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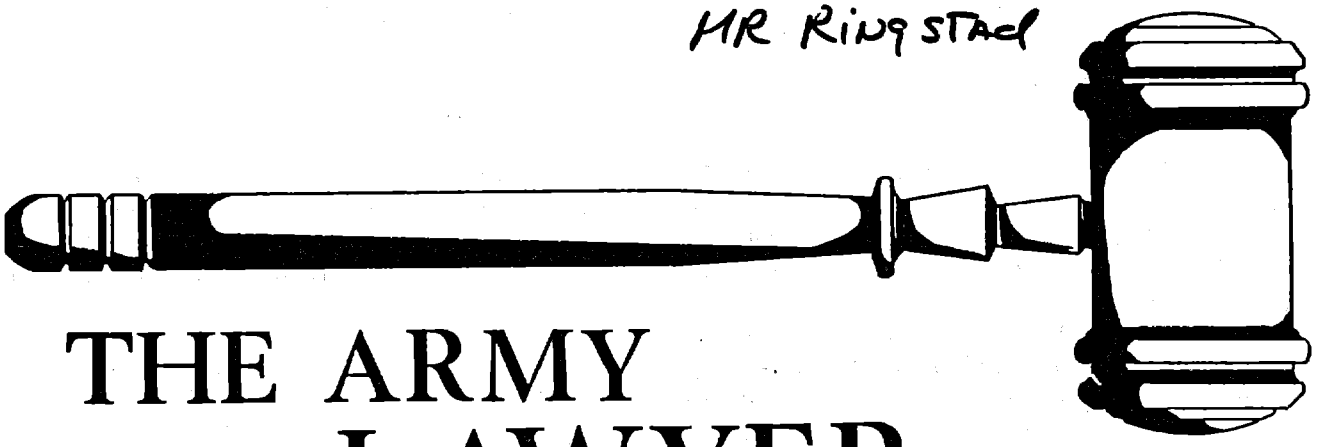

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27-50-148
April 1985

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The Legal Basis for United States Military Action in Grenada

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"The Marshal said that over two decades ago, there was only Cuba in Latin America, today there are Nicaragua, Grenada, and a serious battle is going on in El Salvador."[1]

"Thank God they came. If someone had not come in and done something, I hesitate to say what the situation in Grenada would be now."[2]

I. Introduction

During the early morning hours of 25 October 1983, an assault force spearheaded by US Navy

[1]Memorandum of Conversation between Soviet Army Chief of General Staff Marshal Nikolai V. Ogarkov and Grenadian Army Chief of Staff Einstein Louison, who was then in the Soviet Union for training, on 10 March 1983, *quoted in Preface to Grenada: A Preliminary Report*, released by the Departments of State and Defense (Dec. 16, 1983) [hereinafter cited as Preliminary Report].

[2]Statement by Alister Hughes, a Grenadian journalist imprisoned by the military junta on 19 October 1983, after he was released by US Military Forces, *quoted in* N.Y. Times, Oct. 31, 1983, at A12, col. 1.

SEALS, Marines, and Army Rangers and Airborne troops landed on the Caribbean island of Grenada. This was the vanguard of a combined US-Caribbean security force composed of several thousand US soldiers, sailors, and Marines and 300 soldiers and police officers from six of Grenada's neighboring islands.[3] The operation, code-named "Urgent Fury," was to pit, for the first time, US forces in direct combat with Castro's Cuban forces.[4] The reaction around the world to this collective military action ranged from condemnation by the United Nations General Assembly[5] and most United States allies[6] to strong approval by the US public,[7] the Grenadian public,[8] and most of the Caribbean nations.[9] There was in the United States, however, a storm of protest arising from

[3]The Caribbean countries represented included Antigua, St. Lucia, St. Vincent and the Grenadines, Dominica, Jamaica, and Barbados. *The Battle for Grenada*, Newsweek, Nov. 7, 1983, at 68.

[4]There is some question as to whether all the Cubans were combat forces. In an interview on Grenada, Major General Trobaugh, Commander of the 82d Airborne Division, stated that the captured Cubans included 366 "workers" who were mostly construction men, 141 combatants, and 159 "sympathizers" who appeared to have a dual function of construction worker and combatant. Taubman, *Experts Say 5 Arms Pacts Suggest Moscow Had Designs on Grenada*, N.Y. Times, Nov. 6, 1983, at 22, col. 1.

[5]On 2 November 1983, in a vote of 109-to-9, with 27 abstentions, the United Nations approved a resolution "deeply deploring" the "armed intervention in Grenada" which it called "a flagrant violation of international law." The resolution called for the immediate withdrawal of all foreign troops. Interestingly, the General Assembly voted to cut-off debate before the United States and the countries of the Organization of Eastern Carribbean States (OECS) could present additional information. Berlin, *U.S. Allies Join in Lopsided U.N. Vote Condemning Invasion of Grenada*, Wash. Post, Nov. 3, 1983, at A1, col. 1; Bernstein, *U.N. Assembly Adopts Measure 'Deeply Deploring' Invasion of Isle*, N.Y. times, Nov. 3, 1983, at A21, col. 1.

[6]Perhaps the strongest criticism came from British Prime Minister Thatcher who stated that "if we're going to have a new rule that whenever communism reigns against the will of the people . . . the U.S. shall enter, then we are going to have really terrible wars in the world." Wash. Post, Oct. 31, 1983, at A18, col. 5. For a review of the reaction of other US allies, *see* Berlin, *supra* note 5; Dobbs, *France Criticizes U.S. Policies on Lebanon, Grenada Invasion*, Wash. Post, Nov. 3, 1983, at A1, col. 1; Wall St. J., Oct. 27, 1983, at 1, col. 5; Wash. Post, Oct. 27, 1983, at A26, col. 1; *but see* Vinocur, *Invasion of Grenada Wins Allied Backers After Initial Dissent*, N.Y. Times, Nov. 3, 1983, at A1, col. 6 (following initial disapproval, several US allies indicated restrained approval).

[7]An ABC News telephone poll indicated an 8-to-1 majority in favor of the US intervention. Hilts, *Call-in Poll Supports Invasion of Grenada, 8 to 1*, Wash. Post, Oct. 30, 1983, at A18, col. 1. A Wash. Post-ABC News survey conducted on 28 October 1983, indicated that 65% of the people polled approved of the US intervention in Grenada as opposed to 27% against it. Wash. Post, Oct. 30, 1983, at A18, col. 1.

[8]A CBS poll conducted on Grenada on 3 November 1983, indicated that 91% of those polled said they were glad the US troops had come to Grenada and 85% of those polled said they felt that they or their family were in danger while General Austin was in power. Clymer, *Grenadians Welcome Invasion, A Poll Finds*, N.Y. Times, Nov. 6, 1983, at 21, col. 1.

[9]*See* Burgess, *Most Residents of Nearby Barbados Appear to Support Grenada Invasion*, Wash. Post, Oct. 29, 1983, at A15, col. 1; Le Moyne, *Governor of Puerto Rico Supports Reagan on Invasion of Grenada*, N.Y. Times, Nov. 4, 1983, at 18, col. 3; Lescaze, *Beach Philosophers of Caribbean Islands Hail Grenada Action*, Wall St. J., Nov. 1, 1983, at 1, col. 3.

The Army Lawyer (ISSN 0364-1287)
Editor
Captain Debra L. Boudreau

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. However, the opinions expressed by the authors in the articles do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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Issues may be cited as The Army Lawyer, [date], at [page number]. Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

much of the academic and legal communities.[10] Many commentators, while tacitly conceding that our action may have been illegal under international law, declared that the United States did the right thing under the circumstances then existing in Grenada.[11]

This article examines the legal basis for the United States intervention in Grenada. There are actually two aspects of legal analysis involved in the use of US military forces to intervene in the internal affairs of a foreign nation. The first relates to the legality of the President's action under US law, *i.e.*, his power under the Constitution to commit US military foces to hostilities without a declaration of war by Congress. This article will not address that issue; rather, it will focus on the legality of the US action under international law. It is important to note, however, the failure of the US to act in a certain manner under a signed and ratified treaty would be a violation of law under the Constitution.[12]

II. Background

To accurately examine the legal basis for US action in Grenada, it is necessary to first examine the factual setting in which the decision to intervene was made. Law, after all, should not be applied in a vacuum. This examination will first focus on the general background of Grenada and then the events leading up to the collective intervention.

A. An Overview

1. Geographic Characteristics

Grenada is the southern-most of the Windward Islands of the Caribbean and is approximately ninety miles north of Venezuela. It has a land area of about 133 square miles, the climate is tropical, and there is a mountainous rain forest in the center of the island. Its population of about 110,000 consists primarily of descendants of African slaves as well as some Europeans and a few descendants of the original Indian population. Grenada shares a common cultural background with many of the small, English-speaking island nations of the Eastern Caribbean region.[13]

2. Recent History

Grenada, a former British colony, achieved independence on 7 February 1974 and Eric Gairy became the nation's first prime minister. Grenada adopted a constitution establishing a parliamentary system of government and retained its membership in the British Commonwealth of Nations.[14] Prime Minster Gairy's administration of Grenada was characterized by corruption and suppression of political opponents.[15] On 13 March 1979, a coup, led by Maurice Bishop, overthrew the Gairy government. Bishop suspended the constitution and established a People's Revolutionary Government.[16] The political party of the People's Revolutionary Government was the marxist

[10]*See* Wall St. J., Nov. 2, 1983, at 30, col. 1 (the article indicates that roughly two-thirds of Harvard University's Law Fcaulty voted to withdraw US troops from Grenada and that a telegram on their behalf was sent to President Reagan condemning the invasion); Epstein, *Law Experts Rebut Reagan's Rationale for Invasion*, The Miami Herald, Oct. 30, 1983, at 18A, col. 1; Taylor, *Experts Question Legality of the Invasion of Grenada*, N.Y. Times, Oct. 20, 1983, at A19, col. 3; *How to Control Reagan's 'Outlawry'*, Manchester Guardian Weekly, Dec. 11, 1983, at 2, col. 1 (a letter to the editor signed by eight international law professors from various law schools).

[11]*See* Harsch, *The Case for Invading Grenada*, The Christian Sci. Monitor, Nov. 1, 1983, at 3, col. 3; Podhoretz, *Proper Uses of Power*, N.Y. Times, Oct. 30, 1983, at E 19, col. 4; Rosenfeld, *Is Intervention Always Wrong?*, Wash. Post, Nov. 4, 1983, at A17, col. 1; Taylor, *Squaring International Law With Political Imperatives*, N.Y. Times, Oct. 30, 1983, at E 2, col. 3.

[12]U.S. Const. art. VI, cl. 2.

[13]*See* Countries of the World And Their Leaders: 1983 Yearbook 541-44 (1983) (Grenada).

[14]The constitution was enacted on 19 December 1973 and was effective on 7 February 1974. It recognized that the executive authority of Grenada was vested in the British Crown and was to be exercised on behalf of the Crown by the Governor-General. Grenada Const. ch. IV, § 57 (1973, suspended 1979), *reprinted in* A. Blaustein & S. Holt, Constitutions of the Countries of the World, Grenada (1974).

[15]Gairy was an eccentric who believed in flying saucers and unconventional religions. Department of Defense, Grenada: October 25 to November 2, 1983, 3 (1983) [hereinafter cited as Grenada: October 25 to November 2].

[16]People's Law No. 1 of 1979 (March 25, 1979) (suspension of constitution) and People's Law No. 2 of 1979 (March 25, 1979) (establishment of People's Revolutionary Government), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

New JEWEL Movement (NJM).[17] Bishop declared that the suspended constitution would be revised but that a series of People's Laws would replace the constitution pending its revision.[18] Bishop suspended the writ of habeas corpus,[19] established preventive detention allowing indefinite imprisonment without trial,[20] and suppressed freedom of the press and political freedom.[21]

Grenada under Bishop and the NJM looked to Cuba and the Soviet Union as role models and established close ties with them. In January 1980, Grenada and Cuba were the only Western Hemisphere countries to vote against a United Nations resolution condemning the Soviet Union's invasion of Afghanistan.[22] Numerous agreements were made between Grenada and other communist countries for the supply of arms and ammunition and for the training of Grenadian military and political personnel.[23] With the assistance of the Cubans and the Soviets, construction was begun on a large international airport capable of handling both large commercial airliners and military aircraft.[24] An interesting aspect of the decision to build the airport was the NJM's declaration before they assumed power in 1979 that they were against building an international airport because it would lead to "national-cultural prostitution" by the tourist industry.[25] The Cubans and the Soviets upgraded Grenada's only radio station, Radio Grenada, from a one-kilowatt station to a seventy-five-kilowatt station that covered the entire Caribbean.[26] The new radio station was renamed Radio Free Grenada, and its source for international news was switched from the British Broadcasting Corporation to the Soviet TASS and Cuban Prensa Latina news networks.[27]

In November 1981, Grenada joined the Organization of Eastern Caribbean States (OECS).[28]

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[17]The name stands for The New Joint Endeavor for Welfare, Education, and Liberation Movement. Preliminary Report, *supra* note 1, at 7.

[18]*Id.*

[19]People's Law No. 21 of 1979 (April 12, 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[20]People's Law No. 8 of 1979 (March 25, 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[21]*See* Langdon, *One Grenadian Prisoner's Story*, Wash. Times, Dec. 15, 1983, at C1, col. 2. *See also* Preliminary Report, *supra* note 1, at 8-13.

[22]Grenada: October 25 to November 2, *supra* note 15, at 4.

