

MILITARY LAW REVIEW VOL. 88

Symposium on
Criminal Law: Introduction

ARTICLES

A Hard Look at the Military Magistrate
Pretrial Confinement Hearing: *Gerstein*
and *Courtney* Revisited

Due Process: Objective Entrapment's
Trojan Horse

BOOK REVIEWS

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

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MILITARY LAW REVIEW (ISSN 0026-4040)

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SYMPOSIUM ON CRIMINAL LAW: INTRODUCTION

With this issue the *Military Law Review* presents the third symposium on criminal law since the current series of symposium issues began with volume 80, spring 1978. The previous issues devoted to criminal law were volume **84**, spring 1979, and volume 87, winter 1980.

In this issue we present two articles proposing changes in military law and procedure. Both articles deal, at least indirectly, with problems of determining what is in the mind of an accused. Is the accused so likely to commit other crimes or disappear before trial that he should be left in pretrial confinement? Was the accused predisposed to commit a crime in which government undercover agents provided assistance?

The first of the two articles is a proposal for reform of the procedures followed by the various military services in reviewing the legality of pretrial confinement of servicepersons accused of crimes. Each of the services has its own system. By examining the applicable service regulations and, to some extent, their practical implementation, Captain Jack Owen shows that an accused may receive substantially different treatment from one service to another. He argues that these differences are unnecessary and lead to unfair treatment of accused in some cases. Captain Owen proposes that a new Department of Defense instruction be issued to promote uniformity of procedures among the services.

Some of Captain Owen's conclusions are certain to be controversial, and the *Military Law Review* does not claim that all of them are correct. Nevertheless, the points made by Captain Owen concern important rights of an accused. For that reason, they are worth consideration. Readers are encouraged to view Captain Owen's article as a statement of an advocate's position on the matters discussed.

Doubtless the various services can present reasons justifying the various differences in their pretrial confinement review programs. An article which gave full consideration to all these reasons would have to be much longer than Captain Owen's already lengthy essay. It is hoped that at least a few readers may be inspired by Captain Owen's work to prepare such articles for publication. Pretrial confinement is an important subject

involving a number of difficulties, and it deserves full development in military legal literature.

Turning to the second article presented in this issue, we find yet another advocate's position. Captain Gallaway discusses the defense of entrapment, in which the accused argues that he or she would not have committed a charged offense but for the inducements or assistance provided by government agents.

Two variations of the test for entrapment are recognized in American courts. Captain Gallaway notes that military jurisprudence prescribes use of the so-called subjective test. Under this test, the defense is not available to an accused, even if government conduct otherwise amounts to entrapment, if the accused was predisposed to commit the offense with which he is charged.

Captain Gallaway argues for a shift to use of the objective test, which focuses exclusively on the conduct of the government agents in the case, without regard to the state of mind of the accused. This argument is explicitly addressed to defense counsel. It is coupled with the suggestion that, in a case involving serious misconduct on the part of entrapping government agents, the military courts or at least the Court of Military Appeals might be willing to disregard predisposition because of overriding due process considerations.

One of the functions of any law review is to stimulate discussion of the law. We are pleased to present two articles which should contribute materially to the performance of that function.

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

A HARD LOOK AT THE MILITARY MAGISTRATE PRETRIAL CONFINEMENT HEARING: *GERSTEIN AND COURTNEY REVISITED**

by Captain **Jack E. Owen, Jr.**, USMC**

Servicemembers awaiting trial by court-martial may be placed in pretrial confinement by order of their commanding officers. What standards and procedures are applicable to such confinement? The Supreme Court in its 1975 Gerstein decision and the Court of Military Appeals in its 1976 Courtney decision have given at least part of the answer.

*In the wake of these two decisions, the military services established programs **under** which military magistrates are required to hold hearings to inquire into the necessity for pretrial confinement. Captain Owen examines the regulations issued by the various services, and discusses their practical implementation.*

*Captain Owen recommends that magistrate programs be **made** uniform among all the services. Among other things, he recommends that use of lawyers as magistrates be **made** mandatory, and that the time between issuance of the confinement **order** and conduct of the hearing be shortened. He proposes a new Department of Defense instruction to effect reforms.*

Opinions differ widely concerning the actual requirements imposed by Gerstein and Courtney, and not everyone will agree

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

United States Marine **Corps. Assigned to Legal Services Support Office, 3d **FSSG**, Okinawa, Japan, **from** Dec. 1979 to present. Former artillery officer, 1973-76. B.S., 1973, United States Naval Academy, Annapolis, Maryland; J.D., 1979, Harvard Law School, Cambridge, Mass. Member of the Bars of Texas and the United States Court of Military Appeals.

with Captain Owen's view of these requirements. It is not self-evident, for example, that lawyers make better magistrates than non-lawyers in all situations. Nevertheless, it is hoped that this interesting article stimulates discussion of some of the issues raised by pretrial confinement today.

I. INTRODUCTION

Prior to 1975–76, pretrial confinement of servicepersons awaiting court-martial was at the virtually uncontrolled discretion of the commanding officer. In the space of less than a year, however, both the Supreme Court and the Court of Military Appeals handed down landmark decisions concerning pretrial confinement procedure. These decisions resulted in the creation of military magistrate systems in each of the armed services to supervise the pretrial confinement of servicepersons and to guard against abuse of the individual rights of service members ordered into pretrial confinement. However, there are some indications that the magistrate programs have devolved into perfunctory rubberstamps for the confinement decisions of commanding officers and now operate to institutionalize the very abuses they were established to protect against.

It is the thesis of this article that military magistrate hearings are a sound and useful idea, but that several major changes in current procedures must be accomplished before the magistrate programs will actually be capable of performing the watchdog duties they were designed to perform. Among the changes considered necessary are the following:

With a few special exceptions, presentment before a magistrate should occur prior to any confinement and within 24 hours of the order into confinement.

The military magistrate should be a lawyer.

The military magistrate systems of the services should be uniform.

The article concludes with a proposed “Uniform Military Magistrate System” regulation which provides suggested Department of Defense standards and guidelines for military pretrial confinement hearings.

The law of military pretrial confinement is not yet so clear as to admit to finality of conclusion in any of its important aspects. Thus, the legal

arguments presented here, while persuasive, are not and cannot be compelling.

The crucial function of this article is to note the trends in military pretrial confinement and to see where the Supreme Court and Court of Military Appeals may be moving in this area. Military judge advocates must be aware of the equities and issues involved in current pretrial confinement procedures. Judge advocates must ultimately choose whether to work to improve those procedures from within, at a comfortable pace, and to the degree deemed compatible with commanders' needs; or alternatively to simply maintain the status quo and perhaps subject the military justice system to rigid, unpalatable changes forced upon it by the Court of Military Appeals.

Ultimately, the question is one of the fairness of military pretrial confinement procedures. Achievement of military objectives in combat and in peacetime demands discipline, and true military "justice" serves to enhance discipline by developing respect, trust and a sense of fair play and cooperation within the military community. Justice is the contribution of the military legal profession to the accomplishment of the military mission, and improvement of the military justice system is an ongoing task. It is incumbent upon all military judge advocates to argue vociferously for those changes in the military justice system which they feel will improve overall military effectiveness. **This** article presents such an argument.

11. THE COURTS, THE CONSTITUTION, AND THE MILITARY

A. REVIEWABILITY

Throughout American judicial history, civilian courts have been hesitant to review military activities.⁷ It was generally believed that such

⁷ E. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va. L. Rev. 483 (1969). See D. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975); F. Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. Cin. L. Rev. 223 (1967).

deference was required by the Constitution's grants of authority over the armed forces to the legislative and executive branches,² and by the necessities of military discipline.³ The principle of nonreviewability⁴ clearly emerged for the first time in 1858.⁵ A "hands off" attitude by the courts toward review of military matters continued for several decades, but the erosion of nonreviewability notions was evident by the 1950s.⁶

² U. S. Const. art. I, sec. 8 grants Congress authority to "make Rules for the Government and Regulation of the land and naval Forces. . . ." U.S. Const. art. 11, sec. 2 states that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" See W. Winthrop, *Military Law and Precedents* 49 (2d ed. 1920).

³ E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962).

[I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

Id.

⁴ For an insightful examination of the nonreviewability doctrine, see E. Sherman, *supra* note 1, and R. Montgomery, *God, the Army and Judicial Review: The In-Service Conscientious Objector*, 56 Cal. L. Rev. 379 (1968).

⁵ *Dynes v. Hoover*, 61 U. S. (20 How.) 65 (1858). In this suit for assault, battery, and false imprisonment arising from the execution of court-martial ordered confinement, the Supreme Court found no authority in the civil courts to review the results of courts-martial.

Nonreviewability of military administrative activities was first established in *Reaves v. Ainsworth*, 219 U. S. 296 (1911). An Army lieutenant, discharged from the service by a board which met in secret, was denied due process relief by the Supreme Court. The Court found the board to be analogous with a military tribunal, in the same category as a court-martial. The Court then declared that there exists a presumption against civil court review of military actions, and stated a disinclination to interfere with the efficient operation of the Army.

⁶ *Burns v. Wilson*, 346 U.S. 137 (1953). Nonreviewability of court-martial decisions was partially rejected by the Supreme Court. The Court held that fundamental due process rights were to be accorded servicepersons in order to protect them from "crude injustices" and to guarantee at least "rudimentary fairness." *Harmon v. Brucker*, 355 U.S. 579 (1958). In that case, nonreviewability of military activities other than courts-martial was called in question. The Supreme

More than two decades later, the trend is quite apparently in favor of reviewability, at least **as far as** military administrative activities are concerned.’ Constitutional challenges,* especially due process **claims**,⁹ have with increasing frequency inspired Supreme Court review of military cases. In fact, the Court has declared virtually all military actions to be reviewable.”

[T] here is nothing in our Nation’s history or in this Court’s decided cases, including our holding today, that can properly be seen **as** giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

B. APPLICATION OF CONSTITUTIONAL SAFEGUARDS TO MILITARY PERSONNEL

Like the doctrine of nonreviewability, notions of the applicability of constitutional safeguards to military personnel have changed over the years.” Throughout most of American history, courts have been reluctant

Court found a statutory limitation on the power of the Secretary of the Army to discharge servicepersons, thus indicating a willingness to intervene in military **affairs** to prevent injustices from occurring.

⁷ D. Peck, *supra* note 1, at 55. The term “military administrative activity” encompasses all military activities other than courts-martial. Thus, military pretrial confinement is considered a military administrative activity.

⁸ *Middendorf v. Henry*, 425 U.S. 25 (1976); *Greer v. Spock*, 424 U.S. 828 (1975); *Laird v. Tatum*, 408 U.S. 1 (1972). The Court held in favor of the military in these sixth amendment (*Henry*) and first amendment (*Spock*, *Tatum*) cases. Of significance, however, is the Court’s willingness to review the constitutional challenges at all.

In *Flower v. United States*, 407 U.S. 197 (1972), the Court found it to be an infringement of a civilian’s first amendment rights to prohibit him from distributing anti-war leaflets on a public street, even if it does pass through the middle of an Army post.

⁹ *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961); *Greene v. McElroy*, 360 U.S. 474 (1959).

¹⁰ *Laird v. Tatum*, *supra* note 8, at 15–16.

¹¹ R. Boller, *Pretrial Restraint in the Military*, 50 Mil. L. Rev. 71, 100 (1970).

to impose constitutional restrictions on the **military**,¹² just as they were unwilling even to review military activities, by and large. Only in recent years have courts asserted that fundamental constitutional rights are applicable to service personnel.¹³

The Court of Military Appeals has stated that the safeguards of the Bill of Rights apply to military personnel. "The protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed **forces**."¹⁴ Even though CMA noted that the applicability of the Bill of Rights to military personnel "must perforce be conditioned to meet certain overriding demands of discipline and **duty**,"¹⁵ it hastened to add that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."¹⁶

¹² *Reaves v. Ainsworth*, *supra* note 5, at 304. In this old decision, the Court said, "What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process."

¹³ *See Burns v. Wilson*, *supra* note 6, at 142. "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."

¹⁴ *United States v. Jacoby*, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960), *citing Burns v. Wilson*, *supra* note 6; *Shapiro v. United States*, 69 F.Supp. 205 (1947); *United States v. Hiatt*, 141 F.2d 664 (3d Cir. 1944). The Bill of Rights, of course, includes the fourth amendment prohibition against unreasonable search and seizure which is an important constitutional basis for challenging the legality of pretrial restraint.

¹⁵ *Courtney v. Williams*, 1 M.J. 267, 270 (1976), *citing Burns v. Wilson*, *supra* note 6, at 140.

Courtney is perhaps the most significant case ever decided in the area of military pretrial confinement procedure. The decision to confine a serviceperson prior to trial was wholly within the commander's discretion before *Courtney*. *Courtney* established the requirement that the accused be brought before a neutral and detached magistrate for a determination of whether he could and should be detained prior to trial.

It is the position of the author that *Courtney* (and other recent Supreme Court and Court of Military Appeals decisions) require more pretrial confinement procedural protections than exist, in practice, in the military services today.

¹⁶ *Courtney*, *supra* note 15, *citing Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969):

It seems fair to conclude that not only are civilian courts willing to review activities of the military, but both civilian and military courts agree that the constitutional safeguards of the Bill of Rights apply similarly to both civilian and military personnel." This presumption of applicability can be overcome only by persuasive argument that military necessity dictates otherwise.

111. A BRIEF HISTORY OF MILITARY PRETRIAL RESTRAINT

A. THE ARTICLES OF WAR

In 1775 the first American Articles of War were adopted. They were based substantially upon the British Articles of War of 1765, and the American provisions concerning pretrial restraint were identical with those of the British." If suspected of having committed an offense, an officer was to be placed under arrest and an enlisted man was to be confined while awaiting court-martial. Over the years, the trend in development of the Articles of War was toward avoidance of lengthy pretrial arrest and confinement, and encouragement of speedy trials.¹⁹

We hold that the test of fairness [announced in *Burns v. Wilson*, *supra* note 6] requires that military rulings on constitutional issues conform to Supreme Court standards unless it is shown that conditions peculiar to military life require a different rule.

¹⁷ S. Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F.L. Rev. 81 (1976). Although the Warren Court criticized the military justice system as being "singularly inept in dealing with the nice subtleties of constitutional law" (*O'Callahan v. Parker*, 395 U.S. 258, 265 (1969)), the Burger Court has been much more supportive and complimentary of the military justice system. The decisions of C.M.A., particularly, have been shown great deference. These accolades, in turn, have infused C.M.A. with a spirit of "judicial activism."

But in areas of law where the Uniform Code of Military Justice is silent, notably fourth amendment considerations, C.M.A. is likely to follow closely the dictates and direction of the Supreme Court. See *Courtney*, *supra* note 15, at 270. See also S. Goodwin, *Military Law—the Role of the Military Judiciary—The United States Court of Military Appeals Strengthens Judicial Control of Courts-Martial and Expands Its Scope of Appellate Review*, 30 Vanderbilt L. Rev. 891 (1977).

¹⁸ W. Winthrop, *supra* note 2, at 931, 944-45.

¹⁹ R. Boller, *supra* note 11, at 91. This article offers an excellent and in-depth historical review of the American military law of pretrial restraint.

B. THE UCMJ AND THE MANUAL FOR COURTS-MARTIAL

In 1950 Congress enacted the Uniform Code of Military Justice.²⁰ The purpose of the UCMJ was to unify and codify a single set of military laws applicable to all the armed forces. In 1951 the Manual for Courts-Martial was published and issued to implement the UCMJ. A revised Manual for Courts-Martial was issued in 1969.²¹ Both the code and the manual deal with matters of pretrial restraint.

The code regulates pretrial restraint in articles 9, 10, 13, and 33. Article 9 defines arrest and confinement, designates who may order enlisted personnel and officers into arrest or confinement, and provides that no person **may** be ordered into arrest or confinement except for probable cause.²² Article 10 states that persons subject to the UCMJ and charged with an offense shall be ordered into arrest **or** confinement, **as** circum-

²⁰ 10 U.S.C. 8 8 801-940 (1976), hereinafter referred to as "the code" or "the UCMJ."

²¹ *Manual for Courts-Martial*, United States, 1969 (Revised edition), hereinafter referred to as "MCM, 1969 (Rev.)," or "the manual" or "the MCM."

²² 10 U.S.C. § 809. The text of this provision, article 9, dealing with imposition of restraint, is as follows:

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by **an** order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or non-commissioned **officers** to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

stances may require. Immediate steps must be taken to inform the arrestee or confinee of the charges against him and to try him or release him.²³ Article 13 requires pretrial restraint to be no more rigorous than necessary to insure the prisoner's presence at trial.²⁴ Article 33 provides for the forwarding of charges from the investigating officer to the officer exercising jurisdiction in a general court-martial case within eight days, if practicable.²⁵

Among the most significant of the MCM paragraphs implementing the pretrial restraint provisions of the code are paragraphs 20c, 20d(1), and 21a. Paragraph 20c states that pretrial confinement is to be imposed only when necessary to insure the presence of the accused at trial or because

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

²³ 10 U.S. § 810. This tenth article, concerning restraint of persons charged with offenses, reads as follows:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in Confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

²⁴ 10 U.S.C. § 813. This provision, article 13, prohibits punishment before trial:

Subject to section 857 of this title [article 57], no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

²⁵ 10 U.S.C. § 833. Article 33, concerning forwarding of charges, states:

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

of the seriousness of the alleged offense.²⁶ Paragraph 20d(1) requires that no one be ordered into arrest or pretrial confinement except for probable cause. In addition, the confining or arresting authority must have either personal knowledge of the offense or must have made inquiry into it such that the known or reported facts furnish reasonable grounds for the arrest or confinement.²⁷ Paragraph 21a indicates that the decision to arrest or confine an accused is normally made by his unit commander.²⁸

²⁶ MCM, 1969 (Rev.), para. 20, Restraint. Subpara. c reads as follows:

c. *Confinement before trial.* As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

For C.M.A.'s views concerning this provision, see *United States v. Heard*, 3 M.J. 14, 20–21 (1977).

²⁷ MCM, 1969 (Rev.), para. 20, Restraint. The provision continues with subpara. d. :

d. *Procedure for arresting or confining.* (1)General. No person may be ordered into arrest or confinement except for probable cause (*Art. 9(d)*). No authority may order a person into arrest or confinement unless he has personal knowledge of the offense or has made inquiry into it. Full inquiry is not required, but the known or reported facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

The foregoing does not preclude imposition of restraint necessary for the administration of military justice, such as arrest, restriction, or confinement to insure the presence of an accused for impending execution of a punitive discharge. See also 21d. A person subject to punitive restraint as a result of the sentence of a court-martial or punishment under Article 15 is not chargeable with conformance to this restraint until notified of the action which places it in effect. See 131e and Article 57(b) and (c). Reasonable restraint may, however, be imposed pending receipt of notice that the sentence has been ordered into execution.

²⁸ MCM, 1969 (Rev.), para. 21, Arrest and Confinement, which states:

a. *Who may arrest or confine.* Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1)Commissioned officer, warrant officer, or civilian. Only a commanding officer to whose authority the individual is subject may order a commissioned officer, warrant officer, or civilian into arrest

*C. COMMANDER'S DISCRETION AND
PROTECTION OF THE RIGHTS OF THE PRETRIAL
CONFINEE UNDER THE UCMJ AND MANUAL FOR
COURTS-MARTIAL*

A careful reading of these articles and paragraphs reveals a perhaps unsurprising lack of procedural specificity and safeguards for the accused.²⁹ Vast discretion is vested in the unit commander to decide if a suspected offender could or should be confined prior to trial. The "could" question is dealt with by article 9(d), UCMJ, and paragraph 20d(1), MCM. Probable cause must exist to warrant arrest or confinement of the accused while awaiting trial by court-martial. The confining authority (commanding officer) must have satisfied himself that there are reasonable grounds for believing that the accused committed the alleged offense.

or confinement. The arrest or confinement must be effected by an order, oral *or* written, delivered in person or by another commissioned officer (Art. 9(c)). The authority to order such persons into arrest or confinement may not be delegated (Art. 9(c)). For this particular purpose, the term "commanding officer" refers to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to convene a summary court-martial.

(2) Enlisted member. Any commissioned officer may order an enlisted member into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or through other persons subject to the code (Art. 9(b)). A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement (Art. 9(b)). Thus, the commanding officer of any command or detachment may delegate to the warrant officers, petty officers, or noncommissioned officers thereof authority to place enlisted members who are assigned or attached to his command or detachment, or who are temporarily within its jurisdiction, for example, in quarters, camp, base, station, or ship, in arrest or confinement as a means of restraint at the instant when restraint is necessary.

²⁹ This lack of specificity and safeguards does not imply malicious or even casual disregard of the rights of the accused. Instead, it reflects the difficulties encountered in codifying any set of regulations. Specificity means a more complex and lengthy statute, and less flexibility in dealing with unforeseen circumstances.

It reflects, further, the date of enactment of the UCMJ and the original edition

The “should” question (one of bail procedures in the civilian community)³⁰ is regulated by Article 10, UCMJ, and paragraph 20c, MCM.³¹ Pretrial restraint should be imposed only to insure the presence of the accused at trial or because of the seriousness of the alleged offense (or, presumably, to prevent harm to others, or to the accused).

These code and manual provisions provide commanding officers great flexibility and leeway to confine accused servicepersons if and as they see fit. Certainly this flexibility enhances the commander’s power of disciplinary control over his unit, but in doing so it presents great potential for abuse of that power. The grant to commanders of extensive authority to order pretrial confinement would not, alone, pose a worrisome problem were redress of unwarranted pretrial confinement in the military not so difficult. There is no constitutional right to bail in the military justice system,³² and authorized remedies have proven ineffective.³³

of the MCM. The 1969 revision did not pertinently alter paragraphs 20c, 20d(1) or 21a. In the post-World War II and Korean War era, concern understandably weighed heavily in favor of the perceived needs of field commanders for discipline and control. Also, this was prior to the Warren Court’s activist liberalizations in the field of criminal law and procedure.

³⁰ There is no right to bail in the military. *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967); *United States v. Hangsleben*, 8 C.M.A. 320, 24 C.M.R. 130 (1957); *United States v. Bayhand*, 6 C.M.A. 762, 21 C.M.R. 84 (1956).

³¹ 4 Mil. L. Rev. 105. The use of the disjunctive “or” in paragraph 20c is somewhat misleading, as article 13 indicates that confinement shall not be “more rigorous than the circumstances require to insure [the accused’s] presence . . .” The ambiguity is somewhat dispelled by *DeChamplain v. Lovelace*, 23 C.M.A. 35, 48 C.M.R. 506 (1974), which indicated that the seriousness of the alleged offense is a major factor to be considered in determining the risk of nonappearance, and by *Heard*, *supra* note 26, at 18, which found article 13 to be descriptive merely of conditions of confinement and not relevant to the question whether an accused *should* be confined.

³² *Supra* note 30.

³³ Article 138, 10 U.S.C. § 938, implemented in the Army by Army Reg. No. 27-14, deals with complaints of wrongs, and reads thus:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The

As of 1975, therefore, a system of pretrial confinement vesting Virtually complete discretion in the **confining** officer and lacking adequate means of preventing or redressing unwarranted pretrial confinement had developed and existed in the military over a period of many years. The situation was soon to change, however. On February 18, 1975, the Supreme Court handed down its decision in **Gerstein v. Pugh**.³⁴

D. GERSTEIN AND COURTNEY

In **Gerstein**,³⁵ the Court unanimously held that any suspect arrested without a warrant and charged by information must, **as** a matter of fourth

officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained **of**; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Article 98, 10 U.S.C. § 898, concerns noncompliance with procedural rules:

Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused:

shall be punished as a court-martial may direct.

Article 97, 10 U.S.C. § 897, concerning unlawful detention, states:

Any person subject to this chapter, who, except **as** provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

Any remedy for unwarranted restraint prior to trial must be speedy if it is to be effective. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The article 138 remedy is enormously time-consuming, and the article 97 and 98 remedies (preferment of charges against the confining officer) ring somewhat hollow. *United States v. West*, 12 C.M.A. 670, 673, 31 C.M.R. 256, 259 (1962). See R. Boller, *supra* note 11, at 98-99.

³⁴ 420 U.S. 103 (1976).

³⁵ *Id.* at 105-6.

amendment right, be afforded a prompt judicial determination of probable cause by a neutral and detached magistrate before extended pretrial restraint is **permissible**.³⁶ This procedure is designed to protect the innocent from unfounded charges and prolonged detention, and at the same time to allow detention of those against whom probable cause has been found.

*Courtney v. Williams*³⁷ was decided by CMA less than a year after *Gerstein*. Chief Judge Fletcher's opinion for the court relied heavily on

Plaintiffs Pugh and Henderson were arrested in Dade County, Florida. Pugh was arrested on March 3, 1971. On March 16 he was charged by information with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Henderson was arrested on March 2 and charged by information on March 19 with the offenses of breaking and entering and assault and battery.

In Florida at that time indictments were required only for prosecution of capital offenses. Prosecutors could charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.

³⁶ The concept of "probable cause" will not be discussed in this article. The meaning of "probable cause" must be determined case by case under either the current military magisterial pretrial confinement hearing system, or under the author's proposed revision of that system.

The traditional definition of "probable cause" is stated in *Beck v. Ohio*, 379 U.S. 89, 91 (1964), "whether at that moment the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

The terms "prompt" and "neutral and detached," on the other hand, will be treated extensively. See *infra* notes 50–91, below, and accompanying text.

³⁷ *Supra* note 15, at 268–69. Courtney, a U.S. Navy fireman apprentice, was awaiting special court-martial for two specifications of unauthorized absence when he allegedly committed an assault on October 6, 1975. The next day, the convening authority of the special court-martial ordered Courtney into pretrial confinement after being advised of the assault incident by a subordinate.

Courtney remained in pretrial confinement until November 6, 1975. By this time, the victim of the alleged assault whose personal safety may have been endangered by Courtney's release had departed the area. At no time during the pretrial confinement was Courtney afforded an opportunity to challenge the convening authority's confinement decision.

Gerstein. It is apparent that *Gerstein* and the rather unsatisfactory provisions of the UCMJ for determining the legality of the pretrial confinement of a military accused served **as** catalysts for the *Courtney* decision.³⁸

Courtney mandated a major change in military pretrial confinement procedure. In an effort to protect accused service members from unwarranted pretrial confinement, CMA established the requirement that a neutral and detached magistrate determine whether pretrial confinement of an accused is justifiable (probable cause; the “could” question), and whether it is necessary (to insure presence at trial, or due to the seriousness of the charge, or because of the threat to the community or to an individual; the “should” question).³⁹

The various services responded to *Courtney* by promulgating regulations to establish military magistrate **systems**.⁴⁰ This article will next explore the workings of the Department of the Navy Military Magistrate Program⁴¹ as **an** example of how the military’s response to the *Courtney*

³⁸ *Courtney*, *supra* note 15, at 269. The court was concerned “[b]ecause of the recurring problem that is presented by the petition,”

³⁹ *Courtney*, *supra* note 15, at 271. “A magistrate must decide if a person could be detained and if he should be detained.”

⁴⁰ In the Army, chapter 16 of Army Regulation No. 27–10 governs. The analogous Air Force provisions are found in Air Force Manual No. 111–1, at para. 3–25. The Navy and Marine Corps system is governed by SECNAV Instruction No. 1640.10. For the Coast Guard, No. CG–488, the Military Justice Manual, part 202, is controlling. The texts of these provisions are set forth in Appendices 11, 111, IV, and V, below.

Each of these four military magistrate systems, although designed to deal with the same problem (that of unnecessary or illegal pretrial confinement of accused military personnel), differs fundamentally in several significant areas. Even after considering the unique needs of each of the services, these differences seem inexplicable. The question of uniformity of military magistrate programs among the armed forces will be discussed below at notes 92–106 and the accompanying text.

⁴¹ *Supra* note 40. Of these four programs, the author is most familiar with the Navy/Marine Corps military magistrate system and has compiled statistical data concerning the operation of that system as it has been implemented in the United States Marine Corps. The Navy/Marine Corps military magistrate program is a particularly representative one, in that it must combine the concerns of both sea-going forces, such as the Coast Guard, and land-operating forces, such as the Army and Air Force.

decision is practically inadequate in terms of the real protection it provides for service members ordered into pretrial confinement.

IV. EVIDENCE OF ABUSE IN THE PRESENT MAGISTRATE SYSTEMS

The Department of the Navy established its military magistrate program by directive (SECNAVNOTE 5810) on October 15, 1976.⁴² As it applied to the Marine Corps, SECNAVNOTE 5810 required marine commanders exercising general court-martial jurisdiction over shore activities having a naval place of confinement to establish and monitor a magistrate program.⁴³

Since its inception and implementation in 1976, the Marine Corps military magistrate program has not been carefully and systematically scrutinized to determine whether it does, in fact, provide adequate protection from illegal or unnecessary pretrial confinement for accused marines. The author conducted an unofficial survey of the operation of the Marine Corps military magistrate program during the summer of 1978.⁴⁴ The method of the survey was to determine for every calendar day from

⁴² The temporary SECNAVNOTE 5810 (Appendix 111, below) was superseded by SECNAV Instruction 1640.10 on August 16, 1978. The provisions of these two regulations are basically the same as they pertain to the arguments in this article. Nevertheless, it should be noted that the data here reported and analyzed were compiled under the SECNAVNOTE 5810 program only.

⁴³ Paragraph 3.a., SECNAVNOTE 5810. At the time of the author's research, conducted from June through August 1978, these generals were the commanding generals of MCB [Marine Corps Base], Camp Lejeune, North Carolina; MCB, Camp Pendleton, California; MCB, Quantico, Virginia; MCB, Camp Butler, Okinawa, Japan; and the MCLSB [Marine Corps Logistics Support Base], Albany, Georgia.

⁴⁴ While serving as a summer intern in the Appellate Defense Division, Navy Appellate Review Activity, Washington, D. C., the author assisted Captain Joseph F. Smith, USMCR (Ret.), in preparation of a petition for review in the Court of Military Appeals in the case of United States v. McCabe, NCMR No. 771776, pet. denied, 6 M.J. 104 (1978).

Private McCabe had twice been placed in pretrial confinement by his commanding officer on a Friday afternoon, spent the weekend in the brig, and was immediately released the following Monday when the magistrate determined Private McCabe's confinement to be unwarranted. SECNAVNOTE 5810 permitted such a 72-hour delay between confinement and hearing, as does its successor, SECNAV Instruction 1640.10. The potential for abuse of this grace period

October 15, 1976, through (approximately) July 1978, the number of marines placed in pretrial confinement and the number of military magistrate hearings held. A summary of the data collected is set forth in the two tables and the figure below.

TABLE 1. CONFINEMENTS

	M	T	W	TH	F	S	SUN	TOTAL
MCLSBALBANY	15	8	7	7	10	3	2	52
QUANTICO	24	40	41	110	233	34	16	498
PARRIS ISLAND	12	20	31	39	62	35	21	220
PENDLETON	201	225	255	247	428	32	13	1401
LEJEUNE	192	216	184	352	364	29	19	1356
TOTALS	444	509	518	755	1097	133	71	3527

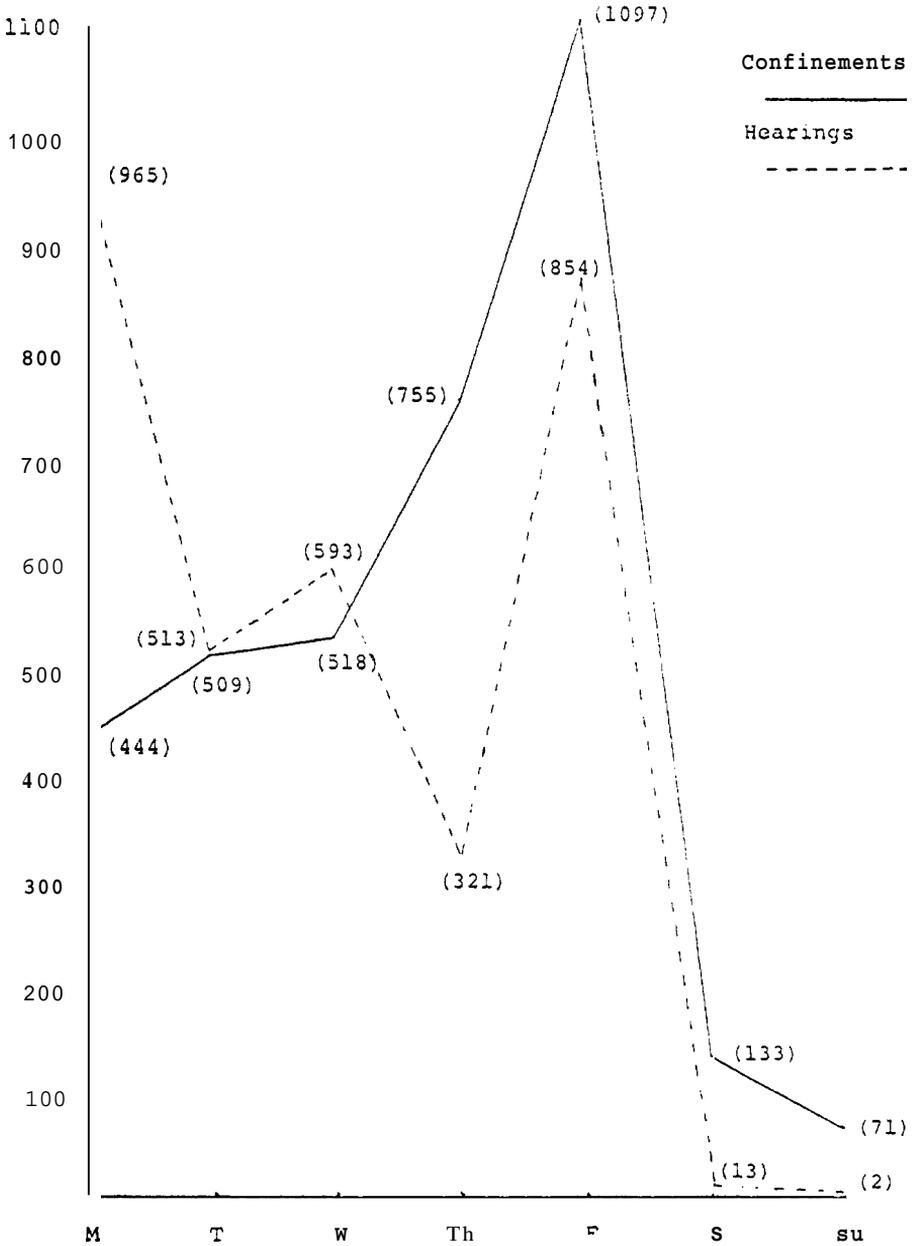
TABLE 2. HEARINGS

	M	T	W	TH	F	S	SUN	TOTAL
MCLSBALBANY	10	3	1	4	5	0	0	23
QUANTICO	164	151	41	28	113	1	0	498
PARRIS ISLAND	20	13	25	13	21	3	1	96
PENDLETON	375	100	356	49	438	3	1	1322
LEJEUNE	396	246	170	227	277	6	0	1322
TOTALS	965	513	593	321	854	13	2	3261

is manifest. "Troublemakers" can be routinely confined for up to three days without a hearing of any sort.

