

MILITARY LAW REVIEW



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BOOK REVIEWS

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Pamphlet

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BOOK REVIEWS

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THE GOVERNMENT-WIDE DEBARMENT AND SUSPENSION REGULATIONS AFTER A DECADE — A CONSTITUTIONAL FRAMEWORK — YET, SOME ISSUES REMAIN IN TRANSITION

BRIAN D. SHANNON*

I. Introduction

“[T]he current [debarment and suspension] process maintains an appropriate balance between protecting the government’s interests in its contractual relationships, and providing contractors with due process.”

The General Accounting Office reached this conclusion following its **1987** review of the major federal procuring agencies’ debarment and suspension procedures. Those procedures, which are generally the same **today**,² had their genesis as gov-

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¹ UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN, HOUSE COMM. ON GOV’T OPERATIONS, PROCUREMENT, SUSPENSION AND DEBARMENT PROCEDURES 10 (Feb. 1987) [hereinafter GAO BRIEFING REPORT].

² See Fed. Acquisition Reg. subpt. 9.4 [hereinafter FAR], 48 C.F.R. subpt. 9.4 (1990). The regulations define a “debarment” as the exclusion of “a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period. . . .” FAR 9.403, 48 C.F.R. §9.403 (1990). A “suspension” is an agency action “to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting. . . .” *Id.* Thus, both of these actions cause a con-

ernment-wide regulations approximately one decade ago. Subsequent to the efforts of an interagency task force and congressional hearings, in July 1981, the Senate Subcommittee on Oversight of Government Management recommended that the federal government issue new debarment and suspension regulations to have government-wide effect.³ The federal government proceeded to implement those recommendations.⁴ Thereafter, over the last decade the federal government has greatly expanded its rate of imposing debarment and suspension against many of the contractors with whom it does business,⁵ and these actions are effective throughout the government. Because of the tensions between the government's interests in procurement integrity and contractors' interests in continuing to pursue government work—and perhaps as a result of the heightened activity by the federal government in the debarment and suspension arena—a number of scholars and practitioners have written about the process.⁶ In particu-

tractor to become ineligible to receive new contract awards. An agency may maintain a suspension for up to eighteen months—or even longer if criminal proceedings commence during that period. *See id.* at 9.407-4(b). Generally, an agency may impose a debarment lasting up to three years (inclusive of any period of suspension if a suspension precedes the debarment). *See id.* at 9.406-4(a). An agency may impose a longer debarment to be commensurate with the seriousness of the cause or causes, *id.*, and may extend the length of debarment for cause. *Id.* at 9.406-4(b). *But cf.* Coccia v. Defense Logistics Agency. *So.* 89-6544 (E.D. Pa. May 15, 1990) (WESTLAW, GENFED library, DCT database) (acknowledging that three years is not the maximum possible debarment, but invalidating a fifteen-year debarment for a lack of explanation for the lengthy period).

³ *See* SENATE SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE COMM. OF GOV'T AFFAIRS, 97th Cong., 1st Sess., REFORM OF GOVERNMENT-WIDE DEBARMENT AND SUSPENSION PROCEDURES 18-19 (Comm. Print 1981).

⁴ *See infra* notes 8-22 and accompanying text.

⁵ *See, e.g.*, GAO BRIEFING REPORT, *supra* note 1, at 3.

⁶ *See, e.g.*, Calamari, *The Aftermath of Gonzales and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 N. ENG. L. REV. 1137 (1982); Coburn, *Due Process Issues in Debarment and Suspension*, 42 FED. CONT. REP. (BKA) 571 (Oct. 8, 1984); Cox, *Due Process Issues in Suspension and Debarment: A Government Perspective*, 43 FED. COST. REP. (BNA) 429 (March 11, 1985); D'Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems and Solutions*, 17 PUB. COST. L.J. 265 (1987); England, *The Fifth Amendment: A Double-Edge Sword for Government Contractors*, 18 PUB. COST. L.J. 601, 603-14 (1989); Graham, *Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests*, 14 PUB. COST. L.J. 216 (1984); Horowitz, *Looking for Mr. Good Bar: In Search of Standards for Federal Debarment*, 14 PUB. CONT. L.J. 58 (1983); Kabeiseman, *Contractor Debarment and Suspension—A Government Perspective*, 19 A.B.A. SEC. PUB. CONTRACT L. NEWSL. 3 (1984); Kortorn, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, 18 PUB. COST. L.J. 633 (1989); Note, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U.L. REV. 693 (1987) [hereinafter Note, *Moving Toward a Better-Defined Standard*]; Note, *"Graylisting" of Federal Contractors: Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Proce-*

lar, several of these writers either have questioned the constitutional validity or otherwise have been critical of the government's debarment and suspension process.⁷ This author respectfully disagrees with these analyses, and a major focus of this article is an examination of the reasons why agency adherence to the current debarment and suspension regulations will result in actions that comport with constitutional due process requirements. On the other hand, even though these government rules provide a constitutional framework, the regulations remain in transition and have been the subject of periodic changes. Thus, new matters will continue to arise. Accordingly., this article also will explore certain issues regarding not only recent but also contemplated changes to the debarment and suspension procedures.

II. The Government-Wide Debarment and Suspension Regulations: A Brief Overview

The regulations governing the debarment and suspension of federal government contractors are set forth in subpart 9.4 of the Federal Acquisition Regulation (**FAR**).⁸ These regulations evolved from efforts by the Office of Federal Procurement Policy (OFPP)—efforts that commenced approximately one decade ago. Roughly contemporaneously with the recommendations of the Senate Subcommittee on Oversight of Government Management to create debarment and suspension regulations with government-wide effect,⁹ the OFPP issued a policy letter setting forth proposed government-wide debarment and suspension regulations.¹⁰ Thereafter, in June 1982, the OFPP issued an additional policy letter delineating final rules for government-wide debarment and suspension proce-

dures, 31 CATH. U.L. REV. 731 (1982) [hereinafter Note, "Graylisting"]. For an earlier analysis of some of the history of predecessor debarment and suspension procedures, see Steadman, "Banned in Boston and Birmingham and Boise and . . ."; *Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L.J. 793 (1976).

⁷ See, e.g., Calamari, *supra* note 6, at 1169-74; Coburn, *supra* note 6, *passim*; Norton, *supra* note 6, at 652-55; Note, *Moving Toward a Better-Defined Standard*, *supra* note 6, *passim*; Note, "Graylisting" *supra* note 6, at 756-66. But see Cox, *supra* note 6, *passim* (arguing for the validity of the process).

⁸ 48 C.F.Rpt. 9.4 (1990).

⁹ See *supra* note 3 and accompanying text.

¹⁰ See Proposed OFPP Policy Letter 81-3, 46 Fed. Reg. 37,382 (July 22, 1981) [hereinafter Policy Letter 81-3]. The OFPP published amendments to Policy Letter 81-3 in September 1981. See 46 Fed. Reg. 45,456 (Sept. 11, 1981). For an excellent history of the earlier evolution of federal debarment and suspension, see Calamari, *supra* note 6, at 1140-45.

dures.¹¹ The OFPP intended that federal agencies initially adopt the rules stated in Policy Letter 82-1 as part of the various agencies' procurement regulations and ultimately intended to include them as subpart 9.4 of the FAR.¹²

The government did not simply thrust the rules included in Policy Letter 82-1 on the contracting community in a unilateral fashion. Instead, an intergovernmental task force comprised of legal and procurement experts from various federal agencies considered over 600 industry comments to the proposed rules.¹³ The OFPP maintained that the proposed Policy Letter **81-3** provided "fundamental due process" for contractors but, as a result of the public comments, the OFPP further refined the procedures.¹⁴

The OFPP's rules, as incorporated in the FAR, generally permit an agency to bar a contractor from receiving new contract awards throughout the federal government prior to any opportunity for a hearing. Specifically, a federal agency may suspend a contractor based on adequate evidence of a variety of charges relating to a lack of contractor integrity.¹⁵ An agency may impose a debarment on roughly similar grounds,¹⁶

¹¹ See OFPP Policy Letter 82-1, 47 Fed. Reg. 28,854 (July 1, 1982) [hereinafter Policy Letter 82-1].

¹² See *id.* (initial summary). Policy Letter 82-1 antedated the implementation of the FAR.

¹³ See *id.* at 28,854-55. A number of these comments addressed the contemplated procedures. See *id.* at 28,856. Many other comments related to the government-wide application of the rules. See *id.* at 28,855. Congress also enacted a statute which required the military departments to honor the debarments and suspensions issued by other federal agencies. See 10 U.S.C. § 2393 (1988).

¹⁴ See 47 Fed. Reg. at 28,856. The OFPP fashioned these procedures in accordance with language in some of the earlier court decisions that had questioned previous agency debarment and suspension practices. See *infra* notes 24-40 and accompanying text. It is worth noting that the Public Contract Law Section of the American Bar Association (ABA) never has been happy about the process afforded. Roughly contemporaneously with the OFPP's development of debarment and suspension procedures, the ABA adopted certain "principles" relating to debarment and suspension which would have afforded contractors far more process than that set forth in the OFPP policy letters. See generally Coburn, *supra* note 6; Graham, *supra* note 6, at 236-37. Attempted legislation incorporating the ABA recommendations died in committee, See H.R. 4798, 98th Cong., 2d Sess. (1984); see also Friedman & Case, *Debarment and Suspension: The Government's Most Powerful Weapons*, in FRAUD IS GOVERNMENT CONTRACTING 306-08 (1985).

¹⁵ See generally FAR 9.407, 48 C.F.R. § 9.407 (1990). Specific reasons for suspension include an indictment or other adequate evidence of fraud or other criminal offenses in connection with public contracts, antitrust violations, offenses such as embezzlement, theft, bribery, false statements, or other bases reflecting a lack of business integrity or business honesty, and "for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." *Id.* § 9.407-2(a), (b).

¹⁶ *Id.* § 9.406-2

although a debarment requires a higher “preponderance of evidence” standard.¹⁷ An agency’s issuance of a notice of suspension or proposed debarment has the immediate effect of barring the contractor from receiving new contract awards from any federal agency.¹⁸ Thereafter, the hearing requirements vary depending on whether a debarment or suspension is involved. With respect to a proposed debarment, the contractor has the right to submit—in person, in writing, or through counsel—information and argument in opposition to the proposed debarment within thirty days following receipt of the notice.¹⁹ If the action is not premised on a conviction or civil judgment, the contractor is entitled to an additional factfinding hearing if its initial presentation raises a genuine dispute concerning the facts giving rise to the proposed debarment.²⁰ Similarly, with respect to a suspension, the contractor is entitled to submit information and argument in opposition to the suspension within thirty days following receipt of the notice.²¹ Except in cases in which (1) an indictment serves as the basis for the suspension or (2) the Department of Justice has advised that additional proceedings would jeopardize substantial governmental interests in pending or contemplated criminal or civil proceedings, the regulations require the agency to conduct additional factfinding proceedings when the contractor’s submission in opposition raises questions of material fact.²² Because a suspension or proposed debarment precedes the opportunity for any form of hearing, contractors repeatedly have challenged the procedures on due process grounds. The next section addresses the due process issues connected with agency actions to debar or suspend government contractors.

¹⁷ *Id.* § 9.406-2(b). Alternatively, a conviction or civil judgment on charges similar to those delineated for imposing suspension is sufficient. *See id.* § 9.406-2(a).

¹⁸ *See id.* § 9.405. Although suspensions had immediate government-wide effect under the OFPP framework prior to 1989, only final debarments had similar government-wide effect; mere proposals for debarment only had the effect of barring the contractor from receiving new awards in the agency that issued the notice. *See* 64 Fed. Reg. 19,812, 19,814 (May 8, 1989) (codified at FAR 9.405, 48 C.F.R. § 9.405 (1990)).

¹⁹ FAR 9.406-3(c)(4), 48 C.F.R. § 9.406-3(c)(4)(1990).

²⁰ *Id.* § 9.406-3(b)(2). In cases involving a conviction or civil judgment, the regulations do not require any hearing beyond the initial presentation of information in opposition to the proposed action. As the regulations caution, however, the “existence of a cause for debarment [such as a conviction], however, does not necessarily *require* that the contractor be debarred; the seriousness of the contractor’s acts or omissions and any mitigating factors should be considered in making any debarment action.” *Id.* § 9.406-1(a) (emphasis in original).

²¹ *Id.* § 9.407-3(c)(5).

²² *Id.* § 9.407-3(c)(6).

III. The Debarment and Suspension Regulations Fully Comport with Constitutional Requirements

Despite numerous commentaries impugning either the constitutionality or desirability of the government-wide debarment and suspension regulations,²³ the courts generally have had little problem in upholding agency debarment and suspension actions against constitutional challenges when the agencies have adhered to the regulations. The ensuing subsections will examine some of the early decisions that helped shape the debarment and suspension regulations' evolution, analyze the constitutional due process issues that are pertinent to the rules—including a detailed focus on a recent decision of the Supreme Court that may alter the analysis in future debarment and suspension challenges—and discuss why cases adhering to the regulations comport with due process requirements.

A. *Significant Decisions Prior to the Promulgation of the Government-Wide Debarment and Suspension Regulations.*

The federal government did not draft the government-wide debarment and suspension regulations from a blank slate. Several significant court decisions guided the drafters in their efforts. The seminal case which led to the federal government's eventual development of government-wide debarment and suspension procedures was *Gonzales v. Freeman*.²⁴ In *Gonzales* the Commodity Credit Corporation first suspended, then debarred, a contractor from doing business with the agency for five years.²⁵ The contractor challenged the action on due process grounds. With respect to whether the court could even consider the contractor's challenge, the District of Columbia Circuit announced,

Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before

²³ For a listing of several such articles, see *supra* note 7; see also *infra* note 126.

²⁴ 334 F.2d 570 (D.C. Cir. 1964). The future Chief Justice, Warren Burger, authored the opinion in *Gonzales*.

²⁵ *Id.* at 572. The agency's initial suspension action related to allegations of possible misuse of official inspection certificates and was to remain in effect "pending investigation." *Id.*

he is officially declared ineligible for government contracts.²⁶

The court was concerned about the lack of standards to guide the agency in making debarment determinations. Accordingly, the court ultimately concluded that the lack of regulations and standards resulted in the agency's having imposed a debarment in excess of its statutory jurisdiction and authority.²⁷ The court reasoned that debarment determinations should not "be left to administrative improvisation on a case-by-case basis . . . [but should be] exercised in accordance with accepted basic legal norms."²⁸ Thus, *Gonzales* served as a directive for federal agencies to develop debarment and suspension procedure ~ . ~ ~

Eight years following *Gonzales*, the District of Columbia Circuit again discussed the procedural requirements connected with government suspension actions in *Horne Brothers, Inc. v. Laird*.³⁰ In *Horne Brothers* the court was extremely critical of the suspension regulations that the Defense Department had developed prior to that time.³¹ Those regulations allowed suspensions to extend up to eighteen months and more without an opportunity for confrontation.³² In dicta the court announced that it would accept temporary suspensions for short periods—up to one month—without an opportunity for confrontation, but not for longer periods.³³ Accordingly, the court delineated more criteria that eventually became incorporated

²⁶ *Id.* at 574 (emphasis in original). The court also concluded that even though the government's debarment authority is inherent as part of its general statutory contracting power, "to the debarment power there attaches an obligation to deal with uniform minimum fairness as to all." *Id.* at 577.

²⁷ *Id.* at 580.

²⁸ *Id.* at 578. Significantly, the court did add that the government could impose temporary suspensions, with procedures to follow, for "a reasonable period pending investigation." *Id.* at 579.

²⁹ A few agencies had developed regulations before *Gonzales*. See Calamari, *supra* note 6, at 1145.

³⁰ 463 F.2d 1268 (D.C. Cir. 1972). In *Horne Brothers* a contractor asserted that the Navy had violated the law by issuing a suspension and then refusing to award a ship repair contract to that contractor some three weeks after the date of suspension. See *id.* at 1269, 1272.

³¹ See *id.* at 1269.

³² *Id.* at 1270.

³³ *Id.* The court reasoned that a suspension requires the government to "insure fundamental fairness" to the contractor by requiring the agency to give "specific notice as to at least some charges alleged against him, and . . . an opportunity to rebut those charges." *Id.* at 1271. The discussion of the suspension regulations was primarily dicta because the Navy's refusal to award the repair contract to the suspended contractor came only three weeks after the issuance of the suspension—well within the one-month window the court found to be reasonable.

in the government-wide debarment and suspension regulation

Another case that impacted on the development of government-wide debarment and suspension regulations was *Transco Security, Inc. v. Freeman*.³⁵ In *Transco* a suspended contractor challenged both the agency's suspension regulations and the agency's notice of reasons for the suspension.³⁶ The agency had adopted the suspension regulations that were at issue in *Transco* subsequent to the District of Columbia Circuit's decision in *Horne Brothers*.³⁷ With respect to the challenge to the regulations, the court weighed the contractor's liberty interest in not being denied the opportunity to seek government contracts against the government's interests in getting its contracting "money's worth" and in protecting its ongoing criminal investigation.³⁸ The court concluded that the regulations were adequate in that the suspended contractor, even in the absence of a more detailed hearing on the facts, did have an opportunity to submit information and argument in opposition to the suspension—that is, some chance at confrontation.³⁹ Despite upholding the regulations, however, the *Transco* court determined that the agency had provided the

³⁴ For example, FAR 9.407-3(c)(5), 48 C.F.R. § 9.407-3(c)(5) (1990), now provides that a contractor may submit information in opposition to the suspension within 30 days following receipt of the notice of suspension—incorporating the one month suggested in *Horne Brothers*. In addition, the court in *Horne Brothers* did not stop with its suggestion that the government must offer the suspended contractor some opportunity for confrontation within one month of the suspension. The court also discussed its views of what constitutes "adequate evidence" for purposes of suspension and what circumstances might permit an agency to limit notice and hearing opportunities for the contractor. See *id.* at 1271-72. The drafters of the current debarment and suspension regulations borrowed liberally from the court's "suggestions." See FAR 9.407, 48 C.F.R. § 9.407 (1990).

³⁵ 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981). *Transco* involved a challenge to a General Services Administration (GSA) suspension of a security guard company. *Id.* at 319.

³⁶ *Id.* at 320.

³⁷ *Id.* at 321. The regulations permitted the agency to deny a hearing to the contractor upon advice from the Department of Justice that a hearing would adversely affect a criminal prosecution. *Id.* at 319 (citing 41 C.F.R. § 1-1.605-4(e) (1975)). In this situation, in lieu of a more extensive factfinding hearing, the contractor could present information and argument in opposition to the suspension. 639 F.2d at 321-22.

³⁸ *Id.* at 322. Of course, two different agencies within the federal government (the Justice Department and the procuring agency) have responsibility to pursue these two governmental interests.

³⁹ *Id.* Moreover, the court observed that although only a high agency official should determine whether there exists adequate evidence for a suspension, the GSA met this standard in *Transco* because the decisionmaker had been the head of the agency. *Id.* at 324.

contractor with a constitutionally inadequate notice.⁴⁰ The court reasoned that due process mandates a “notice sufficiently specific to enable . . . [the contractor] to marshal evidence in . . . [its] behalf so as to make” any confrontation opportunity “meaningful.”⁴¹ Notwithstanding the court’s decision on the notice issue, *Transco* provided the federal government with ammunition for further development of regulations providing for only limited, postdeprivation process in suspension cases.

Although not a debarment or suspension case, one additional court decision rendered prior to the development of the government-wide debarment and suspension regulations had a significant impact in helping to shape those rules. Both *Gonzales* and *Horne Brothers* preceded the United States Supreme Court’s decision in *Muthews v. Eldridge*,⁴² which set forth an analytical framework for examining due process challenges to governmental actions that the courts continue to follow.⁴³ In analyzing a question of whether due process required an oral hearing before the termination of Social Security disability benefits, the *Muthews* Court initially explained that before due process protections are implicated, the aggrieved party first must identify a protected property or liberty interest.⁴⁴ Then, if a reviewing court is satisfied that a property or liberty interest is at stake, the *Muthews* Court instructed that the reviewing court should employ a balancing of three factors to determine whether due process mandates any additional procedures beyond those already in place:

⁴⁰ *Id.* at 323-24. The GSA had couched the notice of contractor wrongdoing in very general terms such as “billing irregularities.” *Id.* at 323.

⁴¹ *Id.* at 324. As the Federal Circuit described in a more colorful fashion some years later, the agency’s notice must be sufficiently specific to enable the contractor “to get its ‘ducks in a row’ in preparation for a meaningful response in the next step of the administrative suspension process.” *ATL, Inc. v. United States*, 736 F.2d 677, 684 (Fed. Cir. 1984) (citing *Transco*, 639 F.2d at 326). The court in *Transco* also instructed that a trial court’s proper employment of an *in camera* inspection of the evidence in a challenge to a debarment or suspension action should be limited to inquiries concerning the adequacy of the agency’s notice—that is, whether the government has provided “as specific a notice as is possible under the circumstances.” 639 F.2d at 326.

⁴² 424 U.S. 319 (1976).

⁴³ Several students of the Court have observed that despite some criticism, the Supreme Court has remained committed to the balancing approach delineated in *Mathews*. See J. NOWAK, R. ROTUKDA, & J. YOUNG, *COKSTITUTIOKAL LAW* 609-10 (3d ed. 1986).

⁴⁴ 424 U.S. at 332. On the facts of *Mathews* the government agency did not dispute that a protected property interest was at stake with respect to the disability benefits in question. *Id.*

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁵

Thus, subsequent to *Mathews*, a reviewing court's due process analysis must take into consideration two distinct inquiries: (1) Is a protected property or liberty interest implicated?; and (2) if so, are any additional procedures sought by the aggrieved party necessary in light of the *Mathews* three-pronged balancing test?⁴⁶ Significantly, with respect to applying the balancing test in the event that a reviewing court reaches this second question, the *Mathews* Court directed that broad rules are not necessarily controlling, but that due process is a matter for a case-by-case determination.⁴⁷ The following subsections will address the application of these two questions to the due process implications presented by debarment and suspension cases.

B. Decisions Establishing that a Liberty Interest Is at Stake.

With respect to the debarment or suspension of a government contractor, *Gonzales* effectively established that no protected property interest is present.⁴⁸ On the other hand, through *Gonzales* and its progeny, several lower courts have established that an agency's debarment or suspension of a

⁴⁵*Id.* at 335. Thus, determining whether due process requires any additionally sought procedures involves balancing the private interests and the governmental interests.

⁴⁶On the facts in *Mathews* the Court determined that the posttermination hearing procedures which the agency afforded to the aggrieved party were constitutionally adequate.

⁴⁷Specifically, the Court stated that earlier decisions

underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Id. at 334.

⁴⁸*Gonzales v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (no "right" to be awarded a government contract). Of course, *Gonzales* long-preceded subsequent due process decisions requiring the initial inquiry to focus on the existence of either a protected property or liberty interest.

government contractor implicates certain procedural protections because that action impacts the contractor's liberty interest . . .

Even though a number of lower courts have determined that the debarment or suspension of a government contractor affects a contractor's constitutionally protected liberty interests, the Supreme Court never has specifically decided a case involving the constitutionality of the debarment and suspension regulations. Moreover, in one case the Supreme Court relied on *Gonzales* for the proposition "that some governmental benefits may be administratively terminated *without* affording the recipient with a pre-termination evidentiary hearing."⁵⁰ In determining that a debarment or suspension does implicate a government contractor's protected liberty interests, however, the lower courts have placed reliance on certain other decisions of the Supreme Court, particularly *Paul v. Davis*.⁵¹ In *Paul v. Davis* an individual sought damages from a police official after city police distributed a flyer to local merchants that included Davis' name and photograph and identified him as an "active shoplifter."⁵² Although Davis previously had been arrested for shoplifting, he never was convicted.⁵³ He then sought compensation for alleged damage to his reputation by asserting that the distribution of the flyer and its wrongful assertion that he was an "active shoplifter" created a stigma

⁴⁹ For example, in *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984), the Federal Circuit summarized the constitutional implications of a government suspension action by observing that "although a citizen has no *right* to a Government contract, and a bidder has no constitutionally protected *property* interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty." *Id.* at 683 (footnotes omitted) (emphasis in original); see also *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 962-63 (D.C. Cir. 1980); *Shermco Indus., Inc. v. Secretary of the Air Force*, 584 F. Supp. 76, 87 (N.D. Tex. 1984). *But cf.* *Southeast Kan. Community Action Program, Inc. v. Lyng*, 758 F. Supp. 1430, 1434-35 (D.Kan. 1991) (no liberty interest if government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"); *PNM Constr., Inc. v. United States*, 13 Cl. Ct. 745, 749 (1987) (no liberty interest implicated when agency found bidder to be nonresponsible based on a lack of competence rather than a lack of integrity). Of course, even if a liberty interest is implicated, *Mathews* instructs that the courts must then apply a balancing test to determine whether the process afforded is sufficient for constitutional purposes. See *supra* text accompanying notes 45-47.

⁵⁰ See *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (emphasis added).

⁵¹ 424 U.S. 693 (1976); see, e.g., *Old Dominion Dairy Prods., Inc.*, 631 F.2d at 964-66.

⁵² 424 U.S. at 695. Davis sought damages pursuant to 42 U.S.C. § 1983 (1988).

⁵³ 424 U.S. at 696. A local judge dismissed all charges against Davis shortly after city police circulated the flyer. *Id.*

and impinged his protected liberty interests.⁵⁴ The Court rejected the constitutional claim and reasoned that earlier decisions had not established "that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."⁵⁵ In reaching its decision the Court distinguished an earlier case—*Wisconsin v. Constantineau*⁵⁶—in which the Court had determined that a liberty interest was at stake when a local police official had caused to be posted a notice in all area liquor stores that the stores were not to make sales or gifts of liquor to the aggrieved party for one year.⁵⁷ The Court, in *Paul v. Davis*, reasoned that the stigma arising from the posting in *Constantineau*, standing alone, was not the reason due process was implicated in the earlier case.⁵⁸ Instead, the *Paul* Court emphasized that the governmental action at issue in *Constantineau* had not merely created a stigma, but had deprived the affected individual of a right previously held under state law—the right to buy or obtain liquor.⁵⁹ In contrast, *Davis* only had established a stigma, without any change in his legal status; thus, the Court denied his liberty interest claims.⁶⁰ Accordingly, *Paul v. Davis* signals a need to establish both a stigma or damage to reputation, plus some altering of legal

⁵⁴ *Id.* at 697. *Davis* alleged that publication and distribution of the flyer inflicted a stigma to his reputation that would seriously impair his future employment opportunities. *Id.*

⁵⁵ *Id.* at 701.

⁵⁶ 400 U.S. 433 (1971).

⁵⁷ *Id.* at 435. The posting of the notices was pursuant to a state statute that allowed such actions with respect to persons known to have engaged in "excessive drinking." *Id.* at 434. The Court determined that due process required notice and an opportunity to be heard before the state could engage in this "posting" under its liquor laws. *Id.* at 437. In reaching its determination, the Court reasoned that "[p]osting under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Id.* (emphasis added) Moreover, the Court broadly declared that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.*

⁵⁸ 424 U.S. at 709.

⁵⁹ *Id.* at 708-09. Professor Tribe has observed that contrary to the Court's contentions in *Paul v. Davis*, the determination that due process requires a showing of "stigma-plus" was a considerable departure from the reasoning in *Constantineau* and other earlier cases. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 702 (2d ed. 1988) (arguing that the *Constantineau* decision rested solely on grounds of stigma and damage to reputation). But cf. Graglia, *Would the Court Get "Procedural Due Process" Cases Right If It Knew What "Liberty" Really Means?*, NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 813, 825-26 (1985) (agreeing with the result in *Paul v. Davis* but decrying the analysis as "remarkable" and "a mess").

⁶⁰ 424 U.S. at 712.

status, to successfully assert an impingement of a protected liberty interest.

A debarment or suspension of a government contractor appears to satisfy the “stigma plus” test established in *Paul v. Davis*. First, in the usual notice of suspension or proposed debarment, the government generally questions the contractor’s business integrity.⁶¹ In addition, the government must place the contractor’s name on a government-wide list, identifying the contractor as ineligible to receive new contract awards.⁶² Finally, by suspending the contractor or instituting a proposed debarment, the government not only has potentially impugned the contractor’s reputation, but also has limited that contractor’s freedom, or liberty, to seek new contract awards—an activity that the contractor previously had the ability to pursue.⁶³

The pertinent case law supports the conclusion that a debarment or suspension affects a contractor’s protected liberty interests. The District of Columbia Circuit’s decision in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*⁶⁴ was the first *post-Mathews* government contracts opinion to expand upon the earlier analysis from *Gonzales v. Freeman* by addressing the due process issues in the context of both *Mathews* and *Paul v. Davis*. Although not arising in the context of a debarment action,⁶⁵ *Old Dominion* involved an Air Force

⁶¹ See FAR 9.407-2, 48 C.F.R. 19.407-2 (1990) (setting out the grounds for suspension); FAR 9.406-2, 48 C.F.R. § 9.406-2 (1990) (setting out the grounds for debarment). On the other hand, the FAR also permits debarment based on a history of unsatisfactory performance, a reason relating to competence, not integrity. See *id.* § 9.406-2(b)(1). This basis for a debarment would not implicate a liberty interest. See *Southeast Kan. Community Action Program, Inc.*, 758 F. Supp. at 1434-35 (no liberty interest if government statement merely alleges incompetence as opposed to dishonesty or some other “badge of infamy”); *PNM Constr., Inc.*, 13 Cl. Ct. at 749 (no liberty interest implicated when agency found bidder to be nonresponsible based on a lack of competence rather than a lack of integrity); see also *Coleman Am. Moving Serv., Inc. v. Weinberger*, 716 F. Supp. 1405, 1414 (M.D. Ala. 1989) (holding that no liberty interest is implicated in a suspension based on an indictment because “any stigma that might attach flows not from underlying charges advanced by the government [procuring agency], but from the existence of the indictment itself”).

⁶² See FAR 9.404, 48 C.F.R. § 9.404 (1990).

⁶³ Thus, the notice and listing of the suspended or debarred contractor more closely resembles the “posting” in *Constantineau* than the flyers in *Paul v. Davis*—given the analysis in *Paul v. Davis*—because of both the contractor’s alleged stigma and a change in the contractor’s legal status.

⁶⁴ 631 F.2d 953 (D.C. Cir. 1980).

⁶⁵ Actually, *Old Dominion* did not deal with a challenge to an agency debarment or suspension at all, but instead involved individual agency refusals to award contracts based upon a view that the contractor lacked present responsibility. See *Calamari*, *supra* note 6, at 1155. The concept of a contractor’s lack of present responsibility is closely related to the lack of integrity that is often at the heart of an agency suspen-

denial of individual contract awards to Old Dominion Dairy Products, Inc. based on a finding of contractor nonresponsibility relating to the company's alleged lack of a "satisfactory record of integrity."⁶⁶ The court determined that the government action had implicated a protected liberty interest.⁶⁷ In response to a government argument that the case involved only an injury to the contractor's reputation, not actionable in light of *Paul v. Davis*, the court concluded that the facts of the case were closer to the cases distinguished by the Supreme Court in *Paul v. Davis* rather than *Paul* itself.⁶⁸ Thus, the court reasoned that the "stigma plus" test of *Paul v. Davis* was satisfied through both the stigma to the contractor and the accompanying loss of government contract work.⁶⁹

Subsequent to *Old Dominion*, courts in other cases have applied the liberty interest analysis directly to debarment and suspension actions. For example, the Sixth Circuit in *Transco* relied on *Old Dominion* for the proposition that a suspension affects a liberty interest "when that denial is base on charges

sion or debarment. For example, successive findings of contractor nonresponsibility based on the same facts and circumstances without notice and an opportunity to be heard can give rise to a successful challenge of the agency action on grounds that the practice amounts to a de facto debarment. See, e.g., *Shermco Indus., Inc. v. Secretary of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984); *Related Indus., Inc. v. United States*, 2 Cl. Ct. 517 (1983); *Art-Metal-USA, Inc. v. Solomon*, 473 F. Supp. 1 (D.D.C. 1978). The contractor in *Old Dominion* raised a de facto debarment argument, but the court did not address the issue directly. See 631 F.2d at 961, n.17. For a more detailed consideration of *Old Dominion*, see *Recent Decision*, 50 GEO. WASH. L. REV. 90 (1981).

⁶⁶ *Old Dominion*, 631 F.2d at 958. The contractor challenged the action by claiming a due process right to be given notice and an opportunity to be heard before being found nonresponsible on lack of integrity grounds. *Id.* at 961.

⁶⁷ See *id.* at 966. The contractor did not claim to have any protected property interest. *Id.* at 961. The court observed that although then-Judge Burger in *Gonzales v. Freeman* had recognized that there was no property right to receive a government contract, that case had still established that the government could not act arbitrarily in causing a contractor to become ineligible to receive government contracts. See *id.* at 962 (citing to *Gonzales v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964)). The court then likened this early analysis from *Gonzales* to the question of whether the government's precluding a contractor from receiving a contract award based on a lack of integrity raises a cognizable liberty interest claim under post-*Mathews* analysis.

⁶⁸ *Id.* at 964-65.

⁶⁹ *Id.* at 966. In reaching this result, the court distinguished the facts in *Old Dominion* from the Supreme Court's earlier analysis in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (involving the refusal to find a protected liberty interest in a case in which a state university refused to reemploy a nontenured instructor). The *Old Dominion* court seized on language in *Roth* that it would have been a different case (in *Roth*) had the instructor been barred by virtue of his lack of reemployment from all other public employment in state universities. 631 F.2d at 963 (citing *Roth*, 408 U.S. at 573-74). The *Old Dominion* court reasoned that the agency had similarly barred the government contractor from further public work.

of fraud and dishonesty.”⁷⁰ Then, in *ATL, Inc. v. United States*,⁷¹ the Federal Circuit succinctly summarized that

in suspension cases it is recognized that, although a citizen has no *right* to a Government contract, and a bidder has no constitutionally protected *property* interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play.⁷²

Accordingly, lower courts to date certainly have embraced the notion that a debarment or suspension may impact a government contractor’s liberty interests. A recent decision by the Supreme Court, however, may require the courts, agencies, and contractors to examine this issue anew.

*C. Given the Supreme Court’s Decision in Siegert v. Gilley,⁷³
Is Prior Liberty Interest Analysis Still Valid?*

Although the analysis contained in decisions such as *Paul v. Davis* undergirds the lower court decisions that have determined that a debarment or suspension threatens a contractor’s protected liberty interests, a recent decision by the Supreme Court calls such analysis into question. In *Siegert v. Gilley*,⁷⁴ a majority on the Supreme Court appears to have retreated from the prior analysis in *Paul v. Davis*. *Siegert* involved a *Bivens* action⁷⁵ for money damages by a government psychologist, Siegert, against his former supervisor, Gilley, based on allegations that Gilley had violated Siegert’s liberty interests by writing a negative recommendation letter.⁷⁶ The Court of Appeals had assumed that the letter violated Siegert’s constitu-

⁷⁰ *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981).

⁷¹ 736 F.2d 677 (Fed. Cir. 1984).

⁷² *Id.* at 683 (footnotes omitted) (emphasis in original). *Accord* *Shermco Indus., Inc. v. Secretary of the Air Force*, 584 F. Supp. 76, 87 (N.D. Tex. 1984).

⁷³ 111 S. Ct. 1789 (1991).

⁷⁴ *Id.*

⁷⁵ *See* *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (authorizing actions for money damages against federal officials who violate a person’s clearly established constitutional rights)

⁷⁶ *Siegert*, 111 S. Ct. at 1791-92. Petitioner Siegert had been a clinical psychologist at a federal hospital in Washington from 1979-85. The respondent, Melvin Gilley, was Siegert’s supervisor during Siegert’s last several months at the facility. After receiving a notice that the government intended to terminate his employment, Siegert resigned. *Id.* at 1791. Thereafter, Siegert began working for an Army hospital in Germany, but because of agency “credentialing” requirements, he needed a

tional rights, but held that his allegations were insufficient to overcome his former supervisor's assertion of qualified immunity from personal liability.⁷⁷ The Supreme Court affirmed the dismissal of Siegert's *Bivens* claim, but on different grounds; the Court held that Siegert had failed to allege a violation of a clearly established constitutional right.⁷⁸

Chief Justice Rehnquist, writing for a five-justice majority in *Siegert*, determined that "[t]he facts alleged by Siegert cannot, in the light of our decision in *Paul v. Davis*, be held to state a claim for denial of a constitutional right."⁷⁹ Although the majority acknowledged that the letter written by Siegert's former supervisor "would undoubtedly damage the reputation of one in his position, and impair his future employment prospects," the Court declined to find that such an injury raised a constitutional claim.⁸⁰ Not surprisingly, Siegert had argued that the combination of his allegations concerning the allegedly malicious letter and the resulting impairment of his ability to retain government employment satisfied the "stigma plus" test of *Paul v. Davis*.⁸¹ The Court, however, observed that the plaintiff in *Paul v. Davis* similarly had alleged an impairment of his future employment prospects because of the "active shoplifter" flyers present in that case, and somewhat cryptically concluded that "[o]ur decision in *Paul v. Davis* did not turn . . . on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation."⁸² As pointed out by the dissent, however, Siegert alleged more than mere damage to reputation and future em-

recommendation from Gilley to maintain this job. *Id.* Gilley notified the Army by letter that he could not recommend Siegert, and that he viewed "Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have known in my thirteen years [at the federal hospital]." *Id.* Based on this letter, the Army denied credentials to Siegert and subsequently terminated his federal service. *Id.*

⁷⁷ *Id.* at 1792. For this portion of the decision below, see *Siegert v. Gilley*, 895 F.2d 797, 803-04 (D.C. Cir. 1990).

⁷⁸ 111 S. Ct. at 1793. The Court determined that the court of appeals erred in assuming without deciding this preliminary issue in the case. *Id.* Apparently, however, the parties neither fully briefed nor argued the question of whether Siegert properly had asserted the deprivation of a constitutionally protected liberty interest. *See id.* at 1795 (Kennedy, J., concurring); *id.* at 1795-96 (Marshall, J., dissenting).

⁷⁹ 111 S. Ct. at 1794. Justice Kennedy concurred in the result but for the reasons set forth by the court of appeals relating to the issue of qualified immunity; he found it "unwise" to reach the constitutional question without a decision on the point by the court of appeals and full briefing and argument at the Court. *See id.* at 1795 (Kennedy, J., concurring). Justices Marshall, Blackmun, and Stevens dissented. *See id.* (Marshall, J., dissenting).

⁸⁰ *Id.* at 1794.

⁸¹ *See id.*

⁸² *Id.*

ployment prospects; he also alleged that the stigmatizing statements in his former supervisor's letter were accompanied by a subsequent loss of government employment—that is, a stigma plus a change in legal status.⁸³ The majority, on the other hand, focused on the following analysis from *Paul v. Davis*:

[I]njury to reputation by itself was not a “liberty” interest protected under the Fourteenth Amendment. 424 U.S. at 708-09. We pointed out [in *Paul v. Davis*] that our reference to a governmental employer stigmatizing an employee in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), was made in the context of the employer *discharging or failing to rehire* a plaintiff who claimed a liberty interest under the Fourteenth Amendment.⁸⁴

Moreover, the Court emphasized that “[t]he alleged defamation was not uttered incident to the termination of Siegert’s employment by the [government] hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later.”⁸⁵ Thus, a majority on the Court appears to have placed the focus of its liberty interest analysis on whether a governmental entity has stigmatized an employee in conjunction with an immediate termination from employment or a refusal to rehire—notwithstanding the employee’s allegations that his or her future government employment options had become unavailable because of the government’s actions.⁸⁶

The parallels from the Court’s analysis in *Siegert* to the debarment and suspension process are readily apparent. The cases that have recognized that the debarment or suspension of a government contractor implicates a protected liberty interest have discussed how the effect of a notice of suspension or proposed debarment meets the “stigma plus” test of *Paul v.*

⁸³ *Id.* at 1795-96 (Marshall, J., dissenting).

⁸⁴ *Id.* at 1794 (emphasis added) (parallel citations omitted).

⁸⁵ *Id.*

⁸⁶ Moreover, the Court’s narrow construction of *Board of Regents v. Roth* seems inconsistent with language in *Roth* that a liberty interest would have been implicated had the state in *Roth* barred the college instructor in that case “from all other public employment in state universities.” *Roth*, 408 U.S. at 573-74. Indeed, *Siegert* would appear to require allegations approaching those necessary to establish the deprivation of a protected property interest in continued government employment.

Davis.⁸⁷ But, *Siebert* appears to require a more substantial showing than *Paul's* "stigma plus" for identifying a protected liberty interest. Indeed, Justice Marshall, in his dissent in *Siebert*, pointed out that *Paul's* "stigma plus" standard had been met "because the injury to *Siebert's* reputation caused him to lose the benefit of *eligibility for future government employment*."⁸⁸ Specifically, *Siebert* had alleged that his former supervisor's letter had caused him not to be "credentialed," which effectively precluded him from being eligible for future government employment.⁸⁹ Not unlike the impact of the letter in *Siebert*, a notice of suspension or proposed debarment has the immediate effect of keeping a contractor from being eligible to receive future government contract awards. Accordingly, if the facts in *Siebert* do not implicate a protected liberty interest, does *Siebert* provide a signal that a majority of the Supreme Court will not follow the lower court opinions which have held that a suspension or debarment implicates a contractor's protected liberty interests?⁹⁰

If one reads the Court's opinion in *Siebert* to the effect that a protected liberty interest is at stake only in a narrow setting such as when stigma is accompanied by a governmental discharge or failure to rehire an employee,⁹¹ then the impact on current debarment and suspension case law may be significant. For example, the effect of a debarment or suspension is

⁸⁷ See, e.g., *Old Dominion*, 631 F.2d at 962-64; *accord ATL, Inc.*, 736 F.2d at 677. In a debarment or suspension based on questionable integrity, there is both a stigma and a hold placed on the contractor's eligibility for future government contract awards. See FAR 9.405(a), 48 C.F.R. 9.405(a) (1990). But see *Coleman Am. Moving Serv., Inc. v. Weinberger*, 116 F. Supp. 1406, 1414 (M.D. Ala. 1989) (holding that no liberty interest is implicated in a suspension based on an indictment because "any stigma that might attach flows not from underlying charges advanced by the government [procuring agency], but from the existence of the indictment itself"). In addition, no liberty interest would be at stake if the government based its debarment or suspension on the contractor's lack of competence, not a lack of business integrity. Cf. *Southeast Kan. Community Action Program, Inc.*, 758 F. Supp. at 1434-35 (no liberty interest if government statement merely alleges incompetence as opposed to dishonesty or some other "badge of infamy"); *PNM Constr., Inc.*, 13 Cl. Ct. at 749 (no liberty interest implicated when agency found bidder to be nonresponsible based on a lack of competence rather than a lack of integrity). Most cases involving allegations of procurement fraud, however, would raise integrity questions.

⁸⁸ 111 S. Ct. at 1797 (Marshall, J., dissenting) (emphasis in original).

⁸⁹ *Id.*

⁹⁰ For the dissenting justices in *Siebert*, Justice Marshall certainly hinted so. See *id.* at 1799 (observing that the majority opinion was inconsistent with the D.C. Circuit's frequent espousal of the view that the government deprives a person "of a protected liberty interest when stigmatizing charges 'effectively foreclos[e] [his or her] freedom to take advantage of other Government employment opportunities.'") (quoting *Old Dominion*, 631 F.2d at 964). Moreover, Justice Marshall's retirement could result in an even wider majority on such issues.

⁹¹ See 111 S. Ct. at 1794.

to preclude the government from awarding new contracts to the affected contractor,⁹² although as a general matter agencies may continue existing contracts.⁹³ On the other hand, the government may not renew or otherwise extend any current contracts.⁹⁴ Accordingly, in drawing a parallel to the Court's reasoning in *Siegert*, a debarment or suspension usually does not result in any "discharge" or termination of existing government "employment"—ongoing contracts. Instead, the debarment or suspension results primarily in the government not awarding any new government "employment"—new contract awards—to the affected contractor.⁹⁵ The only aspect of a debarment or suspension that arguably tracks the narrow focus set forth in *Siegert* relates to the FAR's proscription against renewing or otherwise extending existing contracts. In this respect, a debarment or suspension would be akin to *Siegert*'s language that the government's failure to "rehire" an employee, when coupled with a damage to reputation, amounts to the potential deprivation of a liberty interest.⁹⁶ Thus, if a court were to apply the *Siegert* analysis directly to a debarment or suspension matter, arguments that a protected liberty interest is at stake may no longer prevail. Given *Siegert*, contractors certainly should expect that federal agencies will attempt to avail themselves of the Supreme Court's heightened threshold for establishing a protected liberty interest.

D. What Process Is Due? The Case for Sufficient Process.

Even assuming that *Siegert* has not resulted in mooting the issue and that a liberty interest is at stake in a debarment or suspension action, *Mathews v. Eldridge* requires an analysis of an additional question—that is, what process is due?⁹⁷ The courts that have considered constitutional challenges to the debarment and suspension regulations—and the rules' lack of

⁹² FAR 9.405, 48 C.F.R. § 9.405 (1990).

⁹³ *Id.* § 9.405-1(a). A termination of an existing contract would certainly affect a contractor's property interests.

⁹⁴ *Id.* § 9.405-1(b).

⁹⁵ In this respect a debarment or suspension is very much like the facts in *Siegert*. Even though *Siegert* had alleged a loss of future government work because of the government official's stigmatizing action, the majority determined that no liberty interest was at stake. Cf. 111 S. Ct. at 1799 (Marshall, J., dissenting).

⁹⁶ See *id.* at 1794. Of course, if a suspended or debarred contractor has no current contracts, then this aspect of the effect of a debarment or suspension will be inapplicable to that contractor.

⁹⁷ See *supra* notes 46-47 and accompanying text. More specifically, *Mathews* requires an examination of whether due process requires more procedures than those the agency has already provided or intends to provide.

any requirements for predeprivation hearings—repeatedly have upheld the validity of those regulations as applied to the facts of the underlying agency actions.⁹⁸ Nevertheless, commentators have continued to attack the regulations' constitutionality or desirability, particularly with respect to their provisions for postdeprivation hearings.⁹⁹ In view of the many court decisions, however, arguments that due process requires the adding of more procedures to the debarment and suspension regulations simply are unfounded. Given the significant governmental interests at stake—even though some modicum of protected liberty may be implicated by a debarment or suspension—an adequate notice combined with the postdeprivation process set forth in the FAR generally will provide the

⁹⁸ See, e.g., *James A. Merritt and Sons v. Marsh*, 791 F.2d 328 (4th Cir. 1986); *Electro-Methods, Inc. v. United States*, 728 F.2d 1471 (Fed. Cir. 1984); *Textor v. Cheney*, 757 F. Supp. 51, 59 (D. D.C. 1991); *Mainelli v. United States*, 611 F. Supp. 606, 613-14 (D. R.I. 1985); *Shermco Indus., Inc. v. Secretary of the Air Force*, 584 F. Supp. 76, 87-90 (N.D. Tex. 1984); cf. *ATL, Inc.*, 736 F.2d at 677 (generally upholding the procedures as applied but invalidating the agency action, in part, with respect to notice issues); *Transco Security, Inc.*, 639 F.2d at 322-23 (upholding hearing procedures but invalidating insufficient notice of charges); see also *Robinson v. Cheney*, 876 F.2d 152, 163 (D.C. Cir. 1989) (holding that the standard for a debarment based on a "cause of so serious or compelling a nature that it affects the present responsibility" of the contractor is not unconstitutionally vague as applied). In contrast to due process attacks, contractors have enjoyed somewhat more success in challenging debarments and suspensions in cases in which an agency either did not follow the regulations or otherwise acted in an arbitrary and capricious manner subject to reversal under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988). See, e.g., *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988) (finding arbitrary and capricious an agency's decision to debar certain corporate officials of a convicted corporation but not others); *Coccia v. Defense Logistics Agency*, No. 89-6544 (E.D. Pa. May 15, 1990) (WESTLAW, GENFED library, DCT database) (finding a fifteen-year debarment to be arbitrary and capricious in the absence of specified reasons); *Sterlingwear of Boston, Inc. v. United States*, 11 Cl. Ct. 879, 885 (1987) (determining that the debarring agency violated the regulations by making a decision not to hold a fact-finding proceeding before the contractor submitted its information in opposition to the proposed debarment). But see *Shane Meat Co. v. United States Dept't of Defense*, 800 F.2d 334, 336-38 (3rd Cir. 1986) (overturning trial court's determination that a three-year debarment was arbitrary and capricious); *Novicki v. Cook*, 743 F. Supp. 11 (D. D.C. 1990) (upholding an agency decision to debar a corporation's president based on a finding that the official had "reason to know" of misconduct by other corporate officials); *Mikulec v. Department of the Air Force*, No. 84-2248 (D.D.C. June 27, 1985) (WESTLAW, GESFED library, DCDIST database) (holding that it was not arbitrary and capricious for an agency to suspend a corporation based on the corporate president's arson indictment).

⁹⁹ See, e.g., *Calamari*, *supra* note 6, at 1169-74 (acknowledging the constitutionality of the hearing procedures but recommending that agencies use administrative law judges and more formal hearings); *Coburn*, *supra* note 6 *passim*; Note, *Moving Toward a Better-Defined Standard*, *supra* note 6 *passim* (criticizing procedures for not including standards for agencies to assess "public interest"); *Korton*, *supra* note 6, at 652 (questioning the validity of the lack of pre-suspension hearing opportunities); Note, "Graylisting," *supra* note 6 at 756-66; see also *DeSouza, Regulating Fraud in Military Procurement: A Legal Process Model*, 95 *Yale L.J.* 390, 407 (1985) (recommending presuspension and predebarment hearings to allow courts to "assume a more active role in addressing fraud").

contractor with a constitutionally sufficient opportunity to attempt to clear its name. The following subsections will explore further the issue of how much process is due by first examining one case in detail and then by considering due process challenges in other liberty interest contexts.

1. *A Case Study: Electro-Methods, Inc. v. United States*.¹⁰⁰—The Federal Circuit's decision in *Electro-Methods, Inc. v. United States*¹⁰¹ provides an excellent example of a court applying the *Mathews* balancing test to disallow a due process challenge of a suspension. In *Electro-Methods* the Air Force decided to test the District of Columbia Circuit's dicta set forth in *Horne Brothers* that the adequate evidence required by the FAR to suspend a government contractor is comparable to the probable cause showing necessary to support a search warrant.¹⁰² The Air Force determined to suspend Electro-Methods, Inc. (EMI) and a number of affiliated contractors based on information contained in two affidavits by Federal Bureau of Investigation (FBI) agents.¹⁰³ The affidavits revealed that the FBI suspected EMI of improperly obtaining blueprints and pricing data for jet engine spare parts from a competitor, and then using that information to bid against the competitor in numerous Air Force solicitations for contract offer. The Air Force suspended EMI based on the two FBI affidavits, but not before attorneys for EMI had met with Air Force officials on two occasions and provided numerous documents and affidavits designed to refute the information con-

¹⁰⁰ 728 F.2d 1471 (Fed. Cir. 1984). The author served as Counsel to the Air Force Debarment and Suspension Review Board during the consideration of *Electro-Methods* and assisted attorneys from the Department of Justice during the litigation in the matter.

¹⁰¹ *Id.*

¹⁰² In *Horne Brothers* the D.C. Circuit stated,

The "adequate evidence" showing [needed for suspension] need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to *the probable cause necessary for an arrest, a search warrant, or a preliminary hearing*. This is less than must be shown at trial, but it must be more than uncorroborated suspicion or accusation.

Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972) (emphasis supplied). In *Electro-Methods* Air Force counsel advised the Air Force Debarment and Suspension Review Board that "adequate evidence" for a suspension could be likened to the probable cause showing needed for a search warrant. See *Electro-Methods, Inc. v. United States*, 3 Cl. Ct. 500, 504 (1983), *rev'd in part*, 728 F.2d 1471 (Fed. Cir. 1984) (the trial court opinion in *Electro-Methods* includes a greatly detailed statement of the facts in the matter).

¹⁰³ *Electro-Methods*, 728 F.2d at 1428. These affidavits had formed the bases for two United States district courts to issue search warrants. *Id.*

¹⁰⁴ 728 F.2d at 1473.

tained in the FBI affidavits.¹⁰⁵ Shortly more than one month after the suspension, EMI responded with a voluminous written submission that included additional affidavits refuting the FBI allegations.¹⁰⁶ Included with this response, EMI demanded a hearing within eight days to include, *inter alia*, an opportunity to examine the two FBI agents.¹⁰⁷ Upon not receiving that hearing, EMI filed suit in the Claims Court.¹⁰⁸ Notwithstanding the fact that the Air Force suspension letter to EMI tracked the suspension regulations with respect to the contractor's hearing rights,¹⁰⁹ the Claims Court invalidated the suspension—as well as the suspension regulations—because the suspension notice did not specify a date certain for a hearing.¹¹⁰

An expanded panel of the Federal Circuit unanimously rejected the Claims Court's decision in *Electro-Methods* that the suspension was unconstitutional.¹¹¹ The court relied on *Mathews v. Eldridge* in reasoning that the proper focus in due process challenges should be on the facts of the particular case, not on the validity of general regulations.¹¹² Given that approach, the court did not reach the Claims Court's conclusion that the suspension regulations are defective because

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1474. Two days following the EMI submission, Air Force counsel notified the Department of Justice of the hearing request and alerted EMI that although its submission had raised a factual dispute, the Air Force had sought advice from Justice concerning whether further hearing procedures would jeopardize that agency's criminal investigation. *Id.* Subsequent to EMI's filing suit, Justice advised the Air Force that it "had no objection to a hearing before the [Air Force Debarment and Suspension Review] board concerning material already released by the board, but that examination of the FBI agents or of data obtained by the FBI 'would severely hamper an ongoing criminal investigation.'" *Id.* Of course, the only incriminating information available to the Air Force at that time consisted of the two FBI search warrant affidavits.

¹⁰⁸ *See id.*

¹⁰⁹ The suspension letter informed EMI "that, within 30 days of receipt of the notice, it could submit, whether in person or in writing or through a representative, information and argument in opposition to the suspension." *Id.* at 1473. It also informed EMI that if the information in opposition to the suspension "raised a genuine factual dispute, the Air Force would conduct factfinding, unless the Department of Justice advised that substantial interests of the Government in pending or contemplated legal proceedings would be prejudiced." *Id.* Under current guidelines, this information is required to be included in the suspension notice by FAR 9.407-3(c)(5), (6); 48 C.F.R. §§ 9.407-3(c)(5), (6) (1990) (the requirements are essentially unchanged from those in existence at the time of *Electro-Methods* which were then included in Defense Acquisition Regulation 1-606, 32 C.F.R. § 1-106 (1983)).

¹¹⁰ 728 F.2d at 1474. Of course, the suspension regulations did not require the notice of suspension to identify a date certain for a hearing.

¹¹¹ *Id.* at 1476. Five of the circuit's judges heard the case. Interestingly, the same expanded panel considered *ATL, Inc.*, 736 F.2d at 677.

¹¹² 728 F.2d at 1475 (quoting from *Mathews*, 424 U.S. at 335).

they do not require the fixing of a date certain for a hearing.¹¹³ Nevertheless, the court determined that the Air Force had not violated EMI's due process rights given that the contractor had met on several occasions with Air Force officials, submitted voluminous information to the Air Force regarding the case, and received and rebutted "[e]very bit of evidence which was before the board and suspension official—including, most notably, the two FBI affidavits"¹¹⁴ In balancing the government's interest versus the private interest, the court concluded that due process does not require the added process which EMI desired—that is, the ability to subpoena and question the FBI agents involved in the pending criminal investigation.¹¹⁵

¹¹³ 728 F.2d at 1476 n.11. No subsequent case has followed the holding of the Claims Court on this point, and the federal government has not changed the suspension regulations to require that a suspension notice provide a date certain for a hearing.

¹¹⁴ *Id.* at 1476.

¹¹⁵ *Id.* The Federal Circuit later described EMI's request for these added procedural protections as "an impossible dream." See *ATL, Inc.*, 736 F.2d at 685. Despite the Air Force's success in having the Federal Circuit uphold the suspension in *Electro-Methods*, the matter was far from over. The parties conducted the required fact-finding proceeding before the Air Force Debarment and Suspension Review Board (Board)—without the two FBI agents, of course. Prior to that proceeding, counsel to the Board and the Deputy General Counsel of the Air Force sought additional information from Justice Department officials to counter the affidavits submitted by EMI that had controverted the FBI search warrant affidavits. The Justice Department declined to provide any additional information based, in part, on grand jury secrecy requirements. Thus, at the Air Force fact-finding proceeding the Board had the task of weighing the otherwise unsupported allegations contained in the two FBI search warrant affidavits with numerous sworn denials submitted by the contractor. Based on the evidence that was then available to the Board, the Air Force suspension official decided to lift the suspension. The Air Force subsequently reimposed a suspension against EMI after the company's president was indicted for bribery. (He was convicted of the bribery counts, and later pleaded guilty to an additional mail fraud charge. *Cf.* Stanger v. Department of Justice, No. 87-1407 (D.D.C. Jan. 11, 1989) (WESTLAW, GENFED library, ALLFEDS database)). In addition, the Air Force provided to the Justice Department all of EMI's submissions relating to the suspension, including the affidavits which had denied the allegations in the original FBI search warrant affidavits. Thereafter, Justice prosecuted Richard Horowitz, who had supplied two of the sworn denials on EMI's behalf, for making false statements to the Board in violation of 18 U.S.C. § 1001 (1988). See *United States v. Horowitz*, 806 F.2d 1222, 1224 (4th Cir. 1986) (Horowitz also was convicted). Thus, although in *Electro-Methods* the Air Force aggressively attempted to pursue a preindictment suspension based solely on search warrant affidavits, the agency learned that this action was not without its pitfalls. Certainly, the decision in *Electro-Methods* confirmed the earlier dicta that adequate evidence for purposes of the suspension regulations may be likened to the probable cause showing necessary to obtain a search warrant. Accordingly, search warrant affidavits can support an initial suspension. On the other hand, such evidence, standing alone, can easily be controverted. Without more, an agency might not be able to sustain its suspension action. Accordingly, to avoid having to lift a suspension once it is imposed, agencies should endeavor to obtain or develop additional evidence beyond the "adequate evidence" threshold to better withstand challenges to the actions. *But see Cox, supra* note 6, at 434 (urging agencies to rely on "sensitive criminal investigative information" in preindictment suspension actions but not disclose such information except to a court, *in camera*, if challenged; of course, this presupposes that the

Finally, a mention of the Federal Circuit's decision in *ATL, Inc. v. United States*¹¹⁶ in conjunction with *Electro-Methods* is appropriate given that the same expanded panel of the court decided the two cases roughly contemporaneously and because the court contrasted some of the facts in *ATL* with those in *Electro-Methods*. In *ATL* the court declined to find any constitutional infirmities in the general suspension procedures that the Navy followed, but did determine that the Navy had committed a constitutional error in one narrow aspect of the agency's application of those regulations.¹¹⁷ Although finding the Navy's initial notice of suspension to be constitutionally adequate,¹¹⁸ the court determined that the Navy had erred in not providing certain additional information sought by *ATL*, which the agency possessed.¹¹⁹ In this regard, the Federal Circuit contrasted the Navy's actions with those of the Air Force in *Electro-Methods*, in which the Air Force had provided the suspended contractor with every bit of evidence that had been available to the Air Force at the time of *EMI's* suspension.¹²⁰ Accordingly, the court determined that the Navy had erred in being too secretive regarding the information upon which the suspension was based.¹²¹ Thus, the court's determination was

criminal authorities have even provided the agency with such "sensitive criminal investigative information").

¹¹⁶ 736 F.2d 677 (Fed. Cir. 1984).

¹¹⁷ In *ATL* the Navy held up several contract awards to *ATL, Inc.* (*ATL*), a Hawaiian contractor that had been the low bidder on the procurements. *Id.* at 680. The delay was based on concerns relating to a criminal investigation by the United States attorney in Honolulu. *Id.* Several months later the Navy processed a suspension recommendation and later suspended *ATL*, but not before *ATL* had begun a de facto debarment challenge in the Claims Court. *Id.* The Navy's suspension letter identified nine items of concern and also indicated that because of a request from the United States attorney, the agency only would permit *ATL* to present information and argument in opposition to the suspension and not conduct any factfinding proceeding. *Id.* at 681. *ATL* did make such a presentation, but sought more information from the Navy. *Id.* Subsequent to the presentation, the Navy determined to continue the suspension, but based on only two of the original nine counts. *Id.* *ATL* subsequently raised additional constitutional claims in the Claims Court. *Id.*

¹¹⁸ The court reached this result by employing its "ducks in a row" test. *See id.* at 684; *supra* note 41.

¹¹⁹ 736 F.2d at 685. Apparently, the Claims Court had determined *in camera* that the Navy possessed additional information in its files that could have been provided to the contractor without prejudicing the criminal case. *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* Although the court acknowledged the government's interest in protecting an ongoing criminal investigation, the court reasoned that "this cannot extend to obdurate uncooperativeness where the suspended contractor's interest likewise is great." *Id.* The court stressed that the agency needed to have worked more cooperatively with the criminal authorities to "carve out" a reasonable amount of evidence for release to the contractor. *Id.* In fairness to the Navy, apparently the United States attorney in this matter never expressed much willingness for the Navy to provide any information to the contractor, regardless of whether the information was protected

effectively an inadequate notice decision. By way of contrast, however, the court rejected a number of additional constitutional challenges to the Navy's actions and effectively ratified the Navy's employment of the general suspension procedures.¹²²

2. Analogies to Other *Postdeprivation* Hearings.—The most deeply contentious issue between contractors and federal agencies with respect to debarment and suspension matters centers on the timing of the hearing involved—that is, it comes *after* the issuance of a notice of suspension or proposed debarment.¹²³ Yet, the debarment and suspension process is not the only type of due process setting in which courts have upheld procedures in which hearings follow the governmental deprivation.¹²⁴ Even *Muthews v. Eldridge* involved the Supreme Court upholding a postdeprivation hearing process involving certain disability benefits.¹²⁵ This subsection will explore other recent due process challenges involving protected liberty interests.¹²⁶

under grand jury rules or not.

¹²² For example, the court relied on *Electro-Methods* in rejecting claims that the agency “should have provided ATL ‘an opportunity to confront its accusers and cross-examine witnesses.’” *Id.* at 686. The court reasoned that a “full-blown trial-type hearing is not necessarily the process due a temporarily suspended contractor with a protected liberty interest” pending an ongoing criminal investigation. *Id.* Moreover, the court rejected a determination by the Claims Court that due process prohibits the same person who recommended suspension from conducting a fact-finding or other proceeding with the contractor. *Id.* at 686-87. On this issue the court concluded that the agency's triple-layer review process (involving a field commander, a three-member debarment committee, and a suspension official who was a four-star admiral) afforded the contractor with sufficient process—that is, the decision of a top level administrator. *Id.* at 687.

¹²³ Contractors and their counsel also have never been satisfied with the nature and extent of the hearings afforded either. See, e.g., THE FAR SYSTEM ITS CRITICAL FORMATIVE YEARS 1984-1986, A.B.A. Sec. Pub. Contract Law C-71.3-5 (1988) (Letter from Section Chairman Myers to David Packard (Jan. 24, 1986)) (recommending pretermination hearings and extensive adjudicatory hearings before a centralized debarment/suspension authority) [hereinafter *ABA Recommendation Letter*].

¹²⁴ As Professor Tribe has described,

Exceptions have traditionally been made to the general rule requiring hearings prior to government deprivations only where a prior hearing would have been inconsistent with a “countervailing state interest of overriding significance,” either because of the delays created by the hearing process, or because of the opportunity for evasion presented to the target of government action by the very fact of prior notice.

