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CONTENTS

ARTICLES

The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value

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I. INTRODUCTION

"This [attorney-client] privilege—one of the oldest and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him."[1]

A squadron commander wants to know if a member of her unit visited the Area Defense Counsel (ADC) for advice. A doctor suspected of malpractice thinks the base claims officer is "his lawyer" and should keep his confidences. A legal assistance client comes to the base law center to consult about a divorce and makes criminal admissions to his attorney about abusing his wife. A Marine sees a defense counsel for advice on nonjudicial punishment offered under Article 15[2] of the Uniform Code of Military Justice (UCMJ) for being absent without leave[3] (AWOL)—during the consultation, he tells the attorney he is being sought in connection with an ATM card theft. He is later prosecuted by the *same* counsel for that theft. The Air Force Office of Special Investigations (AFOSI) seizes an Air Force officer's home computer—he demands it back, claiming it contains privileged documents prepared at the

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[1] United States v. Marrelli, 15 C.M.R. 276, 281 (C.M.A. 1954).
[2] 10 U.S.C. § 815 (2000).
[3] Made criminal by Article 86, UCMJ, 10 U.S.C. § 886 (2000).

request of his attorney. A wing commander wants to pursue a clearly illegal course of action and tells his staff judge advocate (SJA) he is "going around these stupid regulations to make the 'right thing' happen." A trial counsel wants to compel an ADC to testify about an AWOL client's whereabouts. An accused marks his incriminating financial files "attorney-client privilege" and hides them in his automobile. AFOSI finds and seizes the files anyway. And the list goes on. . . .

These examples are drawn from case law and the personal experiences of the authors. In each scenario, the attorney-client privilege, one of the legal profession's core values, comes squarely into play. This article grapples with these and other examples of the purpose, limits, and uses of the privilege. We examine these issues with an eye toward the practical application of the privilege to daily military legal practice generally and to Air Force practice in particular. As these examples illustrate, the attorney-client privilege touches every aspect of our profession. The axiom that a lawyer must keep client confidences inviolate is so fundamental to the effective practice of law that it enjoys nearly universal apprehension and acceptance among lawyers and laymen alike.

This article examines the historical development of the attorney-client privilege and then explores the privilege generally before tackling some specific areas where the privilege commonly arises in military practice. We explore important aspects of the privilege from three different perspectives: (1) a prosecution perspective—saving court-martial cases involving alleged compromise of attorney-client privileged material by trial counsel and/or investigators, (2) a defense perspective—using the privilege to protect information about the whereabouts of a client and the contents of a defense counsel's appointment schedule, and, (3) a general military practice perspective—the potential conflicts of interest which may arise when the privilege is factored into a diverse military practice involving advice to command, claims litigation, military legal assistance, and the plethora of other issues handled by installation-level judge advocates daily.

II. THE ATTORNEY-CLIENT PRIVILEGE GENERALLY

A. Common Law Development

"The first duty of an attorney is to keep the secrets of his clients."[4]

A review of the common law roots and scope of the attorney-client privilege will be helpful before proceeding further. The exact origins of the attorney-client privilege are somewhat foggy. It may have origins reaching

[4] Taylor v. Blacklow, 132 Eng. Rep. 401, 406 (C.P. 1836).

back to the Roman Empire.[5] Fragments of the privilege date back to sixteenth century Elizabethan England, when evidentiary privileges arose as the testimony of witnesses became the principal basis of jury verdicts and compulsory process was introduced.[6] The noted scholar Dean John Wigmore wrote: "The history of this privilege goes back to the reign of Elizabeth I, where the privilege appears as unquestioned. It is therefore the oldest of the privileges for confidential communications."[7] The English privilege did not arise to protect the interests of the client, but from a desire to uphold "*the oath and the honor* of the attorney" to abide by his implied "solemn pledge of secrecy."[8] Cases upholding the attorney-client privilege appear as early as 1577.[9]

Two seventeenth century English decisions allowed a "counselor at law" to refuse to testify against "their cause."[10] In each case, the "cause" involved an attorney's testimony against a client. In 1743, an English court in *Annelsey v. Anglesea*,[11] narrowed the privilege to exclude protection in instances where an attorney engages in criminal activity,[12] where information was not gained as a result of the particular pending action,[13] or where information was not essential to the matter for which the attorney was consulted.[14] By the latter part of the 1700s, ownership of the privilege had shifted to the client, and the law recognized that "[i]n order to promote

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[5] *See* Geoffrey C. Hazard Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (Professor Hazard dates the privilege to the Roman Civil Code, but does not cite any authority). *See also* Comment, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 BUFF. L. REV. 211, 213-14 (1975).

[6] 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. 1961) (hereinafter WIGMORE). *See also*, Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury, 1562, 5 Eliz. 1, ch. 9, § 12 (cited in *Development in the Law—Privileged Communication: Part I. Introduction: The Development of Evidentiary Privileges in American Law*, (Part 1 of 8), 98 HARV. L. REV. 1450 (May 1985)) (noting the penalty and possible civil actions imposed on those who refused to attend after service of process and tender of expenses). Although only available to the Crown at first, compulsory process was later extended to civil parties and criminal defendants. *See, e.g.*, Act for Regulating of Trials in Cases of Treason and Misprision of Treason, 1695, 7 Will. 3, ch. 3, § 7 (extending right to have compulsory process to defendants accused of treason) (*cited*, *supra* in 98 HARV. L. REV. 1455).

[7] *Id*., WIGMORE at 542.

[8] *Id.* at 543 (emphasis in original).

[9] *See* Berd v. Lovelace, 21 Eng. Rep. 33 (1577); Dennis v. Codrington, 21 Eng. Rep. 53 (1580).

[10] Hazard, *supra* note 5, *citing* Walfron v. Ward, Style 449 (K.B. 1654) ("[A] 'counselor at law' is not bound to 'make answer for things which may disclose the secrets of his Client's cause") and *see Bulstrod v. Letchmere*, FREEMEN 5 22 ENG. REP. 1019 (Ch. 1676). ("[C]ounselor at law shall not be bound to answer concerning any writings which he hath seen, nor for any thing which he knoweth in the cause as counsellor.").

[11] 17 HOW. ST. TRIALS 1139 (1743) (Also styled as Craig v. Anglesea).

[12] *Id.* at 1229.

[13] *Id.* at 1230.

[14] *Id.*

freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."[15]

In the early 1800's the scope of the English privilege became ever more expansive. In one case, an attorney was prohibited from testifying to facts learned of his own observation in a criminal trial, including instances where he observed a criminal fraud.[16] In another instance, an attorney was precluded from being examined about a message he delivered to the opposite party in a transaction.[17] The Court of Chancery went so far as to hold that an attorney could not be questioned as to whether he had received a discovery notice served by an opposing party.[18]

By the early 1800's, English courts had developed a nascent common law of evidentiary privileges and American judges tentatively looked to this emerging law to help them decide privilege questions. The first American treatise on the subject—Judge Zephaniah Swift's *Digest of the Law of Evidence*—was published in 1810.[19] The author reiterated the attorney-client and spousal privileges, but dismissed, as unsupported by the law, physicians' and clergymen's claims to similar privileges. Neither the United States Congress nor state legislatures added anything of substance to the evidentiary privileges from the 1790's to the early 1800's.[20]

American cases dealing with the attorney-client privilege did not appear until the 1820's, but several post-Revolutionary War courts found the privilege rooted in both the law of evidence (protecting disclosures)[21] and the law of agency (where a fiduciary relationship between a lawyer and client exists).[22] Early American criminal courts and legal scholars viewed the privilege as an outgrowth of the Fifth Amendment privilege against self-incrimination.[23] Later, the Sixth Amendment right to effective assistance of counsel began to appear as an additional rationale. These rights-based rationales are known as the "non-utilitarian" justifications.[24] Some post-World War II decisions gave greater weight to this school of thought and continued to

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[15] WIGMORE, *supra* note 6, § 2291.
[16] *Robson v. Kemp*, 170 Eng. Rep. 499 (K.B. 1798).
[17] *Gainsford v. Grammar*, 107 Eng. Rep. 516 (K.B. 1803).
[18] *Spencley v. Schullenburgh*, 103 Eng. Rep. 138 (1806).
[19] Z. SWIFT, A DIGEST OF THE LAW OF EVIDENCE (Hartford 1810 & photo. reprint 1972) (cited in *Development of Evidentiary Privileges*, 98 HARV. L. REV. 1450, *supra* note 6, at 1457). (Judge Swift sat on the Supreme Court of Errors of Connecticut).
[20] *See generally*, *Development of Evidentiary Privileges*, *supra* note 6, at 1457.
[21] Hazard, *supra* note 5, at 1070.
[22] *See* RESTATEMENT (SECOND) OF AGENCY §§ 395-396 (1958). An agent is prohibited from disclosing information revealed in confidence by the principal or acquired by the agent in the course of the agency relating to matters in which the agent has been employed.
[23] *See, e.g.*, Rochester City Bank v. Suydam Sage & Co., 5 How. Pr. 254, 258-59 (N.Y. Sup. Ct. 1851) and 9 William S. Holdsworth, A HISTORY OF ENGLISH LAW 201-03 (1926).
[24] *See* Deborah S. Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*¸ 60 BROOK. L. REV. 1355, 1362-1363 (1995).

see the privilege as an extension of the right against self-incrimination.[25] However, many courts and scholars also believed the privilege should be extended beyond the bounds of Fifth Amendment in order to facilitate frank communications between attorney and client on all matters, criminal and civil.[26] This "utilitarian" view is the prevailing majority view today.[27]

Many of the common law rules of attorney-client privilege familiar to us today were recognized by the Supreme Court during the nineteenth century. For example, in a case decided in 1888, *Hunt v. Blackburn*,[28] the Court recognized the principle that an attack on the competence of the attorney waives the privilege to the extent necessary to allow the attorney to defend on the charge.[29] Nine years later in *Golver v. Patten*, the Court held that, "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will . . . are not privileged."[30]

American courts also initially entrusted the privilege to the attorney and not the client,[31] following in the English tradition.[32] It was not until the mid-1800's that American courts fashioned the prevailing rule that the client is the holder of the privilege and the attorney is obligated to claim it on his behalf, unless it is waived.[33] For nearly a century, between the mid-1800's and the end of the Roosevelt era, little changed in the extent to which the courts recognized the privilege. Following World War II, there was a largely unsuccessful codification movement, as we shall examine below, which ultimately provided the source of our modern military rule as well as insight into the Supreme Court's view of how the privileges should be applied.[34]

The Supreme Court of the United States has long recognized that the scope of the privilege is "governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience."[35] The Court used similar language in 1981 in *Upjohn Co. v. United States*,[36] and

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[25] *See e.g.*, Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951) and James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 316-338 (1963).
[26] *See* Bartel, *supra* note 24, at 1362-1363 and *see* Hatton v. Robinson, 31 Mass. (14 Pick) 416, 422 (1833).
[27] *See* Bartel, *supra* note 24, at 1364.
[28] 128 U.S. 464 (1888).
[29] *Id.* at 470.
[30] 165 U.S. 394, 406 (1897) (The Court noted that the privilege would survive the testator in a claim by a third party, but not between devisees, where none could rightfully claim a privilege to the exclusion of the others).
[31] *See* Bartel, *supra* note 24, at 1362.
[32] In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996). *See also*, Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928).
[33] *See, e.g.*, King v. Barrett, 11 Ohio St. 261, 263 (1860).
[34] *See infra*, Part II.A.2.
[35] *See* Wolfle v. United States, 291 U.S. 7 (1934) (*citing* Funk v. United States, 290 U.S. 371 (1933)).
[36] 449 U.S. 383, 389 (1981).

again, less than two years ago, in *Swidler and Berlin v. United States*.[37] As we see below, this language is echoed, nearly verbatim, in Federal Rule of Evidence (FRE) 501, which states the general rule of privilege in modern federal practice.[38] Thus, the privileges applied in the federal courts today still derive from common law rules.

1. The Modern Common Law Rule

Stated in contemporary terms, the modern privilege is designed to encourage full and open communication between client and attorney to allow the client to make disclosures without fear that the attorney will be forced to reveal the information confided to her.[39] Dean Wigmore explained the common law elements of the attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[40]

Many jurists have remarked that the attorney-client privilege must be confined to its narrowest limits, however. They argue—as in the case of other exclusionary rules which operate to deprive the trier of fact of material evidence—that the exclusion of relevant evidence must not exceed in scope the policy it is designed to serve.[41] As the Court of Military Appeals stated in an early opinion dealing with the rule:

> Indeed, the concept that the privilege should be applied strictly in terms of its underlying policy, serves to explain the rule that an attorney may be compelled to testify concerning a client confidence received in connection with a *projected* crime. The social interest favoring full disclosure by clients to attorneys is inoperative to shield with secrecy confidences made

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[37] 524 U.S. 399 (1998) (holding that the attorney-client privilege succeeded the death of White House Counsel Vince Foster, when the Office of Independent Counsel sought discovery of statements made by him to his attorney while investigating the "Travelgate" scandal of the Clinton Presidency).

[38] FED. RULES EVID. 501, 28 U.S.C. (2000) and *see* 2 SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 391-396 (7th ed. 1998).

[39] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[40] WIGMORE, *supra* note 6, § 2292 (emphasis in original). *See also* Prichard v. United States, 181 F.2d 326 (6th Cir. 1950), *aff'd*, 339 U.S. 974 (1950) (In *Prichard*, the Court was forced to utilize 28 U.S.C. 2109's provisions (four Justices recused themselves)—the Court lacked a quorum and believed itself unable to hear the case by the next term, so the case was affirmed as if by an equally divided Court); and Palatini v. Sarian, 83 A.2d 24 (N.J. Super. Ct. App. Div. 1951). The privilege has also been held to exist irrespective of whether litigation has commenced or is contemplated. *See, e.g.*, Phillips v. Delaware, 194 A.2d 690 (Del. Super. 1963).

[41] *Marrelli, supra*, note 1, at 281.

> for the purpose of seeking legal advice as to how best to commit a contemplated offense. Similarly the privilege has no application to a communication made before persons whose presence was in no wise essential to a proper performance of the attorney's function.[42]

2. Statutory Developments

Before the Federal Rules of Evidence were enacted in 1975, the question of what evidentiary law the federal courts were to apply in deciding privilege issues was far from settled. Federal courts decided privilege questions sporadically and inconsistently in both the criminal and civil arenas. In 1851, the Supreme Court held that, in criminal cases, federal courts were to apply the common law rules of evidence in effect at the time the federal courts in a given state were created.[43] In *Wolfle v. United States* and *Funk v. United States*, the Court overruled this standard and held that federal courts were henceforth free to apply "common law principles as interpreted . . . in light of reason and experience."[44]

By 1948, the Supreme Court admitted that its "infrequent sallies" into the field of evidence were incapable of transforming the "grotesques structure" of existing evidence law into a "rational edifice."[45] The confusion surrounding evidentiary law in the federal courts eventually prompted a movement to enact uniform federal rules of evidence. At the urging of the American Bar Association (ABA), the Supreme Court's advisory committee worked for six years to codify the common law privileges. On 20 November 1972, the Court, acting pursuant to the Rules Enabling Acts,[46] promulgated the Federal Rules of Evidence. Chief Justice Warren E. Burger transmitted them to Congress on 5 February 1973 recommending they be allowed to automatically become law after the mandatory ninety-day waiting period specified in the Rules Enabling Acts.[47]

FREs 501-513 sought to codify the federal law of privilege and to that end, the proposed rules recognized nine discrete privileges, including communications between attorney and client, under proposed Rule 503. The proposed privilege rules were the single most controversial part of the proposed FREs and were virulently attacked by members of Congress and many other critics. Opponents claimed, among other things, that the privilege

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[42] *Id*. at 281-82 (citations omitted).
[43] *See* United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851). (For states admitted to he Union after 1789, the relevant law was that in effect at the time of admission. *See* Logan v. United States, 144 U.S. 263, 302-303 (1892)).
[44] *See Wolfle*, s*upra* note 35.
[45] Michelson v. United States, 335 U.S. 469, 486 (1948).
[46] The provisions of the Rules Enabling Acts then in force are codified with only minor amendment at 18 U.S.C. §§ 3402, 3771, 3772 (1982) and 28 U.S.C. §§ 2072, 2075 (1982).
[47] *See Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary on the Federal Rules of Evidence*, H.R. 5463, 93rd Cong., 2d Sess. 3, 5 (1974).

rules were incomplete, inconsistent, and incoherent. Of particular note, many critics commented that the advisory committee, which consisted entirely of attorneys, had enacted a comprehensive attorney-client privilege rule while limiting or removing privileges for other professions. Fearing a long battle over the enumerated privilege rules, Congress ultimately deleted them and substituted a single, general rule of privilege—Rule 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[48]

The drafters of Rule 501 intended that state privilege law would apply in diversity cases and that federal question cases would use three general sources of privilege law: the Constitution, acts of Congress, and federal common law developed "in the light of reason and experience."[49] In practice, federal courts in federal question cases often look to state law for guidance in the area of privilege and commentators have argued that in the absence of strong federal policies to the contrary, federal courts should adopt state privilege law where it favors admissibility. Rule 501, however, does not mandate such a practice and thus leaves privilege law open to continuing common law development by the federal courts.[50]

Thus, the United States does not have a single "law of privileged communications" but rather two distinct and often divergent bodies of law: (1) In state courts and in federal cases applying state law, the law of evidentiary privilege is a diverse collection of rules, developed mostly by statute, sometimes by common law, and, (2) In federal cases in which state law is not binding, federal courts have begun to develop a federal common law of evidentiary privileges "in the light of reason and experience."[51] This discussion of the common law is particularly important, because the federal law of privilege, including its frequent resort to state law, is applicable and useful in military practice. Particularly in areas where our military rules and case law are not yet well developed. Thus, as noted below, while the military has a number of explicit rules regarding privileges, Military Rule of Evidence 501(a)(4) also recognizes privileges provided for in:

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[48] FED. RULES EVID. Rule 501, 28 U.S.C. (2000).
[49] *Id.*
[50] *See Development of Evidentiary Privileges*, *supra* note 6, at 1463-1471.
[51] *Id.*

> The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

As noted below, military courts have often turned to these common law authorities to support their holdings on privilege issues.

B. Modern Military Law

The modern military attorney-client privilege takes two related but distinctly different forms: (1) An *evidentiary* privilege defined by Military Rule of Evidence 502 and military case law, which prevents an opponent from discovering and using privileged communications in preparing for litigation or compelling their disclosure at trial, and (2) an *ethical* duty, allowing a claim of privilege which is generally broader in scope than its evidentiary cousin, and is defined by various state and military rules of professional conduct. These latter sources vary slightly among the several states and the military services, and are primarily based on the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice.[52]

1. The Evidentiary Privilege

In pertinent part, Military Rule of Evidence 502 states:

> ***(a) General rule of privilege.*** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer and the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.
> ***(b) Definitions.*** As used in the rule:
> (1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from the lawyer. . .
> (2) A "lawyer" is a person authorized . . . to practice law. . .
> (3) A "representative" . . . is a person . . . assigned to assist a lawyer. . .
> (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the

[52] 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 5-42.00, at 188 and § 5-52.00 at 190-94 (2nd ed. 1999) (hereinafter GILLIGAN & LEDERER).

> rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.[53]

Under section (c) of the Rule, the privilege may be claimed by the client, guardian or conservator of the client, personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer may also claim the privilege on behalf of the client.[54]

Rule 502(d) enumerates several well-known common law exceptions to the privilege. For example, communications clearly contemplating the future commission of a crime or fraud are not protected. Rule 502(d)(3) notes that "communications relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer" may be revealed to the extent necessary to pursue or defend such claims. Other, more rarely used, exceptions are also included.[55]

As noted, Military Rule of Evidence 502 was adapted from proposed FRE 503. The Military Rules of Evidence were promulgated by Executive Order as Part III of the MCM in 1980.[56] However, the attorney-client privilege was already well established in military law before the Military Rules of Evidence or even the UCMJ[57] were adopted.[58] Prior to 1980, the privilege was explicitly recognized by the MCM and thoroughly grounded in military case law, which generally recognized the privilege to at least the same extent established by the federal common law. The United States Court of Appeals for the Armed Forces recently recognized this in *United States v. Romano*, as the court reaffirmed that communications made in confidence to an attorney for the purposes of obtaining legal advice are privileged, unless the privilege is waived by the client.[59]

The Military Rules of Evidence also contain separate rules codifying the doctrine of waiver by voluntary disclosure,[60] suppression of privileged matter which the holder is erroneously compelled to disclose or which is disclosed without opportunity to claim the privilege,[61] and forbidding

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[53] MANUAL FOR COURTS-MARTIAL (2000 ed.), Pt. III, Sec. V, Rule 502 (hereinafter MCM).
[54] *Id.* at MIL. R. EVID. 502(c).
[55] *Id.* at MIL. R. EVID. 502(d)
[56] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, Chap. XXVII, *Military Rules of Evidence* (1969 ed.), Change 3 (1 September 1980).
[57] 10 U.S.C. § 801, *et. seq.* (2000).
[58] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1921, Chap. XI, ¶ 227 at 191 (1921 ed.) and MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 151 at 285 (1951 ed.) (The UCMJ became effective on 31 May 1951).
[59] United States v. Romano, 46 M.J. 269 (1997), *citing* WIGMORE, *supra* note 6, § 2293.
[60] MIL. R. EVID. 510.
[61] MIL. R. EVID. 511.

comment by either side upon a claim of privilege by an accused or any other person at trial.[62]

As noted above, the FREs do not contain a codified rule of attorney-client privilege, relying instead on the general rule of privilege stated in FRE 501 and federal case law. In 1980, the Supreme Court held, in *Trammel v. United States,*[63] that the Federal Rules of Evidence "acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials."[64] The Court once again reiterated that "these privileges are governed by the principles of common law as they may be interpreted . . . in the light of reason and experience."[65] Although *Trammel* chiefly involved an examination of the spousal privilege, the Court defined the purpose of the attorney-client privilege as, "rest[ing] on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."[66]

Military case law continues to make relevant contributions to the development and interpretation of the privileges as well. In *United States v. Ankeny*[67] the Court of Military Appeals reemphasized that "it is black letter law that a military accused has a privilege to prevent unauthorized disclosure of his confidential communications to his attorney."[68] In *Ankeny*, civilian defense counsel for Navy Lieutenant Ankeny inadvertently revealed information (to an Assistant Staff Judge Advocate to the General Court-Martial Convening Authority) about a previously unknown offense. The accused was charged with and convicted of the newly discovered offense. The Navy-Marine Corps Court of Military Review reversed Lieutenant Ankeny's conviction[69] and the Court of Military Appeals affirmed that decision based a violation of the attorney-client privilege by civilian defense counsel.[70]

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[62] MIL. R. EVID. 512.
[63] 445 U.S. 40 (1980).
[64] *Id.* at 45.
[65] *Id.* (The Court further noted that Congress manifested an affirmative intention not to freeze the law of privilege; rather, its purpose was to "provide the Courts with the flexibility to develop rules of privilege on a case-by-case basis." *Id.* at 47, *citing* 120 Cong. Rec. 40891 (1974) (Remarks of Representative Hungate)).
[66] *Id.*
[67] 30 M.J. 10 (C.M.A. 1990).
[68] *Id.* at 15-16.
[69] 28 M.J. 780 (N.M.C.M.R. 1989).
[70] *Ankeny*, 30 M.J. at 17 (noting that the court "seriously doubt[ed] that Congress and the President intended the military justice system to simply stand by when a military accused's ship is accidentally scuttled by its captain in the lull before battle." (internal quotes and footnote omitted)). *Id.*

2. The Ethical Privilege

Neither federal nor state courts are generally bound by state rules of professional responsibility or by the ABA Model Rules, Codes, or Standards. However, these rules provide important guidance for courts in determining whether a case is, or may become, tainted by ethics violations.[71] Ethics rules are also professionally binding on attorneys when adopted by state licensing authorities or military departments. In Air Force practice, the Air Force Rules of Professional Conduct (Air Force Rules) and Air Force Standards for Criminal Justice[72] (Air Force Standards) *are* binding on *all* Air Force attorneys and paralegals—military, civilian, and foreign-national.[73] The Air Force Rules make clear that, when there is a conflict between state licensing rules and the Air Force Rules, the Air Force Rules will govern.[74] The theory being that, since our practice is purely federal, our rules control under the Supremacy Clause of Constitution.[75] The Air Force Rules and Standards are not punitive, but violations may by addressed administratively, or through action to withdraw certification under Article 27(b), UCMJ, or to withdraw designation as a judge advocate.[76]

The Air Force Judge Advocate General's (TJAG) authority to prescribe the Air Force Rules and Standards comes from a number of sources, including: (1) his statutory duty to supervise the administration of military justice under Article 6(a), UCMJ;[77] (2) authority granted by the President in Rule for Courts-Martial (RCM) 109;[78] and, (3) his general statutory authority to

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[71] *See, e.g.*, United States v. Castellano, 610 F.Supp. 1137 (S.D.N.Y. 1985) and United States v. Kerlegon, 690 F.Supp. 541 (W.D. La. 1988).

[72] TJAG Policy Number 26, *Air Force Rules of Professional Conduct* & *Air Force Standards for Criminal Justice*, Attachments 1 and 2, respectively (1998) (*Air Force Standards* amended Nov. 1999) (hereinafter *Air Force Rules* and *Air Force Standards*).

[73] *Id.* at *Air Force Rule* 8.5. *See also* AFI 51-201, *Administration of Military Justice*, ¶ 1.3 (3 October 1997) (making the *Air Force Rules* and *Standards* applicable to all Air Force attorneys).

[74] *Id.*

[75] *See* 1 GILLIGAN & LEDERER, *supra* note 52, at § 5-52.00.

[76] *See Air Force Rules*, Preamble at 1.

[77] 10 U.S.C. § 806(a) (2000).

[78] R.C.M. 109, MCM (2000 ed.), reads, in pertinent part:

> Rule 109. Professional supervision of military judges and counsel
> (a) *In general.* Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the

"perform such other legal duties as may be directed by the Secretary of the Air Force."[79] Additionally, the Air Force Court of Military Review has concluded that military judges have "the inherent power to resolve issues of ethical obligations of counsel."[80]

The Air Force Rules and Standards codify many of an Air Force attorney's ethical duties to his client. With regard to the attorney-client privilege, the Air Force Rule states, in pertinent part:

> **Rule 1.6. Confidentiality of Information**
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraph (b).

> Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.
> (b) *Action after suspension or disbarment.* When a Judge Advocate General suspends a person from practice or the Court of Appeals for the Armed Forces disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

[79] 10 U.S.C. § 8037(c)(2) (2000). The duties relative to the professional conduct of Air Force attorneys are found in a number of regulatory sources, including, but not limited to: (1) AFI 51-102, *The Judge Advocate General's Department* (19 July 1994) (Paragraph 2.4 gives TJAG the power to designate qualified judge advocates under 10 U.S.C. § 8067(g); to certify military judges and trial and defense counsel under 10 U.S.C. §§ 826-827; and to enforce "ethical standards in Air Force military legal practice, including receiving, investigating and disposing of allegations involving breaches of ethical or professional standards applicable to Air Force attorneys"), and, (2) AFI 51-103, *Designation and Certification of Judge Advocates* (1 March 1996) (spelling out the procedures and standards for designating and certifying judge advocates, including members of the Air Reserve Component (both guard and reserve), and clarifying that TJAG may withdraw designation or certification for a number of reasons, including failure to maintain professional and ethical standards.).

[80] *See, e.g.*, United States v. Rhea, 29 M.J. 991, 995-996 (A.F.C.M.R. 1990), *set aside and remanded on other grounds*, 33 M..J. 413 (C.M.A. 1991) (remanding for further inquiry on "constructive force"), *aff'd on remand*, ACM 27563(*f.rev*.) 1992 CMR LEXIS 470 (A.F.C.M.R. 1992), *aff'd mem.* 37 M.J. 213 (C.M.A. 1993) and United States v. Herod, 21 M.J. 762, 763 n.1 (A.F.C.M.R. 1986). *See also Air Force Standard* 6-3.5. *Deterring and Correcting Misconduct of Attorneys*, which states, in part, that "[t]he military judge should require attorneys to respect their obligations as officers of the court . . . [and] if necessary, discipline the attorney by . . . censure or reprimand . . . contempt [proceedings], removal from the courtroom, [r]ecommending suspension from [military practice], and informing appropriate disciplinary bodies."

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.[81]

The Air Force Standards provide further guidance for military justice practitioners:

> **Standard 4-3.7. Advice and Service on Anticipated Unlawful Conduct**
> d. A defense counsel shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (e).
> e. A defense counsel may reveal such information to the extent the lawyer reasonably believes necessary:
> (i) To prevent the client from committing a criminal act that the defense counsel believes is likely to result in imminent death or substantial bodily harm, child sexual and/or physical abuse, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft or weapons system; or
> (ii) To establish a claim or defense on behalf of the defense counsel in a controversy between counsel and client, to establish a defense to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a defense counsel's representation of the client.
> (iii) To prevent the client from attempting suicide or causing serious bodily harm to herself or himself; or
> (iv) To assist Air Force authorities in locating the client when those authorities believe the client may attempt suicide or cause serious bodily harm to herself or himself.

These *ethical* rules create much broader duties for Air Force attorneys to protect client confidences, as well as *any* information relating to representation of a client. This point is critical to resolving many of the issues discussed in this article, but particularly those discussed in Part IV, below, regarding the sanctity of a military defense counsel's schedule and revealing information about the whereabouts of a client.

[81] *Air Force Rules*, ¶ 1.6, *supra* note 72.

III. HANDLING ALLEGED AND ACTUAL CASES OF ATTORNEY-CLIENT PRIVILEGE COMPROMISE

"Lawyers enjoy a little mystery, you know. Why, if everybody came forward and told the truth, the whole truth, and nothing but the truth straight out, we should all retire to the workhouse."[82]

Cases involving alleged prosecution interference with the attorney-client relationship by inadvertent compromise of attorney-client privileged information are increasingly common. In a world where laptop and even hand-held computers may contain vast stores of records, a routine search and seizure can readily lead to such a claim. Other, low-tech methods of compromise still persist as well. In this section we outline three scenarios, adapted from actual Air Force cases, in which the compromise issue reared its head. Next we analyze the extant rules and case law for possible solutions to these cases. Finally, we offer practical guidance on handling such cases when they arise.

A. How it Happens—Three Scenarios

(1) At the request of his attorney, an accused prepares a chronology of events leading up to his apprehension on fraud charges. The chronology contains potentially incriminating admissions, and an electronic copy resides on his home computer, which he also uses to run the business at the heart of the charges against him. The computer also contains several pieces of attorney-client privileged correspondence. The computer is seized by AFOSI investigators as evidence in the fraud case against the accused. Corporate counsel for the accused's company demands that all privileged material be returned. When a special master is appointed to review the documents, he finds several documents appearing to qualify as attorney-client privileged correspondence on the computer's hard drive and seals them with instructions that trial counsel should not examine them. The chronology is not among those papers and the accused never specifically requests its return. Paper copies of the chronology are printed from the computer's hard drive by AFOSI computer investigators, but the documents are misplaced and never used to advance the investigation.