Wondering just how pervasive such practices were, Captain Smith and the author initiated a series of requests for information from the commands listed in note 43, *supra*, and with some effort were able to compile fairly complete data from five of the six commands. The MCB, Camp Butler, Okinawa, Japan, never responded to several requests. The MCB, Camp Lejeune, North Carolina, could provide data only for the period from August 1977, until mid-August 1978. The MCB, Camp Pendleton, California, had data through February 1977, only. Nonetheless, the data which was collected is a very large and representative sample of the workings of the military magistrate system, Marine Corps-wide.

FIGURE 1



The summary reveals that pretrial confinements of marines reach a peak on Friday, while magistrate hearings are held most often on Monday. Clearly, hundreds of marines are spending their weekends in the brig awaiting a magistrate **hearing**.⁴⁵ To be sure, many of them are continued in confinement by the magistrate when a hearing is finally held. To these marines, it can be argued, the weekend delay has caused no significant harm.

However, for most of those who are released from confinement by the magistrate, pretrial incarceration is and has been, by definition, unnecessary, illegal, or both. These pretrial confinees have suffered very real injury in the form of deprivation of liberty.⁴⁶ Perhaps more important is

⁴⁵ Observe that while there were 965 Monday hearings, there were only 444 Monday confinements. Even assuming all Monday Confinements were heard the same day (and it is *highly* unlikely that more than a few Monday confinees appeared before a magistrate the same day, due to the administrative procedures currently required prior to confinement of a serviceperson), the remaining 521 hearings were, at best, for Friday–Sunday confinements. Since there were only 204 Saturday–Sunday confinements, the remaining 317 hearings had to be for Friday confinees. As some of the raw data clearly revealed, a number of these 317 confinees were probably incarcerated even earlier than the previous Friday.

⁴⁶ This is not to say that release of servicemembers by a magistrate shows that, in deciding to confine them, commanders were acting upon improper motivation. The law is complex and subject to frequent change, so that even lawyers, if they do not specialize in military justice, cannot always be certain whether confinement is proper. In addition, commanders have many duties to perform other than those pertaining to military justice. The pressure of the commander's workload virtually ensures that he or she will from time to time make an erroneous decision in a close case. Moreover, the confining commander is a legal adversary of the accused, a party to the dispute, for purposes of determinations of the legality of pretrial confinement. Magistrates, in contrast, are free of the burdens of command and generally remote from the scene of the activities of the accused which led to confinement. Before the magistrate, the commander and the confinee as parties are equals, regardless of all other considerations. It is inevitable that magistrates will occasionally disagree with commanders' decisions to confine, because of all these differences of perspective. That some confinees are released by magistrates should be occasion neither for surprise nor alarm.

Although most commanders perform their duties conscientiously, abuses can occur, inadvertently or otherwise. Pretrial confinement for reasons other than those permitted by law is improper, and commanders should ensure that their knowledge of this area of law is as complete and up to date as possible.

Two examples of apparently wholesale disregard for the rights of large groups of pretrial confinees emerged **from** the author's investigations. At the Marine Corps Recruit Depot, Parris Island, South Carolina, the number of confinements

a realization that the probability of lengthy delay between confinement and hearing is systematic and is characteristic of the current Navy-Marine Corps military magistrate program.⁴⁷ This institutional problem, with its concomitant potential for abuse, is contrary to the letter and spirit of *Gerstein* and *Courtney*.⁴⁸

during the surveyed period was more than double the number of hearings held. This disparity apparently resulted from the confinement of discontented recruits for periods of up to 72 hours without a magistrate hearing. They were then released from confinement by their units before a hearing had to be held under the 72-hour standard of SECNAVNOTE 5810. The same standard is retained in SECNAV Instruction 1640.10. Incarceration apparently was the only way, or at least the easiest way, to separate these "bad" recruits from the good ones while the recruit-confinees were awaiting administrative discharge from boot camp.

At MCB, Camp Pendleton, California, the MCB military magistrate has an informal policy of holding hearings on Monday, Wednesday, and Friday only, as often as possible. Thus, for example, a Marine confined Monday evening or Tuesday morning will not have a hearing until Wednesday at the very earliest, even though the military magistrate is alive, well and working at Camp Pendleton all day Tuesday.

⁴⁷ The SECNAVNOTE 5810 and SECNAV Instruction 1640.10 provision permitting up to 72 hours delay between confinement and magisterial hearing will be discussed further below, at notes 50-74 and accompanying text. In addition, it will be seen that the Army, Air Force and Coast Guard military magistrate systems have similar, systemic delay provisions.

⁴⁸ After-the-fact relief is a possibility for those subsequently convicted by courts-martial. Where pretrial incarceration is illegal, the court should consider it when imposing sentence. *United States v. Kirby*, 41 C.M.R. 702 (ACMR 1970). Automatic credit need not be given, however. *United States v. Lockhart*, 43 C.M.R. 968 (AFCMR), *pet. denied*, 43 C.M.R. 413 (1971). Illegal pretrial restraint is also a basis for sentence reduction on appeal. Para. 88b, MCM, 1969 (Rev.); *United States v. Jennings*, 19 C.M.A. 88, 41 C.M.R. 88 (1969).

Federal procedure requires sentence credit for pretrial restraint. 18 U.S.C. § 3668. In *United States v. Clark*, 17 C.M.A. 26, 27, 37 C.M.R. 290, 291 n. 1 (1967), the Court of Military Appeals suggested that the President should make the military conform to the civilian procedure.

However, after-the-fact relief obviously offers no remedy to an accused who is acquitted at trial. Judicial relief, therefore, is an incomplete answer to the problem of unnecessary or illegal pretrial confinement. In an important sense, after-the-fact judicial relief is totally unacceptable. Such remedy fails to require the government to adhere to the legal requirements for pretrial Confinement. Permitting the government to disregard the law with impunity erodes the concept of equal justice. H. Moyer, *Justice and the Military* § 2-360 (1972).

Although the Department of the Navy's response to Courtney has certainly provided increased protection for the rights of pretrial confinees when compared to pre-Courtney days, this survey indicates at least one area (confinement-hearing delay) in which these protections remain inadequate.⁴⁹ An examination of *Gerstein* and Courtney will provide a more thorough analysis of this "promptness" problem as well as reveal at least two other major shortcomings of military magistrate programs.

V. DEFECTS IN THE MILITARY MAGISTRATE SYSTEMS

A. PROMPT PRESENTMENT

The American system of law is solicitously protective of the "right of the people to be secure in their persons . . . against unreasonable . . . seizures . . ." ⁵⁰ It cannot tolerate the holding of a person in jail without

⁴⁹ The limitations of the author's *post hoc* evaluation of the Marine Corps military magistrate system are several, not the least of which is the lack of experimental control for the evaluator's bias. Use of aggregated data out of official systems can result in different conclusions, based on the evaluator's assumptions. See D. Campbell and J. Stanley, *Experimental and Quasi-Experimental Designs for Research* (1966).

In addition, even if the Marine Corps military magistrate system is demonstrably inadequate to protect pretrial confinees from illegal or unnecessary pretrial confinement, it does not ineluctably follow that Army, Air Force, Coast Guard or even Navy systems are similarly inadequate.

A couple of important things must be said in favor of this unofficial survey, however. First, it raises a question worth asking, to wit, "Are pretrial confinees properly protected from illegal or unnecessary pretrial confinement under current military magistrate programs?" Second, it provides an intriguing and disturbing (if not exhaustive) negative answer to that question, as regards the Marine Corps. If nothing else, this evaluation should inspire much more thorough and rigorous studies of the military pretrial confinement problem to confirm or disprove the results presented here.

This is not to say that the author doubts the validity of his sample results. To the contrary, he is convinced that the trends reflected in this study are indicative of the weaknesses of military magistrate programs in all the services. However, it would be unfair to imply more scientific precision in the survey than actually existed.

⁵⁰ U.S. Const., amend. IV.

some preliminary determination that there is just and probable cause for the incarceration. Nor can it tolerate a leisurely determination of probable cause. Prompt presentment is a fundamental right guaranteed by the Constitution to all citizens. The foundation of the constitutional right to prompt presentment lies in the fourth amendment's protection against unreasonable seizure. Delays in presentment must be closely scrutinized and the justifiable reasons for such delays are narrowly circumscribed.

The fourth amendment states that no warrant shall issue except upon probable cause. The Supreme Court has held that the probable cause standard applies equally to all arrests, whether made with or without a warrant.⁵¹

Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.

Regarding warrantless arrests, the issue of the swiftness with which the probable cause determination must be made was addressed in *Gerstein*.⁵²

Whatever procedure [the Government] may adopt, it must provide a fair and reliable determination for probable cause as a condition for any significant pre-trial restraint of liberty, and this determination must be made by a judicial officer either before or *promptly* after arrest.

The Court explained the rationale behind its holding in these terms:⁵³

[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime and for a brief period of detention to take the administrative steps incident to arrest. *Once the subject is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate.* There no longer is any danger that the suspect will escape or commit further crimes while the police

⁵¹ *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

⁵² *Supm* note 34, at 124–25 (emphasis added).

⁵³ *Id.* at 113–14 (emphasis added).

submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pre-trial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships: . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.

It is clear that an accused suffers immeasurably great harm if he is improperly or unnecessarily placed in pretrial confinement. Indeed, the Court of Military Appeals stated in *Courtney*:”

A fundamental component of due process is the presumption of innocence accorded the criminal defendant. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Pretrial release has long been recognized as a vital concomitant of that presumption. If a person may arbitrarily be confined before his trial, then in truth punishment precedes conviction and the presumption of innocence avails defendant little. *DeChamplain v. Lovelace*, 510 F.2d 419,424 (8th Cir. 1975), judgment vacated as moot, 421 U.S. 996, 95 S.Ct. 2392, 44 L.Ed.2d 664 (1975). See also *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

The “traditional right to freedom before conviction permits the unhampered preparation of a defense.” *DeChamplain v. Lovelace*, *supra* at 424, citing *Stack v. Boyle*, *supra*. In addition to the psychological and physical deprivations brought about by incarceration and the hardships caused to members of an incarcerated person's family, studies have indicated that the conviction rate for jailed defendants materially exceeds that of bailed defendants and a bailed defendant is far more likely to receive probation than his jailed counterpart since the former has been able to demonstrate his reliability under supervision. See *ABA Standards Relating to the Administration of Criminal Justice*, Compilation, p. 216 (1974).

⁶⁴ *Supra* note 15, at 271. With regard to the types of harm which an improperly confined person suffers, see also *Heard*, *supra* note 26, at 21 n. 16.

The CMA did not squarely face the promptness issue in *Courtney* but arguably did incorporate by reference the *Gerstein* promptness language. Be that as it may, CMA has spoken to the matter recently in *United States v. Malia*.⁵⁵ “The first hearing by a magistrate after confinement should be prompt, that is, without unnecessary delay.” The phrase “without unnecessary delay” is cited to the ABA Standards, and, because the pertinent portions of *Malia* relied on *Gerstein* and *Courtney*, it seems reasonable to conclude that the term “prompt” derives its meaning from *Gerstein*.

The Supreme Court has not stated a specific constitutional limitation on the length of time police may detain a suspect without presentation before a judicial officer.⁵⁶ In fact, it is likely that the Supreme Court was deliberately treading softly in this area in *Gerstein* in order to permit the states some latitude in developing (and, more importantly, maintaining the validity of current) presentment statutes.⁵⁷ Not coincidentally, the *Gerstein* “promptly” language is easily accommodated by the presentment statutes of almost every state.⁵⁸

⁵⁵ 6 M.J. 65, 67 (1978). The phrase “without unnecessary delay” was cited to the ABA Standards, Pretrial Release § 4.1 (1968).

The C.M.A. further held in *Malia* “. . . that the initial consideration of pretrial confinement must be immediate. . . .” Specialist Four Malia was confined four days before he was granted a magisterial hearing. However, the matter of prompt presentment was not an issue decided by C.M.A. in the case. The court did use this case as a vehicle to elaborate the due process prerequisite of a magisterial hearing, but the promptness issue was not the ultimate question addressed.

The due process question was the propriety of a magistrate receiving *ex parte* communications from the commander when determining to return an accused to pretrial confinement. Thus, it would not be correct to conclude the C.M.A. has decided that 4 days’ delay is “prompt,” “without unnecessary delay,” or “immediate” enough to satisfy fourth amendment requirements.

⁵⁶ *Michigan v. Mosely*, 423 U.S. 96, 118 n. 6 (1975) (Brennan, J., dissenting).

⁵⁷ *Supra* note 34, at 123–25.

⁵⁸ A majority of states (28) and the District of Columbia have adopted the language of the ABA Standards, Pretrial Release § 4.1 (1968), specifying that action be taken “without unnecessary delay”:

Cal. Penal Code § 849 (1979);
 Colo. Rev. Stat. § 16–2–112 (1973);
 D.C. Code § 23–562 (1973);

Idaho Code § 19-615 (1948);
 Ill. Rev. Stat. ch. 38 § 109-1 (1975);
 Iowa Code Ann. § 804.22 (1978 Spec. Pamphlet);
 Kan. Stat. Ann. § 22-2901 (1974);
 Me. Rev. Stat. Ann., Rule 5(a) (1975) (Supp. Pamphlet);
 Mich. Stat. Ann. § 28.871(1) (1978) (felony); § 28.872(1) (1978) (misdemeanor);
 Miss. Code Ann. § 99-3-17 (1972);
 Mont. Rev. Codes Ann. § 95-901 (1969);
 Nev. Rev. Stats. 171.178 (1977);
 N.J. Rules Governing the Courts, Rule 3:4-1 (1978);
 N.M. Stat. Ann. § 31-1-5 (1978);
 N.Y. Crim. Pro. Law § 140.20 (CLS, 1976);
 N.C. Gen. Stat. § 15A-511 (1978);
 N.D. Cent. Code Ann. § 29-06-25 (1974);
 Ohio Rev. Code Ann. § 2935.05 (1974);
 Okla. Stat. Ann. tit. 22 § 181 (1969);
 Pa. Rules of Court, Rules of Crim. Proc., Rule 130 (1978);
 R.I. Gen. Laws, Court Rules, Crim. hoc., Rule 5 (1978 Cum. Pocket Supp.);
 S.D. Codified Laws Ann. § 23A-4-1 (1978 Spec. Supp.);
 Tex. Stat. Ann., Code Crim. Proc., Art. 15.17 (1977);
 Utah Code Ann. § 77-13-17 (1978);
 Vt. Stat. Ann., Rules of Crim. Proc., Rule 3(b) (1974);
 Va. Code Ann., Rules of Sup. Ct. of Va., Rule 3A:5 (1977);
 Wash. Rev. Code, Justice Court Crim. Rules, Rule 2.03 (1976);
 W. Va. Code § 62-1-5 (1977); and
 Wyo. Stat. Ann., Rules of Crim. Proc., Rule 5(a) (1977).

Three states provide for bringing before a magistrate “forthwith”:

Ala. Code § 15-10-7 (1975);
 Ark. Stat. Ann. § 43-601 (1977); and
 Ind. Code § 35-4-1-1 (1976).

Thirteen state statutes specify a set time period:

Alaska Stat. § 12.25.150 (1978 Cum. Supp.) (24 hours);
 Ariz. Rev. Stat., Rules of Crim. hoc., Rule 4.1(a) (1978 Cum. Pocket Part) (24 hours);
 Del. Code Ann. § 1909 (1974) (24 hours);
 Fla. Stat. Ann., Rule 3.131 (1978) (72 hours);
 Ga. Code Ann. § 27-212 (1978) (48 hours);
 Haw. Rev., Stat. § 803-9 (1976) (48 hours);
 Ky. Rev. Stat., Rule 3.02 (1978 Cum. Supp.) (12 hours);
 La. Stat. Ann., Code of Crim. Proc., Art. 230.1 (Cum. Ann. Pocket Part 1978) (provides for bringing before magistrate for appointment of counsel within 72 hours);
 Md. Ann. Code, Maryland District Rule 709 (1977) (24 hours);
 Minn. Rules of Court, Rules of Crim. Proc., Rule 4.02 (1978) (36 hours);
 Mo. Ann. Stat. 544.170 (1953) (20 hours);

Nonetheless, the Supreme Court did provide an important elaboration on the term “promptly” in its *Gerstein* opinion. The Court declared that after arrest, the suspect could be subject only to a “brief period of detention to take the administrative steps incident to arrest.”⁵⁹

Two federal courts have quantified *Gerstein’s* (“promptly” and “brief period of detention” language. Based upon District of Columbia arrest

Neb. Rev. Stat. § 29-410 (1975) (overnight or longer); and
N.H. Rev. Stat. Ann. § 594:20-a (1974) (24 hours).

Six state statutes fall into a “miscellaneous” category:

Conn. Gen. Stat. Ann. § 6-49 (Cum. Ann. Pocket Part 1978) (with reasonable promptness);

Mass. Rules of Court, Rules of Crim. Proc., Rule 7 (1979) (shall be brought before a court then in session, and if not, at its next session);

Or. Rev. Stat. § 135-245 (1977) (without undue delay);

S.C. Code § 17-13-10 (1976) “[T]ake him to a judge or magistrate, to be dealt with according to law,” has been interpreted by the Supreme Court of South Carolina to mean “within a reasonable time” after arrest. *State v. Swilling*, 249 S.C. 541, 155 S. E. 2d 607 (1967).

Tenn. Code Ann. § 40-604 (1975) “No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate.” The Tennessee Supreme Court has held that under this statute, detention of a prisoner for two days before granting a magistrate hearing is not unlawful, *State ex. rel. Reed v. Heer*, 218 Tenn. 338, 403 S. W. 2d 310 (1966). Note: The Tennessee Supreme Court proposed Rules of Criminal Procedure in 1977 which include a “without unnecessary delay” provision for the initial appearance before a magistrate. The Tennessee General Assembly has not yet approved these proposed rules. Tenn. Court Rules, Rules of Crim. Proc. (proposed text), Rule 5 (1977);

Wis. Stats. 970.01 (1975) (within a reasonable time).

Given the Supreme Court’s stated concern for flexibility in state procedures, it is perhaps not surprising that there has been little state case law, and little need for it, interpreting presentment statutes after *Gerstein*. See generally *Johnson v. State*, 282 Md. 314, 384 A.2d 709 (1978); *Commonwealth v. Davenport*, 471 Pa. 278, 370 A.2d 301 (1977); *Williams v. State*, 264 Ind. 664, 348 N.E. 2d 263 (1976); *State v. Wyman*, 97 Idaho 486, 547 P.2d 531 (1976); *In Re Walters*, 15 C.3d 738, 543 P.2d 607 (1975); *People v. Toler*, 32 Ill. App. 3d 793, 336 N.E. 2d 270 (1975).

The relevant federal standard in cases of warrantless arrest is Fed. R. Crim. Proc. 5(a). The arrested party is to be taken before a magistrate “without unnecessary delay,” and a complaint shall be filed “forthwith” by the magistrate (in compliance with Fed. R. Crim. Proc. 4(a)).

⁵⁹ *Supra* note 53, and accompanying text.

processing procedures, the District of Columbia District Court recently ordered that all arrestees must arrive at the courthouse for a hearing within four hours of **arrest**.⁶⁰ The court said, “The balance weighs so heavily in favor of the individual that the police can justify each delay before presentment only by a strong showing that it is necessitated by a substantial administrative need.”⁶¹

Relying directly on *Gerstein*, the District Court of the Northern District of Alabama, in an order that has been endorsed by the Fifth Circuit,⁶² held that persons arrested without a warrant must be taken before a magistrate for prompt determination of probable cause within a reasonable time. This period cannot exceed **24 hours**.⁶³

The constitutional right to prompt presentment in the military does not require that pretrial confinees be taken before a military magistrate immediately after the confinement is ordered. A “brief period of detention” is permissible “to take the administrative steps incident to arrest” (physical examination, inventory of possessions, paperwork, etc.). After that brief period, however, the core guarantee of the fourth amendment moves into the foreground.

The individual ordered into confinement must be brought before a magistrate who determines if justification exists for the pretrial incar-

⁶⁰ *Lively v. Cullinane*, Civil Action No. **75-0315** (D.D.C., July **31, 1978**) (interim order). The text of this order is set forth in Appendix VI, below.

⁶¹ *Lively v. Cullinane*, **451 F. Supp. 1000, 1005** (D.D.C. **1978**) (memorandum and order).

⁶² The district court judge later vacated his order on the ground that the claim was moot. The fifth circuit reversed the district court’s vacation of its earlier order. After stating that the reasons given by the trial court for vacating its order were unacceptable, the court of appeals went on to say: “We further believe that the plaintiffs class should be entitled to appropriate relief because their complaint falls well within *Gerstein v. Pugh* *McGill v. Parsons*, **532 F.2d 484, 485** (1976).”

⁶³ *Id.*, at **486 n.2** (order of March 28, **1975**). The author does not read the order in *McGill* as holding that any period within **24 hours** after arrest is a reasonable time for presentment. An unreasonable delay can quite often be one of far less than **24 hours**. Since any detention of an individual infringes upon his constitutional rights, the government must pursue its legitimate purposes by means which deny the fundamental right of personal liberty as briefly as possible. *See e.g.*, *Shelton v. Tucker*, **364 U.S. 479, 488** (1960).

ceration. *Lively* and *McGill* make plain the meaning of fourth amendment prompt presentment. Any delay between arrest and hearing (except for a brief administrative processing period) is unconstitutional.

Furthermore, under normal circumstances, there would seem to be no acceptable excuse for a delay of more than **24** hours between an order to confinement or apprehension and a magisterial hearing. Nor is the “end of the working day” or the coming of the weekend or a holiday period justifiable reason for delaying a military pretrial detainee’s magisterial hearing for more than **24** hours.

Certainly there are extraordinary circumstances under which a magisterial hearing could not be held within **24** hours. Combat operations, geographically remote posts and stations, ships at sea, field/ocean training exercises isolated by distance, transportation or communications difficulties, severe weather conditions and other “acts of God” all involve circumstances so unusual as to require perhaps lengthy delay between the order to confinement and a magistrate hearing. But there are pitifully few legitimate justifications for delay of more than **24** hours between order to confinement and hearing in the typical peacetime garrison/port situation.

Although CMA did not specifically confront the promptness issue until *Malia*,⁶⁴ it alluded to the matter both in *Courtney* and in *Heard*. In *Courtney*,⁶⁵ CMA agreed with the principles enunciated in *DeChamplain v. Lovelace*,⁶⁶ which include the conclusion that

the accused serviceman must be afforded an opportunity, before or within a reasonable time after he is *ordered into confinement*, to appear before a neutral officer or judge and present evidence relevant to the necessity for confinement before trial.

The distinction between the terms “order into confinement” and “place in confinement” is apparent. The former refers to an oral or written directive initiating the confinement process, but prior to actual incarceration. The latter describes the completed task of confinement of a person, or the act of obeying an “order into confinement.”

⁶⁴ *Supra* note 55. Recall, also, that *Courtney* could be considered to have incorporated the *Gerstein* “promptly” language by reference.

⁶⁵ *Supra* note 15, at 271 n.13.

⁶⁶ 510 F.2d 419, 426 (8th Cir. 1975) (emphasis added).

The *DeChamplain* court chose the words “after he is *ordered* into confinement” to describe the time frame within which a magisterial hearing must take place, not “after he is *placed* in confinement.” In *Courtney*, **CMA** declared its support of the *DeChamplain* principles after presumably careful and considered deliberation. Thus, it seems the *Courtney* court regarded the military magistrate system as one which should function at some point before pretrial incarceration has begun, before the accused is ever actually placed in the brig.

Further evidence of **CMA**'s intent with respect to the promptness issue may be found in *Courtney*⁶⁷ and *Heard*.⁶⁸ The magistrate's job is defined as one of determining whether a person “should be detained.” The “should be detained” language describes a hearing which is held prior to any actual pretrial confinement. It describes a determination of whether confinement should, in fact, commence at all. If it were intended that the magisterial hearing be held after confinement had already begun, the phrase “should continue to be detained” would more accurately have characterized the magistrate's duties.

Faced with simple alternative word choices, **CMA** selected language describing a magisterial hearing which takes place before confinement begins.⁶⁹ This represents the highest ideal of pretrial restraint procedure—a hearing system which functions in so timely a fashion as to guarantee that no illegal pretrial confinement will be suffered at all.⁷⁰

⁶⁷ *Supra* note 15, at 271.

⁶⁸ *Supra* note 26, at 18.

⁶⁹ *But see Malia*, *supra* note 55, and accompanying text. Is there an implicit assumption by C.M.A. that the “first hearing” is not required until “after confinement” of the accused? The meaning of the phrase is not totally clear. In any event, the notion of a hearing prior to confinement need not be taken to an absurd extreme. Certainly a suspect may be subject to restraint and supervision while awaiting a magistrate hearing (restriction, “chaser” custody, or even temporary incarceration (perhaps in the local military police detention cell) for violent or dangerous suspects, or during hours of the night in which other forms of restraint or supervision are impractical). The requirement of a hearing prior to confinement simply precludes the possibility that a suspect can be incarcerated in the place of long-term confinement (the brig) before a magistrate hearing. This provides the confining officer an incentive to get the accused before a magistrate as expeditiously as possible. Until he does so, the confining officer will not be “rid” of the suspect.

⁷⁰ *Heard*, *supra* note 26, at 23. “But the most appropriate ‘remedy’ —and, indeed, that which reflects best on our justice system — is for illegal pretrial confinement not to be suffered at all.” *Id.*

The current military magistrate programs of the several services permit delays between confinement and hearing ranging from 72 hours to seven days.⁷¹ Thus, despite the emphasis in *Courtney* and *Heard* on the onerous nature of pretrial confinementⁿ and the holding in *Heard* that confinement should be imposed only after lesser forms of restriction have been tried and found wanting,⁷³ the various military magistrate programs routinely allow suspects to be incarcerated for periods of three days and more without a probable cause hearing, and without any meaningful justification for the delay.

It seems abundantly clear that *Gerstein*, *Lively*, *McGill*, *Courtney*, and *Heard* envision a military magistrate program capable of responsive action 24 hours a day and seven days a week to protect the rights of servicepersons ordered into pretrial confinement.⁷⁴ The justice process

⁷¹ See the discussion of uniformity among the services, at notes 92–106, below, and the accompanying text, for details of the four military magistrate systems.

In brief, the limits are: Army—7 days; Air Force and Coast Guard—72 hours; and Navy/Marine Corps—72 hours, plus. In the Marine Corps, for example, the 72 hour delay is not only permissible, but seems to be standard. See statistical summary and note 45, *supra*.

⁷² *Courtney*, *supra* note 15, at 271. *Heard*, *supra* note 26, at 20.

⁷³ *Heard*, *supra* note 26, at 21–22. The *Heard* “stepped process” has been read much less than literally by three Courts of Military Review. The Navy C.M.R. fired a broadside at C.M.A. in *United States v. Burke*, 4 M.J. 530, 534–35 (NCMR 1977), and decided upon a more flexible interpretation of *Heard*’s “stepped process.” The AFCMR adopted the *Burke* position in *United States v. Franklin*, 4 M.J. 635, 636–37 (AFCMR 1977). The ACMR reached a similar position in *United States v. Gaskins*, 5 M.J. 772, 775 (ACMR 1978) and in *United States v. Otero*, 5 M.J. 781, 782–83 (ACMR 1978).

Notwithstanding these modifications of the *Heard* methodology, the principle for which the “stepped process” stands—that confinement is a particularly harsh and burdensome form of pretrial detention which should be employed sparingly and as a last resort—remains sound.

⁷⁴ An all-day, everyday program does not require a uniformed magistrate, gavel in hand, poised to administer justice at a moment’s notice. It does require weekend and afterhours availability. For example, all service members ordered into confinement between the hours of midnight and 1600 should be presented before a magistrate prior to the end of the same day. All service members ordered into confinement between the hours of 1600 and midnight should be presented before a magistrate prior to 1600 the next day. Thus, service members would have a hearing within 24 hours of being ordered into confinement and magistrates would not have to stand all-night vigils at their desks.

does not, and should not, come grinding to a halt at five o'clock in the afternoon and on weekends and holidays. The military conducts business all day, every day of the year. It is only fair that a system which allows a service member to be ordered into pretrial confinement at any time, day or night, provide for protection against abuse at all times, day and night.

B. NEUTRAL, AND DETACHED MAGISTRATE

The Supreme Court has repeatedly held that the determination as to whether probable cause exists must be made by a neutral judicial officer. The Court instructed in *Terry v. Ohio*.⁷⁵

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or a seizure in light of the particular circumstances . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

The underlying reason for this requirement was identified more than thirty years ago in *Johnson v. United States*.⁷⁶

[The Fourth Amendment's] protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crimes.

In *Gerstein*, the Supreme Court held that “the detached judgment of a neutral magistrate” is required to make a satisfactory fourth amendment probable cause determination.⁷⁷ The Court further noted that “a

⁷⁵ 392 U.S. 1, 21–22 (1968).

⁷⁶ 333 U.S. 10, 13–14 (1948).

⁷⁷ *Supra*, text accompanying note 53. *Accord*, *United States v. Turner*, 558 F.2d 46, 50, (2d Cir. 1977). “The Fourth Amendment requires that the determination of probable cause—the judgmental function of drawing inferences from evidence and declaring whether probable cause exists—be made by a neutral and detached magistrate.”

prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached **magistrate**.⁷⁸ The prosecutor's duty is to vindicate the state's interest in enforcing its laws. In contrast, the magistrate's role is to remain wholly disinterested, to see both sides of the case with bias toward neither.

In *Courtney*, the Court of Military Appeals held that a "neutral and detached magistrate" must determine if a person could and should be placed in pretrial confinement." Because of the peculiar nature of the military, with its command organization and rigid hierarchical structure, it would seem extraordinarily difficult for a non-lawyer military magistrate to be "neutral and detached" within the meaning of the fourth amendment, *Gerstein*, and *Courtney*.

The CMA has previously recognized the problems inherent in the use of lay persons to make judicial decisions.⁸⁰ As the court observed in *United States v. Payne*,⁸¹ the competence of laymen to render judicial decisions has been repeatedly challenged in the Supreme Court. Moreover, CMA has had occasion to consider the competence of lay persons to render judicial decisions in its review of magistrate pretrial confinement hearings.⁸²

In *Payne*, CMA noted some of the more serious problems inhering in the use of lay judges.⁸³

⁷⁸ *Gerstein*, *supra* note 34, at 117, *citing* *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971).

⁷⁹ *Supra* note 15, at 271.

⁸⁰ *United States v. Booker*, 3 M.J. 443, 445 n. 13 (1977); *United States v. Payne*, 3 M.J. 354 (1977).

⁸¹ *Supra* note 80, at 355 n. 6.

⁸² *Fletcher v. Commanding Officer*, 2 M.J. 234 (1977). Marines involved in an altercation at Camp Pendleton (the notorious Ku Klux Klan incident of November 13, 1976) were continued in pretrial confinement by the non-lawyer military magistrate. The C.M.A. found no grounds for the confinement and ordered release of the suspects pending court-martial.

⁸³ *Supra* note 80, at 335 n.6. Cf. *United States v. Culp*, 14 C.M.A. 199, 220, 33 C.M.R. 411, 432 (1963) (Ferguson, J., concurring in the result). In this case, Judge Ferguson observed that non-lawyer counsel have difficulty performing the duties of a trained military judge advocate.

Concerning military magistrates, this author believes they should always be

In addition to problems of misperception and inability to follow and apply judicial standards, it has often been suggested that in situations where the only source of information is either the police or the prosecutor, the “flavor” of the decisions rendered is distinctly pro-government.

In short, the difficulties in having lay persons sit as judicial officers are that these laymen often do not understand the law they are called upon to apply, and further, they do not fulfill their obligation to perform as judicial officers, neutral and detached from the dispute before them.

To paraphrase Chief Judge Ferguson, concurring in the result of *United States v. Culp*,⁸⁴ too often it must seem to the officer untrained in the

lawyers. Nevertheless, there is some argument to be made against this proposition. Measured in terms of the amount of specialized knowledge required and the intellectual difficulty in applying that knowledge quickly and correctly, the task of the military magistrate is usually much simpler than that of a military judge presiding over a court-martial, or that of a trial attorney defending or prosecuting an accused. The magistrate’s task is perhaps simpler even than that of the Article 32 investigating officer, who is usually not a lawyer. Virtually all commissioned officers are at least college graduates, and should not find this task difficult. However, the heart of the problem is not ability to perform, but rather opportunity to exercise independent judgment. See note 84, *infra*.

⁸⁴ *Supra* note 83.

The author believes that lawyers are more likely to perform effectively as military magistrates than non-lawyers, because lawyers are better equipped by training to recognize and deal with issues of loyalty to one’s organization (i.e., the Army, Navy, or other service, or a particular chain of command or military unit within a service) versus dedication to the ideal of upholding the rights of the individual against that organization. This conclusion is strengthened by the fact that military judge advocates are often less career-oriented than officers in other branches or specialties.

This is not to say that non-lawyers are incapable of recognizing an ethical issue and of coming down on the right side of it. Nor is it to say that the organization is always or even usually in the wrong. Obviously, also, career-oriented judge advocates are no more (and no less) capable of resolving ethical dilemmas than other career officers. The Watergate episode has made clear the fallibility of lawyers, if there were any doubt of it.

Mention must be made of at least one positive aspect of the Marine Corps pretrial confinement review program. In some Corps commands, senior full colonels have been appointed to be military magistrates. Their rank ensures that they are practically immune to command pressures, inadvertent or otherwise.

law that his loyalty should be to the armed force to which he belongs rather than to the individual whose rights he must, as a judicial officer, respect and protect. A lay officer, whose primary devotion is more likely to be towards his career than to the individual serviceperson whose fate he is called upon to determine, does not seem to qualify as a “neutral and detached magistrate” under any fair reading of the meaning of that term.⁸⁵

Observers have noted that, though these magistrates are not lawyers, they very readily order the release of confinees, and in all respects perform their duties well.

⁸⁵ There has been clear disagreement on this matter, even within the Court of Military Appeals. In *Malia*, *supra* note 55, at 66-67, the court stated that a “magistrate by definition is a judge,” and that a military commander influenced by concerns related to the accused’s pretrial confinement “was disqualified to act as a magistrate within the plain meaning and spirit of (*Courtney*).”