[23]Taubman, *Experts Say 5 Arms Pacts Suggest Moscow Had Designs on Grenada*, N.Y. Times, Nov. 6, 1983, at 1, col. 2. Following the intervention by the US and the Caribbean collective security force, numerous documents were captured detailing the extent of the communist connection to Grenada. A few of those captured documents supporting this point are currently on file in the International Law Division, The Judge Advocate General's School, US Army: letter from Dmitri Ustinov, Minister of Defense of the USSR, to General Hudson Austin, State Minister of Defense and Interior of Grenada (Jan. 19, 1983) (approving the admission of ten Grenadian military officers to a four-year Soviet military school); letter from General Hudson Austin to Divisional General Ochoa, Vice Minister of Defense for the Revolutionary Armed Forces of Cuba (May 16, 1982) (thanking the Cuban government for the special courses in Cuba attended by Grenadian military personnel); Agreement On Cooperation Between the New JEWEL Movement of Grenada and the Socialist Unity Party of the German Democratic Republic (June 10, 1982) (the agreement for the years 1982 through 1985 was to include the political training of members of the NJM in East Germany); Agreement Between the Bulgarian Communist Party and the New JEWEL Movement (signed but undated other than noting it is for the period 1982 - 1983) (the agreement provides for the political training of Grenadians at the political academy of the Bulgarian Communist Party); Summary of Prime Minister Bishop's Meeting With the Soviet Ambassador (May 24, 1983) (the summary mentions that the Soviet Union will provide Grenada with two Coast Guard patrol boats, 72,000 roubles worth of 14.5-mm shells for the Soviet-supplied BTR armored troop carriers, and an aircraft capable of seating 39 paratroopers; all of these items were to be shipped through Cuba); letter on behalf of General Hudson Austin from the Grenadian Ambassador in Cuba to the Vietnamese Ambassador in Cuba (May 23, 1981) (the letter was a request for training of military personnel and included a request for a study of captured US military equipment, an assessment of tactics used by the US in Vietnam, and techniques of mobile warfare).

[24]The new airport's 9,000 foot runway would have given the Soviets the capability of covering the entire Caribbean with MIG-23s stationed in Cuba and Grenada. Preliminary Report, *supra* note 1, at 5.

[25]*Id.*

[26]*Id.* at 13.

[27]*Id.*

[28]People's Law No. 41 of 1981 (Nov. 6, 1981), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

The members, all former members of the West Indies (Associated States) Council of Ministers, include: Antigua, Dominica, Grenada, Montserrat, St. Kitts/Nevis, Saint Lucia and Saint Vincent, and the Grenadines. Grenada is tied to these nations not only by virtue of its membership in the OECS, its common cultural background, and membership in the British Commonwealth, but also by a common currency and mutual economic interests through membership in the East Caribbean Common Market.[29]

B. Events Leading to US Action

1. Relations With the United States

A coolness verging on animosity had existed between the governments of the US and Grenada since Bishop's announcement that the new People's Revolutionary Government was going to seek closer ties with Cuba and the Soviet Union. Grenada's obedient support of the Soviet Union in the United Nations, its extreme revolutionary and anti-American rhetoric, and its decision to build the international airport, with reports that it was to be used for purposes beyond mere tourist traffic,[30] all added to the tensions between Grenada and the US.

In what may have been an attempt to alter the course of events on Grenada in June 1983, Bishop sought and received a meeting with top officials in the US government.[31] There is some indication that this meeting may have been unpopular with the NJM Central Committee and thus may have contributed to Bishop's downfall.[32] Under pressure from other Caribbean leaders, Bishop reportedly agreed to stop letting Grenada be used as a transit point for revolutionaries from other Caribbean nations travelling to Libya for terrorist training.[33]

2. Disintegration of the Party

In July and August 1983, a series of events began that have been characterized as a "Stalinist purge" of Grenada's marxist NJM party.[34] Captured minutes of the organizing committee of the NJM, dated 25 July 1983, reflect the following concern about the revolution: "The continued failure of the Party to transform itself ideologically and organisationally [sic] and to exercise firm leadership along a Leninist line in the face of the acute political, economic, social, military external complexitiei [sic] facing the Revolution."[35] At an extraordinary meeting of the NJM Central Committee, the following was reported: "We need to look at this situation in a special way—We are *seeing the beginning of the disintegration of the party.*"[36] At the same time there were reports of incidents between the Cubans and the Grenadian workers at the international

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[29]*See* Agreement Establishing the East Caribbean Common Market, June 11, 1968, 20 I.L.M. 1176 (1981).

[30]The Grenadian Minister of Mobilization, Selwyn Strachan, stated publicly in 1981 that the USSR would find the new airport "useful because of its strategic location astride vital sea lanes and oil transport routes" and that Cuba would use the airport to supply its troops in Africa. Preliminary Report, *supra* note 1, at 30.

[31]Anderson, *Behind the Purge of Bishop*, Wash. Post, Oct. 30, 1983, at C7, col. 4; Goshko, *Invasion Caps 4 Years of Tension Between Ministate and the U.S.*, Wash. Post, Oct. 26, 1983, at A17, col. 1.

[32]Anderson, *supra* note 31, at C7. Jack Anderson reports that Bishop and William Clark, the President's National Security Advisor, had struck some sort of a deal in their June 1983 meeting. *Id.* This is somewhat substantiated in the article by John Goshko where he stated that Bishop's American friends described Bishop as returning to Grenada determined to respond to the American promises of friendlier relations if Grenada moderated its rhetoric and conduct. Goshko, *supra* 31, at A17. Possible further substantiation comes from a captured document that is handwritten and appears to be the notes taken by a Grenadian attending the meeting with Clark and other officials of the Administration. The tone of the notes are upbeat and tend to support what was reported in the news media. Handwritten notes of what appears to be a memorandum of the meeting between Maurice Bishop and William Clark, Kenneth Dam, and other Administration officials, on file in the International Law Division, The Judge Advocate General's School, US Army.

[33]Anderson, *supra* note 31, at C7.

[34]*Id.*

[35]Captured document, Minutes of the Meeting of the Organising [sic] Committee on Monday, July 25, 1983, at 1-2 (1983), on file in the International Law Division, The Judge Advocate General's School, US Army.

[36]Preliminary Report, *supra* note 1, at 31 (the comments are those of LTC Liam James, Deputy Secretary of Defense and Interior) [emphasis in original].

airport.[37] Another extraordinary meeting of the NJM Central Committee took place over the three day period of 14-16 September 1983 where it was decided that the NJM needed to strengthen its relations with Cuba, the Soviet Union, and East Germany.[38] The Central Committee's state of panic was evidenced in the following statement: "The militia is non-existent, the army demoralized. . . . If this is allowed to continue the party will disintegrate in a matter of 5-6 months. . . . [T]he Comrade Leader [Bishop] has not taken responsibility, not given the necessary guidance . . . is disorganized very often, avoids responsibilities for critical areas of work. . . ."[39] The Central Committee decided that Bishop must share power with his deputy and rival, Bernard Coard.[40]

On 27 September 1983, Bishop departed Grenada to visit several Eastern European countries, the Soviet Union, and for an unscheduled visit to Cuba. Upon his return, Bishop decided to fight the decision of the Central Committee by discrediting Deputy Prime Minister Coard through a campaign of rumors that Coard intended to assassinate Bishop.[41] Coard disavowed knowledge of the plan and resigned his position with the party and the government. On 13 October 1983, Bishop was placed under house arrest pending a determination of his status.[42] On 18 October, five ministers loyal to Bishop resigned from the government.[43] Throughout this period there were reports of strikes and demonstrations at key points throughout Grenada.[44] On 19 October, a crowd of several thousand of Bishop's supporters freed him from his house arrest and marched on nearby Fort Rupert where some of Bishop's supporters were being held prisoner. Upon arriving at Fort Rupert, they disarmed the garrison and took over the fort. Within a short time, soldiers from the People's Revolutionary Army attacked the fort and the crowd surrounding it, firing heavy machine guns from their armored personnel carriers directly into the crowd, killing and wounding many, including women and children. Bishop and six of his ministers and aids were captured and later executed.[45] Radio Free Grenada announced the deaths and the formation of a Revolutionary Military Council and the institution of a twenty-four-hour shoot-on-sight curfew. Journalists who arrived at the airport were met by the military and forced to depart the country immediately.[46]

3. Actions of the OECS and the US

The number of nations of the OECS were shocked and panicked by the occurrences on Grenada.[47] News from Grenada included reports of riots, looting, scattered shooting, more executions, and widespread lawlessness.[48] On 21 October, OECS leaders met in Barbados and unanimously (excluding Grenada, which for obvious reasons was not present) decided to request the US to assist them in restoring order in Grenada. This request by the OECS had followed earlier requests to the US by individual Caribbean leaders.[49] At some point prior to the OECS meeting, the Governor-General of Grenada, Sir Paul Scoon, smuggled out of Grenada a message to the Prime Minister of Barbados requesting assistance.[50] A subsequent written

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[37]Captured document, Minutes of the Political/Economic Bureau, Aug. 10th, 1983, at 5 (1983), on file in the International Law Division, The Judge Advocate General's School, US Army.

[38]Preliminary Report, *supra* note 1, at 32.

[39]*Id.*

[40]*Id.* at 33.

[41]*Id.* at 34.

[42]Tyler, *Chronology of Events In Grenada*, Wash. Post, Oct. 29, 1983, at A14, col. 1.

[43]Preliminary Report, *supra* note 1, at 36.

[44]*Id.* at 34.

[45]*Id.* at 36; *see also Now to Make it Work*, Time, Nov. 14, 1983, at 21.

[46]Preliminary Report, *supra* note 1, at 36.

[47]Gwertzman, *Steps to the Invasion: No More 'Paper Tiger'*, N.Y. Times, Oct. 30, 1983, at 20, col. 4. *See also* Grenada: October 25 to November 2, *supra* note 15, at 5.

[48]Preliminary Report, supra note 1, at 36-37.

[49]Gwertzman, *supra* note 47, at 20, col. 1; Tyler, *supra* note 42, at A14, col. 2-4.

[50]DeFrank & Walcott, *The Invasion Countdown*,Newsweek, Nov. 7, 1983, at 75; *D-Day in Grenada*, Time, Nov. 7, 1983, at 27.

request, dated 24 October 1983, was delivered to the Prime Minister of Barbados requesting assistance from Barbados, Jamaica, the OECS, and the US.[51] The US was informally requested on 21 October to assist in the collective intervention; the formal request from the OECS reached President Reagan on 23 October.[52]

The US had been closely monitoring the events in Grenada since the arrest of Bishop. The US had reportedly offered, through the Prime Minister of Barbados, to assist in rescuing Bishop prior to his execution.[53] US diplomatic personnel attempted to travel to Grenada on 19 October, but were turned back because the airport was closed.[54] After passing a request to the Grenadian authorities through St. George's University Medical School, two US consular personnel from Barbados were allowed to land by charter flight on 22 October. On 23 October, one of the American diplomats met with Major Cornwall, a member of the Revolutionary Military Council, to arrange for the evacuation of US citizens. Cornwall denied that there was any need for evacuation and demanded that anyone departing use commercial carriers. However, the regional air carrier, LIAT, was no longer flying into Grenada. When asked for the identity of the other members of the Revolutionary Military Council, Cornwall reportedly could not or would not provide any other names.[55] Two more US counsular officials arrived, including the Counsul General from Barbados. One US consular official spoke to American students at the medical school and reported that they were scared. Continued unsuccessful discussions with Cornwall led all four diplomats to conclude that he was stalling for time and seeking to impede the evacuation of US citizens as much as possible.[56] Intelligence reports indicated that the military on Grenada was divided and that possibly another coup was being planned.[57] The US was receiving intelligence assessments on the personalities involved in the power struggle on Grenada; the source of these assessments was the Governor-General, Sir Paul Scoon.[58]

On 21 October, a US naval task force bound for Lebanon was diverted to the Caribbean. At the same time, contingency planning for intervention into Grenada began. At approximately seven p.m. on 23 October, President Reagan made a tentative decision to intervene in Grenada as part of the collective security force.[59] On 24 October, US officials continued to receive reports that charter flights were being delayed or denied landing rights in Grenada.[60] At six p.m. on 24 October, President Reagan signed the formal order for US forces to intervene in Grenada. At midnight on 24 October, in reply to assurances from General Austin of the Revolutionary Military Council that US citizens were safe on Grenada, the US sent a message to General Austin asserting that "there was no legitimate government on Grenada and that US citizens were in danger."[61] As the US forces began their landings, the US government notified the governments of Cuba and the Soviet Union of the intervention and stated that US forces would offer shelter and security to their people on Grenada.[62]

III. The Legal Basis for US Action

A. The Stated Reasons

On 25 October 1983, in a statement delivered jointly with Prime Minister Eugenia Charles of Dominica, the chairperson of the OECS, President Reagan stated that there were three reasons for the United States intervention:

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[51]Grenada: October 25 to November 2, *supra* note 15, at 6.

[52]Tyler, *supra* note 42, at A14, col. 5.

[53]*Id.* at cols. 2-3.

[54]Preliminary Report, *supra* note 1, at 37.

[55]*Id.*

[56]*Id.*

[57]Tyler, *supra* note 42, at A15, col. 2.

[58]*Id.*

[59]*Id.*

[60]*Id.*

[61]*Id.*

[62]*Bombings in Beirut: Reagan Makes His Case*, N.Y. Times, Oct. 28, 1983, at A9, col. 6. (transcript of address by President on Lebanon and Grenada).