L. TRIBE, *supra* note 59, at 720-21 (footnotes omitted).

¹²⁵ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹²⁶ Before addressing other liberty interest cases, however, a few remarks regarding one of the more recent commentaries on the government-wide debarment and suspension procedures are in order. In his article, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, see *supra* note 6, Mr. Norton has argued that two recent

As addressed above, in the debarment and suspension process, at most, a protected liberty interest is at stake. Given the Supreme Court's direction in *Muthews v. Eldridge* that courts

Supreme Court decisions— *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), and *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987)—raise questions concerning the continued validity of postsuspension hearings in the debarment and suspension context. See Norton, *supra* note 6, at 652-55. Mr. Norton's reliance on *Loudemill* and *Roadway Express* is misplaced. The facts in *Loudemill* are inapposite to the debarment and suspension arena. The dispute in *Loudemill* involved the hearing rights of two terminated employees; interests in continued employment constitute clearly established property interests—not liberty interests. See 470 U.S. at 538. Somewhat similarly, *Roadway Express* also involved a governmental deprivation of a property interest—that is, a corporation's contractual right to discharge an employee for cause. 481 U.S. at 260. It is true that the Court held in each case that the governmental entity involved was required to provide some pretermination opportunity for the affected parties to respond in addition to the posttermination process already authorized. See *Loudemill*, 470 U.S. at 547-48; *Roadway Express*, 481 U.S. at 264. On the other hand, a suspension or debarment does not infringe on any existing property rights, such as the ongoing employment or pending contractual rights which were at stake, respectively, in *Loudemill* and *Roadway Express*. If a suspension or debarment resulted in the termination of existing contracts, then the analysis from *Loudemill* and *Roadway Express* would seem to be more apt.

In due process cases, courts should weigh the governmental interests against the private interests in light of the specific facts and protected interests at stake in each case. In that regard, the facts and interests involved in one additional Supreme Court decision, which Mr. Norton briefly referred to in his article, appear to be much closer to the types of issues involved in a debarment or suspension than were the interests at stake in either *Loudemill* or *Roadway Express*. See *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988); Norton, *supra* note 6, at 642. Although another property interest case, in *Mallen* the Supreme Court unanimously upheld a Federal Deposit Insurance Corp. suspension of an indicted bank president even though the applicable banking statute did not provide for any presuspension hearing. *Id.* at 248. (The bank officer's interest in continued employment constituted his property interest.) The governing statute, 12 U.S.C. § 1818(g)(3) (1988), required the agency to hold a hearing within 30 days of a request for such a hearing and to decide the case within 60 additional days following any such hearing. 486 U.S. at 242. Although the Court acknowledged "the severity of depriving someone of his or her livelihood," *id.* at 243 (citing *Loudemill* and *Roadway Express*), the Court reasoned that the important governmental interests of protecting the public and maintaining public confidence in the nation's banks justified postponing any hearing until after the deprivation. See *id.* at 243-45. Similar interests are at stake in a debarment or suspension case. With respect to a debarment or suspension, the government must weigh the need to protect the public interest in the expenditure of tax dollars, maintain public confidence concerning contractor integrity, and—in general—protect the public from unscrupulous contractors. Indeed, "failure to do so would be highly irresponsible." See *James A. Merritt and Sons v. Marsh*, 791 F.2d 328, 331 (4th Cir. 1986) (commenting on balancing public and private interests with respect to the suspension of an indicted contractor). Given the similarities of the integrity issues and public interest concerns involved in both *Mallen* and the typical debarment or suspension case, the Court's determination in *Mallen* that a postdeprivation hearing is adequate for due process purposes appears to be readily applicable to a debarment or suspension. Moreover, *Mallen* involved a property interest, and a debarment or suspension implicates, at most, a contractor's liberty interest. *But cf.* *Zinerman v. Burch*, 110 S. Ct. 975, 986 (1990) (rejecting an argument that post-deprivation remedies are never adequate for a deprivation of liberty, as opposed to property, but declining to find a "categorical distinction" between the process due for liberty, as opposed to property, cases). Indeed, the Supreme Court's analysis in *Mallen* serves as a virtual ratification of lower court decisions that have upheld the nature of the hearing process that agencies have afforded to contractors under the government-wide debarment and suspension regulations.

should address due process challenges on a case-by-case basis,¹²⁷ other court actions in which only protected liberty interests have been involved provide useful analogies for considering the process that is due in a debarment or suspension case. For instance, cases involving due process challenges by prisoners provide examples of matters strictly raising liberty interest concerns, with only minimal process being necessary. In *Hewitt v. Helms*,¹²⁸ a prisoner brought suit alleging that prison officials had violated his liberty interests by placing him in "administrative segregation" without prior notice and hearing.¹²⁹ After first determining that a liberty interest was implicated,¹³⁰ the Supreme Court employed a *Mathews* balancing approach to conclude that due process did not require any type of presegregation hearing.¹³¹ Accordingly, despite the presence of a protected liberty interest, the individual interest at stake was insufficient in *Hewitt* to require a predeprivation hearing.¹³²

Academic settings have provided for two additional Supreme Court decisions¹³³ in which the Court has determined

¹²⁷ See *Mathews*, 424 U.S. at 334.

¹²⁸ 459 U.S. 460 (1983).

¹²⁹ *Id.* at 462. Prison officials placed the aggrieved prisoner in administrative segregation (a form of restricted confinement) based on their determination that he was an instigator of a prison riot. *Id.* at 462-64.

¹³⁰ The Court determined that state law created an expectation of liberty in a prisoner remaining a part of the general prison population, as opposed to being ordered to an administrative segregation, through the state's use of mandatory language governing administrative segregation. See *id.* at 470-72.

¹³¹ *Id.* at 472. The Court reasoned that prison officials "were obligated to engage only in an informal, nonadversary review . . . within a reasonable time after confining him [the prisoner] to administrative segregation." *Id.*; see also *Castaneda v. Henman*, 914 F.2d 981 (7th Cir. 1990). In *Castaneda*, the court held that a prison did not have to provide, *inter alia*, an oral hearing to a prisoner who claimed a liberty interest in having his prison records maintained accurately. *Id.* at 985 n.4. Without resolving the question of whether a liberty interest was implicated at all, the court reasoned that the prisoner had sufficient opportunities to pursue other administrative remedies already in place and had received all the process he was due. *Id.* at 985-86.

¹³² Of course, an analogy of prisoner's rights cases to debarment and suspension matters has its limitations. Other than an agency action premised on a conviction, a debarred or suspended contractor is likely not a "prisoner" and retains much more liberty than an individual whom the government has incarcerated. As the Supreme Court observed in *Hewitt*, "In determining what is 'due process' in the prison context, we are reminded that 'one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison.'" 459 U.S. at 472 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 660 (1974)). On the other hand, the prison cases do represent an additional setting in which postdeprivation process is adequate to protect a liberty interest. Additionally, not unlike the administrative segregation in *Hewitt*, a debarment or suspension is intended as an administrative action for protection of the government, not as punishment. See FAR 9.402(b), 48 C.F.R. § 9.402(b) (1990).

¹³³ See *Ingraham v. Wright*, 430 U.S. 651 (1977); Board of Curators of Univ. of Mo.

that only limited process is due. In *Ingraham v. Wright*,¹³⁴ junior high school students alleged a violation of their due process rights after school officials had administered corporal punishment without prior notice or hearing.¹³⁵ The Supreme Court held that even though corporal punishment in the public schools implicated a protected liberty interest, due process did not require prior notice and hearings.¹³⁶ The Court reasoned that traditional common-law tort remedies were sufficient to afford due process.¹³⁷ The Court also indicated that the process to be afforded with respect to the liberty interest at stake in the corporal punishment setting was something less than the process due for a property interest in public education.¹³⁸ Thus, the Court in *Ingraham* had no problem with the lack of a predeprivation hearing in that academic setting.

In another case arising from an academic setting, the Supreme Court, in *Board of Curators of the University of Missouri v. Horowitz*,¹³⁹ determined that due process did not require any pretermination hearing before a medical school dismissed a student for academic reasons.¹⁴⁰ Without deciding whether the student's dismissal deprived her of a liberty or property interest in pursuing a medical career, the Court reasoned that, even in the absence of notice and a predismissal hearing, the school had afforded the former student all the process that was due.¹⁴¹ The Court again distinguished earlier property interest analysis and determined that an academic dismissal called "for far less stringent procedural requirements" than did a disciplinary suspension.¹⁴² Accordingly, the Court concluded that, even assuming the existence of a pro-

v. Horowitz, 434 U.S. 78 (1978).

¹³⁴ 430 U.S. 651 (1977).

¹³⁵ *Id.* at 653.

¹³⁶ *Id.* at 682. The state law required some level of prior consultation between a teacher and the principal or teacher in charge of the school before a teacher could inflict corporal punishment. *Id.* at 655. In practice, however, teachers often paddled students without such consultation. *Id.* at 657. State law did not include any provision for notice and hearing for the student.

¹³⁷ *Id.* at 672. The Court also observed that there is "a de minimis level of imposition with which the Constitution is not concerned." *Id.* at 674.

¹³⁸ See *id.* at 674 n.43. The Court distinguished *Goss v. Lopez*, 419 U.S. 565 (1975), in which the Court had required some type of hearing before a high school suspended students from attending for up to ten days, because *Ingraham* did "not involve the state-created property interest in public education." 430 U.S. at 674 n.43.

¹³⁹ 434 U.S. 78 (1978).

¹⁴⁰ *Id.* at 85. *Horowitz* involved a medical student who was dismissed for academic, not disciplinary, reasons.

¹⁴¹ *Id.* The school had permitted the student "to take a set of oral and practical examinations as an 'appeal' of the decision" to dismiss her. *Id.* at 81.

¹⁴² *Id.* at 86 (distinguishing *Goss v. Lopez*, 419 U.S. 56b (1975)).

tected liberty interest, academic dismissals did not require a predissmissal hearing. Thus, as the cases in this section demonstrate, constitutionally permissible postdeprivation hearings are not unique to the debarment and suspension field, and the Supreme Court has upheld such postdeprivation procedures in an assortment of other settings.¹⁴³

IV. Issues in Transition

Although the federal government has been successful in defending an array of due process challenges to the debarment and suspension regulations, the government has made a habit of periodically amending those rules—generally either to alter the method in which agencies will consider debarment and suspension cases or to expand the scope of the consequences flowing from a debarment or suspension. In this regard, the federal government appears to be striving to “push the outside of the envelope” of the constitutionally permissible range of the effects and breadth of debarments and suspensions.¹⁴⁴

¹⁴³ For additional decisions upholding postdeprivation hearings in the face of due process challenges, see J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 43, at 512-14 (and cases cited therein).

¹⁴⁴ References to the “envelope” are derived from the activities of early test pilots. As Tom Wolfe described,

One of the phrases that kept running through the [pilots'] conversation was “pushing the outside of the envelope.” The “envelope” was a flight-test term referring to the limits of a particular aircraft’s performance, how tight a turn it could make at such-and-such a speed, and so on. “Pushing the outside,” probing the outer limits, of the envelope seemed to be the great challenge and satisfaction of flight test.

T. WOLFE, *THE RIGHT STUFF* 8-9 (Bantam ed. 7th printing Sept. 1983). As an example of such a change, in 1984 then Deputy Secretary of Defense Taft ordered interim changes to the Department of Defense Supplement to the FAR (DFARS) to require generally that contractors be debarred for more than a year in the case of a felony conviction, and that only the Secretary of Defense (or an Under Secretary) could approve a decision to debar for a year or less. See 50 Fed. Reg. 8121-22 (Feb. 28, 1985). In addition, the so-called Taft rules also provided that “any mitigating factors . . . [could] only be considered in determining the period of debarment.” *Id.* at 8122 (amending 48 C.F.R. § 209.406-1(d) (1986)). These changes in the rules provoked much criticism. See Wallick, Dover & Rochlin, *Suspension & Debarment*, in *FRAUD IN GOVERNMENT CONTRACTING* 170 (1985). Subsequent to public comments, in July 1986 the Defense Department amended the Taft rules to lessen their severity somewhat. See 50 Fed. Reg. 28,209 (July 11, 1985). The agency amended these rules to provide that the period for debarments based on felony convictions should “generally be for more than one year,” but that the agency could consider mitigating factors in making the debarment decision. See *id.* (amending 48 C.F.R. § 209.206-1, -4 (1985)). The rules cautioned, however, that “for any decision not to debar or to debar for one year or less, the mitigating factors must demonstrate clearly to the debarbing official’s complete satisfaction that the contractor has eliminated such circumstances [leading to the conviction] and has implemented remedial measures.” *Id.* Despite their departure from the FAR’s guidance on debarment and suspension, the Taft rules remain essentially

As the government continues to expand the reach of its potential debarment and suspension authority, additional questions arise over both the validity and prudence of these changes. This section will explore a few of these changes and the need or desirability for change, if any.¹⁴⁵

A. *Expanding the Scope.*

The federal government has expanded the effects of its debarment and suspension remedies over the last several years. In 1989, the government amended the FAR to require a proposed debarment to have immediate effect throughout the federal government.¹⁴⁶ Thus, under current regulations, a pro-

the same today for Defense Department debarments (although the rules now delineate certain standards for mitigating factors). See DFARS 9.406-1(d), 48 C.F.R. § 209.406-1(d) (1990). But see 56 Fed. Reg. 36,315 (July 31, 1991) (amending DFARS 9.406-1, 48 C.F.R. § 209.406-1, effective Dec. 31, 1991, to reduce the requirements for terminating a debarment based on a felony conviction to the entering of a settlement agreement to include the contractor's agreeing to certain standards of conduct and other appropriate terms).

The Defense Department's previous insistence on a presumptive one-year debarment under the Taft rules appears to be at odds with the FAR's direction that agencies impose debarment only to protect the government "and not for purposes of punishment." FAR 9.402(b), 48 C.F.R. § 9.402(b) (1990). Cf. Wallick, *Dover & Rochlin, supra*, at 172-73. Indeed, some have expressed general doubt about whether agencies actually follow the spirit of the distinction between protection and punishment in practice. See, e.g., Bennett & Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. COST. L.J. 30, 33-34 (1986) (commenting on remarks by former Secretary of Defense Weinberger in a television interview that an indictment of a government contractor requires an "automatic indictment"). In this regard, it was the author of this article's experience that although the majority of officials charged with carrying out debarment and suspension responsibilities within the Department of Defense conscientiously endeavored to adhere to the prevailing regulations, certain high-ranking officials treated debarment and suspension as just another tool for punishing wayward contractors. Although this point of view may have much political appeal, it certainly raises questions about adherence to the prohibition on punishment. On the other hand, proof of an intent to punish in a specific case may be difficult for a contractor to obtain, and the affected contractor—particularly one convicted of a felony—likely will be a relatively unsympathetic plaintiff who still must deflect arguments that the agency decision involved the exercise of discretion. In addition, Congress has declared that any individual convicted of fraud or some other contract-related felony generally is prohibited from being involved in a management or supervisory capacity on defense contracts for at least five years. See 10 U.S.C. § 2408 (1988).

¹⁴⁵ Not all changes to the process have simply expanded the scope of debarment and suspension. For example, the government has added standards for better determining when a contractor constitutes an "affiliate" of another contractor. See 54 Fed. Reg. 19,814 (May 8, 1989) (amending FAR 9.403, 48 C.F.R. § 9.403 (1990)). In addition, the procuring agencies have proposed adding a series of standards for a debarment official to consider before arriving at any debarment decision. See 55 Fed. Reg. 50,152 (Dec. 4, 1990) (proposing amendments to FAR 9.406-1(a), 48 C.F.R. § 9.406-1(a) (1990)). The Defense Department has similar standards already in place. See DFARS 9.406-1(d), 48 C.F.R. § 209.406-1(d) (1990).

¹⁴⁶ See 54 Fed. Reg. 19,814 (May 8, 1989) (codified at FAR 9.405(a), 48 C.F.R. §

posal for debarment has the same government-wide effect as a suspension. Prior to this amendment, a proposed debarment only had the effect of barring a contractor from receiving contracts within the issuing agency pending a final decision in the debarment matter.¹⁴⁷ This change in the regulations corrected an anomaly in the former process. It was incongruous to permit a suspension—which an agency may base merely on an indictment or other adequate evidence of contractor impropriety—to have immediate, government-wide effect, while permitting a proposal for debarment—which an agency must base on a conviction, civil judgment, or some other cause of which a preponderance of evidence of wrongdoing exists—to have effect only within the issuing agency. “This enable[d] a seriously nonresponsible contractor to continue to receive contract awards from other Federal agencies until a debarment decision [wa]s rendered.”¹⁴⁸ From a due process perspective, this expansion in the scope of a proposed debarment’s impact does not entitle contractors to any additional process. Given that the courts have upheld the suspension procedures against constitutional attack, the debarment procedures—even with a proposed debarment now having government-wide effect—must be valid as well.¹⁴⁹

In 1989, in an even more wide-ranging action, the government also took steps to expand the scope of debarments and suspensions to include a prohibition against most subcontracting by either debarred or suspended contractors.¹⁵⁰ Prior rules precluded agencies from consenting to subcontracts with debarred or suspended firms, but these firms otherwise were

9.405(a) (1990)).

¹⁴⁷ See 52 Fed. Reg. 28,642 (July 31, 1987) (proposing amendments to FAR 9.405(a), 48 C.F.R. § 9.405(a) (1990)).

¹⁴⁸ *Id.*

¹⁴⁹ For example, in *Electro-Methods, Inc. v. United States*, 728 F.2d 1471 (Fed. Cir. 1984), the Federal Circuit upheld a preindictment suspension based solely on adequate evidence consisting of two FBI search warrant affidavits. Even though a proposal for debarment now has the same practical effect as a suspension (an immediate, government-wide preclusion from receiving new contract awards), the postdeprivation process is more extensive than for a suspension. First, a debarment requires a higher standard of proof—that is, a conviction, a civil judgment, or a preponderance of evidence. See FAR 9.406-2, 48 C.F.R. 19.406-2 (1990). In addition, unlike the case for a suspension, an agency may not limit a contractor’s hearing rights in a debarment action based on advice from the Justice Department. Compare *id.* §§ 9.406-3(b)(2), (d)(2) with *id.* §§ 9.407-3(b)(2), (d). Thus, if the process afforded for a suspension meets constitutional requirements, then, a *fortiori*, so must the FAR’s process for determining debarments.

¹⁵⁰ See 54 Fed. Reg. 19,815 (May 8, 1989) (codified at FAR 9.405-2, 48 C.F.R. § 9.405-2 (1990)).

permitted to enter into subcontracts.¹⁵¹ As adopted, the regulations now: (1) preclude the government from consenting to subcontracts with a debarred or suspended contractor in the absence of a compelling reason determination by the agency head; and (2) preclude prime contractors from entering into subcontracts of \$25,000 or more with a debarred or suspended contractor unless that prime contractor makes a compelling reason determination and so notifies the agency's contracting officer.¹⁵² This amendment to the FAR is a seemingly unnecessary expansion of the scope of debarments and suspensions. At first blush, some level of facial appeal exists in a rule that does not allow federal contracting dollars to flow to any debarred or suspended contractor, whether the particular debarred contractor is attempting to act as a prime contractor or as a subcontractor. Absent some level of privity between the government and the contractor, however, the barring of further subcontracting appears punitive in nature. Unless the subcontract is one in which the government requires an approval, the business integrity of any subcontractors that contract with the prime contractor should be part of the prime contractor's responsibility—not the responsibility of the procuring agency. Furthermore, although a prime's retention of a debarred or suspended subcontractor may have a bearing on the prime's overall responsibility,¹⁵³ once the government chooses to deal with the prime contractor, why should it be concerned any further about the subcontractor? The procuring agency then has no direct relationship with the subcontractor, and the government does not need the same level of protection that it does in situations in which privity exists between the agency and the contractor. On the other hand, given the ongoing public concerns about procurement fraud, the ban on most subcontracting likely will continue; moreover, it represents another expansion in the scope of a debarment or suspension despite the somewhat punitive nature of these added sanctions.

¹⁵¹ See 52 Fed. Reg. 28,642 (July 31, 1987) (proposing amendments to FAR 9.405-2, 48 C.F.R. § 9.405-2 (1990)).

¹⁵² FAR 9.405-2, 48 C.F.R. § 9.405-2 (1990). Congress has mandated that Defense Department contractors require their subcontractors to notify them at the time of the award of any subcontracts whether they are debarred, suspended, or otherwise ineligible. See 1990 Department of Defense Authorization Act, Pub. L. No. 101-510, § 813, 104 Stat. 1596 (1990).

¹⁵³ See FAR 9.104-4(a), 48 C.F.R. § 9.104-4(a) (1990); *Medical Devices of Fall River, Inc. v. United States*, 19 Cl. Ct. 77, 82-82 (1989) (upholding as reasonable a contracting officer's finding that a contractor, which entered into a subcontract with a debarred contractor for 100% of the contract items, was not a responsible offeror).

B. Should the Investigators Be in Charge?

One potential change to the debarment and suspension process that may impact current procedures significantly is the possibility that agency fraud investigators also will become responsible for pursuing and deciding debarment and suspension matters. The 1992 Department of Defense Appropriations Bill, as passed by the House of Representatives on June 7, 1991,¹⁵⁴ included a provision that no funds "may be used to pay the salaries of debarment/suspension officials [within the Department of Defense] unless such personnel are assigned to a consolidated office of Debarment and Suspension within the Office of the Inspector General."¹⁵⁵ This bill would have the effect of consolidating the activities of the debarment and suspension officials for the various military services and the Defense Logistics Agency into one office located within the Defense Department's Office of the Inspector General (DOD/IG).¹⁵⁶ To date, the Air Force, Army, Navy, and Defense Logistics Agency have maintained their own debarment and suspension authorities, as well as their own internal procedures. The House Appropriations Committee apparently believes that it is "wrong" for each of these agencies to "have its own officials who can decide to debar or suspend a company from doing business with the entire federal government based on a Service unique problem with that company."¹⁵⁷ The committee has indicated that its concerns with a lack of centralization arose "when a company was suspended from contract competition when it should have been placed on probation for six months while internal company problems were analyzed."¹⁵⁸ Accordingly, the House added \$1,000,000 to the DOD/IG's budget to permit it to assume all of the agency's debarment and suspension functions as a way to "remove any perceived

¹⁵⁴ H.R. 2521, 102nd Cong., 1st Sess., 137 CONG. REC. H4175 (1991) [hereinafter H.R. 2521].

¹⁵⁵ H.R. 2521, 137 CONG. REC. at § 8110.

¹⁵⁶ See *House Passes DOD Funding Bill, Provides for Centralizing Debarment/Suspension Under IG*, 55 FED. COST. REP. (BNA) 823 (June 10, 1991). As of the date of the final editing of this article, the 1992 DOD Appropriations Bill has not been enacted into law. Even if the language from H.R. 2521 merging the debarment function into the DOD/IG's office is not finally enacted, the specter of the matter resurfacing at a later date is sufficient to merit attention to the proposal.

¹⁵⁷ H.R. Rep. No. 95, 102nd Cong., 1st Sess. 238 (1991) [hereinafter H.R. Rep. No. 95]. It is worth analyzing the debarment and suspension process within the Defense Department in detail given that the agency has traditionally accounted for most of the federal government's debarment and suspension actions against contractors. See GAO BRIEFING REPORT, *supra* note 1, at 2.

¹⁵⁸ H.R. Rep. No. 95, *supra* note 157. The committee also asserted that "to suspend companies that do not even have a suspicion of government wrongdoing is undue punishment." *Id.*

inconsistencies in the implementation of this [debarment and suspension] process."¹⁵⁹

1. *The New Legislative Initiative Is Unwise.*—The changes adopted by the House of Representatives to consolidate the debarment and suspension authorities within the Department of Defense into the DOD/IG's office, if finally enacted into law, are ill-conceived. Certainly, these changes are not required constitutionally. As described above,¹⁶⁰ due process considerations pursuant to *Mathews v. Eldridge* require an examination of the facts specifically involved in each case, and "are not to be based on the validity of general regulations"¹⁶¹ Accordingly, even if the internal debarment and suspension procedures within the various components of the Department of Defense differ, this lack of uniformity does not suggest that any of the components' procedures are unconstitutional—provided that the various components are affording due process to contractors on a case-by-case basis in individual debarment and suspension proceedings.¹⁶² Thus, uniformity is not compelled by due process considerations.

In addition to the lack of any constitutional requirement that the debarment and suspension activities within the various components of the Defense Department be consolidated, a congressional decision to house these activities within the

¹⁵⁹ *Id.* The committee also directed that "the new office should ensure that decisions are made in a timely fashion by a committee of experts" and that a "probation policy should be used instead of suspension for those companies where there is no suspicion of government wrongdoing." *Id.*

¹⁶⁰ See *supra* notes 42-47 and accompanying text.

¹⁶¹ *Mathews*, 424 U.S. at 335.

¹⁶² Moreover, the debarment and suspension procedures do not differ that greatly between the various components of the Department of Defense. All of these components must, of course, follow the debarment and suspension procedures set forth in both the FAR and the DFARS. They do differ, however, in the nature of the expertise of the persons who are responsible for the ultimate debarment and suspension decisions for the components. For example, the Army has designated the Assistant Judge Advocate General for Military Law—an attorney—as its debarment and suspension official, while the Air Force has designated the Deputy Assistant Secretary for Acquisition Management and Policy—a procurement specialist—as its debarment and suspension official. See DFARS 9.470, 48 C.F.R. 209.470 (1990). In addition, the Army debarment and suspension official presides directly over many of its debarment and suspension proceedings, while the Air Force requires these proceedings to be conducted before the Air Force Debarment and Suspension Review Board, which then makes recommendations to the Air Force debarment/suspension official. Compare Army FAR Supp. 9.493, Gov't Cont. Rep. (CCH) ¶ 41,404.93, with Air Force FAR Supp. 9.402(c)(1), Gov't Cont. Rep. (CCH) ¶ 38,500. (The Air Force, however, has been contemplating changing its debarment and suspension official from a high-ranking procurement expert to an attorney with procurement expertise. Telephone interview with John Janacek, Assistant General Counsel to the Secretary of the Air Force (June 6, 1991)).

DOD/IG is both curious and problematic. As part of its stated basis for consolidating the agency's debarment and suspension authorities into the DOD/IG, the House Appropriations Committee expressed a concern that one of the components within the Defense Department had suspended a particular company from contracting with the federal government when, in the opinion of the committee, the company should not have been suspended.¹⁶³ Thus, the committee apparently was troubled that at least one Defense agency had been too aggressive in imposing the suspension remedy. If overzealous application of the debarment and suspension remedies is a chief concern of the committee, however, then it seems ironic that the committee would recommend consolidating the agency's debarment and suspension functions into the DOD/IG. The DOD/IG long has maintained an aggressive attitude toward the liberal imposition of debarment and suspension against government contractors. Indeed, that office has been overtly critical of components within the Defense Department for not pursuing the extensive use of debarment and suspension sanctions energetically, including preindictment suspensions of contractors under criminal investigations.¹⁶⁴ Thus, not unlike asking the fox to guard the chickens, it is intriguing that the committee would choose to permit the DOD/IG to take charge of the debarment and suspension process within the Defense Department—particularly if the committee's genuine concern is that certain components within the agency have been too aggressive in carrying out their debarment and suspension responsibilities.¹⁶⁵

¹⁶³ See *supra* note 158 and accompanying text.

¹⁶⁴ See OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, REPORT ON SUSPENSION AND DEBARMENT ACTIVITY WITHIN THE AIR FORCE 11-13 (April 29, 1988) [hereinafter 1988 DOD/IG REPORT]; OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, REVIEW OF SUSPENSION AND DEBARMENT ACTIVITIES WITHIN THE DEPARTMENT OF DEFENSE 45, 49-50, 74-75 (May 1984) [hereinafter 1984 DOD/IG REPORT].

¹⁶⁵ Additionally, the debarment and suspension of government contractors is just one small part of the federal procurement process—but it is a part of a *procurement* process. The vast majority of decisions that are made within that process are made on behalf of the government by procurement officials, not investigators. Indeed, the FAR invests the contracting officer with a broad range of power and obligations. With respect to contractor integrity, this procurement expert, the contracting officer, makes decisions concerning whether the contractor has the necessary "responsibility" to be awarded a government contract. See FAR subpt. 9.1, 48 C.F.R. subpt. 9.1 (1990). Correspondingly, in a general sense the decision to debar or suspend a government contractor is simply a global determination of that contractor's responsibility to be awarded any future contracts at all—again, a procurement decision. Thus, the use of investigators, not procurement experts, to take charge of that responsibility is nonsensical. As the General Accounting Office observed in its 1987 report, "Under the FAR, procuring officials . . . have sufficient flexibility . . . to make decisions regarding the type and duration of action based on the unique circumstance that may be present in each case." See GAO BRIEFING REPORT, *supra* note 1, at 10 (emphasis

An additional oddity in the House's decision to consolidate the debarment and suspension authorities within the Defense Department into the DOD/IG relates to the House Appropriations Committee's stated desire to "remove any perceived inconsistencies in the implementation" of the debarment and suspension process.¹⁶⁶ This stated goal of uniformity apparently also relates to the committee's concern that in certain cases, the contractor receives too harsh a treatment from the applicable debarment and suspension authority within the Defense Department. Again, the choice of the DOD/IG provides an ironic cure for this perceived shortcoming. The DOD/IG long has favored having all of the Defense Department's debarment and suspension authorities follow uniform hearing procedures,¹⁶⁷ but not out of any sympathy for contractors who might have been suspended wrongfully or debarred by an overzealous debarment and suspension activity within the agency. Instead, the DOD/IG has been concerned that if any one of the components within the agency provides more process than do others, then actions taken by a component providing less process would be subject to constitutional attack.¹⁶⁸ Accordingly, the DOD/IG has desired uniformity, but at a minimal level of process, thereby facilitating the aggressive imposition of debarment or suspension against contractors.¹⁶⁹

added).

¹⁶⁶ H.R. Rep. No. 95, *supra* note 157, at 238

¹⁶⁷ See 1984 DOD/IG REPORT, *supra* note 164, at 86-87. The American Bar Association's Section of Public Contract Law also has long-favored the creation of a centralized debarment and suspension authority within the DOD. See *ABA Recommendation Letter*, *supra* note 123, at C-71.3 (Recommendation No. 2). The section's recommendation included no discussion, however, concerning housing this centralized authority within the DOD/IG. Moreover, the section further recommended that the centralized authority consist of three administrative law judges. See *id.* at C-71.3-4 (Recommendation No. 4). It is highly unlikely that the DOD/IG will be accommodating in that respect; that is, in providing *more* process to contractors.

¹⁶⁸ See 1984 DOD/IG REPORT, *supra* note 164, at 86-87. The General Accounting Office echoed these concerns in its 1987 report concerning debarment and suspension. See GAO BRIEFING REPORT, *supra* note 1, at 44. The legal authority for this view is somewhat mysterious given the constitutional analysis that the courts have applied to due process challenges of debarment and suspension actions.

¹⁶⁹ As an example of the type of limited process envisioned by the DOD/IG, that office has urged the Air Force to implement procedures to deny or limit hearings in preindictment suspension cases pending the resolution of criminal proceedings by coordinating with the Department of Justice. See 1988 DOD/IG REPORT, *supra* note 164, at 12-13. Although FAR 9.407-3(c)(6)(ii), 48 C.F.R. § 9.407-3(c)(6)(ii) (1990), permits an agency to deny factfinding proceedings in particular suspension cases, when based on Department of Justice advice that related, pending criminal matters would be prejudiced, these ad hoc determinations fall far short of the DOD/IG's apparent suggestion that the government develop blanket procedures to limit hearing rights in all preindictment suspensions.

2. Do Limits Exist Under the APA?—Housing a federal agency's debarment and suspension official within the office of that agency's inspector general also raises significant legal concerns. It is troubling that the same office which has authority to investigate fraud could also recommend and impose debarments or suspensions against the targets of its investigations, and then preside at hearings in which the targeted contractors present information in opposition to the agency actions. This combination of functions could raise both statutory and constitutional concerns.

With respect to statutory concerns, section 554(d) of the Administrative Procedure Act¹⁷⁰ generally prohibits an agency official who has engaged in either the investigation or the prosecution of a matter from participating in the agency's decision or recommended decision in that matter.¹⁷¹ Section 554(a) of the APA, however, states that the provisions of section 554 apply only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing."¹⁷² Thus, the various provisions of section 554 of the APA generally apply only to certain formal adjudications in which a statute has triggered an "on the record" proceeding. The debarment and suspension regulations are not the subject of any separate statutory scheme, but are part of the federal government's general statutory power to contract.¹⁷³ Thus, no statute specifically triggers the formal hearing procedures of the APA. On the other hand, the Supreme Court previously has indicated that the absence of the "on the record" triggering language will not necessarily preclude the application of the APA if due process mandates a formal adjudicatory hearing.¹⁷⁴

¹⁷⁰ 5 U.S.C. §§ 561-59, 701-06 (1988) [hereinafter **APA**].

¹⁷¹ *Id.* § 554(d).

¹⁷² *Id.* § 554(a). Several circuit courts have held that the formal hearing procedures set forth in the **APA** are triggered pursuant to section 554(a) only when: (1) the agency's enabling legislation plainly states that any agency hearings are to be conducted "on the record"; or (2) in the absence of those magic words, Congress clearly indicates its intent to trigger the formal hearing aspects of the **APA** in the legislative history of the enabling statute. *See, e.g.,* Railroad Comm'n of Tex. v. United States, 765 F.2d 221, 227-28 (D.C. Cir. 1985); *City of West Chicago v. United States Nuclear Reg. Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983); *Buttrey v. United States*, 690 F.2d 1170, 1174-76 (5th Cir. 1982). *But cf. Seacoast Anti-Pollution League v. Costle*, 672 F.2d 872, 876-77 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (holding that a statutory requirement of a "hearing" is presumed to mean an "on the record" hearing).

¹⁷³ *See supra* note 26 and accompanying text.

¹⁷⁴ *See* *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1949). In *Wong Yung Sung*, Immigration Service regulations provided that members of the agency's investigative branch were to conduct the agency's deportation hearings. *See id.* at 45. In addition, the regulations required the hearing officer who presided over the case to "conduct

Two circuits recently have had the opportunity to consider the applicability of the APA's formal hearing requirements to the debarment and suspension process. In *Leitman v. McAusland*,¹⁷⁵ an individual and a corporate contractor challenged their three-year debarments from purchasing surplus and foreign excess personal property from the federal government.¹⁷⁶ As one of their grounds for challenging the Defense Logistics Agency's (DLA) debarment decision, the contractors asserted that a DLA official had violated the strictures of section 554(d) of the APA "by acting as both prosecutor and debarment official at the hearing."¹⁷⁷ The agency official, who is a legal counsel for the agency, had served as a hearing officer at the debarment proceedings involving the complaining contractors, and ultimately issued a notice of debarment after the close of the proceedings.¹⁷⁸ The contractors urged that this agency official improperly had taken over the role of prosecuting officer at the hearing by questioning the witnesses.¹⁷⁹ The court recognized that the parties had raised a "thorny issue" regarding whether the formal adjudicative procedures set forth in the APA apply to debarment proceedings, but avoided deciding the question.¹⁸⁰ Instead, the court simply assumed, without deciding, that the APA's provisions for formal adjudication applied to the case and that the prohibitions on combining prosecutorial and decision-making functions had not been violated in the case.¹⁸¹ The court quite properly reasoned that

the interrogation" of both the person to be deported and his witnesses. *Id.* at 46. Thus, the decisionmaker in the case also served as an investigator for the agency and as a prosecutor during the proceedings. No statute required the agency to provide any kind of hearing, but one was required by due process. With respect to the type of hearing required, the Supreme Court held that the APA provisions applied. Specifically, the Court determined that notwithstanding the lack of any statutory language triggering the formal adjudicative aspects of the APA, the words "required by statute" set forth in section 554(a) of the APA were intended to cover hearings required by either statute or constitutional due process. *See id.* at 50; *see also* A. BONFIELD & M. ASIMOV, STATE AND FEDERAL ADMINISTRATIVE LAW 114 (1989) (discussing the Court's holding in *Wong Yang Sung*, but questioning whether *Wong Yang Sung* is consistent with the more recent "variable" due process decisions such as *Mathews v. Eldridge*).

¹⁷⁵ 934 F.2d 46 (4th Cir. 1991).

¹⁷⁶ *See id.* at 47-48.

¹⁷⁷ *Id.* at 49. The contractors also urged, *inter alia*, that the agency official presiding at the debarment hearing had initiated improper ex parte contacts. *See id.* The court rejected this latter claim. *Id.* at 50.

¹⁷⁸ *Id.* at 48-49.

¹⁷⁹ *See id.* at 49. A different individual represented the agency at the hearing and served as the prosecuting official. *Id.*

¹⁸⁰ *See id.* The court observed that no statute requires debarment proceedings to be "on the record" for purposes of section 554(a) of the APA, but that "a judicial gloss has found that these provisions [of the APA] apply to certain hearings required by the Constitution, rather than a statute." *Id.* (citing *Wong Yang Sung*, 339 U.S. at 33).

¹⁸¹ *See id.*

merely because the official conducting the hearing asked questions of some of the witnesses, he had not placed himself in the position of prosecutor of the matter.¹⁸² Thus, even if the challengers had established a constitutional basis for applying the hearing procedures of the APA to these particular debarment proceedings, the complainants could not prove any violation.

Unlike the Fourth Circuit's skirting of the issue in *Leitman*, the Ninth Circuit recently confronted an issue concerning whether any of the agency adjudication procedures mandated by section 664 of the APA apply to the debarment and suspension process. Although not faced with an issue involving an agency official improperly exercising multiple functions, in *Girard v. Klopfenstein*¹⁸³ the Ninth Circuit considered a challenge that raised another aspect of the formal adjudication of administrative disputes as triggered by section 554 of the APA. In *Klopfenstein* two debarred contractors challenged an agency debarment action by urging that the debarment procedures are invalid because they do not require an administrative law judge to preside over the debarment proceedings.¹⁸⁴ The court initially observed that the APA did not apply to the case "because a debarment hearing is not required by a statute."¹⁸⁵ The court reasoned that because no statute exists to authorize a person who is the subject of a debarment proceeding to receive an evidentiary hearing, no enabling legislation requires an "on the record" proceeding for purposes of 554(a) of the APA.¹⁸⁶ Accordingly, the court concluded that the express terms of the APA do not apply in a debarment proceeding to require the presence of an administrative law judge.¹⁸⁷

¹⁸² See *id.* The court analogized the agency official's questions to those that are generally permitted for a trial judge and observed that most of the questions were related to attempts to either clarify matters or to move the proceedings along. *Id.*

¹⁸³ 930 F.2d 738 (9th Cir.), *cert. denied*, 60 U.S.L.W. 3046 (Oct. 7, 1991). In *Klopfenstein* the Agricultural Stabilization and Conservation Service debarred two contractors for selling certain cheese to the agency which happened to be ineligible cheese for that particular government cheese-buying program. See *id.* at 739.

¹⁸⁴ See *id.* If an enabling statute has required the matter to be resolved "on the record," thereby triggering a formal adjudication pursuant to section 554(a) of the APA, then one of the elements of that formal adjudicative proceeding includes the opportunity for a hearing before an administrative law judge. See 5 U.S.C. §§ 554(c)(2), 556, 557 (1988).

¹⁸⁵ 930 F.2d at 741.

¹⁸⁶ See *id.* The court relied on *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), for the proposition that debarment is not a creature of statute, but part of the inherent authority of contracting agencies. See 930 F.2d at 741.

¹⁸⁷ See 930 F.2d at 742.

As an alternative argument in *Klopfenstein*, the debarred contractors urged that the debarment regulations are facially unconstitutional because they do not "guarantee that an individual subject to debarment will receive a fair hearing before an impartial decision maker."¹⁸⁸ The debarred contractors contended that the Supreme Court's holding in *Wong Yang Sung* compels the conclusion that agency debarment proceedings must be conducted by an administrative law judge.¹⁸⁹ The court in *Klopfenstein* determined that *Wong Yang Sung* was inapplicable to the debarment proceedings in question. The court reasoned that *Wong Yung Sung* was distinguishable because the hearing in that case had been conducted in a way that denied due process.¹⁹⁰ Unlike the situation in *Wong Yang Sung*, in which the regulations at issue had required the hearing officer to undertake investigative, prosecutorial, and adjudicative duties in deportation proceedings, the *Klopfenstein* court observed that under the agency's debarment regulations, "the debarring officer is not a member of the investigative branch of the agency. Furthermore, the regulations, on their face, do not merge the functions of prosecutor and decision-maker."¹⁹¹ Moreover, the court determined that the debarment regulations "comport with the fundamental fairness requirements of due process" per the *Mathews v. Eldridge* balancing test, and that "the rationale of *Wong Yung Sung* has no application to the . . . [agency's]debarment regulations."¹⁹²

Although the *Klopfenstein* court determined that the *Wong Yang Sung* decision does not require an agency to provide an APA-style administrative law judge to preside over debarment hearings under the current debarment regulations, that holding was premised on the court's determination that the debarring officer's functions currently are separate from those of both the agency's investigators and prosecutors. If the Defense Department consolidates its various debarment func-

¹⁸⁸ *Id.* They asserted that the regulations did not provide sufficient procedural safeguards "to protect [their]property and liberty interests against unwarranted infringement." *Id.*

¹⁸⁹ *See id.* at 743. Recall that in *Wong Yung Sung* the Supreme Court held that due process interests can trigger the formal adjudicatory provisions of the APA even in the absence of a statute requiring the proceedings to be held "on the record." *Wong Yang Sung*, 339 U.S. at 50; *see supra* note 174.

¹⁹⁰ 930 F.2d at 743.

¹⁹¹ *Id.* The debarment regulations in question are those set forth in subpt. 9.4 of the FAR, 48 C.F.R. § 9.4 (1990).

¹⁹² 930 F.2d at 743. The court reasoned that fundamental fairness "guarantees a fair hearing before an impartial trier of fact to persons facing . . . debarment proceedings." *Id.* Of course, the court determined that such impartial party need not be an administrative law judge as contemplated by the APA

tions into the DOD/IG, then a merging of investigative, prosecutorial, and decision-making functions within the same office could occur.¹⁹³ An administrative structure requiring debarment and suspension actions to be prosecuted and decided by the office that is also in charge of investigating fraud for the Defense Department is far closer to the scheme that the Supreme Court found defective in *Wong Yung Sung* than the current debarment process. Accordingly, a congressional decision to require a merging of agency investigators and debarment officials may trigger additional arguments under *Wong Yung Sung* that certain aspects of the formal adjudicative requirements of the APA apply to debarment and suspension proceedings.

3. Do Constitutional Limits Exist?—One step further removed from whether either a statute or due process might trigger formal APA hearing requirements, is the question of whether persons affected by adverse agency determinations may invoke general due process principles—irrespective of the APA—to invalidate agency actions rendered by decision-makers who also had investigatory or prosecutorial responsibilities. Even if the formal processes of the APA are not implicated, constitutional constraints still may prevent the combining of investigative, prosecutorial, and adjudicatory functions in informal agency adjudications. In the leading case of *Withrow v. Larkin*,¹⁹⁴ the Supreme Court examined the constitutional validity of a combination of investigative and adjudicative functions. Because *Withrow* involved a challenge to a state proceeding, the APA's hearing procedures did not apply, and the arguments focused on whether the general protections of due process of law placed limits on the various roles of the adjudicator in those proceedings. Although the *Withrow* Court broadly determined that agency members who participate in an investigation are not disqualified from later acting as adjudicators,¹⁹⁵ the case did not involve a combina-

¹⁹³ Presumably, the scheme envisioned by the House of Representatives would require the DOD/IG to be involved in investigating fraud matters, recommending debarment and suspension actions, prosecuting the debarment and suspension actions before the debarment and suspension official, and providing that debarment and suspension official.

¹⁹⁴ 421 U.S. 35 (1975). In *Withrow* a state medical examining board conducted an initial investigatory hearing of a physician suspected of various improprieties, and then notified the doctor that it would hold a contested hearing to determine whether to suspend his license to practice. See *id.* at 40-41. The physician then sought to restrain the board from conducting the hearing. *Id.* at 41.

¹⁹⁵ *Id.* at 52. As part of its reasoning the Court observed that "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias . . . must overcome a presumption of honesty and

tion of functions at a level below that of the head of the agency.¹⁹⁶ Moreover, *Withrow* involved a combination of investigative and adjudicative roles—not a mixing of investigatory and prosecutorial roles with that of the adjudicator. Indeed, the Court in *Withrow* cited with approval certain lower court decisions which have held that the combination of an advocacy or prosecutorial role with that of the decision-maker in an agency proceeding raises due process concerns. Accordingly, combining investigatory, prosecutorial, and decision-making functions in the debarment and suspension arena could raise due process concerns.

Based on the foregoing, if the debarment authority for the Defense Department—or any other agency—ultimately is combined into the office of the agency's inspector general, that action may well generate litigation challenging the combination of functions in the decision-maker for the agency on either statutory or constitutional grounds. On the other hand, any new agency debarment and suspension authority that is established in this manner could structure its operations in a way that limits the potential for these attacks. For example, even if the DOD/IG were to maintain independent responsibility for defense fraud matters,¹⁹⁸ as well as assume responsibility for both prosecuting and deciding debarment and suspension cases for the agency, the office could organize its new debarment and suspension authority in a manner that avoids impropriety. Accordingly, it would be prudent for the

integrity in those serving as adjudicators” *Id.* at 47.

¹⁹⁶ Professor Asimow has suggested that part of the undergirding for the *Withrow* analysis was that the matter in question involved a combination of functions at the agency-head level. See Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 783 (1981). A combination of functions at a lower level within the agency should not merit as much deference given that the agency could generally find other employees from within the agency to handle the multiple functions. See *id.* at 784-85.

¹⁹⁷ See 421 U.S. at 50, n.16 and the cases cited therein. For a more recent example, see *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986) (finding a denial of due process when an associate to the prosecutor of an administrative case became the legal advisor to a new judicial officer who was charged with deciding the case; the case also involved the replacement of a judicial officer who had ruled against the agency's wishes with a different official who became the decisional authority on reconsideration of the matter); see also Asimow, *supra* note 196, at 783 (observing that despite the sweeping language in *Withrow*, the Supreme Court has “left no doubt that a particular mixing of functions might deny due process”).

¹⁹⁸ It will no doubt continue to do so. The DOD/IG has certain statutory duties to conduct investigations as provided by the Inspector General Act of 1978. See 5 U.S.C. app. 2, §§ 1-12 (1988 & Supp. I 1989). In particular, that act requires the DOD/IG to “be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud” and to “investigate fraud” within the agency. *Id.* §§ 8(c)(1), (4)

office to undertake measures to compartmentalize its operations to separate the person or persons responsible for making debarment and suspension decisions from the individuals who: (1) will investigate agency fraud matters regularly; and (2) will argue debarment and suspension recommendations to the office's adjudicators.¹⁹⁹ This internal separation of functions no doubt would limit contractors' abilities to succeed in challenging the debarment decisions of the new decision-makers on grounds of improper combinations of functions, and should serve to limit somewhat the appearance of impropriety. Whether the new debarment and suspension authority pursues that course or not, this year's congressional activity could generate a great deal of litigation and certainly will alter the government-wide debarment and suspension process as it enters its second decade.

V. Conclusion

One decade after the origins of the government-wide debarment and suspension regulations, it is well-established that agency actions which adhere to those procedures should satisfy constitutional due process requirements.²⁰⁰ Indeed, the Supreme Court's 1991 decision in *Siegert v. Gilley*²⁰¹ has raised additional questions concerning whether a debarment or suspension even implicates any protected due process interests. Accordingly, the government may have even more power to pursue debarment and suspension remedies than in the past.²⁰² On the other hand, if the government continues to alter the process—either to expand the effects of a debarment or suspension or to afford even less process than has been available in the past—contractors no doubt will continue battling to

¹⁹⁹ By way of example, in *Withrow* the Supreme Court noted with approval that the state board under attack in that case "had organized itself internally to minimize the risks arising from combining investigation and adjudication" 421 U.S. at 64, n.20.

²⁰⁰ As one court has pithily observed, "A small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away" provided that the government affords adequate process. *ATL, Inc.*, 736 F.2d at 684 n.31. The court made this comment in connection with its analysis that a suspension involves a liberty interest—not a life or property interest—and that, in theory, a suspended contractor is still free to pursue nongovernment work.

²⁰¹ 111 S. Ct. 1789 (1991); see *supra* notes 73-96 and accompanying text.

²⁰² Of course, the government still would be precluded from ignoring its own rules or otherwise acting in an arbitrary and capricious manner. See *supra* note 98 and cases cited therein.

avoid wide-scale imposition of these administrative sanctions. It is highly unlikely, however, that the government will back away from aggressively pursuing both fraud and perceived fraud,²⁰³ and the government-wide debarment and suspension regulations should remain a part of the landscape of government procurement practice well into their second decade.

²⁰³ As one commentator observed, "[C]ontractors must come to grips with the fact that the hardline attitude taken toward prosecuting and punishing government contract fraud in recent years is here to stay." Note, *Government Contract Fraud*, 26 AM. J. CRIM. L. 875, 897 (1989). Although debarment and suspension are intended as "protection" of the government and not as "punishment," debarred and suspended contractors do not revel in these distinctions.

MULTIPLICITY IN THE MILITARY

MAJOR THOMAS HERRINGTON*

I. Introduction

In federal practice, the double jeopardy protection against multiple punishment for the same offense has been described as “one of the least understood” and “most frequently litigated” issues.¹ In military practice, the protection operates under the *nom-de-guerre* “multiplicity.” Even so, multiplicity has assumed an identity unique and independent from federal practice. Although federal multiplicity practice has had its detractors, military multiplicity practice has been described as a “mess” and a “minefield.”² The United States Court of Military Appeals has itself admitted that its concept of multiplicity is “confusing.”³ The court’s kinder critics have deemed military multiplicity practice “problematic.”⁴ Others have not been gentle with their criticisms.⁵ An overview of the decisions and analyses by the Court of Military Appeals calls to mind an observation Chief Judge Cuthbert W. Pound made of the New York Court of Appeals: “No two cases are exactly alike. A young attorney once found two opinions in the New York Reports where the facts seemed identical although the

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¹ *Whalen v. United States*, 445 U.S. 684, 699-706 (1980) (Rehnquist, J., dissenting).

² *United States v. Zupancic*, 18 M.J. 387, 392 (C.M.A. 1984) (Cook, J., concurring in part, dissenting in part) (a “minefield”); *United States v. Baker*, 14 M.J. at 372 (Cook, J., dissenting) (a “mess”).

³ *United States v. Doss*, 15 M.J. 409, 410 (C.M.A. 1983).

⁴ *United States v. Hickson*, 22 M.J. 387, 392 (C.M.A. 1984) (Cox, J., concurring in the result).

⁵ The United States Air Force Court of Military Review has derided the military multiplicity rules. In *United States v. Barnard*, Judge James described military multiplicity practice as a “[descent] into that inner circle of the Inferno where the damned endlessly debate multiplicity for sentencing.” *United States v. Barnard*, 32 M.J. 630, 537 (A.F.C.M.R. 1990). In *United States v. Meace*, Judge Mitchell described litigation on the issue as “prolix and futile,” a “[constant] search for the perfect smoke, the savor of which can only be imagined and never experienced.” *United States v. Meace*, 20 M.J. 972, 972-73 (A.F.C.M.R. 1985).

law was in conflict, but an older and more experienced attorney pointed out to him that the names of the parties were different."⁶

II. "Multiplicity" in Federal Practice

The United States Court of Military Appeals has identified three forms of objectionable multiplicity: (1) multiplicity in charging; (2) multiplicity in findings; and, (3) multiplicity in sentencing.⁷ In federal practice, the word "multiplicity," when used as a term of art,⁸ refers to the practice of charging the same offense in more than one count.⁹ Although the military concepts of multiplicity for findings and multiplicity for sentencing do not exist as such in federal practice, federal courts apply parallel but nevertheless distinct principles. To understand the federal multiplicity rules,¹⁰ one must first understand the underlying constitutional principles and the system of criminal justice that American legislatures have developed from these principles.

A. *The Constitutional and Legislative Bases for Federal Multiplicity.*

Two principles of constitutional law define the federal rules of multiplicity. The first is the constitutional doctrine of separation of powers. The second is the Double Jeopardy Clause of

⁶ 5 N.Y. State Bar Bull. 267 (1933), reprinted in R. LeFlar, *Appellate Judicial Opinion* 140-141 (1974).

⁷ See generally *United States v. Baker*, 14 M.J. 361, 364-70 (C.M.A. 1983). Compare *United States v. Baker*, 14 M.J. at 364-67 (multiplicity in charging), with *United States v. Baker*, 14 M.J. at 367-68 (multiplicity in findings), and *United States v. Baker*, 14 M.J. at 369-70 (multiplicity in sentencing).

⁸ Federal courts also use the word multiplicity in its generic sense. See, e.g., *Hoffman-La Roche, Inc. v. Sperling*, 110 S. Ct. 482, 487 (1989) ("a multiplicity of duplicative suits"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2895 (1989) ("a multiplicity of [factual] predicates"); *Owens v. Okure*, 488 U.S. 235, 245 (1989) ("a multiplicity of state intentional tort statutes of limitations"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("a multiplicity of religious sects"); *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983) ("a multiplicity of conflicting results among the courts of the 50 states").

In its generic sense, the word means "the quality or state of being multiple, manifold, or various." *Webster's Third New International Dictionary* 1486 (15th ed. 1969).

⁹ *Sanabria v. United States*, 437 U.S. 54, 66 n.20 (1978) (citing Fed. R. Crim. P. 7(c)(1), and Advisory Committee's Notes on Fed. R. Crim. P. 7, 18 U.S.C. App., 1413 (1976)).

"Although the federal courts do not refer to these rules with the term "multiplicity," this article will make reference to the "federal rule of multiplicity for findings" and the "federal rule of multiplicity for sentencing."

the Fifth Amendment, which states that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb."

1. The Doctrine of Separation of Powers.—The framers of the United States Constitution vested executive, legislative, and judicial powers in three, coordinate branches of government.¹¹ Although the Constitution does not hermetically seal judicial, executive, and legislative powers within each respective branch of this tripartite system,¹² the Supreme Court is nevertheless vigilant in guarding against any encroachment of power that might endanger "the integrity and maintenance of the system of government ordained by the Constitution."¹³ With respect to the power to enact law, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."¹⁴

For purposes of federal multiplicity, one concept defines the interrelationship of the legislative, executive, and judicial branches: "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the *Congress*."¹⁵ The powers of the executive and judicial branches may be stated as corollaries of this principle.

The executive power to prosecute derives solely from legislative enactments because "[i]t is the Congress, and not the prosecution, which establishes and defines offenses."¹⁶ Accordingly, the executive branch exercises its congressionally-created authority to prosecute free from judicial supervision. This notion is premised on the principle that "[t]he Government, and not the courts, is responsible for initiating a criminal prosecution, and, subject to applicable constitutional

¹¹ *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 962 (1982) (Powell, J., concurring in the judgment).

¹² *Cf. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in the judgment) ("This Court has also recognized that a hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government capable of exercising the substantive powers granted to the various branches by the Constitution").

¹³ *Field v. Clark*, 143 U.S. 649, 692 (1892).

¹⁴ U.S. Const., art. 1, § 1.

¹⁵ *Whalen v. United States*, 446 U.S. at 689 (emphasis added); *accord* *Albernaz v. United States*, 437 U.S. 333, 343 (1981); *Sanabria*, 437 U.S. at 69; *Burton v. United States*, 202 U.S. 344, 377-78 (1906); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820).

¹⁶ *Sanabria*, 437 U.S. at 69.

limitations it is entitled to choose those offenses for which it wishes to indict and the evidence upon which it wishes to base the prosecution."¹⁷

The judiciary's role in adjudging and reviewing the constitutional permissibility of punishments is limited to ascertaining the punishments authorized by Congress because "once the legislature has acted courts may not impose more than one punishment for the same offense."¹⁸ In this respect, the Double Jeopardy Clause has been described as an "embodiment" of the doctrine of separation of powers.¹⁹

2. The Double Jeopardy Clause.—The Double Jeopardy Clause is "cast explicitly in terms of" protecting against successive trials for the same offense.²⁰ Nevertheless, the Supreme Court interprets the Double Jeopardy Clause as a prohibition against multiple punishments for the same offense at a single trial.²¹ In this respect, the clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."²² Several constitutional provisions restrict the power of legislatures to create and define offenses,²³ but "[f]ew if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define

¹⁷Garrett v. United States, 471 U.S. 773, 789 n.2 (1985); accord Ball v. United States, 470 U.S. 856, 859 (1985) ("This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case").

¹⁸Brown v. Ohio, 432 U.S. 161, 165 (1977).

¹⁹Whalen, 445 U.S. at 689.

²⁰Missouri v. Hunter, 459 U.S. 359, 365 (1983).

²¹North Carolina v. Pearce, 395 U.S. 711 (1969); accord Grady v. Corbin, 110 S. Ct. 2084 (1990); *Ex parte Lange*, 85 U.S. (19 Wall.) 163 (1874); cf. Brown v. Ohio, 432 U.S. at 165 ("once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors may not attempt to secure that punishment *in more than one trial*") (emphasis added).

²²Garrett, 471 U.S. at 793 (citing *Hunter*, 459 U.S. at 366, and *Albernaz*, 450 U.S. at 344); accord Jones v. Thomas, 491 U.S. 376, 109 S. Ct. 2522, 2525 (1989); Ohio v. Johnson, 467 U.S. 493, 499 (1984).

²³The *Whalen* Court acknowledged the existence of constitutional limitations on the legislative power to create and define offenses, *Whalen*, 445 U.S. at 689 n.3. but none of these limitations is pertinent to multiplicity. Cf. *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty statute held unconstitutional under the Eighth and Fourteenth Amendments); *Roe v. Wade*, 410 U.S. 113 (1973) (criminal abortion statute held void as vague and overbroadly infringing on the Ninth and Fourteenth Amendments); *Stanley v. Georgia*, 394 U.S. 557 (1969) (criminal statute prohibiting possession of obscene matter held unconstitutional infringement on First Amendment right to receive information free from government intrusion); *Loving v. Virginia*, 388 U.S. 1 (1967) (criminal statute prohibiting interracial marriages held unconstitutional violation of the equal protection and due process clauses of the Fourteenth Amendment).

offenses.”²⁴ As the Supreme Court has described the legislative power to create and define offenses, “[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.”²⁵ Accordingly, “[t]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”²⁶ In effect, the double jeopardy protection from multiple punishments is coextensive with legislative limitations on the courts and prosecutors under the separation of powers doctrine. This redundancy is illustrated by two early decisions.

In the 1873 decision *Ex parte Lange*,²⁷ the Court first suggested that the Double Jeopardy Clause includes an implicit prohibition against multiple punishment for the same offense. Lange was convicted of a single violation of a single statutory offense. The trial court sentenced Lange to a term of confinement *and* a fine; the statute authorized punishment in terms of confinement or a fine. The *Lunge* Court first discussed a “maxim of the common law”:

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.²⁸

²⁴ *Sanabria*, 437 U.S. at 69. Some federal courts have gone so far to say that the Double Jeopardy Clause “places no limits ‘on the power of Congress to define the allowable unit of prosecution and punishment where all the charges are brought in one suit.’” *United States v. Johnson*, 909 F.2d 1517, 1518 (D.C. Cir. 1990) (quoting *United States v. McDonald*, 692 F.2d 376, 377 (5th Cir. 1982)).

²⁵ *Albrecht v. United States*, 273 U.S. 1, 11 (1926). The Court added, “[this] general principle is well established.” *Id.*

²⁶ *Albernaz*, 450 U.S. at 344; see also *Hunter*, 459 U.S. at 368-69.

²⁷ 86 U.S. (18 Wall.) 163 (1873).

²⁸ *Id.* at 168.

The Court stated that this principle of common law was “very clearly” embodied within the “spirit” of the Constitution.²⁹ The Court concluded, “The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.”³⁰

Fourteen years later, the Court decided *In re Snow*.³¹ Although the case differed from *Lange* factually, those facts raised an issue within the scope of the Court’s previous pronouncement on the Double Jeopardy Clause. The Court, however, referenced neither *Lange* nor the Double Jeopardy Clause. The Court considered the matter solely as a question of whether Congress had authorized separate punishments. In other words, the case turned on the principle of separation of powers.

Snow received three separate convictions for unlawful cohabitation with the same woman. One alleged unlawful cohabitation from January 1, 1883, through December 31, 1883; another alleged unlawful cohabitation from January 1, 1884, through December 31, 1884; the last alleged unlawful cohabitation from January 1, 1885, through December 31, 1885.³² In holding that Snow had committed but a single, continuous violation of the statute, the Court relied on the English case *Crepps v. Durden*³³ and quoted at length from the opinion authored by Lord Mansfield:

Here are three convictions of a baker, for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If *the act of Parliament gives authority to levy but one penalty there is an end of the question*; for there is no penalty at common law. On the construction of the act of Parliament the offence is “exercising his ordinary trade on the Lord’s day”; and that without any fraction of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so,

²⁹ *Id.* at 170

³⁰ *Id.* at 173

³¹ 120 U.S. 274 (1887)

³² *Id.* at 277

³³ *Id.* at 283 (citing *Crepps v. Durden* 2 Cowp 640, 98 Eng. Rep. 1283 (K.B. 1777)) In *Crepps*, a baker who had conducted business on Sunday in violation of statute was convicted of four charges each alleging separate business transactions on the same Sunday

whether it consists of one, or of a number of particular acts.³⁴

Relying on this precedent, the Court granted Snow's petition for writ of habeas corpus. The Court concluded: "The principle which governs the present case has been recognized and approved in many cases in the United States."³⁵ Thus, Snow was resolved on the basis of the doctrine of separation of powers despite the fact that it dealt with a second punishment "proposed in the same court, on the same facts, for the same statutory offense" just as *Lange* did.³⁶ While Snow and *Lange* could have been resolved on the same constitutional basis, the Court nevertheless resolved the cases on distinct grounds and achieved the same result.³⁷ The point is that legislative intent alone established the maximum permissible punishment regardless whether the matter was viewed as an issue of double jeopardy or of the doctrine of separation of powers.

3. The American System of *Criminal* Justice.—In exercising their plenary, constitutional power to create and define offenses, American legislatures steadily have enlarged the number of overlapping, predicate and ancillary criminal offenses.³⁸ In doing so, legislatures contemplate the permissive application of the full panoply of criminal sanctions to any one criminal act, transaction or enterprise. One may criticize multiple convictions and pyramiding penalties for the same criminal act as redundant and unnecessary, but this scheme of criminal justice reflects two practical concerns. First, it acknowledges the inability of a legislature to anticipate every variation of human behavior which might comprise or attend a criminal

³⁴ *Id.* at 284 (emphasis added).

³⁵ *Id.* at 286.

³⁶ *Ex parte Lange*, 85 U.S. (18 Wall.) at 168.

³⁷ Shifts in the Supreme Court's view of the double jeopardy clause may explain this apparent inconsistency. As recently as 1963, the Court was adamant that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" *Downum v. United States*, 372 U.S. 734, 736 (1963) (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)). It seems that the Court found the implicit constitutional prohibition against multiple punishment in *Lange*, rejected it in *Ball*, and found it again in *North Carolina v. Pearce*. See *supra* note 19, and accompanying text.

³⁸ As the Supreme Court observed with respect to federal narcotics laws:

Of course the various enactments by Congress extending over nearly half a century constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution, and punishment—tighter and tighter.

act or enterprise. Second, it promotes the notion that criminal penalties should be individualized to reflect the defendant's misconduct.

That criminals do not act with the niceties of statutory prohibitions in mind is axiomatic—after all, the essence of crime is violation of the law. To achieve the criminal purpose, criminal ingenuity seizes upon every device, scheme, and specie of act that will aid in the success of the criminal enterprise. Thus, although the independent criminal enterprises of two individuals ultimately may violate the same statute, one's ancillary and predicate acts might reflect a substantially greater or significantly different criminal culpability.³⁹ In other circumstances, the consequences of an essentially identical criminal act may be significantly distinct.⁴⁰ No legislative body possibly could anticipate every variation of human behavior and every aggregation of acts that conceivably might make up a criminal enterprise or undertaking.

To individualize any one criminal enterprise for purposes of prosecution and punishment, American legislatures have created an array of distinct statutory offenses, many of which overlap. A legislature individualizes the criminal enterprise by authorizing discrete convictions for a criminal transaction under multiple, independent statutory offenses. Each conviction represents a legislatively distinguished act of criminal misconduct and the penalties pyramid accordingly.