Judge Cook, dissenting, reasserted his conviction that a military commander is not inherently disqualified to act as a neutral and detached magistrate (*Malia* at 68), recalling the reasoning of his previous dissents in *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975) (Cook, J., dissenting), and *Phillippy v. McLucas*, 23 C.M.A. 709, 710, 50 C.M.R. 915, 916 (1975) (Cook, J., dissenting). Much of these two dissenting opinions is an argument for judicial restraint and strict construction of applicable statutory language.

In pertinent part, Judge Cook argues correctly that military magistrates need not be judicial officers (*Porter*, 23 C.M.A. at 705, 50 C.M.R. at 910-11). He admits, however, that anyone connected with the offense or the investigation would be disqualified from acting as a magistrate (*Porter* at 708 and 914 n.4). Thus, Judge Cook would have to agree that a military magistrate must be “neutral and detached,” whether or not he is a judicial officer. Judge Cook would merely say that a non-lawyer can be “neutral and detached.” *See generally* United States v. Ezell, 6 M.J. 307, 310 (1979).

If a truly neutral and detached non-lawyer could be found, he or she would (perhaps) be qualified for duty as a military magistrate. It can be argued, however, that non-lawyers (all of whom either aspire to command, are subject to command fitness evaluations, or are at least steeped in respect for the authoritative judgment of command superiors in all matters) are, *per se*, not neutral and detached in the fourth amendment/*Gerstein/Courtney* sense. They are simply too biased (if only subconsciously) in favor of the commander, by the very nature of their calling and position in the command structure.

The suggestion is not that military lawyers have “cornered the market” on sound and impartial judgment, but rather that military lawyers are, almost by default, more likely to be “neutral and detached” than are lay officers. *See Ezell, supra* at 330 (Fletcher, C. J., concurring).

While it is undeniable that lay persons do serve as magistrates in some states, the civilian lay magistrate is not faced with the conflicting loyalties and career-oriented problems encountered by the military magistrate. The civilian lay magistrate need not concern himself with such matters as fitness reports, future promotions in rank (and, therefore, pay), desirable duty stations, or assignments within an occupational specialty, as must his military counterpart.

In essence, for the non-lawyer, the military magistrate's job is a poor place to be neutral and a very poor place in which to rule in favor of the accused with any regularity. Interestingly, both the Army and the Navy seem to have recognized implicitly that a lay magistrate is somehow less desirable under the "neutral and detached" language of *Courtney*, be-

Even supposing a neutral and detached non-lawyer officer could be found, his or her qualifications to be a military magistrate would still be in serious doubt. *Cf. Ezell, supra* at 312, where it is stated that the minimum requirements for an official issuing fourth amendment warrants are (1) to be "neutral and detached," and (2) to be capable of determining probable cause to arrest or search. In terms of technical competence, the law can best be applied by those trained in its intricacies and cognizant of the requirements of legal/judicial ethics. Non-lawyers, by definition lacking a legal education, would have significant difficulty mastering the very subject matter which they were purporting to administer.

See J. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil.L.Rev. 43, 77-84 (1977).

Contrary positions taken by the courts of military review are set forth in two cases. One of these is *United States v. Williams*, 2 M.J. 275, 276 (AFCMR 1976). The AFCMR sustained Air Force pretrial confinement procedures and stated satisfaction that the special court-martial convening authority qualifies as a neutral and detached magistrate so long as he is not involved in the initial decision to confine the accused. This is an example of the situation envisioned by J. Cook, and the arguments critical of his position, *supra*, apply to this decision.

The second case is *United States v. Espinosa*, 2 M.J. 1198, 1201 (NCMR 1976). The NCMR flatly rejected the notion that the *Gerstein/Courtney* "neutral and detached" standard means a military judge or officer neutral and detached from prosecution. Of course, this decision is simply wrong.

"Neutral and detached," if it means anything, must mean neutral and detached from the prosecution. *Cf. Ezell, supra* at 315, where it is stated that no official exercising warrant authority on the one hand and acting as policeman or prosecutor on the other can escape the strictures of the fourth amendment. The AFCMR in *Williams, supra*, and Judge Cook admit as much. Moreover, C.M.A., in the portion of its *Malia* opinion cited at the beginning of this note, seems to have overruled this conclusion of *Espinosa, sub silentio*.

cause both services require by regulation that the military magistrate be a lawyer.⁸⁶

Military lawyers, by their professional training, have a better understanding of and a greater respect for the judicial duties which a military magistrate must perform. Military lawyers, at least in theory, are not subject to command influence to the same extent as non-lawyers. Article 37, UCMJ, and paragraph 38, MCM, are expressly written to protect military lawyers from command influence in the performance of their duties.⁸⁷ Accordingly, military judges and counsel can exercise inde-

⁸⁶ See discussion of uniformity among the services, *infra* notes 92–106 and accompanying text, for details of the four military magistrate systems. Note that while the Navy/Marine Corps military magistrate system requires Navy magistrates to be lawyers, Marine magistrates may be, but need not be lawyers.

The term “military lawyer” means counsel certified under article 27(b), UCMJ, 10 U.S.C. § 827, which reads as follows:

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

⁸⁷ Article 37, UCMJ, 10 U.S.C. § 837, entitled, “Unlawfully influencing action of court,” reads as follows:

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce, or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in

pendent judgment without fear that a dissatisfied superior officer will be able to vent his anger by giving the lawyer a bad fitness report.

Unfortunately, a non-lawyer military magistrate is not similarly protected from the possibility that his legitimate actions as a military magistrate will be reflected adversely in a fitness report. Since he is not similarly protected against this possibility, the chances are increased that his actions as a military magistrate will tend to be more in tune with what he perceives to be the result desired by the author of his fitness report.

Again paraphrasing Chief Judge Ferguson's concurring opinion in *Culp*,⁸⁸ it is well nigh impossible for a lay magistrate, untrained in the law and the inviolable standards of the legal profession, to put to one side his unflinching loyalty to the military institution and assume a detached and neutral stance in passing on the question of whether a serviceperson accused by a commanding officer could or should be detained, especially when to do so might jeopardize his career.

It seems that the only method of assuring impartial review of pretrial confinement orders is the delegation of the power to appoint the magistrate to one who is completely outside the local chain of command, such as the Judge Advocate General of each service.⁸⁹ To enhance the technical

the substantive and procedural aspects of court-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Paragraph 38, MCM, 1969 (Rev.) is substantively identical with article 37.

⁸⁸ *Supra* note 83.

⁸⁹ M. Brown, *Building a System of Military Justice Through the All Writs Act*, 52 Ind. L.J. 189, 201 (1976).

competence in the magistrate system and to strengthen the protection of magistrates from command influence, all magistrates should be military lawyers.⁹⁰ This would guarantee a full understanding of military pretrial confinement law on the part of the magistrate implementing that law, and it would bring magisterial functions more clearly under the protective umbrella of article 37 of the UCMJ.⁹¹

C. UNIFORMITY AMONG THE SERVICES

Despite the semantic clarity of the term “Uniform Code,” there is far less uniformity in the application of military justice than was intended

⁹⁰ On the related question of the need for representation by counsel at the magistrate hearing, it has been suggested that the accused should have a right to consult with a military lawyer before the question of his pretrial incarceration is decided. D. Gilley, *Using Counsel to Make Military Pretrial Procedure More Effective*, 63 Mil. L. Rev. 45 (1974); cf. *United States v. Jackson*, 5 M.J. 223 (1978), in which the Court of Military Appeals stated that prisoners confined for more than a brief period of time need assistance of counsel.

However, both the Supreme Court and CMA have made it clear that “the probable cause determination is not ‘a critical state’ in the prosecution that would require appointed counsel.” *Gerstein*, *supra* note 34 at 122; *Malia*, *supra* note 55 at 68; *Jackson*, *supra* at 227–28 (Cook, J., concurring in the result).

⁹¹ Arguably, article 37, UCMJ, and paragraph 38, MCM, were designed to prevent exercise of unlawful command influence over court-martial members, counsel, and military judges only, and not military lawyers generally (including military magistrates). On the other hand, it can be maintained that the spirit of the statute is to prevent commanders from exerting undue influence anywhere in the military justice system, subject only to the two explicit exceptions mentioned in article 37. Under both readings, article 37 and paragraph 38 would seem either to include military magistrates or not include them, regardless of their lawyer or non-lawyer status. However, since article 37 was enacted prior to the creation of the military magistrate systems, an activist CMA would likely strain to include magistrates under the statute’s protections. *See also* *Calley v. Callaway*, 519 F.2d 184, 213–17 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

It would be easier for CMA to fit a lawyer magistrate under the statutory protection than it would be to “shoehorn” a lay officer under the same statute. The pretrial confinement hearing more clearly takes on the characteristics of a judicial proceeding with a lawyer presiding. Thus, lawyer magistrates would more clearly bring the magistrate function under the protective umbrella of Article 37.

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by Congress or is allowed by the due process clause of the fifth amendment. The CMA has both identified and expressed its concern about the uniformity problem.⁹² The uniformity of application requirement has two fundamental sources, the code itself and the fifth amendment's due process clause. A third source, Department of Defense Instruction 1325.4, requires uniform regulations among the services concerning military prisoners in general, and pretrial confinement specifically.

In *United States v. Jackson*,⁹³ the statutory basis of the requirement for uniformity of application was first identified. After discussing *United States v. Courtney*⁹⁴ and due process, the Court of Military Appeals wrote:

The Uniform Code of Military Justice was designed to afford equal treatment for servicepersons in all branches of the armed forces.

Soon thereafter, in *Corley v. Thurman*,⁹⁵ Judge Perry's dissenting opinion pointed out the code's requirement of "uniform and equal treatment for **all** servicepersons." Unmistakably, CMA has found the requirement of uniformity of application of the UCMJ intrinsic to the code.

The CMA has also noted that equal protection concepts made applicable to the states by the fourteenth amendment have long been applied in federal practice through the fifth amendment's due process clause and are, therefore, applicable to the **military**.⁹⁶ Hence, disparate treatment of military pretrial confinees similarly circumstanced must be reasonable, not arbitrary. If similar categories of prisoners are treated differently, there must be some rational basis for the distinction; that is, some reason having a fair and substantial relation to the object of the regulation.⁹⁷

Washington, D. C. for his ideas and assistance in the completion of this portion of the article.

⁹² *Corley v. Thurman*, 3 M.J. 192, 195 (1977) (Perry, J., dissenting); *United States v. Jackson*, 3 M.J. 101, 102 n.2 (1977); *United States v. Courtney*, 1 M.J. 438 (1976).

⁹³ *Supra*, note 92.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *United States v. Courtney*, *supra* note 92 at 439 n.3; *United States v. Lerner*, 1 M.J. 371, 375 (1976) (Fletcher, C. J., concurring).

⁹⁷ *Lamer*, *supra* note 96, citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 416 (1920).

There are four military magistrate systems—Army, ~~Air~~ Force, Navy/Marine Corps, and Coast Guard. Each is established by regulation.⁹⁸ They deal with a single class of persons, similarly situated (military personnel ordered into pretrial confinement) which has been split into four subclasses, dependent solely upon the service to which the confinee belongs. While disparate treatment based on branch of service is sometimes valid,⁹⁹ each of these subclasses of military pretrial confinees has a distinctly different set of rules applied to it, the dissimilarities between which seem wholly unrelated to the “needs” of any particular service.¹⁰⁰

There are at least four major, inexplicable procedural differences between the military magistrate programs. Each of these four variations impacts more severely on the rights of personnel in one or more of the

⁹⁸ *Supra* note 40.

⁹⁹ United States v. Hoelsing, 5 M.J. 355, 358 (1978).

Congress has never required such uniformity among the services, and it has consistently authorized the Secretary of each armed force to promulgate regulations *to meet special needs of his service*, as determined by him (emphasis added).

Thus, unequal interservice treatment of persons subject to the UCMJ is permissible under conditions of military necessity unique to a given service or set of circumstances. However, such unequal treatment is not otherwise permitted.

¹⁰⁰ See generally discussion of military necessity, at notes 107–126, below, and accompanying text.

The services have never been required to justify the differences between them concerning treatment of pretrial confinees. It is the author's position that such justification is impossible of formulation. “here seem to be no rationally promoted, proper governmental purposes underlying the differences between military magistrate programs noted in this article. Thus, even assuming application of the traditional equal protection test, disparate treatment of pretrial confinees of different services in the typical peacetime garrisonport situation would be unconstitutional. See also U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).

It could conceivably be argued that freedom from unnecessary pretrial restraint is a “fundamental right” under the fourth amendment, triggering strict scrutiny of the equal protection question raised here. The variations between the four military magistrate programs of the services hardly seem to serve any compelling governmental interest which could stand up to strict scrutiny. See Roe v. Wade, 410 U.S. 113 (1973).

services than it does on members of the remaining services.” In none of the four instances does there seem to be a readily ascertainable, rational justification for the unequal treatment, especially when considered in the context of the typical peacetime garrison/port situation. These are set forth below.

¹⁰¹ **1. Time period within which magisterial hearing must be held.** Clearly, the longer a serviceperson is in confinement prior to a magistrate hearing, the more serious the deprivation of liberty. See “prompt presentment” discussion, at notes 50–74, above, and accompanying text.

2. Military magistrate’s qualifications. A lawyer magistrate would be more qualified than a non-lawyer to effectively and correctly implement military pre-trial confinement law. See “neutral and detached” discussion, at notes 75–91, above, and accompanying text.

3. Provision for review of confinements approved by the magistrate. The four provisions for review, in combination, constitute an excellent review procedure. Individually, each lacks something.

In the Army procedure, no petition from the accused is permitted while he or she is awaiting automatic review. Presumably, if new information comes to the attention of the accused, he or she can make it known to the magistrate through informal communication, and the magistrate can call an immediate review hearing. However, it is pointless not to have a formal petitioning process by which the accused can seek such review.

In the Air Force and Coast Guard, review depends entirely upon the initiative of the accused who, due to his or her confinement, is the person least capable of unearthing the new information required to justify a review hearing. He or she may not even be aware of the petitioning process.

In the Navy and Marine Corps procedure, there exists no automatic review provision. Such a provision is necessary in those cases in which the accused is unaware of the petitioning process, or is unable by reason of incarceration to obtain evidence of changed circumstances justifying review, or cases in which the magistrate is too busy or too uninterested to reexamine the facts surrounding the accused’s confinement.

4. Record & magistrate hearing included in trial record as an allied paper. An accused must be given the opportunity to rebut or explain adverse matters which were not part of the record of the trial proceedings. *United States v. Roop*, 16 C.M.A. 612, 37 C.M.R. 232 (1967); *United States v. Vara*, 8 C.M.A. 651, 25 C.M.R. 155 (1958); *United States v. Griffin*, 8 C.M.A. 206, 24 C.M.R. 16 (1957). See *United States v. Gladden*, 1 M.J. 12 (1975).

Confinement is neither a commonly nor casually imposed form of pretrial restraint. It is reserved only for dangerous or flight-prone suspects. The mere fact

1. *Time period within which magisterial hearing must be held.*

a. *Army.* The hearing must be held within 7 days of entry into pretrial confinement.

b. *Air Force.* The hearing must be held within 72 hours of confinement.

c. *Navy and Marine Corps.* A command report is to be submitted within 72 hours of the order into pretrial confinement, except on long weekends when the period is extended until 1600 of the first working day following the weekend. The hearing is to take place promptly after receipt of command report by magistrate.

d. *Coast Guard.* The hearing must be held promptly, but never more than 72 hours after confinement begins.

2. *Military magistrate's qualifications.*

a. *Army.* The magistrate must be a judge advocate.

b. *Air Force.* The magistrate must be the officer exercising special court-martial jurisdiction over persons at the place of confinement, or a judge advocate appointed by him.

c. *Navy.* The magistrate must be a judge advocate.

d. *Marine Corps.* The magistrate may be, but need not be, a judge advocate.

e. *Coast Guard.* The magistrate must be a commissioned officer, but need not be a judge advocate.

of pretrial confinement casts aspersions of culpability upon the accused which cannot fail to affect the disposition of his case adversely in some manner.

Since only the Air Force includes the record of the magistrate hearing as an allied paper at trial, pretrial confinees in the other services have no opportunity to dispel or rebut the "desperado" image created by reason of the pretrial confinement. Consider, especially, the plight of an accused who was improperly or unnecessarily confined prior to trial and immediately released at his magistrate hearing. Looking at the trial record, the reviewing authority would be aware of little more than the accused's pretrial confinement. He would have no way of knowing that the accused was unjustly confined, and his review of the case would be colored by a negative impression of the accused.

3. *Provision for review of confinements approved by the magistrate.*

a. *Army.* Automatic review takes place at least every two weeks; petition for review is neither required nor permitted.

b. *Air Force.* If a confinee believes he has reason for a reconsideration of his case, he may submit a written petition to the magistrate.

c. *Navy and Marine Corps.* If new information arises concerning the propriety of a confinee's pretrial incarceration, a rehearing may be held upon the magistrate's own motion or the prisoner's petition.

d. *Coast Guard.* The accused may petition magistrate for a new hearing, based on changed circumstances or newly acquired information.

4. *Record of magistrate hearing included in trial record as an allied paper.*

a. *Army.* A record is kept, but there exists no requirement for its inclusion in the trial record.

b. *Air Force.* A record is kept which is required to be included in trial record as an allied paper.

c. *Navy and Marine Corps.* A record is kept, but there is no requirement for its conclusion in trial record.

d. *Coast Guard.* A record is kept, but there is no requirement for its inclusion in trial record.

The CMA is not alone in its awareness of the problem of non-uniform interservice treatment in matters of pretrial confinement. The Department of Defense has issued a regulation requiring the services to develop uniform procedures for the treatment of military prisoners and the administration of military correctional facilities.¹⁰² The regulation, Department of Defense Instruction 1325.4, applies specifically and in principle to pretrial confinement, as well as to confinement under sentence of court-martial.

¹⁰² Department of Defense Instruction 1325.4, in pertinent part, reads:

I. REISSUANCE AND PURPOSE

This Instruction . . . establishes uniform Department of Defense policies

It is well settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests.¹⁰⁸ This principle, known as the *Accardi* doctrine,¹⁰⁴ has been held applicable to the military by CMA.¹⁰⁶ Department of Defense Instruction 1325.4 establishes guidelines for the uniform treatment of military prisoners, including pretrial confinees. These guidelines are designed, in large part, to delineate clear standards for the imprisonment of military personnel and otherwise to protect incarcerated servicepersons from unwarranted interference with their right to personal liberty.¹⁰⁶ As a result, Department of Defense Instruction 1325.4 falls within the ambit of the *Accardi* doctrine, and the various services are obligated to conform with the letter and spirit of its uniformity requirements.

and procedures governing the treatment of military prisoners and the administration of places of correction.

11. APPLICABILITY AND SCOPE

The provisions of this Instruction apply to the Military Departments and cover military prisoners and places of correction worldwide.

111. POLICY

The Secretaries of the Military Departments shall issue uniform regulations . . . , subject to limitations imposed by operating conditions, personnel, or facilities in certain areas: . . .

Paragraph 111.2. identifies pretrial confinement practices as one of the areas in which uniform practices shall exist. The specific requirements and extent of "uniformity" are not fully explained, but the clear import and spirit of this regulation is consistent with fifth and fourteenth amendment notions of equal protection and uniform treatment of persons (pretrial confinees) similarly circumstanced.

¹⁰⁸ *United States v. Russo*, 1 M.J. 134, 135 (1975), citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

¹⁰⁴ *Supra* note 103.

¹⁰⁶ *United States v. Dunks*, 1 M.J. 254, 255 (1976); *Russo*, *supra* note 103.

¹⁰⁶ Paragraph III.A.1 of Department of Defense Instruction 1325.4 states as follows:

It is desirable for persons under sentence of courts-martial or other military tribunals to be accorded uniform treatment, in furtherance of equality within the Department of Defense and in justice to individuals concerned.

There may well be plausible and sensible arguments in favor of non-uniform treatment of military pretrial confinees based upon service connection, in specific circumstances of unique **military** necessity. The fifth and fourteenth amendment due process and equal protection clauses of the Constitution, decisions of the Court of Military Appeals, and Department of Defense Instruction 1325.4 **all** recognize that possibility. However, unsupported (and unsupportable) broad claims of military necessity cannot and must not be permitted to obscure senseless lack of uniformity among the services in pretrial confinement procedures. This lack of uniformity involves inequalities which prejudice the rights of servicepersons unnecessarily, based upon the fortuity of their particular service connection.

Instead, it is imperative that the military magistrate programs of the armed forces be analyzed with an eye towards promoting uniformity, not for uniformity's sake, but in order to bring about clear articulation of the policies underlying every aspect of the program regulations. Only in this manner can the true dictates of **military** necessity be accommodated with the otherwise predominantly important right of the serviceperson to be protected from unnecessary or illegal pretrial confinement.

VI. MILITARY NECESSITY

A. GENERAL

Military law seeks to insure discipline and administer justice within the armed forces. Although the two functions are not contradictory, a certain tension is frequently evident between considerations of military **necessity**¹⁰⁷ and notions of servicepersons' individual rights. Nowhere in recent years has this clash been more sharply focused than in the divergence of judicial thought between CMA and the Supreme Court on **matters** of military necessity and the administration of military justice.

It is undeniable that CMA has been moving in the direction of activist reform of the military justice system, at least since about 1975.¹⁰⁸ Included

¹⁰⁷ "Military necessity" is a collective term referring to the special requirements of military discipline and the problems of maintenance of an effective fighting force.

¹⁰⁸ J. Cook, *supra* note 85. The departure of J. Perry may have an effect on the liberal activism displayed by the Court of Military Appeals in recent years.

in this “civilianization”¹⁰⁹ of military law has been a readjustment of the balance between individual rights and collective discipline. The court’s trend has been toward greater emphasis on considerations of individual rights coupled with a more critical view of the requirements of discipline.¹¹⁰ The CMA is insisting that the demands of military necessity be “proven, not presumed.”¹¹¹ As the court remarked in *Courtney*, “the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.”¹¹²

At about the same time CMA began its military justice reform movement, the Supreme Court turned away from the liberal activist philosophies of the Warren Court and returned to the traditional “hands off” attitude toward military law. In *Parker v. Levy*, the Court wrote:¹¹³

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). In *In re Grimley*, 137 U.S. 147, 153 (1890), the Court observed: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” More recently we noted that “(t)he military con-

¹⁰⁹ The term was popularized by Prof. Edward F. Sherman in his article, *The Civilianization of Military Law*, 22 Me. L. Rev. 3 (1970).

¹¹⁰ The court does not seem to feel it is tipping an evenly balanced scale in favor of individual rights. Rather, it sees itself correcting a pre-existing imbalance which favored discipline, viewing the net result as a more equitable balance between discipline and individual rights in the military justice system.

¹¹¹ *United States v. Tucker*, 1 M.J. 463, 465 (1976).

¹¹² *Supra* note 16.

¹¹³ 417 U.S. 733, 743-44 (1974). Captain Levy, an Army doctor, was convicted by a general court-martial of making provoking and disloyal statements to enlisted personnel concerning his opposition to the Viet Nam war. See *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974).

stitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty" *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).

The Court asserted strong support for the doctrine of military necessity.¹¹⁴

The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

In a subsequent case, *Middendorf v. Henry*,¹¹⁵ the Supreme Court again indicated a willingness to defer to broad claims of military necessity, thereby reinforcing the judicial attitudes which had first surfaced in *Parker v. Levy*.

The CMA is well aware of this trend in the decisions of the Supreme Court, yet it persists in an effort to closely examine assertions of military necessity which would otherwise tend to deny or compromise individual rights. In *United States v. Grunden*, the court stated:"¹¹⁶

This Court recognizes that the Supreme Court in *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974), acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions. See *Middendorf v. Henry*, 425 U.S.25, 96 S.Ct. 1281, 47 L.Ed. 2d 556 (1976); *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed. 2d 505 (1976); *Schlesinger v. Councilman*, 420 U.S.738, 95 S.Ct, 1300, 43 L.Ed. 2d 591 (1975). Yet, this Court once again must state that analysis and rationale will be determinative of the propriety of given situations, and that the mere uniqueness of the military

¹¹⁴ *Parker v. Levy*, *supra* note 113 at 758.

¹¹⁵ *Supra* note 8.

¹¹⁶ 2 M.J. 116, 121 n.9 (1977). To further complicate the issue, among the courts of military review, the Navy court is strongly opposed to CMA's "civilianization" of military justice and agrees with the Supreme Court's deferential approach to military necessity. *United States v. Rivera*, 6 M.J. 535, 536-37 (NCMR 1978).

society or military necessity cannot be urged as the basis for sustaining that which reason and analysis indicate is untenable. See *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967).

Recognition of the distinct differences between CMA's skepticism and the Supreme Court's deference towards arguments of military necessity heightens the awareness that questions of individual rights of servicepersons and matters of military discipline are really two sides of the same coin. The close relationship of one to the other and the direct effects that changes in one can have on the other demand careful evaluation and scrutiny of each set of facts which gives rise to conflicting claims of military necessity and individual rights. To properly perform such a balancing test, the general policies for and against the doctrine of military necessity must be examined.

B. MILITARY NECESSITY POLICY ARGUMENTS

The policy arguments in favor of a military necessity doctrine are both simple and persuasive." First, the primary task of military forces is fighting wars, a difficult and dangerous business. Second, defense of the nation is an absolutely vital activity. Third, harsh battlefield conditions and the powerful human survival instinct, which could so easily give rise to desertion, retreat, and ultimate military failure, can be countered only by strong indoctrination in obedience to orders, and teamwork in critical situations. To insure performance in combat, military personnel must be highly disciplined. As defined by General William Westmoreland,¹¹⁸

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task that is to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation.

¹¹⁷ D. Zillman and E. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 *Notre Dame Law*. 396, 402 (1976).

¹¹⁸ W. Westmoreland, *Military Justice — A Commander's Viewpoint*, 10 *Am. Crim. L. Rev.* 5 (1971).

The crucial need for discipline in the military, both in combat and during peacetime while training and preparing for wartime conditions, clearly distinguishes the military as a “society apart” from civilian society. Accordingly, the administration of military justice may properly vary from the civilian norm when special military needs so dictate.

The doctrine of military necessity is not immune from attack, however. First, even though military discipline is important, authority can be abused. It is the very essence of military law that it serves **as** a limitation upon absolute command authority and, therefore, military discipline.¹¹⁹

Second, the military has changed a great deal over the past few decades. From World War II through the end of the Viet Nam conflict, conscription “civilianized” the military far more than any court’s decisions ever could. In fact, judicial decisions today importing “civilian” standards into military law can be viewed as merely a recognition of the many similarities between the multi-million person armed forces and the civilian community from which they were recruited.

Third, it can be argued that the American tradition of the “citizen-soldier” is pertinent to the structure of the military justice system. American citizens in uniform should be entitled to exercise the rights they have sworn to defend with their lives. In addition, the discipline and order of a military force, if allowed to become substantially different from that of the civilian sector, may render the military establishment dangerous to the very freedoms it was created to protect.¹²⁰ Accordingly, the administration of military justice should not vary from the civilian norm unless compelling military needs so require.

Different standards may be justified, but naked claims of military necessity should not be proffered or accepted on faith alone. It is too easy and too tempting to rely on generalized arguments of military necessity to rationalize what may be essentially arbitrary and purposeless distinctions between military and civilian treatment of comparable conduct. In each fact situation or set of similar situations, the appropriate civilian standard and the suggested military variation should be closely and carefully assessed to determine whether or not a different military rule ac-

¹¹⁹ See generally M. Janowitz, *The Professional Soldier: A Social and Political Portrait*, ch. 3 (1960).

¹²⁰ C. Bruton, Book Review (*Justice Under Fire: A Study of Military Law*, by Joseph W. Bishop), 123 U. Pa. L. Rev. 1482, 1492 (1975).

tually furthers a legitimate, necessary military purpose. Given CMA's position as stated in *Courtney*,¹²¹ the presumption is that the civilian standard applies to the military unless a specific and convincing argument of military necessity for a different rule can be affirmatively established.

C. MILITARY NECESSITY AND PRETRIAL CONFINEMENT

There must be interplay between discipline and the court-martial process. They cannot be divorced. A commander has a military mission to perform and if that mission is impaired by the actions of a member of his unit, he should not be required to retain the person in the unit. That does not mean, however, that confinement is the only other choice. A balance must be struck between the constitutional preference for pretrial release on the one hand and the need to protect society and to insure the accused's presence for trial on the other. Military considerations must be weighed in making this decision.¹²²

In establishing the broadly defined, general requirement of a "magistrate hearing" for military pretrial confinees, the Court of Military Appeals found "no considerations of military necessity which would require a different rule."¹²³ It is the specifics of magistrate hearing procedures and regulations, however, which ultimately are affected by military necessity, and it is at the implementing directive level that the military magistrate system must make allowances for the exigencies of combat and training operations; weather conditions and other "acts of God;" isolation of ships and stations; the unique problems of servicepersons in civilian custody, in the custody of another service, or in transit to the parent command; unexpected unavailability of magistrates due to illness, accident, or other emergency; and all other legitimate requirements of military necessity concerning pretrial confinement. %

¹²¹ *Supra* note 16.

¹²² *Otero, supra* note 73, at 783 n. 4.

¹²³ *Courtney, supra* note 15, at 270.

¹²⁴ This list, reasonably interpreted, should encompass most considerations of military necessity legitimately relevant to pretrial confinement procedures. The "burden" of administrative paperwork is not a proper consideration in establishing magisterial hearing procedures. Indeed, to argue that the requirements of paperwork should shape the substance of the hearing procedure is a clear case of permitting the "tail to wag the dog." If paperwork is a "burden," the paperwork should be reduced.

The most fundamentally important standard of military necessity to be satisfied is, ‘Will discipline suffer?’ The military magistrate program should not be permitted to impact negatively on military discipline. Properly structured, the military magistrate system can and should enhance and improve discipline in the armed forces.

VII. PROPOSAL: A “UNIFORM MILITARY MAGISTRATE SYSTEM” REGULATION

There follows in Appendix I, below, a draft of a proposed “Uniform Military Magistrate System” regulation¹²⁵ which promises not only to correct the problems of promptness, non-lawyer magistrates, and lack of uniformity noted earlier, but also to accommodate the unique features of the military mission which require variations from civilian standards of pretrial confinement procedure. The thrust of the regulation is that in the peacetime garrison/port situation there are few reasons for military pretrial confinement procedure to vary from the civilian norm.

This proposed “Uniform Military Magistrate System” regulation creates no new costs for the military justice system. The promptness requirement simply compresses in time what has to be done anyway and may encourage streamlining of current unnecessary or inefficient confinement processing procedures. The 24 hour availability proposal will impose no new requirement for magistrates. Presumably, there are already magistrates serving commands with major military confinement facilities, so the proposal demands no new magistrate billets. There must **also** already be “back up,” or alternate, magistrates wherever there are presently magistrate billets, in order to fill in for magistrates on leave, temporary assignment elsewhere or indisposed due to illness or accident.

Likewise, the suggestion that non-lawyer magistrates are necessary because of a scarcity of experienced, field grade lawyers is also a dubious one. There is no reason to believe that (senior) company grade lawyers cannot bring sufficient “experience” to the magistrate’s bench (if, in fact, “experience” is somehow relevant at all). In addition, there are more than enough company grade judge advocates to fill the magistrate billets.

¹²⁵ The proposed regulation, if adopted by the Department of Defense, would be applicable to the Army, Air Force, Navy, and Marine Corps. The proposed regulation would also have to be adopted by the Department of Transportation to be applicable to the Coast Guard.

The lawyer-magistrate requirement is cost-free because it merely changes the magistrate's designator/MOS, not his pay grade. Uniformity of procedure among the services may even save money in terms of shared expertise and the reduced costs of producing identical administrative forms, etc. The proposed regulation should in no way increase the case-load carried by the magistrate system, nor should it require expansion of any physical facilities or significantly modify the functions of any agency within the military justice/confinement system.

Finally, with respect to the ultimate and most demanding standard of military necessity, the regulation should have no adverse effects upon military discipline. Indeed, discipline, authority, and morale should be enhanced by a military magistrate system which operates faster (promptness), with more even-handed fairness (lawyer magistrates), and more consistently (uniformity among the services) than ever before. In matters of military law, it is the perception of impartial justice by servicepersons which best promotes discipline and accomplishment of the military mission. Those who argue that military law should be a "tool of the commander" to better enable him to impose iron-fisted rule over his unit have a myopic view of the true nature of leadership and discipline, and the real factors which lead to victory in war.

Fear has never won a battle, although it has lost more than a few. Respect for the fairness and integrity of a leader, however, has inspired many a man to follow his commander into the very jaws of death. In its own small way, a more impartial and just military magistrate system can contribute to that respect for authority which is so essential to the success of the armed services. Military law does not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice, and in fulfilling this function, it will promote discipline.¹²⁶

VIII. CONCLUSION

The military is sometimes derisively accused of preparing to fight the last war. The negative implications of thinking in terms of outdated concepts and assumptions are equally relevant to military law. Military law is a dynamic field which must change to fit the needs of the changing society from which the military draws its most precious resource, the

¹²⁶ W. Westmoreland, *supra* note 118, at 8.

human resource. In no way should changes in military law be permitted to adversely affect accomplishment of the military mission, but adverse impact is not the inevitable result of “change,” *per se*.

The administration of military criminal justice should be efficient, speedy and **fair**.¹²⁷ It can and should accommodate both the commander’s legitimate need to promote good order and discipline and the service member’s right to be free of illegal or unnecessary pretrial incarceration. A careful balancing of these two considerations, in the context of the impartial military magisterial hearing described in the proposed uniform regulation, will promote fairness, justice and discipline simultaneously.

Constructive change within the military law should be invited, welcomed, embraced. Let us seize this opportunity to refine and improve what is already one of the best systems of criminal justice and procedure in the world—the American military justice system.

¹²⁷ *Id.*

APPENDIX I

DEPARTMENT OF DEFENSE INSTRUCTION

SUBJECT: A Uniform Military Magistrate System to
Monitor Orders into Pretrial Confinement of
Servicepersons

I. *Purpose.* This instruction establishes standards and guidelines for the creation of uniform military magistrate systems in the armed services. It sets forth the policy of the Secretary of Defense concerning the appointment of military magistrates and review of the orders into confinement of servicepersons to be incarcerated in military or civilian facilities awaiting trial by court-martial. The Secretaries of the Military Departments shall issue uniform regulations consistent with the following standards, guidelines and exceptions.