> First, and of overriding importance, to protect innocent lives, including up to 1,000 Americans whose personal safety is, of course, my paramount concern. Second, to forestall further chaos. And, third, to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada. . . .[63]

In letters on 25 October to the Speaker of the House and the President Pro Tempore of the US Senate, the President listed the reasons for the US intervention as the "overriding importance of protecting the lives of the United States citizens in Grenada" and "the call for assistance" from the OECS.[64] Another justification for the US intervention, announced a few days later, was the request by the Governor-General of Grenada for assistance.[65] The reason given for the delay in citing this basis was the need to insure the safety of the Governor-General before publicly disclosing his request.[66] In fact, Scoon was not rescued until almost a day after the intervention began.[67]

B. Analysis of the Legal Basis for US Action

Dur to the nature of the stated bases for intervention and the manner in which they are interrelated, there will be some overlap in analysis. This is also a result of the reciprocal nature of existing treaties and charters. The second ("forestalling further chaos") and third ("restoration of conditions of law and order and of governmental institutions") reasons stated by the President for US intervention are inextricably tied to the OECS request for assistance. Since this was, in large part, the basis for the OECS decision to act and its subsequent request for US assistance, these two reasons wil be combined under the analysis of the OECS request.

1. Protection of US Citizens

The number of US citizens on Grenada, approximately 1100, was fairly substantial in relation to the total population of Grenada.[68] This accounted for roughly one percent of the entire population of Grenada and represented the largest single group of foreign nationals on Grenada.[69] The majority of the US citizens were students and staff at the two campuses of St. George's University School of Medicine; however, several hundred of them were retirees, tourists, *etc.*[70] Although the medical students were centrally located around the two medical school campuses, it would have been difficult to locate quickly the other US citizens on the island.

Under customary international law, every state is viewed as having the right to intervene into a foreign country to protect the rights of its citizens.[71] This right is regarded as inherent in the powers of the state and has been recognized by the United States Supreme Court: "Another privilege of a citizen of the United States is to *demand the care and protection of the Federal government* over his life, Liberty, and property when on the high seas or *within the jurisdiction of a foreign government.*"[72] This right to

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[63]Statement by the President and by the Prime Minister of Dominica Eugenia Charles on U.S. Involvement in Grenada, released by Office of the Press Secretary, The White House, at 1 (Oct. 25, 1983) [hereinafter cited as Statement by President and Prime Minister of Dominica].

[64]Letters from President Reagan to the Speaker of the House and the President Pro Tempore of the US Senate (Oct. 25, 1983), on file in the International Law Division, The Judge Advocate General's School, US Army.

[65]Statement by the Honorable Kenneth W. Dam, Deputy Secretary of State, Before the House Committee on Foreign Affairs, at 8 (Nov. 2, 1983), on file in the International Law Division, The Judge Advocate General's School, US Army.

[66]*Id.* at 9.

[67]A Navy SEAL team parachuted into the residence of the Governor-General. They secured the Governor-General, but were quickly pinned down by Cuban-manned armored personnel carriers. It was not until 21 hours later that a task force of 250 Marines with 5 tanks and 13 armored personnel carriers were able to rescue the Governor-General and the seals. *The Battle for Grenada*, Newsweek, Nov. 7, 1983, at 73.

[68]Tyler, *supra* note 42, at A14, col. 2.

[69]Statement by President and Prime Minister of Dominica, *supra* note 63.

[70]Tyler, *supra* note 42, at A14, col. 2.

[71]*See* 1 L. Oppenheim, International Law 276 (H. Lauterpacht 7th ed. 1948).

[72]Slaughter House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) [emphasis added].

protect nationals has been viewed by different writers as springing from various sources, including the inherent right of a sovereign to protect nationals abroad, the inherent right of self-defense, and as a form of forcible self-help to protect human rights.[73] No matter what the source, however, it is clear that the right to protect one's own citizens in a foreign country generally has been recognized under customary international law.

The United Nations Charter seems to prohibit the use of force in Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[74] The purposes of the UN, as stated in the Charter, include taking "collective measures for the prevention and *removal of threats to the peace*, and for the suppression of acts of aggression or other breaches of the peace . . . *in conformity with* the principles of justice and *international law*. . . ."[75] This language would seem, however, to preserve those generally recognized principles of customary international law, at least in regard to taking collective action. Article 51 of the United Nations Charter further supports the concept of self-defense: "Nothing in the present Charter shall impair the *inherent right of individual or collective self-defense* if an armed attack occurs against a Member of the United Nations. . . ."[76]

Using the terminology "inherent right" clearly seems to indicate that this right was not created by the UN Charter but rather is a recognition of the previously existing right of self-defense of sovereign states rooted in customary international law. This supports the concept that other inherent state rights also exist outside the UN Charter. The requirement of an "armed attack" under Article 51 of the Charter would seem to limit the ability of a state to protect its citizens by use of force in a foreign country. Several commentators have indicated, however, that the words "armed attack" were not intended to limit the traditional right of self-defense but were used instead to demonstrate a legitimate use of self-defense.[77] If there ever is to be a right of nations to protect their citizens in foreign countries, a restrictive interpretation of the armed attack requirement of Article 51 would seem to eliminate it. As the right to protect one's citizens is an inherent right of every sovereign state, the armed attack requirement does not apply to a state protecting the lives of its citizens in a foreign country.

The UN Charter further requires the parties to a dispute to seek a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[78] If these procedures are unsuccessful, then the matter must be referred to the UN Security Council.[79] It seems unreasonable, however, in today's Security Council environment to expect any resolution to be passed or action taken in light of the frequent use veto. The Iranian hostage situation was a clear example of how slow and ineffective UN procedures are for resolving these types of problems when competing superpower interests are involved.

The US is a signatory to both the Rio Treaty[80] and the Charter of the Organization of American States.[81] Any military action we take in

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[73]*See* 1 L. Oppenheim, *supra* 71, at 626 n.2; Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of U.S. Claims*, 83 Mil. L. Rev. 59, 71 (1979); Lillich, *Intervention to Protect Human Rights*, 15 McGill L.J. 205, 207 (1969).

[74]U.N. Charter art. 2, para. 4.

[75]*Id.* at art. 1, para. 1 [emphasis added].

[76]*Id.* at art. 51 [emphasis added].

[77]*Id.* at art 33.

[78]*Id.* at art. 37.

[79]*See* J. Brierly, The Law of Nations 417-20 (6th ed. 1963); L. Goodrich, E. Hambro, & A. Simons, Charter of the United Nations 344-47 (3d rev. ed. 1969).

[80]Inter-American Treaty of Reciprocal Assistance Between the United States of America and other American Republics, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838 [hereinafter cited as Rio Treaty].

[81]Revised Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361 (amended 1967) [hereinafter cited as O.A.S. Charter].

this hemisphere must be in consonance with these treaties. The Rio Treaty states that its provisions are not to be construed as impairing the rights and obligations of the contracting parties under the UN Charter.[82] A similar provision is found in the Charter of the Organization of American States.[83] The clear import of both is that if a state has a particular right under the UN Charter, then it retains that right under these two treaties.

It is clear under existing international law that a state has the right (and an obligation) to protect its citizens who are in a foreign country. Whether the right is inherent or stems from the right of self-defense, the result is the same if its citizens are legitimately in peril and the foreign country will not or cannot help them. One standard that has been advanced for intervention to protect a state's citizens in a foreign country provides that intervention is legal when a "large scale, clear and present danger threatens the lives of its nationals in another jurisdiction wherein law and order has broken down, the government refuses to protect their lives, or the government is actively participating in the lawless behavior which threatens their lives."[84] Another standard used for the general concept of self-defense is a modified version of the rule in the *Caroline*[85] case which requires:

> First, an actual infringement or threat of infringement of the rights of the defending state; second, a failure or inability on the part of the other state to use its own legal powers to stop or prevent the infringement; and third, acts of self-defense strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.[86]

Under either of these standards, it would appear that the situation in Grenada supported the intervention by the OECS and the United States. There was a period of turmoil on the island which began with the arrest of Prime Minister Bishop. The turmoil increased after the execution of Bishop and other cabinet members. There were reports of executions, random shootings, and lawlessness. The Deputy Prime Minister had previously resigned and there was no clear indication of who was running the country. Intelligence assessments indicated that the People's Revolutionary Army, the only identifiable organization exercising any control in the country, was deeply divided, and there were indications that a counter-coup was about to take place. It was clear that the individuals exerting power were significantly more radical and revolutionary than Bishop and, therefore, believed to be more unstable. The US officials who visited Grenada concluded that the military was stalling the evacuation of US citizens. Their contact, Major Cornwall, reportedly a member of the Revolutionary Military Council, did not seem to know the names of any other members of the Council. The US students at the medical school were reportedly scared. An unprecedented, Draconian twenty-four-hour shoot-on-sight curfew was in effect on the entire island. This alone would have caused great concern considering the large number of US citizens on the island. Also significant were the concerns of the neighboring countries about the instability of Grenada. They took the unprecedented step of voting for military intervention and requesting US assistance. The situation was so alarming that the Governor-General of Grenada covertly sent a plea for outside assistance.

The requirement under the UN Charter to negotiate or otherwise use peaceful means was satisfied in Grenada by the earlier diplomatic effort by the US. There is no requirement that a state exhaust every avenue short of intervention if its citizen's lives are at stake. The situation in Grenada was clearly deteriorating; law and order had broken down and there was a real threat to the lives of the US citizens on Grenada. This threat, when viewed in light of America's recent experience involving the

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[82]Rio Treaty art. 10.

[83]O.A.S. Charter art. 137.

[84]The Law of Limited International Conflict, A Study by the Institute of World Policy, Edmund A. Walsh School of Foreign Service, Georgetown University, at 30 (Apr. 1965).

[85]1 L. Oppenheim, *supra* note 71, at 268, II Hyde, International Law 409-414 (1906).

[86]Behuniak, *supra* note 73, at 75.

treatment of its citizens in the Iranian hostage crisis, prompted the President to respond with force.

One issue that would seem to cause some problems under this theory justifying the intervention is whether the US response was necessary to protect its citizens. First, it must be remembered that although the largest segment of US citizens in Grenada was in the vicinity of the two medical school campuses, there were also hundreds of US citizens on other portions of the 133 square mile island.[87] Considering the size of the island[88] and the number of US citizens dispersed throughout Grenada, it was not unreasonable to land forces at several points to gain access to the US citizens on the island. The fact that the US forces stayed beyond the time required to evacuate its citizens was due to the necessity of restoring order and functioning of governmental institutions pursuant the requests by the Governor-General and the OECS.

2. Request by the Governor-General

The Governor-General of Grenada, Sir Paul Scoon, was nominated for that position in 1978 by Prime Minister Gairy.[89] The actual appointment was made by Queen Elizabeth II. The Governor-General's position and powers were established under the Grenada Constitution of 1973[90] which vested the executive authority of Grenada in the Queen and allowed that authority to be exercised on her behalf by the Governor-General.[91] His powers under the constitution were considerable and included the power to declare a state of emergency in Grenada;[92] to appoint a Prime Minister who "appears likely to command support of a majority of the members of the House of Representatives";[93] to appoint the other ministers of the government in accordance with the advice of the Prime Minister;[94] the authority to "constitute offices for Grenada, make appointments to any such office and terminate any such appointments";[95] the power to grant pardons;[96] and the power to summon the Grenadian Parliament into session and the power to dissolve it.[97] Among the British Commonwealth of Nations, there is legal precedent for a Governor-General to dissolve a government.[98]

Although Bishop's government suspended the 1973 constitution shortly after Gairy's overthrow, it retained the position of Governor-General.[99] One can speculate why a marxist government would want to retain ties to the Commonwealth through the Governor-General: it would undoubtedly give the new government legitimacy and respectability among the other Eastern Carribean members of the Commonwealth and among its own people. In People's Law Number 18, Bishop proclaimed:

> 1. (1) In the exercise of his functions the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by those sections of the Constitution brought into force by People's Law No. 15 of 1979, a People's Law or any other law to act in accordance with the advice of any person or authority other than the Cabinet or in his own deliberate judgment.
>
> . . . .

[87]According to some reports, there would have been approximately 450 US citizens in areas of Grenada other than the medical school. Tyler, *supra* note 42, at A14, col. 2.

[88]The main island is slightly smaller than twice the size of the District of Columbia.

[89]Burgess, *Island Awaits Word From Ex-Teacher*, Wash. Post, Oct. 30, 1983, at A15, col. 1.

[90]Grenada Const. ch. II, § 19 (1973, suspended 1979), *reprinted in*, A. Blaustein & S. Holt, *supra* note 14.

[91]*Id.* at ch. IV § 57.

[92]*Id.* at ch. I, § 17.

[93]*Id.* at ch. IV, § 58(2).

[94]*Id.* § 58(4).

[95]*Id.* § 69.

[96]*Id.* § 72.

[97]*Id.* at ch. III, § 52.

[98]Burgess, *supra* note 89, at A15, col. 3.

[99]People's Law No. 3 of 1979 (Mar. 25, 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

> 2. The Prime Minister shall keep the Governor-General fully informed concerning the general conduct of the government of Grenada and shall furnish the Governor-General with such information as he may request with respect to any particular matter relating to the government of Grenada.[100]

Other functions of the Governor-General under the People's Revolutionary Government included appointing the justices of the Court of Appeal and the judges and chief justice of the High Court.[101]

It should be noted that Bishop merely suspended the 1973 constitution by a People's Law rather than abolish it. The Declaration of the Grenada Revolution stated that the "People's Revolutionary Government pledges to return to constitutional rule at an early opportunity."[102] Notwithstanding the issue of the legitimacy of Bishop's assumption of power, the legality of the People's Laws was questionable absent the abolition of the 1973 constitution. Article 106 of the 1973 constitution states: "This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."[103] Following this line of reasoning, legally the Governor-General retained all those powers granted to him under the 1973 constitution even after its suspension.