Later, on the eve of trial, the chronology is delivered directly to defense counsel by an AFOSI agent. Defense counsel shows the documents to trial counsel (who has not seen them before), claims the entire case is tainted by a violation of the attorney-client privilege, and moves to dismiss all charges, or

[82] DOROTHY L. SAYERS, Sir Impey Biggs, in *Clouds of Witness*, ch. 3 (1926), THE COLUMBIA DICTIONARY OF QUOTATIONS, (Microsoft Bookshelf, 1996-97 Edition 1995).

in the alternative, to suppress all evidence gathered after the date the computer was seized, and to disqualify the prosecution team.[83]

(2) An accused is tried and acquitted of assault, but convicted of other minor charges at a general court-martial (GCM). He remains on active duty. Later, the victim reports to police that the accused forced her to write perjured statements and give perjured testimony at his trial. Investigators of the Naval Criminal Investigative Service (NCIS) search the accused's apartment, and seize all of his personal papers, looking for drafts of the perjured statements written in the accused's hand. Among the papers seized are notes made by the accused before, during, and after his trial; drafts of his clemency matters; and other correspondence to and from his defense counsel in that case. This potentially privileged evidence remains in the hands of investigators for nearly a year. They use some of the documents as handwriting exemplars, but do not otherwise use them to advance their case, and do not provide them to trial counsel. The accused never asks the government to return the allegedly privileged matters.

In preparation for the accused's second GCM (for subornation of perjury), circuit trial counsel visits NCIS offices and inspects their files. She finds some items seized from the accused that appear to be draft clemency matters from his first trial. She reports this immediately to defense counsel, who further examines the evidence in the possession of NCIS and discovers other potentially privileged documents (mixed with other documents and evidence), which have been languishing in the NCIS evidence locker for over a year. Defense counsel recognizes some of it as incriminating and some of it as potentially privileged. Trial counsel does not examine these materials. At trial, the defense moves to dismiss all charges, or in the alternative, to suppress all evidence seized from the accused and disqualify the prosecution team.[84]

(3) The subject of a fraud investigation gets wind that his office is about to be searched. He calls his attorney, who tells him (he later claims) to mark all the files involved in the investigation (files which he created in the course of his government duties) as "attorney-client privilege, [ADC's name]," and to remove them from his office. Investigators, armed with a search authorization, find the files in the trunk of the subject's car and seize them. A special master is appointed to examine the materials and finds that none of them appears to be privileged.[85]

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[83] Based on United States v. Captain Michael P. Sprague, ACM 32791, *aff'd mem.* (A.F.C.C.A. 1998), *pet. denied*, 50 M.J. 202 (1998).

[84] Based on United States v. Senior Airman Robert W. Pinson III, ACM 32963 (currently pending decision before A.F.C.C.A.).

[85] Based on United States v. Master Sergeant Michael W. Hawkins, ACM 33087 (A.F.C.C.A 6 November 2000).

B. The Developing Law

As yet, there are no published military precedents precisely on point with scenarios (1) and (2) above. Nevertheless, the military judge in each case was able to fashion sufficient remedies using Military Rules of Evidence 501-502 along with relevant federal and military case law.

1. Establishing the Privileged Nature of the Compromised Material

As mentioned above, Military Rule of Evidence 502 creates an *evidentiary* privilege, which protects confidential attorney-client communications from compelled production and prevents their use in courts-martial or other proceedings.[86] If the privileged communication is improperly disclosed[87] it continues to retain its privileged character. In military cases involving the alleged compromise of attorney-client privileged communications, the accused must show, as a predicate matter, that the communication in question falls within the protections of Military Rule of Evidence 502. In cases involving documents created by the accused, she must also show that they were prepared at the request of her attorney, and were actually, or intended to be, communicated to the attorney.[88]

If the communication in question does not meet these qualifications, it receives no special protection, and is treated like any other admission of a party-opponent. Additionally, evidence not otherwise privileged does not become privileged merely by marking it as such, or even by transferring it to the possession of an attorney.[89] Suspects may not shield themselves from the fruits of valid, authorized searches by the naked claim that the items to be seized are privileged. Thus, we may easily dispose of scenario (3), above. The

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[86] *See* 1 GILLIGAN & LEDERER, *supra* note 52, § 5-42.00.

[87] For example, without the client's actual or implied consent or under circumstances other than those covered by the exceptions enumerated in MIL. R. EVID. 502(d).

[88] *See* Weil v. Investment/Indicators, 647 F.2d 18 (9th Cir. 1981).

[89] *See* United States v. Rhea, *supra* note 80. In *Rhea*, defense counsel were in possession of an incriminating calendar, prepared by the alleged victim, detailing sexual exploits with the accused. The calendar was among the items that the accused had taken from his step-daughter's room after she moved out, which he subsequently gave to his defense counsel. No part of the calendar had been prepared by the accused or defense counsel for trial—the calendar was simply evidence of the accused's crimes. After consulting with their respective state bar ethics committees, and holding an ex parte meeting with the military judge, defense counsel gave the calendar to the prosecution. The incriminating calendar was held not to be attorney work-product, and was thus not covered by the attorney-client privilege. This comported with the general rule that the instrumentalities of a crime are subject to disclosure to the prosecution. Stolen items and weapons are most often the subject of such cases and nearly always fall outside of the protections of the privilege. *See also* 1 GILLIGAN AND LEDERER, *supra* note 52, § 5-53.00.

files in question were simply not attorney-client privileged materials. In fact, they did not even belong to the accused, as they were government property.[90]

2. Finding a Workable Standard

Military Rule of Evidence 501, the general rule of military privilege, defines a claim of privilege to include: refusal to be a witness or disclose any matter; refusal to produce any object or writing; and, the right to prevent another from being a witness or disclosing any matter or producing any object or writing which is privileged. Thus, if an adverse party improperly comes into possession of privileged information, the party holding the privilege may prevent its introduction into evidence at trial. The key, as with all inadmissible evidence, is that court-martial members must be shielded from knowledge of the evidence, and military judges must disregard it in judge-alone trials. In other words, much like other suppressed or inadmissible evidence, neither it, nor its "fruits" can be used against the accused.[91]

Defense counsel in attorney-client privilege compromise cases may be tempted to urge the military judge to analogize the case to an immunity situation under *Kastigar v. United States*.[92] Under *Kastigar* and the provisions of RCM 704(a)(2), a prosecutor who is aware of the substance of testimony or other information given by an accused under a grant of testimonial immunity, is barred from prosecuting the accused, and another prosecutor must prepare and try the case without any knowledge of, or access to, the evidence gathered under the grant of immunity.[93] This is difficult, at best.

If the judge were to apply a *Kastigar*-type standard in attorney-client privilege compromise cases, the government would presumably have the burden to show, by clear and convincing evidence, that its case was not tainted by use of the compromised attorney-client privileged material by its use in the investigation, preparation, or trial of the case, and that the evidence to be used at trial was derived from a legitimate source wholly independent of the "compelled" evidence (the compromised communications). As most litigators know, this has proven to be an enormous, if not impossible, task in many immunity cases and would likely be so in a compromise case as well.

The defense in scenarios (1) and (2), above, might argue that, as there is no military precedent on point, the *Kastigar* immunity standard is as good as any. However, this is not the case. There is, in fact, substantial precedent available in Supreme Court precedents and other federal case law. There are

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[90] *See Hawkins*, *supra* note 85. The issue was not even raised by the defense at trial. Presumably, due to the obviously nonprivileged nature of the documents. Author Lieutenant Colonel Thompson was the special master appointed to review the materials in this case.

[91] Wong Sun v. United States, 371 U.S. 471, 487-488 (1963) (*citing* MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[92] 406 U.S. 441 (1972).

[93] *See* RCM 704, *Discussion*.

also some helpful military cases, but none are exactly on point with our facts. Despite diligent research, no trace can be found of any court, civilian or military, trial or appellate, applying the *Kastigar* standard to an attorney-client privilege compromise situation. Rather, as the cases below illustrate, the accused has the burden of raising a reasonable inference of prejudice from any compromise after which, the government must convince the judge of the appropriateness of their actions by a preponderance of the evidence.

United States v. Mansfield[94] is an instructive military case. At his retrial for murder, Staff Sergeant (SSgt) Mansfield argued that, since he had to attack his ineffective defense team on appeal, he was "compelled" to waive his attorney-client privilege, and was thus placed in an unfair position at his second trial. He asserted that the prosecution team obtained an unfair advantage when they became aware of many attorney-client confidences during the appeal from the accused's first conviction. Much of the previously privileged information related to a mental responsibility defense the accused wanted to assert. The information allowed prosecutors at the second trial to cross-examine the defense expert more effectively and the accused was once again convicted and sentenced to life imprisonment.[95]

While the cases are factually dissimilar, Staff Sergeant Mansfield found himself in substantially the same place as the accused in both scenarios (1) and (2), above: Possible attorney-client privileged material was in the hands of the government, and the accused had not "willingly" given it to them (because he believed the waiver rules unfairly forced him to sacrifice one right to protect another). Significantly, the defense in *Mansfield* analogized the situation to an immunity case and argued for application of the *Kastigar* standard. The Air Force Court of Military Review flatly refused to apply that standard to the attorney-client privilege issues in the case.[96] While the issue was ultimately resolved under a theory of waiver, the case is relevant to our inquiry because there are elements of constructive waiver in the scenarios above. For example, in both scenarios (1) and (2), significantly long periods of time passed during which the defense team failed to ensure that the government was aware it possessed privileged materials. Additionally, in each case the privileged materials were not well protected by the accused and were commingled with unprivileged materials.

The Supreme Court dealt with the issue of prosecutorial intrusion into the attorney-client relationship in *Weatherford v. Bursey*.[97] This federal civil rights case arose from a criminal prosecution, but is still valid guidance for military practitioners. In *Weatherford*¸ an undercover agent, who was arrested with the accused after they had ransacked a Selective Service office together, maintained his "cover" and pretended to be a co-accused. In this capacity, he

[94] 33 M.J. 972 (A.F.C.M.R. 1991), *aff'd*, 38 M.J. 415 (C.M.A. 1993).
[95] *Id.*
[96] *Id.* at 984.
[97] 429 U.S. 545 (1977).

attended meetings with the accused's attorney, but never passed any of the information gained in those meetings to prosecutors. He was later called as a witness against the accused, but did not testify regarding any matters learned at the attorney-client meetings. The accused was convicted, but later sued for civil rights violations. The Court held that, since the intrusion was unintentional, related to legitimate law enforcement work, and not a *deliberate* attempt by the prosecution to learn about defense plans or trial strategies, the accused's Sixth Amendment rights were not violated, absent a showing of prejudice.[98] In dicta, the Court indicated that perhaps if *intentional* misconduct had been involved, then a showing of prejudice would not be necessary.[99]

Shillinger v. Haworth is another federal case which provides enlightening discussion of the standard for establishing a Sixth Amendment violation when the prosecution possesses attorney-client privileged information.[100] After a very thorough analysis of *Weatherford* and the leading cases in virtually every federal circuit, the opinion articulates a rule whereby *intentional* prosecution misconduct is firmly distinguished from those intrusions that occur as an unintended consequence of otherwise legitimate law enforcement activity.[101] The court found that the accused's rights had been intentionally violated when the prosecutor gathered information from a guard who was assigned to watch the accused while he met with his counsel.[102] The trial court then allowed the prosecution to make use of this evidence to cross-examine the accused about being "coached" by his lawyer. The decision of the court was to remand for fact-finding as to the "extent of the intrusion and the proper remedy" should the illegally obtained evidence and any "fruits" of it be suppressed.[103]

The *Shillinger* court relied heavily upon *United States v. Morrison*[104] where the Supreme Court articulated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[105] The Court made clear that evidence obtained through *intentional and improper* intrusion into a defendant's relationship with his attorney, as well as any "fruits of [the prosecution's] transgression," must be suppressed in proceedings against him.[106] If the taint is pervasive enough, then prosecution by a new prosecutor

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[98] *Id.* at 556-561.
[99] *Id.* at 560-561 n.6.
[100] 70 F.3d 1132 (10th Cir. 1995).
[101] *Id.* at 1142.
[102] *Id.* at 1142.
[103] *Id.* at 1143.
[104] 449 U.S. 361 (1980).
[105] *Id*. at 366.
[106] *Id*.

might be necessary.[107] Dismissal of the case is reserved for only the most serious, extreme cases, as when the prosecution loses potentially exculpatory evidence.[108] As we mentioned earlier, before the court reaches any of this analysis, the accused bears the burden of showing that the material in question is in fact privileged.[109]

Not surprisingly, neither the Military Rules of Evidence nor case law suggests dismissal of charges or disqualification of trial counsel as an appropriate remedy for inadvertent exposure to attorney-client privileged evidence. Prosecutors are often aware of inadmissible, incriminating evidence and are nevertheless allowed to prosecute such cases when the evidence is found to be inadmissible. Disputes about illegally obtained confessions or illegally seized evidence often arise in criminal cases. If the evidence or its "fruits" are suppressed, that does not prevent further trial of the case by the prosecuting attorney who argued for its admission. Furthermore, when an accused makes an offer for a pretrial agreement,[110] the prosecution knows by implication that the accused believes he is guilty of the charge(s) to which he has offered to plead guilty. While this evidence of pretrial negotiations cannot be used against the accused at trial,[111] trial counsel is not disqualified from acting in the case merely because she is aware of the pretrial agreement offer.

3. Waiver

When privileged material does fall into the hands of the government, trial counsel should carefully consider whether the accused waived the privilege with respect to any or all of the evidence by his actions or inaction. Clearly, any material voluntarily made public by the accused (*e.g.*, in letters to Congressman or clemency matters delivered to a convening authority[112]) would lose their privileged nature by operation of Military Rule of Evidence 510.[113] Additionally, there may be issues of constructive waiver based upon the way the material was stored and what actions the accused took to put the government on notice that it was in possession of privileged material after the search.[114] Factors such as the reasonableness of the precautions taken to prevent disclosure and the promptness of the measures taken to rectify the disclosure are clearly relevant under the facts of scenarios (1) and (2).

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[107] *Citing* United States v. Horn, 811 F.Supp. 739 (D.N.H. 1992).
[108] California v. Trombetta, 467 U.S. 479 (1984), notes this possibility.
[109] Weil v. Investment/Indicators, *supra* note 88.
[110] The military equivalent of "plea bargaining." (Procedures for pretrial agreements in the Air Force are set out in AFI 51-201, *supra* note 73, at ¶ 6.A.).
[111] MIL. R. EVID. 410 (*Inadmissibility of pleas, plea discussions, and related statements*).
[112] *See generally*, RCM 1105, MCM, Part II, at II-147-148 (*Matters submitted by the accused*).
[113] MCM, Part V, at III-32 (2000 ed.) (*Waiver of privilege by voluntary disclosure*).
[114] *See* Gray v. Bicknell, 86 F.3d 1472 (8th Cir 1996), United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994), and *Mansfield*, *supra* note 94.

In both scenarios, even if the information is found to be attorney-client privileged, the accused may well have waived his right to claim the privilege by failing to raising the issue at the time the evidence was seized or for over twelve months after its seizure. Another important fact in scenario (2) was that only one page of the material was marked "attorney-client privilege." The evidence was also found mixed in with an equal amount of clearly nonprivileged material, some of which did not even appear to belong to the accused. Thus, the accused did not take active steps necessary to protect the documents or put others on notice as to their nature. These facts all weigh in favor of waiver, and against a finding that there was any intentional or malicious intrusion into the attorney-client relationship.

4. Appropriate Remedies

Relying on *Weatherford*, the Navy-Marine Corps Court of Criminal Appeals in *United States v. Tanksley* established a four-part test to use in cases of government intrusion into the attorney-client relationship in violation of the Sixth Amendment.[115] The *Tanksley* Court announced the prongs of that test as follows:

> (1) Was evidence used at trial by the Government produced directly or indirectly by the intrusion? (2) Was the Government intrusion intentional? (3) Did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion? and (4) Was the information used in any other way to the substantial detriment of the accused?[116]

In scenarios (1) and (2) there is no evidence that the government *intended* to interfere with the attorney-client relationship. In fact, in the underlying cases there was substantial evidence that as soon as the issue was made known to the government, they took extraordinary steps to prevent potential interference with the attorney-client relationship. For, example in both cases, a special assistant trial counsel was appointed specifically to examine the questioned evidence and argue against the defense motions relating to it. After the motions were decided, that counsel had no further role in the case.

The prosecution also made a very strong case that none of the privileged information was ever used in any way to advance the investigation

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[115] 50 M.J. 609 (N.M.C.C.A. 1999), *aff'd*, 54 M.J. 169 (2000), *recon. of partial denial of review granted*, (27 September 2000) http://www.armfor.uscourts.gov/journal/2000Jrnl/2000Sep.htm, *mandate issued* (13 October 2000) http://www.armfor.uscourts.gov/journal/2000Jrnl /2000Oct.htm).

[116] *Id.* at 621 (*also citing* United States v. Walker, 38 M.J. 678 (A.F.C.M.R. 1993)), United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986), and United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981)).

or trial preparation of these cases. This was not difficult as the testimony at trial in both cases confirmed that the evidence had been kept by investigators for nearly a year, where it lay unnoticed by either side in the case. Neither the investigators nor the trial counsel used the substance of the confidential communications in the documents to advance the investigation or preparation of the case.

In the cases upon which scenarios (1) and (2) are based, the trial judge applied the *Weatherford* standard of unintentional intrusion to decide the issue. Under that test, the defense had to show actual prejudice or at least a reasonable inference of prejudice, before the prosecution had any burden to disprove taint. The defense was not able to show prejudice in either case, and in each the court found no prejudicial Sixth Amendment intrusion. However, in scenario (1), the chronology in question was incriminating and created some concern for the court. Trial counsel testified that they had never seen the document. The AFOSI agent involved testified that he may have looked at it, but that he had not used it to advance his investigation. Nevertheless, the court ruled that, to remove any perception of taint, the agent would not be able to testify about any evidence he personally developed in the case after the date upon which he first possessed the document. The government also had to show an independent source for any such evidence, if they desired to admit it in some other fashion. The agent was also barred from further assistance to the trial team during their trial preparation.

Ultimately, in scenario (2), only four out of more than one hundred documents were held to be privileged and even those privileged items were of virtually no value to the prosecution. They were not incriminating, and they were only seen by prosecutors for a very brief time before they were delivered to defense counsel. Any intrusion on the rights of the accused was very slight, unintentional, and easily remedied. In each of our scenarios the trial court found the appropriate remedy to be suppression. Neither disqualification of counsel, other than the special assistant trial counsel, nor dismissal were held to be appropriate remedies under these facts and the law.

C. Practical Guidance for Handling Compromise Cases

When confronted with a situation where alleged attorney-client privileged matter may have been compromised—typically by inadvertently falling into government hands—the following practical guidance may assist staff judge advocates, trial counsel, and investigators in containing the damage to the case or investigation and resolving the issue expeditiously. This section offers advice on methods to avoid compromise altogether and to effectively handle these situations if they occur.

1. Preventive Measures—Initial Considerations

Many attorney-client privilege compromises may be prevented by educating investigators and attorneys to be sensitive to the issue. This helps in three ways: (1) total avoidance of possession of privileged information initially; (2) early recognition of seized privileged matter, thereby avoiding tainting the case in any significant way; and, (3) accurate recognition of what steps to take to resolve the situation without compromising the case, when a suspect declares that matter being seized is privileged.

The key to prevention is recognizing the many ways compromises may occur. A number of examples in the foregoing scenarios and cited cases are illustrative. A major area of concern is obviously the execution of searches and seizures. These can take the form or searching a person, place, or thing, but they may also involve various forms of electronic surveillance (including telephone taps,[117] interception of email, and interception of Internet traffic). Situations, as illustrated in the *Weatherford* case,[118] where an informant may be present during a confidential attorney-client meeting, should always raise a red flag for prosecutors. It is also possible that a malicious third party may come into possession of privileged matter, and send it to investigators or prosecutors. Finally, as shown in *Ankeny*,[119] a defense counsel may inadvertently reveal privileged matter without the client's permission or without realizing it is happening.

2. Preventive Measures—Searches and Seizures

The most common scenario where compromise arises in military criminal practice is in search and seizure situations. The first consideration ought to be the place or thing to be searched. For as noted, some locations or objects are much more likely than others to contain privileged information. In the military context, if the offices of an attorney, clergyman, or psychotherapist[120] are to be searched (hopefully, a rare occurrence), many of the files and electronic media in the office may be privileged. This is especially true in the search of an attorney's office, because most of the files will contain either client confidences or attorney work-product (discussed fully in Part IV, *infra*). Thus, great care should be used in these situations. In the civilian sector, the gravity and implications of such searches have been the subject of both congressional and executive concern. In fact, the Attorney General of the United States has published guidelines for federal officers who want to obtain documentary evidence from disinterested third parties (persons

[117] *See Coplon*, *supra* note 25.
[118] *Supra* note 97.
[119] *Supra* note 67.
[120] *See* MIL. R. EVID. 513.

who are not themselves the subject of the investigation) who may also be the holders of confidential information.[121]

Caution is required when searching businesses, home offices, or storage areas (including rented lockers) which appear to contain personal or business records. Particular objects warranting caution include business or corporate files and computers, private personal computers, personal digital assistants (like the hand-held PalmPilot™-type computer organizers, cellular telephone memories, magnetic media (disks, tapes, memory cards, etc.), and paper documents which are marked as privileged or which appear to relate to litigation or the legal affairs of the suspect.

If investigators know or suspect, as in the case of an attorney's office, that they are likely to come in contact with privileged matter, they must develop a plan to handle these materials properly. There are several approaches discussed below in the subsection on handling compromises. A solid first step is to devise a plan for screening the materials and removing any privileged documents after the search. Ideally, this plan should be described in the documents used to obtain the search authorization. This makes clear that the investigators are acting in good faith, and that the government recognizes the need to protect any privileged material which is discovered.

3. When Privileged Matter Has Been Seized: "What Do We Do Now?"

If the issue has been raised, either through the assertions of the accused or defense counsel, or simply because there is reason to believe that seized material may be privileged, then quick action is imperative. If no compromise has occurred (no investigator or member of the prosecution has seen, or improperly gained knowledge of, any privileged matter), the job ahead is easier, but the procedures are very similar. When there has been a compromise, or the government is in possession of suspected privileged matter, but no one has seen it yet, the most immediate objective is to control any damage the privileged matter might do to the investigation or the case (if it is already at the trial stage). As in basic first aid, the first thing to do is stop the bleeding.

If some material has been compromised, be sure to handle it separately, so later reviewers will know precisely what was seen and by whom. Anyone who has seen the suspected privileged material should immediately write a

[121] *See* 28 C.F.R. § 59.4(b). These guidelines indicate that search warrants should not be used to obtain or review documentary materials which contain confidential information on patients, legal clients, or parishioners, unless other, less intrusive means would substantially jeopardize the investigation and then, only if the application for the warrant has been recommended by the local United States Attorney and approved by the appropriate Deputy Assistant Attorney General. *See also*, 42 U.S.C. §§ 2000aa-11(a) (2000). As discussed in Part IV, *infra*, an Air Force analog to this rule may be found in TJAG Policy Letter 24, which indicates that an ADC's office may only be searched after coordination with their commander, the Commander of the Air Force Legal Services Agency.

statement detailing what they saw and under what circumstances, but should not give the statement to anyone at that point. No person who has seen such material should do further work on the case (including discussion of what they saw) until a determination as to the privileged nature of the material can be made.

If appropriate, defense counsel should be notified as soon as possible to begin an assessment of the material's privileged nature and materiality. While this is not a practical choice if an investigation is still ongoing, as notifying defense counsel will probably compromise the investigation, it should be considered in all other cases. When the problem arises at the trial stage, however, as in the *Pinson* case,[122] it is critical to notify defense counsel of the problem at once, as trial counsel did in that case. This shows good faith on trial counsel's part and gets the defense counsel started on the path of deciding how to react and what may or may not be privileged. This gets the issue focused and helps move it toward resolution.

Have a neutral third party (who will be available to testify at trial, but who is not part of the investigation or trial team) take possession of the material and make a copy of it. This step is very important, because the integrity and chain of custody of the original documents or electronic media must be maintained. In the case of electronic media, be sure to work with properly trained personnel (preferably an AFOSI computer crimes investigator) to make sure the original evidence is not damaged or altered. With paper documents, any neutral person may make the copies and seal the documents. A paralegal not currently assigned to military justice duties is an excellent choice.

4. Using Special Masters and Special Assistant Trial Counsel

As the next step, have the Special Court-Martial Convening Authority (SpCM) appoint an independent reviewing officer (usually called a "special master") to review the material. This person should be an attorney, preferably with experience or training in privileges under military law. The more neutral and detached this officer is the better. Using criteria similar to that for selecting an Article 32, UCMJ[123] investigating officer is an excellent approach. However, this is not required, as long as it is understood that the attorney selected will not be able to prosecute the case later (other than to argue motions involving the alleged privileged material, as in the scenarios above). A civilian attorney may act as special master, but this may result in duplication of effort if a military attorney must later be appointed to argue the motions as just mentioned.

[122] *Supra* note 84.
[123] 10 U.S.C. § 832 (2000).

Store the sealed original documents in an evidence locker, clearly marked: "Potential Attorney-Client Privileged Material—Do Not Open Without Authorization of the [SpCM] Staff Judge Advocate." The sealed copies should be placed in another envelope with the special master's appointment letter. Attachments to the letter should include: (1) statements from anyone who has seen the documents; (2) information regarding the circumstances under which they were obtained (including copies of any search authorizations used); and, (3) any statements or information regarding an assertion of privilege by the accused concerning the documents.

Deliver the envelope with the copies and other information to the special master with a list of duties and instructions contained in the appointment letter, along with a due date by which to complete his review or by which to request an extension. Be sure to instruct him that his final report should *not* reveal the contents of any privileged communication, and that any documents he believes are privileged should be sealed, clearly marked, and attached to his report, along with those that he believes are clearly not privileged, which should be sealed and separately attached. If there are defense counsel involved in the case, the special master may wish to contact them and attempt to have them identify any document believed to be privileged. Such actions can go a long way toward locating and narrowing the list of documents truly falling under a claim of privilege.

If the special master is highly confident that none of the material is privileged, then trial counsel may use it, and litigate its confidential nature at trial if raised by the accused. Of course, if the special master's determination is later found to be incorrect by the military judge, then trial counsel may be disqualified, and the case may even be too tainted to proceed to trial, if irreparable prejudice has occurred (very unlikely). However, if the special master finds that there is some presumptively privileged material, neither investigators nor trial counsel should be allowed access to this material.

If motions regarding the government's use or possession of this material are raised by the defense at trial, then a special assistant trial counsel (SATC) should be appointed to litigate these issues.[124] The SATC, and any other attorneys, investigators, or support personnel assigned to assist him and given access to the privileged material, will then become part of the "taint team," which will likely be disqualified from further participation in the case, once the privilege issues have been litigated. This assumes, of course, that the materials in question are found to be privileged. As mentioned, there is no prohibition on using the special master as the SATC, but if there is any possibility that the special master may need to testify about interactions he had

[124] Author Lieutenant Colonel Thompson was the special assistant trial counsel in both *Sprague*, *supra* note 83 and *Pinson*, *supra* note 84. A civilian special master was also appointed during *Sprague*. In *Pinson*, the issue developed too quickly and unexpectedly to use a special master, as the privileged documents were discovered on the eve of trial.

with counsel and others during his review of the evidence, then a different attorney should be appointed as the SATC.

If the government knows from the start that issues of privilege will be involved in the case (as when a defense counsel's office is searched) then forming a taint team from the start may be advisable. This team would be composed of investigators, attorneys, and paralegals assigned to conduct the search and work the privilege issues exclusively from day-one. The taint team can then pass non-privileged information to the investigators and prosecutors in the case. If this procedure is followed there is no need to appoint a special master, as the taint team fulfills this function. This more aggressive day-one taint team approach is favored by United States Attorneys, but has drawn some criticism from federal courts in civilian cases.[125]

5. Computer Seizures—"Handle With Care"

As mentioned at the beginning of the article, in our technology-rich society, investigators searching for incriminating documents or photographs are as likely to seize a personal computer and its storage media as they were to seize the "papers and effects" of yore. These electronic records are typically *not* examined until after they are seized. Thus, privileged matters may not be readily evident upon seizure. Cases involving computer seizures require special handling. A single computer's hard drive may hold literally millions of files so review of such evidence can be excruciating and very time consuming. It is also extremely easy to alter or damage such evidence. A trained computer crime investigator, working in tandem with a special master or taint team is critical in cases where the seized media may contain privileged information.

The use of special masters in such cases has been approved in a number of federal cases. For example, in *United States v. Abbell*,[126] a case involving the search of the accused's law office, the court approved the appointment of a special master to decide privilege claims related to the electronic documents seized. The court required that the computer-generated and stored data retrieved in the search be searched using information retrieval software and a list of search terms, and that the search program be implemented "without resort to reviewing each computer stored document in order to cull those documents deemed responsive to the search."[127] Copies of the documents retrieved by this additional electronic search were then provided to the special

[125] *See* United States v. Neill, 952 F. Supp. 834, 841 (D.D.C. 1997) and United States v. Hunter, 13 F. Supp. 2d 574, 583 n.2 (D. Vt. 1998) (review by a magistrate judge or special master "may be preferable" to using a taint team) (*citing* In re Search Warrant, 153 F.R.D. 55, 59 (S.D.N.Y. 1994)). Although no clear standard has emerged, the federal courts have typically held that evidence screened by a taint team will be admissible only if the government shows that its procedures adequately protected the accused's right and no prejudice occurred. *See, e.g.*, *Neill* at 840-42 and *Hunter* at 583.

[126] 914 F. Supp. 519 (S.D. Fla. 1995).

[127] *Id.* at 521.

master and defense counsel to allow disposition of privilege issues prior to their examination by the prosecution team.[128]

6. Litigating Issues of Privilege

As mentioned above, unless trial counsel is very confident that the materials in question are not privileged or that the privilege has been waived, then the prudent course is to appoint a SATC to litigate the privilege issues. While the SATC is preparing the case, she should not share offices with trial counsel and must scrupulously protect all alleged privileged material from disclosure to the trial team, the SJA, or anyone else not entitled to know of their contents. As a matter of appearances, and to avoid inadvertent disclosures, the SATC should also avoid most, if not all, social contact with trial counsel until the conclusion of the trial.

Preparation and argument of a successful privilege motion requires a detailed knowledge of privilege law, careful examination of the evidence (to determine whether it really is privileged), and an exhaustive search for witnesses who may provide the basis for arguments that, for example: (1) there has been a waiver of the privilege (such as when the accused reveals the same information to others in a non-privileged setting); (2) the information was never privileged to begin with (*e.g.*, no attorney-client relationship or information intended for communication to a third party, etc.); or, (3) a lack of prejudice or taint to the government's case (such as when the information was not seen or used in the investigation or trial of the case). Privilege motions therefore often involve one side or the other calling a host a host of non-traditional witnesses to the stand.

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[128] This technique was used by the civilian special master in *Sprague*, *supra* note 83, and did locate several pieces of privileged correspondence, but the search terms used *failed* to locate the privileged materials which later surfaced and were the subject of litigation in the case because it was not readily apparent that those documents had been created at an attorney's request. *See also Hunter*, *supra* note 125, *but cf.* Black v. United States, 172 F.R.D. 511, 514 (S.D. Fla. 1997) (ordering an alternative protocol for judicial resolution of privilege issues after recognizing that the special master procedure established in *Abbell* contributed to a thirty-month delay in the case). There are also a number of useful government publications available to prosecutors for handling cases involving computer crime. *See generally*, COMPUTER CRIME INVESTIGATOR'S HANDBOOK, HEADQUARTERS, AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS, OFFICE OF THE STAFF JUDGE ADVOCATE (2000) and SEARCHING AND SEIZING COMPUTERS, UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, COMPUTER CRIME INTELLECTUAL PROPERTY SECTION, http://www.cybercrime.gov/searching.html#CrmCode.