11. *Applicability and Scope.*

- A. The provisions of this Instruction apply to the Military Departments and pertain to all military pretrial confinees worldwide, except for (1) servicepersons confined by civil authorities for a criminal offense over which a military court does not have jurisdiction, (2) servicepersons confined by civil authorities pursuant to Article 8, UCMJ, until they return to military control, and (3) servicepersons confined in military places of confinement who are suspected or have been convicted of offenses under the criminal law of a foreign jurisdiction, and the custody of whom has been retained or obtained in return for assurances by United States officials that the servicepersons would be present and available for delivery to the foreign jurisdiction until all criminal proceedings of the foreign jurisdiction have been completed.
- B. Included under the provisions of this Instruction, but granted special treatment, are (1) returned unauthorized absentees and others to be confined in a military place of confinement while awaiting transportation to their parent commands, (2) servicepersons to be confined in civilian confinement facilities pursuant to an agreement with civil authorities because local military confinement facilities are inadequate or non-existent, (3)

servicepersons to be confined in the military confinement facility of a service different from that of the confinee, and (4) those cases in which pretrial confinement is ordered at sea or in other isolated locations.

111. *Military Magistrate System*

A. *Military Magistrates*

1. *Qualifications.* A person appointed as a military magistrate shall be a commissioned officer, certified by the Judge Advocate General of the service concerned in accordance with Article 27(b), UCMJ. However, at any command to which military lawyers (officers certified under Article 27(b), UCMJ) are not routinely assigned, the duties of the military magistrate may be filled by a non-lawyer commissioned officer. This exception contemplates the use of non-lawyer magistrates only at small or isolated posts and stations, including those commands which confine servicepersons in civilian confinement facilities pursuant to an agreement with civil authorities because local military confinement facilities are inadequate or non-existent. Major military confinement facilities shall be assigned a lawyer magistrate, regardless of the routine assignment of other lawyers to the command.
2. *Appointment.* Lawyer military magistrates shall be appointed by the Judge Advocate General of the service concerned. Non-lawyer magistrates shall be appointed by the officer exercising general court-martial jurisdiction over the command to which the non-lawyer magistrate is assigned. Alternate military magistrates shall be appointed to provide for the emergency absence, disability or disqualification of a magistrate.
3. *Prohibitions.* A military magistrate must be neutral toward and detached from the cases he reviews. No officer connected with law enforcement or the prosecution or defense function may be appointed a military magistrate. If a magistrate's prior duties interfere with his requisite neutral and detached status in a particular case, the case shall be assigned to another magistrate.

4. **Powers.** Although appointed by the Judge Advocate General of the service concerned, or by the officer exercising general court-martial jurisdiction over the command, military magistrates derive their authority from the Secretary of the Military Department. In the exercise of the neutral and detached judgment required by their office, therefore, **military** magistrates are not subject to the discretion or control of the officers who appointed them or the officers in whose command they serve. Subject to the post-hearing procedure provisions of this Instruction, the decision of the military magistrate concerning each pretrial confinement order is final.
5. **Other duties.** A military magistrate may be assigned additional duties not inconsistent with his neutral and detached status and not interfering with his primary responsibility to review pretrial confinement orders. Appropriate additional duties of a lawyer magistrate may include, but are not limited to, the issuing of search warrants, conducting investigations under Article 32, **UCMJ**, and reviewing records of trial in accordance with Article 65(c), **UCMJ**. If a magistrate's additional duties interfere with his requisite neutral and detached status in a particular case, the case shall be assigned to another magistrate.
6. **Administrative Support.** The command to which the military magistrate is assigned and commands served by a magistrate from another installation shall furnish such clerical, material and logistical support **as** may be necessary for the performance of the magistrate's duties.

B. Hearing Procedure

1. **Promptness.** Within **24** hours of the order into confinement, the military magistrate shall hold a hearing to review that order. Servicepersons ordered into confinement between the hours of midnight and 1600 shall be presented before a magistrate prior to the end of the same **day**. Servicepersons ordered into confinement between the hours of 1600 and midnight shall be presented before a magistrate prior to **1600** the next day. The **24** hour promptness requirement applies regardless of the day of the week or the intervention of a holiday period.

a. No confinement of the accused shall take place prior to the magisterial hearing. However, lesser forms of restraint (including overnight detention of unruly or dangerous suspects in a military police cell) may be imposed on the accused.

b. Exceptions to the **24** hour promptness requirement include orders to confinement in combat situations and during field/ocean training operations, hearing delays due to severe weather conditions or other “acts of God,” or due to embarkation aboard ships at sea, or at posts and stations isolated by distance or terrain from the nearest magistrate, unavoidable transportation or communications difficulties, and the unexpected unavailability of a magistrate due to emergency absence, disability or disqualification. In these exceptional situations, confinement or lesser forms of restraint are permissible prior to the magistrate hearing. A magistrate hearing must take place without unnecessary delay, however.

2. *Pretrial Confinement Hearing Report.* Prior to the hearing, the officer ordering the confinement shall provide the magistrate a pretrial confinement hearing report containing sufficient information to permit a review of the factual basis of the confinement decision. The information contained in the report must include, but need not be limited to (a) the name, rank and unit of the accused, (b) appropriate personal information (marital/family status), (c) the proposed place of confinement, (d) the previous disciplinary record of the service member, if available, (e) the offenses charged against the accused and the general circumstances surrounding each offense, (f) any mitigating, extenuating or aggravating circumstances, and (g) the specific reason(s) pretrial confinement of the accused is considered necessary. While it is preferable that the report be submitted to the magistrate in writing, there is no requirement that it be submitted in this manner. (See Sample Pretrial Confinement Hearing Report Form.)

3. *Purpose of the Hearing.* The purpose of the magisterial hearing is to determine (a) if there is probable cause to believe that an offense has been committed, and that the accused committed it, (b) if there is apparent court-martial jurisdiction over the accused for the alleged offense, and (c) if the accused should be placed in pretrial confinement.

4. *Nature of the Hearing.* The magisterial hearing shall be in the presence of the accused service member. The magistrate shall advise the service member of his rights under Article 31, UCMJ, and of his right to present information relative to the legality and appropriateness of his confinement. Such information may include the service member's oral or written statement, documentary evidence, and oral or written statements of others. The magisterial hearing shall be nonadversarial and the rules of evidence shall not apply. Counsel shall not be appointed specifically for the hearing, but if the accused already has appointed or retained counsel, such counsel shall be afforded an opportunity to be present at the hearing with the accused and to speak in his behalf. Even though counsel may be present, the accused has no right to confront and cross-examine witnesses or to convert the hearing into an adversary proceeding. The military magistrate may question any person, including the accused (but only after notice to counsel and warning under Article 31, UCMJ), in order to make an informed judgment as to the propriety of pretrial confinement.
5. *Insufficient Information.* When the military magistrate, based on the information presented, determines there is a need for further inquiry, he shall seek additional information about the case. In no event, however, shall his decision concerning release of the accused be delayed significantly after commencement of the initial hearing. The accused shall not be confined during this continuance, although lesser forms of restraint (including overnight detention of unruly or dangerous suspects in a military police cell) may be imposed on the accused.
6. *Members of Other Armed Services.* The hearing concerning the order into pretrial confinement of any serviceperson shall be governed by the military magistrate regulations of the armed service which has jurisdiction over the place of his confinement. Thus, the order into confinement of an accused of one service may be heard by a magistrate and under the military magistrate regulations of another service.
7. *Pretrial Confinees in Transit to Parent Command.* Servicepersons to be confined awaiting transportation to their parent

commands shall be granted a magisterial hearing at the first military confinement facility in which they are to be incarcerated for a period of at least 24 hours. If the magistrate determines to continue the accused in confinement while awaiting transportation, there need not be any further hearing until the accused returns to his parent command. At that time, if the confining officer desires to continue the accused in confinement, a magisterial hearing concerning pretrial confinement at the parent command must be held within 24 hours.

C. *Magistrate's Decision*

1. *Promptness.* The military magistrate shall promptly make and communicate his decision in each case to the serviceperson ordered into confinement and to the confining officer. Under no circumstances shall the delay between the end of the hearing and communication of the magistrate's decision exceed six hours, except when the accused or the confining officer are unavailable. Under these circumstances, the decision must be communicated to them without unnecessary delay. The accused shall not be confined during this delay, although lesser forms of restraint (including detention of unruly or dangerous suspects in a military police cell) may be imposed on the accused. The confining officer may designate a subordinate to receive this communication from the magistrate.
2. *Policy.* In the absence of information affirmatively establishing a need for pretrial confinement, the accused is entitled to release. It is the policy of the Secretary of Defense to limit the use of pretrial confinement to those cases in which it is essential. Doubtful or borderline cases shall be resolved in favor of the accused and against pretrial confinement.
3. *Record of the Hearing.* The decision of the military magistrate shall be in writing and shall include a brief statement of the reasons in support thereof. (See Sample Magistrate Decision Form.) A copy of the decision shall be forwarded to the serviceperson ordered into confinement and to the confining officer, but the initial communication of the magistrate's decision (which normally must occur within six hours

of the end of the hearing) may be oral. The pretrial confinement hearing report, if submitted in writing, and any documentary evidence or written statements considered by the military magistrate, shall be appended to the decision, and a copy of the appended decision shall be forwarded to the proper authorities for inclusion in any record of trial as an allied paper. The original copy of the appended decision shall be retained by the military magistrate until final disposition of the service member's case.

D. *Post-Hearing Procedures*

1. *Authority of Commanding Officer.* Notwithstanding a decision by the military magistrate that the service member be confined, the commanding officer of the service member may authorize his release from pretrial confinement. The commanding officer may thereafter impose any form of restraint, other than confinement, which is authorized by military law and deemed necessary by the commander.
2. *Imposition of Lesser Forms of Restraint.* If the magistrate has decided that a service member not be confined prior to trial, the commanding officer of the service member may impose any form of restraint, other than confinement, which is authorized by military law and deemed necessary by the commander.
3. *Subsequent Order into Confinement.* Once released pursuant to a decision of the military magistrate, a serviceperson may be ordered into confinement again only upon discovery of (a) a different offense which would justify pretrial confinement, or (b) new information pertaining to the offense for which the serviceperson was originally ordered into confinement which significantly changes the circumstances of the offense and supports confinement. In either situation, the magistrate will conduct a new hearing within 24 hours of the subsequent order into confinement.
4. *Review and Rehearing.*
 - a. At least every two weeks, the military magistrate shall automatically review the case of each serviceperson placed in pretrial confinement.

b. A rehearing may be held by the magistrate upon the serviceperson's written or oral petition at any time prior to action under Article 39(a), UCMJ, by a military judge in the serviceperson's case. Once an Article 39(a) session has been held, the military magistrate is divested of authority to order the serviceperson's release from pretrial confinement.

c. A rehearing by the military magistrate shall be based upon new circumstances which have arisen since the initial hearing was held, or upon any new information concerning the legality or appropriateness of the serviceperson's confinement. The decision to grant a rehearing rests solely with the military magistrate.

d. The procedural provisions of paragraphs III.B.3, 4, and 5, and III.C.1, 2, and 3, are fully applicable to the rehearing, except that the accused shall remain in pretrial confinement pending the magistrate's rehearing decision, and the magistrate's record of the rehearing shall also include a brief statement of the reasons a rehearing was granted. (See Sample Magistrate Decision Form in Annex B, below.)

IV. *Effective Date and Implementation*

- A. *Effective Date.* This Instruction is effective immediately.
- B. *Implementation.* The Secretary of each Military Department shall forward a copy of that Department's implementing regulation to the Assistant Secretary for Manpower, Reserve Affairs and Logistics, Department of Defense, within ninety days.

ANNEX A TO APPENDIX I
SAMPLE PRETRIAL CONFINEMENT HEARING
REPORT FORM

Name of Accused:

Date:

Service Number:

Pay Grade:

Unit:

MOS/Rating:

Time in Service:

Age:

Married: (Yes) (No)

Spouse in **Local Area:** (Yes) (**No**)

Children: (Yes) (No)

Proposed Place of Confinement:

Previous Court-Martial Convictions

Level of C-M	Date	Offense(s)	Punishment
1)			
2)			
3)			

Previous Article 15, UCMJ Proceedings

Date	Offense(s)	Punishment
1)		
2)		
3)		

Offense(s) Charged

UCMJ Article	Date	Description of General Circumstances
1)		
2)		
3)		

Level of C-M Anticipated:

Extenuating, Mitigating, Aggravating Circumstances & Charged Offenses

- 1)
- 2)
- 3)

Pretrial confinement is considered necessary in this case because:

Signature, **Confining** Officer

ANNEX B TO APPENDIX I
SAMPLE MAGISTRATE DECISION FORM

Date:

Subject: Military Magistrate Decision Concerning the Order into Confinement of (Rank, Name, Service Number)

Addressees: (To include the accused, the confining officer, and the proper authorities to insure this form is included in any trial as an allied paper)

1. On (date) I reviewed the circumstances concerning the order into confinement of (Rank, Name). I determined that pretrial confinement of (Rank, Name) is [not] warranted.
2. [Rehearing **Only**]. The reasons for the rehearing were: (a short statement is sufficient).
3. The reasons for my decision were: (a short statement is sufficient).

Signature, Military Magistrate

Attachments: Pretrial Confinement Hearing Report
Documentary Evidence
Statements of Accused or Others

APPENDIX II

U. S. ARMY MILITARY MAGISTRATE PROGRAM

Set forth below **are** excerpts from Army Regulation No. **27-10**, Legal Services: Military Justice (26 Nov. **1968**, and nineteen changes), describing the Army's current policies on pretrial confinement, and the operation of the military magistrate program.

1. Para. 2-35. Pretrial Confinement (change **18** to Army Reg. No. **27-10**, dated **1 Jan. 1979**):

2-35. Pretrial confinement. a. General. As a general rule an accused pending charges should continue the performance of normal duties within his organization while awaiting trial. Pretrial confinement should be used only where permitted by military law (**see** United States v. Heard, **3 M.J. 14** (CMA **1977**)). In any case of pretrial confinement, the staff judge advocate concerned or his designee should be notified prior to the accused's entry into confinement. However, if he is not available to receive notification, it will be given **as soon as** possible after entry into confinement.

b. Detail of Counsel. The staff judge advocate concerned will ensure that a legally qualified defense counsel is appointed for and consults with the accused within **72** hours from the time he enters pretrial confinement. The defense counsel appointed to consult with the accused will normally be detailed to represent him at trial by court-martial, if any. It is preferable, although not required, that consultation between the accused and a legally qualified defense counsel be accomplished prior to the accused's entry into confinement. Consultation with an accused in pretrial confinement takes priority over other defense duties and only a defense counsel who is immediately available for consultation will be appointed. If consultation before confinement is not accomplished, the staff judge advocate will ensure that the defense counsel appointed for the accused consults with the accused within **72** hours from the time of entry into confinement. The 72-hour period represents a minimally acceptable standard,

c. Entry into pretrial confinement. An accused will not be

accepted into pretrial confinement unless accompanied by a properly executed confinement order. Where circumstances permit, a confinement checklist (fig. 16-1, *infra*) should also accompany the accused but is not a requisite for entry into confinement. Magisterial review of pretrial confinement will be accomplished in accordance with the provisions of chapter 16, *infra*.

2. Chapter 16, Military Magistrate Program (change 17 to Army Reg. No. 27-10, dated 15 Aug. 1977):

16-1. Purpose. This chapter establishes the Army-wide Military Magistrate Program to monitor pretrial confinement. It specifies procedures for appointment and assignment of military magistrates and for the military magistrates' reviews of pretrial confinement.

16-2. Scope. a. Military magistrates will review all cases of confinement of Army members confined in military facilities in anticipation of trial by court-martial.

b. There is no relationship between the Military Magistrate Program and Department of the Army's implementation of the Federal Magistrate System to dispose judicially of uniform violation notices and minor offenses committed on military installations (AR 190-29).

16-3. Definition of terms. a. Military Magistrate Program. **An** Army-wide program for review of pretrial confinement in the Army by neutral and detached magistrates who are unconnected with law enforcement or prosecutorial functions.

b. Military magistrate. A judge advocate who is empowered to direct the release of persons from pretrial confinement upon his determination that continued pretrial confinement does not meet legal requirements.

c. Assigned military magistrate. A military magistrate appointed by The Judge Advocate General or his designee and assigned to the US Army Legal Services Agency, or a military judge assigned to the US Army Judiciary who is authorized to perform magisterial duties by the Chief, US Army Judiciary, or his designee.

d. Alternate military magistrate. A military magistrate not assigned to the US Army Legal Services Agency appointed by the officer exercising general court-martial jurisdiction over the confinement facility at which an assigned military magistrate normally reviews cases of pretrial confinement. The alternate military magistrate assumes the duties of the assigned military magistrate only when permitted by his supervising military judge upon the assigned magistrate's absence or disability.

e. Part-time military magistrate. A military magistrate not assigned to the US Army Legal Services Agency appointed by the officer exercising general court-martial jurisdiction over an Army pretrial confinement facility not served by an assigned military magistrate or, with respect to Army members in pretrial confinement in other service facilities not served by an **Army** assigned military magistrate, by the officer normally exercising general court-martial jurisdiction over Army personnel at that place.

f. Supervising military judge. A military judge assigned to the US Army Judiciary designated **as** responsible for the overall supervision of the Military Magistrate Program within a pretrial confinement facility or facilities.

16-4. Appointment and powers of military magistrates.

a. Military magistrates will be appointed in accordance with paragraphs **16-3c, d** and **e**. The names of magistrates appointed under paragraphs **16-3d** and **e** will be promptly reported by the appointing authority to the Chief, US Army Legal Services Agency, ~~Nessif~~ Building, Falls Church, VA **22041**.

b. Assigned military magistrates **will** be given responsibility for reviewing pretrial confinement in **all** confinement facilities in CONUS, Europe, Korea, and elsewhere as The Judge Advocate General or his designee shall direct.

c. **An** alternate military magistrate will assume the duties and exercise the powers of an assigned military magistrate only when the latter is disabled or absent and upon determination by the supervising military judge that obtaining the services of another assigned magistrate is not practicable.

d. Part-time military magistrates will be appointed to review pretrial confinement in all cases at confinement facilities not normally served by assigned military magistrates. Whoever initially authorizes pretrial confinement in a facility not administered by the Army will immediately notify the officer exercising general court-martial jurisdiction over the person confined, which officer will forthwith cause the responsible military magistrate to be notified of the case. In this respect, a commissioned officer lawyer of the Navy, Marine Corps, Air Force, or Coast Guard, who has been authorized or designated to act as a military magistrate by his or her service, may review the pretrial confinement of Army personnel confined in other service facilities, provided such review is authorized by the Chief, US Army Judiciary, or his or her designee.

e. No military magistrate, whether assigned, alternate, or part-time, may be assigned or perform duties incompatible with his requisite neutral and detached status.

f. All military magistrates whether assigned, alternate, or part-time, are empowered to order the release from pretrial confinement of any member of the Army upon determination following review of the case that continued pretrial confinement does not satisfy legal requirements. The military magistrate will consider all relevant facts and circumstances surrounding each case in arriving at his determination. Military magistrates will review each case of pretrial confinement in accordance with the procedures and criteria contained in paragraph 16-5.

16-5. Procedure for review. a. The military magistrate will review all documents and personally interview each person in pretrial confinement within 7 days after that person has entered pretrial confinement. The authority initially ordering the prisoner into pretrial confinement will immediately provide a completed checklist for confinement (fig. 161) to the military magistrate. The checklist will be reproduced locally as illustrated in figure 16-1. The authority ordering confinement will also provide the magistrate with the information which formed the basis for his decision to impose confinement. The military magistrate initially will determine whether there is probable cause to believe the accused committed an offense under the Uniform Code of Military Justice and, if satisfied probable cause exists,

whether the accused should remain in pretrial confinement. In making the probable cause determination the military magistrate must determine whether the facts and circumstances before him are sufficient to warrant a prudent person in believing that the person confined committed an offense. The determination as to whether pretrial confinement is necessary will be made in accordance with military law (*see* United States v. Heard, 3 M.J. 14 (CMA 1977)). If the military magistrate determines, on the basis of his review, that probable cause exists and that continued pretrial confinement is necessary, he will so record that fact and no further action will be required. He will review each case at least every 2 weeks.

b. In those cases where the military magistrate, based upon his initial inquiry or subsequent information, determines that there is a basis for further inquiry, he will seek additional information about the case. He may obtain such information from commanders, supervisors in the confinement facility, or the staff judge advocate. He will not hold a formal hearing in the matter. If the military magistrate determines on the basis of further inquiry that continued pretrial confinement is warranted, he will record the fact. If he determines that the person confined should be released from pretrial confinement, he will notify the unit commander concerned, who will cause him to be released immediately.

c. Military magistrates may not impose conditions upon release from confinement, but may recommend appropriate conditions to the unit commander.

d. The unit commander concerned may impose any authorized pretrial restraint he deems necessary upon a person released from confinement by a magistrate. However, he may not order the return of that person to pretrial confinement except upon the commission of an additional offense or upon receipt of newly discovered information. The military magistrate will be immediately notified of any reconfinement and the reasons therefor.

e. Circumstances of persons who, after release by a military magistrate, are reconfinement will be reviewed by the military magistrate. His determination whether the continued pretrial confinement is warranted will be made on the same basis as the

review and determination for any other case of pretrial confinement.

f. The reviews and inquiries conducted by the military magistrates are automatic. No petitions for review of confinement are required or authorized. A formal hearing or adversary proceeding will not be conducted by the military magistrate. The person confined is not entitled to representation before the military magistrate, but if he has legally qualified counsel he may be present at any interview of him by the military magistrate. The military magistrate may question any person, including the person confined (but only after notice to counsel and warning under Article 31, UCMJ), in order to make an informed judgment as to the need for continued pretrial confinement.

g. The decision of the military magistrate to direct release from pretrial confinement or to decline to do so is not subject to appeal.

h. The military magistrate will promptly communicate his decision in each case to the person confined. In addition, a record will be made of the magistrate's decision and his decision will be filed in that person's correctional treatment folder.

16-6. Assignment and supervision of military magistrates.

a. Responsibilities of the Chief Trial Judge, US Army Judiciary. The Chief Trial Judge, US Army Judiciary, under the supervision of the Chief, US Army Legal Services Agency, will be responsible for the general administration of the Military Magistrate Program. His responsibilities include making recommendations to The Judge Advocate General concerning the program; establishing programs for training; recommending duty stations at which assigned military magistrates will be located, and assignment of responsibility for servicing particular confinement facilities; designating supervising military judges; and designating rating, indorsing, and reviewing officers as required for officer efficiency reports as to assigned military magistrates and rating officers to evaluate other military magistrates with respect to their magisterial functions (para 4-5c, AR 623-105).

b. Responsibilities of supervising military judges. Assigned military magistrates will be supervised by military judges assigned to the US Army Judiciary and designated by the Chief Trial Judge, US Trial Judiciary. The supervising military judge may make an assigned military magistrate available to assist any local staff judge advocate if the supervising military judge determines that such additional duties would not interfere or be incompatible with the military magistrate's primary responsibilities. Appropriate additional duties may include the issuing of search warrants, conducting investigations under Article 32, UCMJ, serving as a summary court-martial, and reviewing of records of trial by summary and special courts-martial in accordance with Article 65(c), UCMJ. When an assigned military magistrate is unavailable for duty due to disability or absence, the supervising military judge will make a determination whether obtaining the services of another assigned magistrate is practicable. If he determines that it is not practicable, the alternate military magistrate will assume duties as the military magistrate.

c. Officer Efficiency Reports upon military magistrates.

(1) Assigned military magistrates will be rated as provided by the Chief Trial Judge, US Army Judiciary.

(2) A military magistrate who is not assigned to the US Army Legal Services Agency will not be rated nor will his report be indorsed or reviewed with respect to his conduct as a military magistrate by any officer not assigned to the US Army Judiciary. A dual rating is required as provided in paragraph 4-5c, AR 623-105.

16-7. Administration and logistical support.

a. Duty station. Commands selected as duty stations will provide administrative and logistical support for military magistrates to include—

(1) Permanent quarters for each military magistrate and his dependents to the same degree as are provided regularly assigned officers of like grade and rank and similar responsibility;

(2) Preparation of pay vouchers and payment of military magistrates;

(3) Maintenance of the Military Personnel Records Jackets, US Army officer qualification records, leave records, and all other personnel records; and

(4) Completion of entries by the personnel officer on DA Form 67-7 (US Army Officer Evaluation Report), and forwarding of the efficiency report at the appropriate time to Headquarters, US Army Legal Services Agency, Nassif Building, Falls Church, VA 22041, for action by the rater, indorser, and reviewer, unless directed otherwise by that headquarters.

b. Duty and other stations. Commands selected as duty stations and commands served by a military magistrate from another installation will provide, to the extent possible, such administrative and logistical support for the military magistrate as may be necessary in the performance of his duties, to include:

(1) Office space;

(2) Office furniture, equipment, and supplies;

(3) Class A telephone service;

(4) Stenographic, clerical, and administrative assistance as required in the expeditious performance of his duties;

(5) Army transportation facilities, including aircraft, as far as is practicable; and

(6) Issuance of such temporary duty orders, at the request of the military magistrate concerned, as may be necessary in the exercise of his duties.

(a) Authority for commanders to issue temporary duty orders for travel of military magistrates within continental United States and to issue temporary duty orders involving travel of military magistrates from locations within the continental United States to destinations outside the continental United States is governed by AR 310-10.

(b) Where AR 310-10 does not delegate authority to commanders to issue temporary duty orders for military magistrates assigned to US Army Legal Services Agency to travel from locations within the continental United States to areas outside the continental United States, orders will be issued by the Department of the Army when travel to destinations outside the continental United States is necessary.

(c) Orders involving travel outside the continental United States will direct use of military aircraft when available and will authorize use of other modes in the event military aircraft is not available. A military magistrate must make his decisions within strict time limits. A military aircraft generally should be considered not available whenever it cannot arrive so as to permit review of pretrial confinement cases before the expiration of the applicable time limit.

(d) Orders will state that authority is granted to make such changes in itinerary and to proceed to such additional places as may be necessary for accomplishment of the assigned mission.

(e) Travel costs and per diem for all military magistrates assigned to the US Army Legal Services Agency will be budgeted and funded by The Judge Advocate General, Department of the Army, WASH, DC.

(f) Distribution of travel orders will include two copies of the travel orders to Finance and Accounts Office, US Army, Pentagon Branch, ATTN: Funds Control Section, WASH, DC 20310, for each individual on the orders.

c. Leave and passes. Assigned military magistrates will request leaves and passes from their supervising military judges.

3. Figure 161, Checklist for Pretrial Confinement (change 17 to Army Reg. No. 27-10, dated 15 Aug. 1977):

FIGURE 16-1

CHECKLIST FOR PRETRIAL CONFINEMENT

Name: Grade Unit Age ETS
Total Service to Date:
Married: (Yes) (No)
Wife in Local Area: (Yes) (No)
No. of Children: (1) (2) (3) ()

Article 15's: (1) (2) (3) ()
Date: Offense: Punishment:
1.
2.
3.

Previous Convictions: (1) (2) (3) ()
Level of Court: Date: Offense: Punishment:
1.
2.
3.

Present Offenses: Type of Court Anticipated:
Article: Date: Description of Offense: (If AWOL, From-To,
etc., and whether surrendered or apprehended)
1.
2.
3.
4.

Pretrial Confinement is Appropriate Because:

Subject: Decision of Military Magistrate Date:
Addressees:

On (Date) I reviewed the circumstances concerning the continued pretrial
confinement of (Name)(Unit). (Based upon this review, I determined that
the continued pretrial confinement of (Name) is warranted.) (Based upon
this review, I determined that the continued pretrial confinement of
(Name) is not warranted and order his release from confinement.)

Military Magistrate

Figure 16-1

APPENDIX III

U. S. NAVY MILITARY MAGISTRATE PROGRAM

Set forth below are the texts of SECNAVNOTE No. 5810, Establishment of Navy-Marine Corps Military Magistrate Program (15 Oct. 1976, and one change), and SECNAV INSTRUCTION No. 1640.10, Department of the Navy Military Magistrate Program (16 Aug. 1978), which replaced the earlier document.

1. SECNAV NOTICE **No.** 5810, Establishment of Navy-Marine Corps Military Magistrate Program (15 Oct. 1976):

From: Secretary of the Navy

To: All Ships and Stations

Subj: Establishment of Navy-Marine Corps Military Magistrate Program

Ref: (a) Courtney v. Williams, **24 USCMA 87, 51 CMR 260** (1978)

(b) ALNAV 021/76 (hereby superseded)

(c) Articles 9 and **33, UCMJ**

(d) Par. 20c, MCM, 1969 (Rev.)

(e) SECNAVINST 1640.9, Corrections Manual

1. Purpose and Background. Reference (a) indicated that a neutral and detached magistrate should determine, in each case of a service member who has been confined pending trial by court-martial, whether such service member "could be detained and if he should be detained." In accordance with those guidelines, reference (b) was promulgated, creating the Navy-Marine Corps Military Magistrate **Program**. This notice makes the information contained in reference (b) available in a more legible and permanent form, and incorporates an additional provision governing the processing of service members of other Armed Forces confined in naval places of confinement.

2. Supersession. Reference (b) is hereby superseded.

3. Action.

a. The Navy-Marine Corps Military Magistrate Program is established to monitor pretrial confinement within the naval service. All officers who exercise general court-martial jurisdiction over a shore activity having a naval place of confinement within the Navy and Marine Corps shall appoint one or more military magistrates, who shall normally be of the rank of lieutenant commander or major, or above. For Navy commands, the appointee(s) will be a judge advocate(s). For Marine Corps commands, the appointee(s) may, but need not be, a judge advocate(s). The military magistrate may not be connected with law enforcement or the prosecution or defense function. The military magistrate may not be a member of the Navy-Marine Corps Trial Judiciary or the Marine Corps Special Court-Martial Judiciary. Military magistrates shall have the powers and shall perform the duties of that office as prescribed herein.

b. The pretrial confinement in naval places of confinement of military personnel who are not members of the naval service is not within the scope of the Navy-Marine Corps Military Magistrate Program, except as provided in this paragraph. In the case of an Army, **Air** Force, or Coast Guard member ordered into a naval place of confinement, the officer ordering such confinement shall comply with the military magistrate regulations of the Armed Force to which the service member belongs. The review of such a service member's case by a military magistrate of his own Armed Force, and that magistrate's decision, shall be sufficient and binding upon all naval service authorities administering the place of confinement, provided that if no action on any Army, **Air** Force, or Coast Guard member's case has been taken by a magistrate of such service member's Armed Force within **72** hours of his incarceration, the naval service magistrate for the place of confinement shall promptly review said case in accordance with subparagraphs 3(c)-3(i) of this notice as if the confined service member were a member of the naval service.

c. Promptly after a service member is ordered into pretrial confinement (and in any event not more than **72** hours there-

after), the officer ordering such confinement shall provide the military magistrate for the place of confinement with sufficient information to permit a review of the factual basis of the confinement decision. Such information shall include (1) the hour, date, and place of confinement; (2) the offenses the service member has allegedly committed and the general circumstances known concerning each offense; (3) the previous discipline record of the service member; (4) any mitigating or extenuating circumstances in the case; and (5) the reason continued pretrial confinement is considered necessary.

d. Upon receipt of the report described in subparagraph 3(c), the military magistrate shall promptly hold an informal hearing at which the service member shall be present, to determine (1) if there is probable cause to believe that an offense has been committed and that the service member committed it; (2) if there is apparent court-martial jurisdiction over the service member for the offense involved; and (3) if the service member should continue in pretrial confinement. Prior to commencement of the hearing, the service member shall be advised pursuant to Article 31, UCMJ. In addition, advice shall be provided concerning the right to present evidence as to whether confinement should be continued. Such evidence may include his oral or written statement, documentary evidence, or the statements of others. The hearing is nonadversary in nature and the rules of evidence do not apply. No counsel shall be appointed specifically for the hearing, but if the service member already has appointed or retained counsel, such counsel shall be afforded an opportunity to be present at the hearing with the service member and to speak on behalf of the service member. Even though counsel may be present, there is no right to confront and cross-examine the witnesses or to convert the hearing into an adversary proceeding.

e. In those cases where the military magistrate, based upon the evidence initially presented, determines that there is a need for further inquiry, additional information may be sought about the case. In no event, however, shall the decision concerning release of the service member be delayed significantly after commencement of the initial hearing.

f. In the absence of clear evidence affirmatively establishing

a need for pretrial confinement, the service member is entitled to release from pretrial confinement. It is the policy of the Secretary of the Navy to limit the use of pretrial confinement to cases fully justifiable and wherein no alternative action is practicable or appropriate.

g. Promptly after the conclusion of the informal hearing provided in subparagraph 3(d), the military magistrate shall determine whether the service member should remain in confinement. If the decision is to continue the member in confinement, it shall be in writing and shall include a brief statement of the reasons in support thereof. Documentary evidence considered by the military magistrate shall be appended to the decision. A copy of the decision shall be furnished promptly to the officer ordering confinement, to the service member, and to the commanding officer of the confinement facility. The original shall be retained by the military magistrate until final disposition of the service member's case.

h. If it is determined that the service member should be released from confinement, the military magistrate will so notify, in writing, the commanding officer of the service member, who shall direct the officer in command of the confinement facility to release the service member immediately, with a copy of the release order to the general court-martial authority. The commanding officer of the service member may thereafter impose any authorized form of pretrial restraint, other than confinement, deemed necessary. Once released by the military magistrate, the service member may be reconfined only upon discovery of (1) a different offense which would warrant pretrial Confinement; (2) new evidence pertaining to the offense for which pretrial confinement was originally ordered; or (3) any new evidence which indicates that the accused may flee to avoid trial. The military magistrate will be notified immediately of any re-confinement and the reasons therefor. The case will then be reviewed in the same manner as is provided for in any other case of pretrial confinement.

i. The decision of the military magistrate in all cases is final. If release from pretrial confinement is denied, however, the service member may later petition the military magistrate for a new consideration of the case. Such petition must be based on

new circumstances which have arisen since the initial determination was made or on any new information as to whether the service member should be continued in confinement. A new hearing may be granted at the discretion of the military magistrate. If granted, the service member shall be present. The military shall continue to maintain a record of the decision and the reasons therefor and shall append thereto all documentary evidence subsequently submitted for consideration by the service member.

j. The operational readiness of ships at sea would be diminished significantly if the traditional authority of the commanding officer to order pretrial confinement could be countermanded by another board. In those cases, however, in which pretrial confinement is ordered at sea, the commanding officer of the ship shall make arrangements for the transfer of the service member **as soon as** practicable to the nearest command ashore having an approved confinement facility. When the service member is transferred, the commanding officer shall forward to the military magistrate the report required by subparagraph 3(c), *supra*, within **24** hours after the transfer is effected. Thereafter, the case shall be treated in accordance with subparagraphs 3(d)-3(i), *supra*.

k. The foregoing procedures do not eliminate the requirements regarding initiation of pretrial confinement contained in reference (c), nor the provisions of reference (d), or reference (e).