Another aspect concerning the authority of the Governor-General was the manner in which the laws of Grenada were promulgated following Bishop's assumption of power and suspension of the constitution. Maurice Bishop, as Prime Minister and the charismatic leader of the revolution, was the source of all laws in Grenada. In the Declaration of the Grenada Revolution, Bishop orally proclaimed the first ten of the new People's Laws.[104] People's Law Number 10 provided that all laws "shall become effective upon oral declaration and/or publication on Radio Free Grenada by the Prime Minister or in the official Gazette under the hand of the Prime Minister."[105] Also, among the first ten People's Laws proclaimed by Bishop was the suspension of the constitution. Arguably, the People's Laws came into being and existed by the force of Maurice Bishop's personality and position. Once Bishop was executed and the position of Prime Minister was vacant, the constitution was automatically reinstated to fill the legal and political vacuum then existing.

Under either the 1973 constitution or the People's Laws, however, the Governor-General's position was an important office in the government. It was a position of visibility to both the world at large and to the people of Grenada. Clearly under the People's Revolutionary Government he did not exercise any policy-making powers. There was, however, the residual power to act in accordance with "his own deliberate judgment."[106]

In his letter to the Prime Minister of Barbados on 24 October 1983, the Governor-General confirmed his earlier message for assistance:

> You are aware that there is a vacuum of authority in Grenada following the killing of the Prime Minister and the subsequent serious violations of human rights and bloodshed. I am, therefore, seriously concerned over the lack of internal security in Grenada. Consequently I am requesting your help to assist me in stabilising [sic] this grave and dangerous situation. It is my desire that a peace-keeping force should be established in Grenada to facilitate a rapid return to peace and tranquility and

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[100]*Id.* at People's Law No. 18 (Apr. 2, 1979).

[101]*Id.* at People's Law No. 14 (Mar. 29, 1979).

[102]Declaration of the Grenada Revolution, March 28, 1979, *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[103]Grenada Const. ch. IX, § 106 (1973, suspended 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[104]Declaration of the Grenada Revolution (March 25, 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[105]People's Law No. 10 of 1979 (March 25, 1979), *reprinted in* A. Blaustein & S. Holt, *supra* note 14.

[106]People's Law No. 18 of 1979 (Apr. 2, 1979), *reprinted in* A. Blaustein & Holt, *supra* note 14.

> also a return to democratic rule. In this connection I am seeking assistance from the United States, from Jamaica, and from the Organization of Eastern Caribbean States through its current chairman, the Hon. Eugenia Charles, in the spirit of the treaty establishing that organization to which my country is a signatory.[107]

In an interview on British television on 31 October 1983, the Governor-General stated that he had been requested by "responsible people in Grenada" to do something about the situation.[108]

In summary, it is clear that the Governor-General possessed a position and power in the government under both the 1973 constitution and the People's Revolutionary Government. The situation in Grenada, outlined above, showed a definite breakdown in authority and an anarchic situation which showed little indication of improving. This was also evident in the Governor-General's request for assistance. There were, according to the Governor-General, requests from responsible persons on the island for him to act pursuant to his position to stabilize the situation. Clearly he did not have the capability to correct or stabilize the situation without outside help. The army was divided and fighting for power. There was a large number of Cubans and Communist Bloc personnel[109] on the island who presumably had more than a passing interest in the outcome of the turmoil.

In comparing this intervention to the Dominican Republic intervention in 1965, which was approved by the Organization of American States, it appears that the Grenadian intervention, requested by the Governor-General, is even more justified. The Governor-General was not one of the rival factions vying for power as existed in the Dominican Republic situation.[110] The Governor-General was acting in his capacity as the only existing representative of the government. He had served in that capacity under both a parliamentary government (Gairy) and a Marxist government (Bishop). His request was a legal response in what he believed to be the best interests of Grenada. According to a spokesperson of the British Crown, the Governor-General has a "constitutional right to form a new government."[111] The Governor-General used the only means available to accomplish this: a request to the member states of a treaty organization to which Grenada belonged and who shared a common culture and heritage with Grenada. There is a well-established basis in international law for requests by a lawful authority to another sovereign for military assitance to establish internal order.[112]

3. Request From the OECS

As indicated in the background section, the OECS formally requested United States assistance. The reason given for this request was the "relative lack of military resources in the possession of the other OECS countries" in comparison to the "level of sophistication and size" of the Grenadian armed forces.[113] The OECS governments' stated intention was to remove the threat in Grenada and to "invite the Governor-General of Grenada to assume executive authority of the country under provisions of the Grenada Constitution of 1973 and to appoint a broad-based interim government to administer the country pending the holding of general elections."[114] The statement about in-

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[107]Letter from the Governor-General of Grenada to the Prime Minister of Barbados, dated Oct. 24, 1983, on file in the International Law Division, The Judge Advocate General's School, US Army.

[108]Interview of the Governor-General of Grenada, Sir Paul Scoon, on Oct. 31, 1983, *reprinted in* Department of State Message, 011245Z Nov. 1983, on file in the International Law Division, The Judge Advocate General's School, US Army.

[109]There were over 900 Cuban and Communist Bloc personnel in Grenada. Of this number, many were military personnel or intelligence operators. *The Cuban Connection*, Newsweek, Nov. 7, 1983, at 77; Preliminary Report, *supra* note 1, at 1.

[110]*See* O'Brien, *68: U.S. Military Intervention: Law and Morality*, VII The Washington Papers 45-49 (1979).

[111]Burgess, *supra* note 89, at A15, col. 3.

[112]*See* 1 L. Oppenheim, *supra* note 71, at 273.

[113]Statement by Prime Minister Charles, Chairman of OECS, at 3 (undated), on file in the International Law Division, The Judge Advocate General's School, US Army.

[114]*Id.* at 4.

viting the Governor-General to assume executive authority of the country was technically unnecessary because he already possessed it under both the 1973 constitution and the People's Laws. It most surely was included so there would be no misunderstanding as to what the intervenors' role in the country would be.

The basis for the OECS decision to intervene was Article 8 of the treaty which established the OECS:[115]

> The Defense and Security Committee shall have responsibility for coordinating the efforts of Member States for collective defence and the preservation of peace and security against external aggression and for the development of close ties among the Member States of the Organization in matters of external defence and security, including measures to combat the activities of mercenaries, operating with or without the support of internal or national elements, in the exercise of the inherent right of individual or collective self-defence recognized by, Article 51 of the Charter of the United Nations.[116]

As pointed out above in Article 8 and as discussed earlier in this article, Article 51 of the UN Charter allows for the inherent right of self-defense. Article 52 of the UN Charter authorizes the existence and use of regional security arrangements for dealing with matters relating to "maintenance of international peace and security as are appropriate for regional action."[117] The inherent right of self-defense under Article 51 is independent of and unimpaired by any other article of the UN Charter. Article 53 of the UN Charter, however, restricts enforcement actions under regional security arrangements to those authorized by the Security Council.[118] Critical in this limitation is the definition of an "enforcement action." The International Court of Justice, in an advisory opinion in 1962, found that a UN emergency peace keeping force which had not been authorized by the Security Council was not an "enforcement action" since it involved a military force with the mission of establishing peaceful conditions and maintaining security.[119] Therefore, under either a theory of self-defense or a theory of humanitarian intervention to establish order, the OECS action was legal under the UN Charter. An issue raised in the news media[120] was the fact that the OECS treaty had not been registered with the United Nations as required by Article 102 of the Charter.[121] It was reported, however, that a copy of the treaty had been submitted in October 1982 to the UN for registration but that a UN request for certain information had delayed the registration.[122] An official of the UN Secretariat stated there had "apparently been a mere administrative delay in good faith" on the part of the submitting party.[123] This clearly does not invalidate the legality of the treaty.

That the nations of the OECS felt threatened by the situation in Grenada cannot reasonably be questioned. The recent events had confirmed their worst fears. They had observed their island neighbor rapidly being transformed into an armed marxist camp. They had evidence that Grenada was being used as a transit point from which Eastern Caribbean revolutionaries were being sent to terrorist training camps. There were statements by the leadership in Grenada that the new airfield was to be used for Soviet and Cuban military purposes. The moderate element of the NJM had been eliminated, and there was a power struggle between at least two elements in the military. Law and order in Grenada appeared to have totally broken down. The twenty-four-hour shoot-on-sight curfew was shocking in its severity. In light of these facts and the request from the Governor-General, the OECS deemed it neces-

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[115]Treaty Establishing the Organization of Eastern Caribbean States, June 19, 1981, art. 8, *reprinted in* XX I.L.M. 1166 (1981).

[116]*Id.*

[117]U.N. Charter art. 52, para. 1.

[118]*Id.* at art 53, para. 1.

[119]Certain Expenses of the United Nations, 1962 I.C.J. 151.

[120]Taylor, *Legal Issues Raised About Caribbean Treaty*, N.Y. times, Nov. 2, 1983, at A17, col. 1.

[121]U.N. Charter art. 102, para. 1.

[122]Taylor, *supra* note 118, at A17, col. 2-3.

[123]*Id.*

sary to intervene under the treaty to preserve the security of the Eastern Caribbean region.

The OECS vote to intervene was unanimous, excluding Grenada which was not present. Although the treaty requires unanimous agreement,[124] it is not reasonable to require agreement of the party subject to the intervention. Additionally, a convincing argument can be made that the request by the Governor-General, the only remaining legitimate person in the government with the legal right to speak for the government, was tantamount to a vote for intervention by Grenada.

The United States' acceptance of the request was based on its desire to protect its own citizens in Grenada and to assist the OECS which did not have the capability to execute the operation. Assuming that the OECS decision was legal under international law, the US assistance, despite the fact that it was not a party to the treaty, must logically also be legal. The US had more than a passing interest in the success of the OECS intervention since roughly one percent of the population of Grenada was US citizens. This, coupled with the US historic interest in the welfare of its hemispheric neighbors, provided sufficient justification for the US to assist the OECS.

IV. Conclusion

The combined United States and Caribbean peace-keeping operation into Grenada caused a flurry of criticism and controversy. Much of the criticism came from some quarters of the academic community, which was quick to find illegality in virtually every aspect of the intervention. In contrast to this criticism was overwhelming popular support of the action in the United States, Grenada, and the Caribbean area.

As discussed above, the United States' decision to intervene was the result of a culmination of events in Grenada that caused concern both for Grenada's neighbors and the United States. The presence of a substantial number of American citizens on the island further heightened the United States' interest and concern. The decision to intervene was based on three legal justifications: (1) protection of United States citizens; (2) the request for assistance by the Grenadian Governor-General; and (3) the request from the OECS for assistance in a combined peace-keeping operation. Each of these bases is supportable under existing international law. When considered as a whole, the reasons asserted by the United States provided a strong legal justification for the intervention.

V. Epilogue

On 15 December 1983, all US combat forces were withdrawn from Grenada. At the request of the Governor-General, a contingent of about 250 United States troops and 450 Caribbean peace-keeping personnel remained to perform police functions and to help train the Grenadian police force.

Elections were held on 3 December 1984 and Herbert Blaize's moderate New National Party won a landslide victory over remnants of the marxist New Jewel Movement, renamed the Maurice Bishop Patriotic Movement, and Eric Gairy's right-of-center Grenada United Labor Party. These were the first elections in Grenada in more than eight years. The elections were monitored by observers from the Organization of American States and the British High Commission for the Eastern Caribbean.

Prime Minister Blaize immediately requested that President Reagan continue the presence of United States military personnel on Grenada for an indefinite time to complete training the Grenadian Security Forces and to assist in police and security functions until the Grenadians were fully capable of taking over. In February, the Department of Defense announced that redeployment of the remaining American military personnel would begin in mid-April 1985, and all personnel were expected to be withdrawn by September 1985.

The legal justifications will be evaluated finally by legal scholars and historians in the years to come, in part, based on the actions taken by the United States in Grenada following the intervention of 25 October 1983.

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[124]Treaty Establishing the Organization of Eastern Caribbean States, art. 6, *supra* note 114.

Preventive Law and Automated Data Processing Acquisitions

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I. Introduction

This article identifies some legal problems peculiar to general purpose Automated Data Processing (ADP) acquisitions. Problems with regulatory compliance, *i.e.*, the Brooks Act, GSA, DOD and Army regulations, will not be discussed here because these problems were fully examined by Captain Mark W. Reardon in his article* on ADP in the August 1984 issue of *The Army Lawyer*. Instead, this article discusses the problems of creating a legally enforceable statement of work, especially for maintenance work, and methods for preventing ADP-related legal problems.

II. ADP Systems

An "ADP system" is not easily defined. It includes different items of hardware, *e.g.*, central processing units, disk drives, tape drives, controllers, cathode ray tube terminals, and loaders, as well as nonhardware items such as software. When integrated, these individual elements create an "ADP system." An "ADP system" is not only a product of the manufacturer of its constituent elements; it is also the product of those who eventually modify it and maintain it.

The system continues to evolve after the ADP equipment is installed and operational. First, the Original Equipment Manufacturer (OEM) of each item of hardware issues engineering changes, *e.g.*, newly designed components to replace or improve parts or panels already in the hardware. These changes are publicized and become part of the standard to which an OEM will maintain the hardware. Engineering changes are often issued years after a particular piece of hardware is initially marketed. These new engineering changes are usually installed during routine preventive maintenance. An ADP system may be substantially altered in the course of installing OEM engineering changes.

Also, in the normal course of operations, parts wear out and must be replaced. If non-OEM approved (nonstandard) parts are used, machine or system-wide deterioration may occur because a non-OEM part may fail to perform or cause other parts to fail (for example, a nonstandard part continues to perform but causes a current overload to reach five other parts, causing them to fail while the nonstandard part chugs along). Additionally, a non-OEM part may cause diagnostic software used to locate problems in an ADP system to become unreliable. Problems in a troubled system or piece of hardware are located by comparing how the diagnostic software performs on the system or hardware being scrutinized to how the diagnostic software should perform on an ideal system or machine. The diagnostic routines are reliable only if run through hardware substantially composed of OEM parts, including reasonably up-to-date engineering changes.