B. "All Guides to Legislative Intent":⁴¹ The Federal Rule of Multiplicity.

As stated above, the double jeopardy prohibition against multiple punishment for the same offense prohibits the imposition of punishment in excess of that authorized by the legislature. Thus, legislative intent alone delimits the maximum permissible punishment under the constitutional doctrine of

³⁹ For example, *A* man may rob a bank simply by placing his hand in an empty coat pocket and threatening the teller. *E*, on the other hand, actually may carry an automatic weapon, disguise himself as a police officer to gain entry into the bank, and steal a car in which he makes his getaway. The idea that a legislative scheme of criminal justice should expose *A* to the same maximum punishment as *B*—or expose *B* to a maximum punishment no greater than *A*'s—offends common sense. *B*'s conduct is clearly the more criminally culpable.

⁴⁰ For example, *A* burglarizes business *X*, an appliance store, and steals a television. *E* burglarizes business *Y*, a pharmacy, and steals the entire stock of narcotics. Although both *A* and *B* have engaged in essentially the same criminal acts, *B*'s offense results in the illicit possession of narcotics.

⁴¹ *United States v. Woodward*, 469 U.S. 105, 109 (1985)

separation of powers. In federal practice, the permissibility of multiple convictions and the permissibility of multiple charges are derivative issues. Consequently, a multiplicity analysis in federal practice begins with the determination of whether the legislature has authorized multiple punishments.

1. *Multiplicity for Sentencing Purposes.*—Regardless of the context in which a multiplicity issue arises, a “clear indication of legislative intent” will control.⁴² Although a rule of statutory construction might mandate a different result, the Supreme Court applies a rule of construction “only . . . when the will of Congress is not clear.”⁴³ Thus, when a legislature specifically authorizes multiple punishments under two statutes, “regardless of whether those two statutes proscribe the ‘same’ conduct under [a rule of statutory construction], a court’s task is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.”⁴⁴ Legislative intent may be found in the language, structure, or legislative history of the statutes in issue.⁴⁵

When a court finds no manifestation of legislative intent in these sources, it must resort to rules of statutory construction. The Court described the difficult task of determining legislative intent in *United States v. Universal C.I.T. Credit Corp.*:

Generalities about statutory construction help us little. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and clause and the statute that express the purpose of Congress. Very early Mr. Chief Justice Marshall told us, “Where the mind labours to discover the design of the legislature, it seizes upon every thing from which aid can be derived”⁴⁶

⁴² *Albernaz*, 450 U.S. at 340; accord *Hunter*, 459 U.S. at 367.

⁴³ *Hunter*, 459 U.S. at 368; accord *Garrett*, 471 U.S. at 779 (“the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history”).

⁴⁴ *Hunter*, 459 U.S. at 368-69.

⁴⁵ See *United States v. Batchelder*, 442 U.S. 118 (1979).

⁴⁶ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) (citations omitted).

The issue of legislative intent for double jeopardy purposes generally arises in two contexts⁴⁷ involving opposite presumptions of legislative intent. First, it arises when multiple counts charge the same act or transaction under separate statutes. Second, it arises when multiple counts charge the same act or transaction under the same statute.

(a) The Rule of *Construction for Counts Charged Under the Same Statute*.—When a single transaction is charged in multiple counts as a violation of a single statute, there is a presumption that Congress intended but a single punishment. As the Court stated in *Gore*:

We [have] held that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity . . . for a single transaction to include several units relating to proscribed conduct under a single provision of a statute.⁴⁸

The Court explained this rule of construction in *Bell v. United States*:

It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.⁴⁹

When multiple counts charge one criminal transaction as ostensibly “separate” violations of the same statute, the court

⁴⁷ Cf. *Sanabria*, 437 U.S. at 70 n.24 (“Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called ‘same evidence’ test, which is frequently used to determine whether a single transaction may give rise to [separate punishments] . . . under separate statutes”); *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946) (“In contrast to the single conspiracy described in [*Braverman v. United States*, 317 U.S. 49 (1942)], separate counts, all charged Under the general conspiracy statute, . . . , we have here separate statutory offenses”).

⁴⁸ *Gore*, 357 U.S. at 391.

⁴⁹ *Bell v. United States*, 349 U.S. 81, 83 (1955).

faces several possible legislative intents. First, the court faces the possibility that Congress did not intend to have a single act, transaction, or episode fragmented into more than one offense under the same statute.⁵⁰ There is the possibility that Congress intended to create a continuing offense.⁵¹ It is also possible that Congress defined a predicate act with the intent that punishment would merge with that authorized for another act proscribed by the same statute.⁵² Finally, there is the possibility that Congress intended to create but a single offense but defined it in such a way that a conviction could be obtained on different factual theories of guilt.⁵³

The unit-of-prosecution rule of construction assumes that the legislature intended any one statutory enactment to define an offense that "compendiously treats as one offense all violations that arise from that singleness of thought, purpose, or action, which may be deemed a single 'impulse.'"⁵⁴ The rule creates a presumption that, had Congress intended multiple convictions and punishments for the same act under the same statute, Congress would have expressly defined the unit of prosecution in those terms. Paraphrasing *Bell* and *Lange*, this presumption affords entire and complete protection under the Double Jeopardy Clause from multiple punishment whenever a second punishment is proposed for a factually united violation of a single statute.

One case is cited frequently to illustrate the statutory language necessary to rebut the presumption that a single statute creates a single unit of prosecution. In *Ebeling v. Morgan*, the defendant was convicted of six counts of "feloniously tear[ing], cut[ting], and injur[ing]" six mailbags.⁵⁵ Ebeling broke

⁵⁰ For example, in *United States v. Braverman*, the Court held that the trial court erred in holding "that even though a single agreement is entered into, the conspirators are guilty of as many single offenses as the agreement has criminal objects." *Braverman*, 317 U.S. at 52. The Court ruled, "The gist of the crime of conspiracy as defined by statute is the agreement of confederation of the conspirators to commit one or more unlawful acts." *Id.* at 53 (emphasis added).

⁵¹ See, e.g., *In re Snow*, 120 U.S. 274 (1887); *supra*, notes 31-35 and accompanying text.

⁵² See, e.g., *Prince v. United States*, 352 U.S. 322, 328 (1967) (the offense of unlawfully entering a bank with the intent to commit robbery under 18 U.S.C. § 2113(a) held to merge with the completed robbery under 18 U.S.C. § 2113(a)).

⁵³ Cf. *Sanabria*, 437 U.S. at 66 n.20 ("a single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged") (emphasis added). For example, in *United States v. Johnson*, the accused was convicted of two specifications of desertion, each alleging a different intent for the same act. *United States v. Johnson*, 17 C.M.R. 297, 301 (C.M.A. 1954).

⁵⁴ *Universal C.I.T. Credit Corp.*, 344 U.S. at 224.

⁵⁵ *Ebeling v. Morgan*, 237 U.S. 625, 627 (1915).

into a "certain railway postal car, then and there in transit on certain railroad," and rifled six mailbags.⁵⁶ The Court held:

Reading the statute with a view to ascertaining its meaning, it is apparent that it undertakes to make an offender of anyone who shall cut, tear, or otherwise injure any mailbag These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags [in this case] was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged . . . irrespective of any attack upon, or mutilation of, any other bag. The words are so plain as to require little discussion or further amplification.⁵⁷

(b) The Rule *of* Construction *for* Counts Charged Under Separate Statutes. — When the counts in issue charge separate statutory violations,⁵⁸ the Court applies the Blockburger test, and does so with no small degree of confidence.⁵⁹ As the Court explained in *Albernaz v. United States*:

Congress cannot be expected to specifically address each issue of statutory construction which may arise. But as

⁵⁶ *Id.* at 627-28.

⁵⁷ *Id.* at 629 (emphasis added)

"Offenses are "separate statutory offenses" when they are set forth in separate sections of the United States Code. The Court repeatedly has declined to draw any inference of legislative intent from the fact that statutory offenses were created by the same legislative enactment. *Compare Braverman*, 317 U.S. at 50, 53 (seven counts of conspiracy charged under the general conspiracy statute, 18 U.S.C. § 88 (1940), held a single offense when there was but one conspiracy to commit seven crimes), *with Albernaz*, 450 U.S. at 334, 335, and *American Tobacco Co.*, 328 U.S. at 787-88; *see also Albrecht*, 273 U.S. at 11

In *Albernaz*, the Court held two conspiracy convictions separate for punishment—one was a conspiracy to import marijuana under 21 U.S.C. § 963, and the other was a conspiracy to distribute marijuana under 21 U.S.C. § 846. There was but one conspiracy and both statutes were enacted as part of the Drug Abuse Prevention and Control Act of 1970. In *American Tobacco Co.*, the Court again held two conspiracy convictions separate. One was a conspiracy in restraint of trade under 16 U.S.C. I 1 and the other was a conspiracy to monopolize under 15 U.S.C. I 2. Again, there was but one conspiracy and both statutes were enacted as part of the Sherman Antitrust Act. In *Albrecht*, the Court affirmed convictions for possessing and selling the same liquor even though both counts were charged under statutes enacted as part of the National Prohibition Act.

⁵⁹ "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

we have previously noted, Congress is “predominantly a lawyer’s body,” and it is appropriate for us to “assume that our elected representatives . . . know the law.” As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress [is] aware of the *Blockburger* rule and legislate[s] with it in mind. It is not a function of this Court to presume that “Congress was unaware of what it accomplished”⁶⁰

In effect, the *Blockburger* test establishes a presumption of legislative intent—that is, if each of two statutes requires proof of an element distinct from the other, it is presumed that Congress intended to authorize separate punishments.⁶¹

The *Blockburger* test may be expressed with the simplicity and precision of mathematical terms. If all of the statutory elements of the offense charged in one count of an indictment are a subset of all of the statutory elements of an offense charged in another count, the two counts charge the “same offense.”⁶² The test is entirely abstract; double jeopardy will not bar multiple, cumulative punishment so long as the charges are “distinct in point of law . . . , however nearly they may be connected in fact.”⁶³ If each statutory offense is not defined in terms of at least one distinct element, the offenses are deemed “coterminous, in effect one offense with two labels.”⁶⁴

Although successive prosecutions were prohibited at common law, the term “same offense” had not been defined at the time the Bill of Rights was adopted.⁶⁵ According to Justice

⁶⁰ *Albernaz*, 450 U.S. at 341, 342 (citations omitted). Significantly, three of the more liberal justices sitting on the Court—Justices Powell, Brennan, and Blackmun—joined in this majority opinion authored by Justice Rehnquist.

⁶¹ As indicated above, the *Blockburger* test is not a “conclusive determinant.” *Garratt*, 471 U.S. at 779. “Insofar as the question is one of legislative intent, the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress.” *Id.*

⁶² *Grady*, 110 S. Ct. at 2097 (“This test focuses on the statutory elements of the two crimes . . . , not on the proof that is offered or relied upon to secure a conviction”); *Illinois v. Vitale*, 447 U.S. 410, 416 (1980) (“In *Brown v. Ohio*, . . . [w]e recognized the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial”); *Brown*, 432 U.S. at 166 (“This test emphasizes the elements of the two crimes”); see also *Blockburger v. United States*, 284 U.S. at 304 (“the test . . . is whether each provision requires proof of a fact which the other does not”) (emphasis added).

⁶³ *Burton v. United States*, 202 U.S. 338, 380 (1911); accord *Gavieres*, 220 U.S. at 343; see also *Martin v. Taylor*, 867 F.2d 958, 962 (4th Cir. 1989) (the *Blockburger* test is one of “narrow focus on the technical elements of the offenses charged”).

⁶⁴ *United States v. Chrane*, 529 F.2d 1236, 1238 (5th Cir. 1976).

⁶⁵ *Ashe v. Swenson*, 397 U.S. 436, 450-51 (1970) (Brennan, J., concurring).

Brennan, "the common law . . . did finally attempt a definition in *The King v. Vendercomb*, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown 1796)," and created what is now called the *Blockburger* test.⁶⁶ The Supreme Court adopted the *Blockburger* elements test in 1911,⁶⁷ rejected a challenge to the test in 1958,⁶⁸ and has not looked back since.

Regrettably, the *Blockburger* test often has been expressed in terms of "same evidence,"⁶⁹ "lesser included offenses,"⁷⁰ and "proof of facts."⁷¹ Superficially, these descriptions of the test are not inaccurate. They are, however, somewhat misleading. With respect to the "same evidence" statement of the test, the Court has pointed out, "Commentators and judges alike have referred to the *Blockburger* test as the 'same evidence' test. This is a misnomer. The *Blockburger* test has nothing to do with the evidence presented at trial. It is concerned solely with the statutory elements of the offenses charged."⁷²

When the test is stated in terms of "lesser-included offenses," it means lesser included *as a matter of law*.⁷³ Thus, counts charging violations of separate statutes are lesser included only when one statute by definition "incorporates" all of the elements of the other statute.⁷⁴ With respect to "proof of facts," one need only note that the full text of *Blockburger* states the test as "whether *each provision* requires proof of a fact which the other does not."⁷⁵ In *Harris v. United States*, the Supreme Court rejected a double jeopardy challenged pre-

⁶⁶ *Id.* at 451 (Brennan, J., concurring).

⁶⁷ *Gavieres*, 220 U.S. at 338. Before the Court's decision in *Gavieres*, the Court had merely observed that "there have been nice questions in the application of the [elements] rule to cases in which the act charged was such as to come within the definition of more than one statutory offence." *Ex parte Lange*, 85 U.S. (18 Wall.) at 168.

⁶⁸ *Gore v. United States*, 357 U.S. 386 (1968).

⁶⁹ *See, e.g., Whalen*, 445 U.S. at 705; *United States v. Jeffers*, 432 U.S. 137, 147 (1977).

⁷⁰ *See, e.g., Brown*, 432 U.S. at 166.

⁷¹ *See, e.g., Blockburger*, 284 U.S. at 304.

⁷² *Corbin*, 110 S. Ct. at 2093 n.12. The Court frequently refers to the *Blockburger* test as the "so-called" same evidence test. *See, e.g., Sanabria*, 437 U.S. at 70 n.24.

⁷³ *Cf. Brown*, 432 U.S. at 167, 168 (proof of one statutory offense would "necessarily" and "invariably" prove the other statutory offense). In *Brown*, the Court found dispositive the fact that "the prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft [as well]." *Id.* at 167.

⁷⁴ *See Grady*, 110 S. Ct. at 2090.

⁷⁵ *Blockburger*, 284 U.S. at 304 (emphasis added); *accord Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes").

mised on grounds that the government established violations of two separate statutes by proof of the same operative fact.⁷⁶

An erroneous determination of permissible punishments will result more frequently than not if a court applies a test based solely on the terms "same evidence," "proof of facts," and "lesser included offenses" taken out of context. These terms inaccurately suggest that a court resolve the issue on the basis of the evidentiary relationship between the acts of misconduct alleged in the *charges* rather than the legislatively defined elements of the *statutes* in issue. In effect, it suggests a resolution based on due process notions of lesser included offenses.

For purposes of due process, an offense *not charged* may be lesser included in a charged offense because of surplusage in the factual allegations set forth in another, charged offense or because of evidence raised at trial.⁷⁷ Our present-day due process notions of lesser-included offenses developed from a common-law doctrine that was designed to assist the prosecution.⁷⁸ When the evidence at trial failed to establish the offense charged, the prosecution could yet obtain a conviction for some less serious, "closely related" offense if the pleadings satisfied the due process requirement for notice to the defendant.⁷⁹ Later, the Court recognized that the requirement assisted the defendant and held that due process notions of a fundamentally fair trial requires a lesser-included offense instruction when warranted by the evidence.⁸⁰

If a "lesser-included offense" test for multiplicity encompassed such due process notions of a lesser-included offense,

⁷⁶ Harris v. United States, 359 U.S. 19 (1959).

⁷⁷ See Keeble v. United States, 412 U.S. 205, 208 (1973).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Hopper v. Evans, 456 U.S. 605 (1982). Otherwise, a jury has but two choices, convict the defendant of the principle offense charged or acquit him. The Court has held that such a Hobson's choice injects "a level of uncertainty and unreliability" into criminal proceedings. See Baldwin v. Alabama, 472 U.S. 372, 386 (1985).

In the absence of a due process entitlement to conviction on closely related, lesser included offenses, a jury would be faced with but two options—conviction or acquittal of the more serious offense—when it is convinced that the defendant has committed *some* crime which merits punishment but is not convinced that he has committed the offense charged. *Id.* The inability to convict on a lesser included offense, such a choice could lead a jury to "erroneously to convict a defendant." *Id.* A lesser included offense instruction channels the jury's discretion "so that it may convict a defendant of any crime fairly supported by the evidence." Hopper, 456 U.S. at 611. In this respect, the jury's role is more than merely determining whether the defendant committed the acts alleged in an indictment; the jury also is tasked with determining the level of the defendant's culpability and the "extent to which he is morally blameworthy." Lockhart v. McCree, 476 U.S. 162, 200 (1986).

application of that test often would result in an erroneous result. Statutory offenses that are "closely related" under the common-law doctrine or the Due Process Clause might not present the identity of elements required under the *Blockburger* test. More to the point, neither the evidence introduced in any one trial, nor mere surplus allegations of fact set forth in an indictment, reflect legislative intent. Stated otherwise, offenses that might be lesser included under the Due Process Clause might not be lesser included under the Double Jeopardy Clause.

Two cases illustrate a proper application of the *Blockburger* test and demonstrate that due process notions of lesser-included offenses do not determine the permissibility of multiple punishment. In *Albrecht v. United States*, the defendant was convicted of four counts of illegal possession of liquor and four counts of illegal sale of the same liquor. As the Court analyzed the case:

[P]ossessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he never has possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale a single offense.⁸¹

In *United States v. Woodward*, the accused and his wife passed through United States Customs carrying \$12,000 and \$10,000, respectively. As he processed through Customs, Woodward checked "no" on a Customs form that asked whether he or any member of his family was carrying over \$5000 into the country. As the Court evaluated the case:

Woodward was indicted on charges of making a false statement to an agency of the United States, 18 U.S.C. § 1001, and willfully failing to report that he was carrying in excess of \$5,000 into the United States, The same conduct—answering "no" to the question whether he was carrying more than \$5,000 into the country—formed the basis of each count.

. . .

[P]roof of currency reporting violation does *not* necessarily include proof of a false statement offense. Section

⁸¹ *Albrecht*, 273 U.S. at 11

1001 proscribes the nondisclosure of a material fact only if the fact is "conceal[ed] . . . by any *trick*, scheme, or device." (Emphasis added). A person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report. A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked whether he is carrying over \$5,000 in currency, might nonetheless be subject to conviction under 31 U.S.C. § 1058 (1976 ed.) for willfully transporting money without filing the required currency report. However, because he did not conceal a material fact by means of a "trick, scheme, or device," (and did not make any false statement) his conduct would not fall within 18 U.S.C. § 1001.82

In Albrecht, possession of the liquor under the facts of the case was a lesser-included offense of sale under the facts of the case. Under the allegations of fact in the indictment in Woodward, the charge alleging the willful failure to report the currency was lesser-included in the charge for the false report. Correctly applying the Blockburger test in both Woodward and Albrecht, the Court yet approved cumulative punishments under the separate statutes. These cases illustrate that a mere factual or procedural relationship between counts do not obviate the separate nature of the offenses even if one of those counts might otherwise constitute a lesser-included offense as a matter of due process. As the Court concluded in Woodward, "We cannot assume . . . that Congress was unaware that it had created two different offenses permitting multiple punishment for the same conduct."⁸³

(c) *The Doctrine of Lenity.*—In those cases in which the Court is unable to determine legislative intent, the Court applies a rule of lenity: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."⁸⁴ In effect, the Court will not attribute to Congress "an intention to punish more severely than the language of its laws clearly imports in the light of

⁸² Woodward, 469 U.S. at 106-08.

⁸³ *Id.* at 109 (citing *Albernaz*, 450 U.S. at 341-42).

⁸⁴ *Ladner v. United States*, 358 U.S. 169, 178 (1958).

pertinent legislative history."⁸⁵ The Supreme Court has defined the analytical role of this rule as follows:

The rule of lenity only serves as an aid for resolving an ambiguity in a statute: it is not to be used to beget one, and the rule comes into operation at the end of the process of construing what Congress has expressed, and not at the beginning as an overriding consideration of being lenient to wrongdoers as that is not the function of the judiciary.⁸⁶

Thus, the judicial doctrine of lenity implicitly acknowledges the power of the legislative branch to create, define, and pyramid punishment, but declines to find such an intent when the rules of statutory construction do not warrant such a finding.

(d) *The Analysis.*—When the same transaction is charged in more than one count of a single indictment, the defendant may challenge the imposition of separate punishments. Because Congress has plenary, constitutional power to create and define offenses and because the Double Jeopardy Clause prohibits a court from imposing multiple punishments for what Congress has defined as the “same offense,” the question is whether those counts proscribe the “same offense.”

If the counts charge violations of the same statute, there is a presumption that those counts charge a violation of the same offense. To obtain cumulative punishment for each count, the Government must rebut that presumption by demonstrating a legislative intent to authorize separate punishments for that offense. If the court fails to find clear legislative intent either to define two discrete offenses in the same statute or to define the offense in terms of discrete units of prosecution, the doctrine of lenity permits the court to impose only one punishment.

If the counts charge violations of separate statutes, the court must identify the elements of the offenses Congress has created in those statutes. If there is an identity of elements between those two statutes, there is a presumption that the statutes define the same offense. If one of the statutes includes all of the elements of the other statute, those statutes proscribe the same offense because the two statutes merge as lesser-included one of the other. Again, the Government bears

⁸⁵ Prince v United States, 362 U S 322, 329 (1957)

⁸⁶ Callanan v United States, 364 U S 587, 596 (1961)

the burden of rebutting the presumption by demonstrating a clear legislative intent to punish the defendant under both statutes. Otherwise, the doctrine of lenity will preclude imposition of separate punishments.

If each statute requires proof of an element not required by the other, there is a presumption that Congress has created two offenses with the intent to authorize separate, cumulative punishments for both. In this situation, the burden is on the defendant to rebut the presumption by showing a clear legislative intent to punish the transaction under only one of the statutes. If the defendant fails to rebut the presumption, the doctrine of lenity must give way to the presumption.

2. Multiplicity for Findings.— While the double jeopardy prohibition against multiple punishment clearly addressed the sentencing aspect of “same offenses,” the question remained whether findings of guilty were permissible when the offenses were not separate for purposes of punishment. Prior to 1986, federal courts dealt with separate convictions for the “same” offense in different ways.⁸⁷ Some courts vacated both the sentence and conviction.⁸⁸ Others, employing what was called the doctrine of concurrent sentencing, simply held that an issue of multiple convictions did not arise whenever the court ordered a concurrent sentence on the multiplicitous count.⁸⁹

In *Ball v. United States*, the Court reconciled the split among the circuits by ruling that a multiplicitous conviction for the same offense itself carries an element of punishment; it is therefore impermissible under the Double Jeopardy Clause.⁹⁰ Thus, the issue of multiplicity for findings is no different than the issue of multiplicity for sentencing.

3. Multiplicity in Charging.— As indicated above, the term “multiplicity,” when used as a term of art in federal practice, refers to the practice of charging the same offense in more

⁸⁷ See generally *Ball*, 470 U.S. at 858 n.5.

⁸⁸ See, e.g., *Chrane*, 529 F.2d at 1238.

⁸⁹ See generally *Benton v. Maryland*, 395 U.S. 784, 786-791 (1969).

⁹⁰ See *Ball v. United States*, 470 U.S. at 864-65 (“potential adverse collateral consequences” and “societal stigma”). Here again, the Court could have disposed of the case on the basis of the separation of powers. If, as the Court stated, Congress did not intend a separate conviction, *Ball*, 470 U.S. at 866, then the Court had no power to adjudge the conviction. Cf. *Whalen*, 445 U.S. at 689 (the power to define criminal offenses resides wholly with the Congress); *Sanabria*, 437 U.S. at 69 (“it is the Congress, and not the prosecution, which establishes and defines offense”).

than one count.⁹¹ In this sense, it is the antithesis of “duplicitry,” the practice of pleading more than one offense in a single count. The multiplicity doctrine is a rule of pleading that is based on the double jeopardy prohibition against multiple punishments. When an indictment alleges the same offense in more than one count, “the indictment exposes the defendant to the threat of receiving multiple punishment for the same offense.”⁹² Nevertheless, the mere fact that two counts charge the same offense under the *Blockburger* rule will not necessarily entitle the defendant to relief.

In *United States v. Batchelder*, the Court stated that “when an act violates more than one criminal statute [that defines the “same offense”], the Government may prosecute *under either* so long as it does not discriminate against any class of defendants.”⁹³ Many courts read this sentence out of context and concluded that *Batchelder* required the prosecutor to elect which multiplicitious charge he would prosecute.⁹⁴ In *Ball*, the Court made it clear that it “had no intention of restricting the Government to prosecuting for only a single offense.”⁹⁵ The Court declared, “[The Double Jeopardy Clause] does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.”⁹⁶

Quite the contrary, the law permits charging “lesser-included” offenses because due process would entitle a defendant to an instruction on the lesser-included offense in any event.⁹⁷ A motion for appropriate relief challenging charges on the basis of multiplicity should be granted only in those cases in which the prosecution has impermissibly fragmented one offense into several or charged a continuing type of offense in more than one count.⁹⁸

⁹¹ *Sanabria*, 437 U.S. at 65 n.19; *accord* *United States v. Moody*, 1991 WL 5751 (5th Cir. 1991); *United States v. Briscoe*, 896 F.2d 1476, 1522 (7th Cir. 1990); *United States v. Eaves*, 877 F.2d 843, 847 (11th Cir. 1989); *United States v. Rodriguez*, 858 F.2d 809, 810 n.2 (1st Cir. 1989); *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988); *United States v. Fiore*, 821 F.2d 127, 130 (2d Cir. 1987); *United States v. Stanfa*, 685 F.2d 85, 86 (3d Cir. 1982).

⁹² *Briscoe*, 856 F.2d at 1522; *accord* *United States v. Maldonado-Rivera*, 1990 WL 200698 (2d Cir. 1990); *Fiore*, 821 F.2d at 130; *Stanfa*, 685 F.2d at 87.

⁹³ *Batchelder*, 442 U.S. at 123-24 (emphasis added).

⁹⁴ *See Ball*, 470 U.S. at 860 n.7.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Ohio v. Johnson*, 467 U.S. 493, 500 (1984)).

⁹⁷ *Hopper*, 456 U.S. at 611; *see* *Beck v. Alabama*, 447 U.S. 625 (1980). Of course, due process and the double jeopardy protection also would require an instruction that the jury could convict the defendant of only one—but not both—of the offenses. *See Ball*, 470 U.S. at 868 (Stevens, J., concurring in the judgment).

⁹⁸ *See, e.g., In re Snow*, 120 U.S. 274 (1887).

C. "All Guides to Legislative Intent"⁹⁹: A Rationale.

A number of justices on the Supreme Court have taken issue with the proposition that the Double Jeopardy Clause imposes no limitation on the legislative power to create and define offenses. In their view, the double jeopardy proscription against multiple punishments for the same offense restricts legislative power to authorize multiple convictions and punishment for any one criminal transaction. In effect, they view the separation of powers doctrine as subordinate to the Double Jeopardy Clause.

In *United States v. Gore*,¹⁰⁰ Justice Douglas first articulated the "one transaction, one conviction, one punishment" notion of double jeopardy. *Gore* was prosecuted for two sales of narcotics. Each sale was "broken down into three separate and distinct crimes" and consecutive sentences were imposed for each of six findings of guilty.¹⁰¹ In Justice Douglas's view:

Plainly Congress defined three distinct crimes, giving the prosecutor on [the facts of the case] a choice. But I do not think the courts were warranted in punishing petitioners three times for the same transaction. I realize that [*Blockburger v. United States*¹⁰²] holds to the contrary. But I would overrule that case. I find that course necessary because of my views on double jeopardy.¹⁰³

Justice Douglas reasoned that the defendant had been the subject of multiple prosecutions at the same trial and on the same evidence.¹⁰⁴ He urged a construction of the Double Jeopardy Clause to the effect that "out of the same facts a series of

⁹⁹ *Woodward*, 469 U.S. at 109.

¹⁰⁰ 357 U.S. 386 (1958).

¹⁰¹ *Id.* at 395 (Douglas, J., dissenting).

¹⁰² 284 U.S. 299 (1932).

¹⁰³ *Gore*, 357 U.S. at 395 (Douglas, J., dissenting).

¹⁰⁴ In *Ohio v. Johnson*, a defendant indicted in four counts for murder, involuntary manslaughter, aggravated robbery and grand larceny, all arising out of a single transaction, made a similar claim. 467 U.S. 493 (1984). He entered pleas of guilty to involuntary manslaughter and grand larceny and pleas of not guilty to murder and aggravated robbery. The trial court accepted Johnson's pleas of guilty over the State's objection. Johnson then moved to dismiss the murder and aggravated robbery counts "on the ground that because of his guilty pleas, further prosecution on the more serious offenses was barred by the double jeopardy prohibitions." *Id.* at 494. The Court's response was brief:

The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided . . . We have never held that, and decline to hold it now,

charges shall not be preferred."¹⁰⁵ The majority's response was compelling.

The majority opinion in *Gore* first declared that the prohibition against double jeopardy is a firmly rooted, historic protection and not an evolving concept of law; it further observed that Douglas's view would overrule precedents dating back more than fifty years.¹⁰⁶ Most important, the Court exposed the utter illogic of the urged interpretation:

Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however,* That if he makes such sale in pursuance of written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further* That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the *Blockburger* doctrine as violative of the double jeopardy clause [sic]?¹⁰⁷

As the Court evaluated Douglas's view: "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding se-

Id. at 501. The Court concluded that acceptance of Johnson's pleas "has none of the implications of an 'implied acquittal'" and that an opposite rule would "deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Id.* at 502.

¹⁰⁵ *Gore*, 357 U.S. at 396 (citing Bishop, 1 Criminal Law § 1060 (9th ed. 1923)).

¹⁰⁶ *Id.* at 392. The Supreme Court first adopted the so-called *Blockburger* test in 1911. *United States v. Gavieres*, 220 U.S. 338 (1911). The rule was first articulated in *Morey v. Commonwealth*, 100 Mass. 433 (1871). *See generally Grady*, 110 S. Ct. at 1086 (citing *Morey v. Commonwealth*, 100 Mass. 433 (1871)); *see also Whalen*, 445 U.S. at 705 n.1 (same).

¹⁰⁷ *Gore*, 357 U.S. at 392-93.

verity of punishment . . . these are peculiarly questions of legislative policy."¹⁰⁸

In *Missouri v. Hunter*, Justice Marshall resurrected Justice Douglas's proposition that "[w]hen multiple charges are brought the defendant is 'put in jeopardy' as to each charge."¹⁰⁹ Beginning with the premise that "each separate conviction typically has collateral consequences" and that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation,"¹¹⁰ Marshall reasoned:

The very fact that the State could simply convict a defendant . . . of one crime and impose an appropriate punishment for that crime demonstrates that it has no legitimate interest in seeking multiple convictions and multiple punishment. The creation of multiple crimes serves only to strengthen the prosecution's hand. It advances no valid state interest that could not just as easily be achieved without bringing multiple charges against the defendant.¹¹¹

The majority's response was perfunctory: "Legislatures, not courts, prescribe the scope of punishments."¹¹²

Thus, in the context of a single trial, the double jeopardy phrase "same offense" takes on a meaning that acknowledges and effectuates the legislative design underlying the pyramiding scheme of punishments characteristic of our American system of criminal justice. Had the Supreme Court adopted the "one transaction, one conviction, one punishment" view of the Double Jeopardy Clause, the prohibition against multiple punishments would frustrate this scheme of criminal justice. Such a restriction would reward the offender for having committed *in serio* a number of distinct offenses by limiting conviction and punishment to the ultimate, consummated goal of his criminal enterprise.

In this regard, Justice Marshall's concern with the stigma and collateral consequences of additional convictions is fallacious. Drawing from the *Gore* analysis, if Congress possesses

¹⁰⁸ *Id.* at 393.

¹⁰⁹ *Hunter*, 459 U.S. at 372 (Marshall, J., dissenting).

¹¹⁰ *Id.* at 372, 373 (Marshall, J., dissenting).

¹¹¹ *Id.* at 373 (Marshall, J., dissenting).

¹¹² *Id.* at 368. One also should note that Justice Marshall's argument that the "creation of multiple crimes serves only to strengthen the prosecution's hand" is not a double jeopardy contention, but a due process, fundamentally-fair-trial argument.

the power to authorize the pyramiding of sentences under separate statutes, surely it possesses the power to pyramid the stigma and collateral consequences attending those additional convictions.¹¹³ In this sense, the additional stigma and consequences are as much an element of permissible punishment as the additional period of confinement. Thus, Justice Marshall's preoccupation with the purportedly collateral consequences of multiple convictions does not present a matter independent of the question whether a legislature can constitutionally authorize multiple punishments for the same offense. Rather, it is subsidiary to the question whether Congress may pyramid punishment at all.

*D. Eliminating Confusion in the Arena of Double Jeopardy:
"Same Offense," Different Meanings.*

The double jeopardy protection serves two distinct interests. It limits the power of the courts to that authority granted by Congress (the protection against multiple punishment) and it assures the criminal defendant some measure of finality in criminal prosecutions (the protection against successive prosecution). The dual nature of the double jeopardy clause has generated confusing dicta and suspect analyses in the Court's case precedents.¹¹⁵ A better understanding of these distinct protections is essential if one is to fully understand and apply Supreme Court precedents.

¹¹³ Cf. *United States v. Holliman*, 16 M.J. 164, 167 (C.M.A. 1983) ("What public policy is offended by requiring such a criminal to bear the stigma of his misconduct I cannot imagine! How justice and society are served by masking such deed I am at a loss to explain!") (Cook, J., concurring in part, dissenting in part).

¹¹⁴ *North Carolina v. Pearce*, 395 U.S. 711 (1969); accord *Grady*, 110 S. Ct. at 2090.

¹¹⁵ See generally *Whalen*, 445 U.S. at 699-705 (Rehnquist, J., dissenting). Justice Rehnquist observed:

[T]his guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights This Court has done little to alleviate the confusion, and our opinions, including the ones authored by me are replete with *mea culpa's* occasioned by shifts in assumptions and emphasis.

Id.; see also *Whalen*, 445 U.S. at 697-98 (Black, J., concurring in the judgment) ("Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments . . . [and] have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishment"); *Burks v. United States*, 437 U.S. 1, 9 (1978) (the decisions on this issue "can hardly be characterized as models of consistency and clarity"); *Sanabria*, 437 U.S. at 80 (Blackmun, J., dissenting) ("This case will afford little guidance as precedent in the Court's continuing struggle to create order and understanding out of the confusion of the lengthening list of its decisions on the Double Jeopardy Clause").

The point to bear in mind is that these double jeopardy protections are *not* coextensive. The double jeopardy protection against multiple punishments is coextensive with the doctrine of separation of powers. At a single trial, this protection serves only to restrict a court's power to adjudge convictions and sentences to that authorized by the legislative branch of government. The double jeopardy protections against multiple prosecutions is *not* coextensive with the double jeopardy protection against successive trials. The double jeopardy protection against successive trials is a broader, more fundamental protection which operates independent of legislative authority. As the Supreme Court has explained:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.¹¹⁶

The United States Court of Appeals for the Ninth Circuit has described this safeguard interest in terms of "assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and preventing prosecutorial misuse of the indictment process."¹¹⁷ In *Grady v. Corbin*, the Court further stated that "[m]ultiple prosecutions also give the States an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction of one or more of the offenses charged."¹¹⁸ In other words, the double jeopardy protection against successive trials "serves the additional purpose of providing criminal defendants with a measure of finality and repose."¹¹⁹

A uniform definition of the term "same offense" as it appears in the double jeopardy clause could not serve this dichotomy of interests without subordinating or sacrificing one or the other.¹²⁰ The rule of statutory construction—whether

¹¹⁶ *Green v. United States*, 355 U.S. 184, 187 (1957), quoted with approval in *Grady*, 110 S. Ct. at 2091.

¹¹⁷ *United States v. Brooklier*, 637 F.2d 620, 622 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).

¹¹⁸ *Grady*, 110 S. Ct. at 2091-92.

¹¹⁹ *Brown*, 432 U.S. at 165.

¹²⁰ See *Grady*, 110 S. Ct. at 2093 ("a technical comparison of the elements of the two offenses . . . does not protect defendants sufficiently from the burdens of multiple trials").

called the elements test, the same evidence test, or the proof of facts test—would bar a subsequent prosecution only if the statutes defined a “same offense” both “in law and in fact.”¹²¹

When applied in the context of successive prosecutions, the rationale underlying the traditional *Blockburger* test was the due process notion that a jury could have returned a verdict of guilty to an offense included in the one charged.¹²² Thus, “[i]f a conviction might have been had, and was not, there was an implied acquittal.”¹²³ In effect, an acquittal of the “greater” offense barred a subsequent prosecution for any offense lesser-included as a matter of law on the theory that the jury could have returned a finding of guilty of the lesser-included offense but refused to do so. Even if the pleadings were insufficient as a matter of due process to permit a finding of guilty on the lesser-included offense, a subsequent prosecution would nevertheless be barred because “the greater crime would involve the lesser.”¹²⁴

This elements test no doubt well served the double jeopardy guarantee against successive trials when applied in the arena of common law offenses and early, relatively simple criminal codes. Over the years, however, criminal codes became more comprehensive as legislatures enacted additional statutes to create overlapping, predicate and compound offenses. Under the *Blockburger* test, a comparison of the elements of these newly created, more comprehensive statutory offenses did not necessarily result in a finding that the offenses were lesser-included. Thus, the double jeopardy guarantee against successive prosecutions could not, under the *Blockburger* test, afford the criminal defendant the full measure of protection intended by the fifth amendment. As Justice Brennan observed:

The “same evidence” test of “same offence” . . . does not enforce but virtually annuls the constitutional guarantee.

Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are

¹²¹ *Burton*, 202 U S at 380, accord *Gavieres*, 220 U S at 343

¹²² See generally *In re Nielsen*, 131 U S 176, 189-90 (1889)

¹²³ *Id* at 190

¹²⁴ *Id*

frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable.¹²⁵

The elements test was so ill-suited to the task of protecting the defendant's constitutional guarantee against successive prosecutions that the judicial doctrines of collateral estoppel¹²⁶ and res judicata¹²⁷ often afforded the defendant a more effective safeguard.¹²⁸ Because the *Blockburger* test was largely ineffective in protecting an accused from multiple prosecutions, many commentators advocated adoption of the so-called "same transaction" test to alleviate the potential for harsh results under *Blockburger*.¹²⁹

The same transaction test rested on a proposed rule of procedure which would require the prosecution to fully exercise its power to join related offenses in a single proceeding.¹³⁰ If the prosecution failed to join all the offenses arising out of a single act or transaction in a single prosecution, a subsequent prosecution would have been barred¹³¹ on the theory that the Government had waived its right to prosecute that offense.¹³² Although commentators contemplated legislative action to ef-

¹²⁵ *Ashe v. Swenson*, 397 U.S. at 452 (Brennan, J., concurring).

¹²⁶ "We defined collateral estoppel as providing that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Dowling v. United States*, 110 S. Ct. 668, 672 (1990) (quoting *Ashe*, 397 U.S. at 443).

¹²⁷ *Cf. Sealton v. United States*, 332 U.S. 575 (1948) (*resjudicata* may bar successive prosecutions even when the offenses are separate and distinct).

¹²⁸ *See Ashe*, 397 U.S. at 457 (Brennan, J., concurring) (declaring that this "anomaly" was "intolerable"). Ironically, the elements test now referred to as the *Blockburger* test was adopted in a case involving successive prosecutions. *See Gavieres*, 220 U.S. at 343.

¹²⁹ The test was proposed both in the Model Penal Code proposed by the American Law Institute (ALI) and the Standards for Criminal Justice articulated by the American Bar Association. ALI, Model Penal Code § 1.08(2) (Tent. Draft No. 6, 1956); ABA Standards for Criminal Justice, Standard 13-2.3(c) (2d ed. 1980 & Supp. 1986).

¹³⁰ Fed. R. Crim. P. 8(a) provides in pertinent part: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

¹³¹ ABA Standards for Criminal Justice Standard 13-2.3(c) (2d ed. 1980 & Supp. 1986); *see* ALI Model Penal Code, § 1.10 (Tent. Draft No. 5, 1956).

¹³² *United States v. Brooklier*, 637 F.2d at 622 (citing J. Sigler, *Double Jeopardy 222-28* (1969): Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 867-969, 976-81 (1980); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 106-14 (1970)).

fect these rules, three justices of the Supreme Court deemed them implicit in the Double Jeopardy Clause.¹³³ Nevertheless, a majority of the Court never has embraced that view and the Court recently has gone to some length to emphasize that it has not adopted that test.¹³⁴

The Court did, however, recognize that the double jeopardy protection includes a collateral estoppel feature.¹³⁵ Thus, the Court came to acknowledge that "[t]he *Blockburger* [elements] test is not the only standard for determining whether successive prosecutions involve the same offense."¹³⁶ Many courts, however, misconstrued this observation as a wholesale renunciation or modification of the *Blockburger* test even for the purpose of determining legislative intent for multiple punishments in the same trial. This misunderstanding was resolved in *Grady v. Corbin*.¹³⁷

In *Grady*, the Court reiterated that the role of the double jeopardy clause in a single prosecution was to effect legislative intent.¹³⁸ The Court further reiterated that a trial court must apply the *Blockburger* test to determine legislative intent in single prosecution cases.¹³⁹ The Court acknowledged, however, that the double jeopardy protection against successive prosecutions required an additional test even broader than its collateral estoppel feature.¹⁴⁰ The Court articulated this new test in the following terms:

The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will

¹³³ *Ashe*, 397 U.S. at 453 (Brennan, J., with whom Marshall and Douglas, JJ., joined, concurring) ("In my view, the Double Jeopardy Clause requires the prosecution . . . to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction").

¹³⁴ *Grady*, 110 S. Ct. at 2093 n.12, 2094 n.15.

¹³⁵ See *Dowling v. United States*, 110 S. Ct. 668, 671 (1990) ("In *Ashe v. Swenson*, we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel"). The Court had earlier questioned the existence of a relationship between the constitutional protection and the judicial doctrine. *Hoag v. New Jersey*, 356 U.S. 464, 471 (1958).

¹³⁶ *Brown*, 432 U.S. at 166 n.6 (citing *Ashe*, 397 U.S. at 436). Although the dicta in *Brown* signaled that the Court was preparing to broaden the double jeopardy safeguard against successive trials, the Court nevertheless resolved the case using a pure *Blockburger* analysis. *Brown*, 432 U.S. at 167-68, 167 n.6.

¹³⁷ *Grady*, 110 S. Ct. 2084 (1990).

¹³⁸ *Id.* at 2090-91

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2093.

prove conduct that constitutes an offense for which the defendant has already been prosecuted.

. . .

The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. On the other hand, the State cannot avoid the dictates of the double jeopardy clause merely by altering in successive prosecutions the evidence offered to prove the same conduct.¹⁴¹

In effect, the Court has given the double jeopardy term “same offense” two separate meanings. In the context of multiple punishments at a single trial, it means “same offense according to legislative intent.” In the context of successive prosecutions, it means “same offense according to legislative intent *and* according to the evidence of misconduct presented at a previous prosecution.”

There is an innate resistance to the notion that the same term in the same phrase can have two different technical meanings.¹⁴² Although making dual constructions of the same constitutional provision seems somewhat paradoxical, the dichotomy of interests served by the Double Jeopardy Clause mandates distinctive tests. With the advent of *Grady v. Corbin*, one must accept the anomaly of “‘same offense,’ different interpretations,” because one must identify the interest protected in each case¹⁴³ to determine the correct, applicable standard of double jeopardy.

One also must keep the duality of interests in mind when reading case precedents. The *Grady* Court did not fashion the rule of double jeopardy for successive prosecutions from whole cloth. That test was the product of evolving views of the protection against successive prosecutions. The Court ex-

¹⁴¹ *Id.* (citations omitted).

¹⁴² *Cf. Hunter*, 469 U.S. at 374 (Marshall, J., dissenting) (“the Double Jeopardy Clause cannot be reasonably interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment on the basis of a single criminal transaction . . . [i]n the context of multiple prosecutions, it is well established that the phrase ‘the same offense’ has [meaning independent of statutory law] . . . [o]therwise, multiple prosecutions would be permissible whenever authorized by the legislature”).

¹⁴³ Cases frequently present both interests protected by the Double Jeopardy Clause. *See, e.g., Garrett*, 471 U.S. at 777.

pressed these views in the dicta of many precedents.¹⁴⁴ In addition to the independent tests applied between the double jeopardy protections against successive prosecutions and multiple punishment, various factions on the Supreme Court have advocated—and continue to advocate— independent and conflicting views of *both* protections of the Double Jeopardy Clause.

One faction insists that the *Blockburger* test is the sole measure of protection for all double jeopardy interests.¹⁴⁵ Others have argued that the Double Jeopardy Clause plays no role in determining what punishments are permissible in a single trial.¹⁴⁶ Still others take an opposite view, as noted above, and contend that the Double Jeopardy Clause restricts the power of Congress to authorize cumulative convictions and punishments even at a single trial.¹⁴⁷ All of these divergent views have found expression in the dicta of many cases.¹⁴⁸ Nonetheless, two clearly separate tests have been articulated and one must consider the possibility that the dicta of any one opinion may not reflect of the majority of the Court. Unfortunately, the United States Court of Military Appeals has not always drawn these subtle but critical distinctions.

III. Military Multiplicity

Military multiplicity practice as defined by the United States Court of Military Appeals is unique from federal multiplicity practice. Contrary to the constitutional dictates of the

¹⁴⁴ See, e.g., *Brown*, 432 U.S. at 166-67 n.6 (citing *Ashe*, 397 U.S. at 436).

¹⁴⁵ Cf. *Grady*, 110 S. Ct. at 2091 n.8 ("Justice SCALIA's dissent contends that *Blockburger* is not just a guide to legislative intent, but rather an exclusive definition of the term 'same offence' in the Double Jeopardy Clause"); see *Grady*, 110 S. Ct. at 2097-98 (Scalia, J., dissenting, with whom Rehnquist and Kennedy, JJ., join, dissenting); see also *Grady*, 110 S. Ct. at 2095 (O'Connor, J., dissenting) ("I agree with much of what Justice SCALIA says in his dissenting opinion"); *Garrett*, 471 U.S. at 796 (O'Connor, J., concurring) ("The [double jeopardy] concerns for finality . . . are no more absolute than those involved in other contexts").

¹⁴⁶ See, e.g., *Whalen*, 445 U.S. at 705 (Rehnquist, J., dissenting) ("I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding").

¹⁴⁷ See, e.g., *Hunter*, 459 U.S. at 372 (Marshall, J., dissenting).

¹⁴⁸ See *Whalen*, 445 U.S. at 697 (Blackmun, J., dissenting) ("Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch clearly intended that multiple penalties be imposed for a single criminal transaction" (citing *Simpson v. United States*, 435 U.S. 6, 11-13, (1978); *Jeffers*, 432 U.S. at 155)).

double jeopardy clause and the separation of powers doctrine, military multiplicity practice rarely involves legislative intent.

A. *Multiplicity for Purposes of Sentencing.*

In *United States v. Baker*, the United States Court of Military Appeals declared that the government's reliance on the *Blockburger* test was "incorrect" and announced, "the President did not simply adopt the so-called 'Blockburger' rule to determine whether offenses arising from the same transaction were separate for purposes of punishment in the military."¹⁴⁹ In support of this declaration, the court cited paragraph 76a(5) of the 1969 Manual:

Care must be exercised in applying the general rule [that offenses are not separate unless each requires proof of an element not required to prove the other] as there are other rules which may be applicable, with the result that in some instances a final determination of whether two offenses are separate can be made only after a study of the circumstances involved in the individual case.¹⁵⁰

The court's reliance upon paragraph 76a(5) as authority for its ruling was misplaced. The drafters included paragraph 76a(5) in the 1969 Manual in recognition of the court's precedents, which disregarded wholesale the sentencing provision of the 1951 Manual.

The 1961 Manual prescribed the following test to determine whether offenses were "separate": "The offenses are separate if each offense requires proof of an element not required to prove the other."¹⁵¹ The drafter stated his intent in prescribing the foregoing test as follows:

Although he may be found guilty of all offenses arising out of one transaction, the accused may be punished only for separate offenses. These two rules are taken, generally, from the decisions of the Federal courts. The rule that offenses are separate if each offense requires proof of an element not required to prove the other is commonly referred to as the "Blockburger rule," having been taken

¹⁴⁹ *Baker*, 14 M.J. at 369, 370.

¹⁵⁰ *Id.* at 369-70 (quoting Manual for Courts-Martial, United States, 1969 (rev.), para. 76a(5) [hereinafter MCM, 1969]).

¹⁵¹ Manual for Courts-Martial, United States, 1951 [hereinafter MCM, 1951], para. 74b(4).

from the opinion of the Supreme Court in *Blockburger v. United States* (1932), 284 U.S. 299.¹⁵²

The drafters — and, presumably, the President — intended to adopt the then-existing federal multiplicity practice for application to military courts-martial.

The Court of Military Appeals, however, had misinterpreted the *Blockburger* test and applied it incorrectly since the 1950's. The court did not focus on the *statutory* elements of the "offense" to determine legislative intent as required by *Blockburger*. Rather, the court focused on the allegations of fact in the specifications to define the accused's offenses.¹⁵³

¹⁵² Hodson, "Status and Duties of the Law Officer, Findings and Sentence; Revisions: Rehearing," *Legal & Legislative Basis: Manual for Courts-Martial, United States, 1951*, 77-78 (emphasis added). The Preface of *Legal & Legislative Basis* states:

This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual.

""See, e.g., *United States v. Reene*, 15 C.M.R. 177, 180 (C.M.A. 1954) ("*Blockburger* indicates that each count of an indictment must require proof of a distinct and additional fact in order that it may constitute a basis for separate punishment"); *United States v. McVey*, 15 C.M.R. 167, 173 (C.M.A. 1954) ("Regardless of the form of the statement of the rule, only the *facts* necessary to allege and prove the elements of the offense are involved") (emphasis added).

The case of *United States v. Redenius*, 15 C.M.R. 161 (C.M.A. 1954), illustrates the tortured approach adopted by the court. In *Redenius*, the accused was convicted and sentenced for two specifications of desertion under article 85 of the Uniform Code of Military Justice. Section 885 of title 10 provided in pertinent part:

- (a) Any member of the armed forces of the United States who—
- (1) without proper authority goes or remains absent from his place . . . of duty with intent to remain away therefrom permanently: or
 - (2) quits his . . . place of duty with intent to avoid hazardous duty or to shirk important service: or

is guilty of desertion

One specification charged desertion "with intent to remain permanently"; another charged desertion "with intent to shirk important service." The court concluded that "[s]ince a different intent is set out in *each of the specifications*, and present intent may be regarded as a fact, superficial application of the *Blockburger* test makes it appear that two offenses are described." *Id.* at 166 (emphasis added).

The court ignored the plain Statement of the rule in *Blockburger* and in *Gavieres*. Instead, the court mistakenly lifted the language of the *Blockburger* test out of context and fashioned an entirely new test.

Although many decisions by the Supreme Court reiterated the test, the Court of Military Appeals was stubborn in its misinterpretation of the test. See *United States v. Gibson*, 11 M.J. 435, 437 (C.M.A. 1981) ("under principles enunciated by the Supreme Court, offenses should be treated as the same when *in light of the allegations*, the proof of one necessarily requires proof of the other") (emphasis added) (citing *Illinois v. Vitale*, 447 U.S. 410 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown*, 432 U.S. at 161

Thus, the Court of Military Appeals must be numbered among those unfortunate “commentators and judges alike”¹⁵⁴ who erroneously focused on the factual allegations contained in the specifications to identify the “elements” of an accused’s “offense” in the *Blockburger* analysis. In effect, the prosecutor’s skill in drafting specifications determined whether the court could impose separate punishments. Problems were inevitable under the interpretation of the test adopted by the Court of Military Appeals. Prosecutors effectively could circumvent the double jeopardy protections against multiple punishment for the same offense by artfully drafting specifications.

By 1963, the court had begun to express dissatisfaction with the test.¹⁵⁵ The court had discovered—not surprisingly—that a critical analysis of the facts underlying some specifications “reveal[ed] the differences [in the offenses charged] to be illusory.”¹⁵⁶ The court noticed that the factual allegations that constituted distinct elements often “merely create[d] a separate arm of the very same crime” even though a “superficial application of [the court’s version of] the *Blockburger* test [made] it appear that two offenses [were] described.”¹⁵⁷ As the court later evaluated the situation, “Certain difficult fact situations which appear to smack of unfairness in doubling the punishment for what might be regarded as one omission have required this Court to seek a judicial means of answering perplexing questions.”¹⁵⁸

In lieu of the court’s version of the *Blockburger* test, the court fashioned myriad “tests,” which could lead to contrary results.¹⁵⁹ Moreover, the court did not feel constrained by any one test or by any of its own case precedents.¹⁶⁰ As the court

¹⁵⁴ *Grady*, 110 S. Ct. at 2093 n.12.

¹⁵⁵ *United States v. Soukup*, 7 C.M.R. 17, 21 (C.M.A. 1951) (“this standard [the *Blockburger* test] may not serve accurately and safely in all situations”).

¹⁵⁶ *United States v. Brown*, 23 C.M.R. 242, 243 (C.M.A. 1957).

¹⁵⁷ *United States v. Redenius*, 15 M.J. at 165, 166.

¹⁵⁸ *United States v. Johnson*, 17 C.M.R. 297, 299 (C.M.A. 1954).

¹⁵⁹ The tests fashioned by the court included a literal, same evidence test, *see, e.g.*, *United States v. Redenius*, 15 C.M.R. at 166-67; a “societal norms” test, *see, e.g.*, *United States v. Beene*, 15 C.M.R. at 180; a test that reflected due process notions of lesser-included offenses, *see, e.g.*, *United States v. McVey*, 15 C.M.R. 167, 174 (C.M.A. 1954); an analysis for legislative intent, *see, e.g.*, *United States v. Bridges*, 25 C.M.R. 383, 385 (C.M.A. 1958); an integrated transaction test, *see, e.g.*, *United States v. Murphy*, 40 C.M.R. 283 (1969); and a single impulse test, *see, e.g.*, *United States v. Pearson*, 41 C.M.R. 379 (1970).

¹⁶⁰ *United States v. Burney*, 44 C.M.R. 125, 128 (C.M.A. 1971) (“No one test is safe and accurate in all circumstances . . . [i]f the tests appear to produce a conflict, we should reconsider whether one of the conflicting tests appropriately applies to the immediate factual situation”). *See United States v. Pearson*, 41 C.M.R. 379, 380-81

stated in *United States v. McClary*:

Our previous rulings do not require a holding of multiplicity. Generally speaking, in determining multiplicity we have used the Manual test which provides that the offenses are separate if each offense requires proof of an element not required to prove the other. In some instances, *that principle has been rejected because it was believed its use would violate the cardinal principle of law that a person may not be twice punished for the same crime.*¹⁶¹

In effect, the court had assumed the role of final arbiter in the double jeopardy arena of cumulative punishment.

The court reviewed multiplicity issues with a single standard in mind—a standard expressed in sententious maxim: "As it is true that a rose by any other name would smell as sweet, so it is equally true that a man may be punished only once for the same offense regardless how that offense is labeled."¹⁶² Thus, when the President promulgated the 1969 Manual, he included in paragraph 76 a caveat warning against the court's possible selection of one of its own unique tests.¹⁶³

By citing paragraph 76a(8) in support of its contention that the President had tacitly authorized the Court of Military Appeals to promulgate alternate tests, the court was in reality dealing in self-fulfilling prophecy. To confirm the power it had usurped, the court did no more than exploit the President's recognition of the court's disregard for the test pre-

("the 'separate facts' test does indeed have utility here . . . [s]ummaries of other tests that have been applied in the past to determine multiplicity need not be discussed").

¹⁶¹ *United States v. McClary*, 27 C.M.R. 221, 225 (C.M.A. 1959) (emphasis added). In 1960, the court seemed to retreat from this position saying only that it had "announced variations of this [the 1951 Manual] rule." *United States v. Hardy*, 29 C.M.R. 303, 308 (C.M.A. 1960).

¹⁶² *United States v. Posnick*, 24 C.M.R. at 13; *accord* *United States v. Smith*, 37 C.M.R. 319, 325 (C.M.A. 1967) ("At the heart of the issue is the principle that an accused shall 'not be twice punished for the same offense'"); *United States v. Blair*, 27 C.M.R. 235, 238 (C.M.A. 1959) ("A fundamental rule followed by this Court is that a person shall not be punished twice for the same offense"); *United States v. Modesett*, 25 C.M.R. at 415 ("In the field of punishment, the fundamental principle is that a person shall not be twice punished for the same offense") (citing *United States v. Braverman*, 317 U.S. 49 (1942)); *see also* *United States v. Burney*, 44 C.M.R. 125, 127 (C.M.A. 1971) ("That a person not be punished twice for the same offense is a fundamental principle"); *United States v. Mirault*, 40 C.M.R. 33, 35 (C.M.A. 1969) ("Bearing in mind the primary concern that punishing an accused twice for what is essentially one offense must be avoided, we must [determine whether offenses are multiplicitous]").

¹⁶³ *Accord Baker*, 14 M.J. at 372 (Cook, J., dissenting).

scribed by the 1951 Manual. The court tacitly corrected its disingenuous reliance on paragraph 76a(8) in *United States v. Smith*. In *Smith*, the court first applied a correct interpretation of the *Blockburger* test but then declared, “*United States v. Baker, supra*, did not content itself with the *Blockburger* rule.”¹⁶⁴

Since the court’s decisions in *Baker* and *Smith*, the court has not entertained challenges to its rules of multiplicity for sentencing. Rather, the focus of challenge has shifted to the court’s rules of multiplicity for findings.

B. Multiplicity for Purposes of Findings.

While multiplicity issues for findings and sentence in federal practice are not independent questions,¹⁶⁵ the Court of Military Appeals has deemed these issues separate in military practice. Thus, offenses may be separate for purposes of findings but multiplicitous for sentencing. In *Baker*, the court correctly identified the issue as one of constitutional magnitude; the court, however, defined the double jeopardy interest not as a matter of legislative intent but as one involving due process notions of lesser-included offenses.^m

¹⁶⁴ *United States v. Smith*, 14 M.J. 430, 432 (C.M.A. 1983) (per curiam).

¹⁶⁵ See *supra* note 90 and accompanying text.

¹⁶⁶ See *Baker*, 14 M.J. at 367-68 (citing *United States v. Duggan*, 16 C.M.R. 396, 399-400 (C.M.A. 1954)). Actually, the due process, lesser-included offense analysis was first articulated by Judge Latimer and applied to issues of multiplicity for sentencing.

In *United States v. McVey*, 15 C.M.R. 167 (C.M.A. 1954), Judge Latimer analyzed the question whether the offenses of robbery under 1960 Uniform Code of Military Justice article 122, 10 U.S.C. § 922 (1950) [hereinafter 1960 UCMJ], and assault with a deadly weapon under 1950 UCMJ article 128, were “multiplicitous.” He concluded:

While an allegation of an aggravating factor may be surplusage to a principal offense, it may satisfy an element of the lesser . . . [t]herefore, we conclude that where, as here, the allegations of the specifications are broad enough to permit proof of the use of a deadly weapon, and its use constituted the force and violence of the robbery charge, an aggravated assault is a lesser crime included within the latter.

McVey, 15 C.M.R. at 174. The due process basis of Latimer’s approach is clearly evident in his analysis:

Tested somewhat differently, if we assume that the Government had alleged the offense in the same language, but it had been unable to establish the larceny, would not the allegations and the proof support a finding of assault with a dangerous weapon? [Yes.] The general rule is that where the specification contains facts showing all the constituent elements of the minor offense, it sufficiently alleges that offense. In construing the specification some liberality of interpretation is permitted.

Id.

Once separate specifications are identified as arising from the same criminal transaction, the test—as stated in *Baker*—focuses on two questions: first, whether one of the specifications is lesser-included of the other as a matter of law; and second, whether the allegations of fact set forth in one specification are “fairly embraced” in the factual allegations of the other and established by evidence introduced at trial.¹⁶⁷ Stated otherwise, offenses are multiplicitous for findings if the allegations of fact set forth in one of the specifications would require an instruction for findings on the other, lesser-included offense as a matter of due process.

Insofar as this test required dismissal of offenses that were lesser-included as a matter of law, the rule did not differ from the Supreme Court’s decision in *Ball* or, for that matter, the court’s earlier decision in *United States v. Drexler*.¹⁶⁸ To the extent that the test required dismissal of findings simply because pleadings were drafted inartfully, the test is inane. Even in the absence of legislative intent concerns, the test constitutes little more than a notion that an accused should escape prosecution and punishment for an offense simply because the allegations contained in the specifications or the evidence introduced at trial establish some latent, or even patent, relationship between the specifications. When legislative intent is considered, the test is indefensible because it rejects legislative intent as the sole measure of authorized punishment. The court’s defense of this rule has been equally inane and indefensible.

In *United States v. Doss*, the court declared that “some confusion existed in [its] precedents” on the subject of multiplicity for findings and concluded that “some further comment emphasizing *Baker* [might] be appropriate.”¹⁶⁹ The court explained:

¹⁶⁷ *Baker*, 14 M.J. at 368. The full text of *Baker* provides:

Assuming both offenses arise out of the same transaction, one offense may be a lesser-included offense of another offense in two situations: First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial.

Id. This test expressly repudiates the *Blockburger* test because it permits a finding that two offenses are multiplicitous for findings when those offenses are not lesser included as a matter of law.

¹⁶⁸ Compare *United States v. Ball*, 470 U.S. 856 (1985), with *United States v. Drexler*, 26 C.M.R. 185, 188 (C.M.A. 1958).

¹⁶⁹ *United States v. Doss*, 15 M.J. 409, 410 (C.M.A. 1983).

[I]n upholding the state-court conviction in [*Missouri v. Hunter*] the Supreme Court did not purport to limit the power of Congress or the President to prescribe different, more lenient procedures for trial by court martial. In *Baker*, we made clear that in fact this has occurred.¹⁷⁰

¹⁷⁰ *Id.* at 411, MCM, 1969, para. 26b.

Paragraph 26b of the 1951 and the 1969 Manuals provided: "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." MCM, 1969, para. 26b; MCM, 1951, para. 26b. This provision indeed focuses on the charges and the parameters of the criminal transaction rather than on the distinctive elements of the statutes violated in the course of that criminal transaction. From an historical perspective, the court's decisions construing this provision have made it something of an enigma.

Initially, the court did not view the rule of pleading set forth in paragraph 26b as a rule of multiplicity. *Cf.* *United States v. Yarborough*, 5 C.M.R. 106, 115 (C.M.A. 1962) ("The only prohibition against multiplicity contained in the Manual is that voiced in paragraph 76a(8) which states that the maximum sentence may be adjudged only for separate offenses"). In *United States v. McCormick*, the court refused even to consider the question whether an allegedly "unreasonable multiplication of charges" amounted to an issue of multiplicity. *United States v. McCormick*, 12 C.M.R. 117, 119 (C.M.A. 1953).

In 1956, the court for the first time indicated its concern with the Manual provision authorizing multiple convictions for the same offense and suggested that paragraph 26b of the Manual might limit the authority to refer charges to court-martial. For the most part the court had dodged the issue of multiplicity in findings. *See, e.g.*, *United States v. Dardeneau*, 18 C.M.R. 86 (1955). The court even dismissed a challenge to separate convictions premised on the preemption doctrine because "the court did not impose punishment for the two offenses." *United States v. Strand*, 20 C.M.R. 13, 23 (C.M.A. 1955). In *United States v. Warren*, however, the Judge Latimer writing for the majority stated:

We have considerable difficulty in determining why the original pleader drew the specifications to make a single transaction the basis for three separate offenses. The evidence interpreted reasonably indicates a continuous course of sexual misbehavior from the meeting in the bar to the completed crime. The lewd and lascivious acts in the two separate specifications were no more than a prelude to, and in essence part of, the completed offense. Yet, what appears to have been one criminal transaction was partitioned into three separate stages and each stage alleged a separate offense.

United States v. Warren, 20 C.M.R. 135 (C.M.A. 1966). Relying on paragraph 26b and failing to find any exigencies of proof, Judge Latimer stated: "Unless we are presented with more valid reasons than we find in this case, we are not disposed to permit the Government to allege lesser included offenses *or separate offenses which arise out of the same transaction.*" *Id.* at 139 (emphasis added).