DAVID R. MacDONALD
Acting Secretary of the Navy

(One change to SECNAV NOTICE No. **5810** was issued. The original notice of **15** October **1976** was issued with an automatic expiration or cancellation date of August **1977**. Change Transmittal No. **1**, dated 31 August **1977**, extended the life of the notice by one year, to August **1978**.)

2. SECNAV INSTRUCTION No. 1640.10, Department of the Navy Military Magistrate Program (16 Aug. **1978**):

From: Secretary of the Navy
To: All Ships and Stations

Subj: Department of the Navy Military Magistrate Program

- Ref: (a) SECNAVNOTE 5810 of 15 Oct 1976 (hereby cancelled)
(b) SECNAVINST 1640.9 of 19 Jun 1972, Dept. of the Navy Corrections Manual
(c) MCM, 1969 (Rev.), Para. 20c

1. **Purpose.** This instruction establishes the Department of the Navy Military Magistrate Program and sets forth the policy of the Secretary of the Navy concerning the review of the confinement of persons awaiting trial by court-martial. The appointment of military magistrates in the naval service, and the review and disposition of each case of pretrial confinement, shall be in accordance with this instruction.

2. **Cancellation.** Reference (a) is hereby cancelled.

3. **Scope.**

a. **Members of the naval service confined ashore.** The procedures set forth in paragraphs 6-8 of this instruction are applicable to all members of the naval service confined in naval places of confinement ashore in advance of trial by court-martial. Included are returned unauthorized absentees who are confined in naval places of confinement awaiting transportation to their parent commands, with the exception of those who are confined less than 72 hours in any particular naval place of confinement. Also included are members of the naval service awaiting trial by court-martial who are confined in civilian confinement facilities pursuant to an agreement with civil authorities made in accordance with paragraph 104.7 of reference (b). Not included are members of the naval service confined by civil authorities pursuant to Article 8, UCMJ.

b. **Members of the naval service confined afloat.** In those cases in which pretrial confinement is ordered at sea, the commanding officer of the ship shall make arrangements for the transfer of the service member as soon as practicable to the nearest command ashore having an approved place of confinement. When the service member is transferred, the commanding officer shall forward to the military magistrate for the place of confinement

the report required by subparagraph 6(a) of this instruction within 24 hours after the transfer is effected. Thereafter, the case shall be treated in accordance with paragraphs 6-8 of this instruction.

c. Members of the naval service confined in connection with foreign criminal proceedings. The procedures set forth in paragraphs 6-8 of this instruction are not applicable to members of the naval service confined in naval places of confinement who are suspected of or have been convicted of offenses under the criminal law of a foreign jurisdiction, and the custody of whom has been retained or obtained in return for assurances by U. S. officials that the members would be present and available for delivery to the foreign jurisdiction until all criminal proceedings of the foreign jurisdiction have been completed.

d. Members of the naval service confined in places of confinement under the jurisdiction of other armed forces. The procedures set forth in paragraphs 6-8 of this instruction are not applicable to members of the naval service who are confined in either an Army, Air Force, or Coast Guard place of confinement. The review of the pretrial confinement of such members shall be governed by the military magistrate regulations of the armed force that has jurisdiction over the place of confinement. In this regard, members of the naval service ordered into pretrial confinement shall be confined in naval places of confinement whenever possible.

e. Members of other armed forces. In the case of an Army, Air Force, or Coast Guard member ordered into a naval place of confinement, the officer ordering such confinement shall comply with the military magistrate regulations of the armed force to which the service member belongs. If no action on any Army, Air Force, or Coast Guard member's case has been taken by a magistrate of such service member's armed force within 72 hours of his incarceration, the naval service military magistrate for the place of confinement shall promptly review said case in accordance with the procedures set forth in paragraphs 6-8 of this instruction, as if the confined service member were a member of the naval service.

4. *Organization.*

a. *Appointment of military magistrates.* All officers exercising general court-martial jurisdiction over a shore activity of the naval service which includes a naval place of confinement shall appoint one or more military magistrates. In addition, all officers exercising area coordination responsibility over a shore activity of the naval service which has made, pursuant to reference (b), an agreement with civil authorities for confinement in civilian facilities of persons awaiting trial by court-martial shall appoint one or more military magistrates.

b. *Administrative support.* The officer appointing each military magistrate shall ensure that adequate clerical and material support is furnished to permit the military magistrate to effectively accomplish his duties.

5. *Military Magistrates.*

a. *Qualifications.* **An** officer appointed as a military magistrate shall normally be in pay grade O-4 or above. All persons appointed as military magistrates for Navy commands shall be commissioned officers who have been certified by the Judge Advocate General pursuant to Article 27(b), UCMJ. For Marine Corps commands, military magistrates shall be commissioned officers who may be, but need not be, certified by the Judge Advocate General pursuant to Article 27(b), UCMJ.

b. *Prohibitions.* No officer connected with law enforcement or the prosecution or defense function may be appointed as a military magistrate. In addition, no member of the Navy-Marine Corps Trial Judiciary or the Marine Corps Special Court-Martial Judiciary may be appointed as a military magistrate.

c. *Inactive Reserve officers.* Inactive duty Reserve officers who are otherwise qualified under subparagraph 5(a), and whose appointment would not be barred by subparagraph 5(b), may be appointed as military magistrates whenever it is infeasible to appoint a qualified active-duty officer. An inactive duty Reserve officer may be appointed as a military magistrate, however, only with his consent.

d. *Powers.* Although appointed by officers exercising general court-martial jurisdiction, military magistrates derive their powers directly from the Secretary of the Navy. In the exercise of the neutral and detached judgment required by their office, therefore, military magistrates are not subject to the direction or control of the officers who appointed them. Accordingly, the military magistrate has the power to initiate and control the proceedings of pretrial confinement review hearings as set forth in paragraphs 6–8 of this instruction. Subject to the limitations set forth in paragraph 8 and any subsequent judicial determination, the decision of the military magistrate in each case is final.

e. *Other duties.* A military magistrate may be assigned other duties not inconsistent with the qualifications and prohibitions set forth in this paragraph.

6. *Hearing Procedure.*

a. *Command report.* Promptly after a service member is ordered into pretrial confinement, the officer ordering such confinement shall provide a report to the military magistrate for the place of confinement containing sufficient information to permit a review of the factual basis of the confinement decision. The information contained in the report to the magistrate shall include (1) the hour, date, and place of confinement; (2) the offense(s) the service member has allegedly committed and the general circumstances known concerning each offense; (3) the previous disciplinary record of the service member, if available; (4) any mitigating or extenuating circumstances in the case; and (5) the specific reason continued pretrial confinement is considered necessary. The report shall be submitted to the military magistrate, in any event, within 72 hours after a service member has been ordered into pretrial confinement; provided however, that if the 72-hour period ends on a holiday, the period within which the officer ordering the service member into pretrial confinement must submit a report to the military magistrate for the place of confinement shall be extended to **1600**, local time, on the day following the holiday; or if the 72-hour period commences on a Friday which is a holiday, the period within which the officer ordering the service member into pretrial confinement must submit a report to the military magistrate for the

place of confinement shall be extended to 1600, local time, on the following Monday. While it is preferable that the report be submitted to the military magistrate in writing, there is no requirement that it be submitted in this manner. Additionally, the service member's parent command is responsible for submitting the report to the military magistrate only when the service member is ordered into pretrial confinement by a member of such command.

b. *Timing and purpose.* Upon receipt of the command report, the military magistrate for the place of confinement shall promptly hold an informal hearing, at which the service member shall be present, to determine (1) if there is probable cause to believe that an offense has been committed, and that the service member committed it; (2) if there is apparent court-martial jurisdiction over the service member for the offense involved; and (3) if the service member should continue in pretrial confinement. The hearing shall be nonadversary in nature, and the rules of evidence do not apply.

c. *Advice to service member.* At the outset of the hearing, the military magistrate shall advise the service member in accordance with Article 31, UCMJ. In addition, the military magistrate shall advise the service member of the purpose of the hearing and the right to present matter as to whether confinement should be continued. Such matter may include the service member's oral or written statement, documentary evidence, or the statements of others.

d. *Representation by counsel.* No counsel shall be appointed specifically for the hearing, but if the service member already has appointed or retained counsel, such counsel shall be afforded an opportunity to be present at the hearing with the service member and to speak on behalf of the service member. Even though counsel may be present, there is no right to confront and cross-examine witnesses or to convert the hearing into an adversary proceeding.

e. *Continuance.* In those cases where the military magistrate, based upon the evidence initially presented, determines that there is a need for further inquiry, additional information may be sought about the case. In no event, however, shall the de-

cision concerning release of the service member be delayed significantly after commencement of the initial hearing.

7. Decision.

a. **Timing.** Promptly after the conclusion of the informal hearing provided in paragraph 6 of this instruction, the military magistrate shall determine whether the service member should remain in confinement.

b. **Policy.** In the absence of clear evidence affirmatively establishing a need for pretrial confinement under existing military law, the service member is entitled to release from pretrial confinement. It is the policy of the Secretary of the Navy to limit the use of pretrial confinement to cases fully justifiable and wherein no alternative action is practicable or appropriate.

c. **Continuation & confinement.** If the decision of the military magistrate is that the service member should continue in confinement, the decision shall be in writing and shall include a brief statement of the reasons in support thereof. Documentary evidence considered by the military magistrate shall be appended to the decision. A copy of the decision shall be furnished promptly to the service member, his commanding officer, and the corrections officer. The original shall be retained by the military magistrate until final disposition of the service member's case.

d. **Release from confinement.** If the decision of the military magistrate is that the service member should be released from confinement, the military magistrate will so notify, in writing, the commanding officer of the service member, who shall direct the appropriate corrections officer to release the service member immediately with a copy of the release order being forwarded to the general court-martial authority. The notice of decision forwarded to the commanding officer of the service member may contain a recommendation by the military magistrate concerning forms of restraint other than confinement which should be placed upon the service member, and may contain a recommendation that other limitations be placed upon the activities of the service member.

e. *Finality.* Except as provided in paragraph 8 of this instruction, the decision of the military magistrate that the service member should be released from confinement is final and binding upon the commanding officer of the service member, the corrections officer, and the general court-martial convening authority. No administrative appeal of the military magistrate's decision that the service member should be released from confinement is authorized or permissible.

8. *Post-Decision Procedures.*

a. *Release by commanding officer.* Notwithstanding a decision by the military magistrate that the service member should be continued in confinement, the commanding officer of the service member may direct the service member's release. The commanding officer of the service member may thereafter impose any form of restraint, other than confinement, which is authorized by military law and deemed necessary by such commanding officer.

b. *Imposition of lesser forms of restraint.* If a service member has been released from confinement pursuant to the decision by the military magistrate, the commanding officer of the service member may thereafter impose any form of restraint, other than confinement, which is authorized by military law and deemed necessary by such commanding officer.

c. *Reconfinement.* Once released, pursuant to the decision of a military magistrate, the service member may be reconfinement only upon discovery of (1) a different offense which would justify pretrial confinement; (2) new evidence pertaining to the offense for which pretrial confinement was originally ordered; or (3) any other evidence establishing both a lawful basis and a need for pretrial confinement. The military magistrate will be notified immediately of any reconfinement and the reasons therefor, and the military magistrate will thereafter promptly conduct a new hearing in accordance with the procedures set forth in paragraphs 6 7 of this instruction.

d. *Rehearing.* If release from confinement has been denied, a rehearing may be held by the military magistrate, upon his own motion or the service member's petition, at any time prior

to action pursuant to Article 39(a), UCMJ, by a military judge in the service member's case. Once an Article 39(a) session has been held by a military judge in the service member's case, the military magistrate is divested of authority to order the service member's release from pretrial confinement. A petition for hearing by the military magistrate will be based on new circumstances which have arisen since the initial determination was made, or on any new information as to whether the service member should be continued in confinement. If granted by the magistrate, the rehearing shall be held in the presence of the service member. The military magistrate shall continue to maintain a record of the decision and the reasons therefor, and shall append thereto all documentary evidence subsequently submitted for consideration by the service member.

9. *Effect on Other Legal Authority.* This instruction does not eliminate the requirements of Articles 9 and 33, UCMJ, concerning the initiation of pretrial confinement, nor does it affect the provisions of references (b) or (c).

APPENDIX IV

U. S. AIR FORCE MILITARY MAGISTRATE PROGRAM

Set forth below is para. **3-25**, *Air* Force Manual No. **111-1**, as amended by change **2**, dated 8 Oct. **1976**:

3-25. Hearings on Pretrial Confinement, A person subject to military law may be temporarily confined pending a formal determination **as** to whether continued pretrial confinement is warranted. That determination may be made only by an officer acting **as** a neutral and detached magistrate, who is empowered and has the duty to determine impartially whether the person should remain in pretrial confinement **as** provided by paragraph **20c**, MCM, **1969** (Rev.). To fulfill this responsibility effectively, all concerned must insure that pretrial confinement is used only where absolutely necessary.

a. The formal determination required on continued pretrial confinement must be based on a hearing, unless the person confined waives the hearing. The hearing must ordinarily be held within **72** hours of confinement or, if the initial confinement is not under *Air* Force jurisdiction, within **72** hours of receipt of notification by a responsible *Air* Force commander that the person is being held solely for the *Air* Force. The hearing should be simple and **as** brief as practicable. It is limited to two questions: **(1)** Is there probable cause to believe that the person committed the offense(s) for which he is being held? **(2)** Is continued pretrial confinement warranted within the criteria prescribed in the Manual for Courts-Martial?

b. Except as provided below, the determination is made by the officer exercising *Air* Force special court-martial jurisdiction over persons at the place of confinement. He may hold the hearing personally or may designate a staff judge advocate to do so, in which case the staff judge advocate makes a recommendation to him within **24** hours of the hearing, with a summary of the hearing.

c. If the person in confinement requests release from confinement and the commander does not order release, he provides the prisoner with a short statement of reasons for continuing confinement. A copy of the statement will be included in any trial as an allied paper, as will the summary and recommendations of the staff judge advocate if he conducts the hearing.

d. To avoid a possible question of disqualification, the officers referred to in b should avoid detailed involvement in the initial decision to confine the individual although, absent other basis for disqualification, routine discharge by these officers of their responsibilities will not disqualify them from acting under this paragraph.

e. Exceptions and special cases:

(1) If the officer exercising special court-martial jurisdiction is absent, the senior officer present eligible to exercise command may act.

(2) If the officer exercising special court-martial jurisdiction is disqualified from acting impartially (for example, if he is an accuser) the jurisdiction to make the determination will be transferred to the next higher commander, or to another officer exercising special court-martial jurisdiction. In this case, the staff judge advocate to the original commander may be used to conduct the hearing, if he is not disqualified.

(3) If the staff judge advocate who would normally be the designee is disqualified or is absent, the senior eligible judge advocate in his office may, as acting staff judge advocate, conduct the hearing. In this regard, designation may optionally be to the office rather than by name.

(4) If two Air Force commanders exercising special court-martial authority share the use of the same detention or confinement facility, they may agree that each may exercise the authority under b above over prisoners confined from his respective jurisdiction.

f. The determination as to whether pretrial confinement should be continued should be made as soon as practicable after

the hearing and the prisoner should be promptly notified of the decision.

g. If a prisoner who is released under this procedure gives reason to reconsider the question of pretrial confinement (for example, he is accused of additional offense(s) or gives indication of intent to absent himself without authority), he may be detained and the procedures above repeated. If a prisoner who is not released believes that he has reason to have the decision reconsidered, he may apply in writing for reconsideration to the commander who made the original decision (or his successor). Such applications will be acted on promptly, with or without an additional hearing, and the prisoner will be notified of the decision. Copies of the documents will be appended to any record of trial which results.

APPENDIX V

U. S. COAST GUARD MILITARY MAGISTRATE PROGRAM

Set forth below is part **202**, Pretrial Confinement, of Coast Guard Manual No. CG-488, the Military Justice Manual, which describes the Coast Guard's military magistrate program:

202-1. Military magistrate program. A neutral and detached magistrate must hold a hearing in each case of pretrial confinement to determine whether there is probable cause to detain an accused and also whether under the circumstance's the accused should be detained. This section establishes the Coast Guard military magistrate program.

(a) Each district commander having a military correctional facility of the Department of Defense located within the geographic confines of his district shall appoint one or more Coast Guard commissioned officers as Coast Guard military magistrates. The appointment may, but need not be, in writing. The district commander shall authorize each magistrate to release pretrial confinees whose cases are referred to him.

(b) Promptly after a member is ordered into pretrial confinement, the command ordering that confinement shall provide by rapid means to the district commander within whose district the confinement facility is located sufficient information to permit a review of the factual basis of the confinement decision. The information provided shall include:

- (1) The hour, date, and place of confinement;
- (2) The offenses the accused has allegedly committed and the general circumstances concerning each offense;
- (3) The previous disciplinary record of the accused;
- (4) Any mitigating, extenuating or aggravating circumstances; and,

(5) The reason pretrial confinement is considered necessary.

(c) The district commander shall promptly pass this information to a military magistrate appointed by him.

(d) Upon receipt of the information from the district commander, and in any event not more than **72** hours after the order into pretrial confinement, the military magistrate shall hold an informal hearing (personal interview with the accused), to determine:

(1) Whether there is probable cause to believe that an offense has been committed and that the member committed it,

(2) Whether there is apparent court-martial jurisdiction over the member for the offenses involved, and,

(3) Whether under the circumstances the member should remain in pretrial confinement.

(e) The military magistrate shall be guided by Articles **9**, **10** and **13**, UCMJ, and paragraphs **19** and **20**, MCM. The accused shall be advised of his right to present information relative to the legality and appropriateness of his confinement. The hearing is nonadversarial in nature and the rules of evidence do not apply. Counsel shall not be appointed specifically for the hearing, but if the accused already has counsel, counsel shall be afforded an opportunity to be present at the interview with the accused and to make a statement in behalf of the accused.

(f) When the military magistrate, based on the information presented, determines there is a need for further inquiry, he will seek additional information about the case. In no event, however, shall his decision concerning release of the accused be delayed significantly after commencement of the initial hearing.

(g) In the absence of information affirmatively establishing a need for pretrial confinement, the accused is entitled to release. It is the policy of the Commandant to limit the use of pretrial confinement to those cases in which it is essential. Doubtful or borderline cases shall be resolved against continued confinement.

(h) Promptly after the conclusion of the informal hearing the military magistrate shall determine whether the accused should remain in confinement. If the decision is to continue the member in confinement it shall be in writing and shall include a brief statement of the reasons in support thereof. A copy of the decision shall be promptly provided to the accused, the command ordering the accused into pretrial confinement, and the district commander in whose district the confinement facility is located. The original shall be retained by the military magistrate until **final** disposition of the member's case.

(i) If the military magistrate determines that the accused should be released from confinement, he shall promptly order his release and advise the command ordering the accused into confinement. The effective date and time of his release order may be delayed for a short period of time to permit the command ordering the confinement to make any necessary administrative arrangements. That command may thereafter impose any authorized form of pretrial restraint, other than confinement, that is deemed necessary.

(j) Once released by the military magistrate, the accused may be reconfined only upon discovery of:

(1) A different offense which would warrant pretrial confinement, or,

(2) New information pertaining to the offense for which he was ordered into pretrial confinement which significantly changes the circumstances and supports reconfinement. The military magistrate will be again notified immediately through the district commander. He will then review the case in the same manner as is provided in any other case of pretrial confinement.

(k) The decision of the military magistrate is final. If release from confinement is denied, however, the accused may later petition the military magistrate for a new consideration of his case. His petition must be based on new circumstances which have arisen since the initial determination was made or on new information available concerning the legality or appropriateness of his confinement. The military magistrate may hold a new hearing.

(l) In those rare cases where the military magistrate to whom the district commander assigns a case is not neutral and detached with respect to the order into confinement, he shall promptly advise the district commander, who shall assign the case to another military magistrate.

(m) In the case of Coast Guard Activities, Europe, any military magistrate of the military service operating a confinement facility in which a Coast Guard member is in pretrial confinement is hereby authorized to release a Coast Guard pretrial confinee on the terms of the regulations applicable to the military magistrate system of that service.

(n) Commander, Fourteenth Coast Guard District is authorized to empower any military magistrate of the military service operating a confinement facility in which a Coast Guard member is in pretrial confinement to release a Coast Guard pretrial confinee on the terms of the regulations applicable to the military magistrate system of that service.

(o) When the Commandant (GPS) has authorized pretrial confinement in a civilian facility, the district commander within the geographical confines of whose district the civilian facility is located shall provide for review by a military magistrate appointed by him in the same manner as prescribed herein for persons confined in military confinement facilities.

(p) A district commander shall, at the request of a command within his district, make available a neutral and detached magistrate appointed by him, to hold a hearing in the case of an accused prior to any initial order into pretrial confinement. In this case the magistrate shall make the initial determination as to the legality and appropriateness of pretrial confinement, and there need be no additional magistrate's hearing except as provided in paragraphs 202-1(j) and 202-(k) above.

(q) This Section does not apply to cases of members of the Coast Guard assigned to units of another military service who are placed in pretrial confinement by an officer of that service. The military magistrate program of the military service to which the accused is assigned shall apply.

APPENDIX VI

Set forth below is the text of the interim order issued on 28 July 1978 by Chief Judge William B. Bryant of the U.S. District Court for the District of Columbia in the case of Lively v. Cullinane. (See notes 60 and 61, and accompanying text, above.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR LIVELY

Plaintiff :

v.

Civil Action No. 75-0315

MAURICE J. CULLINANE, et al. :

Defendants :

INTERIM ORDER

Upon consideration of defendants' request for a 5-month postponement and of the submissions and arguments of the parties, it is, this 28th day of July, 1978,

ORDERED:

1. That defendants shall within 14 days institute those measures necessary so that, until further order of this Court, persons arrested between the hours of 5:00 a.m. and 2:00 p.m. on Mondays through Fridays (except holidays) and between the hours of 6:30 a.m. and 10:00 a.m. on Saturdays and holidays are released or arrive at the courthouse within no more than 4 hours of their arrest and so that persons arrested at any other time are ready for delivery to court within no more than 4 hours of their arrest and arrive at the courthouse by 8:00 a.m. of the next day the court is in session;

2. That the defendants thoroughly document each case in which there is any deviation from paragraph 1 of this Order and document what

defendants have done to make known to the Superior Court of the District of Columbia and the United States District Court for the District of Columbia that arrestees are ready for presentment;

3. That the defendants are hereby granted until December 1, 1978, to submit a proposed final order in this proceeding.

/s/ WILLIAM B. BRYANT,
Chief Judge

FILED JULY 31, 1978, JAMES F. DAVEY, Clerk

DUE PROCESS: OBJECTIVE ENTRAPMENT'S TROJAN HORSE*

by Captain Robert L. Gallaway**

Persons accused of crimes sometimes defend at trial by saying that they were trapped by actions of government agents. The courts have split between two tests for entrapment. In the subjective test, the defense will succeed only if it can be shown that the accused was not predisposed to commit a criminal act before government agents intervened. The objective test, more favorable to the defense, ignores the subjective predisposition of the accused, focusing exclusively on the government's actions.

The subjective test is prescribed by paragraph 216e of the Manual for Courts-Martial, United States, 1969 (Revised edition). Captain Gallaway suggests that this may be objectionable on grounds of denial of due process, at least in cases in which the conduct of the government is outrageous, if not in all cases. He recommends that defense counsel follow this line of attack in appropriate cases.

I. INTRODUCTION

One of the oldest and most consistent divisions within the United States Supreme Court is in the field of entrapment. In every case concerning this issue since the 1932 decision in *Smells v. United States*,¹ the Court has been bitterly split between the proponents of the subjective and the objective theories of entrapment. Over the years the split within the Court was fairly consistent, with the subjective theory commanding a

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

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¹ 287 U.S. 435 (1932).

majority. At least that was the situation until the Court decided the case of *Hampton v. United States*³ in 1976. The fragmented decision in that case has given rise to speculation that a majority of the Court, through the due process guarantees of the United States Constitution, is now willing to give recognition to the objective theory of entrapment as a legitimate bar to prosecution.³

This article highlights the reasoning underlying a line of cases which suggests that, regardless of the subjective predisposition of an accused, objective entrapment may violate constitutional guarantees of due process.

II. THE DEVELOPMENT OF THE ENTRAPMENT DEFENSE IN THE UNITED STATES SUPREME COURT

As noted above, the Supreme Court has dealt with and split over the issue of entrapment many times. The first major division occurred in *Sorrells v. United States*,⁴ in which the Court reversed the defendant's conviction but disagreed as to its reasoning for doing so. In that case, the defendant was convicted of possessing and selling whiskey in violation of the National Prohibition Act.⁵

The offense occurred after a federal agent, posing as a furniture dealer, came to the defendant's town in 1930. He was introduced to the defendant as a veteran of the World War, who had served with him in the 30th Division. The agent asked the defendant to secure for him one half gallon of whiskey, but the latter refused, stating that he did not "fool around" with liquor. The two continued to talk about their war experiences and, during the next hour and a half, the agent asked the defendant for whiskey four or five more times. Finally, the defendant left and returned with the requested whiskey.⁶

² 425 U.S. 484 (1976).

³ Military defense **counsel** should be aware of this possible defense, and should be alert to opportunities to **use** it to their clients' benefit.

⁴ Note 1, *supra*.

⁵ Pub. L. No. 66, ch. 85, 41 Stat. 305 (1919).

⁶ 287 U.S. at 440.

A majority of the Supreme Court held that the defendant was entrapped into committing the offense. They reasoned that, in enacting the criminal statute at issue, Congress could not have intended to punish persons, otherwise innocent, who were lured into committing the proscribed conduct by governmental instigation.⁷ The majority focused on whether the defendant was “otherwise innocent” and adopted the “subjective” or “origin of the intent” test in resolving the question of entrapment.⁷ Under that test, innocence is established only if (1) governmental instigation and inducement oversteps the bounds of permissibility, *and* (2) the defendant does not harbor any pre-existing criminal intent. Since these questions directly concerned the issue of guilt or innocence, they were deemed to be ones for the jury to determine.⁹

Justice Roberts wrote a concurring opinion in which Justices Brandeis and Stone joined. Justice Roberts argued that the purpose of the entrapment defense should be to deter police misconduct.¹⁰ Therefore, any predisposition of the defendant is irrelevant. He based his reasoning on two points. First, the admission of evidence of predisposition would permit proof of guilt by past conduct, rumor, and matters not related to the charged offense. Thus, argued Justice Roberts, an accused could be convicted of a crime because he may have committed other crimes, not because of evidence of his commission of the charged offense.”

Second, as a matter of public policy, the courts should not be party to police tactics designed to instigate crime. Under the view of Justice Roberts and the two justices who joined with him, the only issue was the level of police misconduct, and any predisposition of the defendant was **irrelevant**.¹²

The continued division over the entrapment issue was highlighted 26 years later in a 1958 decision of the Court, *Sherman v. United States*.¹³ Sherman was convicted of sale of narcotics. The record indicated that the government informer met the accused in a doctor’s office where they

⁷ 287 U.S. at 448.

⁸ 287 U.S. at 451.

⁹ 287 U.S. at 452.

¹⁰ 287 U.S. at 457.

¹¹ 287 U.S. at 459.

¹² *Id.*

¹³ 356 U.S. 369 (1958).

were both undergoing treatment for narcotics addiction. They accidentally met again on numerous occasions and began talking about their problems. Finally, the informer asked the accused where he could get some narcotics, claiming he was not responding to the treatment. At first the accused tried to avoid the issue; only after numerous requests predicated on the informer's presumed suffering did he agree to secure the drugs. The accused thereafter purchased drugs, sharing with the informant both their cost and their use. After several such transactions, the informer advised the Bureau of Narcotics that he had a seller for them. Three additional observed sales served as the basis for the charged offenses.

Although splitting as to the reasons, all nine of the justices agreed that entrapment existed in the case, as a matter of law. In a five to four split, the Court continued its disagreement concerning the theoretical basis of the defense. The majority again refused to accept Justice Roberts' "objective" theory. Chief Justice Warren, writing for himself and four others, opined that entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials, noting that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."¹⁵

In a concurring opinion joined by Justices Douglas, Harlan, and Brennan, Justice Frankfurter argued for the adoption of Justice Roberts' objective theory. This position was partly based on the policy position that the courts and the government should not become involved in intolerable police conduct.¹⁶ Additionally, it was noted that the concern for equal justice demanded two considerations: first, the permissible standard of police conduct should not vary according to the perceived reputation or character of the suspect, and, second, in light of the highly prejudicial nature of evidence admitted on the issue of predisposition, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition.¹⁷

Justice Frankfurter advanced a set of factors which should be considered in applying the objective theory, and which have been repeatedly

¹⁴ 356 U.S. at 371.

¹⁵ 356 U.S. at 372.

¹⁶ 365 U.S. at 380.

¹⁷ 356 U.S. at 382-83.

noted by courts and commentators advocating his position. Justice Frankfurter's analysis is so important to the development of the federal law of entrapment that it is set forth below, despite its length:

Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality of law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view.

This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of "entrapment" as a prosecutorial instrument. The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset

by temptations without government adding to them and generating crime.¹⁸

The division in the Court was again illustrated in *United States v. Russell*, decided in 1973.¹⁹ Voting five to four, the court declined to overrule the subjective “origin of the intent” theory outlined in *Smells v. United States*.²⁰ In this case, the defendant was charged and convicted of three counts of unlawfully making, possessing, selling and delivering methamphetamine, commonly called “speed.” The only defense raised was **entrapment**.²¹ The defendant had been producing the drug for approximately seven months. A government agent, seeking to locate a laboratory where illegal methamphetamine was being produced, approached the defendant, claiming that he was from an organization seeking to control the manufacture and distribution of the drug in the area. He offered to supply the defendant with an essential ingredient in the manufacture of the drug in exchange for one half of the drug **produced**.²² The agent did in fact provide the essential ingredient, phenyl-2-propanone, and witnessed the manufacture of the drug. The agent was then given his share and was sold some of the remainder. When the laboratory **was** later searched, a partially filled bottle of phenyl-2-propanone not supplied by the agent was **discovered**.²³

In writing for the majority,²⁴ Justice Rehnquist concluded that a defendant’s concession that he was predisposed to commit the offense is fatal to a claim of entrapment.²⁵ However, the majority did note the possibility of a *due process* challenge to the proceedings because of police misconduct:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due

¹⁸ 366 U.S. at 883–84.

¹⁹ 411 U.S. 423 (1973).

²⁰ 287 U.S. 435 (1932).

²¹ 411 U.S. at 424.

²² 411 U.S. at 425.

²³ 411 U.S. at 426.

²⁴ Justice Rehnquist was joined in his opinion by Chief Justice Burger, Justice White, Justice Blackmun, and Justice Powell.

²⁵ 411 U.S. at 436.

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the instant case is distinctly not of that breed.²⁶

Aside from the citation to *Rochin v. California*,²⁷ the Court gave little guidance as to what level of conduct was required to run afoul of due process principles.

Justice Douglas, joined by Justice Brennan, dissented,²⁸ favoring the objective theory outlined by Justice Frankfurter in *Sherman v. United States*²⁹ and Justice Roberts in *Sorrells v. United States*.³⁰ Justice Stewart wrote a second dissenting opinion and was joined by Justice Brennan and Justice Marshall.³¹ Also borrowing from the opinions of Justice Frankfurter in *Sherman* and Justice Roberts in *Sorrells*, Justice Stewart likewise argued for the adoption of the objective test. It was his view that, in the case before the Court, the offense was made possible only through active government involvement and promotion of the criminal venture. This heavy involvement, he explained, should bar the government from prosecuting its partners in crime.³²

The subjective/objective split within the Court continued from *Sorrells* without any apparent major shift, until April 27, 1976, when the Court issued its multi-opinioned ruling in *Hampton v. United States*.³³ Justice

²⁶ 411 U.S. at 431.

²⁷ 342 U.S. 165 (1952). In this case, defendant was convicted of illegal possession of morphine. To obtain the evidence, police officers illegally forced their way into defendant's home. In sight of the officers, defendant swallowed two capsules which were lying on a night stand beside his bed. A physical struggle followed, in which the police tried unsuccessfully to extract the capsules. They then handcuffed defendant and took him to a hospital, where the tube of a stomach pump was forced down his throat, and an emetic solution was poured into his stomach through the tube. This produced vomiting, and the capsules were recovered. 342 U.S. at 166. Justice Frankfurter characterized this conduct as "brutal" and "offensive to human dignity."

²⁸ 411 U.S. at 436.

²⁹ 356 U.S. 369 (1958).

³⁰ 287 U.S. 435 (1932).

³¹ 411 U.S. at 439.

³² 411 U.S. at 447-50.

³³ 425 U.S. 484 (1976).

Rehnquist wrote the Court's plurality opinion in which he re-emphasized the subjective theory, and in which Chief Justice Burger and Justice White joined. However, it was the concurring opinion of Justice Powell, joined by Justice Blackmun, and the dissenting opinion of Justice Brennan, joined by Justice Stewart and Justice Marshall, that may have signaled the shift to an objective theory.

In *Hampton*, the defendant was convicted of two counts of distributing heroin. At trial, he claimed that he met the government informant in a billiard hall and remarked that he needed some **money**.³⁴ The informant replied that he had a friend who could produce a non-narcotic counterfeit drug which he and the defendant could sell to gullible acquaintances who believed it was **heroin**.³⁵

The defendant explained that he and the informant had successfully duped one buyer and that the sales which led to his arrest were solicited by the defendant in an effort to further profit from this ploy. He stated that he did not know the substance sold did in fact contain heroin, and that all the drugs were supplied by the government **informant**.³⁶ The government conceded that the sales were made to government agents, acting in concert with the **informant**.³⁷ The defendant conceded on appeal that he was predisposed to commit the offense.³⁸

Aside from the question of lack of scienter (which was apparently rejected by the **jury**),³⁹ the case presented the precise issue of whether the defendant could be deemed entrapped through the actions of a government agent in supplying contraband to the defendant in order that he could sell the same to other government agents. The defense asked for a jury instruction to the effect that these facts evidenced entrapment *per se*, but the trial judge denied the request.⁴⁰

³⁴ 425 U.S. at 486.

³⁵ 425 U.S. at 486-87.

³⁶ 425 U.S. at 487.

³⁷ 425 U.S. at 486.

³⁸ 425 U.S. at 487 note 3.

³⁹ 425 U.S. at 487.

⁴⁰ The instruction was:

The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.

