



THE ARMY, THE COURTS, AND THE
CONSTITUTION: THE EVOLUTION OF
MILITARY JUSTICE

The Honorable Walter T. Cox III

CONFRONTATION AND RESIDUAL HEARSAY:
A CRITICAL EXAMINATION, AND A
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PROFESSIONAL WRITING AWARD FOR 1986

Each year, the Association of Alumni of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The Professional Writing Award acknowledges outstanding legal writing and is designed to encourage authors to add to the body of scholarly legal writing available to the legal community. The award consists of a citation signed by The Judge Advocate General, an engraved plaque, and this year for the first time, a set of quill pens. A gift to the Alumni Association in memory of Lieutenant Colonel (Ret.) Jabez Loane made this addition to the award possible.

The recipient of the 1986 award is Lieutenant Colonel William R. Hagan for his article, "Overlooked Textbooks Jettison Some Durable Military Law Legends," which appeared at 113 Mil. L. Rev. 163 (1986). The article traces the development of military law during the sixteenth and seventeenth centuries, and analyzes the origin of our present-day military codes. Lieutenant Colonel Hagan takes a position at odds with contemporary thinking and ably supports it with extensive original research. His article is an outstanding piece of legal scholarship. The *Military Law Review* is proud to add its congratulations to Lieutenant Colonel Hagan.

THE ARMY, THE COURTS, AND THE CONSTITUTION THE EVOLUTION OF MILITARY JUSTICE*

by the Honorable Walter T. Cox III

As we celebrate the Bicentennial of the Constitution, military lawyers have a special obligation to promote an understanding of the role the military plays in our constitutional system. In the following article, the Honorable Walter T. Cox III, Judge, United States Court of Military Appeals, reflects on the development of American military justice under the Constitution. Judge Cox originally presented the article as a lecture at the U.S. Army Military History Institute, Carlisle Barracks, Pennsylvania, on March 19, 1987. The United States Court of Military Appeals later used it as the focus of a symposium in honor of the Constitution Bicentennial.

Judge Cox is uniquely qualified to present such a discussion. Before his tenure on the Court of Military Appeals, he served nearly nine years on active duty with the United States Army. He has also spent five years as a practicing civilian attorney and six years on the bench as a state trial judge,

I. INTRODUCTION

When I was asked to give this presentation, two thoughts came to mind: First, it seemed a very sensible project to undertake in celebration of the bicentennial year of the Constitution; second, it gave me an opportunity to learn more about the jurisprudence of military justice, which is after all, the business of the United States Court of Military Appeals. May I thank the Military History Institute for the unique opportunity to share the results of this project. Truly the development of military law under the Constitution is worth discussing and indeed celebrating this bicentennial year.

The study of the military and the courts is a broad topic. I suspect an historian would do a complete and thorough analysis of at least one aspect of the topic. A lawyer is more likely to “try the whole case.” What I shall attempt to do is cut out a silhouette, from which perhaps

*This article was delivered as the seventh lecture in the 19th Perspective Lecture Series, 1986–1987, at the United States Army History Institute, Carlisle Barracks, Pennsylvania, on March 19, 1987.

you can recognize the subject, notwithstanding that many important details are missing.

And, perhaps I can leave you with some significant principles concerning the relationship of the Constitution to the military that will help you pursue your careers as the future military leaders of our great nation. Before I get into the substance of this discussion, however, allow me to set the stage.

Modern military and civilian leaders seem to agree with the conclusions reached by Colonel Harry Summers, Jr., in his book, *On Strategy: A Critical Analysis of the Vietnam War*, that the people, the politicians and the army—the “trinity”—must all have the will to win if war is to be successfully conducted.¹ Colonel Don Lundy, your Academic Director, is quoted as urging the officers here at Carlisle Barracks to develop a “mind-set” to think **strategically**.²

If we agree that the national defense “strategy” must have the support of the people, the politicians, and the military in order to be successful, then it logically follows that the individual parts which make up the whole of the national “strategy” must likewise have the support of the people, the politicians, and the military. I would suggest that this idea applies equally to other national questions such as, whether we should “draft” soldiers or have an all volunteer military; what procurement procedures we should use; what weapons we should employ; and what should be the size of our military force.

I also would suggest that we need to address these same “strategic” considerations to answer the question, “What system of military justice shall we use to maintain morale and discipline within the services?” Thus, our system of military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians.

Once the “trinity” agrees on the strategic aspects of military justice, the “tactical” decisions and questions will naturally **evolve**.³ I am satisfied that most of us have considered military justice in the tactical sense, i.e, how does military justice affect me and my command? I hope that by presenting to you this background, or history, of the development of military justice in our country, you will come to appreciate it as a vital aspect of our national defense “strategy.”

¹Gladstone. *The Military Mind*. The Boston Globe Magazine. Feb. 8, 1987, at 14, 63.

²*Id.* at 65.

³By “tactical.” I mean the application of the laws to the resolution of a particular problem or case in the same sense that Clausewitz would distinguish the strategic objectives of winning wars from the tactical means of achieving the objectives.

II. THE CONSTITUTION

Let's look first at the Constitution. A discussion of the courts and the military leads us immediately to articles I and III.

Article III provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."⁴ These courts include the United States district courts, the United States courts of appeals, the Supreme Court, and interestingly enough, the United States Court of International Trade.

Article I specifies the powers granted to Congress. Of particular interest are clauses 12, 13 and 14 of article I, section 8. Clause 12 grants Congress the power to "raise and support Armies." Clause 13 authorizes Congress to "provide and maintain a Navy." Clause 14 confers the power "to make Rules for the Government and Regulation of the land and naval Forces." And, of course, clause 18, which empowers Congress to "make all Laws [that are] . . . necessary and proper" is implicated.⁵

In *Dynes v. Hoover*,⁶ an 1857 case, the United States Supreme Court said:

These provisions [article I] show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.⁷

This case made it quite clear, and it has been often affirmed, that the legality of courts-martial is based upon article I of the Constitution.⁸

We will look at the relationship between article I and article III courts later.⁹ I wish to emphasize, however, that the court-martial is

⁴U. S. Const. art. III, § 1.

⁵*Id.*, art. I, § 8, cl. 18, empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

⁶*Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

⁷*Id.* at 79.

⁸*See Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Gaos v. Mayden*, 413 U.S. 665, 686 (1973); *Burns v. Wilson*, 346 U.S. 137, 140 (1953); *Kurtz v. Moffit*, 115 U.S. 487, 500 (1885); *Ex parte Reed*, 100 U.S. 13, 21 (1879).

⁹*See Schlesinger v. Councilman*, 420 U.S. 738 (1975).

but one of many courts in which the military is involved. Everyday, somewhere, one of the military services is a party to litigation in an article III court, in such diverse fields as environmental law, civilian personnel law, military personnel law, procurement law, medical malpractice law, the Posse Comitatus Act,¹⁰ and tort claims.¹¹

Were our forefathers concerned about the court-martial as it relates to the Constitution? Perhaps.¹² It is clear, however, that when the Constitution and the Bill of Rights were drafted, little mention was made of military justice.

Although section 2 of article III enumerates various types of cases to be considered by the judicial branch, there is no specific mention of military trials or military cases. This has not prevented article III courts from finding, in the general language of the article, jurisdiction to review court-martial proceedings when they are collaterally attacked.¹³ Because article I authorized Congress to create a separate system of courts for the military, civilian court review of court-martial proceedings has been limited, until recently, solely to collateral review.¹⁴

Professor Sydney Wise very cogently argues that the drafters of the Constitution were concerned with subordination of the military to civil authority.¹⁵ Thus, the separation of the war powers between the executive branch and the legislative branch—with the President as Commander-in-Chief under article II, and with Congress empowered to raise, support and regulate the forces under article I—was not an accidental result. It was a carefully planned scheme, following British experiences of the previous century, to disabuse the potential for military takeover of the government. Earl Warren, former Chief Justice of the United States Supreme Court, observed: “[I]t is not unreasonable to believe that our Founders’ determination to guar-

¹⁰18 U.S.C. § 1385 (1982).

¹¹For example, as of September 1986, the Army had 1,271 cases in litigation. Report of The Judge Advocate General, Major General Hugh R. Overholt, to Secretary of the Army (29 Sept. 1986). For an interesting discussion of civil litigation in the Army, see Hatch, *Historical Overview of the Development and Function of the Litigation Division of the Office of the Judge Advocate General* (unpublished manuscript, on file in the Office of The Judge Advocate General, Headquarters, Department of the Army).

¹²See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958).

¹³U.S. Const. art. III, § 2, provides in part that, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . .”

¹⁴The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, for the first time provides for direct civilian court review of court-martial convictions by permitting, in certain cases, direct petitions to the U.S. Supreme Court from decisions of the United States Court of Military Appeals.

¹⁵S. Wise, *The Army and the Constitution: Antecedents* (Aug. 21, 1986) (lecture given at the U.S. Army Military History Institute).

ante the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.”¹⁶

In fact, as you may recall, the drafters were concerned with the question of whether standing armies should be allowed to exist at all, and, if so, under what circumstances.¹⁷ For example, while assigned to his diplomatic post in Paris, France, Thomas Jefferson argued for a prohibition in the Bill of Rights against standing *armies*.¹⁸ Recognizing the need to protect the new nation from both Indians and foreign nations, however, Congress grudgingly authorized a small army. To illustrate the numerical insignificance of the army, consider that in August 1789 the remnants of the Continental Army were expanded to a strength of only 1400 *men*.¹⁹

The belief that citizens would lay down the tools of their civilian trades and answer the call to arms to defend the nation had been tested by the Revolution itself. The painting by John Trumbull, *General George Washington Resigning His Commission*, which hangs in the Rotunda of our Capitol, is a most symbolic portrait of the times, as it depicts the General yielding his command after the cessation of hostilities to return to his family and *friends*.²⁰

111. THE ARTICLES OF WAR

From the beginning, all concerned accepted the fact that the military must have a system of what we now call “military justice.” The first of the many codes regulating the military in America actually predated the Constitution and the Declaration of Independence.

In 1775, the Continental Congress enacted separate sets of regulations to govern the Army and the Navy, both based on English precedents which, in turn, drew from codes developed by Gustavus Adolphus and the Roman Empire. The Army’s American Articles of War of 1775 were the work of a five-man committee, of which George

¹⁶Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 185 (1962).

¹⁷The following is an eloquent expression of the distrust evinced by some of the founding fathers: “Standing armies in time of peace, are inconsistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism.” 27 Journals of Continental Congress 518 (1784) (C.P.O. ed. 1928), cited in Hansen, *Judicial Functions for the Commander?* 41 Mil. L. Rev. 1, 1 n.1 (1968).

¹⁸Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in M. Peterson, *Thomas Jefferson, Writings* 914 (1984).

¹⁹The Army Lawyer: A History of the Judge Advocate General’s Corps 1775–1975, at 26 (1975).

²⁰J. Trumbull, *General George Washington Resigning His Commission* (depicting Washington before Congress at Annapolis on Dec. 23, 1783).

Washington was a member.²¹ These Articles did not remain intact very long, however. The very next year another five-man committee, consisting of John Adams, Thomas Jefferson, James Wilson, R.R. Livingston, and one of my fellow South Carolinians, John Rutledge, suggested revisions to the Articles of War, which were adopted on September 20, 1776.²²

The First Congress expressly recognized the Code of 1776, and it continued in effect, with only minor changes, until 1806. The American Articles of War of 1806, consisting of 101 articles, lasted through the War of 1812, the Mexican War, and the Civil War. The next major revision did not occur until 1874.²³ All of these early articles of war provided for trial by courts-martial, although the jurisdiction and composition of these courts were modified from time-to-time.²⁴ Despite several amendments and two major revisions to the Articles of War, the fundamental operations of courts-martial remained unchanged during the 19th century.

A recent work by James C. Neagles, *Summer Soldiers, A Survey and Index of Revolutionary War Courts-Martial*, is a remarkable summary of courts-martial during the revolutionary period.²⁵ It attempts to record all the trials and results during that period, and, indeed, you may find some of your ancestors listed among the guilty.

The most common offense was desertion. Neagles recounts the trouble that General Washington had with the "Summer Soldiers," who would abandon their posts with the onslaught of winter. To deal with the problem, there were public executions, generally by hanging or by firing squad. The members of the condemned man's regiment were required to witness the executions to impress upon them the seriousness of the desertion offense. The number of whiplashes to be administered was raised at General Washington's request from a maximum of thirty-nine to one hundred lashes because Washington believed that a man could easily suffer thirty-nine lashes.²⁶ If this

²¹The committee consisted of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. See 1 Journals of Congress 83, 90.

²²*Id.* at 367, 374.

²³Rollman, *Of Crimes, Courts-Martial and Punishment—A Short History of Military Justice*, 11 A.F. JAG L. Rev. 211 (1969).

²⁴The various military tribunals were the General Court-Martial, the Regimental Court-Martial, the Detachment or Garrison Court-Martial, the Field Officers Court (authorized only in time of war), and the Summary Court-Martial (created in 1890). W. Winthrop, *Military Law and Precedents* 47-48 (2d ed. reprint 1920).

²⁵J. Neagles, *Summer Soldiers, A Survey & Index of Revolutionary War Courts-Martial* (1986).

²⁶*Id.* at 35.

sounds harsh, consider that the British Articles of War authorized up to 1,000 lashes.

At this time, it was traditional to place the unit drum in the center of the proceedings. Then the unit drummer was called upon to administer the “cat-o’-nine-tails” to the convicted man sentenced to “lashes.” It is believed that this is how military justice became known as “drumhead” justice.²⁷

Many general and senior officers were subjected to courts-martial—it was one method by which the good name of an officer could be vindicated. The most notable of these was the court-martial of Major General Benedict Arnold. Mr. Neagles suggests in his book that this court-martial, which occurred prior to General Arnold’s defection to the British Army at West Point in 1780, precipitated Arnold’s decision to become a “turncoat.” Apparently, Arnold believed that he had been wronged by General Washington and Congress in the manner in which the proceedings had been conducted.²⁸

It might be interesting to consider some observations about courts-martial during the post-Revolutionary period by Professor Edward M. Coffman in his delightful book, *The Old Army, A Portrait of the American Army in Peacetime, 1784–1898*. Professor Coffman points out that in the early 1800’s, courts-martial were considered “the backbone of discipline” but they could also be the “outlet for jealousies and animosities which permeated the officer corps” at that time.²⁹

One of the most famous courts-martial of that era concerned the disobedience by Colonel Butler, a Pennsylvania Revolutionary War veteran, of General Wilkinson’s order that he cut his hair. Colonel Butler steadfastly refused to cut off his “queue.” He was court-martialed in 1803 and sentenced to a reprimand. He still refused to cut off his “queue” and was again court-martialed in 1805. This time he was sentenced to a year’s suspension of command, pay, and allowances. Before the sentence went into effect, however, he died of yellow fever, still wearing his queue.³⁰

Another incident discussed by Professor Coffman involved a feud that developed between First Lieutenant Thomas Jonathan Jackson, later known as “Stonewall” Jackson, and his commanding officer, Captain William H. French, while they were posted in Florida in

²⁷ *Id.* at 36.

²⁸ *Id.* at 47.

²⁹ E. Coffman, *The Old Army, A Portrait of the American Army in Peacetime, 1784–1898*, at 32 (1986).

³⁰ *Id.* at 33.

1851. Each officer drew up charges against the other for conduct unbecoming an officer and a gentleman. Although neither was convicted, Lieutenant Jackson left the Army to become a professor at the Virginia Military Institute and Captain French was relieved of command.³¹

Some of the punishments authorized in the 1800's differ greatly from those with which you may be accustomed. For example, as previously mentioned, Army courts could order up to 100 lashes until Congress abolished flogging in 1812. The Navy continued to use the cat-o'-nine-tails until 1850. Other corporal and degrading punishments included being marked with indelible ink, having an ear cropped, being placed in a dark hole, being dunked in water, and having to labor wearing a ball and chain. One of the more celebrated punishments consisted of "drumming out" the convicted soldier. The soldier was marched out of the garrison at bayonet point after his rank and insignia had been stripped and his head shaved, all to the tune of "Rogues March."³²

One of the most controversial cases took place on board the U.S.S. *Somers* in the fall of 1842. In his excellent work, *Military Law*,³³ Captain Edward M. Byrne, Judge Advocate General's Corps, U. S. Navy, recounts the story of Acting Midshipman Philip Spencer, eighteen years old, who was charged with mutiny. After an investigation, the captain of the vessel, Commander MacKenzie, determined that a mutiny was afoot and the only way to avoid it was to hang the ring-leaders. A council of officers was convened, took testimony, and declared after deliberation that Spencer and two others, Small and Cromwell, should be hanged. The accused were not brought before the officers and did not even know they were being tried. After the decision was reported to Commander MacKenzie, Spencer and the two others were led away in manacles and hung from the main yard-arm of the ship.³⁴

Spencer's father was then Secretary of War in President Tyler's cabinet and, quite naturally, did not take kindly to the proceedings. A court of inquiry was formed, but exonerated Commander MacKenzie. He was later tried by court-martial and acquitted of the murder of the three men. James Fenimore Cooper wrote about the episode in a pamphlet published in 1844 called *The Cruise of the Somers*, and

³¹*Id.* at 69.

³²*Id.* at 196-200.

³³E. Byrne, *Military Law* 16-19 (3rd ed. 1981).

³⁴Van de Water, *Punic Rides the High Seas*, 12 *Am. Heritage* 20 (June 1961).

many scholars believe that Herman Melville had the *Somers* incident in mind when he wrote *Billy Budd*.³⁵

IV. CHANGES IN THE WIND

Prior to 1917, national concern with our military justice system as provided for in the Articles of War was not pervasive. The reasons for such benign neglect can perhaps best be understood in light of the small size of the military, its isolation from the American people, and, as Professor Coffman concludes, the relative disdain in which it was held.³⁶ Even then, though, there were signs of the impending constitutional crisis that would later shape our present day code.

For example, Colonel Winthrop notes that the Acts of Congress that enacted Articles of War in 1790, 1795, and 1796 all added that the existing Articles of War were reenacted “‘so far as the same . . . are applicable to the Constitution of the United States.’”³⁷ Moreover, the revision of the Articles of War in 1806 was accomplished because “the changed form of government rendered desirable a complete revision of the code.”³⁸ While these revisions accomplished no major change in our system of military justice, they foreshadowed constitutional concern in these matters.

Later, in 1846, Captain William C. DeHart, acting Judge Advocate for the Army, in a preface of his book on military law, deplored the reliance by American military officers on military justice books from foreign countries designed for use in foreign military bodies.³⁹ He also noted briefly the restraints our written Constitution placed on military law, which did not exist in the “unwritten parliamentary” British constitutional system.⁴⁰ The same themes of “un-Americanism” and the “unconstitutionality” of military law were later trumpeted in the early 1920’s by General Samuel T. Ansell, the father of modern American military law.

In between these two military writers, the Blackstone of American military law, Colonel Winthrop, espoused what might be called the classical theory of military law. Winthrop’s basic position was that a court-martial was an instrument of the Executive Branch of our government that Congress provided to the Commander-in-Chief to assist him in maintaining good order and discipline in the ranks.⁴¹ In other

³⁵H. Hayford, *The Somers Mutiny Affair 197–99* (1959).

³⁶E. Coffman, *supra* note 29.

³⁷W. Winthrop, *supra* note 24, at 23 n.43.

³⁸*Id.* at 23 n.45.

³⁹DeHart, *Observations on Military Law* (1846).

⁴⁰*Id.* at 1–3.

⁴¹W. Winthrop, *supra* note 24, at 48–49, 51–53.

words, it was an advisory body whose advice the President and subordinate commanders could reject in imposing punishment. The commander was not free to ignore the law but he was free to interpret and apply it without any institutional checks or balances, legal or otherwise. The commander in medieval times was the fountain of justice in the military.

The winds of change began to blow, however, after the experiences of World War I. Brigadier General Samuel T. Ansell, acting Judge Advocate General of the Army, became enraged when court-martial sentences, including death sentences, were executed in several controversial cases without legal review by his office.⁴² He characterized such a system as “un-American”, “unconstitutional”, and “lawless.”⁴³ Major General Enoch H. Crowder, the Judge Advocate General, returned to his post and defended the system, which essentially permitted autonomy for local commanders in matters of military justice.⁴⁴

The genesis of the Crowder-Ansell dispute was disagreement over the statutory power of the Office of the Judge Advocate General to review and revise court-martial proceedings. General Crowder asserted that review in his office was advisory and not binding on the local commander. General Ansell vigorously opposed this interpretation of the statute. The constitutional question that emerged was whether Congress could establish a military justice system in which the commander imposed punishment without regard for rules of law. In other words, should the will of the commander or the rule of law reign supreme in the American military justice system?

Some of the changes advocated by General Ansell were adopted by Congress in the early 1920's. It was not until thirty years later, however, after the experiences of World War II, that his view of military justice became predominate.

V. WORLD WAR II

The modern history of military justice can be traced to World War II. During this period, over *sixteen million* men and women served in the Armed Forces.⁴⁵ The vast majority were males between the ages

⁴²W. Generous, *Swords and Scales* 3-13 (1973); Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 *Mil. L. Rev.* 1 (1967). See Application of Yamashita, 327 U.S. 1 (1946), which discusses the distinction between a military court-martial and a military commission or tribunal.

⁴³Ansell, *Military Justice*, 5 *Cornell L.Q.* 1 (1919).

⁴⁴Major General Crowder had been detailed as Provost Marshal General to administer the Selective Service Act. See generally Brown, *supra* note 42, at 2-15.

⁴⁵U.S. Dep't of Commerce, Statistical Abstract of the United States, table no. 385, at 256 (1970).

of eighteen and forty, and social scientists would probably agree that this age group is the one most likely to commit crimes. But the incredible fact to consider is that during the hostilities there were about two million courts-martial convened, or about one for every eight service members.⁴⁶ There were about eighty thousand general courts-martial, or as William T. Generous, Jr. said in his informative work about military justice, *Sword and Scales*, more than sixty convictions by general courts-martial for every day the war was fought.⁴⁷

Unlike the professional armies of the first century and a half of our history, the World War II soldier was a regular citizen, who either volunteered or was drafted to defend our nation. Almost everyone became exposed in some way or another to the military justice system, and many came away not liking what they saw. Some of the soldiers were also lawyers by profession who were shocked at what they experienced, particularly by what they considered to be improper command influence.⁴⁸

The comments of former Vermont Governor Ernest W. Gibson pertaining to his wartime experience are illustrative:

I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith.⁴⁹

The case of Second Lieutenant Sidney Shapiro is often cited as an example of the abuses in military justice during World War II.⁵⁰ Shapiro was an army officer appointed to defend at a general court-martial a soldier charged with assault with intent to commit rape. Thinking that his client could not be identified as the attacker, he substituted another person for his client at counsel's table. The substitute accused was identified as the perpetrator and indeed was "convicted" by the court-martial. Shapiro then revealed his scheme. Not only was his real client thereafter brought to trial and convicted, but

⁴⁶ Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 Mil. L. Rev. 39, 39 n.3 (1972).

⁴⁷ W. Generous, *supra* note 42, at 14.

⁴⁸ *Id.* at 24.

⁴⁹ Willis, *supra* note 46, at 41-42.

⁵⁰ W. Generous, *supra* note 42, at 169-70; L. West, *They Call It Justice* 39-40 (1977).

several days later Shapiro himself was put on trial for violating the 96th Article of War by “delaying the orderly progress” of his client’s court-martial. He was served with the charge at 1240 hours on September 3, 1943, and notified that he would be tried at 1400 that same day. By 1730 that afternoon he had been convicted and sentenced to a dismissal from the service. After being dismissed, he was promptly drafted back into the Army as a private. Alleging wrongful dismissal, he later sued in the Court of Claims for back pay based on the difference between a second lieutenant’s salary and the pay received by him as a private. The Court of Claims ruled in his favor.⁵¹

A hue and cry arose for reform of the military justice system. Citizen-soldiers now returned from the war and put back into civilian life were concerned, as were the military leaders of the times. Not the least of these concerns was the valuable drain of manpower lost to court-martial processes that were considered to be both inefficient and unfair. The adverse effect on morale and discipline was also of great concern.⁵²

Numerous blue ribbon commissions and committees were formed to study the situation. In 1947, the battle heated up, with many public groups like the American Bar Association, the American Legion, the Judge Advocates Association, and the New York Bar becoming increasingly interested in military justice. Further, private citizens were venting their dissatisfaction through letters to editors of newspapers, congressmen, and even President Truman. Editorials criticizing the system were widely published. All of this furor aroused the interest of Congress.⁵³ Congressman Charles H. Elston of Ohio chaired a subcommittee of the House Armed Services committee to study the problem.⁵⁴

For purposes of military justice, the Navy was operating at the time under the Articles for the Government of the Navy, and the Army under the Articles of War. Although Representative Elston expressed hope that his subcommittee would be able to draft legislation applicable to both the Army and the Navy, that was not to be. The Act of June 24, 1948, known as the Elston Act, actually revised only the Army’s Articles of War.⁵⁵ Because of its short life, its reforms will not be discussed. One very important aspect of the Elston Act, however, was that it created The Judge Advocate General’s Corps.

⁵¹ *Brown v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947).

⁵² *W. Generous*, supra note 42, at 15–17.

⁵³ *Hearings on H. R. 2575 Before the Subcommittee of the House Committee on Military Affairs*, 80th Cong., 1st Sess. 2166–75 (1947).

⁵⁴ *W. Generous*, supra note 42, at 16–20.

⁵⁵ *Id.* at 28.

VI. THE UNIFORM CODE OF MILITARY JUSTICE

Life under the Elston Act was short. Because of a quirk in the law, it was not clear whether the Air Force, which became a separate service in 1947, was even covered.⁵⁶ As a result of unification of the services under the Department of Defense, Secretary of Defense James Forrestal was convinced that it was time to have a uniform system of discipline. This decision by the Secretary set the stage for the formulation of the Uniform Code of Military Justice, which now governs the conduct of persons who serve in the Army, Navy, Marine Corps, Air Force, and Coast Guard.⁵⁷

The story of the creation of the Uniform Code of Military Justice is a fascinating one, certainly worthy of a lecture unto itself. Secretary Forrestal asked Edmund M. Morgan, a noted professor of law at Harvard University, to chair The Uniform Code of Military Justice Committee. The committee was charged by the Secretary to: (1) integrate the military justice systems of the three services; (2) modernize the system to promote public confidence and protect the rights of the service member, without impeding the military function; and (3) improve the arrangement and draftsmanship of the articles.⁵⁸

There was genius in the organization of the committee and its work. The committee was actually composed of three subgroups, with only one man being a member of all three. This key figure was Felix Larkin, then a deputy general counsel of the Department of Defense. He served as a member of the so-called "Morgan Committee," was chairman of a "working group," consisting of representatives from each service, and headed up a "research group" within the office of the General Counsel. The research group provided input to the working group. The working group in turn coordinated with their respective services and attempted to provide unanimous recommendations to the Morgan Committee.⁵⁹

One can only imagine the sensitive negotiations required. It must be remembered that the Army and the Navy had been operating all

⁵⁶W. Generous, *supra* note 42, at 31–32.

⁵⁷Administratively, the Marine Corps became part of the Navy by virtue of the Act of June 30, 1834. Therefore, for purposes of military justice, the Marine Corps was governed by the Articles for the Government of the Navy until the enactment of the Uniform Code of Military Justice. The Coast Guard, which was established in 1915, was governed by a system modeled on the Navy's. See H. Moyer, *Justice and the Military 9–10 (1972)*.

⁵⁸Letter from James Forrestal to the Committee on a Uniform Code of Military Justice (Aug. 18, 1948) *reprinted in* I Morgan Papers.

⁵⁹W. Generous, *supra* note 42, at 34–53.

this time under systems having pre-Revolutionary **origins**. The ground rules were also extraordinary. Secretary Forrestal stipulated that: (1) there would be high-ranking representation from the services on the Morgan Committee and comprehensive representation on the working group; (2) if a provision was agreed upon by the military representatives of both the Morgan Committee and the working group, there would be further study by the individual departments; and (3) if there were disagreements, Secretary Forrestal, himself, would be the final **arbiter**.⁶⁰

Miraculously, there were only three major disagreements. These concerned whether to create a civilian “Judicial Council,” whether to permit enlisted court members, and whether there would be a law officer at a general court-martial. Secretary Forrestal resolved all of these in the affirmative, as Professor Morgan had **recommended**.⁶¹

When the proposed bill was presented to Congress, there was hot debate on the Hill, as you can well imagine. The legislative history makes for some revealing and informative reading. But, it suffices to say here that the Uniform Code of Military Justice was enacted and signed into law by President Truman in May of 1950.⁶²

Thus began the modern era of “military justice.” Among the many reforms reflected in the Uniform Code of Military Justice was the creation of the Court of Military Appeals. The name was changed in the House from “Judicial Council” to “Court of Military Appeals” because it was thought that the name “Judicial Council” sounded too much like “city council.”⁶³

What is the Court of Military Appeals? It is composed of three judges, experienced attorneys from “civil life,” who are appointed by the President with the advice and consent of the Senate. The Court was established under Article 67 of the Uniform Code of Military Justice to review:

- (1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;
- (2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and,

⁶⁰*Id.*

⁶¹*Id.*

⁶²Uniform Code of Military Justice, 10U.S.C. §§ 801–940(1982) [hereinafter UCMJ]; see Index and Legislative History, Uniform Code of Military Justice (1950).

⁶³See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1276(1949) [hereinafter 1949 Hearings].

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Appeals has granted a **review**.⁶⁴

In addition to the jurisdiction provided by Article 67, the Court of Military Appeals has held that the All Writs Act⁶⁵ authorizes it to issue all “writs necessary or appropriate in aid of [its] . . . jurisdiction.”⁶⁶

The Supreme Court has described the rationale for the Court of Military Appeals thusly:

When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.⁶⁷

In deciding whether a court-martial was subject to collateral attack in the federal courts prior to exhaustion of all of the remedies provided by the military, the Supreme Court said: “[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. . . . [A]nd it must be assumed that the military court system will vindicate servicemembers’ constitutional rights.”⁶⁸

The creation of the Court of Military Appeals raised many questions. For instance, was it really a “court” or was it an agency of the executive branch? This question was finally laid to rest by Congress in 1968 with an amendment to the Code that clearly provided that the court would be known as the “United States Court of Military Appeals” created under article I of the Constitution.⁶⁹

One of the early questions raised about the court was whether it had authority to interpret “constitutional questions.” In several noted articles published in the *Harvard Law Review* in 1957 and 1958, Mr. Gordon Henderson and Colonel Frederick Wiener, both distinguished members of the District of Columbia Bar, debated whether and to what extent military members enjoyed the protections of the Consti-

⁶⁴UCMJ art. 67(b); see H. Nufer, *American Servicemembers’ Supreme Court* (1981).

⁶⁵28 U.S.C. § 1651(a) (1982).

⁶⁶*United States v. Frischolz*, 16 C.M.A. 150, 36 C.M.R. 306 (1966).

⁶⁷*Noyd v. Bond*, 395 U.S. 683, 694 (1969).

⁶⁸*Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).

⁶⁹Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 179.

tution and the Bill of Rights.” The only mention of the military in the Bill of Rights is contained in the fifth amendment, which expressly excepts from the requirement of indictment by grand jury “cases arising in the land or naval forces.”

By statute, the Uniform Code of Military Justice guaranteed to service members many of the pertinent rights found in the Bill of Rights, such as: the right to remain silent, protected by Article 31; the prohibition against double jeopardy in Article 44; and the right to counsel in Articles 27 and 38. Because of this, the Court of Military Appeals in its earlier days did not feel compelled to answer the question.⁷¹ Dynamic events in the civilian sector, however, particularly with the activism of the Supreme Court during the “Warren era,” kept pressure on the Court of Military Appeals to give due consideration to the “constitutional rights” of service members, as well as statutory rights under the Uniform Code.⁷²

As late as 1983, appellate counsel argued on behalf of the Government—in this instance the United States Army—in a death penalty case⁷³ that the United States Court of Military Appeals did not have the authority to consider the constitutional questions raised in that case because it was an article I court. The court rejected that contention, definitively stating that it did have authority to consider constitutional questions. It would be an “anomalous result,” wrote Chief Judge Everett, for the judges to be required to take an oath to uphold and defend the Constitution yet at the same time be forced to “render judgments based on statutes . . . contrary to that Constitution.”⁷⁴

In spite of the extraordinary changes brought about by the Uniform Code, military justice has continued to be attacked, both from within and without the military.⁷⁵ The Vietnam War years brought much controversy to the system. In 1969, the book, *Military Justice is to*

⁷⁰Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266 (1958).

⁷¹United States v. Sutton, 3 C.M.A. 220, 11 C.M.R. 220 (1953); United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951).

⁷²See United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960). See generally Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 S. Ill. U.L.J. 1; Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 Mil. L. Rev. 27 (1972); Note, *The Court of Military Appeals and the Bill of Rights: A New Look*, 36 Geo. Wash. L. Rev. 435 (1967).

⁷³United States v. Matthews, 16 M.J. 354 (C.M.A. 1983).

⁷⁴*Id.* at 366.

⁷⁵See Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1 (1972).

Justice as Military Music is to Music, was published. This critique of the system was described by Mike Wallace of CBS News as “a chilling analysis of what can pass for justice in [the] military.”⁷⁶ In August of 1970, *Newsweek* magazine featured a cover story captioned, “Military Justice on Trial.” It discussed several sensational cases of the era and concluded that the number one evil with military justice remained “command influence.”⁷⁷

The trial of First Lieutenant William L. Calley, Jr. for the My Lai incident attracted enormous media attention. On May 18, 1971, Major General Kenneth J. Hodson, The Judge Advocate General of the Army,⁷⁸ observed in a speech to the students at the Army Command and General Staff College at Fort Leavenworth, Kansas, that the trial of Lieutenant Calley had “developed a number of critical scholars of the military justice system, and most of them write from the point of view of the accused.” General Hodson commented that he had received more than 12,000 letters about Lieutenant Calley’s conviction.⁷⁹

On the other hand, military commanders complained that discipline under the Uniform Code of Military Justice was too watered down and weak. Expounding this view, retired General Hamilton Howze lamented in 1971 that: “The requirements of military law are now so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system.”⁸⁰ Perhaps he was merely echoing the sentiments of the famous Yankee General, William Tecumseh Sherman, who made this observation in 1879: “[I]t will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.”⁸¹

⁷⁶R. Sherrill, *Military Justice is to Justice as Military Music is to Music* (1969).

⁷⁷*Military Justice on Trial*, *Newsweek*, Aug. 31, 1970.

⁷⁸Major General Hodson became the first general officer to serve as “Chief Judge” of the U.S. Army Court of Military Review. The billet is now a general officer assignment. He is also the Honorary Colonel of the Judge Advocate General’s Corps Regiment, so named on October 9, 1986.

⁷⁹Kansas City Times, May 19, 1971, at 5.

⁸⁰Howze, *Military Discipline and National Security*, *Army Magazine*, Jan. 1971, at 11, 13.

⁸¹More fully, General Sherman stated that:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed

As recently as 1984, in a dissent from the majority report to Congress of the Weinberger Advisory Commission Report on the Military Justice Act of 1983, a Navy captain and a Marine colonel lashed out at the present structure of our military justice system and at the Court of Military Appeals.⁸² They believed the system had moved too fast and too far toward being a "civilian system" and was therefore an inadequate tool for commanders of the twenty-first century. To this criticism, one can consider the lessons learned in World War II and note that Congress, to an extent, rejected the notion that the military justice system needed to be radically different from the civilian system. Senator Wayne Morse expressed a view some thirty-four years ago that reflects this concern:

I do not like this idea in this new era in which we are living of building up one justice system here for men in uniform and another one for so-called free citizens. You cannot keep a civilian Army, in my judgment, under two systems of justice. Differences, I recognize there will be, but I think the military has gone entirely too far in the direction of a system of justice we cannot reconcile with what I think are some basic guarantees of a fair trial.⁸³

The system has continued to change and evolve into a modern, generally efficient, system which tries to serve the delicate balance between the needs of the commander to have an expedient method of administering punishment for serious breaches of the law and the rights of an accused to a fair and impartial trial. It is fair to say, however, that the Uniform Code of Military Justice has not faced the extreme demands placed upon the system that were prevalent during World War II. Hopefully, it never will be.

The first major congressional overhaul of the Uniform Code came almost two decades after its enactment. A key figure in this effort

of strong men so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.

Sherman, *Military Laws (1880)*, reprinted in 1949 Hearings, *supra* note 63, at 780.

⁸²I The Military-Justice Act of 1983 Advisory Commission Report 155 (1984) (minority report) [hereinafter 1983 Advisory Commission Report].

⁸³*Hearings on S. 857 and H. R. 4080 Before Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 84 (1949) (remarks of Senator Wayne Morse).

was a real champion of the rights of the military accused, the Honorable Sam Ervin, Senator from the State of North Carolina. His fight for reform throughout the 1960's culminated in the Military Justice Act of 1968.⁸⁴ When President Johnson signed it into law, he remarked that, "The man who dons the uniform of his country today does not discard his right to fair treatment under law."⁸⁵

One of the most significant changes of the Military Justice Act of 1968 was the designation of a "military judge" to preside over the court-martial proceedings. Further, it provided for trial by a "military judge alone" upon request of the accused. The act also provided for trained legal counsel to represent the accused in every special court-martial empowered to adjudge a bad-conduct discharge. Although the Uniform Code originally provided for appointed lawyer counsel at general courts-martial, it had only provided for appointed nonlawyer counsel at special courts-martial.

So, where are we today? Courts-martial have survived throughout the history of our country. It is doubtful, however, that the framers of the Constitution or our founding fathers would recognize court-martial proceedings as they are conducted today. For example, the court-martial is run by a military judge in a fashion similar to civilian trials, rather than by the senior member or President of the court-martial.⁸⁶ In the Army, Air Force and Coast Guard, the judges wear black judicial robes, although the Navy and Marine judges still appear in their military uniform. The accused is detailed a trained military lawyer or may request an individual military lawyer and has the right to a civilian lawyer at his own expense.⁸⁷ Most courts-martial are tried by military judge alone, rather than a panel of members.⁸⁸ Significantly, the defense counsel no longer work directly within the chain of command of the convening authority, although each service manages its defense counsel somewhat differently.⁸⁹ The accused may appeal in all cases involving punitive discharges or dis-

⁸⁴ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

⁸⁵ Remarks of President Lyndon B. Johnson on occasion of signing into law the Military Justice Act of 1968 (Oct. 24, 1968).

⁸⁶ UCMJ art. 26; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801 [hereinafter M.C.M. and R.C.M., respectively].

⁸⁷ UCMJ arts. 27 and 38, respectively.

⁸⁸ Annual Report submitted to the Committees on Armed Services of the Senate and of the House of Representatives pursuant to Article 67(g)(1), for the period October 1, 1984—September 30, 1985, reprinted in 23 M.J. CXVII, CXLI, CLII, CLXI.

⁸⁹ In response to concerns about the independence of defense counsel, the Air Force created an Area Defense Counsel program, the Army has a Trial Defense Service, and the Navy has a Legal Services Command. See United States v. Davis, 20 M.J. 61 (C.M.A. 1985); United States v. Nicholson, 15 M.J. 436 (C.M.A. 1983).

missals or confinement for more than one year.⁹⁰ And finally, since 1984, some court-martial convictions *can* now be appealed to the **United States Supreme Court**.⁹¹

VII. THE ARTICLE III COURTS

What is the relationship between the article III courts and courts-martial? Prior to the amendment of Article 67 in 1984, there was no direct appeal to the Supreme Court.⁹² The only review by article III courts was by collateral attack. Thus, appeals to the Supreme Court had to work their way through the United States District Courts and Courts of Appeals or through the Claims Court. Collateral attack took various forms, such as suits for back pay, petitions for writ of habeas corpus, declaratory judgments, injunctive relief, and mandamus. The review by article III courts of court-martial proceedings resulted in the development of a "military jurisprudence" or "military common law." Let's look at some of these developments.

If one fundamental concept pronounced by the Supreme Court about courts-martial can be said to have been chiseled in stone, it would be that a civilian is never subject to the jurisdiction of a court-martial so long as the doors of the civilian courts are open and doing business. Having said that, let me hasten to add that there are numerous instances where civilians have been tried and convicted by courts-martial, but not in very recent times.⁹³

This rule has been so scrupulously followed that it has been applied to former service members who committed serious crimes while on active duty, but who were discharged prior to being charged. So Aubrey Toth, who was charged with murder and conspiracy to murder while on active duty in Korea, was ordered released from prison by the Supreme Court because he had been honorably discharged prior to the initiation of charges.⁹⁴ Similarly, civilians accompanying the military abroad cannot be tried by courts-martial, except perhaps in time of war and in the actual field of war.⁹⁵ Consequently, in 1957, the court-martial conviction of Mrs. Covert for the murder of her Air Force sergeant husband in England was set aside by the Supreme Court.⁹⁶ It was a very close case in which the Court first ruled against

⁹⁰UCMJ arts. 66 and 67, respectively.

⁹¹UCMJ art. 67(h).

⁹²*In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

⁹³*See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁹⁴*United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

⁹⁵UCMJ art. 2(a)(10); *see Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Averette*, 19 U.S.C.M.A.363, 41 C.M.R.363 (1970).

⁹⁶*Reid v. Covert*, 354 U.S. 1 (1957).

Mrs. Covert, but, upon petition for reconsideration, Mr. Justice Harlan changed his position, thus paving the way for a reversal of the conviction.

Active duty military personnel are subject to the Uniform Code of Military Justice by virtue of Article 2(1). It was generally believed, therefore, that the court-martial could exercise jurisdiction over persons who were in the Armed Forces. This is not necessarily so.

The first hint that the status of the accused was not totally sufficient to support jurisdiction was found in the case of Harold E. Hirshberg, an enlisted man in the Navy.⁹⁷ Hirshberg was tried by court-martial for the crimes of mistreatment of his fellow prisoners of war while imprisoned in Japan during World War II. Subsequent to his return from that imprisonment, he was honorably discharged and he reenlisted the next day. His crimes were thereafter discovered and he was tried by court-martial. Hirshberg instituted collateral attack through habeas corpus proceedings challenging court-martial jurisdiction. The Supreme Court held that jurisdiction to try him had expired with the end of his enlistment.⁹⁸

But the major case that had an impact on jurisdiction was not decided until 1969. The landmark decision of *O'Callahan v. Parker*⁹⁹ held, for the first time, that military status of the accused at the time of both the charges and the court-martial was not enough. As a result, not only must the accused be subject to the Code, but also there must be a connection between his military duties and the offense committed.¹⁰⁰

Mr. Justice William O. Douglas, speaking for a five-member majority of the Court, expressed the sentiment that the military lacked the ability to render justice fairly and impartially. He opined that, "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."¹⁰¹ He emphasized that courts-martial did not afford defendants the same procedural rights guaranteed by the Constitution in article III courts. The military courts at that time did not afford a trial by jury, guaranteed in the sixth amendment, and did not provide for an indictment before a grand jury. There was no judge whose "objectivity and independence were protected by tenure and undiminishable salary and nurtured by ju-

⁹⁷United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949).

⁹⁸*Id.*; see also United States v. Howard, 20 M.J. 353 (C.M.A. 1985); United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983); United States v. Clardy, 13 M.J. 308 (C.M.A. 1982); United States v. Douse, 12 M.J. 473 (C.M.A. 1982).

⁹⁹395 U.S. 258 (1969).

¹⁰⁰*Id.* at 273.

¹⁰¹*Id.* at 265.

dicial tradition,” and there was the “possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides.”¹⁰²

The decision provided no guidance for determining when “service connection” existed. Two years later, in *Relford v. Commandant, U.S. Disciplinary Barracks*,¹⁰³ the Supreme Court upheld a conviction for murder committed on a military reservation and announced a series of considerations or guidelines to be utilized in determining whether service connection exists.

The issue of “service connection” has generated considerable litigation in the military courts and the issue is not dead by a long shot. On February 24, 1987, the Supreme Court heard argument in *United States v. Solorio*, the first military case briefed and argued under the new direct review procedures.¹⁰⁴ The Supreme Court will decide whether the Coast Guard had jurisdiction to try Solorio for sexual offenses he committed against minor children of fellow coast guardsmen during nonduty hours, off post, eleven miles from his duty station in Juneau, Alaska. Since there have been so many changes to the system after *O’Callahan v. Parker*, many in direct response to Mr. Justice Douglas’ criticisms, it will be interesting to see how the Court views military justice in the 1980’s.¹⁰⁵

The last fundamental proposition of law that I will briefly discuss is that article III courts “must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”¹⁰⁶ Thus, the Air Force regulation prohibiting Captain S. Simcha Goldman, an orthodox Jew, from wearing his yarmulke while in uniform took on special significance. Captain Goldman was not tried by a court-martial. Instead, he brought a lawsuit in a United States district court seeking to enjoin the Air Force from enforcing its regulation, claiming that the Air Force uniform regulations infringed on his first amendment right of free exercise of religion. The Supreme Court upheld the regulation, but the importance of the decision is not in what particular religious article a service member may wear with his uniform. Rather, it lies in the more basic principle of judicial deference to the wisdom of the service in determining what is important in carrying out its mission. The

¹⁰²*Id.* at 264.

¹⁰³401 U.S. 355 (1971).

¹⁰⁴*United States v. Solorio*, 21 M.J. 251 (C.M.A.) cert. granted, 106 S. Ct. 2914 (1986).

¹⁰⁵[ed. note. On June 25, 1987, the Supreme Court overruled *O’Callahan* and affirmed the decision of the Court of Military Appeals, which held there was jurisdiction to try Solorio. *Solorio v. United States*, 107 S. Ct. 2924 (1987).]

¹⁰⁶*Goldman v. Weinberger*, 106 S. Ct. 1310, 1313 (1986).

decision is also important because the 5-4 vote reflects that the military does not have *carte blanche*.

VIII. THE BILL OF RIGHTS

Does the Bill of Rights apply to service persons? The question has often been debated, and I guess the best answer is: Yes, a service person is afforded all the constitutional guarantees of freedom and liberty envisioned in the Bill of Rights—except when he does not enjoy them. As the Court of Military Appeals has stated on several occasions, the protections in the Bill of Rights apply to service members, unless expressly or by necessary implication they are made inapplicable.¹⁰⁷

The only express mention of the military in the Bill of Rights is in connection with the fifth amendment's exception for grand jury indictment. That does not necessarily mean, however, that the rest of the Bill of Rights was intended to apply fully to service members. As you well know, the military by necessity poses restrictions on the lives of service members that have no counterpart in the civilian community.

Perhaps a few examples will illustrate why there is no clear-cut answer. The first amendment to the Constitution grants us: the freedom to worship as we please; freedom of speech; the right to assemble peacefully; and the right to petition the government for redress of grievances.

Does the service member enjoy these rights? Yes, but the exercise of freedom of expression may be restricted when it interferes with the accomplishment of the military mission, or military morale and discipline.¹⁰⁸ As stated by Mr. Justice Rehnquist in *Goldman v. Weinberger*, "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."¹⁰⁹ Thus, there are speech-related offenses unique to the military, such as using contemptuous words against the **President**,¹¹⁰ disrespect toward a superior commissioned officer,¹¹¹ insubordinate conduct to-

¹⁰⁷United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Ezell, 6 M.J. 307 (C.M.A. 1979); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

¹⁰⁸United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972); United States v. Gray, 20 C.M.A. 63, 42 C.M.R. 255 (1970); United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967); United States v. Voorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954).

¹⁰⁹*Goldman*, 106 S. Ct. at 1313.

¹¹⁰UCMJ art. 88.

¹¹¹UCMJ art. 89.

ward a noncommissioned officer,¹¹² and using provoking words or gestures.¹¹³ By statute and regulation, soldiers are also prohibited from forming unions, protesting, assembling against their commanders, publishing papers urging disobedience of orders, and fraternizing with subordinates.¹¹⁴

What about the fourth amendment? Does a member of the military have the right to be secure against unreasonable searches and seizures? The extent of this right is still being debated.¹¹⁵ However, precedents of the United States Court of Military Appeals and the Military Rules of Evidence found in the Manual for Courts-Martial would seem to indicate that the military member does enjoy this fourth amendment right.

The question turns on what is "reasonable."¹¹⁶ Thus, it has been held that health and welfare inspections are not precluded by the fourth amendment.¹¹⁷ A commander may establish a scheme to test his personnel for drug abuse by requiring urine samples.¹¹⁸ Gate guards may randomly stop and search vehicles entering or leaving military installations.¹¹⁹ A majority of the Court would not, however, authorize the "search" of a service person's on-base quarters, or clothing and effects, without the authorization of the commanding officer, based upon "probable cause," a procedure that attempts to emulate the fourth amendment requirement that a search warrant issue from a "detached and neutral magistrate" based upon "probable cause."¹²⁰

What about the right to remain silent envisioned by the fifth amendment? Article 31 of the Uniform Code of Military Justice is the congressional effort to protect military service members against compelled self-incrimination.¹²¹ Notwithstanding Attorney General

¹¹²UCMJ art. 91.

¹¹³UCMJ art. 117.

¹¹⁴See 10 U.S.C. § 976 (1982) (prohibits membership in, organizing of, and recognition of military unions); 18 U.S.C. § 2387 (1982) (prohibits interference with morale, discipline or loyalty of the armed forces); Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces (Sept. 12, 1969). See also *Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985).

¹¹⁵*United States v. Moore*, 23 M.J. 295 (C.M.A. 1987) (Cox, J., concurring in the result).

¹¹⁶*United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987); *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

¹¹⁷*United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

¹¹⁸*Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

¹¹⁹*United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).

¹²⁰*United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

¹²¹Article 31 provides:

(a) No person subject to this chapter may compel any person to incriminate

Ed Meese's concern about the Supreme Court's requiring the police to advise suspects of their constitutional rights before custodial interrogation, a similar warning was required in the military some fifteen years before the decision in *Miranda v. Arizona*.¹²² Article 31(b) requires that a person suspected of an offense be advised of his rights prior to questioning. Although Article 31 has been in existence now for thirty-seven years, there are still those who question whether Admiral John Poindexter and Marine Lieutenant Colonel Oliver North have the right to remain silent about their involvement in the Iran-Contra arms affair.¹²³

Article 44(a) of the Uniform Code applies the double jeopardy protections of the fifth amendment to service members. Thus, a military accused cannot be tried twice for the same offense.¹²⁴

The sixth amendment provides that an accused at a criminal trial has the right "to have the Assistance of Counsel for his defence." Colonel Frederick Bernays Wiener contended in an article in the Harvard Law Review some thirty years ago that the sixth amendment

himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

¹²² 384 U.S. 436 (1966).

¹²³ "Taking the 5th Is Controversial for Military," Army Times, Jan. 5, 1987, at 12, col. 1; *Refusals to Testify Covered by Constitution*, Navy Times, Jan. 5, 1987; see also the series of exchanges between former Supreme Court Justice Arthur J. Goldberg, H. Lawrence Garrett III, the General Counsel of the Department of Defense, and Captain Robert C. Barber, Judge Advocate, U.S. Marine Corps, which appeared in the Washington Post: Goldberg, *Courts-Martial for Poindexter and North*, Wash. Post, Feb. 17, 1987; Barber, *Courts-Martial for North and Poindexter? Not Yet*, Wash. Post, Feb. 21, 1987 (in response to Mr. Justice Goldberg's editorial of Feb. 17); Goldberg, *That Reply on Courts-Martial: "Lacking in Civility and Devoid of Substance."*, Wash. Post, Mar. 9, 1987 (responding to R. Barber's editorial of Feb. 21); Garrett, *A Bad Use for Military Justice (Cont'd.)*, Wash. Post, Mar. 14, 1987 (responding to Goldberg's comments, supporting Barber's position).

¹²⁴ *Burt v. Schick*, 23 M.J. 140 (C.M.A. 1986); *United States v. Waldron*, 15 C.M.A. 628, 36 C.M.R. 126 (1966); *United States v. Schilling*, 7 C.M.A. 482, 22 C.M.R. 273 (1957).

right to counsel was not intended by the founders to apply to trial by court-martial.¹²⁵ He pointed out that defense counsel had a limited role in courts-martial after the Constitution was published in 1787. The distaste with which defense counsel were viewed is exemplified in the 1809 case of Captain Wilson of the artillery. He was tried by general court-martial and represented by civilian counsel. General Wilkinson disapproved the proceedings, in large part because of the participation of counsel, stating in part:

Shall Counsel be admitted on behalf of a Prisoner to appear before a General Court-Martial, to interrogate, to except, to plead, to tease, perplex & embarrass by legal subtilties & abstract sophistical Distinctions?

However various the opinions of professional men on this Question, the honor of the Army & the Interests of the service forbid it, & the interdiction is supported by the ablest witness on the Law Marshal; & by the uniform usage & practice of the American Army. Were Courts Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the military service & the Art of War, to the study of the Law.

No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defence in writing—but he is not to open his mouth in Court.¹²⁶

Whether or not Colonel Wiener was correct in his thesis, it is clear that today military accused have the benefit of the sixth amendment right to counsel.¹²⁷ Furthermore, military standards for providing counsel under the Uniform Code equal or exceed the standards prevailing in the civilian community. Regardless of financial status, the Uniform Code provides that service members are entitled to free, appointed military defense counsel throughout the criminal process, from pretrial stages to appeal to the Supreme Court.¹²⁸

The eighth amendment protects against “excessive bail” and “cruel and unusual punishments.” The eighth amendment’s provision with respect to bail is not applicable to the military.¹²⁹ Confinement pend-

¹²⁵ Wiener, *supra* note 12.

¹²⁶ *Id.* at 27–28.

¹²⁷ *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985).

¹²⁸ The Uniform Code of Military Justice specifically provides for military defense counsel at court-martial, at the pretrial investigation, at the taking of a deposition, and on appeal. UCMJ arts. 27, 32, 38, 49, 70.

¹²⁹ *DeChamplain v. Lovelace*, 23 C.M.A. 35, 48 C.M.R. 506 (1974); *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967).

ing trial is governed by Article 13 of the Code, which prohibits pretrial punishment and requires that "the conditions of . . . confinement shall be no more rigorous than" the circumstances require to ensure the accused's presence for trial.¹³⁰ Article 55 prohibits "punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment." In fact, the Court of Military Appeals has held that in enacting Article 55, Congress "intended to grant protection covering even wider limits" than "that afforded by the Eighth Amendment."¹³¹

IX. ARTICLE III STATUS FOR THE UNITED STATES COURT OF MILITARY APPEALS?

The Military Justice Act of 1983 directed the Secretary of Defense to establish a commission to study and make recommendations to Congress on several specified matters. The Commission was composed of five military members and four civilian members. One of its recommendations is particularly pertinent to our discussion. The Commission recommended that Congress reconstitute the Court of Military Appeals as an article III court under the United States Constitution. One of the primary reasons for recommending article III status was the continuing concern that the court be "truly independent" of the **military**.¹³²

Presently, judges of the United States Court of Military Appeals are appointed for terms of fifteen years. Article III status would provide the judges of the Court with life tenure, protection against removal other than by impeachment, and the right to the same retirement benefits provided to article III judges.

Proponents of the proposal maintain that article III status would enhance the prestige of the Court of Military Appeals, thereby increasing respect for the entire military justice system and making service on the court more **attractive**.¹³³ Critics of the proposal contend that article III status for this article I court would upset the careful balance created in the Constitution. Further, it is argued that the court would expand its jurisdiction into areas beyond its specific au-

¹³⁰United States v. Palmiter, 20 M.J. 90, 93 (C.M.A. 1985).

¹³¹United States v. Wappler, 2 C.M.A. 393, 396, 9 C.M.R. 23, 26 (1953).

¹³²I 1983 Advisory Committee Report, *supra* note 82, at 9. The vote was 5 for, 3 against, and 1 abstention. The Army, Navy and Marine Corps opposed the change.

¹³³See Everett, *Some Observations on Appellate Review of Court-Martial Convictions—Past, Present, and Future*, 31 Fed. B.N. & J. 420 (1984); Mueller & Sterritt, *Article III Status for the U.S. Court of Military Appeals—The Evaluation Continues*, 34 Fed. B.N. & J. 132 (1987).

thority and perhaps impede military readiness.¹³⁴ To date, Congress has not acted on the Commission's recommendations.

X. CONCLUSIONS

As stated at the outset, this has been quite a large topic. But I hope that you are now better informed about the relationship of the courts to the military. There are several conclusions that I have made concerning the subject that I would like to share with you as my last words.

There is no question in my mind that the constitutional provisions separating the powers between the Congress and the President included a grant unto the Congress to provide for a system of military justice. This system is allowed to function by the judicial branch of government as long as there exists a notion of fundamental due process and fair play.

The evidence is convincing that both the legislative and executive branches of government, in formulating a national defense strategy following the experiences of World War II, and more recently in response to the extensive media coverage of war in Vietnam, made a strategic decision that military justice would be administered in a fashion more cognizable to the civilian population. Thereby, military justice would have the approval and support of the people, but nevertheless would be responsive to the needs of commanders in disciplining the personnel serving under them. To carry out its resolve and to ease its own burden of supervising the system, Congress created a United States Court of Military Appeals, consisting of three civilian judges.

So, what is to be said of this system? Perhaps I might quote several military leaders on this point.

Probably the most frequently heard criticism of the system is that it has become too civilianized.¹³⁵ This criticism comes in many forms. But the cleverest and most well-disguised criticism is usually aimed, intellectually, at attacking the United States Court of Military Appeals and alleging that it is destroying the ability of commanders to command their troops. For example, when General John R. Galvin, then Commanding General of VII Corps, U.S. Army, testified before the Military Justice Act of 1983 Advisory Commission, he was challenged by a military member of the commission: "You appear . . . to

¹³⁴I 1983 Advisory Committee Report, *supra* note 82, at 166-73 (minority report).

¹³⁵*See, e.g.*, I 1983 Advisory Committee Report, *supra* note 82, at 155 (minority report).

be rather comfortable with divorcing your responsibility from the conduct of war and the discipline of your troops and the authority to accomplish that inasmuch as you give the authority to do that to military judges, military lawyers and civilians in the Court of Military Appeals."¹³⁶

General Galvin's response to this question articulately sums up the entire concept that our founding fathers envisioned when writing our Constitution and the Bill of Rights:

I think you're 100 percent in error as to my thoughts about authority, responsibility and discipline and probably about the armed forces in general. Let me try to state it succinctly.

I believe that I should have the full authority to do what is my military responsibility, but I am accountable to the United States Congress. The United States Congress has the authority to raise and support an army. I'm accountable to the President of the United States. And there's a third group of people that I'm accountable to. I'm accountable to the judicial side of the house also.

Though we break authority in the United States down into three parts, and I have to understand those three parts as a commanding general, and I think I do. I understand that I have full authority to do things but I do not have absolute authority. That authority is reserved by the United States of America that gave me my commission. The President. Even the President doesn't have absolute authority.

He went on to say:

I think the current code of military justice is a very fine code. It allows me every last drop of authority that I should have. I have all the disciplinary tools that I need. . . . I command 85,000 people. There isn't a soul in those 85,000 people that does not have to obey my legal orders I know that there are a lot of officers in the service today who feel that the Uniform Code of Military Justice is perhaps too lax, but there are a lot of officers who don't feel that it's too lax, and I happen to be one of those.¹³⁷

Expressing a similar view, Major General Hodson, The Judge Advocate General of the Army during 1967-1972, commented in a speech to The Judge Advocate General's School that:

¹³⁶ *Id.* at 186.

¹³⁷ *Id.*

If a commander wants more authority in the area of military justice, it can be for only one reason, and that is that he wants to have the opportunity to influence the scales of justice when it suits him. And I am convinced that all responsible commanders would join with me in denying him that opportunity.¹³⁸

I speak to you with almost nine years of active duty in the United States Army, all of it during the days when the entire military establishment (including military justice) was under attack, and with two-and-one-half years of experience on the United States Court of Military Appeals. Sandwiched in between these periods of service were five years of practicing law in the civilian courts and six years service as a civilian trial judge. And my response to any critics of the system, both to the civilians who cry “drumhead justice” and to military members who cry that the system is too “civilianized,” is that you are wrong. The system functions and functions well. Yes, there may be *tactical* errors and an occasional injustice as the system malfunctions, but the *grand strategy* is sound.

Our citizens should give up fundamental freedoms and liberties to the least degree necessary to accomplish the military mission. The President, Congress, and the courts have given commanders ample authority to discipline their misdemeanants and felons alike. Most importantly, morale and discipline are enhanced when the troops understand that they are being treated with dignity, fairness, and equality under the law. For lack of a better description, it is the “American” way of doing things.

And after all, that is what our founding fathers had in mind when they wrote, “We the people of the United States, in order to form a more perfect union.”

¹³⁸Hodson, *supra* note 75, at 16.

CONFRONTATION AND RESIDUAL HEARSAY: A CRITICAL EXAMINATION, AND A PROPOSAL FOR MILITARY COURTS

by Captain John L. Ross*

I. INTRODUCTION

For the past century, but particularly in the last twenty years, the Supreme Court has struggled to articulate a cohesive analytical framework for applying the similarly rooted, but incongruent, protections afforded to a criminal defendant by the hearsay rule and the confrontation clause of the sixth amendment.¹ Most commentators agree that the Court has not charted a clear or consistent course,² and the Court has itself so acknowledged.³ The Court's effort—difficult enough when balancing confrontation clause protections against “traditional” hearsay concepts—was considerably complicated by the adoption of the residual hearsay exceptions⁴ as part of the Federal Rules of Evidence.

Contrary to some early predictions that the residual exceptions would be unimportant and rarely used,⁵ the exceptions have produced a profusion of lower federal court precedents.⁶ Not surprisingly, these

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¹See, e.g., *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (confrontation clause and hearsay rule stem from same roots, but are not to be equated); *California v. Green*, 399 U.S. 149, 155 (1970) (although generally designed to protect similar values, the two standards are not congruent).

²Baker, *The Right to Confrontation, The Hearsay Rule and Due Process—A Proposal for Determining When Hearsay May Be Used In Criminal Trials*, 6 Conn. L. Rev. 529 (1974); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99 (1972); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1979); Younger, *Confrontation* (7th Annual Foulston-Siefkin Lecture), 24 Washburn L. J. 1 (1984); Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 Val. U.L. Rev. 193 (1983).

³*Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (“The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay ‘exceptions.’” (citing *California v. Green*, 399 U.S. at 162)).

⁴Fed. R. Evid. 803(24) and 804(b)(5).

⁵Waltz, *Rule 803—Hearsay Exceptions: Availability of Declarant Immaterial*, in Fed-

eral Rules of Evidence in Criminal Matters, 13, 41 (1972); Waltz, *Present Sense Impressions and the Residual Hearsay Exception: A New Day for "Great" Hearsay?*, 2 Litigation 22, 24 (1975) [hereinafter *Present Sense Impressions*].