Witnesses on the motion may include, for example, the trial counsel (to testify as to use and taint); trial defense counsel, former defense counsel, civilian counsel, and the accused (to establish the privileged nature of the information, and to counter waiver arguments); Article 32 investigating officers (to testify as to whether they were exposed to privileged information); investigators, paralegals, and other supporting witnesses; and the SJA and special master (to explain how the compromise case was handled, and who may have seen the privileged materials involved). As with all good trial preparation, detailed interviews are critical, but the SATC must be cautious (especially with trial counsel or investigators) not to reveal any privileged material to which trial counsel or agents may not have been exposed previously. Thus, use of non-leading questions regarding what was seen and how it has been used (if at all) in case preparation is the best approach.

Since waiver of the privilege is always a potential issue in these cases, the SATC should search hard for friends and associates of the accused, and find out whether he revealed any of the privileged information (as is often the case) in a non-privileged setting. As we have seen, if there has been an actual compromise, then a major issue will be disproving the existence of taint. Depending upon the approach the court takes, this may involve showing an independent source for each piece of evidence in the case. The SATC should prepare for this eventuality as best she can by becoming intimately familiar with all aspects of the investigation and preparation of the case prior to and after the compromise of the privileged material.

Finally, after the privilege motions are litigated and ruled upon, if any evidence is found to be privileged, the SATC should ask the court for detailed findings and instructions regarding what may be given to the trial counsel, what should be destroyed, and what is to be sealed and attached to the record of trial. In these cases where the SATC is disqualified from further participation, she should also cut off further interaction with the trial team until after the conclusion of the trial. Applying these hints, and some common sense, cases of inadvertent attorney-client compromise may be successfully salvaged in most instances.

IV. PROTECTING A CLIENT'S IDENTITY, WHEREABOUTS, AND THE FACT OF CONSULTATION—ETHICAL, EVIDENTIARY, AND POLICY GROUNDS

"One of our real successes has been the Area Defense Counsel program, now in existence for more than five years. No one told the Air Force to do it—the Chief of Staff decided the defense function should be independent in fact and in appearance."[129]

A. General Considerations

Consider the following scenarios: (1) The prosecution in a court-martial creates a conflict of interest between an ADC and his client by naming the ADC as a prosecution witness and additionally asserting that the ADC is not a "defense counsel" under the Sixth Amendment. Trial counsel wants to use the ADC's testimony regarding the whereabouts of the accused on a given date to help establish the elements of an AWOL offense; and, (2) A wing SJA considers an ADC's appointment schedule open to command review and advises commanders and first sergeants that the ADC is required to tell them if one of their squadron personnel has visited the ADC office, including the date and time of the client's visit.

These scenarios go to the heart of the policy issue of the independence of the ADC function in the Air Force, and raise legal and ethical questions about the extent to which the attorney-client privilege encompasses information regarding a client's identity, dates of consultations with counsel, and whereabouts at given times. Of course, there comes a point in most representations when the defense counsel will *need* to seek his client's approval to reveal the fact of the representation. This can be critical to protecting many of the client's rights. For example, defense counsel will usually want to place the government on notice that an accused is a "represented person," and that counsel must be notified before any interrogation of his client is attempted.[130]

However, when such disclosures are compelled before the defense counsel or his client are prepared to make them in the interests of the client, issues of effective assistance of counsel and conflict of interest come into play. We believe that, absent a court order compelling counsel to testify against his client,[131] he has ethical, evidentiary, and policy grounds to resist disclosing this information. The following discussion explores each of these grounds in detail.

B. The Ethical Duty to Protect Information Relating to Representation

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[129] Letter from HQ USAF/JA (5 March 1980) (copy on file with author (Captain Kastenberg)).
[130] *See, e.g.*, MIL. R. EVID. 305(e).
[131] *See, e.g.*, United States v. Lewis, 38 M.J. 501 (A.C.M.R. 1993), *aff'd*, 42 M.J. 1 (1995) (Trial defense counsel could not invoke attorney-client privilege to refuse to give information regarding allegations of ineffective representation, because the Army Rules of Professional Conduct permit disclosure when compelled by law, as in this case where the appellate court ordered defense counsel to provide affidavits in response to the accused's allegations).

The purpose of a court martial is truth-finding within the bounds of the law. The military courts recognize a hierarchical scheme of rights, duties, and obligations in our criminal practice. The highest source of these is the Constitution, followed by the UCMJ, MCM, Department of Defense regulations, service regulations and policies, ethical rules, and the common law.[132] Implicit in this scheme is that while a lower source in the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with the higher source.[133] In the daily practice of a military defense counsel, this scheme must be extended to non-criminal cases such as nonjudicial punishment under Article 15, UCMJ,[134] and adverse administrative actions.[135] The Air Force Rules of Professional Conduct are an excellent example of an agency-level policy which creates a greater duty to maintain confidentiality than that available under the Military Rules of Evidence or case law.

Thus, information held by a defense counsel regarding a client's identity, whereabouts, and the fact that they have consulted an attorney must be kept confidential under Air Force Rule 1.6's attorney-client *ethical* privilege, which is very broad in scope—covering not just confidential communications, but *any* "information *relating* to the representation."[136] While there are exceptions to Air Force Rule 1.6, enumerated above, informing a commander about an ADC office visit by a member of her unit is not among these exceptions. By the 1970's most state ethics committees agreed that a client's identity was protected confidential information under ethical rules.[137]

Additionally, if the ADC's calendar is not kept confidential—through testimony, revealed attorney work-product, or unwitting investigative assistance—he may well act contrary to the interests of his client, and even be called as a witness against him. In the military context, where a point of pride is maintaining both the perception and the reality of an ADC's independence, the case for protecting an accused's whereabouts and identity (at least initially) is even stronger. The Air Force Rules and Standards are largely silent on the question of when a defense counsel may reveal the whereabouts of his client. However, an exception was recently added which emphasizes that a defense counsel *may* reveal information to assist authorities in locating her client in order to prevent the client's suicide.[138] Significantly, other than in this Air Force Standard, the rules do not otherwise require an attorney to report the

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[132] *See, e.g.*, United States v. Romano, 46 M.J. 269, 274 (1997). *See also*, S.Rep. No 486, 81st Cong., 1st Sess. 32 (1949) and United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992).
[133] *Romano*, 46 M.J. at 274.
[134] 10 U.S.C. § 815 (2000).
[135] Examples include: administrative discharge actions, administrative grade reductions, selective reenlistment actions, boards of inquiry, medical evaluation boards, flying evaluation boards, de-credentialing actions, etc.
[136] *Air Force Rules*, ¶ 1.6, *supra* note 72 (emphasis added).
[137] *See* ABA Informal Opinion 1287 (1974) (*citing* ABA Informal Opinion (1971)).
[138] *See Air Force Standard* 4-3.7(e)(iii) and (iv).

whereabouts of her client. By this silence, one presumes the drafters left such language out intentionally, as it could easily have been included, if the intent was to allow or require defense counsel to assist the government in locating and apprehending an accused who was merely AWOL.

Significantly, in *United States v. Rogers*, the Air Force Court of Criminal Appeals recently acknowledged a defense counsel's ethical obligations, under Air Force Rule 1.6, not to reveal information to commanders about the visits of clients to the ADC office.[139] Senior Airman Rogers was a client who "did not return promptly from his appointments with the defense counsel." Defense counsel and his staff refused to confirm for command the presence of Senior Airman Rogers at his appointments. The court stated: "We understand that normally '[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .' *Air Force Rules of Professional Conduct* Rules 1.6(a) (10 Feb. 98). Thus, the defense counsel may have believed he had a duty not to answer the commander's query." The court then proceeds to specify the practical consequence of this refusal, but makes no express or implied judgment that defense counsel's belief in this regard was incorrect.[140]

C. The Evidentiary Privilege

While there is no military precedent under Military Rule of Evidence 502 on the issue of disclosing a client's whereabouts or identity, a number of federal and state cases have held that the evidentiary privilege protects communications regarding the identity or whereabouts of a client, when this information is the last link in the chain of evidence leading to the conclusion that the client has committed the crime at issue or when revelation of the client's identity would simultaneously reveal confidential communications between lawyer and client.[141] The ABA's position is that in certain cases, the client's identity is the most critical part of the attorney's representation of a client,[142] but has also expressed the view that the issue of privilege with respect to a client's whereabouts remains unsettled.[143] Likewise, many state

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[139] 50 M.J. 815 (A.F.C.C.A. 1999), *pet. denied*, 52 M.J. 490 (1999).
[140] *Id.* at 818.
[141] *See, e.g.*, In re Grand Jury Proceedings, 946 F.2d 746 (11th Cir. 1991) and Brett v. Berkowitz, 706 A.2d 509 (Del. 1998).
[142] *See* ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 55:307-308 (1998).
[143] *Id.* at § 55:309-312 and *see generally*, ABA Informal Opinion 1453, *Lawyer's Duty to Client and Court* (10 April 1980) (noting advising client to surrender is commendable, but no further action compelled by Model Code) and ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, ETHICS OPINIONS 1986-1990 § 901:3012, *quoting* Committee on Professional Ethics of the Illinois State Bar Association, *Missing Client: Confidentiality*, Opinion 89-13 (4/9/90) (noting that a "lawyer whose client has disappeared may reveal this fact when requesting a continuance at a status call only if required by court order or the law to do so.").

and federal cases have held that this information is *not* privileged in many cases.[144] However, there is a clear distinction between what a defense counsel must keep confidential under ethical rules, and information that may be compelled in court, in the interest of justice.

Nevertheless, the matter of whether a client's identity is privileged remains far from settled.[145] Although an accused's whereabouts may not, in and of itself, be a communication, information relating to the client's whereabouts usually comes in the form of a communication between the accused and attorney, and it is certainly information relating to the representation. Whether the courts afford protection to this information ultimately depends upon the facts of each case. The courts must weigh a number of constitutional considerations in deciding whether such information is protected by the evidentiary privilege. For example, in *United States v. Schell*,[146] the United States Court of Appeals for the Fourth Circuit held that both due process and the attorney-client privilege are violated when an attorney represents a client and then participates in the prosecution of that client.[147] Additionally, the Sixth Amendment guarantee to conflict-free counsel comes into question any time a defense counsel is asked to divulge a client's whereabouts.

1. Sixth Amendment Issues—Generally

Any notion that ADCs are not defense counsel for the purposes of the Sixth Amendment should be dispelled by the holding of the United States Court of Appeals for the Armed Forces in *United States v. Russell*.[148] Several

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[144] *See, e.g.*, Annotation: *Disclosure Of Name, Identity, Address, Occupation, Or Business Of Client As Violation Of Attorney-Client Privilege*, 16 A.L.R.3d 1047 (1967) and Diane M. Allen, J.D., Annotation: *Attorney's Disclosure, In Federal Proceedings, Of Identity Of Client As Violating Attorney-Client Privilege*, 84 A.L.R. Fed. 852 (1991).

[145] *See, e.g.*, ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, § 55:307-308 (1998). The manual reads:

> Such cases have stirred up great public debate about the morality of this application in the confidentiality principle where criminal investigations or families of victims urge disclosure. At the heart of the matter is whether the client's name qualifies as a confidence. . . . For the lawyer, these situations raise a difficult conflict between the duty to reveal information requested by a court and the duty to protect the client's identity as a confidence. . . . Whether the attorney is right or wrong, the chances are he will be cited for contempt.

Id. at § 308 (internal citations and quotations omitted).

[146] 775 F.2d 559 (4th Cir. 1985).

[147] *Id.* at 565-566.

[148] 48 M.J. 139, 140 (1998) (noting that the Sixth Amendment guarantees for pretrial assistance of counsel apply to all military accused) and United States v. Fluellen, 40 M.J. 96,

state courts note while the attorney-client privilege is not per se of constitutional origin, the privilege nonetheless has important constitutional implications.[149] That such non-enumerated rights enjoy equal standing with enumerated rights is a common feature in the American legal landscape.

In *Richmond Newspapers, Inc. v. Virginia*,[150] the Supreme Court held certain unarticulated rights implicit in the enumerated guarantees.[151] Clearly, where the prosecution denies an accused the fullest scope of the attorney-client privilege, the accused's Sixth Amendment rights are violated because he or she is deprived of an active advocate.[152]

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[153] The Sixth Amendment does not, however, directly address the question of conflicted counsel nor does it address whether the United States is responsible for supplying a counsel to an indigent accused. The latter point was solved in the litany of cases beginning with *Gideon v. Wainright*.[154] But what of the question of conflict-free counsel?

Even before *Gideon*, the Supreme Court had held that "[t]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired,"[155] In 1978, as well, the Supreme Court examined issues as to whether and to what extent every defendant may waive their "constitutional right to the assistance of an attorney unhindered by a conflict of interests" in *United States v. Holloway*.[156] A long-standing doctrine holds that the right of conflict-free counsel is a fundamental procedural right of any accused. In *Penson v. Ohio*, the Court held that "of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may

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98 (1994) (noting that the Sixth Amendment guarantees for trial and post trial effective assistance of counsel apply to all military accused).

[149] *See, e.g.*, People v. Collie, 634 P.2d 534, 540-41 (Cal. 1981) and Vitauts M. Gulbis, Annotation, *Right of Prosecution to Discovery of Case-Related Notes, Statements, and Reports—State Cases*, 23 A.L.R. 4TH 799 (1981) (compilation of cases).

[150] 448 U.S. 581, 580 (1980).

[151] *Id.* The court noted:

> The rights of association and privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel appear nowhere in the Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.

Id.

[152] *See, e.g.*, Anders v. California, 386 U.S. 738, 744 (1967).

[153] U.S. CONST. AMEND VI.

[154] 372 U.S. 335 (1963).

[155] Glasser v. United States, 315 U.S. 60 (1942).

[156] 435 U.S. 475, 483 n.5 (1978).

have."[157] Further guidance is found in the United States Court of Appeals for the Ninth Circuit's decision in *United States v. Patricia Hearst*.[158]

2. Sixth Amendment Issues—The Right to Conflict-Free Counsel

In *Hearst*, noted criminal defense attorney, F. Lee Bailey, signed a book contract with G.P. Putnam & Co.[159] In an effort to shield himself from ethics charges, Bailey's contract was contingent upon Hearst's approval.[160] Hearst eventually gave approval to Bailey as part of a fee arrangement for an appeal if one became necessary.[161] However, Hearst later declared she was forced into signing Bailey's book rights as part of the fee arrangement for Bailey's trial work.[162]

Hearst alleged Bailey failed to seek a continuance because public interest would eventually cool to her trial, and other would-be authors would get a "head start" on the increasingly media-famous attorney.[163] She further charged Bailey's trial tactics, including encouraging Hearst to testify created a public record unconstrained by the attorney-client confidentiality rules.[164] Hearst finally accused Bailey of refusing to seek a change of venue outside of San Francisco because that city afforded optimum media exposure.[165] Both the United States and Bailey denied his book interest played any role in his tactical decisions and the federal district court denied Hearst a hearing on the issue.[166] The United States Court of Appeals for the Ninth Circuit remanded on the basis that Bailey might have breached the attorney-client relationship in becoming a conflicted counsel.[167] It is noteworthy that the court did *not* definitively find that Bailey had become conflicted, merely that his actions raised the specter of a conflicted counsel.

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[157] 488 U.S. 75, 84 (1988). *See also* Gideon v. Wainright, 372 U.S. 335, 344 (1963) where the Court noted:

> The right of one charged with a crime may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

Id.

[158] 638 F.2d 1190 (9th Cir. 1980).

[159] *Id.* at 1191. (G.P. Putnam & Co. is a New York based publishing firm.).

[160] *Id.*

[161] *Id.*

[162] *Id.* at 1192.

[163] *Id.* at 1193.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

Shortly after the district court trial in *Hearst*, but before the case came to the Ninth Circuit, the Supreme Court decided *Cuyler v. Sullivan.*[168] In *Cuyler*, the Court held that where a defense counsel is in a conflict of interest with his client, the conflicted defense counsel is not a counsel within the Sixth Amendment. The Ninth Circuit in *Hearst*, (with the benefit of *Cuyler*) held that differentiating conflicts are immaterial to an individual's right to a conflict-free counsel. That is, whether a defense counsel breaches ABA Rules by signing a book contract, represents multiple adverse clients, or is forced to testify against the client, the salient point is that the counsel falls outside the Sixth Amendment's requirements for effective assistance of counsel.

Both *Hearst* and *Cuyler* stand for the proposition that the potential for conflicted counsel gives rise to a Sixth Amendment violation. If, as a matter of policy, ADCs are forced to open their schedules for command review, answer questions as to whether and when certain clients visited the office and what assistance they received; then, claims of conflict of interest and of interference with the attorney-client relationship will be rife.

The unarticulated constitutional right to conflict-free counsel has long been recognized by military law. The Court of Military Appeals has steadfastly held that, under both the Sixth Amendment and Article 27, UCMJ,[169] a military accused is guaranteed effective assistance of counsel at the pretrial stage, during the trial, and post-trial.[170]

3. Fifth Amendment Issues—Generally

As noted above, in addition to its Sixth Amendment implications, the attorney-client privilege also helps preserve the right against self-incrimination enumerated in the Fifth Amendment. The Fifth Amendment provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." If a defense counsel is forced to divulge information regarding his appointments with clients, it is not difficult to envision a situation where the government may be able to use that information to identify suspects in unsolved crimes, show consciousness of guilt, or even generate new charges against the accused for AWOL or false official statements[171] (such as when a client says he was at the ADC office, when in fact he was not). If the defense counsel is then called to be a witness against his client on these charges, he would be providing testimony to incriminate his own client. Such action also creates a conflict situation, forcing defense counsel to withdraw from the case.

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[168] 446 U.S. 335, 343-344 (1980).
[169] 10 U.S.C. § 827 (2000).
[170] *See generally*, United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994) and United States v. Carter, 40 M.J. 102 (C.M.A. 1994).
[171] 10 U.S.C. § 907 (2000), art. 107, UCMJ.

4. Fifth Amendment Issues—The Work-Product Doctrine

The work-product doctrine—through the attorney-client privilege—has been held to bar prosecution discovery of notes, statements, or documents relating to defense counsel's case preparation.[172] The practice of prosecutors delving into a defense counsel's investigation and preparation of a case, interviews of witnesses, and defense strategic decisions has been found intolerable in state and federal courts. For example, New York's Court of Appeals in *People v. Belge*,[173] held that the work-product privilege is essential if the accused is to maintain his Fifth Amendment protections against self-incrimination. Interestingly, in *Belge*, the court looked to the attorney-client privilege as well as examining the applicability of the work-product doctrine to the right against self-incrimination. In *United States v. Nobles*[174] the Supreme Court of the United States noted that, "although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital."[175] The court further found the privilege extended beyond the attorney's work-product to "those who work with him to prepare the defense."[176] In a military setting, this would include the defense paralegal, any defense investigators, and civilian counsel and their staff.

For example, in *People v. Sanders*[177] and *People v. Collie*,[178] the California Court of Appeals held that the prosecution was not entitled to discover information gleaned from defense investigator interviews and notes obtained from defense witnesses. California courts, in both *McMullen v. Superior Court of Los Angeles County*[179] and in *Jones v. Superior Court of Nevada County*[180] also held that the work-product privilege barred prosecutorial discovery of the names and opinions of persons contacted or employed by the accused in violation of the right against self-incrimination. The *McMullen* Court reasoned that, inter alia, the defense was not required to supply the prosecution with names and opinions of persons who could testify

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[172] *See, e.g.*, Spears v. State, 401 N.E.2d 331 (Ind. 1980), *reh'g*, 403 N.E.2d 828 (Ind. 1981), and Hergenrother v. State, 425 N.E.2d 225 (Ind. App. 1981). Note that in all three of these decisions, the courts found harmless error in the trial court's erroneous requirement that the defense produce witness statements. *See also, e.g.*, Richardson v. District Court of Eighth Judicial Dist., 632 P.2d 595 (Colo. 1981) and State v. Sandstrom, 595 P.2d 324 (Kan. 1979).
[173] 83 Misc. 2d 186 (Onondaga County Court 1975), *aff'd mem.*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd per curiam*, 359 N.E.2d 377 (N.Y. 1976).
[174] 422 U.S. 225 (1975).
[175] *Id.* at 238.
[176] *Id.* at 240.
[177] 905 P.2d 420, 443 (Cal. Ct. App. 1995).
[178] 634 P.2d 534 (Cal. Ct. App. 1981).
[179] 85 Cal Rptr. 729 (Cal. Ct. App. 1970).
[180] 372 P.2d 919 (Cal. 1962).

against the accused's affirmative defenses.[181] Finally, in *Ruiz v. Superior Court of San Francisco*, the court held the work-product doctrine prohibited the prosecution from discovering statements, locations, and identities of defense witnesses interviewed, but who would not be testifying.[182] Reasoning that the accused's defense counsel could also fit into this non-testifying witness construct, the California court arguably would protect that relationship, as well. A review of case law in this area indicates that military courts frequently avail themselves of federal and state decisions regarding attorney-client privilege issues to perhaps a greater degree than in any other subject matter.

5. The Work-Product Doctrine in Military Law

As noted earlier, the seminal case which recognizes the attorney work-product doctrine under military law is *United States v. Romano*, which held that attorney work-product is a privileged communication, but did not expressly define the parameters of the privilege.[183] *United States v. Rhea*[184]

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[181] *See Jones*, 372 P.2d at 922.
[182] 80 Cal. Rptr. 523 (Cal. Ct. App. 1969).
[183] *Romano*, 46 M.J. 269, *supra* note 59. The court's opinion contains an excellent account of the history and purposes of the work-product privilege:

> Since the seminal case on work-product privilege, Hickman v. Taylor**,** 329 U.S. 495 (1947), a civil case, the work-product rules have been applied to criminal cases. *See*, *e.g.*, Goldberg v. United States, 425 U.S. 94 (1976) (application of the work- product privilege to the statement of witnesses) and United States v. Nobles, 422 U.S. 225 (1975). The theory behind the work-product rule is that, after an attorney has spent time preparing the case, assembling and sorting the facts, deriving a theory and theme for the case, and planning the strategy to be employed, the opponent, without some overriding interests, may not needlessly interfere with the thought processes used in creating the documents. Nobles, 422 U.S. at 238. As the Court noted in Nobles: "At its core, the work-product doctrine shelters the mental processes of the attorney . . ." *Id.*
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> Whatever the outer boundaries of the rule, it certainly applies to memoranda which set forth the attorney's theory and theme of the case. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Because of the broad disclosure rules in the military, many of the privilege issues presented to other courts have been answered. For example, RCM 701(a)(1)(A) and (C), Manual, *supra*, require that trial counsel reveal witness statements. In any event, it is questionable whether witness statements reveal the attorney's thought processes in such detail as to require protection. Foremost, open discovery avoids unnecessary trials and enables an accused to make informed decisions as to his or her options. Absent a disclosure requirement, documents specifically compiled and prepared with a reasonable anticipation of trial will be encompassed within the privilege if they encapsulate the attorney's thought processes.

Id. at 274-275 (internal citations omitted).
[184] *Rhea*, *supra* note 80.

and *United States v. Province*[185] further define the parameters of the military work-product privilege.

The facts of *Rhea* indicate that Master Sergeant (MSgt) Robert Rhea, while stationed in Germany, pressured his teenage step-daughter to engage in sexual intercourse on numerous occasions.[186] This occurred over a two-year period and ended only when the step-daughter became engaged to wed another.[187] MSgt Rhea was tried for sexual abuse of his step-daughter and was convicted at a general court-martial.[188] The crucial evidence against him was his step-daughter's calendar, which dated their numerous sexual episodes. The calendar was not originally in the possession of the prosecution. It was found by MSgt Rhea in his daughter's room and given, along with other materials, to his defense counsel, who did not recognize its incriminating nature.[189] Once the significance of the calendar became clear, and defense counsel discovered that they were in possession of it, they became concerned that they had evidence of a crime. They consulted their respective state licensing agencies.[190] They also requested an ex parte hearing with the military judge.[191] The military judge ordered the two defense counsel to turn the calendar over to the prosecution.[192] After the defense counsel complied with the judge's ruling MSgt Rhea dismissed his counsel and was assigned new defense counsel.[193] MSgt Rhea then filed an Extraordinary Writ with the Air Force Court of Military Review, seeking to suppress the prosecution's introduction of the calendar into evidence—the writ was denied.[194] On appeal, MSgt Rhea argued he was denied effective assistance of counsel when his original defense counsel sought an ex parte hearing with the judge and complied with his order to turn the calendar over to the prosecution.[195]

On appeal, the Air Force Court of Military Review found that the calendar was not attorney work-product within the meaning of the Fifth

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[185] 42 M.J. 821 (N.M.Ct.Crim.App. 1995), *aff'd*, 45 M.J. 359 (1996).

[186] *Rhea*, *supra* note 80, at 993. His step-daughter was approximately seventeen years old when the intercourse began.

[187] *Id.*

[188] *Id.* at 991. MSgt Rhea's adjudged and approved sentence was sentenced to a bad conduct discharge, five years in confinement, total forfeitures, and reduction to airman basic.

[189] *Id.* at 994. The calendar came into the defense counsel's possession after the defense counsel instructed MSgt Rhea to gather any "books, letters, papers, or other sorts of things," the step-daughter had left behind for establishing a motive to fabricate allegations against MSgt Rhea. *Id.*

[190] *Id.*

[191] *Id.* The ex parte hearing was held at the suggestion of the state bars in question.

[192] *Id.*

[193] *Id.* Additionally, the original military judge recused himself from the case and a new judge was appointed.

[194] *Id.* (Writ denied *sub nom.* Rhea v. Starr, 26 M.J. 683 (A.F.C.M.R. 1988)).

[195] *Id.*

Amendment.[196] The notations on the calendar were made by a prospective witness, not the defense counsel or the accused.[197] Moreover, the court held that defense counsel has an obligation to the court to divulge the existence of a criminal instrument.[198] Indeed, the court commended the conduct of defense counsel in doing so.[199]

The Court of Military Appeals affirmed the lower court's decision[200] and cautioned defense counsel in future similar situations to adhere to such an ethical course of representation.[201] The court favorably noted that while MSgt Rhea's defense counsel complied with the military judge's order, they properly protected the interests of their client by not communicating to the prosecution the origins of the calendar.[202] Thus, the defense counsel did not authenticate the calendar or in any way advance the prosecution's case beyond complying with the ethical mandates imposed by their state bars and the orders of the military judge.

Three fundamental rules emerged from *Rhea*: (1) Instrumentalities of a crime are generally not protected by the privilege, (2) attorney work-product must originate from the attorney or the client, at the attorney's direction, and (3) where a defense counsel believes he or she is in possession of a criminal instrument, the defense counsel should do nothing more than notify the military judge via ex parte hearing and not assist the prosecution in any way with their case preparation. There is nothing in the facts or holding of *Rhea* which addresses records kept by the defense counsel, such as his appointment calendar. If the defense counsel's calendar contains information regarding representation and case preparation (such as the dates and times of witness interviews and client meetings), there is no reason to believe the holding in *Rhea* would exclude those records from the protections of the work-product privilege.

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[196] *Id.* at 996. The court held that "[t]he attorney-client privilege prevents a lawyer from being compelled to produce a client's document which pre-dates the attorney-client relationship only if the client himself would be privileged from producing the document. *Id.* The court relied on State ex rel. Hyder v. Superior Court of Maricopa County, 625 P.2d 316 (Ariz. 1981), MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, ch. 10 § 89, at 184-85 (2nd ed. 1972); and WIGMORE, EVIDENCE (McNaughton Rev. 1961) § 2307.

[197] The court further noted not all papers in an attorney's possession are immune under the privilege and writings not otherwise privileged do not become so by merely giving them to an attorney. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 396 (1976) and In re Ryder, 381 F.2d 713 (4th Cir. 1967).

[198] *Rhea*, *supra* note 80, at 996.

[199] *Id.* at 995.

[200] 33 M.J. 413 (C.M.A. 1991).

[201] *Id.* at 419. The court held, "defense counsel [are] not free to tell the prosecution how the calendar came into their possession, for to do so would violate [an accused's] privilege that his lawyer reveal the "communication" implicit in the act of bringing the calendar to the lawyer's office." *Id.*

[202] *Id.*

The second work-product case, *United States v. Province*,[203] is a Navy-Marine Corps Court of Criminal Appeals case. Marine Private First Class (PFC) Richard D. Province II was convicted on 9 April 1992 of two unauthorized absences pursuant to his pleas before a military judge sitting alone.[204] Three years later, PFC Province asserted that his trial defense counsel was ineffective by making an "unauthorized disclosure" of information to the prosecution. Specifically, trial defense counsel discovered a copy of PFC Province's "straggler's orders" (which he had received from his client) and provided them to the prosecution.[205] The "straggler's orders" had been issued by the Department of the Navy pursuant to a lawful instruction and not created by the defense counsel or his client.[206] The accused was originally charged with one specification of AWOL. Upon receipt of the "straggler's orders," the prosecution added an additional specification, and the accused pled guilty to both specifications. Ironically, the original specification was dismissed by the service court on other grounds, and only the additional charge remained to support the sentence.[207]

Applying the test articulated by the Supreme Court in *Strickland v. Washington*[208] the court rejected the ineffective assistance of counsel claim.[209] Discussing whether the "straggler's orders" constituted a confidential communication, the court noted that confidential disclosures, while generally privileged, are not absolute.[210] Significantly, the court also opined that "it is unlikely that documentary materials created by a Government agency are ever

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[203] *Province*, 42 M.J. 821, *supra* note 185.

[204] *Id.* at 823. The accused had been AWOL for five years, including the periods of Operations DESERT SHIELD and DESERT STORM; he was sentenced to a bad conduct discharge, confinement for ninety days, forfeiture of $100.00 pay per month for four months, and reduction to the lowest enlisted grade. *Id.*

[205] *Id.* Defense counsel explained, via affidavit, that his purpose in giving the trial counsel copies of the "straggler's orders" was two-fold: First, after consulting his state ethics rules, he believed he had a duty to release these documents in discovery. Second, he believed PFC Province's guilty plea providence inquiry would be confusing without the straggler's orders. The straggler's orders were produced by the accused's command. In the normal course of things, trial counsel would have provided them to the defense, but for some reason trial counsel did not have a copy of the orders in his records.

[206] *Id.* at 825. *See, e.g.*, Article 1127, United States Navy Regulations (14 September 1990).

[207] *Province*, *supra* note 185, at 825. Dismissal of the original charge was not an issue raised or granted during PFC Province's appeal to United States Court of Appeals for the Armed Forces. Nevertheless, the court, in dicta, expressed doubt about the lower court's rationale. 45 M.J. at 362 n.2.

[208] 466 U.S. 668, 687 (1984). To prevail on a claim of ineffective assistance of counsel, the claimant must demonstrate his counsel's performance was deficient and that this deficiency deprived him of his right to a fair trial. Specifically, appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

[209] *Province*, *supra* note 185, at 825.

[210] *Id.*, *citing* Fisher, *supra* note 197.

protected by the privilege."[211] The court held that the documents were therefore discoverable.[212]

The court then applied the ethics rules governing confidential communications between lawyer and client. Applying Navy Rule 1.6 of Judge Advocate General Instruction 5803.1 (26 October 1987),[213] the court recognized the long-standing rule of confidentiality for both communications and derivative work-product.[214] The court also noted the rules governing candor toward the tribunal. They held that: (1) the "straggler's orders" were discoverable, (2) the orders were not a work-product, and (3) hiding the existence of the orders from the tribunal would itself be unethical. The court also noted that if PFC Province prevailed on his claim, it would encourage defense counsel to "race the police to seize critical evidence."[215]

The United States Court of Appeals for the Armed Forces reviewed *Province* approximately two years later[216] and noted that the government should have already had the "straggler's orders" in their possession and implied a lack of due diligence on the part of trial counsel.[217] The court further held that the "straggler's orders" would only have been discoverable, if the prosecution had asked for them under RCM 701(b)(3).[218] Because the prosecution did not do this, the defense had no affirmative duty to disclose them. The court said the case "presented a close call," and that each case depended on its unique circumstances.[219] While affirming the findings and sentence, the court urged defense counsel to use caution in these situations and continue to seek guidance from state bar licensing authorities and through ex parte communications with the detailed military judge.