For the three-member plurality, Justice Rehnquist once again noted that the defense of entrapment could never be based upon governmental misconduct in a case where the predisposition of the defendant to commit the crime was **established**.⁴¹ The plurality then went further, attempting to clarify their language in *United States v. Russell*,⁴² which left open the possibility of a due process attack on a conviction based upon governmental misconduct. Dealing very strictly with such a possibility, they held that the limitations of the Due Process Clause of the Fifth Amendment come into play only when the government activity in question violates some constitutionally protected right of the defendant. In such a case, the sanction would lie in prosecuting the police, not in freeing an equally culpable defendant.⁴³ The plurality then concluded that the police in the instant case had violated no such right of the **defendant**.⁴⁴

Justice Powell, joined by Justice Blackmun, concurred in the result, noting that *United States v. Russell* was controlling on its facts.⁴⁵ However, Powell refused to join with the remainder of the opinion of the plurality, especially that language restricting the scope of the protections of due process. Indeed, he specifically excepted himself from the theory that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police **behavior**.⁴⁶ He did suggest, however, that the term “entrapment” should now be employed **as** a term of **art**, focusing on the question of predisposition. Defined that way,

If you find that the defendant’s sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your **own** minds, then the predisposition of the defendant would not matter.

425 U.S. 487–88.

⁴¹ 425 U.S. at 488–89.

⁴² 411 U.S. at 431–32.

⁴³ 425 U.S. at 490.

⁴⁴ 425 U.S. at 490–91.

⁴⁵ 425 U.S. at 491–92, .

⁴⁶ 425 U.S. at 492–93.

entrapment would not be the only defense relevant to cases in which the government has encouraged or otherwise acted in concert with the defendant.⁴⁷ In explaining these broader defenses, Justice Powell borrowed the language of Judge Friendly in *United States v. Archer*.⁴⁸

[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.⁴⁹

Justice Brennan's dissent, joined by Justice Stewart and Justice Marshall, once again asserted the objective theory⁵⁰ found in Stewart's dissent

⁴⁷ 425 U.S. at 492 note 2.

⁴⁸ 486 F.2d 670 (2d Cir. 1973).

⁴⁹ 486 F.2d 676-77, *quoted at* 425 U.S. 493 note 4.

In that case, the Court of Appeals reversed the conviction of defendants convicted of using telephone facilities in interstate commerce and foreign commerce to commit bribery, and of conspiracy to commit the same. In their investigation of a suspected bribery ring in the Queens Office of the District Attorney, police investigators submitted false police reports and false arrest affidavits, committed perjury before the grand jury, and requested that some of the individuals under investigation contact them telephonically at a New Jersey telephone to discuss their illegal activity.

⁵⁰ 425 U.S. at 495-97.

Justice Brennan noted that the beginning and the end of the crime coincided with the government's entry into and withdrawal from the criminal activity. To the dissent, it was a critical failing that the government set up an accused by supplying him with contraband and bringing in another government agent as the potential purchaser. Such police activity was directed at enticing individuals to committing crimes rather than discovering ongoing criminal activity. Brennan also pointed out that lower federal courts had already held that a conviction cannot be had where the government has provided the contraband that the defendant is charged with selling, citing *United States v. Bueno*, 447 F.2d 903 (6th Cir. 1971). Also cited were *United States v. Oguendo*, 490 F.2d 161 (5th Cir. 1974) and *United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974), noting *Bueno's* survival of *United States v. Russell*, 411 U.S. 423 (1973).

in *United States v. Russell*,⁵¹ Frankfurter's concurring opinion in *Sherman v. United States*,⁵² and Roberts' concurring opinion in *Smells v. United States*.⁵³ It also agreed with Justice Powell's opinion that, if the traditional defense of entrapment is foreclosed to a predisposed defendant, due process guarantees and the court's supervisory powers should be available to shield a defendant from outrageous government conduct."

The significance of *Hampton v. United States* is that five of eight justices determined that, while predisposition to commit an offense may bar a defendant from exerting a traditional entrapment defense, **as** defined by the plurality, due process guarantees of fundamental fairness would not, when the police conduct is outrageous. The ninth justice, John Paul Stevens, did not participate in the 1976 consideration of *Hampton* and thus has not had an opportunity to voice an opinion on this entrapment issue since his appointment to the Supreme Court. Therefore, if one is to speculate **as** to Justice Stevens' beliefs on this issue, one must look to the opinions emanating from the Seventh Circuit Court of Appeals during his tenure **there**.⁵⁵

When he was a member of the Seventh Circuit, Justice Stevens participated in only one case resulting in a published opinion dealing with the possibility of due process/objective entrapment, *United States v. McGrath*.⁵⁶ In its first consideration of the case, the court, in an opinion authored by Chief Judge Swygert, reversed the counterfeiting conviction of the defendant due to government conduct which the court believed was totally **unjustified**.⁵⁷ The court noted that the defendant had initially embarked on the plan to counterfeit United States currency before Secret Service agents became involved by discovering the scheme, infiltrating the conspiracy, and effectively taking direction of it. The Secret Service not only arranged and supervised the actual printing of the counterfeit

⁵¹ 411 U.S. at 439.

⁵² 356 U.S. at 380.

⁵³ 287 U.S. at 457.

⁵⁴ 425 U.S. at 499.

⁵⁵ Justice Stevens served on that court from 1970 to 1975.

⁵⁶ 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded*, 412 U.S. 936, (1973), *per curiam*, 494 F.2d 562 (7th Cir. 1974).

⁵⁷ 468 F.2d at 1030. The Seventh Circuit let stand a conviction for an offense of conspiracy that had already been committed at the time the Secret Service became involved in the counterfeiting scheme. 468 F.2d at 1031.

currency, but also determined how and when the currency would be delivered to the defendant for distribution. A government agent made delivery to the defendant, who was apprehended by other agents.⁵⁸

Notwithstanding the defendant's demonstrated willingness to counterfeit, the Court of Appeals reversed. The court noted that the *Sorrells* prohibition of the government's engineering of a crime should apply equally to a situation where the government itself performs essential parts of a criminal offense that might not otherwise have been committed. The government's hand in the scheme was simply too strong to justify convicting its co-actors in the **venture**.⁵⁹ In passing on the effect of the government's involvement, the court announced, "We find it repugnant to the most essential notions of justice to permit the law enforcement personnel to manufacture counterfeit bills, deliver them, and then arrest the recipient for possession of **contraband**."⁶⁰ As support for its reversal, the court specifically pointed to the reasoning behind the concurring opinions of *Smells* and *Sherman* and stressed the continuing validity of the concerns acknowledged in them:

An approach which focuses on the defendant's predisposition may not be adequate to deal with situations involving solicitation of those with criminal records who may be more amenable to inducement, those involved in minor crimes who by official encouragement move on to major ones, or those, like McGrath, who have embarked on a criminal venture that may never have been completed without official aid.⁶¹

Because of the heavy involvement of the government in the criminal scheme, the court held that the defendant was entrapped **as** a matter of law.⁶²

Justice Stevens did not dissent from the court's holding. Although he did not author the opinion, his concurring vote does give some insight into his possible views. It must be noted, however, that the subsequent history of *McGrath* diminishes its use in predicting Justice Stevens' future orientation on the due process/objective entrapment issue. Subsequent

⁵⁸ 468 F.2d at 1028.

⁵⁹ 468 F.2d at 1031.

⁶⁰ 468 F.2d at 1030.

⁶¹ 468 F.2d at 1031.

⁶² 468 F.2d at 1028.

to the Seventh Circuit's decision in *McGrath*, the Supreme Court handed down its decision in *United States v. Russell*.⁶³ Noting similar patterns of government involvement in *McGrath* and *Russell*, the Supreme Court vacated the judgment in *McGrath* and remanded it.⁶⁴ On remand, the Court of Appeals, in a *per curiam* opinion, decided that, due to the similarity of the cases, *United States v. Russell* was controlling and affirmed the conviction.⁶⁵

As a result of *Hampton* and *McGrath*, two main developments appear to have occurred in the field commonly referred to as entrapment. First, the use of the term "entrapment" has been narrowed to a term of **art** meaning only that defense earlier referred to as the subjective or "origin of the intent" theory of entrapment. Again, under this restrictive definition, a defendant would be deprived of the use of an entrapment defense if he is predisposed to criminal conduct.⁶⁶

Secondly, perhaps as many as six justices believe that a defendant may raise a due process bar to his conviction,⁶⁷ with overtones of the objective theory promoted by the concurring opinions in *Sorrells*⁶⁸ and *Sherman*,⁶⁹

⁶³ 411 U.S. 423 (1973).

⁶⁴ 412 U.S. 936 (1973).

⁶⁵ *United States v. McGrath*, 494 F.2d 562 (7th Cir. 1974).

⁶⁶ *Hampton v. United States*, 425 U.S. at 488–89; Powell, J., concurring in result, 425 U.S. at 492 note 2.

⁶⁷ The six justices in this possible majority include Justices Powell and Blackmun, on the basis of Powell's opinion in *Hampton*; Justices Brennan, Stewart, and Marshall, on the basis of their dissents in both *Russell* and *Hampton*; and Justice Stevens, on the basis of the original Seventh Circuit Court of Appeals' decision in *McGrath*.

Although the plurality opinion in *Hampton* acknowledged the possibility of due process objections based upon governmental misconduct, it stated that due process protections come into play only when a protected right of the defendant is violated and that the sanction for such a violation would be the prosecution of the offending officers rather than affording an accused a defense to the charge. As this imposes such a strict standard for due process application, **as** well as very limited relief, the three members of the plurality are not counted **as** subscribers to the possible due process/objective entrapment majority. Justices Powell and Blackmun specifically refused to join in the absolute language of the plurality and left open the door for a less restricted due process attack directly on the conviction.

⁶⁸ 287 U.S. at 457.

⁶⁹ 356 U.S. at 380.

and Justice Stewart's dissent in *Russell*," when the government conduct is egregious. As a result, notwithstanding language of the lead opinion in *Hampton* to the contrary, a predisposed defendant may still raise outrageous governmental misconduct as a defense. However, the question remains as to what level of misconduct is required to bar the prosecution? Or, more simply put, "How outrageous is outrageous?"

III. FEDERAL COURTS' REACTION TO HAMPTON

Not surprisingly, the federal courts have divided in attempting to contend with the multi-opinioned *Hampton* decision. Interpreting the Supreme Court's comments in *Russell* as instructions not to reverse convictions simply because of what a particular court might believe are highly distasteful tactics,⁷¹ some have been reluctant to reverse convictions based on police misconduct.⁷²

⁷⁰ 411 U.S. at 439.

⁷¹ In *Russell*, the majority criticized unnamed lower courts for reversing cases due to police misconduct, noting:

Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this Court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be, for want of a better term, 'overzealous law enforcement.' But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*.

Id. at 435.

⁷² *United States v. Laurenti*, 581 F.2d 37, 44 n.19 (2d Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *United States v. Leja*, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 435 U.S. 1074 (1978). In the *Leja* case, the Seventh Circuit Court of Appeals refused to reverse a conviction based in part on governmental misconduct, noting:

A proper respect for the coequal responsibilities of the other branch of government under the Constitution and for the system of checks and balances, however, persuades us to refrain from acting here. This is

Others have responded by noting that *Russell* and *Hampton* merely raise questions concerning the possibility of a due process defense. Until the Supreme Court confirms the existence of such a defense, at least one court of appeals has declared its unwillingness to serve as a midwife to its birth.⁷³

A third group of courts has issued opinions with the view that *Hampton* fully supports a due process defense based upon the outrageous nature of the government's conduct.⁷⁴ In this group are two cases which have held the government misconduct to be sufficiently egregious to apply the due process defense and require dismissal of the charges.

The most recent of these two cases is *United States v. Twigg*, decided in 1978.⁷⁵ There, the government once again became involved in the

particularly so where, as here, no precise violation of any penal statute by the officers in question is shown and where it seems certain that the defendants could have obtained sources of supply and information without the assistance of the government agents, given their established predisposition to go into the drug making business.

563 F.2d at 247. *See also* *United States v. Monasterski*, 567 F.2d 677 (6th Cir. 1977); *United States v. Benavidez*, 558 F.2d 308 (5th Cir. 1977); *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded*, 412 U.S. 936 (1973), *per curiam*, 494 F.2d 562 (7th Cir. 1974).

⁷³ *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977).

⁷⁴ Many of the opinions which have addressed this question have held that, although a due process attack is available under *Hampton*, the facts of the individual cases concerned were not sufficiently out of line with universal standards of fundamental fairness to require reversal of the convictions. *See* *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978); *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978); *United States v. Batchelder*, 581 F.2d 626 (7th Cir. 1978), *rev'd on other grounds*, 442 U.S. 114 (1979); *United States v. McClure*, 577 F.2d 1021 (5th Cir. 1978); *United States v. Pairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Hansen*, 569 F.2d 406 (5th Cir. 1978); *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States v. Garcia*, 562 F.2d 441 (7th Cir. 1977); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States v. Townsend*, 555 F.2d 152 (7th Cir. 1977), *cert. denied*, 434 U.S. 897 (1977); *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977); *United States v. Ryan*, 548 F.2d 782 (9th Cir. 1977), *cert. denied*, 430 U.S. 965 (1977); and *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976).

⁷⁵ 588 F.2d 373 (3d Cir. 1978).

manufacture of methamphetamine hydrochloride. The government's involvement began when Robert Kubica was arrested and pled guilty to illegal manufacture of the drug. In conjunction with his guilty plea, he agreed to aid the Drug Enforcement Administration in apprehending illegal drug traffickers. He contacted an individual named Neville to discuss setting up a speed laboratory. Neville voiced an interest and arrangements were made, with Neville taking responsibility for raising capital and distribution of the product while Kubica undertook acquisition of the raw materials, equipment, and a production site. In furtherance of the plan, the government provided assistance to Kubica in fulfilling his part of the agreement.⁷⁶

Drug Enforcement Administration agents supplied him with two and one-half gallons of phenyl-2-propanone,⁷⁷ 20% of the glassware needed, and a rented farm house in which to establish the laboratory. Additionally, Drug Enforcement Administration agents made arrangements with a chemical supply house to sell the balance of the needed materials to Kubica under an assumed organization name. With the exception of a single funnel, Kubica personally purchased all the supplies with approximately \$1,500 supplied to Neville.⁷⁸

Neville then introduced Kubica to William Twigg, who became involved in the operation to repay a debt he owed to Neville. Twigg's involvement was minor, once accompanying Kubica on a trip to some chemical supply house, and running errands for groceries or coffee during the laboratory's operation. Production assistance furnished by Neville and Twigg was also minor. The laboratory was set up on March 1, 1977, and operated until March 7, 1977, with Kubica completely in charge. During this time six pounds of methamphetamine hydrochloride was produced. On March 7, Kubica notified DEA agents that Neville could be found in possession of the produced drugs. Neville was then arrested in possession of the drugs and Twigg was arrested at the laboratory."

Stressing the outrageous government conduct, the Third Circuit re-

⁷⁶ 588 F.2d at 375.

⁷⁷ "his is the same essential chemical that was supplied by the government agents in the *Russell* case. 411 U.S. at 425; 459 F.2d at 672.

⁷⁸ 588 F.2d at 375-76.

⁷⁹ 588 F.2d at 376.

versed the convictions of both Neville and Twigg.⁸⁰ The court interpreted *Hampton*⁸¹ as availing to a predisposed defendant a due process defense in which fundamental fairness would not permit any defendant to be convicted of a crime when the police conduct was shocking.⁸² Turning to the question of what level of misconduct is required before the Due Process Clause would bar prosecution, the court reviewed the leading objective entrapment cases which preceded *Hampton*.⁸³

Based upon its review, the Third Circuit concluded that impermissible conduct was manifest in the facts that the government not only directly supplied or made available through other sources the ingredients and the equipment, and supplied the laboratory location and the needed expertise for the drug manufacture, but also conceived and contrived the basic plan.⁸⁴ Although Neville was predisposed and thus could not claim the traditional defense of entrapment, fundamental fairness would operate to bar his conviction.⁸⁵

More importantly, fundamental fairness barred the conviction of Twigg as well. The traditional defense of entrapment was not available to Twigg, not because he was predisposed, but because he was brought into the scheme by a private citizen.⁸⁶ However, the court found that all the actions by Twigg, after he was informed of the purpose of the scheme, were directed by Kubica. As a result, Twigg's conviction was also considered tainted and fundamental fairness required reversal.⁸⁷

⁸⁰ Left intact was the conviction of Neville on a charge of unlawful possession of cocaine. A quantity of this drug was coincidentally found in Neville's automobile when he was arrested in connection with the amphetamine charges. 588 F.2d at 376, 376.

⁸¹ 425 U.S. 484 (1976).

⁸² 588 F.2d at 379.

⁸³ *Id.* The Third Circuit considered unclear the type of conduct considered outrageous by the Supreme Court in *Hampton*, but assumed that such conduct would be similar to that described in two cases decided before *Hampton*, *United States v. West*, 511 F.2d 1083 (3d Cir. 1975), and *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). *Id.*

⁸⁴ 588 F.2d at 380.

⁸⁵ 588 F.2d at 381.

⁸⁶ *Id.* *United States v. Garcia*, 546 F.2d 613 (5th Cir. 1977), cert. denied, 430 U.S. 958 (1977); *United States v. Mayo*, 162 U.S.App.D.C. 171, 498 F.2d 713 (D.C. Cir. 1974).

⁸⁷ 588 F.2d at 382.

Another post-*Hampton* case dismissed on due process/objective entrapment grounds is *United States v. Hustings*, decided in 1977.⁸⁸ There, local police authorities engineered an investigation against the defendant which the court found to be motivated by one police official's desires for **vengeance**.⁸⁹ An informant, released from jail, supplied with an assumed name, a car, and a liberal amount of spending money, began negotiations with the defendant concerning the purchase of an air compressor. Agreements were ultimately made to deliver an air compressor and a truckload of tires to the defendants. The police then arranged for the "theft" of these two items to take place across state lines in Texas and Mississippi, with the cooperation of police within those two states. The "stolen" items were picked up in both Texas and Mississippi with the assistance of local police and were transported to Arkansas with the assistance of Little Rock police **officers**.⁹⁰

The defendants, who had been informed before payment for the compressor and delivery of the tires that the items were **stolen**,⁹¹ were ultimately indicted⁹² for transporting in interstate commerce an air compressor having a value in excess of \$5,000, knowing it to be stolen;⁹³ receiving the same air compressor, knowing it to be stolen;⁹⁴ stealing, receiving and possessing a truckload of tires which constituted an interstate shipment of **freight**;⁹⁵ and receiving the tires, knowing that they had been stolen.⁹⁶

The local police officer admitted that this was intended to be a federal case from the beginning. However, the Federal Bureau of Investigation **was** not consulted or informed when the scheme was planned and were only contacted toward the termination of the investigation.⁹⁷

On the basis of these facts, the Attorney General of the United States

⁸⁸ 447 F.Supp. 534 (E.D. Ark. 1977).

⁸⁹ 447 F.Supp. at 540.

⁹⁰ 447 F.Supp. at 538-39.

⁹¹ *Id.*

⁹² 447 F.Supp. at 535.

⁹³ 18 U.S.C. § 2314 (1976).

⁹⁴ 18 U.S.C. § 2315 (1976).

⁹⁵ 18 U.S.C. § 371 (1976).

⁹⁶ 18 U.S.C. § 659 (1976).

⁹⁷ 447 F.Supp. at 539.

moved to dismiss the indictments on the ground that the local law enforcement tactics employed in the apprehension were inimical to the concept of fundamental fairness guaranteed by the Fifth Amendment of the United States Constitution.⁹⁸ The District Court, in granting the motion, noted that a majority of the sitting justices in *Hampton* indicated that police misconduct, standing alone, may be so outrageous that further prosecution is **foreclosed**.⁹⁹ The court also noted that, while the plurality in *Hampton* would require that some protected right of the defendant be violated before fundamental fairness came into play, a majority refused to adopt such a **hardfast rule**.¹⁰⁰

It is significant that in neither *United States v. Twiggs*, nor *United States v. Hastings*, did the courts find that any specific constitutionally protected rights of the defendants had been violated. Rather, both opinions relied upon the general principles of fundamental fairness.

Aside from voicing these fundamental fairness considerations, federal courts have failed to establish an articulable standard or set of guidelines for measuring the level of governmental misconduct required before due process would bar a prosecution. Thus, the federal courts have yet to indicate "how outrageous is outrageous.")

IV. APPLICATION OF DUE PROCESS/OBJECTIVE ENTRAPMENT IN THE STATE COURTS

The state courts have not been immune from the debate concerning the subjective and objective theories of entrapment. Many states have elected to either recognize the objective theory **as** the only theory, or have added it to the previously recognized subjective **theory**.¹⁰¹ In the

⁹⁸ 447 F.Supp. at 535. The motion was made pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, which states in part, "The Attorney General or the United States Attorney may by leave of Court file a dismissal of an indictment . . . and the prosecution shall thereupon terminate." 447 F.Supp. at 536.

⁹⁹ 447 F.Supp. at 539.

¹⁰⁰ 447 F.Supp. at 539 note 7.

¹⁰¹ States adhering to a due process or objective theory include Alaska (*Grossman v. State*, 457 P.2d 226 (1969)); Colorado (*People v. Vandiver*, 552 P.2d 6 (1976)); Delaware (*State v. Brown*, 287 A.2d 400 (1972)); Hawaii (*State v. Anderson*, 572 P.2d 159 (1977)), and via statute, Hawaii Rev. Stat. § 702-237; Iowa (*State v.*

wake of *Humpton*, both New York¹⁰² and California¹⁰³ have adopted due process/objective entrapment theories and have attempted to furnish guidance for their application.

In *People v. Isaacson*, the New York Court of Appeals reversed the conviction of a predisposed defendant on the ground that the conviction was obtained through the use of police tactics violative of *due process*.¹⁰⁴ In 1974, the New York State Police arrested an individual named Breniman, who had an "unsavory drug history," for possession of drugs.¹⁰⁵

While on bail pending appeal of another drug violation, Breniman was solicited by the police to assist in drug investigations. As an inducement to acquire his services, one investigator of the New York State Police struck Breniman with such force as to knock him out of a chair, kicked him, cutting his mouth and forehead, and then threatened to shoot him. Breniman testified that this abuse was administered because he refused to answer a question; that, when struck, his glasses flew off; that he was kicked in the ribs when down; that a chair was thrown at him; that he was also threatened with being hurled down a flight of steps; and that one of two uniformed State troopers who witnessed these events told Breniman not to report the beatings. Breniman stated, "They would swear that I fell coming in the substation on the steps." Before he was released on bail, the police had received a laboratory report showing that the capsules discovered on him were not contraband but nothing more harmful than caffeine. Breniman, however, was not informed of this until after he had been used by the police as an informant in the instant case. In an attempt to gain their favor, Breniman agreed to assist the police in the drug investigations.¹⁰⁶

Mullen, 216 N.W.2d 375 (1974)); Michigan (*People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1974)); and Pennsylvania (*Commonwealth v. Jones*, 242 Pa. 303, 363 A.2d 121 (1976) and via statute, 18 Pa. C.S. § 313(a)).

¹⁰² *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S. 714 (1978). Further citations to this case will be primarily to the New York Reports, 2d series (N.Y.2d).

¹⁰³ *People v. Barraza*, 23 Cal.3d 675, 591 P.2d 947, 153 Cal.Rptr. 459 (1979). Further citations to this case will be primarily to the California Reports, 3d series (Cal.3d).

¹⁰⁴ 44 N.Y.2d at 512.

¹⁰⁵ 44 N.Y.2d at 514.

¹⁰⁶ 44 N.Y.2d at 515.

Trying to set up some drug purchases for the police, Breniman made numerous calls to different persons indiscriminately. One person he called was the defendant, a graduate student and teacher at Pennsylvania State University, whom Breniman had known for two years. Breniman told the defendant that he was facing a large prison sentence, that his parents had cut him off, that he was running out of friends, and that he was looking for ways to make money to hire a decent lawyer. Breniman, relying on friendship and sympathy, made many calls to the defendant before he could arrange a purchase of cocaine.¹⁰⁷

When the defendant finally agreed to sell cocaine to Breniman, it was on the condition that the sale would take place in Pennsylvania. With the assistance of the New York State Police, Breniman arranged to have the transfer occur at a location that, although appearing to be in Pennsylvania, was in fact in New York. At the time of the transfer, New York State Police apprehended the defendant.¹⁰⁸

The New York Court of Appeals found the police conduct to be reprehensible. Even though the court acknowledged the trial court's finding that the defendant was predisposed, it ruled that the police conduct, when tested by due process standards, was so egregious and deprivative as to require dismissal.¹⁰⁹ In applying a due process standard to judge police conduct, the court realized that difficulties existed.¹¹⁰

The New York court noted that, while due process is a flexible doctrine, certain types of police action demonstrate disregard for cherished principles of law and order:

Upon an inquiry to determine whether due process principles have been transgressed in a particular factual frame there is no

¹⁰⁷ 44 N. Y. 2d at 516.

¹⁰⁸ 44 N. Y. 2d at 517–18.

¹⁰⁹ 44 N. Y. 2d at 518–19.

¹¹⁰ 44 N. Y. 2d at 519–20. The New York court reviewed and relied upon decisions of the United States Supreme Court. However, the court was not certain what standard of police conduct the United States Supreme Court intended to be applied. The New York court dealt with the problem by noting that it could, under the New York State Constitution, “impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision.” The court therefor decided the case under the New York constitution. However, the reasoning and the application of federal case law are not out of line with what one could expect to find in federal decisions.

precise line of demarcation or calibrated measuring rod with a mathematical solution. Each instance in which a deprivation is asserted requires its own testing in the light of fundamental and necessarily general but pliant postulates. All components of the complained of conduct must be scrutinized but certain aspects of the action are likely to be indicative.”

In testing a particular factual situation for possible due process violations, the court advised that several questions should be considered: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant’s reluctance to commit the crime was overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the police motive was only a desire to obtain a conviction with no indication that the motive was to prevent further crime or protect the populace. All these questions should be viewed together in determining whether a due process violation occurred.¹¹²

In analyzing its concerns about the police activity in this case, the court specifically rejected the argument that a protected right of the defendant must be violated before he can seek the protections of fundamental fairness. The court strongly denounced the treatment of Breniman and relied partly on that treatment as a reason for reversing Isaacson’s conviction.¹¹³

¹¹¹ 44 N.Y.2d at 521, 378 N.E.2d at 83, 406 N.Y.S. 2d at 719 (citations omitted).

¹¹² *Id.*

¹¹³ The court expressed its outrage in no uncertain terms:

While this harm was visited upon a third party, it cannot be overlooked, for to do so would be to accept police brutality as long as it was not pointed directly at defendant himself. Not only does the end not justify the means, but one should not be permitted to accomplish by indirection that which is prohibited by direction. More importantly, these actions set the pattern for further disregard of Breniman’s rights in failing to reveal to him that the material he possessed on December 5 would not subject him to criminal charges. [citation omitted] This was deceptive, dishonest and improper; it displayed a lawless attitude and, if countenanced, would suggest that the police are not bound by traditional notions of justice and fair play. . . .

Thus, it was inconsequential that the brutality and deceit was directed at the informant, for it was also the defendant who suffered their effects.

In *People v. Barraza*,¹¹⁴ the California Supreme Court was faced with the case of a government agent prodding a predisposed accused to participate in a drug sale. The agent made repeated attempts to contact the defendant at a detoxification center where the defendant worked as a patient care technician. When the agent finally succeeded in contacting him, she asked him if he had “anything.”¹¹⁵

The defendant asked her to meet with him because he was “fed up with her.” He stated that he was fearful that her actions would cause him to lose his job. He told her that he did not have any drugs for her, that although he had spent more than 23 years in prison he was no longer involved in drugs, and wanted her to stop “bugging” him. The defendant claimed that the agent persisted in her efforts to have him assist her in securing drugs and, after more than an hour of further conversation, asked him for a note to introduce her to someone who transferred heroin. He then agreed, giving her a note in order to “get her off. . . [his] back.”¹¹⁶

In reversing the defendant’s conviction for sale of heroin, the California Supreme Court adopted the *objective theory* of entrapment.”” The test the court applied is whether the conduct of the police was likely to induce a normally law-abiding citizen to commit the offense. Although such a determination must necessarily proceed on an ad hoc basis, guidance could be found in the application of one or both of two principles. The first is that, if the action of the police would generate in a normally law-abiding person a motive for a crime other than ordinary criminal intent,

44 N. Y.2d at 522, 378 N.E.2d at 84, 406 N. Y.S.2d at 720.

[W]hile the informant was the victim of the trickery and beating, these actions were indeed directed at defendant. This misbehavior set the pattern for an investigation in which the informant was maliciously used as a pawn to obtain a conviction of any individual.

44 N. Y.2d. at 524, 378 N.E.2d at 85, 406 N. Y.S.2d at 721.

¹¹⁴ 23 Cal.3d 675; 591 P.2d 947; 153 Cal.Rptr. 459(1979).

¹¹⁵ 23 Cal.3d at 680, 591 P.2d at 461, 153 Cal.Rptr. at 949.

¹¹⁶ 23 Cal.3d at 681, 591 P.2d at 462, 153 Cal.Rptr. at 950.

¹¹⁷ 23 Cal.3d at 688–89.

entrapment would be established. As examples of such tactics, the court included inducements of crime based upon appeals to friendship or sympathy instead of a desire of personal gain or other typical criminal purposes. The second is that, if the police conduct would make the commission of a crime unusually attractive to a normally law-abiding person, entrapment would likewise be established. Examples of such conduct would be a guarantee by the police that the act is not illegal, or that the offense would go undetected, or an offer of exorbitant gain. Finally, the conduct of the police must be judged by the effect it would have on a *normally law-abiding person* situated in the circumstances of the case at hand.¹¹⁸

Significantly, under the California rule, therefore, the character of the defendant and any predisposition to commit the offense are irrelevant. The purpose of the test is primarily to deter impermissible police conduct. As the standard of government conduct should not shift from suspect to suspect, matters relating to an individual's predisposition would be, at best, irrelevant. At worst, such matters would divert the court's inquiry from the heart of the entrapment defense, *i.e.*, the allegation of police misconduct, and instead, focus on the general character of a given defendant.

V. DUE PROCESS AS RESTATED OBJECTIVE ENTRAPMENT

A comparison of the holdings and guidance contained in *Isaacson*,¹¹⁹ and *Barraza*,¹²⁰ leads to the conclusion that the new due process standard of New York and the new objective entrapment test in California are essentially the same. The similarity of these concepts had been addressed in the dissent in *United States v. Russell*,¹²¹ when Justice Stewart noted that they were merely different means of stating the same evil. In discussing the entrapment views earlier proposed by Justice Roberts and Frankfurter, he wrote:

Thus, the focus of this approach is not on the propensities and predisposition of a specific defendant, but on 'whether the police

¹¹⁸ 23 Cal.3d at 689-90.

¹¹⁹ 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S. 714 (1978).

¹²⁰ 23 Cal.3d 675, 591 P.2d 947, 153 Cal.Rptr. 459 (1979).

¹²¹ 411 U.S. at 439.

conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' . . . Phrased another way, the question is whether—regardless of the predisposition to crime of the particular defendant involved—the governmental agents have acted in such a way as is likely to instigate or create a criminal offense.¹²²

Thus Justice Stewart noted that the objective test could be stated either **as** the manner in which the police conduct violates standards of fundamental fairness (similar to that applied by New York in *People v. Isaacson*¹²³), or in the manner in which the police conduct tends to promote or instigate criminal activity among the generally law-abiding citizenry (similar to that applied by California in *People v. Barraza*¹²⁴).

The similarity between the New York and California tests can also be shown by comparing illustrative factors noted in *Isaacson* and the guiding principles and examples noted in *Barraza*. This appellate guidance can be traced directly to the considerations voiced by Justice Frankfurter in his concurring opinion in *Sherman v. United States*.¹²⁵ While labeling their defenses differently, both New York and California really have adopted the objective view of entrapment espoused by Justices Roberts, Frankfurter, and Stewart. The focus of these opinions on the outrageous character of police conduct and New York's applications of those concerns in due process terms also illustrate the similarity of these opinions to Justice Powell's concurrence in *Hampton*.¹²⁶ The theoretical identity of opinions in *Isaacson* and *Barraza* perfectly mirrors the common thread of the *Sorrels*¹²⁷ and *Sherman*¹²⁸ objective entrapment theory and the *Hampton* due process defense.

It must be noted that New York, California, and the other state courts, like the federal courts, have failed to produce a litmus test for due process violations under *Hampton*.¹²⁹ This is not surprising, since a rule that

¹²² 411 U.S. at 441.

¹²³ Note 119, *supra*.

¹²⁴ Note 120, *supra*.

¹²⁵ 356 U.S. at 383–84.

¹²⁶ 425 U.S. at 491.

¹²⁷ 287 U.S. at 457.

¹²⁸ 356 U.S. at 380.

¹²⁹ 425 U.S. 484 (1976).

requires the careful examination of police conduct in individual fact situations defies the possibility of such a test. However, New York and California, in the interests of the orderly administration of justice, have done the next best thing. They have suggested criteria by which to examine the facts of a given case and guidelines in which to channel the analysis of possible due process violations. They have not simply proposed a new rule that promotes haphazard determinations of violations of an ill-defined fundamental fairness doctrine. The guidance contained in *Isaacson* and *Barraza* could easily be adopted by the federal courts to assist in their determinations of "how outrageous is outrageous."

VI. APPLICATION OF DUE PROCESS/OBJECTIVE ENTRAPMENT IN THE MILITARY

Defense counsel in the military can make great use of the recent development in the law of entrapment. The shift in analysis from a mere alternative theory of entrapment to a due process consideration makes available to the military accused the entire range of police misconduct cases.

Under the Manual for Courts-Martial,¹³⁰ only the subjective test of entrapment is available. The Manual restricts the defense to those cases where the intent originates with the government agents who implant it in the mind of an individual not predisposed to commit the offense.¹³¹ In order to rebut an entrapment defense and show predisposition, the gov-

The strict test espoused by the plurality in *Hampton* (violations of the defendant's protected rights) has been rejected by most courts recognizing the due process considerations in misconduct cases.

¹³⁰ Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969, or as Manual].

¹³¹

Entrapment is a defense which exists when the criminal design originates with Government agents, or persons cooperating with them, and they implant in the mind of an innocent person the disposition to commit the alleged offense and thus induce its commission. What is meant by "innocent" in this connection is the absence of a predisposition or state of mind which readily responds to the opportunity furnished by the Government agents or persons cooperating with them to commit the forbidden act with which the accused is charged. "Innocent" in the context of entrapment means that the accused would not have perpetrated the crime

ernment is permitted to introduce evidence of other offenses or acts of misconduct of the accused.¹³²

Military appellate courts have long embraced both functions of the subjective theory of entrapment set forth in the Manual. Not only is the defense centered on the "origin of intent" test found in *Sorrells*,¹³³ but also acts of misconduct deemed relevant to the issue of predisposition are admissible to rebut the defense of entrapment. • Thus, the military rule is in line with the rule of *United States v. Russell*,¹³⁵ and *Hampton v. United States*,¹³⁶ that the predisposition of an accused forecloses a defense of entrapment.¹³⁷

The Court of Military Appeals has acknowledged in dicta the possibility of a due process bar to prosecution due to outrageous government conduct. % The subsequent United States Supreme Court decision in *Hamp-*

with which he is presently charged but for the enticement of one of these persons. The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law enforcement officials.