⁶*Nowell v. Universal Elec. Co.*, 792 F.2d 1310 (5th Cir. 1986); *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986); *United States v. Vretta*, 790 F.2d 651 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1987); *Cook v. Hoppin*, 783 F.2d 684 (7th Cir. 1986); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *United States v. Cree*, 778 F.2d 474 (8th Cir. 1985); *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. Welsh*, 774 F.2d 670 (4th Cir. 1985); *United States v. Simmons*, 773 F.2d 1455 (4th Cir. 1985); *Branca v. Security Ben. Life Ins. Co.*, 773 F.2d 1158 (11th Cir. 1985), *modified*, 789 F.2d 1511 (11th Cir. 1986); *United States v. Brown*, 770 F.2d 768 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2896 (1986); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *United States v. Woosley*, 761 F.2d 445 (8th Cir. 1985); *In re Corrugated Container Antitrust Litigation*, 756 F.2d 441 (5th Cir. 1985); *United States v. Loalza-Vasquez*, 735 F.2d 153 (5th Cir. 1984); *Debra P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984); *Moffett v. McCauley*, 724 F.2d 581 (7th Cir. 1984); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3rd Cir. 1983), *rev'd*, 106 S. Ct. 1348 (1986); *Herdman v. Smith*, 707 F.2d 839 (5th Cir. 1983); *Estate of Gryder v. Commissioner*, 705 F.2d 336 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983); *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982); *Wright v. Farmers Co-op of Arkansas and Oklahoma*, 681 F.2d 549 (8th Cir. 1982); *Karme v. Commissioner*, 673 F.2d 1062 (9th Cir. 1982); *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Colson*, 662 F.2d 1389 (11th Cir. 1981); *Piva v. Xerox Corp.*, 654 F.2d 591 (9th Cir. 1981); *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023 (5th Cir. 1981); *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Robinson v. Shapiro*, 646 F.2d 734 (2nd Cir. 1981); *United States v. Hinkson*, 632 F.2d 382 (4th Cir. 1980); *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *United States v. Ratliff*, 623 F.2d 1293 (8th Cir. 1980), *cert. denied*, 449 U.S. 876 (1981); *United States v. Anderson*, 618 F.2d 487 (8th Cir. 1980); *United States v. Atkins*, 618 F.2d 366 (5th Cir. 1980); *United States v. White*, 611 F.2d 531 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980); *deMars v. Equitable Life Assur. Soc. of U.S.*, 610 F.2d 55 (1st Cir. 1979); *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *United States v. Hitsman*, 604 F.2d 443 (5th Cir. 1979); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *United States v. Fredericks*, 599 F.2d 262 (8th Cir. 1979); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Kim*, 595 F.2d 755 (D.C. Cir. 1979); *United States v. One 1968 Piper Aircraft*, 594 F.2d 1040 (5th Cir. 1979); *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979); *United States v. Love*, 592 F.2d 1022 (8th Cir. 1979); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Barnes*, 586 F.2d 1052 (5th Cir. 1978); *United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978); *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3rd Cir. 1978); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953 (3rd Cir. 1978); *United States v. Gamer*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); *United States v. Williams*, 573 F.2d 284 (5th Cir. 1978); *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977); *United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977); *United States v. Medico*, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); *United States v. Ward*, 552 F.2d 1080 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977); *United States v. Grasso*, 552 F.2d 46 (2d Cir. 1977); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Homer*, 545 F.2d 864 (3rd Cir. 1976); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976); *United States v. Iaconetti*, 540 F.2d 574 (2nd Cir. 1976), *affg.*, 406 F.Supp. 554 (E.D. N.Y.), *cert. denied*, 429 U.S. 1041 (1977); *United States v. Pfeiffer*, 539 F.2d 668 (8th Cir. 1976); *United States v. Gomez*, 529 F.2d 412 (5th Cir. 1976); *United States v. Yates*, 524 F.2d 1282 (D.C. Cir. 1975); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th

decisions have also been analytically inconsistent,' and the Supreme Court has yet to interpret either of the residual exceptions. Furthermore, while some scholars have discussed the confrontation clause as it relates to hearsay **generally**,⁸ and others have analyzed it against specific hearsay exceptions,⁹ and still others have examined the residual exceptions themselves, "inquiry into the impact of the residual exceptions upon confrontation clause analysis has been limited."¹¹

Cir. 1975); *United States v. Obayagbona*, 627 F. Supp. 329 (E.D. N.Y. 1985); *Morgan Guarantee Trust Co. v. Hellenic Lines, Ltd.*, 621 F. Supp. 198 (S.D.N.Y. 1985); *Keith v. Volpe*, 618 F. Supp. 1132 (C.D. Cal. 1985); *Erwin v. State Farm Fire & Cas. Co.*, 618 F. Supp. 1040 (E.D. Mo. 1985); *Pink Supply Corp. v. Hiebert, Inc.*, 612 F. Supp. 1334 (D. Minn. 1985), *aff'd*, 788 F.2d 1313 (8th Cir. 1986); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1280 (D. Minn. 1985); *Corrigan v. United States*, 609 F. Supp. 720 (E.D. Va. 1985); *Land v. American Mut. Ins. Co.*, 582 F. Supp. 1484 (E.D. Mich. 1984); *Osterneck v. E.T. Barwick Indus., Inc.*, 106 F.R.D. 327 (N.D. Ga. 1984); *In re A.H. Robbins Co., Inc.*, 575 F. Supp. 718 (D. Kan. 1983); *United States v. Muscato*, 534 F. Supp. 969 (E.D.N.Y. 1982); *United States v. American Tel. & Tel. Co.*, 516 F. Supp. 1237 (D.D.C. 1981); *Zenith Radio Corp. v. Matshushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1190 (E.D. Pa. 1980), *aff'd in part, rev'd in part*, 723 F.2d 238 (3rd Cir. 1983), *rev'd*, 106 S. Ct. 1348 (1986); *United States v. Thevis*, 84 F.R.D. 57 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Turner*, 475 F. Supp. 194 (E.D. Mich. 1978); *United States v. Diehl*, 460 F. Supp. 1282 (S.D. Tex.), *aff'd per curiam*, 586 F.2d 1080 (5th Cir. 1978); *Wolfson v. Mutual Life Ins. Co. of N.Y.*, 455 F. Supp. 82 (M.D. Pa.), *aff'd without opinion*, 588 F.2d 825 (3rd Cir. 1978); *United States v. Henry*, 448 F. Supp. 819 (D.N.J. 1978); *United States v. American Cyanamide Co.*, 427 F. Supp. 859 (S.D.N.Y. 1977); *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977); *United States v. Iaconetti*, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Arrow-Hart, Inc. v. Covert Hills, Inc.*, 71 F.R.D. 346 (E.D. Ky. 1976); *Lowery v. Maryland*, 401 F. Supp. 604 (D. Md. 1975); *Matter of Teletronics Services, Inc.*, 29 B.R. 139 (Bkrtcy. N.Y. 1983).

⁷See, e.g., *infra* notes 233-35 and accompanying text.

⁸*Baker, supra* note 2; *Graham, supra* note 2; *Younger, supra* note 2; *Younger, Confrontation and Hearsay*, 1 Hofstra L. Rev. 32 (1973); *Note, Confrontation Clause*, 28 Howard L. J. 175 (1985).

⁹*Jaffe, The Constitution and Proof by Dead or Uncomfortable Declarants*, 33 Ark. L. Rev. 227 (1979); *Waltz, Present Sense Impressions, supra* note 5; *Note, Inculpatory Declarations Against Interest and the Confrontation Clause: A Wider Spectrum of Admissible Evidence Against Co-Conspirators*, 48 Brooklyn L. Rev. 943 (1982); *Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159 (1983).

¹⁰*Grant, The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 Dickinson L. Rev. 75 (1985); *Imwinkelreid, Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 San Diego L. Rev. 239 (1978); *Lewis, The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 Rutgers L.J. 101 (1983); *Sonensheim, The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. Rev. 867 (1982); *Yasser, Strangling Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 Tex. Tech. L. Rev. 587 (1980); *Note, Rules 803(24) and 804(b)(5)—The Residual Exceptions to the Hearsay Rule*, 32 Okla. L. Rev. 516 (1979); *Note, Federal Courts and the Catchall Hearsay Exceptions*, 25 Wayne L. Rev. 1361 (1979).

¹¹*Note, Confrontation Clause and the Catch-All Exceptions to the Hearsay Doctrine: Hopkinson v. State*, 17 Land & Water L. Rev. 703, 711-12 (1982) ("Finally, the confrontation clause limits the type of hearsay which may be admitted, when a witness against the accused is unavailable, to previously confronted statements. No Supreme

The Military Rules of Evidence, of course, adopted Federal Rules of Evidence (F.R.E.) 803(24) and 804(b)(5), with most federal bags and judicial baggage included.¹² Given the confusing analyses of the article III courts, predictably, the growing number of courts of military review decisions resolving residual hearsay questions have been equally inconsistent. Although several residual hearsay cases have reached the Court of Military Appeals, that court has not yet embarked on a comprehensive examination of the military residual hearsay exceptions in the context of confrontation clause analysis.¹³ Finally, military scholarship on the subject has similarly been limited.¹⁴

Accordingly, this article has several aims. First, it will reexamine the confrontation clause guarantee in light of several recent Supreme Court decisions,¹⁵ and offer a proposed analytical framework. Second, it will examine the residual exceptions, as interpreted by the article III courts, and suggest a methodology for resolving residual hearsay questions. Finally, the article will examine the residual hearsay decisions of the military courts, and evaluate the courts' treatment of the hearsay and confrontation issues.

Court decision has approved the use of an out-of-court statement which produces significant impact against the accused's position unless that statement has been subjected to cross-examination by the accused either at a preliminary hearing or previous trial."); Note, *Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination*, 31 Rutgers L. Rev. 687, 719 (1978) ("the residual exceptions do not appear to pose a real threat to the confrontation rights of criminal defendants"). The former comment, if correct when written, may no longer be accurate. See *United States v. Inadi*, 106 S. Ct. 1121 (1986) (coconspirator declarations, not subjected to cross-examination, were admissible, even without a showing of declarant's unavailability).

¹²The Official Analysis of the Military Rules of Evidence states that, in interpreting the rules, precedent of the article III courts, although not binding, "should be considered very persuasive" because the "significant policy consideration" in adopting most of the Federal Rules "was to ensure, where possible, common evidentiary law." Mil. R. Evid. analysis.

¹³*United States v. Hines*, 23 M.J. 125 (C.M.A. 1986); *United States v. Cordero*, 22 M.J. 216 (C.M.A. 1986); *United States v. Powell*, 22 M.J. 141 (C.M.A. 1986) (confrontation clause not addressed); *United States v. LeMere*, 22 M.J. 61, 69 (C.M.A. 1986) (Confrontation issue not present); cf. *United States v. Cokeley*, 22 M.J. 225 (C.M.A. 1986) (confrontation issue addressed, but case did not involve residual hearsay).

¹⁴Clevi, *Military Rule of Evidence 803(24)(B) and the Available Witness*, The Army Lawyer, Nov. 1986, at 51; Holmes, *The Residual Hearsay Exceptions: A Primer for Military Use*, 94 Mil. L. Rev. 15, 82-83 (1981) (equating the standards for admissibility under the confrontation clause and the residual hearsay exceptions); Kelly & Davis, *Litigating the Residual Exceptions to the Hearsay Rule*, 16 The Advocate 4, 38 (1984); Thwing, *The Constitutional Parameters of Hearsay Evidence*, The Army Lawyer, Dec. 1986, at 25; Note, *Effective Use of the Residual Hearsay Exception*, The Army Lawyer, Sept. 1984, at 2.

¹⁵*New Mexico v. Earnest*, 106 S. Ct. 2734 (1986) (*per curiam*), *vacating and remanding* 103 N.M. 95, 703 P.2d 872 (1985); *Lee v. Illinois*, 106 S. Ct. 2056 (1986); *United States v. Inadi*, 106 S. Ct. 1121 (1986); see also *Gibson v. Illinois*, 106 S. Ct. 2886 (1986), *vacating and remanding in part* 137 Ill. App. 3d 330, 92 Ill. Dec. 127, 484 N.E.2d 858 (1985).

Like at least one author before me,¹⁶ I recognize the hazards of such a grandiose undertaking.¹⁷ Nevertheless, given the relative infancy of the military residual hearsay exceptions, the potential benefits to military justice are worth the risk. The Court of Military Appeals presently has a golden opportunity to examine this complex area of evidential and constitutional law anew, and provide fresh, clear guidance to both the lower military and article III courts.¹⁸

11. THE CONFRONTATION CLAUSE

A. DEFINING THE ISSUE

In seeking to interpret a part of the Constitution, logic suggests that we might begin with the provision's language. As it relates to confrontation, the sixth amendment states simply: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." This literal reading immediately tells us several things, if inexactly.¹⁹

First, the provision applies only to criminal prosecutions.

Second, whatever the provision may guarantee, it is a "right" that "shall" be enjoyed only by the accused, not the prosecution.

Third, the right is to be "confronted."

Fourth, the right only applies to "witnesses against" the accused.

Our focus will be on the latter two of these elements. More specifically, this article assumes a criminal prosecution with trial before a petit jury or court members,²⁰ and with the challenged evidence offered against the defendant in open court." Likewise, the article does

¹⁶Graham, *supra* note 2, at 144.

¹⁷See *supra* note 11.

¹⁸United States v. Rousseau, 21 M.J. 960 (A.C.M.R.), *petition granted*, 23 M.J. 176 (C.M.A. 1987); United States v. Slovacek, 21 M.J. 538 (A.F.C.M.R.), *petition filed*, 21 M.J. 384 (1985); United States v. Yeager, 20 M.J. 797 (N.M.C.M.R. 1985), *petition granted*, 22 M.J. 199 (C.M.A. 1986); United States v. Barror, 20 M.J. 501 (A.F.C.M.R.), *petition granted*, 21 M.J. 151 (C.M.A. 1985); United States v. Hubbard, 18 M.J. 678 (A.C.M.R.), *petition granted*, 19 M.J. 216 (C.M.A. 1984); United States v. Arnold, 18 M.J. 559 (A.C.M.R. 1984), *petition granted*, 20 M.J. 129 (C.M.A. 1985).

¹⁹See Younger, *supra* note 2, at 3.

²⁰Accordingly, the article does not explore the extent to which the confrontation clause, or other sixth amendment provisions, apply to forums and situations other than a criminal trial. See, e.g., Kirby v. Illinois, 406 U.S. 682 (1972) (pre-indictment lineups); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juvenile proceedings); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings); United States v. Wade, 388 U.S. 218 (1967) (courtroom identifications). See generally Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense*, 56 Geo. L.J. 939 (1968).

²¹Thus excluded are cases involving consideration by the jury of prejudicial extrajudicial information. E.g., Parker v. Gladden, 385 U.S. 363 (1966) (bailiff's statements

not address the scope of the right of confrontation once a witness for the prosecution is present in court and has, admittedly, testified “against” the defendant.²² Nor will the article address the extent to which the sixth amendment gives a defendant the right to “confront” a witness called to testify *by the defendant*.²³

The precise issue addressed is: When does a person’s declaration, when offered in evidence at a criminal trial, make the declarant a “witness against” the defendant, such that the confrontation clause demands that the prosecution produce the declarant for “confrontation,” and under what circumstances may production of the witness be excused?

Again, beginning with a literal reading, two possibilities are apparent. First, the confrontation clause could be read to exclude *all* hearsay and require that all evidence be offered against the defendant through live testimony. Second, the provision could be read to not exclude *any* hearsay, affording the defendant only the right to be physically present in court and “confront” those witnesses actually called to testify against him.²⁴ The former is suggested by the definition, in unqualified terms, of the “right” of confrontation that “shall” be afforded the accused. The latter is suggested by the limited application of the right to “witnesses against” the defendant, and the absence of any specific mention anywhere in the sixth amendment of

to jury violated confrontation clause); *accord* *Mattox v. United States*, 146 U.S. 140 (1892) (although confrontation clause not specifically cited as authority); *cf.* *Turner v. Louisiana*, 379 U.S. 466 (1965) (due process violation to have jury placed in charge of two deputies who were key prosecution witnesses).

²²*E.g.*, *Davis v. Alaska*, 415 U.S. 308 (1974) (violation of confrontation clause to invoke state statute to prevent defense from cross-examining prosecution witness concerning pending charges against the witness); *Smith v. Illinois*, 390 U.S. 129 (1968) (reversing conviction where defense was prevented from requiring witness to give his true identity).

²³*E.g.*, *Chambers v. Mississippi*, 410 U.S. 284 (1973) (error not to permit defendant to use another’s statement against penal interest that exculpated defendant); *see also* *Mattox v. United States*, 146 U.S. 140 (1892) (dying declarations are admissible in favor of the defendant as well as against him); *cf.* *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process violated by state rule prohibiting accomplice from testifying on behalf of defendant).

[I]t is important to recognize that the question whether the testimony of a defense witness is competent, material, or non-privileged is ultimately a federal one to be resolved by constitutional standards, that the constitutional standard is a rigorous one, and that the standard is the same, whether in the context of the defendant’s right to cross-examine prosecution witnesses (confrontation) or is in the context of his efforts to examine defense witnesses (compulsory process).

Westen, *supra* note 2, at 593. Professor Westen’s article examines each of the aspects of confrontation that are excluded from consideration here.

²⁴One author defines this as the “narrow” right of confrontation. Graham, *supra* note 2, at 102–03.

the “right” of cross-examination. However, since its earliest confrontation clause decisions, the Court has never embraced either extreme, opting instead for a middle ground.²⁵

What exactly then does “confrontation” mean, in the context in which we have defined it? When does a declarant become a “witness against” the defendant? When may “confrontation” be excused? Academic inquiries have generally attempted to discern the purpose of the confrontation clause in one of two ways.²⁶

First, some scholars have sought to divine the clause’s meaning from examining its literal language in the larger context of the sixth amendment generally.²⁷ Sandwiched between the sixth amendment’s rights to a speedy and public trial, to trial by jury, to be informed of the nature and cause of the charges, to have compulsory process, and to the assistance of counsel, the confrontation clause is viewed by these authors as part of a general intent by the Framers to insure an open, adversarial form of criminal procedure.²⁸

Second, others have attempted to decipher clues to the clause’s design from the historical record. One theory traces confrontation roots to colonial reaction to the abuses in the trial of Sir Walter Raleigh.²⁹ Others dispute this theory, believing instead that the confrontation clause stems from the colonists’ abhorrence for the abuses of the vice-admiralty courts.³⁰

²⁵ *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

²⁶ Of course, the confrontation clause need not have only a single purpose. See *supra* notes 19–23.

²⁷ *Graham, supra* note 2, at 102 & n. 17.

²⁸ *E.g., Lilly, Notes on the Confrontation Clause and Ohio v. Roberts*, 36 Fla. L. Rev. 207; 208–11 (1984).

²⁹ *E.g., F. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 104 (1951); Hadley, *The Reform of Criminal Procedure*, 10 Proc. Acad. Pol. Sci. 396 (1923). Raleigh, the founder of the Lost Colony at Roanoke, was tried for treason for conspiring against the King of England. Unrepresented by counsel, Raleigh was tried in a proceeding in which the chief evidence against him was the statement of his alleged accomplice, Lord Cobham, and the hearsay declaration of an unidentified Portuguese gentleman, testified to at the trial by a witness to whom the declaration had allegedly been made. Even though Cobham had recanted his earlier statement, Raleigh was denied the opportunity to call Cobham to testify. Predictably, Raleigh was convicted and sentenced to death.

³⁰ *Graham, supra* note 2, at 100 n.4, 104 n.23; *Lilly, supra* note 28. Admiralty courts were used by the British to supplant the adversarial proceedings of colonial common law courts. The vice-admiralty courts enforced English acts designed to restrict international trade by the colonies, and had jurisdiction to punish violators. Although vice-admiralty proceedings were originally adversarial, Parliament expanded the courts’ jurisdiction, eliminating the right to trial by jury and limiting the opportunity to examine witnesses. See *Lilly, supra* note 28, at 210–15. Professor Lilly traces the language of the confrontation clause to a similar provision in the Virginia Declaration of Rights, drafted by George Mason. Mason had explicitly condemned the procedures of the vice-admiralty courts.

Despite this extensive scholarly research, historical analysis has not yielded any convincing theory. As Justice Harlan observed in *California v. Green*:³¹ “[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.”³²

Consequently, like so many other parts of the Constitution, the confrontation clause means whatever the Supreme Court says it means. Unfortunately, the Court hasn’t yet clearly articulated a consistent, coherent meaning.

B. ANALYSIS OF SUPREME COURT CASES—EARLY DECISIONS

The Court’s earliest confrontation clause decision established that the defendant’s right was not absolute. In *Reynolds v. United States*,³³ the Court held that no error was committed by admitting, in the defendant’s second trial for bigamy, the testimony given at the first trial by his then unavailable alleged second wife, because it appeared to the Court’s satisfaction that the defendant had been instrumental in procuring the woman’s unavailability for the second trial.³⁴ The prior testimony had been given subject to full cross-examination.³⁵ The Court rested its decision, however, on the simple proposition that a defendant should not profit from his own wrongful acts.³⁶

The Court’s first real attempt to articulate the meaning of the confrontation clause came in *Mattox v. United States*.³⁷ Once tried and convicted of murder, Mattox was again convicted at a second trial, based in part on the record of testimony given at the first trial by two witnesses who had since died. The Court stated that:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an oppor-

³¹ 339 U.S. 149 (1970).

³² *Id.* at 174–75 (Harlan, J., concurring); *accord, e.g.*, Baker, *supra* note 2, at 532.

³³ 98 U.S. 145 (1878).

³⁴ *Id.* at 158–61.

³⁵ *Id.* at 161.

³⁶ *Id.* at 158.

³⁷ 156 U.S. 237 (1895). This was Mattox’s second time before the Court. In *Mattox v. United States*, 146 U.S. 140, 151 (1892), the Court stated that “[d]ying declarations are admissible . . . in favor of the defendant as well as against him.” The latter portion of the statement was dicta since the case involved the exclusion at trial of an exculpatory declaration offered by the defendant.

tunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.³⁸

Despite these important purposes, in the Court's view, confrontation was clearly a limited right that "must occasionally give way to considerations of public policy and the necessities of the case" because "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the **accused**."³⁹ Noting that dying declarations had "from time immemorial . . . been treated as competent testimony," the Court found no violation of the confrontation clause by the admission of the prior cross-examined testimony.⁴⁰

Thus, in its initial detailed look at the confrontation clause, the Court squarely rejected the one literal interpretation that would give the defendant the absolute right to demand production of all declarants. It did, however, identify as the primary purposes of confrontation the prevention of trial by *ex parte* affidavits, and the opportunity for cross-examination before the jury, except in the case of necessity. The facts of the case also suggested two circumstances that might permit the right to "give way." First, the declarants were both plainly unavailable. Second, the hearsay declarations were made under oath at a previous trial and had been subjected to cross-examination. The Court apparently believed that a second opportunity for cross-examination and for the jury to see the witnesses was an "incidental benefit," insufficient to offset the public policy considerations.⁴¹ Reliability is not specifically mentioned by the Court, and can only be inferred, as a purpose of confrontation, to indirectly flow from the opportunity to test reliability through cross-examination.

The Court next considered the scope of the confrontation clause four years later in *Kirby v. United States*.⁴² There, the Court held that Kirby's right to confrontation was violated when, in his trial for receiving stolen government property, the sole evidence offered to establish that the property had been stolen was a record of the principals' conviction for theft. Kirby had not been a defendant in the

³⁸156 U.S. at 242-43.

³⁹*Id.* at 243.

⁴⁰*Id.*

⁴¹*Id.* at 242 ("[T]he right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read.")

⁴²174 U.S. 47 (1899).

trial of the principals.⁴³ Although clearly decided on confrontation clause grounds, *Kirby* could as easily have been decided on due process grounds, since the trial court had instructed the jury that they could presume that the property had been stolen based solely upon the record of the earlier conviction.⁴⁴ The Court correctly noted that the record logically only proved that the principals had been convicted of theft, not, as to *Kirby*, the actual theft, and conviction of the principals was not an element of the offense of receiving stolen property.⁴⁵

Viewed, however, as a confrontation clause case, the decision seems to rest on the absence of any showing of necessity. The Court noted that the admission of dying declarations were permitted as an exception to confrontation only on the basis of necessity.⁴⁶ No reason appears in the opinion for the prosecutor's failure to prove the theft through live testimony.

The Court's next confrontation clause decision, *Motes v. United States*,⁴⁷ demonstrates the "flip side" of *Reynolds*.⁴⁸ In *Motes*, the Court set aside the conviction of several defendants because the prosecution had been permitted to introduce at trial the prior testimony of a witness whose unavailability at trial resulted from the prosecution's negligence.⁴⁹

As in *Kirby*,⁵⁰ *Motes* could have been decided on due process grounds. If "necessity" is the test for permitting exceptions to the right of confrontation, as *Mattox*⁵¹ suggested, *Motes* seemed to meet that requirement. The sheriff's deputies had been "unable to find [Taylor, the declarant] anywhere."⁵² Moreover, the hearsay being offered had been given under oath and subject to cross-examination. Nevertheless, citing *Reynolds*, the Court refused to permit the prosecution "to take

⁴³*Id.* at 61.

⁴⁴*Id.* In later years, the Court employed a due process analysis to evaluate presumptions. *See, e.g.*, *Barnes v. United States*, 412 U.S. 837 (1973) (possession of recently stolen property); *Leary v. United States*, 395 U.S. 6 (1969) (possessor of marijuana deemed to know of the marijuana's unlawful importation); *Tot v. United States*, 319 U.S. 463 (1943) (statutory presumption that a defendant, previously convicted of a crime of violence, and found in possession of a firearm, received the firearm in interstate commerce).

⁴⁵174 U.S. at 60.

⁴⁶*Id.* The Court also stated, in dicta, that the dying declaration exception "was well established before the adoption of the Constitution, and was not intended to be abrogated."

⁴⁷178 U.S. 458 (1900).

⁴⁸*See supra* notes 33–36 and accompanying text.

⁴⁹The witness, who had been in jail awaiting trial himself, was released by authorities to the custody of another, and the witness escaped. 178 U.S. at 467–69.

⁵⁰*See supra* notes 42–46 and accompanying text.

⁵¹*See supra* notes 37–41 and accompanying text.

⁵²178 U.S. at 469.

advantage of its own **wrong**,”⁵³ essentially a fairness, *i.e.*, a due process, argument.

Some initial conclusions might be drawn from these first few decisions. In each case, the Court’s focus was on the declarant’s availability. In each case, the evidence offered against the defendant had been important evidence for the **prosecution**.⁵⁴ In that situation, the prosecution was required to demonstrate unavailability of the declarant through no fault of its own. If unavailability was demonstrated, the hearsay would be admissible, at least where the statement was a dying declaration—where, in the common law’s view, the impending belief that one was about to meet his or her Maker provided an adequate substitute for the **oath**⁵⁵—or was prior testimony, given under oath and subject to cross-examination. The Court’s next confrontation clause decisions, however, recognized further exceptions to the right of confrontation.

In *Dowdell v. United States*,⁵⁶ the defendants were convicted of several offenses committed in the Philippine Islands and appealed to the Philippine Supreme Court. Upon reviewing the record, the Philippine high court noted that the record of trial was incomplete, and it issued an order to the trial court for supplemental information. The order was issued, and statements from the trial judge and court reporter submitted, without notice to the defendants. The **U.S.** Supreme Court found no confrontation clause violation in this procedure, holding that “[d]ocumentary evidence to establish collateral facts admissible under the common law, may be admitted in **evidence**.”⁵⁷ The Court did not view the trial judge or court reporter as “witnesses against the accused” because “[t]hey were not asked to testify as to facts concerning [the defendants’] guilt or **innocence**.”⁵⁸

*Delaney v. United States*⁵⁹ recognized another exception. There, the Court upheld the trial court’s admission of the hearsay declaration of a dead coconspirator, testified to at the trial by another coconspirator. The decision provides little that is useful in developing a coherent theory of confrontation clause law, since the Court did not

⁵³*Id.* at 472.

⁵⁴ Although the Court reversed several of the defendants’ convictions in *Motes*, it affirmed *Motes*’ own conviction because the error in admitting Taylor’s prior testimony was harmless as to *Motes*. *Motes* had testified and judicially confessed to the murder. 178 U.S. at 475–76.

⁵⁵ See Jaffe, *supra* note 9, at 228–29.

⁵⁶ 221 U.S. 325 (1911).

⁵⁷*Id.* at 330.

⁵⁸*Id.*

⁵⁹ 263 U.S. 586 (1924).

cite any of its previous confrontation clause decisions, and held simply that the trial judge had not abused his discretion.⁶⁰

*Salinger v. United States*⁶¹ suggested still another exception to the confrontation clause. Salinger was convicted of mail fraud. He contended that the admission of a number of letters, written by persons not called as witnesses, but answered by him, violated his confrontation rights. The Court found no violation. Although referred to by the Court as hearsay, it appears that none of the letters were offered for their truth, but merely to show the use of the mails and Salinger's relationship to that use.⁶²

In summary, the Court's early decisions evinced a theory of the confrontation clause that required the production of witnesses whenever the prosecution sought to introduce substantive evidence on non-collateral matters. Exceptions were permitted only based on necessity or the defendant's own misconduct. In each case where an exception had been allowed, however, the evidence either was not hearsay, or fit within a recognized exception to the hearsay rule. Furthermore, the Court had several times referred to the existence of hearsay exceptions at the time of the Constitution, and had attributed to the Framers no intent to abrogate or modify those exceptions. Did this mean that the Court viewed the confrontation clause as nothing more than a constitutionalization of the hearsay rule?

C. ANALYSIS OF SUPREME COURT CASES—HEARSAY AND CONFRONTATION BROUGHT TO A HEAD

1. Pointer u. Texas through Bruton v. United States.

Beginning in 1965, the Supreme Court began what has become an extensive, twenty-year long reexamination of the confrontation clause. Initially, the Court shifted its emphasis from "availability" to cross-examination, and expanded the concept of when a declarant was "witness against" the accused.

The first in a series of six such cases was *Pointer u. Texas*.⁶³ Pointer was arrested for robbery and a preliminary hearing was held. At the

⁶⁰*Id.* at 590. Furthermore, it is difficult to see how the statements admitted in *Delaney* are analytically different from those of the Portuguese gentleman admitted in Sir Walter Raleigh's trial. See *supra* note 29.

⁶¹272 U.S. 542 (1926).

⁶²Of note, however, is the Court's statement that "The right of confrontation did not originate with . . . the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision . . . is to continue and preserve that right, and not to broaden it or disturb the exceptions." 272 U.S. at 548.

⁶³380 U.S. 400 (1965).

hearing, one Phillips testified and identified Pointer as one of the perpetrators. Pointer was not represented by counsel at the hearing, and did not cross-examine Phillips. At trial Phillips' prior testimony was admitted, based on the prosecutor's representation that Phillips had moved out of the state and did not intend to return to Texas. Although an identical procedure had successfully withstood constitutional challenge sixty-one years earlier,⁶⁴ the Court found the use of the prior testimony a confrontation clause violation, holding the sixth amendment applicable to the states.⁶⁵

The greater significance of the case for our purposes, however, was the Court's repeated reference to cross-examination as a primary purpose of **confrontation**.⁶⁶ Specifically, the Court found a confrontation clause violation "[b]ecause the transcript of Phillips' statements . . . had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips"⁶⁷

The Court again emphasized the importance of cross-examination as a primary component of confrontation in *Douglas v. Alabama*.⁶⁸ There, the prosecutor called to testify an alleged accomplice of Douglas who had already been tried separately and convicted. Loyd, the alleged accomplice, invoked his right to remain silent, refusing to testify even after being ordered to do so by the judge. The prosecutor then, under the guise of refreshing Loyd's recollection, read aloud from a confession Loyd had made, which implicated Douglas. The prosecutor then called law enforcement officers to identify the statement as one made by Loyd, but the statement was never formally admitted into evidence. The Court reversed, stating:

Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. . . . In the circumstances of this case, petitioner's in-

⁶⁴See *West v. Louisiana*, 194 U.S. 258 (1904) (sixth amendment not applicable to the States; no due process violation in admission of the cross-examined pretrial testimony of out-of-state resident).

⁶⁵380 U.S. at 403. Because Pointer was not represented at the preliminary hearing, the Court could have reversed on that ground by extending *Gideon v. Wainwright*, 372 U.S. 335 (1963) to preliminary hearings. The Court chose to reserve this issue until *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁶⁶*E.g.*, 380 U.S. at 404–05 (“It cannot seriously be doubted . . . that the right of cross-examination is included in the right . . . to confront the witnesses [T]he right of confrontation and cross-examination is an essential and fundamental requirement”).

⁶⁷*Id.* at 407.

⁶⁸380 U.S. 415 (1965).

ability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his.⁶⁹

In two confrontation clause cases not directly involving the use of hearsay against the defendant, the Court repeated its refrain concerning the importance of cross-examination. In *Brookhardt v. Janis*,⁷⁰ the defendant purportedly agreed to a “prima facie trial” and thus was not allowed to cross-examine the state’s witnesses. The decision focused on the issue of waiver, but the Court noted that the state had properly conceded that “if there was a denial of cross-examination without waiver, it would be constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it.”⁷¹ Likewise, in *Smith v. Illinois*,⁷² the Court reversed Smith’s conviction because his counsel had not been permitted to require a prosecution witness to give his true identity, stating:

In the present case there was not, to be sure, a complete denial of all right of cross-examination. . . . Yet, when the credibility of a witness is in issue, the very starting point in “exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives To forbid this most rudimentary inquiry . . . , is effectively to emasculate the right of cross-examination itself.”⁷³

The fifth case in this series revisited the factual setting of *Pointer v. Texas*.⁷⁴ In *Barber v. Page*,⁷⁵ the prosecution introduced the preliminary hearing testimony of a witness who was at the time of trial in federal custody, outside the state. The Supreme Court reversed the conviction, even though Barber had been represented by counsel at the preliminary hearing and had been afforded the opportunity for cross-examination, which he had not exercised. First, the Court further narrowed the concept of “unavailability.” Not only would the prosecution have to demonstrate an absence of negligence or misconduct on its part in the witness’ unavailability,⁷⁶ but also affirmative

⁶⁹*Id.* at 418–20.

⁷⁰384 U.S. 1 (1966).

⁷¹*Id.* at 3. The Court went on to find no waiver.

⁷²390 U.S. 129 (1968).

⁷³*Id.* at 131.

⁷⁴See *supra* notes 63–67 and accompanying text.

⁷⁵390 U.S. 719 (1968).

⁷⁶See discussion of *Motes v. United States*, *supra* notes 47–53.

good faith efforts to obtain the witness' presence at trial.⁷⁷ Second, the opportunity for cross-examination at the preliminary hearing was no substitute for cross-examination at trial, at least not in the absence of a showing of nonavailability: "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."⁷⁸

Finally, in *Bruton v. United States*,⁷⁹ the Court again reversed a conviction based on a perceived denial of cross-examination as part of confrontation. *Bruton* was analytically similar to *Douglas v. Alabama*.⁸⁰ At Bruton's trial, the confession of a jointly tried codefendant, which implicated Bruton, was admitted against the codefendant. The codefendant did not testify at trial. The confession was not substantively admissible against Bruton under federal hearsay rules,⁸¹ and the trial judge so instructed the jury. *Bruton* took *Douglas* one step further, because in *Douglas*, Loyd's confession was never actually received into evidence for any purpose, whereas in *Bruton*, the codefendant's statement was substantively in evidence against the codefendant, but subject to limiting instructions as to Bruton.

Finding that the codefendant's confession "added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination,"⁸² the Court found the limiting instruction to be an inadequate substitute for cross-examination.⁸³

The significance of the Court's shift in emphasis, evident in these cases, to cross-examination as one of the primary purposes of confrontation had more than academic significance. If, as the Court's early cases seemed to suggest, the confrontation clause was nothing more than a constitutionalization of common law hearsay rules, no conflict between the two concepts existed, and the right of confrontation would be subject to further limitation as the courts further defined the hearsay rule.⁸⁴

On the other hand, if the confrontation clause was read as providing some additional substantive protection beyond that afforded by the

⁷⁷ 390 U.S. at 324–25. In *Barber*, the Court found no such showing because the state had not made any request to federal authorities to produce the witness.

⁷⁸ *Id.* at 725.

⁷⁹ 391 U.S. 123 (1968).

⁸⁰ See *supra* notes 68–69 and accompanying text.

⁸¹ See, e.g., *Krulewitsch v. United States*, 336 U.S. 440 (1949) (post-arrest statements made by coconspirator are not in furtherance of the conspiracy).

⁸² 391 U.S. at 128.

⁸³ *Id.* at 137 ("[W]e cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination.").

⁸⁴ This was the view advanced by Professor Wigmore. 5 J. Wigmore, *Evidence in Trials at Common Law*, § 1364, at 22–28 (Chadbourn Rev. 1974) [hereinafter Wigmore].

hearsay rules, it might exclude evidence that the hearsay rule would permit. Revision of the law of hearsay might be limited by constitutional considerations.

The potential for conflict was not merely theoretical. Calls for evidentiary reform in this country had been ongoing for decades.⁸⁵ Indeed, a committee appointed by the Supreme Court was working on a draft of new evidence rules when *Bruton* was decided.⁸⁶ A footnote in *Bruton* indicates that the Court was beginning to recognize the importance of the issue.

We emphasize that the hearsay statement inculpatory petitioner was clearly inadmissible against him. . . . There is not before us, therefore, any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.⁸⁷

This was an issue the Court had not addressed in *Pointer*, *Douglas*, or *Barber*. Yet, in both *Pointer* and *Barber*, the prior testimony did come within the states' hearsay exceptions, and was admitted substantively. In *Douglas*, although Loyd's statements "were not technically testimony," the Court believed that the jury may have treated them as such.⁸⁸ In each case, the "evidence" was received in a form that prevented the defendant from cross-examining the declarant.

2. *California v. Green and Dutton v. Evans*.

The issue came to a head in *California v. Green*.⁸⁹ The California legislature had revised the state's hearsay rules, allowing prior inconsistent statements to be admitted substantively. Green was tried for supplying drugs to Melvin Porter. At Green's preliminary hearing, Porter identified Green as the supplier of drugs that Porter himself later sold to an undercover officer. At trial, however, Porter claimed that he was unable to identify Green, claiming a lack of memory

⁸⁵The roots of the Federal Rules of Evidence can be traced to work begun by the American Law Institute in 1936. See Yasser, *supra* note 10, at 587-89; see also Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961) (calling for the abolition of class exceptions to the hearsay rule).

⁸⁶See *Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates*, 46 F.R.D. 161 (1969). In reporting the draft, the Committee noted that "[u]nder the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule But, under the recent cases, the impact of the clause clearly extends beyond the confines of the hearsay rule." *Id.* at 330.

⁸⁷391 U.S. at 128 n.3.

⁸⁸380 U.S. at 419.

⁸⁹399 U.S. 149 (1970).

because of drug use. Portions of both Porter's prior testimony and an earlier oral, custodial confession made by Porter to police, in which Porter also identified Green, were admitted substantively against Green. The California Supreme Court reversed, relying on *Barber* and one of its own earlier cases,⁹⁰ on the basis that the opportunity for cross-examination at the preliminary hearing was not an adequate substitute for full and effective cross-examination at trial.⁹¹ But the U.S. Supreme Court disagreed.

As a lighthouse for guidance through the shoals of hearsay and confrontation clause law, the majority opinion in *Green* furnishes a dim beacon. Its legal analysis begins with its oft-quoted confirmation of the suggestion in its cases from *Porter* through *Bruton* that confrontation is not merely the sum of common law hearsay rules:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence, indeed we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception [*citing Barber and Pointer*]. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.⁹²

The Court then refused to provide an adequate explanation for determining the boundary between the two rules:

We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the valid-

⁹⁰ *People v. Johnson*, 68 Cal.2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968), cert. denied, 393 U.S. 1051 (1969).

⁹¹ 70 Cal.2d 654, 661, 75 Cal. Rptr. 782, 789, 451 P.2d 422, 429 (1969).

⁹² 399 U.S. at 155-56.

ity of all such hearsay “exceptions” permitting the introduction of an absent declarant’s statements.⁹³

What resulted was an opinion that wavers, suggesting that the confrontation clause was satisfied, as to the preliminary hearing testimony, either by the adequacy of the prior cross-examination or by the production of the witness and the opportunity for cross-examination at trial.⁹⁴

The problem with the first view is that the Court fails to reconcile such a view with *Barber’s* statement that “confrontation is basically a trial right” that is not satisfied by the cross-examination at a preliminary hearing, which “is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is . . . limited . . . [to] determining whether probable cause exists”⁹⁵

The problem with the latter view is the factual difficulty of explaining how Green had a greater opportunity for “full and effective cross-examination” of Porter than Douglas did of Loyd in *Douglas v. Alabama*.⁹⁶ Loyd was physically present in court, but refused to testify. There, the Court stated that “effective confrontation . . . was possible only if Loyd affirmed the statement as his.”⁹⁷ Similarly, in *Green*, Porter was physically present, but testified that he was unable to remember how he obtained the drugs. It is difficult to understand how cross-examination at trial of Porter’s perception, memory, and narration⁹⁸ of the information contained in his prior testimony was any more “full and effective” than in *Douglas*.

A cleaner analysis would have been to find that loss of memory made Porter “unavailable” and then admit the previously cross-examined testimony based on necessity, citing *Mattox*.⁹⁹ This also would have been consistent with both *Douglas* and *Barber*. *Green* would have been distinguishable from *Douglas* because Porter’s out-of-court statement had been previously cross-examined. It would have been

⁹³*Id.* at 162.

⁹⁴*Compare id.* at 165 (“Porter’s statement at the preliminary hearing had already been given under circumstances closely approximating a trial, i.e., under oath, in a judicial proceeding in which it was recorded and was subject to cross-examination by Green’s counsel.”) *with id.* at 159 (“[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.”)

⁹⁵390 U.S. at 725.

⁹⁶*See supra* notes 68–69 and accompanying text.

⁹⁷380 U.S. at 420.

⁹⁸*See infra* notes 147–155 and accompanying text.

⁹⁹*See supra* notes 37–41 and accompanying text.

consistent with Barber because of a good faith demonstration of “unavailability”; Barber had recognized that “there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable”¹⁰⁰ And indeed, the Green opinion made a half-hearted stab at this **approach**.¹⁰¹ The Court did quote *Mattox*’s statement that the primary purpose of confrontation was literal, physical confrontation at trial, coupled with **cross-examination**.¹⁰² Instead of recognizing that what excused those requirements in *Mattox* was the death and consequent unavailability of the witnesses, however, the Court stated that the requirements could be met by “full and effective cross-examination” at trial—implying, oblivious to the facts, that such had taken place in *Green*.¹⁰³

The Court’s analysis is particularly puzzling because the Court stated that for purposes of the confrontation clause, there was “little reason” to distinguish between prior testimony and prior, uncross-examined statements—the later opportunity for cross-examination at trial satisfied the confrontation clause with respect to both types of **hearsay**.¹⁰⁴ Yet, the Court upheld the admission of Porter’s prior testimony, while remanding the case concerning Porter’s custodial statement to the police, to determine “[w]hether Porter’s apparent lapse in memory so affected Green’s right to cross-examination as to make a critical difference in the application of the Confrontation Clause”¹⁰⁵ Thus, the Court’s “analysis of present confrontation [makes it impossible to determine] where the description of this case ends and the rule for future cases **begins**.”¹⁰⁶

It is Justice Harlan’s thoughtful, scholarly concurring opinion that begins to lay a foundation for a reasoned, cohesive confrontation analysis.¹⁰⁷ Justice Harlan began by candidly acknowledging the confusion created by the Court’s earlier confrontation opinions, and accepting the need for the Court to take a “fresh look at the constitutional concept of ‘confrontation.’”¹⁰⁸ He then examined the history of the sixth amendment to arrive at several conclusions.

¹⁰⁰ 390 U.S. at 725–26.

¹⁰¹ 399 U.S. at 157–58, 168 n.17 (hearsay rule recognizes lapse of memory as a basis for “unavailability”).

¹⁰² See *supm* notes 37–41 and accompanying text.

¹⁰³ 399 U.S. at 158.

¹⁰⁴ *Id.* at 168.

¹⁰⁵ *Id.* This language suggests that it was the prior opportunity to cross-examine that permitted admission of Porter’s preliminary hearing testimony.

¹⁰⁶ Graham, *supm* note 2, at 120–21.

¹⁰⁷ 399 U.S. at 172–89.

¹⁰⁸ *Id.* at 173.

First, he rejected both the literal reading of the confrontation clause that would exclude all evidence unless given by witnesses subject to **cross-examination**,¹⁰⁹ and Wigmore's argument that the confrontation clause merely constitutionalized the law of hearsay:¹¹⁰ "Wigmore's reading would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee. It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence."¹¹¹

Instead, Harlan concluded that the clause was intended, as the Court's early decision had suggested, "to require the prosecution to *produce any available* witness whose declaration it seeks to use in a criminal trial."¹¹²

Notwithstanding language that appears to equate the Confrontation Clause with a right to cross-examine, and, by implication, exclude hearsay, the early holdings and dicta can, I think, only be harmonized by viewing the confrontation guarantee as being confined to an availability rule, one that requires the production of a witness when he is available to testify.¹¹³

Harlan then argued that the Court's recent decisions made two errors: 1) expanding the scope of the confrontation clause beyond an availability requirement, and 2) "incorporating" that sixth amendment misinterpretation into the fourteenth amendment and imposing it on the states.¹¹⁴ Harlan would have held, rather, that a state's use of hearsay ought to be judged solely under a due process analysis. Because Harlan, consistent with the recent cases, viewed confrontation, *i.e.*, availability, as a fundamental right, he would have had the Court impose the same requirement as an element of due process, but would also have gone further to evaluate reliability of hearsay, otherwise admissible under the forum's hearsay law, under the due

¹⁰⁹Justice Harlan rejected this approach, advanced by Professor Heller, *supra* note 29, as unpersuasive, "resting as it does essentially on assertion." *Id.* at 178.

¹¹⁰Also resting "on assertion without citation." *Id.*

¹¹¹*Id.* at 179. Harlan viewed the sixth amendment as intended primarily to curb the abuses of trial by absent witnesses.

¹¹²*Id.* at 174 (emphasis original); see also *id.* at 179-82 (citing the Court's early decisions).

¹¹³*Id.* at 182.

¹¹⁴*Id.* at 184.

process clause.¹¹⁵ Harlan had consistently made the same due process argument in *Pointer*,¹¹⁶ *Douglas*,¹¹⁷ *Barber*,¹¹⁸ and *Bruton*.¹¹⁹

With this analysis, on the facts in *Green*, because Porter was produced at trial, Harlan would have found that there was no confrontation clause issue as to either Porter's prior testimony or his custodial admissions. Second, because of the circumstances under which the prior testimony was given, Justice Harlan could not conclude that the former testimony was so unreliable as to violate due process. Finally, he would have remanded the case for a due process analysis by the state court, of the reliability of Porter's custodial statement.¹²⁰

Harlan's approach, *i.e.*, limiting confrontation to an availability requirement while leaving reliability and prevention of abusive use of hearsay to the due process clause, has much to commend itself, and several authors have taken a similar view.¹²¹

First, while confrontation is a right enjoyed only by an accused, a due process approach to reliability would apply equally to civil cases, and would avoid the potential for a dichotomy of evidence law.

Second, while the confrontation clause applies only to criminal prosecutions, a due process analysis would be equally applicable to other, noncriminal proceedings.¹²²

Third, a due process analysis would avoid the need to torture the language of the confrontation clause to reach the correct result in some cases. For example, in *Douglas*,¹²³ Loyd refused to testify, and his statement was never formally in evidence. How was he a "witness against" Douglas? Similarly, how *can* Bruton's codefendant, who *never* took the stand, be considered a "witness against" the accused?

Further, use of a due process analysis would be consistent with the Court's development of a due process approach to the reliability of

¹¹⁵*Id.* at 184-87.

¹¹⁶380 U.S. at 408-09.

¹¹⁷*Id.* at 423.

¹¹⁸390 U.S. at 726.

¹¹⁹391 U.S. at 138-44 (dissenting with White, J.).

¹²⁰399 U.S. at 188-89.

¹²¹Westen, *supra* note 2, at 599-601; Younger, *Confrontation and Hearsay, supra* note 8, at 42; see also Haddad, *Post Bruton Developments: A Reconsideration of the Confrontation Rationale and a Proposal for a Due Process Evaluation of Limiting Instruction*, 18 Am. Crim. L. Rev. 1 (1980).

¹²²See, *e.g.*, *Bridges v. Wixom*, 326 U.S. 135 (1945) (use as substantive evidence of unsworn, uncross-examined, prior inconsistent statements in deportation proceedings held improper).

¹²³See *supra* notes 68-69 and accompanying text.

evidence in other contexts to which the confrontation clause clearly does not apply.¹²⁴

Finally, a due process rationale for determining reliability would be applicable to evidence offered by a defendant, as well as the prosecution, subject to considerations addressed in *Chambers v. Mississippi*.¹²⁵

Yet, Harlan's analysis needed further refinement, as he himself recognized only six months later. Six months after *Green*, the Court decided *Dutton v. Evans*.¹²⁶ Evans was tried for the murder of three Georgia police officers. At trial, one of the witnesses called to testify, named Shaw, was a cellmate of one of Evans' alleged accomplices, Williams. Shaw testified that when Williams returned from his arraignment, he told Shaw "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Evans was tried separately from Williams, and Williams did not testify. Williams' jailhouse statement was substantively admitted under Georgia's coconspirator hearsay exception.¹²⁷ Evans was convicted and, after exhausting state remedies, he sought *habeas corpus* relief in federal court. He was unsuccessful in the district court, but prevailed in the Fifth Circuit. However, the Supreme Court reversed.

Dutton presented the Court with a case that was factually different from its previous cases in several important respects. First, because Williams' statement fell within Georgia's hearsay rule, the case presented the Court with the issue it had avoided in *Bruton, i.e.*, whether a hearsay exception necessarily raises confrontation clause issues.¹²⁸ Second, because Williams had not testified, and his statement had not been made in a trial-like setting, neither of the two possible interpretations of *Green, i.e.*, either confrontation at trial, or pretrial cross-examination in a trial-like setting, may satisfy confrontation requirements,¹²⁹ could justify the statement's admission. Finally, the state apparently made no affirmative showing of unavailability. Apparently, it was assumed that Williams would invoke his right to silence if called to testify.

¹²⁴*E.g.*, *Simmons v. United States*, 390 U.S. 377 (1968) (identification evidence); *Stovall v. Denno*, 388 U.S. 293 (1967) (same); see also *supra* note 44 (presumptions).

¹²⁵See *supra* note 23.

¹²⁶400 U.S. 74 (1970).

¹²⁷The Georgia exception was broader than the federal coconspirator exception which had applied in *Bruton*. See *Krulewitsch v. United States*, 336 U.S. 440 (1949); *supra* note 81.

¹²⁸See *supra* note 87 and accompanying text.

¹²⁹See *supra* notes 94-98 and accompanying text.

The Court's inability in previous cases to develop a workable confrontation clause analysis left it in a difficult position to dispose of *Dutton* in an analytically consistent fashion. As a result, the Court failed to produce a majority opinion.

The plurality opinion first dealt with the unresolved *Bruton* issue by reemphasizing that confrontation was not a constitutionalization of hearsay law. Thus, state hearsay exceptions do not have to be identical to those used by the federal courts.¹³⁰ Satisfaction of the confrontation clause requires a separate analysis from the question whether a particular declaration is admissible under the forum's hearsay rules.

But what, then, is the test for satisfaction of the confrontation clause? How was confrontation satisfied in *Dutton*? Clearly, *Green* could not answer these questions since Williams had not testified, and the jailhouse surely was not a trial-like setting.

One reading of the plurality opinion is that production of a declarant is excused when the hearsay used is not important to the government's case. The plurality distinguished its cases, beginning with *Pointer*, by pointing out the critical weight given to the prosecution's case by the out-of-court declaration used in each of those cases.¹³¹ Noting that nineteen other witnesses had testified against Evans, including another accomplice who testified under a grant of immunity and directly implicated Evans, the plurality concluded that the evidence was neither "crucial" nor "devastating."¹³²

Another reading of the plurality opinion—and the one most accepted by courts and commentators¹³³—is that the opinion defined a new purpose of the confrontation clause, *i.e.*, insuring reliability.¹³⁴ In other words, the confrontation clause chiefly requires reliable evidence. The chief method for insuring reliability is cross-examination

¹³⁰ 400 U.S. at 80–83. The argument made by Evans on this point was a predictable result of the Court's "incorporation" theory in *Pointer*, which Harlan had criticized. Evans' argument was, in essence, 1) *Pointer* said that the sixth amendment confrontation clause is applicable to the states; 2) *Bruton* held that a codefendant post-arrest statement is not admissible under the confrontation clause against the defendant, at least where the codefendant does not testify, and, accordingly, 3) the states are bound by that interpretation and may not have a hearsay rule that permits introduction of post-arrest coconspirator statements. *Id.*

¹³¹ *Id.* at 83–86.

¹³² *Id.* at 87. The plurality also characterized Shaw's testimony as "of peripheral significance." *Id.*

¹³³ *E.g.*, Younger, *supra* note 2, at 14–17.

¹³⁴ 400 U.S. at 89 ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process . . .").

of available witnesses, but that is not the only method. Here, the plurality viewed potential cross-examination of Williams as pointless, because the circumstances under which the statement was made provided, in the plurality's view, sufficient equivalent guarantees of accurate memory, perception, narration, and sincerity—the four testimonial characteristics that cross-examination is designed to test.¹³⁵ The plurality believed that “the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made,^[136] might have been unreliable was wholly unreal.”¹³⁷

Neither reading of the plurality opinion, if accurate, provides a satisfactory analytical framework. The former reading suffers from the practical inability of having a trial judge determine while a trial is in progress which bits of evidence may be “crucial” or important to the prosecution's case, and is an unsatisfactory test for determining when the confrontation clause requires a witness to be produced. The result reached in *Dutton* may have been correct, based on the factors cited by the plurality, but it is one thing for an appellate court, with cool reflection and a cold record, to say that admission of a hearsay statement was harmless error,¹³⁸ and quite another to prospectively authorize a trial judge to do away with production of a witness for cross-examination on the basis of the judge's *in limine*, subjective assessment of the criticality of a piece of hearsay.

The latter reading has two major defects. First, by using the confrontation clause to determine reliability, rather than the due process clause, the opinion continues to unnecessarily foster a dichotomy in

¹³⁵ See *infra* notes 147–56 and accompanying text.

¹³⁶ At trial, Evans' strategy was to attack Shaw, Williams' testifying cellmate, in an attempt to demonstrate that Williams' alleged statement had never been made. See 400 U.S. at 90–91 (Stewart, J., concurring). Indeed, the Fifth Circuit characterized Shaw's testimony as “somewhat incredible” and possessing “basic incredulity.” Evans v. Dutton, 400 F.2d 826, 828 n.4 (5th Cir. 1968). It is open to speculation whether Evans' choice of strategy was the invention of necessity because of William's refusal to testify, or a carefully calculated strategy because Evans knew that, if called to testify, Williams would have admitted making the statement. In either case, Evans' strategy parallels the tactic adopted by Sir Walter Raleigh in challenging the statement of the Portuguese gentleman, Graham, *supra* note 2, at 101, 122–23. Evans, like Raleigh, received the death sentence (initially). 400 U.S. at 90 n.20.

¹³⁷ 400 U.S. at 89. The plurality found four reasons why Williams' statement was sufficiently reliable for admission without cross-examination. First, it “contained no express assertion about past fact.” Second, Williams' basis for personal knowledge was established by the direct testimony of the immunized accomplice. Third, that the statement was the result of faulty memory was “remote in the extreme.” Finally, “circumstances”—which the opinion did not further define—“were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime.” *Id.* at 88–89.

¹³⁸ Justice Blackmun, joined by Chief Justice Burger, would have reversed *Dutton* on the basis of harmless error. *Id.* at 90–91.

evidence law and analysis between criminal cases and proceedings in other forums.¹³⁹ More importantly, however, if the primary purpose of the confrontation clause is reliability, and the primary purpose of the hearsay rules is **reliability**,¹⁴⁰ isn't the plurality effectively adopting Wigmore's view that the confrontation clause is merely a constitutionalization of hearsay? The Court specifically rejected that view in *Green*, and the plurality did so again in *Dutton*, but failed to offer a reasoned explanation of *how* confrontation clause reliability differs from reliability presumably insured by the law of **hearsay**.¹⁴¹

In a concurring opinion, Justice Harlan, perhaps in exasperation at trying to articulate an acceptable dividing line between hearsay and the confrontation clause, specifically embraced the Wigmore position that he had rejected just six months earlier in *Green*.¹⁴² What was most unsettling to Harlan was his perception that his *Green* position, *i.e.*, that confrontation meant production of all available witnesses,

would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act . . . and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports ~

Harlan opted for equating the confrontation clause with hearsay law, and leaving to the due process clause the task of curbing hearsay abuse. Other than for perceived inconvenience, however, Harlan never offered a satisfactory theory for rejecting the view he embraced in *Green*, that "Wigmore's reading would have the practical consequence of rendering meaningless what was *assuredly in some sense* meant to be an enduring **guarantee**."¹⁴⁴ Nor does Harlan cite any authority—other than Wigmore—to explain his change of **view**.¹⁴⁵ There is, however, a way out of Harlan's dilemma and the analytical morass into which the Court had placed itself by its decisions through *Dutton*.

¹³⁹ See *supra* notes 121–26 and accompanying text.

¹⁴⁰ Wigmore, *supra* note 84, § 1360.

¹⁴¹ One author suggests—one suspects only half tongue-in-cheek—that, under *Dutton's* approach, what the confrontation clause requires is "super-duper" reliability. Younger, *supra* note 2, at 17.

¹⁴² 400 U.S. at 94–95 ("Contrary to things as they appeared to me last term . . . I have since become convinced that Wigmore states the correct view . . .").

¹⁴³ *Id.* at 95–96.

¹⁴⁴ *California v. Green*, 399 U.S. at 179 (Harlan, J., concurring) (emphasis added).

¹⁴⁵ In *Green*, Harlan had discredited Wigmore's view because it "rests also on assertion without citation, and attempts to settle on ground that would appear to be equally infirm as a matter of logic . . ." *Id.* at 178–79.

D. A PROPOSED ANALYSIS

The primary difficulty in the Court's analyses in *Green* and *Dutton* was its refusal—or inability—to address how, precisely, the similar values of the confrontation clause and hearsay law differ. Historically, hearsay was admitted as an exception to the general requirement of live testimony only based upon a showing of necessity and trustworthiness.¹⁴⁶ Reliability and probative value of evidence can be judged against four testimonial characteristics:¹⁴⁷ **narration**,¹⁴⁸ **sincerity**,¹⁴⁹ **memory**,¹⁵⁰ and **perception**.¹⁵¹ The traditional hearsay exceptions, however, focused primarily only on one aspect of reliability—sincerity.¹⁵² Indeed, the rationale usually given for each of the traditional hearsay exceptions seems focused—almost to the point of obsession—upon presumed circumstantial substitutes for the **oath**.¹⁵³

Even a cursory examination of Federal Rule of Evidence 803, which incorporates many of the traditional exceptions, supports this view. For example, the underlying rationale for present sense impressions, excited utterances and similar exceptions, is that these sorts of declarations are made *ante litem motam*, *i.e.*, before a motive for fabrication would likely exist.¹⁵⁴ Even a traditional exception like dying declarations—which is truly based on necessity—rested on the fiction that the fear of impending death was a powerful motive to speak the truth.¹⁵⁵

Sincerity, however, is only one aspect of reliability, and the other three aspects—narration, memory, and perception—are particularly suited to testing through cross-examination. “Few would doubt that cross-examination effectively remedies defects in the other three capacities; it exposes and resolves ambiguity, it tests or refreshes mem-

¹⁴⁶ *E.g.*, Imwinkelreid, *supra* note 10, at 244–46. It was Wigmore who sought to systematize hearsay exceptions, and who identified these two common denominators.

¹⁴⁷ *E.g.*, Comment, *Theoretical Foundations of the Hearsay Rules*, 93 *Harv. L. Rev.* 1786 (1980); Notes of the Advisory Committee on the Federal Rules of Evidence, *reprinted in* Federal Civil Judicial Procedure and Rules 302 (West 1985) [hereinafter *Advisory Committee Notes*].

¹⁴⁸ **What** does a declarant mean by his words? Is a statement vague and ambiguous, or clear and precise?

¹⁴⁹ **Is** the declarant engaging in intentional falsehood, or is (s)he honestly offering what (s)he believes to be the truth?

¹⁵⁰ **How** accurate is the declarant's power of recall?

¹⁵¹ **How** accurately did the declarant perceive, *i.e.*, see, hear, smell, touch, or taste, that about which (s)he is speaking? What was the declarant's opportunity for perception?

¹⁵² Imwinkelreid, *supra* note 10, at 263; Comment, *supra* note 147.

¹⁵³ *Id.*

¹⁵⁴ **Note**, *supra* note 2, at 218–20.

¹⁵⁵ **Jaffe**, *supra* note 9.

ory, and it brings into question possible defects in perception. By contrast, cross-examination may be less well suited to exposing insincerity.”¹⁵⁶

The Court has erred by failing to recognize the single aspect of testimonial reliability on which hearsay law focuses. If this distinction is recognized, a coherent approach to balancing confrontation and hearsay suggests itself.

First, the confrontation clause should be viewed—as the cases from *Pointer* through *Bruton* suggest—as a guarantee of cross-examination. That is, the prosecution should be required to produce all available witnesses where reliability and relevance of the witness’ declaration depend primarily upon the accuracy of the declarant’s perception, memory, or narration, or where the declaration was made *post litem motam*.¹⁵⁷ Where the declaration is one made *ante litem motam*, however, and under circumstances indicating a likelihood of sincerity, for example, business records or excited utterances, is not offered for its truth, or has independent evidentiary significance in addition to truth,¹⁵⁸ unavailability need not be shown.

Second, if the witness is unavailable without fault of the prosecution¹⁵⁹ and after a good faith effort to locate the witness,¹⁶⁰ statements made *post litem motam*, or which depend for their reliability primarily on the declarant’s narration, memory, or perception, would not be inadmissible under the confrontation clause if the accused had a previous opportunity for cross-examination,¹⁶¹ or if the statement fell within the dying declarations exception.¹⁶²

¹⁵⁶ Comment, *supra* note 147, at 1798.

¹⁵⁷ If the witness testifies and is subject to cross-examination, consistent with *Green*, nothing in the confrontation clause would require exclusion of pretrial statements. Such statements would be subject to exclusion, if at all, only under the forum’s hearsay rule, or the due process clause.

¹⁵⁸ If a statement is not offered for its truth, there is no need to test the declarant’s memory, narration, or perception. Similarly, if the statement has independent evidentiary significance in addition to its truth, it would be admissible for the former purpose regardless of whether the declarant is available.

¹⁵⁹ Cf. *Motes v. United States*, 178 U.S. 458 (1900); *supra* text accompanying note 47–53.

¹⁶⁰ Cf. *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *supra* text accompanying notes 63–67, 75–78.

¹⁶¹ Cf. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

¹⁶² I recognize that allowing the dying declaration is subject to criticism on at least two grounds. First, dying declarations can be subject to defects in memory, narration, and perception, even if honestly made. See Jaffe, *supra* note 9, at 260–76. Nevertheless, the exception is long recognized and was extant at the time the confrontation clause was adopted, even if the historical rationale for its supposed reliability is subject to serious question. Second, even recognizing necessity as the basis for admissibility of dying declarations, that rationale itself is subject to criticism as basing admissibility on a presumption of guilt, i.e., admitting dying declarations on the theory that an

Finally, if the evidence was not inadmissible under this confrontation clause analysis, its admissibility would be governed only by the forum's hearsay law and by the due process clause.

Adopting this approach solves the problem perceived by Justice Harlan in his *Dutton* concurrence. Business records, official records, and similar evidence could be properly admitted under the forum's hearsay rules without implicating the confrontation clause.¹⁶³ Yet, the confrontation clause would be an "enduring guarantee" of the right to confront and cross-examine those sorts of accusatory declarations that are in need of testing through cross-examination. As long as the confrontation clause is thus satisfied, any additional challenge to the use of the hearsay should be based on the due process clause, for the reasons cited by Justice Harlan in his *Green* concurrence.¹⁶⁴ The main benefit of this proposal would be to give the trial judge a more objective measure for determining when the confrontation clause requires production or a showing of unavailability. Instead of subjectively trying to assess the criticality of the hearsay, as the *Dutton* plurality would seem to require, the judge would examine the content of the hearsay to see if it is the sort of statement that needs testing through cross-examination. Is it uttered after a possible motive to fabricate existed? Is the language of the statement ambiguous or clear? Is it accusatory, or simply evidence of a collateral fact? Does it contain "assertion about past fact"?¹⁶⁵ Finally, does its reliability depend primarily upon the declarant's memory or perception? If so, either the witness must be produced, or unavailability demonstrated.

If the witness is unavailable, the declaration would have to either have been subject to prior cross-examination or be a dying declaration to pass constitutional muster. If this confrontation clause test was met, the judge would then have to insure that the declaration fits

accused should not benefit from his wrongful acts presumes that the accused committed the homicide. One possible solution to this criticism would be to make dying declarations admissible only after a preliminary showing that the accused is connected to the homicide, much like coconspirator declarations are currently dependent upon a preliminary showing of the existence of the conspiracy and the accused's participation in it. *E.g.*, *United States v. James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

¹⁶³ *See, e.g.*, *United States v. Hans*, 684 F.2d 343 (6th Cir. 1982), *rev'g*, 496 F.Supp. 957 (S.D. Ohio 1980) (workmen's compensation checks admissible as business record in tax fraud case without implicating the confrontation clause), *discussed in* Note, *supra* note 2, at 216-17.

¹⁶⁴ *See supra* notes 107-24 and accompanying text.

¹⁶⁵ *Dutton v. Evans*, 400 U.S. at 88. *See* Graham, *supra* note 2, at 122 (the *Dutton* plurality "seems to sense the fact that . . . this case presented for the first time the analog of the remarks of the Portuguese gentleman.").

within the forum's hearsay exceptions, and also rule on any due process challenges to the declaration's use.¹⁶⁶

Applying this approach to *Dutton*, it is difficult to argue with the four dissenters' view that Williams' statement was in substantial need of cross-examination.¹⁶⁷ On the facts of the case, though, admission was probably harmless error.¹⁶⁸ Applied to the Court's earlier confrontation cases, the suggested analysis is also consistent with the results reached in each case, for reasons similar to those cited in Harlan's *Dutton* and *Green* concurrences.¹⁶⁹

E. ANALYSIS OF SUPREME COURT CASES—RECENT DECISIONS

There remains to be examined whether the proposed analysis is consistent with the Court's confrontation cases decided since *Dutton*.

In *Nelson v. O'Neil*,¹⁷⁰ the Court was presented with a factual situation identical to *Bruton*, except that in *O'Neil* the confessing codefendant took the stand and denied both having made the out-of-court confession to police and the substance of the statement. The confession was substantively admissible under the forum's hearsay rule only against the codefendant, and the trial judge gave limiting instructions on its use as to O'Neil. O'Neil chose not to cross-examine the codefendant.

A six-member majority found no confrontation clause violation, citing *Green*, because Runnels, the codefendant, had fully testified concerning the out-of-court confession, and O'Neil had the opportunity to conduct a full cross-examination. As far as it goes, the *O'Neil* decision is correct, and is consistent with the proposed analysis.¹⁷¹

¹⁶⁶ For example, the defendant might claim that the declaration's probative value is substantially outweighed by its prejudicial impact. *E.g.*, *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965). Similarly, it might be shown that a declaration is sufficiently unreliable that it should not be admitted, even if not excluded by the hearsay rule. *E.g.*, *Jones v. State*, 52 Ark. 347, 12 S.W. 704 (1889) (where it was shown that victim did not see who shot him, his declaration that a named person shot him properly excluded).