If there are nonstandard parts in the hardware, or if the necessary OEM engineering changes have not been made, it cannot be determined whether anomalous diagnostic results are the product of standard parts not functioning or functioning nonstandard parts. Where a sufficient number of nonstandard parts have been used, diagnostic software becomes unreliable. Because diagnostic software is the principal method of locating maintenance problems, once diagnostic software loses reliability, government oversight of contractor maintenance becomes extremely difficult. Also, without reliable diagnostic software, system problems are free to multiply until a major breakdown occurs. Diagnostic software is usually designed by the OEM and updated to accommodate engineering changes. There is no

*Reardon, *Automated Data Processing Equipment Acquisition*, The Army Lawyer, Aug. 1984, at 19.

easy way to quantify its effectiveness, but it is essential in maintaining ADP system reliability.

In addition, failing to make required OEM engineering changes and failing to use standard OEM parts may restrict competition for future maintenance contracts because many reputable OEM and non-OEM vendors of maintenance services will not accept responsibility for a "bastardized" system, *i.e.*, not repaired with standard OEM parts and OEM engineering changes not made. These vendors will not commit to long-term maintenance of a machine which may break down due to causes they cannot reasonably identify or cure. In this circumstance, the OEM must usually be brought in to overhaul the system or, in extreme cases, to rebuild hardware. The hardware may have to be written off as a complete loss if rebuilding or overhauling is not economically justified.

Finally, your confidence in a non—OEM vendor of OEM-level maintenance can only be as high as your confidence in the OEM itself. It is arguable, for example, that no equipment of a financially nonresponsible OEM should be purchased even through what appears to be a financially responsible third party vendor. If the OEM cannot support the vendor with parts and engineering changes, the vendor cannot support your system.

Well-supported hardware frequently has a useful life of more than ten years, yet some Department of Defense systems have deteriorated irreparably less than two years after acquisition. Describing a standard of maintenance in the contract that is legally and practically enforceable is one action necessary to prevent this premature deterioration.

III. The ADP Market

The computer industry is advancing faster than its ability to define itself. New services and items are constantly being marketed. To solicit competitively, our solicitations must contain specifications sufficiently well-defined to be used in evaluating competing offers. This puts an enormous load on the installation data processing personnel who write the specifications, for they are operators, not manufacturers or maintainers, of ADP equipment. Because our installation data processing personnel must functionally describe things they are not expert in, and because many of the terms they use are not well-defined even in the industry, the lawyer reviewing the acquisition must take special care that the contract is sufficiently definite in setting forth the obligations of each party.

A good example of the ambiguities inherent in ADP is the concept of the Original Equipment Manufacturer. A machine manufactured by the X Corporation will have the X Corporation as its OEM, right? Not necessarily. To understand why, the market structure must be explored.

To reach more hardware customers, some OEMs use different marketing devices. To explain these devices, I have divided these general scenarios into "High" and "Low" ADP equipment; "High" indicating high confidence in system reliability, "Low" indicating low confidence in system reliability. Not all situations or vendors fit neatly into this scheme, but, after examining it, it is easier to understand the legal problems caused by the ADP market structure.

High ADP Equipment

1. *OEM furnished new, state-of-the-art equipment with OEM maintenance.* This is the ultimate ADP contract. Obtaining the equipment directly from the OEM means that the hardware will probably receive engineering changes more quickly than others using the same brand hardware. Maintenance will sometimes be better because contractor personnel will have specialized training in the particular product and they will be backed by other contractor personnel who actually created the software and hardware. Also, state-of-the-art, premium services will be available from the OEM before other vendors create or obtain functional equivalents—for instance, remote diagnosis of machine problems by an OEM team at a centralized, national center (over phone lines) is currently available from most OEMs but is not performed by many non-OEM vendors.

2. *OEM-authorized third party vendor furnishing new, state-of-the-art OEM equipment with OEM-supported maintenance.* An OEM-authorized vendor is an independent vendor

who sells OEM equipment and maintains it with OEM-furnished parts and maintenance. However, these personnel may not have the specialized training the OEM has, and there may be a longer wait to obtain OEM engineering changes and OEM parts. For certain servicess, *i.e.*, remote support, the third party vendor may have no equivalent service or may have to subcontract the service to the OEM. Yet, some OEMs market their hardware mostly through OEM-authorized vendors.

3. *OEM equipment maintained by third party vendor with OEM support.* Here, hardware already owned by the government is maintained by a vendor who sells only maintenance services, not hardware. Frequently, this vendor takes over hardware that is no longer state-of-the-art or which other vendors have degraded.

In each of the above situations, satisfactory performance is usually achieved, although there are major exceptions. For instance, one OEM-authorized vendor at Aviation Systems Command fell substantially behind in contract-required engineering changes. The vendor was forced to repair the hardware. Even OEMs may neglect engineering changes unless the customer is careful. *Caveat emptor* is the rule in this industry.

Low ADP Equipment

1. Third party added-value vendor/system integrator (putative OEM). This is a marketing device used by several OEMs. OEMs customarily furnish hardware, software, engineering changes, and maintenance as part of a total package. When using a "third party added-value vendor," the OEM sells its hardware to an independent vendor on the condition that the independent vendor must significantly alter the hardware (the "added value") and/or not represent it as a product of the OEM. The OEM sells the hardware to the added-value vendor at a high discount (as high as 40%) because the OEM's long term engineering support and warranty obligations cease. The third party vendor, selling to the ultimate user, makes money by undercutting competing OEMs and OEM vendors by reducing costs for hardware, engineering changes, parts, and maintenance.

Sometimes, by the terms of the contract between the original OEM and the third party vendor, the third party vendor becomes the OEM of the value added machine. Therefore, if a contract defines maintenance obligations in terms of an "OEM," but does not designate a particular OEM, an ambiguity may be created. Instead of binding the contractor to the standards of the "true" OEM, the third party added-value vendor may claim that it is the OEM. Because a third party added-value vendor may not have any practical technical expertise or ability to design ADP equipment, the quality of vendor support after system installation may be dubious. Also, the added-value system may be degraded even before it is installed if hardware alterations impair compatibility with software (including diagnostics). By failing to specify a competent OEM as the standard for maintenance, the requirement for OEM engineering changes and standardized parts in performing maintenance may be unknowingly waived by the government.

These problems have, in fact, occurred with added-value vendors. For example, what was thought to be "name-brand" CPUs purchased through an added-value vendor for several Army commands was actually incompatible with software developed for that name-brand CPU. The government had to contract with the "true" OEM just to make the system work in the short term. After about two years, the altered hardware had to be replaced at government expense with "true" OEM hardware.

2. *Used machine vendor/vendor of obsolescent hardware.* There are significant amounts of used and new, obsolete ADP equipment on the market. Some is trade-in equipment, and some is inventory sold by the OEM to avoid getting caught by the next technological advance. It is not unusual for hardware to be offered as "new" even though it has not been in manufacture for several years. Statements of work and evaluation factors must guard against the danger of inferior hardware and hidden costs of used or new, obsolete ADP equipment. Among the facts to be considered are:

a. Newer hardware frequently uses less than one-half the total direct and indirect

power (*e.g.*, cooling) used by hardware available five years ago and requires fewer maintenance hours over an equal system life.

b. Costs of power per kilowatt hour and per hour maintenance have escalated over the past several years.

c. New hardware acquisitions cost for comparable capabilities are actually lower in adjusted dollars than five years ago.

If used or dated hardware is favorably evaluated for acquisition, there is good reason to suspect either an evaluation mistake, omission of a relevant evaluation factor or technical requirement, or a misapplication by the technical specification writer of the concept of system life. A system life evaluation that is too short, for example, will result in underevaluating cheaper maintenance and coding costs and lower power usage. The projected length of the system life, the factors used in the evaluation, and the technical specification should be reviewed for accuracy and completeness. As always, the best time to catch these problems is in the presolicitation review.

IV. What To Check in the Legal Review

Maintenance obligations in a statement of work should usually be defined in terms of the "true" OEM. Engineering changes required by the OEM should be required to be regularly installed and only OEM-approved replacement parts should be used during maintenance. Where used equipment is being considered, an OEM inspection and certificate of maintainability should be required, at the vendor's expense, before hardware is accepted. In addition, OEM-conducted inspections should be written into all ADP equipment contracts as a prerogative of the contracting officer at government cost or, for vital systems, as a regular part of a vendor's maintenance routine with the results turned over to the government. It is notable that DOD Federal Acquisition Regulation Supplement 70.200 lists unwillingness or inability of an OEM to support a system as an indicator of obsolescence when defining "Obsolescence Review."

A contract should require proper performance of all OEM diagnostic software. Also, vague, unenforceable terms should be avoided or clarified. For example, "OEM part or part of equal quality." There is usually no practical way to ascertain whether non-OEM parts are of equal quality with OEM parts unless the OEM has tested and approved them. Once non-OEM parts are in the hardware, the diagnostic software may not function properly, making it impossible to determine whether system problems are resulting from nonstandard parts. Only OEM or OEM-*approved* parts (*i.e.*, parts OEM tested and accounted for in standard diagnostic routines) should be used. Otherwise, maintenance vendors may use whatever nonstandard parts will allow the hardware to run for the moment, disregarding long term deterioration. This innocuous phrase could sink a system.

Another example is "good operating condition." What is good operating condition? When does bad operating condition commence? This frequently used standard is, by itself, useless.

Another ambiguous term is "effectiveness level/availability level." This is a common way of measuring performance but which, by itself, is perfectly meaningless. Basically, it is a fraction showing how long the machine is actually operational over how long the government desires it to be usable. Generally, if the machine is available for less than ninety or ninety-five percent of the time the government desires it, a percentage of the monthly maintenance charge is deducted as liquidated damages. This sounds nice, but in reality the damages provision is almost never used because the formula only measures the amount of time the machine is actually not in use due to maintenance problems. The amount of time hardware is "down," *i.e.*, not operational, has almost nothing to do with how *well* it is functioning. In some instances, hardware or a system can go "down" for two minutes (*e.g.*, a 99.8% effectiveness level) and in that two minutes electronically lose several days work. Also, data processing activities operate in real time (not on reasonable time as lawyers do). Even when hardware is performing at only fifty percent of capacity, it is not taken off-line. Tomorrow's work must still be done; the data processing activity frequently

cannot take partially disabled hardware off-line. Hardware operating 100% of the time at only 50% of normal capacity is still a 100% efficient machine under the formula and no liquidated damages are assessed. Effectiveness level clauses are seldom invoked and are meaningless without additional terms, *e.g.*, OEM standards.

Another concern in the legal review is whether the specification writers are using brand name descriptions of desired features without providing a functional specification. This can result in a vague statement of work, or regulatory problems because the specifications may be more restrictive than permitted when brand name descriptions are used.

Are there terms in the solicitation that need to be defined? To solve the OEM ambiguity described above, for example, I recommend that "OEM" be defined in solicitations as:

> That manufacturer under whose control a piece of equipment initially becomes identifiable with its final designed function (for example, under whose control a group of parts becomes a Central Processing Unit). Mere modification, alteration, or integration into a larger system shall not, for the purpose of this solicitation and the resulting contract, alter the identity of the Original Equipment Manufacturer.

I also suggest a particular firm be named as the OEM standard in the contract award.

V. Beyond Legal Review to Preventive Law

While ADP approvals and delegations are centralized, ADP procurement is not; systems with Army-wide implications are purchased through non-specialized local support procurement offices. Nonspecialized legal and technical support is also common. To minimize these disadvantages when dealing in a predatory ADP market, teamwork is essential. Government technical, procurement, and legal personnel should constantly discuss methods for improving ADP procurement. Lawyers should act as catalysts for this effort. Preventive law in ADP procurement is a lawyer contributing to a sound acquisition strategy that will lead to long-lasting, well-functioning ADP systems. This is preventive law at its best.

Preventive law should include getting involved in the acquisition process early, when the requirement is being defined. One lawyer at the Aviation Systems Command recently noticed, for example, that in a statement of work several different brand name 8-megabyte Central Processing Units were cost evaluated against each other even though one (with comparable costs over the system life) had, compared to the others, fewer channels for user access, half the expandability of memory core, was only capable of processing data at approximately one-third of the speed of the others, and used substantially more power. By calling this incongruity to the contracting officer's attention (the inefficient CPU was eliminated from consideration by firming up the specification), that lawyer probably prevented a follow-on procurement to obtain the lost capability, and by steering technical personnel to consider expandability possibly prevented future replacement of the CPU to expand the overall system. Also, getting involved early in the procurement process allows the attorney to check Agency Procurement Requests for compliance with the appropriate regulations before they are approved by higher authority and become binding.

Preventive law can also help avoid acquisition strategies that lead to legal problems. Some Army activities, for example, have built automated systems by ordering hardware components and maintenance from different requirement-type contracts (including some with added-value vendors) and integrating them. This kind of split acquisition strategy can build an automated Tower of Babel: different OEMs, added-value vendors, third party maintenance vendors, and standards of maintenance shoehorned into the same ADP system can lead to chaos. An ADP system with faults that cannot be traced to a particular vendor means the involved contracts are, as a practical matter, unenforceable. For each system being acquired, there should ideally be one maintenance vendor and a clear maintenance standard. A lawyer should consider future legal implications of proposed acquisition strategies and actively counsel procurement and technical personnel.