MCM, 1969, paragraph 216e.

¹³² MCM, 1969, paragraph 138g(6). This is one of seven exceptions recognized by the Manual to the general rule that evidence of other offenses or acts of misconduct of the accused is not admissible as tending to prove his or her guilt.

¹³³ 287 U.S. 435 (1932).

¹³⁴ *United States v. Henry*, 23 C.M.A. 70, 48 C.M.R. 541 (1974); *United States v. McGlenn*, 8 C.M.A. 286, 24 C.M.R. 96 (1957).

¹³⁵ 411 U.S. 423 (1973).

¹³⁶ 425 U.S. 484 (1976).

¹³⁷ Defense counsel would probably meet with failure if he or she were to attack such a rule by advocating that the trial court adopt a mere alternative theory of the defense of entrapment. Entrapment is not a defense of constitutional dimension. *United States v. Russell*, 411 U.S. at 433. Because of this, a court-martial could feel bound by the language of paragraph 216e. However, if counsel were to cast this argument in terms of the accused's constitutional protections under the principles of due process, he could advocate that the *Manual for Courts-Martial* would no longer prohibit such an alternative view.

¹³⁸ *United States v. Herbert*, 1 M.J. 84 (C.M.A. 1975). The Army Court of Review also noted in dicta the possibility of such a defense, *United States v. Young*, 2 M.J. 472 (ACMR 1975).

ton and the federal and state cases interpreting it might be used by a military counsel in his attempts to apply the due process defense at trial.¹³⁹

In sum, military counsel should be aware of the possibility of a bar to prosecution based upon outrageous police conduct violating due process guarantees. Although the United States Supreme Court has never flatly held that such conduct would in fact bar prosecution, counsel should argue that the concurring and dissenting opinions in *Hampton v. United States* can plausibly be interpreted that such a bar exists.¹⁴⁰

¹³⁹ Trial defense counsel has many avenues available for the use of the due process defense. One possibility is the use of it in a motion to dismiss. MCM, 1969, paragraph 68. Such a motion would be made during an Article 39(a) session. Uniform Code of Military Justice, 10 U.S.C. § 939(a), Article 39(a). By this means, the accused can present evidence concerning the alleged police misconduct, and can assert during the pretrial session that the due process violation constitutes a bar to trial. *United States v. Hastings*, 447 F.Supp. 534 (E.D. Ark. 1977); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

Another avenue is for the accused to move for a finding of not guilty at the close of all the evidence. MCM, 1969, paragraph 71a. In preparing such motions, counsel should carefully draft special findings. In doing so, counsel should note the considerations voiced by Justice Frankfurter in his concurring opinion in the *Sherman* case, 356 U.S. at 380; the New York State Court of Appeals in *Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S. 714 (1978); and the Supreme Court of California in *Barraza*, 23 Cal.3d 675, 591 P.2d 947, 153 Cal.Rptr. 459 (1979). Counsel should direct the judge's attention to these cases, and request that the judge consider them in preparing special findings. (Concerning special findings, see L. Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73 (1980).)

Finally, an accused can request that the issue of entrapment be presented to the jury for consideration. This can be requested notwithstanding the existence of issues of law to be resolved in the motions discussed above. Defense counsel may argue that, in view of its potentially substantial effect on the issue of guilt or innocence, the due process/objective entrapment issue remains one of fact for resolution by the jury. *People v. Barraza*, 591 P.2d at 956 note 6, 153 Cal.Rptr. at 468; *United States v. Oguendo*, 490 F.2d 161 (5th Cir. 1974). *Contra*, *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075; *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976). Additionally, if the facts related to the alleged due process violation are themselves disputed by the parties, a stronger argument for jury submission may exist.

¹⁴⁰ Furthermore, counsel should argue that the rejection by Justices Powell and Blackmun of the plurality's strict due process standard, combined with the lan-

guage of Justice Brennan's dissent, indicates that this due process guarantee is merely a restatement of the objective standard noted in the concurring opinions in *Sorrells* and *Sanders*, and in Justice Stewart's dissent in *Russell*.

As further evidence of the identity of these two approaches, counsel can look to the New York and California decisions in *Isaacson* and *Barraza*. In applying this constitutionally-based bar to prosecution in a court-martial environment, counsel should also use those same state decisions as persuasive authority on the proper application of the law to a given fact situation.

BOOK REVIEW:

GOVERNMENT CONTRACT LAW MANUAL*

Monroe, Glenn E., ** *Government Contract Law Manual*. Charlottesville, Virginia: The Michie Company, 1979. Pages: xiv, 599. Price: \$40.00. Index and appendices.

*Reviewed by Lieutenant Colonel Robert M. Nutt****

Major Monroe has tried to capture the whole governmental contract law system by summarizing and collecting in one volume the Defense Acquisition Regulations (DAR), the Model Procurement Code (MPC) and the International Agreement on Government Procurement. This treatment should provide attorneys new to the field of government contracting

*The opinions and conclusions presented in this book review, and in the book reviewed, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. Major Monroe's book is mentioned also in "Publications Received and Briefly Noted," elsewhere in this volume.

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Major Monroe is the author of *An Analysis of ASPR Section XV by Cost Principle*, 80 Mil. L. Rev. 147 (1978); and co-author, with Major Theodore F. M. Cathey, of *The Allowability of Interest in Government Contracts: The Continuing Controversy*, 86 Mil. L. Rev. 3 (1979); as well as four short articles published in *The Army Lawyer*.

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Lieutenant Colonel Nutt is co-author, with Major Gary L. Hopkins, of *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (1978); and two articles published in *The Army Lawyer*.

an appreciation of the scope of government intervention in the purchasing process.

Chapter II is the essence of this 599 page work. It is a fifty-four page summary of Federal procurement law which contains everything you would ever want to know about the subject if you were a beginner in this field. It opens with a brief statement on authority to contract, comments on contract formation principles, contractor qualifications and the contractor selection process. Various forums for challenging improprieties in the formations process are revealed here. The author then explains the methods for entering into contracts, compares them with new ideas expressed by the Federal Acquisition Regulation System (FARS) writers. He continues with a brief narrative setting forth the various types of contracts available for allocating the cost risk of performance to each party.

The best treatment of the procurement law summary appears in section L, Contract Performance. Here the author addresses principles involved in changing the nature of the work required by the contract through contract clauses as well as the doctrine of constructive change. He looks at the method of computing payment by equitably adjusting the contract price. The author then embarks on a scenic path through a myriad of clauses affecting the time and place of performance. These clauses deal with performance conditions and performance failures, and describe relief to which the parties have contractually bound themselves. Of course, adjustments under these clauses are constrained by standard cost principles which the author touches upon briefly, as well as by audit scrutiny from within the agencies and from without.

The performance section concludes with a discussion of the Contract Disputes Act of 1978 and the jurisdictional impact that that statute has made on the federal disputes resolution process. The author briefly compares this new federal approach to the Model Procurement Code approach which was drafted for the several states. He concludes that the two are substantially similar except for "equity" actions under the Model Procurement Code, which are not available to Federal litigants.

Chapter III's contribution is a comparison of the Model Procurement Code for state and local governments with the Defense Acquisition Regulation and the Contract Disputes Act. State and Local Government officials or legislators seeking to emulate the federal practice may find this useful, for it takes each section of the MPC and compares it to a

corresponding DAR section or federal statute, the meanings for which can be found in quasi-judicial and judicial holdings from the various agency boards of contract appeals, the federal district courts, the United States Court of Claims, and the United States Supreme Court.

Chapter IV develops the theory upon which the International Procurement Code was proposed. While this document is still in the formative stages, the author of the Manual relates its provisions to DAR and MPC provisions when he can. The thrust, he concludes, is to provide a scheme that requires competitive conditions for obtaining actual minimum needs of the contracting parties under a set of rules that would ensure performance, principally through informal settlements rather than forced litigation. The disputes resolution forum, of course, would be an international panel that would act much like an arbitration, where the parties, by agreement, submit to a third party decision.

The rest of this book is full of appendices. Definitions you can use make up Appendix 1. Principal DAR clauses and forms fill Appendix 2. The final draft of the Model Procurement Code with commentary is at Appendix 3. A proposed international agreement is included in Appendix 4. Appendix 5 is the annotated bibliography. Appendix 6 contains the Contract Disputes Act of 1978. All of these are useful.

This book is really designed for one who is curious about federal government contracting or about state and local government contracting. Reading through it once will give the curiosity seeker some good general principles and a broad framework for beginning research. For the practitioner, the annotated bibliography will lead to sources which can provide solutions to real problems. For the legislation or contract drafter at the state or local level, the DAR clauses provide model language for expressing rights, duties and obligations of the parties. The DAR and the MPC provide good fodder for state legislators. In short, this book provides a little something for everyone.

BOOK REVIEW: A WRITER'S GUIDE*

Walpole, Jane R., *A Writer's Guide: Easy **Ground** Rules for Successful Written English*. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1980. Pages: xiv, 187. Price: **\$4.95**, paperback. Index.

*Reviewed by Major Percival D. Park.***

Most practicing attorneys would react with disbelief if they were told that their writing could be improved by a book or a course of study on grammar. A lawyer's stock in trade is words, after all. With three years of law school and a bar examination to endure, lawyers could not get into the profession if they did not already possess highly developed writing skills. Or could they?

Dr. Jane R. Walpole has for some time been conducting writing instruction for career judge advocates in the Graduate Course¹ at The

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

Dr. Walpole's book is briefly described in "Publications Received and Briefly Noted," elsewhere in this volume.

**Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia, 1977 to present.

The assistance of Major Robert B. Kirby in preparing this review is gratefully acknowledged by the author. Major Kirby served as an instructor in the Administrative and Civil Law Division at the J.A.G. School, 1977-80. Among his duties were the coordination and direction of the J.A.G. School's program of instruction in communications for career judge advocates attending the nine-month Graduate Course.

¹ The Graduate Course, formerly called Advanced Course, is described as follows at page 11 of the J.A.G. School's Annual Bulletin for 1979-80:

The Graduate Course is comparable to an LL.M. program. "the class consists of between **50** and **60** students from the Army, Navy, and Marine Corps. All students are attorneys with four to eight years of experience as practitioners. Attendance at the Graduate Course is competitive, with selection of Army Lawyers made by a board of officers convened by The

Judge Advocate General's School, Charlottesville, Virginia. Her book *A Writer's Guide* is a direct outgrowth of the program, and is based in part on lecture notes and class materials originally prepared for distribution to her military students.

The problem with the writing of military attorneys and many other professionals is not one of basic literacy, but rather of clumsiness of expression caused by a few, sometimes subtle, errors of grammar, usage, and sentence and paragraph structure. The teacher who would correct these deficiencies is faced with a further problem, that of establishing credibility with such students, and overcoming a perhaps understandable resistance which many of them may feel toward such instruction. By all accounts, Dr. Walpole met the classroom challenge successfully. If her book is anything like her approach to classroom instruction, this success is easy to understand. Written in a chatty, comfortable style that promotes ease of reading and comprehension, *A Writer's Guide* avoids the stiffness, dryness, and emphasis on technical jargon that so often make the study of grammar stultifyingly dull.

Most works on grammar are reference texts, like dictionaries or encyclopedias. They assume that the user knows his problem and needs only to look up the solution and apply it. Dr. Walpole's approach is different. Her book is an overall review of grammar, building concepts cumulatively from beginning to end. The book's brevity is thus a strong point.

Dr. Walpole successfully reduces the essentials of English grammar to seven simple rules. Chapter by chapter, these are discussed, with examples of their practical application and misapplication. The author's approach avoids dogmatism and excessive rigidity while making clear that standard English as written by most authorities does require adherence to at least a few generally accepted principles. She provides many helpful suggestions as well. For example, she recommends that writers check on themselves by reading aloud their words. This is not to ensure that one's writing is like one's speech; the reverse should probably be true, as written and spoken English are as different from each

Judge Advocate General of the Army. The Graduate Course consumes a full resident academic year. It prepares experienced attorneys for supervisory positions and other positions of special responsibility within the Judge Advocate General's Corps.

other as if they were separate dialects. Rather, by reading aloud one can test the smoothness of flow of one's words.

Dr. Walpole's book is well worth the small cost required to obtain it, and the small amount of time required to peruse it. I recommend it to all who care about the quality of their writing.

Dr. Walpole teaches English at Piedmont Virginia Community College, near Charlottesville, Virginia. She received her undergraduate education at the College of William and **Mary**, Williamsburg, Virginia. She holds masters degrees from both George Washington University and American University, and has earned the Ph.D. degree from the University of Virginia in the field of English education. Recently, Dr. Walpole was granted a fellowship by the National Endowment for the Humanities, to enable her to participate in national seminars on the rhetoric and teaching of **writing**.²

² Dr. Walpole has other Army associations in addition to teaching at the J.A.G. School. Her husband, Dr. James R. Walpole, a former president of Piedmont Virginia Community College, is an attorney and a former Army judge advocate. At one time he served as staff judge advocate for the 82d Airborne Division at Fort Bragg, North Carolina. The Walpoles' son is serving in the Army at the present time, and has recently graduated from Officer Candidate School.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section V, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section 11, Publishers or Printers of Publications Noted; and Section IV, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section V. For books having more than one principal author or editor, all authors and editors are listed in Section 111.

In Section 11, Publishers or Printers of Publications Noted, all firms or organizations are listed whose names are displayed on the cover or on or near the title page of a noted publication. Excluded from this list are institutional authors and editors who are listed in Section 111. No distinction is made in Section II among copyright owners, licensees, distributors, or printers for hire.

The opinions and conclusions expressed in the notes in Section V are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

11. PUBLISHERS OR PRINTERS OF
PUBLICATIONS NOTED

Adjutant General Publications Center, *see* U.S. Army AG Publications Center.

American Bar Foundation, 1155 East 60th St., Chicago, IL 60637 (No. 1).

Anchor Press, *see* Doubleday and Co., Inc.

Army AG Publications Center, *see* U.S. Army AG Publications Center.

Bobbs-Merrill Co., Inc., 4300 West 62d St., Indianapolis, IN 46206 (No. 8).

Cerberus Book Company, Columbia, South Carolina (No. 18).

Crane, Russak, & Co., Inc., 347 Madison Ave., New York, New York 10017 (No. 20).

Dolphin, *see* Doubleday and Co., Inc.

Doubleday and Co., Inc., 501 Franklin Ave., Garden City, NY 11530 (Nos. 11, 12, 13, 15, 16).

Federal Publications, Inc., 1725K Street, N.W., Washington, D.C. 20006 (No. 19).

Government Printing Office, *see* Superintendent of Documents.

Johns Hopkins University Press, Baltimore, MD 21218 (Nos. 14, 21).

Lomond Publications, Inc., P.O. Box 56, Mt. Airy, MD 21771 (No. 3).

Michie Company, P.O. **Box** 7587, Charlottesville, VA 22906 (Nos. 8, 9).

Oceana Publications, Inc., 75 Main St., Dobbs Ferry, NY 10522 (No. 7).

Prentice-Hall, Inc., Englewood Cliffs, NJ 07632 (No. 17).

Resources for the Future, Inc., **1755** Massachusetts Ave., N.W., Washington, D.C. **20036** (Nos. **14, 21**).

Seven Arts Press, Inc., **6605** Hollywood Blvd., P.O. Box 649, Hollywood, CA **90028** (Nos. **4, 5**).

Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. **20402** (Nos. **2, 6, 10**).

U.S. Army AG Publications Center, **2800** Eastern Boulevard, Baltimore, MD **21220** (Nos. **2, 6, 10**).

U.S. Government Printing Office, *see* Superintendent of Documents.

111. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

American Bar Foundation, *Annotated Code of Professional Responsibility* (No. **1**).

Armed Forces Information Service, *DEFENSE/80* (No. **2**).

Bedingfield, James P., and Howard W. Wright, *Government Contract Accounting* (No. **19**).

Bush, George P., and Robert H. Dreyfuss, *Technology and Copyright: Sources and Materials* (No. **3**).

Dreyfuss, Robert H., and George P. Bush, *Technology and Copyright: Sources and Materials* (No. **3**).

Fritsch, Albert J., and Science Action Coalition, *Environmental Ethics: Choices for Concerned Citizens* (No. **15**).

Hurst, Walter E., and Don Rico, *How To Sell Your Song* (No. **4**).

Hurst, Walter E., *Managers', Entertainers', and Agents' Book* (No. **5**).

Kaplan, Irving, editor, *Dep't of Army Pamphlet No. 550-75, Zambia: A Country Study* (No. **6**).

Levie, Howard S., editor, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, Vol. 1 (No. 7).

Marshall, James, *Law and Psychology in Conflict* (No. 8).

Monroe, Glenn E., *Government Contract Law Manual* (No. 9).

Nelson, Harold D., editor, *Dep't of Army Pamphlet No. 550-85, Libya: A Country Study* (No. 10).

Newman, Oscar, *Community of Interest* (No. 11).

Pomroy, Martha, *What Every Woman Needs to Know About the Law* (No. 12).

Rejnis, Ruth, *Her Home: A Woman's Guide to Buying Real Estate* (No. 13).

Rico, Don, and Walter E. Hurst, *How To Sell Your Song* (No. 4).

Russell, Clifford S., editor, *Collective Decision Making: Applications from Public Choice Theory* (No. 14).

Science Action Coalition, and Albert J. Fritsch, *Environmental Ethics: Choices for Concerned Citizens* (No. 15).

Smith, Robert Ellis, *Privacy: How to Protect What's Left of It* (No. 16).

Walpole, Jane R., *A Writer's Guide: Easy Ground Rules for Successful Written English* (No. 17).

Weber, John Paul, *The German War Artists* (No. 18).

Wright, Howard W., and James P. Bedingfeld, *Government Contract Accounting* (No. 19).

Wu, Yuan-li, *Raw Material Supply in a Multipolar World* (No. 20).

Young, Oran R., *Compliance and Public Authority: A Theory with International Applications* (No. 21).

IV. TITLES NOTED

Annotated Code of Professional Responsibility, *by American Bar Foundation* (No. 1).

Collective Decision Making: Applications from Public Choice Theory, *edited by Clifford S. Russell* (No. 14).

Community of Interest, *by Oscar Newman* (No. 11).

Compliance and Public Authority: A Theory with International Applications, *by Oran R. Young* (No. 21).

DEFENSE/80, *by Armed Forces Information Service* (No. 2).

Dep't of Army Pamphlet No. 550-75, Zambia: A Country Study, *edited by Irving Kaplan* (No. 6).

Dep't of Army Pamphlet No. 550-85, Libya: A Country Study, *edited by Harold D. Nelson* (No. 10).

Environmental Ethics: Choices for Concerned Citizens, *by Science Action Coalition and Albert J. Fritsch* (No. 15).

German War Artists, *by John Paul Weber* (No. 18).

Government Contract Accounting, *by Howard W. Wright and James P. Bedingfeld* (No. 19).

Government Contract Law Manual, *by Glenn E. Monroe* (No. 9).

Her Home: A Woman's Guide to Buying Real Estate, *by Ruth Rejnis* (No. 13).

How to Sell Your Song, *by Walter E. Hurst and Don Rico* (No. 4).

Law and Psychology in Conflict, *by James Marshall* (No. 8).

Libya: A Country Study, Dep't of Army Pamphlet No. 550-85, *edited by Harold D. Nelson* (No. 10).

Managers', Entertainers', and Agents' Book, by *Walter E. Hurst* (No. 5).

Privacy: How to Protect What's Left of It, by *Robert Ellis Smith* (No. 16).

Protection of War Victims: Protocol I to the 1949 Geneva Conventions, vol. 1, edited by *Howard S. Levie* (No. 7).

Raw Material Supply in a Multipolar World, by *Yuan-li Wu* (No. 20).

Technology and Copyright: Sources and Materials, by *George P. Bush and Robert H. Dreyfuss* (No. 3).

What Every Woman Needs to Know About the Law, by *Martha Pomroy* (No. 12).

Writer's Guide: Easy Ground Rules for Successful Written English, by *Jane R. Walpole* (No. 17).

Zambia: A Country Study, Dep't of Army Pamphlet No. 550-75, edited by *Irving Kaplan* (No. 6).

V. PUBLICATION NOTES

1. American Bar Foundation, *Annotated Code of Professional Responsibility*. Chicago, Illinois: American Bar Foundation, 1979. Pp. xxii, 478. Available in cloth cover or as paperback. Index and tables.

The Code of Professional Responsibility, which governs the behavior of attorneys as attorneys, was adopted by the American Bar Association on August 12, 1969, with an effective date of January 1, 1970. This book is a collection of explanatory notes and interpretive comments concerning the various provisions of the Code, including citations to court decisions, opinions of the ABA ethics committee, law review articles, and other authorities. The work is, in effect, a treatise on American legal ethics today.

The Code of Professional Responsibility replaced the Canons of Professional Ethics, a set of thirty-two rules first adopted by the American Bar Association in 1908. By the mid-1920's, if not earlier, it was recognized

by many that the old Canons did not deal adequately with the problems faced by attorneys in dealing with, and within, the many new business and governmental structures which were coming into being. Several efforts at reform were launched, but none succeeded until the 1960's.

The Code is organized in nine numbered canons, which are short, broad statements. Canon 1, "A Lawyer Should Assist in Maintaining the Integrity and competence of the Legal Profession," is typical. Each canon is supplemented by numbered "ethical considerations," in paragraph form, and from time to time by numbered "disciplinary rules."

The book follows the organization of the Code, with each canon presented in a separate chapter. The text of the canons, ethical considerations, and disciplinary rules is set forth in bold face type at the beginning of each chapter. The provisions are then broken up and repeated for separate discussion. Discussion of each provision is set forth in a comment, followed by textual and historical notes, and by lists of related provisions.

For the convenience of the user, the book offers a table of contents, a preface, a discussion of sources for the material in the book, a note concerning the legislative history of the Code, and a note about footnotes used in the book. Two Code documents are presented in this introductory section, the preface to the 1969 final draft of the Code, and the preface to the 1977 version of the Code. Next follows a list of names and other information concerning the twelve members and two reporters of the ABA Special Committee on Evaluation of Ethical Standards, as it was in 1969. The main body of the book follows next, opening with the preamble to the Code and a preliminary statement by the Code's drafters.

The Annotated Code, like the Code itself, was a group project. Olavi Maru served as Director of the American Bar Foundation Project to Annotate the Code of Professional Responsibility, and was assisted by several editors and others. The Code itself was prepared by the Special Committee on Evaluation of Ethical Standards, which in 1969 was chaired by Edward L. Wright of Little Rock, Arkansas. The group is sometimes referred to as the Wright Committee.

2. Armed Forces Information Service, *DEFENSE/80*. Washington, D.C.: U.S. Government Printing Office, 1980. Monthly magazine. Pages in January 1980 issue: 8. Price: \$1.00 per single copy; \$12.00 for one-year subscription in United States; \$13.24 for foreign subscription.

This small magazine has heretofore been published under the name **Command Policy**. The January 1980 issue is the first under the new name. The periodical describes itself as “a publication of the Department of Defense to provide official and professional information to commanders and key personnel on matters related to Defense policies, programs, and interests, and to create better understanding and teamwork within the Department of Defense.” With the change of name and format, the periodical “will seek to report on a broader range of topics of interest to senior military and civilian leadership.”

The January issue consists of eight pages, and contains two articles. The first is “Technology Trends In Communications, Command, and Control,” by Dr. Ruth M. Davis, Deputy Under Secretary of Defense (Research and Advanced Technology). The second, “The Continuing Military Manpower Crunch,” is by Robert B. Pirie, Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics). The articles are illustrated by a number of color pictures. One chart accompanies the Pirie article. The pages are of glossy paper, slightly larger than eight by ten inches.

This magazine is prepared by the Armed Forces Information Service, or AFIS, a field activity of the Office of the Secretary of Defense, under the Assistant Secretary of Defense (Public Affairs). Located in Arlington, Virginia, the AFIS consists of two other agencies, the American Forces Press and Publications Service, which is responsible for *DEFENSE/80* and other publications; and the American Forces Radio and Television Service, well known to military personnel who have been stationed overseas.

3. Bush, George P., and Robert H. Dreyfuss, *Technology and Copyright: Sources and Materials* (2d edition). Mt. Airy, Maryland: Lomand Publications, Inc., 1979. Pages: viii, 552. Price: \$22.50, hardcover; \$15.50, microfiche.

The statutory portion of the copyright law of the United States, found in Title 17 of the United States Code, was extensively updated through the Copyright Act of 1976, effective 1 January 1978. One of the major reasons for this massive effort at updating is that modern technology has raised many issues of the nature and extent of copyright protection. The old 1909 act, modeled on the needs of the book publishing trade, had little to say about xerox-type reproduction, videotaping, and the like.

The book here noted is not a treatise, but a research tool. The first

118 pages set forth an annotated bibliography of publications on copyright in relation to technology. The remainder of the book contains reprinted essays from many sources, and related materials.

The book is organized in two parts. Part I, the annotated bibliography, is divided into thirteen lettered subparts. These are labelled: "Technology," "Computer Systems," "Reprography," "Video Communications," "Microforms," "CONTU," "Fair Use," "Education," "Libraries, Networks, and Information Systems," "Permissions and Payments," "Legislation/Legal," "International," and "Basic References."

The second part, "Selected Materials," is divided into nineteen subparts, preceded by an introduction summarizing the contents. These nineteen items are reprints of reports, articles, and the like, written by various authors and published originally in many places. Subpart S is a reprint of the decision of the United States Court of Claims in the case of *Williams and Wilkins v. United States*. In that case, decided in **1973**, the firm of Williams and Wilkins, a medical publisher, unsuccessfully sought damages for copyright infringement allegedly committed by the National Health Institutes and other government agencies which engaged in large-scale copying of the firm's publications.

For the convenience of the user, the book provides a foreword, preface, and detailed table of contents. The work closes with a list of the periodicals cited, an index of names mentioned in the bibliography or cited in the selected materials, a subject-matter index, and an index of cases cited.

Dr. George P. Bush, deceased, was a communications engineer and was the compiler of the first edition of this work, published in **1972**. Robert H. Dreyfuss is manager of computer composition at Port City Press, Inc., Baltimore, Maryland. He was a student of Dr. Bush before undertaking with him the work of preparing the second edition. Both authors have been much interested in the technology of information transfer and retrieval.

4. Hurst, Walter E., and Don Rico, *How to Sell Your Song* (2d edition). Hollywood, California: Seven Arts Press, Inc., **1980**. Pages: vi, **95**, Price: \$15.00, hardcover; \$10.00, paperback.

As indicated by its title, this book is a practical manual of information for use by songwriters and composers, and by others interested in the

mechanics of the music industry from their point of view. The book is written in a simple, easy-to-read style. It is not a lawbook, although it does contain some information about contracts, taxation, copyright procedures, and the like, from a layman's point of view.

The book is organized in fifty chapters dealing with various aspects of the business of songwriting and the music industry. An appendix is provided which sets forth sample copyright registration forms, a performing rights organization clearance form, and a song registration card. A subject-matter index is provided. Charts and cartoon-type illustrations are scattered throughout the text. The current edition replaces the 1961 edition.

The author, Walter E. Hurst, is an attorney specializing in the law of the entertainment industry, in Hollywood, California. He sometimes writes under the pseudonym William Storm Hale. His organization, Seven Arts Press, publishes nineteen titles in its Entertainment Industry Series. The book here noted is No. 18 in that series. Co-author Don Rico is a professional cartoonist with long experience in the comic book industry. He has prepared the illustrations and charts used in the book.

5. Hurst, Walter E., *Managers', Entertainers', and Agents' Book* (2d edition). Hollywood, California: Seven Arts Press, Inc., 1980. Pages: viii, 92. Price: \$15.00, hardcover; \$10.00, paperback.

This book is a how-to-do-it manual for those who are interested in becoming managers or agents for professional entertainers. It is addressed also to various others who perform related functions, including entertainment lawyers. The book is not a work of reflective scholarship, but it does contain the texts of several court decisions, with some discussion, together with sample contract forms and instructions concerning their use and tailoring for different circumstances.

The terms "agent" and "manager" have overlapping meanings in the entertainment industry, and can often be used interchangeably. As used in the Hurst book, the term "agent" means primarily a salesman, whose wares are the entertainers he represents, and whose customers are recording companies, night clubs, radio and television stations, and any other entities that might be interested in the particular entertainers offered. The manager, in contrast, performs many more personal services for the entertainer, organizing tours, maintaining financial records, running personal errands, maintaining the entertainer's schedule and ap-

pointment book, serving as a point of contact for all who want to talk to the entertainer, and generally performing dozens of petty and time-consuming but necessary tasks for the entertainer. A manager may also perform the duties of an agent in whole or part, and an agent may perform some or all the duties of the manager. There is no sharp dividing line, just a difference of emphasis.

The book is organized in forty chapters covering various aspects of the entertainment business from the point of view of the manager or agent. An explanatory preface and a table of contents are provided, together with an appendix containing a sample talent agency contract, and a subject-matter index. Cartoon-type illustrations by the artist Don Rico are scattered throughout the book. The current edition replaces the 1971 edition.

The author, Walter E. Hurst, is an attorney specializing in the law of the entertainment industry, in Hollywood, California. He sometimes writes under the pseudonym William Storm Hale. His organization, Seven Arts Press, publishes nineteen titles in its Entertainment Industry Series. The book here noted is No. 6 in that series.

6. Kaplan, Irving, editor, *Dep't. of A m y Pamphlet No. 550-75, Zambia: A Country Study*. Washington, D.C.: U.S. Government Printing Office, 1979. Pages: xxv, 308. Index, appendix, bibliography, and glossary.

This volume is a collection of five essays describing the Republic of Zambia, its history, people, government, economy, and military and police forces. Emphasis is on conditions of the last five or ten years, but mention is made of the earlier history of the country also. This work is one of one hundred eight studies of different countries or groups of countries prepared by scholars of Foreign Area Studies, a directorate within the American University, Washington, D.C.

Zambia was a British protectorate, under the name of Northern Rhodesia, until independence in 1964. With a geographic area of approximately 290,000 square miles, Zambia is about eight percent as large as the United States. Its estimated population exceeds 5,000,000 people. The capital, Lusaka, is also the largest city, exceeding 400,000 people. Although only one party is legally recognized, the government, headed by President Kenneth Kaunda, is considered essentially democratic. The major industries are copper mining and farming.

The book is organized in five chapters. The first chapter, "Historical Setting," was prepared by Joseph P. Smaldone; the second, "Society and Its Environment," by J. Jeffrey Hoover. Chapter 3, "Government and Politics," was written by Margarita Dobert. This is followed by "The Economy," by Donald P. Whitaker, and last, "National Security," by Eugene K. Keefe. Unfortunately we are not given any information about these five authors or about the principal editor, Irving Kaplan, except their names; but presumably they are scholars connected with American University.

The book offers a foreword, preface, and table of contents including chapter summaries. These items are followed by a country profile and an introduction. No footnotes are used, but the chapters conclude with discussion of works available which deal with the topics covered in each chapter. Twelve figures or charts, as well as several pictures, are scattered throughout the text, and an appendix is provided which contains fifteen more statistical tables on various subjects. An extensive bibliography, a glossary of relevant terms, and a subject-matter index complete the volume. The text of the chapters is divided by many headings and sub-headings.

This study of Zambia and the other studies mentioned above are produced under the Department of the Army Area Handbook Program, the DA pamphlet 550 series, and are sold through the U.S. Government Printing Office, or distributed to Army addressees by the U.S. Army Adjutant General Publications Center, Baltimore, Maryland. However, the area handbooks, like issues of the *Military Law Review*, do not present the official views of the United States Government. The study of Zambia is a third edition, replacing the Area Handbook for Zambia, which was published in 1974.

7. Levie, Howard S., editor, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, volume 1. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1979. Pages: xxx, 542. Price: \$45.00.

This compilation is the first of a set of four volumes containing certain documents concerning the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, commonly referred to as Protocol I. The purpose of this work is to provide a reference tool less cumbersome than the Official Record, which reportedly is being published in seventeen volumes by the Swiss Government (xiv).

This work by Professor Levie collects together all the materials concerning each numbered article of Protocol I, and presents them in order, article by article. In the Official Record, materials concerning both Protocols I and II and all the articles of each of them are apparently going to be thrown together in a manner confusing to researchers.

The 1977 Protocol I, as its formal title indicates, focusses on international armed conflicts. Professor Levie's work explicitly excludes discussion of Protocol II, concerning protection of victims of non-international armed conflicts (xvi). Both protocols were developed by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in four sessions from 1974 through 1977. Protocol I in its final form consists of ninety-one articles and two annexes.

This first volume discusses the preamble and the first twenty articles of Protocol I. Volume 2 will set forth the materials concerning articles 21 through 47, less article 44; volume 3 will focus on article 44 and articles 48 through 67; and the last volume, articles 68 through 91 and the two annexes. Each of the volumes has a price of \$45.00. Volumes 2, 3, and 4 will be published in 1980 and 1981. Materials contained therein have been drawn chiefly from the Official Record, but some other materials not in the Record are also included.

The entire work is organized in six parts, most of these subdivided into sections, and in some cases chapters of sections. Volume 1 contains part I, "General Provisions," which sets forth the materials concerning the first seven articles. Part II, "Wounded, Sick and Shipwrecked," is started in the first volume and will be completed in volume 2. Part III in volume 1 consists of section I, "General Protection," covering articles 8 through 20.

The book opens with a summary of the contents of all four volumes, and a table of contents for volume 1. This is followed by a foreword by Ambassador George H. Aldrich, and an introduction and acknowledgements by the author. The materials concerning the preamble to Protocol I are set forth next, before part I, "General Provisions." There is no index in volume 1; presumably this will appear in volume 4 or elsewhere.

The editor and compiler of this work, Howard S. Levie, is a professor at Saint Louis University School of Law, and is also a retired Army JAGC colonel. Among his many published writings is an article, *The*

Employment of Prisoners of War, published at 23 Mil. L. Rev. 41 (1964). He held the Naval War College Stockton Chair of International Law during the academic year 1968-69.

Professor Levie has also written *Prisoners of War in International Armed Conflict*, published in 1978 by the Naval War College as volume 59 of the N.W.C. International Law Studies. This work was briefly noted at 84 Mil. L. Rev. 151(1979), and was reviewed at length by Major James A. Burger at 86 Mil. L. Rev. 155 (1979).