¹⁶⁷ 400 U.S. at 103-04. Williams' statement was highly ambiguous and in dire need of explanation. Based on other evidence at trial, it was subject to several interpretations.

¹⁶⁸ *Id.* at 90-93 (Blackmun, J., and Burger, C.J., concurring).

¹⁶⁹ *Id.* at 97-100; *California v. Green*, 399 U.S. at 180-83.

¹⁷⁰ 402 U.S. 622 (1971).

¹⁷¹ The decision does not go far enough, however. The Court did not address the due process issue raised, i.e., the fairness and adequacy of using limiting instructions as a safeguard to prevent a jury from drawing substantive adverse inferences against the defendant from the codefendant's statement. The Court's unfortunate choice of a confrontation clause rationale rather than a due process one has produced some peculiar

*Mancusi v. Stubbs*¹⁷² presented a fairly straightforward case of unavailability and admission of prior, cross-examined testimony. In 1954, Stubbs was convicted of murder and other offenses in Tennessee. He successfully appealed his first conviction, and was again convicted at a second trial ten years later, based on testimony offered at the first trial by the spouse of his murder victim. By the time of the second trial, the spouse had become a permanent resident of Sweden. The issue before the Supreme Court was the propriety of admitting the spouse's prior testimony.¹⁷³ The Court found that Tennessee had made a good faith effort to produce the witness. The witness was unavailable, and accordingly, the prior testimony was admissible. For purposes of our analysis, *Mancusi* is significant only for its renewal of the claim, first made by the plurality in *Dutton*, that the focus of the confrontation clause is to insure that hearsay possess "indicia of reliability" before its admission.

In many ways, *Ohio v. Roberts*¹⁷⁴ is also a straightforward case of unavailability and admission of prior testimony. At Roberts' preliminary hearing on check forgery and other charges, Roberts called the daughter of the forgery victim to testify. Robert's counsel examined her in an effort to get the woman to admit that she had given Roberts the check and some credit cards without informing him that she had no permission to use them. At trial, the state made a showing of unavailability,¹⁷⁵ and introduced the prior testimony.

results. Before *O'Neil*, a substantial number of state court decisions found the use of limiting instructions unsatisfactory, as a matter of due process, regardless of whether the confessing codefendant testified. Likewise, a number of cases, as a matter of due process, took other methods, such as effective redaction of the confession to eliminate implication of the nonconfessing defendant. *E.g.*, *People v. Aranda*, 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965). Since *O'Neil*, however, courts in these same jurisdictions uncritically follow *O'Neil* and affirm convictions on confrontation grounds that would have been reversed for "unfairness" before the decision. *See Haddad, supra* note 121, at 11-14, and cases cited there. *O'Neil* is also significant for its specific rejection of the dicta first given in *Douglas v. Alabama* and repeated in *Bruton* that effective cross-examination is possible only if the witness affirms the prior statement. 402 U.S. at 627.

¹⁷²408 U.S. 204 (1972).

¹⁷³The case reached the Supreme Court because, after his release from Tennessee prison, Stubbs was convicted of a felony in New York and sentenced as a second offender based on the Tennessee conviction. After exhausting his New York state remedies, Stubbs sought habeas corpus in federal court, challenging New York's ability to use the Tennessee conviction for sentencing purposes, on the theory that the conviction was obtained in violation of the confrontation clause.

¹⁷⁴448 U.S. 56 (1980).

¹⁷⁵The majority and dissent primarily disagreed over the adequacy of the showing of availability. For purposes of this article, the merits of the adequacy argument in *Roberts* is irrelevant, since our focus is on *when* such a showing need be made, and what *type* of hearsay may constitutionally be admitted once unavailability is shown,

Roberts was the Court's first attempt since *Green* to discern a "general approach" to "map[ping] out a theory of the confrontation clause that would determine the validity of all hearsay 'exceptions.'"¹⁷⁶ The Court began by reiterating the *Green-Dutton* view that confrontation and hearsay are not synonymous,¹⁷⁷ rejecting the arguments of Wigmore, and Harlan's *Dutton* concurrence.¹⁷⁸ The Court then established a two-part test for satisfying the confrontation clause. The first prong is the familiar availability/unavailability standard. Second, if the declarant is unavailable,

then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.¹⁷⁹

Both the Court's two-part analysis, and the proposal made here, would produce similar results, but in a different analytical manner. The second prong of *Roberts* continues to misuse the confrontation clause, rather than the due process clause, as a substantive measure of reliability. Moreover, instead of "map[ping] out a theory of the confrontation clause that would determine the validity of all hearsay 'exceptions,'" the Court instead used a theory of "firmly rooted" hearsay exceptions to map out when the confrontation clause is satisfied.

The Court's equation of "firmly rooted" hearsay exception and the confrontation clause probably reflects the Court's shared concern with Justice Harlan that requiring a strict rule of preference for live testimony would negate many long recognized exceptions.¹⁸⁰ It may also stem from the perceived need to prevent the "reliability" of long recognized hearsay exceptions from being empirically challenged.¹⁸¹ Of course, therein lies the primary defect in the *Dutton-Roberts* approach. It is precisely *because* the Court defines the purpose of the confrontation clause in terms of assuring substantive reliability that it provides the theoretical framework for empirically attacking the historical assumptions of reliability on which hearsay exceptions rest!

¹⁷⁶ 448 U.S. at 64-65.

¹⁷⁷ *Id.* at 63.

¹⁷⁸ *Dutton v. Evans*, 400 U.S. at 94-95 (Harlan, J., concurring).

¹⁷⁹ 448 U.S. at 66. The Court then found the prior testimony sufficiently reliable because the form and purpose of Roberts' counsel's examination was that of cross-examination. *Accord* United States v. Hubbard, 18 M.J. 678 (A.C.M.R.), *petition granted*, 19 M.J. 216 (C.M.A. 1984).

¹⁸⁰ See *supra* note 143 and accompanying text.

¹⁸¹ See, e.g., Comment, *supra* note 147.

The *Roberts* response to this dilemma is the circular position that confrontation clause reliability is defined by the assumed reliability of “firmly rooted” hearsay exceptions.¹⁸²

The root of this dilemma is the Court’s continued failure to recognize the different role that hearsay rules play in insuring reliability, *i.e.*, primarily sincerity, from the role played by the confrontation clause, *i.e.*, cross-examination, in insuring reliability, *i.e.*, accurate narration, memory, and perception. Even the most “firmly rooted” exception—dying declarations—is based upon assumed notions of sincerity.¹⁸³

Under the proposed analysis, by limiting the purpose of the confrontation clause to cross-examination, evidence offered under most hearsay exceptions—at least those codified in Federal Rule of Evidence and Military Rule of Evidence 803(1)-(23)—would, in most instances, not implicate the confrontation clause. Only if the declaration is accusatory, *post litem motam*, or otherwise in need of having the memory, perception, or narration of the declarant probed through cross-examination, would the confrontation clause require a showing of unavailability.

*Tennessee v. Street*¹⁸⁴ further supports the proposed analysis. There, the prosecution was permitted to have a sheriff testify in rebuttal about certain aspects of an accomplice’s confession. The accomplice’s confession was not offered substantively against the defendant, but to specifically rebut portions of the defendant’s testimony. The defendant claimed that his own confession had been coerced because the sheriff had read him the accomplice’s confession and told Street to say the same things. The accomplice’s confession was read to demonstrate the differences between the two confessions. Consistent with the proposed analysis,¹⁸⁵ the Court held that the introduction of non-hearsay raises no confrontation clause issue.

United States v. Inadi,¹⁸⁶ the first in the most recent series of Supreme Court confrontation clause cases, further supports the proposed analysis. Inadi was convicted for conspiracy to manufacture and distribute illegal drugs. At trial, the prosecution introduced, under the

¹⁸²Of course, the Court’s use of the confrontation clause, rather than the due process clause, continues to perpetuate the problems previously discussed. See *supra* notes 121–25 and accompanying text.

¹⁸³This, of course, is the most charitable view for the presumed “reliability” of such declarations. See Jaffe, *supra* note 9.

¹⁸⁴471 U.S. 409 (1985).

¹⁸⁵See *supra* note 57 and supporting text.

¹⁸⁶106 S. Ct. 1121 (1986).

federal coconspirator rule,¹⁸⁷ recordings of several conversations between various members of the five-person conspiracy. Two of four unindicted coconspirators testified and were subject to cross-examination. Another invoked his right to silence. A fourth was subpoenaed by the prosecution, but “failed to appear, claiming car trouble.”¹⁸⁸ Inadi claimed that the prosecution had failed to demonstrate unavailability of the fourth coconspirator, and, therefore, the recordings were inadmissible under the confrontation clause. The court of appeals agreed, but the Supreme Court reversed, and reinstated the conviction.

The Court held—consistent with the proposed analysis¹⁸⁹—that nonavailability was not a prerequisite to admission of the coconspirator statements. Statements made in furtherance of the conspiracy possess independent evidentiary significance apart from their truth. Consequently, they would be admissible regardless of whether the declarant testified.¹⁹⁰ In this situation, the Court was willing to place the burden on the defense to seek production of the declarant if the defendant believed cross-examination may prove beneficial.¹⁹¹

While the Court’s decision is correct, under our approach, the route by which the Court reached its decision is troubling, and may plant the seeds for a trial judge, who reads the opinion on the run, to sow much mischief in this constitutional field.

The first prong of the *Roberts*’ test—unavailability—was essentially an adoption of Harlan’s *Green* concurrence.¹⁹² This absolutist position, however, left the Court facing in *Inadi* the same dilemma in which Harlan found himself in *Dutton*. Applying the first prong of *Roberts* in every case

would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the

¹⁸⁷ Fed. R. Evid. 801(d)(2)(E). Coconspirator statements falling within the rule are not considered hearsay.

¹⁸⁸ 106 S. Ct. at 1124.

¹⁸⁹ See supra notes 157–62 and accompanying text.

¹⁹⁰ 106 S. Ct. at 1126–27.

¹⁹¹ *Id.* at 1127–28.

¹⁹² Compare *Ohio v. Roberts*, 448 U.S. at 65 (“First . . . [T]he Sixth Amendment establishes a rule of necessity . . . [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use . . .”) with *California v. Green*, 399 U.S. at 174 (Harlan, J., concurring) (“First . . . the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to produce any available witness whose declaration it seeks to use . . .”).

Business Records Act . . . and the exceptions to the hearsay rule for official statements, learned treatises. . .¹⁹³

And, in *Inadi*, coconspirator statements.

Consequently, just as Harlan backtracked in *Dutton* from his *Green* opinion, the *Inadi* court quickly backed away from what had seemed a clear rule in *Roberts*: "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced without a showing that the declarant is unavailable."¹⁹⁴

Yes, it can, which is exactly what the court of appeals had done.¹⁹⁵ The danger with *Inadi* is that the Court was forced by its previous inability to articulate a consistent confrontation clause theory into making artificial distinctions from some of its earlier decisions. The Court distinguished these cases on the ground that each of them had involved the use of prior testimony.¹⁹⁶ This distinction is both artificial and unfortunate.

It is artificial because it fails to recognize that the need for a showing of unavailability in the earlier cases was not because the prosecution sought to *use prior testimony*, but because the *content* of the prior testimony involved accusatory or other declarations that depend for reliability primarily on the memory, perception, or narration of the declarant. That the prosecution was offering in those cases a transcript of prior testimony is significant only because there had been at least an opportunity for cross-examination, thus arguably satisfying the confrontation clause's demand for cross-examination, because the declarant was unavailable. Unavailability became a necessity in each of those cases because of the *content* and *nature* of the hearsay offered, not because the hearsay was in the *form* of prior testimony.¹⁹⁷

The Court's analysis is unfortunate, because it appears to limit the need for establishing unavailability to cases where the prosecution seeks to offer prior testimony, and undoubtedly, some lower court will, unfortunately, read the opinion that way.

The further, but related, problem with *Inadi* is that the Court still fails to articulate a rational theory upon which trial courts can de-

¹⁹³ *Dutton v. Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring).

¹⁹⁴ 106 S. Ct. at 1126.

¹⁹⁵ *United States v. Inadi*, 748 F.2d 812, 818 (3rd Cir. 1984).

¹⁹⁶ 106 S. Ct. at 1125-26.

¹⁹⁷ Clearly, unavailability must be shown before prior testimony can pass constitutional muster, but that showing is necessitated by the nature and content of the declaration.

termine when unavailability must be shown. *Inadi* leaves room for lower courts to do away with the need for proof of unavailability in other situations, for example, statements against penal interest, which, because of the declaration's dependence for reliability upon accurate memory, perception, and narration, in addition to sincerity, should be subject to cross-examination. But the Court provides no clear standards for determining when unavailability must be shown.

Two further points need to be made about *Inadi*. First, the Court clearly stated that the same confrontation analysis applies to all out-of-court statements that are offered for truth, whether defined as an exception to the hearsay rule, or as an exemption from it. Thus, other declarations falling within Federal Rule of Evidence 801, such as prior identification,¹⁹⁸ are subject to confrontation clause analysis.¹⁹⁹ Second, *Inadi* should not be read as a broad abandonment of proof of unavailability for all statements that may fall within the forum's coconspirator exception. It is only because the coconspirator statements in *Inadi* were plainly made "in furtherance of the conspiracy" that they possessed the independent evidentiary value that made them admissible regardless of the declarant's availability. The same rationale would not apply to coconspirator statements made after a coconspirator was arrested, even if such custodial statements might fall within the forum's hearsay rule.²⁰⁰ In that circumstance, the declaration loses its independent evidentiary significance and becomes analytically similar to a statement against penal interest, which has traditionally been viewed as having questionable reliability.²⁰¹ Moreover, even if the declarant is unavailable, such post-arrest statements should not be admissible in the absence of prior opportunity for cross-examination.²⁰²

¹⁹⁸ Fed. R. Evid. 801(d)(1)(C).

¹⁹⁹ By definition, the reliability of an "identification of a person made after perceiving him," *id.*, depends upon the perception of the declarant while "perceiving" the person identified and upon the witness' memory of that person identified from an earlier time when he was "perceived". Reliability may also depend upon probing narration, if the prior identification was ambiguously made. Accordingly, production or proof of the declarant's unavailability should be required for admission of prior identification testimony.

²⁰⁰ See *Dutton v. Evans*, 400 U.S. 74 (1970).

"See *Bruton v. United States*, 391 U.S. at 141-42 (White, J., dissenting) ("[T]he statements of a codefendant have traditionally been viewed with special suspicion . . . the codefendant's confession implicating the defendant is intrinsically much less reliable.")

"See *Dutton v. Evans*, 400 U.S. at 98 (Harlan, J., concurring): "I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption."

In *Lee v. Illinois*,²⁰³ the Court reversed the murder convictions of Lee because the trial judge had considered, as substantive evidence against Lee, portions of a nontestifying codefendant's custodial confession. Lee's participation in the homicide was not disputed. She had given her own confession. The *degree* of her involvement and the element of premeditation were in dispute, however. Lee's confession indicated an absence of premeditation, but the codefendant's confession clearly inculpated Lee on the issue of intent.

Again, although the result is consistent with the proposed analysis, the Court's rationale differs, primarily because the Court has not yet abandoned the notion that the confrontation clause is aimed at insuring "reliability," without recognizing the four separate elements that make up "reliability." Under our proposed analysis, because the confession of Lee's codefendant clearly was accusatory and was made *post litem motam*, it was the type of evidence that require testing through cross-examination, and hence to which the confrontation clause applied. Here, there was no question of the codefendant's nonavailability, but there had been no prior opportunity for cross-examination. Accordingly, those portions of the confession that implicated Lee on the issue of intent and premeditation should have been excluded.

The Court, however, approached the case using the *Roberts* test. Since no issue of unavailability was present, the decision focused on the confession's reliability. The Court, correctly so, held that implications of nonconfessing codefendants contained in such confessions are "presumably suspect and must be subjected to the scrutiny of cross-examination,"²⁰⁴ and are inadmissible unless the presumption is overcome. The state tried to overcome the presumption by "interlocking" the codefendant's confession with the defendant's confession, a theory that developed after *Bruton* and which received acceptance by a plurality of the Court in *Parker v. Randolph*.²⁰⁵ Here, however, while the confessions did "interlock" in many respects, they diverged significantly on facts that bore directly on the issues of intent and premeditation.²⁰⁶

If those portions of the codefendant's purported "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not so thoroughly substantiated by the defendant's own confession, the admis-

²⁰³ 106 S. Ct. 2056 (1986).

²⁰⁴ *Id.* at 2062-63.

²⁰⁵ 442 U.S. 62, 74-75 (1979).

²⁰⁶ 106 S.Ct. 2065.

sion of the statement poses too serious a threat to the accuracy of the verdict to be countenanced.²⁰⁷

Finally, in *New Mexico u. Earnest*,²⁰⁸ and *Gibson v. Illinois*,²⁰⁹ the Court again briefly addressed the substantive use against a defendant of a nontestifying codefendant's confession. In *Earnest*, the New Mexico Supreme Court had reversed the defendant's convictions for murder, conspiracy and other offenses, where a nontestifying codefendant's custodial confession was substantively admitted at trial against *Earnest*.²¹⁰ Purporting to simply apply *Roberts'* two-part test, the state court held that reliability for *Roberts'* second prong required a pretrial opportunity for cross-examination. The Supreme Court vacated the decision, per curiam, for further consideration in light of *Lee u. Illinois*.

Of note is the concurring opinion of four justices that indicates that the State should be given an opportunity to "overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating . . . sufficient 'indicia of reliability.'" ²¹¹

Similarly, in *Gibson v. Illinois*,²¹² the Court vacated the decision of the state court,²¹³ which had upheld all the defendants' convictions on the grounds that all three defendants had given "interlocking" confessions.²¹⁴ However, as to one defendant the confessions diverged on which two of the three defendants had sexually assaulted the victim. Significantly, the Court denied certiorari as to the one defendant who admitted participation in the assault.

F. SUMMARY

From a review of more than a century of Supreme Court decisions, a cohesive, coherent confrontation clause analysis is discernible, even if never clearly articulated by the Court.

First, if the prosecution seeks to offer any out-of-court declaration against an accused, upon objection, the trial judge should begin by looking at the *content* of the declaration. If it is a statement that depends for its reliability upon the memory, perception, or narration

²⁰⁷ *Id.* at 2064–65.

²⁰⁸ 106 S. Ct. 2734 (1986).

²⁰⁹ 106 S. Ct. 2886 (1986).

²¹⁰ *State v. Earnest*, 103 N.M. 95, 98–99, 703 P.2d 872, 875–76 (1985), *vacated*, 106 S. Ct. 2734 (1986).

²¹¹ 106 S. Ct. at 2735.

²¹² 106 S. Ct. 2886 (1986).

²¹³ *People v. Gibson*, 137 Ill. App.3d 330, 92 Ill. Dec. 727, 484 N.E.2d 858 (Ill. App. Ct. 1985).

²¹⁴ 484 N.E.2d at 862.

of the declarant, or if it was made after a motive for the declarant to distort truth may have arisen, it is the type of statement that requires confrontation clause analysis. If, on the other hand, the declaration is not offered for truth,²¹⁵ was made before a motive to fabricate may have existed,²¹⁶ if the declaration has independent evidentiary significance that would make it admissible regardless of whether the declarant testifies,²¹⁷ or the need for cross-examination is obviated by the defendant's own confession,²¹⁸ then the confrontation clause is not implicated and admissibility should be judged only by the forum's hearsay rules and the due process clause. In the first three situations, none of these sorts of statements depend for their reliability primarily upon the declarant's memory, narration, and perception, and, accordingly, do not require testing through cross-examination. In the latter situation, the defendant's own confession obviates the need for cross-examination.

Second, if the confrontation clause applies to the statement, the prosecution must either produce, or establish the unavailability of, the declarant.²¹⁹ If the witness appears and testifies, the confrontation clause is satisfied and admission of the witness' prior out-of-court statements is governed only by the forum's hearsay rules and the due process clause.²²⁰

Third, if unavailability is shown, even then the declaration is not admissible unless it has either been subjected to prior opportunity for full and effective cross-examination,²²¹ is a dying declaration,²²² or the declarant's unavailability is attributable to the defendant.²²³

Finally, any further challenges to use of the out-of-court declaration

²¹⁵ *Tennessee v. Street*, 471 U.S. 409 (1985).

²¹⁶ For example, business records, official records, and similar items. This is, I believe, the thrust of what the Court meant in *Roberts* when it said "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66.

²¹⁷ *Inadi v. United States*, 106 S. Ct. 1121 (1986); *Sallinger v. United States*, 272 U.S. 542 (1926); *Delaney v. United States*, 263 U.S. 586 (1924). Also included in this category would be declarations relevant only to collateral matters. *Dowdell v. United States*, 221 U.S. 325 (1911).

²¹⁸ *Lee v. Illinois*, 106 S. Ct. 2734 (1986); *Parker v. Randolph*, 442 U.S. 62 (1979).

²¹⁹ *E.g.*, *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

²²⁰ *Nelson v. O'Neil*, 402 U.S. 622 (1971); *California v. Green*, 399 U.S. 149 (1970).

²²¹ *Ohio v. Roberts*, 448 U.S. 56 (1980); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Mattox v. United States*, 156 U.S. 237 (1895); *Reynolds v. United States*, 98 U.S. 145 (1878).

²²² *Mattox v. United States*, 146 U.S. 140 (1892).

²²³ *Reynolds v. United States*, 98 U.S. 145 (1878); see *supra* notes 33-36.

should be governed by the due process clause and the forum's hearsay

It follows from this approach that astute defense counsel ought to frame their objections carefully to challenge out-of-court declarations on both hearsay and confrontation clause grounds, and, if a basis for doing so exists, due process grounds. A request for a limiting instruction might also be appropriate.²²⁵ Likewise, for the sake of clarity, trial judges should analyze and rule on each issue separately.²²⁶

111. THE RESIDUAL HEARSAY EXCEPTIONS AND THE CONFRONTATION CLAUSE IN THE MILITARY COURTS

A. INTRODUCTION

As should be apparent from the confrontation clause analysis, the Court has repeatedly stated that confrontation and hearsay analyses are not identical. Some declarations never implicate the confrontation clause, and their admissibility is governed primarily by the forum's hearsay rules. Furthermore, even those declarations that are subject to the confrontation clause's requirement for production or proof of unavailability, must still be admissible under the forum's evidence law. It should also be apparent that "the modification of . . . hearsay rules to create new exceptions . . . will often raise questions of compatibility with the defendant's constitutional right to confrontation."²²⁷ The residual hearsay exceptions²²⁸ daily provide fertile ground for constitutional clashes with the confrontation clause.

The history of the residual hearsay exceptions has been recounted many times, and need not be repeated in detail here.²²⁹ The legislative history takes on importance primarily if one enters the debate over whether courts should impose self-restraint over and above the literal

²²⁴ Cf. *Lee v. Illinois*, 106 S. Ct. 2735 (1986); *Dutton v. Evans*, 400 U.S. 74 (1970); *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Kirby v. United States*, 174 U.S. 47 (1899); *Mil. R. Evid.* 403.

²²⁵ See Note, *Inculpatory Declarations*, *supra* note 9, at 965–66 n.10.

²²⁶ This article does not explore the issue, discussed elsewhere, of whether there is an even higher confrontation standard required by military justice. See *Holmes*, *supra* note 14, at 87–90.

²²⁷ *California v. Green*, 399 U.S. at 156.

²²⁸ *Fed. R. Evid.* 803(24), 804(b)(5); *Mil. R. Evid.* 803(24), 804(b)(5).

²²⁹ *Grant*, *supra* note 10, at 78–81; *Holmes*, *supra* note 14, at 21–25; *Imwinkelreid*, *supra* note 10, at 247–52; *Lewis*, *supra* note 10, at 102–11; *Sonensheim*, *supra* note 10, at 868–76; *Yasser*, *supra* note 10, at 587–94; Note, *Residual Exceptions*, *supra* note 11, at 688–94; Note, *Catchall Hearsay Exceptions*, *supra* note 10, at 1362–64.

language of the rules, applying the exceptions only in “extraordinary” or “exceptional” cases,²³⁰ or whether, as a matter of statutory construction, courts ought only to apply the rules’ “clear” and “unambiguous” language.²³¹ For purposes of discussion, this article accepts the rules literally. As we shall see, however, the courts have sometimes given insufficient analysis to what the rules require.

The military residual hearsay exceptions are taken verbatim from the federal rules. Military Rule of Evidence 803(24) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Military Rule of Evidence 804(b)(5) is identical, except that it requires, as do the other exceptions of M.R.E. 804, that the declarant be unavailable. Thus, under both rules, there are five prerequisites for a declaration’s exception from the general hearsay rule:²³² 1) The declaration must possess circumstantial guarantees of trustworthiness equivalent to the “foregoing” exceptions; 2) It must be offered as evidence of a material fact; 3) It must be the most probative evidence available with reasonable effort on the point for which it is

²³⁰ *E.g.*, Grant, *supra* note 10; Lewis, *supra* note 10.

²³¹ *E.g.*, Imwinkelreid, *supra* note 10; Yasser, *supra* note 10.

²³² As with all evidence offered under Mil. R. Evid. 803 or 804, the fact that a declaration meets the requirements of the exception does not mean that the declaration is admissible, only that it is *not excluded* by the hearsay rule. The evidence may still be subject to challenge on confrontation clause, due process, or other constitutional, procedural, or evidentiary grounds.

offered; 4) Introduction must serve the interests of justice; 5) Appropriate prior notice must be given.

This article focuses only on the first three of these requirements. The notice requirement, while important to fundamental notions of fairness and due process, does not directly implicate the confrontation clause, and the “interests of justice” test, to the extent that it means that the evidence must be admissible under the confrontation clause, has been addressed in Part II, above.

1. Equivalent Circumstantial Guarantees of Trustworthiness.

The language of the residual hearsay exceptions plainly indicates that there are two aspects to this requirement. First, the circumstantial guarantees of trustworthiness are to be measured against the *foregoing* exceptions. Thus, the plain language of the rules suggest that a statement offered under Rule 803(24) ought to have the equivalence of its guarantees of trustworthiness measured *only* against the sort of trustworthiness guaranteed by Rules 803(1) through (23). Similarly, a statement offered under Rule 804(b)(5) ought to be tested only against the comparable trustworthiness of the other Rule 804 exceptions.

Second, the guarantees of trustworthiness should be equivalent, *i.e.*, possess characteristics similar to the statements that are admissible under the “foregoing” exceptions.

Article III courts have generally taken one of two approaches to this requirement. Some courts look only to the circumstances at the time the statement was made.²³³ Others consider extrinsic factors as well, such as the existence of corroboration,²³⁴ and the availability of the declarant to testify at trial.²³⁵ While some authors argue for a broad interpretation of the rules,²³⁶ both logic and statutory construction support the view that the trustworthiness of a statement offered under the residual exceptions should be judged only by the circumstances that existed when the statement was made.

First, historically the presumed reliability of hearsay exceptions focused on the circumstances under which the statement was made. The main vice of hearsay is the inability to cross-examine the declarant when the statement is made. Wigmore, one not known for placing restrictions on the use of hearsay, states that the historical

²³³The leading proponent of this view is *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

²³⁴*E.g.*, *United States v. Ward*, 552 F.2d 1080 (5th Cir. 1977).

²³⁵*E.g.*, *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976).

²³⁶*Supra* note 231.

basis for trustworthiness is found in the circumstances under which the statement was made.²³⁷ Likewise, Judge Weinstein, also an advocate for expansive use of hearsay, states that in order to determine how much weight should be given to the declarant, courts should examine the circumstances that existed “when the declarant *made the Statement*”²³⁸ Examination of the federal and military hearsay rules further confirms this view. Each of the exceptions depend for their assumed reliability on the circumstances at the time the declaration was made.²³⁹

Second, consideration of extrinsic factors in determining reliability is inconsistent with the implicit assumptions made by Congress in adopting the federal rules. Those in favor of an expanded use of hearsay usually argue that the assumptions of reliability of many of the traditional exceptions are empirically questionable. Therefore, the argument goes, there is little justification for not admitting evidence of equal probativeness.²⁴⁰ Whatever may be the merits of such arguments, Congress and the Advisory Committee clearly rejected this approach, retaining the perhaps imperfect assumptions of the common law’s class exceptions:

Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards has been impressively advocated. Weinstein, *The Probative Force of Hearsay* [citation omitted]. . . . The Advisory Committee has rejected this approach . . . as involving too great a measure of judicial discretion. . . . The approach to hearsay in these rules is that of the common law.²⁴¹

Third, consideration of extrinsic factors is inconsistent with other aspects of the residual exceptions. Both M.R.E. 803(24) and 804(b)(5) require that the statement offered be the most probative evidence reasonably available. To consider corroboration as an element of equivalent trustworthiness is inconsistent with this requirement. The more “trustworthy” a statement becomes because of corroboration, the less necessary would be its admission.²⁴²

²³⁷Wigmore, *supra* note 84, §§ 1420, 1422.

²³⁸Weinstein, *supra* note 85, at 333.

²³⁹Examples include excited utterances and business records.

²⁴⁰*E.g.*, Imwinkelreid, *supra* note 10, at 262–64.

²⁴¹Advisory Committee Notes, *supra* note 147, at 303.

²⁴²Sonensheim, *supra* note 10, at 879–80. The only hearsay exception that looks to corroboration is Mil. R. Evid. 804(b)(3) when the evidence is offered by the defendant to exculpate himself.

Fourth, the availability of the declarant at trial is irrelevant under Rule 803(24). The main vice of hearsay is the inability to cross-examine the statement *when made*.²⁴³ That vice is not cured by the witness' later availability at trial.²⁴⁴ Moreover, hearsay that is admissible under M.R.E. 803(1) through (23) does not depend for its reliability on the availability of the declarant. Such evidence must possess reliability other than the witness' availability.²⁴⁵ Rather, the reliability of statements within one of those exceptions arises from the circumstances under which the statement was made.

Accordingly, the trustworthiness of a statement offered under the residual hearsay exceptions should be judged by the circumstances at the time the statement was made.

2. Most Probative Evidence of a Material Fact.

These two requirements are closely related. There is no indication that Congress intended a special definition of "material." Article III courts have agreed that the language means only that the evidence must be relevant under the definition in Rule 401.²⁴⁶

The requirement that evidence be "more probative" contemplates that evidence having a greater tendency in logic to prove a fact is more probative than evidence with a lesser tendency to do so.²⁴⁷ Direct evidence is "more probative" than circumstantial evidence. Testimonial evidence is more probative than hearsay.²⁴⁸

B. DECISIONS OF THE MILITARY COURTS

Since the adoption of the Military Rules of Evidence, military courts have interpreted the military residual hearsay exceptions in more than twenty-five cases. This part of the article will examine the courts' applications of the residual hearsay exceptions and the confrontation clause.

²⁴³*Id.*

²⁴⁴The witness' availability may, however, cure any confrontation clause problems with using a prior out-of-court statement. *See California v. Green*, 399 U.S. 149 (1970); *supra* text accompanying notes 89–105.

²⁴⁵Note, *Catchall Hearsay Exceptions*, *supra* note 10, at 1376–77.

²⁴⁶Fed. R. Evid. 401; Mil. R. Evid. 401; *e.g.*, *Huffv. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

²⁴⁷*Sonensheim*, *supra* note 10, at 889–90. For a discussion of the "reasonable efforts" requirement, *see* Holmes, *supra* note 14, at 65–67.

²⁴⁸Is hearsay that falls within a "firmly rooted" hearsay exception, *see* *Ohio v. Roberts*, 448 U.S. 56 (1980), "more probative" than hearsay, *e.g.*, residual hearsay, not falling within a "firmly rooted" exception?

*United States v. Barnes*²⁴⁹ is a curious case to begin our examination because the court applied a residual hearsay exception to evidence that was not even hearsay. In *Barnes*, the accused was convicted for an assault. At trial, the victim could not remember the details of the assault. He testified, however, over objection, that at a time in the past, while in the hospital, he did remember certain details that tended to implicate the accused. Accordingly, the witness was not testifying to any out-of-court declaration. He was testifying from present memory concerning a past event, *i.e.*, what he remembered while in the hospital. Nevertheless, the court ruled that the testimony was not admissible under M.R.E. 803(24) because it lacked circumstantial guarantees of trustworthiness, but that its admission was harmless error. No confrontation clause issue was involved in the case since the victim testified.

The first case that actually presented an issue of residual hearsay was *United States v. Ruffin*.²⁵⁰ The accused was convicted of sodomy with his stepdaughter, committed on February 21, 1981, and lewd and lascivious acts with the same stepdaughter, committed "at divers times" between two years and six months earlier. On February 21, 1981, military police responded to a disturbance call at Ruffin's quarters. An older stepdaughter told the military police that she had heard her sister crying in the bathroom. When she tried to enter, Ruffin had come out of the bathroom, chased and assaulted the older girl. Two days later the younger girl gave a sworn statement to the investigators, in which she alleged that her stepfather had committed sodomy on her in the bathroom, and had sexually molested her when the family was living in California and Texas—a period determined by other evidence to have been between March 1979 and August 1980. Ruffin confessed to the bathroom sodomy incident. Both girls refused to testify at trial, and the younger girl's written statement was admitted, over objection, under Military Rule of Evidence 804(b)(5). The Air Force Court of Military Review upheld the admission.

The court's analysis, however, is faulty on both confrontation and hearsay grounds. Concerning the confrontation clause, the girl's statement was clearly accusatory. Made two days after the February 1981 incident, it was not admissible, concerning either the bathroom incident or the previous alleged sexual acts, under Military Rule of

²⁴⁹ 12 M.J. 614 (N.M.C.M.R. 1981), *aff'd on other grounds*, 15 M.J. 121 (C.M.A. 1983).

²⁵⁰ 12 M.J. 952 (A.F.C.M.R.) petition denied, 13 M.J. 494 (C.M.A. 1982).

Evidence 803(1) or (2).²⁵¹ The court, citing *United States v. Blake*,²⁵² held simply that the confrontation clause was satisfied because it was certain that the girl made the statement, and there was circumstantial evidence to support the truth of the statement.²⁵³

This analysis is wholly lacking in either factual or legal basis. First, *Blake* was decided pre-Roberts, based on the Seventh Circuit's analysis of *Dutton*. The *Ruffin* court failed to even mention Roberts' general requirement that if the prosecution seeks to introduce an out-of-court statement against the accused it "must either produce, or demonstrate the unavailability of, the declarant."²⁵⁴ Nor did the court address Roberts' second prong.

Second, while the portion of the girl's statement related to the bathroom sodomy incident might have passed constitutional muster since *Ruffin* had confessed to the offense,²⁵⁵ there was absolutely no constitutionally sufficient substitute for cross-examination concerning the earlier sexual acts. Unless there was evidence that the girl's silence was procured by the accused,²⁵⁶ the latter portion of the statement should have been excluded on confrontation clause grounds.

The court's residual hearsay analysis is equally faulty on a number of grounds. Most of the flaws in analysis stem from the court's treatment of the written statement as a single out-of-court declaration, rather than separately analyzing each out-of-court declaration made within the written document.²⁵⁷

First, the court ruled that the girl's statement was the most probative evidence available. This might, perhaps, be true concerning the earlier sexual incidents, but not concerning the bathroom sodomy

²⁵¹Had it been so admissible, it would have been an *ante litem motam* statement, within a "firmly rooted hearsay exception. Under our analysis, the confrontation clause would not have applied.

²⁵²607 F.2d 779, 786 (7th Cir. 1979).

²⁵³12 M.J. at 955.

²⁵⁴448 U.S. at 65.

²⁵⁵This would have been the analytical equivalent of an "interlocking" confession. Cf. *Lee v. Illinois*, 106 S. Ct. 2056 (1986); *supra* notes 203-07.

²⁵⁶Cf. *Reynolds v. United States*, 98 U.S. 145 (1878). In *Ruffin*, the court, without stating its reasons, stated: "[W]e can only conclude that K.L.D.'s refusal to testify was motivated by a desire to help her step-father." 12 M.J. at 955. (emphasis added). Leaving aside the constitutional irrelevance of the court's subjective belief, absent proof of complicity by the defendant in the witness' unavailability, the presumption of innocence should place the burden of the turncoat witness on the prosecution, not the defense. *Graham*, *supra* note 2, at 121.

²⁵⁷*Gibson v. Illinois*, 106 S. Ct. 2886 (1986), and *Lee v. Illinois*, 106 S. Ct. 2056 (1986), clearly indicate that hearsay statements must be carefully analyzed and not treated merely as a unified whole. See *supra* text accompanying notes 203-07, 212-14.

incident to which Ruffin had confessed.²⁵⁸ Surely, if the residual exceptions' language means anything, the confession of an accused is "more probative" than residual hearsay.

Second, as evidence of circumstantial guarantees of trustworthiness, the court cited the fact that the statement was given only two days after the February incident. Concerning the February incident, this is an insufficient guarantee. As noted, the statement did not fall within M.R.E. 803(1) or (2). Two days is ample time to develop deliberate or conscious misrepresentation.²⁵⁹ Moreover, even if the temporal proximity to the sodomy incident was probative of reliability, it certainly was no guarantee of reliability concerning alleged incidents that happened over six months earlier.

Third, the court found a circumstantial guarantee of reliability in the fact that other evidence established that the girl and her family had lived in Texas and California. This corroboration is irrelevant to reliability for residual hearsay purposes, for the reasons previously noted.²⁶⁰ Moreover, even if relevant, the minimal corroboration of collateral facts is wholly insufficient to guarantee reliability of the inculpatory portions of the statement.²⁶¹

The first Army case to deal with residual hearsay was *United States u. Whalen*.²⁶² *Whalen* presented a case factually similar to *California v. Green*²⁶³ and *Nelson u. O'Neil*.²⁶⁴ A soldier named Rodriguez had given a custodial statement that implicated Whalen in drug offenses. At trial, Rodriguez repudiated the contents of the statement. The prosecution offered Rodriguez' pretrial statement, both as a prior inconsistent statement for impeachment, and substantively against Whalen under M.R.E. 803(24).

Initially, the court properly held that there was no confrontation clause issue since Rodriguez testified and was subject to cross-examination.²⁶⁵ Admissibility in *Whalen* was governed solely by the

²⁵⁸In this case, since the more probative evidence was Ruffin's own confession, this flaw was harmless. Nevertheless, the court's summary treatment of the girl's statement highlights the need for careful analysis and application of the residual hearsay requirements.

²⁵⁹The court's reference to these factors is an implicit use of the "near miss" theory: declarations that don't quite meet the requirements of admission under one of the enumerated exceptions should be admitted as residual hearsay. This theory has been justifiably criticized elsewhere. *E.g.*, Sonensheim, *supra* note 10, at 885-88; Note, *Catchall Hearsay Exceptions*, *supra* note 10, at 1376.

²⁶⁰See *supra* notes 234-45 and accompanying text.

²⁶¹*Cf.* Lee v. Illinois, 106 S. Ct. 2056 (1986).

²⁶²15 M.J. 872 (A.C.M.R. 1983).

²⁶³See *supra* notes 89-91 and accompanying text.

²⁶⁴See *supra* notes 170-71 and accompanying text.

²⁶⁵15 M.J. at 877.

forum's hearsay rules. Unfortunately, the court's residual hearsay analysis was not equally well done.

First, the court concluded that the ability to cross-examine at trial supplied the requisite guarantees of trustworthiness. *Green* and *O'Neil*, however, make clear that the confrontation clause analysis and hearsay analysis are entirely separate. While the Constitution does not *prohibit* substantive use of prior inconsistent statements where the declarant testifies and is subject to cross-examination, whether such statements *should* be substantively admissible is a policy question for the forum's evidence rulemakers.²⁶⁶ In adopting Federal Rule of Evidence 801(d)(1)(A),²⁶⁷ Congress made the policy decision to limit the substantive admissibility of prior inconsistent statements to ones given "under oath . . . at a trial, hearing, or other proceeding, or in a deposition." Congressional—or, in the case of the Military Rules of Evidence, presidential—judgment having thus been exercised, such policy choices should not be overridden by the courts through use of the residual hearsay exceptions. *Whalen* presented nothing more than a typical turncoat witness situation, not an uncommon occurrence in the workaday world of criminal trials. Surely it cannot be suggested that this was a "new and . . . unanticipated situation" that Congress and the President did not consider. Yet, Congress and the President chose to limit the substantive use of prior inconsistent statements to those given in a trial-like setting. That policy choice is not one to be casually tossed aside for the sake of expediency.

Second, *Whalen* also upheld admission of the statement on the dual "near misses" of being a statement against penal interest under Rule 804(b)(3) and as prior testimony under Rule 801(d)(1)(A). The latter "near miss" is paralogistic for the reasons just given. Since the primary difference between Rodriguez' statement and Rule 801(d)(1)(A) evidence is the opportunity for cross-examination of the declarant when the statement is made, it seems disingenuous in the extreme to conclude that a statement lacking that fundamental guarantee is of "equivalent" trustworthiness.

The former theory is inadequate because the exception only applies, as a matter of necessity, because the declarant is unavailable. But, in *Whalen*, Rodriguez testified fully.²⁶⁸ Further, the use of the excep-

²⁶⁶ *California v. Green*, 399 U.S. at 155 ("Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder.").

²⁶⁷ Mil. R. Evid. 801(d)(1)(A) is identical.

²⁶⁸ Mil. R. Evid. 803(24) is limited to statements having circumstantial guarantees of trustworthiness equivalent to the "foregoing exceptions." It was both logically and legally incorrect for the court to look to Mil. R. Evid. 804(b)(3) to find trustworthiness. If the statement was offered as equivalent to that exception, it should have been offered under M.R.E. 804(b)(5), which requires unavailability of the declarant.

tion to justify reliability under the residual hearsay rules is also disingenuous given the great suspicion with which custodial statements of accomplices are viewed.²⁶⁹

Finally, the court found sufficient circumstantial guarantees of trustworthiness because the hearsay statement was made shortly after the incident, reduced to writing and sworn, after a rights advisement. The same factors are often present with accomplice statements, however, and the court failed to explain how these factors negated the inherent suspicion with which accomplice statements are viewed.²⁷⁰

The Army court next considered the residual exceptions in *United States v. King*.²⁷¹ At King's trial for sodomy and conduct unbecoming an officer, the prosecution introduced, as substantive evidence under Rule 803(24), three pretrial statements made by the "victim" to CID agents. The "victim," who had since married the accused, testified that she made her earlier statements because she thought that she was pregnant by her father, and had sought to "pin" the paternity on King so he would marry her and take her out of an abusive home environment.

The court correctly ruled that the trial court erred in admitting the statements.²⁷² While the court reached the correct result, much of the language used to distinguish *Whalen* is both troubling and unpersuasive. The court found the statements in *King* insufficiently trustworthy because they had been given during "a police house interrogation" and the "victim" had a motive to falsify.²⁷³ The court offered no explanation for why the same rationale did not apply to *Whalen*.²⁷⁴ The court sought to distinguish *Whalen* on the ground that the statements in *Whalen* were corroborated.²⁷⁵ Corroboration under Rule 803 is irrelevant, however, and many of the "corroborating" factors in *Whalen* were neutral, as equally capable of implicating Rodriguez as Whalen.

*United States v. Thornton*²⁷⁶ involved the admission under Rule 804(b)(5) of a statement made at the request of the staff judge advocate

²⁶⁹The court also offered no explanation for why admission was not precluded under Mil. R. Evid. 803(8)(B). *But see* *United States v. Hines*, 23 M.J. 125, 136 (C.M.A. 1986).

²⁷⁰*See supra* note 204 and accompanying text.

²⁷¹16 M.J. 990 (A.C.M.R. 1983).

²⁷²No confrontation issue was present since the "victim" fully testified.

²⁷³16 M.J. at 993.

²⁷⁴Rodriguez had been "caught in the act" with Whalen and had ample motive to minimize his own involvement in the drug offenses while exaggerating Whalen's.

²⁷⁵16 M.J. at 993.

²⁷⁶16 M.J. 1011 (A.C.M.R. 1983).

by the victim of an assault, allegedly inflicted by the accused. The victim, a German national, was unavailable at trial. The court properly held that the statement was not admissible, either under Rule 804(b)(5) or the confrontation clause. Although the defense had an opportunity to cross-examine the victim at the Article 32 hearing, the *Thornton* court **took** a narrow view of the adequacy of such cross-examination as a sufficient substitute for cross-examination at trial, given that Article 32 hearings are primarily a discovery tool.²⁷⁷ Additionally, the statement was given at the request of the staff judge advocate and thus was arguably *proscribed* by Rule 803(8)(B).²⁷⁸

In *United States v. Crayton*,²⁷⁹ the military judge admitted under Military Rule of Evidence 803(24) a sworn statement given to OSI agents by Crayton's stepdaughter, in which she alleged that Crayton had committed various acts of sodomy upon and with her. At trial, the girl recanted, claiming that she made up the allegations because she hated her stepfather and resented her mother having married him. Her mother and brother testified that the girl was untruthful. The accused admitted to fondling the girl on two occasions, but denied having done anything further.

Initially, the court should not have reached the residual hearsay issue since it was apparent from the findings by exceptions and substitutions that the court members had not credited the girl's pretrial statement.²⁸⁰ Nevertheless, in *dicta*, the court stated that the military judge had erred in admitting the statement, primarily because of the absence of **corroboration**.²⁸¹ Once again, corroboration should be irrelevant to whether residual hearsay under Rule 803(24) possesses guarantees of trustworthiness equivalent to its foregoing exceptions. Furthermore, as also previously noted, the President specifically limited the substantive use of prior inconsistent statements, and his judgment should be respected.

In *United States v. Garrett*,²⁸² the court properly held that the custodial confession of a nontestifying accomplice was improperly admitted against the accused as substantive evidence under Rule 804(b)(5).

²⁷⁷*Id.* at 1014; *cf.* *Barber v. Page*, 390 U.S. 719, 725 (1968). Note that the result in *Thornton* was not constitutionally compelled. *Cf.* *Ohio v. Roberts*, 448 U.S. 56 (1980); *accord*, *United States v. Hubbard*, 18 M.J. 678 (A.C.M.R.), *petition granted*, 19 M.J. 216 (C.M.A. 1984).

²⁷⁸*Id.*

²⁷⁹17 M.J. 932 (A.F.C.M.R.), *petition denied*, 19 M.J. 57 (C.M.A. 1984).

²⁸⁰*Crayton* was convicted only of assault consummated by a battery by fondling the girl. 17 M.J. at 934. Accordingly, the court's discussion of the residual hearsay issue is *dicta*.

²⁸¹*Id.*

²⁸²17 M.J. 907 (A.F.C.M.R. 1984).

The portions of the accomplice's statement that implicated the accused were collateral to the minimal culpability to which the accomplice confessed. Admission of the statement violated both M.R.E. 804(b)(5) and the confrontation clause.²⁸³

*United States v. White*²⁸⁴ represents the first detailed analysis that closely follows the one suggested here. In *White*, the accused was charged with making a false household goods claim, based on an alleged loss, during a permanent change of station, of some sterling silverware allegedly given to him by his mother. At trial, the prosecution introduced, under Military Rule of Evidence 804(b)(5), a written statement obtained from the mother by OSI agents that contradicted her son's story. At the time of trial, the mother did not testify because she was too ill to travel. The mother's statement was one ripe for testing by cross-examination. The mother was sixty-eight years old, in ill health, and the statement depended for its reliability on her ability to recall events that allegedly occurred nearly ten years earlier.²⁸⁵ Accordingly, under the constitutional analysis, the statement should not have been admitted in the absence of prior cross-examination. The court did not reach the issue,²⁸⁶ because it determined, properly so, that the statement should not have been admitted under the residual exception.

Both the military judge and the reviewing court focused their analysis on the equivalent circumstantial guarantees of trustworthiness. The military judge found such guarantees in "the totality of the circumstances" and the trial counsel's "near miss" of Rule 804(b)(4). The court of review found insufficient guarantees based on conflicting opinion testimony as to the mother's reliability, the absence of specific corroboration, the dependence of the statement on the declarant's memory, and the absence of an oath.²⁸⁷ In addition, the evidence also should have been excluded because it was not the most probative evidence available. An acquaintance of the accused testified that the accused had "stated 'very bluntly' that no silverware ever existed."²⁸⁸ Yet, this direct evidence was one of the bits of evidence used by the military judge to find "corroboration," and highlights the internal

²⁸³*Id.* at 911.

²⁸⁴17 M.J. 953 (A.F.C.M.R. 1984).

²⁸⁵The accused claimed to have received the silver as a gift from his mother in 1971.
²⁸⁶17 M.J. at 960-61. The military judge had held that the confrontation clause was satisfied because other circumstantial evidence corroborated the statement, including the OSI agent's testimony concerning the woman's demeanor when giving the statement. *Id.* at 955.

²⁸⁷*Id.* at 959.

²⁸⁸*Id.*

conflict created by using corroboration as a means of establishing the “trustworthiness” of residual hearsay.

*United States v. Powell*²⁸⁹ was the first residual hearsay case to reach the Court of Military Appeals, and was another case of a turncoat witness. The declarant made a custodial statement to CID agents in which she stated that she had received heroin from the accused. She testified at trial,²⁹⁰ but recanted the statement. Her pretrial statement was then admitted as substantive evidence against the accused under Rule 803(24). Both the court of review and the Court of Military Appeals affirmed. The Army court subjectively found the declarant’s recantation to be **unbelievable**.²⁹¹ The court also found the prior statement sufficiently trustworthy based on corroboration and the defendant’s opportunity to cross-examine at trial. The Court of Military Appeals affirmed for similar reasons, but cautioned against “an overly mechanistic application of our holding today to other cases.”²⁹²

The disposition of the case is troubling in several respects. First, the Court of Military Appeals’ decision focused only on the equivalent circumstantial guarantees of the trustworthiness **requirement**.²⁹³ Another witness had testified, however, that when he asked the accused if he had given “the stuff” to Hernandez, the accused admitted giving Hernandez “a piece.” While Hernandez’ statement and the accused’s admission were both direct evidence of possession and transfer, is not the latter **non-hearsay**²⁹⁴ “more probative” than the recanted, presumptively unreliable, custodial, residual hearsay statement of an accomplice?

Second, at least as concerns prior inconsistent statements offered substantively under Military Rule of Evidence 803(24), the opportunity for cross-examination at trial should be irrelevant for determining admissibility. Like corroboration, later cross-examination of the declarant is irrelevant to determining the existence of trustworthiness equivalent to the “foregoing exceptions” of Rule 803(24)—all of which focus on the circumstances under which the statement was made.

Finally, again, where the President has specifically chosen to limit substantive use of prior inconsistent statements to those given under

²⁸⁹ 17 M.J. 975 (A.C.M.R. 1984), *aff’d*, 22 M.J. 141 (C.M.A. 1986).

²⁹⁰ Accordingly, there was no confrontation clause issue.

²⁹¹ 17 M.J. at 977 (“Finding Hernandez’s explanation for changing her story to be unbelievable, *we reject it.*”) (emphasis added).

²⁹² 22 M.J. at 145.

²⁹³ This may have been because the accused appears to have conceded the other four requirements. *See* 22 M.J. at 143.

²⁹⁴ Admissions of a party are not hearsay. Mil. R. Evid. 801(d)(2)(A).

oath and subject to cross-examination in a prior proceeding, the courts should respect that policy choice. In *Powell*, the court specifically recognized that the statement did not fit within Rule 801(d)(1)(A),²⁹⁵ yet upheld admission nonetheless.

In *United States v. Arnold*,²⁹⁶ the accused was convicted of indecent liberties with his teenage daughter. The daughter made three pretrial statements about the incident, all of which were admitted under Rule 803(24); one orally to a school counselor the morning after the incident, one orally to a school nurse whom the counselor contacted, and one, sworn and in writing, to CID agents later in the day. The first statement was properly admitted as an excited utterance, under Rule 803(2), without a showing of unavailability. The court properly found the latter two statements inadmissible under M.R.E. 803(24), however—without ever addressing the confrontation clause—because “the government utterly failed to show unavailability.”²⁹⁷

Arnold is most noteworthy for the court’s astute suggestion that Rule 803(24) might never be properly invoked to admit “the written out-of-court statement of a victim-witness, who is available.”²⁹⁸ The court noted that fifteen of the “foregoing” twenty-three exceptions deal with some sort of record-keeping.²⁹⁹

Three others involve reputation testimony where the declarant of the opinion must be present and subject to cross-examination.³⁰⁰ The court also claimed that three other exceptions “pertain to impressions, intent and memory and the declarant must be present and subject to cross examination,” and that “[o]nly two, excited utterances and medical diagnoses, permit the use of a declarant’s personal out-of-court statement.”³⁰¹ While the court is technically incorrect in its reading

²⁹⁵ 17 M.J. at 976. In dicta, the court stated that Article 32 testimony would qualify for admission under Mil. R. Evid. 801(d)(1)(A).

²⁹⁶ 18 M.J. 559 (A.C.M.R. 1984), *petition granted*, 20 M.J. 129 (C.M.A. 1986).

²⁹⁷ 18 M.J. at 561.

²⁹⁸ *Id.*

²⁹⁹ Mil. R. Evid. 803(6)–(18), (22), and (23). This, of course, is what provides the trustworthiness sufficient to allow admission without producing the declarant for cross-examination.

³⁰⁰ Mil. R. Evid. 803(19)–(21). The court’s use of these three exceptions to make its point is slightly misplaced. While a witness must be available to testify as to reputation where reputation is admissible, *see* Mil. R. Evid. 608(a), the *foundation* for the witness’ reputation testimony, by definition, involves hearsay by declarants, *e.g.*, the accused’s community, who need not be shown to be unavailable. Reputation evidence necessarily requires the witness to be asked what he or she has heard spoken by an out-of-court declarant.

³⁰¹ 18 M.J. at 561.

of Rule 803,³⁰² the court does seem to sense that there is some common denominator among the “foregoing” exceptions that simply is not present with out-of-court, accusatory, *post litem motam* statements made—often in the jailhouse—by accomplices and recalcitrant or turncoat witnesses. There is a common denominator—the circumstances extant at the time the statement was made are such that the likelihood of deliberate or conscious misrepresentation is remote.

In *United States v. Hines*,³⁰³ the factual setting was a familiar one: uncross-examined statements made by the accused’s dependents, alleging incestuous conduct by the accused, admitted at trial after the dependents refused to testify. The accused had made a full confession to all but two offenses. The three judges agreed in the result, upholding the admission under Military Rule of Evidence 804(b)(5) of pretrial sworn statements made to investigators by the accused’s wife and two stepdaughters. Two of the judges affirmed, stating simply that “[t]he circumstantial guarantees of trustworthiness that were present in *Ruffin*³⁰⁴ are also present here.”³⁰⁵ The Court of Military Appeals reversed, in part, holding that portions of the ex parte statements which were not corroborated by Hines’ confession had been improperly admitted.³⁰⁶ Initially, the court recognized that the con-

³⁰²Neither Mil. R. Evid. 803(1) nor 803(3) require the presence of the declarant. *E.g.*, *Mutual Life Insurance Co. v. Hillmon*, 145 U.S.285 (1892); *see also supra* note 297. Of the twenty-three “foregoing” exceptions to Mil. R. Evid. 803(24), only Rule 803(5) (past recollection recorded) requires the presence of the declarant at trial to lay the foundation for admission of the recorded recollection, (lack of present recollection, lack of present recollection refreshed, etc.). This exception is grouped with the others under Rule 803 solely as a matter of choice. *See* Advisory Committee Notes, *supra* note 147, at 312.

³⁰³18 M.J. 729 (A.F.C.M.R. 1984), *rev’d in part*, 23 M.J. 125 (C.M.A. 1986).

³⁰⁴*See supra* notes 250–61. One judge embarked on what he termed “a *de novo* analysis of [Mil. R. Evid. 804(b)(5)’s] intent.” 18 M.J. at 730. This judge concluded that the “equivalent guarantees of trustworthiness” standard was, after *Ohio v. Roberts*, the same as the test for confrontation clause admissibility. 18 M.J. at 735. He then concluded that the residual exceptions were intended to be a “dramatic departure from the common law hearsay concepts,” and that the rules should be read literally. His first conclusion is untenable, simply as a matter of logic. As noted in Part II, the Supreme Court has repeatedly stated that confrontation clause and hearsay rule analyses are not equivalent. Evidence that may pass muster under one might not under the other. It logically follows that some residual hearsay might have circumstantial trustworthiness equivalent to a foregoing hearsay exception and yet not meet the strictures of the confrontation clause. The judge’s second conclusion would certainly surprise the Advisory Committee. *See supra* note 239 and accompanying text. The final conclusion, while perhaps correct, was then ignored in the remainder of the opinion; the judge never explained how residual hearsay was “more probative” than the accused’s own confession. The remainder of the opinion focused only on the equivalency, in the judge’s view, of the trustworthiness of the evidence. The remaining judges concurred only in the result.

³⁰⁵18 M.J. at 774.

³⁰⁶23 M.J. 125 (C.M.A. 1986).

frontation clause and the hearsay rules require separate analyses.³⁰⁷ Beginning with the confrontation clause analysis, the court first concluded that the government had demonstrated unavailability.³⁰⁸ The court then examined alternative theories offered to meet confrontation clause objections for what were plainly accusatory, uncross-examined statements.

First, on the facts of the case, the court refused to conclude that the witnesses' "unavailability" was attributable to the accused.³⁰⁹ Second, the court examined the circumstances under which the statements were made, and concluded that, "the investigative process was not equivalent to the judicial process," and did not provide a substitute for cross-examination.³¹⁰ Finally, however, the court held that the findings of guilty could stand on all but two specifications, because Hines' confession admitted all but two of the charged offenses.³¹¹

The court's confrontation clause analysis is consistent in result with the proposed analysis, but troubling in its methodology. On the one hand, the court recognized the very limited substantive use of accusatory, uncross-examined hearsay that has been sanctioned by the Supreme Court:

Despite its occasional use of sweeping language, the Supreme Court itself has been quite cautious in applying reliability analysis to specific facts. Many of the cases have dealt with prior recorded testimony. In these cases, where the accused were not denied representation by counsel at the prior hearings, where the witnesses were cross-examined, and where they were shown to be unavailable at the subsequent hearings, the Court has been satisfied with the indicia of reliability of prior testimony and has permitted its admission. Where any of these factors have been absent, at least in the context of prior recorded testimony, the result has been the reverse [citations omitted].³¹²

³⁰⁷*Id.* at 127–28.

³⁰⁸*Id.* at 133.

³⁰⁹*Id.* at 131–33; see *Reynolds v. United States*, 98 U.S. 145 (1878); *supra* notes 33–36 and accompanying text.

³¹⁰23 M.J. at 137.

³¹¹*Id.* at 138. The court did not explain whether this result was because admission of the dependents' statements was harmless error, or whether the confession sufficiently "interlocked with the statements so that the statements were properly admitted on the confessed allegations. The distinction is important because if the court viewed the statements as substantially admissible in the first instance, the court's discussion of waiver (*id.* at 131–33) and the reliability of ex parte statements to law enforcement officials (*id.* at 135–37) is dicta.

³¹²*Id.* at 130.

Yet, instead of following this lead and simply ruling that accusatory, uncross-examined statements by an unavailable witness are inadmissible under the confrontation clause, the court appears to have adopted a case-by-case approach, examining the circumstances under which the ex parte statements are made to determine if the circumstances afford the equivalent of **cross-examination**.³¹³

In support of this approach, the court cited several lower federal cases where uncross-examined accusatory statements were admitted.³¹⁴ It then proceeded to distinguish these cases, however, as “justified either on the basis of necessity or waiver, or . . . some [other] form of confrontation,” and concluded that “the investigative process was not the equivalent of the judicial process, and we would not ordinarily expect it to be.”³¹⁵

Finally, the court’s decision is significant for its implicit recognition, consistent with *Lee v. Illinois*,³¹⁶ that an ex parte written statement cannot be treated as an undifferentiated whole. Rather, each declaration within the statement must be examined for admissibility.

Because the court concluded that the statements failed to meet confrontation clause standards, it never expressly decided whether the statements would have met the standards of Military Rule of Evidence 804(b)(5). Implicitly, however, the court found the statements insufficient as residual hearsay because the court “constitutionalized” the equivalent circumstantial guarantees of trustworthiness under Rule 804(b)(5), equating them with confrontation clause reliability:

Initially, we note that the constitutional requirement that the evidence be taken under circumstances bearing “indicia of reliability” appears on its face to be closely related to the evidentiary requirement that the evidence have “equivalent circumstantial guarantees of trustworthiness.” Since, to be admissible, residual hearsay statements have to pass both constitutional and evidentiary muster, we can see no harm in “constitutionalizing” this aspect of Mil. R. Evid. 804(b)(5).

³¹³*Id.* at 136–37.

³¹⁴*Id.* The Supreme Court has never adopted the position taken in some of these lower federal court cases that uncross-examined hearsay such as grand jury testimony satisfies the confrontation clause if the declarant is unavailable at trial. As noted elsewhere in this article, the Court has never sanctioned the use of accusatory hearsay unless the statement was a dying declaration, not admitted substantively for truth, supported by an “interlocking” confession, previously cross-examined, otherwise admissible, or the witness’ unavailability was attributable to the defendant.

³¹⁵*Id.* at 137.

³¹⁶*See supra* notes 206–07, and accompanying text.

Therefore, we agree with those courts that have construed these requirements to be equivalent.³¹⁷

The court's decision to equate residual hearsay reliability with confrontation clause standards is both unfortunate and analytically incorrect.

First, equating the standards flies in the face of the Supreme Court's repeated admonitions—specifically recognized in *Hines*³¹⁸—that the overlap between the confrontation clause and the hearsay rules is not complete or coextensive, and that the two rules require separate analysis.

Second, by equating the two separate standards, the court implicitly failed to recognize the different aspects of reliability protected by the confrontation clause (narration, memory and perception) and the hearsay rules (sincerity).

Third, “constitutionalizing” the residual hearsay rules imposes a higher standard of admissibility than required by the language of the rules. By their terms, Rules 803(24) and 804(b)(5) only require trustworthiness “equivalent” to their respective “foregoing” exceptions. As the Supreme Court has repeatedly noted, evidence may fall within the forum's hearsay rules, and yet fail to pass constitutional muster.³¹⁹ The practical significance of “constitutionalizing” Rules 803(24) and 804(b)(5) may be minimal since the Military Rules of Evidence, necessarily, apply only to criminal trials. Analytically, however, the court's approach, if adopted for the Federal Rules, would further foster a dichotomy between the rules of evidence in civil and criminal cases.

Again, in *United States v. Henderson*,³²⁰ the intermediate appellate court upheld admission of a pretrial statement by an allegedly molested and, at the time of trial, unavailable stepdaughter of the accused. The accused confessed to the act, and the only issue was sanity. Because the accused had confessed,³²¹ the opinion is noteworthy only for its failure to explain how the girl's statement was probative at all on the issue of sanity, or “more probative” than the accused's confession, and for its repetition of the erroneous view, stated in *Ruffin*,³²² that the confrontation clause is satisfied if it is shown that

³¹⁷ 23 M.J. at 134. As noted earlier, depending on one's reading of the holding in *Hines*, the language may be dicta. See *supra* note 311.

³¹⁸ 23 M.J. at 127–28.

³¹⁹ E.g., *Barber v. Page*, 390 U.S. 719 (1968); *supra* notes 75–78 and accompanying text.

³²⁰ 18 M.J. 745 (A.F.C.M.R.), *petition denied*, 19 M.J. 243 (C.M.A. 1984).

³²¹ See *supra* note 255 and accompanying text.

³²² See *supra* notes 250–54 and accompanying text.

the declarant actually made the statement and there are circumstantial guarantees of trustworthiness.³²³

*United States v. Harris*³²⁴ is on all fours with the approach to residual hearsay advocated in this article. A witness for the defense was impeached with a prior inconsistent stipulation that had been entered into by the witness at his own earlier trial. The trial judge in Harris' trial also admitted the document substantively against Harris, under Military Rules of Evidence 803(24). The court properly found admission of the statement to be error. More importantly, the court interpreted Rule 803(24) to refer only to the foregoing exceptions in Rule 803. Accordingly, it refused to consider that the stipulation had trustworthiness comparable to a statement against penal interest under Rule 804(b)(3). Finally, the court indicated that if the declarant is unavailable, proponents of residual hearsay may not offer it under Rule 803(24).

Three other court of military review cases must be addressed. Two would make even Sir Walter Raleigh shudder.

In *United States v. Slovacek*,³²⁵ the accused made a partial confession in which he admitted going to a fellow service member's home for the purpose of kidnapping the service member's daughter and "having sex" with her. In his confession, which the prosecution introduced, the accused denied having other sexual contacts with other small children. In rebuttal, a police investigator was allowed to testify that he had talked to the mother of another alleged victim of the accused, and that "*the victim's mother told him that her daughter [had] told her that 'six months prior the accused had her perform oral sex on [the accused].'*"³²⁶ Fortunately, the appellate court noted that this was the rankest sort of hearsay—something akin to a statement made by the *daughter* of the Portuguese gentleman³²⁷—and inadmissible under the loosest interpretation of the residual hearsay exceptions. Nevertheless, the error was found to be harmless.