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[211] *Province*, 42 M.J. at 826, *citing* People v. Swearingen, 649 P.2d 1102, 1105 (Colo. 1982).
[212] *Province*, 42 M.J. at 826-27.
[213] Comparable to *Air Force Rule* 1.6.
[214] *Province*, *supra* note 185, at 826-27.
[215] *Id.* The court did not approve of the defense counsel's methods, however. It would have been preferable, in their view, to give the documents to the military judge, so the prosecution would not know their origins. PFC Province's defense counsel not only delivered the "straggler's orders" to the prosecution, but in doing so also revealed portions of his conversations with PFC Province to the prosecution. *Id.* at n.6.
[216] 45 M.J. 359 (1997).
[217] *Id.* at 363.
[218] *Id.*
[219] *Id.* As guidance, the court recommended the following cases: Cluchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985) (defense investigator required to turn over receipts that led to incriminating evidence because the agent removed the receipts from their resting place and thus could not claim attorney-client privilege); People v. Meredith, 631 P.2d 46 (Cal. 1981), (defense investigator required to turn over robbery/murder victim's wallet to police discovered as a result of client's confidential communication because investigator took possession of it rather than leaving it undisturbed); People v. Lee, 83 Cal. Rptr. 715 (Cal. Ct. App. 1970) (lawyer must turn over physical evidence of a crime to the prosecutors, the evidence itself is not privileged); and *see Rhea*, discussed *supra* note 80.

Some commentators have argued that physical evidence in the defense counsel's possession should be protected under the privilege in order to avoid a tension between the accused's constitutional rights.[220] However, in light of *Rhea* and *Province*, this is clearly *not* the law in military practice. Nonetheless, while physical evidence of a crime is generally not covered by the attorney-client privilege or the work-product doctrine, information relating to representation clearly is protected absent a court order to the contrary. Thus, even when counsel must make discovery of physical evidence, they should do so in a way calculated to least harm their client's interests.

6. Fifth Amendment Issues—Reporting a Missing Client

An instructive federal case regarding the duty to report the whereabouts of a missing client is *United States v. Del Carpio-Contrina*,[221] in which the district court held that, under certain circumstances, a lawyer is not obligated to tell the court that his client has "jumped bail." Mr. Del Carpio-Contrina was indicted by a grand jury on charges of conspiracy to possess cocaine, with intent to distribute. After his indictment, he bonded out. During this period, Mr. Del Carpio-Contrina was represented by an appointed counsel. He moved to substitute his appointed counsel for Mr. Joel DeFabio. The substitution was granted on 26 July 1989. Shortly after the substitution was granted, Mr. DeFabio, on several occasions, attempted to contact Mr. Del Carpio-Contrina. Mrs. Del Carpio-Contrina notified Mr. DeFabio that her husband had packed a suitcase and left the general area of their residence. On 1 September 1989, the court held a "calendar call." At no time prior to the calendar call did Mr. DeFabio relay information regarding his client's whereabouts to either the court or the prosecution. In fact, it was Mr. DeFabio's associate counsel—appearing on Mr. DeFabio's behalf—who notified the court of Mr. Del Carpio-Contrina's disappearance. The district court then ordered Mr. DeFabio to show cause why he failed to notify the court of his client's disappearance.[222] On 6 September 1989, Mr. DeFabio complied with the show cause order, stating he "was never certain of his client's failure to appear," and, "under both

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[220] *See* Michael B. Dashijian, Note, *Criminal Law: People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights* 70 CAL. L. REV. 1048, 1057-59 (1982) and Comment, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN L. REV. 977, 993 (1980).

[221] 733 F.Supp. 95 (S.D. Fla. 1990).

[222] *Id.* at 97. The court noted that in determining whether an ethical violation has occurred, one looks to the controlling ethical principles of the forum state for guidance. *Id.* Obviously, under Air Force practice, the *Air Force Rules* are the primary guidance, followed by the individual attorney's state rules. *See, e.g.*, TJAG Policy Number 26, ¶ 3, *supra* note 72. Federal courts have clear statutory authority to review the conduct of attorneys who practice before them. *See, e.g.*, Greer's Refuse Serv., Inc. v. Browning-Ferris Indus., 834 F.2d 443, 446 (11th Cir. 1988).

the attorney-client privilege and ethical rules governing attorneys, he had no duty to notify the court of his client's disappearance."[223]

The district court analyzed Florida attorney ethics rules to discern whether Mr. DeFabio had violated any standard of conduct. The court found that he had "in effect, walked a very fine line."[224] The district court noted, "it is admittedly difficult for a lawyer to know when the criminal intent will actually be carried out, for the client may have a change of mind."[225] The court also noted that a mere suspicion of criminal wrongdoing does not trump the ethics rules governing confidentiality.[226]

Finally, although the court held that Mr. DeFabio had an affirmative duty to notify the court of his client's status once it became clear his client had no intention of coming to trial, it declined to impose sanctions on Mr. DeFabio.[227] The court went on to stress that it is essential to the adversary system that a client's ability to communicate freely and in confidence be maintained inviolate.[228] It further emphasized when an attorney unnecessarily discloses the confidences of a client, the attorney creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation.[229] *Del Carpio-Contrina* thus appears to indicate that a defense counsel's information regarding the general whereabouts of his or her client is normally a matter of privileged information.

7. Choose Your Poison! An Impermissible Fifth and Sixth Amendment Tension?

In the trial of *United States v. Branker*,[230] the prosecution introduced defendant's statement in an earlier proceeding that his financial condition

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[223] *Id.* Of important note, Mr. DeFabio was represented by the National Association of Criminal Defense Lawyers and their official position was that defense counsel had no duty to notify a court of their client's whereabouts.

[224] *Id.* at 99. The court noted that the professional ethics committee opinion issued in this case found that a Florida attorney *did* have an affirmative duty to inform a court when his client jumps bail. However, Florida's professional ethics committee withdrew this opinion in 1989 upon receiving advice from the ABA. *Id.*

[225] *Id. citing* Fla. Rule 4-1.6, Comment.

[226] *Id. citing* Sanborn v. State, 474 So.2d 309, 313 n.2 (Fla. Dist. Ct. App. 1985). Moreover, the district court noted, federal and state courts have agreed that actual knowledge means at least a firm factual basis. *See, e.g.*, United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (hereinafter Wilcox), State v James, 739 P.2d 1161, 1169 (Wash. Dist. Ct. App. 1987), and Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989).

[227] *Del Carpio-Contrina, supra* note 221, at 99.

[228] *Id.*

[229] *Id*., *quoting* Wilcox, *supra* note 226, at 122.

[230] 418 F.2d 378 (2nd Cir. 1969) (*citing* Simmons v. United States, 390 U.S. 377 (1968) in which the Supreme Court stated that situations like this create "an undesirable tension" and that it found "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons*, 390 U.S. at 394).

required appointment of counsel.[231] The United States Court of Appeals for the Second Circuit held that, because the defendant's testimony used to secure his right to counsel was later used to convict him, an impermissible constitutional tension had been created.[232] Work-product doctrine aside, abrogating the attorney-client privilege by forcing a defense counsel to give incriminating evidence against his client, may likewise improperly force the accused to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against involuntary self-incrimination. Compelling an ADC to open her calendar to command scrutiny has much the same effect in certain cases, and makes the ADC less effective than her civilian counterparts.

We should be mindful that in the military environment the potential for this "impermissible tension" is even higher. The Supreme Court has called the military "a society apart."[233] We have higher standards and we live and work in an environment where obedience to orders is required and essential to our mission. Military defense counsel, attorneys as well as officers, are usually junior in grade to most commanders and the base SJA. It may be tempting for a senior officer to "order" an ADC to reveal details about his calendar. SJAs should discourage such temptations and encourage commanders to understand the reasons why such conduct is inimical to our system of military justice.

The clients of civilian defense counsel, by contrast, receive legal advice without fear that the fact of their visit to the attorney will be made public knowledge without their consent. No one will attempt to tell the civilian defense counsel that he "must" reveal details of his representation in violation of ethics rules and perhaps to the detriment of his client's interests. This leads to a discussion of important policy considerations for defense counsel, SJAs, and commanders in dealing with these issues.

D. Policy Considerations

For over twenty-five years, the Air Force Judge Advocate General's Department has stressed the importance of its Area Defense Counsel program, including the perception and reality that our defense services system is fair, free from command influence, and completely independent of the prosecution function. Indeed in 1994, on the 20th Anniversary of the Air Force Area Defense Counsel program, Major General Nolan Sklute, then-Air Force TJAG, emphasized the "critical role a truly independent defense program plays in the fair administration of military justice" and stressed that ADC's "must be able to ensure our system is fair and that it proves its fairness at every turn."[234] General Merrill A. McPeak, then-Air Force Chief of Staff also stated on that

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[231] *Id.* at 380-81.
[232] *Id. See also*, United States v. Anderson, 567 F.2d 839, 841-42 (8th Cir. 1977).
[233] Goldman v. Weinberger, 475 U.S. 503 (1986).
[234] Remarks delivered on occasion of 20th Anniversary of the Air Force Area Defense Counsel Program (1994) (videotape copy on file with THE AIR FORCE LAW REVIEW).

occasion that he "knew from first-hand experience that the Air Force provides superb legal defense services."[235] Of course, like all judge advocates, military defense counsel are Air Force officers first, subject to the Uniform Code of Military Justice, and responsible to live the Air Force Core Values of integrity, service, and excellence. Moreover, military defense counsel are uniquely able to serve their clients precisely because they are officers trained in military missions, customs, courtesies, and traditions.

The independence of the Air Force Area Defense Counsel function is recognized in a number of Air Force policy and regulatory documents. For example, TJAG Policy Number 24[236] requires coordination with the commander of Air Force Legal Services Agency (AFLSA/CC) whenever any government search of an ADC's office or a subpoena of a military defense counsel is being contemplated.[237] This policy makes it abundantly clear that the offices and records of the ADC are rightly viewed as having special status. It states, in pertinent part:

> In 1990, the ABA House of Delegates adopted an amendment to Rule 3.8 of the Model Rules of Professional Conduct. Rule 3.8(f) prohibits a prosecutor from seeking or issuing a subpoena to another lawyer to present evidence about a past or present client, unless the subpoena is "essential," and there is no other feasible alternative to obtain the information. Further, the rule requires the prosecutor to obtain prior judicial approval for the subpoena, after an opportunity for an adversarial proceeding.
> 2. In adopting the amendment to Rule 3.8, the ABA struck a chord familiar to those of us who are concerned about the administration of military justice. The Area Defense Counsel Program was established primarily to correct the perception (or misperception) among Air Force members that their detailed counsel could not zealously defend them, because "beating the prosecutor" would ruin the defense counsel's career. As we know, the Area Defense Counsel Program has been largely successful in putting to rest any fears about defense counsel independence. Because of this, and in light of the ABA's concerns, we must vigorously resist any unnecessary actions which could create a perception among service members that the attorney-client relationship can be breached, and confidences disclosed whenever "the legal office" wants them to be. [238]

TJAG Policy Number 28 further reinforces the independence of the military defense counsel by noting that the ADC Program

> is one of the great strengths of the Air Force military justice system and will continue to be so long as the defense function is, and is perceived to be,

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[235] *Id.*
[236] *Compelling Defense Counsel to Produce Evidence* (4 Feb. 1998), ¶¶ 1-2.
[237] AFLSA/CC is the commander of all Air Force defense counsel. *Id*. at ¶ 3.
[238] *Id.* An example of this coordination is found in United States v. Calhoun, 47 M.J. 520 (A.F.C.C.A. 1997) (reversing general court-martial's findings and sentence), *set aside and remanded*, 49 M.J. 485 (1998), *aff'd on f. rev.*, 1999 CCA LEXIS 166, ACM 32314 (A.F.C.C.A. 1999), *aff'd mem.*, 53 M.J. 48 (2000).

> independent. The military justice system is only as good as the independence and capability of the defense. The message of the importance of the defense must be stated frequently and sincerely.[239]

Air Force JAG Department training materials have also dealt with these issues. Advocacy Continuing Education (ACE) materials, published by the Air Force Legal Services Agency's Government Trial and Appellate Counsel Division in January 1995, point out that "prosecutors have been previously admonished to refrain from actively undermining the defense counsel attorney-client privilege and from coercing or cajoling a defense counsel into revealing confidences which are not authorized."[240] The policy also warns defense counsel not to reveal privileged confidences which may lead to prosecution or additional charges against a client: "If more charges are brought against an accused because of unauthorized disclosures by the defense counsel, the defense counsel may face an ethics violation claim, and the government may face an issue of ineffective assistance of counsel or incompetent evidence, both of which can reverse a conviction on appeal."[241] Finally, the materials state that, "trial counsel should not intentionally attempt to get a defense counsel to reveal confidential information. If more charges are brought against an accused because of unauthorized disclosures by the defense counsel, the defense counsel may very likely face an ineffective assistance of counsel complaint . . . no good end comes to the use of unauthorized disclosures of confidential information. It is better to recognize the issue up front and try to avoid it."[242]

As discussed above, if a defense counsel is called to be a witness against his client on charges stemming from a client's failure to go to, or promptly return from, the ADC office, he assists in incriminating his own client. This also creates a conflict of interest situation, where defense counsel will likely be forced to withdraw from the case. Even if this result is legally sound, an undesirable perception is created: "Johnny had a military lawyer. He missed an appointment at his lawyer's office. The lawyer quit and turned evidence against him for AWOL. You can't trust a military lawyer." This begs the questions: Is it really worth pursuing an "open calendar" policy for the ADC? Do such negative perceptions really balance the positive interests?

Ethical and evidentiary considerations aside, from a policy standpoint, if an ADC follows a base-wide "open skies" policy with respect to his appointment schedule, he may harm perceptions regarding his independence and give credence to the myth that the ADC is merely an extension of the

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[239] *The Area Defense Counsel Function* (4 Feb 1998), ¶ 1.
[240] Advocacy Continuing Education Program ACE Newsletter #7, Jan 1995, AFLSA/JAJG, https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JUSTICE/ACE/newsletters/NEWS9501.HTM (copy on file with THE AIR FORCE LAW REVIEW).
[241] *Id.*
[242] *Id.*

SJA's staff, who cannot be trusted with a client's confidences or to pursue his client's best interests. It is a fundamental tenet of our profession that many clients, especially criminal suspects, wish the fact that they have consulted with defense attorneys to be kept confidential. This is particularly true of those clients making initial visits to a defense counsel for advice about an undiscovered offense or who are worried that they may be about to commit an offense and want professional legal advice and counsel.

By contrast, Air Force Rule 1.13 demands that confidences received by SJAs from commanders must be treated as privileged to the greatest extent allowed by law. An SJA would quickly lose the confidence of his wing commander, if he was found to have "loose lips." There are, of course, exceptions to the rule, when the commander wants to pursue a course which is contrary to the interests of the SJA's "real client," the Air Force. By contrast, the ADC has an even greater duty of confidentiality, as his is a traditional client, whom he is bound to represent "with courage and devotion, to the utmost of his learning and ability, and according to the law"[243] and who qualifies, without reservation for the full protections of the attorney-client privilege, in both its ethical and evidentiary forms.

This analysis is certainly not intended to imply that an ADC should permit his office to be used as a convenient excuse for clients to skip duty. ADC's should actively *discourage* this practice to assist clients in avoiding additional legal entanglements, such as those discussed above, and to maintain credibility with command. Likewise, the ADC should obviously never lie about whether a client visited his office. A bright line policy of refusing to give any information regarding representation without client consent or court order is both prudent and required by the Air Force Rules and Standards. Of course, as the Air Force Court of Criminal Appeals pointed out in *Rogers*,

> defense counsel must understand that actions have consequences. We are still a military organization, and a commander has a right, even a duty, to know where his troops are. Counsel should not be surprised, therefore, that a commander who cannot confirm the whereabouts of a subordinate with a penchant for disappearing, feels compelled to take sterner measures to insure that the subordinate returns to duty in a timely fashion, or that a commander requires defense counsel to meet with a client inside the confinement facility instead of at the attorney's office.[244]

Defense counsel would be well advised to explain the significance of this ruling to Houdini-like clients with "a penchant for disappearing."[245]

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[243] *See supra* note 72, *Air Force Standard* 4-1.1 (*Role of Defense Counsel*).
[244] *Rogers*, *supra* note 139, at 818.
[245] *Id.* at 819 (The court held that there was no Article 13, UCMJ (10 U.S.C. § 813 (2000) violation of unlawful pretrial punishment where a commander imposed additional restrictions, including escorts, whenever the accused left his place of duty.).

E. Summary

Information relating to representation of a military client and the confidences of that client, including his whereabouts, are matters which are broadly protected by the Air Force Rules and state rules of professional conduct, and to a lesser extent, by Military Rule of Evidence 502 and case law. When the attorney-client privilege is abrogated, it raises constitutional issues under both the Fifth and Sixth Amendments. An accused's whereabouts is, absent the fraud exception, covered by the attorney-client privilege. Violation of the privilege forces an accused to chose between his Fifth and Sixth Amendment rights, creating an impermissible constitutional tension, and contravening long-standing common law norms.

The Air Force Area Defense Counsel Program is a model of independence, integrity, and outstanding service to clients. Proper respect for the attorney-client privilege will help keep it that way. All of those engaged in the practice of military criminal justice would do well to heed the Supreme Court's hoary, but venerable admonition against trammeling the rights of an accused:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[246]

As noted at the beginning of this article, the attorney-client privilege is at the very core of our profession—it is a fundamental tenet of our profession that a client's confidences and information relating to a client's representation are safe with his attorney and will be shielded by law from the prying eyes of the prosecution and others hostile to a client's interests. This privilege is central to maintaining the public trust in our profession. The privilege is perhaps even more important in military criminal practice. As good as our system of military justice is, it still suffers from some largely false perceptions about unlawful command influence, confusion about the area defense counsel's chain of command, and a tendency to view the SJA as chief prosecutor on the installation, rather than as the officer entrusted with administering justice fairly and efficiently across the installation. If a military member's decision to seek the advice of defense counsel is routinely revealed to representatives of

[246] Berger v. United States, 295 U.S. 78, 88 (1935).

command, and if defense counsel are called upon to testify against their current and former clients in any but the most extraordinary cases, then perceptions, and perhaps reality, will be heading in the wrong direction. Part of our mission must be to strive to assure that representation by military defense counsel carries the same benefits incident to attorney-client privilege available from the civilian defense bar.

Air Force defense counsel have worked hard for over twenty-five years to maintain the independence of their offices. SJAs should support their ADCs in this effort and discourage subordinate judge advocates and others on base from routinely taking actions which may cause the independence of the ADC to come into question. There are few military cases that address the issue, but the discussion in this article will undoubtedly add substance to the debate.

V. GENERAL MILITARY PRACTICE: RECOGNIZING AND HANDLING ATTORNEY-CLIENT PRIVILEGE CONFLICTS OF INTEREST

"Whenever you wish to do anything against the law, Cicely, always consult a good solicitor first."[247]

This section deals with the attorney-client privilege in the general practice of military law. Its focus is primarily on dealing with conflicts of interest which may arise from the many "hats" a military attorney wears as legal adviser to command, claims officer, legal assistance attorney, government ethics counselor, and trial and defense counsel, among others. Our manifold practice is unique in the law and presents many conflict of interest situations unknown to civilian practitioners. For example, a county or state district attorney does not normally see clients regarding private, civil law matters, and thus rarely has to consider whether his office might prosecute one of his clients at some future point.

Also, while legal assistance is a free service for military members, dependents, and retirees (some of whom are also civilian government

[247] GEORGE BERNARD SHAW, Sir Howard, in *Captain Brassbound's Conversion*, act 1. THE COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 82.

employees), rules of professional conduct and representation standards still apply to these consultations. They are "real" attorney-client relationships. Some of these same clients may later file grievances, complaints, or lawsuits against the Air Force, or themselves be the subjects of investigation or disciplinary proceedings. The same legal office which advised these clients in the first instance may then be assigned to defend the interests of the Air Force or prosecute criminal charges against them for alleged criminal acts. Next, this article will explore some of the more common conflict of interest situations in military practice; examine the interplay of these situations and the attorney-client privilege; and, examine solutions available under various policy-level rules, statutes, and case law.

A. The Air Force as Client

In daily practice, most Air Force attorneys are assigned to represent the Air Force through its authorized officials.[248] Providing personal legal assistance or acting as detailed or individual military defense counsel (where the attorney has a traditional "human" client with full attorney-client privilege) is the exception, rather than the rule.[249] Sometimes confusion arises when government officials and individual military members seek advice from "the JAG" on a variety of official matters. These "clients" may view the judge advocate as their personal legal adviser for all matters, personal and professional, and believe that all communications made to the attorney are always covered by the attorney-client privilege, and will thus be kept confidential.

While many statements made between or among government officials and government attorneys do qualify as privileged communications,[250] government attorneys are assigned to provide legal advice to government officials only on official matters, and are more analogous to corporate attorneys who represent the corporation as opposed to any one of its officers.[251] Government officials lose the protection of the attorney-client privilege when the communication in question clearly contemplates "the future commission of a fraud or crime."[252] Additionally, when an official "is acting, intends to act or refuses to act in an official matter in a way that is either a violation of the person's legal obligations to the Air Force or a violation of law

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[248] *See generally*, *supra* note 72, *Air Force Rule* 1.13 (*The Air Force as Client*) (4 Feb 1998).
[249] *Id.* at *Air Force Rule* 1.13(f).
[250] For example, in the military justice context, MIL. R. EVID. 502(a) protects these exchanges as long as the communication is both confidential and "made for purpose of facilitating the rendition of professional legal services to the client."
[251] *See* 1 GILLIGAN AND LEDERER, *supra* note 52, § 5-53.00.
[252] MIL. R. EVID. 502(d)(1).

which might reasonably be imputed to the Air Force," the lawyer must act in the best interest of the Air Force.[253]

In these situations, the attorney must initially make clear to the official that the Air Force is his true client and that his first duty is to the organization, not the individual official.[254] Once that is made clear to the official, however, the attorney must "take measures to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."[255] However, in no event may the attorney participate or assist in illegal activity, even if ordered to do so by a superior officer.[256] Of course, most commanders and other government officials readily accept the advice of their military attorneys, and are content to accomplish the mission within the bounds of the law. In these more common situations, military attorneys must guard the confidences of their government-official "clients" to the largest extent allowed by law, in order to maintain the confidence of these officials and the interests of the Air Force.[257]

B. The Role of the Legal Assistance Attorney

1. Background and Policies

Legal assistance entails providing legal advice to service members, their dependents, and other entitled persons on limited civil law matters, such as wills, powers of attorney, domestic relations, debtor and creditor problems, landlord-tenant issues, etc. The scope of Air Force legal assistance is limited by regulation.[258] In most cases, the advice and representation is limited to matters which do not require representation in civilian court, and which do not qualify as matters within the charter of the ADC. Legal assistance services, while broad, do not extend to making claims against the United States, adverse administrative actions against the client, or criminal matters of any kind.[259] The limited scope of these representations, however, does not limit the scope

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[253] *See Air Force Rule* 1.13, *supra* note 72 and discussion.
[254] *Id.* at *Air Force Rule* 1.13(d).
[255] *Id.* at *Air Force Rule* 1.13(b). The rule provides extraordinary and progressive measures to be taken before an official's confidences may be revealed, including, but not limited to: (1) advising the client that the action, planned action or refusal to act is contrary to law or regulation, (2) advising the person of Air Force policy on the matter, (3) advising the person that his or her personal legal and professional interests are at risk, (4) asking the person to reconsider, (5) suggesting a separate legal opinion, (6) advising the person that the lawyer is ethically obligated to preserve the interests of the Air Force, (7) consulting with senior Air Force lawyers, (8) seeking the assistance of lawyers at the same or a higher level of command to discuss available options to avoid violation of the law by the Air Force.
[256] *Id.* at *Air Force Rule* 1.13(c).
[257] *Id.*
[258] *See* AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (1 May 1996), ¶ 1.2.1.
[259] *Id.*

of the attorney-client privilege. The program provides clients an invaluable service they may not otherwise be able to afford. For the Air Force, legal assistance serves as both a preventive law program and a means for ensuring combat readiness. It is a critical morale and readiness program. As the cases below show, the attorney-client privilege applies fully to confidences given to legal assistance attorneys, including confidences taken *in violation of* policies limiting the scope of legal assistance. This is important to maintaining client confidence in the program.

Legal assistance attorneys should direct clients to an area defense counsel when they realize the servicemember is making an inculpatory statement likely to end up in some type of disciplinary action against the individual. Air Force policy regarding the scope of legal assistance and its relationship to the attorney-client privilege is regulated by Air Force Instruction 51-504 and TJAG Policy Number 18. The latter specifies:

> The legal assistance officer is prohibited from receiving confidences in any case in which the person requesting assistance is, or probably will be, the subject of military or civilian criminal action or other military disciplinary action. In such cases, the judge advocate is limited to assisting the individual to obtain civilian or proper military counsel. In cases where the person seeking legal assistance is or may be the subject of court-martial charges, other disciplinary action, or adverse personnel action (discharge, promotion delay, etc.), such person should be referred to the staff judge advocate or area defense counsel. Referral to the staff judge advocate is not required if the judge advocate being consulted is a circuit defense or area defense counsel.[260]

AFI 51-504 further defines the scope of permissible legal assistance:

> **1.2. Scope.** Legal assistance consists of providing advice on personal, civil legal problems to eligible beneficiaries. For any other legal concern, the Air Force remains the client. On such matters, do not provide advice to or enter into an attorney-client relationship with individuals.
> 1.2.1 Limits.
> Do not enter into an attorney-client relationship on these issues:
> • Issues involving personal commercial enterprises (unless such advice is related to the Soldiers' and Sailors' Civil Relief Act [SSCRA]).
> • Criminal issues under the Uniform Code of Military Justice (UCMJ) or any state or federal criminal law.
> • Standards of conduct issues.
> • Law of armed conflict issues.
> • Official matters in which the Air Force has an interest or is involved in the final resolution.
> • Legal issues or concerns raised on behalf of another person, even if the other person is eligible for legal assistance.
> • Drafting or reviewing real estate sales or closing documents, separation agreements or divorce decrees, and inter vivos trusts. If the SJA

[260] TJAG Policy Number 18, ¶ 2(b) (4 Feb 1998).

> determines that an attorney in the office, whether active duty or reservist, has the expertise to draft or review these documents, then the SJA may authorize that attorney to do so.
> • Representation of the client in a court or administrative proceeding.[261]

These policies and regulatory rules cover situations where an accused, or potential accused, is known and identified by the legal assistance attorney or screening personnel prior to formation of the attorney-client relationship. Despite these policies, legal assistance and screening personnel do not always immediately recognize potentially conflicted clients or problems which exceed the scope of legal assistance. Many clients are understandably reluctant to say *anything* of substance about their legal problems until the door to the attorney's office is closed and the consultation has started. Thus, proper referral to the ADC or other agencies does not always occur before the point at which a client might reasonably believe an attorney-client relationship has been formed. Additionally, situations arise where a sudden, unexpected criminal admission is made during an otherwise permitted attorney-client consultation. There are also cases where the legal assistance attorney later learns that her client has become an accused, and discovers that the criminal matter is substantially related to the civil matter about which the member previously consulted the attorney.

These situations present issues of attorney-client privilege and conflicts of interest. Can the legal assistance attorney be called to testify against an accused client? What about acting as trial counsel at the accused's court-martial? These questions are explored below.

It is clear that attorneys providing legal assistance are bound by the Air Force Rules of Professional Conduct and that the attorney-client privilege applies to these consultations. AFI 51-504 explicitly acknowledges this:

> **1.6. Ethical Responsibilities and Rules.** SJAs administer the legal assistance program in strict compliance with the *Air Force Rules of Professional Responsibility*.
> 1.6.1. Only attorneys give legal advice.
> 1.6.2. Information received from a client during legal assistance, attorney work-products, and documents relating to the client are legally confidential. Release them only with the client's express permission, pursuant to a court order, or as otherwise permitted by the *Air Force Rules of Professional Responsibility*.
> 1.6.3. Judge advocates and civilian attorneys who perform legal assistance must have private offices.
> 1.6.4. Legal assistance attorneys must avoid creating the impression that they represent the Air Force's interests in resolving the client's concerns or that the Air Force has an interest in the outcome of the matter. When writing letters on a client's behalf, do not use Air Force letterhead. Include a statement in the letter making it clear the Air Force does not represent the client in resolving the matter.

[261] AFI 51-504, *supra* note 258.

> 1.6.5. Legal assistance attorneys may not interfere with an existing attorney-client relationship.[262]

2. Conflicts Generally–Representation Adverse to Former Client

In *Kevlik v. Goldstein*,[263] a case which has been favorably cited by a number of military courts, the United States Court of Appeals for the First Circuit held that trial judges have a duty to supervise the conduct of attorneys appearing before them in matters affecting the preservation of client confidences.[264] The Kevliks were plaintiffs in a civil suit against the Town of Derry, New Hampshire. The case arose out of allegations of police brutality. In November 1980, James Kevlik was stopped for drunk driving while traveling through Derry. He was not ultimately charged with drunk driving, but he and his passengers, Jan Kevlik and John Southmayd, were arrested, allegedly beaten by the Derry police, and allegedly denied proper medical care. The Kevliks and Southmayd were charged with assault and resisting arrest, and all were acquitted.[265]

Southmayd had consulted an attorney named Robert McNamara about his criminal case, who took his confidences, made one court appearance, and then withdrew from the case, informing Southmayd that he had a conflict of interest, since he also represented the Derry Police Department's insurer. At the conclusion of his criminal case, Southmayd obtained other counsel and successfully and independently of the Kevliks subsequently settled his civil claim against the Town of Derry without filing suit. The Kevliks filed suit against the Town of Derry, and McNamara's firm represented the defendant town. The Kevliks moved to disqualify McNamara's firm, because they were privy to privileged attorney-client information from Southmayd, a key plaintiff's witness.[266]

The court held that, despite its withdrawal from Southmayd's case, an attorney-client privilege still existed between Southmayd and McNamara's law firm. It found that these conflicting representations were a violation of the Model Code of Professional Responsibility, and upheld the district court's decision to disqualify McNamara's firm. The court reminds us of the basic rule that, "an attorney should be disqualified from opposing a former client if,

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[262] *Id.* at ¶ 1.6.
[263] 724 F.2d 844 (1st Cir. 1984).
[264] *Id*. at 847. Military judges have the same duty regarding the conduct of attorneys appearing in courts-martial. *See, e.g., Rhea, supra* note 80, at 994-995; *see generally*, United States v. Ramos, 42 M.J. 392, 396 (C.M.A. 1995) and United States v. Greaves, 46 M.J. 133, 139 (1997) (addressing the inherent authority of the military judge to control the conduct of a court-martial).
[265] 724 F.2d at 845-846.
[266] *Id.*

during his representation of that client, he obtained information relevant to the controversy at hand."[267]

While the primary issue in *Kevlik* was compromise of the attorney-client privilege, the case also raised the issue of the "one-firm" rule, applicable in most civilian jurisdictions, which imputes knowledge of attorney-client privilege information to every member of a law firm, and thus prevents *any* member of a law firm from representing a client with interests adverse to those of any other client represented by the firm.[268] The rule is *not* applied in Air Force practice. Air Force Rule 1.10, *Imputed Disqualification*, states: "Air Force attorneys who work in the same military law office are *not automatically disqualified* from representing a client even if other Air Force attorneys in that office would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."[269] However, as in *Kevlik*, all attorneys, including military counsel are prohibited from representing clients with interests adverse to those of a former client in the same or a substantially related matter.[270] In the following case, we see a Marine defense counsel push the conflicts envelope to its outermost edges as he *prosecutes* a former client on the same matter for which he earlier delivered "counseling" to the accused. While not strictly a legal assistance situation, it is closely analogous.