Both Chief Judge Quinn and Judge Brosman filed separate opinions in *Warren* and distanced themselves from Judge Latimer's opinion. Chief Judge Quinn maintained that accusers are "free to allege an offense in as many ways as they . . . deem advisable"; he also observed that the court had not "intervened" unless the pleadings have resulted in multiple punishments for the same offense. *Id.* at 146 (C.M.A. 1955) (Quinn, J., concurring in the result). Chief Judge Quinn indicated that, although Judge Latimer's proposal "conflicts with this Court's prior decisions," *id.* at 146-46, he was "not opposed to reviewing charges upon the basis of an abuse of discretion." *Id.* at 146. Judge Brosman simply states that he could not "unreservedly" agree with Judge Latimer. *Id.* (Brosman, J., concurring). Although Judge Latimer's opinion in *Warren* did not express a clear majority view, it was published as the "majority" opinion and the separate opinions of Chief Judge Quinn and Judge Brosman did not entirely repudiate that view. *Id.*

The court then explained: "Presumably, in prescribing these rules the President took into account those considerations to which Justice Marshall called attention in his dissent in *Missouri v. Hunter*."¹⁷¹

The problem with the court's presumption is self-apparent. *Missouri v. Hunter* was decided in 1983—some thirty years after paragraph 26b first was promulgated. In effect, the court attributed to President Harry S. Truman concerns that Justice Douglas did not articulate until 1958.¹⁷² Moreover, the court cited, but failed to attribute, any significance to the fact that both the 1951 Manual and the 1969 Manual specifically authorized multiple convictions for the same offense—even if those offenses were "the same offense" as a matter of law.¹⁷³

The court has from time to time paid lip service to legislative intent.¹⁷⁴ Recently, the court seemed to announce a new basis for its multiplicity rulings. In *United States v. Hickson*, the court analyzed the multiplicity issue on the basis of legislative intent, characterizing its decisions on multiplicity as fol-

In *United States v. Albrico*, the court observed the friction between paragraph 74b(4) of the 1951 Manual which authorized multiple convictions for the same offense and paragraph 26b of the 1951 Manual which provided that one transaction "should not be made the basis for an unreasonable multiplication of charges." *United States v. Albrico*, 23 C.M.R. 221, 223 (C.M.A. 1967). In *Albrico*, the court held that the specific authorization of paragraph 74b(4) controlled: "Where the Manual, *supra*, specifically authorizes the bringing of multiple charges arising out of the same transaction regardless of separability, it is difficult to see how the bringing of two charges allegedly out of the same transaction can be an abuse of discretion." *Id.* at 223-24.

In the case *United States v. Drexler*, the court first established a standard of "reasonableness" for paragraph 26b: "[W]hen it is manifest that one charge is *identical* to another, a motion to dismiss one or the other is proper." *United States v. Drexler*, 26 C.M.R. 185, 188 (C.M.A. 1958) (emphasis added); *accord* *United States v. Middleton*, 30 C.M.R. 54, 58 (C.M.A. 1960) ("on timely objection, it is appropriate to dismiss a charge which merely duplicates another"). The court maintained, however, that the error of multiplicity affected only the sentence. The court stated:

After verdict, the form of the initial charges need not be corrected by dismissing a duplicative count. Particularly an appellate tribunal need not take such action. Consequently, the appellate courts ordinarily direct only a reconsideration of the sentence, in instances where the form of the charges affects the sentence imposed upon the accused.

Id.

¹⁷¹ *Doss*, 15 M.J. at 411 (citing *Hunter*, 459 U.S. at 681-82; *see supra* notes 109-11 and accompanying text).

¹⁷² *See infra* notes 173-77 and accompanying text.

¹⁷³ MCM, 1969, para. 74b(4); MCM, 1951, para. 74b(4); *see Albrico*, 23 C.M.R. at 223-24.

¹⁷⁴ *See Smith*, 37 C.M.R. at 325 ("Application of the rule [against multiple punishment for the same offense] depends on whether Congress intended to make each step in a single transaction separately punishable"). In doing so, however, the court repudiated the rule of statutory construction established in *Blockburger*. *Id.* at 325 ("In the absence of *clear-cut congressional intention*, the courts have followed a 'policy of

lows: "In various cases we attempted to provide guidance as to factors which might help in ascertaining what maximum punishment had been intended when an accused was convicted of several offenses arising out of the same transaction."¹⁷⁵ Although the court analyzed the issue in terms of legislative intent, it failed or refused to apply the test mandated by the Supreme Court; further, it failed or refused to acknowledge the presumption of legislative intent established by the Supreme Court in *United States v. Albarnaz*.¹⁷⁶

The lack of merit in the *Hickson* rationale is evidenced by a subsequent decision issued by the court. In *United States v. Jones*, the court lapsed again into a contention that the multiplicity rules it has devised are based on constitutional law and on the Manual for Courts-Martial.¹⁷⁷ In *Jones*, the court reversed decisions by the Navy-Marine Court of Military Review that held that the President had superseded the court's decision in *Baker* by prescribing a return to the *Blockburger* test in the new Manual for Courts-Martial promulgated in 1984.¹⁷⁸ They gave the matter short shrift:

The initial assertion of the court below is based on a profound misunderstanding of the legal basis of this Court's decision in *United States v. Baker, supra*. Its unsoundness is further exacerbated by an insupportable reading of the cited rules in the new Manual for Courts-Martial. Finally, the intermediate court's simplistic

lenity") (emphasis added). Instead, the court seemed to view the matter as a judicial policy not unlike the "one transaction, one punishment" view espoused by other jurists. *Id.* at 325 ("Essentially, the same idea is expressed in the Manual's observation that '[o]ne transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person'").

The court also paid lip service to the Supreme Court's decision in *Blockburger* and the test prescribed by the Manual for Courts-Martial. *United States v. Weaver*, 39 C.M.R. 173, 175 (C.M.A. 1969) ("This rule [paragraph 76a(8) of the 1951 Manual] is based largely on the decision of the United States Supreme Court in [*Blockburger*]"). But the court declared unabashedly, "However, this Court has not always followed the guidance of the [1951 Manual] in this area. Instead, we have considered each case on its own facts and at different times have applied different tests to determine whether offenses were separate." *Id.* (emphasis added).

¹⁷⁵ *United States v. Hickson*, 22 M.J. 146, 153 (C.M.A. 1986) (citing *United States v. Beene*, 15 C.M.R. 177 (C.M.A. 1954); *United States v. Redenius*, 15 C.M.R. 161 (C.M.A. 1954); and *United States v. Soukup*, 7 C.M.R. 17 (C.M.A. 1951)).

¹⁷⁶ *Compare Hickson*, 22 M.J. at 151-55, with *Albarnaz*, 450 U.S. at 341, 342 ("if anything is to be assumed from the congressional silence on this point, it is that Congress [is] aware of the *Blockburger* rule and legislate[s] with it in mind. It is not a function of this Court to presume that 'Congress was unaware of what it accomplished'").

¹⁷⁷ *United States v. Jones*, 23 M.J. 301, 302-303 (C.M.A. 1987) (citing *Ball v. United States*, 470 U.S. 856 (1985), *Garrett v. United States*, 471 U.S. 773 (1985)).

¹⁷⁸ *Id.* at 302-03.

embrace of the “*Blockburger*” rule ignores significant problems concerning its propriety as the sole test for determining double-jeopardy claims, particularly in the context of a jurisdiction’s law defining a lesser included offense.¹⁷⁹

The foregoing line of cases illustrates that, while the early court misunderstood the *Blockburger* rule and resorted to alternate tests out of necessity, the present court fully understands the *Blockburger* rule and willfully disregards it.

IV. Conclusion

Supreme Court precedents have fully explored and established the limits of the double jeopardy protection against multiple punishment for the same offense. There is but one limit—legislative intent.¹⁸⁰ The Supreme Court also has mandated the rules of construction to be used when legislative intent with respect to the imposition of cumulative punishments is not otherwise manifest. The United States Court of Military Appeals has determined that it will not be bound by these decisions. Thus, one might petition the Supreme Court assigning as error the following question: CAN THE COURT OF MILITARY APPEALS REFUSE TO FOLLOW A PRECEDENT OF THIS COURT?

The Court of Military Appeals has from time to time relied on various provisions of the several manuals for courts-martial for its errant adventure into the realm of the proper apportionment of punishment. Out of fairness to the court, the Manual’s statement of the *Blockburger* test is more than a little ambiguous. The Manual invariably has phrased the test as “**offenses** are separate if each *offense* requires proof of an element not required to prove the other.”¹⁸¹ Such a definition violates a cardinal rule of definition by defining the term “of-

¹⁷⁹ *Id.* at 303 (citations and footnote omitted).

¹⁸⁰ The Court of Military Appeals has incorrectly read *Missouri v. Hunter* as authorizing “jurisdictions”—and presumably, inferior federal courts—to establish their own law of lesser included offenses. The Court’s decision in *Hunter* was, however, premised in the doctrine of sovereignty. Compare *Hunter*, 459 U.S. at 368 (“We are bound to accept the Missouri court’s construction of that State’s statutes” (citing *O’Brien v. Skinner*, 414 U.S. 524, 531 (1974)). with *Whalen*, 445 U.S. at 687 (“Acts of Congress . . . certainly come within this Court’s Art. III jurisdiction . . . and we are not prevented from reviewing the decisions . . . interpreting those Acts”).

¹⁸¹ The full text of the test articulated in *Blockburger* provides: “the test . . . is whether *each provision* requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304 (emphasis added).

fense" using the word "offense." The word "offense" is susceptible of several meanings. The term could be construed to refer to the offense defined by Congress in the Uniform Code of Military Justice, the factual allegations charged in the specification, or accused's misconduct as established by the evidence introduced at trial. Thus, the Manual's circular use of the term is ambiguous.

More important, however, the test prescribed by the various Manuals has been fatally flawed in two other respects. The Manual does not state the test as a rule of statutory construction. Rather, the "test" is stated as a dispositive rule of law. In this sense, the statement of the test contained in the 1961 Manual fails to make legislative intent the measure of permissible punishment. In effect, the test provided by the Manual does not serve to assist the courts in determining the punishment authorized by Congress; rather, the test itself defines the measure of permissible punishment. Additionally, the various Manuals incorrectly have mandated application of the *Blockburger* test in *all* situations. As stated above, the *Blockburger* test was designed only for application when there was an issue whether Congress intended multiple punishment under *two* separate statutory provisions.¹⁸²

In fairness to the Court of Military Appeals, the problems with military multiplicity practice rest as much with the Manual as with the court. But this fact does not justify the court's wholesale disregard for constitutional law. The constitutional infirmities in the multiplicity practice fashioned by the court would not dissipate if the Manual prescribed the very rules the court employs. Further, practical concerns such as judicial economy, certainty, and *stare decisis* weigh heavily in favor of modifying military practice to mirror federal practice.

¹⁸² Regardless of the argumentative merits of the court's reliance on the various provisions Manual, the question remains whether the Congress intended in articles 36 and 56 to grant the President authority to override the double jeopardy protection against multiple punishments for what the legislature intended to be the "same offense." See UCMJ art. 36 (authorizing the President to promulgate rules of procedure "which may not be contrary to or inconsistent with this chapter"; UCMJ art. 56 (authorizing the President to prescribe maximum punishments). Conversely, there is also the question whether Congress intended to grant the President the power to obviate the legislatively created distinctions between statutory enactments. Given the court's manifest predilections on the issue of multiplicity, the court would surely answer the foregoing questions in the affirmative.

DIVIDING MILITARY RETIREMENT PAY AND DISABILITY P N: A MORE EQUITABLE APPROACH

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I. Introduction

There has been a dramatic change during the past twenty years in the treatment of military retirement pay as property that is divisible pursuant to a divorce.¹ In some ways, these changes parallel the changes taking place in other pensions. Military retirement pay, however, is different than other pensions because it is a creation of the federal government. As a result, the developments leading to the divisibility of military retirement pay have followed a somewhat different course than other civilian pensions.

In 1981, the Supreme Court held in *McCarty v. McCarty*² that the federal preemption doctrine prohibited the states from dividing military retirement pay. The inequity that this decision caused to former spouses of service members led Congress to enact the Uniformed Services Former Spouses' Protection Act (USFSPA).³

Although the USFSPA returned the ability to divide military retirement pay to the states, it also contained certain limitations restricting the states' ability to divide military retirement pay. These limitations were the result of concern over national defense requirements and being equitable to service members.⁴ Several of these limitations caused some contro-

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²Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. Rev. 1250 (1986).

³453 U.S. 210 (1981).

⁴10 U.S.C. § 1408 (1982).

*S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1596 (1983).

versy and resulted in litigation. Although some of the controversy and confusion generated by these limitations already has been resolved either by litigation or by legislation, two major areas of controversy remain.

The first major area of controversy concerns what method of dividing retirement pay should be applied to military retirement pay. Using one approach, the court would determine the value of the pension at the time of divorce and award each of the parties one-half. Unfortunately, this is far more complex than it sounds. Using another approach, the court could retain jurisdiction of the matter and divide the pension between the parties as it is received by the service member. While this approach solves some of the problems of the first approach, it also has disadvantages.

The second area of controversy is what portion of military retirement pay the former spouse should receive and when should he or she begin receiving it. One issue is whether the former spouse should share in postdivorce adjustments, such as cost of living increases and promotions that occur after the divorce. The major issue involved in when the former spouse should begin receiving retired pay is whether the service member should begin paying while he or she is still serving on active duty.

Another major area of controversy concerning military benefits is whether military disability pay should be subject to division by the state courts. The United States Supreme Court held in *Mansell v. Mansell*⁵ that neither military disability pay, nor the retired pay waived to receive disability pay, can be subject to division.

This article examines all three of these major areas of controversy and makes a recommendation as to the proper resolution of each. The final result is one that is, on balance, more equitable to both the former spouse and the service member.

II. History of Dividing Military Retirement Pay

A. *Dividing Military Retirement Pay Prior to USFSPA.*

Prior to the Supreme Court Decision in *McCarty v. McCarty*,⁶ the historical development of the divisibility of military retirement pay was very similar to other pensions. First, courts

⁵ 490 U.S. 581 (1989).

⁶ 453 U.S. 210 (1981).

found that military retirement pay was not subject to division because it was not marital **property**.⁷ Like other pensions, the most frequently used rationale consisted of either the impossibility of establishing a present value for the pension or the speculative nature of the pension.⁸

Subsequently, courts began to recognize that vested military retirement plans should be considered marital property and, as such, should be subject to division upon divorce.⁹ While recognizing the divisibility of vested military pensions, courts initially refused to consider unvested pensions as marital property subject to division.¹⁰ Subsequently, courts began to consider military pensions marital property subject to division whether or not they were vested.”

Thus, prior to 1981, some states were dividing military retirement pay the same way they divided other pensions. Because military pensions are a creation of the federal government, however, some states concluded that federal preemption precluded them from considering military retirement pensions as marital **property**.¹² The result was that these states treated military retirement pay differently from civilian pensions because they believed they were compelled to do so.¹³

⁷ *In re* Marriage of Ellis, 36 Colo. App. 234, 538 P.2d 1347 (1975).

⁸ *Hiscox v. Hiscox*, 179 Ind. App. 378, 385 N.E.2d 1166, (1979); *Paulson v. Paulson*, 269 Ark. 523, 601 S.W.2d 873 (1980).

⁹ *In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (1976), *modified on appeal*, 73 N.J. 464, 375 A.2d 659 (1977); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968).

¹⁰ *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986); *Wilson v. Wilson*, 409 N.E.2d 1169 (Ind. Ct. App. 1980); *Ratcliff v. Ratcliff*, 586 S.W.2d 292 (Ky. Ct. App. 1979); *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982); *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978) (although pension involved was vested, court stated in dicta that unvested pension “cannot be said to constitute a property right because the benefits rest upon the whim of the employer”).

¹¹ *Laing v. Laing*, 741 P.2d 649 (Alaska 1987); *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977); *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Linson v. Linson*, 1 Haw. App. 272, 618 P.2d 748 (1980); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371 (1981); *Janssen v. Janssen*, 331 N.W.2d 762 (Minn. 1983); *Weir v. Weir*, 173 N.J. Super. 130 (1983); *Damiano v. Damiano*, 94 A.D.2d 132, 463 N.Y.S.2d 477 (1983); *Cearley v. Cearley*, 644 S.W.2d 661 (Tex. 1976); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 467 (1978).

¹² *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1981).

¹³ *Id.*

On June 26, 1981, the Supreme Court of the United States decided the landmark case of *McCarty v. McCarty*¹⁴ and held that division of military retirement pay was foreclosed under the preemption doctrine.¹⁵ The court also made clear that state courts could not make offsetting awards of other community property to compensate the former spouse for his or her interest in the military retirement benefits.¹⁶

McCarty was a decisive point in the development of the divisibility of military retirement pay. *McCarty* caused states already dividing military retirement pay to overrule prior case law and stop awarding military retirement pay as property.¹⁷ Thus, states were required to treat military pensions differently than other civilian pensions.

Because *McCarty* represented a major change in the way some states were dividing military pensions, the issue naturally arose as to whether *McCarty* should be applied retroactively. Nearly every state that considered the issue determined that *McCarty* should not be applied retroactively.¹⁸

Despite the prohibition on the divisibility of retirement pay, however, some states determined that *McCarty* did not prohibit them from considering a service member's military retirement pay in determining an appropriate level of alimony.¹⁹ Still, awarding alimony in lieu of dividing military retirement pay as property was not a sufficient remedy to resolve the inequity of a former military spouse being deprived of a portion of the service member's pension while a similarly situated civilian spouse was entitled to a portion of the employee spouse's pension. When military retirement pay is divided as property, the former spouse receives either a lifetime annuity—if the court uses the retained jurisdiction method—or a large lump sum cash payment—if the court uses the present cash value method. In contrast, when military retirement pay is considered in an award of alimony, the award may be subject to reduction or termination upon a change of circumstances related to either party's earning power or remarriage of the former spouse.

¹⁴ 453 U.S. 210 (1981).

¹⁵ *Id.* at 211.

¹⁶ *Id.* at 212-16.

¹⁷ *Jacanic v. Jacanic*, 124 Cal. App. 3d 67, 177 Cal. Rptr. 86 (1981).

¹⁸ L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* (1983).

¹⁹ *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982).

B. The USFSPA.

To resolve the inequity to the military spouse, Congress enacted the Uniformed Services Former Spouses' Protection Act.²⁰ This 1982 act was intended to overrule *McCarty* and allow for the divisibility of military retirement pay.²¹ The act went even further and provides a mechanism that allows for the direct payment of military retirement pay to the former spouse under certain circumstances.²²

Not surprisingly, this reversion of the power to divide military retirement pay to the states caused some convulsions in many states. Those states that were dividing military retirement pay prior to *McCarty* had to decide whether the USFSPA was retroactive within their jurisdictions. The USFSPA contained language which stated that a court may treat disposable retired pay for pay periods beginning after June 26, 1981, either as property solely of the member or as property of the member and his or her spouse in accordance with the law of the jurisdiction of each state court.²³ The legislative history of the USFSPA also suggests that Congress intended that the USFSPA would permit spouses to reenter state courts to obtain new divisions of military retirement pay.²⁴

Despite the clear intent of Congress, applying the USFSPA retroactively was not a simple matter. The doctrine of res judicata prohibited the relitigation of cases that became final during the nineteen-month period between the date of the *McCarty* decision and the effective date of the USFSPA. Nonetheless, the majority of states that considered military retirement pay as divisible prior to the Supreme Court's decision in *McCarty* decided that the statute was to be applied retroactively and allowed numerous cases that were decided between June 26, 1981, and February 1, 1983, to be reopened.²⁵ To reach this result, some states relied upon state rules of procedure analogous to Federal Rule of Civil Procedure 60(b), which per-

²⁰ Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 718, 730-37 (1982) (codified at 10 U.S.C. § 1408).

²¹ H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1569 (1983); S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1596 (1983).

²² 10 U.S.C. § 1408(d) (1982).

²³ *Id.* 1408(c)(1).

²⁴ H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1569 (1983); S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1596 (1983).

²⁵ Campbell and McKelvey, *Partitioning Military Retirement Benefits: Mapping the Post-McCarty Jungle*, TEX B.J. (Oct. 1986).

mits modification of otherwise final judgments.²⁶ Other states solved the problem through legislation.²⁷ In contrast, most states that had considered military retirement pay not to be divisible as property prior to the *McCarty* decision decided that the USFSPA was not to be applied retroactively.²⁸ The primary rationale for this position was that when the state courts did begin allowing the division of military retirement pay, it represented a fundamental change in the law.

Another group of litigants lost any opportunity to receive the advantages that the retroactive application of the USFSPA might have afforded them because they had obtained divorces pursuant to separation agreements that gave the service members the sole rights to the military pensions. Consider the spouse receiving legal advice concerning his or her property rights during the period from June 25, 1981, until February 1, 1983. Many were likely being advised that they had no right to their spouse's military pensions. As a result, many entered into property settlement agreements that awarded the military retirement pension to the service member as his or her sole property. In some of these cases, the USFSPA provided no remedy for these former spouses because some of the state courts concluded that a final divorce obtained pursuant to a separation agreement was not subject to modification.²⁹

The difficulty that the states encountered in applying the USFSPA retroactively is indicative of the problems Congress has in implementing a change in an area traditionally controlled by state law. Despite the retroactivity provision in the USFSPA that indicated Congress's clear intent that the states be allowed to divide military retirement pay effective June 26, 1981, that was not the final result. Nonetheless, the retroactivity issue has now been resolved in all states by either case law or legislation. Perhaps the best resolution of the issue has been the passage of time. The retroactivity issue is a moot point to anyone seeking a divorce today.

Because the USFSPA did not require the states to divide military retirement pay, states still were left to decide whether they would treat military retirement pay as property. Initially, several states decided that, despite the USFSPA, military retirement pay was not divisible as marital property as a

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Wiles v. Wiles*, 289 Ark. 340, 711 S.W.2d 789 (1986); *In re Marriage of Wolford*, 789 P.2d 459 [Colo. Ct. App. 1989].

²⁹ *Habermehl v. Habermehl*, 135 Ill. App. 3d 105, 481 N.E.2d 782 (1985).

matter of state law.³⁰ The rationale for not dividing military retirement pay was similar to the rationale being applied to other civilian pensions that were not vested. For example, in *Grant v. Grant*³¹ the Kansas Court of Appeals held that because the plaintiff's military retirement pay had no present determinable value, it could not qualify as marital property subject to division. This ruling does not reflect that military retirement pay was being treated differently than other pensions. It reflected the law in Kansas as to all pensions.

During the six years following the enactment of USFSPA, the decisions prohibiting the divisibility of military retirement pay subsequently were overturned either by case law³² or statute.³³ For example, following the court's decision in *Grant*,³⁴ the Kansas Legislature amended the Kansas statute specifically to include the present value of any vested or unvested military retirement pay as marital property subject to division by the court during a divorce.³⁵ Not surprisingly, states finding for the first time that military retirement pay was divisible initially would find that only vested military retirement pensions were subject to division.³⁶ Eventually, all military retirement pensions would be considered as divisible in these states regardless of whether they were vested or unvested.³⁷ Currently, all states except one³⁸ treat military retirement pay as divisible property upon the dissolution of a marriage.³⁹

Although virtually all states now treat military retirement pay as marital property, some states still require that the military retirement pay be vested prior to being treated as prop-

³⁰ *In re* Marriage of Mattson, 694 P.2d 1285 (Colo. Ct. App. 1984); *Grant v. Grant*, 9 Kan. App. 2d 671, 685 P.2d 327, *rev. denied*, 236 Kan. 875 (1984); *Koenes v. Koenes*, 478 N.E.2d 1241 (Ind. Ct. App. 1985).

³¹ 9 Kan. App. 2d 671, 685 P.2d 327, *rev. denied*, 236 Kan. 875 (1984).

³² *Chase v. Chase*, 662 P.2d 944 (Alaska 1983); *Gallo v. Gallo*, 752 P.2d 47 (Colo. 1988); *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986); *Powers v. Powers*, 465 So. 2d 1036 (Miss. 1985).

³³ Fla. Stat. § 61.075(3)(a)4 (1988); Ind. Code § 31 1-11.5-2(d)(3) (1985); Kan. Stat. Ann. § 23-201(b) (1987).

³⁴ 9 Kan. App. 2d 671, 685 P.2d 327, *rev. denied*, 236 Kan. 875 (1984).

³⁵ Kan. Stat. Ann. § 23-201(b) (1987).

³⁶ *In re* Marriage of Gallo, 752 P.2d 47 (Colo. 1988); *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984).

³⁷ *In re* Marriage of Beckman, 800 P.2d 1376 (Colo. Ct. App. 1990); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986).

³⁸ *Tinsley v. Tinsley*, 431 So. 2d 1304 (Ala. Civ. App. 1983).

³⁹ Note, *Uniformed Services Former Spouses' Protection Act Update*, The Army Lawyer, June 1990, at 58.

erty.⁴⁰ This result is simply a reflection of state law regarding the divisibility of pensions in general and does not reflect that the divisibility of military retirement pay is more restrictive than other pensions.⁴¹

C. USFSPA Limitations Placed on Dividing Military Retirement Pay.

While the divisibility of military retirement pay began to once again parallel the development of civilian pensions, a separate area of law was, at the same time, being carved out concerning military retirement pay. This was because the USFSPA did not represent a total reversion to the states of the ability to divide military retirement pay. The USFSPA sets out certain limitations on the divisibility of military retirement pay.

These limitations on the divisibility of military retirement pay reflect Congress's resolution of the competing interests involved in deciding to enact the USFSPA. On the one hand, Congress was very concerned with the inequity facing former spouses of service members.⁴² Congress was concerned that after these former spouses experienced great hardship as military spouses, they were being treated unfairly when their marriages ended in divorces.⁴³

At the same time, Congress was also concerned with the impact the USFSPA would have on the military's ability to meet national defense requirements by maintaining a ready force during both peace and combat.⁴⁴ Military retirement was identified as the most important factor in building and retaining a career all-volunteer force to meet national defense objectives. Thus, these limitations on the divisibility of military retirement pay were deemed necessary to protect the personnel management requirements of the military services.⁴⁵

One major limitation is that the states can divide only "disposable retirement pay" and not gross retirement pay. Despite

⁴⁰ *Wilson v. Wilson*, 409 N.E.2d 1169 (Ind. Ct. App. 1980); *Bickel v. Bickel*, 533 N.E.2d 593 (Ind. Cr. App. 1989).

⁴¹ *Skirvin v. Skirvin*, 560 N.E.2d 1263 (Ind. Ct. App. 1990).

⁴² S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1596 (1983).

⁴³ *Id.* at 1601.

⁴⁴ *Id.* at 1601-02.

⁴⁵ *Id.* at 1612.

the plain language in the USFSPA,⁴⁶ some states divided gross pay anyway.⁴⁷ Although the Supreme Court never has directly addressed the issue, dicta in the *Mansell* case suggests that only disposable retirement pay is divisible.⁴⁸ This position is supported by the language of the statute.⁴⁹

One of the major criticisms of the states being limited to dividing disposable pay is that the former spouse receives less than his or her fair share of retirement pay. The following example demonstrates the validity of this complaint. Assume that the service member receives \$1600 per month as retirement pay. If the service member is in the fifteen-percent tax bracket, the service member's disposable retirement pay would be \$1360. If the former spouse had been married to the service member during his or her entire military career, the former spouse would be entitled to fifty percent, or \$680. This would represent a fair division of the property. Unfortunately, the former spouse may have to pay taxes on the \$680. If that is the case, the former spouse will receive only \$578, assuming the former spouse is also in the fifteen-percent bracket.

This inequity apparently has been resolved. A recent amendment to the USFSPA directs that payments made directly to the former spouse will not be considered the retired pay of the service member.⁵⁰ The result of this change will be that taxes will be withheld by the finance center from the individual who is receiving the pay. Thus, in the above example the service member and the former spouse each would have \$120 in taxes withheld and each would receive \$680 net income. Nonetheless, the states still must divide gross pay to achieve this equitable division of military retirement pay.

Another limitation of the USFSPA requires the former spouse to be married to the service member for at least ten years to be eligible for direct payment from the finance center.⁵¹ This limitation has caused some confusion because some have misunderstood the provision as requiring that the former spouse must be married to the service member for ten years to be entitled to a share of the retirement pay. Several

⁴⁶ 10 U.S.C. § 1408(a)(4) (1982).

⁴⁷ *Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33 (1986).

⁴⁸ 490 U.S. 581, 583 (1989).

⁴⁹ 10 U.S.C. § 1408(c)(1) (1982).

⁵⁰ Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990).

⁵¹ 10 U.S.C. § 1408(d) (1982).

service members have argued that the former spouse must be married for at least ten years, but every case that has considered this issue has ruled that there is no such requirement.⁵² These rulings are consistent with the legislative history of the USFSPA. Despite the House version of the act containing a ten-year marriage requirement for retired pay to be divisible and the Senate version containing a five-year requirement, the conference committee rejected both these limitations on the divisibility of military retirement pay.⁵³ Thus, this issue has been resolved.

It is now clear that, as a result of the USFSPA, military retirement pay is divisible. Still, the legislative history of the USFSPA indicates a recognition that there are some differences between military retired pay and other pensions.

Because of this and other factors that will be discussed shortly, there are two major unresolved issues concerning the divisibility of military retired pay. The first issue is whether the present cash value or the retained jurisdiction method should be used when dividing military retired pay. Second, what portion of retired pay should be awarded to the former spouse and when should he or she begin receiving it?

III. Present Value Versus Retained Jurisdiction

A. *The Difficulty of Valuating Pensions Generally.*

To understand the advantages and disadvantages of the two approaches to dividing pensions, it is necessary to have an understanding of some pension definitions and concepts. The definitions, concepts, and difficulties involved in dividing pensions are applicable to military as well as civilian pensions.

Because of its impact on the historical development of the divisibility of pensions, the first important concept discussed is vesting. A pension is considered to be vested when an employee completes the required period of service to have an indefeasible entitlement to a pension payable upon retirement.⁵⁴ Once a pension vests, an employee may leave his or her job

⁵² *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988); *Scott v. Scott*, 519 So. 2d 351 (La. Ct. App. 1988); *Carranza v. Carranza*, 765 S.W.2d 32 (Ky. Ct. App. 1989); *In re Marriage of Wood*, 66 Or. App. 941, 676 P.2d 338, 340 (1984); *Oxelgren v. Oxelgren*, 670 S.W.2d 411 (Tex. Ct. App. 1984); *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97 (1985).

⁵³ H.R. Conf. Rep. No. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE & CONG. ADMIN. NEWS 1569, 1572 (1983).

⁵⁴ B. GOLDBERG, VALUATION OF DIVORCE ASSETS (1984); L. GOLDES, *supra* note 18.

for any reason and still receive benefits when he or she eventually becomes eligible to receive them.⁵⁵ Thus, an individual may have a vested right to receive a pension, but have no right to receive any pension benefits at the present time.

A second important concept is when a pension is considered to be matured. Generally, maturing occurs only after all the conditions precedent to the payment of the benefits have taken place.⁵⁶ Thus, when a pension matures, an employee has an immediate right to receive benefits.

The following example explains the difference between vesting and maturing. Assume that an employee has a right to retirement pay after working with a company for thirty years and the employee can start receiving this retirement pay after reaching the age of sixty. Assume additionally that one of the employees has served thirty years and is retiring at the age of fifty-six. At this time, the employee's pension is vested because he or she has served the required thirty years. But, the pension has not matured because the employee has no right to receive any benefits under the pension because he or she has not yet reached the age of sixty. When the employee reaches the age of sixty, the pension will have matured and the employee will have an immediate right to receive benefits under the plan. Thus, after the employee is sixty years old, the pension would be both vested and matured.

Another concept relevant to understanding the difficulties in dividing pensions is valuation. Placing a value on a pension is a very complex process involving the consideration of a variety of factors. The difficulty of this process can best be explained by providing an example and looking at how some commonly encountered contingencies affect the example.

Assume that a husband and wife are married for thirty years. During that thirty years, the husband works at the same place of employment while the wife works in the home. Assume also that, as a result of that thirty years of employment, the husband has earned a pension that will pay him \$1000 a month for twenty years and he has an immediate right to receive this pension. Therefore, the pension is vested and matured. For simplification, assume further that there is no inflation and thus the first \$1000 received will be worth the same as the last \$1000. In this simplified fact pattern the

⁵⁵ B. GOLDBERG, *supra* note 54; L. GOLDEN, *supra* note 18.

⁵⁶ *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 617 P.2d 449, 461, 111 Cal. Rptr. 369, 371, *cert. denied*, 419 US .825, *reh'g denied*, 419 U.S. 1060 (1974).

value of the pension is very easy to ascertain. The pension is worth \$240,000, which is the sum of 240 times \$1000. Therefore, to divide the pension equally each party would receive \$120,000.

The first complicating variable or risk factor is that of inflation. Inflation causes the last \$1000 received twenty years from now to be worth much less than the \$1000 received next month. Although both parties can have experts testify about the likely potential rates of future inflation, there is still a degree of uncertainty in this process. The question then becomes who assumes the risk of this uncertainty. With inflation as the only factor both parties assume some risk. If the court assumes an annual rate of inflation of four percent, the present value of the pension will be \$165,021.86.⁵⁷ If the court is wrong and inflation over the next twenty years averages three percent, the value of the pension should have been \$180,310.90.⁵⁸ On the other hand, if the rate of inflation is five percent over the next twenty years, the value of the pension should have been \$151,525.30.⁵⁹ Therefore, if the court assumes an annual rate of inflation of four percent, the wife would be awarded \$82,510.93 as her share of the pension. But if the annual rate of inflation is three percent, the value of the pension that the wife should have been awarded would be \$90,155.45. As a result, the risk that inflation is lower than the court anticipated is placed on the wife. Conversely, if the annual rate of inflation is five percent, then the wife should only have been awarded \$75,762.65. Because the wife already would have been awarded \$82,510.93, the husband bears the risk that inflation will be higher than the court determines. In sum, the wife assumes the risk that inflation will be lower than the court anticipates and the husband assumes the risk that inflation will be higher. If this were the only risk and it was evenly divided between the parties, there would not be anything necessarily inequitable about this distribution. But there are many other risks, and not all of them can be divided equally between the parties.

Returning to our original example and ignoring inflation, assume that instead of receiving \$1000 a month for twenty years the husband is to receive \$1000 a month for the rest of his life. This creates another contingency or risk factor that must be evaluated to determine the present cash value of the

⁵⁷ WELSH, ZLATKOVICH & HARRISON, *INTERMEDIATE ACCOUNTING*, at 190 (1979)

⁵⁸ *Id.*

⁵⁹ *Id.*

pension. Of course, expert testimony could again be used regarding the life expectancy of a man this age in general, or regarding this man in particular, if he had some indication that his life expectancy will be different from normal.

Nonetheless, the financial risk of an earlier or later than expected death will be placed on the parties when placing a value on the pension. For example, if the man is sixty years old and has a life expectancy of seventy-two, then the pension would be worth \$144,000—that is 144 months times \$1000. Thus, each party would be awarded \$72,000. If he were to die after only one year, however, then the actual value of the pension was only \$12,000 and his former spouse should have been awarded only \$6000. On the other hand, if he lives to be 92, then the pension would have been worth \$384,000 and his former spouse should have been awarded \$192,000. Thus, valuing this type of pension at the time of divorce places the financial risk associated with a premature death entirely on the husband and the financial risk associated with a long life entirely on the wife. Naturally, the effects of inflation only would exacerbate this problem.

Another variable that will affect this example involves the question of when the pension is matured. If the husband retires after thirty years of service at the age of fifty-five, but has no right to receive any benefits under the pension plan, the pension is vested, but not matured. If a court were to divide the pension at this point at time, it would have to calculate the possibility that the pension would never mature. This calculation also would be based on actuarial tables, which would indicate the likelihood of whether the husband would ever receive his pension. Thus, the financial risk that the pension will never mature is placed entirely on the husband. From the wife's perspective, she would have her share of the pension reduced in value because of the risk the pension will never mature. If the pension does mature, then the wife would have received less than her fair share of the pension.

A final variable worth discussing involves the concept of vesting. Assume in our example that the husband has worked for only twenty years, but the pension does not vest until he has worked for thirty. Under these circumstances, it is virtually impossible to determine the value of the pension. Determining whether the husband will ever have a vested right in the pension involves nothing more than pure speculation. First, will the husband live long enough? Second, will his employment be terminated prior to vesting? If the court were to

award a portion of the pension to the wife, it would place on the husband the entire risk that the pension will never vest. On the other hand, if the court does not award the wife a portion of the pension, it would most likely be depriving her of the greatest asset that the parties have accumulated during their twenty-year marriage. It is because of the speculative nature of this pension as property that courts initially would only divide vested pensions as marital property.⁶⁰

Because of these difficulties in valuing pensions, only vested and matured pensions initially were treated as marital property. Courts generally took the position that unvested pensions were merely an expectancy that had no present determinable value. An example of this position is found in the California case of *French v. French*.⁶¹ In *French*, the husband served in the navy for sixteen years prior to being transferred into the Reserves. Under the then existing law, he had to serve another fourteen years in the Reserves to receive retirement pay. The court concluded that only vested pensions were subject to division because unvested pensions were merely an expectancy — not a property right.⁶²

In spite of the difficulty in valuing a pension, there has been a growing trend in this country to treat all pensions as marital property subject to division upon the dissolution of a marriage, regardless of whether or not they are vested.⁶³ This development has coincided with the increased use of the retained jurisdiction approach to dividing pensions. The retained jurisdiction approach alleviates the need to determine the present value of a pension and will be explained later.

Not all courts have followed the trend toward dividing pensions regardless of whether or not they have vested or matured. Some states still require that a pension be vested before it is divisible upon divorce.⁶⁴ The case *Skirvin v. Skirvin*⁶⁵ provides an example of the harsh results of taking this approach. After more than twenty-four years of marriage, the court in *Skirvin* ruled that a wife was not entitled to a share of her husband's police pension because the pension would not vest until thirty-two days after the date of the divorce. Although this decision is based on an interpretation of a state

⁶⁰ B. GOLDBERG, *supra* note 54.

⁶¹ 17 Cal. 2d 775, 112 P.2d 235 (1941)

⁶² *Id.* at 236.

⁶³ Blumberg, *supra* note 1

⁶⁴ Ind. Code § 31-1-11.5-11 (1978).

⁶⁵ 560 N.E.2d 1263 (Ind. Ct. App. 1990)

statute, and not on an analysis of the difficulties of valuation, this case serves as an example of the hardship this approach places on the nonemployee spouse.

It is apparent that there are a variety of difficulties in valuing pensions. Some of the problems, like inflation, can be resolved by using expert testimony and placing the risk of the court making an incorrect determination on both of the parties. Other problems, such as vesting and death, can be resolved somewhat by expert testimony, but the risk of the court improperly determining the proper value of the pension falls on one party or the other, depending on future events. The question is which method of dividing pensions best deals with these problems.

B. Retained Jurisdiction Versus Present Cash Value.

1. Present **Cash** Value.—Courts traditionally have used one of two approaches in determining how to divide pensions.⁶⁶ One of the methods is the present cash value method. The court, frequently through expert testimony, calculates the present value of the pension and divides it between the parties. Usually this is done by awarding the nonemployee spouse other property to offset the value of the pension.

The primary advantage to the present cash value approach is that it immediately results in a final resolution of a divorcing couple's financial affairs and the relationship between the parties and the court is terminated at the conclusion of the divorce proceedings.⁶⁷ Because of this advantage, some states have a clear preference for this approach.⁶⁸

There are some obvious problems, however, with the present cash value method of distributing pensions as marital property. In addition to the previously discussed problems of inflation, mortality, vesting, and maturing—which affect the valuation of all pensions—there are other problems in valuing military retired pay. The very nature of military retirement pay makes it difficult, if not impossible, to determine its present value. When the present value approach is used, the

⁶⁶ L. GOLDEN, *supra* note 18.

⁶⁷ Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981); Taylor v. Taylor, 329 N.W.2d 795 (Minn. 1983); Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76, *aff'd*, 438 A.2d 317 (N.J. 1981); Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981).

⁶⁸ Miller v. Miller, 140 Ariz. 520, 683 P.2d 319 (Ariz. Ct. App. 1984); Dewan v. Dewan, 506 N.E.2d (Mass. 1987).

service member assumes a greater risk that he or she will never receive any retirement pay because the pension never vests. This could be the result of death or being separated prior to serving the necessary twenty years required for the pension to vest. The risk of the military pension not vesting is greater because military pensions do not vest until after twenty years, while many civilian pensions vest after only a few years.⁶⁹ Further, the military has an "up-or-out" promotion system that forces many service members out of the service prior to serving twenty years.

An additional risk that the court would have to evaluate is the risk that the service member could be recalled to active duty in time of national emergency. If this happens, the service member does not receive retired pay during this period of activation. It is virtually impossible to calculate the likelihood of this occurrence and its influence on the overall value of military retired pay.

Another complicating factor in determining the present cash value of military retirement pay is the fact that it is subject to manipulation by Congress. While Congress historically has increased the value of the pensions by the cost of living each year, there is no legal requirement that it do so. Again, it is virtually impossible to calculate the risks involved here.

Another problem with the present cash value method that is applicable to all pensions is that the parties may not have enough assets to offset one-half the value of the pension. This renders the present division of the pension impossible.

One final criticism of the present cash value approach is that it increases the cost of divorce.⁷⁰ Both parties must pay for expert testimony and the increased expenses that result from the additional time spent in court.

2. Retained Jurisdiction.—Some courts, recognizing the difficulties with the present cash value method, prefer an alternative method that frequently is called the retained jurisdiction method.⁷¹ Depending on how this approach is applied, it can eliminate the need to determine a present cash value of the pension. In cases in which the pension has not vested at the time of divorce, the retained jurisdiction method also di-

⁶⁹ 29 U.S.C. d 1053 (1990).

⁷⁰ Sterling, *Division of Pensions: Reserved Jurisdiction Approach Preferred*, 11 COMMUNITY PROP. J. 17 (1984).

⁷¹ B. GOLDBERG *supra* note 54, at 254.

vides equally the risk that the pension will fail to vest.⁷² Using this method, the court retains jurisdiction and awards the pension using one of two methods.

First, in the case of a pension that has not vested, the court can retain jurisdiction until the pension vests. Then the court can determine the present cash value of the pension with a greater degree of accuracy. Still, this method involves many of the risk allocation factors previously discussed concerning the valuation of pensions. The only factor that the court really has removed is the virtually incalculable risk of whether the pension will ever vest. As a result, this approach is not a pure retained jurisdiction approach. It is a hybrid between the present cash value approach and the retained jurisdiction approach.

A second approach is for courts to retain jurisdiction and award the former spouse a dollar amount or a percentage of the pension as it is received.⁷³ This approach can be used regardless of whether the pension is vested or unvested at the time of divorce. Because the pension is divided as it is received, this method eliminates the need to place a value on the pension.

In the example in which the employee's pension is \$1000 a month, the court could award the spouse fifty percent of the husband's pension, to be paid to the wife as it is received by the husband. The effects of inflation would be the same on both parties. If the pension has not vested, the former spouse would receive the fifty percent only if the employee spouse receives the pension. Therefore, the risks that the pension will not vest or mature fall equally on both parties.

One criticism of the retained jurisdiction approach is that it creates a permanent relationship between the court and the parties and is therefore adverse to the interests of finality in court decisions. This criticism is more theoretical than practical. At the time of divorce, the court can divide the pension and order it to be paid to the former spouse as it is received. Therefore, as long as the parties comply with the court order, there is no further litigation of the matter.⁷⁴

This criticism is also less applicable to the military because the USFSPA contains a provision that minimizes the adminis-

⁷² *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

⁷³ *B. GOLDBERG*, *supra* note 54, at 254.

⁷⁴ Note, *Pension Rights as Marital Property: A Flexible Approach*, 48 Mo. L. REV. 245, 254 (1983).

trative burden that the retained jurisdiction approach otherwise might place on the court. The USFSPA provides that the former spouse can receive payment directly from the respective service's financial center under certain circumstances.⁷⁵

The only other criticism of the retained jurisdiction approach is that the nonemployee spouse's interest is subject to a variety of risks until the employee spouse begins to receive the pension. From the perspective of the employee spouse, this is only fair because his or her pension is subject to these same risks. Still, the result of using the retained jurisdiction approach is that the amount of the nonemployee spouse's share remains within the control of the employee spouse to some extent. The major way the employee spouse can exercise this control is by continuing to work at the same job after the pension has vested. This keeps the pension from maturing and becoming payable. Despite this criticism, the reserved jurisdiction approach is still preferable to the present cash value approach.⁷⁶

Because of the numerous disadvantages of the present cash value approach and the relative ease of application of the retained jurisdiction approach, many states now prefer the retained jurisdiction method.⁷⁷ Some states actually require that courts use the retained jurisdiction approach and prohibit the use of the present cash value approach.⁷⁸ Because of the additional difficulties in determining a present cash value for military retirement pensions, many states recognize that the retained jurisdiction method should be used.⁷⁹

Despite the conclusion that the retained jurisdiction method should be used, there should not be any prohibition on the use of the present cash value method. If the parties agree on the value of the pension and have the necessary assets, courts should not preclude them from making a final distribution of their marital assets. Nevertheless, because most parties either will not agree on a value or will lack the current assets to

⁷⁵ 10 U.S.C. § 1408(d)(1) (1982).

⁷⁶ Sterling, *supra* note 70.

⁷⁷ Laing v. Laing, 741 P.2d 649 (Alaska 1987); *In re* Marriage of Gallo, 752 P.2d 47 (Colo. 1988); *In re* Marriage of Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985); Tarr v. Tarr, 570 A.2d 826 (Me. 1990).

⁷⁸ *In re* Marriage of Dooley, 137 Ill. App. 3d 401, 484 N.E.2d 894 (1985); Wagner v Wagner, 4 Va. App. 397, 358 S.E.2d 407 (1987).

⁷⁹ Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981); Taylor v. Taylor, 329 N.W.2d 795 (Minn. 1983); Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76, *aff'd*, 438 A.2d 317 (N.J. 1981); Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981).

make an immediate disposition of their marital assets, the retained jurisdiction method most often will be used.

IV. What Should the Former Spouse Receive and When Should Payment Begin

A. *What Should the Former Spouse Receive?*

The division of military retirement pay presents several unique problems. One major issue is what to do with postdivorce adjustments, such as promotions and cost of living increases.

Unlike many retirement plans, military pensions are increased each year to offset the increased cost of living because of inflation. The cost of living increase is usually equal to the consumer price index. Thus, the first issue is how this increase in the value of the pension should be divided between the parties. Because cost of living increases are part of the military pension, they routinely are divided between the parties in proportion to their contributions to the pension.⁸⁰

More controversy has surrounded how the court should divide increases in the value of the pension as the result of the efforts of the service member. Some courts have concluded that former spouses should be entitled only to share in the retirement pay that the service member would have received had he or she retired at the grade held at the time of divorce.⁸¹ In *Grier v. Grier*⁸² a Texas Court of Appeals actually applied this rule so rigidly that it awarded the spouse a portion of the retirement pay that the service member would have received if he were retired at the rank of major even though the service member was on the promotion list to lieutenant colonel at the time of the divorce.⁸³

Similarly, in *In re Marriage of Castle*,⁸⁴ a California Court of Appeals apportioned the property based on the rank that the service member could retire at the time of the divorce and awarded the wife a portion of a captain's retirement pay—

⁸⁰ Moore v. Moore, 114 N.J. 147, 663 A.2d 20 (1989); Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986); *In re Marriage of Castle*, 18 Cal. App. 3d 206, 226 Cal. Rptr. 382 (1986); *In re Marriage of Scott*, 156 Cal. App. 3d 261, 202 Cal. Rptr. 716, cert. denied, 469 U.S. 1036 (1984).

⁸¹ *Grier v. Grier*, 713 S.W.2d 213 (Tex. Ct. App. 1986).

⁸² 713 S.W. 213 (Tex. Ct. App. 1986).

⁸³ *Castle v. Castle*, 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

⁸⁴ 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

rather than the higher rank of major—even though the service member had been promoted to the rank of major prior to the divorce.⁸⁵ The court reached this conclusion based on the fact that the service member was not eligible to retire at the rank of major at the time of divorce.⁸⁶

The rationale of these cases is that the former spouse contributed to the service member making only the rank held at the time of divorce and should not be entitled to increases in the value of the pension that were solely the result of the service member's work.

The results reached in these two cases, however, fail to take into account the fact that the former spouse contributed to the service member's promotion. In *Castle*, it is clear that the wife contributed to the service member's obtaining the rank of major because he was a major at the time of divorce. Therefore, this method fails to take into account the wife's contribution to a higher rank by distinguishing between the rank that she helped her husband attain and the rank at which the service member is eligible to retire on the date of the divorce.

Other courts reject the distinction between increases in rank that occur after divorce and hold that the former spouse should receive a percentage share of the service member's retirement pay based on his or her contribution to the pension.⁸⁷ Under this approach, the former spouse is given a percentage of the service member's retirement pay regardless of the service member's final retirement rank. Thus, if a service member were to serve for twenty-six years and during that service he or she was married for thirteen years, the former spouse would receive one half, times $13/26$ ths, times the service member's eventual retirement pay. This formula renders it irrelevant that the marriage was during the first thirteen-years, the last thirteen years, or some thirteen-year period in between. The rationale for this formula is that the former spouse's contribution to the pension should not be considered any less because she was married to the service member in the middle or at the beginning of the service member's career, rather than at the end of his or her career.⁸⁸

Unfortunately, the courts following this approach ignore the realities of a military career. The simple fact is that it is much

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Askins v Askins*, 288 Ark 333, 704 S W2d 632 (1966)

⁸⁸ *Id.* at 634

easier to stay in the service and obtain rank during the first ten years than it is during later years. Department of Defense promotion guidelines and limitations make it more difficult to obtain the higher ranks. While the Army will be used as an example, this illustration is applicable to all services. Assume that there are approximately 100,000 officers on active duty, since this is the approximate end strength for September 30, 1991.⁸⁹ With this force structure, the Army is allowed to have 17,112 majors, 11,049 lieutenant colonels and 4548 colonels.⁹⁰ Therefore, only sixty-four percent of the majors will be promoted to lieutenant colonel and forty-one percent of lieutenant colonels will be promoted to colonel.⁹¹ Further reducing this promotion rate is the fact that the military is expected to be much smaller by 1995.⁹² Therefore, there will be a corresponding reduction in all officer ranks.⁹³ Thus, it seems logical that promotions will be even more difficult to obtain in the future.

A proper resolution of this issue falls somewhere between the two approaches. The argument that a former spouse should not be entitled to the enhancement of value that occurs as a result of the service member's efforts after the divorce has some merit. The previously cited cases, however, draw the line too far on the side of the service member. For example, it is clear that the service member in *Castle* had obtained the rank of major at the time of divorce. Thus, the wife had contributed to that service member's making the rank of major. Similarly, the wife in *Grier* clearly contributed to her husband's making the rank of lieutenant colonel because he was already on the promotion list. A further inequity was imposed on the former spouse in *Grier* because Texas courts use the present cash value approach and determine the present value of the retirement pay without considering future cost of living increases.⁹⁴ Thus, the former spouse did not receive her share of the future cost of living increases that are part and parcel of the military pension.

Because the court in *Castle* supposedly was using the retained jurisdiction approach, the court could have divided the pension based on the service member's eventual ability to re-

⁸⁹ Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 401, 104 Stat. 1485, 1543 (1990).

⁹⁰ 10 U.S.C. § 523 (1985).

⁹¹ *Id.*

⁹² Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 401, 104 Stat. 1485, 1643 (1990).

⁹³ 10 U.S.C. § 523 (1985).

⁹⁴ *Berry v. Berry*, 644 S.W.2d 945 (Tex. 1983).

tire at the rank that the former spouse had helped him or her obtain. Thus, the court could have waited until the service member was eligible to retire at the rank of lieutenant colonel and then given the former spouse a proportion of the difference based on the former spouse's amount of contribution to the rank of lieutenant colonel. For example, assume that it took the service member six years to be promoted from the rank of major to the rank of lieutenant colonel. Assume further that the former spouse and service member were divorced at the four-year point in this process. Thus, the former spouse would be entitled to a share of what the service member would have received had the service member retired as a major, plus two-thirds—that is, four divided by six—of the difference between a lieutenant colonel's retirement pay and a major's retirement pay. While this certainly would involve more complex formulas than the approach of basing the former spouse's share on the service member's eligible retirement rank at the date of divorce, the amount of complexity involved is not overwhelming and should not excuse the court from seeking to achieve this more equitable result. Further, this method would not impose any additional administrative burden because the court could order the formula to be used and the numbers simply would be filled into the formula when the service member retires.

B. When Should Payment Begin?

When the retained jurisdiction approach is used, military retirement pay is paid to the former spouse as it is received. Because some courts use the present cash value approach and some use a hybrid approach, a question arises as to when the former spouse should begin receiving retirement pay.

The controversy concerns requiring the service member to pay the former spouse while the service member is still on active duty. One issue is whether the courts can force the service member to retire so that the former spouse can begin receiving his or her share of military retirement pay. Congress, however, was very clear in enacting the USFSPA that a court could not force a service member to retire.⁹⁵

The other issue involves whether the courts can order the service member to begin paying the former spouse a portion of his or her military retirement pay after he or she has served

⁹⁵ 10 U.S.C. § 1408(c)(3) (1982)

twenty years, but is still serving on active duty. California courts have decided that they can do so because to conclude otherwise would allow the service member to deprive the former spouse of the present use of her property interest in the retirement pay simply by remaining on active duty.⁹⁶

California courts also allow the former spouse to elect when he or she begins to receive the military retirement pay.⁹⁷ Thus, for example, a former spouse who has been married to a service member for twenty years would be able to choose between fifty percent of the retirement pay immediately or a lesser percent of the higher retirement pay the service member receives when he or she subsequently retires. Again, the rationale behind this approach is that the service member should not be allowed to deprive his or her former spouse of community property by remaining on active duty.

This rationale is flawed for several reasons. First, it ignores the limitations placed on state courts' ability to order a service member to retire.⁹⁸ While the court is not ordering the service member to retire, it is ignoring the intent of this limitation on the divisibility of military retirement pay. As previously discussed, the limitations placed on the divisibility of military retirement pay were designed to protect national defense requirements by maintaining a ready force.⁹⁹ This approach gives senior service members an incentive to leave the military after twenty years because they will be paying a portion of their retirement pay to their former spouse even though they are not receiving retirement pay.

Second, this approach has been criticized because it is not a pure reserve jurisdiction approach.¹⁰⁰ The court is reserving jurisdiction until the pension vests and then using the present cash value approach. As a result, all of the problems of the present cash value method are still present, except the problem of vesting.¹⁰¹ Therefore, this approach is inequitable to the service member for several reasons. It ignores the possibility that the service member could be recalled to active duty at

⁹⁶ *In re* Marriage of Gilmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981); *In re* Marriage of Scott, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716, cert. denied, 469 U.S. 1035 (1984).

⁹⁷ *In re* Marriage of Castle, 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

⁹⁸ 10 U.S.C. § 1408(c)(3) (1982).

⁹⁹ S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 1596, 1612 (1983).

¹⁰⁰ *Sterling*, supra note 70, at 27.

¹⁰¹ *Id.*

some time in the future. If this were to happen, the service member would receive active duty pay for services being currently performed and would not be receiving military retirement pay. Thus, the risk that the retirement pay will be lost because of national defense requirements is placed entirely on the service member. Further, the risk that the military retirement pension will never mature is placed entirely on the service member. As a result, both advantages of the retained jurisdiction approach are frustrated. The risks of future contingencies are not divided evenly between the parties and the court must now use expert testimony and place a value on the pension.

Therefore, the argument that the service member should not be allowed to deprive the former spouse of her share of the military pension is not compelling. Using the retained jurisdiction method of dividing pensions, a pension is not payable until it is vested *and* matured. When a service member has served for twenty years, the military retirement pension is vested, but it has not matured. The only way to make the pension mature is for the service member to retire, but Congress has determined that the states cannot order a service member to retire.¹⁰² Therefore, the former spouse should not receive his or her share until the service member begins receiving his or her own share.

The negative impact on the former spouse can be set off more easily with military retirement pay. This is because it is easy to distinguish longevity increases from merit increases in the military. Therefore, a former spouse's percentage can be locked at the point of vesting, if appropriate, and this percentage can be applied to the retirement pay of the rank, or portion thereof, achieved during marriage. This eliminates the service member's ability to reduce the former spouses percentage of retirement pay by remaining on active duty and allows the former spouse to share in the longevity increases the service member receives by remaining on active duty for more than twenty years.

The only time this method might cause some inequity is when a service member is married to two or more different women for a total of more than twenty years. In that case the former spouses' respective percentages might add up to more than fifty percent of the service member's retirement pay. Because the service member must receive fifty percent, the sec-

¹⁰² 10 U.S.C. § 1408(c)(3) (1982)

ond spouse would receive less than he or she would using the mathematical formula. Although this is a disadvantage of this method, it is rather minimal. First, this type of situation does not occur very often. Second, the second spouse should be aware of the percentage to which the first former spouse is entitled. Therefore, the second spouse can determine his or her maximum percentage and make his or her decision accordingly.

The following example will clarify this approach. Assume the service member and former spouse are married for twenty years and the service member is on active duty during the entire marriage. Assume at this point that the service member is a lieutenant colonel. If the couple divorces at this time, the former spouse would be entitled to fifty percent—that is, one-half times twenty-twentieths—of the service member's retirement pay at the current rank of the service member. Thus, if the service member remains on active duty six more years and retires at the rank of lieutenant colonel, the former spouse would receive fifty percent of the retirement pay of a lieutenant colonel with twenty-six years of service, and not fifty percent of the retirement pay of a lieutenant colonel with twenty years. As a result, the former spouse will receive a higher monthly amount when the service member retires because of the service member's additional service time. In addition, if the service member were to have been promoted following the marriage, the former spouse would be entitled to a percentage of this increased pension to the extent that the former spouse contributed to it during the marriage.

A review of postdivorce adjustments leads to the conclusion that former spouses should share in the portion of the highest rank to which they contributed. Further, the review of when payment should begin leads to the conclusion that military retirement pay should be paid to the former spouse as it is received by the service member.

A final example will demonstrate how the combination of these two principles works. Assume that the service member divorces his or her spouse after sixteen years of marriage that overlapped with sixteen years of military service. Assume further that the service member obtained the rank of major after serving twelve years. Subsequent to the divorce, the service member attains the rank of lieutenant colonel after serving a total of eighteen years and subsequently retires at that pay grade after serving twenty-four years.

The former spouse would not receive any money until the service member retires after serving twenty-four years. At that time, the spouse would receive forty percent—that is, sixteen twentieths times one-half—of a base retirement pay figure. The base retirement pay figure would be the retirement pay of a major plus sixty-seven percent—that is, four sixths—of the difference between the retirement pay of a major and the retirement pay of a lieutenant colonel. Because the former spouse's share of the military retirement pay is expressed as a percent, the former spouse will receive an increase in the amount he or she receives as the service member's retirement pay is increased as a result of annual cost of living raises.

This approach balances the interests of the former spouse, the interests of the service member, and the military's interest in retaining its senior officers and noncommissioned officers after they have served twenty years.

V. Disability Pay

A. *Disability Pay Generally.*

The states are more divided on the issue of the divisibility of disability pay than they are on the issue of the divisibility of retired pay. Part of the difficulty with determining whether to divide disability pay is the complex nature of disability pay. Disability pay has the characteristics of three different types of classifiable property: pensions, workers' compensation, and personal injury recoveries.¹⁰³

Thus, disability pay is designed to replace lost wages like workers' compensation and some portions of a personal injury award. Disability pay also may be intended to compensate for pain and suffering.¹⁰⁴ Unlike workers' compensation and personal injury causes of action, however, disability pay may be earned by marital effort. As a result, disability pay has been classified as variously pensions, workers' compensation, and personal injury recoveries. Actually, disability pay often is classified variously within the same jurisdiction.¹⁰⁵

One approach to determining whether disability pay should be considered marital property is to focus on the source of the

¹⁰³ *Blumberg*, *supra* note 1

¹⁰⁴ *Id.* at 1266.

¹⁰⁵ *Id.* at 1267.

coverage. If the source of the coverage is marital labor, then disability pay should be divided as marital property.¹⁰⁶ Another approach is to focus on the extent to which disability pay displaces retirement pay. Some states classify postcoverture retirement pay as marital property and postcoverture disability pay as separate property. As a result, the divorcing employee who has a choice between disability and retirement pay has an incentive to opt for disability pay. In these cases, several jurisdictions have held that the portion of disability pay displacing retirement benefits earned during marriage, to which the employee would otherwise be entitled, is marital property.¹⁰⁷ Thus, this approach focuses on the extent to which disability pay displaces retirement pay. By combining these two approaches, a majority view has emerged. This approach divides disability pay to the extent that it is similar to retirement pay because it is earned by the spouses during marriage.¹⁰⁸

B. Military Disability Pay.

1. Types of Military Disability Pay.—The United States has provided some form of a military disability pension in this country since August 26, 1776.¹⁰⁹ There are currently two different statutory provisions for military disability pensions. It is important to have some understanding of these two types of benefits because courts have distinguished the two in determining whether they should be divisible as marital property upon the dissolution of a marriage.

First, there are disability pension benefits pursuant to title 38 of the United States Code. Under title 38 there are two subcategories of benefits—compensation benefits that are paid by the Department of Veteran's Affairs for injuries sustained in the line of duty,¹¹⁰ and pension benefits that are paid for similar injuries according to a subsistence standard based on need.¹¹¹ It should be noted that only compensation benefits are available to peacetime service members.¹¹²

¹⁰⁶ *Id.* at 1268.

¹⁰⁷ *Id.* at 1271.

¹⁰⁸ *Morrison v. Morrison*, 286 Ark. 348, 692 S.W.2d 601 (1986); *In re Marriage of Smith*, 84 Ill. App. 3d 446, 405 N.E.2d 884 (1980); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977); *see also Blumberg, supra* note 1.

¹⁰⁹ W. GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES (1900).

¹¹⁰ 38 U.S.C. § 310 (1981) (wartime disability); *id.* § 331 (peacetime disability).

¹¹¹ *Id.* §§ 501-503.

¹¹² *Id.* § 521.

The second type of military disability pension is disability retirement pay. Disability retirement pay is paid under basically two circumstances. First, it is paid when a service member has a disability of a permanent nature that renders him or her unfit to perform assigned duties and the service member has served at least twenty years. Second, it is paid when a service member has a disability of a permanent nature that renders him or her unfit to perform assigned duties, the disability is at least thirty percent, and the member has either served eight years or the disability is the proximate result of performing active duty.¹¹³ Another form of disability pay also should be mentioned here because the USFSPA excludes it from the definition of disposable retired pay that is subject to distribution by the states.¹¹⁴ This disability pay is compensation under title 5, which deals with compensation for civil service injuries.

Disability compensation and pension benefits are determined by the Department of Veteran's Affairs based on the severity of the disability and the degree to which the veteran's ability to earn a living has been impaired.¹¹⁵ If the service member otherwise already is receiving or eligible to receive retirement benefits, the service member must waive so much of that retired pay as would be equal to this compensation or pension.¹¹⁶

The service member obtains several advantages by waiving his retirement pay in exchange for disability pension benefits. First, disability pension benefits are not taxable.¹¹⁷ Therefore, the service member will increase his or her after tax income by exchanging retirement pay income for disability pension income. A second advantage to disability pension benefits is that they are protected from creditors.¹¹⁸

Disability retired pay is determined based on a formula in which the member elects the greater of two-and-one-half percent, times the number of years of service, times a retired pay base; or the percentage of disability, times the same retired pay base.¹¹⁹ Thus, service members may increase the value of this pension the longer they remain on active duty. This first

¹¹³ 10 U.S.C. § 1201 (1982).

¹¹⁴ *Id.* § 1408(a)(4)(B).

¹¹⁵ 38 U.S.C. § 314 (1981); *id.* § 355

¹¹⁶ *Id.* § 3105.

¹¹⁷ *Id.* § 3101(a).