³²³Two other cases, also involving child molestation, are *United States v. Quick*, 22 M.J. 722 (A.C.M.R. 1986) and *United States v. Barror*, 20 M.J. 501 (A.F.C.M.R.), petition granted, 21 M.J. 151 (C.M.A. 1985). Because these cases raise issues identical to those discussed, they will not be treated separately. Likewise, *United States v. Homan*, 23 M.J. 616 (A.F.C.M.R. 1986), and *United States v. Yeager*, 20 M.J. 797 (N.M.C.M.R. 1985), petition granted, 22 M.J. 199 (C.M.A. 1986), in both of which a confessing accomplice's unsworn custodial statement was admitted both for impeachment and substantively against the accused, raise issues identical to those discussed in Whalen, Garrett, and Powell.

³²⁴18 M.J. 809 (A.F.C.M.R.), petition denied, 19 M.J. 125 (C.M.A. 1984).

³²⁵21 M.J. 538 (A.F.C.M.R.), petition filed, 21 M.J. 384 (C.M.A. 1985).

³²⁶*Id.* at 539 (emphasis in original).

³²⁷See supra note 29.

In *United States v. Rousseau*,³²⁸ the prosecution introduced, under Rule 803(24), the statement of the accused's wife, made to CID, in which she accused her husband of assault and child abuse. At trial, she refused to testify. The case is not significantly different, analytically, from *Garrett*.³²⁹ Moreover, the statement was elicited from the wife after CID was called to the hospital, where the wife had taken her child for treatment, because medical authorities suspected child abuse. In such a situation, it is difficult to view the statement with any less suspicion than that of a confessing accomplice.³³⁰ Nevertheless, the court upheld the statement's admission.

The final court of review case of note is *United States v. Mayer*.³³¹ There, the court affirmed the thoughtful analysis of the trial judge, excluding evidence under the residual hearsay exception. At Mayer's trial, several charges were dismissed for lack of a speedy trial. The prosecution then sought to offer evidence of the dismissed offenses, in the form of two statements and the Article 32 testimony of the victim, as proof of plan, scheme, or design. The judge properly denied admission of the two statements as having insufficient trustworthiness under Rule 803(24). Additionally, although he found the Article 32 testimony not excluded by Rule 804(b)(1), he nevertheless excluded it as unduly prejudicial, under Rule 403. This is precisely the analytical approach suggested in Part II, *supra*.³³²

Two additional residual hearsay cases have reached the Court of Military Appeals. In *United States v. LeMere*,³³³ the prosecution offered, through the testimony of the victim's mother, a statement made by her three-year-old daughter that tended to indicate that the accused had sexually assaulted the child. The statement was made at the mother's urging about twelve hours after the incident. The little girl also testified at trial. The trial judge admitted the statement under Rule 803(2) as an excited utterance. The Army Court of Military Review found the statement inadmissible on that basis, because the statement was not made while the girl was under the excitement of a startling event. The Court of Military Appeals agreed, but upheld the conviction on the basis of harmless error. The Court of Military Appeals' opinion is instructive for several reasons.

³²⁸21 M.J. 960 (A.C.M.R.), *petition granted*, 23 M.J. 176 (C.M.A. 1987).

³²⁹*See supra* notes 282-83. In *Garrett*, admission of the statement was held to be error.

³³⁰*See* *New Mexico v. Earnest*, 106 S. Ct. 2734, 2735 (1986).

³³¹21 M.J. 504 (A.F.C.M.R. 1985).

³³²*See also* *United States v. May*, 18 M.J. 839 (N.M.C.M.R. 1984) (document, purporting to be record of prior civilian conviction, which contained numerous patent omissions, inadmissible under Mil. R. Evid. 803(24)).

³³³22 M.J. 61 (C.M.A. 1986), *aff'g* 16 M.J. 682 (A.C.M.R. 1984).

First, the court refused to consider the statement admissible, substantively, as a prior inconsistent statement. Plainly, the statement did not meet Rule 801(d)(1)(A)'s requirements. The significance of the opinion, however, lies in the court's recognition that the Military Rules of Evidence may, and do, impose stricter requirements for admissibility than the confrontation clause. The court clearly recognized that the President had imposed stricter standards under Rule 801(d)(1)(A) than the confrontation clause requires when the declarant testifies.³³⁴

The court also clearly stated that Rule 804(b)(5) is not available when the witness testifies. It declined to rule, however, on whether such a statement could have been admitted under Rule 803(24), since the trial judge had not ruled on that basis.³³⁵

In *United States v. Cordero*,³³⁶ the court held that a custodial statement made by the accused's wife was improperly admitted. Both the accused and his wife were suspected of child abuse and culpability in the death of the accused's son. The court found both that the accused's right to confrontation had been violated, and that the statement was not sufficiently trustworthy for admission under Rule 804(b)(5).³³⁷

C. SUMMARY AND ANALYSIS

Each of the residual hearsay cases decided by the military courts can be grouped, generally, into one of three categories: 1) cases involving sexual offenses with minors where the declarant is reluctant or otherwise unavailable to testify;³³⁸ 2) cases involving accusatory statements made by nontestifying accomplices, witnesses or victims; and 3) cases involving substantive use of prior inconsistent statements.³⁴⁰ The first two categories of cases are analytically similar, raising both confrontation clause and hearsay issues. The third category only raises residual hearsay issues, because in each case the declarant testified.

1. Category One and Two Cases.

For the most part, these cases fail to adequately treat confrontation clause issues. The Supreme Court has repeatedly stated that con-

³³⁴ *Id.* at 67.

³³⁵ *Id.* at 68.

³³⁶ 22 M.J. 216 (C.M.A. 1986).

³³⁷ The court, in dicta, also embraced the view advocated here that the statement would not have been admissible under Mil. R. Evid. 803(24) even had the declarant testified.

³³⁸ *LeMere; Barror; Quick; Henderson; Hines; Arnold; Ruffin.*

³³⁹ *Cordero; Rousseau; White; Garrett; Thornton.*

³⁴⁰ *Powell; Homan; Yeauger; Harris; Whalen; Crayton; Kin.*

frontation clause and hearsay analyses are to be separately performed. Hearsay may qualify for admission under a specific hearsay exception, and yet not be constitutionally sufficient.³⁴¹ Accordingly, residual hearsay, which for purposes of the hearsay rule, need only have *equivalent* circumstantial guarantees of trustworthiness to be admissible, may yet be insufficient to satisfy the confrontation clause.³⁴²

Because these cases necessarily involve use of Military Rule of Evidence 804(b)(5) and an "unavailable" witness,³⁴³ however, if we accept the position that the confrontation clause imposes a separate, higher standard for admissibility, it seems apparent that if a residual hearsay declaration's "reliability" passes confrontation clause muster, it necessarily is sufficiently reliable under the residual exception. Accordingly, the approach often taken in these cases³⁴⁵ should be reversed. Instead of first examining the hearsay for equivalent trustworthiness under the residual exceptions and, if found sufficiently trustworthy, then making the conclusion that it meets confrontation clause standards,³⁴⁶ the hearsay should be tested first for confrontation clause admissibility. Referring back to our analysis in Part II, the military courts should recognize that the Supreme Court has *neuer* upheld the admissibility under the confrontation clause of a significant accusatory declaration made by a witness, victim, or accomplice, unless the declaration has either: 1) been subjected to a past or present opportunity for full and effective cross-examination; 2) been independently admissible; 3) was not admitted for truth; 4) was a dying declaration; 5) the defendant had made a truly interlocking confession; or 6) the declarant's unavailability is attributable to the defendant.³⁴⁷ Although not specifically recognizing this approach, the Court of Military Appeals' decisions are consistent with it.³⁴⁸

³⁴¹ Cf. *Lee v. Illinois*, 106 S. Ct. 2056 (1986). Although under Illinois law the accomplice's statement, substantively, was inadmissible hearsay, under Fed. R. Evid. 804(b)(3), the statement would not have been excluded by the hearsay rule.

³⁴² *Id.*, cf., Mil. R. Evid. 804(b)(5). For the reasons cited earlier, *see supra* notes 318–19 and accompanying text, *Hines*' equation of the hearsay and confrontation standards is analytically incorrect, although of little practical consequence under the Military Rules of Evidence.

³⁴³ In each of the cases cited in this category of cases, the nature of the statement is such (e.g., accusatory, made when a motive to fabricate is present, etc.), that the statements should qualify for admission, if at all, only under Mil. R. Evid. 804(b)(5).

³⁴⁴ Of course, the other requirements (e.g., notice, "most probative,"), would also need to be met.

³⁴⁵ E.g., *United States v. Ruffin*, 12 M.J. 952 (A.F.C.M.R.), *petition denied*, 13 M.J. 494 (C.M.A. 1982); *supra* text accompanying notes 250–54.

³⁴⁶ *Id.* at 955.

³⁴⁷ *See supra* notes 215–22 and accompanying text.

³⁴⁸ *United States v. Hines*, 23 M.J. 125 (C.M.A. 1986); *United States v. Cordero*, 22 M.J. 216 (C.M.A. 1986); *United States v. LeMere*, 22 M.J. 61 (1986).

The admission of hearsay in the cases in these two categories most closely approximates trial by *ex parte* affidavit. Although there is an understandable desire to admit the alleged victims' statements in the child sexual assault cases, such accusatory statements are sometimes prompted by motives other than **truth**.³⁴⁹ Moreover, even where the "unavailability" of a declarant has been procured by the accused, the Supreme Court has only permitted hearsay statements of a declarant when they have been subjected to prior **cross-examination**.³⁵⁰

2. *Category Three Cases.*

These cases involve only residual hearsay questions. More specifically, because the declarant testified in each case, the cases only involve application of Military Rule of Evidence 803(24). With some notable **exceptions**,³⁵¹ the analysis in these cases of the residual exceptions has generally not been adequate.

First, when the declarant testifies, unless the evidence is independently admissible, the substantive use of prior inconsistent hearsay ought to be limited by the policy choice reflected in Rule 801(d)(1)(A).

Second, as suggested in *United States v. Arnold*,³⁵² accusatory statements of a witness, accomplice, or victim should never be admissible under Rule 803(24).³⁵³

Finally, the courts should more carefully analyze the other residual hearsay requirements (for example, that the evidence be "more probative").

IV. CONCLUSION

It is difficult to read the military residual hearsay cases without drawing the conclusion that some judges are testing the equivalency of the hearsay's trustworthiness by their own subjective assessment of the hearsay's probative value, rather than some more objective

³⁴⁹ *E.g.*, *United States v. King*, 16 M.J. 990 (A.C.M.R. 1983).

³⁵⁰ *Reynolds v. United States*, 98 U.S. 145 (1878).

³⁵¹ *E.g.*, *United States v. Arnold*, 18 M.J. 559 (A.C.M.R. 1984), *petition granted*, 20 M.J. 129 (C.M.A. 1986).

³⁵² *Id.*

³⁵³ *United States v. LeMere*, 21 M.J. at 68, suggests that it would be illogical to so limit Mil. R. Evid. 803(24), because, by its **terms**, the rule applies even if the declarant is unavailable. The inconsistency is, however, more apparent than real, since at least one "foregoing" exception, Mil. R. Evid. 803(5), requires declarant availability. Moreover, whatever merit *LeMere* may have when the declaration is of the *ante litem motam* sort present in the other "foregoing" exceptions, when the declaration is accusatory, admission of such declarations under Mil. R. Evid. 803(24) ought to be precluded by the policy choices reflected in M.R.E. 801(d)(1)(A), (B), and (C).

measure of analysis, as is suggested in this article.³⁵⁴ This was the Weinstein approach, which was specifically rejected by the drafters of the federal rules.³⁵⁵

Both the confrontation clause and the residual exceptions require careful, step-by-step analysis by both counsel and the trial and appellate judges. The traditional hearsay exceptions, embodied in the federal and military rules, evolved slowly, judiciously over centuries of common law. The residual exceptions, while they need not be restricted beyond their literal language, need to be interpreted in light of the other policy choices carefully made by the drafters, and embodied in the other parts of article VIII of the rules, and against the requirements of the confrontation clause.

³⁵⁴*E.g.*, *United States v. Powell*, 17 M.J. 975 (A.C.M.R.1984), *aff'd*, 22 M.J. 141 (C.M.A.1986); *United States v. Ruffin*, 12 M.J. 952 (A.F.C.M.R.) *petition denied*, 13 M.J. 494 (C.M.A.1982).

³⁵⁵*See supra* note 241.

DUE PROCESS AND UNAVAILABLE EVIDENCE

by Captain Alan D. Chute*

I. INTRODUCTION

In our system of criminal justice, we expect the adversarial process to produce a fair result in a contested criminal trial. The government and the accused have their respective advocates who zealously represent their positions within the bounds of the law, presenting the strengths of their own positions and exposing the weaknesses of their opponents. The government, beginning with a police investigation and culminating with a court presentation, seeks out, preserves, and places before the fact finder the relevant and admissible evidence it believes will convict the accused. Although the defense is not obligated to present anything to the court, counsel in contested cases should attempt to discover exculpatory evidence that they can present on behalf of their clients. It is possible, however, for the government to hinder the defense counsel's efforts, either intentionally or unintentionally, by failing to disclose exculpatory evidence. Further, it is possible for the government to lose or to destroy evidence, either deliberately or inadvertently, that the defense is or later becomes aware of and believes to be exculpatory. Naturally, the defense will complain when it learns of these developments, but sometimes the courts will provide no remedy.

In the landmark case of *Brady v. Maryland*,¹ the United States Supreme Court held the prosecution responsible for failing to disclose evidence favorable to the accused,² and in later cases the Court refined its analysis by extending protection to the accused in some circumstances and restricting protection in others.³ The Supreme Court did not address the issue of loss or destruction of evidence, however, until

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²*Id.* at 87.

³See *infra* notes 22-37 and accompanying text.

1984, when it decided the case of *California v. Trombetta*.⁴ In that case, the Court held that the government does not violate the accused's due process rights under the Constitution by losing or destroying exculpatory evidence unless 1) the exculpatory value of the evidence was apparent to the government before it rendered the evidence unavailable, and 2) there is no comparable evidence available to the accused.⁵ Under these circumstances, the prosecution may proceed and the accused may be convicted, even though the defense is deprived of evidence that could potentially exonerate the accused.

In 1986, the Court of Military Appeals incorporated the *Trombetta* ruling into standards of military due process,⁶ but the court went beyond *Trombetta* by placing the burden on the accused to show that the missing evidence fits within the *Trombetta* standard.⁷ In doing so, the Court of Military Appeals did not seem to give full consideration to military rules that provide more discovery and disclosure to the accused than the minimum constitutional requirements that apply to the Supreme Court's review of civilian prosecutions. This shortcoming may have occurred, in part, because the trials in the cases that the Court of Military Appeals reviewed took place prior to the effective date of the new Manual for Courts-Martial,⁸ which departs from the prior edition by specifically addressing the issue of unavailable evidence.⁹ The court's position may also have been influenced by reviewing a case where there was no prejudice to the accused because the trial judge had already granted an appropriate remedy,¹⁰ and by reviewing another case that generated little sympathy for the accused.¹¹ After the court gained momentum with the issue, it summarily affirmed two urinalysis cases where the government destroyed the accused's urine samples, and the court merely cited *Trombetta* in its summary dispositions."

⁴467 U.S. 479 (1984).

⁵*Id.* at 489.

⁶United States v. Kern, 22 M.J. 49, 57 (C.M.A. 1986).

⁷See *id.* at 51-52.

⁸The new Manual for Courts-Martial became effective "on August 1, 1984, with respect to all court-martial processes taken on and after that date." Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984), as amended by Exec. Order No. 12484, 49 Fed. Reg. 28825 (1984), reprinted in Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984]. The trial in Kern occurred in April 1984. United States v. Kern, 22 M.J. at 50. In United States v. Garries, 22 M.J. 288 (C.M.A. 1986), the second Court of Military Appeals opinion that cited *Trombetta*, the trial occurred in January 1983. *Id.* at 290.

⁹See MCM, 1984, Rule for Courts-Martial 703(f)(2) [hereinafter R.C.M.]. The prior edition of the Manual contained no similar provision.

¹⁰See *infra* notes 108-09 and accompanying text.

¹¹See *infra* notes 120-21 and accompanying text.

¹²United States v. Frost, 22 M.J. 386 (C.M.A. 1986) (summary disposition); United States v. Krueger, 22 M.J. 210 (C.M.A. 1986) (summary disposition).

In the future, when military courts consider cases where the government has lost or destroyed evidence, they should conclude that the *Trombetta* rationale should not be applied to all such cases in the military justice system. This article begins by examining the minimum constitutional standards that apply to disclosures of and destruction of evidence. The Supreme Court periodically modifies these standards, and several issues remain uncertain after *Trombetta*. Next, the article reviews the special standards that apply to the military justice system, standards of military due process that rise above the constitutional minimums. After identifying these standards, and proposing how courts should apply them in cases where evidence is unavailable, the article examines the numerous remedies available for military courts to safeguard the accused's rights if the courts find that the government has violated standards of military due process. By applying the proper rules and selecting the appropriate remedies in cases where the government has lost or destroyed exculpatory evidence, the military justice system can provide a fair trial for the accused.

II. CONSTITUTIONAL MINIMUMS

A. DISCOVERY OF EXCULPATORY EVIDENCE

1. Constitutional Right to Discovery.

In a series of cases, the Supreme Court has established "what might loosely be called the area of constitutionally guaranteed access to evidence"¹³ for criminal defendants. Although some of these rules are now contained in rules of criminal procedure¹⁴ and ethics codes,¹⁵ the development of the constitutional rules and the definition of terms are part of an ongoing process. The minimum standards for access to evidence are based on the due process clause of the United States Constitution,¹⁶ which requires criminal trials to "comport with prevailing notions of fundamental fairness,"¹⁷ and which requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense."¹⁸ Without access to the evidence, it is difficult

¹³United States v. Valenzuela-Bernal, 458 U.S. 858, 857 (1982).

¹⁴See, e.g., R.C.M. 701(a)(6).

¹⁵See, e.g., I Standards of Criminal Justice, The Prosecution Function, Standard 3-3.11 (1980); Model Code of Professional Responsibility DR 7-103(B) (1980).

¹⁶U.S. Const. amend. V.

¹⁷California v. Trombetta, 467 U.S. 479, 485 (1984).

¹⁸*Id.* Military accused also enjoy a statutory right to discovery of evidence and witnesses. See Uniform Code of Military Justice, art. 46, 10 U.S.C. § 846 (1982); *infra* text accompanying notes 158–200.

to imagine how defense counsel could adequately prepare for trial; and without access to exculpatory evidence, counsel's opportunity to present a complete defense is foreclosed.

In *Brady v. Maryland*,¹⁹ the Supreme Court announced a basic constitutional principle for required disclosures to defendants. *Brady* was a murder case where the prosecution did not disclose an accomplice's statement that the accomplice was the person who actually did the killing, even though the defense had requested such a statement. On appeal, the defendant claimed that, since the accomplice's statement would have been relevant to the issue of an appropriate sentence, the prosecution should have disclosed the statement. The Supreme Court concluded that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."²⁰ The Court sent the case back to the state courts for a new sentencing proceeding.²¹

In *United States v. Agurs*,²² the Supreme Court reviewed a case where the prosecution suppressed exculpatory evidence that the trial defense counsel did not specifically request. The defendant had been convicted of homicide, and had defended on a theory of self-defense. After trial, the defense alleged that the prosecution was aware of and failed to disclose the victim's criminal record of pleas of guilty to charges of assault and carrying deadly weapons. In allowing the conviction to stand, the Supreme Court stated that the government does not commit constitutional error in cases where the defense makes only a general request for exculpatory evidence or makes no request at all unless "the omitted evidence creates a reasonable doubt that did not otherwise exist."²³

2. *The Materiality Standard.*

The outcome of suppression-of-evidence cases, and also the outcome of destruction-of-evidence cases, often turns on whether the evidence in question is "material" to guilt or to punishment. Cases reviewing the rules relating to lost or destroyed evidence inevitably include discussions of the materiality standard in *Brady*, *Agurs*, and subsequent cases that have refined the materiality analysis.²⁴

¹⁹373 U.S. 83 (1963).

²⁰*Id.* at 87.

²¹*Id.* at 90-91.

²²427 U.S. 97 (1976).

²³*Id.* at 112.

²⁴*See, e.g., California v. Trombetta*, 467 U.S. 479, 485-87 (1984).

Brudy seems deceptively straightforward in stating that, upon request, the government must produce evidence that is “material either to guilt or to punishment.”²⁵ *Brudy*, however, offers no clear definition of the word “material,” and the Court has debated the test for the materiality standard in *Agurs*²⁶ and, more recently, in *United States v. Bagley*.²⁷ The actual *Brudy* holding is often repeated in subsequent cases, but these cases fail to emphasize the remaining portion of the *Brudy* opinion that explains the Court’s rationale for reaching its conclusion and sheds some light on the materiality standard the Court envisioned. The Court’s overall concern was with fundamental fairness, as represented by its statement that a “prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.”²⁸ The Court acknowledged this concern in *Agurs*, where the Court stated that a “fair analysis of the holding in *Brudy* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.”²⁹ It seemed that, in *Brudy*, the Court was concerned about the government’s failure to disclose evidence that *might* have been exculpatory, that is, evidence that would merely *tend* to exculpate the accused. This would have been a low materiality standard for the defense to meet.

In *Agurs*, the Court said that the definition of materiality varied, depending on the nature of the defense counsel’s request.³⁰ While the *Brudy* standard to be applied where the prosecution suppresses specifically requested evidence is apparently open for debate,³¹ the *Agurs* opinion was clear on the materiality standard where the defense has made no request or has made only a general discovery request for exculpatory information. The Court stated that a “mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality,’”³² a position that Justice Marshall advocated in his dissent.³³ Instead, the Court settled on a standard that would not require a conviction’s reversal unless the evidence actually cre-

²⁵ *Brady v. Maryland*, 373 U.S. at 87.

²⁶ Compare *United States v. Agurs*, 427 U.S. 97, 112–13 (1976) (majority opinion) with *Agurs*, 424 U.S. at 122 (Marshall, J., dissenting).

“Compare *United States v. Bagley*, 105 S. Ct. 3375, 3380–84 (1985) (Justice Blackmun’s lead opinion) with *Bagley*, 105 S. Ct. at 3389–94 (Marshall, J., dissenting).

²⁸ *Brady v. Maryland*, 373 U.S. at 87–88.

“*United States v. Agurs*, 427 U.S. at 104.

³⁰ See *id.* at 103–12.

³¹ See *supra* note 27.

“*United States v. Agurs*, 427 U.S. at 109–10.

³³ *Id.* at 122 (Marshall, J., dissenting).

ated a reasonable doubt.³⁴ In *Agurs*, the Court justified the distinction by noting that, with a specific request, the prosecution is on clear notice that the defense desires a particular piece of exculpatory evidence;³⁵ but with a general request or with no request, the prosecution does not have clear notice of what the defense is seeking, and should be held accountable only for producing evidence that is “obviously exculpatory”³⁶ or is “clearly supportive of a claim of innocence.”³⁷

In *Bugley*, the Court explained yet another definition of the materiality standard. In a portion of his opinion where he addressed *Brady's* treatment of evidence that merely tends to be exculpatory, Justice Blackmun indicated that this “language [in *Brady*] merely explains the meaning of the term ‘materiality,’”³⁸ and “does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.”³⁹ Justice Blackmun, in a portion of his opinion joined by four other members of the Court, concluded that suppressed “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁴⁰ Justices Blackmun and O’Connor would apply this standard to all suppression cases, whether the defense made a specific request, a general request, or no request at all.⁴¹ The other three Justices conclude that “this standard is ‘sufficiently flexible’ to cover all instances of prosecutorial failure to disclose and all instances”⁴² of suppression, and “see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense’s request.”⁴³ The *Bagley* standard places a heavier burden on the accused than the original *Brady* rationale, where the accused in specific request cases needed to show that the undisclosed evidence would “tend to exculpate him,”⁴⁴ and it places a lighter burden on the accused than the *Agurs* standard, where he or she must show that the evidence creates a reasonable doubt.

³⁴*Id.* at 112.

³⁵*Id.* at 106.

³⁶*Id.* at 107.

³⁷*Id.*

³⁸United States v. *Bagley*, 105 S. Ct. at 3383 n.12.

³⁹*Id.*

⁴⁰*Id.* at 3384 (Blackmun and O’Connor, JJ.); *id.* at 3385 (White, Burger, and Rehnquist, JJ. concurring) (agreeing with Justice Blackmun’s definition of materiality).

⁴¹*Id.* at 3384.

⁴²*Id.* at 3385 (concurring opinion).

⁴³*Id.*

⁴⁴*Brady v. Maryland*, 373 U.S. at 87–88.

B. CALIFORNIA V. TROMBETTA: MATERIALITY OF DESTROYED EVIDENCE

As the Supreme Court debated the materiality test to be applied in suppressed evidence cases, the Court faced a related issue in *California v. Trombetta*:⁴⁵ whether the Constitution requires the police and the prosecution to “preserve potentially exculpatory evidence on behalf of **defendants**.”⁴⁶ The issue arises when the government has lost, or destroyed certain evidence and the accused later wants the government to produce that evidence at the trial. Existing standards from the failure to disclose evidence cases are difficult to apply to cases where the government has lost or destroyed evidence. If the nature of the evidence is known precisely, the courts could apply the *Brady*, *Agurs*, or *Bagley* materiality standards. But unlike suppressed evidence cases, where the evidence can be presented to the trier of fact at a new trial, lost or destroyed evidence is not available for further consideration. Moreover, the precise nature of the lost evidence may be unknown or in dispute, requiring the courts to speculate on whether the missing evidence would tend to exculpate the defendant or would reasonably raise a reasonable **doubt**.⁴⁷

In *Trombetta*, the police administered Intoxilyzer tests to the defendants to measure their blood-alcohol concentration. The Intoxilyzer is a device into which the subject blows air; the air is captured in a chamber, and the machine then uses infrared light to sense the alcohol level. After the test, the operator purges the machine with fresh air, and discharges the subject’s breath sample. After being charged with driving while intoxicated, the defendants moved to suppress the test results on the ground that the police did not preserve samples of the defendants’ breath. The defendants alleged that, if the police would have preserved their breath samples, they might have been able to impeach the breath test **results**.⁴⁸ After finding that the arresting officers had the capability of preserving samples of breath in addition to the samples that were collected in the machine, the California Court of Appeal ruled that “where evidence is collected by the state . . . law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the **defendant**.”⁴⁹

⁴⁵ 467 U.S. 479 (1984).

⁴⁶ *Id.* at 481.

⁴⁷ See *California v. Trombetta*, 467 U.S. at 486.

⁴⁸ The facts of the case are reported in 467 U.S. at 481–83.

⁴⁹ *People v. Trombetta*, 142 Cal. App. 3d 138, 144, 190 Cal. Rptr. 319, 323 (1983), *quoted in* *California v. Trombetta*, 467 U.S. at 483–84.

The Supreme Court began its analysis in *Trombetta* by reviewing the access-to-evidence standards established in *Brady*, *Agurs*, and related cases.⁵⁰ The Court noted that lost evidence cases present peculiar problems, and that when the government unconstitutionally destroys evidence, courts have two alternatives: bar further prosecution, or suppress the government's most probative evidence.⁵¹ The Court compared the breath sample issue with the case of *Killian v. United States*,⁵² where F.B.I. agents destroyed preliminary notes that they made for the purpose of transferring data to final reports.⁵³ In applying the analogy, the Court reasoned that breath samples come into the police officers' possession "for the limited purpose of providing raw data to the Intoxilyzer. The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples."⁵⁴ Although it is not clear whether bad faith on the part of the authorities would have had any impact, the Court noted in this case that there was "no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence."⁵⁵ The Court limited the state's duty under the fourteenth amendment to preserving "evidence that might be expected to play a significant role in the suspect's defense."⁵⁶ The Court then established a two-part standard for testing the materiality of lost or destroyed evidence: the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by any other reasonable means."⁵⁷

The Court's application of this two-part test in *Trombetta* illustrates its meaning. Regarding the exculpatory value of breath samples, the Court acknowledged that they may have "conceivably contributed to respondents' defenses,"⁵⁸ but "that the chances are extremely low that

⁵⁰The Court did not decide *Bugley* until a year later.

⁵¹*California v. Trombetta*, 467 U.S. at 487. The Court did not go beyond this statement in exploring possible remedies in the event it would have found a violation. Other remedies besides barring prosecution or excluding evidence may be available to the trial court. See *infra* notes 253–314 and accompanying text. Even if the breath test evidence is suppressed, however, the prosecution may proceed. Just as the defendant has "comparable evidence" available to establish his or her innocence, the prosecution has "comparable evidence" to establish guilt: testimony of the arresting officers describing the defendant's appearance, control over physical actions, and manner of speech.

⁵²368 U.S. 231 (1961).

⁵³*Id.* at 242.

⁵⁴*California v. Trombetta*, 467 U.S. at 487–88.

⁵⁵*Id.* at 488.

⁵⁶*Id.*

⁵⁷*Id.* at 489.

⁵⁸*Id.*

preserved samples would have been exculpatory. . . . In all but a tiny fraction of cases preserved breath samples would simply confirm⁵⁹ the breath test results. The Court stated that the exculpatory value prong of the materiality standard is “directly related to the reliability of the Intoxilyzer itself,”⁶⁰ suggesting that when the court considers the machine to be reliable, the breath samples’ materiality will be low, but if the machine was “truly prone to erroneous readings,”⁶¹ the breath samples would have had a higher exculpatory value. Regarding the “comparable evidence” prong, the Court stated that, even if the breath samples would have been exculpatory, the defendants had other methods of attempting to challenge the test results. The Court reasoned that the defendants could have inspected the machine and its calibration data, identified sources of interference with proper test results, and cross-examined the law enforcement officer in an attempt to establish operator error.⁶²

C. ISSUES REMAINING AFTER TROMBETTA

Although the Supreme Court in *Trombetta* seemed to establish a clear test for judging the constitutional materiality of unavailable evidence, several questions remain to be answered. First, what is the effect of government bad faith on the outcome of the analysis? Second, when does evidence have an “apparent” exculpatory value? Third, what happens if the exculpatory value becomes apparent only after the evidence is unavailable? Finally, what is “comparable” evidence? Each question raises distinct issues.

1. The Effect of Bad Faith.

The *Trombetta* Court noted that the police officers acted with good faith,⁶³ and the court then proceeded to outline the new materiality standard. Given the Court’s conclusion that, even if the breath samples would have been exculpatory, they would not have been material, the Court may be implying that the accused would have no remedy even if the government destroyed the evidence in bad faith. This is consistent with the Court’s language in *Agurs*, indicating that “the constitutional obligation is [not] measured by the moral culpability or the willfulness of the prosecutor,”⁶⁴ and that “[i]f the suppression

⁵⁹*Id.*

⁶⁰*Id.* n.10.

⁶¹*Id.* at 490 n.10.

⁶²*Id.* at 490.

⁶³*Id.* at 488.

⁶⁴*United States v. Agurs*, 427 U.S. at 110.

of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”⁶⁵ It may be disturbing, however, to allow a prosecutor to proceed when the government has intended to hamper the defense and to prevent a fair trial. As a state court noted after the *Trombetta* decision, “[t]he fact that the defendant is ‘probably guilty’ does not excuse lack of due process where there is conduct rising to the level of bad faith or connivance on the part of the state.”⁶⁶

Various government actions could give rise to an inference of bad faith. The obvious example would be a prosecutor’s destruction of an item of evidence that he knows to be exculpatory. Another example could be a government representative’s failure to preserve a piece of evidence when the evidence has no exculpatory value that is apparent to the government agent, but the defense has requested that the evidence be preserved and has represented that the evidence is essential to the defense case.⁶⁷ Negligent administrative practices in maintaining control over evidence may also support a claim of bad faith.⁶⁸

Trombetta should not be interpreted to mean that government bad faith will never affect the outcome of a lost or destroyed evidence case. It is possible that individual cases of bad faith may be so extreme as to rise to a violation of due process regardless of the materiality of the evidence.⁶⁹ At a minimum, any possible bad faith should be considered in assessing whether the evidence had any exculpatory value that was apparent to the government before the evidence was destroyed. In cases where exculpatory value cannot be determined by any independent assessment, the existence of bad faith or animosity toward the accused may support an inference that the prosecutor or the police believed that the evidence was exculpatory.

⁶⁵*Id.*

⁶⁶*Oshrin v. Coulter*, 142 Ariz. 109, 112, 688 P.2d 1001, 1004 (1984).

⁶⁷*See infra* notes 305–08 and accompanying text.

⁶⁸*See, e.g.*, *United States v. Scott*, 6 M.J. 547, 549 (A.F.C.M.R. 1977) (court reporter and other personnel were responsible for loss of tape-recorded testimony from an Article 32 investigation).

⁶⁹In *Oshrin v. Coulter*, a felony prosecution involving a breath test for alcohol content, the state filed the felony charges months after the police had destroyed the breath sample. Although the Arizona court may not have found prejudice to the defendant under normal circumstances, the court declined to apply *Trombetta* to the case. “To tell a defendant that his case is dismissed, return the amount of his bond, release him from custody, then destroy evidence of guilt or innocence before filing a formal complaint is a denial of fundamental fairness shocking to a sense of justice and a denial of due process.” *Oshrin v. Coulter*, 142 Ariz. at 111, 688 P.2d at 1003.

2. Determining Whether Missing Evidence is Exculpatory.

A second concern after *Trombetta* is the standard the courts will use to determine whether evidence had an apparent exculpatory value before the government lost or destroyed it. In *Trombetta*, the Supreme Court, obviously impressed by the accuracy of the breath testing equipment, indicated that there was a high degree of mathematical certainty that the destroyed breath samples were not exculpatory. By using this analysis, the Supreme Court seems to have accepted that in “a tiny fraction of cases, preserved breath samples”⁷⁰ could exonerate a defendant.

In determining the apparent exculpatory value of evidence, courts should consider other factors in addition to the degree of mathematical certainty involved. First, if the accused requests that an item of evidence be preserved, the government is put on notice that the evidence may be exculpatory. The defense attorney, in preparing the case, presumably is aware of evidence that may support an affirmative defense or may be used in raising a reasonable doubt. As the Court of Military Appeals noted in a Jenks Act case, “[t]he defense counsel is the appropriate party to determine the effective use of [an] agent’s notes to discredit him. ‘The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant.’ ... The government may grow weary of a defense counsel who requests the government to preserve and to gather numerous pieces of evidence, but the attorney may be attempting to insure that all possible exculpatory evidence is preserved until he or defense experts can analyze it.

Another problem in determining apparent exculpatory value is a concern that, although missing evidence may not be apparently exculpatory when it is lost or destroyed, the missing evidence is of such a nature that it has the potential of supplying a complete defense. An example is a Ninth Circuit pre-*Trombetta* case, *Hilliard v. Spalding*.⁷² *Hilliard* was a rape case where the missing evidence was a glass slide containing seminal fluid from the victim’s vagina. The court recognized that a laboratory could make scientific comparisons between the seminal fluid and the accused’s saliva and blood. “The results of such a test cannot positively identify a defendant as the perpetrator, but the test *can* conclusively exculpate an individual if the blood types do not match.”⁷³ The same analysis could be applied

⁷⁰*California v. Trombetta*, 467 U.S. at 489.

⁷¹*United States v. Dixon*, 8 M.J. 149, 152 n.7 (C.M.A. 1979) (quoting *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir. 1975)).

⁷²719 F.2d 1443 (9th Cir. 1983).

⁷³*Id.* at 1445.

to the military's handling of urine samples in drug use prosecutions. The accused may have no quarrel with the accuracy of the laboratory test establishing that the donor of the urine used illegal drugs, but the accused may be interested in testing the urine for blood type in an attempt to exculpate himself.⁷⁴ To destroy the evidence before additional tests are conducted forecloses a *possible* defense, but the accused is unable to show that the evidence has any apparent exculpatory value after the government has destroyed it. The Ninth Circuit appropriately phrased this concern: "In cases where the government has arbitrarily suppressed a sperm sample without affording the defense an opportunity to test it, requiring a showing of prejudice before a defendant may assert his constitutional right to the evidence places his rights in the unsupervised hands of the prosecution."⁷⁵ In cases where the missing evidence is such that it could be highly exculpatory and the government should have been aware of its possible use, perhaps the courts could conclude that the evidence had an apparent exculpatory value, even though the evidence, if actually available, may not assist the defense at all. This would be especially important to an accused who has no other evidence with which to raise a defense.

3. *Exculpatory Value Subsequently Discovered.*

Under the *Trombetta* standard, conclusively exculpatory evidence would not be considered material as long as the exculpatory value was not apparent before the government lost or destroyed the evidence. As distinguished from evidence that is impossible to evaluate after it is destroyed, such as breath or urine samples, the characteristics of other items of evidence may have been sufficiently recorded to allow post-destruction analysis. This evidence could be of minimally exculpatory value, such as evidence that would merely tend to exculpate an accused, or the evidence could be sufficiently strong to completely exonerate an accused. As long as the government did not

⁷⁴For example, consider the case of one Army officer stationed at Fort Lewis, Washington, who participated in a urinalysis:

The initial test of the sample, and a subsequent retest, proved positive for the presence of THC. Collection of the sample was personally observed by the Company Commander and the Chain of Custody Documents indicated proper handling. The positive urine sample together with samples of [the officer's] blood and urine were provided to an independent laboratory for comparison. The results of the tests, conducted by a Forensic Serologist, confirmed that the positive urine sample did not come from [the officer's] body. In essence, the blood type of the positive urine sample and [the officer's] blood type were different.

Disposition Form, DA Form 2496, AFZHJAA, Office of the Staff Judge Advocate, I Corps and Fort Lewis, Ft. Lewis, Wash., to Alcohol and Drug Abuse Prevention and Control Office, subject: Urinalysis Testing Procedure (19 Apr. 1985).

⁷⁵Hilliard v. Spalding, 719 F.2d at 1446.

destroy the evidence before its exculpatory value became apparent, the accused is entitled to no relief under *Tornbetta* because the government has not violated his due process rights.

An example of how the *Tornbetta* standard affects the subsequent discovery of exculpatory value is the California case of *People v. Gonzales*.⁷⁶ The victim of an attempted robbery wrote the letters "g-u-i-l-t-y" on a piece of paper to record the spelling of a tattoo on the robber's arm. The police, however, lost the piece of paper prior to finding a suspect, and the eventual defendant had a tattoo that read "g-u-l-i-t-y", an incorrect spelling with the letters "i" and "l" transposed. At the time of the trial, the victim could not remember what he had written. The parties agreed, however, that the victim had originally spelled the word correctly, and the California appellate court that considered the case before the *Tornbetta* decision ruled that the defendant was entitled to a jury instruction conclusively establishing that the victim had spelled the word **correctly**.⁷⁷ In considering the same case after *Tornbetta*, the court ruled that the defendant was not entitled to any relief due to the lost **evidence**.⁷⁸ Fortunately, the defendant was not at a complete disadvantage, because the police officers were available to testify that the victim had correctly spelled the **word**.⁷⁹

*United States v. Scott*⁸⁰ is an example of how such a situation could easily arise in a military setting. In *Scott*, the Article 32 investigating officer tape-recorded the testimony of witnesses at the pretrial Article 32 hearing, but his report presented the testimony in summarized form. The defense counsel later requested the tapes, but the government was unable to find them. At trial, certain witnesses made statements inconsistent with their Article 32 hearing testimony, but the summarized transcripts apparently were insufficient for impeachment purposes. The appellate court, in reviewing the case under the Jenks Act, declined to apply the Jenks Act's good faith exception, and held that the trial court should have excluded the relevant witnesses' **testimony**.⁸¹ Aside from Jenks Act considerations, the courts would afford the accused no relief under the current *Tornbetta* rule, because the exculpatory value of the tapes was not apparent until the witnesses testified at the trial and after the government had destroyed the tapes, even though the accused would have no comparable impeachment evidence at the trial.

⁷⁶179 Cal. App. 3d 566, 224 Cal. Rptr. 853 (1986).

⁷⁷*See id.* at 569, 224 Cal. Rptr. at 855.

⁷⁸*Id.* at 575, 224 Cal. Rptr. at 858-59.

⁷⁹*Id.*, 224 Cal. Rptr. at 859.

⁸⁰6 M.J. 547 (A.F.C.M.R.1977).

⁸¹*Id.* at 549.

Although the Supreme Court finds no due process violation when the government loses or destroys evidence with a latent exculpatory value, the accused is nevertheless at some disadvantage: he cannot present the trier of fact with all of the relevant exculpatory information. In some cases, this will make no difference, and the accused will be convicted even if the missing evidence were suddenly available. In other cases, however, it is conceivable that the missing evidence could affect the verdict. As the Supreme Court stated in the context of the government's use of perjured testimony, a remedy should be warranted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."⁸² The Court repeated a similar standard in a case where the government deported a witness whose testimony was not known at the time of deportation, a situation similar to the loss or destruction of evidence.⁸³ Thus, where the exculpatory value of lost or destroyed evidence becomes apparent after it is no longer available, the courts should fashion remedies to restore the accused's case to its original strength.

4. Defining "Comparable" Evidence.

If the accused learns that evidence is exculpatory only after the evidence is unavailable, the due process clause does not afford any protection if the accused can "obtain comparable evidence by other reasonably available means."⁸⁴ The only definition of "comparable evidence" offered in *Trombetta* is "alternative means of demonstrating . . . innocence."⁸⁵ The Supreme Court explored the alternative means available to the *Trombetta* defendants, and concluded that these means satisfied the "comparable evidence" prong of the materiality standard. In its analysis of this prong, the Court assumed for argument purposes that the breath test was inaccurate and that the breath samples would have been exculpatory,⁸⁶ obviously an assumption of a very strong exculpatory value. Although it is clear that the *Trombetta* defendants had other methods of attacking the breath test results, it is equally as clear that no alternative method would be as strong as having a preserved breath sample that showed a "legal" blood-alcohol level. Perhaps the Court's far-reaching language should be viewed in the context that the Court seemed firmly convinced of the defendants' guilt, as evidence by its conclusion "that the chances are extremely low"⁸⁷ that the destroyed evidence would

⁸²United States v. Agurs, 427 U.S. at 103.

⁸³See United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982).

⁸⁴California v. Trombetta, 467 U.S. at 489.

⁸⁵*Id.* at 490.

⁸⁶*Id.*

⁸⁷*Id.* at 489.

have assisted the defense. In close factual cases, courts may be more cautious in stating that alternative evidence is “comparable” to the destroyed evidence.

The Sixth Circuit elaborated on the meaning of “comparable evidence” in *Elmore v. Foltz*.⁸⁸ “All that matters is that some reasonably alternative means exists for attempting to do what one would have attempted to do with the destroyed evidence,”⁸⁹ even if the destroyed evidence would have been the best available evidence. In a contested case, the defendant’s ultimate goal is to avoid a conviction, and the defense uses any available exculpatory evidence to achieve an acquittal. Some evidence conceivably is much more exculpatory than other evidence, and is not “comparable” in the sense that it will have a different effect on the fact finder. This is evident from the Supreme Court’s assessment of evidence that fits into such categories as evidence that will “tend to exculpate” the accused,⁹⁰ evidence that has a “reasonable probability” of affecting the verdict,⁹¹ and evidence that actually “creates a reasonable doubt.”” A broad meaning of “comparable evidence” would swallow the rule and render it meaningless, because every defendant has at least some means of attacking the prosecution’s case. At a minimum, for example, the defense has the alternatives of cross-examining the government’s witnesses and presenting the accused’s testimony. It does not seem fair to conclude that cross-examination of government witnesses is “comparable” to other evidence that would exonerate a defendant.

The Arizona Supreme Court has expressed its concern when alternate means are not necessarily of the same type or character of evidence as the destroyed evidence.⁹³ In another breath sample case, that court focused on the accused’s “right to test incriminating evidence . . . [where] the defense has little or no recourse to alternate scientific means of contesting the test results.”⁹⁴ Thus, this court was concerned that the accused should not be deprived of scientific evidence, and the court was not satisfied in knowing that the accused had other avenues of attack. This narrower view of what constitutes comparable evidence therefore focuses more closely on the character of the lost evidence, rather than on unrelated categories of evidence such as impeachment material or general cross-examination.

⁸⁸ 768 F.2d 773 (6th Cir. 1985).

⁸⁹ *Id.* at 778.

⁹⁰ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

⁹¹ *United States v. Bagley*, 105 S. Ct. 3375, 3384 (1985).

⁹² *United States v. Agurs*, 427 U.S. 97, 112 (1976).

⁹³ *See Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979).

⁹⁴ *Id.* at 356, 604 P.2d at 620.

The narrow view is the better view, because it leads to a fairer result. Although every criminal defendant has alternate means of challenging the government's case, these alternate means exist independently of the missing evidence, and they would be available to the accused even if the missing evidence were suddenly available. The broader view accepts the proposition that it is permissible to subtract from the pool of evidence available to an accused, while the narrower view attempts to restore what the accused has lost.

D. TROMBETTA IN THE MILITARY COURTS

1. *United States v. Kern.*

The Court of Military Appeals first applied the *Trombettu* rule in *United States v. Kern*.⁹⁵ The accused was charged with larceny of government property of a value of \$2647.72.⁹⁶ During the investigation into his activities, the accused admitted that he stole the property, and he returned the stolen property to the investigating agents. After the agents photographed and inventoried the property, they obtained the trial counsel's consent to return the property to the military supply system. When the property was returned to the users, it apparently was no longer identifiable nor available for production as evidence at the trial. Therefore, the defense moved to dismiss the charges on the ground that the government could not produce the evidence. The military judge denied the motion, because the loss of the evidence did not prevent the accused from defending against the allegation that he committed a larceny. The *value* of the alleged stolen property does, however, affect the maximum sentence upon conviction.⁹⁷ The trial judge therefore ruled that, because the evidence was not available for court use, the accused was unable to challenge effectively the government's allegation of the property's value. The military judge amended the specification by changing the property's alleged value from an amount in excess of two thousand dollars to an allegation that the property was "of some value." This remedy

⁹⁵22 M.J. 49 (C.M.A. 1986).

⁹⁶The facts are reported *id.* at 50.

⁹⁷See MCM, 1984, Part IV, para. 46e(1) (stating the maximum punishment for larceny).

reduced the maximum punishment to the lowest maximum allowed for a larceny conviction.⁹⁸

After reviewing the basic principle that the government may not deliberately suppress exculpatory evidence,⁹⁹ the Court of Military Appeals stated that Article 46, Uniform Code of Military Justice,¹⁰⁰ “seems to go beyond this constitutional minimum”¹⁰¹ by granting the defense the same degree of access to evidence that the government possesses. Because Article 46 “makes no distinction as to types of evidence, an accused is entitled to have access to both exculpatory and inculpatory evidence.”¹⁰² The court recognized the problem, however, “in articulating a rule which applies to the loss or destruction of evidence which is not ‘apparently exculpatory.’”¹⁰³ Although the court conceded that the accused’s discovery rights and access to evidence have been more liberal in the military justice system than in the civilian setting, the Court of Military Appeals concluded without reference to any other precedent or authority that military law “does not place stricter requirements on the government to preserve evidence which is not ‘apparently exculpatory’ than is required of the states under the fourteenth amendment to the Constitution. The rule announced in *Trombettu* satisfies both constitutional and military standards of due process. . . .”¹⁰⁴ The court went beyond *Trombettu*, however, by adding that “the burden is upon the accused”¹⁰⁵ to establish that the unavailable evidence satisfies the two-part materiality standard.

Even though the Court of Military Appeals unhesitatingly applied the *Trombettu* materiality standard to this case, adoption of the *Trombettu* rule as the military due process standard was not necessary for the court to uphold the accused’s conviction in *Kern*. First, unlike a

⁹⁸The maximum penalty in the military for larceny of property of a value in excess of \$100.00 is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years; whereas the maximum penalty for larceny of property worth \$100.00 or less is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Id.* The 1969 Manual, which applied to Kern’s trial, included an intermediate penalty of confinement for one year, a bad-conduct discharge, and forfeiture of all pay and allowances if the value of the property was more than \$50.00 but less than or equal to \$100.00. Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 127c [hereinafter MCM, 1969].

⁹⁹*United States v. Kern*, 22 M.J. at 51.

¹⁰⁰Uniform Code of Military Justice art. 46, 10 U.S.C. section 846 (1982) [hereinafter UCMJ].

¹⁰¹*United States v. Kern*, 22 M.J. at 51.

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

breath sample case, the unavailable evidence in *Kern* was not of such a nature that the court would have to speculate on the general nature and qualities of the evidence. It is impossible to perform a blood-alcohol analysis on a sample of breath that a breath testing machine has long since discharged into the air. It does not require speculation, however, for an expert witness familiar with the value of military property to examine photographs and inventories of over two thousand dollars worth of government equipment and to conclude that the property's value is more than one hundred dollars,¹⁰⁶ the threshold value that the government must prove for the accused to be eligible for the maximum sentence.¹⁰⁷ Second, the posture of this case did not require the Court of Military Appeals to adopt a new military due process standard. After the trial judge changed the allegation of value to "of some value," he removed any possible prejudice to the accused from the case, and probably gave the accused more of a remedy than the circumstances warranted.¹⁰⁸ Since the trial judge granted a remedy, he apparently found that the government violated the accused's rights of access to the evidence, or else he was removing any possible prejudice in the event the appellate courts would find a violation. The Court of Military Appeals stated that "[t]he military judge properly applied the law here... [The] appellant was not harmed by the government's inability to produce the property."¹⁰⁹ The court could have decided *Kern* by concluding that, even if the government did

¹⁰⁶The 1969 Manual provided the following discussion of proof of value:

Value is a question of fact to be determined on the basis of all the competent evidence presented. When the property allegedly stolen is an item issued or provided from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. . . . The price listed in the official publication is not conclusive as to the value of the item, and other competent evidence is admissible on the question of its condition and value.

. . . . When the character of the property clearly appears in evidence, as when, for instance, it is exhibited to the court, the court, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of \$100 . . . the court may find a value of more than \$100.

MCM, 1969, para. 200a(7). This explanation is substantially repeated in MCM, 1984, Part IV, para. 46c(1)(g). At the trial in *Kern*, the government had photographs and inventories of the property, and the investigative agents had delivered the specific property in question to a battalion supply officer. *United States v. Kern*, 22 M.J. at 50. The court should have been able to make findings as to whether the property was worth more than \$100.00, especially if the battalion supply officer would have testified as to his opinion of the property's value.

¹⁰⁷See *supra* note 98.

¹⁰⁸The military judge sentenced *Kern* to a bad-conduct discharge, forfeiture of \$200.00 pay per month for two months, confinement for two months, and reduction to pay grade E-1. *United States v. Kern*, 22 M.J. at 50.

¹⁰⁹*Id.* at 52.

violate the accused's rights in the case, the trial judge awarded an appropriate remedy and removed all prejudice to the accused. The decision as to whether to absorb Trombettu as the standard of military due process would then have been left to a future case with more suitable facts.

The court's initial concern that dismissal of the charges would be required if the government violated the accused's rights to production of the evidence¹¹⁰ may have fueled the court's rush to review the case under the Trombettu rule. As the court later concluded, however, "the trial judge may fashion such remedies as are appropriate to protect the fundamental rights of the accused."¹¹¹ If the military judge would have granted no relief at the Kern trial, the Court of Military Appeals could have sent the case back for a new sentencing proceeding after holding that the maximum sentence would be that for stealing property "of some value."¹¹² Thus, if the court would have proceeded more cautiously, it might have given more consideration in subsequent cases to the rationale behind the military's liberal discovery rules.

Although the court adopted the Trombettu rule, it certainly did not condone the government's conduct in disposing of the evidence. The court cautioned that government prosecutors should give notice to the defense when the government desires to dispose of evidence, "thereby allowing the defendant to conduct an independent examination of the property and placing on the defense the onus of requesting that property be retained for use as evidence at trial. This should bring to light any nonapparent exculpatory value of evidence to the defense case. . . ."¹¹³ The court based this suggestion on "the rule of reason . . . in dealing with evidence,"¹¹⁴ which requires "a diligent effort by prosecutors to preserve and protect exculpatory evidence and make it available to the accused for use in his defense."¹¹⁵

2. United States v. Garries.

Four months after Kern, the Court of Military Appeals decided *United States v. Garries*,¹¹⁶ a more appropriate application of the

¹¹⁰The court specified two issues for review, paralleling the "apparent exculpatory value" and "comparable evidence" prongs of the Trombettu materiality standard, indicating that if the accused were successful, the government would be barred from prosecuting him. See *id.* at 50.

¹¹¹*Id.* at 52.

¹¹²The Supreme Court's remedy in *Brady v. Maryland* was not to dismiss the charges, but rather to send the case back for a new sentencing proceeding. *Brady*, 373 U.S. at 90-91.

¹¹³*United States v. Kern*, at 52-53.

¹¹⁴*Id.* at 53.

¹¹⁵*Id.*

¹¹⁶22 M.J. 288 (C.M.A. 1986).

Trombetta rule. In *Garries*, the State of Colorado originally attempted to prosecute the accused for a murder that the accused committed on an Air Force base. During the original investigation, state police removed certain items from the accused's government quarters and from his automobile, because they apparently contained blood stains. The police sent the items to the F.B.I. laboratory, where technicians consumed the stains during testing. Because the F.B.I. consumed the stains without granting the accused access to the stains or to the testing procedures, the Colorado state courts subsequently suppressed the blood stain evidence and the state prosecution terminated.¹¹⁷ The Air Force later tried the accused by court-martial for the same offense, and the military judge denied a motion to suppress the same evidence.¹¹⁸ When the accused appealed his case, the Supreme Court had already decided *Trombetta*, and the military appellate courts had no difficulty concluding that the accused did not satisfy the burden of showing that the destroyed evidence met the *Trombettu* materiality standard.¹¹⁹

The *Garries* court could have analyzed the case under clearly established military rules before examining the facts under the constitutional minimum standards. As with *Kern*, the court was only slightly concerned about the potential application of Article 46 of the Uniform Code of Military Justice. If the court would have applied Article 46 to *Garries*, it would have found no violation. Although the laboratory that destroyed the evidence was a federal organization, the F.B.I. conducted the analysis pursuant to the state's request.¹²⁰ Thus, the military prosecutors and investigative agents arguably did not violate Article 46; the State of Colorado had control over the evidence when the F.B.I. consumed the blood stains. The accused and the military prosecuting authorities had equal access to the evidence: none. Further, the Court of Military Appeals apparently had little sympathy for the accused, because the court was unwilling to conclude with certainty that the F.B.I. actually destroyed all of the blood stains. A footnote in the opinion reveals the court's speculation that some blood may still have been present on the real evidence when the

¹¹⁷ See *United States v. Garries*, 22 M.J. at 292 (citing *People v. Garries*, 645 P.2d 1306, 1308 (Colo. 1982)).

¹¹⁸ See *United States v. Garries*, 22 M.J. at 292.

¹¹⁹ The Air Force Court of Military Review noted briefly that the government acted with good faith, the F.B.I. forensic serologist was available for full cross-examination, and that *Trombetta* and one of the Air Force court's own cases "are dispositive of the issue." *United States v. Garries*, 19 M.J. 845, 856 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 288 (C.M.A. 1986).

¹²⁰ See *id.*

evidence appeared in court.¹²¹ After deciding that the government did not violate any military access to evidence rules, the court could then have moved on to discuss the constitutional minimum standards.¹²² This would have drawn sufficient attention to the importance of Article 46, even though the government satisfied that rule's requirements.

The court did, however, acknowledge some Article 46 concerns by advising the government how to handle similar evidence in future cases. After reviewing the general principle that the defense is entitled to equal access to the evidence,¹²³ the court said that "the better practice is to inform the accused when testing may consume the only available samples and permit the defense to have a representative present."¹²⁴ In a footnote, the court continued: "If the testing had been done by the military or at its request, a different result might be required. In that situation, it would be difficult to excuse the failure to provide notice to the defense."¹²⁵ Thus, the court implies that it is possible to meet minimum constitutional standards in the area of loss or destruction of evidence and yet violate Article 46's safeguards. This is consistent with the court's earlier recognition in *Kern* that Article 46 affords more rights to the accused for access to evidence than does the due process clause of the Constitution.¹²⁶

3. *Urinalysis Cases.*

Urinalysis cases in the military justice system are as ripe for litigation over the destroyed evidence issue as are drunk driving cases in the civilian context. The typical case would be a prosecution for using illegal drugs, with the government using a urinalysis test result

¹²¹ Apparently quoting from the record of trial, the Court of Military Appeals noted

At the time of trial, still remaining on the exhibit were several "very suspicious" stains which the defense expert testified would lead him to test further "for the presence of blood." Although this exhibit was available for further testing, the defense apparently did not have it tested by its expert. Thus, it appears that appellant may not have been totally deprived of the opportunity for independent testing.

United States v. Garries, 22 M.J. at 292-93 n.5.

"See *infra* text accompanying note 243.

¹²³ United States v. Garries, 22 M.J. at 293.

¹²⁴ *Id.*

¹²⁵ *Id.* n.6. The court inserted this footnote after it stated in the opinion that, under the circumstances of this case, it found no prejudice. *Id.* The court thus hinted that it may find prejudice if military authorities are responsible for destroying evidence. In view of the summary disposition in United States v. Frost, 22 M.J. 386 (C.M.A. 1986), however, which the court actually published two weeks prior to the date of the *Garries* opinion, the court may not find prejudice even if the government is responsible for destruction of the evidence. See *infra* notes 137-40 and accompanying text.

¹²⁶ See United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986).

as the primary evidence of drug use.¹²⁷ Typically, numerous urine samples are collected locally, and the samples are shipped to a drug testing laboratory for analysis.¹²⁸ Administrative regulations require the commanders and the laboratory to preserve positive urine samples until the conclusion of any disciplinary procedures.¹²⁹ Preserving the evidence ensures that it is available for trial use, and also that it is available to both the prosecution and the defense for any further testing.¹³⁰ If the urine sample is destroyed, the accused could seek appropriate relief from the military judge because of the loss or destruction of evidence.

Urine sample cases involve some different issues than breath sample cases. First, the chain of custody of a breath sample does not become an issue in a drunk driving trial. When a soldier's commander collects numerous urine samples and sends them to a laboratory, however, the prosecutor must establish the chain of custody of a positive sample before the test results are admissible against the accused.¹³¹ Thus, the accused may not only be interested in retesting the sample to ensure that the sample is truly positive, but he or she may also be interested in challenging the chain of custody. Besides closely examining the government's documents and cross-examining the chain of custody witnesses, the defense could attempt to challenge the chain of custody by analyzing the urine sample for blood type characteristics to determine whether the positive sample originated

¹²⁷ See, e.g., *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) (prosecution based its case against the accused on the results of various laboratory tests on his urine and expert testimony explaining them); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987) (prosecution based its case on one positive urine sample).

¹²⁸ Department of Defense guidelines for administering the urinalysis program are contained in Dep't of Defense Directive No. 1010.1, Drug Abuse Testing Program, Encls. 2-3 (Dec. 28, 1984), as changed by Dep't of Defense System Transmittal No. 1010.1 (ch. 1, Dec. 12, 1986). The guidelines state that the military departments will maintain a documented chain of custody of the urine samples, *id.* at Encl. 2, and that the drug testing laboratories will preserve positive samples until the conclusion of adverse judicial or administrative proceedings, *id.* at Encl. 3.

¹²⁹ The Army has implemented its drug testing program in Dep't of Army, Reg. No. 600-85, Personnel—General—Alcohol and Drug Abuse Prevention and Control Program, ch. 10 (3 Nov. 1986) [hereinafter AR 600-85]. The regulation makes the unit commander responsible for ensuring "that those positive specimens that will be used in UCMJ or adverse administrative actions are retained by the [laboratory] until the action is complete." AR 600-85, para. 10-4e(5).

¹³⁰ *United States v. Scholz*, 19 M.J. 837 (N.M.C.M.R. 1984).

¹³¹ For example, in *United States v. Murphy*, 23 M.J. 310, 311 (C.M.A. 1987) the court summarized that the government produced "various witnesses from the command concerning the command procedures for taking the specimen from appellant, mailing it to the laboratory, its return to command, and its presence in the courtroom." AR 600-85 outlines a rigid chain of custody procedure for the Army's program: "The chain of custody must account for each individual urine specimen in groups of 12 or less from the time of collection of the urine specimens until final analysis at the drug testing laboratory." AR 600-85, para. 10-5b.

from the accused.¹³² Second, in a drunk driving trial, the defense can cross-examine the police officer who operated the breath testing machine.¹³³ In a urinalysis trial, however, the government is not required to produce the drug testing machine's operator at the trial. In the usual case, the government could merely produce some laboratory official who could explain the testing procedures and the testing results. In a urinalysis trial, then, there is no guarantee of being able to cross-examine the machine's operator in an attempt to show operator error as is possible for a breath test.

In addition to *Kern* and *Garries*, the Court of Military Appeals had the opportunity to rule on at least two urinalysis cases in 1986 where the government was responsible for the destruction of the urine samples. The court previously had granted petitions for review to consider whether the military judge properly admitted the urinalysis results into evidence under these circumstances.¹³⁵ After the court decided in *Kern* to absorb the *Trombetta* materiality standard as a military due process standard, however, the court affirmed both urinalysis convictions in summary dispositions.¹³⁶

United States v. Frost,¹³⁷ one of the two affirmed cases, is an example of how the government consumed the urine sample in the drug testing process. After the government initially tested the sample, the defense requested a portion of the sample for testing at a laboratory that the

¹³² See *supra* notes 72–74 and accompanying text.

¹³³ See *California v. Trombetta*, 467 U.S. 479, 490 (1984).

¹³⁴ In *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986), the government called the officer in charge of the drug testing laboratory to testify “concerning the operation of the laboratory, including security, personnel, testing procedures, reporting procedures and receipt and delivery practices.” *Id.* at 160. Although the court apparently does not require the actual machine operator to testify, the court will at least require the government to present some expert testimony to the court. See *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987) (court reversed conviction where government did not produce an expert witness, or some other lawful substitute, to interpret the drug tests).

¹³⁵ The court granted the following issue in *United States v. Frost*:

Whether the military judge erred to the substantial prejudice of the appellant by denying defense counsel's motion to dismiss the charge of wrongful use of marijuana when the evidence of guilt was taken from a urine sample that was subsequently destroyed in violation of standard procedures and after a defense request had been made to preserve the sample.

United States v. Frost, 20 M.J. 365 (C.M.A. 1985) (order granting petition for review). In the second case, the court was less specific: “Were the results of a urinalysis improperly admitted into evidence?” *United States v. Krueger*, 20 M.J. 11 (C.M.A. 1985) (order granting petition for review).

¹³⁶ *United States v. Frost*, 22 M.J. 386 (C.M.A. 1986); *United States v. Krueger*, 22 M.J. 210 (C.M.A. 1986).

¹³⁷ The Air Force Court of Military Review's opinion is published at 19 M.J. 509 (A.F.C.M.R. 1984).

defense would choose.¹³⁸ When the government laboratory personnel removed a portion for the government's retest, they inadvertently destroyed the remainder of the sample. After this retest, the government performed yet another test on the previously removed portion, and the government sent a small portion to the accused's laboratory at the same time. The accused's laboratory, however, reported that the small amount of urine it received was not sufficient to perform the desired tests. By the time the Air Force Court of Military Review reviewed the accused's conviction, the Supreme Court had decided *Trombetta*; the Court of Military Review held that, because the defense "examined and cross-examined extensively"¹³⁹ the laboratory personnel, the court-martial "adequately protected the accused's rights, and we find no error in admitting the test results."¹⁴⁰ The reported opinion does not indicate what type of scientific tests the accused wanted his laboratory to perform or which government laboratory personnel testified at the trial.

111. MILITARY RULES APPLIED TO LOSS OR DESTRUCTION OF EVIDENCE

A. MILITARY DUE PROCESS

The *Trombetta* materiality standard is based on the due process provisions of the fifth and fourteenth amendments to the Constitution;¹⁴¹ *Trombetta* therefore prescribes only the minimum constitutional standards that a prosecution must meet when the government has lost or destroyed evidence.¹⁴² The Supreme Court recognized that individual states are free to establish higher standards when the

¹³⁸United States v. Frost, 19 M.J. at 510.

¹³⁹*Id.* at 510.

¹⁴⁰*Id.*

¹⁴¹Although the Supreme Court established the *Trombetta* standard under the fourteenth amendment, see *California v. Trombetta*, 467 U.S. 479, 491 (1984), the court undoubtedly would have applied the same standard under the fifth amendment. See *id.* at 485, where the Court stated that Agurs, which interpreted the fifth amendment's due process clause, applies to the states through the fourteenth amendment.

¹⁴²Several state courts have adopted the *Trombetta* standard as the due process standard under their own state law. See, e.g., *People v. Gonzales*, 179 Cal. App. 3d 566, 575, 224 Cal. Rptr. 853, 858-59 (1986) (modifying earlier decision that defendant was entitled to a jury instruction on the characteristics of the missing evidence); *Houser v. State*, 474 So.2d 1193, 1195-96 (Fla. 1985); *State v. Albright*, 110 Idaho 748, 749, 718 P.2d 1186, 1187 (1986); *People v. Jordan*, 103 Ill. 2d 192, 210-13, 469 N.E.2d 569, 578-79 (1984); *State v. Casele*, 198 N.J. Super. 462, 469-71, 487 A.2d 765, 769-70 (Super. Ct. App. Div. 1985); *State v. Purdon*, 24 Ohio App. 3d 217, 219, 494 N.E.2d 1154, 1157 (1985); *Commonwealth v. Gamber*, 352 Pa. Super. 36, 41, 506 A.2d 1324, 1327 (1986); *State v. Williams*, 480 A.2d 1383, 1390 (R.I. 1984).

prosecution is responsible for the loss or destruction of evidence.¹⁴³ Although federal civilian courts must follow the Supreme Court's minimum standards,¹⁴⁴ the same is not necessarily true for the military courts. As with individual states, the military justice system is free to set standards that are higher than the constitutional minimum standards.