3. The Legal Assistance Attorney as Prosecutor

In *United States v. Hustwit*,[271] Marine Private (PVT) Glenn Hustwit was both advised by and later prosecuted by, the same counsel on the same matters. Private Hustwit sought advice from Captain Foreman, a Marine Corps defense counsel, regarding a pending nonjudicial punishment action for a number of AWOL offenses under Article 86, UCMJ.[272] Both PVT Hustwit and Captain Foreman provided affidavits to the Navy-Marine Court of Military Review indicating that no substantive discussions took place regarding the nonjudicial punishment. PVT Hustwit claimed, however, and the court found as fact, that PVT Hustwit additionally told Captain Foreman that the Naval Criminal Investigative Service (NCIS) was looking for him in connection with an ATM card theft.[273]

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[267] *Id.* at 850.
[268] *See, e.g.*, American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1128-29 (5th Cir. 1971).
[269] *Air Force Rule* 1.10. The other rules cited deal with various forms of conflict of interest.
[270] *Id.* at *Air Force Rule* 1.7.
[271] 33 M.J. 608 (N.M.C.M.R. 1991).
[272] 10 U.S.C. § 886 (2000).
[273] *Id.* at 610. According to PVT Hustwit, Captain Foreman advised him not to speak with any NCIS agents, and told him they would meet again later. This second meeting never occurred. *Id.*

Ultimately, PVT Hustwit was taken to a special court-martial on charges of AWOL and larceny,[274] and Captain Foreman turned up not to *defend*, but to *prosecute* him. When PVT Hustwit informed his defense counsel about the prior consultation with Captain Foreman, he told PVT Hustwit "not to worry about it" and his defense counsel did not raise the issue at trial.[275] The court held that the issue was waived during trial, and that no substantial relationship existed between Captain Foreman and PVT Hustwit. While many might disagree with the court's decision in the case, at least on grounds of perception, the opinion includes a thorough discussion of the rules applicable to such cases.[276]

As the opinion correctly points out, "an attorney-client relationship is formed when a service member obtains legal advice of any kind from an individual representing himself as a legal advisor."[277] This attorney-client relationship and the ethical duty to maintain client confidences remains intact *even if the attorney has violated the orders of superiors to limit the scope of the representation*, and thereby subjects himself to discipline.[278] The court also points out that once a confidential relationship exists, the attorney may not act in any manner inconsistent with the client's interests.[279] The court then cites precedent for resolving such cases:

> The critical inquiry. . . centers normally . . . on the possibility that the accused may be prejudiced by the presence of a personal interest in the outcome of the case on the part of the prosecutor, or the latter's possession of privileged information or an intimate knowledge of the facts by reason of a professional relationship with the accused. If—after a consideration of all the circumstances—possibility of prejudice may be said to exist, the prosecutor must be disqualified.[280]

The *Hustwit* Court ultimately held that "the practicalities inherent in normal military lawyer assignment rotation without a showing of specific prejudice (particularly when the appearance of conflict is recognized and then waived), militate against a per se rule of disqualification when it is not required in the interests of military justice."[281] The court found that the accused was not prejudiced, because Captain Foreman "did not acquire any confidential

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[274] 10 U.S.C. § 921 (2000), art. 121, UCMJ.
[275] *Hustwit*, *supra*, note 270, at 610-611.
[276] *Id.* at 612-16. These rules essentially form a three pronged test: The accused must prove: (1) a former relationship; (2) a substantial relationship between the subject matter of the former representation and the issues of the subsequent case; and, (3) prejudice to the accused in the form of later adverse employment against the accused.
[277] *Id.* at 612.
[278] *Id.* at 612-13.
[279] *Id.* at 613.
[280] *Id.* at 615, *citing* United States v. Stringer, 16 C.M.R. 68 (C.M.A. 1954).
[281] *Hustwit*, 33 M.J. at 615.

information."[282] The record was void of any evidence that PVT Hustwit's prior consultation with Captain Foreman adversely affected his interests or provided an advantage to the government. The court also found that, even under a per se disqualification standard, the accused had waived the issue by bringing it to the attention of his defense counsel and later stating on the record that he was satisfied with his defense counsel. The court presumed that he would have expressed dissatisfaction had he been concerned with his counsel's instructions "not to worry about" his perceived conflict of interest with Captain Foreman.

While *Hustwit* involved only military justice matters, it is still instructive for legal assistance attorneys who need to be constantly vigilant to warn clients up-front as to the scope of legal assistance and to avoid accepting confidences relating to criminal matters.

4. The Legal Assistance Attorney as Witness

There are no reported military cases of a legal assistance attorney being called as a witness against a former client. *Hustwit* is closely analogous, as is *United States v. Rust*[283] discussed below, which involves a claims officer's investigation, rather then a traditional legal assistance consultation. The simple rule is that legal assistance visits are attorney-client consultations, and consistent with rules cited throughout this article, the confidences of those clients must be kept confidential. As the article has noted, these confidences are protected even if the attorney takes them in violation of the established scope of legal assistance.[284] The attorney must keep them confidential even if it means he will be disciplined for taking them in the first place.[285] As the analysis and examples showed earlier in Part III of the article, if a legal assistance attorney improperly divulges confidential information to the prosecution, he could severely damage the government's case or even preclude prosecution of the accused.[286] At the very least, such disclosures greatly complicate the case, and the attorney may subject himself to discipline, perhaps even disbarment, for this most serious of ethics violations.

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[282] *Id*. at 613. The court apparently did not find the accused's revelation that he knew NCIS was looking for him amounted to a "confidence," even though it was arguably related to his unauthorized absences.

[283] 38 M.J. 726 (A.F.C.M.R. 1993) (Dr. Rust was originally sentenced to a dismissal, a $5000.00 fine, and a reprimand), *aff'd on other grounds and reh'g granted*, 41 M.J. 472 (1995)) (The United States Court of Appeals for the Armed Forces affirmed the lower court's finding of prejudicial error by the military judge during the original sentencing hearing and upheld their order for a rehearing), *aff'd on f.rev*, 1996 CCA LEXIS 275 (ACM 29629) (1996) (at the rehearing on sentence, Dr. Rust received a fine of $5000.00 and a reprimand), *aff'd mem.* 48 M.J. 5 (1997).

[284] *See, e.g.*, *Hustwit*, *supra* note 270.

[285] *Id*.

[286] *See* Part III, *supra*.

In *United States v. Gandy*,[287] the Air Force Court of Military Review stated the basic premise that "lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony 'can be avoided consonant with the end of obtaining justice.'"[288] The court also noted, "this does not mean that one who formerly represented one of the parties to the litigation is thereafter disqualified as a witness."[289]

This makes the point that not every consultation conflicts the attorney from ever testifying against a former client. Aside from the usual exceptions (fraud, future crime, etc.) to the attorney-client privilege rule discussed throughout this article, if the matter is unrelated to the previous representation, the attorney may be called as a witness or may even prosecute the accused. However, this situation should be avoided wherever possible because of the appearance of conflict it creates: "Last week he did my will; this week he's going to bury me!"

C. The Role of Ethics Counselor

Judge advocates are regularly assigned to function as ethics counselors under various provisions of the Joint Ethics Regulation (JER), which is the "single source of standards of ethical conduct and ethics guidance, including direction in the areas of financial and employment disclosure systems, post-employment rules, enforcement, and training."[290] This function is *not* a traditional legal assistance function. Ethics counselors represent the government, not the member or employee, and they may *not* form attorney-client relationships during these counseling sessions. Many ethics counseling "clients" do not understand this distinction, however, as *United States v. Schaltenbrand*,[291] a federal criminal case, demonstrates.

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[287] 26 C.M.R. 135 (C.M.A. 1958).
[288] *Id.* at 357, *citing* United States v. Alu, 246 F.2d 29 (2d Cir. 1957).
[289] *Id.*, *citing* United States v. Steiner, 134 F.2d 931 (5th Cir. 1943) and WHARTON, CRIMINAL EVIDENCE § 809 (2d ed.). Wharton noted:

> An attorney may be examined like any other witness concerning a fact that he knew before he was employed in his professional character, as when he was a party to a particular transaction, or as to any other collateral fact which he might have known without being engaged professionally. . . . The privilege does not extend to knowledge possessed by the attorney which he obtained relative to matters as to which he had not been consulted professionally by his client, or to information that the attorney has received from other sources, although his client may have given him the same information.

Id.
[290] JOINT ETHICS REGULATION, DEPARTMENT OF DEFENSE 5500.7-R, through Change 4, August 6, 1998, at ¶¶ 1-100 *et seq.* (Before the JER came into existence, Air Force Regulation 30-30, *Standards of Conduct*, covered this area.).
[291] 930 F.2d 1554 (11th Cir. 1991).

Eugene Schaltenbrand, a Colonel in the Air Force Reserve, was convicted in federal district court of violating 18 U.S.C. Section 208(a),[292] which prohibits federal employees from working on projects in which they have a financial interest,[293] and of violating 18 U.S.C. Section 207(b), which prohibits former federal employees from representing private parties before the government on matters they previously worked on for the government.[294]

Between February and May 1987, Colonel Schaltenbrand was brought on active duty nine times for "short periods of duty."[295] During this period and while on active duty status, he traveled to Peru and Mexico to conduct site surveys for C-130 aircraft.[296] He also sought retirement employment with a private contractor, Teledyne Brown Engineering (TBE).[297] TBE officials expressed interest in hiring him but cautioned him to discuss with the Air Force any potential conflicts of interest "which might arise."[298] On 21 September 1987, TBE offered Colonel Schaltenbrand a job.[299]

On 24 September 1987, Colonel Schaltenbrand went to an Air Force legal office for "legal assistance."[300] He filled out a standard legal assistance questionnaire which indicated his discussions during legal assistance were protected by the attorney-client privilege. He then met with two "legal assistance attorneys" from the base office and they engaged in an hour-long discussion. However, the attorneys indicated to Colonel Schaltenbrand they could not answer questions regarding conflict of interest issues because they were representatives of the government and instead handed him printed materials on conflicts of interest issues. One day later, Colonel Schaltenbrand accepted TBE's employment offer. He continued to participate in active duty recalls during the time of his employment with TBE.[301]

Ultimately, his employment activities led to a criminal investigation in which the two attorneys who had counseled him explained to investigators the nature and specifics of their meeting with Colonel Schaltenbrand. No consent was ever given to have the two attorneys disclose any information from their meeting. During an evidentiary hearing, Colonel Schaltenbrand's defense attorneys attempted to suppress any evidence derived from the unauthorized disclosures. Their motion was denied and he was convicted, in part, based on the testimony of the two ethics counselors *cum* "legal assistance" attorneys.[302]

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[292] *Id*. at 1556.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.* at 1557.
[298] *Id.* (Sometime before May 1987, Colonel Schaltenbrand sent his resume to TBE.).
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.* The district court ruled that the communications between the defendant and the legal assistance attorneys were not confidential because one of the legal assistance attorneys testified

On appeal, the circuit court applied the black letter law of attorney-client privilege. The opinion noted that the party invoking the privilege has the burden of proving that: (1) an attorney-client relationship existed, (2) the particular communications were intended to be confidential,[303] (3) the communications were made for the purpose of obtaining legal advice or assistance,[304] and, (4) "the key question in determining the existence of a privileged communication is whether the client reasonably understood the conference to be confidential."[305]

Applying this test, the court found that he intended to make his communications to the two "legal assistance" attorneys confidential and for the purpose of securing legal advice.[306] The government argued that because the defendant was informed that the two legal assistance attorneys were *also* ethics counselors for the Air Force, he should have been aware his disclosures were not confidential.[307] Rejecting the government's argument, the court reasoned that non-lawyers are generally unable to delineate when a legal assistance attorney is no longer acting in the capacity of a legal assistance attorney.[308] More importantly, the court recognized that the type of "hair splitting" envisaged by the government would "inhibit [service members] from seeking the advice of JAG attorneys in order to avoid conflicts of interest."[309] In light of this holding, wise SJAs will make sure ethics counseling customers are taken in separately from legal assistance clients, and that very clear explanations are given regarding the purpose of the counseling, that the counselor is not acting as a legal assistance attorney, and that the conversation is not privileged.

D. The Role of Claims Officer

As in the *Schaltenbrand* case, the court's analysis in *Kevlik* (regarding when an attorney-client relationship is formed) was ultimately adopted by the United States Court of Appeals for the Armed Forces in *United States v. Rust.*[310] An examination of the *Rust* decisions is particularly useful to those wrestling with issues of privilege as it combines elements of military justice, claims, and legal assistance—showing how the lines may quickly become blurred in the eyes of the "client," and modeling, through the professional

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he noted to the defendant the attorney's status as a Deputy Counselor rather than as a legal assistance attorney for matters of conflict of interest.

[303] *Id.* at 1562, *citing* In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1575 (1lth Cir. 1983).

[304] 930 F.2d. at 1562, *citing* United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973).

[305] 930 F.2d. at 1562, *citing* Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984).

[306] 930 F.2d. at 1563.

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] *Rust*, *supra* note 283, 41 M.J. 472.

actions of the claims officer in the case, the correct way to handle such situations. The case also makes the point that a claims officer represents the government and not any individual claimant, witness, and tortfeasor when investigating and settling claims. As long as he makes this clear, then the attorney-client privilege does not come into play.

While several cases discuss the duration and scope of the attorney-client relationship, few actually delineate how the relationship is formed. As noted throughout this article, some authorities hold that the relationship comes into being when confidences are accepted, and when the client honestly (but not necessarily reasonably) believes and that he has formed an attorney-client relationship and that his confidences will be kept. This subjective standard has not received wide acceptance, and most military and federal courts apply an objective, "reasonable belief" test, as the court did in *Rust*.

The pertinent facts of *Rust* are as follows: Major (Dr.) Rust worked at the Castle Air Force Base hospital as the base obstetrician.[311] When a pregnant hospital patient visiting another doctor complained of vaginal bleeding, the other doctor sought advice from Dr. Rust. Dr. Rust advised his colleague to prescribe bed rest and that the patient should return to the hospital if she had any further complaints. The patient returned to the hospital the following evening and spoke over the telephone to Dr. Rust. In a written statement, Dr. Rust said that he advised the patient to remain at the hospital but she refused. Ultimately, the patient left the hospital, went into premature labor, and lost the baby. To complicate matters further, within a few days, the patient was killed by her boyfriend (the baby's father) who then committed suicide himself, apparently in a joint suicide plan.[312]

During the ensuing claims investigation, Dr. Rust was contacted by the Castle Air Force Base claims officer. He advised Dr. Rust that, "he was the hospital's lawyer," and not Dr. Rust's lawyer. Significantly, he also informed Dr. Rust that his report would be sent to a number of other reviewing authorities.[313] Prior to their meeting, Dr. Rust made a handwritten statement detailing his involvement with the patient in question and subsequently gave the statement to the claims officer during their meeting. Later, the accused was tried for dereliction of duty[314] and false official statement,[315] and found guilty of both charges. The note given to the claims officer was the basis for Dr. Rust's false official statement conviction. It was also useful to the prosecution because it contradicted other testimony given by the accused. The statement's

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[311] *Id.* at 472-473.
[312] *Id.*
[313] *Id.* The claims officer had indicated to Dr. Rust that he was "basically the hospital's attorney" and that he represented the Air Force. The claims officer also indicated to Dr. Rust that if a medical malpractice suit were to arise, the United States Attorney would move to replace the United States as the defendant vice Dr. Rust.
[314] 10 U.S.C. § 892 (2000), art. 92, UCMJ.
[315] 10 U.S.C. § 907 (2000), art. 107, UCMJ.

admission was contested on appeal as protected under the attorney-client privilege.[316]

The Air Force Court of Military Review, in a brief analysis, concluded that Dr. Rust's written statement given to the claims officer was not protected by the attorney-client privilege.[317] The court cited *United States v. Henson* for the proposition that, while the test to determine the existence of the relationship is examined from the would-be client's point of view, the belief must be reasonable.[318] The court found that Dr. Rust's belief that he had an attorney-client relationship with the base claims officer was unreasonable.[319]

The United States Court of Appeals for the Armed Forces affirmed the Air Force Court's decision but provided a more detailed analysis. Relying on both *Schaltenbrand* and *Kevlik,* the court acknowledged that the party invoking the attorney-client privilege has the "burden of proving that a relationship existed and that the communications [in question] were confidential"[320] The court also held that the pivotal question is whether the client reasonably understood the communication to be confidential. Noting that any questions of doubt as to the existence of the privilege should be resolved in favor of the accused, the court held that there was no attorney-client relationship. Dr. Rust should reasonably have understood that the claims officer was *not* providing him with personal legal assistance, but rather, investigating on behalf of the United States. It was also clear that these communications were not intended to be kept confidential, because the accused knew that any information he gave would be passed on to other military authorities via the claims officer's report.[321] Thus, the court had little trouble holding that no attorney-client privilege existed.

E. Summary

The case law, regulatory, and policy guidance cited within this article is applicable to all Air Force attorneys, military and civilian, in all of their various roles as advocates, advisers, and counselors. However, general practitioners, primarily at installation-level legal offices must be particularly vigilant about avoiding conflicts of interest with their duties under the attorney-client privilege. The very service members they advise today, may face adverse action or court-martial tomorrow. It is the best practice, where possible, to avoid prosecuting or assisting in the prosecution of service members to whom we have provided legal assistance. However, it is not Air Force practice to designate permanent legal assistance attorneys. Thus, the

[316] *Id.*
[317] 38 M.J. 726, 730 (1993).
[318] *Id.*, *citing* Henson, 20 M.J. 620, 622 (A.C.M.R. 1985).
[319] 38 M.J. at 730.
[320] 41 M.J. at 475.
[321] *Id.*

need to preserve the attorney-client privilege takes on added importance. When the privilege is abrogated, the administration of military justice may suffer and the attorney risks disciplinary action.

Legal office personnel should diligently and regularly check their records to ensure that conflicts of interest do not exist before referring a client to a particular attorney. Likewise, SJAs should ask legal assistance personnel to check their records for conflicts, prior to detailing trial counsel to cases. This will help to avoid pre-existing attorney-client relationship conflicts between trial counsel and the accused. The best practice, where possible, is to remove the attorney from any involvement in the case, when such a conflict is discovered.

VI. CONCLUSION

The attorney-client privilege is the oldest and most universally respected of the testimonial privileges. It remains a professional core value and all military and civilian attorneys owe their best efforts to keep the privilege and client confidences inviolate. An attorney who cannot or will not keep his client's confidences has no place in our profession. Violation of this sacred trust eviscerates fundamental constitutional, codal, MCM, regulatory, ethical, and common law principles and brings our profession into disrepute.

This article has grappled with and presented many examples of the purpose, limits, and uses of the privilege. These issues have been analyzed with an eye toward practical applications of the privilege to daily military legal practice generally and to Air Force practice in particular. The historical development of the attorney-client privilege and some specific areas where the privilege commonly arises in military practice have been explored. As these examples, rules, and cases have shown, the attorney-client privilege touches every aspect of the legal profession. Important aspects of the privilege have been examined and described from three different perspectives: (1) a prosecution perspective—saving court-martial cases involving alleged compromise of attorney-client privileged material by trial counsel and/or investigators, (2) a defense perspective—using the privilege to protect information about the whereabouts of a client and the contents of a defense counsel's appointment calendar, and, (3) a general military practice perspective—the potential conflicts of interest which may arise when the privilege is factored into a diverse military practice involving advice to command, claims litigation, military legal assistance, and the many other issues handled by installation-level judge advocates daily.

Hopefully, this article provides a greater appreciation of the central role of the attorney-client privilege in the daily practice of military law and provides a number of practical tools and references for researching privilege questions as they arise. Despite the complex, often tangled set of facts that inevitably appear in these cases, it is hoped all will keep in mind our shared

professional core value: an attorney's first duty is to keep the secrets of his clients.

The Imposition of Martial Law In The United States

MAJOR KIRK L. DAVIES*

"Necessity hath no law. Feigned necessities, imaginary necessities . . . are the greatest cozenage that men can put upon the Providence of God, and make pretenses to break known rules by."[1]

I. MARTIAL LAW: THREAT AND RESPONSE

Imagine the following frightening scenario: Members of an American militia group enter a major metropolitan airport and attach small aerosol-like devices in several restrooms throughout the concourse. These devices release deadly amounts of smallpox bacteria into the air, infecting hundreds of Americans travelling through the airport. Within days, citizens around the country begin to display the horrific symptoms of smallpox.[2] Public health workers soon determine the nature of the epidemic and release the information to the press. Widespread panic results. Civilian public health agencies attempt to educate the public on how to control the spread of the disease. But despite

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[1] Remarks of Oliver Cromwell, JOHN BARTLETT, FAMILIAR QUOTATIONS 247 (16th ed. 1992).

[2] A 1998 Frontline™ series episode discussed in detail the possibilities and ramifications of biological warfare. *Plague War* (PBS television broadcast, 13 Oct. 1998). In conjunction with the television series, PBS maintains a comprehensive web site, which includes a transcript of the broadcast, Frequently Asked Questions, texts of interviews not aired on the broadcast, and other resource materials (*available at* http: www.pbs.org/wgbh/pages/frontline/shows/plague) [hereinafter Frontline Internet Site]. The site offers the following information regarding smallpox:

> Smallpox is a virus. It is highly contagious transmits through the atmosphere very easily and has a high mortality rate. A worldwide vaccination program eliminated smallpox in the 1970s. Both the United States and the former Soviet Union officially maintained small quantities of the virus at two labs. However, there is the suspicion that it may have been or is still researched and developed at other labs either within Russia or in other countries, thus increasing the concern of smallpox being used as a biological weapon.

See Frontline Internet Site at http: www.pbs.org/wgbh/pages/frontline/ shows/plague/etc/faqs.html (copy on file with THE AIR FORCE LAW REVIEW).

police efforts to control the populace by establishing quarantine areas, the civilian infrastructure is quickly overwhelmed. Chaos results. Finally, the President declares martial law in an attempt to restore order in the nation.

This unwelcome scenario is but one example of a crisis that could quickly rip apart America's social structure.[3] Even though civilian disaster relief and law enforcement agencies regularly prepare for emergencies, Americans as individuals and as a society are woefully unprepared to face this kind of serious disaster.[4] Michael Osterholm, State Epidemiologist for the Minnesota Department of Health, and Chair of the Committee on Public Health and the Public and Scientific Affairs Board, is an outspoken advocate of developing a national emergency preparedness program for biological attack. He recently stated:

> Several of my colleagues and I have tried to walk though these [disaster] scenarios time and time again. We've looked at them as we would handle any other public health disaster, as we've done in the past. Unfortunately, each and every time, given the resources we have now, given the kinds of authorities we have now, we come down to basically complete chaos and panic. In many instances, the only thing that would probably prevail is martial law. I don't think this country has yet prepared to realize that we may face that in the future.[5]

Given the relative easy availability of biological and chemical weapons, and considering the number of groups[6] who would conceivably use such weapons, it is not difficult to imagine a disaster scenario in which the President would feel compelled to restore order by imposing martial law.

The term "martial law" has an ominous ring to it, especially in a country founded upon notions of civil liberties and individual rights. Considering our national predilection for demanding "our rights," and in view

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[3] Other possible scenarios might include one, or more, of the following conditions: wide-spread terrorist attacks with chemical or biological weapons, nuclear attacks, cyber-attacks on critical national computer systems, or conventional wars waged within our own borders. The purpose of this article is not to explore the relative likelihood of any of these scenarios. Instead, the author uses the biological attack scenario merely as a tool to illustrate the possible conditions that could lead to martial law.

[4] This article is not intended as an analysis of the American civil defense program. However, a layman's comparison of current U.S. civil defense activities with those of the Cold War era when Americans regularly participated in nuclear attack exercises supports this conclusion. Illustrative of the past attention given to civil preparedness was an exercise conducted by President Dwight D. Eisenhower in 1955. OPERATION ALERT, 1955, included the evacuation of government buildings in Washington D.C. and a "proclamation" of martial law by the President. *See* N.Y. TIMES, June 16, 1955, at 1. It is difficult to image the federal government today conducting such an extensive exercise.

[5] Frontline Internet Site, *supra* note 2, at http: www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/osterholm.html.

[6] International terrorist organizations, militia groups, millennial "doomsday" cults, and right-wing hate groups, to name a few.

of the constitutional separation of powers, a President who imposed martial law would almost certainly face strong political and legal opposition. Even if our population faced a severe disaster, like the one described above, it is quite predictable that many Americans would rebel against a President who took such drastic action, despite the President's good intentions.

It seems axiomatic that the President, as the chief executive, would have authority to respond to national emergencies without any specific authorization from Congress. The extent to which the President may constitutionally or lawfully employ military force to react to an internal, national crisis is not at all clear. The Constitution does not explicitly grant any emergency powers to the President. Perhaps the clause that requires the President to "take Care that the Laws be faithfully executed . . ."[7] could be interpreted to allow the President some authority to respond to national emergencies or crises. But relying only on that authority to employ military force to impose martial law is problematic since the Constitution grants *Congress* the authority to "call[] forth the Militia to execute the Laws of the Union…."[8]

The tendency in recent years has been for the President and Congress to direct the military into more and more operations that are traditionally civilian in nature.[9] Several factors could combine to continue this trend. First, the threats against national security have become more complicated and diverse.[10] Second, the political leaders view the military as possessing critical expertise for responding to the varied threats previously mentioned.[11] Third, the

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[7] U.S. CONST. art. II, § 3.

[8] *Id.* at art. I, § 8, cl. 15.

[9] *See generally* Colonel Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994); DAVID JABLONSKY, *The State of the National Security States*, *in* U.S. NAT'L SEC., 36 (Jul. 26, 1997) (citing James Dubik, *"The New Logic: The U.S. Needs Capability-Based, Not Threat Based Military Forces,"* ARMED FORCES J. INT., Jan. 1997, 43); WILLIAM S. COHEN, ANN. REP. TO THE PRESIDENT AND THE CONGRESS, 5-11 (Apr. 1997); WILLIAM S. COHEN, ANN. REP. TO THE PRESIDENT AND THE CONGRESS, 5-10 (1998); WILLIAM S. COHEN, ANN. REP. TO THE PRESIDENT AND THE CONGRESS, 4-8 (1999); and WILLIAM S. COHEN, ANN. REP. TO THE PRESIDENT AND THE CONGRESS, 4-9 (2000).

[10] For example, who should respond to an attack against nationwide sophisticated computer systems such as air traffic control or the national banking system, should the response be solely the Federal Bureau of Investigation or the Department of Defense or some combination? Who is best suited to respond to a terrorist-sponsored chemical weapon attack? The Department of Justice, who is authorized to do so, (*see infra* note 23 and accompanying text), or the Department of Defense? This shift in the traditional threat could lead the nation to continue to interject the military into roles that previously were handled by civilians. *See* Tom Bowman, *Clinton Suggests Budget Increase to Deal With Modern Terrorism*, THE BALT. SUN,. Jan. 23, 1999, at 3A ("We must be ready; ready if our adversaries try to use computers to disable power grids, banking, police, fire and health services, or military assets.").

[11] Because of its expertise, the President has tasked the military with training groups of civilians around the country on the proper response to chemical and biological attacks. *See generally, The Threat of Chemical and Biological Weapons, Before the Senate Subcomm. of*

military is the only governmental organization whose members are not only trained to do dangerous jobs, but who can also be ordered into life-threatening situations.[12] Finally, if federal funds remain limited, Congress and the President will probably want to capitalize on the money they have already spent on military training, rather than expend additional dollars on civilian training and supplies.

The trend to grant the President more statutory authority to regularly involve the military in civilian law enforcement and disaster relief roles creates serious risks for the military and the nation. For purposes of this article, the risk inherent in this slow, but steady, move is that it may push the military closer to fulfilling a role that our founding fathers did not envision. A significant offshoot of this trend is whether Congress has so altered the role of the military that they have granted the chief executive implied authority to act in response to severe emergency crises, even in the absence of specific authorization from either the Constitution or the United States Congress. If so, the leap to a lawfully imposed condition of martial law is not so far as otherwise imagined.

Those facing the risks associated with declaring martial law would extend beyond the President and his close circle of advisors. Military commanders who have sworn to support and defend the Constitution of the United States[13] *and* who are required to follow the President's orders,[14] would

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Tech., Terrorism and Gov't, Info. Comm. on the Judiciary, and Select Comm. on Intelligence, (1998), available in 1998 WL 11516695, (statement of Janet Reno, Attorney General); *Federal Spending on Anti-Terrorism Efforts, Before the House Subcomm. on Nat'l Sec., Veterans Affairs, and Int'l Relations, Comm. on Gov't Reform*, House of Representatives, available in 1999 WL 8085480 (statement of Henry L. Hinton, Jr., Assistant Comptroller General, National Security and International Affairs Division.) Beyond their expertise and training in dealing with chemical and biological weapons, the military is currently under an anthrax inoculation program. *See generally* information available at http://www.anthrax.osd.mil (DoD's anthrax program Website). These kinds of activities make the military the best choice to respond to the scenarios envisioned by this article.

[12] Pursuant to the anthrax inoculation program, military authorities have ordered military members to receive the anthrax vaccination, in preparation for facing future threats. Some have resisted such vaccinations, but their resistance has been met with direct orders, threats of punishment, and in some cases, courts-martial. *See generally* http://www.af.mil/news/Apr1999/n19990423_990759.html (AF summary court-martial); http://www.af.mil/news/Mar1999/n19990301_990321.html (AF special court-martial); http://www.newstribune.com/stories/081899/wor_0818990038.asp (US Navy special court-martial); and http://www.jsonline.com/news/nat/ap/aug99/ap-anthrax-refusal081699.asp and http://starbulletin.com/1999/03/25/news/story11.html (USMC courts-martial) (copies on file with THE AIR FORCE LAW REVIEW).

[13] 5 U.S.C. § 3331 (2000). *See also* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 187 n.22 (1998) (discussing Constitution's checks and balances among the executive, legislative and judicial branches).

[14] U.C.M.J. art. 92, 10 U.S.C. § 892 (2000).

find themselves in an equally challenging predicament. Under declared martial law, the President would expect military commanders to follow his orders and execute the day-to-day duties associated with martial law. Yet in a commander's mind, the President's orders may appear to stand in direct opposition to the commander's oath to uphold and defend the nation's Constitution. Under normal conditions, following the commander-in-chief's orders and directives do not usually raise these kinds of constitutional dilemmas. Martial law, however, would be anything but "normal." Under such conditions, commanders would unfortunately be placed in the difficult position of wondering whether their actions were protected under the law.

A. Overview of Martial Law Issues

This article addresses the issue of martial law in the following manner: First, as a necessary precondition to a declaration of martial law, this article presumes that America's civilian agencies would be unable to adequately respond to certain crises. Accordingly, the article looks briefly at how America's civilian agencies may respond to these types of scenarios.

This article next looks at the military's role in America and how that role has developed from the early days of our nation's history to the present day. It also considers briefly the President's authority as commander-in-chief under our constitutional scheme, and how the constitutionally imposed separation of powers affects the military. The article then addresses how various statutes and regulations impact on military operations, particularly in the area of emergency response activities.