¹¹⁸ *Id.*

¹¹⁹ 10 U.S.C. § 1401 (1985).

method of determining the service member's disability retired pay actually is identical to the method of determining a service member's regular retirement pay.¹²⁰

Thus, a major who has served twelve years on active duty and is injured on active duty with a forty percent disability, which renders him or her unfit to perform assigned duties, would receive the greater of \$1279.68—that is, forty percent of \$3199.20—or \$959.76—that is, two and one-half percent times twelve times \$3199.20.¹²¹ Under these circumstances, there would be no waiver of retirement pay because the service member has no right to any retirement pay since he or she has not served for twenty years.

Another situation involves service members who are injured and determined to have disabilities rendering them unfit for service after serving twenty years. Under these circumstances, the service member is entitled to disability retirement pay under 10 U.S.C. section 1201 using the same formulas as before. In addition, because the service member has served over twenty years, the service member also would be entitled to retirement pay if he or she were not suffering from any disability.¹²² The service member, however, can be retired only once. Therefore, the service member is either retired for disability¹²³ or he or she is retired regularly.¹²⁴

Thus, a service member who currently is retired after twenty years with a disability under fifty percent is simply having his or her ordinary retirement pay displaced by the disability pay because a service member who currently retires after serving twenty years is entitled to fifty percent of his or her base retirement pay.¹²⁵

2. The Divisibility of Military Disability Pay.—Because of the similarity between calculating disability retired pay and regular retired pay, some courts long have held that disability retired pay is marital property subject to division.¹²⁶ In *Busby v. Busby*,¹²⁷ the court had to determine whether disability re-

¹²⁰ *Id.*

¹²¹ Based on 1991 military pay (Source: DOD Compensation Office).

¹²² 10 U.S.C. § 3911 (1981) (Army); *id.* § 6321 (Navy and Marine Corps); *id.* § 8911 (Air Force).

¹²³ *Id.* § 1201.

¹²⁴ *Id.* § 3911 (Army); *id.* I 6321 (Navy and Marine Corps); *id.* § 8911 (Air Force).

¹²⁵ *Id.* § 1401.

¹²⁶ *Luna v. Luna*, 125 Ariz. 120, 608 P.2d 57 (Ariz. Ct. App. 1980); *Busby v. Busby*, 457 S.W.2d 561 (Tex. 1970).

¹²⁷ 457 S.W.2d 551 (Tex. 1970).

tired pay should be divisible as marital property. After comparing disability retirement pay with regular retirement pay, the court concluded that disability retirement pay was divisible as marital property. The court analyzed disability retirement and regular retirement and concluded that disability retirement pay should be treated the same as regular retirement pay because the disability retirement benefits accrued during marriage.¹²⁸

In contrast, virtually all states that have considered the issue have concluded that disability pension benefits under title 38 are the separate property of the service member.¹²⁹ Title 38 disability pay, however, can be awarded to service members who have served only a few years, as well as to those who have served twenty years and are otherwise eligible to receive retirement pay.¹³⁰ The service member who is otherwise eligible to receive military retirement pay, on the other hand, must waive the portion of that retirement pay that is equal to the amount of disability pay to which he or she is entitled under title 38.¹³¹

As a result, while the states generally have concluded that disability pensions under title 38 are not marital property subject to division, they are not in agreement as to how to treat the retirement pay that the service member has waived so that he or she can receive the disability pension. When a service member waives a portion of retirement pay to receive a disability pension under title 38, several courts have concluded that the retirement pay waived should be treated as marital property.¹³² These courts based their conclusion on the belief that the service member should not be allowed unilaterally to defeat a former spouse's property right to his or her share of the retirement pay.

California typifies this approach. When a service member had served the requisite amount of time needed to receive retirement pay, a California appellate court ruled that the service member could not defeat the community interest in a spouse's right to the retired pay by electing to receive a dis-

¹²⁸ *Id.* at 554.

¹²⁹ 94 A.L.R.3d 176 (1979).

¹³⁰ 38 U.S.C. § 310 (1985).

¹³¹ *Id.* § 3105.

¹³² *In re* Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 420, 148 Cal. Rptr. 9 (1975); *In re* Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980); *In re* Marriage of Kosko, 126 Ariz. 517, 611 P.2d 104 (Ariz. Ct. App. 1980).

ability pension.¹³³ In contrast, another California appellate court concluded that disability retirement pay which was awarded before a service member's retirement benefit had in any way vested on a longevity basis, was not community property.¹³⁴

Other courts have reached the same result and have determined that the retirement pay which is waived to receive disability pension benefits is marital property subject to division.¹³⁵ Thus, prior to *McCarty* and the USFSPA, the predominant issue was whether the service member was waiving or giving up a portion of his or her retirement pay, in which his or her spouse had an interest, in exchange for disability pay. If the service member was doing so, courts would find that the former spouse still was entitled to a share of the retirement pay that the service member had waived.¹³⁶

The USFSPA, which was effective February 1, 1983, and arguably allowed for retroactive application back to June 26, 1981, appeared to represent a change in this area of the law.¹³⁷ When initially enacted, the USFSPA exempted disability retired pay and retired pay waived to receive disability pensions under either title 5 or title 38.¹³⁸ The USFSPA subsequently was amended in 1986 to remove the exclusion of all disability retirement pay. The amendment provided that only the amount of disability retirement pay computed using the member's percent of disability would be excluded and not the amount of disability pay determined based on the years of service.¹³⁹ Of course, if the amount of disability retirement pay based on the percent of disability exceeds the amount of disability retirement pay based on years of service, then the disability retirement pay is not divisible. Thus, disability retirement pay is divisible only to the extent that the amount of disability retired pay based on years of service exceeds the amount of disability retired pay based on the percent of disability.

¹³³ *In re* Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

¹³⁴ *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

¹³⁵ *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.), *cert. denied*, 409 U.S. 1028 (1972).

¹³⁶ *In re* Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 420, 148 Cal. Rptr. 9 (1975); *In re* Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 633 (1980); *In re* Marriage of Kosko, 125 Ariz. 517, 611 P.2d 104 (Ariz. Ct. App. 1980).

¹³⁷ 10 U.S.C. § 1408 (1982).

¹³⁸ *Id.*

¹³⁹ National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

Following the enactment of the USFSPA, almost all of the states that considered the issue concluded that disability pay was not divisible as marital property.¹⁴⁰ Nevertheless, some states concluded that retirement pay waived to receive disability pay was marital property and, as such, was divisible upon the dissolution of the marriage.¹⁴¹

The issue was resolved by the Supreme Court in *Mansell v. Mansell*.¹⁴² The Court held that military disability pay was not to be subject to division by the states and went further by holding that retirement pay waived to receive disability pay also was not subject to division.¹⁴³ Although some courts have expressed their dissatisfaction with the result of the *Mansell* decision, they have complied with it.¹⁴⁴

Ironically, Gerald Mansell, the appellant in the *Mansell* case, obtained no relief when his case was remanded to the California courts. Gerald Mansell fell victim to the same fate that befell many former spouses who entered into separation agreements between June 26, 1981, and February 1, 1983, who waived their rights to their service members' military retirement pensions. The California court on remand concluded that while the award of a portion of Mansell's disability pay may have exceeded the jurisdiction of the court, Gerald Mansell waived any right to raise this assertion because he had consented to the court awarding a portion of his disability pay in the separation agreement that he had signed voluntarily.¹⁴⁵ Thus, Mrs. Mansell continues to be entitled to a portion of Gerald Mansell's disability pay.

The result of the Supreme Court's decision in *Mansell* is clear—neither disability retirement pensions nor the retirement pay waived to receive them is marital property that is subject to division. Further, the USFSPA is similarly clear that disability retirement pay that can be directly attributable to a service member's disability is also not divisible.¹⁴⁶

¹⁴⁰ 194 A.L.R.3d 176, (1979 & Supp. 1987).

¹⁴¹ *In re* Marriage of Stenquist, 145 Cal. App. 3d 430, 193 Cal. Rptr. 587, (1983); *In re* Marriage of Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); *Campbell v. Campbell*, 474 So. 2d 1339 (La. App. 1985). *writ denied*, 478 So. 2d 148 (La. 1985)

¹⁴² 490 U.S. 581 (1989).

¹⁴³ *Id.* at 583.

¹⁴⁴ *Bewley v. Bewley*, 116 Idaho 843, 780 P.2d 596 (1989).

¹⁴⁵ *In re* Marriage of Mansell. 216 Cal. App. 3d 937, 265 Cal. Rptr. 227 (1990).

¹⁴⁶ National Defense Authorization Act For Fiscal Year 1987. Pub. L. No. 99-661. § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

C. Should Disability Pay Be Divisible?

By far the biggest controversy surrounding what should be subject to division concerning military pay and benefits is military disability pay. As previously discussed, veterans' disability benefits under title 38 always have been excluded from divisibility.¹⁴⁷ Thus, the primary issue to be resolved regarding title 38 benefits is whether the military retirement benefits waived to receive title 38 benefits should be considered marital property subject to division upon dissolution of the marriage. A related issue is whether disability retirement benefits should be subject to division upon dissolution of the marriage.

A review of the historical development of the divisibility of retirement pay and the divisibility of disability pay reveals several similarities. Prior to *McCarty*, many states were dividing military retirement pay as marital property. Similarly, prior to *Mansell*, many states were dividing the military retirement pay waived to receive disability benefits under title 38. Subsequent to *McCarty*, the USFSPA was enacted and state courts again were allowed to divide military retirement pay pursuant to state law. It is not unreasonable to believe that congressional action will lead to an overruling of *Mansell* and allow states to treat military retirement pay that is waived to receive military disability pay as marital property.

The basic rationale of the courts that consider the military retirement pay waived to receive disability pay to be marital property is compelling. The basic premise is that the service member should not be allowed unilaterally to dispose of his or her former spouse's property. One party unilaterally cannot dispose of another party's property without consent in any other circumstance in the area of divorce law. For example, one party cannot sell the marital home and then dispose of the proceeds by giving them to a third party. The party selling the marital home would still be liable to the former spouse for her one-half interest in the home.

Thus, state courts now find themselves in much the same situation as they did after the Supreme Court decided *McCarty*. The theories that they use to divide marital property are inapplicable to the division of military disability pay. Thus, they must ignore their property distribution rules in this area of the law until Congress acts. The result is that mil-

¹⁴⁷ 194 A.L.R.3d 176 (1979).

itary spouses are treated differently than all other spouses who reside within that state's borders.

As can be seen by the problems caused by the USFSPA regarding retroactivity, Congress will not be able to resolve all the damage caused by delay in amending the USFSPA's definition of disposable retirement pay to include military retirement pay waived to receive disability pay. The lessons of *McCarty* and the USFSPA teach that Congress should act quickly to avoid the injustices caused by delay.

The issue of disability retirement pay has been adequately resolved by the 1986 amendment to the USFSPA.¹⁴⁸ This approach allows the service member to retain the portion of disability retirement pay directly relating to his or her disability as separate property. At the same time, it allows the former spouse to obtain a share of the disability retirement pay that is related to longevity (i.e. marital contribution).

VI. Conclusion

Dividing pensions is an inherently difficult process because of the many variables that can affect the actual value of the pension. This is even more true in the military setting in which service members may not receive retirement pay because of various factors such as the failure of the pension to vest and the possibility that the service member will be recalled to active duty in the event of a national emergency. While the retained jurisdiction approach is fairer when dividing all pensions, it is even more so when dividing military pensions.

State courts should be allowed to treat military spouse's rights to property the same as they treat other citizens to the greatest extent possible without sacrificing national defense interests. The primary concern is that the military spouse's property rights do not have a negative impact on the military's ability to perform its mission.

Therefore, a former spouse should be able to share in the retirement pay of a service member when the service member retires. In addition, the former spouse should be able to share in the retirement pay at the rank or percentage of rank that he or she helped the service member attain. The former

¹⁴⁸ National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

spouse should not be limited strictly to the rank that the service member could retire at on the date of the divorce.

Further, a former spouse should receive a share of the retirement pay as the service member receives it. Therefore, former spouses should not be entitled to a share of retirement pay until the retirement pay is vested and matured. This approach is consistent with the retained jurisdiction approach. This approach is also necessary for the national defense interest of retaining a viable fighting force. Allowing courts to order service members to pay retirement pay while they are still on active duty, places pressure on the service member to leave military service when he or she has reached the peak of his or her career. This approach is also inequitable to the service member. It places all the risks associated with the present cash value approach on the service member. It also places the risk that the service member will be recalled to active duty in time of national emergency and forfeit his or her retirement pay entirely on the service member. In addition, this approach also increases the cost of divorce because of the difficulty in determining the present cash value of the pension.

Finally, courts should be able to award former spouses retirement pay that the service member waives to receive disability pay. No significant national security interest would be compromised and it would not be inequitable to the service member. The service member simply is being required to pay the former spouse the share of the military retirement pay that the former spouse earned through his or her marital efforts.

Therefore, Congress should act immediately and make two amendments to the USFSPA. First, states should not be permitted to order service members to pay a portion of their retirement pay until it is received by the service member. The only exception to this rule would be if both the former spouse and the service member agreed to an alternative disposition. Second, states should be permitted to divide retirement pay that a service member waives to receive disability pay.

ASSASSINATION AND THE LAW OF ARMED CONFLICT

LIEUTENANT COMMANDER PATRICIA ZENDEL*

This article examines the development of the customary prohibition of assassination during time of war and concludes that there is no longer any convincing justification for retaining a unique rule of international law that treats assassination apart from other uses of force. It then examines assassination as a domestic political issue and concludes that it is better addressed in the context of the use of force generally by the United States against foreign nations.

I. Introduction

The availability of assassination of foreign leaders as a means of achieving United States foreign policy objectives is an issue that has proven in recent years to be a recurring one. It does not, however, arise in isolation; instead it is almost always part of a larger political controversy over United States foreign policy objectives and whether force of any kind should be used to pursue them. Certainly this was true with regard to the controversies that surrounded United States policy, including its alleged involvement in assassination plots, against officials in Cuba, Vietnam, the Congo, and the Dominican Republic in the 1960's and in Chile in the early 1970's. It is also true, though to a lesser degree, of more recent debates concerning the United States air strike against Libya in April 1986, and the role of the United States in Panama prior to the December 1989 invasion. In each case there was, or later developed, significant disagreement over the appropriateness of United States policy toward the nation involved and the use of force to induce changes in the nature or activities of its government.

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Inevitably, these disagreements have tended to distract attention from the issue of the manner in which force might be applied: if the chosen objective appears not to be a legitimate one or if the use of force seems unjustified, the relative merit of an attack on a military installation, for example—as opposed to the assassination of a single individual—is unlikely to be seriously or productively considered. The recent war in the Persian Gulf has again revived the controversy and provided a new opportunity for debate. This time, however, the issue appeared more starkly framed than previously. Public doubt as to the legitimacy of the immediate objective—the ejection of Iraq from Kuwait—was for the most part absent, and although there was disagreement about the timing and amount of coercion to be used, force generally was perceived as a legitimate option. Far from presenting a sympathetic image, Iraqi President Saddam Hussein was perceived by the American public as probably the least ambiguous villain of the second half of the twentieth century. Unchallenged by any significant political opposition prior to the war, he appeared as the sole instigator of Iraq's seizure of Kuwait, as well as the cause of its intransigence in the face of international insistence that it withdraw.

These circumstances prompted a number of knowledgeable individuals—both within and without the United States government—to suggest that killing Saddam actually might prove faster, more effective, and less bloody than killing his army in resolving the problem of Iraq.¹ Public discussion touched lightly on the feasibility of this action and the likelihood that it would succeed in its purpose, but focused primarily on the legality of active efforts by the United States to bring about the Iraqi President's death. The answer offered to that question most often turned on whether killing Saddam Hussein would be an "assassination" within the meaning of a presidential ban on resort to assassination currently embodied in Executive Order 12333.² Argument on that issue inevitably must be unenlightening, in part because the order itself provides no guidance, but also because the argument is a circular one—that is, to determine that a particular killing was illegal leads

¹ One prominent example was Air Force Chief of Staff Michael J. Dugan, relieved in September 1990, after having told journalists that, in the event of war, the United States would launch an intensive air campaign in which Saddam Hussein would be a target. L.A. Times, Sept. 18, 1990, at A1, col. 6; see also Turner, *Killing Saddam: Would it be a Crime?* Washington Post, Oct. 7, 1990, at D1, col. 5; Charen, *Kuwait Isn't the Issue, Hussein Is*, Sewsday, Nov. 26, 1991, at 80.

² Exec. Order No. 12333, 3 C.F.R. 200 (1982), reprinted in 50 C.S.C. § 401 at 44-51 (1982).

directly to the conclusion that it is by definition an assassination, and conversely, if not illegal, it is not assassination. Needless to say, apparently there was little discussion of international law concerning assassination.

Actually, however, because this issue inescapably involves relations between nations, any useful discussion of the circumstances in which it would be permissible for the United States actively to seek the death of a foreign leader must consider both international law, and whatever constraints the United States may see fit to impose upon itself. It is assumed that the killing of a foreign political or military leader in an attempt to influence another nation's leadership, foreign policy, or military capabilities would amount to a use of force that generally is prohibited under the United Nations Charter,³ unless justified as a defensive action.⁴ Accordingly, assassination will be discussed in the context of international law of armed conflict. It is the thesis of this article that what is commonly called assassination is best treated as one of many means by which one nation may assert force against another, and should be considered permissible under the same circumstances and subject to the same constraints that govern the use of force generally. It should not be viewed as a unique offense under international law or as a subject of statutory prohibition under the law of the United States.

II. International Law Regarding Assassination

Assassination as a tactic of war was a subject frequently discussed by chroniclers of international law writing during the seventeenth and eighteenth centuries. None of these authors asserted that a leader or particular member of an opposing army enjoyed absolute protection, or was not a legitimate target of attack. They focused on the manner and circumstances in which these individuals could be killed, insisting that they not be subject to treacherous attack. The writings of most reflect concern that the honor of arms be preserved, and that public order and the safety of sovereigns and generals not be unduly threatened. Although their discussions clearly assumed that an individual specifically selected as a target would be a person of some prominence, their concept of assassination did not, as will be seen, necessarily require an eminent victim.

³ U.N. Charter art. 2, para. 4

⁴ U.N. Charter art. 51.

A. *Early Commentators.*

Alberico Gentili, writing early in the seventeenth century^k, considered three possible situations: (1) the incitement of subjects to kill a sovereign; (2) a secret or treacherous attack upon an individual enemy; and (3) an open attack on an unarmed enemy not on the field of battle. Gentili concluded that each of these was to be condemned. He argued,

if it is allowed openly or secretly to assail one man in this way, it will also be allowable to do this . . . by falsehood . . . If you allow murder, there are no methods and no forms of it which you can exclude; therefore murder should never be permitted.⁶

He feared the danger to individuals and general disorder that would result if opposing sides plotted the deaths of each other's leaders. Just as important to Gentili, however, was the absence of valor. He noted,

. . . accomplishment (victory) consists in the acknowledgement of defeat by the enemy, and the admission that one is conquered by the same honorable means which gave the other victory. . . . But if "no one says that the three hundred Fabii were conquered, but that they were killed;" and if the Athenians are said on some occasions to have been rather worn out than defeated, when they nevertheless fell like soldiers; what shall we think of those who fell at the hands of assassins?⁷

Gentili expressly rejected the suggestion that, by killing a single leader, many other lives might be saved, believing that such an argument ignored considerations of justice and honor. Moreover, he questioned the ultimate result—that is, a new leader would emerge, with followers all the more inflamed by their previous leader's death. If, however, an enemy leader was sought out and attacked on the field of battle, Gentili considered that to be entirely permissible.⁸

Hugo Grotius considered "whether, according to the law of nations, it is permissible to kill an enemy by sending an

^kA. GENTILI, *DE JURE BELLI LIBRI TRES* (1612), reprinted in 16(2) *THE CLASSICS OF INTERNATIONAL LAW* 166 (J. Rolfe trans. 1933).

⁶*Id.* at 171.

⁷*Id.* at 171-72.

⁸*Id.* at 170-71.

assassin against him.”⁹ He distinguished between “assassins who violate an express or tacit obligation of good faith”—such as subjects against a king; soldiers against superiors; or suppliants, strangers, or deserters against those who have received them—and assassins who have no such obligation.¹⁰ Grotius considered it permissible under the law of nature and of nations to kill an enemy in any place whatsoever, though he condemned killing by treachery or through the use of the treachery of another. He further condemned the placing of a price on the head of an enemy, apparently not only because such an offer implicitly encouraged treachery among those to whom it was directed, but also because, like Gentili, he disapproved of a victory that was “**purchased.**”¹¹ Grotius, unlike Gentili, exonerated Pepin, the father of Charlemagne, who reputedly crossed the Rhine at night, slipped into the enemy camp, and killed the enemy commander while he was sleeping.¹² Grotius went on to note that a person who commits such a deed, if caught, is subject to punishment by his or her captors, not because he has violated the law of nations, but because “anything is permissible as against an enemy,” and it is to be expected that his or her captors will want to punish—and presumably discourage—attacks of that sort.¹³ The reason Grotius offered for forbidding the use of treachery with regard to assassination, but for allowing it in other contexts was that the rule “prevent(ed) the dangers to persons of particular eminence from becoming excessive.”¹⁴

Interestingly, Grotius believed that one attribute of sovereignty was the right to wage war,¹⁵ and that the prohibition of treacherous assassination applied only in the context of a “public war” against a sovereign enemy. Thus, one effect of forbidding the use of assassination was to protect kings in the exercise of their prerogatives as rulers. Treachery used in fighting enemies who were not sovereign, such as “robbers and pirates,” while not morally blameless, Grotius said, “goes unpunished among nations by reason of hatred of those against whom it is practiced.”¹⁶

⁹ H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (rev. ed. 1646), *reprinted in* 3(2) *THE CLASSICS OF INTERNATIONAL LAW* 653 (E Kelsey trans., 1925).

¹⁰ *Id.* at 653-54.

¹¹ *Id.* at 655, n.2.

¹² *Id.* at 654.

¹³ *Id.* at 654-55.

¹⁴ *Id.* at 656.

¹⁵ *Id.* at 633.

¹⁶ *Id.*

Emer de Vattel rejected assassination as contrary to law and honor, but was careful to distinguish it from “surprises”—that is, attacks by stealth. According to Vattel, if a soldier were to slip into an enemy’s camp at night, make his or her way to the commander’s tent and stab him or her, the soldier would have done nothing wrong; the soldier’s action actually would be commendable.¹⁷ Vattel was firm in this opinion despite the inclination of others to disapprove of the taking of a sovereign’s or general’s life in battle. He observed,

Formerly, he who killed the king or general of the enemy was commended and greatly rewarded . . . (because) in former times, the belligerent nations had, almost in every instance, their safety and very existence at stake; and the death of the leader often put an end to the war. In our days, a soldier would not dare to boast of having killed the enemy’s king. Thus sovereigns tacitly agree to secure their own persons. . . . In a war that is carried on with no great animosity, and where the safety and existence of the state are not involved . . . this respect for regal majesty is perfectly commendable. . . . In such a war, to take away the life of the enemy’s sovereign, when it might be spared, is perhaps doing that nation a greater degree of harm than is necessary. . . . But it is not one of the laws of war that we should . . . spare the person of the hostile king¹⁸

Like Grotius, Vattel found no inconsistency in the fact that the perpetrator of such an act, if caught by the enemy, would be severely punished.¹⁹

Assassination, defined by Vattel as “treacherous murder,” was an entirely different matter, which was “infamous and execrable, both in him who executes and in him who commands it.”²⁰ In addition to believing such an act to be devoid of honor, Vattel thought that it would place in jeopardy the “safety and interest of men in high command . . . (who) far from countenancing the introduction of such practices . . . should use all possible care to prevent it.”²¹ Vattel evidently

¹⁷ E. DE VATTEL, *LAW OF NATIONS* 358 (1758) (J. Chitty ed./trans. 1883)

¹⁸ *Id.* at 363. Vattel, writing in the 18th century, accepted as matter of course that nations warred against each other even when the safety and existence of the state were not jeopardized. Note, however, that he applied the concept of proportionality to the force used in these conflicts.

¹⁹ *Id.*

²⁰ *Id.* at 359.

²¹ *Id.* at 360-61.

found no contradiction in citing the well-being of men in high command as one reason for proscribing killing in a manner he considered assassination, yet dismissing it as justification for a rule prohibiting the killing of an enemy king.

Vattel's perception of treachery appears to have been broader than that of Grotius in that Vattel includes within its scope killings perpetrated by "subjects of the party whom we cause to be assassinated, or of our own sovereign,—or that it be executed by the hand of any other emissary, introducing himself as a supplicant, a refugee, a deserter, or, in fine, as a **stranger**."²² Grotius's reference to a suppliant, stranger, or deserter having been "received" by his intended victim is omitted, although in referring to an assassin "introducing himself," Vattel does seem to contemplate some affirmative misrepresentation on the part of the assassin.

With a view of war that may more closely correspond to that of modern times, and certainly less inclined than many of his contemporaries to see war as a contest of valor and honor, Bynkershoek, writing in 1737 on what force may properly be used in war, said,

. . . , in my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know that Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins. . . . But if we follow reason, who is the teacher of the law of nations, we must grant that everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our warfare, does it matter what means we employ to accomplish it?²³

Continuing, Bynkershoek observed that, because it is immaterial whether an enemy is fought with courage or with strategy, any manner of deceit or "fraud" may be used, except perfidy. By perfidy he meant the breaking of one's word or of an agreement, and excepted it "not because anything is illegiti-

²² *Id.* at 359.

²³ C. VAN BYNKERSHOEK, *QUAESTIONUH JURIS PUBLICI LIBRI DUO (1737)*, reprinted in 14(2) *THE CLASSICS OF INTERNATIONAL LAW* at 16 (T. Frank trans. 1030).

mate against an enemy, but because when an engagement has been made the enemy ceases to be an enemy as far as regards the engagement."²⁴

The consensus of these early commentators was that an attack directed at an enemy, including an enemy leader, with the intent of killing him or her was generally permissible, but not if the attack was a treacherous one. Treachery was defined as betrayal by one owing an obligation of good faith to the intended victim. Grotius and Vattel also objected to making use of another's treachery. Bynershoek, however, did not. He considered the only obligation of good faith owed to an enemy to be that of abiding by any agreements that had been made with him or her. Gentili dissented, in effect declaring any secret attack to be treacherous, and limiting permissible attacks upon enemy leaders to those on, or in close proximity to, the battlefield.

The reasons given for restricting the manner in which an enemy might be attacked personally generally involved perceptions of what constituted honorable warfare, together with a desire to protect kings and generals—who were reasonably expected to be the most frequently selected targets—from unpredictable assaults against which they would find it difficult to defend themselves. Implicit in the latter was the premise that making war was a proper activity of sovereigns for which they ought not be required to sacrifice their personal safety.

B. Codification and Interpretation of the Customary Law.

The first efforts to codify the customary international law of war appeared during the nineteenth century. The Lieber Code, promulgated by the United States Army in 1863 as *General Order No. 100: Instructions for the Government of Armies of the United States in the Field*, echoed Grotius and Vattel in providing,

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence

²⁴ *Id.*

of such proclamation, made by whatever authority. Civilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism.²⁵

The code was widely respected, and served as the basis for later Army manuals and for the Prussian Army code used during the Franco-Prussian War.²⁶

In 1865, James Speed, then Attorney General, concluded that there was reason to believe that John Wilkes Booth had acted as a "public enemy" on behalf of the Confederacy, rather than for private motives, in killing Abraham Lincoln. Therefore, Speed asserted his accomplices should be tried before a military tribunal for assassination—an offense he declared to be contrary to the law of war.²⁷ Speed cited Vattel's definition of assassination—that is, a treacherous murder perpetrated by any emissary introducing himself as a suppliant, refugee, deserter, or stranger.²⁸ He concluded that Booth, as an anonymous member of the public, had come as a stranger to Ford's theatre, where he shot Lincoln.

It was generally accepted that in time of war every enemy combatant was subject to attack, anywhere and at any time, so long as the method of attack was consistent with the law of war.²⁹ It was immaterial whether a given combatant was "a private soldier, an officer, or even the monarch or a member of his family."³⁰ Enemy heads of state and important government officials, who did not belong to the armed forces—that is, who were noncombatants—were protected from attack in the same sense as were "private enemy persons."³¹

1. Deceit as treachery.—It thus appears that assassination under customary international law is understood to mean the selected killing of an individual enemy by treacherous means. "Treacherous means" include the procurement of another to act treacherously, and treachery itself is understood as a breach of a duty of good faith toward the victim. There is little discussion of by whom and under what circumstances

²⁵ Reprinted in 2 THE LAW OF WAR, A DOCUMENTARY HISTORY 184 (L. Friedman ed. 1972).

²⁶ *Id.* at 152.

²⁷ 11 Op. Att'y Gen. 297 (1865).

²⁸ *Id.* at 316.

²⁹ Dep't of Army, Field Manual 27-10: The Law of Land Warfare, para. 31 (1966); British Manual of Military Law, pt. III, § 115, n.2 (1958).

³⁰ 2 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE § 108, at 156 (H. Lauterpacht 7th ed. 1952).

³¹ *Id.* § 117, at 153.

this duty is owed; that which exists generally is confined to reiteration and quotation of earlier writers. Article 23(b) of the annex to Hague Convention IV of 1907, which generally is considered to have embodied and codified the customary rule,³² itself provides no further enlightenment. It states merely that it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army." Most attempts to elaborate on the meaning of treachery in the context of article 23(b) have focused on the aspect of deceit—that is the "test of treacherous conduct . . . is the assumption of a false character, whereby the person assuming it deceives his enemy and so is able to commit a hostile act, which he could not have done had he avoided the false pretenses."³³ It should be noted that article 23(b) is read to forbid other means of killing or wounding in addition to assassination. Treacherous requests for quarter; false surrender; or the feigning of death, injury, or sickness in order to put an enemy off guard also are considered proscribed.³⁴

2. *Ununiformed attacks*.—Some have suggested that assassination more usefully could be defined as the "selected killing of an individual by a person not in uniform," with the element of treachery arising from the fact that the assassin's malevolent intent deliberately is hidden by the appearance of civilian innocence.³⁵ This approach evidently is derived from two conceptually related lines of reasoning. The first, already discussed, involves the evolution of the original concept of treachery as a breach of an obligation of loyalty or good faith into a concept of treachery as any act involving deception, regardless of the existence of an obligation of good faith on the part of the deceiver. Thus, as in the case of Booth, a stranger who makes no representations as to his or her identity or loyalties and who receives no confidence, trust, or benefit in return, can be said to be treacherous for failing to proclaim himself or herself an enemy to warn the intended victim. The

³² The British Manual of Military War suggests that the customary prohibition on assassination may not be considered identical with Art. 23(b) of the annex to the Hague Convention. *See supra* note 29. It lists as separate acts—that are not lawful acts of war—assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army. Further, it defines "enemy agents or partisans" as illegal combatants—those not members of organized resistance groups or a *levee en masse* and who are therefore not entitled to prisoner of war status if captured. *See id.*

³³ 2 A. KEITH, *WHEATON'S INTERNATIONAL LAW* 207 (7th ed. 1944).

³⁴ British Manual of Military Law, *supra* note 29; M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 317 (1959).

³⁵ Comment, *Assassination in Wartime*, 30 *MIL. L. REV.* 101 (1955)

second line of reasoning appears to arise from an incorrect understanding of the term “war crime” as it was used prior to the end of World War II, and of the concept of an “illegal combatant.”

(a) *War Crimes and War Treason.*— At one time, the term “war crime” was understood somewhat differently than it commonly is understood today. It was said to consist of any “hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.”³⁶ War crimes included not only violations of the international law of war, but also acts such as espionage and “war treason.”

War treason was defined as “such acts . . . committed within the lines of a belligerent as are harmful to him and are intended to favor the enemy.”³⁷ Activities within the definition of war treason were not considered forbidden under international law. Because of the danger they posed to the party against whom they were directed, however, the threatened belligerent was permitted to punish them. A private individual who committed acts of war treason was always subject to punishment. An enemy soldier who was operating behind the lines of the opposing forces, however, could be punished only if he or she committed the act while disguised—that is, while not wearing his or her uniform. If acting in uniform, the soldier was entitled to the protected status of a prisoner of war, provided first by customary international law and then under a series of international agreements leading to the 1949 Geneva conventions.³⁸ Thus, an enemy soldier who committed acts of sabotage while in uniform behind enemy lines was a protected prisoner of war if captured, but if he or she wore civilian clothes while conducting activities, he or she was guilty of a “war crime”—that is, war treason—and could be punished by his or her captors, even though the soldier had committed no violation of international law. If, however, the soldier wore the uniform of his or her enemy while acting as a saboteur, he or she did commit a violation of the international

³⁶ 2 L. OPPENHEIM, *supra* note 25, § 251, at 566.

³⁷ *Id.* § 255, at 575.

³⁸ *Id.* at 575-76; see also Trial of Generaloberst Nicholas von Falkenhorst, Case No. 61, British Military Court, Brunswick, XI Law Reports of Trials of War Criminals 18, 27 (1949) (indicating that commando operations behind enemy lines “probably” would be punishable as war treason if performed by members of a belligerent’s armed forces while wearing civilian clothes). The origin of the assumption that a member of the enemy armed forces—otherwise entitled to be treated as a prisoner of war—loses the protection of that status if he or she engages in hostilities out of uniform, is unclear. It is not contained within the terms of the Geneva Convention.

law of war³⁹ and could be tried and punished as a war criminal, as that term commonly is understood today. The same analysis would apply if, instead of sabotage, the soldier had engaged in any other activity hostile to the belligerent who captured him or her.

The use of the term "war treason" to describe hostile acts by civilians and ununiformed soldiers implied that any of these acts, including the killing of an adversary, were necessarily in some sense treacherous. It is important, however, to note that the application of the term treason to actions by individuals who owe no allegiance to the party they have offended against was resoundingly criticized.

So-called war treason . . . must be distinguished from treason properly so-called which can only be committed by persons owing allegiance, albeit temporary, to the injured state. The latter can be committed by a member of the armed forces or an ordinary subject of a belligerent. It is not easy to see how it can be committed by an inhabitant of occupied enemy territory, or by a subject of a neutral state . . . it seems improper to subject the inhabitants of the occupied territory to the operation of a term . . . based on a nonexistent duty of allegiance . . . Moreover it implies a degree of moral turpitude made even more conspicuous by the frequent, though essentially inaccurate, designation of so-called war treason as a war crime.⁴⁰

Clearly the commission of any hostile act—including the killing of an enemy leader—by an inhabitant of occupied territory or by a member of an opposing army would be punishable, but it could not in itself be treasonable.

Another group of activities that, like war treason, were punishable as war crimes as that term was once understood, were armed hostilities by those who were not members of the enemy's regular armed forces. Although similar to war treason, irregular warfare generally involved some form of group action, not necessarily within the lines of the party it was directed against. Those who engaged in it, such as the soldier who shed his or her uniform, were not entitled to be treated

³⁹ 2 L. OPPENHEIM *supra* note 25, § 163, at 429

⁴⁰ *Id.* § 162 at 425-26, *see also* *Trial of Falkenhorst* XI Law Reports of Trials of War Criminals at 28 in which the court distinguished between war treason and a war crime in the contemporary sense, and observed that both might be punished by the perpetrator's captor

as prisoners of war if captured, and were sometimes called “illegal” combatants, even though “extralegal” might have been a more accurate characterization. Examples of irregular combatants were members of guerrilla bands or partisan groups. These groups were described as “wag(ing) a warfare that is irregular in point of origin and authority, of discipline, of purpose and of procedure . . . lack(ing) uniforms . . . (and) given to pillage and destruction.”⁴¹ They were thought to be “particularly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands.”⁴² Their activities, like war treason, were presumed to be punishable by the party against whom they were directed because of the threat they posed. It was also occasionally suggested, however, that warfare conducted by irregular, ununiformed “soldiers” violated international law.⁴³

That proposition was far from universally accepted. Both the Brussels Code, and later the Annex to the 1907 Hague Convention, included provisions providing protected status for civilian citizens rising in a *levee en masse* to resist an advancing enemy army,⁴⁴ and for members of organized militias and volunteer corps. It was not until the end of World War II, however, with the then recent example of the resistance movements conducted against German and Japanese occupations, that a consensus arose within the international community, recognizing irregular or guerilla combat as a significant and permanent aspect of modern warfare. There was general agreement that members of partisan and guerrilla groups justly could not be considered violators of international law based merely on their participating in irregular hostilities. For that reason, prisoner of war status should be provided unambiguously to individuals belonging to organized resistance groups provided they met the same criteria required of militia and volunteer corps that had been afforded protection under the Hague Conventions.⁴⁵ Those criteria include the requirements that members carry their arms openly and that they

⁴¹ 3 C. HYDE, INTERNATIONAL LAW § 652, at 1797 (1945).

⁴² 2 F. LIEBER, MISCELLANEOUS WRITINGS 289 (1880).

⁴³ 11 Op. Att’y Gen. 297, 316 (1865) (“The law of nations which is the result of the experience and wisdom of the ages, has decided that jayhawkers, banditti, etc., are offenders against the laws of nature and of war”).

⁴⁴ Baxter, *So-called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 334 (1951).

⁴⁵ *Id.* at 335.

wear distinctive, identifiable insignias,⁴⁶ that constituted, in essence, the functional equivalent of uniforms. Many signatories to the 1949 Convention remained profoundly reluctant to provide prisoner of war status to ununiformed combatants.

So long as that reluctance rested on the desire not to be restricted in the ability to punish and thus deter a form of warfare especially difficult to counter, it reasonably followed that irregular combatants who did not meet the requirements for prisoner of war protection did not violate the international law of war by engaging in hostilities. Instead, they merely became subject to punishment if captured. That interpretation was supported by the fact that the 1949 Convention itself did not require the wearing of uniforms while engaged in combat, and that it also was the position taken by most commentators, ~ ~

Assassination, however, was an exception to that rule. It was the only form of hostile activity, the legality of which seemed to depend on the clothing not worn by the perpetrator. While an ununiformed commando belonging to the enemy armed forces or an irregular resistance fighter was allowed to destroy a bridge or to attack a military installation, it was impermissible for him to attack a single preselected individual even if that individual was clearly a combatant and a legitimate target. This conclusion evidently was founded on the assumption that failure to identify oneself as a combatant was treacherous—a conclusion that may have arisen from the fact that hostile acts committed by those not in uniform customarily had been described as war “treason,” as discussed earlier. It is curious, however, that while article 23(b) of the Hague Conventions forbids all killing and wounding of enemy persons by treachery, the flavor of treachery was perceived only when the target was a specific, single individual. It was not considered similarly treacherous for ununiformed or irregular forces to attack entire enemy military units consisting of many members, all of whom were collectively targets.

(b) Application of the Customary Law.—The practical application of this conception of the crime of assassination is illustrated by two well known incidents that occurred during World War II. One took place in April, 1943, when United States forces obtained advance intelligence information

⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War, 1949, Aug. 12, 1949, 6 U.S.T. 3316, T.I.X.S. So. 3364. 75 U.N.T.S. 135.

⁴⁷ Comment, *supra* note 35, at 106.

concerning the precise time that Japanese Admiral Isoroku Yamamoto would fly from Rabaul to Bougainville. Admiral Yamamoto was considered invaluable to Japanese war efforts and, for that reason, it was decided to try to shoot down his plane enroute. A squadron of American planes was dispatched for that purpose and Admiral Yamamoto died when his plane crashed in the jungle.⁴⁸ The attack on Admiral Yamamoto clearly was permissible under international law. He was a member of the Japanese armed forces and a combatant. His plane was attacked openly by United States military aircraft. The situation was analogous to that of Pepin, mentioned earlier, whose attack on the enemy commander under cover of darkness likewise is considered to have been a proper attack on a legitimate target.

A more difficult case is that of SS General Reinhard Heydrich who, while serving as Acting Protector—that is, the military governor—of German occupied Bohemia and Moravia in 1942, was killed by a British bomb thrown into his car by two members of the Free Czechoslovak Army, headquartered in London. The two ununiformed soldiers had parachuted into Czechoslovakia from a British Royal Air Force plane, and after their attack hid with members of the Czech resistance in a Prague church. The Germans surrounded the church and killed everyone inside, reportedly never realizing that the men who had killed Heydrich were among the occupants. That massacre of 120 people was only one element of massive German reprisals against Czech civilians that followed Heydrich's death: another 1331 Czechs were executed; 3000 Jews imprisoned at Theresienstadt were transported to camps in the east for extermination; and the town of Lidice was dismembered.⁴⁹ The incident is a troubling one because most analyses conclude that the killing of Heydrich was a prohibited assassination under international law and suggest that the Germans would have been entitled, under the law as it was then formulated, to take proportionate reprisals.⁵⁰

The difficulty with this approach is that if assassination is treacherous murder, and treachery requires a betrayal, the nature of the obligation that was betrayed is elusive. Certainly the two individuals who killed Heydrich were bound by no obligation of duty or allegiance either to him or to Germany. Heydrich, as a military officer, was a legitimate target who

⁴⁸ *Id.* at 102-03.

⁴⁹ W. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 991 (1960)

⁵⁰ British Manual of Military Law, *supra* note 29, at n.1.

without question properly could have been the object of an attack such as the one that killed Admiral Yamamoto. There was no affirmative misrepresentation by his assailants and no personal trust or confidence obtained and betrayed. The most that can be said is that the two Czech soldiers camouflaged themselves as civilians until the time of their attack, knowing that if the Germans spotted them earlier they would be prevented from accomplishing their purpose. Camouflage under most other circumstances is a legitimate ruse. Had they hidden inside a parked vehicle along Heydrich's anticipated route—or in classic cartoon fashion, disguised themselves as two trees by the side of the road—there would have been no question but that they were acting within the bounds of international law. Furthermore, if they were wearing uniforms while hiding, or under their camouflage, they would have been entitled to prisoner of war status if captured.

It follows that neither the Czech Government in exile nor the British Government can be said to have made use of treachery to obtain Heydrich's death. There was no independent treacherous betrayal on the part of either government because there was then no agreement between Czechoslovakia and Germany that only uniformed combatants would engage in hostilities, nor was that a generally recognized tenet of international law. Moreover, no other provision of international agreement or law then existed that would have protected Heydrich from attack. This incident highlights the illogic and inconsistency surrounding the issue of assassination as it traditionally is treated in international law.

C. An Alternative Treatment: Perfidious Attacks.

In the years following World War II, as the international community gained experience with guerrilla war and with the terrorism that frequently was associated with it, a new concern was added to the desire of many nations to deter highly disruptive and often effective guerilla warfare. That concern was that the presence of clandestine combatants would endanger the civilian populations within which they operated, which is reflected in articles 37 and 44 of Additional Protocol I to the 1949 Geneva Conventions.⁵¹ Article 44, in particular,

⁵¹ Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], *reprinted in* INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977).

was a source of controversy even as it was written,⁵² and a number of nations—including the United States—have not ratified Protocol I.⁵³ Nevertheless, it represents a significant development in the approach of the international community to the issue of hostilities by ununiformed combatants.

Article 44 of the Protocol seeks to establish a requirement, independent of qualifications for prisoner of war status if captured, that all combatants distinguish themselves from the civilian population while preparing for or engaging in an attack. A combatant who does not wear a uniform or distinguishing insignia because the nature of hostilities prevents him or her from doing so would retain his or her status as a combatant and would remain entitled to protection as a prisoner of war so long as he or she carries any arms openly. In addition, article 37 of the Protocol forbids the killing, injury or capture of an adversary through perfidy, which it defines as:

acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.

It offers, as an example of perfidy, “the feigning of civilian, non-combatant status.”⁵⁴ Article 44 explicitly states that one who, though not in uniform, carries arms openly while preparing for or engaging in hostilities, is not acting perfidiously within the meaning of article 37.

These two articles are drafted in a manner such that an ununiformed attack on an adversary is perfidious only if weapons are hidden, in which case the attacker loses his or her status as a combatant. If a combatant, although not in uniform, nevertheless carries arms openly while attacking his or her adversary, the combatant would not have engaged in a perfidious attack under article 37, and would retain combatant status under article 44. He or she then could be tried only as a prisoner of war for the offense of engaging in combat or preparing for it while undistinguished from the civilian popu-

⁵² International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1987) [hereinafter *Commentary*].

⁵³ Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 Am. J. Int'l L. 1 (1991).

⁵⁴ Protocol I, *supra*, note 51. Other given examples of perfidy are feigning an intent to negotiate under a flag of truce or of surrender; feigning incapacitation by wounds or sickness; and feigning protected status by the use of signs, emblems, or uniforms of the United Nations or states not parties to the conflict.

lation—an offense that article 44 makes a violation of international law. If, however, the combatant carried arms clandestinely, he or she would have violated both article 44 for engaging in an ununiformed attack against any target and article 37 for performing a perfidious attack upon a person. Additionally, under article 44 he or she would lose the status of a combatant, and could be tried for any crime he or she had committed under the municipal law of the captor state.

It is apparent that the Conference did not intend to supercede article 23(b) of the Annex to the Hague Convention, but considered article 37 to be broader in its prohibition, not only because it added the act of capture to those of killing or injuring, but also because perfidy was considered to include acts of treachery.⁵⁵ Thus, while neither article of the Protocol was intended specifically to address the issue of assassination, the effect of their enactment was to absorb that concept and treat it as part of a far broader prohibition of perfidious attacks on persons. In so doing, an alternative approach is suggested—one that better reflects contemporary concern for the mitigation and containment of the horrific effects of war on humanity than did the traditional focus on treachery.

Among the reasons most often cited for prohibitions on the use of perfidy contained in the Protocol, and in international law generally, are considerations of honor and morality among nations. Another reason is the desire to discourage conduct that might make it more difficult to reestablish peaceful relations at a later time.⁵⁶ Perhaps a more pragmatic motivation is that, if the protections and obligations provided by international law are permitted to become bases of trickery, they will not be observed.⁵⁷ In this context, that means that the continued potency of protections established for civilian noncombatants depends upon those protections not being available to shield individuals who are combatants. The object to be protected is not the targeted adversary, but rather the safety of the civilian population and, more generally, continued confidence in law and international agreements. This rationale provides a far firmer foundation for requiring the wearing of uniforms while attacking the enemy than do attempts to characterize the failure to do so as treacherous. Seen from this perspective, the offense of the two Czech soldiers who killed SS General Heydrich was not that they behaved treacherously

⁵⁵ *Commentary, supra* note 52, para. 1491, at 432.

⁵⁶ *Id.* paras. 1497-1500, at 434-36.

⁵⁷ M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 319 (1959)

or even deceitfully toward him or toward Germany as an occupying power. Rather, it was that the method chosen to execute their attack endangered civilian noncombatants in the immediate vicinity of the attack, and others who would suffer if efforts to preclude future attacks undermined the observance of legal protections for civilians provided by international law.

III. Assassination as a Political Issue

Discussion of assassination as matter of foreign policy and as a political issue within the United States more or less has been a matter apart from the question of assassination under international law. The subject received some public attention following the assassination of President Kennedy in 1963, largely as a result of allegations that Cuba's Fidel Castro was responsible for Kennedy's death and that Castro had acted in retaliation for attempts by the United States Central Intelligence Agency (CIA) to arrange Castro's death. The subject also arose in discussions regarding the wisdom of numerous aspects of United States actions in Vietnam, including United States encouragement of a military coup that resulted in the death of South Vietnamese President Ngo Dinh Diem. Assassination did not, however, become a prominent political issue until the mid 1970s, when, in the post Watergate period, allegations that the United States government had been involved in plotting to kill foreign leaders were the subject of intensive scrutiny as part of congressional investigations of covert activities.⁵⁸

A. Select Committee on Intelligence Activities Interim Report on Alleged Assassination Attempts.

In November 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities issued an interim report on alleged assassination attempts in which it found that the United States Government was implicated in five assassinations or attempted assassinations against foreign government leaders since 1960. Four of those instances involved plots to overthrow governments dominated by the targeted leaders, the fifth was an attempt to prevent a new government from assuming power. The interim

⁵⁸ Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795 (1989).

⁵⁹ S. Rep. No. 465, 94th Cong., 1st Sess. (1975) [hereinafter Interim Report].

report noted varying degrees of United States involvement. In the case of General Rene Schneider of Chile,⁶⁰ who died of injuries received in a kidnapping attempt in 1970, the Committee found that the CIA had been actively involved in efforts to prevent Salvadore Allende from taking office as Chile's president, and that General Schneider was thought to be an obstacle to that goal. It further found that the CIA had provided money and weapons to a number of anti-Allende military officers, including the group that attempted to kidnap General Schneider. CIA support, however, was withdrawn from that particular group before the attempt was made, although the CIA had continued to provide support to other Chilean dissident groups. In the case of President Diem,⁶¹ the United States had encouraged and assisted a coup by South Vietnamese military officers in 1963, but it appeared that Diem's death in the course of the coup was unplanned and occurred without prior United States knowledge. In the Dominican Republic,⁶² the United States had supported and provided small numbers of weapons to local dissidents with knowledge on the part of some United States officials that the dissidents intended to kill Rafael Trujillo. It was unclear whether the weapons were intended for use or were used in the assassination. In two other cases,⁶³ however, the Committee concluded that the CIA had actively and deliberately planned to kill foreign leaders. In both cases, it was unsuccessful. The Congo's (now Zaire) Premier Patrice Lumumba ultimately was killed by individuals with no connection to the United States, and Fidel Castro survived.

1. Discussion by the Committee.—The Committee's discussion, together with other findings and conclusions based upon the circumstances of those five cases are instructive. The Committee was of the opinion that, short of war, assassination should be rejected as a tool of foreign policy, citing as the primary reason the belief that assassination "is incompatible with American principle, international order and morality."⁶⁴ It also noted, however, the difficulty in predicting the ultimate effect of killing a foreign leader. It pointed out, for example, the danger that political instability following the leader's death might prove to be an even greater a problem for the United States than the actual leader; the demonstrated in-

⁶⁰*Id.* at 256, 262.

⁶¹*Id.* at 256, 261.

⁶²*Id.* at 256, 262.

⁶³*Id.* at 255-256, 263-64.

⁶⁴*Id.* at 1.

ability of a democratic government to ensure that covert activities remain secret; and the possibility that use of assassination by the United States would invite reciprocal or retaliatory action against American leaders.⁶⁵ Further, the Committee made two important distinctions with regard to plots to overthrow foreign governments.⁶⁶ The first distinction was between those plots that were initiated by the United States and those that involved the United States only in response to a request by local dissidents for assistance. The second distinction was between those plots that had as an objective the death of a foreign leader, and those in which the leader's death was not intended, but was a reasonably foreseeable possibility. The interim report commented,

Once methods of coercion and violence are chosen, the possibility of loss of life is always present. There is, however, a significant difference between a coldblooded, targeted, intentional killing of an individual foreign leader and other forms of intervening in the affairs of foreign nations.⁶⁷

While asserting unequivocally that targeted assassinations instigated by the United States should be prohibited, the Report nonetheless observed,

Coups involve varying degrees of risk of assassination. The possibility of assassination . . . is one of the issues to be considered in determining the propriety of United States involvement This country was created by violent revolt against a regime believed to be tyrannous, and our founding fathers (the local dissidents of that era) received aid from foreign countries . . . we should not today rule out support for dissident groups seeking to overthrow tyrants.⁶⁸

In addition to questioning the propriety of United States involvement in activities of this nature, the interim report expressed profound concern over the manner in which they were authorized.⁶⁹ The Committee repeatedly was frustrated in its attempts to ascertain precisely where authority originated. It believed that efforts to maintain "plausible deniability"

⁶⁵ *Id.* at 281-82.

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 268.

⁶⁹ *Id.* at 6-7, 260-79.

within the government itself, the deliberate use of ambiguous and circumloctious language when discussing highly sensitive subjects, and imprecision in describing precisely what sorts of action were intended to be included in broad authorizations for covert operations, produced a breakdown of accountability by elected government and created a situation in which momentous action might have been undertaken by the United States without ever having been fully considered and authorized by the president.

2. Recommended legislation.—Based on its findings, the Committee recommended legislation that would have made it a criminal offense for anyone subject to the jurisdiction of the United States to assassinate, attempt to assassinate, or conspire to assassinate a leader of a foreign country with which the United States was not at war pursuant to a declaration of war, or engaged in hostilities pursuant to the War Powers Resolution.⁷⁰

Despite three different legislative proposals placed before Congress between 1976 and 1980,⁷¹ no statute materialized. It has been suggested that the failure of Congress to enact legislation forbidding assassinations might be interpreted as implicit authority for the President to retain this action as a policy option.⁷² More likely, it reflected reluctance on the part of Congress to reopen debate on a very sensitive subject that would prove divisive, that could be highly controversial, and on which the outcome was uncertain.

B. Executive Order 12333.

Instead of congressional action, in 1976, President Ford issued an executive order that barred United States Government employees or agents from engaging or conspiring to engage in assassination. That prohibition was reissued without significant change by Presidents Carter and Reagan, and is now embodied in Executive Order 12333 pertaining to United States intelligence activities, which reads:

2.11 Prohibition *on* Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

⁷⁰ *Id.* at 281-84

⁷¹ Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 656, 685-86, n.195 (1987).

⁷² *Damrosch, supra* note 58, at 801,

2.12 Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this order.⁷³

The order contains no definition or further elaboration of what constitutes assassination. The context in which it was promulgated suggests that it was understood to apply to circumstances similar to those that recently had been the subject of investigation. Specifically, it targeted peacetime efforts by United States intelligence agency officials to cause the deaths of certain foreign persons whose political activities were judged detrimental to United States security and foreign policy objectives. It also was intended to address concerns similar to those expressed by the Senate Select Committee in its interim report. Nonetheless, it is reasonable to believe that the vagueness surrounding the meaning of the term "assassination" was deliberate, or at least considered desirable. In forbidding—and, by clear implication, forswearing—the use of assassination in general rather than specific terms, the order responded to intense political pressure to "do something" while maintaining flexibility in interpreting exactly what had been done. In so doing, President Ford and his successors may have prevented legislation on the subject that likely would have been far more specific, and, given the political climate at the time, far more restrictive. There is, of course, also an advantage in leaving potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked.⁷⁴

1. Interpretations. — Whether the uncertainty regarding the intended meaning of the word "assassination" was inadvertent or deliberate, its effect on domestic political discussion has been to invite interpretations significantly more restrictive than the legislation originally proposed in the Senate Select Committee's Interim Report, and certainly more restrictive than required by international law. Disregarding any distinction between peacetime and times of conflict, those who argue for the broadest interpretation evidently believe that the exec-

⁷³ Exec. Order No. 12333, *supra* note 1. Earlier versions were Exec. Order No. 11905, 3 C.F.R. 90 (1977), reprinted in 60 U.S.C. § 401 (1976); and EXEC. ORDER NO. 12036, 3 C.F.R. 112 (1979), reprinted in 60 U.S.C. § 401 (Supp. III 1979).

⁷⁴ Newman and van Geel, *Executive Order 12333: The Risks of a Clear Declaration of Intent*, 12 *Harv. J. L. & P. Pol'y* 434, 443-47. The authors use game theory analysis to demonstrate that a nation having a declared policy precluding the use of assassination is more likely to be the subject of assassination by other nations. The article, however, disregards the fact that a nation with a no-use policy that has been the subject of assassination can retaliate by other means.

utive order prevents the United States Government from directing, facilitating, encouraging, or even incidentally causing the killing of any specified individual, whatever the circumstances.

Discussion of this subject often has been more emotional than rational. A 1986 essay characterized the word assassination as one that "get(s) stuck in our throats," as it is "hissed rather than spoken."⁷⁵ Former CIA Director Robert Inman has described assassination as a "cowardly approach to cowardly acts."⁷⁶ Others assert that "a free society will tolerate killing civilians in bombing raids but not government-sanctioned murder."⁷⁷ Despite the sincerity with which these views are held, they cannot obscure the fact that any definition of assassination must incorporate the idea of an illegal killing—that is, what is not murder cannot be assassination. In addition, assassination requires a selected individual as a target, as well as a political rather than private purpose.

2. Legal implications.—The President has the authority, through the National Security Council, to direct the CIA "to perform . . . other functions and duties related to intelligence affecting the national security."⁷⁸ This has been interpreted to include authority to order covert activities⁷⁹ that sometimes violate the laws of the country in which they take place, and some of which involve the use of force or violence. The President's freedom to act in this area has been somewhat restricted by measures designed to increase congressional oversight of covert activities, but those restrictions are more procedural than substantive.⁸⁰ Assuming the President made the required finding that a given course of action was important to national security,⁸¹ and assuming appropriate reports were provided to Congress,⁸² a covert operation that involved the killing of a specific foreign leader or other person would not be illegal under United States law. The existence of Executive Order 12333 does not alter that conclusion significantly. It is subject to modification or rescission by the President at any

⁷⁵ B. JENKINS, SHOULD OUR ARSENAL AGAINST TERRORISM INCLUDE ASSASSINATION? (1986)

⁷⁶ Shapiro, *Assassination: Is It a Real Option?*, NEWSWEEK, Apr. 29, 1986, at 21

⁷⁷ *Id.*

⁷⁸ 50 U.S.C. § 403

⁷⁹ Interim Report, *supra* note 59, at 9.

⁸⁰ See generally Damrosch, *supra* note 58.

⁸¹ 22 U.S.C. § 2422 (1988) (providing that appropriated funds may not be expended by the CIA for covert activities abroad unless the President first finds that the action is important to the national security of the United States).

⁸² 50 U.S.C. § 413(a)(1) (1988).

time and a proper finding by the President, coupled with direction to an intelligence agency to procure the death of a foreign official, arguably would result in the constructive rescission of any conflicting provision of Executive Order 12333. Such action very likely would, however, provoke emphatic protests from congressional overseers who would assert that they had been misled on administration policy, and that the policy had been changed without adequate prior notification and consultation.

The true effect of the executive order is neither to restrict in any legally meaningful way the President's ability to direct measures he determines to be necessary to national security, nor to create any legal impediment to United States action that can be said to constitute assassination. Instead, the order ensures that authority to direct acts that might be considered assassination rests with the President alone. It prohibits subordinate officials from engaging on their own initiative in these activities and makes clear that should they stray into questionable territory, they do so at their own risk. In this way, it discourages the establishment of "plausible deniability" within the government, which caused such difficulty for congressional investigators seeking to trace ultimate responsibility for activities of the 1960's and early 1970's. Finally, it constitutes a statement—albeit an ambiguous one—of administration policy made in a manner that precludes, or makes very difficult, changes in that policy without prior consultation with Congress. Attempts to narrow the definition are actually efforts to exclude certain acts from those which the President has assured Congress he will not undertake, and are seen by many as surreptitious attempts to narrow the scope of that assurance. It is in the context of this last function that debate over the definition of assassination must be understood.

IV. Assassination as a Use of Force

A. *Iraq.*

Returning to the dilemma of Iraq, discussed in the introduction to this paper, it is apparent that application of Executive Order 12333 is inappropriate. The executive order explicitly addresses the conduct of intelligence activities, while United States action against Iraq was military in nature. Moreover, in its proposed legislation, the Senate Select Committee had re-

commended that wartime activities be excluded from any statutory ban on assassinations.

Under international law as it pertains to armed conflict, an overt attack against the person of Saddam Hussein, carried out by uniformed members of the opposing armed forces, would have been entirely permissible. The United States and its allies had explicit authority from the United Nations both to threaten and ultimately to use force against Iraq.⁸³ There is no doubt that a state of war existed between the United States and its allies, and Iraq. There being no dispute concerning the legality of using force, there likewise can be no dispute that Saddam Hussein, as commander of the Iraqi armed forces, was as legitimate a target as was Admiral Yamamoto—that is, both were enemy combatants.

It does not necessarily follow that deliberate efforts to kill Saddam Hussein necessarily would have been wise. There were good arguments to be made that such attempts likely would have failed and would have become sources of embarrassment. Furthermore, many argued that assassination of Saddam might have had an effect contrary to the desired one of avoiding—or hastening the end of—the conflict or that the long-term consequences of Saddam's death would have been less desirable than those of allowing the opposing forces to reach a conclusion in battle. But those are questions of policy not subject to legal analysis.

Whether international law would have permitted the Iraqi President to be the subject of a covert attack by ununiformed commandos or civilian agents again raises the issue of ununiformed attacks discussed earlier. It would seem that the answer must be no. Under the traditional view as it has evolved, such an attack would be treacherous; likewise, applying Protocol I, combatants who claim the protection of a false civilian identity act perfidiously. There is, however, a countervailing principle that applies to any lawful use of defensive force—that is, it should be applied only when necessary and its magnitude should be proportionate to the task at hand.⁸⁴ That principle suggests that a covert attack should be allowed.

For discussion, assume that it could have been known with certainty that Saddam's death could be brought about and that it would avoid or significantly shorten the war, thus

⁸³ S.C. Res. 678 (Nov. 29, 1990), *reprinted in* 29 I.L.M. 1565 (1990).

⁸⁴ M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 241-44 (1961).

preventing massive destruction in Iraq and Kuwait and thousands of military and civilian casualties. Assume also that it was apparent that an overt attack could not succeed. It then appeared that the interest in avoiding treacherous killing and preserving the benefit of protection for civilian populations conflicted directly with the desire to avoid unnecessary suffering, damage, and loss of life by ensuring that only necessary and proportionate force is used. One response to that dilemma might be to argue that an attack by other than uniformed combatants was illegal under international law, and therefore was not available as an option. Thus, the battle that would have killed thousands would have been indeed necessary. This resolution, however, seems inherently unsatisfactory. An alternative means of resolving the apparent contradiction, at least with regard to Protocol I's requirement that combatants distinguish themselves from the civilian population, might be to consider that article 44 of Protocol I was intended primarily to apply to combatants engaged in guerilla warfare.⁸⁵ Under ordinary circumstances, international law generally does not undertake, or consider it necessary, to protect civilian populations from their own governments. It follows logically that the requirement for a uniform or distinguishing insignia, and by extension article 37's equation of ununiformed attack with perfidy, should apply only in situations involving guerilla warfare and, by analogy, in occupied territory—both of which involve circumstances that require special protection of civilians. This interpretation would—absent guerilla war—allow an ununiformed attack upon an enemy combatant within his or her own country, while continuing to promote international legal protection of populations that a belligerent is likely to perceive as hostile.

B. Libya.

Assassination was also an issue in the April 1986 United States air attack on Libya. That attack was directed against military targets in Tripoli and Benghazi, including Colonel Muammar Qaddafi's headquarters in the al-Azziziya Barracks. The Libyan Government reported that thirty-six civilians and one soldier died. Other reports estimated the actual number to be at between fifty and one hundred—primarily military per-

⁸⁵ *Commentary*, *supra* note 52 at 521-22.

sonnel. Colonel Qaddafi, in an underground bunker at the time, was unharmed.⁸⁶

In reporting this action to the United Nations Security Council pursuant to article 51 of the United Nations Charter, the United States indicated that the attack was made in self defense in response to "an ongoing pattern of attacks by the government of Libya," the most recent of which had been the bombing of a Berlin discotheque earlier that month.⁸⁷ The Berlin attack injured over two hundred people—fifty of them Americans—and killed two others, including an American soldier. Although the issue was one of some controversy, it appears that the United States had credible and convincing evidence that the Libyan Government was actually responsible for the discotheque bombing and that the bombing was the latest in a series of incidents backed by Libya, involving attacks against American citizens.⁸⁸ Previous pronouncements by Colonel Qaddafi indicated that these attacks could be expected to continue.⁸⁹

While Reagan administration officials cited deterrence and a desire to destroy Libya's ability to support future attacks by damaging its terrorist infrastructure as motivations for the air strikes,⁹⁰ critics alleged that at least one objective actually had been to kill Qaddafi. If so, the critics charged, the attack was illegal because the executive order had been violated. Some went so far as to suggest that, even if Qaddafi had not been a target, the failure to take precautions to ensure that he was not injured or killed in the attack constituted a violation of the executive order.⁹¹

As was true with regard to the Iraqi situation, the situation in Libya involved not intelligence activities, but instead the application of military force. Thus, application of the executive order is inappropriate. A more useful approach is to consider first whether the United States was justified in using force against Libya, and then to examine whether the nature

⁸⁶ E. Schumacher, *The United States and Libya*, FOREIGN AFFAIRS, Winter 1986/1987, at 335.

⁸⁷ Letter from Herbert S. Okun, Acting United States Permanent Representative, to the United Nations Security Council (Apr. 14, 1986), reprinted in Leich, *Contemporary Practice of the United States*, 80 AM. J. INT'L L. 612, 632 (1986).