In *United States v. Clay*,¹⁴⁵ one of the Court of Military Appeals' first cases, that court initiated a doctrine known as "military due process," a doctrine that the court would eventually use in holding military courts to higher standards than the constitutional standards that apply to civilian courts. In *Clay*, the president of the court-martial closed the court for deliberations without instructing the court members on the elements of the offense, the presumption of innocence, and the burden of proof, even though the Uniform Code of Military Justice required him to give these instructions.¹⁴⁶ The Court of Military Appeals, in beginning to assert its control over the military justice system,¹⁴⁷ searched for the basis of due process in the military system. The court found the basis in the specific provisions of the Uniform Code itself. "There are certain standards . . . which we must demand be observed in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law."¹⁴⁸ After adopting the phrase "military due process,"¹⁴⁹ the court stated that military due process standards would be based on the laws of Congress and not on the Constitution. Effectively circumventing the Uniform Code's harmless error rule,¹⁵⁰ the court held in *Clay* "that the failure to afford to an

¹⁴³"State courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution." *California v. Trombetta*, 467 U.S. at 491 n.12. See *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986) (due process clause of the Arizona Constitution guarantees DWI suspects a fair chance to obtain evidence of sobriety at the only time the evidence is available); *People v. Sheppard*, 701 P.2d 49, 52 (Colo. 1985) (police must employ regular procedures to preserve evidence that they could reasonably foresee might be favorable to the defense; state is responsible even if the loss of the evidence is inadvertent and not the result of bad faith).

¹⁴⁴See, e.g., *Elmore v. Foltz*, 768 F.2d 773, 778 (6th Cir. 1985); *United States v. Webster*, 750 F.2d 307, 333 (5th Cir. 1984), cert. denied, 471 U.S. 1106 (1985); *United States v. MacDonald*, 640 F.Supp. 286, 307 (E.D.N.C. 1985).

¹⁴⁵1 C.M.A. 74, 1 C.M.R. 74 (1951).

¹⁴⁶See *id.* at 76, 1 C.M.R. at 76.

¹⁴⁷See generally Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 Mil. L. Rev. 39, 71-93 (1972) (reviewing the court's assumption of a general supervisory role over the administration of military justice, in light of the UCMJ's limitations on its powers).

¹⁴⁸*United States v. Clay*, 1 C.M.A. at 77, 1 C.M.R. at 77.

¹⁴⁹"For lack of a more descriptive phrase, we label the pattern as 'military due process' and then point to the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted." *Id.*

¹⁵⁰"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a); see Willis, *supra* note 147, at 79-80.

accused any of the enumerated rights denied him military due process and furnishes grounds for us to set aside the conviction."¹⁵¹ In justifying the harsh remedy for a violation of military due process, the court believed that "[t]here is importance attached to a benefit given by Congress, and the importance should not be diluted by an assumption that doubtful cases call for its protection but those appearing to be certain permit it to be discarded."¹⁵²

As the doctrine of military due process evolved, the Court of Military Appeals recognized that certain constitutionally required standards also would be included in the concept of military due process. As the court concluded in *United States v. Jacoby*,¹⁵³ "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."¹⁵⁴ As the court's original Chief Judge later wrote, "military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code added their weighty demands to the requirements of a fair trial."¹⁵⁵ As a result, military due process includes, at a minimum, certain constitutional due process guarantees; and the specific military procedural safeguards provide additional guarantees that protect the military accused. In addition to recognizing that military due process is more protective of an accused than constitutional minimum due process, the court also realized that an automatic reversal is not necessary whenever the government violates one of the Uniform Code's provisions,¹⁵⁶ even though a reversal will be required in many circumstances.¹⁵⁷

¹⁵¹*United States v. Clay*, 1 C.M.A. at 78, 1 C.M.R. at 78.

¹⁵²*Id.* at 81-82, 1 C.M.R. at 81-82.

¹⁵³11 C.M.A. 428, 29 C.M.R. 244 (1960).

¹⁵⁴*Id.* at 430-31, 29 C.M.R. at 246-47.

¹⁵⁵*Quinn, The United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225, 232 (1961), quoted in Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 189 (1962). Chief Justice Warren's article is reprinted under the same title at Mil. L. Rev. Bicent. Issue 249 (1975).

¹⁵⁶*See, e.g., United States v. Applewhite*, 23 M.J. 196, 199-200 (C.M.A. 1987) (court applied harmless error rule after finding violation of sixth amendment right to counsel); *United States v. Frost*, 22 M.J. 386 (C.M.A. 1986) (summary disposition); *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986); *United States v. Killebrew*, 9 M.J. 154, 162 (C.M.A. 1980) (after finding that the government violated UCMJ art. 46, in preventing defense access to a witness, court returned the case for a limited hearing to determine what information the witness would provide; court would later consider this information in assessing prejudice to the accused).

¹⁵⁷*See, e.g., United States v. Toledo*, 15 M.J. 255, 256 (C.M.A. 1983) (conviction reversed where military due process required government to provide defense with a transcript of a witness's former testimony); *United States v. Killebrew*, 9 M.J. 154, 162 n.13 (C.M.A. 1980) (if the court could have been able to determine the information possessed by the witness the government prevented the defense from contacting, dismissal of charges or a rehearing may have been appropriate).

B. UCMJ ARTICLE 46

Article 46¹⁵⁸ provides the statutory basis for discovery in the military justice system. In providing that the prosecution and the defense “shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe,”¹⁵⁹ the statute appears to grant to the defense the same access to the evidence that the prosecution has. The Uniform Code’s legislative history sheds little light on the meaning of this article. After repeating the substantive provision, the legislative history merely states that “[i]t is considered appropriate to leave the mechanical details . . . to regulation.”¹⁶⁰ Regardless of how “equal” this access to the evidence is, it is clear that Article 46 provides the military accused with a broad right to discovery.¹⁶¹ By leaving the details to subsequent regulations, however, the accused’s access to the evidence may not be as “equal” as Congress originally envisioned.

The Court of Military Appeals has identified Article 46 as one of the specific statutory rights that the government must afford an accused to satisfy the guarantees of military due process. In *United States v. Toledo*,¹⁶² one of the court’s leading discovery cases, the court cited Article 46 in stating that military due process required the government to prepare a transcript of a government witness’s former testimony in another proceeding at another location, but involving the same subject matter. The court rationalized that “[w]hen documentary evidence is sought by the accused, it must be shown that the material is relevant to the subject matter of the inquiry and that the request itself is reasonable.”¹⁶³ Unlike *United States v. Clay*, however, where the court indicated that a violation of military due process will always result in reversal,¹⁶⁴ not every violation of Article 46 will require dismissal of the charges. Rather, the court will examine the record for “the risk of prejudice” to the accused.¹⁶⁵

¹⁵⁸UCMJ art. 46.

¹⁵⁹*Id.*

¹⁶⁰S. Rep. No. 486, 81st Cong., 1st Sess. 21 (1949), reprinted in 1950 U.S. Code Cong. Serv. 2222, 2246.

¹⁶¹“Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts.” *United States v. Mouganel*, 6 M.J. 589, 591 (A.F.C.M.R. 1978), petition denied, 6 M.J. 194 (C.M.A. 1979). As the drafters of the 1984 Manual noted: “Military discovery practice has been quite liberal, although the sources of this practice are somewhat scattered.” MCM, 1984, R.C.M. 701 analysis.

¹⁶²15 M.J. 255 (C.M.A. 1983).

¹⁶³*Id.* at 256.

¹⁶⁴*United States v. Clay*, 1 C.M.A. at 81–82, 1 C.M.R. at 81–82.

¹⁶⁵*United States v. Killebrew*, 9 M.J. 154, 162 (C.M.A. 1980).

Consistent with the doctrine of military due process, it is obvious that the accused's discovery rights under Article 46 are broader than those guaranteed under the due process clause of the fifth amendment. As the Court of Military Appeals recognized in *Kern*,¹⁶⁶ the difference is best illustrated by the accused's right of access to inculpatory as well as exculpatory evidence. The accused also does not need to show that the evidence to which he seeks access is "material"; he needs only to show that the evidence is relevant and that the request is reasonable.¹⁶⁷ Further, the evidence to which the accused seeks access does not have to be admissible at his court-martial. In *United States v. Mouganel*,¹⁶⁸ for example, the Air Force Court of Military Review held that the government should have granted the defense access to the results of polygraph examinations administered to a government witness.¹⁶⁹

The military accused's broad discovery rights result in a logical tension between Article 46 and the Supreme Court's *Trombettu* decision. Before the government loses or destroys evidence, any evidence to which it has access is also available to the accused under Article 46, and to deny the defense access to the evidence at that point is a violation of Article 46 and arguably a denial of military due process. If the accused specifically requests access to this evidence, as he did in *United States v. Frost*,¹⁷⁰ the government seems to have no other alternative under Article 46 than to grant the request, whether the evidence is inculpatory or exculpatory. Under *Trombettu*, however, the government would not be violating the accused's constitutional due process rights by denying access unless the evidence is apparently exculpatory.¹⁷¹ Therefore, prior to loss or destruction of the evidence, Article 46 imposes higher standards on the government than does *Trombettu*, rather than some other minimum standard that would apply after the evidence is no longer available.¹⁷²

After the government renders the evidence unavailable, however, by losing it, destroying it, or by consuming the evidence during testing, the constitutional minimum standard provides more protection than Article 46 provides for the accused. In that case, the evidence is just as unavailable to the government as it is to the defense. Neither

¹⁶⁶ *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986).

¹⁶⁷ *See United States v. Toledo*, 15 M.J. 255, 256 (C.M.A. 1983).

¹⁶⁸ 6 M.J. 589 (A.F.C.M.R. 1978), *petition denied*, 6 M.J. 194 (C.M.A. 1979).

¹⁶⁹ *Id.* at 591.

¹⁷⁰ 19 M.J. 509 (A.F.C.M.R. 1984), *aff'd*, 22 M.J. 386 (C.M.A. 1986); *see supra* notes 137–40 and accompanying text.

¹⁷¹ *See supra* note 57 and accompanying text.

¹⁷² R.C.M. 703(f)(2) supplies the other military standard that applies to unavailable evidence. *See infra* notes 192–95 and accompanying text.

Article 46 nor any other Uniform Code provision addresses the situation where evidence is no longer available, although the new Rules for Courts-Martial may provide a **remedy**.¹⁷³ Thus, it would seem that after the evidence is unavailable, there can be no violation of Article 46 itself, because equal access to the evidence would be the equivalent of no access at that point.

C. *MANUAL FOR COURTS-MARTIAL, 1969*

Paragraph 115 of the 1951 and 1969 Manuals for Courts-Martial¹⁷⁴ were the Presidential regulations that implemented Article 46 of the Uniform Code of Military Justice. The 1969 version of this paragraph is wider in scope than its 1951 counterpart,¹⁷⁵ stating that when “documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel . . . will, upon reasonable request . . . take necessary action to effect their production for use in evidence and . . . to make them available to the defense to examine or to use.”¹⁷⁶ As with Article 46, paragraph 115c makes no distinction between exculpatory and inculpatory evidence, and the provision fails to address the consequences of losing or destroying evidence.

Paragraph 115c, however, explicitly introduces a concept that Article 46 only implies: the paragraph does not impose a duty upon the government unless the defense actually requests access to or production of the **evidence**.¹⁷⁷ And the government has no duty under Article 46 unless, at the time of the request, the evidence is available to the government. Thus, the defense cannot complain of being denied access to the evidence in violation of Article 46 unless the defense has actually requested access to the evidence, and the defense cannot complain of being denied equal access if, at the time of the defense request, the prosecution no longer has access to the evidence. Thus, under the

¹⁷³R.C.M. 703(f)(2) authorizes the military judge to abate the proceedings when missing evidence is “of such central importance to an issue that it is essential to a fair trial” and there exists no adequate substitute for the evidence. See *infra* text accompanying notes 192–200.

¹⁷⁴MCM, 1969, para. 115; Manual for Courts-Martial, United States, 1951, para. 115 [hereinafter MCM, 1951].

¹⁷⁵MCM, 1951, para. 115c provided that the government must produce for the defense “documents which are to be introduced in evidence.” *Id.* The paragraph did not mention other evidentiary materials, or any information the defense would like to use for background purposes to assist in the preparation of the defense case or to lead the defense to other, admissible evidence.

¹⁷⁶MCM, 1969, para. 115c.

¹⁷⁷Other provisions in the 1969 Manual required the trial counsel to disclose certain information to the defense without any request, e.g., MCM, 1969, para. 44h.

1969 Manual, the defense had to look elsewhere for a remedy when evidence was no longer available.

D. MANUAL FOR COURTS-MARTIAL, 1984

The 1984 Manual for Courts-Martial contains an extensive set of discovery rules.¹⁷⁸ These rules encompass many of the rules that existed in the prior editions of the Manual,¹⁷⁹ and they also reflect rules that developed through case law.¹⁸⁰ Upon request, the prosecution must disclose just about anything within its possession,¹⁸¹ unless the material is privileged.¹⁸² After repeating Article 46's guarantees of equal access to the evidence, the new rules state that "[n]o party may unreasonably impede the access of another party to a witness or evidence."¹⁸³ The new rules may even require the government to gather information for the defense that the government investigators have not already collected, if the government has the capability of gathering the information should the government want to use it.¹⁸⁴ If the defense requests that a particular item be produced, the trial counsel must obtain the evidence unless he believes the evidence is not relevant or not necessary,¹⁸⁵ in which case the defense may seek relief from the military judge.¹⁸⁶ The new rules also provide remedies that the military judge may impose in cases where the parties have not complied with discovery rules¹⁸⁷ or where the prosecution has declined to produce relevant and necessary witnesses or evidence.¹⁸⁸

The 1984 Manual incorporates what resembles the constitutionally required minimum disclosures by providing that the trial counsel must disclose evidence "which reasonably tends" to negate guilt, to reduce the degree of guilt, or to reduce the punishment.¹⁸⁹ This rule's general concept is not new to military practice, because the Model Code of Professional Responsibility's similar rule¹⁹⁰ applied to mili-

¹⁷⁸The discovery practice generally is governed by R.C.M. 701-703.

¹⁷⁹*E.g.*, R.C.M. 701(a)(1)-(3); see R.C.M. 701(a) analysis.

¹⁸⁰See R.C.M. 701(a)(6); R.C.M. 701(a)(6) analysis.

¹⁸¹R.C.M. 701(a)(2).

¹⁸²R.C.M. 701(f).

¹⁸³R.C.M. 701(e).

¹⁸⁴See R.C.M. 701 analysis.

¹⁸⁵R.C.M. 703(f)(3) (incorporating procedures established in R.C.M. 702(c) relating to witness requests).

¹⁸⁶*Id.*

¹⁸⁷R.C.M. 701(g)(3).

¹⁸⁸R.C.M. 703(f)(3); R.C.M. 703(c)(2)(D).

¹⁸⁹R.C.M. 701(a)(6).

¹⁹⁰Model Code of Professional Responsibility, DR 7-103(B) (1980).

tary prosecutors before the 1984 Manual came into effect.¹⁹¹ This new rule is important, however, because it establishes the standard for judging the materiality of what the prosecution must disclose—evidence that reasonably tends to favor the defense. In determining whether the government violated its duty to the defense, the courts need not be concerned with the changing constitutional definitions of materiality, and with determining whether evidence could reasonably affect the findings or if it raises a reasonable doubt. The military standard is now set by Executive order, and it rises above the constitutional minimum required disclosure standards.

In another departure from 1969 Manual, the 1984 Manual specifically addresses the issue of unavailable evidence. Rule for Courts-Martial 703(f)(2) recognizes that the government cannot produce lost or destroyed evidence.¹⁹² The rule further recognizes, however, that the unavailability of the evidence may significantly affect the defense case. In what somewhat resembles the *Trombetta* materiality standard, the rule may provide a remedy "if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence."¹⁹³ If the unavailable evidence satisfies this test, the military judge should fashion a remedy in an attempt to obtain the evidence or presumably to obtain an adequate substitute for the evidence, or he can abate the proceeding. The rule would not require a remedy if the requesting party caused or could have prevented the unavailability of the evidence.¹⁹⁵

Although Rule 703(f)(2) shares some of *Trombetta's* qualities, some differences make the rule more beneficial to the military accused. First, where *Trombetta* elaborated on the prosecution's good faith,¹⁹⁶ Rule 703(f)(2) does not mention the prosecutor's motives.¹⁹⁷ Second the exculpatory value of the unavailable evidence is not required to be apparent before the government renders the evidence unavailable. If the government, in good faith, renders certain evidence unavailable and the evidence is later found to be important to the defense case, the rule will afford protection to the accused unless there is an adequate substitute for the evidence, contrary to *Trombetta's* result that the accused would be left with no remedy.¹⁹⁸

¹⁹¹ See Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (25 Sept. 1986).

¹⁹² "[A] party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process." R.C.M. 703(f)(2).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *California v. Trombetta*, 467 U.S. 479, 488 (1984).

¹⁹⁷ See R.C.M. 703(f)(2).

¹⁹⁸ See *California v. Trombetta*, 467 U.S. at 489.

The “adequate substitute” provision of the rule, however, as with *Trombetta*’s “comparable evidence” prong, has the potential of swallowing whatever protection the rest of the rule provides. The results of *Kern* and *Garries*, for example, may not have been any different had the two cases been handled under Rule 703(f)(2). In *Kern*, the photographs and inventories of the stolen government property would have qualified as an “adequate substitute,”¹⁹⁹ as would have the cross-examination of laboratory witnesses in lieu of the blood stain evidence in *Garries*.²⁰⁰

E. IDENTIFYING THE MILITARY STANDARDS

From a review of the various constitutional and military rules governing disclosure of evidence to the defense, it is possible to identify the standards that military courts should apply when the government has lost or destroyed evidence. It is clear that, in some situations, military law imposes on the government a higher burden than the bare minimum rule of *California v. Trombetta*.²⁰¹ Military law, however, requires no more than the minimum in other situations.²⁰² The scope of the government’s duty to the accused should depend on whether the defense has made a specific request for evidence, and whether the defense requested access to the evidence before the evidence became unavailable. Because the standards have constitutional minimum requirements as their foundation, and are further supported by the Uniform Code of Military Justice, these standards should form the basis for military due process in cases where evidence is unavailable.

1. Request for Evidence Prior to Loss or Destruction.

The military standard that affords the most protection to an accused’s rights would apply in situations where the defense has requested access to the evidence before the government lost or destroyed the evidence. In these cases, the government’s duty is governed by Article 46 of the Uniform Code, which guarantees equal access for the accused. To determine whether this duty arises, the test should require the defense to make a reasonable and specific request for relevant evidence to which the government has access.²⁰³ The government should be found in violation of Article 46 and of military

¹⁹⁹ See *supra* notes 106–07 and accompanying text.

²⁰⁰ See *supra* note 119.

²⁰¹ See *infra* notes 203–07 and accompanying text (discussing application of UCMJ art. 46); *infra* notes 228–34 and accompanying text (discussing application of R.C.M. 703(f)(2)).

²⁰² See *infra* notes 242–43 and accompanying text.

²⁰³ See *United States v. Toledo*, 15 M.J. 255 (C.M.A. 1983).

due process if it later loses or destroys the requested evidence without granting access to the defense. Even though the Rules for Courts-Martial establish a low government burden with respect to unavailable evidence,²⁰⁴ this new rule should not apply where the government loses or destroys evidence after the accused specifically requests access to the evidence.²⁰⁵ To hold otherwise would allow the government independently to lower its burden to preserve evidence and to raise the accused's burden of proof simply by losing or destroying the evidence.²⁰⁶ The accused's burden is raised from merely showing that the evidence is "relevant" to the level of showing that the evidence is "essential" to the defense.²⁰⁷ Thus, once the government violates Article 46, the violation should be fixed and the government should not be allowed to escape liability by its own actions. The remedy for an Article 46 violation may not be fatal to the government's case,²⁰⁸ but the accused nevertheless should be entitled to some remedy if he can show that the government has violated his Article 46 rights.

(a) Reasonable Request.

The reasonableness of the accused's request for evidence is one factor in identifying the government's duty under Article 46. Although not mentioned in the statute, the reasonableness concept originates from the Manual for Courts-Martial²⁰⁹ and from case law,²¹⁰ including the provision that no party may "unreasonably" impede another's access to the evidence.²¹¹ In a homicide case, for example, the defense may request access to the victim's body or may request that certain evidence be collected from the body. It would seem permissible to delay shipment of the remains for a short period of time so that the defense counsel or a retained expert could examine the body, or so that government investigators could gather evidence requested by the defense. This duty may go beyond the minimum con-

²⁰⁴R.C.M. 703(f)(2).

²⁰⁵"When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976).

²⁰⁶*Cf. Hilliard v. Spalding*, 719 F.2d 1443, 1446 (9th Cir. 1983) (requiring defendant to show prejudice after government destroyed evidence places accused's rights "in the unsupervised hands of the prosecution").

²⁰⁷Under R.C.M. 703(f)(1) the defense is entitled to evidence that is "relevant and necessary," but once the evidence becomes unavailable, the evidence must be "essential to a fair trial" for the accused to be entitled to a remedy. R.C.M. 703(f)(2); *see infra* notes 228-41 and accompanying text.

²⁰⁸Dismissal of charges or reversal of the conviction may not be necessary. *See infra* notes 253-310 and accompanying text for suggested possible remedies.

²⁰⁹*See* MCM, 1969, para. 115c ("upon reasonable request").

²¹⁰*See, e.g., United States v. Toledo*, 15 M.J. 255, 256 (C.M.A. 1983).

²¹¹R.C.M. 701(e).

stitutional standards. In *People v. Jordan*,²¹² for example, the victim's teeth turned pink, a factor that caused an expert witness to testify that the victim was strangled, and the defense had requested the state to preserve the victim's jaw. The state did not do so, and the Illinois Supreme Court held that the state's failure to preserve the jaw did not violate the accused's due process rights.²¹³ In the military, however, it would be difficult to excuse a request for temporary access before the government releases the body for burial. In a case where the defense counsel expects that fingerprint evidence will be important to the defense, the defense might request a complete and legible set of the victim's fingerprints. In a urinalysis case, a request for a quantity of urine sufficient to perform an independent scientific test of the urine would be reasonable. Such requests are reasonable intrusions into the government's orderly investigative procedures.²¹⁴ If the government denies reasonable access to the evidence, or fails to collect requested evidence properly, the government has impeded the accused's own rights to investigate the case. Conversely, a request to preserve a homicide victim's body until the conclusion of the trial could be viewed as unreasonable, as would a request for a quantity of urine in a urinalysis case that would leave the government with an insufficient amount of urine to perform the tests necessary for prosecuting the case.

(b) *Specific Request.*

Although the request's specificity may no longer be important in invoking constitutional minimum standards,²¹⁵ the government should not be held in violation of Article 46 unless it has denied the accused access to evidence to which he has specifically requested access. The government should not be held responsible for unreasonably impeding the defense's access to the evidence unless it knows what evidence it is preventing the defense from examining.²¹⁶ A defense request for the government to preserve "all evidence" or even "all exculpatory evidence" does little to provide notice of what the defense seeks access

²¹²103 Ill. 2d 192, 469 N.E.2d 569 (1984).

²¹³*Id.* at 212-13, 469 N.E.2d at 579.

²¹⁴The accused may have his urine sample retested at the government's laboratory, AR 600-85, para. 10-8a(1), or he may request the government to send a portion of the sample to another laboratory, AR 600-85, para. 10-8b. See *United States v. Frost*, 19 M.J. 509 (A.F.C.M.R.1984). Consistent with the Court of Military Appeals's suggestion, see *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986); *United States v. Kern*, 22 M.J. 49, 52-53 (C.M.A.1986), some state courts urge that the defense be granted access to the evidence or be allowed to observe testing procedures. See, e.g., *People v. Gomez*, 198 Colo. 105, 112-13, 596 P.2d 1192, 1197 (1979), cert. denied, 455 U.S. 943 (1982); *Stipp v. State*, 371 So.2d 712, 713-14 (Fla. Dist. Ct. App. 1979).

²¹⁵See supra notes 41-43 and accompanying text.

²¹⁶See supra notes 35-37 and accompanying text.

to. If the defense cannot point toward a particular piece of evidence to which it unsuccessfully sought access, the defense should not be heard to complain at a later time that it did not have equal access. In the case of a nonspecific request, the government will proceed with its investigation of the case, possibly allowing potentially exculpatory evidence to disappear. If the investigative agents are reasonably unaware of the exculpatory nature of the evidence, the courts should not find them at fault under Article 46. On the other hand, if the defense provides sufficient notice to focus the government's attention on a particular piece of evidence or on a small physical location, the government's duty should **begin**.²¹⁷

(c) Request *for* Relevant Evidence.

Under Article **46** and the Rules for Courts-Martial, the defense is granted access to evidence that is "relevant and **necessary**."²¹⁸ In the discussion following the **rule**,²¹⁹ the drafters refer to Military Rule of Evidence 401 concerning the word "relevant"; that rule defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the **evidence**."²²⁰ After referring to this evidentiary rule, the discussion continues by stating that "[r]elevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in **issue**."²²¹ The drafter's analysis of this rule states that Rule 703(f) "is based generally on paragraphs 115a and c"²²² of the 1969 Manual for Courts-Martial. As previously noted, paragraph 115c made evidence "available to the defense to examine or to use, as appropriate under the **circumstances**,"²²³ and evidence did not have to be admissible at trial to be discoverable under paragraph 115c.²²⁴ Thus, the evidence should not have to be admissible to satisfy the requirement of contributing to the defense presentation in some positive way. Further, courts and prosecutors should not place an undue burden on the defense because of Rule 703(f)(1)'s use of the word "necessary." The rule's concept, as explained by the drafter's intent and by appellate court interpretation, is to make evidence available to the defense and to assist in its preparation for trial. If the defense can explain why the evidence is

²¹⁷ See *supra* note 35 and accompanying text.

²¹⁸ R.C.M. 703(f)(1).

²¹⁹ R.C.M. 703(f)(1) discussion.

²²⁰ Mil. R. Evid. 401.

²²¹ R.C.M. 703(f)(1) discussion.

²²² R.C.M. 703(f) analysis.

²²³ MCM, 1969, para. 115c.

²²⁴ See *supra* notes 168–69 and accompanying text.

related to an issue in the case, and can assert a good-faith basis for believing that the evidence may assist the defense in some manner, there is no reason to deny the defense access to the evidence.

(d) Evidence Available to the Government.

Before the government is found in violation of Article **46**, the defense must be denied access to evidence that is available to the government. In granting equal access to the evidence, the Uniform Code clearly includes evidence within the direct control of military authorities, and the Rules for Courts-Martial provide a simple method for the trial counsel to obtain such evidence.²²⁵ Other evidence may exist, that, although not within the government's immediate control, is available through the use of a subpoena.²²⁶ Further, the rules "may accord the defense the right to have the government assist the defense to secure evidence or information when not to do so would deny the defense similar access to what the prosecution would have if it were seeking the evidence or information."²²⁷ Thus, in granting equal access to the evidence, Article **46** seems to give to the defense the right to have the government, through its investigative agents or other personnel, gather evidence or information that will assist the defense in preparing its case. At the same time, Article **46** itself does not penalize the government for being unable to accomplish the impossible task of obtaining evidence that is nonexistent.

2. Request for Evidence After Loss or Destruction.

A separate military standard should apply when the defense seeks access to evidence after the evidence is no longer available. In these cases, the government violates no Article **46** duty by failing to grant access to the evidence. After the government has lost or destroyed an item of evidence, it is no longer available even if the government should desire to produce it for its own purposes. Recognizing that loss of evidence may nevertheless place the defense in an unfair position, Rule 703(f)(2) would penalize the government if the evidence is es-

²²⁵The trial counsel obtains evidence within the control of the government by "notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence." R.C.M. 703(f)(3)(A). The defense counsel, although a military officer usually holding the same rank as the trial counsel, has no such authority. If the custodian believes that the trial counsel's order is unreasonable or oppressive, the custodian's only recourse is complaining to the convening authority or to the military judge. R.C.M. 703(f)(3)(C).

²²⁶For special or general courts-martial, only the trial counsel has the authority to issue a subpoena. R.C.M. 703(e)(2)(C). The subpoena may "command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties." R.C.M. 703(e)(2)(B).

²²⁷R.C.M. 701 analysis.

sential to a fair trial and there is no adequate substitute for the evidence.

(a) *Essential Evidence.*

Other than the prefatory words that essential evidence is evidence that is of “central importance to an issue”²²⁸ in the trial, Rule 703(f)(2) does not define the term. The drafter’s analysis²²⁹ refers to similar language in Rule 703(b)(3), which addresses the issue of unavailable witnesses. The drafter’s analysis²³⁰ of that rule, in turn, refers to the Supreme Court case of *United States v. Valenzuela-Bernal*,²³¹ which would hold the government accountable where there is a reasonable likelihood that the evidence could have affected the judgment of the jury.²³² Thus, to be “essential,” the exculpatory characteristics of the evidence must be identifiable, but the rule does not require the exculpatory value to be apparent before the government disposes of the evidence. Further, the evidence does not need to be so strong that it actually creates a reasonable doubt.²³³ The evidence, however, needs to be stronger than being merely relevant or being of such a value that it may affect the court’s finding. The exculpatory value of the evidence must be sufficiently strong that there is a reasonable likelihood that, if the evidence were available, the court would return a finding of not guilty where it otherwise would find the accused guilty.²³⁴ Thus, even if there is a high probability that the court would have convicted the accused if the evidence was available, the evidence will be essential to a fair trial if there is a reasonable probability that the court would have acquitted him.

An example of unavailable essential evidence is *United States v. Jarrie*,²³⁵ a Jenks Act case that involved due process considerations²³⁶ and that can also be analyzed under Rule 703(f)(2). In *Jarrie*, an informant witness gave an oral statement to an investigator, who took notes that the informant later adopted as his own statement. When the investigator prepared a typewritten report, he destroyed the handwritten notes but failed to incorporate into the typed report the names of two witnesses. The defense was able to learn the identity

²²⁸R.C.M. 703(f)(2).

²²⁹R.C.M. 703(f) analysis.

²³⁰R.C.M. 703(b) analysis.

²³¹458 U.S. 858 (1982).

²³²*Id.* at 873.

²³³This was the *Agurs* standard that the Supreme Court modified in *Bagley*. See *supra* notes 38–44 and accompanying text.

²³⁴See *supra* note 40 and accompanying text.

²³⁵5 M.J. 193 (C.M.A. 1978).

²³⁶See *United States v. Bosier*, 12 M.J. 1010, 1014 (A.C.M.R.), *petition denied*, 13 M.J. 480 (C.M.A. 1982).

of one of the witnesses, who contradicted the informant's in-court testimony. No party was able to remember the identity of the other witness. Obviously under the impression that the unknown witness also could have contradicted the informant, the Court of Military Appeals decided that the military judge should have excluded the informant's testimony under the Jenks Act.²³⁷ If the defense, under a similar case today, could make a good-faith offer of proof that the unknown witness would contradict the informant, it is not difficult to conclude that the evidence has a reasonable likelihood of affecting the court's finding, even if there is a high probability that the court would not believe the witness and still convict the accused.

(b) *No Adequate Substitute.*

In reviewing Rule 703(f)(2)'s requirement that there must be no "adequate substitute" for the missing evidence for the accused to be entitled to a remedy, the courts have the opportunity either to give some meaning to the rule or to render it useless. By defining "adequate substitute" as some appropriate evidence that would exist independently of already available defense options²³⁸ such as the available option of cross-examination, the court would be attempting to restore the same fairness to the proceeding that would have existed with the missing evidence being available. By including cross-examination of government witnesses within the scope of the rule, however, the courts will be defeating the purpose of having the rule in the first place, unless through the cross-examination the defense is able to elicit the same information it would have presented with the unavailable evidence. Thus, in a case such as *United States v. Jarrie*,²³⁹ the option of cross-examining the informant apparently would not restore the defense case to the strength it would have had with the unavailable witness.²⁴⁰ If the informant would have admitted in cross-examination, however, the same information that the defense would seek to introduce with the missing witness, then the "adequate substitute" standard would be satisfied.²⁴¹

3. *Fallback Position: The Trombetta Rule.*

There will be some situations where the military accused will be entitled to no more protection than that provided by *California v. Trombetta*'s constitutional minimum standards. If the defense re-

²³⁷ *United States v. Jarrie*, 5 M.J. at 195.

²³⁸ See supra notes 84-94 and accompanying text.

²³⁹ 5 M.J. 193 (C.M.A. 1978).

²⁴⁰ See supra notes 235-37 and accompanying text.

²⁴¹ See *United States v. Greene*, 12 M.J. 862, 866 (A.F.C.M.R.) (in a rape case where the government discarded the victim's clothing, victim testified that her clothing was not damaged by the assault), *petition denied*, 13 M.J. 243 (C.M.A. 1982).

quests evidence to which the government has never had access or that no longer exists, the defense will be entitled to no remedies under Article 46 of the Uniform Code. And, if “the unavailability of the evidence is the fault of or could have been prevented by”²⁴² the defense, the accused will be entitled to no remedy under Rule 703(f)(2). For example, if the defense has reason to believe that the government is about to destroy an item of evidence and the government in fact does so, the defense should have no valid complaint under Rule 703(f)(2), because the defense could have brought the item’s value to the government’s attention. If the accused is entitled to no special protection by the Uniform Code of Military Justice or by the Manual for Courts-Martial, however, this does not mean that he is without protection at all. Consistent with the doctrine of military due process,²⁴³ every military accused is entitled at least to the applicable minimum standards available under the Constitution. Thus, if the accused in such a situation could satisfy the *Trombetta* standard of showing that the evidence had an exculpatory value that was apparent before the evidence became unavailable, and that no comparable evidence is available for use at trial, the accused should be entitled to a remedy for the government’s violation of his constitutional due process rights.

IV. REMEDIES FOR LOSS OR DESTRUCTION OF EVIDENCE

When the government has violated the accused’s rights by losing or destroying evidence, the accused is entitled to an appropriate remedy. At the trial level, the military judge will have a wide range of discretion in selecting appropriate remedies in some situations,²⁴⁴ and a narrower range of remedies in other situations.²⁴⁵ Appellate courts will probably review the trial court’s actions for an abuse of discretion,²⁴⁶ and where the trial judge has imposed an inadequate remedy

²⁴²R.C.M. 703(f)(2).

²⁴³See *supra* notes 153–57 and accompanying text.

²⁴⁴After noting that “the Supreme Court has fashioned no remedy where apparently exculpatory evidence is lost or destroyed and no comparable evidence is available to the accused,” the Court of Military Appeals stated that “[d]etermination of an appropriate remedy is left to the sound discretion of the trial judge.” *United States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986).

²⁴⁵See *infra* note 303 and accompanying text.

²⁴⁶See *United States v. Strong*, 17 M.J. 263, 267 (C.M.A. 1984) (review of military judge’s discretion in applying rules of evidence to cross-examination); *United States v. Butler*, 14 M.J. 72, 73, (C.M.A. 1982) (review of military judge’s discretion in deciding on accused’s request for trial by military judge alone); *United States v. Rice*, 16 M.J. 770, 772–73, (A.C.M.R.) (review of military judge’s discretion in ruling on a challenge for cause), *petition denied*, 17 M.J. 194 (C.M.A. 1983).

or no remedy for a violation, the appellate courts may impose their own remedies.²⁴⁷

Some courts would select a remedy by balancing “the quality of the government’s conduct and the degree of prejudice to the **accused**.”²⁴⁸ These criteria include the concept of punishing the government for its role in the loss or destruction of the evidence. The Rules for Courts-Martial advise a military judge to do what “is just under the **circumstances**”²⁴⁹ when the parties have not followed the prescribed discovery rules. According to the Court of Military Appeals, the courts should select remedies that “are appropriate to protect the fundamental rights of the **accused**.”²⁵⁰ This approach focuses on placing the accused on the same ground as he was before the government lost or destroyed the evidence, rather than on punishing the government. Although an accused probably would not complain if the court selected a remedy that punished the government more than was necessary to restore the defense case to its original strength, the defense should be most concerned with presenting all helpful evidence to the trier of fact.

Courts have a large selection of alternatives to remedy the loss or destruction of evidence. The Rules for Courts-Martial explicitly provide for a continuance to obtain evidence, or even abatement of the proceedings, if unavailable evidence is essential to a fair trial,²⁵¹ and the Court of Military Appeals has suggested other possible remedies in dicta in *United States v. Kern*.²⁵² Other possible remedies are limited only by the imagination of participating counsel or of the trial or appellate courts. The following available remedies are discussed in order of severity, beginning with the least severe.

A. EXPLAIN CIRCUMSTANCES SURROUNDING LOSS OR DESTRUCTION OF THE EVIDENCE

One solution to the problem of lost or destroyed evidence is to inform the fact finder of the circumstances surrounding the loss or destruction

²⁴⁷ See UCMJ art. 66(c) (establishing scope of review for Court of Military Review); UCMJ art. 67(d) (establishing scope of review for Court of Military Appeals).

²⁴⁸ *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

²⁴⁹ R.C.M. 701(g)(3)(D).

²⁵⁰ *United States v. Kern*, 22 M.J. 49, 52 (C.M.A.1986).

²⁵¹ R.C.M. 703(f)(2) (continuance to obtain evidence or abatement of proceedings).

²⁵² 22 M.J. at 52.

of the **evidence**.²⁵³ The court could accomplish this by allowing the defense to cross-examine government witnesses concerning their handling of the evidence, or by allowing the defense to present testimony on how the evidence became unavailable. The parties to the trial could also use a stipulation of fact to inform the fact finder of these **circumstances**.²⁵⁴ Although the court cannot force either party to enter into a **stipulation**,²⁵⁵ the parties would be permitted to stipulate voluntarily as to the facts and circumstances concerning the loss or destruction of the evidence. If the defense presented the information through cross-examination, or with its **own** witnesses, the government would be free to challenge the defense's allegations by presenting testimony and arguing to the fact finder that the facts and circumstances are not as the defense **claims**.²⁵⁶ With a stipulation of fact, however, the government would not be able to contradict the facts contained in the **stipulation**.²⁵⁷

There are several reasons why this remedy may restore fairness to the trial. The defense may be concerned that the court members are wondering what has happened to a certain piece of evidence that is obviously missing, and that the absence of the evidence may have an adverse effect on the **members**.²⁵⁸ The adverse effects could include the "dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing **evidence**."²⁵⁹ The defense would want to ensure that the members are informed that the government was at fault in making the evidence unavailable, and not risk having the members think that the accused has disposed of evidence. Another reason is that the defense may want to use the facts and circumstances to convince the court members that there is a reasonable doubt of the accused's guilt. The defense could argue that, had the government not destroyed certain evidence, the defense could possibly have used the evidence to show the accuseds innocence, but now is precluded from doing so.

²⁵³The Court of Military Appeals suggested this possible remedy in *United States v. Kern*, 22 M.J. at 52.

²⁵⁴See R.C.M.811.

²⁵⁵R.C.M. 811(c).

²⁵⁶The same would be true if the defense presented the information with a stipulation of expected testimony. R.C.M. 811(e).

²⁵⁷*Id.*

²⁵⁸See *United States v. Greene*, 12 M.J. 862, 865 (A.F.C.M.R.) *petition denied*, 13 M.J. 243 (C.M.A.1982).

²⁵⁹*United States v. Tercero*, 640 F.2d 190, 192 (9th Cir. 1980), cert. *denied*, 449 U.S. 1084 (1981), *quoted in* *United States v. Greene*, 12 M.J. at 865.

For example, consider the previously discussed²⁶⁰ urinalysis case *United States v. Frost*,²⁶¹ where the government performed several tests on the accused's urine sample and disposed of all but a minuscule amount, after the defense requested a portion of the sample for its own testing. It would be relatively painless for the government to allow the court members to hear how the government's representatives handled the evidence. This would especially be important in a case where the evidence is totally unavailable, preventing the defense from even obtaining a blood-type test, which requires only a small amount of fluid.²⁶² By explaining the facts and circumstances to the members, including what analysis the defense would perform if the evidence were available, the defense would be able to argue that the government has deprived the accused of evidence that he potentially could have used to exonerate himself by conclusively establishing that the urine sample in question does not belong to him.

B. TESTIMONY CONCERNING NATURE OF THE MISSING EVIDENCE

The next logical step from explaining to the members how the government lost or destroyed certain evidence would be to actually describe the evidence for the members.²⁶³ The least severe method of accomplishing this would be to present testimony or a stipulation of expected testimony concerning the characteristics of or the condition of the unavailable evidence. With testimony or a stipulation of expected testimony, the government would be able to attack, contradict, or argue against the inferences that the defense would urge the members to draw from the testimony.²⁶⁴ A stipulation of expected testimony "does not admit the truth of the indicated testimony . . . nor does it add anything to the evidentiary nature of the testimony."²⁶⁵ Thus, this remedy introduces into the procedure a permissive inference²⁶⁶ that the members can reasonably accept or reject as they see fit,²⁶⁷ without altering either party's burden of proof.

²⁶⁰ See *supra* notes 137-40 and accompanying text.

²⁶¹ 19 M.J. 509 (A.F.C.M.R. 1984), *aff'd*, 22 M.J. 386 (C.M.A. 1986).

²⁶² See *supra* notes 73-74 and accompanying text. In *Hilliard v. Spalding*, 719 F.2d 1443 (9th Cir. 1983), the court found that the amount contained on a glass slide was sufficient to perform this test. See *id.* at 1445.

²⁶³ The Court of Military Appeals suggested this possible remedy in the form of a stipulation of fact in *United States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986).

²⁶⁴ See R.C.M. 811(e).

²⁶⁵ *Id.*

²⁶⁶ "A permissive inference in military law has long been considered no more than a well-recognized use of circumstantial evidence." *United States v. Ford*, 23 M.J. 331, 333 n.2 (1987).

²⁶⁷ "[T]he inference may . . . be drawn where the . . . evidence contrary to the inference may be reasonably disbelieved by the factfinder." *Id.* at 334.

This remedy would be appropriate in cases where the parties are in agreement that the government has lost or destroyed certain items of evidence, but are not in agreement over the specific characteristics of the evidence. Although the military judge should not force the prosecution to stipulate to facts that it disbelieves or that it cannot verify, it is still reasonable to allow the defense to present its version of the description of the missing evidence and argue to the members that the missing evidence would exonerate the accused. The prosecution could then argue against this permissive inference or could introduce contradictory evidence.

For example, in *United States v. Kern*,²⁶⁸ the defense could have presented evidence of the stolen military property's condition to show that the property was worth less than one hundred dollars, the minimum dollar amount the government must establish for the accused to be eligible for the maximum penalty for the larceny. If the prosecution disagreed with the defense characterization of the stolen property's condition, it could have either presented contradictory witnesses or merely urged the court not to believe the defense witnesses.

Another example of the parties' use of a permissive inference is the previously discussed²⁶⁹ case of *People v. Gonzales*,²⁷⁰ where the police lost the victim's written description of the suspect's tattoo. Because the defense was able to produce testimony that the victim's written description was inconsistent with the accused's tattoo, the defense was able to urge the jury to find that the wrong man was on trial.²⁷¹ The prosecution presented no contradictory evidence, but because the jury convicted the accused, the jury obviously rejected the inference that the defense urged them to draw.

C. PRESUMPTION CONCERNING NATURE OF THE MISSING EVIDENCE

If the defense is able to establish the exculpatory nature of the missing evidence to the military judge's satisfaction, the court may conclude that a presumption concerning the nature or condition of the missing evidence is an appropriate remedy. To obtain the benefit of a presumption, the defense should be able to provide a sufficient amount of proof that would allow the military judge to reasonably conclude that the asserted facts are true.²⁷² A presumption would not

²⁶⁸ 22 M.J. 49 (C.M.A. 1986); see *supra* notes 95–98 and accompanying text.

²⁶⁹ See *supra* notes 76–19 and accompanying text.

²⁷⁰ 179 Cal. App. 3d 566, 224 Cal. Rptr. 853 (1986).

²⁷¹ *Id.* at 575, 224 Cal. Rptr. at 859.

²⁷² To carry its burden on a pretrial motion, the defense normally must establish that the facts are true by a preponderance of the evidence. R.C.M. 905(c)(1).

be fatal to the government; it would merely shift the burden of producing evidence to the prosecution to contradict the defense's characterization of the missing evidence.²⁷³ Since the government caused the loss or destruction of the evidence, the government is in a better position than the accused is in assessing the nature of the missing evidence. This presumption would be "created to correct an imbalance resulting from one party's superior access to the proof."²⁷⁴

The use of presumptions is common in military law. For example, in a case where an Article 32²⁷⁵ investigating officer communicates *ex parte* with a prosecutor, the Court of Military Appeals will presume prejudice to the accused's rights.²⁷⁶ The burden of proof is shifted to the prosecution, which must establish by clear and convincing evidence that the investigating officer's conduct did not prejudice the accused's rights.²⁷⁷ The court imposed this remedy because, as compared to the government, the accused is in a relatively disadvantageous position in determining the full extent of the prejudice that has occurred.²⁷⁸ The same concept is present in a drug case, where the fact finder may infer that the accused's actions were wrongful unless the defense presents evidence of lawful use or possession.²⁷⁹ "The burden of going forward with evidence with respect to any such exception . . . shall be upon the person claiming its benefit."²⁸⁰ In the case of wrongful involvement with drugs, the inference is not mandatory,²⁸¹ and therefore is not a true presumption,²⁸² because the law does not require the fact finder to draw an inference against the accused. In the case of the Article 32 investigating officer's *ex parte* discussion with a prosecutor, however, the presumption appears to carry a mandatory inference that the prosecution may overcome only by producing evidence and by satisfying the requisite standard of proof.

²⁷³"A presumption shifts the burden of producing evidence, and . . . operates to assign the burden of persuasion as well." E. Cleary, *McCormick's Handbook on the Law of Evidence*, section 343, at 806 (2d ed. 1972).

²⁷⁴*Id.*

²⁷⁵UCMJ art. 32 (requires investigation of charges prior to referring a case to a general court-martial).

²⁷⁶*United States v. Payne*, 3 M.J. 354, 357 (C.M.A. 1977).

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹MCM, 1984, Part IV, para. 37c(5).

²⁸⁰*Id.*

²⁸¹*United States v. Ford*, 23 M.J. 331, 335 (C.M.A. 1987).

²⁸²"[M]odern draftsmen, while retaining the term presumption for criminal cases, have reduced the effect of presumptions in those cases to that of a standardized inference. The jury is permitted but not required to accept the existence of a presumed fact even in the absence of contrary evidence." E. Cleary, *supra* note 273, section 342, at 804.

D. STIPULATION CONCERNING NATURE OF THE MISSING EVIDENCE

The next remedy available to the courts would be requiring the prosecution to stipulate as to the nature and condition of the unavailable evidence.²⁸³ Although the courts technically cannot force the government to enter into a stipulation of this type,²⁸⁴ the trial counsel probably would accept this remedy to avoid a harsher remedy. An accepted stipulation of fact describing the unavailable evidence "is binding on the court-martial and may not be contradicted"²⁸⁵ by the prosecution. In a trial with members, the military judge instructs the court that "the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered by [the members] along with all the other evidence in the case."²⁸⁶ Thus, the court is not required to acquit the accused for the reason that certain evidence is deemed to be exculpatory, and the prosecution will not necessarily forfeit a conviction if it cooperates by agreeing to the stipulation. Rather, a conviction will stand if, considering all the other evidence in the case in a light most favorable to the government, a reasonable fact finder could conclude beyond a reasonable doubt that the accused is guilty.²⁸⁷ The government is merely cooperating to the extent of insuring that all relevant evidence favorable to the accused is available for the fact finder to consider.

This remedy would be appropriate when there is not much dispute over the nature of the missing evidence. The California court's original treatment of *People v. Gonzales*,²⁸⁸ the case where the police lost the victim's written description of the robber's tattoo, is an example of how a court can treat the issue of missing evidence where the judge is convinced of the characteristics of the evidence. In *Gonzales*, when the appellate court considered the case prior to the *Trombettu* decision, the court ruled that the defendant was entitled to a jury instruction conclusively establishing the victim's written description of the tattoo.²⁸⁹ This jury instruction, although the government's consent apparently was not required, is roughly analogous to the military's stipulation of fact in that the jurors must accept a certain fact as

²⁸³The Court of Military Appeals suggested this possible remedy in *United States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986).

²⁸⁴R.C.M. 811(c); *but see Kern*, 22 M.J. at 52 (suggesting that military judge may require the government to stipulate).

²⁸⁵R.C.M. 811(e).

²⁸⁶Dep't of Army, Pamphlet No. 27-9, *Military Judges' Benchbook*, para. 7-7 (May 1982).

²⁸⁷*Cf.* R.C.M. 917(d) (standard for ruling on a motion for a finding of not guilty).

²⁸⁸179 Cal. App. 3d 566, 224 Cal. Rptr. 853 (1986).

²⁸⁹*Id.* at 569, 224 Cal. Rptr. at 855.

being true. The court would not have required the jurors to find that the actual robber's tattoo matched this description, and the jurors would have been free to believe that the victim simply made a mistake. Thus, as with military stipulations, the jurors would have considered the instruction along with the remaining evidence to assess the defendant's guilt or innocence.

E. EXCLUSION OF GOVERNMENT EVIDENCE

Exclusion of some portion of a party's evidence is a recognized remedy for enforcing that party's obligation to comply with evidence disclosure rules.²⁹⁰ The Rules for Courts-Martial allow this remedy in cases where a party desires to introduce into evidence some item not previously disclosed to the opposing party.²⁹¹ In effect, the offending party is punished for its misconduct, and the party to whom the offending party fails to disclose the information gains the benefit of not having the trier of fact hear or see evidence that would adversely affect that party's position. This remedy can also be applied to situations where the government has lost or destroyed evidence. If the government seeks to introduce a specific item of testimony or evidence against the accused, and the accused would have been able to contradict that evidence with additional evidence that the government has rendered unavailable, then the government's evidence should be excluded. This remedy should be imposed only when less harsh remedies will not be effective and where the law requires no harsher remedy.

The "exclusion of evidence" remedy is used in Jenks Act²⁹² cases, situations similar to loss or destruction of real evidence. In the typical case, the defense requests disclosure of a prosecution witness's prior statement so that the defense can use the prior statement to impeach the witness's in-court testimony.²⁹³ If the government is unable to produce the statement, the court may strike the witness's testimony.²⁹⁴ If the trial court does not strike the testimony, the appellate court may reverse the conviction, authorize a rehearing, and direct

²⁹⁰ See *United States v. Kern*, 22 M.J. 49, 52 (1986).

²⁹¹ R.C.M. 701(g)(3)(C).

²⁹² 18 U.S.C. § 3500 (1982).

²⁹³ See, e.g., *United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978); *United States v. Bosier*, 12 M.J. 1010 (A.C.M.R.) *petition denied*, 13 M.J. 480 (C.M.A. 1982); *United States v. Thomas*, 7 M.J. 655 (A.C.M.R. 1979), *aff'd*, 11 M.J. 135 (C.M.A. 1981).

²⁹⁴ The military judge now has the remedy available under R.C.M. 914, a rule based on the Jenks Act. See R.C.M. 914 analysis. In addition, the judge has the authority to declare a mistrial if the government violates R.C.M. 914. See R.C.M. 914(e).

that the witness's testimony be excluded at the subsequent trial.²⁹⁵ This theory recognizes that the defense is at a disadvantage even if the defense cannot articulate the contents of the missing statement, and attempts to restore fairness by removing the prosecution's advantage. Likewise, in destruction of evidence cases, if there is a logical nexus between particular items of government evidence and other unavailable evidence that the defense establishes may be exculpatory, the courts should consider the possibility of prohibiting the government from introducing its desired evidence.

F. AMENDMENT OF SPECIFICATIONS

Amending the specifications is another remedy available to the military judge. In some cases, it would be possible to remove even a remote possibility of prejudice to an accused due to the loss or destruction of evidence. This remedy could result from a defense counsel's pretrial motion for appropriate relief in the form of amending the specifications.²⁹⁶ Although the Rules for Courts-Martial are not clear on the military judge's authority to amend the specifications on his own motion, it is clear that the Court of Military Appeals thinks it is entirely proper for the military judge to do so to protect the rights of the accused.²⁹⁷ The defense would have no substantial basis for objecting to this remedy unless the amendment is a major change to the specifications.²⁹⁸ Assuming the amendment's purpose is to safeguard the accused's rights, the defense probably would not object since the amendment operates for the benefit of the accused.

This remedy would be appropriate in cases where the lack of access to certain evidence reduces the accused's ability to defend against some of the allegations contained in the specification or against the charged offense as opposed to a lesser included offense. For example, in a conspiracy²⁹⁹ or in an attempt³⁰⁰ case, the accused may be precluded from defending against one of the alleged overt acts in the specification. If, after striking the language pertaining to the overt act, the remaining language states an offense against which the accused can defend, there will be no prejudice. In a rape case, if the government has lost or destroyed evidence that the defense would

²⁹⁵See *United States v. Jamie*, 5 M.J. at 195 (court said judge erred by not striking witness's testimony; court set aside the findings and sentence, and dismissed the affected specification); *United States v. Scott*, 6 M.J. 547, 550 (A.F.C.M.R. 1977) (findings and sentence set aside, rehearing authorized).

²⁹⁶See R.C.M. 906(b)(4).

²⁹⁷See *United States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986).

²⁹⁸See R.C.M. 906(b)(4); R.C.M. 603(a).

²⁹⁹UCMJ art. 81.

³⁰⁰UCMJ art. 80.

like to use to show lack of penetration, the offense could be reduced to attempted rape or indecent assault. The accused gains some benefit from this procedure, but still faces the risks of conviction and sentencing. The government pays a price, perhaps small, but also gains a benefit by removing an appellate issue from the case.

This was the remedy that the military judge applied in *United States v. Kern*.³⁰¹ When the government disposed of the stolen military property, the accused was hampered in his ability to defend against the property's alleged value. When the judge reduced the value in the specification to "some value," he removed all prejudice to the accused's rights. The Court of Military Appeals sanctioned this remedy, even though the court probably would not have required the lower court to apply this remedy under the existing law.³⁰²

G. ABATEMENT OF THE PROCEEDINGS

If the military judge finds that the government's actions have deprived the accused of evidence essential to a fair trial, and the accused could not have prevented these circumstances, the Rules for Courts-Martial require the judge either to grant a continuance or some other relief so that the government has a chance to produce the evidence, or to abate the **proceedings**.³⁰³ In a case where the government has misplaced the evidence or if the evidence is not subject to compulsory process, this "produce or abate" order will not necessarily terminate the court-martial. The government is capable of mustering its resources in an attempt to locate the evidence, to encourage the holder of evidence not subject to a subpoena to bring the evidence to court voluntarily, or to find an adequate substitute for the evidence. Even in cases where the government has destroyed the evidence, the trial may continue if the government produces an adequate **substitute**.³⁰⁴ If no substitute is available, however, a "produce or abate" order will be fatal and will have the same practical effect as dismissing the charges.

The military judge in *United States v. Fawcett*³⁰⁵ employed a produce or abate order to have the government produce a set of fingerprints from a deceased soldier.³⁰⁶ The government originally charged the

³⁰¹22 M.J. 49 (C.M.A. 1986).

³⁰²Even though the court said that the military judge properly applied the law, *United States v. Kern*, 22 M.J. at 52, the court also found that the government did not violate the accused's constitutional or military due process rights. *Id.*

³⁰³R.C.M. 703(f)(2).

³⁰⁴*Id.*

³⁰⁵CM 448544 (A.C.M.R.30 Dec. 1986).

³⁰⁶Record at 471, *United States v. Fawcett*, CM 448544 (A.C.M.R. 30 Dec. 1986).

accused with premeditated murder by shooting the victim, but subsequently tried him for voluntary manslaughter. Shortly after the soldier's death, the defense requested access to the body, and the defense had in fact retained a fingerprint expert for the trial. Rather than complying with the request, however, the government shipped the body to the soldier's home for burial. The weapon used to inflict the fatal wound was a handgun, and an unexplained fingerprint was present on the **handgun**.³⁰⁷ Experts could not rule out the possibility that the prints belonged to the victim, because investigators negligently obtained an incompetent set of fingerprints from his **body**.³⁰⁸ The accused contended that the victim's fingerprints were essential to his defense, because a medical expert testified that the cause of death was "undetermined," meaning he could not conclude whether the death was a homicide or the result of a self-inflicted **wound**.³⁰⁹ After the military judge entered the produce or abate order, the government elected to exhume the body and to obtain a legible set of fingerprints. The court-martial subsequently **continued**.³¹⁰ Although the judge's order could potentially have been fatal to the government's case, the defense obtained the desired evidence, and the military judge cured the objection and restored fairness to the proceeding.

H. DISMISSAL OF CHARGES

Dismissal of the charges is the most drastic remedy available to the courts. The Rules for Courts-Martial do not specifically provide for dismissal as a remedy in cases of lost or destroyed evidence, but the Court of Military Appeals suggested this approach in cases "where bad faith is clearly demonstrated, and the rights of the accused cannot adequately be protected **otherwise**."³¹¹ As with abatement of the proceedings, dismissal of charges does not leave the government without recourse. The prosecution may appeal the judge's ruling to the appropriate appellate **court**,³¹² or the government may prosecute the accused again on the same charges if the government can cure the reason for the **dismissal**.³¹³ Defense counsel may be expected to ask

³⁰⁷ Record at 194, 201, 312, *Fuwsett*.

³⁰⁸ Record at 193-95, 200, *Fuwsett*.

³⁰⁹ Record at 41, *Fuwsett*.

³¹⁰ The accused eventually was acquitted of manslaughter, and the Army Court of Military Review reviewed the case on an unrelated issue pertaining to a different charge. See *United States v. Fawcett*, CM 448544 (A.C.M.R. 30 Dec. 1986) (after finding that accused was improperly convicted of assault consummated by battery, court found accused guilty of simple assault and reassessed the sentence).

³¹¹ *United States v. Kern*, 22 M.J. at 52.

³¹² See R.C.M. 908(a).

³¹³ See R.C.M. 907(a) discussion; R.C.M. 905(f) (military judge may reconsider a ruling not amounting to a finding of not guilty).

for this remedy on a routine basis in cases of lost or destroyed evidence,³¹⁴ but the courts probably will use this remedy only in rare cases where less harsh remedies will not grant adequate relief to the accused.

V. CONCLUSION

In *Brady v. Maryland*, the Supreme Court committed our judicial system to providing exculpatory evidence to an accused as a matter of constitutional due process. Although the Court periodically changes and refines the constitutional minimum standards, the basic principle remains the same: the accused is entitled to production of "material" exculpatory evidence. In its application of due process standards to cases of lost or destroyed evidence, however, the Supreme Court would allow a defendant to be convicted after the government has deprived the defendant of exculpatory evidence. Even though the Supreme Court permits this result as a matter of constitutional due process, the military justice system is not obligated to follow the Supreme Court's lead. Standards of military due process often rise above the constitutional minimum due process standards that the Supreme Court establishes. The military justice system has a history of affording liberal discovery and disclosures to military accuseds, and we should continue that practice by properly applying standards of military due process in cases where the government has lost or destroyed exculpatory evidence. In doing so, we can continue our tradition of providing a fair trial to the accused within the framework of our adversarial system, perhaps to a greater degree than his counterpart receives in a civilian court.

³¹⁴*E.g.*, *United States v. Kern*, 22 M.J. at 50; *United States v. Greene*, 12 M.J. 862, 865 (A.F.C.M.R.), *petition denied*, 13 M.J. 243 (C.M.A. 1982).

HANDLING TOBACCO-RELATED DISCRIMINATION CASES IN THE FEDERAL GOVERNMENT

by Captain Scott D. Cooper*

I. INTRODUCTION

There are few things in today's society that can start an argument faster than a lit cigarette. When smokers and nonsmokers are in the same room, the nonsmokers often object to being exposed to the smoke. Conversely, the smokers object to being told where and when they can smoke.

Until recently, smokers and nonsmokers had no recourse other than to argue with each other. More and more, however, courts are recognizing a legal "right" to smoke as well as a "right" to a smoke-free environment.¹ These courts have considered the growing evidence indicating that nonsmokers are harmed by cigarette **smoke**,² as well as the smoker's arguments that smoking is a personal activity that should not be regulated by either the government or the courts.

In recent months, many government agencies, including the General Services Administration, have adopted regulations placing limits on the right of government employees to smoke tobacco products while

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¹Private sector employees have no "right" to smoke in the workplace. *See, e.g.*, Diefenthal v. Civil Aeronautics Board, 681 F.2d 1039 (5th Cir. 1982); Shimp v. New Jersey Bell Telephone, 145 N.J. Super. 516, 368 A.2d 408 (1976). There is still some controversy as to whether federal government employees have a "right" to smoke on the job. Smoking policies in federal government agencies are, however, negotiable issues. *See* Social Security Administration, Region II, F.L.R.A. Case No. 2-CA 30014 (Feb. 27, 1984). It is, at least, possible that the Federal Services Impasse Panel (F.S.I.P.) would give employees a "right" to smoke on the job. At present, there is very little law in this area. The only thing that is clear is that the Rehabilitation Act, 29 USC § 794a(a)(1) (1982), provides limited protection both to nonsmokers and smokers. *See infra* text accompanying notes 174-209, 229-35.

²Despite the protests of the tobacco lobby, courts generally agree that cigarette smoke is harmful to nonsmokers. *See, e.g.*, Banzaf v. Federal Communications Comm'n, 405 F.2d 1082 (D.C. Cir. 1968).

at work.³ These agencies' reasons for enacting these regulations have included: providing a safe working environment for nonsmokers, cutting down on tobacco-related illnesses, and protecting business machines. In drafting regulations limiting the ability to smoke, agencies have tried to balance the interests of both the smokers and the nonsmokers. While this is a noble aim, it is probably impossible to achieve. Even if the agency strikes what appears to be a perfect balance, some employees will still feel that they are being treated unfairly. This can lead to grievances,⁵ unfair labor practice complaints,⁶ and even tort claims.⁷

A growing number of employees are successfully raising claims that the government must provide accommodation for their tobacco-related handicaps. Some argue that their ability to work is affected by a smoke sensitivity handicap. Other employees assert that their addiction to tobacco constitutes a handicap. Still other employees claim adverse effects on their careers merely because their superiors have a bias against smokers.

Handling tobacco-related handicap discrimination cases presents special problems for lawyers who are not familiar with administrative labor practice. These cases do not arise in familiar federal court forums; they are heard initially before either the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB). EEOC and MSPB procedures differ substantially from

³Most agencies have issued policies limiting smoking to designated smoking areas. The policies are generally vague and give supervisors a great deal of discretion in designating smoking areas. Some agencies, including the Merit Systems Protection Board, have prohibited smoking in all open areas. *See* Merit Systems Protection Board, Buildings and Space Management Notice **86-46** (Apr. 29, 1986).

⁴Many agencies, *e.g.*, the Merit Systems Protection Board, are citing computer problems as a major reason for instituting smoking limitations. If the agency can show computer problems, it will have less trouble defending smoking limitations before the Federal Service Impass Panel and may be able to declare the proposal to be nonnegotiable. *Cf.* National Archives, **6 FLRA No. 91** (1984) (Under 5 U.S.C. § 7106(b)(1)(1982), permissive rights such as eating or smoking at work stations are nonnegotiable).

⁵Because of the wide range of grievance procedures available at different agencies, this article will not deal directly with grievances. *See* text accompanying notes **227-82** for a general discussion of how to avoid grievances.

⁶Unfair labor practice charges generally arise from a failure to negotiate issues relating to a new smoking policy. *See supra* notes **1** and **4**.

⁷No plaintiff has prevailed against the federal government in a tobacco smoking case using a tort theory. Several plaintiffs have raised constitutional tort claims based on an alleged constitutional right to a smoke-free environment. Courts have agreed, however, that no such constitutional right exists. *See, e.g.*, *Vickers v. Veterans Administration*, **549 F. Supp. 85** (W.D. Wash. 1982), *Federal Employees for Non-Smokers Rights (FENSR) v. United States*, **466 F. Supp. 181** (D.D.C. 1978), *affd without opinion*, **598 F.2d 31** (D.C. Cir. 1982); *Gaspar v. Louisiana Stadium and Exposition District*, **418 F. Supp. 716** (E.D. La. 1976); *Kensell v. Oklahoma*, **716 F.2d 1350** (10th Cir. 1983).

those used in the federal courts. An agency representative also faces a convoluted set of laws and regulations that were not designed to deal with anything similar to tobacco-related cases.

This article will provide guidance in the handling of tobacco-related handicap discrimination cases. It first will discuss the laws and regulations used in handicap cases. It will set out the steps to follow in presenting a case before the EEOC or the MSPB. The article will then define the key terms used in handicap actions and discuss the proper order of proof. The remainder of the article will discuss the strategies used in handling the three different types of tobacco-related discrimination cases: nonsmoker's accommodation cases, smoker's accommodation cases, and cases involving intentional discrimination in personnel actions. Both litigation and litigation avoidance strategies will be suggested.