Next, this article explores the topic of martial law itself. It develops a definition of martial law and discusses whether or not martial law can ever be considered lawful. To help in that analysis, the article reviews Supreme Court cases in two areas: those that address the issue of martial law and those that address the extent of the President's emergency authority. The article looks at how a military commander should respond to the unusual order to execute a presidential declaration of martial law. Finally, the article integrates the various statutes, rules, and case law and develops an approach for analyzing an executive proclamation of martial law.

B. Civilian Agencies' Response to Crises

One can easily construct a crisis scenario that overwhelms the capabilities of civilian law enforcement and relief agencies.[15] For example, during the 1992 Los Angeles riots, civilian law enforcement agencies were unable to cope with the widespread rioting and relied upon National Guard and Federal troops to help restore order.[16]

According to a Department of Defense (DoD) directive, "[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local government."[17] Within the federal government, the Federal Emergency Management Agency (FEMA) is the lead federal agency for domestic disaster relief. Under FEMA's Federal Response Plan, DOD has assigned responsibilities during disaster response operations.[18] FEMA's primary responsibilities lie in the area of disaster or consequence management, that is, taking steps to aimed at restoring the community to its previous condition. As an agency, they are neither trained nor manned to handle scenarios involving insurrection. In such a severe crisis, if the President might be inclined to streamline the operational chains of command, resulting in removing FEMA from its primary role in consequence management and mandating that the Department of Defense take over the process under a proclamation of martial law.[19]

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[15] This article does not address whether or not the military would, under such circumstances, be prepared to restore law and order within the community. The military may be *better prepared* than most federal agencies to handle certain types of emergency situations. However, since the military does not train for such circumstances, it may also be seriously unprepared to impose and administer martial law.

[16] *See* Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291 (1993).

[17] U.S. DEP'T OF DEFENSE DIRECTIVE 3025.12, para D(1)(c), MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 94) [hereinafter DOD DIR. 3025.12].

[18] Assignment of Emergency Preparedness Responsibilities, Exec. Order No. 12656, 53 Fed. Reg. 47, 49 (1988).

[19] As the country pays more attention these issues, the military will likely emerge as a central player in whatever course the nation ultimately takes. For example, the DoD is "stationing 10 Rapid Assessment and Detection Teams (RADT), each composed of 22 specially trained Air Force and Army National Guard personnel, in 10 states to respond to chemical and biological weapons attacks." Jim Landers, *U.S. Quietly Upgrading Homeland Defense Plan*, THE DALLAS MORNING NEWS, Feb. 9, 1999 at 1A. In addition, some factors indicate that FEMA is not prepared to properly execute its statutorily authorized role to control disasters. One author stated,

> [i]n practice, nobody knows who would do what if American city-dwellers faced a lethal cloud of anthrax or nerve gas. An exercise in March, designed to test the authorities' response to a genetically engineered virus spread by

A recent presidential initiative reflects the Administration's belief that the nation is poorly prepared to respond to the kinds of non-traditional attacks envisioned in this article.[20] In the area of biological attack, FEMA officials maintain an unusual position that they have inadequate funding[21] to respond to these types of emergencies. This position is contradiction by the government's decision in recent years to initiate large-scale emergency training programs.[22]

> terrorists on the Mexican-American border, led to bitter squabbling among rival agencies. "There is no clear demarcation line between the FEMA, and knowledge about disease and hazardous materials is spread over a broad array of institutions," says Zachary Selden, a germ-warfare boffin. "Somebody is needed to sit on top of these operations."

The National Guard in a Brave New World, THE ECONOMIST, May 9, 1998, at 25.

[20] *See* John M. Broder, *President Steps Up War On New Terrorism*, N.Y. TIMES, Jan. 23, 1999, at 14. (discussing the President's proposed new steps to defend against unconventional warfare, including creation of 25 "urban medical emergency teams to respond to germ weapons attacks."); *See also* Landers, *supra* note 19; Paul Mann, *White House Shed Inertia on Germ War*, AV. WK. & SPACE TECH., May 4, 1998, at 36.

[21] Mann, *supra* note 20.

> Stephen Sharro, Acting director of FEMA's terrorism coordination unit, said his agency has very little funding for WMD or terrorism specifically. Total dedicated funding amounts to $6.8 million . . . Sharro noted, however, that "FEMA is not the responder, it is the coordinator of the federal response. So I would think the real shortfall [is in] agencies like Public Health Service [and the] Health and Human Services [Dept.], who are struggling mightily to deal with these kinds of threats, and how you prepare a nation this size for this new threat."

For additional comments regarding the federal government's failure to properly allocate funds to preparing to counteract this threat, *see* Osterholm interview, *supra* note 5.

[22] The 1996 Defense Against Weapons of Mass Destruction Act of 1996 (known as Nunn-Lugar), *see* National Defense Authorization Act For Fiscal Year 1996, Pub. L. No. 104-106, §1201, 110 Stat. 186, 469 (1996) has provided millions of dollars to train local communities on how to respond to nuclear and biological attacks. DoD trainers are an integral part of the program. Under this legislation, DoD and other federal agencies have established teams who teach local forces how to deal with explosives and nuclear, chemical and biological attacks. *See Federal Response to Terrorist Incidents Involving Weapons of Mass Destruction: Status of Dep't of Defense Support Program, Before the Subcomm. on Research and Development of the House Comm. on Nat'l Sec.*, 105th Cong., 1997 WL 697573 (1997) (statement of Mr. James Q. Roberts, Principal Director to the Deputy Assistant Secretary of Defense (Policy and Missions), Office of the Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict); *see also* Skip Thurman, *Cities Learn How to Handle Terrorists' Chemical Attacks*, THE CHRISTIAN SCIENCE MONITOR, Aug. 26, 1997, at 3; Karen Ann Coburn, *Rehearsal for Terror*, GOVERNING MAGAZINE, Feb. 1998, at 22; Otto Kreisher, *Pentagon to Create More Chemical-Bio Response Teams*, COPLEY NEWS SERVICE, Mar. 17, 1998; and Frontline interview with William S. Cohen, United States Secretary of Defense, Frontline Internet Site, *supra* note 5, at http://www.pbs.org/wgbh/pages/frontline/shows/plague/ interviews/

Rioting, insurrection, or other serious disturbances are natural responses to severe disasters. These responses would hamper efforts to counteract the effects of the disaster. The authority to direct the federal response to such civil disturbances lies with the Attorney General of the United States.[23] The federal response to terrorist attack falls under the direction of the Department of Justice and the Federal Bureau of Investigation.[24] However, the Department of Justice can enlist the support of DoD when conditions warrant.[25] In recognition of anticipated threats, government officials have granted an increased attention to funding and training, particularly in the areas of disaster response, on a nation-wide basis and DoD plays a critical role in this training.[26] This funding and training alarms civil rights activists that the President will eventually use the military in a way that violates American's Civil and Constitutional rights—in other words, martial law.

C. Traditional Views

The American military currently enjoys a relatively high level of respect within our country.[27] Along with this increased popularity, the

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cohen.html.

[23] *See* U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA), para D(1)(d), (15 Jan. 1993) [hereinafter DOD DIR. 3025.1].

[24] *See* DOD DIR. 3025.12, *supra* note 17, para D(8)(a)(1-2).

[25] It is hard to predict how the President would react in a severe national crisis like the ones considered in this article. Nonetheless, it is somewhat predictable that federal agencies may not follow the prescribed, pre-planned method of response. Realistic training scenarios increase the likelihood that officials would not make these kinds of changes.

> We do not want to be in a posture where the only thing which you can do at that time is turn it into martial law because we haven't done the process of . . . working out those standing arrangements with FBI and working it out with local civil defense people and emergency preparedness people. If none of that takes place . . . that is far more likely to lead to an unacceptable role of the military in our society.

Jonathan S. Landay, *Delicate Task of Rallying Public About Threat of Terrorism*, THE CHRISTIAN SCIENCE MONITOR, Feb. 3, 1999, at 2 (quoting a senior Pentagon official).

[26] See generally statement of Mr. James Q. Roberts, supra note 22, (discussing the Nunn-Lugar-Domenici legislation and subsequent counter-terrorism actions).

[27] See Chris Chambers, *Military Number One in Public Confidence, HMOs Last*, at http://www.gallup.com/poll/releases/pr000710.asp ("The Gallup Poll's annual rating of Americans' confidence in the country's major institutions shows that the public has more confidence in the military than in any other institution tested) (copy on file with THE AIR FORCE LAW REVIEW); Rudi Williams, *Military, Civilians Follow Different Callings*, ("[a]ccording to public opinion polls, the armed forces are the most highly regarded institution in American society," quoting Charles Moskos, a sociology professor at Northwestern

American military establishment has become increasingly involved in domestic affairs.[28] Despite these recent trends to the contrary, Americans have historically shown a strong aversion to military involvement in civil affairs.[29] Given this traditional distaste for military involvement in civil affairs, it is likely that Americans would not merely grumble about the rigors of living under martial law. Instead, it is quite possible that citizens would actively resist the President's and the military's action under a martial law regime, regardless of the stated purpose or intended outcome.

The traditional American dislike for a strong military role in society has its genesis in the American Revolution. The Declaration of Independence, which set out a multitude of the colonists' grievances against the King of Great Britain, listed several complaints against his use of the military, including:

> He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.
> He has kept among us, in times of peace, Standing Armies, without the consent of our legislatures.
> He has affected to render the Military independent of and superior to the Civil power.[30]

One renowned commentator has noted that "[a]ntimilitarism arose in colonial America for two primary reasons: first, the belief that professional soldiers were the agents of oppression and, second, the loathsome reputation of the soldiers themselves."[31]

According to some national opinion polls, the American military has successfully cast off this negative reputation.[32] After displaying their new, improved military skills during the Persian Gulf war, the President and Congress rewarded the American military by assigning them a host of new

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University) at http://www.defenselink.mil/news/May2000/n05302000_20005202.html, (2000) (copy on file with THE AIR FORCE LAW REVIEW).

[28] *See generally* Dunlap, *supra* note 9, at n.121.

[29] *See* Duncan v. Kahanamoku, 327 U.S. 304, 320 (1946).

[30] THE DECLARATION OF INDEPENDENCE para. 15-17 (U.S. 1776).

[31] *See* Dunlap, *supra* note 9, at 344 (citing generally RICHARD H. KOH, EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 3-9 (1975)).

[32] According to a 22-25 June 2000 poll on the amount of confidence in the country's major institutions, "[t]he military retains its leading position—as it has since 1986—with 64% of Americans giving it high confidence marks," outpolling organized religion, the police, the Supreme Court, and banks, among other well-known institutions. *See* Chambers, *supra* note 27; *see also* Dunlap, *supra* note 9, at 354 ("The American public no longer views the armed forces with the fear and loathing that produced the antimilitarism that provided the intellectual infrastructure for civilian control of the military in this country. In 1993 the steadily climbing approval rating for the military reached a twenty-seven-year high.") (citing *Public Confident About Military*, SOLDIERS, June 1993, at 5 (reporting results from a Harris poll)).

responsibilities.[33] These non-traditional roles include enforcing peace in such places as Bosnia and Haiti and conducting counter-narcotics operations in Central and South America.[34] These typically non-military operations have earned the military a new reputation as a sort of "go-to" guy for the United States. Thus, the military's improved reputation probably has less to do with the an increased appreciation for the role of the military in contemporary society and more to do with the common perception that when asked, the military gets the job done.

Despite an improved reputation in society, many institutions in America ardently object to any notion that the military should further increase its involvement in traditional civilian functions. While Americans may recognize and appreciate the military's ability to competently respond to a variety of national and international crises, there remains a strong distrust of the military crossing too far into the traditionally taboo territory of civilian law

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[33] *See FY2000 Appropriations, the Air Force Posture, Before the Senate Comm. on Appropriations, Subcomm. on Defense*, 1999 WL 8085693 (statement of F. Whitten Peters, Acting Secretary of the Air Force and General Michael E. Ryan, Chief of Staff).

> In 1998, the Air Force flew more than 2,200 missions in the Balkans, 27,000 missions over Southwest Asia, and 30,000 airlift missions. During this same period, Air Force members participated in over 1,600 exercises in 35 countries, and conducted almost 300 military-to-military contact visits in Europe and the Pacific. Additionally, Air Force airlifters conducted almost 100 Denton Amendment humanitarian relief missions to 30 countries, and supported numerous joint force deployments throughout the year.

Id. See also Brian Mitchell, *Air Force Heads for Bumpy Ride*, INVESTOR'S BUSINESS DAILY, Sept. 25, 1998, at A1 (noting the recent high number of mission requirements for the Air Force). Even though the author specifically refers to the Air Force in this article, similar facts could presumably be produced for the other Services.

[34] John Yoo, *War Powers: Where Have All the Liberals Gone?*, THE WALL ST. J., Mar. 15, 1999:

> When it comes to the use of American military, no president has a quicker trigger finger than Mr. Clinton. Since December 1995, some 20,000 American troops have implemented the peace accords in Bosnia, American planes and missiles attack Iraq on an almost daily basis, as well as enforce a no-fly zone. Last summer, Mr. Clinton used cruise missiles to bomb terrorist targets in Sudan and Afghanistan. In 1994, he ordered 16,000 troops into Haiti to enforce its transition to civilian government. In 1993, Mr. Clinton expanded the goals of the 28,000 American troops in Somalia, originally deployed by Mr. Bush for humanitarian reasons, but then withdrew them after the deaths of soldiers in combats. On Mr. Clinton's watch American troops have participated in U.S. peacekeeping mission in dangerous places such as Macedonia and Rwanda.

Id. at A19. *See also* Christopher Walker, *Long-Term Solution Needed in Kosovo*, NEWSDAY, Mar. 3, 1999, at A39 (noting that 7,000 American troops still remain in Bosnia).

enforcement. This attitude was evident in the response to President Clinton's recent announcement regarding increased Federal funding to fight biological, chemical and computer attacks where many groups decried the President's move to increase the military's role in civil law enforcement.[35] Americans may now applaud the military's entering into such popular battles like the fight against illegal drugs, but once the "enemy" becomes the average American under strict conditions of martial law, that applause would likely be quickly silenced.

D. Constitutional Roles

When the founders drafted the Constitution, they weakened the possibility of a military with a dominant role in society by subordinating the military to civilian control. The Constitution placed the military subordinate to a civilian President, who serves as the Commander-in-Chief of the Armed Forces.[36] But clearly under our constitutional scheme, the President's title as commander-in-chief does not accord him full authority over the military and its operations. In fact, the Constitution ensures civilian control of the military, not only through appointing the President as its civilian head, but by allowing the other two branches of the government to exercise control or influence over the armed forces.

Of the other two branches of government, Congress has the most practical authority to exercise influence over the military.[37] Interestingly, the Framers gave Congress, not the President, the authority to declare war.[38] Congress also has the authority to raise and support an Army[39] and a Navy.[40] The Congress may make rules and regulations for the military[41] and call forth

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[35] "The danger is in the inevitable expansion of that authority so the military gets involved in things like arresting people and investigating crimes . . . . It's hard to believe that a soldier with a suspect in the sights of his M-1 tank is well positioned to protect that person's civil liberties." Dith Miller, *Pentagon Seeks Anti-Terrorism Role*, PORTLAND OREGONIAN, Jan. 30, 1999, at A14 (quoting Gregory Nojeim, legislative counsel on national security for the American Civil Liberties Union, Washington D.C.). *See* Mr. Nojeim's further comment in Landay, *supra* note 25, at 2 ("The best way to convince the public that the military isn't crossing the line into civilian law enforcement is to draw the line darker and heavier, not to blur it as the administration proposes yet again."); *see also* Bradley Graham, *Pentagon Plans Domestic Terrorism Team*, THE WASH. POST, Feb. 1, 1999, at 2.

[36] U.S. CONST. art. II, § 2.

[37] *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 353-56 (2d ed. 1988)) ("Because of national security interests and concern for unforeseen military exigencies, it was the intent of the framers to vest very great authority over these matters in Congress." (quoted in United States v. Weiss, 36 M.J. 224, 236 (C.M.A. 1992), *aff'd*., 510 U.S. 163 (1994)).

[38] U.S. CONST. art. I, § 8, cl. 11.

[39] *Id.* at cl. 12.

[40] *Id.* at cl. 13.

[41] *Id.* at cl. 14.

the militia.[42] Congress must provide advice and consent to the President's appointment of officers.[43] Perhaps most significant, is the constitutional requirement that Congress "raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years."[44] This limitation on long-term military funding ensures that the Congress maintains an active, regular role in regulating the affairs of the military.[45] Clearly, the Constitution envisions a strong, regular involvement by the Congress in military affairs.[46]

In addition to congressional control, under our Constitutional scheme the judicial branch watches over the executive branch and its military activities.[47] The Court has at times hesitated to fully interject itself into military affairs, calling the military a "separate society"[48] that may merit more

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[42] *Id.* at cl. 15.
[43] *Id.* at art. II, § 2, cl. 2.
[44] *Id*. at art. I, § 8.
[45] *See generally* Elia V. Pirozzi, *The War Power and a Career-Minded Congress: Making the Case of Legislative Reform, Congressional Term Limits, and Renewed Respect for the Intent of the Framers*, 27 SW. U.L. REV. 185 (1997).
[46] *But see* Corn, *supra* note 13, at 183 (noting that even though the Constitution envisions "congressional predominance" over the war power, "primary authority over the war power has shifted from that representative body to the executive branch.").
[47] A complete discussion of the history of the Supreme Court's exercise of judicial review of the executive branch is beyond the scope of this article. The precedent for such a practice was established in the historic case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). A number of authors have since discussed the *Marbury* decision, resulting in a diverse body of opinion on the meaning of the case. *See generally* Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891 (1989); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, SUP. CT. REV. 329 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is.*, 83 GEO. L.J. 217 (1994).
[48] Parker v. Levy, 417 U.S. 733 (1974) (holding that a lower expectation of privacy existed in the military, a separate society with unique needs). *See also* Able v. United States, 155 F.3d. 628 (1998), where the court noted,

> [d]eference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain. For example, the Supreme Court has upheld Congress's delegation of authority to the President to define factors for the death penalty in military capital cases; Congress's authority to order members of the National Guard into active federal duty for training outside the United States; the President's authority as Commander in Chief to "control access to information bearing on national security;" Congress's decision to authorize registration only of males for the draft; Congress's regulation of the conduct of military personnel under the Uniform Code of Military Justice; and the President's discretion as Commander in Chief to commission all Army officers.

Id. at 633 (citations omitted).

relaxed scrutiny when it comes to judicial review, or by refusing to interject itself into matters that the Court does not believe are best decided by the judicial branch.[49] Justice Frankfurter summed up this attitude in the seminal separation of powers case, *Youngstown Sheet and Tube Co. v. Sawyer*, when he stated that the Framers "did not make the judiciary the overseer of our government."[50] Despite this traditional deference to the military, the Court has not granted the President *carte blanche* when it comes to military affairs. The Court's repeated willingness to review actions taken by the President presumably indicates a belief and willingness not only to review, but even to overturn, executive and military action when constitutionally required, especially when the action taken impacts constitutional rights.

E. Statutes and Regulations Covering the Military's Involvement in Civilian Affairs

An intricate array of statutes, directives, and regulations govern the military's activities in the civilian arena, particularly when acting in law enforcement activities or in disaster relief roles.[51] Even though some of these rules attempt to limit certain types of military activity, taken as a whole, they show that the President and military commanders have substantial authority to involve our armed forces in a wide array of civilian activities.

In 1878, the Congress enacted the Posse Comitatus Act.[52] Congress passed this Act "[i]n response to the military presence in the Southern States during the Reconstruction Era"[53] and the perceived abuses of involving the military in various civilian responsibilities. The Act's primary purpose was to forbid military personnel from executing laws or having any direct involvement in civilian law enforcement activities. The Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[54]

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[49] *See infra* note 183 and accompanying text.
[50] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (hereinafter Youngstown).
[51] This article is not intended as a comprehensive treatise on all of these rules. They are presented merely as support for the article's overall proposition that Congress has, in recent years, given explicit and implicit endorsement to the military's increased involvement in non-traditional roles.
[52] Army Appropriations Act, ch. 263, 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2000)).
[53] Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953 (1997). *See also* Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. LAW REV. 109 (1984).
[54] 18 U.S.C.§ 1385 (2000).

Determining when the military is in violation of the Act can be difficult.[55] However, considering the Act's punitive provisions, commanders have an obvious interest in ensuring they do not disobey it.[56] Over time, Congress has authorized relatively significant exceptions to the Act's sweeping prohibitions. None of the exceptions have specifically granted the military a domestic law enforcement role, but the recent pattern is to accord the military a greater role in civilian affairs than had been previously envisioned.

Congress has granted the Department of Defense (DOD) some authority to support civilian law enforcement activities.[57] Several different regulations govern military support to civilian law enforcement agencies. The application of these regulations depends upon the nature of the crisis involved.[58] These exceptions to the Posse Comitatus Act allow the military to provide support to civilian law enforcement agencies by sharing information,[59] loaning equipment,[60] and providing expert advice and training.[61]

Perhaps the broadest exception to the Posse Comitatus Act is Congress's relatively recent move to direct the military to join civilian law enforcement agencies in the fight against illegal drugs.[62] Congress made the Department of Defense "the lead federal agency for detection and monitoring of aerial and maritime transit of illegal drugs into the United States."[63] The

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[55] In reviewing the military's actions under the Act, courts have developed three tests for determining whether the military has violated the Act. The first test asks whether the military's actions were "active" or "passive." *See* United States v. Rasheed, 802 F. Supp. 312 (D. Hawaii 1992); United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988); United States v. Red Feather, 392 F. Supp. 916, 921 (W.D.S.D. 1975). The second test asks whether the use of the armed forces "pervaded" the activity of civilian law enforcement officials. *See* Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990); United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982). The third (and perhaps most common) test looks at whether citizens were subject to military power that was regulatory, proscriptive, or compulsory. *See* United States v. Kahn, 35 F.3d 426 (9th Cir. 1994); United States v. Casper, 541 F.2d. 1274 (8th Cir. 1975).

[56] 18 U.S.C.§ 1385 (2000).

[57] 10 U.S.C.§§ 371-382 (2000).

[58] DOD DIR. 3025.1, *supra* note 23, is the umbrella directive for dealing with civil emergencies and attacks. This directive governs all of DoD's planning a response for civil defense or other support to civil authorities, except, military support to law enforcement. *See also* U.S. DEP'T OF DEFENSE, DIR., 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES, (18 Feb. 1997) [hereinafter DOD DIR. 3025.15.] (governing military support to law enforcement); U.S. DEP'T OF DEFENSE, DIR., 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, (15 Jan. 1986) [hereinafter DOD DIR. 5525.5] (providing additional guidance in this area). Note that law enforcement scenarios involving other federal agencies may also implicate the Economy Act, 31 U.S.C.§ 1535 (2000) if the request calls for sharing goods and services. *See generally* Winthrop, *infra* note 78, at 14.

[59] 10 U.S.C.§ 371 (2000).

[60] Id. at § 372.

[61] Id. at § 373.

[62] 10 U.S.C.§§ 124 and 371-82 (2000), also known as the Defense Drug Interdiction Assistance Act, Pub. L. No. 99-570, Title III, Subtitle A, § 3051, 100 Stat. 3207-74, (1986).

[63] INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 344 (2001), quoting 10 U.S.C. § 124.

use of the military in these diverse roles has been the subject of a fair amount of criticism. Yet, despite the concerns, Congress and the President appear to remain committed to them.

Congress has also granted the President specific statutory authority to use federal troops in a law enforcement role in the case of national emergency involving civil disturbances.[64] This authority exists even though responsibility for quelling such rebellions lies primarily with State and local governments.[65] These statutory exceptions to the Posse Comitatus Act include insurrections within a state (upon the Governor's request);[66] rebellions which makes it impracticable to enforce federal laws;[67] or any insurrection or violence which impedes the state's ability to protect citizens of their constitutional rights, and the state is unable or unwilling to protect those rights.[68]

Perhaps the President already has the authority to act in situations involving maintenance of public order, even without congressional authorization. According to the Code of Federal Regulations (CFR), "[t]he Constitution and Acts of Congress establish six exceptions,[69] generally applicable within the entire territory of the United States, to which the Posse Comitatus Act prohibition does not apply."[70] The CFR cites two constitutional exceptions. The first is an emergency authority to prevent lost of life or property during serious disturbances or calamities.[71] The second authority allows the use of military forces to protect Federal property and governmental functions.[72]

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[64] 10 U.S.C.§§ 331-334 (2000). *See also* DOD DIR. 3025.12, *supra* note 17.
[65] *See* 32 C.F.R. 215.4(a).
[66] 10 U.S.C.§ 331 (2000).
[67] *Id.* at § 332.
[68] *Id*. at § 333. For a detailed discussion of DOD's rules relating to this topic, *see* DOD DIR. 5525.5, *supra* note 58; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 63, at 337-344.
[69] Besides the two constitutional exceptions, the Code of Federal Regulations lists four statutory exceptions to the Posse Comitatus Act. They include the three statutory exceptions found in 10 U.S.C.§§ 331-33, and another exception for assisting the Secret Service in providing protection to governmental officials and political candidates. 32 C.F.R. § 215.4(c)(2)(i)(a-d).
[70] *Id.* at § 215.4(c).
[71] *Id.* at § 215.4(c)(1)(i) states:

> The emergency authority. Authorizes prompt and vigorous Federal action, including use of military forces to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.

Id.
[72] *Id. at* § 215.4(c)(1)(ii) (This section addresses protection of federal property and functions and "[a]uthorizes Federal action, including the use of military forces, to protect Federal

Obviously, the Code of Federal Regulations is not the source of the President's emergency response authority.[73] However, when considering whether Congress has granted the President either "express or implied"[74] authority to use military troops in a domestic crisis, evidence of a federal regulation that recognizes such a constitutional basis for authority is extremely relevant. This is especially true if Congress takes no action to modify or interpret the language of the Code.

1. Disaster Relief

Under the Stafford Act,[75] the President may commit federal troops to assist state governments in their disaster relief operations.[76] Under this Act, the President may use military troops to perform work "essential for the preservation of life and property."[77] The Stafford Act is not an exception to the Posse Comitatus Act, primarily because actions taken under the Stafford Act should not involve law enforcement activities. Preconditions to federal support under the Act's various sections include a natural catastrophe or major disaster, a request from the state's governor to provide support, and a finding that the state needs additional help beyond what it is able to provide.[78]

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property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protections." *Id.*).

[73] Interestingly, the Code of Federal Regulations also defines martial law. *Id.* at § 501.4. Noting, in relevant part, that,

> martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration…In most instances the decision to impose martial law is made by the President, who normally announces his decision by a proclamation, which usually contains his instructions concerning its exercise and any limitations thereon…When Federal Armed Forces have been committed in an objective area in a martial law situation, the population of the affected area will be informed of the rules of conduct and other restrictive measures the military is authorized to enforce…Federal Armed Forces ordinarily will exercise police powers previously inoperative in the affected area, restore and maintain order, insure the essential mechanics of distribution, transportation, and communication, and initiate necessary relief measures.

Id.

[74] Youngstown, 343 U.S. at 635 (Frankfurter, J., concurring).

[75] 42 U.S.C. § 5121 (2000).

[76] *Id. See also* DOD DIR. 3025.1, *supra* note 23; DOD DIR. 3025.15, *supra* note 58.

[77] 42 U.S.C.§ 5170b(c) (2000).

[78] For a more detailed discussion of the Stafford Act, *see generally* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., Jul. 1997, at 9-11.

2. The Military's Inherent Immediate Response Authority

In recent years, Department of Defense personnel have acted in civilian emergency situations without any specific statutory authorization. They have done so under a theory of "immediate response authority."[79] An example of the military acting under this immediate response authority occurred in Oklahoma City after the bombing of the Alfred P. Murrah federal building.[80] In that case, local authorities could be assisted by the military providing support to the investigation in the form of "medevac aircraft, ambulances, bomb detection dog teams, and various military personnel."[81] Local commanders at Fort Sill and Tinker Air Force Base provided this support under the theory of the commander's immediate response authority.[82]

This immediate response authority is mentioned in two Department of Defense Directives, one relating to disaster relief support to civil authorities,[83] and the other relating to support for civilian agencies during civil disturbances.[84] According to these regulations, commanders may act to prevent human suffering, save lives, or mitigate great property damage, even without prior authorization from the President.[85] Commanders may act in these cases if there is an emergency that "overwhelms the capabilities of local authorities."[86]

The "most commonly cited rationale to support Immediate Response actions is the common law principle of necessity."[87] From a humanitarian, common sense perspective, it seems self-evident that a military commander should be able to use available resources to alleviate human suffering, without first requiring a bureaucratic permission slip. Arguably, that is why Department of Defense directives articulate this authority. Interestingly, even

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[79] Technically, this authority does not fall under any of the categories previously discussed, although it is mentioned in of all the primary DoD Directives that cover support to civilian authorities. These Directives recognize the authority in the context of the scenarios they cover. *See* DOD DIR. 3025.1, *supra* note 23, para. D5(a); DOD DIR. 3025.12 para. D2(b), *supra* note 17; DOD DIR. 5525.5, *supra* note 58, para. A2(c).

[80] *See* Winthrop, *supra* note 78, at 4.

[81] *Id.*

[82] *Id*. at 3.

[83] DOD DIR. 3025.1, *supra* note 23, para. D5. Under this directive, the military must receive a request for support from civil authorities before providing any emergency support.

[84] DOD DIR. 3025.12, *supra* note 17, para D2(b). This directive does not require a request for support from civilian authorities before military authorities may provide needed assistance.

[85] These authorities provide military commanders some guidance on the types of actions they can take. For example, these directives limit commanders to providing support in the form of emergency medical care, clearance of debris, and recovery and identification of the dead. DOD DIR. 3025.12, *supra* note 17. However, the list also includes safeguarding, collecting and distributing food, and "facilitating the reestablishment of civil government functions." DOD DIR. 3025.12, *supra* note 17, para. D5(d).

[86] Winthrop, *supra* note 78, at 6. *See also* DOD DIR. 3025.12, *supra* note 17, para. D2(b)(1).

[87] Winthrop, *supra* note 78, at 6.

though Congress undoubtedly is aware of the military's actions under these Department of Defense directives, congressional leaders have not acted to limit or codify a commander's authority to act in these types of scenarios.

F. Summary

It appears that the traditional prejudice against military involvement in civil affairs may be on the decline. The evidence of that decline is manifest in congressional willingness to create exceptions to the Posse Comitatus rules[88]—rules allowing for military support during law enforcement activities,[89] and the President's continued use of the armed forces in these roles.[90] Whatever the reason, Congress has implicitly or explicitly given the military increased authority in the civilian domain, an authority Presidents have not hesitated to use.[91] This trend has serious implications for the legality of a President's actions under a proclamation of martial law.

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[88] *See* discussion *supra* Part I.E.

[89] *Id.*

[90] *See 21st Century Security Threats Before the Senate Armed Services Committee, Hearing on Transnational Threats*, United States Senate, 1998 WL 11515924 (1998) (statement of Walter B. Slocombe, Under Secretary of Defense for Policy) (discussing the involvement of military personnel in domestic anti-terrorism training programs).

> The Department of Defense has prepared to play a significant role in supporting other government agencies like the Federal Bureau of Investigation for crisis response and the Federal Emergency Management Agency for consequence management. DoD possesses significant assets, including active forces, National Guard and other reserve components, that, at the onset of a domestic NBC terrorism incident, can be integrated into a coordinated Federal response.
>
> [T]he Department is also implementing the Domestic Terrorism Preparedness Program to train and exercise local first responders, including firemen, law enforcement officials, and medical personnel. Two parallel efforts are ongoing: first, training responders in the nation's largest 120 cities; second, developing training modules and establishing mechanisms to provide federal expertise to every community in the nation, using mass media formats such as the Internet, video and CD-ROM.