⁸⁸ Turndorf, *The United States Raid on Libya: A Forceful Response to Terrorism*, 14 BROOKLYN J. INT'L L. 187 (1988).

⁸⁹ *Id.* at 191.

⁹⁰ Letter from Vernon A. Walters, United States Permanent Representative to the United Nations (Apr. 15, 1986), reprinted in Leich, *supra* note 87, at 633.

⁹¹ Note. *supra* note 71, at 690 n.246.

of the force used was appropriate. Briefly stated, the legal argument supporting the attack was that, although the right to engage in peacetime reprisals was expunged by adoption of the general ban on the use of force contained in article 2(4) of United Nations Charter, and although the single terrorist assault on the Berlin discotheque may not have been sufficient to rise to the level of an armed attack, Libya's conduct over time—regarded in its entirety—constituted a continuous and ongoing attack against United States nationals, against which the United States was entitled to defend itself.⁹²

If one accepts that a forcible, military response was justified, then the nature and magnitude of the force used must be considered. Accepting for discussion that Colonel Qaddafi was a target of the United States attack, as a member and commander in chief of Libya's armed forces he—like Saddam Hussein—was an enemy combatant and therefore a legitimate object of attack. The attack itself was an open one by uniformed members of the United States Armed Forces, which clearly was neither “treacherous” nor “perfidious.”

A question left unasked, perhaps due to the inclination of critics to define the issue as one of assassination, is one suggested by Vattel—that is, whether an attack directed against Qaddafi, who was Libya's head of state in addition to being a military leader, caused what would otherwise have been a proportionate response to recurring Libyan attacks against United States citizens to become disproportionate. That question may well be unanswerable. Certainly it is true that the impact of the death of a national leader on a nation may far exceed that of the death of a person who is only a military commander. To weigh proportionality, however, appears to require answers to other questions, such as how many private lives equal the value of the life of one head of state, and whether alternative actions might be as effective in defending United States citizens. Yet, as difficult as those issues are, they appear better to reflect contemporary concern for minimizing the horror and destruction caused by war than do attempts to define and prevent treachery.

C. Panama.

A more difficult situation is presented by the failed coup attempt against Panama's General Manuel Noriega in October

⁹² See generally *Turndorf, supra* note 88; Wallace, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49 (1988).

1989.⁹³ Tension between the United States and Panama had been growing since shortly after General Noriega took control of the Panamanian Defense Force and the Government of Panama in 1983. It did not assume major importance, however, until 1988, when General Noriega was indicted on narcotics charges in federal court in Florida. The United States was concerned not only with regard to General Noriega's assistance to and participation in the narcotics trade, but also with his gun smuggling and other illicit activities. It also was sensitive to issues relating to the Panama Canal, which by treaty was to be turned over to the Government of Panama in 1999. In July 1988, President Reagan had authorized the CIA to provide assistance to certain Panamanian military officers seeking to remove General Noriega from power. The Senate Intelligence Committee objected because it feared that Noriega might be killed—a possibility it viewed as a potential assassination and a violation of Executive Order 12333. In October 1989, a revolt within the Panamanian armed forces failed to oust General Noriega after receiving minimal United States support. United States officials indicated that additional help was not provided because it was not requested, but also pointed to congressional disapproval of efforts to provide assistance the previous year. Two and one half months later, following additional provocations by the Panamanian Government—including a declaration by General Noriega that “a state of war” existed with the United States—and further attacks on United States personnel resulting in the death of an American officer,⁹⁴ United States forces invaded Panama and removed General Noriega. This same result might have been achieved through the attempted military coup.

The issue presented with regard to United States options in Panama in October 1988 differed significantly from the one posed by the air attack on Libya or by the consideration of options that might have been pursued against Saddam Hussein. Libya and Iraq involved the undisguised application of military force. In Panama, no decision yet had been made to apply force directly to remove Manuel Noriega. Instead, the question was the extent to which the United States should respond to requests from dissident Panamanians within the Panamanian Defense Force seeking to depose General Noriega. Those individuals were part of an active and very vocal Pana-

⁹³ Robinson, *Dwindling Options in Panama*, 68 *Foreign Affairs* Winter 1989/1990 at 185.

⁹⁴ Terry, *Law in Support of Policy in Panama*, 43 *NAVAL WAR COLLEGE REV.* 110, 111 (Autumn 1990).

manian opposition to Noriega's rule which, while evidently reflecting the desires of a majority of the population, had repeatedly failed in its attempts to remove him using a democratic process that Noriega had repeatedly subverted. Noriega's refusal to recognize the results of elections held in May 1989 was only one example.⁹⁵ Further, indications are that those Panamanians seeking to remove General Noriega from power sought exactly that. Their plans did not include Noriega's death as an objective, although if it became necessary to kill him in the course of achieving their objective, they were prepared to do so. The fact that Noriega previously had demonstrated his intent forcibly to resist any attempt to remove him made it quite possible that he would be a casualty of any coup.⁹⁶

Unlike the situation in Iraq and Libya, the situation in Panama did appear to have been of the sort contemplated by Executive Order 12333. With reference to the Senate Select Committee's Interim Report, however, two points should be noted. First, the proposed coup was instigated by Panamanians and was intended to depose Noriega—not necessarily to kill him. Second, it involved the kind of assistance to those struggling against “tyrannous regimes” that the committee had been unwilling to rule out. Examined in this light, once a decision to provide assistance was made, it would be naive at best on the part of the United States to have insisted that as a condition for receiving such help, the Panamanians had to provide guarantees that no harm would come to General Noriega. While the United States reasonably could seek assurances that coup leaders sought only Noriega's removal, and that efforts to punish him would be confined to appropriate legal means, for congressional and other critics to demand more suggests an unrealistic view of violent political change. The Senate Select Committee was correct—that is, the personal fate of a leader under these circumstances is a factor to be considered, but should not in itself be determinative.

The greatest legal vulnerability of an attempt by the United States in October 1989, to assist dissident Panamanians against General Noriega was in the context of international law. The issue was not assassination, but rather intervention by the United States in the internal affairs of Panama. It received little discussion, perhaps because by the fall of 1989,

⁹⁵ *Robinson, supra* note 93, at 190-99.

⁹⁶ *Justice Department Studying U.S. Role in Coups*, N.Y. Times, Nov. 6, 1989, at 11, col.1.

there was consensus within the United States that Noriega was sufficiently noxious to justify the risk of international disapproval.

V. Conclusion

The customary treatment of assassination under international law is in most cases impertinent to, or in contradiction with, contemporary concerns regarding the use of force in armed conflict. It developed during an era in which the waging of war was considered an intrinsic right of nations and kings, when respect for personal honor and loyalty to one's sovereign was paramount and when wars, by today's standards, produced relatively little harm. As is true of law generally, the customary provisions concerning assassination served to protect and preserve values that were important to the society in which they originated.

Changes in society, together with changes in the nature of warfare and the magnitude of destruction it is capable of causing, have changed the focus of the law of war. Less concerned than in the past with detailed rules as to how wars are to be fought, today's law attempts first to prevent the outbreak of war and then, should those efforts fail, to limit the resulting damage and bring the fighting to an end as rapidly as possible. In this context, it makes little sense to preserve a special and unique provision of law that protects the lives of single individuals—regardless of their prominence—at the possible expense of the lives and well-being of hundreds or thousands of others.

Similarly, in the context of domestic law and United States policy, it serves little purpose to rule out any particular action as a future option when the issues and circumstances that may then be present are as yet unknown. There is no longer, if indeed there ever was, a clear demarcation between a state of peace and a state of war. Instead, we see varying degrees of justification for the use of force when a nation's vital interests are attacked. There is a tendency to believe that mistakes in government can be avoided if only a law is passed— or, at the very least, a rule promulgated—prohibiting them. In this context the result has been a rule, embodied in Executive Order 12333, designed to assure Congress and the public that unpopular and ill-conceived policies undertaken in the 1960's and early 1970's will not be repeated. In attempting to prevent a repetition of the past, however, the rule would limit

the flexibility of policy makers in responding to current and future situations that may differ in significant aspects from the situations that gave rise to it. No law can prevent bad policy—much less guarantee that decisions made by government will be wise. Indisputably, the foreign policy of the United States requires the best judgment of the President and Congress. The circumstances that they will confront in the future, as well as the competing interests and values they will be required to weigh, cannot be foreseen in more than the most general terms. Having elected officials who presumably have the judgment and ability to make these decisions, it is counterproductive for the nation to restrict their abilities to do so.

THE JACKSONVILLE MUTINY

CAPTAIN B. KEVIN BENNETT*

I. Introduction

At 1200 hours, on 1 December 1866, six soldiers from the 3d United States Colored Troops (USCT) were led from the guard house at Fort Clinch, Fernandina, Florida, and executed by a firing squad drawn from white troops at the garrison. The six soldiers—Privates David Craig, Joseph Green, James Allen, Jacob Plowden, Joseph Nathaniel, and Thomas Howard—were executed for the offense of mutiny. They were the last servicemen in the American Armed Forces to be executed exclusively for this offense.¹ The mutiny leading to these convictions occurred on 29 October 1866—just thirty-three days earlier. It resulted in an armed fire fight between officers and enlisted men and in fourteen court-martial convictions. While most students of the history of military justice are familiar with the injustices perpetrated upon black soldiers because of the Brownsville Affray or the Houston Riots, the Jacksonville Mutiny remains an obscure and long forgotten footnote in the saga of the black soldier's struggle to obtain fair treatment within the military justice system. Inasmuch as the Civil War period marked the first time in American history that blacks served in the military in any appreciable numbers, the Jacksonville Mutiny is a tragic but instructive beginning milestone on which the progress of the black soldier within the military justice system can be measured.

II. Background

As a result of large scale operations and resultant massive casualties, the Civil War created a manpower crisis that, in turn, led to the enlistment of large numbers of blacks into the

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¹ In 1882, three Indian Scouts—Sergeant Jim Dandy, Corporal Skippy, and Sergeant Dead Shot—who were attached to the 6th U.S. Cavalry, were executed on the charge of mutiny. The author notes that these individuals were in an auxiliary status as scouts and that the offense for which they were convicted should have been charged more properly as murder. These scouts joined with a party of hostile Indians in a fire fight that resulted in the death of an officer and six soldiers. *See* G.C.M.O. 12 (1882).

federal military and naval services. Prior to the Civil War, free blacks served in a limited capacity in the American Revolution and the War of 1812. Unfortunately, their participation was limited by the relatively small numbers of free blacks and by the prejudices of society. The Civil War, however, was the first real opportunity for blacks to join organized military units and to vindicate the freedom and status of their race. Recruitment for the military was spurred on by the exhortations of black leaders like Fredrick Douglass who declared,

Let the black man get upon his person the brass letters U.S., an eagle on his button, and a musket on his shoulder and bullets in his pocket, and there is no power on earth which can deny that he has earned the right of citizenship.

In response, blacks turned out in large numbers to recruiting calls. By the end of the war, over 200,000 blacks had joined the Union Army and Navy.² One of the earliest units formed was the 3d USCT, which was organized at Camp William Penn, near Philadelphia, in July 1863. Comprised of escaped slaves and freedmen from the various northern states, it was—like all black units³—officered by whites. After a brief period of basic training, the regiment embarked in August 1863 for Morris Island, South Carolina, where they served in the trenches before Fort Wagner—a campaign recently made famous by the movie “Glory.” Having suffered substantial casualties during this campaign, the regiment was transferred in February 1864 to Jacksonville, Florida, which by then was occupied by Union forces. From then until the end of the war, the regiment served on outpost duty, continually fighting skirmishes, mounting raids, and launching expeditions into the Confederate-held interior of the state. After the cessation of hostilities, the regiment continued to be stationed in Florida on occupation duty.

Assigned the unenviable chore of trying to re-establish and uphold federal authority in a hostile environment, the soldiers of the 3d USCT found the duty marked with endless hours of boredom and frustration. In the absence of the excitement and

² S. CHANNING, *CONFEDERATE ORDEAL*, 145 (1984).

³ Late in the war, several blacks were commissioned as officers to serve in black regiments. Additionally, several regiments of free blacks raised early in the war by General Butler and Senator Jim Lane were officered by blacks. These officers, however, were replaced with whites early on.

challenge of combat many of the soldiers turned to alcohol and chafed under the continuing restrictions of military life and discipline. Finally, orders were received for the regiment to muster out on October 31, 1866, and the regiment concentrated at Jacksonville to muster out and ship home.

Commanding the regiment at this time was twenty-three year old Lieutenant Colonel John L. Brower, a native of New York City. Unlike most white officers assigned to black regiments, Brower had no previous enlisted military experience when he obtained a direct commission as a captain in August 1863. Rather, he apparently obtained his commission through political connections. Lieutenant Colonel Brower only recently had been promoted, assuming command on 12 September 1866, when the former regimental commander—a Colonel Bardwell—was promoted to the position of military district commander.⁴ Unfortunately for the enlisted rank and file, in addition to his inexperience, Brower apparently was something of a martinet. Despite the fact that the 3d USCT had served honorably as a combat regiment and was shortly due to muster out, Brower seemed determined not to let military discipline slack off. While this was understandable and accepted by the troops during hostilities—when strict discipline and control were necessary to keep troops in line during battle—Brower's inflexible discipline only served to exacerbate an already strained relationship between most of the officers and the enlisted men of the 3d USCT. Indications of this discontent was evidenced in a letter to the editor from a black soldier to a black religious publication. Decrying the contemptuous and callous treatment of black laundresses and camp-followers by white officers of the 3d USCT, he noted:

We have a set of officers here who apparently think that their commissions are licenses to debauch and mingle with deluded free women under cover of darkness. The conduct of these officers is such that their presence among us is loathsome in the extreme.⁵

The officers were concerned about the growing insubordination and drunkenness on the part of their troops. While willing to serve in black regiments despite the negative connotations attached to such an assignment, these officers typically were a cross section of the society from which they were drawn. While they may have desired the abolishment of Slav-

⁴ Military Service Record of John L. Brower, National Archives, Washington, D.C.

⁵ *RHB to Sir*, The Christian Recorder, Aug. 6, 1864.

ery and respected the fighting qualities of their black troops, rarely was the individual officer untainted by some form of racism.

Letters and journals indicate that most white officers considered blacks just one step removed from barbarism. As descendants of primitive peoples, these black soldiers—so their white officers felt—lacked self-control and discipline. “The Negro is very fanciful and instable in disposition” stated one officer. Because they perceived their black troops to be inherently savage and lacking self-discipline, white officers greatly feared that their troops could go wild⁶ and riot at any time.

Just as the fear of brutal violence in slave revolts terrified Southerners, so too it made the Northern white officers uneasy with the possibility of armed mutiny. One Union officer in a black regiment wrote his wife, “I do not believe we can keep the Negroes from murdering everything they come to once they have been exposed to battle.”⁷ Additionally, it seems that some white officers were at a loss on how to teach and administer discipline to their black troops. As one enlightened regimental commander pointed out, “Inexperienced officers often assumed that because these men had been slaves before enlistment, they would bear to be treated as such afterwards. Experience proved to the contrary. Any punishment resembling that meted out by overseers caused irreparable damage.”⁸ Given then, the volatile environment which existed within the regiment, it did not require much for the long-simmering discontent to explode into confrontation.

The incident providing the spark occurred on Sunday, October 29, 1865—two days before the regiment was to be mustered out.

III. The Mutiny

From the testimony recorded in the various court-martial transcripts it appears that during the midmorning hours of Sunday, October 29th, an unnamed black soldier was apprehended while attempting to pilfer molasses from the unit kitchen. The arresting officer was a Lieutenant Greybill, who was acting as officer of the day. Lieutenant Greybill then un-

⁶ J. GLATTHAAR, *FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS* 84 (1989).

⁷ *Id.* at 84.

⁸ T. HIGGINSON, *ARMY LIFE IN A BLACK REGIMENT* 259 (1971).

dertook to have the soldier summarily punished by having him tied up by his thumbs in the open regimental parade ground.⁹ The prisoner resisted the efforts of Lieutenant Greybill and a Lieutenant Brown, the regimental Adjutant, to tie him up. At this juncture Lieutenant Colonel Brower arrived on the scene and the prisoner was bound “after some difficulty.”¹⁰

During the time that the prisoner was being strung up, a crowd of enlisted men gathered in the general area and began to manifest a disposition to cut the prisoner down and free him. Private Jacob Plowden, a forty-four year-old ex-slave from Tennessee, began “talking loudly” and disputed the authority of the officers to punish a man by tying him up by the thumbs. Plowden, who was alleged to “have been considerably in his liquor,” stated “That it was a damn shame for a man to be tied up like that, white soldiers were not tied up that way nor other colored soldiers, only in our regiment.” He further announced that “There was not going to be any more of it, that he would die on the spot but he would be damned if he wasn’t the man to cut him down.”¹¹

Plowden was not alone in his attempts to incite the crowd as Private Jonathan Miller began moving among the crowd shouting, “Lets take him down, we are not going to have any more of tying men up by the thumbs.”¹² According to an eyewitness account by another officer, a group of twenty-five to thirty-five unarmed enlisted men started advancing toward the three officers and the prisoner. A Private Richard Lee was in the lead, telling the crowd to “Come on, the man has been hanging there long enough.” At this point, Lieutenant Colonel Brower stood by the side of the prisoner, waited until the group was within fifteen feet, and then—drawing his revolver—fired into the crowd. Two of the shots struck a Private Joseph Green in the elbow and side, and he fell wounded in the parade ground. Pandemonium then broke loose and the

⁹ The punishment of tying up by the thumbs, while not a “prohibited” punishment, was looked upon with great disfavor by most commanders. A number of departmental commanders had banned the practice at the time of the incident. The punishment called for the offender to be stripped to the waist and be strung up by the thumbs for several hours so that only his toes were touching the ground. This obviously was a painful punishment that easily could result in dislocated thumbs.

¹⁰ Transcript of General Court-Martial of Private Richard Lee, 001477, Record Group 163, National Archives, Washington, D.C.

¹¹ Transcript of General Court-Martial of Private Jacob Plowden, 001477, Record Group 153, National Archives, Washington, D.C.

¹² Transcript of General Court-Martial of Private Jonathan Miller, 001477, Record Group 163, National Archives, Washington, D.C.

crowd retreated with a number of soldiers yelling "Go get your guns, lets shoot the Son of a Bitch."¹³ While a number of the black enlisted troops dispersed after the firing, around fifteen to twenty actually obtained their weapons from their respective tents and returned to the parade area, There, they opened fire on Lieutenant Colonel Brower and the other officers.

Lieutenant Greybill departed the camp to obtain¹⁴ assistance from the town, several shots whistling close behind him. The adjutant, Lieutenant Brown, mounted his horse and proceeded to the section of camp where Company "K" was located. There he attempted to have the company fall in so as to quell the mutiny. As the company was forming, several of the armed mutineers—Privates Harley, Howard, and Nathaniel—also arrived in the area. Shots allegedly were fired at Lieutenant Brown, whereupon several soldiers forcibly subdued Privates Nathaniel and Howard and took their muskets away. By this time, the company was gathering about Lieutenant Brown, querying him as to what was going on. During this confusion, Private Harley took Lieutenant Brown's service revolver from its holster and attempted to take him prisoner. In a matter of minutes, however, the noncommissioned officers of Company "K" had restored order in that area.¹⁵

While this was occurring, a Lieutenant Fenno came out from his quarters to ascertain what the firing was all about. He quickly was surrounded by several enlisted men whom he attempted to question. He met with curses and "improper language" from a Private Calvin Dowrey. Lieutenant Fenno responded by drawing his saber and slashing Private Dowrey on the left arm, slightly wounding him. While Lieutenant Fenno's attention was distracted by several other of the enlisted soldiers, Dowrey returned with a fence rail and walloped Lieutenant Fenno on the right side of his head. While he was attempting to pick himself off the ground, another unknown soldier forced him down again into the dirt with a buttstroke of his musket. The soldier with the musket then disappeared into the crowd and several soldiers took the fence rail away from Dowrey.¹⁶

¹³ *Id.*

¹⁴ Transcript of General Court-Martial of Private Thomas Howard, 001477, Record Group 153, National Archives, Washington, D.C.

¹⁵ Transcript of General Court-Martial of Private Joseph Nathaniel, 001477, Record Group 153, National Archives, Washington, D.C.

¹⁶ Transcript of General Court-Martial of Private Calvin Dowrey, 001477, Record Group 153, National Archives, Washington, D.C.

Meanwhile, a fairly brisk fire fight took place at the regimental parade ground between Lieutenant Colonel Brower and several of the armed mutineers. It was estimated that thirty to forty shots were exchanged, until the gunfire abruptly ended when Brower's finger was shot off. Private Richard Lee, one of the original instigators—but one who had not taken up arms—rushed over to Lieutenant Colonel Brower. With the help of several others, he escorted Brower to the relative safety of the cookhouse. Several of the mutineers followed close behind, including Private James Allen, who yelled, "Let me at him, let me shoot the son of a bitch."¹⁷ Private Lee tried to ward the pursuers off, warning them to "stop their damn foolishness."¹⁸

As Lieutenant Colonel Brower was seeking refuge in the cookhouse, a Captain Walrath arrived with a number of troops who immediately began to disarm the mutineers and quell the disturbance. Brower then left the cookhouse and started for town, aided by several enlisted soldiers. A number of mutineers who had not been apprehended began to follow him a short distance behind, shouting threats and insults. The mutiny pretty much had spent its force at this point although Private Allen did take a Captain Parker prisoner at gunpoint and tied him up in the officer's tent. Colonel Bardwell, the former regimental commander, arrived as the mutiny was winding down. Inasmuch as Colonel Bardwell was well respected by the troops, he was quickly able to settle the situation, obtain aid for the wounded, and effect the immediate release of Captain Parker.¹⁹ With respect to the immediate cause of the mutiny, it appears that a Private James Thomas took advantage of the confusion and worked furiously to release the prisoner. Just when he had succeeded in cutting the post down, however, he was apprehended at gunpoint by²⁰ a Captain Barker.

IV. The Courts-Martial

As was to be expected, fifteen of the suspected mutineers quickly were placed in confinement, and charges were drafted

¹⁷ Transcript of General Court-Martial of Private James Allen, 001477, Record Group 153, National Archives, Washington, D.C.

¹⁸ Transcript of General Court-Martial of Private Richard Lee, *supra* note 10.

¹⁹ Transcript of General Court-Martial of Private Joseph Green, 001477, Record Group 153, National Archives, Washington, D.C.

²⁰ Transcript of General Court-Martial of Private James Thomas, 001477, Record Group 153, National Archives, Washington, D.C.

and preferred. With a speed that would please many a modern day trial counsel, a court-martial convening order was issued on 30 October 1865 with the court-martial scheduled to convene on 31 October 1865. The proceedings consisted of a general court-martial composed of seven officers headed by a Major Sherman Conant, who interestingly was the Provost Marshal of the 3d USCT. The judge advocate who prosecuted the cases was a Lieutenant A.A. Knight—a line officer from the 34th USCT. With the exception of Lieutenant Knight, all members of the court-martial were drawn from the officers of the 3d USCT.²¹ All of the accused declined assistance of counsel and proceeded to trial representing themselves. The separate trials began on October 31, 1865 and ran until November 3rd.

By the time of the Civil War, three kinds of courts-martial had evolved in the Army: general; regimental; and garrison. Then, like today, only a general court-martial could try officers and capital cases; and only a general court-martial could impose a sentence of death, dismissal from the service, forfeiture of more than three months of pay, or incarceration exceeding three months. During this period, a general court-martial could be convened only by the President, the Secretary of War acting under the order of the President, a general officer commanding an army, or a colonel commanding a separate department. Exceptions were made during the Civil War, however, with General Orders No. 111 allowing the commander of a division or separate²² brigade—as was true in the instant case—to appoint such a court. The 64th Article of War provided that general courts-martial would consist of five to thirteen officers, but of no fewer than thirteen if that number could be convened without “manifest injury to the service.” As a matter of course, the number of officers actually appointed effectively was left to the discretion of the convening authority.²³

Of the fifteen soldiers who were to stand trial, fourteen were charged with mutiny—a violation of the 22d Article of War. Mutiny was defined as the unlawful resistance or opposition to superior military authority, with a deliberate²⁴ purpose

²¹ Special Order 189, Dist. of East Florida, 1st Separate Brigade, Oct. 30, 1865, 001477, Record Group 153, National Archives, Washington, D.C.

²² Du Chanel, *How Soldiers Were Tried*, CIVIL WAR TIME: ILLUSTRATED, Feb. 1969, at 11.

²³ W. WINIHROP, *MILITARY LAW AND PRECEDENTS* 79 (1868).

²⁴ *Id.* at 578.

to subvert the same, or to eject that authority from office. The remaining accused, Private Archibald Roberts, was charged with a violation of the 99th Article—conduct prejudicial to the good order and military discipline. Private Roberts did not take part in the actual mutiny, but afterwards was overheard to say: “Lieutenant Colonel Brower, the God-damned son of a bitch, he shot²⁵ my cousin. Where is he? Let me see him.”

The maximum punishment for mutiny in time of “war, rebellion or insurrection” was death by shooting. Unfortunately for the accused, Florida still was considered to be in a state of rebellion at the time of the incident, notwithstanding the fact that the last organized Confederate forces had surrendered in May, 1865. This legal fiction not only impacted upon the ability of the court-martial to assess the death penalty but also limited the amount of appellate review that would be afforded any death penalty that was adjudged. In times of peace, any death sentence was required to be transmitted to the Secretary of War, who would review it and present it to the President for his consideration along with his recommendation.²⁶ In a period in which a state of war or rebellion existed, the division or department commander had the power finally to confirm and execute sentences of death. He could, if he so desired, suspend the execution of a death sentence so as to allow review by the President and to permit the condemned soldier an opportunity to petition for clemency.²⁷ This, however, was optional while a state of war existed.

The composition of the court-martial afforded black troops but one advantage—any soldier from a black regiment usually was tried by officers assigned to black regiments. Although not specifically required by regulations, the practice first was instituted by Major General Benjamin Butler to shield the black troops from abuse and prejudice.²⁸ While this was obviously a prudent safeguard for the black troops in general, it was of dubious value in a mutiny case such as this one, in which most prosecution witnesses were fellow officers from the same regiment.

The trial procedure for general courts-martial, which was used in the instant cases, was similar to that of a modern day administrative elimination board. First, the judge advocate

²⁵ Transcript of General Court-Martial of Private Archibald Roberts, 001477, Record Group 153, National Archives, Washington, D.C.

²⁶ W. WINTHROP, *supra* note 23, at 65; DU CHANEL, *supra* note 22, at 12.

²⁷ J. GLATTHAAR, *supra* note 6, at 199.

²⁸ See Article of War 65.

read the order assembling the court and asked the accused if he had any objections to being tried by any member of the court. Following the negative response received in each case, the judge advocate administered the oath to each member of the court and the president administered the oath to the judge advocate. The judge advocate then read the charges, the general nature of the offenses and the specifications. The accused then would enter his plea of guilty or not guilty. The witnesses for the prosecution then were sworn in and questioned by the judge advocate, the court, and the accused. After all its witnesses had testified and were cross-examined, the prosecution rested its case. Then the defense witnesses and the accused were sworn in, questioned, and cross-examined. Before the court was closed, the accused had the opportunity to make a statement, either oral or in writing. This statement was not considered evidence, but could be considered by the court in its deliberations. After "having maturely deliberated upon the evidence adduced," the court announced its findings and, if the accused was found guilty, his sentence also was announced. Decisions on guilt required only a simple majority, except for a sentence of death, which needed a two-thirds majority. The summarized transcript then was authenticated by the judge advocate, who would then forward the court record to the officer having authority to confirm the sentence.²⁹

Typically, the trials were models of expediency. Evidently, the longest was four hours in length and the shortest was one hour long. Starting with four courts-martial on 31 October, three were held on November 1, three on November 2, and five on November 3. A total of twenty-two witnesses provided testimony in the various courts-martial, the most appearances being logged by Lieutenant Brown, the prosecution's star witness. Indeed, Lieutenant Brown seems to have possessed an uncanny ability to remember the faces and mutinous acts of quite a number of individuals who stood trial. From the testimony offered, Lieutenant Brown apparently was most eager to provide damning evidence against the various accused soldiers. In the case of Private Joseph Nathaniel in particular, his questionable testimony that Nathaniel fired upon him cost Private Allen any chance of escaping the death penalty.

The defense strategy, to the extent that there was one, was first to show that the accused had not taken up arms. If that fact was beyond controverting, then it was crucial to show that the accused had not fired his weapon at the white of-

²⁹ Transcript of General Court-Martial of Private Joseph Nathaniel. *supra* note 19

ficers during the mutiny. This act clearly was the dividing line between a death sentence and a lengthy prison term. With respect to Private Nathaniel, Lieutenant Brown swore that a shot that had whistled over his head came from Nathaniel. The two black noncommissioned officers who had apprehended Private Nathaniel and stripped him of his weapon testified differently. They indicated that they had not witnessed Nathaniel discharging his musket. Further, they checked his musket for evidence of firing but could not detect signs that it had been discharged. They found his musket capped³⁰ and loaded. Despite the obviously exculpatory nature of this evidence, however, the court-martial panel either discounted or disregarded it and found Private Nathaniel guilty of firing at Lieutenant Brown.

Another troubling feature of Lieutenant Brown's and several other officers' testimonies was the issue of Lieutenant Colonel Brower firing into the unarmed group of soldiers. During the first few courts-martial, all the officers—including Brown—testified that Brower actually had fired into the crowd and that the soldiers in the crowd were unarmed at the time. By the second day of the proceedings, however, Brown was asserting that Brower instead had fired warning shots into the air. Perhaps realizing the inconsistency of this testimony with the wounds suffered by Private Green, both Brown and Lieutenant Greybill later claimed that the crowd was armed at the time Brower opened fire.³¹

The part played by Lieutenant Colonel Brower in the various courts-martial also was curious. He testified in only one—that of Private Joseph Green. Brower did not testify about the events leading up to the mutiny, nor did he discuss the specifics of his actions or the mutiny. He testified that Private Green advanced upon him with a musket, along with the crowd, and that he had fired to disable Green. Private Green disputed that account, claiming that he had not taken up arms until after he was shot.³² Shortly after testifying, Brower was mustered out and quickly shipped back home to New York City.³³ In light of this, one cannot help but wonder what transpired between Lieutenant Colonel Brower and his superiors in the two days between the court-martial and his mustering

³⁰ Transcript of General Court-Martial of Private Sam Harley, 001477, Record Group 153, National Archives, Washington, D.C.

³¹ Transcript of General Court-Martial of Private Joseph Green, *supra* note 19.

³² Military Service Record of John L. Brower, National Archives, Washington D.C.

³³ W. WINTHROP, *supra* note 23, at 35.

out. Considering his incredible overreaction by opening fire, combined with his allowing punishments which, while not specifically prohibited, were looked upon with great disfavor, one has to suspect that the command was anxious to be rid of an embarrassment.

Because of the expedited nature of the proceedings and the sentences handed down, one readily might conclude that the trials were nothing more than “kangaroo courts.” Notwithstanding the length of the trials and the fact that the accused were not represented by counsel, it appears that the president, Major Conant, endeavored to ensure each accused a full and fair hearing. Conant, a former noncommissioned officer with the 39th Massachusetts Volunteers, consistently asked questions of the various witnesses in an effort to ascertain facts and resolve inconsistencies. Unfortunately, the same balanced approach was lacking from the judge advocate, Lieutenant Knight. Procedurally, he was required to assist the accused soldiers in eliciting favorable³⁴ testimony when they were not represented by counsel. Throughout the courts-martial, his questions were leading and designed to elicit only incriminating evidence.

When the last court-martial had adjourned on November 3d, thirteen of the accused had been found guilty of mutiny. Another—Private Roberts—was convicted of conduct prejudicial to good order. Only one accused—Private Theodore Waters—was acquitted of the charge of mutiny. Of the sentences handed down, six—Privates Plowden, Craig, Allen, Howard, Green, and Nathaniel—were sentenced to execution by shooting. Private Dowrey received a sentence of fifteen years at hard labor while Privates Morie and Harley each received ten years. A sentence of two years at hard labor was adjudged against Privates Richard Lee, Alexander Lee, Miller, and Thomas. Private Roberts received a relatively light sentence of two month’s confinement. All received dishonorable discharges and total forfeiture of pays.³⁵

IV. The Aftermath

Upon the conclusion of the trials, the mission of mustering out the remainder of the regiment was completed. The court

³⁴ General Orders 39, Department of Florida, Nov. 13, 1866, 001477, Record Group 163, National Archives, Washington, D.C.

³⁵ Foster earlier had risen to prominence as an officer in the besieged garrison of Fort Sumter, South Carolina, in April 1861.

record was authenticated and forwarded for review on November 10th to the Department Commander, Major General John Foster.³⁶ In reviewing the records, General Foster declined to exercise any leniency, approving each finding of guilty and adjudged sentence. Interestingly, General Foster disapproved the findings of not guilty with respect to Private Waters, noting on the record that there was insufficient evidence!³⁷ General Foster set the execution date for 1 December 1865, between the hours of noon and 2 P.M. He further designated the place of imprisonment as Fort Jefferson, located on Dry Tortugas Island in the Florida Keys.³⁸

The court records of the proceedings apparently were forwarded to the Bureau of Military Justice in Washington, D.C., on 13 November 1865, but no actual legal review of the cases appears to have taken place until after the executions. This was evidenced by the troubling case of Private David Craig, one of the soldiers sentenced to death. Contained within Craig's service file is a letter from a H.C. Marehand, dated 10 December 1865, to a Senator Cowan. The letter requested that the sentence of execution be suspended pending a review and investigation of the case. Craig, a twenty-one year-old laborer from Pennsylvania, had been raised as a child by Mr. Marehand. The letter indicated that Marehand had received correspondence the previous day from Craig indicating his dilemma and proclaiming his innocence in that "[Craig] had been excused to take the guns from some of the mutineers and in doing so was **arrested.**"³⁹ In response to the congressional inquiry, a telegraph was sent to General Foster to suspend the sentence and to transmit the record for review. Unfortunately, the telegraph and suspension were too late because the executions had been carried out nine days earlier. General Foster replied back by telegraph on 16 December, informing the War Department of the execution and the fact that the court records had been forwarded on 13 November. There is a further handwritten notation on the telegraph, "Senator Cowan

³⁶ Transcript of General Court-Martial of Private Thomas Waters, 001477, Record Group 153, National Archives, Washington, D.C.

³⁷ This was the same infamous prison in which the alleged Lincoln conspirators—Dr. Samuel Mudd and Michael O'Laughlin—were incarcerated.

³⁸ Correspondence from H.C. Marchand to Senator E. Cowan, Dec. 10, 1865; Military Service Record of Private David Craig, National Archives, Washington, D.C.

³⁹ Correspondence from General John Foster to Colonel J.A. Hardie, Dec. 16, 1865; Military Service Record of Private David Craig, National Archives, Washington, D.C.

informed, Dec 20."⁴⁰ Apart from the questions of the late delivery of Craig's letter and the belated legal review is the mystery of what happened to the record of Private Craig's court-martial. Among all the records arising from the Jacksonville Mutiny, his record alone has been lost, misplaced, or destroyed.

Fortunately for the imprisoned soldiers, the legal process did not end with the deaths of their six comrades. In December 1865, a review of the court-martial records was accomplished by The Judge Advocate General of the Army, Joseph Holt. Although his review was limited to strictly procedural matters, a further review on the merits was conducted by the Bureau of Military Justice in late 1866. That review resulted in the commutation of the prison sentences of the surviving mutineers. Private Jonathan Miller was released in November 1866 and the others—Privates Calvin Dowrey, Morie, Harley, Thomas, and Alexander Lee—were discharged in January 1867. Private Richard Lee previously had died from typhoid fever.⁴¹

From that point, the lives of the participants in the mutiny slipped into obscurity. Of the officers, no further record of Lieutenant Colonel Brower remains because he failed to file for a pension. Lieutenant Brown returned to Indiana, married, and died in 1912.⁴² Major Conant left active duty immediately after the trials. Interested in promoting the welfare of newly freed blacks, he accepted a position with the Freedman's Bureau in Florida. He later returned to New England and died in Connecticut in 1924. Of the black mutineers who survived prison, even less is known. Having been dishonorably discharged, they were ineligible to apply for a military pension; thus no recorded information is available. The only postscript is a letter contained within the file of Private Jacob Plowden. Dated in 1878, it was written by his brother on behalf of Private Plowden's minor son Jesse, attempting to collect any arrears in pay due Private Plowden.

Did the soldiers who were tried as a result of the Jacksonville Mutiny receive justice? In light of the severe sentences handed down, the court-martial apparently failed to consider as mitigating the egregious actions of the commanding officer.

⁴⁰ Monthly Returns from Fort Jefferson, Florida, File 10-27-1, Returns from Army Posts, National Archives Microfilm Publication M617, Roll 542, National Archives, Washington, D.C.

⁴¹ Military Service Records of Cyrus W. Brown, National Archives, Washington, D.C.

⁴² Military Service Records of Sherman Conant, National Archives, Washington, D.C.

By his condoning the use of a disreputable and inflammatory punishment and by imprudently firing into a group of unarmed soldiers, he essentially provoked an armed mutiny from what appeared to be insubordination. It is perhaps too easy to criticize and second-guess the commander's actions. It would be an understatement on the other hand, to assert that more ordinary methods could have been used to quell the initial disturbance. The harsh sentences meted out were not so unusual in the context of the black soldier serving in the Civil War. While blacks comprised nine percent of the total manpower in the Union Army, they accounted for just under eighty percent of the soldiers executed for the offense of mutiny during the Civil War period.⁴³ Based upon this statistical data, the appearance of disproportionate treatment and racial bias in mutiny cases clearly is suggested. Additionally, one has to question the fairness of these courts-martial given their composition, the absence of defense counsel, the rapid fashion in which they were tried, and the sentences carried out. While the concept of due process was not as well defined in that period as it is today, even by the minimal standards of the time, an element of fairness was lacking.

In reviewing the transcripts and the testimony offered however, there seems to be little doubt that Privates Plowden, Green, Howard, and Allen were among the group of soldiers that took up arms and fired upon their officers. Additionally, there was no dispute that Privates Nathaniel, Morie, and Alexander Lee took up arms. There was considerable evidence, however, that they did not fire their weapons. In the case of Private Lee, who enjoyed the shortest court-martial, the accused merely proffered that he had been drunk during the mutiny and did not remember a thing. With respect to the cases of Privates Harley, Dowrey, Richard Lee, Miller, and Thomas, the court probably was justified in finding them guilty of mutiny for their various acts in inciting, assisting, and attempting to free the prisoner. Likewise there was no dispute that Private Roberts had uttered the disrespectful language about Lieutenant Colonel Brower in public hearing and that he, therefore, was guilty of conduct prejudicial to good order. Therefore, with the exception of the unusual case of Private Craig, the findings of guilty on the charges of mutiny likely were supported by the evidence.

In retrospect, the Jacksonville Mutiny serves as a tragic illustration of the turbulent introduction of the black soldier to

⁴³R. ALOTTA, CIVIL WAR JUSTICE: UNION ARMY EXECUTIONS UNDER LINCOLN 26 (1989)

the military justice system. Clearly, black soldiers had achieved remarkable gains through their noteworthy participation in the Civil War—not the least of which was the end of slavery. While their gains in the administration of military justice were significant in comparison to the arbitrary slave codes, they still had far to travel to achieve parity with their white counterparts. Accordingly, the Jacksonville Mutiny was but the first stop on a long, painful road.

THE ADVOCATE'S USE OF SOCIAL SCIENCE RESEARCH INTO NONVERBAL AND VERBAL COMMUNICATION: ZEALOUS ADVOCACY OR UNETHICAL CONDUCT?

CAPTAIN JEFFREY D. SMITH*

The ability to communicate in a persuasive manner is an important skill for all lawyers to possess, but it is especially critical to trial and defense counsel. Social scientists have conducted numerous experiments studying the impact on message recipients of nonverbal and verbal communications. This article examines that research and discusses whether it is ethical for counsel to apply at courts-martial the results of those studies in an effort to increase their persuasiveness in the courtroom.

Part One examines nonverbal aspects of courtroom messages and discusses how counsel potentially could use nonverbal communication at courts-martial to increase the persuasiveness of their courtroom presentations. Part Two of this article analyzes the use of language in the courtroom by considering two issues. First, does a witness's speech style affect the jury's perception of the witness? Second, can the attorney's choice of words influence the substance of a witness's testimony and the jury's recollection of the evidence? Finally, Part Three addresses whether the Army's Rules of Professional Conduct for Lawyers¹ prohibit counsel from using the various techniques suggested by research into nonverbal and verbal communications.

I. Nonverbal Communication in the Courtroom

When an individual speaks, he or she communicates both verbally and nonverbally. Experts in the field generally agree

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¹Dep't of Army Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26].

that over sixty percent of the meaning of a communicated message is contained in the nonverbal behavior that accompanies the oral message.² Research has demonstrated that message recipients use the nonverbal component of a communication to make decisions concerning the speaker's credibility, persuasiveness, and competence.³ For purposes of this article, three elements of nonverbal communication will be examined: kinesics, paralinguistics, and proxemics.

A. *Kinesics.*

Kinesics, the study of so-called "body language," involves examining and interpreting the movement of the body.⁴ One of the most important and widely recognized aspects of kinesics is eye contact. A speaker either may look directly at the target of his or her communication ("gaze maintenance") or may look slightly downward while speaking ("gaze aversion").⁵ Several experiments have examined the effect of this looking behavior on the message recipient's perceptions of the speaker. In one study, researchers used a courtroom simulation to determine whether message recipients would use an alibi witness's looking behavior to make an inference concerning the speaker's credibility. The experiment also investigated whether the message recipients had enough confidence in their judgments concerning the speaker's credibility to apply that information to a subsequent decision.⁶

Participants in the study rated witnesses who exhibited gaze aversion as being less credible than witnesses who exhibited gaze maintenance.⁷ Subjects also judged the defendants for whom the gaze aversion witnesses testified as more likely to be guilty than the defendants for whom gaze maintenance

² Peskin, *Non-verbal communication in the courtroom* TRIAL DIPL. J., Spring 1980, at 8. Some researchers claim that the impact of a verbal message consists of seven percent verbal and 93% nonverbal communication. *Id.* at 7. For a more detailed examination of nonverbal communication, see A. EISENBERG & R. SMITH, *NONVERBAL COMMUNICATION* (1971); G. NIRENBERG & H. CALERO, *HOW TO READ A PERSON LIKE A BOOK* (1971).

³ Additionally, a speaker may use nonverbal communication to assess the impact of his message on the listener. For example, the trial attorney may use nonverbal communication as a gauge of juror reactions to his arguments and questions. See Peskin, *supra* note 2, at 7.

⁴ *Id.* at 6.

⁵ Hemsley & Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J OF APPLIED SOC. PSYCHOLOGY 136 (1978).

⁶ *Id.* at 137.

⁷ *Id.* at 141.

witnesses testified.* Thus, the message recipients used a witness's visual behavior to make an inference concerning the witness's credibility *and* to make a subsequent evaluation of the defendant's guilt. This study provides empirical support for the practice of instructing one's witnesses to look at the fact-finder, rather than at counsel, when answering questions.

In addition to gaze maintenance, researchers have identified other body movements that message recipients perceive as indicative of credibility and persuasiveness. A series of studies that required observers to rate the persuasiveness of a speaker revealed that more gestures, more facial activity, less self-touching, and moderate relaxation led to higher ratings of persuasiveness.⁹ Listeners interpret the use of gestures as indicating credibility and persuasiveness, however, only if they appear natural and are not used excessively so as to distract from the verbal content of the message.¹⁰

B. Paralinguistics.

Paralinguistics studies the sound of an oral communication by examining variables such as pitch, speech rate, intensity, tone, and volume of the voice.¹¹ Researchers have discovered that pitch and speech rate affect a listener's perception of the speaker's credibility and persuasiveness.¹² In one study, subjects listened to recordings of male speakers answering interview questions and then rated the speakers on a variety of characteristics. The recordings had been altered so that the pitch of the speakers' voices was raised or lowered by twenty percent or left at its normal level.¹³ The subjects in the experiment rated the high-pitched voices as being less truthful, less persuasive, and significantly more nervous than the lower pitched voices.¹⁴ Consequently, although changes in pitch can be used to avoid a monotonous presentation and to highlight a

⁸ *Id.* at 142.

⁹ Miller & Burgoon, *Factors Affecting Assessments of Witness Credibility*, in *PSYCHOLOGY OF THE COURTROOM* 169, 175-78 (1982).

¹⁰ *Peskin*, *supra* note 2, at 55.

¹¹ *Id.* at 8.

¹² Apple, Krauss & Streeter, *Effects of Pitch and Speech Rate on Personal Attributions*, 37 *J. OF PERSONALITY AND SOC. PSYCHOLOGY* 715 (1979); Miller, Maruyama, Beaber & Valone, *Speed of Speech and Persuasion*, 34 *J. OF PERSONALITY AND SOC. PSYCHOLOGY* 615 (1976).

¹³ Apple, Krauss & Streeter, *supra* note 12, at 717-18.

¹⁴ *Id.* at 720, 724.

phrase or argument, variations in pitch must be used with discretion.

Research has also demonstrated that the rate at which one speaks affects a listener's perception of the speaker. Several experiments have studied the relationship between rate of speech and persuasion by varying the rate of speech.¹⁵ In one experiment, researchers discovered that a message delivered at a rate of 191 words-per-minute produced a greater amount of listener agreement with the speaker's position than did the same message delivered at the normal rate of 140 words-per-minute or at the slow rate of 111 words-per-minute.¹⁶ Moreover, listeners rated the faster speaker as being more knowledgeable, more trustworthy, and more competent.¹⁷ A second series of experiments confirmed the results of that earlier study, finding that listeners judged slow-talking speakers as being less truthful, less fluent, and less persuasive.¹⁸ These results may reflect a belief on the part of the listeners that only a skilled speaker can rapidly present complex material in a clear manner.

Not only are rapid speakers judged to be more credible, competent, and persuasive, but also researchers have discovered that a dramatic increase in the rate of speech does not significantly affect a listener's comprehension. In one study, researchers electronically increased the speed of a message to **282** words-per-minute—twice the average speech rate of 140 words-per-minute—without significant losses in comprehension.¹⁹

C. *Proxemics.*

Individuals maintain different zones of space between each other depending upon their relationships, the subject matter of their conversations, and the social settings. Proxemics studies the spatial relationships between a speaker and other people or objects.²⁰ Research suggests that in the courtroom, counsel can increase the credibility of their own witnesses and decrease the believability of their opponent's witnesses by applying proxemics.

¹⁵ *Id.* at 717, Miller, Maruyama, Beaber & Valone, *supra* note 12, at 615

¹⁶ Miller, Maruyama, Beaber & Valone, *supra* note 12, at 619-21

¹⁷ *Id.* at 616

¹⁸ Apple, Krauss & Streeter *supra* note 12, at 723

¹⁹ Peskin, *supra* note 2, at 5

²⁰ A EISENBERG & R SMITH, *supra* note 2, at 28

According to proxemics, counsel can enhance the credibility of their own witnesses during direct examinations by standing across the courtroom from witnesses in the profile position to the jury. This position increases the perceived status and importance of a witness by expanding his or her personal territory in the courtroom. Additionally, by standing in the profile position, the lawyer shares the fact-finder's attention with the witness.²¹

Researchers also claim there are two ways in which the trial lawyer can use proxemics during cross-examination to decrease the credibility and persuasiveness of an opponent's witnesses. First, counsel can stand near the witness in an open position in front of the jury. By standing near the witness, the lawyer decreases the witness's personal territory, thereby delimiting his or her importance and status. By facing the jury, the attorney commands the jury's attention, diverting attention away from the witness.²²

Second, an adverse witness's credibility can be damaged by slowly moving towards the witness during cross-examination. Frequently, the witness will become preoccupied with the lawyer's movement and begin to show signs of anxiety. Although that anxiety is due to the presence of counsel, rather than the questions being asked, the fact-finder may perceive that the witness is nervous and stumbling in his or her testimony because he or she is being deceptive.²³

In summary, courtroom communications have both a verbal and a nonverbal component. Research into nonverbal communication has demonstrated that listeners use the nonverbal component of a message to draw conclusions concerning the speaker's credibility, intelligence, and persuasiveness. Consequently, nonverbal communications provide a potential means that trial and defense counsel may be able to use to increase the persuasiveness of their courtroom advocacy.²⁴

II. Verbal Communication in the Courtroom

In discussing social science research into the verbal component of courtroom communications, two issues will be ex-

²¹ Colley, *Friendly Persuasion*, TRIAL, Aug. 1981, at 46.

²² *Id.*

²³ *Peskin*, *supra* note 2, at 9.

²⁴ For a discussion of whether using nonverbal communication techniques at court-martial violates the Army's Rules of Professional Conduct for Lawyers, see *infra* notes 68 to 76 and accompanying text.

amined. First, what effect does a witness's style of speech have on a fact-finder's perception of the witness? Second, will the lawyer's choice of words during the questioning of a witness affect the witness's testimony and the fact-finder's recollection and analysis of that evidence?

A. Speech Style of Witnesses.

In the typical contested court-martial, witnesses for the Government and for the defense provide conflicting accounts of what happened. To obtain a favorable verdict, both trial and defense counsel want their witnesses to testify in credible and persuasive manners. Of interest is the effect of a witness's style of speech on the listener's perceptions of the speaker's credibility and persuasiveness. William O'Barr studied that issue and identified four characteristics of speech style that affect a listener's perceptions of a witness.²⁵

1. *Powerless vs. Powerful Speech.*—O'Barr began his study by observing, recording, and analyzing over 150 hours of actual courtroom testimony. After listening to speakers from a variety of backgrounds, O'Barr discovered that the speech of the different witnesses contained certain linguistic features that appeared to vary with the respective speaker's social power and status. Individuals of low status and social power—the poor and uneducated—tended to use a style of speech characterized by the frequent use of words and expressions that conveyed a lack of forcefulness in speaking. This style, termed “powerless,” involved the frequent use of the following:

- (a) “hedges” in the form of:
 - (1) prefatory remarks (e.g., “I think” and “I guess”);
 - (2) appended remarks (e.g., “you know”); and
 - (3) modifiers (e.g., “kinda” and “sort of”).
- (b) “intensifiers” (e.g., “very” and “definitely”).
- (c) “hesitation forms” (e.g., “uh,” “um,” and “well”).

²⁵ For a detailed discussion of the research conducted by the Law and Language Project, see W. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM* (1982); Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 *DUKE L.J.* 1376; Erickson, Lind, Johnson & O'Barr, *Speech Style and Impression Formation in a Court Setting*, 14 *J. OF EXPERIMENTAL SOC. PSYCHOLOGY* 266 (1978).

- (d) “polite forms” (e.g, the use of “sir” and “please”).
- (e) “question intonation” (making a declarative statement while using a rising intonation).²⁶

O’Barr also identified a more forceful and direct manner of testifying. Witnesses having relatively high social power and status in court—that is, the well-educated, professionals, and expert witnesses—tended to use a speech style that exhibited relatively few of the features of the powerless style. O’Barr called this style the “powerful” style of courtroom speech.²⁷

O’Barr then conducted an experiment to determine whether a witness’s speech style affects a listener’s perception of the speaker. Participants in the study listened to different versions of courtroom testimony that differed only in the speaking style used by the witness—that is, either powerless or powerful.²⁸ The subjects then rated the speaker on a number of characteristics. Participants rated witnesses using the powerful style of speech as more convincing, more competent, more intelligent, and more trustworthy than witnesses using the powerless style. As such, listeners showed greater acceptance of the information conveyed by speakers using the powerful style of speech.²⁹ This suggests that trial and defense counsel could increase the credibility and persuasiveness of their witnesses by preparing them to testify using the powerful speech style.

2. Hypercorrect Speech in Testimony.—O’Barr also studied the formality of the witnesses testimonies. Although most of the testimony recorded and analyzed was more formal than everyday conversations, O’Barr observed that some witnesses used a style of speaking significantly more formal than the style they used in their out-of-court conversations. Witnesses who used this “hypercorrect” style tended to use convoluted grammatical structures and to substitute more difficult and obscure words for their ordinary vocabularies.³⁰ They also used bits of legal terminology and overused whatever technical or professional vocabulary they did possess. Accordingly,

²⁶ Conley, O’Barr & Lind, *supra* note 25, at 1380.

²⁷ Erickson, Lind, Johnson & O’Barr, *supra* note 26, at 268.

²⁸ *Id.* at 269-73.

²⁹ *Id.* at 273-76.

³⁰ For examples of hypercorrect speech and vocabulary, see W. O’BARR, *supra* note 25, at 83-84.

those witnesses spoke in a stilted and unnatural manner, rather than in the formal style they apparently sought.³¹

To study the effect of hypercorrect speech on listeners, O'Barr had subjects listen to testimony in which the witness used either hypercorrect speech or the standard formal courtroom speaking style. Participants rated the witnesses using the ordinary formal style of speech significantly more convincing, competent, qualified, and intelligent than witnesses using the hypercorrect style.³² This result led researchers to conclude that jurors—based upon what they infer about a witness's background and social status—develop certain expectations concerning the witness's behavior. When a witness violates those expectations by speaking with an inappropriate level of formality, jurors react punitively.³³ This suggests that counsel should advise their witnesses to testify using their normal, out-of-court vocabularies while, of course, staying within the confines imposed by the formality of courts-martial.

3. Narrative vs. Fragmented Styles of *Testimony*.—O'Barr next examined the testimonial style used by witnesses on direct examination. Some of the testimony recorded by O'Barr consisted of relatively infrequent questions by the attorney and long, narrative answers by the witness. Other testimony involved frequent questions by the lawyer and short answers by the witness.³⁴ These stylistic differences prompted an experiment to determine if a witness's credibility can be enhanced by allowing the witness to testify in long, narrative answers—that is, in a “narrative” form—rather than in short, brief answers—that is, in a “fragmented” form.

O'Barr had subjects listen to reenactments of direct testimonies from a criminal trial. Each witness presented the same substantive testimony on each tape using either the narrative or fragmented style. The study then assessed listeners' evaluations of the witness's competence.³⁵

Although the results of the study were rather complex,³⁶ O'Barr did make some general conclusions. First, listeners fre-

³¹ CONLEY, O'BARR & LIND *supra* note 25, at 1389-90; Conley, *Language in the Courtroom*, Trial, Sept. 1979, at 34.

³² CONLEY, O'BARR & LIND *supra* note 25, at 1390.

³³ *Id.*

³⁴ W. O'BARR *supra* note 25, at 76-77.

³⁵ *Id.* at 78-79; CONLEY, O'BARR & LIND *supra* note 25, at 1387-88.

³⁶ For a detailed discussion of the results, see W. O'BARR, *supra* note 25, at 80-82; CONLEY, O'BARR & LIND, *supra* note 25, at 1388-89.

quently evaluate witnesses who use the narrative style more favorably than witnesses who use the fragmented style. Second, listeners tend to base their evaluations of a witness on their perceptions of the examining lawyer's opinion of the witness. If a listener interprets the use of the narrative style as indicating that the lawyer trusts and believes the witness, the listener is more likely to reach a similar conclusion concerning the witness.³⁷ This study provides empirical support for the common practice of advising witnesses to use a narrative style when testifying on direct examination.

4. Simultaneous Speech and Interruptions.— During cross-examination, the examining attorney and the witness often interrupt each other and speak simultaneously in an effort to dominate and control the testimony. O'Barr's final study examined the effect of these hostile exchanges on listeners' perceptions of the witness and the attorney. Using a segment of an actual cross-examination, O'Barr made four different tapes that presented the same evidence, but which differed in terms of the verbal exchange between the witness and the attorney. The tapes consisted of the following scenarios: (1) no simultaneous speech; (2) simultaneous speech, but neither party dominated; (3) lawyer dominated by persevering in about seventy-five percent of the instances of simultaneous speech; (4) witness dominated by persevering in about seventy-five percent of the instances of simultaneous speech.³⁸

The experiment resulted in two important findings. First, listeners perceived the lawyer's control over the presentation of testimony as low in all situations involving simultaneous speech, regardless of which party dominated the exchange. That is, no matter which party dominated a cross-examination containing simultaneous speech, listeners rated the lawyer as having far less control over the presentation of evidence whenever simultaneous speech occurred. Similarly, listeners rated the witness as being more powerful and more in control whenever there was simultaneous speech.³⁹

Second, in situations in which counsel dominated by persevering in the vast majority of the simultaneous speech exchanges, the lawyer "lost" in the eyes of the listeners. When the attorney appeared to "win" the exchange by persevering more than the witness, listeners rated the lawyer as giving the

³⁷ W. O'BARR, *supra* note 25, at 82.

³⁸ *Id.* at 88-89.

³⁹ *Id.* at 90.

witness less opportunity to present his or her testimony. Listeners also rated the attorney as being less fair to the witness and as being less intelligent. When the witness dominated, however, subjects felt that the witness had a better opportunity to present his or her version of events and the participants evaluated the *lawyer* as being more intelligent and fairer than when the lawyer dominated the verbal exchange.⁴⁰

O'Barr's final study suggests that counsel should avoid interruptions and simultaneous speech during a cross-examination to preclude the appearance of having lost control of the examination. When simultaneous speech does occur, however, the lawyer should not attempt to dominate the exchange. To do so creates an appearance of unfairness to the witness and will result in the lawyer receiving a negative overall assessment from the jury.⁴¹

B. Using Language to Influence a Witness's Testimony.

Social scientists have discovered that the wording of a question can influence the answer given to that question significantly. In one experiment, researchers studied the effect of altering the wording of a question on an individual's account of events he or she recently witnessed.⁴² Subjects viewed a film of an automobile accident and then were asked questions about what they observed in the film. The question, "About how fast were the cars going when they smashed into each other?" elicited significantly higher estimates of the cars' speed than questions that used the verbs "collided," "bumped," "contacted," or "hit" in place of "smashed."⁴³ On a retest a week later, subjects who had been questioned using the verb "smashed" were more likely to answer yes to the question, "Did you see any broken glass?" even though broken glass was not present in the film.⁴⁴

⁴⁰ *Id.* at 90-91.

⁴¹ *Id.* at 91; CONLEY, O'BARR & LIND, *supra* note 25, at 1392.

⁴² Loftus & Palmer, *Reconstruction of Automobile Destruction*, 13 J. OF VERBAL LEARNING AND VERBAL BEHAV. 585 (1974).

⁴³ The verb "smashed" elicited a mean speed estimate of 40.8 miles per hour while the verb "contacted" elicited a mean speed estimate of 31.8 miles per hour. The mean speed estimates obtained using the other verbs fell between those obtained for smashed and contacted. *Id.* at 586.

⁴⁴ Loftus & Palmer, *supra* note 42.

In a second experiment, subjects viewed a film depicting a multiple-car accident and then completed a questionnaire.⁴⁵ Half of the individuals were asked several questions starting with the words, "Did you see a . . .," such as, "Did you see a broken headlight?" The other subjects were asked several questions beginning with the words "Did you see the . . ." such as, "Did you see the broken headlight?" In some cases, the item asked about was present in the film, while in other cases the item was not present.⁴⁶

Subjects who completed the questionnaire containing questions using the indefinite article "a" were over twice as likely to reply "I don't know" than were subjects who completed the questionnaire containing questions using the definite article "the." This result held true whether or not the item—such as, the broken headlight—was actually in the film. Additionally, subjects interrogated using "the" questions were more than two times as likely to report seeing something that was not present. That is, subjects who answered questions containing the definite article "the" gave over twice as many false reports as compared to subjects who answered questions containing the indefinite article "a."⁴⁷

The ability of subtle variations in the wording of a question to influence the answer given also has been demonstrated in the context of questions concerning an individual's personal experiences. In one study, interviewers questioned subjects about their headaches and about headache products.⁴⁸ One question asked how many headache products the individual had tried and gave a range of possible responses. When the possible responses were phrased in terms of small increments—that is, one, two, or three products—the subjects claimed to have tried an average of 3.3 other products. When the possible responses were phrased in terms of larger increments—that is, one, five, or ten products, the subjects claimed to have tried an average of 5.2 products.⁴⁹

A second question concerned how often the participants suffered headaches. When the interviewers asked one group of subjects if they had headaches "frequently," and if so how

⁴⁵ Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. OF THE PSYCHONOMIC SOC'Y 86 (1975).

⁴⁶ *Id.* at 87.

⁴⁷ *Id.* at 87-88.

⁴⁸ Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOLOGY 660 (1975).

⁴⁹ *Id.* at 561.

often, those subjects reported an average of 2.2 headaches per week. When the interviewers asked a second group of participants if they had headaches "occasionally," and if so how often, those subjects reported only 0.7 headaches per week.⁵⁰

In summary, research has demonstrated that subtle variations in the wording of a question can influence the answer given dramatically. This effect occurs when an individual describes recently witnessed events and when he or she reports about his or her personal experiences. This suggests that trial and defense counsel can influence the content of a witness's testimony by carefully formulating the wording of the questions they ask. Although this may result in a witness providing the version of events that is most favorable to one's client, that testimony may not be the most accurate account of what actually occurred.⁵¹

C. Using Language to Influence Jury Deliberations.

Social science research also has identified two concepts that appear capable of influencing jury deliberations. First, studies suggest that pragmatic implications influence jury members' recollections of the evidence and their opinions about a witness. Second, it appears that the technique of priming affects a fact-finder's analysis of ambiguous evidence.

1. *Pragmatic Implications.*—Testimony at courts-martial may consist of directly asserted statements, as well as logical and pragmatic implications. A logical implication exists when some information necessarily is implied by a remark. For example, the statement, "John is taller than Bill," logically implies that Bill is shorter than John. When a sentence contains a logical implication, the sentence cannot be interpreted and understood meaningfully without believing that the logical implication is true.⁵²

In contrast to a logical implication, a pragmatic implication exists when a statement leads the hearer to expect something that neither is stated explicitly nor is implied necessarily and logically in the sentence. For example, the statement, "The prisoner was able to leave the confinement facility," leads one

⁵⁰ *Id.*

⁵¹ For a discussion of the ethical ramifications of this practice, see *infra* notes 81 to 87 and accompanying text.

⁵² Harris & Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*. 107 J. OF EXPERIMENTAL PSYCHOLOGY: GENERAL 1. 2 (1978).

to believe—and pragmatically implies—that the prisoner left the confinement facility. The sentence, however, does not state that he left the confinement facility and he actually may have never left. Unlike logical implications, pragmatic implications do not have to be understood for the listener to comprehend the sentence meaningfully. Unless the context indicates otherwise, however, a listener usually will make the pragmatic inference upon hearing the **statement**.⁵³

Several studies have demonstrated that listeners frequently remember the pragmatic implication of a sentence, rather than what the statement directly **asserted**.⁵⁴ That is, people tend to misremember the content of sentences containing pragmatic implications, believing these statements directly asserted what actually was implied only pragmatically. In one study, subjects heard an excerpt of mock courtroom testimony. Half of the subjects heard certain information directly asserted—such as “I rang the burglar alarm”—while the other half heard the same information pragmatically implied—that is, “I ran up to the burglar alarm.” The participants later were asked to indicate if certain statements concerning the testimony were true, false, or indeterminate. A significant number of subjects incorrectly remembered pragmatic implications as being direct assertions, rating **71.4%** of the pragmatic implications and **79.6%** of the direct assertions as being definitely true. This tendency to misremember pragmatically implied information as having been asserted directly occurs even when the listeners specifically are warned not to treat implications as assertions of **fact**.⁵⁵ At a court-martial, pragmatic implications could influence a panel’s deliberations because the members may incorrectly believe that witnesses directly asserted information that actually was implied only **pragmatically**.⁵⁶

⁵³ *Id.* at 3. Pragmatic implications may take several forms. They may involve events in a temporal sequence (*e.g.*, “The safe cracker put the match to the fuse,” implies “The safecracker lit the fuse”) or an implied cause (*e.g.*, “The clumsy chemist had acid on his coat,” implies “The clumsy chemist spilled acid on his coat”). Pragmatic implications also may entail the implied instrument of some stated action (*e.g.*, “John stuck the wallpaper on the wall,” implies “John pasted the wallpaper on the wall”). Finally, a pragmatic implication may imply location (*e.g.*, “The barnacles clung to the sides,” implies “The barnacles clung to the ship”). *Id.* at 3-5.