11. AVAILABLE FORUMS

Under the Civil Service Reform Act of 1978,⁸ all handicap discrimination cases begin in one of two forums. If a case involves an "adverse action"⁹ taken against a nonprobationary competitive service or preference eligible employee,¹⁰ the MSPB may hear the case.¹¹ Examples of this type of case include: an employee fired for smoking in a non-smoking area or; a nonsmoker fired for inability to work with cigarette

⁸Pub. L. No. 95-454, 42 Stat. 1111.

⁹**Adverse** actions include: "(1) Removal or reduction-in-grade of competitive or preference eligible employees; (2) Denial of within-grade step increases; (3) Actions based upon removal, suspension for more than 14 days, reduction-in-grade, or pay, or furlough for 30 days or less; and (4) Certain actions relating to the Senior Executive Services." 5 C.F.R. § 1201.3 (1986).

¹⁰For the purpose of MSPB jurisdiction, "employee" is

- (A) an individual in the competitive service who is serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and
- (B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions.

5 U.S.C. § 7911(a)(1) (1982).

¹¹5 U.S.C. § 7911(a)(1) (1982). The MSPB was created when the Civil Service Reform Act split the Civil Service Commission (CSC). The Office of Personnel Management assumed CSC's management functions, 5 U.S.C. §§ 1101-1105 (1982), and the MSPB the adjudicatory functions, 5 U.S.C. §§ 7701-7703 (1982). The purpose of this change was to have appeals handled by an agency independent of the agency responsible for setting federal government personnel policy.

smokers. The EEOC hears all other cases.¹² Examples of these types of cases include: a nonsmoker complaining that exposure to tobacco smoke is affecting his work, a smoker complaining about not being able to smoke at his workplace, or an employee complaining that he did not get promoted merely because he is a smoker. While the applicable law and strategies in handicap cases are the same before both the MSPB and the EEOC,¹³ the procedures are different.

A. APPEALS TO THE EEOC

The EEOC appeal procedure comprises five stages: precomplaint and settlements, investigation, formal hearing, appeal to the EEOC, and appeal to Federal District Court.¹⁴

Stage 1: Precomplaint and Settlement

An employee or applicant for employment initiates the complaint process by contacting an EEO counselor for informal counseling within thirty calendar days after the effective date of the alleged discrimination in question.¹⁵ Most tobacco-related cases involve the enforcement of regulations and are classified as continuing violations,¹⁶ for which the thirty-day time limit is not applicable.

The EEO counselor listens to the employee's or applicant's complaint and, as appropriate, contacts management officials regarding possible settlement or resolution of the complaint.¹⁷

¹²The EEOC has jurisdiction of all federal employee discrimination claims that cannot be brought before the MSPB. The MSPB and the EEOC have concurrent jurisdiction of "mixed cases" that deal with both discrimination and adverse actions taken against employees. S. Rep. No. 969, 95th Cong., 2d Sess. 56-60, reprinted in 1978 U.S. Code Cong. & Admin. News 2860, 2869-72. For employees represented by unions, discrimination cases may also begin in the negotiated grievance procedure, unless specifically excluded by the collective bargaining agreement. The MSPB may hear appeals from arbitrators' decisions in "mixed" cases. See 5 U.S.C. § 7121 (1982).

¹³See *Stalkfleet v. U.S. Postal Service*, 6 M.S.P.B. 536 (1981).

¹⁴29 C.F.R. part 1613 (1986). Not all cases involve all five steps of the hearing procedure. The employee must pursue the precomplaint and investigation stages. The formal hearing, EEOC appeal and federal court appeal are optional for the employee.

¹⁵29 C.F.R. §§ 1613.213, 1613.214(a) (1986). All "days" noted in this paper are calendar days. This time limit can be waived if the employee was not aware of the time limits, see, e.g., *Bragg v. Reed* 592 F.2d 1136 (10th Cir. 1979), or if a continuing violation is involved. See *infra* note 16.

¹⁶If a single violation continues over a long period of time or a series of related acts creates a pattern of discriminatory conduct, the conduct is a continuing violation and the charge need only be filed within 30 days of the last action. See *Blackman v. McClucas*, 18 Fair Empl. Prac. Cas. (B.N.A.) 654 (D.D.C. 1976).

¹⁷See *infra* notes 283-87 and accompanying text.

Stage 2: Investigation

If the EEO counselor is unable to resolve the complaint after twenty-one days, the employee or applicant may file a formal complaint. The formal complaint must be filed within fifteen days of the close of counseling.¹⁸ The agency must accept the complaint unless it is untimely,¹⁹ already filed before the MSPB,²⁰ “not within the purview of regulations”,²¹ or if the employee has rejected an offer of settlement that would provide all relief requested.²²

The agency then forwards the complaint to an investigator, who may be an agency employee or an employee of an outside investigative agency. The investigator looks into the charge in one of two ways. He may obtain statements from pertinent witnesses as well as the complainant and any alleged discriminating officials, and then obtain any pertinent documents directly from the complainant or the agency. The investigation may also take the form of an informal hearing. At these informal hearings, witnesses testify under oath in front of the investigator, the complainant, the complainant’s counsel, and the agency counsel. Alleged discriminating officials are usually not allowed to be present during testimony of other witnesses.

At the close of either form of investigation, the investigator issues a report to the agency. The agency then issues a proposed agency disposition. If the complainant accepts the proposed disposition, the process ends.²³ If not, the agency often makes another attempt to settle the case. If this fails, the complainant may either request a final agency decision and proceed directly to federal court (stage 5)²⁴ or request a formal hearing. The complainant must request a formal

¹⁸29 C.F.R. § 1613.213 (1986).

¹⁹*Id.* § 1613.215.

²⁰*Id.* § 1613.405. If the agency receives an EEOC complaint relating to an action that is the subject of a previously filed MSPB complaint, the agency must reject the complaint and refer the complainant to the MSPB. 5 C.F.R. § 1201.155 (1986). If, after accepting a complaint, an agency learns that the complainant filed an appeal with the MSPB before filing the formal EEOC complaint, the EEOC complaint must be cancelled. 29 C.F.R. § 1613.405(b) (1986). See *infra* notes 46–48 for a discussion of procedures to be followed if the EEOC action was filed first.

²¹29 C.F.R. § 1613.215 (1986). The most common example of a complaint “not within the purview of regulations” would be a case complaining about an agency action mandated by OPM rules. As the agency has no control over the action, the appeal should be against the Office of Personnel Management using the procedures of 5 C.F.R. 300.104 (1986). See *Chisholm v. U.S. Postal Service*, 516 F. Supp. 810, 25 (W.D.N.C. 1980), *affd in part and vacated in part on other grounds*, 665 F.2d 482 (4th Cir. 1981).

²²E.E.O.C. Policy Letter 86–197 (1986).

²³29 C.F.R. § 1613.217(a) (1986).

²⁴See *infra* notes 40–44.

hearing within fifteen days after the agency issues its proposed disposition.²⁵

Stage 3: Formal Hearing

EEOC employees called hearing examiners preside over the formal hearings.²⁶ Due to the backlog at some EEOC offices, it is not unusual for it to take over a year before a hearing date is set. The hearing is generally preceded by a prehearing conference where the hearing examiner rules on the parties' requests for witnesses.²⁷ The hearing examiner will also frequently use the prehearing conference to encourage the parties to settle the case and to narrow the issues.²⁸

Because complainants bear the burden of proof at the formal hearing,²⁹ they are allowed to present their case first. A typical hearing consists of opening statements, examination and cross-examination of witnesses,³⁰ and closing statements. A relaxed form of the Federal Rules of Evidence applies.³¹ In some jurisdictions the examiner issues

²⁵29 C.F.R. §§ 1613.217(b), (c) (1986).

²⁶Hearing examiners are usually attorneys and act as administrative law judges.

²⁷Neither the complainant nor the agency has a right to call witnesses to testify at a hearing. 29 C.F.R. § 1613.218(e) (1986). Only the complainant and the alleged discriminating officials have a right to testify. All other witnesses are called by the hearing examiner. The parties may request that the hearing examiner call particular witnesses. If this request is denied, the examiner must give his reasons for the denial to the requesting party. The agency is responsible for providing any of its employees who may be called to testify, as well as any witness called at its request. The agency must assist the complainant in obtaining witnesses requested by the complainant who are federal government employees and not employees of the agency, but is not responsible for financial arrangements. The complainant must provide all nongovernment employee witnesses that he has requested. The parties may also request informal discovery. While EEOC rules do not provide for formal discovery, parties can request the hearing examiner "to call" a piece of evidence in the same way that they can request that he "call" a witness.

²⁸As a practical matter, the prehearing conference is often the most important part of a case. Cases can be won and lost by the framing of an issue and by the witnesses called. As a result, agency representatives should be as well prepared for a prehearing as they are for a trial. Agency representatives should also listen to complainant's proposals to settle the case even if they are not considering settlement. Hearing examiners will often pressure the parties to settle. A refusal to consider settlement may offend the examiner and makes the agency look unreasonable. In addition, by discussing settlement the complainant can often be convinced to drop his case.

²⁹McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

³⁰Witnesses called by both parties are usually only required to testify once. The complainant conducts a regular direct examination. The agency then conducts a combination direct and cross-examination. The complainant is then allowed a combination cross-examination and redirect.

³¹The extent to which the Federal Rules of Evidence are enforced depends upon whether or not the complainant is represented by an attorney. If the complainant is pro se the rules are relaxed almost to the point of nonexistence. Early in a hearing against a pro se complainant, it is almost impossible to win an objection. As the hearing progresses, relevance objections become more and more feasible. If the complainant has an attorney, most rules are enforced. In general, relevance standards are loosened and hearsay is admissible.

a recommended decision at the close of the hearing. In other jurisdictions the examiner may take as long as two years to issue a recommended decision.

The recommended decision of the hearing examiner is not binding upon the **agency**.³² The hearing examiner's decision is forwarded, along with a full transcript and record, to the head of the agency. The agency then uses this information to make its own final decision on the **complaint**.³³

After they have received the final agency decision, complainants have three options. They may accept the agency's final decision and let the process end, proceed to stage **5** and file a federal court **claim**,³⁴ or appeal the final agency decision to the **EEOC**.³⁵

Stage 4: EEOC Appeal

A complainant must file his appeal to the EEOC within **20** days of the final agency **decision**.³⁶ The EEOC bases its conclusions on a review of the agency decision and the record of the formal **hearing**.³⁷ Briefs are generally not **required**.³⁸ The EEOC decision is binding upon the **agency**.³⁹

Stage 5: Federal Court Appeal

If the employee is not satisfied with the decision of the agency or the EEOC, he can file a civil action in an appropriate district **court**,⁴⁰ and receive a full de novo **hearing**.⁴¹ The civil action may be filed after 180 days have passed without agency action on an **appeal**,⁴² within thirty days of an agency **decision**,⁴³ or within thirty days of an EEOC **decision**.⁴⁴ Unlike the administrative stages of the process, federal court litigation is very expensive and time-consuming. As a

³² 29 C.F.R. § 1613.221 (1986).

³³ *Id.*

³⁴ See *infra* text accompanying notes 40–44.

³⁵ 29 C.F.R. §§ 1613.231–.233 (1986).

³⁶ 29 C.F.R. § 1613.233(a) (1986).

³⁷ 29 C.F.R. §§ 1613.234–.235 (1986).

³⁸ 29 C.F.R. § 1613.233(a) (1986). Briefs must be filed within 30 days of the filing of the appeal.

³⁹ 29 C.F.R. § 1613.234 (1986).

⁴⁰ 29 C.F.R. § 1613.281 Complainants may also file an appeal with the MSPB at this stage. See *infra* note 48 and accompanying text.

⁴¹ 42 U.S.C. § 2000e-16(c) (1982); 29 C.F.R. § 1613.281 (1986).

⁴² 29 C.F.R. § 1613.281 (1986). However, if the complainant elects an EEOC appeal under 29 C.F.R. § 1613.233(a) (1986) a new 180-day period starts as of the day of the filing of the appeal.

⁴³ 29 C.F.R. § 1613.233(a) (1986).

⁴⁴ 42 See 42 U.S.C. § 2000e-16(c) (1982); 29 CFR § 613.281 (1986). The time limits noted above do not apply to age discrimination cases.

result, only a small percentage of the claims raised at the administrative level reach the federal courts.

B. APPEALS TO THE MSPB

The MSPB appeal process in "mixed" handicap-adverse personnel action cases consists of five stages: hearing, MSPB appeal, EEOC review, special panel review, and federal court appeal.

Stage 1: Hearing

An employee (appellant) initiates an MSPB appeal by filing the proper forms with the MSPB within twenty days of the effective date of the adverse action.⁴⁵ Employees may not simultaneously appeal a single action to both the EEOC and the MSPB. Once an employee has appealed an action to the EEOC, he may not file an appeal with the MSPB until either 120 days have passed or the agency has issued a final decision.⁴⁶ Once 120 days have passed, the employee has up to one year from the date of the EEOC complaint to withdraw the EEOC complaint and appeal to the MSPB.⁴⁷ After an agency issues a final decision on the EEOC complaint, the employee has twenty days to appeal to the MSPB.⁴⁸ The appellant has the option of requesting a hearing or having the case decided using documentary evidence alone.⁴⁹ Appellants almost always request a hearing.

Once the request for hearing has been filed, the agency and employee may then enter into discovery. The discovery process is based upon the Federal Rules of Civil Procedure,⁵⁰ with two notable exceptions: the time allowed for MSPB discovery is very short, and failure to respond to a Request to Admit will not result in presumed admission. If a party does not respond to discovery within the time lim-

⁴⁵ 5 C.F.R. § 1201.154(c) (1986). The effective date is always the date that the personnel action took place. This could be the first date of a suspension, the last day of work before a removal or the day a within-grade increase is denied. The date of filing is considered to be the postmark date on the appeal. The regulations do not provide for waiver of this deadline; in practice, however, the MSPB accepts late filing by an appellant if received reasonably close to the deadline.

⁴⁶ 5 C.F.R. § 1201.154 (1986). MSPB appeals filed within 120 days of an EEOC appeal on the same issue are usually dismissed. An MSPB administrative judge is allowed to hold the appeal for 120 days instead of dismissing the appeal. *Howard v. Department of Commerce*, AT07528110216 (M.S.P.B. Feb. 18, 1983).

⁴⁷ *Id.*; see *Lewis v. Internal Revenue Service*, 2 M.S.P.B. 181(1980); *Allen v. Veterans Administration*, 2 M.S.P.B. 417 (1980).

⁴⁸ 5 C.F.R. § 1201.154(a)(1) (1986); see *Hobson v. Department of Navy*, 3 M.S.P.B. 79 (1980). As this can result in MSPB claims being raised up to three years after an adverse action, agency representatives must maintain all of their records in adverse action cases.

⁴⁹ 5 C.F.R. § 1201.24(c) (1986).

⁵⁰ See 5 C.F.R. §§ 1201.71-.75 (1986).

⁵¹ 5 C.F.R. § 1201.71(c) (1986).

itations, the opposing party should promptly file a motion to compel answers to **discovery**⁵² with the administrative judge assigned by the MSPB.

The agency is asked soon after the filing of the appeal to submit a **response**.⁵³ This response must contain all the documentary evidence that the agency plans to use at the hearing. In general, everything included in the response is presumed to be automatically admitted into evidence. The agency is also asked to include with the response its rebuttal to the legal and factual arguments raised by appellant in his **complaint**.⁵⁴

Parties have no right to call witnesses at an MSPB hearing; they may only request that the testimony of witnesses be allowed at the hearing. The administrative judge has the final decision on what testimony will be **heard**.⁵⁵ In some jurisdictions, the administrative judge will call a prehearing conference to discuss potential witnesses and pursue settlement with the **parties**.⁵⁶

Hearings are usually scheduled within ninety days after the **MSPB** receives the appeal. The hearing is formal and uses a relaxed form of the Federal Rules of **Evidence**.⁵⁷ The agency presents its case first

⁵²*See* 5 C.F.R. § 1201.25 (1986). Due to the short time allowed for discovery, any delay in requesting a motion to compel could result in the agency not receiving answers until after the close of the record. As a practical matter, agency lawyers should be cautious in using discovery, because agency use of discovery tends to result in increased discovery activity on the part of the appellant. As the discovery process is usually far more helpful to the appellant than it is to the agency, the agency should avoid alerting appellants.

⁵³*See* 5 C.F.R. § 1201.25 (1986).

⁵⁴*Id.* If the appellant has requested a hearing, the response to legal and factual arguments should merely outline the agency's positions. There is no need to alert the appellant to the agency's hearing strategy. If the appellant has not requested a hearing, the response should be comprehensive as it is the only chance for the agency to argue its points.

⁵⁵**Parties** must submit a list of desired witnesses to the presiding official. In a case involving poor performance, the official who proposed the adverse action is always a relevant witness. In a case involving poor conduct, the deciding official is always a relevant witness. The appellant is also always allowed to testify. The MSPB observes a strict relevance standard in respect to other witnesses. They are far less likely to allow the testimony of a minimally relevant witness than a similarly situated EEOC examiner. Under 5 C.F.R. § 1201.33(1986) the rules governing the providing of witnesses are the same as those used by the EEOC. *See supra* note 27.

⁵⁶5 C.F.R. § 1201.41 (1986) MSPB prehearing conferences are usually not as formal as EEOC prehearings. They are usually telephonic and generally short. Some MSPB examiners wait until the hearing to pursue settlement. The agency representative should listen to all proposals and should not appear unreasonable, even if settlement is not a possibility.

⁵⁷5 C.F.R. § 1201.67(1986). MSPB hearings are usually more formal than EEOC hearings. Hearsay is still admissible and leading questions are allowed, but this will result in the testimony being given less weight. Evidentiary rules are not strictly enforced against pro se appellants.

and bears the burden of proof in justifying the personnel action.⁵⁸ A claim of discrimination is an affirmative defense; thus the appellant must prove discrimination.⁵⁹ Hearings include opening statements, examination and cross-examination of witnesses, and closing arguments.

The administrative judge will generally issue his decision within twenty-five days of the hearing⁶⁰ and within 120 days of the appeal.⁶¹ This decision becomes final unless the appellant appeals to the full board of the MSPB within thirty-five days.⁶²

There is a second form of MSPB hearing called the Voluntary Expedited Appeals Procedure (VEAP)⁶³. Under VEAP, the time limits are shortened,⁶⁴ discovery is eliminated, and there is no transcript of the hearing.⁶⁵ VEAP is only considered appropriate in cases that require no discovery, raise no novel questions of law, and lend themselves to expedited resolution.⁶⁶ This is almost never the case when handicap issues are involved. The lack of a transcript alone is ample reason for the agency representative to refuse to consent to VEAP⁶⁷ in any mixed case.

Stage 2: MSPB Appeal

Either the appellant or the agency may initiate an appeal to the MSPB full board by filing a petition for review within thirty-five days

⁵⁸ 5 C.F.R. § 1201.56 (1986). If the personnel action is based upon poor conduct, the agency must support its charges by a preponderance of the evidence. 5 C.F.R. § 1201.56 (1986). In a case involving poor performance, the agency need only support its charges with substantial evidence. 5 C.F.R. § 1201.56(a)(i) (1986). The purpose of this differing standard of proof was to make it easier to remove an employee for performance deficiencies. Even so, due to the many protections given to an appellant in a performance case, see Broida, *A Guide To Merit Systems Protection Board Law And Practice* (1986), it can be harder to win a performance case than it is to win a conduct case.

⁵⁹ 5 C.F.R. § 1201.56(b)(2) (1986).

⁶⁰ 5 C.F.R. § 1201.111 (1986).

⁶¹ This is the goal expressed by the MSPB under its present policy. This goal is almost always achieved.

⁶² 5 C.F.R. § 1201.113 (1986).

⁶³ See 5 C.F.R. §§ 1201.200-.222 (1986).

⁶⁴ Theoretically, the parties must submit a Joint Appeal Record within 30 days of the MSPB's acknowledgment of the appeal. 5 C.F.R. § 1201.203 (1986). In practice, however, parties are almost never able to agree on a Joint Appeal Record; thus separate appeal records are filed. The hearing must take place within 45 days of MSPB's acknowledgment order. The final decision must be issued no later than 60 days after the acknowledgment order. 5 C.F.R. § 1201.205(b) (1986).

⁶⁵ 5 C.F.R. § 1201.206(b) (1986). In VEAP cases the parties should also expect the presiding official to exert much greater pressure to settle the case than in normal proceedings.

⁶⁶ 5 C.F.R. § 1201.201(c) (1986).

⁶⁷ The Voluntary Expedited Appeals Procedures, as its name implies, is a voluntary procedure. It can only be used when the complainant, the agency, and the presiding official all consent to its use.

of the initial **decision**.⁶⁸ This submission is in the form of a **brief**.⁶⁹ Only issues of law can be appealed; findings of fact are **final**.⁷⁰ A party may offer new evidence with the petition only if it was not available at the time of the **hearing**.⁷¹ The opposing party may file a response brief. The full board will then issue a final **decision**.⁷² The full board overturns very few initial decisions.

Stage 3: EEOC Review

The appellant has the option to request the EEOC to review the MSPB final **decision**.⁷³ Such requests must be filed within thirty days of the final MSPB **decision**.⁷⁴ The EEOC review is based strictly on the **record**;⁷⁵ the EEOC may, however, address issues not raised in a petition for **review**.⁷⁶ The EEOC has thirty days to decide whether to review a **decision**.⁷⁷ If the EEOC decides to review the decision of the MSPB, the EEOC has an additional sixty days to issue its **decision**.⁷⁸ If the EEOC concurs with the MSPB, the MSPB's decision becomes **final**.⁷⁹ If the EEOC does not concur, it remands the case to the MSPB along with the EEOC's suggested **changes**.⁸⁰

The MSPB has thirty days to either concur or nonconcur with the proposed EEOC **changes**.⁸¹ If the MSPB concurs, it vacates the old decision and issues a new **one**.⁸² If the MSPB does not concur with the EEOC changes, the case is referred to a special **panel**.⁸³

Stage 4: Special Panel Review

Disputes between the EEOC and the MSPB are referred to a special panel consisting of one MSPB member, one EEOC member, and a chairman appointed by the President for a six-year **term**.⁸⁴ The panel issues a final decision based upon the record and upon supplemental

⁶⁸ *Id.*

⁶⁹ 5 CFR § 1201.114 (1986). While the board can require oral argument, 5 C.F.R. § 1201.116(a)(1)(1986), this seldom happens.

⁷⁰ 5 C.F.R. § 1201.115 (1986).

⁷¹ *Id.*

⁷² 5 C.F.R. § 1201.116(b) (1986).

⁷³ 5 U.S.C. § 7702(b) (1982); 5 C.F.R. § 1201.61 (1986).

⁷⁴ *Id.*

⁷⁵ 5 C.F.R. § 1201.161 (1986).

⁷⁶ See *Combs v. U.S. Postal Service*, DA 075209176 (E.E.O.C. April 12, 1983).

⁷⁷ 5 C.F.R. § 1201.161(a) (1986).

⁷⁸ 5 C.F.R. § 1201.161(c) (1986).

⁷⁹ 5 C.F.R. § 1201.161(c)(1) (1986).

⁸⁰ 5 C.F.R. § 1201.161 (1986).

⁸¹ 5 C.F.R. § 1201.162(a) (1986).

⁸² 5 C.F.R. § 1201.162 (1986). The MSPB may also reopen the hearing to clarify issues raised by the EEOC.

⁸³ 5 C.F.R. § 1201.171 (1986).

⁸⁴ 5 C.F.R. § 1201.172 (1986).

briefs, if any, submitted by the parties.⁸⁵ The parties also have the right to oral arguments. The time limits in special panel cases are very short.⁸⁶

Stage 5: Federal Court Actions

In mixed cases, a person can appeal any final decision of the MSPB, EEOC or Special Panel to an appropriate federal district court.⁸⁷ The party has thirty days from the issuance of any final decision to file an appeal.⁸⁸ This means a person can appeal directly from any decision at stages 2, 3 or 4 or file a direct appeal thirty-five days after a decision at stage 1.⁸⁹

The appellant is entitled to a *de novo* hearing on all discrimination claims.⁹⁰ Review of the adverse personnel action claims is based upon the record alone.⁹¹

III. HANDICAP LAW AND REGULATION

A. ADMINISTRATIVE FORUMS

The Federal Government's policy relating to handicapped individuals is set out in the Code of Federal Regulations (C.F.R.) which states:

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person."

1. Definitions.

Handicapped Individuals: Under the regulations set out in the C.F.R., a person is entitled to protection only if he meets the definitions of a "qualified handicapped individual."⁹² The C.F.R. defines a handicapped individual as, "one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major

⁸⁵ 5 C.F.R. § 1201.173 (1986).

⁸⁶ 5 C.F.R. §§ 1201.173(c),(g) (h) and (i) (1986). Very few cases have been brought before the special panel.

⁸⁷ 5 C.F.R. § 1201.175(a) (1986).

⁸⁸ 5 C.F.R. § 1201.175(b) (1986).

⁸⁹ *Id.*

⁹⁰ 5 U.S.C. §§ 7702(e)(3), 7703(b)(2) (1982).

⁹¹ *See Wiggins v. U.S. Postal Service*, 653 F.2d 2111 (5th Cir. 1981).

⁹² 29 C.F.R. § 1613.703 (1986).

⁹³ *Id.*

life activities, (2) has a record of such an impairment, or (3) is regarded as having such an **impairment**.”⁹⁴

In order to qualify as handicapped under subsection (1), a person must have an unique physical or mental **handicap**.⁹⁵ It is not enough to have a condition that is shared by a large portion of the population, such as being **left-handed**.⁹⁶

Major Life Activities: Major life activities are defined as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and **working**”.⁹⁷ In order to be defined as handicapped this life activity must be *substantially* impaired. A person who merely experiences discomfort or considerable inconvenience is not necessarily handicapped under this **test**.⁹⁸

Regarded As Handicapped: Under the C.F.R., people who are regarded by the agency as handicapped are, in fact, handicapped. The C.F.R. states:

“Is regarded as having such an impairment” means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an **impairment**.⁹⁹

⁹⁴29 C.F.R. § 1613.702(a) (1986).

⁹⁵*See* *Vickers v. Veterans Administration*, 549 F. Supp 85 (W.D. Wash. 1982); *Arnold v. Department of the Army*, 033-085-5003 (E.E.O.C. Oct 27, 1986); *Evans v. Department of the Navy*, SF07528410124 (M.S.P.B. Aug. 24, 1984) (available on LEXIS Labor Library, M.S.P.B. File); *see also* *De la Torres v. Bolge*, 781 F.2d 1134 (5th Cir. 1986) (left-handedness is not a handicap even if it prevents a person from doing his or her job.)

⁹⁶*Id.* The definitions of physical and mental disorders are contained at 29 C.F.R. § 1613.702(b) (1986), which states:

“Physical or mental impairment” means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

⁹⁷29 C.F.R. § 1613.703(c) (1986).

⁹⁸*See, e.g., Vickers*, 549 F. Supp. at 87.

⁹⁹29 C.F.R. § 1613.703(e) (1986); *see also* *Blackwell v. United States Dep’t of the Treasury*, 639 F. Supp. 289 (D.D.C. 1986) (an employer cannot defend against a charge of discrimination by arguing that its assumption that the complainant was handicapped was erroneous.)

This section most often comes into play where a person has received accommodation from an agency in the past. This person can argue that whether or not he is truly handicapped is irrelevant. Because the agency has already provided him with accommodation, it must consider him to be **handicapped**;¹⁰⁰ thus, he meets the C.F.R.'s definition of a handicapped individual.

Record Of Impairment: The C.F.R. eases complainants' burden of proof by allowing them to prove handicap status by showing that they have a "record of impairment." The C.F.R. states: "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.¹⁰¹ As a result, a person's medical record is often all the evidence necessary to prove **handicapped status**.¹⁰²

Qualified Handicap Status: Once potential complainants have cleared the hurdle of proving handicap status, they must still show they are "qualified" handicapped employees. The C.F.R. defines a qualified handicapped employee as

[a] handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.¹⁰³

Reasonable Accommodation: Proving the existence of some form of reasonable accommodation is the most difficult task in this type of litigation. The handicapped individual must show that the government can provide some type of accommodation that would, for all practical purposes, eliminate the effects of the handicap on his essential job elements.¹⁰⁴ The agency's obligation to provide such accommodation is limited. The C.F.R. only requires that: "[a]n agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would im-

¹⁰⁰ See *infra* text accompanying notes 192-96.

¹⁰¹ 29 C.F.R. § 1613.703(e) (1986).

¹⁰² See *infra* text accompanying notes 186-91.

¹⁰³ 29 C.F.R. § 1613.703(f) (1986).

¹⁰⁴ See *Stalkfleet v. United States Postal Service*, 6 M.S.P.B. 536 (1981).

pose an undue hardship on the operation of its program.”¹⁰⁵ An agency is only required to provide accommodation for known handicaps. As a result, the agency has no duty to accommodate until it learns of an employee's handicap.¹⁰⁶

The agency is also only required to provide reasonable accommodation. The C.F.R. states:

Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar action ~. ~ ~'

It is not the responsibility of the agency to design a program of reasonable accommodation.¹⁰⁸ It is the duty of the handicapped employee to suggest some form of reasonable accommodation.¹⁰⁹ To help management personnel as well as handicapped employees determine what is reasonable, the Office of Personnel Management has issued the *Handbook of Reasonable Accommodation*.¹¹⁰ This publication provides guidance to help the agency define what should normally be considered reasonable accommodation in a particular setting.

Until recently, the duty to provide reasonable accommodation was limited to the obligation to modify a handicapped employee's present job. *Ignacio v. United States Postal Service*,¹¹¹ decided by the special panel of the EEOC and MSPB¹¹² added a new type of required accommodation. The panel, in adopting the EEOC decision, held that reassignment of the employee must be considered as a form of reasonable accommodation,¹¹³ even if the reassignment would require retraining or would violate the applicable collective bargaining agreement.¹¹⁴

¹⁰⁵ 29 C.F.R. § 1613.704 (1986).

¹⁰⁶ *Id.*; see also *Womack v. Veterans Administration*, 10 M.S.P.B. 75 (1982).

¹⁰⁷ 29 C.F.R. § 1613.704(b) (1986).

¹⁰⁸ See, e.g., *Clancy v. Department of the Navy*, 6 M.S.P.B. 173 (1981).

¹⁰⁹ *Id.*

¹¹⁰ United States Office of Personnel Management, *Handbook of Reasonable Accommodation*, Personnel Management Series, PMS-720A (Mar. 1983) [hereinafter *Handbook of Reasonable Accommodation*].

¹¹¹ 30 M.S.P.B. 471 (1986).

¹¹² See *supra* text accompanying notes 84–86.

¹¹³ This does not mean that an agency must reassign all qualified handicapped employees. It means only that the agency must make a good faith effort to reassign the employee. See *Lynch v. Department of Education*, 31 M.S.P.B. 518 (Special Panel No. 2 1986). The agency is not required to create a position for the employee. *Id.* at 526.

¹¹⁴ *Ignacio*, 30 M.S.P.B. at 481.

Undue Hardship: An agency can escape its obligation to provide reasonable accommodation if it can show that providing such accommodation would place an undue hardship on its operations.¹¹⁵ The C.F.R. gives the following guidance:

In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.¹¹⁶

In addition, the OPM *Handbook of Reasonable Accommodation* lists several factors that an agency can use to determine if a particular form of accommodation would be an undue burden for the agency.¹¹⁷

B. ORDER OF PROOF

The MSPB,¹¹⁸ EEOC,¹¹⁹ and federal courts¹²⁰ have all adopted a modified form of the discrimination test contained in the Supreme Court's opinion in *McDonnell-Douglas Corp. v. Green*.¹²¹ The *McDonnell-Douglas* test divides hearings on discrimination complaints into three sections: the prima facie case, management's opportunity to show legitimate nondiscriminatory reasons for its actions, and complainant's rebuttal to show that management's stated reasons were merely a pretext for discrimination.¹²²

On its face, the *McDonnell-Douglas* test deals only with race discrimination; the Supreme Court noted, however, that the test should be modified to fit differing situations.¹²³ The form of the test used in handicap cases depends on whether the case is based on a failure to

¹¹⁵ 29 C.F.R. § 1613.704(a) (1986).

¹¹⁶ 29 C.F.R. § 1613.704(c) (1986).

¹¹⁷ See infra text accompanying notes 201-02.

¹¹⁸ See, e.g., *Stalkfleet*, 6 M.S.P.B. 536.

¹¹⁹ See, e.g., *Arnold v. Department of the Army*, No. 033-085-5003 (E.E.O.C. Oct. 27, 1986).

¹²⁰ See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

¹²¹ 411 U.S. 792 (1973).

¹²² *Id.* at 796-97.

¹²³ *Id.* at 796.

accommodate a known handicap¹²⁴ or intentional discrimination in personnel actions on the basis of handicap.¹²⁵

1. Failure To Accommodate A Known Handicap.

In cases involving the government's failure to accommodate a known handicap, the most commonly accepted modification of the *McDonnell-Douglas test*¹²⁶ is contained in *Stalkfleet v. United States Postal Service*.¹²⁷ Under the *Stalkfleet*¹²⁸—*McDonnell Douglas*¹²⁹ test, a complainant makes a prima facie case by proving that he is handicapped under the definitions contained in the C.F.R.¹³⁰ and articulating some form of reasonable accommodation that would allow him to perform the essential functions of his job without endangering the health or safety of others.¹³¹ In most discrimination cases, the com-

¹²⁴In this type of case there is no need to prove any intent to discriminate. In this way these cases are a form of disparate impact actions. See *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) (a racial discrimination case that articulated the disparate impact theory of discrimination). The employee is complaining that his job requirements have a disparate impact on handicapped employees. In fact, some complaints raise both a disparate impact and a failure to provide accommodation claim. In theory, these are separate causes of action; in practice, however, they can be merged. See *Prewitt v. United States Postal Service*, 642 F.2d 292,306 (5th Cir. 1981). To prove a handicap disparate treatment case a person must show that an employer has a rule that disproportionately affects handicapped employees. See *Griggs*, 401 U.S. at 427. Employees must first show they are handicapped under the provisions of 29 C.F.R. § 1613.702 (1986). Next, the employees must show that they are qualified for all aspects of the job other than the challenged rule. *Griggs*, 401 U.S. at 431. This is analogous to proving "qualified handicap" status. The burden of persuasion is shifted to the employer to show that the challenged rule is "job related" or a "business necessity." *Id.* This amounts to the employer showing that elimination of the rule would impose an undue burden on its operations under 29 C.F.R. § 1613.704(a) (1986). Since disparate treatment cases overlap to such a great degree with failure to provide accommodation cases, courts treat them as the latter. See *Prewitt*, 662 F.2d at 306-07.

¹²⁵In this type of case employees meet all of the requirements for their jobs but have nonjob-related handicaps. A good example would be a case involving an employee in the early stages of Acquired Immune Deficiency Syndrome (AIDS) or an employee with AIDS Related Complex (ARC). These employees would be able to perform the requirements of their jobs but likely would be regarded as handicapped. See *supra* notes 99-100 and accompanying text. It is easy to imagine this type of employee being discriminated against because of his condition. This would constitute intentional disparate treatment. To prove this type of discrimination an employee must show that the employer intentionally discriminated against him or her because of the handicap. There are few reported intentional handicap discrimination cases before any district court or court of appeals. See *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). This type of case is, however, sometimes raised at the administrative stages.

¹²⁶411 U.S. 792 (1973).

¹²⁷6 M.S.P.B. 536 (1981); see also *Clancy v. Department of the Navy*, 6 M.S.P.B. 173 (1981).

¹²⁸6 M.S.P.B. 536 (1981).

¹²⁹411 U.S. 792 (1973).

¹³⁰*Stalkfleet*, 6 M.S.P.B. at 542.

¹³¹*Id.* In most cases, essential elements will be the standards noted as critical elements in the employee's performance standards.

plainant has very little difficulty proving a prima facie case.¹³² In a handicap accommodation case, however, proving a prima facie case is the complainant's greatest burden. The difficulty lies in articulating a form of *reasonable* accommodation. In most cases, if the accommodation suggested was reasonable, not an undue hardship, and previously articulated, the government would have already adopted it.¹³³

Once the complainant establishes a prima facie case, the burden of proof does not shift; rather, it remains with the complainant throughout the case.¹³⁴ Management must, however, articulate legitimate, nondiscriminatory reasons for its actions. In theory, management should only have to assert that the accommodation suggested by the complainant would impose an undue burden on its operations.¹³⁶ In practice, however, management usually explains the attempts it has made in an effort to accommodate the complainant. Under a strict application of the test, management need only express the reasons for its actions if the complainant is able to establish a prima facie case.¹³⁷ Most hearing examiners, administrative judges and judges, however, require the government to state its reasons even in the absence of a prima facie case.¹³⁸

In the final portion of the hearing the complainant must prove that management's stated legitimate, nondiscriminatory reasons for its actions are merely pretext for discrimination.¹³⁹ In handicap cases,

¹³²The Supreme Court noted in *Burdine*, 450 U.S. at 253, that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253.

¹³³This statement should not be taken to imply that the government is always in the right and complainants are always in the wrong. In practically all handicap cases, however, the government has attempted some form of accommodation. Most agencies act reasonably in determining what accommodation to offer. EEOC hearing examiner Arlean Leyland stated, in a telephone interview conducted on August 12, 1986, that most handicap cases arise not from a lack of accommodation but from disputes as to the form of accommodation that is required. She went on to state that handicap cases can arise from management providing too much accommodation. This can create the impression that management will provide every accommodation possible, whether or not it is reasonable.

¹³⁴*Burdine*, 450 U.S. at 249.

¹³⁵*McDonnell-Douglas*, 411 U.S. at 797; *Stalkfleet*, 6 M.S.P.B. at 542.

¹³⁶*Stalkfleet*, 6 M.S.P.B. at 542.

¹³⁷*Burdine*, 450 U.S. at 248.

¹³⁸This practice is easily understood by anyone who has read an EEOC hearing examiner's recommended decision. In cases where the examiner concludes that the complainant has not shown a prima facie case, the examiner will almost always go on to state that management had legitimate nondiscriminatory reasons for its actions. In fact, the form decision used by the San Francisco Office of the EEOC requires the use of this structure. The examiners probably do this to ensure that their decisions will not be reversed if only their prima facie case determinations are reversed.

¹³⁹See *McDonnell-Douglas*, 411 U.S. at 797; *Stalkfleet*, 6 M.S.P.B. at 542.

the complainant normally argues the accommodation suggested would not impose an undue hardship on the **government**.¹⁴⁰

2. Intentional Discrimination In Personnel Actions On The Basis Of Handicap.

In some rare cases employees will claim that they were not promoted or were disciplined merely because they were handicapped.¹⁴¹ In these cases employees try to show that the agency is biased against handicapped employees. To prove a prima facie case, complainants must show that they meet the C.F.R.¹⁴² definition of qualified handicapped individual.¹⁴³ If the case involves a failure to hire or promote, they must show they applied and were qualified for the job or promotion in question, and the job or promotion remained open or was given to a nonhandicapped **person**.¹⁴⁴ If the case involves discipline, the complainant must prove that he was disciplined under circumstances sufficient to raise an inference of handicap discrimination.¹⁴⁵

In the second stage of the hearing, management must state legitimate, nondiscriminatory reasons for its **actions**.¹⁴⁶ In hiring or promotion cases this usually involves showing the complainant was not the most qualified individual for the **job**.¹⁴⁷ In discipline cases management usually shows it used similar discipline when dealing with nonhandicapped individuals for the like offenses or shows it conformed to a standard table of **penalties**.¹⁴⁸ Once again, management is usually required to state the reasons for its actions even in the absence of a prima facie **case**.¹⁴⁹

In the final section of the hearing, complainants try to prove that the handicap was the real reason for the personnel **action**.¹⁵⁰ Typi-

¹⁴⁰ *Stalkfleet*, 6 M.S.P.B. at 542.

¹⁴¹ See *supra* note 125.

¹⁴² 29 C.F.R. § 1613.703 (1986).

¹⁴³ See *McDonnell-Douglas*, 411 U.S. at 795; *Prewitt*, 662 F.2d at 304.

¹⁴⁴ *Prewitt*, 662 F.2d at 304.

¹⁴⁵ *Id.*

¹⁴⁶ See *McDonnell-Douglas*, 411 U.S. at 786.

¹⁴⁷ See *Burdine*, 450 U.S. at 251. Under *Burdine*, management need only state the reasons for its actions. In practice, however, agency representatives should present evidence that its belief that the complainant was not the most qualified applicant was well founded. This makes it much more difficult for the complainant to show that management's stated reasons were a pretext for discrimination. The agency representative does not have to show that complainant was not the most qualified applicant. He need only show that management reasonably believed that the complainant was not the most qualified applicant.

¹⁴⁸ *Id.* Once again, the agency is not required to present this evidence, although failure to present some form of proof is poor hearing strategy.

¹⁴⁹ See *supra* note 138.

¹⁵⁰ See *McDonnell-Douglas*, 411 U.S. at 796.

cally, a complainant attempts to show he or she was, in fact, more qualified than the selectee for a job or to show that the punishment given to nonhandicapped employees is less severe than the punishment given to handicapped employees for similar rules violations.¹⁵¹

IV. JUDICIAL FORUMS

Congress passed the Rehabilitation Act of 1973¹⁵² to "promote and expand" employment opportunities in the public and private sectors for handicapped individuals.¹⁵³ Title V of the Rehabilitation Act of 1973 established the principle that the federal government cannot discriminate against the handicapped.¹⁵⁴ A Senate committee report stated: "the Federal Government must be an equal opportunity employer and this equal opportunity must apply fully to handicapped individuals."¹⁵⁵ While this rhetoric was certainly favorable to handicapped individuals, it gave them no right to ask for judicial enforcement of these federal goals.

Only recently have handicapped individuals been given the right to bring a private action for handicap discrimination in federal court. In 1978 the Rehabilitation Act was amended to provide the remedies of Title VII of the Civil Rights Act of 1964¹⁵⁶ to handicapped individuals. This new section stated:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.¹⁵⁷

¹⁵¹*Id.*

¹⁵²29 U.S.C. §§ 701-796 (1982).

¹⁵³29 U.S.C. § 701(8) (1982).

¹⁵⁴29 U.S.C. § 791 (1982).

¹⁵⁵S. Rep. No. 318, 93d Cong, 1st Sess 48, *reprinted in* 1973 U.S. Code Cong. & Admin. News 1071.

¹⁵⁶42 U.S.C. § 2000e-16 (1982).

¹⁵⁷29 U.S.C. § 794a(a)(1) (1982).

Section 717 of Title VII of the Civil Rights Act of 1964¹⁵⁸ provides for a private right of action for persons with discrimination claims after they have exhausted their administrative remedies. Federal courts have followed the EEOC and MSPB in adopting the order of proof set out in the *McDonnell-Douglas* test, as modified to deal with handicap actions.¹⁵⁹ The courts also use the appropriate definitions contained in the C.F.R.¹⁶⁰

V. NONSMOKER ACCOMMODATION CASES¹⁶¹

Of all of the different types of tobacco-related discrimination cases, nonsmoker accommodation cases are, by far, the most **common**.¹⁶² In many cases the complainants are encouraged to file complaints by one of the many nonsmoker's rights lobbying **groups**.¹⁶³ These groups provide legal support and usually file amicus briefs. Agency representatives should do all that they can in this type of case to keep the issue narrow. Many nonsmoking complainants consider themselves to be "crusaders for the rights of the **masses**."¹⁶⁴ They will often attempt to bring in reams of evidence relating to the harms of smok-

¹⁵⁸ 42 U.S.C. § 2000e-16 (1982).

¹⁵⁹ See *Prewitt*, 642 F.2d at 305.

¹⁶⁰ *Id.* at 307-09.

¹⁶¹ This article contains several suggestions as to recommended strategies to be used in handicap cases. These suggestions constitute the opinions of the author. They are based on the author's experience as labor and EEO counselor for the United States Army Military District of Washington and his handling of over 100 EEOC cases, many in the area of handicap discrimination. The author was also the agency representative in *Arnold v. Department of the Army*. See *infra* notes 223-26. Opinions are also based upon interviews with: EEOC examiner Arlean Leyland (telephone interview Oct., 1986), EEOC examiner Jeff Goodfriend (interview Nov. 28, 1986), MSPB Administrative Judge Martha Lamphear (telephone interview Aug. 29, 1986), MSPB Administrative Judge Elizabeth Boggle (telephone interview Sept. 30, 1986) Dr. John F. Banzaf (Executive Director, Action on Smoking and Health) (telephone interview July 12, 1985) as well as various labor lawyers for the Army and several other governmental agencies. All strategy items not footnoted should be considered to be opinions of the author.

¹⁶² Smoker accommodation and intentional tobacco discrimination cases have been raised at the administrative levels, but no case in this area has ever been reported. Thus, the entire body of recorded case law is in the nonsmoker accommodation area.

¹⁶³ The two most powerful lobbying groups that become involved in this type of case are Action on Smoking and Health (ASH) and Federal Employees for Non-Smokers Rights (FENSR).

¹⁶⁴ See *Arnold v. Department of the Army*, No. 033-085-5003 (E.E.O.C. Oct. 27, 1986). In the decision in *Arnold*, the EEOC examiner characterized the complainant's action as a crusade and not a complaint. The examiner commented that a great many of complainant's problems were caused by this attitude and not by the fact that the complainant did not smoke.

ing.¹⁶⁵ When such evidence is raised, a government attorney may feel tempted to follow the lead of the tobacco lobby and deny that tobacco smoke has a harmful effect upon nonsmokers. This is a strategic error. Because courts have interpreted handicap to mean a unique physical condition resulting in an **impairment**,¹⁶⁶ the effect of tobacco smoke on an average person is not relevant. Contesting this evidence merely highlights an emotionally charged issue. In addition, the agency risks offending a nonsmoking judge or examiner. The proper response to an attempt to admit this type of evidence is an objection on relevance grounds.

Many complainants will try to raise the argument that the Occupational Safety and Health Act (OSHA) forbids tobacco smoke in the **workplace**.¹⁶⁸ The only response that is necessary is that OSHA regulations do not bind the federal **government**;¹⁶⁹ thus, OSHA is not an issue. In addition, a violation of an OSHA rule is not discrimination.

The most dangerous of the "non-issues" that is often raised by complainants is rule enforcement. The complainant will attempt to show that the agency's own regulations forbid tobacco smoke in the presence of nonsmokers. Unfortunately, many agencies' regulations are poorly written and may impliedly prohibit nonsmoker exposure to **smoke**.¹⁷⁰ This type of evidence places the agency in a very bad light. Fortunately, since enforcement of a rule is not related to handicap discrimination, this evidence is technically irrelevant in a handicap case."¹⁷¹ Agency counsel should, thus, strongly object to the inclusion of this type of evidence in the record. It should be noted, however, that agency regulations may be relevant to showing that a form of accommodation contained in a regulation would not constitute an undue burden for the **agency**.¹⁷²

¹⁶⁵In both *Arnold* and *Pletten v. Department of the Army*, 23 M.S.P.B. 682 (1984) (*Pletten II*), ASH submitted extensive briefs relating the harms of smoking. Mr. Arnold himself attempted to admit over 100 exhibits, amounting to over 20,000 pages, relating the harms of tobacco smoke.

¹⁶⁶*See supra* note 95 and accompanying text.

¹⁶⁷All of the exhibits relating to the harms of smoking offered into evidence in *Arnold* were excluded on relevance grounds.

¹⁶⁸*See, e.g.*, *Parker v. Department of the Interior, Bureau of Land Management*, 4 M.S.P.B. 184 (1980).

¹⁶⁹*Id.*

¹⁷⁰*See infra* notes 276-82 and accompanying text.

¹⁷¹The only issues before the EEOC in this type of case are whether the employee is entitled to accommodation and what accommodation is reasonable. The existence of rules plays no part in this type of determination. *See Arnold* at 2. Rule enforcement is grievable under most agency's grievance procedures. That is the proper forum for rule enforcement claims.

¹⁷²The fact that an agency has established a rule requiring the accommodation requested by the complainant is strong, if not overwhelming, evidence that the accommodation does not constitute an undue burden on the agency.

Agency counsel must limit their own arguments to true discrimination issues. They must avoid red herrings and try to limit their opponent's arguments to the three prongs of the *McDonnell-Douglas*¹⁷³ test. This will highlight the relevant issues, while avoiding the non-issues.

A. THE PRIMA FACIE CASE

1. Establishing Handicapped Status.

The biggest mistake most government representatives make in tobacco handicap cases is stipulating to the existence of a handicapping condition. In most cases complainants will be able to show that their major life activity of breathing or **working**¹⁷⁴ has been affected. However, they must also show they have a unique physical or mental **condition**¹⁷⁵ that *substantially* limits a major life activity.¹⁷⁶

Proof That The Employee Has A Physical Or Mental Condition: Most nonsmokers are annoyed, to some extent, by tobacco smoke. Many people experience tearing eyes, coughing, and *dry* throats. According to Dr. Richard Summers, Chief of Allergy-Clinical Immunology Services at Walter Reed Army Medical Center, most nonsmokers suffer some psychosomatic tightening of the throat and chest and have difficulty breathing in the presence of **smoke**.¹⁷⁷ Other common psychosomatic symptoms cited by Dr. Summers include headaches, twitching, running nose, and irritability. The symptoms cited above are experienced by the average nonhandicapped nonsmoker. In order to prove the existence of a handicap, the complainant needs to show symptoms above and beyond these normal **symptoms**.¹⁷⁸

Proof That The Employee Has An Actual Handicap: Complainants will often present medical records that purport to document reactions to tobacco smoke. Agency representatives should carefully examine these records and, if necessary, contact the physician. In most cases the information contained in these records is merely a restatement of the unsupported claims of health problems reported by the com-

¹⁷³411 U.S. 792 (1973).

¹⁷⁴29 C.F.R. § 1613.703(c) (1986).

¹⁷⁵See *supra* note 85 and accompanying text.

¹⁷⁶29 C.F.R. § 1613.703(a) (1986).

¹⁷⁷The statements of Dr. Summers are drawn from his testimony in *Arnold v. Department of the Army* on September 26–27, 1985. He was serving as complainant's expert witness.

¹⁷⁸*Arnold*, at 3.

plainant to the doctor.¹⁷⁹ In order to show a handicapping condition, there must be independent clinical proof of symptoms.¹⁸⁰ The simplest form of clinical proof is a workplace observation performed by medical personnel. This consists of trained medical personnel observing the symptoms exhibited by a complainant when exposed to tobacco smoke at the workplace.¹⁸¹ If a person shows symptoms that would substantially interfere with his ability to work, he has met his burden of proof of showing handicapped status. Mere signs of discomfort are not sufficient to show a handicapping condition.¹⁸²

The most conclusive form of proof of a smoke sensitivity handicap is a procedure known as a bronchial challenge.¹⁸³ In this procedure, the patient's lung capacity is measured before and after exposure to tobacco smoke.¹⁸⁴ If exposure to tobacco smoke results in a significant drop in lung capacity, the person's major life activity of breathing is substantially limited. Severe symptoms shown in a workplace observation or a positive bronchial challenge constitute proof of a substantial limitation of a major life activity.¹⁸⁵ In the absence of such clinical evidence, the agency representative should argue the complainant has not met his burden of proving handicapped status.

Proof That The Employee Has A Record Of Impairment: Complainants who are unable to prove handicap can assert that they have a record of impairment.¹⁸⁶ Most often this will consist of a medical report concluding a person has an allergy to tobacco. This evidence is easily refuted. Any objective allergist will testify that the tobacco allergy test does not indicate that a person is allergic to tobacco smoke, only that the person is allergic to tobacco pollen.¹⁸⁷ In fact, according to Dr. Summers, many doctors feel that there is no such thing as an allergy to tobacco smoke.¹⁸⁸ This should not be taken to imply there

¹⁷⁹In *Arnold*, the complainant submitted a medical report listing several severe symptoms caused by exposure to cigarette smoke. Complainant's doctor, Terrence Cook, M.D., testified at the hearing that his statements about the complainant contained in complainant's medical record were "based upon what [the complainant] told me." He went on to state that: "I can make no statement as to the exact symptoms caused by Mr. Arnold's allergies."

¹⁸⁰See *Arnold*, at 2.

¹⁸¹Testimony of Dr. Summers in *Arnold*.

¹⁸²See *Arnold*, at 2; see also *Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982).

¹⁸³Testimony of Dr. Cook and Dr. Summers in *Arnold*.

¹⁸⁴*Id.*

¹⁸⁵*Arnold*, at 3.

¹⁸⁶See 29 C.F.R. § 1613.703(d) (1986).

¹⁸⁷All four of the allergists appearing in *Arnold*, Dr. Cook, Dr. Summers, Dr. Muslewite and Dr. Brack (all of whom were called by the complainant) agreed that they did not believe that there was any such thing as an allergy to tobacco smoke.

¹⁸⁸*Id.*

are no medical conditions that cause an unusual sensitivity to tobacco smoke. Documented asthma,¹⁸⁹ SICCA syndrome,¹⁹⁰ and nasal disorders¹⁹¹ have all been successfully used to show a handicapping physical condition.

Proof That The Employee Is Regarded As Handicapped: Complainants are considered handicapped for purposes of establishing a prima facie case if they can show the agency regards them as handicapped.¹⁹² This type of argument is raised most often in the context of past accommodation attempts. In most cases that progress to the litigation stage, management has made some attempt to appease the complainant. This usually involves some form of relocation, or the establishment of no smoking areas. Complainants often argue that, because management officials have tried to accommodate them, they must regard the complainants as handicapped.¹⁹³ There are two ways to refute this argument. First, it can usually be argued that the accommodation was supplied only by personnel at the supervisory level. The complaint, however, is against the agency. Knowledge and approval of any accommodation cannot be imputed to the employer (the agency);¹⁹⁴ thus, the accommodation is not proof that the agency regards the complainant as handicapped. Second, the agency can assert it never believed that the complainant was handicapped. One appropriate argument is that any changes in any workplace environment¹⁹⁵ were made to raise morale in the workplace and not to accommodate a handicap. Finally, the agency may assert that, even if the complainant is "regarded as impaired," this type of fictional "handicap" requires little or no accommodation¹⁹⁶ because there is no real interference with a substantial life activity for the agency to accommodate.

¹⁸⁹ See *Pletten v. Department of Army*, 23 M.S.P.B. 682 (1984) (*Pletten II*).

¹⁹⁰ See U.S. Department of Labor and AFGE Local 12, (Margaret Wells) Case No. ARB-N-BLS-81-055 (Fasser, Apr. 2, 1984), *award modified*, 17 F.L.R.A. 125 (1985).

¹⁹¹ See *Parker v. Department of the Interior*, 4 M.S.P.B. 184 (1980).

¹⁹² 29 C.F.R. §§ 1613.703(a) and (e) (1986); see *supra* notes 99–100 and accompanying text.

¹⁹³ See *supra* notes 99–100.

¹⁹⁴ *Arnold*, at 2.

¹⁹⁵ The agency representative should be very careful not to use the word "accommodation." By definition, a person who requires "accommodation" is handicapped. Thus, if the agency supplies "accommodation" it must regard the employee as handicapped. An agency can, however, "supply beneficial changes" or "modify the workplace environment" without conceding handicap. While this is all an exercise in semantics, it can be very important in a hearing.

¹⁹⁶ Under 29 C.F.R. § 1613.703(1986), an agency is only required to provide accommodation that would allow the employee to perform the essential functions of a position. If a person has no real handicap, he has no real need for accommodation. Thus, the agency should argue that, even if the complainant is regarded as handicapped, the agency has no need to provide accommodation.

2. Establishing Qualified Status.

To gain the protections of The Rehabilitation Act of 1973¹⁹⁷ handicapped people must prove they are "qualified."¹⁹⁸ In order to prove they meet this status, complainants must articulate some form of *reasonable* accommodation that would allow them to perform their jobs.¹⁹⁹ Agency representatives must remember that all *feasible* accommodations are not necessarily reasonable.²⁰⁰ *The Handbook of Reasonable Accommodation*²⁰¹ lists the following factors to be used in determining what accommodation is reasonable:

- Is the accommodation necessary for performance of duties?
- What effect will the accommodation have on the agency's operations and on the employee's performance?
- To what extent does the accommodation compensate for the handicapped person's limitations?
- Will the accommodation give the person the opportunity to function, participate, or compete on a more equal basis with co-workers?
- Would the accommodation benefit others (nonhandicapped as well as other handicapped individuals)?
- Are there alternatives that would accomplish the same purpose?²⁰²

A good example of a case where the accommodation requested by the complainant was feasible but not reasonable is *Pletten v. Department of the Army*.²⁰³ In *Pletten*, several doctors testified that the complainant's asthma was so severe he could not be exposed to even a small amount of tobacco smoke.²⁰⁴ His proposed accommodation was that he be placed in a totally smoke-free environment.²⁰⁵ The MSPB held that, while technically the agency could create a smoke-free environment,²⁰⁶ it was not reasonable to expect it to do so.²⁰⁷ The MSPB also

¹⁹⁷ 29 U.S.C. §§ 701-796 (1982).

¹⁹⁸ See 29 C.F.R. § 1613.703(f) (1986); see also notes 103-17 and accompanying text.

¹⁹⁹ See 29 C.F.R. § 1613.703(f) (1986).

²⁰⁰ See, e.g., *Turner v. Office of Personnel Management*, 29 M.S.P.B. 212 (1985).

²⁰¹ *Handbook of Reasonable Accommodation*, *supra* note 110.

²⁰² *Id.*

²⁰³ 23 M.S.P.B. 682 (1984) (*Pletten II*).

²⁰⁴ *Pletten v. Department of Army*, 6 M.S.P.B. 626 (1981) (*Pletten I*).

²⁰⁵ *Pletten II*, 23 M.S.P.B. at 684.

²⁰⁶ The conclusion that creation of a smoke-free environment was feasible was actually reached by the EEOC. *Pletten* was first brought before the MSPB after Mr. Pletten was placed on enforced leave because his doctors stated that he could not work in anything but a smoke-free environment. The MSPB ruled that it had no jurisdiction over enforced leave cases because enforced leave was not an adverse action (this is no longer good law; after *Valentine v. Department of Transportation*, 31 M.S.P.B. 358 (1986), enforced leave is now an adverse action). Mr. Pletten appealed to the MSPB again after OPM turned down his application for disability retirement. The MSPB

held that, as the only form of accommodation available was not reasonable, the complainant was not a protected qualified handicapped employee.²⁰⁸ The EEOC declined review of the final decision. It is now generally accepted that it is not reasonable to expect an agency to create a smoke-free environment.²⁰⁹

B. THE AGENCY'S LEGITIMATE, NON-DISCRIMINATORY REASONS FOR ITS ACTIONS

If a complainant has proved a prima facie case, the agency can respond in one of two ways. The agency can show that the reasonable accommodation proposed by the complainant would place an undue burden on its operations, or it can show that it has already provided sufficient accommodation.²¹⁰

There is no clear distinction between an unreasonable accommodation and a reasonable accommodation that places an undue burden upon the agency's operations. It appears the focus in a reasonableness determination is upon whether the accommodation is reasonably necessary and reasonably could be supplied by any agency. In a determination of whether an accommodation would be an undue burden, the focus is on whether this type of accommodation could be supplied

again refused to take jurisdiction. In a third appeal the MSPB ruled that it still had no jurisdiction, but added that even if it did have jurisdiction, the agency had provided sufficient accommodation. *Pletten I*, 6 M.S.P.B. at 631. The MSPB made this determination before the agency had the chance to put all its evidence relating to its accommodation attempts on the record. Mr. Pletten appealed this decision to the EEOC. The EEOC ruled that the record did not contain sufficient evidence to support the MSPB's conclusion that the agency had provided sufficient accommodation. It went on to state that "[c]learly, the agency had the authority to ban smoking from its buildings but the Board decided that such a ban was impossible and, even though not substantiated by the agency's argument, an undue hardship on it." *Pletten v. Department of the Army*, No. 03810087 (E.E.O.C. May 12, 1983). In light of this EEOC decision, the MSPB reopened all of Mr. Pletten's cases, a hearing was held and all interested parties were asked to submit briefs. The Board found that, despite the statements of the EEOC, a total ban on smoking would not be practical. They noted that a smoking ban would violate applicable regulations, be difficult to enforce and would create grave problems with the agency's unions. *Pletten II*, 23 M.S.P.B. at 686. Thus, it ruled that a smoking ban was not a reasonable form of accommodation. Because Mr. Pletten's doctors stated that a smoking ban would be the only type of accommodation that would allow Mr. Pletten to return to work, the Board ruled that Mr. Pletten was not a qualified handicapped individual. *Id.* Thus, it stated that the agency had met its obligation under 29 C.F.R. § 1613.704(a) (1986). The EEOC declined review of this decision.

²⁰⁷ See *supra* note 206.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Rosiek v. Department of the Army*, 31 M.S.P.B. 140 (1986); *Holder v. U.S. Postal Service*, 31 M.S.P.B. 469 (1986); *Turner v. Office of Personnel Management*, 29 M.S.P.B. 212 (1985).

²¹⁰ See *supra* notes 198-202 and accompanying text.

by the particular agency.²¹¹ *The Handbook of Reasonable Accommodation*²¹² lists the following factors to consider in determining undue hardship: "The overall size of the agency with respect to number of employees, number and type of facilities, and size of budget. The type of operation, including the composition and structure of the work force. The nature of the accommodation needed."²¹³ An example of a reasonable accommodation that would present an undue burden would be the establishment of large nonsmoking areas in a strong union shop with a large number of smokers. Since smoking policies at most agencies are negotiable,²¹⁴ getting the union to agree to a nonsmoking policy would constitute an undue burden.²¹⁵ It would also be an undue burden for a small agency with a tight budget to install an expensive ventilation system for the benefit of one person, if the added expense threaten its operations.²¹⁶ A particular form of accommodation might also be an undue burden if there is another form of accommodation that would impose less of a burden on the agency.²¹⁷

In most cases, the agency's response will concentrate on its attempts to provide accommodation. The agency has no obligation to provide the reasonable accommodation requested by the complainant. Its only burden is to provide accommodation sufficient for qualified complainants to be able to perform the essential elements of their jobs.²¹⁸ The agency should pick the form of accommodation that imposes the least hardship upon its operations. Often this is not the most desirable form of accommodation for complainants and the accommodation provided by the agency may require additional effort on the complainant's part.

Complainants are required to cooperate in attempts to accommodate them.²¹⁹ The accommodation may involve extra walking or a secluded office. In some cases complainants may still be exposed to some smoke, but not enough to affect their work. If complainants refuse to cooperate in attempts to accommodate them, the agency has

²¹¹ See Handbook of Reasonable Accommodation, *supra* note 110.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See, e.g., Social Security Administration, Region 11, 2-CA-30014 (F.L.R.A. 27 Feb. 1984); National Archives, 6 F.L.R.A. 98 (1982) (available on LEXIS, Labor Library, F.L.R.A. file).

²¹⁵ See *Pletten II*, 23 M.S.P.B. at 686.

²¹⁶ See, e.g., *Vickers v. Veterans Administration*, 548 F. Supp. 85 (W. D. Wash. 1982); *Evans v. Department of the Navy*, SF0752841024 (M.S.P.B. Aug. 24, 1984) (Available on LEXIS, Labor Library, M.S.P.B. file).

²¹⁷ See *Evans* at 3.

²¹⁸ See *Vickers*, 549 F. Supp. at 89.

²¹⁹ *Id.*

no further duty to continue to supply the accommodation.²²⁰ In fact, if the accommodation allows the complainant to work, all further accommodation is an undue hardship.²²¹ The agency should, therefore, attempt to show the accommodation already provided will allow the employees to perform the essential elements of their positions.

Agency representatives must be careful not to appear to concede a prima facie case by admitting to past "accommodation" of the complainant. If the agency representative admits that the agency accommodated the complainant, the complainant has a strong argument that the agency must consider him to be handicapped. Therefore, arguments should begin: "Even if the complainant is considered to be qualified handicapped, . . ." When discussing what has been done for the complainant in the past, agency representatives should be careful not to use the word "accommodation."²²² Also, the agency representatives should have the appropriate supervisors testify as to the nonhandicap-related reasons for their actions on behalf of the complainant.

C. COMPLAINANT'S REBUTTAL

This part of the hearing allows the complainant an opportunity to contest the agency's reasons for its actions. The complainant is given the chance to prove he has not been accommodated and his accommodation proposal would not be unduly burdensome for the agency. This is what is supposed to happen; nevertheless, the agency representative must be prepared for anything. In *Arnold v. Department of the Army*,²²³ the complainant used his rebuttal to raise two novel arguments. First, he argued, because the Diagnostic and Statistical Manual of the American Psychiatric Association (DSMIII)²²⁴ defined cigarette addiction as a mental illness with possible fatal consequences, all cigarette smokers are suicidal. The Federal Personnel Manual (FPM)²²⁵ recommends suicidal employees be declared unfit for duty. Thus, he argued, all federal employees who smoke need to be fired, making a smoke-free workplace easy to accomplish. The hearing examiner, a chain smoking federal employee who needed to suck on a cinammon stick during the hearing to keep from smoking,

²²⁰ *Id.*

²²¹ See *Evans* at 3.