Id. at Part C5.

[91] Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 129 (1996). As she noted:

> While Clinton has had great difficulty controlling a military made powerful and enormous by the Cold War, he too is attracted to the ease and efficiency of emergency procedures. In the wake of the April 19, 1995 terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, the most lethal act of terrorism in the nation's history, Clinton has advocated amending the Posse Comitatus Act, whose enactment finally ended Civil War crisis government. Clinton's proposed amendment would allow military

II. PRESIDENTIAL POWER

Ideally, the President will never have to declare martial law in response to a national crisis.[92] The best scenario envisions the nation responding to such a crisis with civilian agencies in the forefront and the Department of Defense in its traditional support role. However, should civilian agencies become overwhelmed in an environment of chaos and panic, one of the President's obvious options for restoring order would be to declare martial law. Such a response is an extreme option, well beyond what is contemplated under statutes relating to disaster response actions or limited military support to civilian law enforcement authorities.

A. Martial Law Defined

In our country, federal authorities have declared martial law on only a few occasions.[93] Since our country's legal system is based on the concepts of

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> personnel and equipment to be used to help civilian authorities investigate crimes involving "weapons of mass destruction," such as chemical or biological weapons. This exemption may be narrowly drawn and reasonable, but there are good reasons for concern about such a mingling of civil and military police responsibilities. Beyond the possibility of military usurpation of civilian authority, servicemen are unfamiliar with the constitutional rights which guide domestic police work. Perhaps more significantly, delegating domestic functions to the military appears to be an implicit acceptance of the current size, power, and resources of the military, all of which are products of the Cold War.

Id. at 142.

[92] Few would argue that the President has the authority to respond with force to an armed attack upon the United States. "An early draft of the Constitution vested in Congress the power to 'make' war rather than the power to 'declare' war. The change from 'make' to 'declare' was intended to authorize the President the power to repel sudden attacks and to manage, as Commander-in-Chief any war declared by Congress." Commonwealth of Massachusetts v. Laird, 400 U.S. 886, 893 (1970) (Douglas, J., dissenting)) and *see generally*, Note, The Congress, the President, and the Power to Commit Forces to Combat, 81 HARV. L. REV. 1771 (1968)). *See also* Jane E. Stromseth, *Collective Force and Constitutional Responsibility*, 50 U. MIAMI L. REV. 145, 158 (1995) ("To be sure, the President as Commander in Chief clearly has the authority under the Constitution (and under Article 51 of the U.N. Charter) to repel sudden attacks against the United States and its forces."). For purposes of this article, the author assumes the President's authority to respond to civil disorder or crisis, either as a response to external attack (by a terrorist or nation state) or an internal attack (with a biological or chemical agent) is not an offshoot of this "repel" authority.

[93] Martial law has been imposed on the state level on numerous occasions, generally in the context of "labor strikes or other civil turmoil." Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i*, 19 U. HAW. L. REV. 480 (1997) (citing Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942)).

stare decisis and precedent, there is no body of case law to which explains a precise legal definition of the term "martial law." Some scholars suggest that martial law is not really law at all. Blackstone, for example, has described martial law as:

> [T]emporary excrescences bred out of the distemper of the state, and not any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, *is . . . in truth and reality no law*, but something indulged rather than allowed as a law.[94]

Some scholars prefer to use the term "martial rule," avoiding the use of the term "law" in this context.[95] In fact, one of the most noted authors on the subject of martial law, Charles Fairman, insists on referring to it as martial rule, thus eliminating the possibility of inferring that the condition is lawful.[96] He states:

> Martial law [in the sense we are using it] is more accurately described as *martial rule*, which obtain in a domestic community when the military authority carries on the government, or at least some of its functions. Martial rule may exist *de facto;* the term is noncommittal as to its legality.[97]

Martial law has been defined in various manners. Essentially, it is "the rule which is established when civil authority in the community is made subordinate to military, either in repelling invasions or when the ordinary administration of the laws fail to secure the proper objects of the

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[94] 2 W. BLACKSTONE, COMMENTARIES 413, *quoted in* DYCUS ET AL., NATIONAL SECURITY LAW 398 (1990) (emphasis added).

[95] For some people, the distinction between "martial rule" and "martial law" is a distinction without a difference. For others, the terminology is important because of the underlying message sent by each term.

> People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial . . . Let us call the thing by its right name; it is not martial law, but martial rule.

CHARLES FAIRMAN, THE LAW OF MARTIAL RULE 28 (2 ed. 1943) (quoting David Dudley Field in his argument before the Supreme Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 35 (1866)).

[96] For purposes of this article, the author prefers to use the more common term, "martial law," in order to avoid confusion. However, he agrees that "martial rule" is a more desirable term for describing the condition of military imposed rule.

[97] FAIRMAN, *supra* note 95, at 30. *See also* ROBERT S. RANKIN, WHEN CIVIL LAW FAILS 173-76 (1939) (surveying scholarly opinion positing that martial law is extraconstitutional in nature).

government."[98] The Supreme Court has defined martial law as "the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary, but it must be obeyed."[99]

Scholars consistently agree that necessity is a mandatory precondition to imposing the state of martial law.

> Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity. What constitutes necessity is a question of fact in each case.[100]

The Code of Federal Regulations mirrors this definition of martial law. It states: "Martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration."[101]

Compared to the civil disorder statutes, which give the President limited authority in narrowly defined circumstances, martial law grants the executive broad emergency powers. The civil response statutes impose restrictions that the President must meet before he can commit federal troops to a given crisis.[102] In contrast, practically the only limitation on a commander's actions under martial law is the continued state of necessity that prompted its imposition in the first place.[103] The declaration of martial law allows the military broad authority to "do all acts which are reasonably necessary for the purpose of restoring and maintaining public order."[104] These acts include restricting individuals' movement, imposing punishment through military trials, and suspending other fundamental rights.[105]

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[98] MAJOR WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW ¶ 357, at 371 (3rd ed. Revised, Franklin Hudson Publishing Co., 1914).

[99] United States v. Diekelman, 92 U.S. 520, 526 (1876).

[100] FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940). *See also* FAIRMAN, *supra* note 95, at 22; RANKIN, *supra* note 97, at 191.

[101] 32 C.F.R. § 501.4 (1999).

[102] *See* discussion *infra* Part 1.E.

[103] An obvious exception to this general rule is that federal troops may not take extreme actions, like torture, murder and rape, which would violate Americans' human rights, even in the name of national emergency. *See* discussion *infra* n.191.

[104] 53 AM. JUR. 2ND *Military and Civil Defense* § 441 (1996). *But see* WIENER, *supra* note 100, at 15 ("[T]he purpose of martial law is not to replace the civil administration of law but to support it by brushing aside the disorders which obstruct its normal operation.").

[105] This article does not explore the full extent of a commander's authority while operating under a proclamation of martial law. But for a thorough discussion of what a commander may do under such circumstance, *see generally* FAIRMAN, *supra* note 95, RANKIN, *supra* note 97, BIRKHIMER, *supra* note 98, and WIENER, *supra* note 100.

B. Is Martial Law Lawful?

It is logical that a President should be able to impose martial law to preserve the nation, even if not explicitly authorized in the Constitution. President Lincoln echoed this sentiment when he asked: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[106] Indeed, the President states in his oath of office: *I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*.[107] In addition, the Constitution requires the President to ensure that the laws are faithfully executed.[108] Accordingly, the President should have the inherent authority, in fact the *responsibility*, to preserve the nation, even if it means taking extreme actions not specified in the Constitution.

Some scholars suggest that the executive may be justified in acting outside the Constitution's explicit authority, when required by the nation's best interests.[109] This type of power (as opposed to authority) was apparently accepted by classical thinkers in the 18th Century. A review of the prevailing intellectual views on this topic during that time provides insight into why the Constitution does not more explicitly define the President's emergency powers:

> Classical liberal theory thus divides executive action into two spheres: normal constitutional conduct, inhabited by law, universal rules and reasoned discourse; and a realm where universal rules are inadequate to meet the particular emergency situation and where law much be replaced by discretion and politics . . . . liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its

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[106] President Abraham Lincoln, Message to a special session of Congress (July 4, 1861), *quoted in* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME, at title page (1998).

[107] U.S. CONST. art. II, § 1.

[108] U.S. CONST. art. II, § 3.

[109] William C. Banks and Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1 (1993). The authors note that,

> liberal constitutional thought in the 18th century separated lawful from lawless government by simply positing a boundary line: "separate spheres of emergency versus non-emergency governance." . . . Through the doctrine of prerogative, [John] Locke's version of executive emergency powers was their extra-legal character. The prerogative was to act "according to discretion, for the publick [sic] good, without the prescription of the law, and sometimes even against it."

Id. at 10.

> pristine form while providing the executive with the power, but not legal authority, to act in an emergency.[110]

Under this theory, the executive can impose martial law without violating the Constitution, even though he is acting outside its express language. President Abraham Lincoln embraced this theory when he stated:

> [M]y oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which the Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[111]

This commonsensical point of view rings true, particularly when considering that the President not only has the duty to preserve the nation, but also that the office has most resources ready and prepared to take such drastic action. Whether or not the President has inherent powers to preserve the nation has been the topic of vigorous scholarly debate.[112]

Beyond the intellectual arguments, the real difficulty comes in determining when the President may wield such frightening power, as in the

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[110] Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1390 (1989).

[111] Letter from Abraham Lincoln to A. Hodges (April 4, 1864) reprinted in VII COLLECTED WORKS 281 (R. Basler ed. 1953-1955) *quoted in* DYCUS, *supra* note 94, at 83.

[112] Regardless of the lack of explicit constitutional authority, society appears to recognize the fact that the President, as chief executive, possesses some authority to preserve the nation during a time of crisis. Interestingly, among all of the Supreme Court cases (*see* discussion *infra* Part III) that have addressed martial law, none have stated that it is completely unlawful for the President to declare it. Instead, they focus on the preconditions necessary for its imposition. Alexander Hamilton stated:

> [I]t is impossible to foresee or define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

THE FEDERALIST No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (*quoted in* Oren Gross, "*Once More Unto the Breach*": *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 439 (1998). *But cf.* Henry Paul Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

case of martial law, to deprive citizens of their constitutional rights. Fairman has stated that,

> [o]ur constitutional system contains within itself all that is essential to its own preservation. It is adequate to all the exigencies which may arise. When force becomes necessary to repress illegal force and preserve the commonwealth, it may lawfully be exerted. Martial rule depends for its justification upon this public necessity. It is not a thing absolute in its nature, a matter of all or nothing. On the contrary, it is measured by the needs of the occasion. What appeared reasonably necessary under the circumstances will be justified upon the great first principle that the nation has power to maintain its own integrity. The reason of the law, as the judges often said, is compressed in the maxim *Quod enim necessitas cogit, defendit*.[113]

For a military commander responsible for executing the President's orders, these questions are more than an interesting intellectual debate. The commander in this unusual situation must make the difficult and risky analysis of whether or not the President is properly operating within his "power," even though he is technically acting beyond his "legal authority."[114] A review of Supreme Court case law provides some useful guidance.

III. THE SUPREME COURT'S ANALYSIS OF MARTIAL LAW

Developing helpful rules to follow or legal standards to apply under martial law is extremely difficult because the Supreme Court of the United States has issued very few opinions on the subject.[115] Perhaps the best way to predict how the Court would deal with a case of martial law is to analyze the few existing martial law cases, along with some of the Court's decisions relating to the Constitutional limits of executive power. Even here, though, the Supreme Court recently remarked that the "decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases."[116] Nonetheless, taken as a whole, the Supreme Court cases that deal with martial law and executive power reveal some important guiding principles.

First, even though the Court has held unconstitutional certain activities that took place under the umbrella of declared martial law, it has never held that martial law itself is per se unconstitutional or unlawful. Second, the Court has held that martial law is allowable under only the most extreme circumstances. Finally, the Court has recognized that the President may

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[113] FAIRMAN, *supra* note 95, at 47. (Translation: That which, in fact, you know you need, defend.).
[114] Lobel, *supra* note 110, at 1390.
[115] Martial law has been federally imposed only a few times, although various state governors have declared it on numerous occasions. Scheiber and Scheiber, *supra* note 93, at 478, 480.
[116] Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

possess powers beyond those specifically enumerated in the Constitution. How and when the President may lawfully exercise those powers will be discussed below.

A. The Seminal Case: *Youngstown Sheet & Tube Co. v. Sawyer* [117]

When considering the principle of the United States Constitution and the powers of the executive, *Youngstown* is probably the most important Supreme Court declaration on the principle. The case arose in the context of a threatened nation-wide strike in the national steel industry during the Korean War. President Harry Truman, concerned that the "proposed work stoppage would immediately jeopardize"[118] national defense, issued an Executive Order directing the "Secretary of Commerce to take possession of most of the steel mills and keep them running."[119] The steel companies protested the Secretary's actions and brought "proceedings against him in the District Court."[120]

Against this backdrop, the mill owners argued that "the President's order amount[ed] to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."[121] The government argued that the order "was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production."[122] The Government further argued that a steel strike "would so endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done—power 'supported by the Constitution, by historical precedent, and by court decisions.'"[123] The Court rejected the Government's position, holding that the Constitution did not give the President such broad authority.[124]

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[117] Youngstown, 343 U.S. 579 (1952).
[118] *Id.* at 583.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 582.
[122] *Id.* at 582.
[123] *Id.* at 584.
[124] Central to both the majority opinion concurring opinions was the fact the Congress had specifically refused to grant the President seizure authority. The majority opinion stated:

> [T]he use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan

Unfortunately, the Court did not speak with a unified voice.[125] Justice Black, who wrote the opinion of the Court, viewed the issue quite simplistically. If the President had authority to take such an action, he had to derive it either from an act of Congress or the Constitution itself—but his opinion found no legislation granting the President seizure authority.[126] The opinion also rejected the argument that the President enjoyed any powers that could be "implied from the aggregate of his powers under the Constitution."[127]

Obviously, a majority of the Court joined Justice Black in his belief that the President's actions were unconstitutional. But the other justices who comprised the majority must have also agreed in principle with Justice Frankfurter who stated that "considerations relevant to the legal enforcement of the principle of separation of powers . . . [were] more complicated and flexible"[128] than what Justice Black had expressed in his opinion. As a result, the Court issued numerous concurring opinions, opinions which provide important guidance to a discussion of martial law. [129] Of all these concurring

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> Congress adopted in the Act did not provide for seizure under any circumstances.

Id. at 586 (citations omitted).

[125] Besides Justice Black's opinion, the case includes five concurring opinions and a dissent by three Justices.

[126] *Id.* at 585.

[127] *Id.* at 587.

[128] *Id.* at 589 (Frankfurter, J., concurring).

[129] The concurring opinions show that a number of the Justices would agree that the President *does* enjoy some inherent emergency powers. Even though concurring with the majority, Justices Frankfurter, Burton and Clark, all expressed opinions that gave credence to the position that the President, as the chief executive, enjoys emergency powers not expressed in the Constitution. Justice Frankfurter stated:

> In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.

Id. at 610 (Frankfurter, J., concurring). Justice Burton stated: "The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations." *Id.* at 659 (Burton, J., concurring). Finally, Justice Clark stated:

> In my view—taught me not only by the decision of Chief Justice Marshall in *Little v. Barreme*, but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national

opinions, Justice Jackson's provides the most useful and pragmatic approach to analyzing this issue.[130]

Justice Jackson posited a three-tiered approach to analyzing executive power under our constitutional scheme. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[131] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[132] Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[133]

Justice Jackson was careful to emphasize his view that the President's emergency powers are derived from the Constitution,[134] and are essentially

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> emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, "[is] it possible to lose the nation and yet preserve the Constitution?" In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest of purpose.

Id. at 662 (Clark, J., concurring) (alteration in original) (citations omitted).

[130] Justice Rehnquist approvingly noted the views held by both parties in Dames & Moore by stating that "Justice Jackson in his concurring opinion in *Youngstown* . . . brings together as much combination of analysis and common sense as there is in this area." Dames & Moore, 453 U.S. at 661 (Jackson, J. concurring).

[131] Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

[132] *Id*. at 637. Jackson went on to note the important impact congressional action might have on such a determination:

> Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Id.

[133] *Id.*

[134] Justice Jackson stated that,

> [i]n the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency.

shared with the Congress. Indeed, for Jackson, such power could only arise from an interaction between the legislature and the executive: "Presidential powers are not fixed but fluctuate, *depending upon their disjunction or conjunction with those of Congress*."[135] And even though Jackson was willing to give these powers broad interpretation,[136] he was unwilling to go so far as to declare the Executive possesses an inherent emergency power. [137]

Key to Justice Jackson's analysis is how congressional action or inaction affects presidential authority. On that point, *Dames & Moore v. Regan*[138] is an important companion case to *Youngstown*, because it provides some guidance on how to apply the *Youngstown* test. In *Dames & Moore*, Justice Rehnquist noted:

> Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping,' and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.[139]

> Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of national emergency.

Id at 652.

[135] *Id.* at 635 (emphasis added).

[136] Justice Jackson felt that just "because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times." *Id.* at 640.

[137] Justice Jackson also stated that,

> [t]he appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies . . . . I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so.

Id. at 649-650.

[138] 453 U.S. 654 (1981) (Presidential orders nullifying attachments on Iranian assets after 14 November 1979 and suspending all claims against Iranian government, held authorized by International Emergency Economic Powers Act (50 U.S.C. § 1702) and congressional approval of claims settlement procedures).

[139] *Id.* at 669 (citations omitted).

This analysis is complicated by the difficulty in ascertaining whether a particular statute should be viewed as a specific or implied grant of authority to the President, or whether Congress intended the law to limit the President's actions within certain boundaries. Language from *Dames & Moore* assists the practitioner in making this determination:

> As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive." On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.[140]

Under this analysis, Congress may, either through legislative action, or indeed, inaction, inadvertently grant the President broader authority to proclaim and execute martial law by "inviting" such action.

The *Youngstown* opinion, read together with *Dames & Moore*, provides important guidance to any analysis of the President's authority to declare martial law. First, in dicta, Justice Jackson specifically excludes martial law from his assertion of an absence of inherent executive emergency powers.[141] Even though martial law was not at issue in the *Youngstown* case, any Supreme Court recognition, albeit in dicta, that implicitly recognizes the validity of martial law, adds some strength to the argument that the President may lawfully impose it. This is particularly true when it is part of a discussion rejecting an inherent emergency power.

Second, in addition to Justice Jackson's implicit expression that the President may have the authority to impose martial law, his three-tiered framework is extremely useful in any analysis of how and when that authority may be exercised. Because martial law is clearly an extreme option on the spectrum of presidential emergency powers, and considering the paucity of caselaw directly concerning martial law, any guidance on the exercise of executive authority is very useful, even if that guidance is not directly on point.

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[140] *Id.* at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981), and Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).

[141] Justice Jackson mentioned that "[a]side from the suspension of the privilege of habeas corpus," the framers made "no express provision for exercise of extraordinary authority because of a crisis." Youngstown, 343 U.S. at 650. In a footnote to that comment, he wrote: "I exclude, as in a very limited category by itself, the establishment of martial law." *Id.* n.19 (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) and Duncan v. Kahanamoku, 327 U.S. 304 (1946) (citations omitted), (*see infra* Parts III.B and III.C for a discussion of these cases).

Finally, even if the President does have authority to declare martial law, the *Youngstown* opinion shows that exercise of any emergency authority must be assessed in light of several factors, including, congressional action (or inaction), the Constitution, and the prevailing circumstances at the time.

B. *Ex parte Milligan* [142]

In July 1862, President Lincoln's Secretary of War, Edwin M. Stanton, issued an order under the President's authority, suspending the writ of habeas corpus for "persons arrested for disloyal practices."[143] Another order, issued the same day, directed U.S. marshals to arrest disloyal persons and stated that military commissions would try such persons. In September 1862, President Lincoln issued another proclamation that provided authority to subject to martial law and trial and punishment by courts-martial or military commissions, those individuals who were found "discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels."[144]

In March 1863, Congress added to President Lincoln's proclamation by "passing a law which authorized the President to suspend the writ whenever he thought necessary and to detain those persons under arrest by the military authorities without interference by the civil courts."[145] In passing the law, Congress specified that in jurisdictions where the civil courts were still open, the names of those individuals violating these laws be provided to the federal courts for presentation to a grand jury for indictment. If this procedure was not followed, the detainee should be discharged.[146]

Lambdin P. Milligan, a lawyer from Huntington, Indiana, had been active in Democratic politics and was sympathetic to the Confederate cause.[147] Milligan, along with several other defendants, was tried for treason by a military commission in 1864.[148] The Commission found Milligan guilty and sentenced him to be hanged. Milligan appealed his conviction to the Circuit Court of Indiana, which, in turn, certified the case to the Supreme Court of the United States.[149]

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[142] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[143] REHNQUIST, *supra* note 106, at 60 (citations omitted). *See generally* Hasday, *supra* note 91, at 130-32 (discussing President Lincoln's actions relating to the suspension of the writ of habeas corpus during the Civil War.).
[144] REHNQUIST, *supra* note 106, at 60 (internal quotation marks omitted). For a near complete text of the proclamation, *see* RANKIN, *supra* note 97, at 55-56.
[145] RANKIN, *supra* note 97, at 56. The President issued another proclamation on 15 September 1863, suspending the writ.
[146] Milligan, 71 U.S. at 115-118.
[147] REHNQUIST, *supra* note 106, at 89.
[148] Mr. Milligan and the other defendants were suspected of making plans to "stage an uprising and free the eight thousand Confederate prisoners at nearby Camp Douglas." *Id*. at 83.
[149] RANKIN, *supra* note 97, at 54.

At the Supreme Court, Milligan argued that the military commission did not have jurisdiction over him as he was not a member of the armed forces.[150] The government argued that as a result of the necessities of war, the President and the Congress suspended the writ of habeas corpus, and that the declaration of martial law justified the government's use of the military commission in the Milligan case. The Court rejected this argument, stating:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[151]

In overturning Milligan's conviction, the Court rejected the government's argument that the laws of war justified the use of military commissions under the circumstances present in Milligan's case.[152] The Court

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[150] According to Chief Justice Rehnquist, a defendant tried before a military commission would lose some procedural protections that he would otherwise enjoy in the civil courts, since:

> [A] defendant before a military court at this time was not accorded some of the important procedural rights possessed by a defendant in a civil court. But if a military commission could simply decide for itself what acts were criminal, and what sentence was appropriate upon conviction, a defendant before such a commission suffered an additional and equally serious deprivation, compared with his counter part in a civil court.

REHNQUIST, *supra* note 106, at 85-86. Not only did the defendant receive fewer procedural protections at a trial by military commission, he was also subject to greater potential punishment. After a review of the then-existing federal treason statutes, Rehnquist states:

> The charges before the military commission, on the other hand, included offenses covered by these statues but swept more broadly in several instances. But the greatest contrast was not in the acts that were proscribed but in the maximum penalties authorized. Both of the statutes quoted above set maximum imprisonment terms at ten years and six years, respectively. But, as mentioned, the military was authorized by a two-thirds majority to impose a sentence of death.

Id. at 88.

[151] Milligan, 71 U.S. (4 Wall.) at 120-121.

[152] *Id.* In a later case, the Supreme Court "cut back on some of the extravagant dicta favorable to civil liberty in *Milligan*." REHNQUIST, *supra* note 106, at 221. (discussing *Ex parte Quirin*, 317 U.S. 1 (1942)). In *Quirin*, the Court upheld the conviction by a military commission of

based its logic on the fact that the civil courts had remained open, despite the suspension of the writ of habeas corpus and the proclamation of martial law.[153] Further, the Court noted its concern that the authorities had not followed the congressionally mandated procedures for suspending the writ, by stating that,

> [t]his court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service . . . One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress.[154]

Because Congress had established procedures for suspension of the writ, Milligan's conviction by military commission was clearly in direct opposition to stated congressional intent.[155]

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seven men, six of whom were German citizens. 317 U.S. 20-21, 48. These men were apprehended during a failed secret attack mission against the United States. *Id.* at 21. Citing *Milligan*, the defendants argued that because the civil courts were open, and because there had been no invasion of the country, the military commission lacked jurisdiction over them. *Id.* at 45. In response, the Court limited *Milligan* to its facts, holding that,

> [t]he Court's opinion is inapplicable to the case presented by the present record. We have no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries.

Id. at 45-46. This analysis is more consistent with Court's approach in the Japanese cases, where it refused to interject itself into the area of war-making, and analyzed Presidential and Congressional actions under a reasonableness standard. *See* discussion *infra* Part III.D. In fact, the *Quirin* Court had no trouble accepting the government's argument that one of the defendants, who was arguably a U.S. citizen, had abandoned his American citizenship and was, therefore, subject to the laws of war. Quirin, 317 U.S. at 20-21 and 37-38. The atmosphere of wartime crisis that pervaded the nation likely influenced the Court's opinion. Perhaps even more meaningful to a discussion of martial law was the Court's acceptance that a non-belligerent would be subject to the law of war, albeit under certain narrow circumstances. Those circumstances would be "constitutionally established" martial law. *Id.* at 45. Thus the Court recognized that martial law might not only be legally supportable, but also constitutionally supportable

[153] Milligan, 71 U.S. (4 Wall.) at 120-121.

[154] *Id.* at 122.

[155] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2. The Constitution does not explicitly grant Congress the authority to suspend the writ. As the authority is found in Article I, the legislative section, the Framers presumably intended

If we apply these facts to Justice Jackson's three-tier approach in *Youngstown*, the President's actions would fall into the third tier. By trying Mr. Milligan at a military commission, without following the procedures established by Congress, the President was taking "measures incompatible with the expressed or implied will of Congress."[156] Under a Justice Jackson's *Youngstown* analysis, then, the President's actions must be supportable under "his own constitutional powers minus any constitutional powers of Congress over the matter."[157] So, even under Justice Jackson's theory in *Youngstown*, Milligan's conviction would likely have been overturned.[158]

In *Milligan*, the Court also provided guidance, albeit in dicta, for determining when, if ever, martial law would be justified.[159] The Court noted that the Constitution only provides for the suspension of one enumerated right—the *writ of habeas corpus*.[160] Nevertheless, the Court implicitly recognized that there may be situations where martial law would be needed. But even as the Court stated that necessity is a prerequisite for martial law it

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Congress to exercise that power. During the Civil War, Congress delegated the authority to the President, pursuant to the procedural restrictions mentioned above.

[156] Youngstown, 343 U.S. at 637.

[157] *Id.*

[158] The *Milligan* Court was not only concerned that Mr. Milligan's trial was in contravention of Congressional will, it was also concerned that his conviction violated basic constitutional rights, like his right to a trial by jury. Milligan, 71 U.S. (4 Wall.) at 122-123.

[159] The Court seems to indicate at one point that martial law is unconstitutional:

> It is claimed that martial law covers with its broad mantle the proceedings of this military commission . . . . The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"– the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in conflict, one or the other must perish.

Id. at 124.

[160] In *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)), Chief Justice Taney, sitting as a circuit judge, held that only Congress had the authority to suspend the writ of habeas corpus. *Id.* at 148. In that case, Merryman had been seized after President Lincoln signed an order suspending the writ at the beginning of the Civil War. *Id.* Interestingly, President Lincoln ignored Chief Justice Taney's opinion and Merryman remained imprisoned. REHNQUIST, *supra* note 106, at 38-39.

repeated the earlier assertion that in order to declare martial law, the courts must be closed.[161]

According to the *Milligan* Court, "proper" martial law can only be allowed under narrow circumstances, *i.e.*, under, (a) strict conditions of necessity, (b) during war (foreign invasions or civil war), (c) when the courts are closed,[162] and (d) only in the area of the "actual war."[163] Perhaps the most important point to be learned from *Milligan*, though, is that any exercise of emergency power by the President must be viewed in conjunction with congressional will. The Court did not declare unlawful the President's proclamation of martial law. It was the exercise of that power, in a manner contrary to congressional mandate, that caused the Court to opine that "[n]o graver question" had ever been considered by that Court.[164] Interestingly, this opinion practically validated the *Youngstown* template that would follow by several years.

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[161] The Court focused on necessity and the courts being closed: "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." Milligan, 71 U.S., at 127.

[162] According to Rankin, this provision of the *Milligan* decision has been routinely misinterpreted. He states that,

> [t]he *Milligan* case, in late years, has been called upon to prove that when the civil courts are open, martial law cannot be used. Such an interpretation is erroneous. The "open" court must have unobstructed exercise of its jurisdiction, and it is possible that the court might be open and yet its jurisdiction be obstructed. Therefore, to make the broad statement that, by the *Milligan* case, martial law cannot be established when the civil courts are open is incorrect, for the courts must also be unobstructed and functioning in the proper manner.

RANKIN, *supra* note 97, at 63.

[163] The Court stated that,

> it follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free courts. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Milligan, 71 U.S. (4 Wall.) at 127.

[164] *Id*. at 118.

C. *Duncan v. Kahanamoku*[165]

Shortly after the 1941 Japanese surprise attack on Pearl Harbor, the Territorial Governor of Hawaii, Joseph B. Poindexter, declared martial law and suspended the writ of habeas corpus.[166] Besides declaring martial law, Governor Poindexter authorized the commanding general of the Military Department of Hawaii, Lieutenant General Walter Short, "to exercise all of the powers normally exercised by judicial officers and employees" of the territory.[167] Military rule lasted in Hawaii for nearly three years, until it was revoked by President Franklin D. Roosevelt.[168]

In his opinion overruling the three convictions obtained in *Duncan*,[169] Justice Black, in his later opinion in *Youngstown*,[170] looked primarily at whether Congress had authorized the trial of civilians[171] by military commission under a declaration of martial law.[172] Justice Black noted that the Organic Act[173] did have a provision for placing the territory[174] under martial

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[165] Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[166] *See generally* J. GARNER ANTHONY, HAWAII UNDER ARMY RULE 5 (1955) and REHNQUIST, *supra* note 106, at 212. Governor Poindexter relied on the authority of the territorial charter, enacted by Congress in 1900. Hawaii Organic Act § 67, ch. 339, 31 Stat. 141, 153 (1900).

[167] ANTHONY, *supra* note 166, at 5-6. For a complete text of the Governor's proclamation, *see id*., App. A at 127.

[168] See REHNQUIST, *supra* note 106, at 214.

[169] *Duncan* actually involved two petitioners. Petitioner Duncan was arrested for and convicted of assaulting two armed Marine sentries at the Honolulu Navy Yard where he worked. 327 U.S. at 310-11. Petitioner White, a civilian stockbroker with no connection with the military, was arrested for and convicted of embezzling stocks belonging to another civilian. *Id*. at 309-310.

[170] *See* discussion *supra* Part III.A.

[171] The *Duncan* Court noted that, at the time Mr. Duncan was arrested, "[c]ourts had been authorized to 'exercise their normal functions.' They were once more summoning jurors and witnesses and conducting criminal trials." However, there were exceptions for cases like Duncan's, that involved violations of military orders. *See id.*

[172] As in *Milligan*, the Court's opinion may have turned on the summary manner in which the military commissions disposed of the petitioner's cases. As Justice Murphy noted:

> [T]he military proceedings in issue plainly lacked constitutional sanction. Petitioner White was arrested for embezzlement on August 20, 1942, by the provost marshal. . . . On August 25 he was convicted and sentenced to five years in prison. Petitioner Duncan was accorded similar streamlined treatment by the military. On February 24, 1944, he engaged in a fight with two armed sentries at the Navy Yard at Honolulu. He was promptly tried without a jury in the provost court on March 2 and was sentenced to six months at hard labor, despite his plea of self-defense. Both the petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial.

Duncan, 327 U.S. at 326. (Murphy, J., concurring.)