VI. Conclusion

General purpose ADP equipment is revolutionizing management and logistics the same way special purpose ADP equipment like missile guidance systems is revolutionizing combat strategy and tactics. Like the new automated weapons, our new, general purpose computers change the way the Department of the Army organizes and trains its personnel. Procuring obsolete hardware or substandard maintenance services renders these organization and training efforts ineffective. The maze of regulations involved in ADP equipment procurement should not shorten our sights. A procurement is not successful merely because it complies with all laws and regulations. A procurement is successful when the organization's mission is accomplished. Attorneys can play an important role as a part of the total team to improve ADP system effectiveness.

The Advocacy Section

TRIAL COUNSEL FORUM

Trial Counsel Assistance Program, USALSA

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Trial Counsel's Guide to Multiplicity

Captain Timothy Raezer, TCAP

I. Introduction

In his final dissenting opinion in a multiplicity case, Judge William H. Cook of the US Court of Military Appeals accurately depicted the frustration of Army trial counsel faced with the current confusion surrounding the issue of multiplicity of charges. He wrote, "How trial practitioners can be expected to proceed in implementing the myriad, fickle rules propounded by this Court, in light of my Brothers' failure to follow even their own dictates, is beyond me."[1]

Indeed, there are too many multiplicity rules. Different rules apply depending on whether one is testing for multiplicity or charging, findings, or sentencing and the Court of Military Appeals at times appears to fail to follow its own multiplicity rules, or, at least, seems to apply them inconsistently. Due to this confusion, TCAP regularly receives questions from trial counsel on whether to charge certain offenses, whether to consolidate and charge hybrid offenses, whether to charge the offenses in course of conduct specifications, or whether two or more offenses are multiplicious for

[1]United States v. Zupancic, 18 M.J. 378 (C.M.A. 1984).

sentencing. Unfortunately, not only is there no single bright-line rule on multiplicity, there also is no single approach that will resolve all multiplicity questions. As a result, the government's interest in obtaining a just punishment and in having an accused's conviction accurately reflect all of his misconduct is no longer being fully protected. For instance, many charges that previously would have been allowed to stand are now routinely dismissed on appeal, even in the absence of a defense objection at trial.[2] Additionally, confused trial counsel, intimidated by all the multiplicity rules, are failing to charge the necessary offenses which are required to protect the government against exigencies of proof which may arise at trial. Even worse for trial counsel, the confusion surrounding multiplicity will probably not go away, even in light of the new Manual for Courts-Martial.[3]

To help trial counsel understand multiplicity, this article will briefly trace the historic development of the multiplicity rules. It will then present some of the dilemmas and inconsistencies created by these rules and will offer some practical approaches and solutions to trial counsel as a means of protecting the government's interests. Finally, a topical outline of recent multiplicity cases will be provided in the Appendix to this article with the hope that it will be the best solution to the multiplicity problem. Instead of worrying about which multiplicity rule to apply, trial counsel will be able to find a case factually similar to his or her own, and charge accordingly.

II. Historical Background

The military law on multiplicity stems from the Court of Military Appeals' interpretation of *Blockburger v. United States.*[4] In *Blockburger*, the accused was charged separately with three sales of morphine without complying with the federal statute. One of the accused's sales violated two separate statutes and resulted in two separate charges. One of the statutes prohibited the sale of morphine that was not in or from the original stamped package, and the other statute prohibited the sale of the drug without a written order from the purchaser. Because two separate statutes were violated and each required proof of a separate element not required by the other, the Court held the accused could be punished separately for each charge. This holding became known as the "elements" test.

Moreover, the Court held that each successive sale was separately punishable even though made to the same buyer within a short period of time. This application of *Blockburger* to charging successive acts is still good law in the military. For example, in *United States v. Davis*,[5] the robbery of the victim's car and the subsequent robbery of the same victim's money were not multiplicious when the intent for each was formed at different times. In military and civilian courts, however, each act would not be separately punishable if a statute was intended to punish a course of conduct (such as the crime of wrongful cohabitation).[6]

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[2]United States v. Bolling, 16 M.J. 901 (A.C.M.R. 1983) (Foreman, J., concurring); United States v. Tyler, 14 M.J. 811 (A.C.M.R. 1982); United States v. Huggins, 12 M.J. 657 (A.C.M.R. 1981), *rev'd*, 17 M.J. 345 (C.M.A. 1984) (summary disposition). *Cf.* United States v. Broce, 36 Crim. L. Rep. (BNA) 2308 (10th Cir., Jan. 9, 1985) (guilty plea did not waive right to be free from double jeopardy violation resulting from two conspiracy convictions and punishments at a single trial.

[3]*See generally* Ott, *Military Supreme Court Practice*, The Army Lawyer, Jan. 1985, at 63.

[4]284 U.S. 299 (1932).

[5]18 M.J. 79 (C.M.A. 1984). *See also* United States v. Nugent, 16 M.J. 419 (C.M.A. 1983) (summary disposition) (90 specifications of wrongful possession, use, transfer, sale, and introduction of drugs were not multiplicious where each represented a separate incident); United States v. Ennis, 15 M.J. 970 (A.C.M.R. 1983) (41 specifications of willful damage to private property by puncturing tires in one drunken spree were not multiplicious for sentencing); United States v. Ziegler, 14 M.J. 860 (A.C.M.R. 1982) (where first rape completely terminated prior to start of second rape, each was separately punishable). *Cf.* United States v. Morris, 18 M.J. 450 (C.M.A. 1984) (assault on same victim broken down into separate blows was multiplicious).

[6]*See* Braverman v. United States, 317 U.S. 49 (1942) (the accused could not be separately convicted and punished for each act in furtherance of the conspiracy where the statute proscribed the conspiracy and not the separate acts). This in no way implies that Congress could not have chosen to separately punish each act within the conspiracy.

The *Blockburger* "elements" test was incorporated in paragraphs 74*b*(4) and 76*a*(8) of the 1951 Manual for Courts-Martial.[7] Paragraph 26*b* of the 1951 Manual also added a "rule of reason" forbidding the unreasonable multiplication of charges. After 1951, in *United States v. Soukup*[8] the Court of Military Appeals interpreted the *Blockburger* "elements" test to mean that if the statutes prescribed different duties, then separate punishments were authorized. Subsequently, the Court said in *United States v. Redenius*[9] that even assuming the offenses contained separate elements, the offenses were not separate if the law imposed the same duty (and required the same proof). As a result, focusing on the different elements of the statutes charged became less significant,[10] except where the legislative intent to permit punishment of the same act in more than one way was clear.[11]

The focus changed to the facts in evidence and on the duties imposed by statute. The Court of Military Appeals created various tests to determine if the offenses were within a single "transaction," and accordingly not separate offenses and not separately punishable. Consequently, as noted in *United States v. Burney*, "no one test is safe and accurate in all circumstances."[12] In *Burney*, the Court identified the "separate duties" test of *Soukup*;[13] the *Blockburger* "elements test";[14] the "societal norms" test of *United States v. Beene*;[15] the "single-impulse" test of *United States v. Pearson*[16] and *United States v. Weaver*;[17] the "integrated occurrences" test of *United States v. Payne*;[18] and the test announced in *Burney* itself: the "combination of like object and insistent-flow-of-events" test. This test was updated in *United States v. Harrison*[19] to include the "unity-of-time and connected-chain-of-events" test of *United States v. Irving*.[20] The tests devised by the court progressively changed from a concern for whether the offenses were "separate" or merely a "single transaction."[21] to whether these *different* offenses should be "*treated as* a single offense" for punishment.[22] Paragraph 76*a*(5) of the 1969 Manual[23] codified the various tests created by the Court of Military Appeals when interpreting *Blockburger* and prohibited multiple punishment for what is in fact one act or transaction. As a result, drug offenses occurring at the same time and place are now multiplicious and subject to only one punishment, whereas under the *Blockburger* "elements" test, separate punishments would have been authorized.[24]

The Supreme Court in *United States v. Albernaz*,[25] made it clear that the Court of Military Appeals misinterpreted *Blockburger* when developing its various tests for multiplicity. In *Albernaz*, the accused was charged separately with conspiracy to import marijuana and conspiracy to distribute the same marijuana. The accused received consecutive sentences for the charges even though there was only one conspiracy which violated the two federal statutes. The Court held that where there are two statutes each listing a punishment, Congress intended that they are separ-

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[7]Manual for Courts-Martial, United States, 1951, paras. 74*b*(4) and 76*a*(8). [hereinafter cited as MCM, 1951].

[8]2 C.M.A. 141, 7 C.M.R. 17 (C.M.A. 1953).

[9]4 C.M.A. 161, 15 C.M.R. 161 (C.M.A. 1954).

[10]*United States v. Posnick*; United States v. Brown, 7 C.M.A 452, 23 C.M.R. 242 (C.M.A. 1957).

[11]United States v. Washington, 1 M.J. 473 (C.M.A. 1976); United States v. Hughes, 1 M.J. 346 (C.M.A. 1976).

[12]21 C.M.A. 71, 73, 44 C.M.R. 125, 127 (C.M.A. 1971).

[13]*Id.*, 44 C.M.R. at 127.

[14]*Id.*, 44 C.M.R. at 127.

[15]*Id.*, 44 C.M.R. at 127.

[16]*Id.* at 74, 44 C.M.R. at 128.

[17]*Id.*, 44 C.M.R. at 128.

[18]*Id.*, 44 C.M.R. at 128.

[19]4 M.J. 332 (C.M.A. 1978).

[20]3 M.J. 6 (C.M.A. 1977).

[21]*Burney*, 21 C.M.A. at 73, 44 C.M.R. at 127.

[22]*Harrison*, 4 M.J. at 335; *Irving; Hughes.*

[23]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 76*a*(5) [hereafter cited as MCM, 1969].

[24]United States v. Holsworth, 7 M.J. 184, 187 (C.M.A. 1979).

[25]450 U.S. 333 (1981).

ately punishable unless a different intent was expressed.

After *Albernaz*, the Court of Military Appeals reexamined the issue of multiplicity in *United States v. Baker*.[26] In *Baker*, the accused was charged with aggravated assault and communication of a threat. Baker had grabbed and choked the victim and threatened to kill her, all of which was done in an attempt to force the victim to drive Baker somewhere. The court held that the two charges were multiplicious for sentencing but not for findings. Furthermore, the court rejected the simple application of the *Blockburger* "elements" test because the Manual provided additional tests for multiplicity. The court held that two charges were multiplicious for findings if one of the charges necessarily included all the elements of the other, or if the allegation under one of the charges, as drafted, "fairly embraced" all the elements of the other. In rejecting the *Baker* holding, Judge Cook, in his vigorous dissent, urged a return to *Blockburger*, citing its recent interpretation in *Albernaz*.[27]

Baker is now the preferred test. The Court of Military Appeals has been examining the wording of the specifications and, in some cases, refusing to look at the facts to determine whether the specification "fairly embraced" the other.[28]

The rationale of *Baker* was also applied in an expansive manner to provide the military accused with even more protection against multiplicious offenses. In *United States v. Hollimon*,[29] the accused was charged with rape and communication of a threat. Dismissing the threat charge, the court held that it was multiplicious for findings with the rape and developed the new test of "fairly-embraced-as-an-integral-means-of-accomplishment" test.

That the Court of Military Appeals was providing more protection than constitutionally mandated by the fifth amendment's double jeopardy protection was again illustrated in the case of *Missouri v. Hunter*.[30] In this case, the Supreme Court held that separate punishments under two Missouri statutes for armed robbery and armed criminal action did not violate double jeopardy proscriptions where the state legislature intended to authorize such punishments. Again, the Court of Military Appeals felt compelled to reexamine the issue of multiplicity in light of *Missouri v. Hunter*, which post-dated the *Baker* decision. The reexamination occurred in *United States v. Doss*,[31] in which the Court of Military Appeals reiterated that the more lenient treatment provided to military accused, as compared to their civilian counterparts, was justified by thirty years of Court of Military Appeals' precedent as recognized by the 1969 Manual.

With the stroke of the President's pen, the Manual's recognition of thirty years of precedent was eliminated on 1 August 1984. The 1984 Manual provision disregards the myriad of multiplicity tests encompassed in paragraph 76*a*(5) of the 1969 Manual and instead prescribes the *Blockburger* elements test:

> When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided [as to conspiracy], offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.[32]

Undoubtedly, Rule 1003 will compel the Court of Military Appeals to again reexamine the issue of multiplicity in the military. The court could take several possible approaches to the new rule: (1) the court could ignore the new

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[26]14 M.J. 361 (C.M.A. 1983).

[27]14 M.J. at 373 (Cook, J., dissenting).

[28]United States v. Holt, 16 M.J. 393 (C.M.A. 1983).

[29]16 M.J. 164 (C.M.A. 1983).

[30]459 U.S. 359 (1983).

[31]15 M.J. 409 (C.M.A. 1983).

[32]MCM, 1984, Rule for Courts-Martial 1003(c)(1)(C) [hereinafter cited as RCM].

rule and adhere to *Baker* and prior precedent;[33] (2) the court could apply a strict *Blockburger* rule and reverse many prior precedents;[34] or (3), and most likely, the court could give new vitality to the *Blockburger* test, but additionally apply, as a supplemental test, the rule enunciated in *Baker*.[35] This latter approach would result in a more narrow and restrictive application of *Baker* in determining whether the language of one specification "fairly embraced" the factual allegations of another specification. As a result, some prior precedents would have to be reconsidered.[36]

Whatever interpretation the Court of Military Appeals gives to the new Manual rule, the Supreme Court is unlikely to resolve the issue.[37] Under any of the above approaches there will be neither a violation of the accused's right to protection under the double jeopardy clause of the fifth amendment nor a substantial federal question[38] Moreover, the Supreme Court has granted the Court of Military Appeals great deference in interpreting military law.[39] Thus, even if the Court of Military Appeals interprets Rule 1003 in terms of prior military precedent, the Supreme Court would not likely interfere. Consequently, the confusion surrounding the issue of multiplicity would continue.