²²² See supra note 195.

²²³ No. 03-83-143-E (E.E.O.C. Sept. 12, 1985).

²²⁴ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders §§ 292.00, 305.1, 327.71 (1980) [hereinafter DSM III].

²²⁵ Federal Personnel Manual § 731 (1984).

was not amused.²²⁶ Second, Arnold argued allowing smoking in the workplace was an agency pretext to discriminate against blacks and males. He presented evidence that blacks and males have a higher incidence of lung cancer. Since lung cancer is often caused by tobacco smoke, he reasoned that tobacco smoke has a different effect on blacks and males. Thus, he believed that, by allowing smoking in the workplace the government was trying to kill off all of its male and black employees.

Agency representatives must not let these types of arguments take them off guard and must resist the temptation to argue with complainants on their grounds.²²⁷ Hearing examiners and judges have a tendency to admit a wide range of evidence at this stage of the hearing procedures.²²⁸ This does not mean the evidence will be given any weight, however.

VI. SMOKERS' ACCOMMODATION CASES

That smoking can constitute a protected handicap comes as a surprise to most people. In fact, it is easier for smokers to show they are handicapped than it is for nonsmokers. At present, few smokers know of their rights in this area, so cases are rare. As limitations on smoking become more common, however, these cases will become more frequent.

A. THE PRIMA FACIE CASE

1. Establishing a Handicap.

Smokers should have no problem proving they have a physical condition that interferes with a major life activity. DSM III classifies tobacco addiction as both a physical (organic) and a mental disorder.²²⁹ DSM III goes on to state that, "[s]ome individuals who are dependent on tobacco may have difficulty remaining in social or occupational situations that prohibit smoking."²³⁰ Thus, their disorder can interfere with the major life activity of working. DSM III is gen-

²²⁶In response to this argument, the author pointed out that DSM III § 327.80 lists caffeine addiction (found in coffee, tea, cola and chocolate) as a mental illness with possibly fatal consequences. Thus, by this logic, coffee, tea, and cola drinkers as well as chocolate eaters would have to be fired. Mr. Arnold was unable to identify anyone (besides himself) who would be left to run the government.

²²⁷No reasonable person would be persuaded by this type of argument. By discussing it, an agency representative is merely lending credibility to an otherwise incredible argument. Often the best response to this type of argument is to roll your eyes with an audible sigh.

²²⁸See *supra* note 31.

²²⁹DSM III, *supra* note 224, §§ 292.00, 327.72, 305.1X.

²³⁰*Id.* § 305.1X.

erally considered to be the definitive source of evidence in this area.²³¹ Agency representatives should not, however, automatically concede that smoking is having a substantial effect upon a major life activity of a particular complainant.²³² DSM III states only that *some* smokers will have problems in work situations.²³³ As a result, the complainant must show that his performance has suffered since the onset of the limitations on smoking. An agency representative can refute this claim if he can present testimony or performance appraisals showing that complainant's performance continued to be acceptable in the smoke-free environment. If the complainant's performance has, in fact, declined under the smoking regulations, the agency representative would have to show that there was an independent, nonsmoke-related cause for the performance problems.²³⁴

2. *Establishing Qualified Status.*

Almost any smoker who has proved handicapped status has already proved qualified handicapped status. All the smoker has to do is propose some form of reasonable accommodation that would allow him to perform the essential functions of his position. In most cases the accommodation proposed will be to let the person smoke on the job. Since establishment of a prima facie case is not likely to be a great burden for the complainant,²³⁵ most smokers will be able to meet this relaxed burden of proof.

B. THE AGENCY'S LEGITIMATE NONDISCRIMINATORY REASONS FOR ITS ACTIONS

The real question in most smokers' accommodation cases is not *if* accommodation is required, but *what* accommodation is required. The agency has no obligation to provide the accommodation requested by the complainant if it can show it has offered alternative accommodation that would allow the complainant to perform the essential functions of his job.²³⁶ The challenge for the agency representative is

²³¹The entire body of the American Psychiatric Association has endorsed DSM III's authority as a descriptive and diagnostic tool. *Id.* at 4.

²³²See 29 C.F.R. § 1613.702(a) (1986).

²³³DSM III, *supra* note 224, § 305.1X.

²³⁴Most of those types of cases will arise before the EEOC and will be heard by hearing examiners. Cases brought before the MSPB usually also involve rules violations and present special problems. An employee who has violated a rule is not protected by the Rehabilitation Act of 1973 unless the rules violation was directly and unavoidably caused by the handicap. See *infra* notes 240 and 242.

²³⁵See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).

²³⁶See *Vickers v. Veterans Administration*, 949 F. Supp. 85 (W.D. Wash. 1980).

to find the least burdensome form of accommodation for the agency. There is very little case law in the area of accommodation for tobacco addiction.

The most common form of accommodation provided by government agencies involves the setting up of designated smoking areas. If the employee's work site can be made a designated smoking area, all problems can be resolved. The presence of nonsmokers in the office, however, often makes it impossible to designate a particular worksite as a smoking area. The solution in many offices is to establish a smokers' lounge where employees can smoke on their breaks. Potential problems arise when employees feel they cannot wait until break time to smoke. Providing additional breaks for smoking employees is probably not a reasonable form of accommodation. Government employees are paid to work an eight-hour day; thus, it would be wasteful to give them additional breaks. This could also have a detrimental effect on morale since smokers would be working a shorter day than nonsmokers. Alternatively, some agencies might adopt a form of "flex-time". Under "flex-time," the employees would be allowed to take additional breaks while at work. They would then be required to extend their workday to make up the time lost in the additional breaks. This could, however, present an undue burden for some agencies.²³⁷

Instead of accommodating employees' handicaps by allowing them to smoke during work time, an agency may wish to accommodate the employees by aiding them in eliminating the handicap. There are no reported cases in this specific area, but these cases can be analogized to the substantial body of case law in the area of alcohol addiction. Both alcohol and tobacco addictions start with voluntary acts and develop into handicaps. Also, in both tobacco and alcohol cases the handicap can be cured.²³⁸

Both the MSPB²³⁹ and the EEOC²⁴⁰ have ruled that an agency has the right to limit smoking in the workplace. The MSPB has gone so far as saying a person can be fired for ignoring agency smoking lim-

²³⁷ Many agencies have rules that do not allow for flex-time. In addition, some jobs do not lend themselves to flex-time. For example, it would not benefit the office to have a receptionist stay an extra half an hour late if all of the other members of the office have gone home. It could also be an undue burden for any office to offer flex-time if this would result in the agency being obligated to give flex-time to all of the other agency employees in the office.

²³⁸ See DSM III, *supra* note 224, §§ 305.0X, 305.1X.

²³⁹ See *Golden v. Comm. Tech. Corp.*, 36 Empl. Prac. Dec. (CCH) ¶ 35,095 (N.D. Ga. 1985). (affirming MSPB removal of an employee for smoking rules violations).

²⁴⁰ See, e.g., *Pletten v. Department of the Army*, No. 03810087 (E.E.O.C. May 12, 1983).

itations.²⁴¹ These restrictions are consistent with MSPB and EEOC case law dealing with alcohol use in the workplace. Agencies are required to provide accommodation to alcohol addicts but are not required to let employees drink on **duty**.²⁴² The amount of accommodation agencies are required to provide alcohol addicts varies among the available forums.

The MSPB's position on accommodation for alcoholics was set out in *Ruzek v. General Services Administration*.²⁴³ In *Ruzek*, the MSPB stated that, before taking disciplinary action against an alcoholic, an agency should offer rehabilitative **assistance**.²⁴⁴ This assistance usually consists of providing counseling and sick leave for **treatment**.²⁴⁵ Under *Ruzek*, supervisors must confront the employee and inform the employee of the consequences of refusing the rehabilitative assistance offered by the **agency**.²⁴⁶ If the employee refuses or fails to progress in treatment, he or she can be **removed**.²⁴⁷

The EEOC follows the same guidelines as the MSPB in this type of case. The EEOC has yet to suggest changes to an MSPB opinion as a part of its review process; however, the EEOC has tended to demand a greater showing of attempted accommodation than the MSPB in similar cases. It is not clear why this is the case.

In *Whitlock v. Donovan*,²⁴⁸ the United States District Court for the District of Columbia adopted a much broader definition of required accommodation than the one set out in *Ruzek*. Under *Whitlock*, an agency must offer an alcoholic employee a "firm, fixed choice" of accepting treatment or being **removed**.²⁴⁹ If the employee refuses treatment, he may be removed. If he enters into treatment, however, he may be removed only after **repeated relapses**.²⁵⁰ The court stated:

Since it is recognized that relapse is predictable in treatment of alcoholics, an agency is not justified in automatically giving up on an employee who enters treatment but who subsequently relapses. In such a case, the agency may follow through with discipline short of removal. However, the agency

²⁴¹ See *supra* note 240.

²⁴² See, e.g., *Lott v. Department of the Navy*, 7 M.S.P.B. 367 (1981).

²⁴³ 7 M.S.P.B. 307 (1981).

²⁴⁴ *Ruzek*, 7 M.S.P.B. at 312.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ 598 F. Supp. 126 (D.D.C. 1984), *aff'd sub nom.* *Whitlock v. Brock*, No. 85-5026 (D.C. Cir. June 3, 1986).

²⁴⁹ *Id.* at 130, 133, 137.

²⁵⁰ *Id.* at 133.

is obligated before removing the employee from its work force to evaluate whether keeping the employee presents an undue hardship under 29 C.F.R. § 1613.704. If removal seems to be the only feasible option, the agency is obligated to conduct a formal evaluation, including a fitness for duty examination if necessary, to confirm whether the employee's alcoholism disease is in fact responsible for the employee's poor performance. If so, the agency must offer leave without pay if the employee will seek more extensive rehabilitative therapy which seems promising.²⁵¹

Whitlock is only binding in the District of Columbia. While the case was affirmed on appeal,²⁵² the decision was unpublished and non-precedential. The Court of Appeals also very clearly affirmed the decision only on its facts. They stated they were not ruling on any issues of law.²⁵³ The MSPB has not adopted the *Whitlock* rational, and the case's persuasive impact is questionable.

Agency representatives should keep *Ruzek* (and to a lesser extent *Whitlock*) in mind when designing this type of accommodation for smokers. The smoker should be offered a choice of abiding by the agency's limitations on smoking, facing disciplinary action for failure to abide by agency regulations, or accepting rehabilitative assistance. While rehabilitative assistance will normally be geared to helping the employee stop smoking, it may also be designed to help the employee with the more limited goal of stopping smoking during work time. The agency should provide the employee with some form of counseling as well as any sick leave or leave without pay that may be required to complete the program. In addition, the agency should exhibit extra tolerance while the employee is trying to change his smoking habits. According to DSM 111, tobacco withdrawal can cause mood swings as well as impairment in performance of tasks requiring vigilance.²⁵⁴ These withdrawal symptoms usually begin immediately after a reduction in tobacco use and will decrease in intensity over a period of a few days to several weeks.²⁵⁵ The agency may wish to grant extra break time to a smoking employee while he is in treatment. In order that it not have an adverse effect on morale, however,

²⁵¹ *Id.*

²⁵² *Whitlock v. Brock*, No. 85-5026 (D.C. Cir. June 3, 1986).

²⁵³ *Brock*, slip opinion at 2.

²⁵⁴ DSM 111, *supra* note 224, § 305.1X.

²⁵⁵ *Id.*

these extra breaks should not be granted for more than one **month**.²⁵⁶ The agency should make it clear to the employee when offering this type of accommodation that the employee is not required to stop smoking, only to stop smoking during work time. If the employee turns down this accommodation, the agency should have no further duty to provide **accommodation**.²⁵⁷

C. COMPLAINANT'S REBUTTAL

This stage of the hearing has very little purpose in smokers' accommodation cases. The only thing the complainant can argue is that management's actions did not constitute reasonable accommodation. As is the case with nonsmoker cases, however, the agency representative should be ready for **anything**.²⁵⁸

VII. INTENTIONAL TOBACCO-RELATED DISCRIMINATION

In some cases, employees attempt to prove that the agency intentionally discriminated against them because they were either smokers or nonsmokers, or because they filed a tobacco-related discrimination case in the past. As previously discussed, in accommodation cases, discrimination results from inaction, the failure to provide accommodation. In contrast, intentional discrimination cases always result from action, usually either a disciplinary action or nonselection for a job.

In accommodation cases, the handicap in question is always job related in that it interferes with work performance. The handicaps in intentional discrimination cases are nonjob-related and have no actual effect on performance. A smoker who limits his on-the-job smoking to designated breaks in smoking areas has a nonjob-related handicap. If a supervisor denies this employee a promotion because the supervisor does not like smokers, the supervisor has committed intentional discrimination.

²⁵⁶DSM III states that a person should be able to quit smoking in a month or less. Thus, accommodation for more than one month should not be necessary. *Id.* The agency should be ready, however, to grant additional periods of accommodation at a later time. DSM III states that 75% of people who quit smoking will start again. *Id.* Thus, employees who are trying to quit should be given a second or even a third chance if the supervisor feels that they are sincerely trying to quit smoking.

²⁵⁷See *supra* note 220 and accompanying text.

²⁵⁸See *supra* note 223 and accompanying text.

A. PRIMA FACIE CASE

To establish a prima facie case, complainants must show either that they are handicapped or that management is aware that they had filed an EEO complaint or engaged in activity protected under Title VII.²⁵⁹

1. *Establishing Qualified Handicapped Status.*

Complainants prove handicap status in intentional discrimination cases in the same way they do in an accommodation cases.²⁶⁰ Thus, the advice contained in earlier sections relating to proof of handicap applies here.²⁶¹ If complainants can show they are handicapped and performing their jobs at a satisfactory level or above, they have proved that they are qualified handicapped.

2. *Establishing Reprisal Status.*

As an alternative to proving that they are handicapped, complainants may allege that agency action was taken in reprisal for past EEOC activity.²⁶² The complaints must prove the agency knew they had engaged in EEOC protected activity in the past.²⁶³ It is not enough for complainants to prove solely that they engaged in protected activity. If the complainants do not show that the agency official who allegedly discriminated against them knew of the past protected activity, they have not established a prima facie case.²⁶⁴

3. *Discrimination in Selection.*

Employees who are complaining that they were not selected for a job because of a nonjob-related handicap must prove: (1) they were qualified for the job in question, (2) they applied for the job, (3) they were not selected for the job, and (4) the job was filled by a non-handicapped employee or the job remained open.²⁶⁵ This is ordinarily very easy for the employee to prove. The agency representative should be careful to ensure that all prongs of the prima facie case are met. Often the complainants have not applied for the jobs in question, but

²⁵⁹ See *Warren v. Department of Army*, 804 F.2d 654 (Fed. Cir. 1986); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 310 (D. Mass. 1974), *aff'd*, 545 F.2d 222 (1st Cir. 1976) 178.

²⁶⁰ See *supra* notes 92–106 and accompanying text.

²⁶¹ See *supra* notes 174–96, notes 229–36, and accompanying text.

²⁶² *Warren*, 804 F.2d at 656–59; *Hochstadt*, 425 F. Supp. at 310.

²⁶³ *Warren*, 804 F.2d at 656.

²⁶⁴ The employee must show: (1) a protected disclosure; (2) the accused official knew of the disclosure; (3) some form of retaliation resulted; and (4) there was a nexus between the retaliation and petitioner's removal. *Id.*; see also *Hagmeyer v. United States*, 757 F.2d 1281 (Fed. Cir. 1985).

²⁶⁵ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 797 (1973); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 249 (1981).

argue it would have been futile to apply because they would not have been selected. Generally, these employees have not established a prima facie case.²⁶⁶ The complainant may use his or her SF-171²⁶⁷ to establish the first two prongs of the prima facie case.

4. Discrimination in Discipline.

Employees complaining that they have received excessive discipline because of their handicap status or because of reprisal must prove that they were disciplined, and other similarly situated nonhandicapped employees received lesser forms of discipline.²⁶⁸ To meet this burden, the complainants need to document the punishments given to other employees. Enterprising complainants will request this information under the EEOC's informal, or the MSPB's formal, discovery procedure. Most complainants, however, attempt to prove the punishment given to others with their own hearsay testimony. They say, for example, they heard several employees committed the same violation but were not punished.²⁶⁹ As hearsay is admissible before both the EEOC and the MSPB, the proper objection to this type of testimony is that the complainant has no basis for personal knowledge of the punishment given to these employees. To refute this type of testimony the agency representative should call a management-employee relations specialist from the agency's civilian personnel office to testify as to the punishments given for the type of offenses committed by the complainant.

B. THE AGENCY'S LEGITIMATE NON-DISCRIMINATORY REASONS FOR ITS ACTIONS

The agency is usually required to state legitimate nondiscriminatory reasons for its actions even if the employee fails to establish a prima facie case.²⁷⁰ In theory all the agency need do is assert its reasons; it does not have to prove them.²⁷¹ As a practical matter, however, the agency representative should present evidence as to the reasons for its actions.

²⁶⁶ See, e.g., *Araujo v. Department of the Army*, No. 091-86-X0234 (E.E.O. Dec. 10, 1986).

²⁶⁷ Office of Personnel Management, Standard Form 171, Personal Qualifications Statement (1979).

²⁶⁸ See *Burdine*, 450 U.S. at 249.

²⁶⁹ As agencies rarely keep information on disciplinary actions not taken, complainants usually cannot supply documentary evidence in this area. Most people are reluctant to admit that they committed an offense and were not punished. As a result, there will be very little direct testimony in this area. Most proof provided by the complainant will be some form of hearsay testimony.

²⁷¹ See *supra* note 137 and accompanying text.

1. Discrimination in Selection.

The agency does not have to prove the person selected for the job was the most qualified applicant or the complainant was not the most qualified applicant. The agency will be expected, however, to show that it had a reasonable basis for its belief that the complainant was not the most qualified applicant.²⁷² The agency representative should not spend excessive time comparing the applicants, because this opens the door for similar evidence in the complainant's rebuttal. The agency should have the selecting officials testify as to the reasons they did not select a complainant.²⁷³ It is also useful to compare the SF-171s of both the complainant and the selectee. Although usually requested by complainants, the selectee is almost never called as a witness;²⁷⁴ the selectee cannot be said to have discriminated against a complainant merely because he was selected instead of the complainant.

2. Discrimination in Discipline.

In a discipline hearing, the agency should introduce the testimony of the official who decided to institute the discipline. It should also produce witnesses who can testify as to the poor conduct or performance that resulted in the discipline. Finally, a representative of the management-employee relations branch of the agency's civilian personnel office should testify as to the advice he or she gave about appropriate penalties for offenses. If the agency has a standard table of penalties for certain offenses, it should be introduced at this time to show that the penalty imposed conformed to the agency's standard practice.

C. COMPLAINANT'S REBUTTAL

1. Discrimination in Selection.

In this portion of the hearing, the complainant attempts to prove the agency did not have a reasonable basis for its belief that complainant was not the most qualified employee, and that the agency's reasons were a pretext for discrimination.

The most common form of "proof" introduced by complainants to prove that they were the most qualified applicant is the complainant's past performance evaluations. Very often complainants bring this

²⁷² See supra note 134 and accompanying text.

²⁷³ See, e.g., *Lucket v. Department of the Army*, No. 093-85-7164 (E.E.O.C. Aug. 12, 1986).

²⁷⁴ The selectee was requested as a witness in all of the nonselection cases tried by the author. These requests were denied in every case.

type of case because the complainants cannot believe that a determination they were not the most qualified applicant could be based on anything other than discrimination. They often point out that they have received excellent performance appraisals. The agency should, however, have already dealt with this issue when it presented its legitimate nondiscriminatory reasons for its actions.²⁷⁵ A greater problem for the agency representative is presented by supervisor's performance potential evaluations. These evaluations, submitted with the job application, constitute the employee's present supervisor's opinion of the employee's potential in the job for which he or she is applying. When problem employees apply for positions outside their present departments, supervisors tend to employ a practice known as "lateral removal:" the supervisor gives the employee a glowing evaluation to "unload" problem employees on another department. When the same employees apply for a job within the department, however, the supervisor will give a more candid evaluation. A comparison of evaluations given for intra-department jobs with those given for inter-department jobs can be harmful to the agency. The agency representative should guard against the use of this type of evidence by cautioning supervisors about the importance of all forms of performance evaluations. At a hearing, the agency representative should not try to justify the supervisor's actions in giving this type of evaluation. While "lateral removal" is not a proper personnel practice, it is not necessarily a discriminatory practice. Witnesses must be honest and straightforward when testifying as to the reasons for their actions.

2. Discrimination in Discipline.

If the agency has submitted evidence to support the disciplinary action and has shown that other similarly situated employees received similar punishment, very little will happen in this portion of the hearing. The only thing that the complainant can do is contest the evidence provided by the agency. If the agency's evidence is valid, the agency representative will have little to do in this portion of the hearing. If the agency's evidence is not valid, it has already lost the case.

VIII. PREVENTING LITIGATION

Most litigation in the tobacco discrimination area is caused, not by a lack of accommodation, but by a lack of communication. People bring this type of complaint because they want to have a forum where they are sure their views will be heard. Supervisors can often avoid the expense of formal litigation by providing an informal forum for

²⁷⁵ See *supra* notes 272-74 and accompanying text.

their employees. If supervisors logically explain the reasons for the agency's actions to their employees, the employees are far less likely to file an appeal, even if they do not agree with the agency's rationale. An easy way to encourage unnecessary litigation is to refuse to listen to an employee.

EEOC hearing examiner Arlean Leyland noted that agencies that make it too easy for an employee to receive accommodation for an alleged handicap are far more likely to receive discrimination complaints than agencies that stick to the letter and the spirit of the law.²⁷⁶ Most employees will respect an agency's desire to get all the facts before providing accommodation. When an agency provides all the accommodation requested by any employee who merely asserts a handicap claim that may not be valid, it sends a message that employees can get anything they want merely by filing a discrimination complaint. This can work into a classic case of the agency giving the complainant an inch and the complainant taking a mile. In *Arnold*,²⁷⁷ for example, the agency established the complainant's entire building as a nonsmoking area. The complainant said this was not enough and demanded that smoking be prohibited on all Army installations. His rationale was that he might have to go on temporary duty to another post **someday**.²⁷⁸ He stated that his desire to fight for this change was fueled by his past success in getting any relief he requested from the **agency**.²⁷⁹

One effective method of establishing a smoking policy is for the supervisor to call a meeting in order to solicit suggestions from all the employees in this office. The supervisor should explain that he or she will make the final decision, which will also be based upon agency policy. When a final decision is reached, the supervisor should carefully explain the reasons for the office's smoking policy and keep an open door for questions. Once a decision is reached, however, the policy should be vigorously enforced. The biggest mistake a supervisor can make is to have an unenforced policy on the books. This causes the nonsmokers to be unhappy because of the general lack of enforcement and makes future enforcement impossible due to the establishment of a past practice of nonenforcement.

Supervisors should also give the union an opportunity for input into the formulation of the smoking policies. This is true even for agencies where the smoking policy would be a nonnegotiable issue.²⁸⁰

²⁷⁶Telephone interview, Aug. 12, 1986.

²⁷⁷*Arnold v. Department of the Army*, No. 033-085-5003 (E.E.O.C. Oct. 27, 1986).

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰*See supra* note 7.

Because union membership consists of both smokers and nonsmokers, the union's opinions on the issue of smoking regulations are usually fairly evenly split. As a result, unions will seldom take a firm stand if they are consulted. The business manager of one American Federation of Government Employees local stated that most unions will be satisfied if, in enacting smoking regulations, the agency attempts to balance the interests of smokers and nonsmokers.²⁸¹

IX. SETTLEMENT

A. *WHEN SETTLEMENT IS APPROPRIATE*

Many cases involving tobacco discrimination can be settled before litigation. This has the potential for saving the government a great deal of money. Of course, not all cases are appropriate for settlement. Settlements that encourage future frivolous discrimination complaints should be avoided.

Most discrimination cases fall into one of three categories. In the first, the complainant presents a valid claim of discrimination. All of those cases should be settled. Part of the job of a government EEOC practitioner is to prevent discrimination in the government. Thus, any government EEOC practitioner who allows a case where the agency is guilty of discrimination to proceed to litigation without an attempt at settlement is not doing his job.

The second category of complaints is brought by the system abusers. These are cases brought by people who know that they have no valid case of discrimination. These complainants usually add a fictitious charge of discrimination to a personnel case because they think it will improve their chances of obtaining relief. Often employees who think they may be facing removal in the future will file an EEOC case for the purpose of allowing them to file a reprisal complaint when they are removed. Agencies should never settle this type of complaint. If these cases are settled, the agency is encouraging frivolous complaints.

At present, the backlog at the EEOC often results in up to a three year delay in the issuance of a final decision.²⁸² A great deal of this delay is caused by frivolous cases. Agencies who unintentionally encourage these cases through settlements not only hurt themselves but also hurt the whole EEOC system. Agencies also must not allow

²⁸¹ Telephone interview with Pat Strong, Business Manager, American Federation of Government Employees, Local 12 (June 6, 1986).

²⁸² The amount of backlog at the EEOC varies greatly from office to office. In some offices the delay only amounts to several months.

themselves to be intimidated by the threat of reprisal complaints. If an agency's actions are affected by the threat of reprisal complaints, the frivolous complainant has won the battle.

The third category of complaints presents the most difficult questions relating to settlement. In these complaints, there is no valid claim of discrimination; nevertheless, the complainants sincerely believe the agency has discriminated against them. These people are not attempting to abuse the system and cannot be faulted for their attempts to gain relief. In these cases, settlements may be appropriate if they result in overall benefit to the government. Factors to keep in mind in determining whether settlement is appropriate are the same as the factors used when considering settlement in most other forums. They include the cost of the settlement, the risk of losing the case, the effect of the settlement on the morale of the employee, the effect on the morale of the agency, the nature of the complaint, and the nature of the agency. In many cases an agency representative can convince this type of complainant that the agency has not discriminated against them by talking to them before the hearing. This often results in the case being dismissed before litigation.

B. DRAFTING SETTLEMENT AGREEMENTS

If the agency decides to settle a case, the agency representative should exercise care in drafting a settlement agreement. All agreements should expressly state that the agreement is not to be construed as any form of admission on the part of the agency. Unless the employee's handicapped status is obvious, the agreement should also state that the agency expressly denies the existence of any alleged handicaps. This prevents the complainant from using the settlement agreements in future litigation as evidence that the agency regards him as handicapped. The agency may even wish to include nonhandicap related reasons for agreeing to the settlement. An example might include: "In order to increase the morale of the division and to foster better working conditions, the agency agrees to the following. . ."

Agreements should contain a provision requiring complainants to dismiss their cases with prejudice unless the agency violates the agreement.²⁸³ Agreements should also contain a clause prohibiting complainants from bringing another action, in any forum, related to the same facts. An ideal clause might read:

²⁸³ According to EEOC Examiner Jeff Goodfriend, interviewed November 28, 1986, cases of alleged breach should be resumed at the stage of the appeal process where the agreement was signed. The agency is not required to repeat the entire process.

The complainant agrees to dismiss the subject complaint with prejudice. (Subject to a later clause giving the complainant a remedy in case of breach). The complainant further agrees to dismiss all other pending actions and bring no further actions relating to the facts underlying subject complaint, or relating to any incident occurring prior to the date of this agreement before the EEOC, MSPB, FLRA, federal court system, state employment board system, state court system, agency grievance and arbitration system, or any other

This clause protects the agency from dismissing the action in one forum only to immediately confront it in another.

Any agreement to pay attorney's fees should be part of the settlement. All agreements should also contain the following clause: "The Agency shall pay no (additional) attorney's fees, back pay, or any other claim concerning matters relevant to this action. The Employee shall not submit to the Agency any claim for (additional) attorney's fees, back pay, or any other claim concerning matters relevant to this matter." This clause is necessary because courts have held that, just because a discrimination case is settled on the merits, it does not mean it is settled on the issue of fees.²⁸⁵ The addition of this clause constitutes a waiver of fees on the part of the complainant. Even if the agreement includes a provision for attorney's fees, this clause forecloses any attempts at claims for additional fees.

Because complainants are often pro se, a clause is needed to show the court that the complainants understand the nature of an agreement. This type of clause should state: "The Employee declares that no promise, inducement, or agreement not included herein has been made to him, and that the entire agreement between the parties hereto and each of the terms of agreement are contractual and not mere recitals. The parties declare that they understand and agree to these terms."

²⁸⁴This clause contains a great deal of protection for the agency. As a result, it may be difficult to get the complainant to agree to it. The agency representative should be prepared to drop the language relating to actions "occurring prior to this complaint" since it is difficult to get the complainant to agree to this clause.

²⁸⁵See *Maher v. Gagne*, 448 U.S. 112 (1980) (§ 1988 case); *Copeland v. Marshall* (Copeland III), 641 F.2d 880 (D.C. Cir 1980) (applied *Maher* to title VII cases). See generally B. Schlei & P. Grossman, *Employment Discrimination Law* (1983). It should be noted that courts are not bound by attorney fee determinations set in settlement agreements and can bind the parties to a settlement with increased fees. See, e.g., *Foster v. Boise-Cascade Inc.*, 577 F.2d 339 (5th Cir. 1978).

In order to allow the reopening of a case in the event of a breach by either party, the agreement should contain a clause stating: "This agreement or any true copy may be used as evidence in any subsequent proceedings in which either of the parties allege a breach of this agreement."

If the complainant is represented by counsel, the agreement should contain signature blocks for both the complainant and his representative. This constitutes evidence that the employee made an informed choice in signing the agreement.

C. FINALIZING THE SETTLEMENT

All postcomplaint or postcharge settlements must be forwarded to the appropriate hearing examiner, judge, or administrative judge before a case is dismissed. These judges and examiners will dismiss the case only if they feel the settlement agreement is fair and was entered into voluntarily.²⁸⁶ As a practical matter, these agreements are almost always approved.

X. CONCLUSION

As more agencies enact limitations on smoking at the workplace, the reported body of case law in this area will continue to grow. Meanwhile, agency representatives must strive to strike a balance between the rights of handicapped smokers and the rights of handicapped nonsmokers. The best strategy in this type of litigation is to avoid it. The best way to avoid litigation is through communication. Do not allow the emotional nature of the issue to prevent a mutually agreeable resolution of any conflict. Agency representatives should act as mediators as well as advocates for the agency and its employees.

²⁸⁶ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); see also 5 C.F.R. § 1201.217(b) (1986).

THE USMA HONOR SYSTEM—A DUE PROCESS HYBRID

by Major John H. Beasley*

“A cadet will not lie, cheat, or steal, nor tolerate those who do.” This is the Cadet Honor Code at the United States Military Academy. Upon this Honor Code rests the ethical standards of the United States Corps of Cadets. The Honor Code is also an institutional goal, ensuring that graduates of West Point have strong character, unimpeachable integrity, and moral standards of the highest order. The Cadet Honor Code and System is recognized by the Academy and the Department of the Army as a primary means of achieving this character development.¹

The Cadet Honor System is the vehicle by which the Corps of Cadets imparts the Honor Code to its members. The Honor System establishes educational programs that support the basic concepts of the Honor Code, as well as the due process procedures to follow when a suspected honor violation is reported. While the fundamental statement of the Honor Code has changed very little since the early 1900's, the Honor System is an ever-evolving process that has undergone some rather drastic changes in the last ten years. Tracing these procedural and due process developments within the Cadet Honor System is a fascinating exercise. From an institutional point of view, it is interesting to see the growth of the Honor System from the early ad hoc cadet procedures, intentionally ignored by Academy officials, to the very structured and open system in existence today. From a legal perspective, the changes in the Honor System reflect significant court decisions on administrative due process, an area largely ignored until the 1970's. This article traces the due process aspects of the Cadet Honor System from both institutional and legal perspectives.

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¹United States Military Academy Press, Honor Guide for Officers 4 (13 Aug. 1958). [hereinafter Honor Guide].

During the course of this analysis, it is important to keep in mind that the United States Military Academy (USMA) is indeed part of the United States Army. Although this seems a rather obvious point, it is all too easy to get the impression that the Military Academy is somehow exempt from Army regulations and policies. Cadets at the Academy are, in fact, members of the Regular Army.² They are assigned to a unit designated as the Corps of Cadets³ which is organized into companies commanded by commissioned officers of the Army.⁴ Upon entering the Academy, cadets sign an agreement to complete the four-year course of instruction, to accept an appointment as a commissioned officer of the Regular Army, and to serve in such capacity for at least five years immediately following such appointment.⁵ Cadets failing to fulfill this agreement may be transferred by the Secretary of the Army to the Army Reserve, in an appropriate enlisted grade, and ordered to active duty in that grade for a maximum of four years.⁶

Control of the Academy falls under the Department of the Army, with immediate governance being with the Superintendent, who is the commanding officer of both the Academy and the military post at West Point.⁷ The immediate commander of the Corps of Cadets is the Commandant, who is also responsible for the instruction of the Corps in tactics.⁸

Just as it may be hard at times to view West Point within the Army system, placing the Cadet Honor Code and Honor System within the framework of Army administrative law can also appear to be somewhat cumbersome. The Honor Code is currently described by the Academy as “the *minimum standard* of [ethical] behavior required by cadets,”⁹ and also as “the foundation of the standards and values of the Corps of Cadets.”¹⁰ The Honor Code is really many things—a rule of acceptable conduct, a moral and ethical creed, a revered custom of the service, and an important element of the Academy’s mission—to name but a few. But from the legal standpoint, the description of the Honor Code as that minimum standard of cadet ethical behavior is most relevant. The Honor Code, thus defined, is not unlike a reg-

²10 U.S.C. § 3075 (1982).

³10 U.S.C. § 4349 (1982).

⁴*Id.*

⁵10 U.S.C. § 4348 (Supp. III 1985).

⁶*Id.*

⁷10 U.S.C. § 4334 (1982).

⁸*Id.*

⁹United States Corps of Cadets Pamphlet No. 632-1, The Honor Code and Honor System, para. 2, at 2 (June 1987).

¹⁰*Id.*

ulation or directive issued by a given command, in this case, the United States Military Academy.

As stated earlier, the Honor System is the educational and procedural framework supporting the Honor Code. If an honor violation is reported, these procedures involve various preliminary levels of informal investigations and, if required, a formal hearing by a cadet panel. These procedures have been approved by the Academy Superintendent,¹¹ under his inherent authority as a commander inquiring into the activities of his command.”

With this general picture of how West Point fits within the overall Army framework, the Honor Code and System can now be traced. The first segment in the history of the Honor Code and System begins with the founding of the Military Academy in 1802 and ends in approximately 1925, when both the Code and System were first formalized. The original Honor Code was actually an extension of the “Code of Honor” then prevalent in the officer corps of the U.S. Army. This was a very broad code but, at least in the Academy’s application, it meant that a cadet was to be fundamentally honest and accepted at his word. There was little agreement as to what constituted a violation of the early code and, until the mid-1920’s, there were no attempts made to place the code into written form.¹³

The first attempt to expand the early code beyond lying came when Colonel Sylvanus Thayer was Superintendent of the Academy from 1817–1833. Colonel Thayer, honored as the “Father of the Military Academy” primarily for his development of the West Point educational system and cadet training programs, considered cheating to be a violation of the Honor Code and announced that violators would be expelled. The prohibitions on cheating did not apparently take hold, as indicated by a quote from the Academy adjutant in a May 9, 1905, letter written in response to a questionnaire from the University of Chicago on the West Point Honor System: “It is not a point of honor with cadets not to obtain information unauthorizedly. By this I mean that if a cadet is ever caught cheating, his punishment, while very severe, does not include necessarily dismissal from the Military Academy.”* In this same letter the adjutant went on to explain that “The

“United States Corps of Cadets Pamphlet No. 15-1, Honor Committee Procedures, at i (June 1984).

¹²Dep’t of Army, Pamphlet No. 27-21, Military Administrative Law, para. 1-7(1 Oct. 1985).

¹³United States Military Academy, Superintendent’s Special Study Group on Honor at West Point, May 1975, at A-2, -3 [hereinafter Study Group].

¹⁴*Id.* at A-22.

honor system which we have involves this and only this: that the *word* of a cadet is never questioned.”¹⁵

Just two years later, however, the superintendent issued a written directive that cheating would in fact fall ‘under the Honor Code. The use of this directive is interesting not only from the standpoint of expanding the Honor Code, but it also provides insight into the developing “official” nature of the Honor Code as part of Academy policy.

Stealing, the third tenet of the present Honor Code, was not included in the early code but was rather a matter of regulations. Offenders were court-martialed; if found guilty they were separated from the Academy as a *minimum*.¹⁶ At some point in the mid-1920’s stealing did become part of the Honor Code, but it appears that serious violators were still referred to courts-martial.

With the addition of stealing as an honor violation, the Honor Code became, “A cadet does not lie, cheat, or steal.” From the mid-1920’s to 1970, when the nontoleration clause was added, this remained the Cadet Honor Code.

The early Honor System was in reality no “system” at all, but rather a tradition of cadet enforcement of their “Code of Honor.” While Academy officials were quite willing to recognize the existence of the Code, very little was said or written about enforcement. It appears that “minor” violations would often result in the offending cadet being directly confronted by the offended party. The issue would then be settled in a duel of some type, the most common being fisticuffs. If Academy officials were made aware of the dishonorable act, the offending cadet would also be punished under the cadet disciplinary system. In very serious cases the punishment might result in dismissal. Dismissals could be directed by the Superintendent without a formal hearing or investigation. In most cases, however, it appears that a thorough investigation was conducted.

In the late 1800’s the cadets began forming grievance committees to study various aspects of cadet life. At this time a Vigilance Committee was created to deal with honor matters. A forerunner to the Honor Committee, the Vigilance Committee investigated possible honor violations and reported its decisions to the cadet chain of command. If a cadet was found guilty, the cadet chain of command would often ask the offending cadet to resign. A cadet not electing to leave the Academy could be reported to the Commandant for an independent investigation. Although the Vigilance Committee had no official rec-

¹⁵*Id.*

¹⁶*Id.* at A-4

ognition by the Academy, its existence was tolerated and its decisions unofficially sanctioned.

It is unfortunate that so little is known of this formative stage of the Honor System. The Vigilance Committee was obviously a powerful force in honor matters, but its procedures may always remain a mystery. The best clue available is that the formation of the Honor Committee/Honor System (1920) used the Vigilance Committee and its procedures as a model. The early Honor System involved an investigation but, as described later in some detail, due process was sorely lacking. This was in all likelihood the method of the Vigilance Committee—an informal investigation with very few rights being afforded the accused cadet. The big difference was that the Honor Committee's investigation was only the first step in a two-step system, the second being the right of the accused cadet to a very formal hearing by a board of officers. The Vigilance Committee's decision was usually the final decision on the issue of guilt or innocence unless the Academy also became aware of the incident and conducted its own investigation.

In conclusion, the early Honor Code was generally concerned with lying and the early Honor System was a very informal enforcement mechanism conducted first on a cadet-to-cadet basis and later through the Vigilance Committee. The Academy became involved only in serious cases that had some official interest or impact. Otherwise it appears that a "guilty" cadet was usually confronted by the cadet chain of command and asked to leave the Academy. A cadet not electing to leave could be "silenced" (discussed later) or reported to the Academy for official action, often including court-martial.

Following the formative period (1802–1925) of the Honor Code and Honor System, the next logical break is from 1926–1975. This fifty-year period saw some gradual evolution in the Honor Code, the Honor System, institutional concepts, and legal concepts, which set the stage for the rather abrupt changes occurring in 1976.

As concerns the Honor Code, it remained unchanged until the addition of the nontoleration clause in 1970. With this addition, the Honor Code emerged in its present form: "A cadet will not lie, cheat, or steal, nor tolerate those who do."

While toleration was not officially prohibited until 1970, there is every indication that there long had existed an informal policy against the toleration of known violators of the Honor Code. As early as 1908, a reference is found in the cadet booklet, *Bugle Notes*, that "the high standards of integrity for which the institution is famous cannot be maintained if toleration for such is known. A thief, a liar and a coward

cannot be extenuated in the eyes of the Corps, and it is no part of the function of West Point to become a reformatory of morals.”¹⁷ The informal policy gradually became more “official” as evidenced by the 1958 *Honor Guide for Officers*, which stated: “One of the tenets of the Code which they [cadets] have elected to support and cherish is that each cadet is responsible for insuring compliance with the Honor Code and System. *If he does not do so, he too is violating the Honor Code.* The effective self-policing of the Honor System is one of the major features which sets it above other such systems.”¹⁸

Since its inception, the Honor Code has seen many changes in its interpretation and scope. Over the years, attitudes among cadets and the level of acceptance of the Code has continually fluctuated. While it is not the purpose of this article to trace these somewhat conceptual developments, it is difficult to fully appreciate the procedural and due process modifications without some idea of the human dynamics occurring behind the scenes.

From 1926 to 1975 cadet acceptance and support for the Honor Code hit certain highs and lows, as might be expected with any essentially moral code. An ever-changing cadet, staff, and faculty population further accelerated this natural tendency of change. Although it is impossible to accurately trace the ongoing trends in the general acceptance of the Honor Code, certain issues have surfaced on a recurring basis throughout this period. Cadet observations concerning these issues tend to indicate the general level of support for the Honor Code and System. Though cadets will always profess a general and sincere respect for the Code, when they are questioned on certain critical issues, weaknesses in the level of commitment to the Code emerge. These issues include the tendency to turn the Code into detailed rules, the use of the Code to enforce cadet regulations, a lack of confidence in the fairness and justice of the Honor System, and dissatisfaction with the nontoleration provision of the Code.

The practices of some honor committees in turning the Code into very detailed rules, often seeming like cadet regulations, has been a long-standing problem. Such rule-making obscured the true meaning and higher purpose of the Code. The honor chairmen from 1934, 1947, and 1953 all commented upon the importance of maintaining the “spirit of the Code” and, as the 1947 chairman put it, doing away with the “many poop sheets and interpretations that have come down

¹⁷Bugle Notes 27 (1908).

¹⁸Honor Guide, *supra* note 1, at 5 (emphasis added).

through the years.”¹⁹ Ten years later the 1957 chairman expressed similar ideas and commented that such extensive rule-making caused “most of the Corps of Cadets to quit thinking for itself.”²⁰ This problem was later noted by the Study Group ('74-'75): “[T]he inevitable drift is toward an increasing listing of specifics. This trend tends to obscure the spirit of the Code and exacerbate the conflict that cadets conjure up between honor and regulations.”²¹

The concern that the Honor Code was being improperly used to enforce Cadet regulations has been an issue since at least the 1950's. The 1953 chairman stated that the “Honor Committee is dominated by the Tactical Department” and that the Code “is becoming too involved with regulations and administrative requirements.”²² The Study Group ('74-'75) revealed in its survey that 76 percent of the cadets believe that the Honor Code is used to enforce regulations.²³

The third issue, that of a lack of cadet confidence in the Honor System, has been a problem since the Honor Committee was first formed in 1924. Some factors causing this problem have been the past secrecy of the System, the lack of solid honor education, and cadet disapproval with decisions of honor boards or officer boards. Cadets were often misinformed or uninformed about the workings of the Honor System. By 1974, cadet confidence in the Honor System was extremely low. A survey, conducted by the Study Group ('74-'75), found that:

—seventy percent of the cadets denied that the Honor Code was uniformly adhered to throughout the Corps.

—sixty percent of the Corps felt that cadet adherence to the spirit of the Honor Code was deteriorating. This attitude was strongest among the upper two classes.

—thirty-nine percent of the cadets and 24 percent of the officers did not believe the Honor System was fair and just.²⁴

The final issue has been the significant dissatisfaction with the nontoleration provision. Inasmuch as nontoleration first became an official part of the Code in 1970, tracing nontoleration before 1970, when it was a “quasi-official” segment of the Code, could be mislead-

¹⁹Report to the Secretary of the Army by the Special Commission on the United States Military Academy 58 (15 Dec. 1976) [hereinafter Special Commission Report].

²⁰*Id.* at 59.

²¹Study Group, *supra* note 13, at 9.

²²Special Commission Report, *supra* note 19, at 63.

²³Study Group, *supra* note 13, at C-1-4.

²⁴*Id.* app. 1 to annex C.

ing. But since 1970, there have been serious problems with the non-toleration precept. The 1972 Superintendent's Honor Review Committee was "convinced that toleration is the greatest threat to the current health of the Honor System."²⁵ The Committee reports in 1973 and 1974 came to similar conclusions. The survey of the Study Group ('74-'75) found that:

—73 percent of the cadets would not report a good friend for a possible honor violation and 34 percent of the cadets would not report a good friend for a clear-cut violation.

—45 percent of the cadets wanted toleration removed as an honor violation.²⁶

With this general background on some of the more significant problems surrounding the Honor Code and Honor System, the procedural and due process issues from 1926–1975 can be brought into focus. The legal basis is the fifth amendment to the Constitution, applicable to federal agencies, which provides that no person shall "be deprived of life, liberty, or property, without due process of law."²⁷

The concept of procedural due process implies that official action must meet minimum standards of fairness to the individual, which generally encompass the right of adequate notice and a meaningful opportunity to be heard. Concern with procedural due process in the academic setting in general, and at cadet boards in particular, is, however, a fairly recent legal development. Early concepts of due process at the Academy, to include the handling of honor violations, were based upon already existing Army administrative and criminal procedures.

These early procedures began in 1924 when the Academy superintendent, Brigadier General Douglas MacArthur, made the critical decision to remove all punitive powers from the cadets. That decision formed the basis of the two-tiered due process Honor System that existed from 1926 until 1976. The first tier was the cadet hearing conducted by the Honor Committee. The second tier was the opportunity for a cadet found guilty by the Honor Committee to have a *de novo* hearing before a board of officers or a court-martial. If found not guilty at this second tier, the cadet was returned to the Corps, but faced the unofficial punishment of the "cut" or "silence" and was treated by all other cadets as if he did not exist.

²⁵Special Commission Report, *supra* note 19, at 43.

²⁶Study Group, *supra* note 13, app. 1 to annex C.

²⁷U.S. Const. amend. V.

The only exception to this system was the policy, begun in the mid-1920's, that officer-reported violations of the Code were sent to the commandant and handled exclusively through criminal law channels. From 1958 to 1963 the commandant had the option of disposing of officer-reported violations by criminal action or by referring the case to the Honor Committee. From 1963 to the present, with the exception of cases involving serious criminal misconduct, all reports of honor violations have been referred directly to the Honor Committee.

During the majority of the 1926–1975 period, the Honor System maintained a fairly consistent structure and procedural scheme. The first tier in the System, the cadet investigation and hearing, was initiated when a possible violation of the Code was reported. Cadets observing possible violations reported the matter to the Company Honor Representative, an elected post in each cadet company filled by a first classman (senior cadet). Officers who suspected honor violations by cadets reported the matter to the head of the academic department or other Academy organization to which those officers were assigned. The department gathered the evidence and forwarded it to the commandant, who in turn forwarded the case to the honor chairman (at least from 1963 onward).

In the case of reports by cadets, if the honor representative believed that no honor violation had occurred, the case was dropped. If he felt that a possible honor violation had been committed, he gathered all pertinent information and reported the case to the honor chairman. When the chairman received the reports from the honor representative, or from the commandant in the case of officer reports, he next appointed an investigating subcommittee consisting of three other honor representatives. The subcommittee did not decide guilt or innocence, but rather determined if there was in fact a conflict with the Honor Code or whether the incident was the result of a misunderstanding. The subcommittee was required to thoroughly investigate the case and attempt to resolve all facts and conflicts. Witnesses, to include the accused, could be called and required to give oral or written statements. If any one member of the subcommittee believed that there was sufficient evidence to convene a hearing, the case was referred to the chairman. Any decision of the subcommittee, whether for dismissal or referral to a hearing, could be overruled by the chairman.

If a hearing was convened, a jury of twelve honor representatives was selected by the secretary of the Honor Committee. Excluded from the jury was the honor representative from the accused's company and any honor representatives who were involved in the investigation of the case. Other jury members who felt in any way biased or prej-

udiced were to excuse themselves from the case. Once the jury was formed, the chairman issued some general instructions on procedures and called upon the chairman of the investigating subcommittee to summarize the facts and present a list of witnesses.

The witnesses were called before the hearing one at a time to testify, to include the accused who, in all but a few years during this period, testified last. Although required to testify, the accused was to be free from pressure and was to be advised of the alleged honor offense. Except while testifying, the accused was not allowed to be present during the hearing. Questions could be asked of the witnesses directly by the jury members or indirectly by any member of the audience, through a designated member of the Honor Committee. After all witnesses, to include the accused, had testified, the hearing was closed for deliberations.

If necessary, the jury could recall witnesses or the accused during deliberations. When discussions were complete, the chairman would inquire if all members of the jury were ready to vote. When all members were prepared to vote, the chairman would summarize the case, and a vote by secret ballot was taken. If the vote was unanimous in a finding of guilty, the case was forwarded to the commandant along with a brief of the case. A less than unanimous vote resulted in the cadet being retained in the Corps without prejudice.

At the hearing, the standard of proof was the criminal standard of proof beyond a reasonable doubt. Whether or not this standard was explained to the cadet jury is unknown. Also, no mention is made of rules of evidence, so presumably any evidence, including various degrees of hearsay, was admissible.

Since the early 1950's, a finding of guilty also required that there be both some act or omission (e.g., false statement) as well as dishonorable intent (e.g., intent to deceive or mislead).

Exceptions to this hearing procedure occurred at times, but most notably from 1948–1953 when the hearing resembled the formal board of officers procedure. To begin with, the accused was informed in writing of the alleged violation. He was provided with a cadet advisor, usually an honor representative, who acted as his defense counsel. The chairman of the investigating subcommittee acted in the role of prosecutor. Nevertheless, the accused still did not have a right to be present during the hearing or to refuse to testify. His advisor could remain in the hearing room and question the witnesses on his behalf. At the conclusion of the hearing, the cadet “attorneys” made final arguments and the vote was taken.

From a due process viewpoint, the standard cadet hearing of the 1926–1975 era had some obvious weaknesses. The cadet received no formal notice of his alleged honor violation, he had no right to consult with or be represented by counsel (including a cadet advisor in most years), he could not challenge jury members, he had no right to remain silent at any stage of the investigation or at the hearing, he could not call witnesses in his defense, and he could not confront witnesses called against him. How these problems may have affected the validity of the entire two-tier system will be discussed later.

Upon a guilty finding the Honor Committee report was “reviewed by the commandant (and by the staff judge advocate, if necessary) to determine whether a prima facie case of an honor violation existed. (If the facts [were] inconclusive, an officer investigate[d] the case to determine if additional evidence [was] available.)”²⁸ The accused cadet was then interviewed by the commandant, who advised him of his right to remain silent, informed him of the accusations and the evidence against him, and gave him the option of resigning or appearing before a board of officers.

If the cadet elected to have his case heard by a board of officers, he was then appointed legal counsel and a board, convened under the provisions of Army Regulation 15-6,²⁹ was held at the Academy. At this board, the cadet was formally notified of the alleged honor violation, was represented by qualified legal counsel, was allowed to challenge board members for cause, was present throughout the hearing, could elect to testify or remain silent, was able to call witnesses in defense and to confront the witnesses against him. The standard of proof was substantial evidence, or such evidence as a reasonable man can accept as adequate to support a conclusion. The decision of the board, usually comprised of five senior officers, was by majority vote. The report and findings of the board were furnished to the superintendent for review and action. The cadet was also furnished a copy of the report and was allowed to submit a written statement to the superintendent. The superintendent could not disapprove a finding of “not guilty”, but could reverse a “guilty” finding and return the cadet to the Corps. Guilty findings approved by the superintendent were forwarded to Headquarters, Department of the Army, for final review and, in the vast majority of cases, dismissal orders were issued.

As concerns punishment, it was Department of the Army policy that honor violators who resigned or were separated as a result of

²⁸ Honor Guide, *supra* note 1, at 7.

²⁹ The current version of the regulation is Dep’t of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) [hereinafter AR 15-6].

board action were furnished a general discharge. "The separation from the Corps is the primary punishment as the only legal disability connected with the General Discharge is that it bars a man from becoming a regular officer at any future date. This type discharge does carry some definite penalties in an extra-legal sense as many large concerns and highly selective colleges will not accept a man who has been given a General Discharge. Other officer programs (OCS, ROTC, Air Cadet, etc.) usually will not enroll a man with a General Discharge."³⁰ In some cases, notably when a cadet had reported himself for an honor violation, the Honor Committee could recommend leniency and the cadet might receive an honorable discharge.

As mentioned earlier, a cadet found not guilty by the board of officers or superintendent was returned to the *Corps*, but was usually "cut" or "silenced," meaning that he was treated as if he did not exist. The "silenced" cadet lived in a separate room, ate alone at a table in the Cadet mess, was not spoken to by any other cadet except for official purposes, and was otherwise completely ignored. The "silence" was not something new, but had originated long before the formalization of the Honor Committee in the early 1920's. The Academy and even some honor committees attempted to do away with the "silence," but all attempts were unsuccessful. The 1928 honor chairman was quite blunt in his statement to the Corps that "This action [the silence] established a wrongful precedent. This, in a few words, means that you have no right to "silence." There is no such thing as "silence." Forget about it."³¹ Just how vigorously the Academy attempted to do away with the "silence" is a matter of speculation. The cadets were told by Academy officials that they had no authority to punish, yet the practice of the "silence" continued.

Most "silenced" cadets could not endure the punishment and resigned after a short period. A cadet who was silenced in 1971, however, remained at the Academy until his graduation and commissioning in 1973. This much-celebrated case of Cadet Pelosi stirred public demand for an end to the "silence." During this controversy, the official Academy position was in support of the "silence," an unusual stand considering the completely unsanctioned nature of the punishment.³² Nonetheless, the Corps itself voted to end the punishment of the "silence" in 1973 and the issue was finally laid to rest.

³⁰Honor Guide, *supra* note 1, at 8.

³¹United States Corps of Cadets, Honor **Book** 12 (1928).

³²Special Commission Report, *supra* note 19, at 52.

When the “silence” ended, the number of cadets requesting boards of officers increased dramatically. From September 1965 to June 1973, a total of 305 cadets were found guilty by the Cadet Honor Committee. Of those, only fifteen cadets elected to go before boards of officers. During the 1973 to 1974 academic year, ten of twenty-five cadets found guilty by the Honor Committee requested boards of officers. In academic year 1974–1975, fourteen of the twenty-four cadets found guilty at cadet boards chose boards of officers.³³ This remarkable increase in cadets requesting boards of officers (from approximately 5% to approximately 50%), can be attributed in large part to the end of the “silence.” With the threat of the “silence” gone, cadets found guilty by the Honor Committee could only stand to gain from selecting boards of officers. This conclusion is supported by the Study Group (’74–’75), which found in its survey that “[f]orty-nine percent of the Corps indicated that they would request a board of officers if found for a clearcut honor violation, and if the possibility existed that a board of officers might reverse the Honor Committee’s decision because of a legal technicality.”³⁴

With this understanding of the due process mechanics of the 1926–1975 Honor System, the issue becomes whether that system met constitutional standards. The fifth amendment, however, states only that no person shall “be deprived of life, liberty, or property without due process of law.” It fell to the courts to decide when “due process of law” was required and what that requirement meant in the administrative setting of the Honor System.

The threshold decision for the courts was whether due process protection applied to cadets facing separation for alleged honor violations. Did these cadets have sufficient private interests (life, liberty, or property) to necessitate due process of the law? Before the first honor cases reached the courts, two earlier decisions concerning cadet (Merchant Marine and U.S. Military Academy) separations for excessive demerits had already established the dominant due process position. In *Wasson v. Trowbridge*,³⁵ the appellant Wasson, a third-year student at the Merchant Marine Academy, was charged with violating an Academy regulation, required to appear before a board of officers, and was recommended for dismissal because of excessive demerits. Wasson contended that minimal due process requirements were not met by the board and that he had generally been denied a fair hearing. In determining the constitutional standard to be applied,

³³*Id.* at 52-53.

³⁴Study Group, *supra* note 13, at C-1-6.

³⁵382 F. 2d 807 (2d Cir. 1967).

the court held that Wasson did in fact have private interests, presumably property interests, requiring a due process hearing. The court was careful to point out that, while Wasson had sufficient private interests to warrant a due process hearing, the government interest in maintaining discipline permitted the Merchant Marine Academy greater procedural freedom than civilian authorities might enjoy.

Some five years later the Second Circuit decided *Hagopian v. Knowlton*,³⁶ involving the separation of a West Point cadet for accumulating an excessive number of demerits. The court reaffirmed its earlier decision in *Wasson* and further explained that, at least in the Military Academy context, the scope of the private interest included the probable loss of a career as an Army officer. Thus, by its decisions in *Wasson* and *Hagopian*, the Second Circuit had clearly established a position that cadets facing separation for misconduct had constitutionally protected private interests.

In 1975, three years after the *Hagopian* decision, the Second Circuit also heard the first West Point honor cases to be challenged in the courts, *Andrews v. Knowlton* and *White v. Knowlton*.³⁷ Both cases had been first tried in 1973 in the Southern District of New York; they were consolidated on appeal. The Second Circuit court held that its decisions in *Wasson* and *Hagopian*, while dealing with dismissal due to excessive demerits, were also controlling with respect to a separation for a violation of the Honor Code. *Andrews* relied totally on the *Wasson* and *Hagopian* decisions regarding entitlement to a hearing before a cadet could be separated from a service academy. Thus the same due process standards were to apply whether the issue was misconduct (excessive demerits), or a violation of the Honor Code.

Once it has been determined that a constitutionally protected interest exists, the next stage of the due process analysis is a balancing of the government's interest in expeditious action against the individual's interest in obtaining a hearing or other procedural protections before adverse action can be taken. In *Dixon v. Alabama State Board of Education*,³⁸ the court considered whether due process required notice and some opportunity for a hearing before students at a tax-supported college are expelled for misconduct. This case, discussed in *Wasson*, determined that "[i]n the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board

³⁶470 F. 2d 201 (2d Cir. 1972).

³⁷509 F. 2d 898 (2d Cir. 1975).

³⁸294 F. 2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense.”³⁹ By way of contrast, *Wusson* determined that the governmental interest in the selection and discipline of future officers of the military and merchant marine was substantially greater than the governmental interest involved in the expulsion or discipline of students in state colleges. *Hugopiun* also recognized that the Academy’s conduct of military affairs should not be interfered with by the judiciary. In balancing the governmental interests against the private interests of the cadets facing separation, both *Wusson* and *Hugopiun* nevertheless determined that a due process hearing would be required before separation. The *Andrews* court came to the same conclusion when the basis for separation was a violation of the Honor Code rather than excessive demerits.

Thus with *Wusson* (1967), *Hugopiun* (1972), and finally *Andrews* (1975), the courts had consistently ruled that cadets facing separation for misconduct have constitutionally protected interests that require some due process before adverse action is taken. The next issue was what level of due process met the constitutional minimums. In the cadet context, as in other similar due process issues, the courts have not dictated certain fixed procedures but have instead stressed the very flexible nature of administrative due process. *Wusson* summed up the general philosophy of most courts: “Thus to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand.”⁴⁰

The 1970–1975 time frame saw a tremendous expansion of procedural due process litigation. Procedural protection had been provided for the right to one’s commercial bank account,⁴¹ household possessions,⁴² parole,⁴³ employment,⁴⁴ and driver’s license,⁴⁵ as well as many other private rights. In these cases and others, the balancing of governmental and private interests resulted in a variety of due process models. While the analysis and methodology of the courts differed, the common question was whether the projected gains in accuracy and fairness of additional due process were outweighed by the in-

³⁹294 F. 2d at 157.

⁴⁰382 F. 2d at 812.

⁴¹*North Georgia Finishing, Inc. v. Dichem, Inc.*, 419 U.S. 601 (1975).

⁴²*Fuentes v. Shevin*, 407 U.S. 67 (1972).

⁴³*Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁴⁴*Perry v. Sindermann*, 408 U.S. 593 (1972).

⁴⁵*Bell v. Burson*, 402 U.S. 535 (1971).

creased time, effort, and disruption that such procedures often create. This balancing of competing interests also runs through the service academy cases. In all these cases, the balancing of interests was clearly in favor of the governmental interest in training future officers and maintaining discipline and order. Nevertheless, as discussed below in some detail, the courts have not hesitated to establish certain due process standards that must be met.

In *Wasson* (1967), the court had to determine if the Merchant Marine Academy's procedures in cases of cadet misconduct met constitutional requirements. The Merchant Marine Academy provided cadets with graduated due process rights, depending on the maximum authorized punishment for the misconduct charged. In Cadet Wasson's case, he was charged with an offense of intermediate seriousness that entitled him to written notice and a hearing before a board of officers from his regiment. When this board awarded him 75 demerits, Wasson exceeded his maximum allowance of total demerits and was thereby subject to dismissal. He was then permitted another hearing before a board comprised of different officers on the issue of retention. The second board of officers recommended dismissal.

The Second Circuit court ruled on the specific due process objections raised by Wasson, and also provided the general guidance later relied upon in *Hagopian* and *Andrews*. *Wasson* held: "Due process only requires for the dismissal of a Cadet from the Merchant Marine Academy that he be given a fair hearing at which he is apprised of the charges against him and permitted a defense."⁴⁶ The Court, while maintaining the need for flexibility, went on to explain: "The rudiments of a fair hearing in broad outline are plain. The Cadet must be apprised of the specific charges against him. He must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence."⁴⁷ The court further explained that the hearing need not be adversarial or formalized.

As for counsel at such hearings, the court ruled that due process does not mandate representation by counsel as a general requirement. "Where the proceedings are noncriminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual is mature and educated, . . . and where the other aspects of the hearing taken as a

⁴⁶382 F.2d at 812.

⁴⁷*Id.*

whole are fair, due process does not require representation by counsel.”⁴⁸

Regarding some specific due process objections raised by Wasson, the court ruled that Wasson was entitled to inquire into matters concerning possible grounds for challenge against board members, that he should have been allowed an opportunity to show that he required additional time to prepare his defense, and that, generally, a cadet facing elimination should be informed of all the evidence against him. On this last point, however, the court was careful to specify that Wasson would not be entitled to the confidential opinions of faculty members on the issue of fitness.

Some five years later, in 1972, the Second Circuit reaffirmed the *Wasson* ruling in deciding *Hagopian*. Like *Wasson*, *Hagopian* concerned a cadet elimination proceeding based on the accumulation of excessive demerits. Cadet Hagopian was separated from the Military Academy by the Academic Board after receiving 107 demerits, 5 in excess of the 102 demerit allowance authorized cadets for the period approximating an academic semester. Cadet Hagopian’s legal challenge concerned procedures used in the awarding of demerits for Class III delinquencies and those procedures followed by the Academic Board in determining separation once the demerit limit was exceeded.

Cadet Hagopian had accumulated numerous demerits for Class III delinquencies, those involving very minor misconduct (e.g. dirty uniform, late to formation, etc.). When cited for Class III violations, cadets were to submit immediate written explanations and could at their option submit written appeals. The court ruled that these procedures were entirely adequate “because the sanctions imposed are slight, the nature of the proceeding is corrective and educational, and the burden on the proceedings which a hearing would impose is excessive.”⁴⁹

As for the procedures of the Academic Board, Cadet Hagopian was not allowed to participate in the board proceedings, with the exception of the submission of written evidence. Hagopian did submit a letter essentially asking for a “second chance” and three earlier appeals concerning specific awards of demerits were also before the board. Relying to a great extent on *Wasson*, the court ruled that these procedures were inadequate. The court recognized that the Academic Board has two functions—a determination of the total number of validly awarded demerits and, secondly, the cadet’s potential for ser-

⁴⁸ *Id.*

⁴⁹ 470 F.2d at 211.

vice. In fulfilling both of these functions, the court saw the need to provide the cadet with a hearing at which he could testify and present evidence, including witnesses, on his behalf. Taking a passage from the landmark case of *Goldberg v. Kelly*,⁵⁰ the court noted that “Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.”⁵¹ The court did not, however, expand beyond *Wasson* in any aspect of procedural due process. Citing the *Wasson* due process guidelines, the court found “these standards to be of persuasive and controlling guidance in the remarkably similar context with which we are here confronted.”⁵²

Following *Hagopian*, and perhaps due in part to the decision reached in that case, the federal courts began hearing a series of West Point honor cases. The **1973** cases of *White* and *Andrews* were most significant in that the Honor System was examined in some detail by an appellate court. Another important case that addressed some key due process issues was the district court case of *Roberts v. Knowlton*.⁵³ *Roberts* involved a first-year West Point cadet found guilty by a board of officers of cheating by marking an examination card in the room where the correct answers were posted. Before the board of officers, conducted in accordance with Army Regulation **15-6**, Cadet Roberts was afforded the following rights:

- a. Advance notice of the precise allegation;
- b. Advance notice of government witnesses who would testify;
- c. Appointment of military attorney as counsel and right to civilian attorney at his own expense;
- d. Opportunity to be present at the proceeding and to be represented therein by counsel;
- e. Full opportunity to challenge board members for cause;
- f. Opportunity to cross-examine witnesses;
- g. Opportunity to present witnesses and other evidence; and
- h. The right to remain silent without any adverse inference being drawn from the exercise of that right.

The court concluded that Roberts had been afforded rights that exceeded the minimal due process requirements set forth in *Hagopian*.

⁵⁰397 U.S. 254 (1970).

⁵¹470 F.2d at 214.

⁵²*Id.* at 210.

⁵³377 F. Supp. 1381 (S.D.N.Y. 1974).