⁵⁴ *See, e.g.*, Harris, Teske & Ginns, MEMORY FOR PRAGMATIC IMPLICATIONS FROM COURTROOM TESTIMONY, 6 BULL. OF THE PSYCHONOMIC SOC'Y 494 (1975).

⁵⁵ *Id.* at 495-96. The figures cited are the overall mean score across all experimental groups.

⁵⁶ For a discussion of the ethical ramifications of this practice, see *infra* notes 88 to 89 and accompanying text.

2. *Priming*. — Researchers have discovered that repeated exposure to a specific category of information increases the propensity to classify ambiguous information according to that category—a concept known as priming. In one study, researchers primed certain subjects through exposure to words associated with hostility and then gave all of the participants in the study a description of an individual's actions that was ambiguous on the primed trait. The subjects who had been primed were substantially more likely to rate the person's actions as hostile.⁵⁷ This effect is strongest when priming occurs immediately before the presentation of the ambiguous information and when there is some delay between the presentation of the ambiguous information and its classification by the listener.⁵⁸

One potential courtroom application of priming would be in an opening statement. For example, in his or her opening statement, a trial counsel in an assault and battery case might make frequent references to violent actions without limiting those references to violent acts by the accused. Priming theory maintains that the trial counsel's use of words associated with violence will increase the probability that panel members will interpret ambiguous behavior by the accused as being violent. Similarly, defense counsel might make frequent references to more passive actions in an effort to increase the probability the members will interpret the accused's ambiguous behavior as nonviolent.⁵⁹

In summary, social science research has discovered various ways in which verbal communications affect a listener. First, listeners use a speaker's speech style to assess the individual's credibility, persuasiveness, and trustworthiness.⁶⁰ Second, subtle variations in the wording of a question can influence the answer given dramatically.⁶¹ Finally, the implications and premises within oral communications can affect the listener's recollection and analysis of what he or she heard and his or her opinion concerning the speaker.⁶²

⁵⁷ Lind & Ke, *Opening and Closing Statements*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 229, 241-42 (1985).

⁵⁸ *Id.* at 242.

⁵⁹ For a discussion of the ethical ramifications of this use of priming, see *infra* notes 90 to 92 and accompanying text.

⁶⁰ See *supra* notes 25 to 41 and accompanying text.

⁶¹ See *supra* notes 42 to 51 and accompanying text.

⁶² See *supra* notes 52 to 59 and accompanying text.

The extent to which the research findings discussed above can be applied directly to the courtroom setting remains an area of controversy among social scientists.⁶³ Some skeptics question the external validity of the research, arguing that the jury simulation technique used in many of the studies does not reflect the reality of an actual trial accurately.⁶⁴ Despite this criticism, however, it appears that use of the communication techniques suggested by social science research can affect the trial process, making the true controversy the extent to which the process can be influenced. The issue that then must be addressed is whether these efforts to influence courts-martial violate the Army's Rules of Professional Conduct for Lawyers.

III. Ethical Considerations

Trial and defense counsel must fulfill several roles. First, they are advocates and in that role, counsel must "zealously assert[] the client's position under the law and the ethical rules of the adversary system."⁶⁵ Second, they are officers of the legal system; therefore, each of them has a "duty of candor to the tribunal."⁶⁶ Finally, trial and defense counsel are public citizens who have a "special responsibility for the quality of justice" dispensed by the court.⁶⁷ Given these potentially conflicting duties, is the use at courts-martial of the research findings previously examined zealous advocacy or a violation of the lawyer's duties as an officer of the court and a public citizen? An examination of the various techniques that apparently are capable of influencing the courts-martial process demonstrates that, in general, those techniques do not violate the Army's ethical rules.

A. *Nonverbal Communications.*

There are several reasons why the use of kinesics and paralinguistics should be viewed as zealous advocacy. First, the use of kinesics and paralinguistics is merely an effort by the advocate to increase the persuasive power of the words used in his or her presentation and is analogous to the lawyer practicing

⁶³ Tanford & Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C.L. REV. 741, 754 (1988).

⁶⁴ *Id.* at 754-55.

⁶⁵ DA Pam. 27-26, Preamble (A Lawyer's Responsibilities).

⁶⁶ *Id.* rule 3.3.

⁶⁷ *Id.* Preamble (A Lawyer's Responsibilities).

the delivery of an opening statement and closing argument. In each case, counsel is attempting to find the most persuasive method of communicating to the fact-finder the factual and legal basis for returning a favorable verdict.

Moreover, our judicial system implicitly recognizes that the trial lawyer's duty zealously to advance the client's interests involves more than merely identifying the legal arguments that support the client's position. If the only requirement was to find the right words, then the lawyer's arguments could be given to the fact-finder in written form. Our trial system, however, is based upon oral advocacy—a fact that amounts to an implicit acknowledgment that the manner in which information is presented in the courtroom is a critical aspect of the legal process. The use of kinesics and paralinguistics therefore should be viewed as a legitimate and ethical effort by counsel to increase the persuasiveness of his or her presentation.

Second, there is a tendency to exaggerate the probable effects that nonverbal communications have on the fact-finder, and to ignore that the strength of the evidence actually has the greatest impact on the fact-finder's decision.⁶⁸ Most studies examining the influence of nonverbal communications hold evidentiary strength constant and manipulate the variable of interest, such as, eye contact. Studies manipulating evidentiary strength have discovered that extralegal factors, such as nonverbal communication, have the greatest impact when the evidence is weak or ambiguous, and may have little or no effect when the evidence is strong.⁶⁹

Although counsel should be allowed to use kinesics and paralinguistics freely, there are limitations on the use of proxemics. Using proxemics during a direct examination to enhance the credibility of one's own witnesses⁷⁰ is an ethical and legitimate tactic that is similar to the common practice of preparing a witness to testify by conducting practice direct and cross-examinations. In both cases, counsel is not affecting the content of the witness's testimony. Rather, counsel merely is helping the witness present his or her testimony in the most persuasive and credible manner possible.

There are several reasons why, in general, employing proxemics during cross-examination also should be viewed as a permissible and ethical tactic. First, an individual has the

⁶⁸ Tanford & Tanford, *supra* note 63, at 755

⁶⁹ *Id.*

⁷⁰ See *supru* note 21 and accompanying text

right to test his or her opponent's proof, and using proxemics is one method of testing an adversary's evidence. This technique is similar to using the verbal component of a cross-examination to cast doubt upon the credibility of a witness.⁷¹ Second, there are ways to reduce the effectiveness of this use of proxemics without imposing a total prohibition. During pre-trial preparation, counsel may warn his or her witnesses that opposing counsel may use proxemics during cross-examination in an effort to make witnesses appear nervous. Additionally, during voir dire counsel can inform the jury that, as is to be expected, witnesses may appear to be nervous. The lawyer then may argue on closing that any lack of composure on the witness stand resulted from the witness being nervous—not from attempts at deception.

One problem area, however, is the use of proxemics to damage the credibility of an opponent's witness who has accurately and truthfully testified. Is it ethical to use proxemics to make that witness appear nervous and therefore less credible, less persuasive, and less trustworthy?⁷² The American Bar Association Standards for Criminal Justice prohibit trial counsel, but not defense counsel, from using proxemics in this situation.⁷³

Trial counsel always must remember that a "prosecutor is both an administrator of justice and an advocate" whose duty "is to seek justice, not merely to convict."⁷⁴ Accordingly, if trial counsel knows that a witness is testifying truthfully, he or she "should not use the power of cross-examination to discredit or undermine [that] witness."⁷⁵ Moreover, if trial counsel reasonably believes that a witness is telling the truth, "the method and scope of cross-examination" may be affected.⁷⁶ Given this guidance, a trial counsel should use proxemics—as well as the full range of cross-examination techniques—only when he or she knows or reasonably believes that a witness is not testifying accurately or truthfully.

⁷¹ For a defense of this impeachment technique, see M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 43-49 (1981).

⁷² See *supra* notes 22-23 and accompanying text.

⁷³ Unless they are clearly inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial, and Department of the Army Regulations, the American Bar Association Standards for Criminal Justice apply to counsel, military judges, and clerical support staff. See Army Reg. 27-10, *Legal Services: Military Justice*, para. 5-8 (1 July 1984).

⁷⁴ American Bar Association Standards for Criminal Justice, 3-1.1 [hereinafter ABA Standards].

⁷⁵ ABA Standard 3-5.7.

⁷⁶ *Id.*

B. Speech Style.

As previously discussed, a witness's speech style can affect the listener's assessment of the witness's credibility, truthfulness, and persuasiveness. Consequently, trial and defense counsel can increase the fact-finder's acceptance of a witness's testimony by manipulating the witness's style of speech.⁷⁷ This practice does not violate the Army's ethical rules and not only should be permitted but actually should be encouraged.

Although observers tend to correlate a witness's style of speech with his or her truthfulness, credibility, and persuasiveness, in reality the speech style used by the witness correlates with his or her social status.⁷⁸ Consequently, a panel's decision may be based upon the social status and power of a party's witnesses, rather than upon the strength of the evidence. Counsel can mitigate that effect by training witnesses who belong to a lower social class to use the powerful style of speech. This will counteract the members' natural tendency to view these witnesses as less credible, less trustworthy, and less persuasive. This appears to be the only method of mitigating that tendency because research has shown that jury instructions telling jurors to disregard style of speech are ineffective.⁷⁹ Instructing witnesses to testify using a powerful style of speech does not violate the Army's ethical rules provided counsel does not instruct the witness to change the substance of his or her testimony. Additionally, this use of social science research actually improves the adversary process by increasing the likelihood that a panel will decide the case based on the evidence and not on the social status and power of each side's witnesses.⁸⁰

C. Using Language to Influence Witness Testimony.

Researchers have discovered that a lawyer can influence a witness's testimony through the wording of the questions counsel asks.⁸¹ The practice of preparing and coaching witnesses prior to trial, however, would appear to undermine an attorney's ability to influence a witness's testimony by the wording of his or her questions. Specifically, because most

⁷⁷ See *supra* notes 25 to 41 and accompanying text.

⁷⁸ See *supra* notes 25 to 41 and accompanying text.

⁷⁹ W. O'BARR, *supra* note 25, at 96.

⁸⁰ See Tanford & Tanford, *supra* note 63, at 750.

⁸¹ See *supra* notes 42 to 51 and accompanying text.

witnesses will have practiced their testimony before trial, their versions of events should be well-settled and not easily swayed at trial by subtle variations in the wording of a question.

The practice of preparing witnesses to testify at an Article 32 Investigation and at trial, however, does pose a potential problem. During that preparation phase, trial and defense counsel, by carefully choosing the wording of their questions, may influence a witness's recollection of what he or she observed or experienced. After further rehearsal and coaching, the version of the "facts" created through counsel's strategic use of language becomes the witness's in-court testimony. Is this practice ethical?

The Army's ethical rules contain several prohibitions on the use of false evidence. Specifically, a lawyer "shall not knowingly make a false statement of material fact or law to a tribunal . . . [or] offer evidence that the lawyer knows to be false."⁸² Additionally, an attorney "shall not falsify evidence [or] counsel or assist a witness to testify falsely . . ."⁸³ A lawyer violates these prohibitions if he or she intentionally interviews and prepares witnesses using carefully formulated questions knowingly to present at trial favorable—but false—evidence.

Such clear-cut ethical violations are probably infrequent. The more common—and difficult—situation is when counsel, using carefully formulated and worded questions during the pretrial investigation and preparation, obtains the desired version of events but he or she is uncertain about the accuracy of the witness's answers. May counsel present that version of events at trial or should any effort to elicit favorable testimony through the use of strategically formulated questions be considered unethical?

Dean Freedman has addressed this issue in the general context of preparing a witness to testify.⁸⁴ Freedman begins by noting that the process of remembering is more a process of reconstruction than of recollection. He argues that the process is a creative one in which questions play an essential role in the reconstruction of what happened and when honest clients will, without realizing it, both invent facts and suppress

⁸² DA Pam. 27-26, rule 3.3.

⁸³ DA Pam. 27-26, rule 3.4.

⁸⁴ M. FREEDMAN, *supra* note 71, at 59-77

them.⁸⁵ A witness's testimony, therefore, is often "subjectively accurate but objectively false" and "accurate recall is the exception and not the rule."⁸⁶

Accepting Dean Freedman's argument, it appears that the use of carefully formulated questions designed to elicit favorable testimony is ethical, provided the lawyer does not use testimony that he or she knows is false. Some measure of consolation is provided by the fact that counsel for each side is attempting to present a favorable version of events. The panel will hear each version and decide which account is closest to what actually happened. In this situation, in which both trial and defense counsel strive to protect their respective client's interests, the "lawyer can be a zealous advocate . . . and at the same time assume that justice is being done."⁸⁷

D. Using Pragmatic Implications and Priming to Influence Jury Deliberations.

The use of pragmatic implications to influence the jury's recollection and analysis of the evidence long has been practiced by both witnesses and lawyers. Does counsel violate the Army's ethical prohibition against creating and knowingly using false evidence when he or she instructs a witness to pragmatically imply a falsehood? Arguably, although a witness commits perjury if he or she asserts or logically implies a false statement, the witness does not commit perjury when he or she pragmatically implies something false. After all, the witness swears to tell the truth—not necessarily to imply the truth. As such, a lawyer who instructs a witness pragmatically to imply a falsehood, technically at least, has not suborned perjury.

Research has demonstrated that listeners often remember the pragmatic implication of a statement, rather than the statement itself, believing that information which was pragmatically implied was asserted directly.⁸⁸ Consequently, the effect of pragmatically implying a falsehood is often the same as a directly asserted false statement—that is, the factfinder makes a decision based on false information. Accordingly, a lawyer who instructs a witness to pragmatically imply

⁸⁵ *Id.* at 65-68.

⁸⁶ *Id.* at 66.

⁸⁷ Preamble to Model Rules of Professional Conduct (1983)

⁸⁸ See *supra* notes 54 to 55 and accompanying text.

a falsehood should be treated as if he or she directed the witness to make a false statement in violation of the Army's ethical prohibition against creating and knowingly using false evidence.⁸⁹

Unlike the above use of pragmatic implications, the use of priming should be permitted. First, each side will attempt to use the words most favorable to its case and efforts at priming may therefore cancel themselves out. This view is supported by research that suggests that priming effects may be inhibited by an adversarial presentation of information.⁹⁰ Second, although trial counsel may speak forcefully when characterizing the accused, he or she may not be excessive and incite the passions of the fact-finder.⁹¹ Finally, if there is a significant potential for prejudice from the repeated use of certain words or phrases, one may seek from the judge a ruling prohibiting the use of that language during the trial.⁹²

IV. Conclusion

Social science researchers have demonstrated the effect that nonverbal and verbal communications have on the message recipient. Applying that research to the courtroom provides a potential means by which trial and defense counsel can increase the persuasiveness of their trial advocacy. The Army's Rules of Professional Conduct for Lawyers, however, place limitations on counsel's use of some of the techniques suggested by social science research. Although the Rules provide some guidance applicable to the use of nonverbal and verbal communications, there are a number of areas in which the Rules do not provide a definitive answer. This article has identified some techniques that trial and defense counsel can use to increase the persuasiveness of their advocacies while also prompting discussion among counsel concerning the ethical constraints on their behaviors when they prepare for, and appear at, courts-martial.

⁸⁹ DA Pam. 27-26, rules 3.3, 3.4.

⁹⁰ Lind & Ke, *supra* note 57, at 242.

⁹¹ Trial counsel may strike only "hard but fair blows." See *United States v. White*, 23 M.J. 84, 88 (C.M.A. 1986); *United States v. Zeigler*, 14 M.J. 860, 866 (A.C.M.R. 1982).

⁹² This was done in a criminal trial involving an obstetrician-gynecologist charged with manslaughter because he performed a late abortion. Prior to trial, the defense attorney obtained a court order prohibiting the use at trial of phrases such as "baby boy," "smother," and "murder." Danet, *Baby or Fetus?: Language and the construction of reality in a manslaughter trial*, 32 SEMIOTICA 187, 189 (1980).

GUILTY PLEA INQUIRIES: DO WE CARE TOO MUCH?

MAJOR TERRY L. ELLING*

*"Frequently, the issue of whether a plea of guilty is provident or improvident is anything but clear. The military judge is caught between Scylla and Charybdis and must chart his passage carefully. . . ."*¹

I. Introduction

No one seriously can dispute that the mainstay of criminal trial practice involves disposing of cases through guilty pleas. Within the Army, over sixty percent of the records of trial received at the Army Court of Military Review involve guilty pleas.² They are even more prevalent in federal district court, where close to ninety percent of the cases are resolved through guilty pleas.³

An avowed purpose of guilty pleas is to maximize the effective use of legal resources by foregoing lengthy trials in cases

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¹United States v. Clark, 26 M.J. 589, 593 (A.C.M.R. 1988), *aff'd*, 28 M.J. 401 (C.M.A. 1989).

²In fiscal year 1990, 60.8% of general courts-martial and 64.3% of special courts-martial empowered to adjudge a bad conduct discharge involved guilty pleas. In fiscal year 1989, these figures were 63% and 63.5%, respectively. This information was provided by Ms. Nancy Silva, Office of the Clerk of Court, Army Court of Military Review (ACMR). It appears that this proportion is similar to that experienced at earlier times. For example, in the 1960 Report to the Honorable William M. Brucker by the Committee on the Uniform Code of Military of Justice Good Order and Discipline in the Army ("Powell Report") it was reported that about 60% of all cases going before the ACMR involved pleas of guilty.

³During the year ending June 30, 1989, of 44,524 defendants convicted in federal district courts, 37,973 pleaded guilty and 708 pleaded *nolo contendere*, for a rate of about 87%. Annual Report of the Director of the Administrative Office of the U.S. Courts, app. I, table D-4 (1989).

in which an accused is willing to admit guilt.⁴ After investigating a case, consulting with the client, negotiating a pretrial agreement, and preparing the client for the providence inquiry, the military defense counsel probably would dispute whether military guilty plea practice actually results in any savings in time and energy. Trial counsel or military judges may have similar misgivings if they have experienced a reversal on appeal for failure to resolve an "inconsistency" that went unnoticed at trial or for a "formal" violation of Rule for Courts-Martial (R.C.M.) 910.⁵

A casual reader may conclude that—except for minor differences attributable to uniquely military considerations—R.C.M. 910 and its counterpart, Federal Rule of Criminal Procedure 11,⁶ provide the same essential requirements for accepting a guilty plea. Indeed, R.C.M. 910 purportedly is based upon Rule 11.⁷ Actually, however, the procedure followed in federal district courts is substantially different.

District court judges are not required to reject a guilty plea when an accused claims he or she is innocent or asserts a matter that is inconsistent with guilt,⁸ as military judges must do under the mandate of article 45(a) of the Uniform Code of Military Justice (UCMJ).⁹ Guilty pleas in both forums must be supported by a sufficient factual basis.¹⁰ District court judges, however, enjoy great flexibility as to the method through which the factual basis is developed and are not strictly required to question the accused personally to establish the accuracy of the plea as are military judges under *United States v. Care*.¹¹

Federal courts have evolved standards that accord substantially greater respect to a defendant's decision to plead guilty upon advice of competent counsel, while military courts are constrained to meet unnecessarily strict and antiquated requirements. In large part, this difference in approaches stems

⁴ See generally *Santobello v. New York*, 404 U.S. 257, 260 (1971); *Brady v. United States*, 397 U.S. 742, 752-53. (1970); *ABA Standards Relating to Pleas & Guilty* (1980), Introduction.

⁵ Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984. Rule for Courts-Martial 910 [hereinafter R.C.M.]

⁶ FED. R. CRIM. P. 11 [hereinafter rule 11].

⁷ See MCM, 1984, R.C.M. 910 analysis, app. 21, at A21-51 to 54.

⁸ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

⁹ Uniform Code of Military Justice art. 45(a), 10 C.S.C. § 845(a) (1982) [hereinafter UCMJ].

¹⁰ Compare FED. R. CRIM. P. 11(f) with R.C.M. 910(e).

¹¹ 40 C.M.R. 247 (C.M.A. 1969)

from the fact that federal civilian courts have confronted the issue from the standpoint of ensuring that minimal constitutional standards for a waiver of the defendant's right to a trial are satisfied. Rule 11 is only a means for implementing and safeguarding these basic, underlying rights.

Military courts, on the other hand, primarily have concerned themselves with interpreting and applying legislative and regulatory requirements that far exceed constitutional requirements and result in inconsistent and confusing judge-made law. This article will show that the requirements of article 45(a) and its judicial progeny have caused military appellate courts to approach the providence issue from the perspective of whether any matter contained in a record of trial can be interpreted as inconsistent with guilt. In many instances, it will be seen that the same matters are clearly reconcilable with guilt.

The purpose of this article is to compare these aspects of guilty plea inquiries in courts-martial and in federal district courts to determine whether there are any lessons that the armed forces might learn and adapt to military practice.¹² The following pages will examine the history of guilty plea inquiries as they have developed over this century, compare the current federal civilian and military practices, and offer some specific legislative and judicial reforms of military guilty plea practice.

II. Historical Development of the Guilty Plea Inquiry¹³

A. *Development of the Military Providence Inquiry.*

1. *Early History: Practice Under The Articles of War and the Early Manuals for Courts-Martial, U.S. Army.*—Military courts, in apparent contrast with civilian courts, have a long history of exercising care not to accept a guilty plea that may be the result of coercion, lack of knowledge as to the plea's

¹² The intent of this article is to focus strictly on the basic aspects of guilty plea inquiries necessary to establish the validity of the plea. Consequently, a detailed discussion of related topics—such as plea bargaining, conditional guilty pleas, collateral uses of an accused's testimony during the inquiry, and withdrawal of plea—is beyond the scope of this paper.

¹³ An article providing an alternative version of the development of guilty plea practice before federal and military practice, and which provided background for this thesis is Vickery, *The Providency of Guilty Pleas: Does the Military Really Care?*, 58 MIL. L. REV. 209 (1972).

effects and consequences, or misunderstanding as to the nature of the charged offense.

Colonel William Winthrop, in describing the established practice by the late nineteenth century, admonished that judge advocates should make no attempts to induce an accused to plead guilty and that the court should advise an accused to withdraw his or her plea if it has any reason to believe that the plea was "not both voluntary and intelligent, or that the accused does not appreciate its legal effect, or is misled as to its influence upon the judgement of the court."¹⁴

Of particular concern throughout early courts-martial practice was the possibility—especially at courts-martial without judge advocates and where the accused appeared without benefit of counsel¹⁵—that a guilty plea would be made "improvidently" in situations in which the accused's actual conduct did not support guilt in which the accused had a valid defense or was guilty of only a lesser-included offense.¹⁶ Consequently, even the earliest courts-martial manuals provided that the guilty plea should be withdrawn and a plea of not guilty entered when it appeared that the plea was entered by the accused without knowledge of the effect of the plea or when the accused made a statement that was inconsistent with guilt.¹⁷ Although the lack of a comprehensive reporting system for cases prior to the 1950's creates much difficulty in commenting on the actual practice concerning guilty plea inquiries, many references can be found to cases in which The Judge Advocate General took corrective action when it appeared that an accused misunderstood the effect of the plea or when

¹⁴ W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 270 (2d rev. ed., 1920).

¹⁵ Note that the Army did not require law officers at general courts-martial until 1920. *See* MCM, United States Army, 1921, paras. 81a, 89 [hereinafter MCM 1921]. The Navy did not require judge advocates at courts-martial until after the Uniform Code of Military Justice was adopted in 1951. *See* MCM, 1951, para. 4e. The requirement of a lawyer as defense counsel at general courts-martial also did not appear until 1951. *See* MCM, 1951, para. 6b. *See generally* W. GENEROUS, *SWORDS AND SCALES* 40-43, 107 (1973).

¹⁶ W. WINTHROP, *supra* note 15, at 277-78.

¹⁷ *See* MCM, United States Army, 1893, at 39-40 [hereinafter MCM. 1893]; MCM, United States Army. 1901, 32; MCM, United States Army. 1908, at 33. Each of the foregoing provided:

When the accused pleads "guilty" and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and, if guilt is not conclusively admitted, the court will direct the entry of a plea of "not guilty," and proceed to try the case.

the court did not resolve an inconsistent statement made by the accused.¹⁸

Apparently, military authorities especially were concerned that relatively uneducated enlisted soldiers might plead guilty to desertion when they actually had no intention to remain away permanently, or that they might plead guilty to larceny with no intention to permanently deprive the owner of the property taken.¹⁹

The Articles of War (A.W.) revisions in 1920 expressly included these concerns as to the legitimacy of guilty pleas. A.W. 21, as revised in 1920, provided:

When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through a lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.²⁰

Further, the 1921 Manual for Courts-Martial provided a fairly extensive form to be used in explaining the meaning and effect of a guilty plea to an accused.²¹ The form specifically required the law officer or president to explain: (1) the plea was an admission that the accused actually had committed the charged offense; (2) the charged offense by reading the specification and explaining each element in simple terms; (3) the intent required for offenses such as desertion, larceny, burglary; and (4) each element of the maximum punishment. This explanation was to be made to the accused personally and the accused's responses were to be made on the record.²²

¹⁸ See, e.g., cases referred to in W. WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 376-79 (1880); W. WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, pp. 588-90, (1895); W. WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY pp. 553-55 (1901).

¹⁹ W. WINTHROP, *supra* note 16. The 1893 Manual made specific reference to the "embarrassing" lack of evidence frequently found supporting desertion convictions. See MCM, 1893, at 39.

²⁰ MCM, United States Army, 1920, app. 1, at 600.

²¹ MCM, 1921, app. 9, form 3.

²² It is curious that this form for the providence inquiry was omitted from later editions of the Manual for Courts-Martial. It does not appear in the 1928 or 1949 editions. Most notably, a much-abbreviated form of the inquiry appears in the 1961 edition, which was the first Manual to apply to all of the services following the adoption of the Uniform Code of Military Justice.

Hence, even before the enactment of the UCMJ and the Supreme Court's development of standards for determining the constitutionality of guilty pleas in federal civilian courts, military tribunals had significant, detailed guidance in this area.

2. Concerns Over The Adequacy of Providence Inquiries Under the UCMJ.—Guilty plea practice did not escape scrutiny during the period of intense criticism to which the military justice system underwent following World War II.²³ The Report and Recommendations of the General Court-Martial Sentence Review Board,²⁴ (popularly referred to as the Keefe Board, after its president, Professor Arthur John Keefe), a report which was to be given considerable attention during the congressional debates leading up to the enactment of the UCMJ and in the Court of Military Appeals' judicial expansion of the providence inquiry, levelled some specific criticisms and recommendations at the Navy's practice. The Keefe Board expressed considerable concern over the large number of cases it reviewed in which young men, unrepresented by counsel and perhaps ignorant or unaware of the legal consequences of their pleas, pleaded guilty to most or all of the charges against them.²⁵ Further, the Navy "guilty plea inquiry" at that time consisted only of advising an accused that by pleading guilty he or she was giving up the benefits of a regular defense.²⁶

The Keefe Board expressed approval of the requirement instituted by the Army that required that the judge advocate explain to the accused in all general courts-martial: (1) that a plea of guilty admits the offense as charged and makes conviction mandatory; (2) the permissible sentence that could be imposed; and, (3) that the plea will not be accepted if the accused later sets up a defense or if the accused fails to admit guilt to the charged offense.²⁷

The Keefe Board specifically recommended:

²³ An excellent summary of the criticisms leveled at the military justice system and the events leading up to the adoption of the UCMJ can be found in W. GENEROUS, *supra* note 15, at 14-34.

²⁴ General Court Martial Sentence Review Board, Report and Recommendations (1947) (available in the Navy Judge Advocate General's Library, Arlington, Virginia). This board was convened for the purpose of reviewing general courts-martial conducted during World War II, and to report findings and recommendations concerning any deficiencies in the naval military justice system.

²⁵ *Id.* at 140-41.

²⁶ *Id.* at 140.

²⁷ *Id.* at 141-42.

- (1) That the plea of guilty shall not be received in capital cases;
- (2) That the accused in every case be represented by counsel appointed for or selected by him, and that a plea of guilty be received only after an accused has had an opportunity to consult with counsel;
- (3) That in every case the judge advocate explain to the accused the meaning and effect of a plea of guilty, such explanation to include the following:
 - (a) That the plea admits the offense, as charged (or in a lesser degree, if so pleaded), and makes conviction mandatory.
 - (b) The sentence which may be imposed.
 - (c) Unless the accused admits doing the acts charged, or if he claims a defense, a plea of guilty will not be accepted.
- (4) That the judge advocate determine whether a plea of guilty should be accepted, and rule on all special pleas.²⁸

The Advisory Committee to the Secretary of Defense on the UCMJ specifically endorsed these recommendations in its draft of article 45(a).²⁹ In his testimony in support of article 45(a) before the House Armed Services Committee, Felix Larkin, Assistant General Counsel of the Department of Defense and member of both the Advisory Committee to the Secretary of Defense and the Keeffe Board, urged the adoption of the article.³⁰ Mr. Larkin further stated that the inquiry recom-

²⁸ *Id.* at 142-43.

²⁹ Uniform Code of Military Justice: Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense (popularly referred to as the "Morgan" draft of the UCMJ) at 63-65 (1950). Article 45(a), in both the Morgan draft and as enacted in 1951, provided:

Article 45. *Pleas of the Accused.*

(a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

Except for a minor amendment under the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-43 (1968), that substituted "after arraignment" for "arraigned before a court-martial," article 45(a) has not been altered.

³⁰ *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee on the Armed Services, House of Representatives*, 81st Cong., 1st Sess. 1052-55 (1949).

mended by the Keeffe Board was necessary to ensure “an added amount of protection to the innumerable cases where pleas of guilty are taken, particularly among the younger men,” and that a verbatim record of this colloquy between the court and the accused would eliminate “the continually [sic] complaint of accused that they did not understand what they were doing when they took their plea.”³¹

Curiously, this discussion of guilty pleas under the newly enacted article 45(a) generated no significant changes in the corresponding provisions of the Manual for Courts-Martial. The first Manual adopted following the enactment of the UCMJ—the 1951 Manual—added a subparagraph prescribing the actual advice to be given an accused upon entry of a plea of guilty in conformity with the recommendations of the Keeffe Board.³² The procedural guide contained in the new Manual, however, set forth advice to the accused quite similar to that contained in the 1949 and earlier Manuals.³³ Strangely, the form procedure in the 1951 Manual eliminated the express requirement to recite the elements of the offense to the accused that the 1949 Manual contained.³⁴

This potential “failure” of the 1951 Manual to stress and delineate the requirements for a provident plea—particularly to advise accused of the elements of the offense and obtain their admissions that describe their conduct, as advised by the Keeffe Board and the Advisory Committee—may be due to a number of factors. At least one writer has noted that the UCMJ was not much different, quantitatively, from the Army’s practice under the 1948 A.W. and, consequently, the Army judge advocates who led the effort to draft the 1951 Manual did not deem it necessary to make many changes.³⁵ An alternative possibility, at least in the author’s opinion, is that given the Keeffe Board’s favorable endorsement of the Army practice (indeed, their criticisms were aimed directly and solely at the Navy’s practice), the drafters of the 1951 Manual reasonably could have concluded that 1949 Manual’s provisions were otherwise adequate.

³¹ *Id.* at 1055-56.

³² MCM, 1951, para. 70b.

³³ Compare MCM, United States Army, 1949, app. 5, at 340, with MCM 1951, app. 8a, at 509.

³⁴ This omission would be of considerable concern to the Court of Military Appeals in the *Chancellor* and *Care* cases.

³⁵ See W. GENEROUS, *supra* note 15, at 55-58.

The next question to be faced was: What action would the newly-created Court of Military Appeals take in reviewing guilty plea challenges?

3. The Court of Military Appeals' Early *Concerns*.—In some of its earliest cases, the Court of Military Appeals (CMA) appeared to endorse the providence inquiry set forth in the 1961 Manual and to indicate that procedural errors in taking a guilty plea would not result in reversal unless a substantial harm to the accused could be shown. For example, in *United States v. Lucas*,³⁶ the court held that reversal was not warranted when an accused pleaded guilty and received the “boilerplate” advice from the court as to the effect of the plea, but the court-martial thereafter failed to instruct its members and vote on findings as then required.

In *United States v. Kitchen*,³⁷ however, the court was to embark on what has become, over the years, a substantial body of case law scrutinizing what constitutes an “inconsistent” statement. *Kitchen*, charged with desertion, pleaded guilty to the lesser-included offense of unauthorized absence, but was found guilty of desertion to the period of absence as charged. During his testimony on findings, the accused mentioned an alleged attempt to surrender to a recruiter one and a half months prior to the date military police apprehended him. The court found that the law officer should have withdrawn the guilty plea because of the accused’s assertion, inconsistent with his plea, that his absence ended at an earlier date.³⁸

In one of many dissents in cases in which the court reviewed the adequacy of a providence inquiry, Judge Latimer criticized the majority in *Kitchen* for failing to accord guilty pleas the finality they ordinarily deserve, and pointed to some very practical considerations ignored by the majority. These

³⁶ 1 C.M.R. 19 (C.M.A. 1952); see also *United States v. Messenger*, 6 C.M.R. 21 (C.M.A. 1952) (article 45(a) did not require rejection of a guilty plea when the accused presented evidence in extenuation that the property, to which he pleaded guilty of stealing, was damaged and of little value, implying that evidence would not be “inconsistent” with the plea of guilty unless it actually showed the property taken was worthless); *United States v. Trede*, 10 C.M.R. 79 (C.M.A. 1955) (testimony of a defense witness, a psychiatrist, that the accused was acting under an irresistible impulse at the time of the theft, but who stopped short of testifying that the accused otherwise suffered from a mental disease or defect did not render an accused’s plea of guilty to larceny improvident); *United States v. Hinton*, 23 C.M.R. 263 (C.M.A. 1955) (statements by accused and defense counsel that accused was suffering from a mental condition at time of larcenies were not sufficient to render guilty pleas improvident).

³⁷ 18 C.M.R. 165 (C.M.A. 1955).

³⁸ *Id.* at 171.

considerations were that: (1) the practical effect of requiring the withdrawal of the guilty plea actually would make the accused guilty of two unauthorized absences; (2) the accused was represented by counsel and there were any number of tactical reasons for foregoing the possible defense; and, (3) most importantly, the accused at no time at trial or on appeal contended that when he contacted the recruiter, he actually was prepared to surrender to military authorities. "At best he merely dropped in at a recruiting station as it was closing up and informed some sergeant that he was absent. . . . He did not ask to be taken into custody or sent to a nearby installation."³⁹ Hence, Kitchen's statement simply was not inconsistent with his plea.

In *United States v. Welker*,⁴⁰ the CMA held that an accused had pleaded improvidently to larceny of a government rifle when, in the court's view, a stipulation of fact only established that most of which he was guilty was receiving stolen property by going and taking possession of the rifle after another soldier informed him of its theft and location. In his dissent, Judge Latimer contended that the stipulation clearly established the accused's intent to retain the rifle and clearly set forth all of the elements necessary for a larceny by withholding.⁴¹

Despite the implications of *Kitchen* and *Welker* that the court would subject perceived "inconsistent" matters to considerable scrutiny, some cases that closed out the court's first decade seemed to indicate the opposite.

In *United States v. Lemieux*,⁴² Private Lemieux pleaded guilty at trial to, *inter alia*, false claim and false official document offenses that involved obtaining allowances for a woman not his wife. Although no other evidence was offered at trial, the staff judge advocate, in his posttrial review, quoted Lemieux as stating during a posttrial interview that he had been told that living with a woman for at least two years created a common-law marriage, but that he never verified this information. The court ruled, however, that this matter was not "in-

³⁹ *Id.* at 172-73.

⁴⁰ 26 C.M.R. 151 (C.M.A. 1958)

⁴¹ *Id.* at 154-55.

⁴² 27 C.M.R. 84 (C.M.A. 1958).

consistent” with his pleas because the accused’s statement did not relate the necessary elements of a common-law marriage.⁴³

*United States v. Brown*⁴⁴ involved an accused who pleaded guilty, *inter alia*, to three larcenies involving a camera, a radio, and a coat. Three days after the convening authority’s action in the case, the accused presented an unsworn statement to the convening authority in which he averred that the camera had been “pawned” to him by the owner earlier and that the radio was only borrowed. The court stated that a motion for a new trial under article 73⁴⁵ was the appropriate manner to raise such challenges after action has been taken by the convening authority, and, further, that the accused’s statements were not clearly inconsistent with his pleas under the facts of the case.

In a dissent that foreshadowed later developments, Judge Ferguson specifically cited what he perceived as shortcomings in the procedural guide contained in the 1951 Manual.⁴⁶ Judge Ferguson concluded that the *pro forma* explanation to the accused contained in the Manual did not carry out the Keefe Board’s recommendation that pleas should not be accepted unless the accused admits doing the acts charged. He urged law officers to “interrogate the accused upon his plea in simple, nontechnical language and determine if he understands it in fact admits the allegations involved in the specifications and that he is pleading guilty because he is in fact guilty.”⁴⁷

4. *Judge Ferguson’s Judicial “Reform” of the Providence Inquiry.* — A clear indication of the CMA’s direction in examining guilty pleas appears in *United States v. Richardson*.⁴⁸ This case involved an accused who pleaded guilty to dishonorably failing to maintain sufficient funds to pay checks under article 134⁴⁹ and, in extenuation and mitigation, presented evidence of extensive indebtedness. The accused, however, offered nothing concerning the circumstances surrounding the bad checks themselves. On the other hand, during a posttrial interview, Richardson claimed that the checks were dishonored be-

⁴³ *Id.* at 86. This decision is difficult to reconcile with *Kitchen* and *Welker*, especially since the court did not address whether Lemieux’s belief that he had entered into a common-law marriage might constitute a mistake of fact defense.

⁴⁴ 29 C.M.R. 23 (1960).

⁴⁵ 10 U.S.C. § 873 (1956).

⁴⁶ *Brown*, 29 C.M.R. at 31.

⁴⁷ *Id.*

⁴⁸ 35 C.M.R. 372 (C.M.A. 1966).

⁴⁹ 10 U.S.C. § 934 (1956).

cause checks he had deposited earlier, which he received from friends in payment of gambling debts owed him, had bounced.⁵⁰ Judge Ferguson, writing for a unanimous court, ruled that the inconsistency required that the court reverse and remand the case.⁵¹

In *Richardson*, the CMA found that inconsistent posttrial statements of an accused constituted strong evidence that the accused did not understand the meaning and effect of the plea. The court relied upon the plain language of article 45(a) concerning inconsistent matters raised "after a plea of guilty" and on the congressional intent to eliminate improvident pleas to require that pleas be rejected in these situations.⁵² The court reasoned, using what many would consider to be questionable logic, that a posttrial claim of innocence was more reliable than a pretrial claim of innocence. Prior to trial, accused soldiers may be asserting their innocence in circumstances in which they are unaware of the weight of the Government's case or in which they have not yet been overwhelmed by "consciousness of guilt."⁵³ Further, Judge Ferguson once again criticized the *pro forma* advice to the accused in the 1951 Manual and commented that a more extensive record would resolve many of these cases.⁵⁴

Hand in hand with the evolution of the providence inquiry, the CMA developed the occasionally troublesome standard that any "inconsistency" raised during the inquiry must be absolutely repudiated by the accused if the guilty plea is to stand. For example, in *United States v. Fernengel*,⁵⁵ the accused pleaded guilty to desertion. During the sentencing phase of the trial, the defense counsel made an "ambiguous" reference to the difficulty of proving, under the facts of the case, that the accused had an intention to return to the Army at some point.⁵⁶ The court reversed the case, holding that even

⁵⁰ *Richardson*, 35 C.M.R. at 373.

⁵¹ *Id.* Note that Judge Latimer left the Court in 1960.

⁵² *Id.* at 374-75.

⁵³ *Id.* at 374. Note that the sentencing limitation on rehearings contained in article 63(b), 10 U.S.C. § 863(b) (1956) provides an excellent incentive to accused and counsel to raise claims of inconsistent matters. See Cargill, *The Article 63 Windfall*, *The Army Lawyer*, Dec. 1989, at 26-32.

⁵⁴ *Richardson*, 35 C.M.R. at 375-76.

⁵⁵ 29 C.M.R. 3.51 (C.M.A. 1960).

⁵⁶ *Id.* at 252-53.

an ambiguous reference to a possible defense must be resolved on the record or the plea of guilty must be withdrawn.⁵⁷

In *United States v. Chancellor*,⁵⁸ Judge Ferguson indicated that the procedural guide was simply inadequate to ensure that an accused understood the nature and elements of the offense and to ensure that actual guilt was established on the record. Like *Richardson*, *Chancellor* involved an accused who pleaded guilty to a bad check offense, received the *pro forma* advice as to the plea's effect, and raised nothing inconsistent with the plea at trial. Chancellor claimed, however, in a post-trial clemency interview, that the check was dishonored because of irregularities in his pay.⁵⁹ Judge Ferguson specifically admonished law officers to develop a more detailed inquiry of the accused and advised the services to take remedial action to institute better procedures to ensure factual guilt.⁶⁰ Judge Ferguson made the dubious prediction that upon adopting such procedures "the haunting issue of improvident pleas would become rare indeed."⁶¹

Although the procedural guides in both the short-lived 1968 Manual and the 1969 Manual contained expanded providence inquiries,⁶² this action was apparently too little, too late.

*United States v. Care*⁶³ marked the watershed of the development of the providence inquiry. The court actually affirmed the conviction in *Care*, stating that the law officer's failures in the case to explain the elements and to determine the factual basis for the plea were cured by overwhelming evidence of guilt that otherwise appeared in the record.⁶⁴ The more important holding in *Care*, however, was the court's pronouncement that, effective thirty days after the date of the opinion, all records of trial involving guilty pleas must contain not only an explanation of the elements of the offense by the military judge, but also a personal interrogation of the accused as to what he or she actually did "to make clear the basis for a determination by the military judge . . . , whether the acts or

⁵⁷ *Id.* at 253-54; *see also* *United States v. Vance*, 38 C.M.R. 242 (C.M.A. 1968); *United States v. Lewis*, 39 C.M.R. 261 (C.M.A. 1969); *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983).

⁵⁸ 36 C.M.R.453 (C.M.A. 1966).

⁵⁹ *Id.* at 454.

⁶⁰ *Id.* at 456.

⁶¹ *Id.*

⁶² *See* MCM, 1968, app. 8a, at A8-9 to A8-10; MCM, 1969, app. 8a, at A8-14 to A8-16.

⁶³ 40 C.M.R. 247 (C.M.A. 1969).

⁶⁴ *Id.* at 252-53.

the omissions of the accused constitute the offense or offenses to which he [or she] is pleading guilty.”⁶⁵ Military judges also were directed to ensure that the accused understood the fifth and sixth amendment rights waived by a plea of guilty.⁶⁶

Judge Darden, in the court’s opinion in *Care*,⁶⁷ not only cited Chancellor’s reference to the inadequate procedures being followed by law officers as a basis for the court’s sweeping action, but also placed great weight upon its interpretation of the recent Supreme Court cases of *McCarthy v. United States* and *Boykin v. Alabama*.⁶⁸ *McCarthy* was cited for its implication that personally addressing accused soldiers to determine their understanding of the plea, as required by rule 11, is consistent with the constitutional prerequisites for a valid waiver of the right to plead not guilty. *Boykin* served as authority for the court’s imposition of the requirement to advise an accused of the constitutional rights waived by a plea of guilty.

Without doubt, the CMA should be lauded for its concern and protection extended to the accused who pleads guilty.⁶⁹ The requirement that the accused be questioned personally in detail about the offense and that this interrogation support all elements of the offense, however, has proven to be troublesome and simply has not had the desired effect of reducing the number of “improvident” pleas requiring action on appeal.⁷⁰

Further, the CMA has not substantively reconsidered the necessity or desirability of what has come to be called the “*Care* inquiry” despite a number of factors that support reconsideration. These factors include federal courts’ interpretation of *McCarthy* as not requiring nearly as exhaustive a personal inquiry of the accused as is required in military courts. An additional factor, of equal importance, is the evolution of an independent trial judiciary and defense bar that should allevi-

⁶⁵ *Id.* at 253.

⁶⁶ *Id.*

⁶⁷ Not surprisingly, Judge Ferguson dissented, stating that the case should be reversed and remanded.

⁶⁸ *Id.* at 250-51; see *infra* text accompanying notes 69-71.

⁶⁹ The requirements set forth in *Care* were imposed six years before similar amendments were made to rule 11.

⁷⁰ Though no precise statistics are available on this point, a WESTLAW search for cases appearing in volumes 1-31 of West’s Military Justice Reporter for cases in which issues concerning improvident guilty pleas appeared, revealed a total of 513 cases. The specific search terms were: Improvident” /p “guilty plea”.

ate many of the concerns that accused were not acting with full knowledge and independent advice concerning their pleas.

5. *The Promulgation of R.C.M. 910.*—The remainder of this article primarily will be concerned with comparing the current military and federal guilty plea inquiries. Before turning to this effort, an exposition of the current Manual provisions relating to the providence inquiry is in order.

The 1984 Manual involved a sweeping reorganization of the Manual's format. Concerning the aspects of the providence inquiry addressed in this article, the changes were matters more of form than substance. The requirements for acceptance of a plea of guilty were set forth in the new R.C.M. 910.

As noted in the introduction to this article, R.C.M. 910 was patterned after rule 11.⁷¹ Indeed, the relevant portions of R.C.M. 910(c), *Advice of accused*, are very similar in language to rule 11(c).⁷² In practice, however, the application of the rules is not nearly as similar.

R.C.M. 910(e), *Determining accuracy of the plea*, requires the judge to question the accused under oath about the offense.⁷³ Its counterpart, rule 11, establishes the requirement that the judge be satisfied that a factual basis supports the plea, but does not strictly require that the factual basis be established through questioning the defendant personally.⁷⁴

R.C.M. 910(h) sets forth the requirement to reject a guilty plea when an accused sets up an inconsistent matter. This provision has no counterpart in rule 11.

Having examined how military guilty plea inquiries have evolved over this century, it is now appropriate to review the historical evolution of the guilty plea inquiry in federal civilian practice.

B. The Federal Experience and the Evolution of Rule 11.

1. *Early history.*—Very few reported cases appear that discuss the prerequisites for a valid guilty plea in federal courts prior to the 1940's, and those that do appear seem to reflect a

⁷¹ R.C.M.910 analysis, at A21-52 to A21-54.

⁷² Compare FED. R. CRIM. P. 11(c) with R.C.M.910(c).

⁷³ R.C.M.910(e); *id.*, analysis at A21-53.

⁷⁴ *Id.*

strong policy of upholding the finality of pleas once accepted.⁷⁵

The modern standard for determining the legitimacy of waivers of constitutional rights, including the fifth and sixth amendment rights waived by a plea of guilty, originated in *Johnson v. Zerbst*.⁷⁶ In reviewing the lower courts' denial of Johnson's petition for *habeas corpus*, the Supreme Court ruled that a waiver of Johnson's right to counsel could not be presumed when there was no request for counsel by the defendant, nor any offer of counsel by the court at trial.⁷⁷ Rather, the trial judge has the duty specifically to determine whether a defendant has made an "intentional relinquishment of a known right or privilege," and further, "the determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."⁷⁸

The Supreme Court subsequently applied the Zerbst waiver test in examining the constitutional validity of guilty pleas. In *Waley v. Johnston*,⁷⁹ the Court held that Waley's allegations that he was coerced to plead guilty by threats and intimidation of Federal Bureau of Investigation agents warranted an evidentiary hearing on his *habeas corpus* petition even though "petitioner's allegations in the circumstances of this case may tax credulity." The Court, citing *Johnson v. Zerbst*, stated that if the allegations of coercion were true, the guilty plea could not operate as a waiver of Waley's right to attack his conviction.⁸⁰

Against this judicial development of the waiver doctrine and its application in analyzing the validity of guilty pleas, an examination of the procedural guidance extended to the district courts becomes pertinent. Rule 11, as adopted in 1944, consisted of a scant three sentences:

⁷⁵ See *Kercheval v. United States*, 274 U.S. 220 (1927); *United States v. Bayaud*, 23 Fed. 721 (1883).

⁷⁶ 304 U.S. 458 (1938).

⁷⁷ *Id.* at 460. Petitioner, interestingly, was a Marine who was on leave in Charleston, South Carolina, at the time of his arrest and trial.

⁷⁸ *Id.* at 464-65.

⁷⁹ 316 U.S. 98, 103 (1942) (*per curiam*).

⁸⁰ *Id.* at 104; see also *von Moltke v. Gillies*, 332 U.S. 708 (1948) (Black, J.) (petitioner's allegations that her guilty plea and waiver of right to counsel were induced by coercion and misrepresentation by Federal Bureau of Investigation agents warranted an evidentiary hearing). Frederick Bernays Wiener, a noted military jurist, argued the respondent's case in *von Moltke*.)

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.⁸¹

Rule 11 existed in this form until 1966. While its provisions clearly were consistent with the concept of ensuring valid waivers of constitutional rights by defendants who plead guilty, it provided no guidance as to the procedure and form that a court's inquiry into the voluntariness and intelligence of a plea should take. The absence of detailed guidance was to provide a fertile ground for judicial interpretation in later years.

2. The Warren Court: Heightened Scrutiny of Guilty Pleas.— Consistent with its well-known concern for and extension of individual rights, the Supreme Court, under Chief Justice Earl Warren, subjected guilty pleas to considerable scrutiny. In *Machibroda v. United States*,⁸² the Court vacated and remanded the lower courts' denial of petitioner's claim that his guilty pleas to two bank robbery charges were involuntary. Machibroda claimed his pleas were induced by an unkept promise by the assistant United States attorney to limit his sentence to twenty years, as opposed to the forty years he received subsequent to his pleas. While noting that this case was "not far from the line" of cases in which a hearing could be denied, the Court ruled that Machibroda had stated a sufficient allegation of involuntariness to warrant a hearing.⁸³

In an extremely critical dissent, Justice Clark noted *inter alia*, that Machibroda was represented by counsel when he pleaded, he stated that he was pleading guilty voluntarily, he testified at the trial of a codefendant in which he admitted to committing the robberies in great detail, and—most notably—he waited until nearly three years after his incarceration at Alcatraz to raise his allegation of an unkept plea bargain. Further, the dissent noted that the prosecution in the case vigor-

⁸¹ 327 U.S. 842 (1944).

⁸² 368 U.S. 487 (1962).

⁸³ *Id.* at 495-96.

ously denied the alleged plea bargain.⁸⁴ Justice Clark concluded "Alcatraz is a maximum security institution housing dangerous incorrigibles, and petitioner wants a change of scenery. The Court has left the door ajar. . . ." ⁸⁵ These concerns about the practical aspects of the Court's actions were not to receive much attention in subsequent cases under the Warren Court.

Subsequently, in *Brookhart v. Janis*,⁸⁶ the Court held that the *Zerbst* test for determining a defendant's voluntary and knowing waiver was not satisfied when counsel persuaded his client to agree to a prima facie trial.⁸⁷ The defendant proclaimed his innocence during the course of the trial, and the trial judge did not ascertain from the defendant personally whether he understood and actually consented to the abbreviated procedure that was tantamount to a plea of guilty.

In a first step towards providing greater guidance to trial judges, the Supreme Court prescribed several significant changes to rule 11 in 1966.⁸⁸ Although the new rule 11 was only one sentence longer than the prior rule, it added some significant requirements: (1) that the trial judge address the defendant personally to determine if the plea is made knowingly and voluntarily; (2) that the judge ensure that the defendant understands the consequences of the plea; and (3) that the trial court not accept a guilty plea unless satisfied that a factual basis supports the plea.

⁸⁴ *Id.* at 496-501; see also *United States v. Shelton*, 356 U.S. 26 (1958). Warren Court, in *Shelton's* very brief *per curiam* opinion, did not discuss the merits of the case, but reversed the Fifth Circuit Court of Appeal's decision, 246 F.2d 571 (5th Cir. 1957), finding that the appellant voluntarily had pleaded guilty despite allegations of an unkept plea bargain.

⁸⁵ *Id.* at 501

⁸⁶ 384 U.S. 1 (1966).

⁸⁷ This is a procedure that formerly existed under Ohio law by which a defendant, though technically pleading not guilty, agreed that the prosecutor was required only to establish a prima facie case, and that he or she would not cross-examine or present any evidence of his or her own.

⁸⁸ 383 U.S. 1097 (1966). The new rule provided:

A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The requirement to address the defendant personally perhaps was motivated by the concern expressed in cases such as *Janis*, in which an interrogation of the defendant about the understanding of the plea at trial could eliminate many unnecessary appeals and further was intended to settle the confusion that existed at that time over whether an accused who was represented by competent counsel should be addressed personally regarding the plea.⁸⁹

The factual basis requirement sought to avoid the possibility that a defendant, though pleading voluntarily and with knowledge of the nature of the offense, was nevertheless not guilty because the conduct did not meet all of the elements of the charged offense.⁹⁰ The Advisory Committee to the 1966 amendments to the rule contemplated that, when a factual basis could not be developed, the guilty plea would be set aside and a plea of not guilty would be entered.⁹¹

*United States v. Jackson*⁹² addressed the issue of voluntariness of a guilty plea in a bold fashion. This case involved an indictment under the Federal Kidnapping Act,⁹³ which then provided that defendants who pleaded guilty could avoid exposure to a possible death penalty, whereas defendants who contested the case risked capital punishment, which only a jury could impose. The Court invalidated this provision, reasoning that a statute of this nature had the effect of impermissibly coercing waivers of a defendant's right to plead not

The Warren Court indicated an intention strictly to enforce the new requirements of rule 11 in *McCarthy v. United States*.⁹⁵ *McCarthy* involved a defendant who pleaded guilty to

⁸⁹ 1966 Advisory Committee Note to Rule 11. *Compare, e.g.,* *United States v. Diggs* 304 F.2d 929 (6th Cir. 1962) (indicating that presence of counsel alone did not necessarily relieve the trial judge of his duty to determine the legitimacy of a plea from the defendant personally) *with* *Nunley v. United States* 294 F.2d 579 (10th Cir. 1961) (implying that a trial court need not make any express determination from the defendant in the absence of any indication that he is not aware of the nature and effect of his plea or is being coerced).

⁹⁰ Advisory Committee Note to Rule 11.

⁹¹ *Id.*

⁹² 390 U.S. 570 (1968).

⁹³ 18 U.S.C.11201 (1956).

⁹⁴ *United States v. Jackson*, 390 U.S. at 582-83. It will be seen, however, that although *Jackson* never has been overruled expressly, its implication that statutes which encourage guilty pleas by subjecting defendants to lesser punishments are invalid has been limited severely by subsequent cases. *See infra* notes 96-100 and accompanying text.

⁹⁵ 394 U.S. 459 (1969).

a charge of income tax evasion. Although the trial judge inquired as to the defendant's understanding of the possible sentence and waiver of his right to a jury trial, the judge did not address the defendant personally about the nature of the charges. To make matters worse, McCarthy's counsel maintained at the sentencing hearing that his client's failure to pay income tax was due to poor health, alcoholism, and poor record keeping. Chief Justice Warren, in an opinion in which seven justices joined and Justice Black concurred, reversed and remanded the case. The Court reasoned that strictly following rule 11's requirements not only will establish the validity of guilty pleas but will also build a record that is much more complete and less subject to postconviction attack.⁹⁶ It is important to note, for purposes that will be addressed later in this article, that the Court was careful to indicate that its decision was based solely upon its construction of rule 11, and not upon any constitutional arguments.⁹⁷ The Court very clearly implied, however, that establishing the defendant's understanding of the relation of the facts of his case to the applicable law on the record in the manner required by rule 11 was essential to a valid waiver under the *Zerbst* standard.⁹⁸

The Court made a more sweeping pronouncement of what it would require of trial judges in determining a defendant's understanding about the effect of the plea of guilty in *Boykin v. Alabama*.⁹⁹ Boykin pleaded guilty to five counts of armed robbery. The trial judge made no inquiry concerning his pleas and Boykin made no statements in the course of the proceeding. A jury sentenced him to death on each of the five counts. Although the Court appeared to stop short of imposing the requirements of rule 11 on state courts, it stated that a valid, knowing waiver of due process rights could not be presumed from a silent record. Citing *McCarthy*, the Court implied that the rule 11 procedure was perhaps necessary for guilty pleas to be constitutionally acceptable.¹⁰⁰

⁹⁶ *Id.* at 465-67. Interestingly, in *United States v. Halliday*, 394 U.S. 831 (1969), the Court declined to apply *McCarthy* retroactively because of the large number of otherwise valid convictions that might be overturned.

⁹⁷ *Id.* at 464.

⁹⁸ *Id.* at 466.

⁹⁹ 395 U.S. 238 (1969).

¹⁰⁰ *Id.* at 243-44. Note that the *McCarthy* and *Boykin* cases were to figure prominently in the Court of Military Appeals' decision in *Care*. See *supra* notes 67-70 and accompanying text.

Against this backdrop of growing scrutiny of guilty pleas, Chief Justice Warren E. Burger assumed office upon Chief Justice Warren's retirement in 1969.

3. *The Burger Court: A Retreat From Strict Enforcement of Rule 11?*—A series of cases early in the Burger Court's tenure that has become known as the *Brady* trilogy¹⁰¹ marked a substantial shift from the strict standards applied to guilty pleas by the Warren Court.

Brady v. United States involved a defendant who had pleaded guilty under the same fear of capital punishment under the Federal Kidnapping Act as the defendant in *Jackson*.¹⁰² Unlike *Jackson*, which involved a direct appeal of the district court's finding that the statute was unconstitutional, the record in *Brady* indicated that the defendant made a deliberate decision to plead guilty following the decision of his codefendant to plead guilty and testify against him. In the majority opinion, Justice White also found that the trial judge had adequately determined the voluntary and understanding nature of the plea required by the pre-1966 rule 11, which was then in effect.¹⁰³ The Court rejected *Brady's* contention that he would have pleaded not guilty "but for" the chilling effect of a possible death penalty. The Court applied, instead, the more traditional *Johnson v. Zerbst* analysis, which focuses only on the more limited issue of the voluntary and understanding nature of the guilty plea at trial, and found that statutory schemes that encourage guilty pleas do not, alone, invalidate an otherwise voluntary and understanding guilty plea.¹⁰⁴

McMann v. Richardson, the second case in the *Brady* trilogy, involved defendants who were attacking their convictions through *habeas* petitions on the grounds that their pleas of guilty were the result of confessions that clearly were illegally coerced.¹⁰⁵ The Court rejected this contention and based its ruling, in part, on a finding that the availability of counsel between the time the confessions were compelled and the time the pleas were entered served to attenuate any taint on the plea that might be attributable to the confessions. More impor-

¹⁰¹ *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 769 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); see also 8 J. MOORE, W. TACGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶¶ 11.70 to 11.73 (2d ed. 1986).

¹⁰² *Brady*, 397 U.S. at 743.

¹⁰³ *Id.* at 749.

¹⁰⁴ *Id.* at 749-52.

¹⁰⁵ *McMann*, 397 U.S. at 760.

tantly, however, the Court unequivocally established the principle that an uncompelled decision to plead guilty based upon "reasonably competent" legal advice will not be set aside simply because a defendant misjudges the strength of the prosecution's case.¹⁰⁶

The final case in the Brady trilogy was *Parker v. North Carolina*. Parker, a fifteen year-old who pleaded guilty to burglary, alleged that his plea was involuntary because it was induced by a North Carolina statute that subjected those who pleaded not guilty to a possible death penalty—as did the statute in Jackson and Brady—and that his lawyer misinformed him that his confession would be admissible at trial.¹⁰⁷ Citing Brady and *McMann*, the Court reinforced the concept that if a statutory encouragement exists to plead guilty and "even if Parker's counsel was wrong in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent and entitle Parker to disavow his admission in open court that he committed the offense with which he was charged."¹⁰⁸

In each of these three cases, the Court placed considerable weight upon the fact that the defendants entered the guilty pleas with assistance of counsel. From these cases, the inference can be drawn that adequate representation will cure a number of ills if a defendant's guilty plea is otherwise accurate and voluntary.¹⁰⁹ In *Brady*, the Court specifically cited *Miranda v. Arizona*¹¹⁰ for the proposition that the presence of a competent attorney provides adequate protection against an accused making unintelligent or involuntary decisions with regard to his options under the criminal justice system.¹¹¹

In each of the Brady trilogy cases, no real question existed as to the factual basis or "accuracy" of the guilty pleas in question. Considerable, uncontroverted evidence was present in each case to establish that the defendant committed the crime to which he had pleaded, and the focus in each case was on the intelligent and voluntary waiver aspect of the pleas. The Burger Court stretched the requisites for a factual basis

¹⁰⁶ *Id.* at 766-68.

¹⁰⁷ *Parker*, 790 U.S. at 794.

¹⁰⁸ *Id.* at 795-97.

¹⁰⁹ *See Brady*, 397 U.S. at 793-94; *McMann*, 397 U.S. at 770-71; *Parker*, 397 U.S. at 796-97.

¹¹⁰ 384 U.S. 436 (1966).

¹¹¹ *Brady*, 397 U.S. at 754.

for pleas in one of its more controversial and interesting cases, *North Carolina v. Alford*.¹¹²

Alford again involved a defendant who pleaded guilty to a homicide to avoid a possible death penalty. He entered the plea on advice of counsel and was as steadfast in his desire to plead guilty as he was in protesting that he was not actually guilty of the crime. The Court held that, although denials of guilt should cause grave concern and ordinarily should result in rejection of the plea, the guilty plea could be accepted if it truly represented "a voluntary and intelligent choice among the alternative courses of action open to the defendant."¹¹³ Justice White, again writing for the majority, held that the trial court had established a sufficient factual predicate for the plea through considerable evidence. The record included the testimony of witnesses who had seen Alford leaving his home with a gun proclaiming his intention to kill and who later heard Alford announce that he had carried out his plan.¹¹⁴

The Court also found support for its decision in a number of federal and state cases that implied that, though there is no absolute right to plead guilty, judges should be wary of forcing a defendant to pursue defenses or factual issues that they knowingly and voluntarily decide to forego.¹¹⁵ Further, the Court reasoned that no constitutionally significant distinction existed between an otherwise valid guilty plea accompanied with a protestation of innocence and a plea of *nolo contendere* in which an accused can be convicted and sentenced with no admission of guilt or factual basis for his plea.¹¹⁶

The Court was clear that the reasoning behind *Alford* and the Brady trilogy would prevail or even be extended in its subsequent review of guilty pleas. In *Tollett v. Henderson*,¹¹⁷ the Court reviewed the habeas challenge of a black defendant who pleaded guilty to a murder indictment returned by a grand jury from which blacks had been excluded systematically. Although the Court could have denied Tollett's petition for other reasons, including the fact that the constitutional violation he was alleging had not even been pronounced when he originally pleaded guilty in 1948, it went much farther. The

¹¹² 400 U.S. 26 (1970).

¹¹³ *Id.* at 31-32.

¹¹⁴ *Id.* at 32.

¹¹⁵ *Id.* at 33-34.

¹¹⁶ *Id.* at 36-37.

¹¹⁷ 411 U.S. 258 (1973).

Court specifically held that a guilty plea represents a significant "break in the chain of events which has preceded it" and that collateral attacks upon the voluntariness or intelligence of pleas will be permitted only when the advice of counsel to plead guilty falls outside the standards set out in *McMann*.¹¹⁸

In the wake of these judicial developments, several changes were implemented to rule 11 in 1975.¹¹⁹ The new rule retained the requirement that the trial judge address the defendant

¹¹⁸ *Id.* at 266-67

¹¹⁹ As amended, rule 11 now provided,

Rule 11. Pleas.

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to assistance of counsel, the right to confront and cross examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo Contendere he waives the right to a trial; and

(5) if the court questions the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement,

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea agreement procedure

[Omitted]

(f) Determining accuracy of the plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea

personally, as mentioned in *McCarthy*, and for the first time rule 11(c) specified the elements that must be covered to determine whether a guilty plea was entered knowingly. Rule 11(c)(1) retained the requirement that a defendant must understand the nature of the charge to which he or she is pleading and the Advisory Committee recommended that this could be accomplished by reading the indictment and listing the elements of the offense.¹²⁰

The new rule 11(c)(1) also clarified the mandate of the former rule to ensure that defendants understand the “consequences” of their guilty pleas by providing simply that judges ensure that defendants are aware of any mandatory minimum and maximum penalties for offenses. Although the Committee conceded that it might be desirable to advise a defendant of other consequences of the plea—such as ineligibility for parole, an increased sentence due to previous convictions, or other matters significant to an individual defendant—it determined it would simply not be feasible to impose these obligations on the judge.¹²¹ Rules 11(c)(2) and 11(c)(3) required the court to advise the defendant of the right to counsel at every stage of the proceeding.