8. Marshall, James, *Law and Psychology in Conflict* (2nd edition). Indianapolis, Indiana, and Charlottesville, Virginia: Bobbs-Merrill Company, Inc., and the Michie Company, 1980. Pp. xvi, 173.

This work by a New York attorney grapples with the problems presented by the law's approach to determination of facts, which is often inadequate and outdated in the face of today's knowledge accumulated by psychologists, psychiatrists, and other scientists. In the introduction by Lee Loevinger, it is stated that "law suits are never decided on the facts since only evidence is available to the courts and this is simply a secondary indication of the facts" (p. x). This is the theme of the book. The author feels strongly that the rules of evidence should be extensively revised.

The text is organized in six chapters. Chapter I, "Psychology and Evidence," is introductory in nature. Considerable space therein is devoted to problems of perception, including variations in range and acuteness, and interpretive judgments and their significance. Also discussed are recollection and articulation. The chapter closes with a brief discussion of selected rules of evidence.

The second chapter, "Identification," is subtitled, "I'll Never Forget That Face." This is followed by Chapter 111, "Some Vagaries of Recall," which reviews a number of problems affecting the quality of witness testimony. These include the socio-educational status of witnesses, time elapse, selectivity, bias, and the effects of punitiveness, among other topics.

Chapter IV, "Examination of Witnesses," reviews the effects of methods of interrogation, surroundings, and other factors on the quality of witness testimony. The results of research conducted by the author and others are presented. Among other things, they concluded that use of

leading questions does not necessarily produce less accurate responses than non-leading ones. The fifth chapter discusses problems surrounding use of juries, and Chapter VI discusses the psychology of courtroom advocacy. The author's conclusion follows the sixth chapter, urging review of the law of evidence to bring it into conformity with current knowledge about the realities of witness observation and recollection.

The book offers the forewords of both the first and second editions; a table of contents; and an introduction. Illustrations and cartoons are scattered throughout the book. Charts and graphs are frequently used to set forth the results of scientific studies. The work is heavily footnoted, and the notes appear at the bottoms of the pages to which they pertain, and are numbered consecutively from beginning to end of the book. An appendix sets forth descriptions of research projects which could profitably be carried out by lawyers and social scientists jointly. The book closes with a subject-matter index.

The author, James Marshall, is a New York attorney and has done research and published many writings concerning law and psychology, or forensic psychology. He is of counsel to the firm of Marshall, Bratter, Greene, Allison and Tucker, and was formerly an adjunct professor of public administration in the Graduate School of Public Administration at New York University. He holds a law degree from Columbia University, and was formerly chairman of the New York City Board of Education.

9. Monroe, Glenn E., *Government Contract Law Manual*. Charlottesville, Virginia: The Michie Company, 1979. Pages: xiv, **599**. Price: \$40.00. Index and appendices.

This work by an active duty judge advocate is a summary and comparison of government procurement regulations and procedures employed at the federal, state, and international level. Extensive appendices are included which set forth the verbatim text of many procurement regulations and forms, as well as other materials. The book is aimed not so much at the specialist in government contract law, as at attorneys, government contracting personnel, and contractors who have only occasional need for general information about government contract law, not an exhaustive, in-depth treatment of every aspect of the subject.

The book is organized in four chapters and six appendices. The first chapter is a short introduction explaining the purposes and use of the book. The much longer second chapter summarizes federal procurement

procedures, with emphasis on the Defense Acquisition Regulation procedures. The second chapter is divided into fifteen lettered parts. An introductory part is followed by Part B, "Authority to Contract," and Part C, "Formation of Contracts." These two parts lay the legal foundation for all of federal procurement. The next several parts focus on the solicitation process. The fourth part, "Contractor Qualification," is followed by "Remedies of Unsuccessful Offerors." Parts F, G, and H concern the procedures for selecting a contractor from among the bidders or offerors, by means of either formal advertising or, more commonly, negotiation. Part I is a short discussion of the Federal Acquisition Regulations, which is the civilian equivalent of the Defense Acquisition Regulation.

Chapter II continues with Part J, "Contract Types," reviewing the several types of fixed price, cost reimbursement, and variable quantity contracts, the characteristics and conditions for use of each of them. Part K, "Socio-Economic Policies," examines the preferences for small businesses and labor surplus areas; the several statutes establishing labor standards concerning wages, hours, working conditions, and the like; and provisions for protection of the environment. Part L deals with the broad subject of contract modification and termination; inspection, acceptance, and warranties; and delays, the cost principles, contract audits, and the limitation-of-cost clause. The last three parts conclude Chapter II with discussion of contract disputes, appeals, and lawsuits; interdepartmental and coordinated procurement; and ethical standards applicable to procurement personnel.

Chapter III discusses the Model Procurement Code for State and Local Governments. The Model Procurement Code was prepared under the auspices of the American Bar Association. After several drafts, a final draft was issued in February of 1979. The code consists of twelve articles, divided into many sections, with commentary concerning the origins and purposes of the various provisions. Thus it is similar to the uniform laws developed by the American Law Institute during the earlier part of this century. Several states have adopted or are considering adoption of the Model Procurement Code as law. The code is substantially derived from, and is generally similar to, the Defense Acquisition Regulation and the Federal Acquisition Regulations, although it is shorter and simpler than these documents.

Parts B through M of the third chapter discuss the provisions of the Model Procurement Code, article by article. For example, Article One,

“General Provisions,” is the subject of Part B, and is followed by Article Two, “Procurement Organization,” in Part C, and “Source Selection and Contract Formation,” the title of Article Three, in Part D. The other articles and parts deal with topics similar to those covered by the federal procurement regulations presented in the second chapter, concluding with Part M, concerning Article Twelve, “Ethics in Public Contracting.”

The fourth and last chapter concerns the proposed International Agreement on Government Procurement. This is one of many documents developed during the Tokyo Round of multilateral trade agreements, a series of talks conducted during the 1970's under provisions of the General Agreement on Tariffs and Trade. The draft International Agreement on Government Procurement was sent to Congress by President Carter in January of 1979. This agreement is tentative in nature, a negotiating document rather than a finished product ready for signature and ratification by the world's governments.

The thrust of the proposed agreement is to induce signatory countries to accept a uniform procurement code which will standardize procurement policies and practices along the lines of the procurement regulations used by the United States Government. At the same time, the proposed code contains clauses prohibiting discrimination against foreign contractors. In effect, the code would promote free trade across international boundaries, at least in respect to governmental purchases above a specified minimum price.

The code set forth in the proposed International Agreement on Government Procurement contains eight articles, or parts. These parts deal with such matters as “Technical Specifications,” “Tendering Procedures,” “Information and Review,” and “Enforcement of Obligations.” There is a part which would give favored treatment to contractors in developing countries, analogous with the United States federal provisions favoring small businesses and labor surplus areas.

Chapter IV is organized in ten lettered parts. The short introductory part is followed by eight parts discussing the eight parts of the proposed code, one by one. The chapter closes with a summary of the strengths and weaknesses of the proposed code. It appears that the United States would have to make almost no changes in its procurement policies, regulations, and practices, except repeal of the Buy American Act and re-cision of its implementing regulations. But the proposed code is very weak, and fails to deal at all with a number of important aspects of

procurement, so that it would provide practically no effective regulation. The paradox is, of course, that a system providing for strong regulation probably would receive no support from potential signatory states.

The six appendices following the four chapters are a very important part of the book. They comprise three-fourths of the bulk of the book, and are basic research and reference tools pertaining to the subjects discussed in the first quarter of the work. The first appendix is a definitions section, or glossary of terms pertaining to government procurement, especially federal procurement. Appendix 2 sets forth, in nearly 200 pages, the principle Defense Acquisition Regulation contract clauses and the principle forms used in federal procurement. The third appendix sets forth the complete text, with commentary, of the Model Procurement Code, together with certain provisions from earlier drafts. Appendix 4 contains the text of the proposed International Agreement on Government Procurement. The fifth appendix is an extensive annotated bibliography of books and articles on various aspects of government procurement. The final appendix sets forth the text of the Contract Disputes Act of 1978, which made some changes in disputes resolution procedures at the federal level.

For the use of readers, the book offers a preface, a detailed table of contents, and an introduction, as well as a subject-matter index. Relevant portions of the table of contents are duplicated at the beginning of each chapter. The text is divided into sections which are numbered by chapter and consecutively throughout the book, i.e., § 3.87 is section 87 of chapter 111. Footnotes appear at the bottoms of the pages to which they pertain.

Major Monroe, the author and compiler of this work, was an instructor in the Contract Law Division of The Judge Advocate General's School, U.S. Army, at Charlottesville, Virginia, from 1976 to 1979. In the summer of the latter year he was assigned to the Contract Appeals Division, U.S. Army Legal Services Agency, at Falls Church, Virginia, where he serves as a government trial attorney before the Armed Services Board of Contract Appeals. He is the author of *An Analysis of ASPR Section XV by Cost Principle*, 80 Mil. L. Rev. 147 (1978), and is co-author, with Major Theodore F. M. Cathey, of *The Allowability of Interest in Government Contracts: The Continuing Controversy*, 86 Mil. L. Rev. 3 (1979). A biographical sketch of Major Monroe appears in the notes on the first page of the latter article. *Government Contract Law Manual* was based on a thesis written during 1978 and 1979 for the S.J.D. degree at the School of Law of the University of Virginia.

Major Monroe's book is reviewed by Lieutenant Colonel Robert M. Nutt elsewhere in this volume.

10. Nelson, Harold D., editor, *Dep't. of Army Pamphlet No. 550-85, Libya: A Country Study*. Washington, D.C.: U.S. Government Printing Office, **1979**. Pages: xxviii, 350. Index, appendix, bibliography, and glossary.

This volume is a collection of five essays describing the country of Libya, its history, people, government, economy, and national security establishment. Emphasis is on developments and conditions of the last ten years or so, but mention is made of the country's earlier history also. This work is one of over a hundred studies of different countries or groups of countries prepared by scholars of Foreign Area Studies, a directorate within the American University, Washington, D.C.

Libya was a colony of Italy from **1912** until the Second World War, when Britain and France took over administration of the country until its independence in **1951**. The government was governed by a conservative monarchy until the present ruler, Muammar al Qadhaafi, and several fellow army officers, carried out a successful coup in **1969**. Qadhaafi's government, republican in structure, emphasizes Arab socialism and nationalism.

With 680,000 square miles, Libya is about **19%** as large as the United States. The population is small, about three million, but the population growth rate, including immigration, is high. Major cities include Tripoli, the capitol, and Tobruk, Benghazi, and Qasr Ahmad, all of them ports on the Mediterranean. Petroleum is very much the most important item of production, accounting for over 50% of the Libyan gross national product and almost all the exports. Libya is the largest oil producer on the African continent.

The book is organized in five chapters, resembling in format other country studies in the DA pamphlet **550** series. Chapter **1**, "Historical Setting," was prepared by Robert Rinehart; the second chapter, "Society and Its Environment," by David S. McMorris. Chapter **3**, "The Economy," was written by Howard I. Blutstein. This is followed by the fourth chapter, "Government and Politics," by William A. Mussen, Jr. The book closes with the fifth chapter, "National Security," by David R. Holmes and Harold D. Nelson.

The book offers a foreword, preface, country profile, detailed table of contents, and introduction. Footnotes are not used, but each chapter concludes with a short discussion of works published which deal with topics covered in the chapter. Various maps, pictures, and charts or figures are scattered throughout the text. An appendix is provided, consisting of nineteen statistical tables setting forth information about the population, employment, education, economy, military forces, medical services, and criminal activity. A lengthy bibliography is provided, broken out by chapters. This is followed by a glossary of terms and a subject-matter index.

This study of Libya and an approximate one hundred other country studies are produced under the Department of the Army Area Handbook Program, in the DA pamphlet 550 series. They are sold through the U.S. Government Printing Office, or distributed to Army addressees by the U.S. Army Adjutant General Publications Center, Baltimore, Maryland. However, the area handbooks, like issues of the *Military Law Review*, do not present the official views of the United States Government. Rather, the views presented are those of the American University-affiliated scholars who wrote the handbooks. The current study of Libya is a third edition and replaces the Area Handbook for Libya which was published in 1973.

11. Newman, Oscar, *Community & Interest*. Garden City, New York: Anchor Press/Doubleday & Co., Inc., 1980. Pages: x, 357. Price: \$14.95. Index and bibliography.

This work deals with city planning and architectural design of dwellings, especially apartment buildings. It is not a law book, but the issues and problems discussed have legal implications. For example, the design of entryways and the relationship between entries and interior and exterior spaces can influence the crime rate in a neighborhood. The fewer people using a particular entrance, the easier it is for the occupants and managers to control the flow of traffic through that entrance. Play grounds or parking lots are less likely to be vandalized if more entrances disgorge on them. Other examples abound.

However, crime prevention is not the primary subject of this book. That subject has been dealt with in several other publications by Oscar Newman, such as the book *Defensible Space*, published by Macmillan in 1972. *Community & Interest* emphasizes the desirability of designing neighborhoods as small communities within the larger city, communities

of like-minded people having similar housing needs but not necessarily similar backgrounds. Newman addresses particularly the need for integration to promote long-term community stability. By this he means not only racial or ethnic integration, but also economic integration, as between low-income and middle-class families. Newman believes that quotas must be legalized and used if integration is ever to be effected in the long term.

The book is organized in eleven chapters. The opening chapters explain the problems which should be addressed by present-day city planners and architects. Many examples of good and bad planning are set forth, with some illustrations and statistical tables. Chapter VI, "The Private Streets of St. Louis," describes arrangements which, according to the author, hold promise for solving or ameliorating many problems of urban life today. In certain neighborhoods, occupants have assumed ownership of certain residential streets from the city, and have blocked them off to through traffic. Later chapters discuss design principles and guidelines for housing, and their practical application in new housing projects and in modification of existing housing. The concluding chapter is philosophical, discussing the "failure of modern architecture," and problems of style.

The book offers a table of contents, an introduction, a bibliography, and a subject-matter index. Footnotes are collected together after the last chapter. As mentioned, many illustrations and some statistical tables are used.

The author, Oscar Newman, is an architect and city planner. He is also president and founder of the Institute for Community Design Analysis, described on the book jacket as "a nonprofit research corporation engaged in the study of the effects of environmental design on human behavior." He has published a number of articles and at least one book, *Defensible Space*, on problems of contemporary housing and neighborhood design. Newman has prepared housing plans for many American cities.

12. Pomroy, Martha, *What Every Woman Needs to Know About the Law*. Garden City, New York: Doubleday & Company, Inc., 1980. Pages: xv, 416. Price: \$14.95. Index.

This book, written by a woman attorney, is based upon two assumptions, First, although in general the law is the same for both men and women, there are still a number of important areas of law—property,

inheritance, social security, contracts—where the law treats women differently than men. Second, there are certain areas of law which, because of sex role differences, are likely to be of more concern to women than to men, such as consumer law, child abuse, and sex discrimination. The book is directed toward the increasing number of women who are supporting themselves and are not married.

The book is organized in nine parts and twenty-nine chapters. The nine parts, are, “Family,” “Working,” “Housing,” “Money,” “Your Person,” “Dealing With Governments,” “Consumerism,” “Crime and Punishment,” and “Advocacy.” The parts consist of chapters discussing various aspects of the title subject. For example, part IV, “Money,” has six chapters dealing with various aspects of taxation, insurance law, investments, and wills, estates, and trusts. “Crimes and Punishment” contains a chapter on traffic offenses, and another chapter providing general information about crimes as a public issue. “Advocacy” concerns hiring and making effective use of an attorney.

The book is written in an informal, conversational style, without technical jargon, so that it is comprehensible to the normally intelligent and normally educated layperson. The text is broken up by headings, labelled “rules,” usually one or two per page, which promotes ease of reading and comprehension.

For the convenience of readers, the book offers a table of contents, an introduction, and, at the end, a bibliography and a detailed subject-matter index. As mentioned above, the text is organized by rules, some of which are statements of law, and others of which are practical advice or how-to-do-it instructions.

The author, Martha Pomroy, is an attorney specializing in income tax law in New York City. She was formerly a television newscaster and studied at Northwestern Law School, Chicago, Illinois.

13. Rejnis, Ruth, *Her Home: A Women's Guide to Buying Real Estate*. Garden City, New York: Anchor Press/Doubleday & Company, Inc., 1980. Pp. **183**. Price: \$8.95.

This book is addressed to the increasing number of modern women who live alone and who have their own investment programs, independently of husband and family. Written in a popular, nontechnical style,

the book covers a variety of topics, such as mortgages, condominiums, mobile homes, and the like.

The book is organized in twelve chapters. The introductory chapter provides an overview of the various types of housing available. The author advises that most people could probably benefit from purchasing a house rather than renting or otherwise obtaining housing.

The second chapter deals with the all-important subject of financing the purchase of realty. Several chapters follow which describe various types of properties, and the benefits and pitfalls of each. Chapter 7, "Housing Choices for Special Times of Your Life," focusses on the problems of divorced, widowed, and retired people. The eighth chapter deals with vacation homes, and the ninth, with special problems faced by unmarried people living together. The tenth and eleventh chapters concern purchasing land and buildings for investment rather than residential purposes, and the final chapter is a glossary containing definitions of several dozen real estate terms.

The book offers a table of contents and a subject-matter index, as well as the glossary mentioned above.

The author, a freelance writer, was formerly employed on the news staff of the *New York Times*. She has written extensively on housing and real estate, and is the owner of an income-producing brownstone. She lives in Hoboken, New Jersey.

14. Russell, Clifford S., editor, *Collective Decision Making: Applications from Public Choice Theory*. Washington, D.C.: Resources for the Future (with the Johns Hopkins University Press, Baltimore, Maryland), 1979. Pp. xvi, **296**.

This book is a collection of ten essays and associated critical comments dealing with various aspects of public choice theory. This theory, said to be a new approach departing from traditional political science and sociology, deals with the mechanisms by which human societies make decisions about their collective lives. The theory makes use of mathematical models, formulae, charts, and graphs, perhaps reflecting the background of some of its proponents in economics. The essays in this volume try to show that public choice theory does lead to formulation of testable hypotheses about the behavior of voters, legislators, and the like.

The ten essays and the critical comments supplementing them were presented at, or based upon the proceedings of, a forum sponsored by Resources for the Future, on January 17 through 19, 1978, with funding provided by the Rockefeller Foundation. The thirty-one participants in this forum came chiefly from the academic community, but some were from research institutions of various sorts, and from government service.

The book offers a list of names and affiliations of the participants, a table of contents, and an introduction, as well as a table of contents. Footnotes appear at the bottoms of the pages to which they pertain, and bibliographical reference lists follow several of the essays and critical comments. There is some use of statistical tables, charts, graphs, and formulae.

The editor, Clifford S. Russell, is head of the institutional research unit at Resources for the Future. He was assisted by several other editors associated with that organization, and was author of the first of the ten essays.

Resources for the Future, Incorporated, is located in Washington, D.C., and describes itself as "a nonprofit organization for research and education in the development, conservation, and use of natural resources and the improvement of the quality of the environment." The organization was established in 1952 with the assistance of the Ford Foundation. Resources for the Future both accepts research grants from other organizations and individuals, and awards grants to others. The organization has in the past been interested primarily in economic policy research. The volume here noted represents a departure from that emphasis, into organizational analysis and the sociology of collective decision making.

15. Science Action Coalition, and Albert J. Fritsch, *Environmental Ethics: Choices for Concerned Citizens*. Garden City, N.Y.: Anchor Press/Doubleday & Co., Inc., 1980. Pages: 309. Price: \$3.95. Paperback. Index.

This work discusses in philosophical rather than technological terms the problems of preserving the environment. The solution to those problems is seen in extensive changes, sometimes radical changes, in our attitudes, in particular our way of viewing our relationship with the world around us.

The book proceeds from several assumptions, some obvious and gen-

erally accepted, others not so obvious. For example, the authors urge the importance of recognizing that everything—all life forms, and also all non-living things—is related to everything else, and all are valuable and worthy of respect for themselves. This is certainly not a new idea; but it has had little influence in western industrial society during this century, until the past decade or so. Other points made by the authors are that technological development should be controlled and in some cases restricted, and that growth should be redefined to emphasize internal self-development and social development, in place of gross national product and other material indicators. Many other similar points are made.

The book is organized in eight chapters. The first four comprise a group, each dealing with some particular aspect of the environment—endangered species, both plant and animal; nuclear power generation and waste disposal; mineral extraction, especially coal, oil, and gas, and related problems; and dangerous and potentially dangerous chemicals of all sorts, including but not limited to food additives, fertilizers, medicines, and chemicals used in industrial activities. Various choices and the costs of each are discussed.

Chapter V, “Growing During a Conservation Era,” discusses the concept of qualitative growth mentioned above, **as** opposed to material growth. The sixth chapter emphasizes the desirability of and ultimate practical necessity for simpler lifestyles in the interest of conserving resources and avoiding further damage to the environment. This is followed by a chapter entitled, “Theological Foundations for an Environmental Ethics,” which shows the bases in the Judeo-Christian tradition for the authors’ proposals. The closing chapter, “Moving from Reflection to Action,” is a description of a variety of practical proposals for protection and restoration of the environment.

The eight chapters are supplemented by four appendices. The first of these is a criticism of some current methods of pest control. Appendix II discusses the concept of “rights” **as** applied to animals and plants. The third appendix criticizes an essay by Garrett Hardin, an environmentalist who advocates the use of triage in deciding what countries or societies should be assisted to survive in a resource-scarce world. Appendix IV sets forth the text of a declaration of principles developed at the United Nations Conference on the Environment, held in Stockholm, Sweden, in 1972.

For the convenience of readers, the book offers a short table of con-

tents, an introduction, and an index, as well as the appendices mentioned above.

The Science Action Coalition describes itself as “a nonprofit research organization located in Washington, D.C., that investigates public-interest issues, including energy, environmental protection, consumer safety, and other health-related topics.” Albert J. Fritsch is an organic chemist and a director of the Science Action Coalition. He has published other works on environmental topics, and is a member of the Jesuit order.

16. Smith, Robert Ellis, *Privacy: How to Protect What's Left of It*. Garden City, N.Y.: Anchor Press/Doubleday & Co., Inc., 1980. Pages: 352. Price: \$4.95. Paperback. Index.

This book is addressed to the layperson concerned about the many demands of private and public agencies for information about him or her, and about the uses those agencies make of the information. The author, a Washington, D.C., attorney, is publisher of a newsletter called Privacy Journal.

The hardcover edition of this work was published in 1979, and was noted at 83 Mil. L. Rev. 188 (1979).

17. Walpole, Jane R., *A Writer's Guide: Easy Ground Rules for Successful Written English*. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1980. Pages: xiv, 187. Price: \$4.95, paperback. Index.

This book presents a series of lessons in basic English grammar for the use of otherwise educated people who are deficient in this area of knowledge and practice. The author, Dr. Walpole, prepared the book after conducting communications courses for practicing attorneys as part of the curriculum of the nine-month graduate (advanced) course for career judge advocates.

The book is organized in eight parts and thirty-five short chapters, dealing with terminology, the independent clause, punctuation, editing, style, and other topics. Numerous examples of acceptable and unacceptable grammar are scattered throughout the text, in graphic or tabular form. A table of contents and a subject-matter index are provided for the convenience of the reader.

Dr. Walpole is a teacher of English composition at Piedmont Virginia

Community College, near Charlottesville, Virginia. Her book is reviewed at greater length elsewhere in this volume by Major Percival D. Park.

18. Weber, John Paul, *The German War Artists*. Columbia, South Carolina: The Cerberus Book Company, 1979. Pp. 151. Price: \$24.95. Index, bibliography, and notes.

This remarkable book is both a collection of reproductions of paintings, and a treatise on a point of international law. During 1947, the United States forces shipped back to the Pentagon no less than 8,722 paintings and drawings produced by 369 German war artists. Several dozen of these paintings are reproduced in full color in this book, and brief biographical sketches of the lives of some of the artists are provided. Most of the text consists of a discussion of the reasons for the transfer of all these paintings, and the legal arguments in favor of and against the action. Extensive quotations from regulations, memoranda, and correspondence of the occupation authorities and other United States officials are provided.

German field armies included so-called "propaganda companies," whose functions were analogous with the public affairs offices of the United States Army. In addition to photographers and journalists, these units included artists. A special staff of these artists was attached also to the headquarters at Potsdam. Despite the well publicized inferiority of much Nazi art, these artists were not untalented party hacks. Some came to military service from long careers as professional portraitists and teachers. Moreover, they were allowed much greater freedom of expression than their civilian counterparts.

The seizure and transfer of these works of art by the United States was part of an effort to extirpate every trace of militarism from German culture. This policy was implemented under the inspiration, if not the direction, of Secretary of the Treasury Hans Morgentau. However, examination of the works of art revealed that not all of them dealt with military or political topics. A few years later, 1,659 paintings were returned to German authorities.

Readers interested in German art during the Hitler years may want to consult another recently published work, *Art in the Third Reich*, by Berthold Hinz. Translated from the German language, this work was published in paperback in 1979 by Pantheon Books, a division of Random House, Inc., of New York City. With 268 pages, this work sells for \$7.95.

A hardcover edition is also available. The book is profusely illustrated, in both color and black and white.

The Hinz book inadvertently complements the Weber book, by dealing with areas not covered in the latter. Explicitly political art is discussed at length, and some mention is made of architecture, sculpture and other media as well. The text does not discuss legal questions; instead, it sets forth the theory of **art** which the National Socialists sought to impose on the world. The historical and cultural origins of this theory are described.

Returning to the Weber book, this work is organized in eight unnumbered chapters. "Prologue" provides an overview of the subject. The next four chapters, "Occupation Policy," "The Confiscation," "Spoils of War," and "Second Thoughts," describe the history of the seized works of art from 1945 to 1950. The sixth chapter, "The Petitioners," discusses the unsuccessful efforts of some of the former war artists to obtain from the United States the paintings they produced.

The chapter entitled "Congressional Action" discusses the passage of the Act of October 25, 1978, Public Law No. 95-517, 92 Stat. 1817. This act was necessary to effect the return of ten paintings by Claus Bergen to the West German government. These paintings have the German Navy as their theme, but apparently they are primarily of interest to sailors, and do not convey any particular political message. The paintings were placed in the German Navy Memorial, near Kiel, West Germany. The book concludes with a short epilogue.

The book offers a table of contents and an introduction. Among the many names and organizations mentioned in the acknowledgments is Mrs. Vivian Hebert, Librarian at The Judge Advocate General's School, Charlottesville, Virginia, who assisted the author in his research work. Footnotes are collected at the end of the book. A bibliography and subject-matter index are also provided. As noted above, original documents, including letters, regulations, and internal government memoranda, are extensively quoted in the text.

The author, John Paul Weber, is a major on active duty in the United States Army Judge Advocate General's Corps. He is presently stationed at Fort Buchanan, Puerto Rico, where he serves as staff judge advocate. Major Weber graduated from the U.S. Military Academy at West Point, New York in 1964. Commissioned as an infantry officer, he served in Vietnam and elsewhere until 1972, when he commenced law study at the

Marshall-Wythe School of Law at the College of William and Mary, Williamsburg, Virginia. He graduated therefrom in 1975 and was admitted to the Virginia bar.

19. Wright, Howard W., and James P. Bedingfeld, **Government Contract Accounting**. Washington, D.C.: Federal Publications, Inc., 1979. Pages: 496. Price: \$85.00. Glossary and index.

This treatise deals with the peculiarities and intricacies of accounting under federal government contracts. Emphasis is placed on cost accounting, with extensive discussion of the cost principles and cost accounting standards prescribed by government regulations such as the Defense Acquisition Regulation and the Cost Accounting Standards Board. There are also chapters considering accounting for various types of claims based on changes, delays, and terminations, and other topics.

The book is organized in fifteen chapters and seven parts. The first, introductory, part contains two chapters providing an overview of government procurement in general and the rationale of accounting, Part II is comprised of three chapters on general concepts. These chapters deal, respectively, with generally accepted accounting principles, cost accounting, and government contract cost principles. The third part, "Cost Allocation," has two chapters concerning allocation of costs, first, to accounting periods, and second, to specific objectives.

The fourth part, "Supply Contract Costs," discusses several dozen selected costs in two chapters. Part V, "Significant Claims," applies accounting principles to changes, delays, and contract terminations in two chapters. The sixth part considers other contract types, specifically, construction, architect-engineer, and facilities contracts, as well as grants and non-profit organization contracts. Part VII discusses the Renegotiation Act, which expired on 31 March 1979, and the Vinson-Trammell Act of 1934, which is broadly similar to the Renegotiation Act in its purposes.

For the convenience of readers, the book offers a detailed table of contents, a list of figures (i.e., reproductions of official forms of various types), a glossary of terms, and a subject-matter index. The various parts and chapters each open with an abbreviated table of contents. Footnotes are collected at the end of each chapter. There are few footnotes, however; most citations to authority are inserted directly in the text. Included are extensive quotations from regulations, standard clauses, and court

and board decisions, and other publications and authorities. Some of the chapters have short appendices.

Howard W. Wright is a leading authority on government contract accounting. A retired professor of accounting and former department chairman at the College of Business and Management, he has published numerous articles and two previous books on the subject. He has also been associated with the federal government in a variety of capacities, in the course of which he became one of the authors of the first edition of the Department of Defense Contract Audit Manual and also of the contract cost principles in section XV of the Defense Acquisition Regulation (formerly Armed Services Procurement Regulation).

James P. Bedingfield is an associate professor of accounting at the University of Maryland and has worked closely with Dr. Wright during the past decade. He also has served as a consultant to government agencies and has published a number of articles on accounting.

Federal Publications, Incorporated, is a private, commercial publishing firm in Washington, D.C., which specializes in making available books and periodicals dealing with laws and regulations of the federal government. The volume here noted is the latest number of Federal Publications' Government Contracts Texts series. Previous numbers in this series are "Government Contract Bidding," by Paul A. Schnitzer, and "Government Contract Changes," by Ralph C. Nash, Jr.

20. Wu, Yuan-li, *Raw Material Supply in a Multipolar World* (second edition). New York City, New York: Crane, Russak & Company, Inc., and the National Strategy Information Center, Inc., **1979**. Pages: xvii, **99**. Paperback.

This small book discusses the problem of American and allied dependence upon importation of important raw materials, especially oil. The author suggests that increasing political instability and Islamic militancy in the Middle East makes it unwise for the United States to continue to rely upon the friendship of countries like Saudi Arabia. Other possible sources of raw materials, such as China, are proposed. This edition replaces the **1973** edition by the same author.

The book is organized in five chapters, dealing with import dependence, trade routes and suppliers, and national policies and strategic vulnerabilities, among other topics. For the convenience of readers, the book

offers a table of contents, a preface, and a foreword, and an appendix containing statistical information in tabular form showing the extent to which the major western powers rely upon importation of basic metals, and upon collection of scrap metals within their boundaries. Many other statistical tables are scattered throughout the text.

The author, Dr. Yuan-li Wu, is a professor of economics at the University of San Francisco, and a consultant to the Hoover Institution on War, Revolution, and Peace. During **1969–70**, he served as a deputy assistant secretary of defense in the Office of International Security Affairs.

The National Strategy Information Center describes itself as “a non-partisan tax-exempt institution organized in **1962** to conduct educational programs in national defense.” Its officers and directors are said to share “the conviction that neither isolationism nor pacifism provides realistic solutions to the challenge of 20th century totalitarianism.” The organization “exists to encourage civil-military partnership on the grounds that, in a democracy, informed public opinion is necessary to a viable U.S. defense system.”

21. Young, Oran R., *Compliance and Public Authority: A Theory with International Applications*. Washington, D.C.: Resources for the Future (with The Johns Hopkins University Press, Baltimore, Maryland), **1979**. Pp. x, **172**.

It is sometimes asserted that the major problem of international relations is the weakness or lack of an international central government. Further, many question whether international law really deserves to be called “law” in the absence of an effective international enforcement mechanism. Professor Young suggests that these objections are not well founded; that “international society is a member of the set of highly decentralized social systems” (p. ix); and that international society, like other decentralized systems, can function smoothly enough to ensure compliance with international norms, if the dynamics of the system are understood, and if the participants therein are prepared to adjust their expectations accordingly. The author’s approach is multidisciplinary.

The book is organized in eight chapters and three parts. The opening chapter, “The Problem of Compliance,” provides an overview of the author’s thesis. Part I, consisting of chapters **2** and **3**, sets forth Professor Young’s theory of compliance in greater detail. He discusses problems

of choice, and perceptions of the needs and goals of other participants. His approach resembles the goal-oriented approach decision theory of Professors Lasswell and McDougal.

The second part consists of two chapters in which the author applies his theory to two cases of international interaction—the Partial Nuclear Test Ban Treaty, and the International North Pacific Fisheries Conventions. The first of these is an example of compliance without formal organization, and the second, of compliance with the assistance of decentralized institutions. The author concludes that compliance has been reasonably good, and that these two examples can serve as models for additional international arrangements.

Part 111, “Toward a More General Theory of Compliance,” consists of three chapters in which the author puts together what has been learned in the previous chapters, and discusses at greater length the problem of compliance, the behavior of governments, and various aspects of mechanisms for ensuring compliance.

For the convenience of the reader, the book offers a table of contents? a preface, a bibliographical note and reference list, and a subject-matter index. Textual footnotes appear at the bottoms of the pages to which they pertain, and shorter citations are parenthetically inserted in the text. Graphs are used in chapter 7, concerning the behavior of public authorities.

The author, Oran R. Young, is a professor of government and politics at the University of Maryland. The publisher, “Resources for the Future,” describes itself as “a nonprofit organization for research and education in the development, conservation, and use of natural resources and the improvement of the quality of the environment.” The organization was established in 1952 under the sponsorship of the Ford Foundation. Resources for the Future both accepts and issues grants for research. Professor Young’s book is described as a product of the organization’s Quality of the Environment Division, which is directed by Walter O. Spofford, Jr. The organization’s president is Emery N. Castle, and its headquarters is located in Washington, D.C.

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I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published **as** volume 81 of the *Military Law Review*. That index **was** continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under **as** many different headings **as** they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty **as** regards new articles, indexed a few at a time **as** they are published.

Second, new subject-matter headings are easily added, volume by volume, **as** the need for them arises. **An** additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in five parts, of which this introduction is the first. Part II, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part III, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order by title under the various subject headings. The subject-matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

The fifth and last part of the index is a book review index. The first

part of this is an alphabetical list of the names of all authors of the books and other publications which are the subjects of formal book reviews published in this volume. The second part of the book review index is an alphabetical list of all the reviews published herein, by book title, and also by review title when that differs from the book title. Excluded are items appearing in "Publications Received and Briefly Noted," above, which has its own index.

All titles are indexed in alphabetical order by first important word in the title, excluding *a*, *an*, and *the*.

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any governmental agency.

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