is a matter of domestic law. Under the law of the United States, the Constitution is the appropriate referent for determination of the existence of the powers of government; therefore, questions about the Army's capacity to conduct criminal proceedings against its own members are constitutional issues, at least initially. The national practice and its sources, as so exhaustively analyzed by the Historical School, are relevant to questions about the existence of such power as well as to

the manner of its exercise. When, however, it becomes apparent that the nature of the attack is not a typical challenge to the Executive's asserted abuse of an extant power, reiteration of typical, historical arguments will fail to persuade. The attack by such as Robert Sherrill¹³ and Joseph DiMona¹⁴ is against the Constitution's division of powers over the Armed Forces. Essentially this statement is that Article III courts, not Article I courts, should try offenses by soldiers and that the President and his commanders should have no power to affect the lives or property of soldiers, except by orders during actual combat. To one who holds such views, even heavenly justice administered by a commander or court-martial would be insufficient.

The locus of the dispute, then, is not history. "This is the way it has always been done" is no answer. The issue must be joined on such questions as: Will the necessary unity of command be disrupted by another scheme for the governance of the Army? Will the security of the state be impaired by lessening Executive control over the Armed Forces? Will the balance of powers among the three branches be harmfully disturbed by divesting the Executive? Had the issue been properly joined the formidable talents of the members of the Historical School and the authors here under review could have made short work of the "Sunday Supplement" attackers on questions like these.

Perhaps when the history of military law in the United States is written its own discipline will isolate the external aspects of military law from the internal. Such isolation will show that "How did the Army come to have a certain share in the powers of government?" is a different question from "How well was the power exercised?" The same isolation will establish a framework which will permit adjustments in tenets of the Historical School, more reassuring responses to questions from outside the Government, and more consistent distribution of powers within the Government.

The Generous book provides a good start in some of these directions of inquiry. By dint of a lot of hard work interviewing active and recently retired military lawyers and writers he got a good sense of how military criminal law develops. His accounts of events preceding the major statutory changes of 1920, 1951, 1962 and 1968 contain more of the "juice" of personal and factional relationships

¹³ SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1972).

¹⁴ DIMONA, *GREAT COURT-MARTIAL CASES* (1973).

than is available elsewhere. A thesis that such changes are predominantly the product of personal power positions may be a bit overdrawn, however. There are social forces at work and certain demands arise from the internal workings of any legal system, but law is made by men and their part in the making of military criminal law is well exposed by Dr. Generous.

His happy faculty for associating men with ideas is much like that of the good novelist. His chapter on the Inter-Service jockeying over Code amendments during the '60's make more understandable both the motives and the law. This observation is even more appropriate as to the chapter on "The Court of Military Appeals," subtitled: "The Ferguson Revolution," and the chapter "The Court of 1960's." Generous weaves together a fair amount of the motivations of court members and reactions in the Services as Quinn the statesman, Latimer the conservator, and Ferguson the far-seeing, battled it out. Latimer filed one dissent in every three cases during a five-year period, as Quinn undertook to build the reputation of his court and Ferguson attacked those few remaining dragons of ancient practice which had not been buried by the framers of the Code. The United States Court of Military Appeals planned to keep its own house clean.

By way of supplement, Bishop's chapter on "The Bill of Rights and the Serviceman" is a useful review of attacks on court-martial results in various civilian courts. He emphasizes the small scope left for such attack by the United States Court of Military Appeals, saying that where it finds a violation of military due process "COMA will bust the conviction." This chapter of his, and the one entitled "The Jurisdiction of Courts-Martial," are replete with bits and pieces for active counsel. The author outlines the points of contact between the military and civilian legal systems and applies a larger-than-legal view to some real problems. For instance, knowledge of the punitive aspects of a bad-conduct discharge leads Bishop to question the characterization of certain nonmilitary offenses as "petty" and triable by special court-martial despite the *O'Callahan* rule.

Such specifics are useful and entertaining, but history is chronicle, analysis and interpretation. This review has contested certain bases used by the authors in beginning their analysis and interpretation. Their chronicles remain, as does that part of the analysis and inter-

pretation not affected by the disputed choice of starting point. Consequently, there is much of value in these books, in addition to attributes mentioned earlier. I would emphasize Bishop's implicit suggestion of the broad scope of military law and legal activities, and the detail in Generous' chronicle of criminal justice legislation for the military since 1916. Each has made a contribution which the practitioners of military law should not overlook.

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'Mention of a work in this section does not preclude later review in the *Military Law Review*.

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