Also, rule 11 now elaborated the specific constitutional rights waived by a guilty plea that must be explained to an accused to establish a knowing and intelligent waiver under *Boykin v. Alabama*.¹²² The rule mandated that defendants be advised that their pleas waived their fifth amendment rights against self-incrimination, as well as their sixth amendment rights to trials of the facts and to confronting their accusers.¹²³

For the first time, in rule 11(g), district courts were required to prepare a verbatim record of all guilty plea inquiries to provide a meaningful record to appellate courts reviewing postconviction challenges.¹²⁴ The 1975 amendments also contained significant provisions mandating the disclosure of, and

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

FED. R. CRIM. P. 11 (1976).

¹²⁰ 1975 Advisory Committee Note to rule 11.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *supra* note 119 (text of rules 11(c)(3) and 11(c)(4)).

¹²⁴ *Id.*

requiring detailed advice to defendants concerning, the existence and nature of any plea bargains.¹²⁵

This consideration of the development of the current guilty plea inquiry in federal courts will end with a discussion of the strictness, or lack thereof, with which these changes in rule 11 have been applied.¹²⁶

4. *Application of the Harmless-Error Rule.*—In its present form, rule 11 bears little resemblance to the three sentences prescribed in 1945. Rule 11 now requires judges to conduct far more specific and detailed inquiries than its predecessors simple command for judges to ensure only that a guilty plea is "made voluntarily with understanding of the nature of the charge.."

Despite Federal Rule of Criminal Procedure 52(a)'s¹²⁷ provision that any deviation from the rules that does not affect the substantial rights of a defendant shall be disregarded, considerable confusion arose over whether this harmless-error rule applied to rule 11 violations.¹²⁸ This confusion was attributable to *McCarthy v. United States*, which was, and continues to be, cited for the notion that unless rule 11 is adhered to scrupulously, a guilty plea is invalid.¹²⁹ It soon became apparent, however, even before rule 11(h) expressly incorporated the harmless-error rule, that formal violations of rule 11 would not render guilty pleas invalid.

Many of the foregoing cases involved collateral attacks on pleas through petitions for writs of *habeas corpus*. The Supreme Court finally acted to forestall most of these challenges

¹²⁵ See *id.* These changes were prompted by the court's holding in *Santobello v. United States*, 404 U.S. 257 (1971), which indicated that unkept plea bargains could render guilty pleas involuntary and urged the adoption of safeguards to ensure that defendants were treated fairly. Because the concern of this article is the more basic requirements for valid guilty pleas, a detailed discussion of this very important subject is beyond its scope.

¹²⁶ Rule 11 was amended substantively in 1979 (clarifying circumstances in which a plea bargain may be accepted); 1980 (providing withdrawn guilty pleas and related plea discussions are inadmissible); 1982 (requiring advice to defendant of possible special parole terms); 1983 (authorizing conditional guilty pleas and expressly adopting harmless-error rule to rule 11); 1985 (requiring advice to defendant when an order of restitution may be included in sentence); and 1989 (requiring advice to defendant that the court is required to consider sentencing guidelines). See 1979, 1980, 1983, 1985, and 1989 Advisory Committee Notes to Rule 11. Only the 1983 adoption of the harmless error rule, however, is directly relevant to this article.

¹²⁷ FED. R. CRIM. P. 52(a) (1975).

¹²⁸ See 1983 Advisory Committee Note to Rule 11

¹²⁹ *Id.*

in *United States v. Timmreck*.¹³⁰ In *Timmreck*, the Court stated that collateral challenges of pleas based upon violations of rule 11, such as the judge's failure in the case to explain a mandatory special parole term, would not result in reversal unless other aggravating circumstances accompanied the failure.¹³¹

In a steady stream of cases on direct appeal, a series of circuit courts of appeal decisions have had the effect of limiting *McCarthy* to the pre-1975 rule 11 and have upheld a harmless-error analysis.¹³² Consequently, pleas will not be invalidated unless the alleged rule 11 violation is accompanied with a specific showing of prejudice that directly affects the "core concerns" of rule 11, such as actual coercion or misunderstanding concerning the nature of the charge or consequence of the plea indicating that the defendant would otherwise have pleaded not guilty.¹³³ These cases will be discussed in detail later in Part II, which will compare the current federal practice with the military providence inquiry.

The Supreme Court also has ruled that the two-part test of *Strickland v. Washington*¹³⁴ for evaluating claimed ineffectiveness of counsel will govern its review of guilty pleas that are challenged on the basis that the plea was the product of incompetent or incomplete legal advice. In *Hill v. Lockhart*,¹³⁵ the Court ruled that in the absence of any showing that he would have pleaded not guilty had he been properly advised, the appellant was not entitled to relief even though his counsel failed to advise him of a mandatory minimum period of confinement he would have had to have served as a repeat offender.

Having reviewed the development of the procedure applied by federal district courts and by military courts-martial, the following sections shall compare and offer conclusions about the different practices.

¹³⁰ 441 U.S. 780 (1979).

¹³¹ *Id.* at 783-85 (citing *Hill v. United States*, 368 U.S. 424 (1975)) implying that a violation of rule 11 must have resulted in a "complete miscarriage of justice" or amount to "an omission inconsistent with the rudimentary demands of fair procedure").

¹³² *See, e.g.*, *United States v. Lovett*, 844 F.2d 487 (7th Cir. 1988); *United States v. Dayton*, 604 F.2d 940 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *United States v. Scarf*, 551 F.2d 1124 (8th Cir. 1977).

¹³³ *See Dayton*, 604 F.2d at 940.

¹³⁴ 466 U.S. 668 (1983).

¹³⁵ 474 U.S. 52 (1985).

III. Comparison of Federal Civilian and Military Practices

The focus of this section is a comparative analysis of military and federal guilty plea inquiries, specifically concerning the required advice to the accused about the nature of the charge and the requirement that the guilty plea be supported by a sufficient factual basis. These requirements, with their obvious links to the actual relationships between the facts and the charges, offer considerable contrast between federal civilian and military practices.

A. *Advice to the Accused of the Nature of the Charge.*

The duty of a trial judge under both R.C.M. 910(c)(1) and rule 11(c)(1) to determine whether the accused understands the nature and elements of the charge against him or her is of long-standing and constitutional dimension.¹³⁶ It is axiomatic that an accused cannot begin to make an intelligent waiver of his or her right to plead not guilty without "real notice of the true nature of the charge against him [or her], the first and most universally recognized requirement of due process. . . ." ¹³⁷ Further, an understanding of the law as it relates to the facts of the particular case is an essential element of due process as it applies to the decision of an accused regarding the plea.¹³⁸

The plain languages of R.C.M. 910 and rule 11 are identical; both require the judge to determine from accused personally that he or she understands "the nature of the charge to which the plea is offered . . ." ¹³⁹ In practice, however, district court judges enjoy much greater flexibility and discretion in the manner in which this requirement may be satisfied.

1. *Federal Practice Under Rule 11(c)(1).*—In federal district court, the judge normally satisfies the standard of rule 11(c)(1) by merely reading the indictment or information to the defendant, provided the indictment is drafted properly and sets forth all elements of the offenses.¹⁴⁰ In cases involving relatively simple offenses, such as illegal possession of drugs, a simple "yes, sir" in response to a judge's reading of

¹³⁶ See generally *Henderson v. Morgan*, 426 U.S. 237 (1976); *Smith v. O'Grady*, 312 U.S. 329 (1941); *Care*, 40 C.M.R. at 247.

¹³⁷ *O'Grady*, 312 U.S. at 334.

¹³⁸ *McCarthy*, 394 U.S. at 466; *United States v. Broce*, 488 U.S. 563, 570 (1989)

¹³⁹ See R.C.M. 910(c)(1); FED. R. CRIM. P. 11(c)(1).

¹⁴⁰ 1975 Advisory Committee Note to Rule 11.

the charge and query whether the defendant understands the nature of the charge is sufficient.¹⁴¹

Even when the judge completely omits a reading of the indictment, the harmless-error provision of rule 11(h) precludes action on appeal when some recitation of the facts or elements of the offense, with the defendant's acknowledgement that he or she understands or agrees, appears on the record. For example, in *United States v. Ray*,¹⁴² the judge failed to read the indictment or discuss the nature of the conspiracy, mail fraud, and transmission of altered postal money order charges with the defendant, but the Seventh Circuit held the error to be harmless. The record, however, did contain a detailed summary by the prosecutor of the evidence he intended to offer to prove each charge, although the evidence of each element was not specifically recited for each charge. The defendant also stated that he agreed with the prosecutor's statements and that he had read the indictment and discussed it with his attorney.¹⁴³

The foregoing, however, should not be taken to imply that action will not be taken when a defendant makes a colorable showing that he actually was unaware of a critical element of a charge, and would have pleaded not guilty if he had been advised of an element properly.¹⁴⁴ Hence, in *Henderson v. Morgan*,¹⁴⁵ the Supreme Court reversed the case of a defendant who pleaded guilty to second degree murder as a lesser-included offense to a first degree murder charge because neither the trial judge nor counsel explained to the accused that second degree murder required an intent to kill.¹⁴⁶ Critical to the Court's holding, however, were the facts that the accused was mentally retarded and, in pleading to a lesser-included offense, never formally was indicted for second degree murder, which indictment would have contained the scienter element.¹⁴⁷ On these facts, the defendant may actually

¹⁴¹ See *Dayton*, 604 F.2d at 941-43.

¹⁴² 828 F.2d 399 (7th Cir. 1987), cert. denied, 486 U.S. 964 (1988).

¹⁴³ *Id.* at 406-10; see also *Harvey v. United States*, 860 F.2d 388 (8th Cir. 1988) (harmless error for judge to fail personally to address defendants as to nature of charge when he asked them if they had read the indictments, and when defendants stated they had received indictment, and defense attorney stated he had explained the charges to the defendants and believed the defendant understood the charge).

¹⁴⁴ See *supra* notes 111-26 and accompanying text (brief discussion of the distinction between violations of "core concerns" relating to fundamental requirements of a valid guilty plea versus technical violations of 1976 Amendments to Rule 11).

¹⁴⁵ 426 U.S. 237 (1976).

¹⁴⁶ *Id.* at 640.

¹⁴⁷ *Id.* at 640-46.

have been guilty only of manslaughter and might have prevailed on this point at trial.¹⁴⁸

The cases following Henderson, however, clearly show that a judge's failure to explain the nature and elements of an offense will not result in reversal unless the defendant can demonstrate that he or she was never advised of the nature of the offense and, further, that this failure affected his or her decision to plead guilty.

Compare Henderson with *Harrison v. Warden*,¹⁴⁹ in which the defendant similarly challenged his *Alford* plea to second degree murder for the judge's failure to enunciate the specific intent to kill element of the offense. The Fourth Circuit ruled that reversal was not proper because the defendant stated on the record that he had discussed the plea with his counsel and his counsel testified at a postconviction hearing that he had discussed the nature of the offense with the defendant. The court further reasoned that the fact that the defendant entered an *Alford* plea, denying specific intent to kill yet pleading guilty, strongly indicated that he understood this element.¹⁵⁰

2. The Military Practice Under R.C.M. 910(c)(1).—Although the CMA has offered some indication that a "flexible" approach to explaining the elements of the offense might be acceptable,¹⁵¹ in practice, military judges rely on the litany contained in the Military Judges' Benchbook,¹⁵² which mandates a detailed explanation of each element, including important definitions, and eliciting the accused's response to each element and definition.¹⁵³

In *United States v. Kilgore*,¹⁵⁴ the first case to consider the issue in the aftermath of *Care*, the CMA held that the judge's failure to detail separately the elements of, *inter alia*, the unauthorized absence offense to which the accused pleaded guilty did not violate *Care* when it appeared from the record that the judge questioned the accused extensively concerning the offenses and the questions were carefully tailored to the

¹⁴⁸ *Id.*

¹⁴⁹ 890 F.2d 676 (4th Cir. 1989), *cert. denied*, __ U.S., __ (1990).

¹⁵⁰ *Id.* at 678-79.

¹⁵¹ See *infra* text accompanying notes 154-57.

¹⁵² Dep't of Army, Pam. 27-9, Military Judges' Benchbook, (1 May 1982) [hereinafter Benchbook]; see also MCM, 1984, app. 8, at A8-6 to A8-7.

¹⁵³ Benchbook, paras. 2-12 and 2-13.

¹⁵⁴ 44 C.M.R. 89 (C.M.A. 1971).

technical elements of the offenses.¹⁵⁵ Similarly, in *United States v. Crouch*,¹⁵⁶ the court ruled that the appellant's assertion that the military judge did not adequately explain the intent necessary for guilt as an aider or abettor did not render the plea improvident when the accused's answers to questions posed during the *Cure* inquiry clearly established guilt.¹⁵⁷

Subsequently, however, in *United States v. Pretlow*,¹⁵⁸ the CMA appeared to curtail the holding of *Kilgore* severely by implying that a failure specifically to enumerate all elements of the offense to the accused will be excused only in the "simplest of all military offenses."¹⁵⁹ In *Pretlow*, the military judge failed to explain any of the elements of the underlying offense of robbery to an accused who pleaded guilty to conspiracy to commit robbery.¹⁶⁰

Consequently, *Kilgore* and its progeny have been limited to situations in which a military judge's duty specifically to delineate the nature and elements of the offense is otherwise discharged. For instance, questions and explanations propounded to the accused during the *Cure* inquiry, which are tailored to, and which show the accused was actually aware of the elements of the offense are sufficient.¹⁶¹ Indeed, even the "service discrediting" and "prejudicial to good order and discipline" elements of an article 134 offense must be ex-

¹⁵⁵ *Id.* at 91. Because the court held that the inquiry was sufficient, it did not rule on the other certified issue—whether the harmless-error rule of article 59(a) applies to providence inquiry errors. This remains an open question.

¹⁵⁶ 11 M.J. 128 (C.M.A. 1981).

¹⁵⁷ *Id.* at 129-30. In an interesting dissent, Judge Fletcher noted a key distinction between *Crouch* and *Kilgore*: In *Kilgore*, the record indicated both the accused's guilt and a correct explanation of the elements; in *Crouch*, on the other hand, the judge arguably failed to explain properly the element of intent for guilt as an accessory. *Id.* (Fletcher, J., dissenting).

¹⁵⁸ 13 M.J. 86 (C.M.A. 1982).

¹⁵⁹ *Id.* at 88.

¹⁶⁰ *Id.* at 86-88. Further, there was a lack of evidence on the record to indicate specific intent on the part of the accused to take by force.

¹⁶¹ See *United States v. Mervine*, 23 M.J. 801 (N.M.C.M.R. 1986), *rev'd on other grounds*, 26 M.J. 842 (C.M.A. 1987) (military judge did not explain elements of larceny to an accused who pleaded guilty to attempted larceny, but this omission was not harmful when questions posed to accused addressed elements of larceny and accused stated that he understood the elements of larceny); *United States v. Peterkin*, 14 M.J. 660 (A.C.M.R. 1982), *petition denied*, 17 M.J. 197 (military judge's failure to list elements of attempted murder not prejudicial when questions addressing elements and accused's understanding of the elements established that the accused was aware of the nature and elements of the offense).

plained to an accused, and he or she must specifically admit to each, for the plea to be provident.¹⁶²

From the foregoing, some conclusions may be made concerning the differences and similarities between the military and civilian practice. Though both military and federal civilian courts operate under what appears to be the same rule, federal district court judges are permitted much greater leeway in developing the accused's understanding of the nature of the offense to which he or she is pleading guilty.

Federal appellate courts again give much deference when it appears on the record that an accused made the decision to plead guilty with adequate assistance of counsel.¹⁶³ By its very terms, however, *Care* requires the military judge to explain the elements of the offense to the accused and obtain the accused's acknowledgement regardless of whether he or she has discussed them with counsel. *Care* permits no digression.¹⁶⁴

The areas of ensuring that guilty pleas are supported by a factual foundation and resolving inconsistent matters, however, provide the greatest differences between the two practices.

B. The Factual *Basis* or "Accuracy" Requirement.

1. In General.—Unlike advice to the defendant about the nature of the charge, the requirement that a plea of guilty be in accordance with the facts is not constitutional in nature. Although the Supreme Court has not ruled expressly on the issue, dicta in several cases clearly indicate the requirement is one of statutory and regulatory origin and is not based upon any constitutional mandate.¹⁶⁵

¹⁶² See *United States v. Thatch*, 30 M.J. 623 (N.M.C.M.R. 1990); *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990); *United States v. Stener*, 14 M.J. 972 (A.C.M.R. 1982). But see *United States v. Finn*, 20 M.J. 697 (N.M.C.M.R. 1986) (service-discrediting and prejudicial nature of drug distribution are so well established and known that specific advice to accused of unique article 134 elements not necessary).

¹⁶³ See *Broce*, 488 U.S. at 563; *Harvey*, 850 F.2d at 388; *Ray*, 828 F.2d at 399.

¹⁶⁴ *Care*, 40 C.M.R. at 253.

¹⁶⁵ See *McCarthy*, 394 U.S. at 465. Further, the clear weight of authority among the federal circuit courts of appeal, primarily in reviewing *habeas* challenges to the adequacy of the factual basis of guilty pleas, is that the factual basis requirement is purely a product of rule 11 or similar state rules—not the Constitution—and that absent a showing that a plea was actually involuntarily or unknowingly, mere failure to develop a proper factual basis on the record will not result in reversal. See, e.g., *United States v. Newman*, 912 F.2d 1119 (9th Cir. 1990); *Willbright v. Smith*, 745 F.2d 779 (2d Cir. 1984); *Roddy v. Black*, 516 F.2d 1380 (6th Cir. 1975), cert. denied, 423

The recent Supreme Court case of *United States v. Broce*¹⁶⁶ serves by analogy to underscore the very different manner in which federal civilian and military courts regard the necessity that guilty pleas be "accurate." In *Broce*, the defendants pleaded guilty to two counts of conspiracy relating to bid rigging on two different construction projects. Defendants in a related case, however, pleaded not guilty, were acquitted, and won dismissal of a later indictment for bid rigging in connection with other construction projects on the grounds that the alleged conspiracies all were part of one overarching conspiracy to rig bids and, hence, the double jeopardy doctrine barred further prosecution.¹⁶⁷ The Court rejected Broce's argument that the double jeopardy proscription required that his second conspiracy charge be set aside. It held that Broce's guilty plea, followed by a colloquy with the judge that fully complied with rule 11, including Broce's admission that he was guilty of two conspiracies, waived that defense and did not render his guilty plea invalid.¹⁶⁸ The point is that the Court upheld the guilty plea even though compelling evidence existed to show that the defendant could not "legally"¹⁶⁹ be guilty of two different offenses. The Court placed far greater importance on the finality of pleas when the guilty plea is entered voluntarily, intelligently, and in compliance with the "core concerns" of rule 11.

2. Sources of the Factual Basis.—Under the military rule, evidence establishing that an accused is guilty must be developed from the accused's own testimony, regardless of whatever other evidence may be presented in the course of the case.¹⁷⁰ R.C.M. 910(e) specifically mandates that the military judge question the accused under oath to establish the factual predicate for the plea, whereas rule 11(f) does not require the judge to elicit the factual basis from the defendant personally.¹⁷¹

Rule 11 certainly does not discourage questioning the defendant. It recognizes that an inquiry of the defendant often will

U.S. 917 (1976); *Wade v. Coiner*, 468 F.2d 1069 (4th Cir. 1972).

¹⁶⁶ 488 U.S. 663 (1989).

¹⁶⁷ *Id.* at 666-67.

¹⁶⁸ *Id.* at 571-74.

¹⁶⁹ See *Braverman v. United States*, 317 U.S. 49 (1942), double jeopardy precluded two convictions for the same conspiracy.

¹⁷⁰ *Care*, 40 C.M.R. at 247.

¹⁷¹ Compare R.C.M. 910(e) containing a second sentence stating, "The accused shall be questioned under oath about the offenses") with FED. R. CRIM. P. 11(f) (containing no such requirement).

be the best means of establishing whether the defendant actually committed the acts alleged in the charge.¹⁷² Rule 11, however, does provide great leeway and permits establishing the evidentiary basis for the plea through alternatives such as proffers of proof from the prosecutor, inquiries of law enforcement officials who investigated the case, and presentencing reports.¹⁷³ A district court judge even may rely upon the factual predicate developed in accepting the guilty plea of a codefendant, provided this intention is placed on the record and is not disputed.¹⁷⁴

In sum, a federal district court may use virtually any reliable information at its disposal to ensure a guilty plea is consistent with the facts. Only when the record fails to contain some information supporting an essential element of the offense will appellate courts take corrective action.¹⁷⁵

Military courts, in contrast, must demonstrate a factual foundation for every element of the offense by direct examination of the accused, notwithstanding any other evidence presented in the course of the providence inquiry.¹⁷⁶ This rule generally requires that an accused attest to his or her guilt to all elements of the offense from his or her own knowledge, and the CMA permits only minor departure.

The only real permissible deviation from *Care* exists in the situation in which an accused admits to being guilty, but is unable to recall or is not personally aware of all of the facts establishing guilt. Accordingly, an accused may plead guilty if he or she sincerely believes that he or she is guilty through reviewing witness statements or other evidence, even though the accused cannot personally recall, or was not physically

¹⁷² See 1966 Advisory Committee Notes to Rule 11; ABA Standard Relating to Pleas of Guilty 14-1.6(b); *Santobello*, 404 U.S. at 261.

¹⁷³ 1966 Advisory Committee Notes to Rule 11; see *Dayton*, 604 U.S. at 540 (prosecutor's statement of available evidence established factual basis for plea).

¹⁷⁴ See *United States v. Thompson*, 680 F.2d 1145 (7th Cir. 1982), *cert. denied*, 459 U.S. 1089.

¹⁷⁵ See *United States v. Goldberg*, 862 F.2d 101 (6th Cir. 1988) (case remanded because of absence of evidence indicating intent to actively conceal mail fraud in case of defendant who pleaded guilty to misprision of a felony); *United States v. Fountain*, 777 F.2d 351 (7th Cir. 1985) (defendant pleaded guilty to murder as an accessory, but only evidence of codefendant's actual commission of offense as principal appeared on record). The factual basis was insufficient because no evidence was presented on the record of defendant's role as accessory. See *Fountain*, 777 F.2d at 779.

¹⁷⁶ *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980); R.C.M. 910(e); see *United States v. Frederick*, 23 M.J. 561 (A.C.M.R. 1986) (when military judge's inquiry of accused elicited "nearly monosyllabic" responses concerning his guilt of two specifications of distributing cocaine, the inquiry was insufficient to meet the mandate of *Care*, which requires detailed interrogation of accused to support guilt).

present when, the events establishing guilt occurred. In *United States v. Penister*,¹⁷⁷ for example, the CMA ruled that the accused's inability specifically to recall his shooting the victim because of his being intoxicated at the time did not, standing alone, preclude pleading guilty when the accused was convinced of his guilt through other evidence.¹⁷⁸

This deviation from *Care* in no way abrogates the essential requirement that an accused be convinced of, admit to, and describe facts supporting each element of the offense. It merely affords very limited leeway to establish a part of the factual predicate for the plea from other sources to which the accused must certify his or her agreement.¹⁷⁹

3. What Standard of *Proof* Applies?—It is somewhat perplexing that neither R.C.M. 910 nor rule 11 provide any burden or standard of proof that the factual predicate for a guilty plea must meet. Under rule 11, federal courts have stated that the standard for evaluating whether a sufficient factual basis exists is “whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty.”¹⁸⁰ The key issue is whether the factual basis for the plea reasonably supports the trial judge's determination that the defendant is actually guilty and this determination will be reversed only when an abuse of discretion is present.¹⁸¹ Consequently, rule 11 gives federal district court

¹⁷⁷ 25 M.J. 148 (C.M.A. 1987).

¹⁷⁸ *Id.* at 152; *see also* *United States v. Moglia*, 3 M.J. 217 (C.M.A. 1977) (accused's inability to testify from personal knowledge that heroin he distributed to victim was same heroin that caused victim's death did not render guilty plea to involuntary manslaughter improvident when accused was convinced of and admitted to guilt through other sources); *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971) (accused pleaded guilty providently to sodomy and assault with intent to commit rape— despite inability to recall events because of intoxication at time— when accused was convinced of guilt through discussions with witnesses and review of other evidence); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971).

¹⁷⁹ In *Butler*, Chief Judge Quinn made the intriguing remark that “even a personal belief by an unremembering accused, that he did not commit the offense, does not preclude him from entering a plea of guilty because he is convinced that the strength of the Government's case against him is such as to make assertion of his right to trial an empty gesture.” *See Butler*, 43 C.M.R. at 88. The author has found no later military case, apart from *Luebs*, that refers to this dicta. All subsequent cases appear to state that an accused must be convinced of his or her own guilt.

¹⁸⁰ *United States v. Lopez*, 907 F.2d 1096, 1100 (11th Cir. 1990).

¹⁸¹ *See Lopez*, 907 F.2d at 100-02 (former police officers' guilty pleas to Racketeer Influence and Corrupt Organizations Act (RICO) narcotics charges supported by sufficient factual basis despite judge's failure to elicit defendants' admissions to all factual predicates for the RICO violations); *United States v. Owen*, 858 F.2d 1614 (11th Cir. 1988) (evidence sufficient to establish factual basis for guilty pleas to tax evasion charges despite defendant's protestations after entry of pleas that nonpayment of taxes was not willful); *see also Dayton*, 604 F.2d at 938.

judges broad discretion in determining whether a sufficient factual predicate exists and they need not fear being overruled as long as some reliable information appears supporting each element of the offense.

The standard applied at courts-martial, however, is far stricter than the one applied in federal criminal cases. The duty placed upon military courts to resolve inconsistent matters, with the other requirements that must be met, has the practical effect of requiring that the accused's guilt be established to a virtual—if not absolute—certainty.¹⁸²

C. The Duty to Resolve Inconsistent Matters Raised During the Guilty Plea Inquiry.

1. The Federal Civilian and Military Practices.—As noted earlier in this article, the mandate that military courts reject guilty pleas when the accused raises some inconsistency is entrenched firmly in courts-martial practice.¹⁸³

Federal civilian courts, on the other hand, never have operated under an express rule to this effect. Nonetheless, the normal practice when a defendant claims his or her innocence or raises another matter inconsistent with his or her guilty plea is to permit the defendant to withdraw the plea and plead not guilty. Judges are admonished to exercise special care in these situations to ensure that the defendant actually is guilty before accepting the plea.¹⁸⁴

A district court judge may accept a plea of guilty despite any number of “inconsistencies” if an adequate factual basis appears from which the judge can reasonably conclude that the defendant is actually guilty.¹⁸⁵ “There is no requirement . . . that there be uncontroverted evidence of guilt. Instead, there must be evidence from which a court could reasonably find that the defendant was guilty—a factual basis for the plea.”¹⁸⁶

The ABA Standards Relating to Pleas of Guilty seem to go even farther. They take the position that a judge should not reject a guilty plea solely because a defendant refuses to ad-

¹⁸² See generally R.C.M. 910 discussion

¹⁸³ See *supra* notes 23-35 and accompanying text.

¹⁸⁴ 1966 Advisory Committee Note to Rule 11; ABA Standard Relating to Pleas of Guilty 14-1.6(c) (1980).

¹⁸⁵ See *Owen*, 858 F.2d at 1516; *Dayton*, 604 F.2d at 938.

¹⁸⁶ *Owen*, 858 F.2d at 1516-17.

mit culpability, but should reject a guilty plea only when a separate, specific reason exists for doing so, such as a lack of evidence otherwise establishing guilt.¹⁸⁷

A military judge, conversely, must reject any guilty plea when an unresolved inconsistency arises.¹⁸⁸ Unless an accused absolutely disavows a possible defense or matter inconsistent with an element of the offense, the plea must be **withdrawn**.¹⁸⁹ A slight deviation from this rule is the very limited situation in which the factual basis elicited during the Care inquiry demonstrates that the accused is guilty of a different, but closely related, offense that carries about the same maximum punishment.¹⁹⁰ In these cases, the matters raised by the accused are only inconsistent with guilt to the precise offense charged; they are not inconsistent with guilt in the broader sense and they involve no denials of guilt or assertion of a possible defense by the accused.

A similar variance is found in a few cases involving illegal drug use, in which the accused believed he or she was ingesting one illegal substance but actually was ingesting combinations of, or different, controlled substances.¹⁹¹ The accused must believe the conduct was wrongful and that his or her possession actually was illegal. Hence, the accused's statements are not inconsistent with guilt, but only with the precise "form" of his or her guilt.

¹⁸⁷ ABA Standard Relating to Pleas of Guilty 14-1.6(c) and commentary (1980).

¹⁸⁸ R.C.M. 910(h)(2); *Lee*, 16 M.J. at 280.

¹⁸⁹ *See, e.g.*, *United States v. Stener* 14 M.J. 972 (A.C.M.R. 1982). In *Stener*, the accused initially disagreed with military judge's explanation of article 134 element of service-discrediting or prejudicial to good order and discipline on a drug importation offense. He later agreed with judge's explanation of the element without disavowing his earlier inconsistent statement. The court held that findings and sentence should be set aside because accused's mere agreement with judge's explanation did not have the effect of repudiating his earlier statement. *See id.*

¹⁹⁰ *United States v. Jones*, 30 M.J. 127 (C.M.A. 1990) (accused pleaded guilty to involuntary manslaughter by culpable negligence, but record of providence inquiry indicated accused was actually guilty of manslaughter while perpetrating battery); *United States v. Hubbard*, 28 M.J. 203 (C.M.A. 1989) (accused, a noncommissioned officer with custody of government property, pleaded guilty providently to larceny, although providence inquiry indicated he actually may have been guilty of receiving stolen property); *see also* *United States v. Epps*, 25 M.J. 319 (C.M.A. 1987); *United States v. Wright*, 22 M.J. 25 (C.M.A. 1986).

¹⁹¹ *United States v. Yance*, 26 M.J. 244, 254 (C.M.A. 1988), *cert. denied*, 488 U.S. 942 (1988); *United States v. Stringfellow*, 31 M.J. 697 (N.M.C.M.R. 1990) (accused pleaded providently to wrongful use of cocaine and methamphetamine even though, at time of ingestion, he believed substance contained only cocaine). *But see* *United States v. Domingue*, 24 M.J. 766 (A.F.C.M.R. 1987) (rejecting "different substance" analysis).

A detailed examination of the impact on courts-martial practice of the requirement that inconsistent matters raised by the accused ordinarily must result in rejection of the guilty plea follows.

2. *The Impact of Article 45(a), UCMJ.*—A considerable volume of *dicta* exists to the effect that article 45(a) does not require accused to raise implausible defenses or matters that they intelligently elect to forego in light of a strong Government case or a desire to benefit from a pretrial agreement.¹⁹² This notion, however, conflicts with the rule that once an accused makes a comment or offers any other matter that reasonably raises a possible defense, the military judge must, *sua sponte*, explain the possible defense to the accused personally and either obtain the accused's disavowal of the matter or reject the plea.¹⁹³ In practice, the accused and counsel must flatly repudiate the existence of any matter that is inconsistent with guilt—even the tactical possibility of a defense—in order to persist in a guilty plea.¹⁹⁴

The mandate of article 46 places the military judge in a similarly tenuous position: the judge not only must ensure that the accused admits a sufficient factual basis for the plea and raises nothing inconsistent, but also must take care not to reject a provident plea through perhaps an overzealous desire to resolve inconsistencies.¹⁹⁵

¹⁹² See *United States v. Clark*, 28 M.J. 401, 406-7 (C.M.A. 1989); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973); *Butler*, 43 C.M.R. at 88.

¹⁹³ See *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976).

¹⁹⁴ The dilemma counsel and accused face in this situation is not new. During the floor debate on article 45(a), in discussing the duty to reject a guilty plea when an inconsistent matter is raised, Congressman Foster Furcolo of Massachusetts offered the following comment:

there is a clause in there, and it is in all the court-martial books, which is supposed to be in there for the benefit of the defendant pointing out if after a plea of guilty the defendant sets up a matter inconsistent with the plea, you have to have a trial. I think probably you have to have that provision, but I do know that very often in a matter of mitigation or extenuation—I have had it happen to myself when representing one of these fellows—you may have a matter that is inconsistent with the plea of guilty, but the defendant then has to go through a trial which often results in a greater punishment to him because he did not plead guilty. I do not know how you would handle the situation, but I think the committee ought to give it some consideration.

95 Cong. Rec. 5286. No subsequent discussion or consideration of the requirement to reject guilty pleas when an inconsistency is raised appears in the legislative history of the UCMJ.

¹⁹⁵ See *Penister*, 25 M.J. at 148 (military judge abused his discretion in rejecting a guilty plea to the offense of assault with a dangerous weapon through a misapplication of the law relating to intoxication as a possible defense); *United States v. Clayton*, 25 M.J. 888 (A.C.M.R. 1988) (military judge improperly rejected guilty plea by

A few examples will demonstrate that the duty under article 45(a) to reject guilty pleas when an inconsistency arises results in confusing, if not simply inconsistent, holdings. Confusion runs rampant, not only because of the actions a military judge must take when an inconsistency is reasonably raised, but also because it is often extremely difficult to determine if the accused has raised an "inconsistency" in the first place.

For instance, a number of drug distribution cases involving guilty pleas have seen action on appeal because of relatively far-fetched "inconsistencies" involving possible entrapment defenses. Compare, by way of illustration, *United States v. Clark*¹⁹⁶ with *United States v. Williams*.¹⁹⁷ In *Clark*, a civilian defense counsel argued on sentencing that the accused had been "set up" through repeated phone calls and pressure from an informant to obtain cocaine, but the CMA ruled that this did not require rejection of the guilty plea because the defense counsel had denied the viability of an entrapment defense when it arose during the providence inquiry and the evidence presented did not fairly raise the defense.¹⁹⁸ In *Williams*, however, the Army Court of Military Review reversed the accused's conviction for distributing marijuana because the judge failed to resolve the accused's assertion during the providence inquiry that he felt "rather reluctant" to obtain marijuana for an noncommissioned officer, despite the fact that the defense counsel specifically denied the existence of the defense, and both the accused and counsel stated they had discussed the issue of entrapment.¹⁹⁹

Another example is found in a series of cases in which the accused is purported to have raised the defense of duress. Compare *United States v. Logan*,²⁰⁰ in which the CMA ruled that the accused's statements that threats made against his family in the United States were insufficient to raise the defense of duress as to larcenies of government property committed in Korea, despite the judge's apparent failure to resolve

not sufficiently determining whether accused was reasonably raising entrapment defense, entitling accused to benefit of original pretrial agreement sentence limitation).

¹⁹⁶ *Clark*, 28 M.J. at 401.

¹⁹⁷ 27 M.J. 671 (A.C.M.R. 1988).

¹⁹⁸ *Clark*, 28 M.J. at 407. Curiously, it appears that the judge made no inquiry of the accused personally on the issue of whether he believed he had been entrapped into distributing cocaine.

¹⁹⁹ *Williams*, 27 M.J. at 673; see also *United States v. Brooks*, 26 M.J. 930 (A.C.M.R. 1988).

²⁰⁰ 47 C.M.R. 1 (C.M.A. 1973).

the issue, with *United States v. Jemmings*,²⁰¹ in which the court ruled the issue of duress was raised and not resolved sufficiently when the accused asserted that he would not have committed the housebreaking to which he pleaded guilty had threats not been made against himself and his children.²⁰² In his dissent in *Jemmings*, Judge Cook criticized the majority, by citing: (1) the accused's own statements at trial that he did not fear injury to himself or his children at the time he actually committed the offense; and (2) the accused's intent and resolve to commit the housebreaking displayed by his assaulting a guard with a piece of lumber to effect entry as showing that duress was not reasonably raised.²⁰³

More recently, a similarly disturbing development has arisen in guilty plea cases involving the issue of voluntary abandonment of attempted crimes. In a series of cases in which the CMA noted that it was questionable, as a threshold matter, whether the defense even exists in military criminal law, the accused's testimony nevertheless raised inconsistencies requiring reversal.

In *United States v. Byrd*,²⁰⁴ the accused pleaded guilty, *inter alia*, to attempted distribution of marijuana, but the CMA ruled that the record of trial was insufficient to show more than mere preparation for commission of the offense. It found further that Byrd's answers during the providence inquiry raised the possibility he had voluntarily abandoned the venture.²⁰⁵ Subsequently, in *United States v. Walther*,²⁰⁶ and in *United States v. Rios*,²⁰⁷ the Navy and Army Courts of Military Review, respectively, ruled that the judges in those cases failed to resolve possible abandonment defenses raised by the accuseds' comments that, at some point, they elected to give up their endeavors. In *Walther*, the accused averred that he changed his mind about stealing a stereo after he had broken into the car in which it was located. In *Rios*, the military judge failed to resolve whether the accused, who fled from the scene of his attempted robbery after a store clerk failed to comply with his "stick-up" note, did so from fear of apprehen-

²⁰¹ 1 M.J. 414 (C.M.A. 1976).

²⁰² *Id.* at 416-18; *see also* *United States v. Pinkston*, 39 C.M. R261 (C.M.A. 1969)

²⁰³ *Jemmings*, 1 M.J. at 418-19.

²⁰⁴ 24 M.J. 286 (C.M.A. 1987).

²⁰⁵ *Id.* at 292.

²⁰⁶ 30 M.J. 829 (N.M.C.M.R.1990).

²⁰⁷ 32 M.J. 501 (A.C.M.R. 1990).

sion or through an honest change of heart, or for other reasons.

These are but a few examples of the confusion that article 45(a), in conjunction with *Care's* mandate to elicit the factual predicate from the accused, has generated in military practice. Other similarly confounding examples can be found in "bad check" cases, in which accused soldiers equivocate when confronted with the issue of whether they intended to defraud at the time the check was presented or thereafter dishonorably failed to maintain sufficient funds;²⁰⁸ in larceny and false claim cases, in which accused soldier's assertions raise the possibilities that he or she merely accepted overpayments from the government;²⁰⁹ in unauthorized absence cases in which the accused soldiers make statements averring their inability or attempts to return to military control;²¹⁰ in cases in which accused soldiers make allusions to possible deficiencies in mental responsibility at the time of their offenses;²¹¹ in cases involving article 134 violations in which accused soldiers appear to equivocate on the "service discrediting" or "prejudicial to good order" elements;²¹² and, in article 133 cases in which the accused soldiers aver the possibilities that their conduct was not "unbecoming an officer" or contrary to customs of the service.²¹³

The author does not mean in any way to denigrate the decisions of military appellate courts in addressing these issues. The ensuing disarray is directly related to the basic problem of reconciling the mandate of article 45(a) to resolve inconsistencies with the notion that an accused, with advice of counsel, should be permitted to make reasonable tactical decisions not to raise a defense. The basic tendency of most human beings to try to rationalize or minimize the criminal nature of their conduct is another, equally responsible, factor. As Judge Cox has stated, "one aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization

²⁰⁸ See *United States v. Duval*, 31 M.J. 650 (A.C.M.R. 1990) (accused's mere agreement that his conduct was dishonorable was insufficient to support his guilty plea when he asserted on sentencing that he was unable to maintain a sufficient balance due to financial inability).

²⁰⁹ See *United States v. Watkins*, 32 M.J. 527 (A.C.M.R. 1990).

²¹⁰ *Lee*, 16 M.J. at 278.

²¹¹ See *Hinton*, 23 C.M.R. at 265; *United States v. Logan*, 31 M.J. 910 (A.F.C.M.R. 1990).

²¹² See *United States v. Thatch*, 30 M.J. 623 (N.M.C.M.R. 1990); *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990); *Stener*, 14 M.J. at 972.

²¹³ See *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990).

is 'inconsistent with the plea,' more often than not it is an effort by the accused to justify his misbehavior."²¹⁴

In light of these problems, it seems odd that no serious effort appears ever to have been undertaken to modify or rescind some of the requirements of article 45(a) and Care. The remainder of this article, therefore, will focus on possible revisions of military guilty plea practice that might be made in light of lessons learned from both the historical development and current practice in federal civilian courts.

IV. Reform of Military Practice

A. *Legislative and Executive Reforms.*

Military jurisprudence has a mandate under UCMJ article 36²¹⁵ that court-martial procedures shall, so far as practical "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts . . ." Although no significant discussion of the foregoing aspects of military guilty plea practice appears to have been undertaken on the point of whether it should conform with federal civilian practice, bringing military practice into conformity certainly would be consistent with article 36. The following revisions of military practice are offered in the hope of bringing the most adaptable and enlightened aspects of federal civilian practice into the court-martial arena.

1. UCMJ Article 45(a) and R.C.M. 910(h)(2).—By far the simplest and most direct solution to the problem of inconsistent matters raised by an accused would be to delete the words "or after a plea of guilty sets up a matter inconsistent with the plea," from article 45(a). A complementary change to R.C.M. 910(h)(2) should then be made to the effect that a statement or other matter inconsistent with the plea ordinarily should not result in rejection of the guilty plea unless there is insufficient evidence to find, beyond a reasonable doubt, that the accused is actually guilty of the offense.

As demonstrated above, the relatively rigid requirement that a court-martial reject a guilty plea upon entry of an inconsistent matter is an historical anomaly unique to military practice.²¹⁶ The provision dates back to an era in which law-

²¹⁴ *Penister*, 25 M J at 153

²¹⁵ 10 U.S.C. § 836 (1966).

²¹⁶ See *supra* notes 27-36 and accompanying text

yers had little direct involvement in the actual conduct of courts-martial and even further predates the advent of an independent trial judiciary and defense bar. One could maintain that the increased participation of lawyers in the process has had the indirect effect of increasing the quantity of conceivable “inconsistencies” raised at trial through more zealous sentencing presentations and advocacy generally, though this is a point on which it would be difficult, if not impossible, to gather empirical evidence.

The requirement has not resulted in any real decline in allegations of “improvident” pleas on appeal and has the detrimental effect of directing military and appellate judges’ attentions to severely scrutinizing possible perceivable “inconsistencies” in records. Military judges are, arguably, operating under a rule that stresses producing a clean, uncontroverted record over examining the totality of the circumstances to address the more essential, constitutional concern of whether the accused made a voluntary, intelligent decision to plead guilty.

Indeed, the view could be taken that current military practice in a given case impermissibly forces an accused to plead not guilty and risk a trial on a defense that is implausible, but that the accused cannot in good conscience repudiate as required under military law. Military accused quite possibly could receive greater punishment in a situation in which they are otherwise perfectly willing to plead guilty and accept the responsibilities for their conduct. Several cases mentioned above have involved situations that differ only in degree from this scenario, in which the military judge improperly rejected an accused’s guilty pleas.²¹⁷

These revisions would mean that a military judge still should reject a guilty plea in most cases in which it appears on the record that an accused has a valid defense or other matter barring trial. The revision would leave it to the military judge’s discretion whether a matter raised by the accused, though inconsistent, was so contrary to the plea and credible as to warrant rejecting the guilty plea.

Similarly, revisions of R.C.M. 910(c)(5) and R.C.M. 910(e) should be made eliminating the strict requirement that the accused be interrogated under oath. Questioning the accused under oath still would be the most desirable and expeditious manner to establish the factual basis for the plea in most

²¹⁷ See *Penister*, 26 M.J. at 148; *Clayton*, 26 M.J. at 888.

cases.²¹⁸ The decisions as to the methods of establishing and examining the sufficiency of the factual basis should be committed to the military judge's discretion. These changes would recognize that the military judge is in the best position to regulate the flow of the case and to make findings on the record that an accused is guilty beyond a reasonable doubt despite any inharmonious matters that may have been raised.

No changes should be made to R.C.M. 910(c)(1). The military judge should be obligated to enumerate the elements of the offense in simple terms. The accused should be required to attest that he or she understands the elements and that he or she is guilty. This obligation is constitutional in nature—the requirement that the record be “uncontroverted” is not. Logically, it appears that requiring the military judge to enunciate the elements of the offense and to explain important definitions is the simplest and easiest manner to ensure the accused understands the offense and to avoid problems that arise in federal civilian courts when such an explanation is omitted, as occurred in *Henderson v. Morgan*.

The foregoing should not be taken to mean that the military should adopt what have come to be called “*Alford* pleas.” There are compelling practical reasons for rejecting this practice, apart from the disdain many place on sending a person to jail upon a guilty plea while he or she is advocating innocence. The point properly is made that accused soldiers who are convicted upon *Alford* pleas pose serious problems in the correctional setting, where many decisions concerning the dispositions of offenders relate to whether they have admitted responsibility for their conduct.²¹⁹

The intent of the recommended changes is not to permit acceptance of a guilty plea in the case of an accused who flatly refuses to accept responsibility for his or her conduct; the intent is to permit him or her to make an intelligent, voluntary decision to plead guilty when he or she is convinced it is in his or her best interests to forego possible defenses. The benefits to the military justice system in dispensing with unnecessary contested trials could be considerable.²²⁰

²¹⁸ The proposed revisions would, however, eliminate the requirement that an inquiry of the accused must support each element of the offense in an uncontroverted manner.

²¹⁹ See 1975 Advisory Committee Note to Rule 11(f).

²²⁰ Although empirical evidence on this point is not possible, the author personally is aware of a number of cases that have been contested at trial in which an accused was willing to plead guilty and accept responsibility and punishment for his acts—but through moral or personal considerations—was unwilling or unable to recite suf-

2. Adoption of a Harmless-Error Rule.— Consideration should also be given to incorporating a specific harmless-error rule into R.C.M. 910. The effect of this rule would be to preclude the need for corrective action unless an appellant can show that a violation of R.C.M. 910 materially prejudiced a substantial right and, additionally, that the accused actually would not have pleaded guilty had the error not occurred and that the accused intends to plead not guilty if a rehearing is directed. Such a rule appears to have had some success in forestalling challenges to guilty pleas in federal district courts. Further, it seems logically absurd to take corrective action on appeal when the error did not affect the accused's basic decision to plead guilty.²²¹

B. Judicial Reforms.

In the absence of the foregoing reforms by the Congress or the President, the courts can take substantial action to improve this area. The change in membership of the CMA²²² will afford an excellent opportunity to revisit these issues.

1. *Overrule or Modify United States v. Care.*— As former Senior Judge Raby of the Army Court of Military Review commented “perhaps the provisions of Care should be relaxed.”²²³ The time is long overdue to reconsider the judicial fiat of Care that requires an extensive narrative colloquy from the accused that establishes guilt to each element of the offense. As we have seen, this protracted discussion frequently has the counterproductive and unwelcome result of affording the accused an extended opportunity to equivocate, express moral—though not legal—doubts as to culpability, and otherwise to raise spurious matters that might conceivably amount to “inconsistencies.”

ficient facts to support guilt. The possibility that military judges might, on occasion, be overzealous in rejecting guilty pleas because of “inconsistencies” developed through an unnecessarily rigorous examination of the accused is even more difficult to develop.

²²¹ Note that the proposed harmless-error rule would affect only R.C.M. 910 violations. It would not preclude, for example, a rehearing on sentencing because of erroneous admission of evidence in violation of R.C.M. 1001(b) or M.R.E. 404(b).

²²² The composition of the CMA recently was increased from three to five judges. See 103 Stat. 1570-72, codified at 10 U.S.C. §§ 941-945 (1989). This factor, together with Chief Judge Everett's assumption of senior judge status upon expiration of his term, appears to offer an opportunity to reconsider some of the court's earlier cases in this area.

²²³ *United States v. Frederick*, 23 M.J. at 564.

Compelling reasons for reconsidering *Cure* can be found by examining the opinion itself. The CMA's conclusions that the providence inquiry then employed by most law officers or presidents of courts-martial did not comport with the mandate of the Keeffe Board, as endorsed by Congress, are suspect. In any event, the inquiry since developed under the 1969 and 1984 Manuals and in the Military Judge's Benchbook into the accused's understanding about the nature of the offense and consequences of the plea more than satisfies Judge Ferguson's original concerns.

Additionally, the CMA placed great reliance in *Cure* upon the Supreme Court's then-recent *McCarthy* decision for its holding that an extensive personal interrogation of the accused was strongly advisable, if not constitutionally necessary. The Supreme Court and federal circuit courts of appeal, however, strictly have limited the edict of *McCarthy* that rule 11 violations of any nature require reversal due to the essential, "core" concerns of rule 11. The CMA simply has not kept pace with these developments and the time has come to revisit *Care* in light of later constitutional and statutory interpretations that severely have limited the effect of *McCarthy*.

The effect of *Cure's* continued vitality is to place an unfair and constitutionally unnecessary burden upon military judges and counsel to "ferret-out" all facts necessary to establish guilt from an accused personally and to resolve complex, if not imperceptible "inconsistent matters," averred by the accused. The CMA has recognized this problem,²²⁴ but has not yet acted to alleviate it.

Consequently, the court specifically should overrule *Care* to the extent that it requires a personal interrogation of the accused, establishing guilt to each element of the offense in a narrative fashion. A showing on the record that the accused understands and admits each element of the offense, pursuant to R.C.M. 910(c)(1), and the inclusion of evidence presented through any number of reliable sources,²²⁵ establishing the factual basis for guilt, are all that are necessary and all that should be required.

The complementary changes to R.C.M. 910(c)(5) and R.C.M. 910(e) discussed above are also advisable to eliminate the requirement, based upon *Cure*, to elicit the factual basis for the

²²⁴ See, e.g., *Penister*, 25 M.J. at 152; *Byrd*, 24 M.J. at 286.

²²⁵ These sources include stipulations of fact or of testimony, witnesses, and documentary evidence, in addition to any testimony rendered by the accused personally.

plea by questioning the accused. This change will render courts-martial consistent with federal civilian practice, which permits the judge to use any reliable information to establish the factual predicate for the plea. Although the accused frequently will be the best source of information concerning his or her conduct, in many instances he or she is personally unaware or unable to recall key facts and, under R.C.M. 910(e) and *Cure*, must testify to hearsay or matters of belief that are probably not as reliable as the original information presented through witnesses, documents, or stipulations.

2. Strict Construction of “Inconsistencies.”—Short of other measures, appellate courts seem to enjoy considerable leeway in what they may construe to be inconsistent matters raised by accused.²²⁶ It clearly can be asserted, as Judge Latimer did in many of his dissents, that a matter one judge may perceive as inconsistent may well be reconcilable with guilt. The author suggests that appellate judges should be particularly wary of construing a matter as being inconsistent with guilt in the absence of an allegation by the appellant that he or she actually would have pleaded not guilty had he or she appreciated the effect of the “inconsistency” before deciding to plead guilty.

In many of the foregoing cases, the military appellate courts appear to approach the providence issue from the perspective of whether a matter contained in the record can be interpreted as inconsistent with guilt. The author contends that the more advisable approach is to take corrective action on appeal only when a matter cannot be reconciled reasonably with guilt.

The CMA indeed may come to view such challenges to guilty pleas in a stricter fashion. Judge Cox has indicated in several cases that considerably more deference should be given to a military judge’s findings “on the record” that an accused is actually guilty and that the court should not lose sight of the more essential constitutional prerequisites for a valid guilty plea.²²⁷ Perhaps Judge Cox signals the future course of the court in construing article 45(a) in a more realistic fashion by stating that in guilty plea cases:

It is sufficient that: [The accused] knowingly and voluntarily admits his [or her] guilt; [The accused] knowingly and voluntarily gives up his [or her] rights; and [The accused]

²²⁶ See, e.g., *Clark*, 28 M.J. at 401; *Logan*, 47 C.M.R. at 1.

²²⁷ See, e.g., *Penister*, 26 M.J. at 153 (Cox, J., concurring).

knowingly and voluntarily gives up his [or her] defenses to the charges.²²⁸

V. Conclusion

The time has come to modernize military guilty plea practice. The courts-martial practice inherited from the last century, requiring resolution of any inharmonious matters raised by the accused, has the unforeseen and unfortunate effect of exalting the form of the plea over its substance—the “form” being the duty to avoid the appearance of any inharmonious items on the record and the “substance” being the issues of whether the accused is actually guilty and whether the accused and the court should enjoy the benefits of an enlightened, considered decision to plead guilty. The result is that courts-martial focus on the antiquated statutory concern that no inconsistencies appear on the record as much, if not more, than on the more fundamental constitutional requisites for a legitimate waiver of the right to a trial.

Further, it is difficult to articulate any “uniquely military” concerns that justify applying a guilty plea practice at courts-martial so substantially different from that applied in other federal courts. The era in which courts-martial lacked significant direct involvement of trained judge advocates is gone, eliminating the need for such a paternalistic, solicitous practice. The time is ripe for serious reconsideration of article 45(a) and its judicial progeny.

Adoption of the proposed reforms is advisable not only for constitutional and practical reasons. The reforms are necessary to accord sufficient deference to the right of the accused to enter a guilty plea. Moreover, the reforms are necessary to grant proper respect and deference to the court-martial as a tribunal.

²²⁸ *Id.*

BOOK REVIEWS

WITNESS FOR THE DEFENSE*

REVIEWED BY MAJOR FRED L. BORCH**

Witness for the Defense will interest both criminal and civil litigators, because it shows the power of expert testimony in the courtroom. Defense counsel will want to read the book because it illustrates how inaccurate and imperfect the memory of an eyewitness can be; prosecutors and plaintiff's attorneys will want to read *Witness for the Defense* to learn how to challenge expert testimony in this area of psychology.

Witness for the Defense is about Dr. Elizabeth Loftus, an expert in memory and eyewitness identification. Its focus is on Dr. Loftus's work as a defense expert witness in various well-known criminal prosecutions. Dr. Loftus, a professor of psychology at the University of Washington, is one of the foremost experts in the study of human memory and how it works. Her studies on how the memory of an event is affected by stress experienced during that event, and how memory is shaped by suggestive questioning techniques, led her to question the reliability of eyewitness identifications. Contrary to popular belief, Dr. Loftus' psychology experiments showed that stress on a person witnessing an event tends to make memory of that event unreliable. Additionally, her studies demonstrated that police investigative techniques that intentionally or unintentionally suggest a perpetrator's identity—especially in photographic or live line-ups—result in unreliable eyewitness identifications. In short, Dr. Loftus concluded that stress-affected memories and suggestive line-ups were causing victims and witnesses falsely to accuse men and women of crime. Particularly when the eyewitness identification was the lynch-pin of the prosecution's case, Dr. Loftus believed that innocent defendants were being convicted.

For the last fifteen years, Dr. Loftus has testified as a "witness for the defense." She testifies as an expert in the field of memory, perception, and eyewitness identification—to include

*Elizabeth Loftus & Katherine Ketcham, *Witness for the Defense*. New York: St. Martin's Press (1991). Pages: 288. Price: \$19.95.

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cross-racial identification. Readers of *Witness for the Defense* will recognize several infamous names in the eight cases detailed in the book—among them Ted Bundy and John Demjanjuk. In early 1976, Dr. Loftus testified at Bundy's trial in Utah for aggravated kidnapping. She testified as an expert about the various factors that might have led the victim mistakenly to identify Bundy as her kidnapper. Despite her testimony, the judge convicted Bundy, who subsequently was executed in Florida after admitting that he had murdered between two and three dozen women. In the 1987 Israeli prosecution of John Demjanjuk, the defense asked Dr. Loftus to testify as an expert about the unreliability of eyewitness identifications of Demjanjuk. Treblinka concentration camp victims insisted that Demjanjuk was "Ivan the Terrible," a guard who murdered thousands and thousands of Jews. Even though they had not seen him for forty years, these victims selected Demjanjuk from a photographic line-up and were "attempting to identify a man they had known for less than a year from a photograph taken nine years after their last encounter with him." Ultimately, Dr. Loftus did not testify in the case, but her discussion of the psychological issues involved make fascinating reading. The six other cases recounted in the book are equally interesting.

Witness for the Defense is written in the style of F. Lee Bailey's *The Defense Never Rests*. It reads well, with crisp, clear prose. The book, however, is often sensational and overly emotional in its discussion of a particular criminal case. Dr. Loftus firmly believes in the innocence of the many of the defendants for whom she has testified, and she sees herself as a crusader for the rights of innocent people. She explains it best when she writes that real life

provides dramatic proof that memory is fallible, that eyewitnesses make mistakes, and that innocent people are convicted and imprisoned . . . [i]n the process of arresting, charging, and trying a defendant, a subtle transformation occurs. We begin to presume guilt, and the burden is actually shifted onto the defense to pursue innocence . . . [t]his is mob mentality, and someone needs to block the way. I am a specialist in memory and perception, a scientist who conducts research experiments in controlled environments. It is my job to be rational and clearheaded, to prevent emotions from swelling up and distorting reason, bending reality, twisting facts.

Witness for the Defense demonstrates that innocent defendants mistakenly have been identified as criminals, but Dr. Loftus shows that she often is more of an advocate for the defense than a dispassionate and neutral expert. She places undue emphasis on her view of the guilt or innocence of a defendant in making her decision to testify. As defense counsel inevitably learn, however, this issue is not particularly relevant to presenting a good defense. In John Demjanjuk's case, for example, Dr. Loftus refused to testify as an expert despite repeated pleas from his defense counsel. Her reasons were very personal and understandable. In refusing to testify for Demjanjuk, however, Dr. Loftus reveals that she is influenced by factors that are not relevant to her testimony as an expert. This leaves her expert testimony open to attack by prosecutors and plaintiff's attorneys.

Witness for the Defense is worth reading. Its case histories are fascinating and are superb illustrations of Dr. Loftus' value as an expert witness in the courtroom. No one who reads her book will fail to appreciate that unreliable eyewitness identifications and faulty memories have caused the conviction of innocent defendants.

AMERICA'S FIRST BLACK GENERAL*
and
BENJAMIN O. DAVIS, JR.: AMERICAN**

REVIEWED BY MAJOR FRED L. BORCH***

These two books—a biography about Army Brigadier General Benjamin O. Davis, Sr., and an autobiography by his son, a retired Air Force Lieutenant General—will interest military lawyers for at least two reasons. First, both books reveal the personal struggle of two men serving as commissioned officers despite military laws and regulations designed to thwart them at every stage of their careers. Their successes in the face of overwhelming odds demonstrate a strength of will that Americans typically admire and like to read about. Second, the cruel racism suffered by the Davises' as blacks was supported in

* Marvin E. Fletcher, *America's First Black General*. Lawrence, Kansas: University Press of Kansas (1989). Pages: 226. Price: \$ 22.60 (hardcover).

** Benjamin O. Davis, Jr., *Benjamin O. Davis, Jr.: American*. Washington, D.C.: Smithsonian Institution Press (1991). Pages: 442. Price: \$ 19.96 (hardcover).

*** Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army.

large part by laws and regulations. Military attorneys unfamiliar with the rules mandating segregation in the Army, Army Air Corps, and the Air Force of yesteryear will find both books revealing.

America's First Black General is a scholarly biography by a professional historian, Marvin Fletcher. Ben Davis, Sr., wanted a career as a Regular Army officer at a time when the professional Army was exceptionally small and the officer corps was an elite minority in American society. It "was not politically feasible" for a black man to get an appointment to West Point during President McKinley's administration, so the elder Davis enlisted in 1898 and served two years in the all-black Ninth Cavalry at Fort Duchesne, Utah. Davis's education and exceptional abilities brought him to the attention of his superiors. As evidence of his abilities, within two years after enlisting he was a Sergeant Major. In August 1900, Ben Davis, Sr., took the competitive examination for an officer's commission; he ranked third out of the twelve men who qualified; and in 1901, he was commissioned a second lieutenant of cavalry. For the next forty years, Ben Davis, Sr., led a lonely life as a black officer in a segregated Army. Significantly, there were then never more than two black Regular Army officers, and at one point, Davis was the only black officer in the Army.

He served as a Professor of Military Science and Tactics at Tuskegee Institute and Wilburforce University, and as the military attache to Liberia. The War Department made sure that his assignments "were far from the center of Army life." Racial prejudice touched his career often. When the United States entered World War I, the War Department refused to send him to Europe because his high rank—Lieutenant Colonel—meant that he might be in command of white officers and troops in combat. Accordingly, because blacks were "deficient in moral fiber, rendering them unfit as officers and leaders of men," they could not be allowed to fight.

Although Jim Crow laws and other racial barriers angered him, Ben Davis, Sr., was not a militant. Rather, he tried "to avoid conflict whenever possible and work[ed] quietly to encourage change." By the end of World War II, he was a Brigadier General and member of the Inspector General's staff, where he worked to end racial segregation in all forms. He particularly was opposed to the War Department's policy of not allowing black soldiers to go into combat and the Red Cross's practice of segregating white and black blood plasma.

Fletcher's biography traces Ben Davis, Sr.'s, family life and career from birth to death, and concludes that he had a positive impact on the Army.

Lieutenant General Benjamin O. Davis, Jr., followed his father in wanting a military career. Ben Davis, Jr., however, wanted to be a pilot. He secured an appointment to West Point in 1932 because he wanted to be an officer in the Army Air Corps. Racial prejudice affected him from the beginning. For the next four years, Ben Davis, Jr., like his father, endured a lonely existence. His fellow cadets excluded him from all social events and refused to speak with him. He was ostracized totally. Davis would not leave West Point, however, and graduated 35th in his class of 276 in 1935. This high finish should have allowed him to pick the branch of his choice, but when Benjamin Davis, Jr., asked for the Air Corps, he was told that there were no black flying units and that he could not be a pilot. World War II changed the situation quickly. Then-Captain Davis was trained as a pilot, selected to command the newly formed 99th Pursuit Squadron, and later trained and commanded the famous Tuskegee Airmen. He excelled at every step of his career and retired in 1970 as a Lieutenant General. After leaving active duty, he continued to serve in a variety of important public service positions—among others, he was Assistant Secretary of Transportation—before retiring from public life a few years ago.

Much of Lieutenant General Davis's autobiography details the cruel racism he suffered in his early military career. Surprisingly, he is not bitter and refrains from naming any personal enemies. Rather, his criticisms are directed at the Army, Army Air Corps, and Air Force and the institutional racism and segregation that denied black people the opportunity to serve the nation with honor and dignity.

It is apparent, however, that Lieutenant General Davis genuinely loves the United States Air Force, and is proud of his time in uniform.

Paradoxically, although Lieutenant General Davis does not want to be remembered as a *black* general, stating that "Sandra Day O'Connor is probably tired of hearing that she is the first woman appointee to the Supreme Court, and I do not find it complimentary to me or the nation to be called 'the first black West Point graduate in this century,'" Davis's place in history in part is due to his being the senior-most black Air Force officer and his ability to claim most of the credit for moving the Air Force to racial integration. Like his father,

Lieutenant General Davis sees himself as an American and officer first, and a black man second. To many in the black community, however, Davis was, first of all, a black. This tension between how Lieutenant General Davis sees himself, and how others wanted him to be—or wanted to view him—led some to criticize him when he chose to work within the military establishment for integration, rather than taking the confrontational approach advocated by some black leaders. Lieutenant General Davis no doubt would prefer that men and women read his book because he is a great American, but many will read it because he is a great black American. Certainly he is both.

The chief weakness of both books is that they lack a theme and are overly chronological. Fletcher's Benjamin O. Davis, Sr., never comes alive. Rather, he remains two-dimensional, and what made him "tick" remains unsolved. What gave him the strength of will and sense of purpose to serve fifty years of active duty in an Army that never fully accepted him as an officer? This question is not answered adequately. *American's First Black General* would be better if it included the thoughts and insights of those men who were friends, associates, bosses, or subordinates of Davis. Certainly there are many individuals still living who knew him well, given that Davis, Sr., died in 1970. This lack of a broader perspective is a serious shortcoming in the book.

Benjamin O. Davis, Jr.: American, is far and away the better of the two books. Lieutenant General Davis writes well, and gives a wealth of detail. He does not, however, reveal much of his inner self, and some readers will wish he had talked more about his philosophy of life or his thoughts and opinions on American politics and society. Military readers will note that Davis never discusses his techniques for command or philosophy of leadership. Nor does he talk about the tough problems he must have had as an unit commander, and how he solved them. Clearly he is a private, quiet man, but his autobiography would be better if it had included these items. These are minor defects, however, in an otherwise excellent book about one of the makers of the modern Air Force.

By Order of the **Secretary** of the Army:

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General, United States Army
Chief of Staff

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