The court further determined that no due process was required at the first stage of the procedure, which consisted of a hearing before the Cadet Honor Committee.

Roberts was of course on firm ground in approving the due process procedures of the board of officers. The question still unanswered was just how the cadet investigation and hearing fit within the context of the overall system. The *Andrews* and *White* cases attempted to resolve this and other issues. Both cases involved violations of the Honor Code for which appellants were found guilty both at the cadet hearings and before boards of officers. The facts in both cases were undisputed before the courts. Cadet Andrews was found guilty of lying when, contrary to military police reports, he stated that he had only been on the Academy grounds for a short time before being apprehended for being out of uniform and in an unauthorized vehicle in which alcohol was found. In the case of Cadet White, he and five other cadets were found guilty of cheating on a physics examination by using answer lists obtained from the same examination given at an earlier time.

The common issues raised by each appellant were:

- (1) whether the proceedings before the Cadet honor committee comported with procedural safeguards required by the Due Process Clause of the Fifth Amendment;
- (2) whether the procedures and the standard of proof utilized in the Board of Officers hearing under Army Regulation 15-6 comported with the procedural due process guarantees of the Fifth Amendment; and (3) whether the sole penalty of expulsion of each appellant constitutes a violation of constitutional rights.⁵⁴

Taking up the first issue of the Cadet Honor Committee procedures, the court first determined that these procedures, although not formally adopted by the Academy, were in fact part of the separation process and could be considered governmental activity for the purposes of the due process clause. The court analogized the Cadet Honor Committee to a grand jury and stated that “the effect of the committee’s procedures and determinations on the separation process is sufficiently intertwined with the formal governmental activity which may follow as to bring it properly under judicial review.”⁵⁵

⁵⁴509 F.2d at 903.

⁵⁵*Id.* at 906.

Although preliminary to its later holdings, this was a significant decision by the court. For the first time a federal court had clearly stated that the Cadet Honor System, historically existing in a grey area between cadet and Academy control, was in fact governmental activity within the reach of the judicial system. The court also concluded that the holdings of *Wasson* and *Hagopian*, although dealing with dismissal due to excessive demerits, were equally controlling in cases involving violations of the Honor Code.

As for the constitutionality of the Cadet Honor Committee procedures, the court, apparently on the basis of *Wasson* and *Hagopian*, ruled that the cadet proceedings “were wholly lacking in procedural safeguards.”⁵⁶ Nevertheless, the court was “unpersuaded by the record. . . that the Cadet Honor Committee hearing was a critical stage in the separation of appellants from the Academy for Honor Code violations.”⁵⁷ It found that the boards of officers were de novo proceedings, were not tainted by the cadet hearing, and that these boards of officers met the *Wasson* and *Hagopian* standards. Concluding its discussion of this issue, the court stated: “[T]he Due Process Clause does not require the utilization of any particular procedure by the Cadet Honor Committee.”⁵⁸

Having determined that the procedures of the boards of officers met constitutional standards, the court specifically ruled that the “substantial evidence” standard used in these boards was valid. (Appellants had argued that the boards of officers should apply the “guilty beyond a reasonable doubt” standard used by the Cadet Committee.) The court also ruled that the procedures of the Cadet Committee did not in any way bind the boards of officers and that Army regulations governing boards of officers would take precedence over any cadet custom regarding dismissal for honor violations.

On the final issue, appellants challenged the sole penalty of expulsion as a violation of administrative due process. The court here agreed with the district court that “[w]hile the penalty is severe, it is nevertheless reasonable and not arbitrary, and therefore does not violate due process.”⁵⁹

Two important subsidiary issues were raised by the appellants in *Andrews* to demonstrate to the court that the cadet hearing was in fact a critical stage in the separation process. Appellants first attempted to show that statistically very few cadets found guilty at

⁵⁶*Id.* at 907

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* at 908.

cadet honor hearings went on to request officer boards. They cited statistics that revealed: “That between 1967 and 1972 there was only one successful appeal out of 150 guilty findings by the Cadet Honor Committee, and that only nine cadets chose Board of Officers’ hearings over resignation.”⁶⁰ The court noted, however, that these statistics covered a period before Hugopiun (1972) first required minimal due process and the post-*Hagopian* figures from the 1973–1974 academic year showed that cadets requested boards of officers in ten honor cases. In half of those cases, the cadets were found not to be in violation of the Honor Code.

On this point the court was correct in its figures, but the court was totally incorrect in citing Hugopiun as the basis for the sudden change in the number of cadets requesting boards of officers. The 1972 *Hagopiun* decision did nothing to change the then existing Honor System at the Academy and certainly had no influence on the number of requests for boards of officers. As discussed earlier, the basic Honor System had remained virtually unchanged from the late 1920’s up until 1976. Cadets always had the option of requesting either boards of officers or, in the earlier years, trial by courts-martial. These options provided the cadets with due process rights far in excess of the *Hagopian* standard. What did occur in the fall of 1973 was the elimination of the “silence” and, as discussed earlier, this for the first time made the option to select a board of officers a feasible alternative to resignation.

Appellants in *Andrews* further argued that the resulting ignominy and pressure to resign further caused the cadet “guilty” finding to be a critical stage in the proceeding. “Ignominy suffered while at the Academy and injury to future officer careers after graduation of cadets who are found, after adverse Honor Committee findings, by a board of officers not to have violated the Cadet Honor Code, clearly raise important questions concerning the need for procedural safeguards at an initial hearing before the Cadet Honor Committee. Because each appellant here was found by a board of officers to have violated the Honor Code and was separated from the Academy, the factual foundation upon which the above charges rest is not now before us. The appellants lack standing to assert such claim.”⁶¹

With the “silence” eliminated in the fall of 1973 and with no earlier cases addressing this issue, the constitutionality of cadet honor procedures during the existence of the “silence” will remain unanswered. Certainly a very good argument exists that the “silence” was a pun-

⁶⁰*Id.* at 906.

⁶¹*Id.* at 907.

ishment resulting in the loss of private interests, primarily that of reputation. As such, due process was required before cadets were deprived of that private interest. Furthermore, such punishment may have rendered illusory the possibility of vindication by a board of officers once found guilty by a cadet hearing.

By the end of the **1974–1975** academic year, the Honor Code and Honor System appeared to be having serious problems. The Study Group ('74–'75) conducted extensive cadet surveys and reached some disturbing conclusions on the level of cadet support of the Honor Code and System. Approximately two weeks after the Study Group's report was issued, the **1975** Cadet Honor Committee chairman, a member of the Study Group, wrote the following to his successor: "This past year has been very difficult. The Honor System is in transition, and has come very close to failing altogether. Although we may perhaps have arrested the demise of the System, there is still a great deal more to be done to restore a healthy one."⁶²

With this rather grim state of affairs existing in **1975**, the Honor System would, in the next three years (**1976–1978**), undergo drastic changes. The changes would come suddenly, prompted by one of the most serious cheating incidents in Academy history.

In March **1976** the Electrical Engineering Department (Course EE 304) gave **823** second classmen (juniors) a take-home computer examination to be returned in two weeks. The cadets received written instructions that no collaboration was permitted on certain portions of the examination. When the papers were returned, instructors noted striking similarities among some papers. The department head ordered that all papers be screened. On April **4, 1976**, the department forwarded to the Honor Committee the names of **117** cadets believed to have collaborated on the assignment. Honor boards were convened and by April **21, 1976**, fifty cadets were found guilty of either giving or receiving unauthorized assistance. Allegations that the cheating was even more widespread, and that there were coverups at certain honor boards, caused the superintendent to appoint an Internal Review Panel (IRP) to investigate the EE **304** incident and refer suspected violators directly to boards of officers. As a result, 150 cadets, in addition to the fifty already found guilty, were referred to boards of officers. Of these, eighteen elected to resign and **103** were found guilty, including twenty-nine previously found not guilty by cadet boards.⁶³

⁶²Special Commission Report, *supra* note 19, at 35.

⁶³*Id.* at 24-25.

In August 1976 the Secretary of the Army, in an unprecedented decision, announced a plan whereby any cadet who either resigned for honor reasons or was found guilty of an honor violation during the 1975–1976 academic year could apply for readmission to the Academy after one year. This plan also waived the requirement of enlisted service for all ex-cadets in this category, including those who did not seek readmission.⁶⁴

The EE 304 cheating incident was not the first major incident of its kind in Academy history. In 1951, for example, there occurred a major cheating incident which resulted in the separation of ninety cadets. The significance of the EE 304 incident lies in the Department of the Army and the Academy response to the problem. In the past, honor “scandals” were handled by the Academy internally and the official report was to the effect that the Honor Code and System were still strong and the Corps had successfully eliminated a handful of dishonorable cadets. To the credit of Department of the Army and the Academy officials, the EE 304 cheating incident certainly did not result in a reaffirmation of the status quo.

On September 9, 1976, the Secretary of the Army appointed a Special Commission “to conduct a comprehensive and independent assessment of the . . . EE 304 cheating incident and its underlying causes in the context of the Honor Code and Honor System and their place in the Military Academy.”⁶⁵ The commission, chaired by Academy graduate and former astronaut Frank Borman, issued its report on December 15, 1976, making three general statements of position:

First—The Commission unanimously endorses the Honor Code as it now exists.

Second—We believe that education concerning the Honor Code has been inadequate and the administration of the Honor Code has been inconsistent and, at times, corrupt. There must be improvement in both education and administration.

Third—The Commission concurs unanimously with the actions that you have taken to provide a “second chance” for certain cadets involved in the Electrical Engineering cheating incident last spring. Moreover, the Commission believes that the same consideration should be given to all other cadets who were involved in cheating, or tolerating cheating on the examination in question.⁶⁶

⁶⁴*Id.* at 26.

⁶⁵*Id.* at Introduction.

⁶⁶*Id.*

On the issue of the Honor System and due process, the commission noted “gross inadequacies in the Honor System”⁶⁷ and “the perceptions of many cadets that the Honor System has been hypocritical, corrupt, and unfair.”⁶⁸ The Commission also cited “the absence of fundamental fairness in some Honor Board proceedings.”⁶⁹ The commission said very little else about due process, however, for on November 9, 1976, a full month before the Commission Report was published, the cadets themselves voted to revamp the Honor System. With eighty-five percent of the Corps of Cadets voting in favor of the proposed revisions, the cadets completely eliminated the two-tier system in favor of a single “due process” hearing at the Cadet Honor Board level. On November 12, 1976, these changes were approved by the superintendent for immediate implementation.

The new system called for various levels of preliminary investigations followed, if necessary, by a Full Honor Board which was, with but a few exceptions, a cadet version of the AR 15-6 board of officers. The process still began with the company honor representative, who made an initial inquiry to determine if there was credible evidence substantiating the allegation. Before questioning the accused cadet, the company honor representative, and all other cadet investigators at higher levels, were required to advise the cadet in writing of the allegation, his right to remain silent, and his right to consult with legal counsel at any time before, after, or during questioning. The company honor representative would then determine if the case would be dropped or forwarded for further investigation to the regimental honor representative. The regimental honor representative would review the evidence and either order a new investigation by another company honor representative or appoint a subcommittee of five cadets (two company honor representatives and three cadets not on the Honor Committee). The subcommittee actually conducted a nonadversarial hearing to determine whether there were reasonable grounds to believe that a violation of the Honor Code had been committed and that a Full Honor Board should hear the facts. At the subcommittee hearing the accused cadet was given the opportunity to challenge members for cause and was then dismissed from the hearing room until called as a witness. Once again the accused cadet was advised in writing of the allegation and of his rights to remain silent and to consult with counsel. The subcommittee recommendation was by secret ballot, majority deciding, whether to send the case to a Full Honor Board. The subcommittee recommendation was advisory only; the

⁶⁷*Id.*

⁶⁸*Id.* at 9.

⁶⁹*Id.* at 8.

Honor Committee chairman made the final decision based upon his own review of the case and the written recommendation of the staff judge advocate. If a Full Honor Board was then convened, the accused cadet (respondent) was provided with written notice of the allegation and his rights at the Board. These rights included:

- a. The right to legal counsel;
- b. The right to remain silent;
- c. The right to call witnesses and present evidence;
- d. The right to be present and be represented by counsel during all Board proceedings except deliberations;
- e. The right to cross-examine all adverse witnesses;
- f. The right to challenge any member of the Board for cause;
and
- g. The right to designate one class from which no Board members would be selected.

The Board was comprised of twelve cadets, four members of the Honor Committee and eight members of the Corps at large, with at least two cadets from each of at least three classes. The Full Board was a *de novo* proceeding and was presided over by the cadet president, a first classman and also an honor representative. The cadet president ruled on all procedural matters, with advice from a legal advisor, an Army lawyer. The recorder presenting the evidence to the board was also an Army lawyer.

Generally, board procedures were governed by AR 15-6 unless there was a specific Honor Committee procedure that differed with AR 15-6, in which case the Honor Committee procedure was followed. The board voted by secret written ballot and a finding of a violation of the Honor Code required an affirmative vote of at least ten of the twelve board members. The new standard of proof was now the AR 15-6 “substantial evidence” standard.

While the new system was certainly not procedurally unique, it most definitely was a clear break with the former two-tier system. Now, for the first time in Academy history the formal and final due process hearing was in cadet hands. Why and how did this change come about? It is apparent that both the Cadet Honor Committee and Academy officials saw the need for a single hearing at the cadet level. From the cadet point of view, the former cadet hearing was becoming a meaningless part of the overall process. With more and more cadets requesting officer boards and with the end of the “silence,” the cadet

hearing had very little impact. The *Andrews* court had recently compared the cadet hearing to a grand jury function and not a critical stage in the separation process. From the Academy point of view, the two-tier system was becoming a procedural and administrative liability. It had also become a tremendous source of antagonism between the cadets and the Academy administration. Although there was one Honor Code, the two-tier system now seemed to create different standards of enforcement, something that neither the Academy nor the Corps of Cadets could tolerate.

In January 1977, two months following the implementation of the new system, the Secretary of the Army authorized a change to Academy regulations whereby cadets found to have violated the Honor Code would not face mandatory separation. This break with the long-standing single sanction of dismissal now allowed the superintendent to retain a cadet found to have violated the Honor Code. The change, generally favored by both Academy officials and cadets, tended to improve the overall Honor System. Although the Secretary made it clear that cadets violating the Code normally should be separated, the change did allow for discretion in those cases in which separation would clearly be an unreasonably harsh punishment.

The implementation of the new Honor System began smoothly enough, but it soon became apparent that the new system was not working as planned. The extensive cadet investigations and the fairly complex due process hearing had sacrificed simplicity, practicality, and timeliness. The investigations, now including additional due process rights, tended to last several weeks. At the board itself, the sessions became increasingly involved with legal and procedural points. The cadet president now had to rule on what seemed to be an ever-increasing number of legal motions and evidentiary objections. These legal matters, although sanctioned by the new procedures, often tended to disrupt, delay, and confuse the board process. The board proceedings were becoming unmanageable.

Now, however, the call for change came not from within the Academy but from without. Although Academy honor cases had routinely been sent to the Department of the Army for review, Department of the Army officials consistently had refused to interfere with most Academy matters, especially the Honor Code and System. But in March of 1978, Major General Wilton B. Persons, The Judge Advocate General (TJAG), and an Academy graduate, stated in a formal written opinion that the Academy honor procedures "exceed the requirements of due process and common sense."⁷⁰ Accompanying that opinion,

⁷⁰DAJA-AL 197812206, 9 March 1978.

General Persons submitted summaries of proposed procedures for honor separations. His proposals, essentially a simplified version of the former two-tier system, were rejected by Academy officials. Nevertheless, General Persons continued to press for simplification of the Honor System and, towards this end, worked directly with the Academy superintendent and his legal staff.

Although Academy officials generally agreed with the need for simplification, they were understandably reluctant to upset what was perceived as a fragile relationship with the Cadet Honor Committee. The cadets, concerned with any loss of their authority in deciding honor cases, were opposed to any changes that seemed to threaten that authority. The Academy, both officers and cadets, were therefore extremely hesitant to accept any TJAG recommendation regarding the Honor System.

The main controversy at the TJAG and Academy level first centered around the role of the legal advisor, an Army lawyer who advised the president of the Full Honor Board. TJAG proposed to expand the role of the legal advisor and limit that of the cadet president. The legal advisor would be redesignated as the hearing officer, and would rule on challenges, motions, objections, and other legal questions that might arise at the board. Under existing procedures the cadet president ruled on all legal questions but would seek advice from the legal advisor. At first opposed to such a change, the Academy reluctantly agreed to consider the proposal only after TJAG announced that he could not legally approve the current procedures.

Throughout 1978, the discussions continued regarding other methods of simplifying the Honor System. By December 1978 three proposals had been presented to the chairman of the Cadet Committee: eliminate the subcommittee system, transfer to the legal advisor the responsibility for legal decisions during the board, and adopt a summarized transcript of the hearing.

As these proposals were being considered, the Secretary of the Army **took** decisive action that would eventually force the Academy to change its honor procedures. In a letter dated 9 February 1979, the Secretary of the Army notified the Academy superintendent that

[e]xcessive delays such as occurred last year cannot be tolerated. They are not fair to accused cadets, to their fellow cadets, to the Academy, or to the Army. Therefore I am adopting the following policy. Except under the most unusual circumstances, I will not approve separation, or any other sanction requiring my action, in a cadet honor proceeding which has not been completed at the Military Academy and received at Headquarters, Department of the Army, *within 60 days*

of the date on which a specific report of any included honor violation was made to the accused cadet's Company Honor Representative. Defense requested delays may be excluded.⁷¹

The new "60-day rule" caused the Academy and Cadet Honor Committee to move quickly to modify the existing procedures. By May 1979, approximately three months after the Secretary's letter, the Corps of Cadets voted to ratify the Honor Committee's decision to modify the Full Honor Board. The "new" Board (now designated the Full Honor Investigative Hearing) was designed to be a nonadversarial, fact-finding hearing, eliminating the government recorder and the respondent's defense counsel, while expanding the role of the legal advisor to that of hearing officer.

While the "60-day rule" is considered the primary factor in bringing about such sudden changes, it appears that the cadets were becoming increasingly dissatisfied with the adversarial system. In a newspaper account dated 18 May 1979, the Honor Committee Chairman was quoted: "The impression of many honor representatives and cadets was that we were more spectators than participants. It wasn't the cadets pursuing the facts, it was the lawyers involved in motions that seemed irrelevant and inconsequential."⁷²

The changes, effective 1 July 1979, replaced the preliminary investigative hearing with a less formal Investigative Team consisting of two impartial Honor Committee members. They investigate the facts and make recommendations to the Honor Committee chain of command, and, if appropriate, to the Commandant of Cadets, for a decision whether to refer the case to a Full Honor Investigative Hearing. The composition of the Full Honor Investigative Hearing is basically the same as the old Full Honor Board, but there are numerous changes in other areas designed to simplify the entire procedure.

The respondent is no longer represented by counsel at the hearing, but he or she may consult with legal counsel at all stages of the proceeding and have a cadet advisor of his or her own selection present at the hearing. A judge advocate hearing officer, appointed by the Commandant of Cadets, replaced the recorder. The hearing officer presides over the entire case. At the preliminary hearing he or she makes rulings on all challenges, evidentiary issues, and procedural matters. During the actual presentation of the case to the Full Honor Investigative Hearing the hearing officer, like a judge, has the responsibility to conduct the hearing in a fair, impartial, and nonad-

⁷¹Letter from Secretary of the Army Clifford L. Alexander to U.S. Military Academy Superintendent LTG Andrew J. Goodpaster (9 Feb. 1979) (emphasis added).

⁷²The Times Herald Record, 18 May 1979 at 9, col. 3.

versial manner. The duties of the hearing officer include giving a legal charge to the members prior to their deliberation and voting.

The vote of the Full Honor Investigative Hearing need not be unanimous. Ten of the twelve members must vote in support of a finding that a Honor Code violation occurred. A verbatim transcript is no longer necessary; the hearing officer authenticates a summarized transcript of the case. Finally, the findings and members' recommendations are forwarded to the superintendent for action.

The modified procedures, with only minor changes since 1979⁷³, have served the needs of the Academy and the individual cadets. The due process requirements of *Wusson* and *Hagopian* have been more than satisfied, while a good balance has been struck between fairness, thoroughness, and **efficiency**.⁷⁴

The present Academy Honor System, from initial investigation to final hearing, is indeed a unique procedural hybrid, just as the Academy Honor Code is a unique moral code. If a lesson can be learned from the preceding historical and legal analysis, it must be one of willingness to change. Administrative procedural law, unlike many other legal concepts, encourages flexibility to fit the needs of a changing society. At West Point, the procedural changes that have been made have definitely served to support the tenets of the Honor Code. When necessary, future changes should be encouraged, and viewed as a means of improving not only the System but, more importantly, the Code that the System supports.

⁷³In 1985 a new procedure was approved for cadets who wished to admit to a violation of the Honor Code. The procedure, called a Modified Honor Investigative Hearing, is similar to a guilty plea procedure in a criminal action. The Modified Hearing consists of only four members, rather than the twelve present at a Full Honor Investigative Hearing. The hearing officer conducts an inquiry to ensure that the cadet understands the effects and possible consequences of admitting to a violation. The four members make no findings with respect to the Honor Code violation; they only make recommendations on retention. As with the Full Honor Investigative Hearing, the authenticated transcript of the proceedings, with the members' recommendations, are sent to the superintendent for action.

⁷⁴*See* *Love v. Hidalgo*, 508 F. Supp. 177 (D. Md. 1981) (discussing due process standards for review of dismissals from the Naval Academy).

PLAIN ENGLISH FOR ARMY LAWYERS

by Mr. Thomas W. Taylor*

I. INTRODUCTION

When you read complicated judicial opinions or government contracts, do you ever wonder why we lawyers torture each other (not to mention our clients) with writing that is so hard to understand that it takes two or more readings?

And, if it takes two or more readings for us—as experienced attorneys—to understand our own colleagues' writing, what must the average person think about legal writing and about our ability as professionals to communicate to them or for them?

Most people have some contact with legal writing, whether on a somewhat rare occasion (for them) such as a divorce; a more frequent occasion, such as a home or car purchase; or a common occasion, such as a credit card transaction. In all three instances, legal concepts govern their rights and duties, yet most people have only a vague idea about where they stand legally, because of the complexity of legal writing. Although there has been some progress toward making consumer transactions more easily understood (as I'll discuss later), complex legal writing bedevils, confounds, and confuses average people and leads them to add their voices to a growing chorus of critics of the legal profession.

And Army lawyers are not immune from this criticism. Commanders and staff officers frequently make caustic comments about hard-to-understand legal opinions on a variety of complex issues from environmental law to fiscal law. Military appellate judges frequently criticize (and sometimes reverse) trial judges for their confusing jury

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instructions during courts-martial. Contractors and contracting officers outdo each other in blaming lawyers for problems that crop up in government contracts. The list of complaints could go on and on, while our clients ask the burning question: *Why don't Army lawyers write in plain English?*

That's what this article is about. I'll begin by looking at the plain English movement and its impact on legal writing. Experts disagree about whether the movement has merit, but the evidence so far favors it. Then I'll discuss why—in light of the trend favoring plain English—lawyers have not embraced the movement. I'll look at what the Army is doing to encourage its lawyers to use plain English and what it might do to develop a more effective program.

For the most part, poor legal writing is more a matter of neglect, than intent. We don't intentionally use unclear words and write incoherent sentences; we do so out of ingrained habit. And if the benefits of the plain English movement were only semantical, there would be less reason to push it.

But the real issue is that poor writing often disguises poor legal analysis—disguises it from others and from ourselves! Writing clearly makes it easy to criticize your legal analysis; as George Orwell observed, “When you make a stupid remark, its stupidity will be obvious, even to yourself.”

11. SO WHAT IS PLAIN ENGLISH?

Before examining the pro's and con's of the plain English movement and why lawyers haven't embraced it, let's look at what “plain English” means.

A. WHAT PLAIN ENGLISH IS

Plain English has a variety of definitions; many of them also illustrate rules for its use. Consider the following definitions.

1. Good English.¹
2. English easily understood by an ordinary person.³
3. English expected of someone with an eighth or ninth grade education.⁴

¹Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 Yale L.J. 161, 187 (1982).

²Hathaway, *The Plain English Movement in the Law—Past, Present, and Future*, 64 Mich. B.J. 1236, 1238 (1985).

³Gale, *Corporate Plain English*, 63 Mich. B.J. 919 (1984).

⁴R. Flesch, *How to Write Plain English: A Book for Lawyers & Consumers* 26 (1979).

4. English that is written the way we talk.⁵

5. English you would want someone to use if you were the reader and knew nothing about the subject (the Golden Rule of plain English).⁶

6. English “written in a clear and coherent manner using words with common and everyday meanings.”⁷

All of these definitions are essentially correct but reflect progressively complex ideas about plain English. You will not be surprised to learn that the last—and most complicated—definition in the list comes from New York’s plain English consumer protection law, the first plain English law in the country when it passed in 1978. For our purposes, plain English is a dynamic approach to writing in clear conversational language that your audience will easily understand.

B. WHAT PLAIN ENGLISH IS NOT

To better understand what plain English is, let’s look at what it is not. In one critique of plain English statutes, Professor Dickerson commented that plain English is “anything but plain.”⁸

However, most agree that plain English is *not* simple, disjointed baby talk, using only short sentences and shorter thoughts in machinegun-style bursts. It also is not condescending, and its use is not restricted to simple ideas, such as “you lost the case but still must pay my fee.”

Finally, plain English is not a substitute for a decent education, a panacea for a bad one, or an attempt “to turn our rich language into a series of one-syllable words” or legislate “the style of a society’s prose.”⁹

111. PLAIN ENGLISH AND LEGAL WRITING

Now that we have looked at some ideas about what plain English is and is not, we need to focus briefly on legal writing to see if there is anything about it that precludes the use of plain English. In dis-

⁵E. Bailey, Jr., *Writing Clearly: A Contemporary Approach* 16 (1984).

⁶*Plain English for Lawyers*, J. L. Soc’y Scotland (Sep.-Oct. 1984), reprinted in *Queensland L. Soc’y J.* 293 (Aug. 1985).

⁷N.Y. Gen. Law § 5-702a (McKinney Supp. 1978).

⁸Dickerson, *Should Plain English Be Legislated?*, 24 *Res Gestae* 332, 333 (1980) [hereinafter *Res Gestae*].

⁹C. Felsenfeld & A. Siegel, *Writing Contracts in Plain English* 232 (1981).

cussing (in the next section) why lawyers have resisted the use of plain English, we'll examine some of these ideas in more detail.

A. WHAT IS LEGAL WRITING?

1. A language?

Is legal writing a specialized type of English? Or ordinary English adopted for the function of talking about the law? Or both?

Some law professors contend that “[l]inguistic research suggests that legal language is a sublanguage of English which has certain linguistic features rarely found in normal discourse;” examples include the frequent use of the passive voice and nominalizations (making nouns out of verbs).¹⁰ Most lawyers’ spouses would probably agree with this position, especially if “sublanguage” connotes an inferior form of English!

Other legal scholars contend that most legal writing uses ordinary English words sprinkled with terms of art and holdovers from antiquity.”

This view makes more sense; as social and legal problems change, we use ordinary words to describe legal relationships, rather than creating new “legal language.” However, we inevitably rely on certain terms of art in relating the new developments to precedents.

2. Literature?

Another way of looking at legal writing is to compare it with literature. Both legal writing and literature are more organized than ordinary conversation, and both have a story to tell; but legal writing “isolates from the story the legally relevant facts and subsumes them under a rule of law . . . interprets the facts theoretically—and therefore conceptually,” allowing us to find similar legal concepts in cases with diverse facts, so that we can reach the basic goal of justice—“deciding like cases alike.””

Literature—although it also deals with concepts—does not have this goal and need not be concerned with functioning as a pragmatic problem-solver for society. Thus the language of literature is more flexible than the language of law.

¹⁰Charrow, Book Review, 30 UCLA L. Rev. 1094, 1102 (1982) (reviewing D. Mellinkoff, *Legal Writing: Sense and Nonsense* (1982)).

“D. Mellinkoff, *supra* note 10, at 45.

¹²Hyland, *A Defense of Legal Writing*, 134 U. Penn. L. Rev. 599, 611-14 (1986).

3. *A straightjacket?*

Another characteristic of legal writing is that while “all writers write to be understood, lawyers write so they cannot be misunderstood.”¹³ This leads to using more words to qualify, explain, and limit what is intended than would otherwise be the case. The goal is usually to leave no loopholes.

This also limits lawyers’ literary licenses; they may not wax poetic lest others misconstrue their ramblings as side agreements in a contract or precedents in a judicial opinion. In fact, when a judge does venture into poetry or other literary anomalies in opinions, it is usually newsworthy and reported in state or national legal newspapers or journals.

B. THE CASE AGAINST PLAIN ENGLISH

As we have just seen, legal writing differs from other forms of writing. Critics of the plain English movement seize upon these differences to stake out positions along a spectrum from indignation to compromise.

1. *Plain English? Never!*

Among the indignant are those who believe that complex language is necessary to identify and explain complex legal problems or facts and that simpler statements may be misleading. According to these critics, “[t]he ‘Plain English’ movement is born of nostalgia and displays an impatience and frustration with our times,” a yearning to return to the simpler times of yesteryear.¹⁴

Taking a humorous swipe, another critic complained of being “told to avoid gerunds, participles, and infinitives. Well, you may be able **[sic]* live without them, but it would sure make my come *[sic]* and go *[sic]* difficult. But then, see *[sic]* is believe *[sic]*, I always say.”¹⁵ Other critics see plain English as an “alternative to [a] decent public education.”¹⁶

¹³Lindgren, *supra* note 1, at 170.

¹⁴Grad, *Legislative Drafting as Legal Problem Solving*, in Practising Law Institute, Commercial Law and Practice Course Handbook Series, No. 208 (1979), *reprinted in* F. Dickerson, *Materials on Legal Drafting* 277 (1981).

¹⁵V. Charrow, *What is ‘Plain English,’ Anyway?* (1979), Publication C1, Document Design Center, American Institute for Research, *reprinted in* F. Dickerson, *supra* note 14, at 278.

¹⁶C. Felsenfeld & A. Siegel, *supra* note 9, at 231.

2. *Conceptual issues are sacred.*

Still indignant—but with a different twist—are those critics who acknowledge that legal writing has all the appeal of a cockroach, but perceive the sentiment underlying the plain English movement is that the law “is the law—and not life” and that lawyers “are lawyers—and not ordinary people.”¹⁷ These critics explain that the general public, without the benefit of a professional legal education, has difficulty understanding the law because they do not understand legal concepts; lawyers and legislators, however, must use legal concepts to safeguard the role of precedent in our system.

The obvious fallacy is that lawyers and legislators have no excuse for using tortured language to express the concepts. And, as to precedent, George Hathaway observed:

“Case precedent” is the classical reason for not writing Plain English, like a headache is the classical reason for not making love. Case precedent is the real reason for not writing Plain English about as often as a headache is the real reason for not making love. “Sorry counselor, no plain English tonight, I have a slight case precedent.””

3. *Plain English Statutes.*

Critics have specifically targeted so-called plain English statutes. These statutes typically require maximum average sentence lengths, use readability formulas to measure degree of difficulty, or otherwise mandate what plain English requires. Even some of those who favor the use of plain English in legal writing oppose these statutes because they tie the drafters’ hands as they struggle to write the clearest possible language.¹⁹

Statutory writing standards will surely reduce innovation and may guarantee that clear writing will not advance beyond the statutory requirements. Nevertheless, they may be a first, and necessary, step in the evolutionary process.

In summary, the best case against plain English is that there are risks in trying to make complicated facts, issues, and concepts appear too simple; the key risk is degradation of legal precedent by oversimplification. One answer is that the risks of oversimplification are acceptable if the stakes are relatively low and clarity of understanding

¹⁷Hyland, *supra* note 12, at 601, 607.

¹⁸Hathaway, *supra* note 2, at 1237.

¹⁹Dickerson, *Plain English Statutes and Readability*, 64 *Mich. B.J.* 567, 568 (1985) [*hereinafter Plain English Statutes*].

is paramount (as in a common consumer transaction). As the stakes increase (either in a more complex transaction or a precedent-setting case), the argument for simplification loses some weight, but the additional details could still be expressed in plain English.

C. THE CASE FOR PLAIN ENGLISH

Now that we have looked at the arguments against the use of plain English in legal writing, let's look from the other side of the fence.

1. History.

From the beginning of our Anglo-American legal tradition, famous people have called for the reform of legal writing to make it simpler and easier to understand. In the seventeenth century Sir Edward Coke, Chief Justice of England, advised his fellow lawyers that their profession required them "to speak effectively, plainly, and shortly."²⁰ In the eighteenth century Thomas Jefferson wrote that, in drafting a criminal bill, he aimed at "accuracy, brevity, and simplicity" rather than "modern statutory language, with all its tautologies, redundancies, and circumlocutions . . . unintelligible to those whom it most concerns."²¹

The early nineteenth century found Jefferson apologizing for the simple style of a bill he had drafted, adding that the bill could be corrected "to the taste of my brother lawyers, by making every other word a 'said' or 'aforesaid,' and saying everything over two or three times."²² Later that century, Jeremy Bentham called legal language "excrementitious matter" and "literary garbage" and advocated writing clear codes that everyone could understand.²³

The criticism has continued into this century. In 1939, a critic remarked, "Almost all legal sentences . . . have a way of reading as though they had been translated from the German by someone with a rather meager knowledge of English."²⁴ Seeds for the present movement were sown in an effort to ensure that the public could understand regulations enacted during World War II to control prices.

Although the push dwindled after wartime pressures eased, the consumer movement in the early seventies revived interest in simplifying legal documents and gave birth to the plain English move-

²⁰Gale, *supra* note 3, at 919.

²¹D. Mellinkoff, *The Language of the Law* 252-53 (1963) [hereinafter *Language of the Law*].

²²*Id.* at 253.

²³*Id.*

²⁴*Res Gestae*, *supra* note 8, at 332.

ment. Simpler automobile insurance policies emerged in 1974, and simplified consumer loan agreements, in 1975.²⁵ And, as mentioned earlier, New York passed a plain English law covering certain consumer transactions in 1978. That same year, President Carter became the first President to require government regulations to be in plain English.

2. *Benefits.*

The advantages that plain English offers legal writing are implicit in the discussion of definitions and legal writing to this point. The following list summarizes the more salient benefits:

(1) Clarity of language, tailored to a particular audience, in a straightforward conversational style.

(2) Clarity of analysis and thought, required to produce number 1.

(3) Clarity of understanding the problem, required to produce numbers 1 and 2.

(4) In a word, clarity—for the writer and the reader.

These benefits are obviously important in the business world. The consumer knows what to expect; the business also knows what to expect so mutual confidence should result.²⁶ Not so obvious, but of equal importance, would be the benefits if *all* legal writing were equally clear. (More about this later.)

3. *Acceptance.*

Although the jury is still out on the degree of acceptance of plain English by the legal community, the following trends are emerging:

a. Businesses are complying with plain English statutes in consumer transactions with relatively little difficulty and expense. Reports from a New York survey indicate that a majority of firms believed that their effort was worth the trouble.²⁷ It is obviously good business to be able to tout openness and honesty in disclosing to customers all terms and conditions of an agreement.

b. Consumers have every reason to praise the plain English movement as they are primary beneficiaries of the reforms. Better than ever before, they are able to tell how much something will cost (to purchase and operate), how long it will last, and what will happen if it breaks. These are relatively new ideas when you consider that

²⁵*Plain English Statutes*, *supra* note 19, at 567.

²⁶R. Moukad, *New York's Plain English Law*, 8 *Fordham Urb. L.J.* 451, 463 (1980).

²⁷*Id.* at 462.

caveat emptor has been the universal rule in a market economy for centuries.

c. Finally, we come to the lawyers. Their reaction has been mixed, as you can see from the cases many made against plain English, and most lawyers still feel uncomfortable with the notion. On the other hand, some lawyers have embraced the movement and become outspoken advocates. Some blue chip law **firms** have even hired writing instructors to teach their lawyers to write better English; moreover, they have hired professional writers to edit and redraft legal briefs and **letters!**²⁸

Some state bar associations have regularly devoted portions of their journals and publications to improving the writing skills of their audiences; Michigan is noteworthy in this regard, with its “Plain Language” series.

Judges have written opinions and made speeches castigating their colleagues for poor writing; at least one has recently required a lawyer to rewrite and resubmit a brief without the usual jargon! And many **state legislatures**—comprised primarily of lawyers—have passed laws requiring plain English in certain consumer transactions.

4. *Future.*

Felsenfeld and Siegel predict the growth of the plain English movement, whether or not legislatures continue to pass plain English laws. They cite four reasons:

- a. Prominent lawyers have accepted the movement.
- b. Vocal consumers will not let up the pressure.
- c. Law schools are introducing writing programs for their students.
- d. Courts will insist on clearly understandable **contracts.**²⁹

The difference between the current movement and earlier reform efforts is that a larger sector of society is involved in today’s movement than ever before. Coke, Jefferson, Bentham—theirs were voices crying in the wilderness, as were the lesser known critics of this century. But now that consumer advocates, business, legislatures, and—yes—even some lawyers have gotten into the act, the movement is likely to continue. It has already lasted longer than a decade. With laws on the books of many states, plain English is not going to fade away.

²⁸Thomas, *Shearman & Sterling’s Hired Gun Shoots Down Legalese*, *Juris Doctor*, June/July 1978, at 28, reprinted in F. Dickerson, *supra* note 14, at 12.

²⁹C. Felsenfeld & A. Siegel, *supra* note 9, at 238-39.

IV. IF PLAIN ENGLISH IS SO GOOD, WHY WON'T MOST LAWYERS ACCEPT IT?

Fair question. The basic instincts of lawyers are honed over years of education and experience and shaped by a number of persuasive influences, including schools, traditions, courts, legislatures, executive decisions, and consumerism. We will examine each of these from the viewpoint of their influence on a lawyer's willingness or ability to use plain English in legal writing, both now and in the future. These influences are powerful and are similar to prejudices; if we expose them to light and recognize that they exist, we have a chance of overcoming them.

A. SCHOOLS

Some educators believe that we form good or bad writing habits at a relatively early age. It is common knowledge that too many of our writing habits are bad, probably reflecting the "rule" orientation that intermediate and high school English teachers have followed too long, producing students who can write grammatically correct, but unclear, sentences.³⁰

Colleges sometimes improve students' writing skills, but most students enter law school without a critical appraisal of their writing skills. Except for staff members of law reviews and similar publications, most lawyers in practice today came through law school without anyone critically reviewing their writing beyond exams and an occasional paper. Is it any wonder we have trouble writing?

Fortunately, some law schools are recognizing this deficiency. For example, both the University of Oklahoma and Wayne State University have writing programs that teach and stress plain English.

Unfortunately, most schools have not established such ambitious programs. Too many law schools pay lip service to their writing programs but do not furnish them their best instructors or stress their importance, so the students get the clear message that good legal writing is not that important after all and react accordingly.

Professor Dickerson has suggested in a number of articles that law schools need a solid jolt to shake their lethargic, traditional approach—trivializing the teaching of legal writing by reducing it to

³⁰Lindgren, *supra* note 1, at 165-66.

semantics and busywork; until better law school education comes, plain English laws help force the issue.³¹

B. TRADITIONS

Traditions are also powerful influences that hinder lawyers from breaking bad writing habits. When traditions are combined with financial incentives (as we shall see momentarily), they become almost insurmountable.

1. Rites of Passage.

For now, let's look at the tradition of legal language and why lawyers perpetuate it. First, upon entering law school, we began to assimilate our professional knowledge in a vocabulary most of us had never heard before. Sure, many of the words (such as void) were ordinary, but were combined in extraordinary ways (null and void) that appeared to have legal magic! Who were we—under pressure to conform or fail—to question the language of a profession we hoped to enter?

That leads to the second point: the legal profession—as many professions—is like a priesthood. As initiates, we wanted to belong, to measure up to the standards, to pass the rites of initiation, and to assume our places as members of the bar. That goal required us to think, talk, and write in legal English.

2. Legal Language.

English itself is a latecomer as a language used for law.³² That accounts for the rich mixture of English, Latin, and French that characterizes our legal language today.

Professor Wydick has commented that lawyers in our tradition usually had

two languages to choose from: first, a choice between the language of the Celts and that of their Anglo-Saxon conquerors; later, a choice between English and Latin; and later, still, a choice between English and French. [To be sure that everyone would understand what was meant,] [l]awyers started using a word from each language, joined in a pair, to express a single meaning.³³

³¹Res Gestae, *supra* note 8, at 333.

³²R. Wincor, *Contracts in Plain English* 25 (1976).

³³R. Wydick, *Plain English for Lawyers* 19 (2d ed. 1985).

Hence, we ended up with “null and void,” two words which mean about the same thing. But try convincing a business lawyer to use one without the other in an important commercial transaction!

These words achieved a mystical level of importance over years and years of usage. Listen to Professor Mellinkoff’s description that ties the priesthood to the language:

The redundancies of primitive word magic and metaphysical ritual; the solemn repetitions coaxing barbarians to accept an unestablished law; the need and fashion of bilingual duplication; the involvement brought on by the translation of Latin, by Elizabethan literary styles, and by a pay-by-the-word legal economy; the overcautious repeating of the repeated to circumvent the harshness of the law and to mask an ignorance of its content . . . —all of these have burdened the law with language unnecessary, confusing, and wasteful.³⁴

3. *Why Don’t We Change?*

Now that many of the reasons have vanished for using two words when one will do, why does this tradition persist? Several reasons.

a. The best justification may be that certain words or combinations are terms of art. They enable lawyers to use a shorthand method to convey a fairly well-defined set of legal meanings and implications. When lawyers should use these terms of art is a different issue that will be addressed later.

b. We also tend to think and speak in the legal language we have learned and used over a lifetime of legal practice, and just like everyone else, feel comfortable with our own habits. Change is often painful and almost always inconvenient.

c. Lawyers tend to be conservative. Aware of the blessings that judges, as high priests, have given to certain legal language used in contracts, deeds, wills, and the like, lawyers—as lesser priests—tend to use that same language to ensure a predictable result for our clients based on precedents. Is that so bad? Isn’t that what we’re paid for?

d. The legal language that has stood the tests of time, trials, and appeals often ends up in forms that lawyers use, perpetuating complex legal language. Commercial publishers, banks, insurance companies, and realtors flood the market with these legal forms; lawyers normally have several to pick and choose among, as well as documents they

³⁴Language of the Law, *supra* note 21, at 399.

have drafted in the past, Routine legal matters, such as wills and deeds, require little modification of these forms from client to client. The use of word processors has made forms even more inviting because now lawyers can quickly prepare routine legal documents that don't look like forms!

e. That brings us to the hardest point to justify—some lawyers intentionally keep the language complex to baffle their clients and justify a higher fee. These motives cannot justify complex legal language and remind us of an earlier time when lawyers were paid by the word. Yet—hard to believe—there is another side to this story.

A lawyer who had reached the pinnacle of his profession tells that when he began practicing law more than two decades ago, his boss had to go into the hospital but left a number of things for him to do, including preparing wills for an elderly couple. Fresh out of law school and eager to try to simplify writing, he created the wills without the usual legalisms and proudly presented them to the couple, who read them and began to converse with each other in Russian, their native tongue. Finally, they said, “These just don't look like the wills we had before.” After listening patiently to his explanation that these wills were perfectly legal and reflected the new way of doing things, the couple said, “We'll just wait until Mr. Smith gets back,” and left, without signing the wills!

This is a painful statement to a young, hungry lawyer about clients' expectations that documents look “legal.” And it illustrates how deeply legalistic language is ingrained—not just in lawyers—but in our society in general.

C. COURTS

We have already touched briefly on the courts' influence over lawyers: Lawyers need to be able to predict that courts will interpret their legal writing in a certain way. The best way to ensure that result is to use language that the courts have blessed in previous cases.

1. Appellate Courts.

Suppose lawyers are willing to simplify their writing, and clients are willing to risk litigation for the sake of simplicity. (Most won't.) How will appellate courts interpret plain English documents?

Over half of the states have some type of plain English statutes applying to insurance policies, consumer contracts, and so forth. In some cases, courts have had little difficulty applying traditional legal principles to decide cases arising under these laws.

But in at least one case, arising out of mudflows from the eruption of Mount St. Helens in 1980, the Washington Supreme Court has put plain English insurance policies in jeopardy.³⁵ The issue was whether a homeowner's insurance policy excluded mudflows from coverage. Prior to plain English simplification, the policy excluded earth movements, which were defined and specifically illustrated to include mudflows. After simplification, the policy still included earth movements but omitted the examples. By reversing a summary judgment for the insurance company, and allowing the jury to decide the case on a proximate cause basis, the court placed the risk of plain English policies on the insurance companies even though it was clear what happened.

Decisions such as this will discourage business from following the plain English movement. Within a year of this decision, insurance companies in Washington had modified 95% of the policies to deal specifically with volcano coverage.³⁶ And who among us can dispute that business ought to be able to predict as easily as consumers the extent of their potential liability when they set their rates for coverage?

Decisions such as this also obviously discourage lawyers from simplifying language but encourage them to continue to follow the old adage: "If you write *at* all, write *it* all." After all, clients do sue their lawyers for errors and omissions, making this threat another incentive not to be miserly with words.

2. Trial Courts.

In addition to influencing lawyers, appellate judges also influence trial judges. As most of these appellate and trial judges are also lawyers, their writing tends to be no better or worse than that of other lawyers.³⁷ And if we were only writing to and for each other (as is often the case in a legal system based on precedent), we would deserve the poor quality of writing we get.

But the legal system is not the sole province of the lawyers. Nowhere is this clearer than in jury instructions; let's look at them for a moment to illustrate the pernicious effects of bad writing and why trial judges can't seem to get away from it.

³⁵Graham v. Public Employees Mut. Ins. Co., 98 Wash. 2d 533, 656 P.2d 1077 (1983).

³⁶Squires, *Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?*, 59 Wash. L. Rev. 565, 567, 581 (1984).

³⁷Mester, *Plain English for Judges*, 62 Mich. B.J. 978 (1983). The author is a judge on Michigan's Sixth Judicial Circuit.

The Charrows have done a useful study on how much average jurors understand of a jury instruction they hear. They concluded that jurors do not understand standard instructions very well, but the primary culprit was the difficulty of the language, rather than the legal concepts **themselves**.³⁸ The implications are serious, when you consider the legal and historical weight accorded the sacred right to a trial by jury.

The good news is that judges can make modifications to improve their instructions; the bad news is they probably won't. As one California trial judge, a member of a committee that writes standard instructions, explained, "There's strenuous opposition to rewriting jury instructions in plain English because you get **reversed**."³⁹ So trial judges feel trapped by the sometimes arcane language drafted by legislatures and upheld by appellate courts.

Compounding their dilemma is the fact that appellate judges don't "write for **jurors**"⁴⁰ (or litigants either, for that matter) but for other lawyers; they write to explain how their decisions fit within the precedents and broad legal concepts enshrined in other cases. The trial judges then have the unenviable task of translating those concepts into understandable jury instructions; obviously they often fail, and it's a wonder that juries do as well as they do. (Their overall success is probably a credit to their own common sense and their visceral ability to figure out what's fair.)

Without a fundamental willingness to change from top to bottom, the courts will continue to assert a powerful influence against the use of plain English in legal writing; but, as we shall later see, there is some hope for military courts in this regard.

D. LEGISLATURES

As we have just seen, judges blame part of their bad writing on legislatures that write laws in such complex language. Is this a valid criticism?

Consider an interview of Assemblyman Peter Sullivan, sponsor of New York's plain English law, by Robert MacNeil, in which MacNeil observed that the law itself was written in fairly complex terms and asked, "Why, if one can demand by statute that plain English be used in contracts, can't you write a law in simple English?"

³⁸R. Charrow & V. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Col. L. Rev. 1306, 1358 (1979).

³⁹Snyder, *Jury Instructions Reconsidered*, 5 Cal. Law. 33 (1985).

⁴⁰*Id.* at 33.

Sullivan answered, “[T]here’s probably one group that’s more traditional than the legal profession and that’s the legislature. . . . [T]hey had difficulty enough accepting the concept as far as a consumer transaction was concerned without having to accept it as far as the way we wrote our laws.”⁴¹ In other words, even the plain English law had to be in legalese!

So while the legislatures get some credit for passing plain English statutes, they share the blame for poor legal writing by enacting most laws—even plain English laws—in complex language and format. Tradition is probably the strongest influence on legislatures—remember Thomas Jefferson’s complaint about their tendency to be verbose and repetitive. But as lawyers comprise most legislatures, they bear the lion’s share of responsibility for the complex language.

Even when legislatures try to simplify legal documents by enacting statutory forms, such as powers of attorney, with magic language to incorporate provisions of the law without having to spell them out, the resulting documents tend to be stilted and hard to understand, leaving clients in doubt as to what they are signing. But, as mentioned earlier, lawyers use these forms repeatedly because they are convenient and virtually guaranteed to be predictable.

An anomaly that needs correcting is that some laws passed to ensure the rights of consumers make it harder to comply with other laws mandating plain English. For example, the Truth in Lending Act requires a number of complex disclosures in various consumer transactions; reducing these disclosures to plain English has proved difficult and, in some cases, of doubtful value.⁴² Witness the disclosures in a typical installment sales contract for a car.

Even municipalities are getting into the act. The City Council of Los Angeles passed policy guidelines in the Spring of 1986 that require new ordinances to be written in plain English. However, it took five years to pass the proposal because of the Council members’ disagreement on the wording!⁴³

E. EXECUTIVE DECISIONS

In addition to the influences of the courts and legislatures, the third branch of government—the executive—also influences lawyers to continue to write as they do.

⁴¹MacNeil/Lehrer Report, Feb. 17, 1978, *reprinted in* F. Dickerson, *supra* note 14, at 259.

⁴²C. Felsenfeld & A. Siegel, *supra* note 9, at 233.

⁴³United Press Int’l Wire Service, Apr. 23, 1986.

As mentioned earlier, one of the initial movements in this century to simplify legal writing came after the United States entered World War II. The Office of Price Administration (OPA) found that businesses could not understand wartime regulations on their own, so OPA hired Rudolf Flesch (whose works are now standard authorities on clear writing) to help improve the readability of their regulations.⁴⁴

Movements to simplify Executive Department regulations have gone in cycles since then, but President Carter issued Executive Order 12044 in 1978 requiring regulations to be “as simple and clear as possible.” President Reagan revoked that order in 1981, but anyone who reads or listens to his speeches knows that he is a master of plain English.

Despite these good examples, the Executive Departments and independent regulatory agencies have continued to write in gobbledygook, pretty much unmoved by the coming and going of Chief Executives. The inertia against simplifying the complex language of these regulations is almost overwhelming because many (1) deal with fairly technical subjects and complex relationships, from the regulation of nuclear power plants to the criteria for receiving certain welfare payments, and (2) are the livelihood of entrenched bureaucrats. And this writing has a powerful influence on the thousands of lawyers who work for these departments and agencies and whose clients must deal with their regulations daily.

F. CONSUMERISM: CLIENTS AND THEIR LAWYERS

We have now looked at schools, traditions and governmental institutions that make it hard for lawyers to break bad writing habits. We will now turn to the influence of the consumer movement on legal writing, and on lawyers' reaction to the movement. The consumer movement is different from other influences, such as the legislative and executive branches, in that it does not give mixed signals about legal language, but consistently supports plain English. Lawyers' reactions to this movement are definitely mixed, however.

You will recall that in our discussion of tradition as a force in maintaining complex legal language, I sadly observed that some lawyers use complicated language to maintain the mystique of their legal practice and justify a higher fee. And, as illustrated by the elderly

⁴⁴Res Gestae, *supra* note 8, at 332.

couple who wouldn't sign a plain English will, some clients mistakenly believe that documents, to be legal, must look legal (meaning that they have a liberal sprinkling of "witnesseth, wherefore, aforesaid, hereby, etc.").

Consumerism is dealing deadly blows to both the lawyers' mystique and their clients' mistake (aforesaid). Once the Supreme Court cleared the way for lawyers to advertise their services, they realized that they could most effectively market legal services by the same simple, direct approach that others use to sell cars, including clear advertisements for simple wills and uncontested divorces at set prices.

While this trend has its professional downside if lawyers in drugstores advertise "blue-light specials" on divorces, the general public now has greater access to legal services than ever before, a lot of the lawyers' mystique is gone, and clients are less likely to pay happily for something that they cannot understand. Moreover, many clients are threatening to seek other counsel if their lawyers charge unreasonable fees. Finally, don't forget that legal malpractice suits are filed daily, and state bar ethics and grievance committees meet continuously to adjudicate complaints against lawyers.

What does all this mean? Despite the healthy competition for legal services spurred by the consumer movement, and the growing awareness of clients that they should be able to understand what lawyers say, it is only natural for lawyers to be slow to abandon the habits reinforced by the weighty influence of their education, tradition, and governmental institutions. In fact, the legal profession is so conservative that it would be surprising if lawyers did embrace the plain English movement wholesale and without question.

So it's unreasonable to expect that lawyers as a profession will change their legal writing just because some of us believe it's a good idea supported by a lot of evidence. Individual lawyers may get religion and try to convert others. But without some institutional reordering, the movement to plain English will be slow, if inevitable.

Drawing on the Bible's Four Horsemen of the Apocalypse (Conquest, War, Famine, and Death), George Hathaway has dubbed lawyers' resistance to plain English the Four Horsemen of Legalese—"ignorance, apathy, stubbornness, and misrepresentation."⁴⁵ As we shall see, the Army is making some exciting inroads to all four of these.

⁴⁵Hathaway, *supra* note 2, at 1237.

V. SO WHAT IS THE ARMY DOING TO STAMP OUT LEGALESE?

Answer: A lot, but it can do more.

A. *GENERAL WRITING PROGRAM*

Before looking at what Army lawyers are doing to improve their legal writing, let's review briefly the general writing program that applies Army-wide.

The current program began in 1984 when General Thurman, as Vice Chief of Staff, directed the U. S. Military Academy to develop and teach an executive writing seminar that summer. The teaching team then proposed an expanded communications program to be taught to soldiers in Army schools. Army Regulation 600-70 established the program in 1985.⁴⁶ The Training and Doctrine Command is executive agent for the program and requires each Army school to have a writing office to teach clear writing.

The Secretary of the Army and Chief of Staff have personally supported efforts to improve communications. Secretary Marsh, in a letter to those attending communications courses, stressed the importance of making the best possible impression in letters responding to inquiries about Army issues.⁴⁷ And in the foreword to the pamphlet issuing plain English standards and guidelines, General Wickham, as Chief of Staff, emphasized the need to improve communicating skills and called for improving the quality of writing.⁴⁸ Without going into details, the program can be summarized as a plain English approach to writing.

B. *LEGAL WRITING PROGRAMS*

The Judge Advocate General's School, U. S. Army (TJAGSA), the Army's graduate law school located at Charlottesville, Virginia, was ahead of its time in developing a legal writing program. For years TJAGSA required all advanced course students (now called graduate course students and made up of officers approaching mid-career) to complete a thesis. By the mid-seventies, the students had an option

⁴⁶Major Joseph Chambers, Fact Sheet, The Army Writing Program (Jan. 1986) (prepared for the Army Writing Office, U.S. Army Training & Doctrine Command, Fort Monroe, Virginia).

⁴⁷Letter from the Honorable John O. Marsh, Jr., Secretary of the Army, to Attendees of Department of Army Communications Orientation Program (Aug. 31, 1984).

⁴⁸Dept of Army, Pamphlet No. 600-67, Effective Writing for Army Leaders (2 June 1986) (foreword by General John A. Wickham).

of writing a thesis or one or more lengthy papers. The school required some legal writing courses, including practical exercises, covering technical legal writing skills (such as footnotes and citations) and general writing skills (such as **organization**).⁴⁹

Because of “complaints from the field that judge advocates lacked adequate writing skills and because TJAGSA concluded that not all students could or should write a thesis,” an expanded communications program for graduate course students began in 1976 and now includes plain English writing classes, several short writing exercises, a lengthy research paper, and a formal **briefing**.⁵⁰ (More about this in a moment.)

In 1984, a communications program began for basic course students (entry-level lawyers). Until then, their instruction consisted of military-unique legal research and military correspondence, with limited and unrelated research **projects**.⁵¹

The graduate course program clearly surpasses that of the basic course and could be a model for law schools to emulate. The graduate course program emphasizes writing from the start; students devote the first two weeks of the academic year exclusively to the communications course. Major General Suter, The Assistant Judge Advocate General, kicks off the course with a lecture stressing the importance of communications skills to their success as Army lawyers. Hearing that kind of personal message from a respected, successful lawyer is worth a ton of regulations and directives.

The students then receive instruction in basic writing skills with a plain English orientation, along with practical exercises in writing and speaking. Throughout the remainder of the year, students have an opportunity to improve or sharpen their writing skills in a series of short and long writing projects from answering Congressional inquiries to drafting litigation reports. Fellow students and faculty members critique the writing so each student has a chance to learn supervisory editing. The culmination is a lengthy research paper which three faculty members critically evaluate. As an aside, classes and exercises on oral communications skills (speaking and briefing) provide balance to the writing **program**.⁵²

⁴⁹The Judge Advocate General's School, U.S. Army, Program History: Communications Program 6 (1986) (unpublished course materials).

⁵⁰*Id.* at 5.

⁵¹*Id.* at 8.

⁵²*Id.* Program Summary at 2-4.

Over the years this program has attracted top-notch speakers, such as Professor Smith, to lecture on basic grammar, writing style, and military **writing**.⁵³ Students receive books on how to write in plain English and how to cite legal references. General Suter uses that fact as a challenge and a promise: he tells the students that when he visits them in their offices around the world, he expects to see four books on their desks—a dictionary, thesaurus, style manual, and Professor Wydick’s book on plain English for lawyers. He says that when he visits former students a year or more later, he does check, and they all know to be prepared with their four **books**!⁵⁴ As we’ll see in a moment, General Suter is onto something with his “four book” requirement that the Army could develop into a quality assurance check.

VI. OVERCOMING THE OBSTACLES TO PLAIN ENGLISH IN ARMY LEGAL WRITING

In discussing the poor quality of legal writing, Professor Charrow observed that “words of admonition. . . are insufficient. The profession must be willing to match those words with deeds, but it has been unwilling to make this commitment. Instead, law schools, judges, and attorneys send mixed **messages**.”⁵⁵ (We just saw these mixed messages in the section on why lawyers persist in writing badly.)

The Army legal community must make its message clear and consistent that plain English is the standard for Army legal writing. Here are some suggestions.

A. TOP-DOWN PRESSURE

As mentioned earlier, General Suter’s personal presence and endorsement at the opening lecture of the communications course send a clear signal to graduate course students of the importance he places on communications. He sends a similar, consistent message when he actually walks into offices halfway around the world to see if the officers have their “four books” on their desks. The other top Army lawyers (the General Counsel and The Judge Advocate General) also agree that the plain English movement has merit for the Army; they

⁵³Professor Robert B. Smith is a retired Army Colonel who now heads the Legal Research, Writing, and Advocacy Program at the University of Oklahoma Law Center. He served more than seventeen years in various judge advocate assignments during his military career. For the past several years the Graduate Course at TJAGSA has started with his class on effective writing.

⁵⁴Interview with Major General William K. Suter, The Assistant Judge Advocate General, United States Army (Sep. 26 and Dec. 3, 1986).

⁵⁵Charrow, *supra* note 10, at 1096.

could initiate several steps to attempt to instill the use of plain English in Army legal writing.

The General Counsel and The Judge Advocate General could task all Army lawyers to use plain English in their legal writing whenever possible. Both could follow-up through their subordinates to ensure compliance with this request by their review of legal documents that routinely make their way to the Pentagon. By messages and letters in Army publications, they could point out examples of very good writing (with praise to the author) and very bad writing (without attribution)—both would show that the top Army lawyers are serious about improving our writing. Their public speeches to audiences of Army lawyers would provide still another opportunity to push the program.

The key is that in an ordered environment, such as the military, the chance for institutionalized change to occur is far greater than in more eclectic surroundings. With their influence over more than 2600 Army lawyers, our leaders should be able in years to make inroads that would otherwise require decades because they can set standards for plain English legal writing by judges, litigators, drafters, and advisors in wide-ranging areas of legal practice—from courts-martial to client services and from business transactions to administrative regulations. Although Army clients may balk initially at documents that don't "look legal," they should soon come to appreciate the new style of legal writing.

B. PLAIN ENGLISH ARMY LEGAL FORMS

Just as the use of legal forms containing traditional legalese has been a barrier to the plain English movement, new and improved legal forms could play a key role in making plain English the norm.⁵⁶ The Army could change some forms immediately with little risk or difficulty, while other forms will require greater study.

1. Consumer-oriented Forms.

The Army could quite easily rewrite many of the forms used in legal assistance offices to make it easier for clients to understand such routine documents as powers of attorney and bills of sale, two of the most common legal services provided. Documents for more complicated transactions such as separation agreements and wills would take more work to simplify but could also use plain English so long as the documents satisfy the requirements of applicable state laws.

⁵⁶Hathaway, *supra* note 2, at 1237.

2. *Notices.*

Notices are another category of forms that could use plain English to satisfy legal requirements and better insulate the Army against lawsuits. Privacy Act notices are often more complex than necessary. Plain English security clearance forms would put the signer on notice of potentially controversial conditions of access, such as polygraphs and urinalysis. Plain English medical consent forms would give clearer notice of the extent of risks and scope of consent. Finally, military enlistment and civilian personnel forms have legal consequences that plain English could help both sides to understand more clearly from the outset.

3. *Commercial Forms.*

Forms used in government commercial or business transactions are often the product of a variety of laws, regulations, and policies governing contracts, leases, and the like. While some of these provisions are required by law, plain English would help simplify their meaning for routine commercial transactions. This simplification process would be more time-consuming than for powers of attorney and bills of sale because more laws and policies are involved. Yet the payoff could eventually be more competition and cheaper prices because more businesses might be willing to bid if they didn't have to wade through the gobbledygook.

For those transactions that are too novel or too complicated for simple forms, plain English will still help clarify the intentions of the parties and ensure a legally enforceable agreement. In tailor-made agreements, you may want to cover every possible contingency but should do so in plain English.

C. FOLLOW-UP

There would be no substitute for follow-up on these initiatives. Just as General Suter looked for the “four books” on his visits to the field, senior lawyers could routinely test all the legal writing they review by the plain English standard and make on-the-spot corrections if possible. If problems recur, senior lawyers could remind their subordinates of the need to write clearly and succinctly and of the importance of that skill to a military or civilian lawyer's success, including a successful efficiency report or performance appraisal! After a lifetime of bad writing habits, lawyers will not—and probably cannot—go cold turkey without some pain. But, as the weightlifters say, no pain, no gain!

VII. CONCLUSION

As an optimist by nature, I hope that the plain English movement is a trend that will continue to grow; that law schools, judges, legislators, and lawyers will use plain English more and more in their writing; that clients will demand their documents in plain English; and that Army lawyers will adopt and press hard for a plain English writing standard.

I am also a realist. The legal profession worked hard at bad writing for several centuries and isn't about to turn its back on that historical (hysterical?) experience. Progress will be incremental in the legal profession generally, but progress can be dramatic and vital among Army lawyers if a steady push comes from the top and meets minimal resistance throughout the system.

This much is clear: **No** one is asking lawyers not to talk to each other in legal jargon nor to use terms of art. Lawyers should come together often to lawspeak among parties of the first and second parts about what they hearsay or witnesseth. (Aforesaid lawspeak is useful shorthand for complex ideas.) And we should preserve our traditional legal language for each other and the profession, for much of it has a rich history worth remembering.

But, to the average person, these words surely sound like incantations from some now-extinct loyal order of the past. And, out of courtesy to and respect for the general public, and to be sure they understand what we mean, we should try to speak to them and write for them in plain English. The laws, after all, belong to everyone. And we'd all really be better off if we wrote in plain English to each other, even when—or especially when—the language has legal importance.

For, ultimately, as I indicated at the outset, the worst you can say about legalese is that its complexity can hide gigantic flaws in facts or logic from the reader or—even worse—from the writer. Make no mistake about it, clearer legal writing will require clearer legal analysis. And clearer legal analysis will require better understanding of the law and facts and legal reasoning than ever before.⁵⁷ But the reward will be better legal services for our clients. Is this too high a price to pay?

Consider what Professor Dickerson said on this point: “. . . The price of clarity, of course, is that the clearer the documents the more obvious

⁵⁷Mellinkoff, *supra* note 11, at 100.

its substantive deficiencies. For the lazy or dull, this price may be too high.”⁵⁸ No Army lawyer, I daresay, would admit that the price is too high.

When all is said and done, lawyers have usually been able to explain things to their families, friends, and clients in plain English. Not even the worst lawspeaker would say, “I like that cake; aforesaid cake is so good I want some **more**.”⁵⁹ All the plain English movement is asking lawyers to do is to write—for other lawyers, other people, and ourselves—like we talk when we’re trying hard to make ourselves understood, as when we’re pleading for that last piece of cake!

⁵⁸F. Dickerson, *Clear Legal Drafting: What's Holding Us Back?*, 16 ALI-ABA CLE Review 3 (1980), reprinted in F. Dickerson, *supra* note 14, at 265.

⁵⁹Raymond, *Legal Writing: An Obstruction to Justice*, 30 Ala. L. Rev. 1, 4 (1978).

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