III. Trial Counsel's Dilemma

The dilemma caused by this confusion can be illustrated by a multiplicity issue that has not yet been decided by the Court of Military Ap-

[33]The discussion to RCM 1003(c)(1)(C) indicates the drafters of the 1984 Manual believed that prior precedents might continue to be applied.

[34]A decision to apply *Blockburger* and reverse prior precedent would be based on the President's broad authority under Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1982) [hereinafter cited as UCMJ]. to prescribe the rules for courts-martial, including the maximum punishments for offenses.

[35]Recent Court of Military Appeal cases have demonstrated new vitality for *Blockburger* and a change in the court's attitude. In United States v. Isaacs, 19 M.J. 220, 223 (C.M.A. 1985), Chief Judge Everett wrote concerning multiplicity that "the Court cannot assure that all maximum penalties will be entirely proportionate. Instead, to some extent we must rely on sentencing and reviewing authorities to see that servicemembers receive fair and equitable punishment." Contrast this statement with Chief Judge Everett's earlier language in United States v. Baker, 14 M.J. at 371:

> I believe it is more appropriate to endure the present "mess," rather than to expose military accused to the harshness of a strictly applied *Blockburger* rule. Moreover, in the records of trial that I have observed, it does not appear to me that the limitations now placed on the operation of that rule have resulted in sentences that were not "appropriate" or were unduly lenient; but I can foresee that the removal of such limitations might lead to sentences that were inappropriately severe and too overreaching by prosecutors in an effort to induce plea bargains.

[36]The key case which would have to be reconsidered can be easily identified as the cases in which Senior Judge Cook felt compelled to dissent: United States v. Allen, 16 M.J. 395 (C.M.A. 1983) (bad checks multiplicious with larceny); United States v. Valenzuela, 16 M.J. 305 (C.M.A. 1983) (attempted rape multiplicious with aggravated assault); United States v. Holliman, 16 M.J. 164 (C.M.A. 1983) (rape multiplicious with threat); United States v. Jean, 15 M.J. 433 (C.M.A. 1983) (assault multiplicious with resisting apprehension); United States v. Ward, 15 M.J. 377 (C.M.A. 1983) (bad check multiplicious with larceny); United States v. McKinnie, 15 M.J. 176 (C.M.A. 1983)(aggravated assault multiplicious with threat).

[37]*See* Ott, *supra* note 3.

[38]*Id.* The double jeopardy clause contains three basic protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina V. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted). The Court of Military Appeals has provided more protection in preventing multiple punishments in violation of the double jeopardy clause. Likewise, the double joepardy clause provides no protection against multiple convictions for the same offense at the same trial. This fact was recently illustrated in Ohio v. Johnson, 104 S. Ct. 2536 (1984), where the accused was charged with murder, involuntary manslaughter, aggravated robbery, and grand theft. The accused's guilty plea to the lesser included offenses of grand theft and involuntary manslaughter did not bar his subsequent prosecution for the greater offenses of aggravated robbery and murder. The convictions were allowed on all the offenses. For this reason, the Court of Military Appeals' inclination to provide greater protection by dismissing multiplicious convictions is not required by the proscriptions of the double jeopardy clause. Accordingly, it is unlikely that any fifth amendment issue will be presented for Supreme Court review.

[39]Middendorf v. Henry, 425 U.S. 25 (1976); Argersinger v. Hamlin, 407 U.S. 25 (1972).

peals.[40] The issue arose in a case where the trial counsel charged the accused with premeditated murder under UCMJ art. 118(1).[41] The case was referred to trial and the accused offered to plead guilty to a lesser offense of involuntary manslaughter under UCMJ art. 119(b)(1). As part of the plea negotiations, the accused offered a statement in which he denied any intent to kill the victim, explaining that the victim owed him money from a drug debt. He further explained that he went to the victim and threatened him with a loaded gun in order to collect the debt. The accused then claimed that the victim swung a gym bag to knock the gun away but caused the gun to discharge accidently, which resulted in the victim being shot to death. Based upon this statement, the trial counsel asked TCAP whether the charge of premeditated murder fairly included felony murder, could be so amended, or whether a separate charge of felony murder under UCMJ art. 118(4), should be added.

After researching state and federal law, TCAP advised the trial counsel that felony murder and premeditated murder were separate offenses for charging and findings,[42] but that the Court of Military Appeals likely would find the two offenses multiplicious for sentencing because there was only one victim and one transaction.[43] Accordingly, the trial counsel was advised that the charge could not be amended to include felony murder.[44] Further, trial counsel was advised that an additional and separate charge of felony murder should not be added because there was no evidence to support it. The only evidence of a felony murder was the accused's statement which was unsworn and inadmissible at trial under Military Rule of Evidence 410 (excluding statements made as part of plea negotiations).[45] For these reasons, the trial counsel had no choice but to proceed solely on the premeditated murder charge. Fortunately, the issue was rendered moot when the accused later agreed to plead guilty to unpremeditated murder under UCMJ art. 118(2).

As a hypothetical problem, however, assume in the above scenario that the accused had pleaded not guilty, and the trial proceeded with the government introducing evidence of premeditated murder and the accused testifying that the killing occurred by accident during the course of a robbery. Assume further that the court members chose to believe the accused and convicted him of the most serious available lesser included offense—involuntary manslaughter. The government would be limited to a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.[46] The question then is whether the conviction for involuntary manslaughter, when charged with premeditated murder, bars the government under double jeopardy proscriptions from subsequently prosecuting the accused for felony murder.

If the Court of Military Appeals finds that felony murder and premeditated murder are separate offenses, then the government should not be barred from reprosecuting the accused for felony murder.[47] Upon conviction for felony murder, however, justice would dictate that the conviction for the lesser offense of involuntary manslaughter be set aside.[48] On the other hand,

[40]United States v. Dodson, *petition granted*, 17 M.J. 298 (C.M.A. 1984); United States v. Hubbard, *petition granted*, 19 M.J. 216 (C.M.A. 1984). Prior military cases have held felony murder to be multiplicious with premeditated murder and the felony. United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

[41]10 U.S.C. § 918(1)(1982).

[42]Richard V. Callahan, 723 F.2d 1028 (1st Cir. 1983); Watson v. Jago, 558 F.2d 330 (6th Cir. 1977); McFaden v. United States, 395 A.2d 14 (C.D. App. 1978); Britt v. State, 453 So. 2d 1154 (Fla. 1984).

[43]*See generally* People v. Goree, 349 N.W.2d 220 (Mich. 1984).

[44]State v. Russell, 678 P.2d 332 (Wash. 1984) (could not amend premeditated murder charge to include felony).

[45]Mil. R. Evid. 410.

[46]MCM, 1984, Part IV, para. 44e(2).

[47]United States v. Hairston, 15 M.J. 892 (A.C.M.R. 1983) (earlier acquittal of larceny by false pretense for selling fake drugs did not prevent second prosecution for attempted sale of the same fake drugs).

[48]Lowe v. State, 242 S.E.2d 582 (Ga. 1978)(where victim had not died at time of aggravated assault conviction, subsequent prosecution for murder was not barred, but, following murder conviction, lesser included assault conviction could be set aside).

if the court decides that felony murder is "fairly embraced" in the factual allegation of premeditated murder, then the double jeopardy proscription should bar the subsequent prosecution for felony murder. Under this latter theory, the accused's claim of felony murder would be a good defense to premeditated murder where only the premeditated murder was charged.[49]

Indeed, the above described dilemma could be replayed in numerous cases where the Court of Military Appeals has broadly applied the *Baker* test to what should be separate offenses. The offenses for which the *Baker* test has been too broadly applied can easily be identified by looking at the cases in which Judge Cook dissented.[50] For example, *United States v. Hollimon*, the accused was charged with both rape and communication of a threat. Neither of the offenses contained similar elements. However, the court found that, as alleged, they were factually duplicative where the threat was used to complete the rape.[51] Consequently, the court dismissed the threat charge as multiplicious for findings. The accused's record will reflect a conviction only for rape and not with the fact that he threatened to kill the victim.[52] Again, under the court's reasoning, if Hollimon had been charged with and acquitted of only the rape charge, he could not have been retried for a later discovered threat offense.

Aggravating this dilemma is the potential failure of the court to apply the *Baker* test to affirm a "fairly embraced" offense when the greater offense is set aside. An example is *United States v. Smith*[53] where the accused was charged with a single specification of robbery which used the standard language "by means of force, steal from the presence of Private First Class Timothy A. Powell, III, against his will, ten (10) dollars ($10.00). . . ." During the providence inquiry, the accused set up the defense of claim of right to the larceny element of robbery. On appeal, the Court of Military Appeals held that the guilty plea was improvident as to the larceny element and that aggravated assault was not a lesser included offense or one that was fairly implied in the robbery offense as charged. The court reasoned that the language "by means of force" fairly implied nothing more than a simple assault.[54] The court then affirmed only a simple assault even though the accused admitted during providence that he assaulted the victim with a knife. As a result, the accused's sentence to a punitive discharge was set aside. After the *Smith* decision, trial counsel might question whether the *Baker* test will be applied where it would benefit the government.[55]

IV. Trial Counsel's Solutions

In solving the multiplicity problem, trial counsel must first realize that determining what offenses should be charged and how they should be charged rests within the broad discretion of the government.[56] A limitation upon this discretion is the rule that an unreasonable multiplication of charges which violates the accused's right to a fair trial will lead to dismissal of the case.[57] Trial counsel, therefore, should always consider whether multiplying the charges is necessary to obtain a just maximum punishment. If not, trial counsel might wish to

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[49]This dilemma could not be circumvented by charging felony murder on the theory of exigencies of proof. If so charged, the defense, after the Government's case in chief, could merely make a motion for finding of not guilty as to the felony murder where there is no evidence of a felony. Motions for finding of not guilty as to a greater offense are now permitted under RCM 917(e).

[50]*See* cases in *supra* note 36.

[51]16 M.J. at 167.

[52]*Id.* (Cook, J., dissenting).

[53]14 M.J. 68 (C.M.A. 1982).

[54]*But see* United States v. McVey, 4 C.M.A. 167, 174, 15 C.M.R. 167, 174 (C.M.A. 1954) (under same language, aggravated assault was held a lesser crime of robbery).

[55]Query, what would have happened had the accused in *Smith* been charged with both robbery and aggravated assault? Would not the Court of Military Appeals have dismissed the aggravated assault charge as being "fairly embraced" in the robbery charge? *Compare* United States v. Glover, 16 M.J. 397 (C.M.A. 1983) *with Holliman.*

[56]United States v. Batchelder, 442 U.S. 114 (1979).

[57]United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982).

forego certain charges.[58] Similarly, due consideration should be given to the time the government wastes on appeal splitting multiplicity hairs.

With these general limitations and considerations in mind, trial counsel are now ready to approach the multiplicity problem. The first question that should be asked is whether the offenses are part of the same act or transaction or did they occur separately.[59] A "transaction" is broadly defined "to embrace a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct."[60] As noted earlier, if the offense occurred separately, then trial counsel can charge them in separate specifications.[61] Indeed, recently the Army Court of Military Review held that assaults upon the same victim separated by fifteen to twenty minutes could be charged separately.[62] Many times, however, trial counsel will want to charge successive and separate acts in a single course of conduct or "mega-spec."[63] These specifications are useful to avoid unwieldly charge sheets in those situations where the accused has committed repeated acts of misconduct over a given period of time, *e.g.*, bad check, drug abuse, and child sexual abuse cases. Another advantage of course of conduct pleading is that the government's burden of proof is lessened because exact dates and amounts do not have to be proven. This can be beneficial when dealing with a child sexual abuse victim who cannot recall the exact dates when the accused molested her. On the other hand, the drawback of a course of conduct specification is that it will limit the maximum imposable punishment.[64] Trial counsel should not try to get around this drawback by pleading separate acts within the course of conduct specification.[65]

Once trial counsel has determined that the offenses arose from the same transaction, he or she should then determine whether they are separate under *Blockburger* and Rule 1003. Although the *Blockburger* test is a rule of construction used to determine the legislative intent, and is to be used only when the legislature's intent is otherwise unclear, trial counsel frequently has neither the time nor the research tools available to investigate congressional intent. Moreover, Congress has delegated to the President the authority to prescribe the punishments for court-martial offenses.[66] Accordingly, only where the President's intent is clear (*e.g.*, conspiracy and the completed offense,[67] simultaneous larceny from different victims[68]) will trial counsel be able to bypass the application of *Blockburger*. In applying *Blockburger*, however, the element of prejudice to good order and discipline or service discrediting conduct under UCMJ art. 134 should not be used.[69] Similarly, violating a lawful order under UCMJ art. 92 should be charged with caution.[70] Once *Blockburger* is applied, and trial counsel has determined that

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[58]Although some commentators have indicated that the maximum punishment is not an important consideration because the accused is rarely sentenced to any punishment approaching the maximum, still the maximum punishment is an important consideration in inducing guilty pleas as well as a key factor for sentencing authorities to consider in arriving at a just punishment. *See* McAtamney, *Multiplicity: A Functional Analysis*, 106 Mil. L. Rev. 115, 159 (1984).

[59]*Baker*, 14 M.J. at 365.

[60]*Id.* at 366.

[61]*See* cases in *supra* note 5.

[62]United States v. Robinson, SPCM 20672 (A.C.M.R. 31 Oct. 1984).

[63]United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (C.M.A. 1961); United States v. Carter, CM 19665 (A.C.M.R. 10 Sept. 1984).

[64]United States v. Grubbs, 13 M.J. 594 (A.F.C.M.R. 1982).