[173] Hawaii Organic Act § 67, ch. 339, 31 Stat. 141, 153 (1900).

[174] Until 1959, Hawaii was still a territory, not a State.

law. But since the Act did not define the term "martial law," Justice Black looked to the legislative history to determine whether Congress intended to grant the military such broad authority.[175] Finding no such authority, Justice Black looked to "other sources"[176] to determine the meaning of the term martial law.

Justice Black did not clearly articulate a constitutional analysis of the executive's constitutional authority under martial law. Perhaps since the Constitution does not mention martial law,[177] he found that question irrelevant. In looking at other "sources" to interpret the meaning of martial law, Justice Black stated that the "answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act."[178] Justice Black ultimately decided that under these other authorities, the meaning of martial law did not include the trial of civilians by military commission, at least under the circumstances described in *Duncan*.[179]

The *Duncan* Court ultimately held that even though the Hawaii Organic Act authorized martial law, Congress had not intended to replace civilian courts with military jurisdiction:

> We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.[180]

How the *Duncan* case would fare under Justice Jackson's three-tier approach is an interesting question. Since Congress had authorized the use of

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[175] Duncan, 327 U.S. at 316.
[176] *Id.* at 319.
[177] *Id.* at 315.
[178] *Id.* at 319. Justice Black reviewed some early American history along with some Supreme Court precedent to support his position that such broad authority under martial law is unacceptable. *See id.* at 319-24. Justice Black makes some brief references to presidential authority to support his position. *See id.* at 323 n.21 (discussing President Johnson's post-Civil War veto of legislation that would have supplanted the civil courts with military tribunals).
[179] The *Duncan* opinion mirrored the *Milligan* opinion, holding that the American "system of government clearly is the antithesis of total military rule." Duncan, 327 U.S. at 322. The Court in *Duncan* reemphasized the necessary preconditions for acting under martial law, holding that "martial law" is only intended to authorize the military to act in such a manner in the cases where the courts are closed and when there exists an "actual or threatened invasion." *Id.* at 318.
[180] *Id.* at 324.

martial law, the actions taken would arguably fall into the first tier.[181] In addition, besides passing the Organic Act, Congress was certainly aware that Governor Poindexter had placed Hawaii under martial law. Accordingly, the case fits best under Justice Jackson's first tier. But in view of the facts of both cases, upholding the convictions would not seem fair, even in light of possible congressional authorization of such trials.

Considering the quick rush to judgment in *Duncan*, perhaps the best way to support the finding (under the three-tiered analysis) would be to argue that even though the President's authority is at its fullest in the first tier, his actions must still be supported by the pre-condition of necessity. In *Duncan*, the courts were open and operating and the defendants were civilians who posed no real threat to security. Balancing those circumstances with the clear violation of the defendant's constitutional rights, it appears that the use of the military commission was not necessary and would therefore fail under the three-tier analysis, even if falling within the first tier.[182] In the end, the holding stands for the proposition that without strict conditions of necessity, even Congress and the President acting together may not violate the Bill of Rights.

D. World War II Japanese Cases

In analyzing relevant Supreme Court decisions in the area of executive emergency authority, political and social conditions existing at the time of congressional and presidential action must be considered as well. The cases arising from the internment of the Japanese during World War II aptly illustrate this point. Even though martial law was not declared on the mainland of the United States during the war, the United States government took extreme actions to intern and relocate thousands of civilians of Japanese ancestry living within its borders.

In two cases, the Supreme Court considered the legality of those governmental actions. [183] In both of these cases, the defendants were charged with violations of orders excluding them from certain areas or imposed

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[181] Justice Black's belief that the Congress did not intend to authorize the imposition of *real* martial law is somewhat strained, especially considering the plain language in the statute. At worst, even if one were to accept Justice Black's contention that Congress didn't intend this type of action under martial law, the case would fall into the second tier.

[182] Or, proceeding under the analysis in *Milligan*, the Court could find that the imposition of martial law was within the first tier, but because the execution of the law was contrary to congressional intent such an action would fall within the third tier. Under the facts in *Duncan*, however, it would be hard to arrive at this conclusion.

[183] Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944).

curfews.[184] These rules applied to persons of Japanese ancestry regardless of their citizenship status or evidence of their loyalty to the United States. In both cases, the Court upheld the government's actions.

Fundamental to the Court's analysis in both cases was its view that in the arena of war making, the Court should not substitute its judgment for those who have been authorized by the Constitution to make such decisions. In *Hirabayashi*, the Court stated that,

> [w]here, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or to substitute its judgment for theirs.[185]

The Court went on to emphasize the great amount of discretion it afforded the constitutionally appointed decision-makers in the area of war powers by noting that,

> [o]ur investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statue afforded a reasonable basis for the action taken in imposing the curfew. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.[186]

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[184] Both of these cases involved executive orders issued by the President. Those executive orders were later authorized by an Act of Congress, which attached a criminal penalty for violating the orders. *See* Hirabayashi, 320 U.S. at 87; Korematsu, 323 U.S. at 216.

[185] Hirabayashi, 320 U.S. at 93.

[186] *Id.* at 101-02. In *Korematsu*, the Court further noted that,

> [t]he provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the government is "the power to wage war successfully." Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. . . . To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war.

Korematsu, 323 U.S. at 224-25 (Frankfurter, J., concurring) (quoting *Hirabayashi*, 320 U.S. at 93).

Despite widespread violations of citizens' most basic constitutional rights, the Court refused to interject itself into an area that it believed was beyond its authority.[187]

Korematsu and *Hirabayashi* are not martial law cases, but while both are instructive, *Korematsu* is particularly useful for determining how the Court might view similar actions under a declaration of martial law.[188] In *Korematsu*, the Court first implicitly recognized the principle of necessity, and permitted otherwise unacceptable actions because, in its estimation, the conditions warranted them. Second, the Court recognized that the severity of the actions must relate to the level of the threat, stating that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[189] Finally, the Court judged the case in the context of the executive and legislative branches operating together, and did not elaborate on the outcome if the President had taken the actions in the absence of congressional authorization. Once again, the Court validated the significance of *Youngstown's* three-tier template.

Additionally, even though the case did not involve a declaration of martial law, Justice Murphy's dissent in *Korematsu* does offer another indication that the Court might, under proper circumstances, approve a regime of martial law. The dissent stated that excluding persons of Japanese ancestry from the Pacific Coast, "on a plea of military necessity in the *absence of martial law* ought not to be approved."[190] By implication, then, Justice Murphy would approve similar actions when necessity dictated and martial law had been properly declared.

E. Summary

None of the Supreme Court cases cited above directly discussed the source of the President's authority to impose martial law. From these cases,

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[187] Even though the Court recognized the existence of such emergency powers under the circumstances of "modern warfare," the Court's opinion does not spell out what standard it would apply to determine the legality of future actions. In *Korematsu*, the Court stated that, "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the *gravest imminent danger* to the public safety can constitutionally justify either." 323 U.S. at 218 (emphasis added). The Court then added an additional standard, stating that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of *direct emergency and peril*, is inconsistent with our basic governmental institutions." *Id.* at 219-20 (emphasis added).

[188] The governmental actions taken in those cases are similar to those envisioned under a regime of martial law (*i.e.*, imposing curfews, restricting movement, etc.).

[189] *Korematsu*, 323 U.S. at 220. In other words, the greater the threat, the more willing the Court would be to accept otherwise unacceptable violations of Constitutional rights.

[190] *Id.* at 233 (Murphy, J., dissenting) (emphasis added).

however, we can glean some legal principles relating to the proper imposition of martial law.

First, no opinion of the Supreme Court has ever declared martial law per se unlawful or unconstitutional. Second, the Supreme Court has recognized some presidential emergency authority. Third, the President's authority to act in emergencies is not unfettered.[191] Fourth, the President's

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[191] Regardless of whether our nation would legally or politically accept imposition of martial law, international law may still condemn actions taken under martial law. The United States, either through treaty or through customary international law, is bound to accord its citizens certain human rights. Imposition of martial law could violate these rights, subjecting the President or military commanders to liability. To help illustrate the point, Article 1 of The Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights." Other pertinent articles from the Declaration include:

> Article 3–Everyone has the right to life, liberty and the security of person.
> Article 7–All are equal before the law and are entitled without any discrimination to equal protection of the law.
> Article 8–Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
> Article 9–No one shall be subjected to arbitrary arrest, detention or exile.
> Article 10–Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
> Article 13–Everyone has the right to freedom of movement.

Universal Declaration of Human Rights, G.A. res. 217 (AIII), U.N. Doc. A/810 at 71 (1948).

Additionally, The American Convention on Human Rights reiterates the Universal Declaration and sets forth certain civil and political rights, including the right to life, right to humane treatment, right to personal liberty, the right to a fair trial, right to peaceful assembly, right to freedom of association, right to equal protection, and the right to judicial protection. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series, No. 36, at 1, OEA/Ser. L./V/II.23 doc. rev. 2., *entered into force* July 18, 1978 [hereinafter *American Convention*].

The *American Convention* also contains a derogation clause. Article 27, Suspension of Guarantees, states that in "time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation . . . ." The exception does not apply to all rights. Specifically, the clause states that any discrimination can not be based upon race, color, sex, language, religion, or social origin. Further, the Article states that several of its articles may not be suspended. Several Articles of the Convention may apply to the treatment of citizens under martial law. *See generally American Convention*, Article 3 (Right to Juridical Personality), Article 5 (Right to Humane Treatment), and Article 23 (Right to Participate in Government).

The prerequisite for suspending these rights is necessity. According to one scholar,

> in addition to the overarching requirement of temporary duration and effect, several factors are considered when giving specific content to the principle of exception danger. First, the particular crisis must be actual or imminent. Derogation may not be used as a purely preventive mechanism unless an

actions are more likely to survive Supreme Court scrutiny if he seeks congressional approval. And fifth, the more extreme the circumstances, the more extensive the power the Court would likely accord the President.[192]

IV. APPLICATION TO MILITARY COMMANDERS

A presidential decision to impose martial law raises the most profound legal, ethical and moral questions imaginable. But once the order is issued, the President must rely on the military, through its chain of command, to execute the order. If the President's decision to issue the order is later questioned or held unlawful, the ramifications for the President lie in the political and judicial realms: public criticism, impeachment, removal from office, injunction or reversal by the Supreme Court, or indictment and conviction. For the military commander, the ramifications could be similarly criminal and career ending.

Under Article 92 of the Uniform Code of Military Justice,[193] a member of the United States military may be held criminally liable for failure to obey lawful orders and for dereliction of duty.[194] Depending on the circumstances, a commander who violates orders may also be punished for conduct unbecoming an officer and a gentleman.[195]

> imminent danger exists. Second, normal measures available to the state should be manifestly inadequate and insufficient to respond effectively to the crisis . . . . Third, the threat must have nationwide effects . . . The threat must endanger the whole population and either the entire territory of the state or significant parts thereof. Finally, the emergency must threaten the very existence of the nation, that is, the "organized life of the community constituting the basis of the State."

Gross, *supra* note 112, at 453-54.

The principle of proportionality also applies to the derogation regime. According to the American Convention, the derogation regime applies "to the extent and for the period of time strictly required by the exigencies of the situation." *American Convention*, Article 27. So, like martial law, necessity guides the executive's ability to rely on the derogation clause.

[192] Chief Justice Rehnquist notes that, "[w]ithout question, the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war . . . ." REHNQUIST, *supra note* 106, at 218.

[193] 10 U.S.C. § 892 (2000) and MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part. IV, ¶ 16 (2000 ed.) [hereinafter MCM].

[194] The punishment options range from a dishonorable discharge (or dismissal for an officer), forfeiture of all pay and allowances, and 2 years confinement for disobedience of a lawful general order, to a bad conduct discharge for enlisted members (a dismissal for officers) and confinement for six months in cases of willful dereliction of duty. MCM, Part IV, ¶ 16(e)(1) and (3).

[195] U.C.M.J. art 133 and MCM, Part IV, ¶ 59(b)-(c). The maximum punishment available under Article 133 is a dismissal, forfeiture of all pay and allowances, and confinement for a

Military members are required to obey *lawful* orders. They are not required to obey unlawful orders, but they disobey orders at their own peril.[196] When a military member receives an order, he presumes it to be lawful, unless it is "patently illegal" or "directs the commission of a crime."[197] According to the Manual for Courts-Martial, a general order or regulation is "lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it."[198]

A military commander is unlikely to ignore the terms "contrary to the Constitution" or "laws of the United States" because all military officers, upon entering active duty service, swear an oath to "uphold and defend the Constitution of the United States."[199] Military commanders understand the obligation to honor individuals' constitutional freedoms, and they receive indoctrination on the role of the military in a democracy (*i.e.*, the Posse Comitatus Act[200]). These commanders, and their legal advisors, will likely pause before executing an order that both involves them directly in civilian law enforcement and which requires systematic violation of citizens' constitutional rights.

Considering the legal standard established in the Manual for Courts-Martial, the commander who receives an order to execute martial law should obey the order. Unless "patently illegal," such as the extremely unlikely order to conduct mass executions of noncombatants or to torture suspected criminals,[201] there is sufficient judicial support for the Commander-in-Chief's

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period not to exceed that authorized for the most analogous offense when the punishment is prescribed in the Manual, or if not prescribed, one year. MCM, Part IV, ¶ 59(e).

[196] The infamous *Calley* court-martial from the Vietnam War era made it clear that the defense of "just following orders" would not exonerate an officer for unlawful behavior. *See* United States v. Calley, 48 C.M.R. 19 (1973), *aff'd sub nom.* Calley v. Callaway, 519 F. 2d 184 (5th Cir. 1975) (habeas corpus review), *cert. denied sub nom.* Calley v. Hoffman, 425 U.S. 911 (1976).

[197] MCM, Part IV, ¶ 14(c)(2)(a)(i) states that "[a]n order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."

[198] *Id.* at ¶ 16(c)(1)(c).

[199] The officer and enlisted oaths of office vary slightly, but the differences have serious ramifications when it comes to obeying a superior's orders to impose martial law. Commissioned officers swear (or affirm) an oath to, *inter alia*, "support and defend the Constitution." 5 U.S.C. § 3331 (2000). Enlisted members swear (or affirm) and oath "to support and defend the Constitution, obey the orders of the President of the United States and the orders of the officers appointed over [them], according to regulations and the Uniform Code of Military Justice." 10 U.S.C. § 502 (2000).

[200] 18 U.S.C. § 1385 (2000), *supra* note 52 (prohibiting federal military forces from assisting in local or state law enforcement roles, with certain exceptions).

[201] *See supra* note 191 and accompanying text.

authority to proclaim martial law. In the end, the commander's best option would be to obey the order.

V. ANALYSIS

Unfortunately neither the author nor this article can resolve all the legal questions that would swirl around a declaration of martial law. But, integrating the cases already discussed, along with the other principles mentioned above, a type of template becomes apparent that could be useful in determining whether the President has the authority to move the military into such an expanded role during an emergency.

This article also presumes that the President enjoys inherent authority to declare martial law, outside of the powers granted him by the Constitution. But just as emergencies do not "create power"[202] and "unenumerated powers do not mean undefined powers,"[203] the President's power to impose martial law must not be limitless. Certainly the ability to exercise such power must be subject to certain limitations. Those limitations are derived from the Congress, balanced upon conditions of necessity, and tempered by other constitutional considerations.

The best method for analyzing the legality of a proclamation of martial is to integrate the three-tier standard set forth in *Youngstown* with some of the principles articulated in the other cases discussed above. Prior to invoking the *Youngstown* three-tier analysis, however, a precondition of "necessity" is indispensable to any declaration of martial law. Meeting this requirement increases the likelihood a court will favorably view the President's exercise of discretion under trying circumstances. Moreover, even if the President is operating under the first-tier, with implied or express congressional approval, without meeting this precondition of necessity, his actions will likely fail judicial scrutiny.

The more dire the circumstances (hence, the greater the necessity), the more direct action the President can take. For example, in *Milligan*, the Court based part of its rationale upon the fact that the courts were not closed. Arguably, the Court believed the military was going beyond merely controlling the civilian population, and inserting itself into the judicial realm—an area where there existed no need for the military to operate. So, the standard of necessity was *not* met in that case, at least to the extent the military wished as it attempted to try civilians before military commissions. In contrast, in the Japanese cases, the Court upheld the President's emergency actions because of his ability to articulate why wartime conditions justified such extreme actions. The conclusion to be drawn from all of these cases is that the principle of necessity is not limited solely to the declaration of martial law, but must also

[202] Youngstown, 343 U.S. at 629.
[203] *Id.* at 610 (Frankfurter, J., concurring).

be matched against the type of action the President takes under the umbrella of his newly declared authority.

Once necessity exists, under the first tier of the *Youngstown*[204] template, congressional action (or inaction) becomes the most critical part of the analysis. Obviously, Congress has never acted to grant the President explicit authority to impose martial law. But there is ample evidence that Congress has granted both express and implied authority to the military to act in certain law enforcement roles. Contrary to years of tradition, the Posse Comitatus Act now is less like a roadblock than a speed bump between the Armed Forces and ever-increasing law enforcement roles.[205] New legislation and initiatives geared to face the emerging threats have charged the military with a central role in the planning, training and execution phases of U.S. crisis readiness plans. Taken together, these statutes and regulations create a strong legal basis for the President to argue that Congress, upon conditions of necessity, has implicitly authorized a proclamation of martial law.

The second tier under *Youngstown*[206] perhaps presents the most difficult legal analysis. Here, looking to congressional intent would be fruitless so the President must act upon his "own independent powers."[207] However, when operating within this "zone of twilight"[208] where distribution of authority is "uncertain,"[209] the President may be invited to exercise "independent presidential responsibility."[210] It is here that the President's inherent authority is arguably at its fullest, and it is here that the President can be guided by certain factors. First, the actual events, or elements of necessity, should be key in determining the President's authority,[211] and second, the extent to which the President is exercising his power must be considered.[212] Finally, in the second tier, n the President can take some reassurance not only in knowing that he is not acting contrary to congressional intent, but also from the fact that no Supreme Court opinion specifically denounces the constitutionality of martial law.

If the President acts directly contrary to congressional will, he is squarely within the third tier of Justice Jackson's template. Even accepting that the President possesses inherent, extra-constitutional authority to

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[204] *Id.* at 635 (Jackson, J., concurring).
[205] *See* discussion *supra* Part III.A.
[206] *Id.* at 637 (Jackson, J., concurring).
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* ("In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.").
[212] As Justice Frankfurter implied, the President's authority may expand if exercised only for a "short, explicitly temporary period, to be terminated automatically unless Congressional approval were given. *Id.* at 597 (Frankfurter, J., concurring).

"preserve"[213] the nation, that power is not unfettered. Here, the President is taking the greatest risk, both politically and legally. Even though the Supreme Court is generally disinclined to involve itself in these types of matters, acting contrary to the stated will of Congress appears to be exactly the kind of "case" or "controversy" that falls directly within the Supreme Court's authority to adjudge.[214]

Finally, one must examine and try to determine exactly where this leaves the military commander. Martial law's "rubber hits the road" when military authorities impose the President's orders upon individual citizens. Under these circumstances, the commander's authority is derived from the President's authority. If the President is justified in taking action, that justification will flow down to support the military's actions taken pursuant to the President's orders.

Any military commander would face numerous dilemmas under these circumstances. Besides facing a hostile population, the commander must weigh duties to obey orders against obligations to uphold the Constitution. Even if the commander believes the order is lawful, he must still remain vigilant not to violate the most basic human rights of the very citizens he is trying to protect. Unfortunately, the lack of training and preparation for such an eventuality probably leaves most commanders ill-prepared to handle such a crisis.[215]

VI. CONCLUSION

In 1998, Americans were exposed to the specter of martial law in the form of a hit movie, THE SIEGE.[216] The movie vividly depicted the aftermath of a terrorist attack on New York City where the government declared martial law and rounded up thousands of Arab-Americans and put them in internment camps.[217] Unfortunately, some time in the future, life may imitate art and America's experience with martial law may extend outside the movie theater into reality. It seems obvious that a number of anti-American groups exist both within and without our borders that would not hesitate to employ

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[213] *See* discussion *supra* note 111.

[214] U.S. CONST. art. III, § 2, cl. 1.

[215] It has been the author's experience that military attorneys receive little, if any, training on the subject of martial law. In addition, the author has not participated in any military training exercises that focused on dealing with civilians in the context of martial law. Even if such emergency plans exist, they are infrequently used in the context of military exercises.

[216] THE SIEGE (Twentieth Century Fox 1998).

[217] As expected, the movie was extremely controversial. Most of the controversy focused on the improper stereotyping of Arab-Americans, but the issue of whether our country could ever face martial law also received a fair amount of attention, as well. *See* Cindy Pearlman, *Terrorism Message to Teach Tolerance; Director Zwick Has Moral Lesson*, THE CHICAGO SUN-TIMES, Nov. 1, 1998, at SHO Section, p.3.

terrorism and other tactics that could result in upheaval and, perhaps, anarchy within our country.[218]

The circumstances that would prompt a declaration of martial law are so horrendous that they are almost beyond contemplation. But that dreadful eventuality should not translate into a lack of preparation, for if the nation is prepared, it is less likely to fear even the most awful possibilities. Those who worry about the profound legal, moral and social implications of declaring martial law must seriously contemplate Thomas Jefferson's insightful words:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means . . . The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk . . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.[219]

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[218] One extremist group, led by Japanese cult leader Shoko Asahara, has already used chemical weapons against civilian targets, killing eleven and injuring 3,796 in a March 1995 Tokyo subway attack. *See* http://www.nttls.co.jp/fpc/e/shiryo/jb/j8.html (discussing poisonous sarin gas attack and the events surrounding the trial of the cult members) (copy on file with THE AIR FORCE LAW REVIEW). Others seriously contemplate the possibility. Consider the following exchange between a member of an American white supremacist group and a television interviewer:

> LARRY WAYNE HARRIS: My view of the future is that we are facing now a biological apocalypse. It is coming. The Bible says that it is coming.
> NARRATOR: Larry Wayne Harris, a member of the white supremacist group Aryan Nation, has been in constant trouble with the law for his attempts to obtain plague bacteria and anthrax through the mail. Harris has written a manual for do-it-yourself biological warfare, and he claims it is easy to acquire these deadly agents.
> INTERVIEWER: Could you personally use biological organisms offensively, if you have to?
> LARRY WAYNE HARRIS: Most definitely. I – I hope I never have – we never have to, but most definitely.
> INTERVIEWER: Do you believe, looking into the future, that you may have to?
> LARRY WAYNE HARRIS: I hope and pray that I never have to.
> INTERVIEWER: That's not the question, Mr. Harris.
> LARRY WAYNE HARRIS: Yes.

Frontline Internet Site, *supra* note 2.

[219] Lobel, *supra* note 110, at 1393 (citing Letter from Jefferson to Colvin, 20 Sept. 1810, reprinted in 11 THE WORKS OF THOMAS JEFFERSON 146, 148-49, (P. Ford ed. 1905)).

Guide to the Index:
The Air Force Law Review,
Volumes 21-49

This index supplements the index compiled by Captain E. Glenn Parr and his Editorial Board as an initial 20-year index of the *Air Force Law Review*. 21 A.F. L. REV. 6-284 (1979).

Following in the footsteps of Captain Parr and his Editorial Board, though just a bit beyond a 20-year cycle, it is my hope and desire that this index will make *The Air Force Law Review* more useful to its readers by assisting them in locating articles, authors, notes, comments, book reviews, or other material published in the *Air Force Law Review* in Volumes 21 to 49. Once this volume is published and made computer-accessible (through LEXIS and WebFLITE, DoD's Executive Agent for Computerized Research), our readers will be able to find these articles more quickly and be able to respond to pressing legal issues more authoritatively.

To provide some history and continuity, I offer the following background information on *The Air Force Law Review*, drawn largely from Captain Parr's initial Guide. This law review was first published as *The United States Air Force JAG Bulletin* (A.F. JAG BULL.). Beginning with Volume 6, Number 6, it became *The United States Air Force JAG Law Review* (A.F. JAG L. REV.). Volume 16 saw the publication take its current name, *The Air Force Law Review* (A.F. L. REV.). Volumes 1 through 10 contain six separately paginated issues and are cited by the month of issue as follows: 1 A. F. JAG BULL. 3 (Mar. 1959); 9 A.F. JAG L. REV. 26 (Sep.-Oct. 1967). Volumes 11-15 are paginated consecutively and are cited by volume and page number only: 14 A.F. JAG L. REV. 84 (1972). Volumes 16-18 each contain four separately paginated issues that are cited by season of the year as follows: 18 A.F. L. REV. (Spring 1976). Volumes 19-49 are paginated consecutively and are cited by volume and page number only: 20 A.F. L. REV. 22 (1978).

To maximize the utility of the index for those searching either this index or the previous 20-year index, this index will follow generally the same conventions employed by the index of the first twenty volumes, so the format of this guide draws heavily from Captain Parr's efforts. With a few exceptions, this table format index contains all writings published in *The Air Force Law Review* from Volume 21 to Volume 49 (2000).

Each item is indexed by one or more subjects, by author, and by title. The subject index groups the writings alphabetically by title under appropriate subject-matter headings, disregarding *a*, *an*, and *the*. The author index lists each writing in alphabetical order by the last name of the author. The rank of military authors is that held at the time the writing was published. Writings

having more than one author are listed under the name of each author. Two or more writings by the same author are grouped in alphabetical order by the first major word of each title, disregarding *a*, *an*, and *the*. Note that the author index includes book reviews indexed by the reviewer's name, not by the book's author. Book reviews are otherwise indexed separately by book title. The title index entries are listed alphabetically by the first major word of each title, disregarding *a*, *an*, and *the*. Each entry contains a numerical reference to the volume, number, if appropriate, and page where that particular item is published. I trust our efforts will assist you in your legal research.

DEL GRISSOM, Major, USAF
Editor, *The Air Force Law Review*

SUBJECT MATTER INDEX

CLAIMS

ENVIRONMENTAL LAW

FISCAL LAW

Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes, The	Major Patrick E. Tolan Jr., USAF	40	89
Something New from Something Old: Federal Procurement of Recycled Products	Lieutenant Colonel Robert S. Lingo, USAFR	31	269
Technical Data Rights: How They Work—Why They Won't	Lieutenant Colonel Richard Kaeser, USAF and Jonathan P. Blucher	29	223
Terminations for Convenience	Captain F. Bryan Cheuvront III, USAF	29	33
Terminations for Default	Major Randall L. Level, USAF	29	49
Tort Liability for Injuries to Employees of Government Independent Contractors	Captain John J. Thrasher, USAF	25 No. 1	41
Truth in Negotiation Act: The Defective Pricing Law, The	Eugene M. Solimine, Pamela M. Stanek, Richard A. Ciambrone, and Barbara Veile	29	117
Unabsorbed Overhead and Inefficiency Claims	Peter M. Ditalia	29	77

FOIA & PRIVACY ACT

INTERNATIONAL AND OPERATIONS LAW

Protection of Victims of International Armed Conflict, The: Protocol I Additional to The Geneva Convention	Major William G. Schmidt, USAF	24 No. 3	189
Realities and Legalities of Information Warfare, The	Captain Robert G. Hanseman, USAF	42	173
Resort to Force in International Law, The: Reflections on Positivist and Contextual Approaches	Major Michael N. Schmitt, USAF	37	105
Role of Regional Organizations in Stopping Civil War, The	Captain Davis L. Brown II, USAF	41	255
Role of the Law of Armed Conflict During the Persian Gulf War, The: An Overview	Major Ariane L. DeSaussure, USAF	37	41
Soviet Military Justice System, The	Major Michael N. Schmitt, USAF and Captain James E. Moody, USAF	34	1
Status of Forces Agreements: A Sharing of Sovereign Prerogative	Colonel Richard J. Erickson, USAF (Ret.)	37	137
Taming Shiva: Applying International Law to Nuclear Operations	Colonel Charles J. Dunlap Jr., USAF	42	157
Thomas P. Keenan Jr. Memorial Lecture, The: The International Criminal Tribunal for Yugoslavia	Colonel Brenda J. Hollis, USAF	39	37
War Powers Resolution, The: Law or Political Rhetoric?	Major Gregory M. Huckabee, USA	34	207

LABOR LAW

LEGAL ASSISTANCE

MILITARY JUSTICE/ CRIMINAL JUSTICE

Permitting Systems Protection Monitoring: Where the Government Can Look and What It Can See	Lieutenant Colonel LeEllen Coacher, USAF	46	155
Post-trial Contact with Court Members: A Critical Analysis	Major Holly M. Stone, USAF	38	179
Practice Tips on Demonstrative Evidence	Major Stephen J. Duggan, USAF	27	153
Pretrial Preparation	Lieutenant Colonel Charles H. Wilcox II, USAF	27	7
Primer on Foreign Criminal Jurisdiction, A	Major Steven J. Lepper, USAF	37	169
Primer on Methods of Impeachment, A	Lieutenant Colonel James Moody, USAF	45	161
Prior Inconsistent Statements and The Military Rules of Evidence	Captain Earl F. Martin III, USAFR	39	207
Procedures and Issues Relating to the Court-Martial of Reservists	Colonel Robert E. Reed, USAF and Major Daniel G. Jarlenski, USAF	32	331
Prosecuting Civilian Misdemeanor Offenders Before United States Magistrate Judges: A Guide for Air Force Judge Advocates	Captain Eric D. Placke, USAFR	39	73
Prosecution Sentencing Case, The	Major Carol A. DiBattiste, USAF	27	203
Rebuttal: A Trial Counsel's Best Friend	Major Kevin Spradling, USAF	27	181

MISCELLANEOUS

TITLE	AUTHOR(S)	VOL.	PAGE
Guide to the Index of Volumes 1-20: *The Air Force Law Review*	Captain Glenn E. Parr, USAF	21 No. 1	4
Guide to the Index of Volumes 21-49: *The Air Force Law Review*	Major Del Grissom, USAF	49	113
Index to Volumes 1-20: *The Air Force Law Review*	Captain Glenn E. Parr, USAF (Editor)	21 No. 1	6
Index to Volumes 21-49: *The Air Force Law Review*	Major Del Grissom, USAF (Editor)	49	115
In Search of Command and Staff Doctrine	Colonel John R. Brancato, USAF	28	1
Introductory Notes*: The Air Force Law Review*: The First Twenty Years	Major General Walter D. Reed, USAF	21 No. 1	1
Open House or Open Forum: When Commanders Invite the Public On Base	Captain Patrick M. Rosenow, USAF	24 No. 3	260

BOOK REVIEWS

How to Write Plain English: A Book for Lawyers and Consumers	Major Richard R. James, USAF	21 No. 3	473
Intoxication Test Evidence: Criminal And Civil	Major Donald G. Rehkopf Jr., USAFR	30	178
Last Lion, The—Winston Spencer Churchill, Visions of Glory, 1874-1932	Major William R. Dugan Jr., USAF	24 No. 1	95
Litigation	Major John A. Arrigo, USAF	30	177
Military Criminal Justice: Practice And Procedure	Captain Linda Strite Woodard, USAF	24 No. 4	368
One L	Captain H. Jack Shearer, USAF	21 No. 3	477
Personal Estate Planning	Colonel William B. Wirin, USAF	22 No. 1	98
Practical Trial Evidence: A Video Handbook	Captain Michael A. McMurphy, USAFR	21 No. 2	390
Shepard's Manual of Federal Practice	Captain Michael A. McMurphy, USAFR	22 No. 2	201
Style Manual	Major Richard R. James, USAF	21 No. 4	620
To Set The Record Straight	Captain H. Michael Bartley, USAF	21 No. 2	394

NOTES & COMMENTS

AUTHOR INDEX

TITLE INDEX