[65]United States v. Maynazarian, 12 C.M.A. 484, 31 C.M.R. 70 (C.M.A. 1961); United States v. Thayer, 16 M.J. 846 (N.M.C.M.R. 1983); United States v. Langford, 15 M.J. 1090 (A.C.M.R. 1983). Nothing prevents trial counsel from separately charging separate incidents which are not contained within the time period alleged in the course of conduct specification.

[66]UCMJ art. 36.

[67]MCM, 1984, Part IV, para. 5c(8).

[68]MCM, 1984, Part IV, para. 46c(1)(h)(ii).

[69]*Doss*, 15 M.J. at 414-15 (Cook, J., concurring in the result).

[70]*See generally* United States v. Lott, 14 M.J. 489 (C.M.A. 1983) (indecent assault multiplicious for findings with violating regulation proscribing the same assault).

each offense contains an element not included in the other, then each offense can be separately charged and trial counsel should be required to go no further. Separate elements in each charged offense will almost always allow the trial counsel to argue exigencies of proof to justify separate charges and findings.[71]

After determining that the offenses are separate under *Blockburger*, trial counsel might still desire to examine the specifications under *Baker*. If the factual allegation of one specification "fairly embraces" the language of another specification, trial counsel might desire to avoid the multiplicity issue and consolidate these offenses into one specification. In doing this, trial counsel must bear in mind the prohibitions against duplicitous pleading,[72] as well as the limitations on alleging matters in aggravation.[73] Also, due consideration should be given to the fact that confusion of court members will be minimized by findings worksheets that reflect specifications which follow the models in the Manual without unnecessary surplusage or various exceptions and substitutions.[74] When consolidating specifications, trial counsel should not create new hybrid offenses but should instead rely on sound military court decisions (as found in the Appendix to this article) when merging offenses. Examples of offenses that might be merged are simultaneous possession of different drugs in a single cache;[75] aggravated assault used to commit a rape, sodomy, or robbery;[76] and breach of restriction that resulted in a brief AWOL.[77]

On the other hand, trial counsel might be able to limit the language of specifications to prevent them from being multiplicious under *Baker*. A recent example is *United States v. Wood*[78] where the accused was charged separately with larceny, check forgery, and wrongful use of a military identification card of another soldier in violation of UCMJ arts. 121, 123 and 134, respectively. Based upon the prior precedent of *United States v. Allen*,[79] the allegation of a worthless or forged check written with the intent to obtain an item of value would "fairly embrace" the larceny of the same item. In *Wood*, however, the forgery specification's mere allegation of falsely making a check to a named payee was held not to "fairly embrace" the larceny from the same payee. In distinguishing *Allen*, the Army Court of Military Review held there was no allegation that the forgery was the means by which the larceny was committed. Thus trial counsel's skill in drafting specifications that do not "fairly embrace" each other can prevent appellate dismissal. However, this desired result may be thwarted by defense counsel's motion to make the charge more definite and certain.

At this point in the analysis, trial counsel should be aware that other auxiliary tests for multiplicity might come into play, especially in determining multiplicity for sentencing. The "societal norms" test can be used to bolster the government's argument that two offenses, each

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[71]*See generally* Uberman, *Multiplicity under the New Manual for Courts-Martial*, Viewpoint, Nov. 1984 at 2, 14.

[72]MCM, 1984, RCM 307(c)(4) and 906(b)(5). A course of conduct specification, combining similar offenses, does not violate the rule against duplicitous pleading. *Means*. However, combining separate and unrelated offenses would violate the rule against duplicitous pleading. United States v. Branford, 2 C.M.R. 489 (A.B.R. 1951) (reckless and drunk driving could not be combined in one specification). The problems created by duplicitous pleading are that the accused could be convicted of the offense even though acquitted of the separate acts or offenses within the specification, the accused could be prejudiced with respect to evidentiary ruling during trial, and the accused might not be fully protected against double jeopardy. United States v. Robin, 693 F.2d 376 (5th Cir. 1982); United States v. Pavloski, 574 F.2d 933 (7th Cir. 1978).

[73]The discussion to RCM 307(c)(3) provides that "[a]ggravating circumstances which increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. Other matters in aggravation ordinarily should not be alleged in the specification."

[74]For example, sometimes in excepting and substituting language from a specification, the words of criminality can be omitted and the accused acquitted. United States v. Wood, SPCM 17226 (A.C.M.R. 9 Mar. 1983).

[75]United States v. Patton, 17 M.J. 405 (C.M.A. 1984).

[76]United States v. Sellers, 14 M.J. 211 (C.M.A. 1982) (summary disposition).

[77]United States v. Doss, 15 M.J. 409 (C.M.A. 1983).

[78]19 M.J. 542 (A.C.M.R. 1984).

[79]16 M.J. 396 (C.M.A. 1983).

containing separate elements, are separate if each violates separate societal norms.[80] Most recently, this test was employed to find that adultery and rape were separate offenses for finding and sentencing.[81] The adultery offense was held to be a crime against the marital relationship whereas the rape was a crime of violence against the person.

Another auxiliary test is the single impulse analysis which was first used as a justification to limit the maximum punishment where simultaneous larcenies were committed against different victims.[82] The rationale was that the maximum punishment for larceny depended upon the value of the item stolen and unlimited prosecutorial discretion in charging could result in a greater maximum punishment.[83] This same rationale, however, is inapplicable to assaults, robberies, and other crimes of violence which are simultaneously committed against different victims.[84] Such offenses have always been held to be separate.[85]

Whatever approach trial counsel might elect in drafting charges, he or she should be aware that the primary goal is to insure that all of the accused's criminal conduct is accurately reflected. If confronted with a motion to dismiss a multiplicious charge, trial counsel should be prepared to argue for consolidation of the offenses if the arguments for separateness and exigencies of proof fail.[86] If the judge does dismiss the charge without consolidation, then presumably the dismissed charge can be "resuscitated" on appeal if warranted by exigencies of proof.[87] In this manner, trial counsel can preserve the accuracy of the accused's criminal record and avoid the dilemmas noted earlier in this article.

[80]*See* United States v. Beene, 15 C.M.R. 177 (1954).

[81]United States v. Lopez, CM 445099 (A.C.M.R. 8 Feb. 1985).

[82]MCM, 1984, Part IV, para. 46c(1)(h)(ii).

[83]United States v. Florence, 5 C.M.R. 48 (C.M.A. 1952).

[84]Ashe v. Swenson, 397 U.S. 436 (1976); United States v. Baker, 2 M.J. 773 (A.C.M.R. 1976).

[85]United States v. Peterson, 17 C.M.A. 548, 38 C.M.R. 346 (C.M.A. 1968); United States v. Cooper, 2 C.M.A. 333, 8 C.M.R. 133 (C.M.A. 1953); United States v. Parks, 42 C.M.R. 545 (A.C.M.R. 1970); United States v. Dean, 41 C.M.R. 763 (A.C.M.R. 1969).

[86]United States v. Huggins, 17 M.J. 345 (C.M.A. 1984).

[87]United States v. Zupancic, 18 M.J. 387 (C.M.A. 1984).

V. Conclusion

This article has not attempted to be an exhaustive or complete discussion of every multiplicity test or every multiplicity dilemma which trial counsel might encounter with regard to charging, findings, or sentencing. Instead, it has focused on the main problems and provided an approach on how to avoid them. Rule 1003 presents the Court of Military Appeals with a unique opportunity to end the dilemmas concerning multiplicity by adopting the bright-line *Blockburger* rule as modified and advocated by Judge Cook. Any cases of unreasonable multiplication of charges resulting in a violation of the accused's right to a fair trial can be remedied by dismissal of all the charges. In the absence of such an approach, the only truly complete and satisfactory solution to the current multiplicity confusion is finding a factually similar case and proceeding accordingly. TCAP hopes the "Topical Outline of Recent Multiplicity Cases" provided in the Appendix to this article will provide that complete and satisfactory solution.

Appendix

Topical Outline of Recent Cases

This outline includes Court of Military Appeals daily journal entries through 15 February 1985 and all decided opinions through 28 February 1985. Additionally, note that many Court of Military Appeals decisions cited below are summary dispositions hidden away in the daily journals. These pronouncements usually contain little or no rationale and are not digested in West's Military Justice Digest. Also note that the cases cited below are arranged topically under one offense charged or the other, but not both. The unpublished opinions cited in the outline will be furnished to counsel upon request.

A. Inchoate Offenses.

1. Conspiracy.

a. MCM, 1984, Part IV, para. 5C(8): Separate for punishment purposes with object of conspiracy.

b. Single ongoing conspiracy fragmented into nine conspiracy charges to smuggle drugs was multiplicious for finding. *United States v. Curry*, 15 M.J. 701 (A.C.M.R. 1983).

c. Issue pending: Multiplicity of solicitation and conspiracy to commit an offense. *United States v. Kauble*, 15 M.J. 591 (A.C.M.R.), *petition granted*, 16 M.J. 176 (C.M.A. 1983).

2. Attempts.

Attempt to commit an offense was multiplicious for findings with the completed offense. *United States v. Armusewicz*, 16 M.J. 418 (C.M.A. 1983).

B. Assaultive Offenses.

1. Assault.

a. Separate blows in a single assault were multiplicious for findings. *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984). Two assault specifications perpetrated on the same victim during a single, uninterrupted scuffle were multiplicious for findings. *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984). Assault (unlawfully grab and choke on the throat) was multiplicious for findings with aggravated assault (slashing at with a dangerous weapon). *United States v. Simmons*, 15 M.J. 316 (C.M.A. 1983) (summary disposition). Simple assault was multiplicious with aggravated assault. *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981).

b. Assault and communication of a threat were not multiplicious for finding, but were multiplicious for sentencing. *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983); *but see United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983) where communication of threat dismissed as multiplicious for findings with rape. Communication of threat was multiplicious for findings with assault charges where the victim, time and circumstances involved were all the same. *United States v. McKinney*, 15 M.J. 176 (C.M.A. 1983) (summary disposition); *United States v. Crockett*, 15 M.J. 336 (C.M.A. 1983) (summary disposition).

c. Assault was multiplicious for findings with rape. *United States v. Tyler*, 15 M.J. 285 (C.M.A. 1983) (summary disposition) *citing United States v. Tusing*, 13 M.J. 98 (C.M.A. 1982) and *United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition).

d. Assault and battery was multiplicious for findings with breach of the peace by engaging in a fist-fight with the person assaulted. *United States v. Mosley*, 16 M.J. 205 (C.M.A. 1983) (summary disposition).

e. Assault charges were multiplicious for findings with the forcible sodomy charge. *United States v. Witherspoon*, 15 M.J. 169 (C.M.A. 1983) (summary disposition). Aggravated assault was lesser offense of forcible sodomy. *United States v. Kamyal*, ____ M.J. ____ (A.C.M.R. 24 Dec. 1984).

f. Battery, as alleged, was a lesser included offense of the robbery charge. *United States v. Vili*, 17 M.J. 437 (C.M.A. 1984) (summary disposition).

g. Resisting apprehension was multiplicious with leaving the scene of an accident where single act and impulse involved. *United States v. Bland*, CM 83-5393 (N.M.C.M.R. 22 Mar. 1984) (unpub.).

h. Provoking language multiplicious for findings with resisting apprehension. *United States v. Hathaway*, S26290 (A.F.C.M.R. 6 May 1984) (unpub.).

2. Aggravated Assault.

a. Assault by intentionally inflicting grievous bodily harm was multiplicious for findings with robbery. *United States v. Milliken*, 15 M.J. 284 (C.M.A. 1983) (summary disposition), *citing United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition). Issue pending: Whether aggravated assault was multiplicious for findings with robbery? *United States v. Hale, petition granted*, 13 M.J. 19 (C.M.A. 1982).

b. Assault with a knife was multiplicious for findings with rape committed upon the same victim. *United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition), *citing United States v. Thompson*, 10 M.J. 405 (C.M.A. 1981). Assault with a dangerous weapon was multiplicious for findings with attempted rape. *United States v. Valenzuela*, 16 M.J. 305 (C.M.A. 1983) (summary disposition), *citing United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition).

c. Aggravated assault was multiplicious for sentencing, but not findings, with forcible sodomy and rape where language of sexual offenses did not "fairly embrace"

the aggravated assault. *United States v. Glover*, 16 M.J. 397 (C.M.A. 1983).

d. Aggravated assault was multiplicious for findings with communication of a threat. *United States v. Silva*, 17 M.J. 428 (C.M.A. 1984) (summary disposition); *United States v. Petty*, 17 M.J. 408 (C.M.A. 1984) (summary disposition); *United States v. Simmons*, 15 M.J. 316 (C.M.A. 1983) (summary disposition); *United States v. McKinnie*, 15 M.J. 176 (C.M.A. 1983).

e. Assault intentionally inflicting grievous bodily harm was a LIO of attempted murder. *United States v. McCray*, 16 M.J. 122 (C.M.A. 1983)(summary disposition) citing *United States v. Gibson*, 11 M.J. 435 (C.M.A. 1981). No exigency of proof in LIO.

f. Aggravated assault was not multiplicious for sentencing with possession of a dangerous weapon in violation of regulation. *United States v. King*, CM84-9241 (N.M.C.M.R. 12 Mar. 1984) (unpub.).

g. Violation of regulation by unlawfully discharging firearm in unauthorized area multiplicious for findings with discharging firearm under circumstances endangering human life under Article 134. *United States v. Meade*, ____ M.J. ____ (A.C.M.R. 20 Jan. 1985).

A. Sex Crimes.

1. Sodomy.

a. Forcible sodomy by appellant not multiplicious for any purpose with forcible sodomy by aiding and abetting his co-accused. *United States v. Lee*, 16 M.J. 532 (A.C.M.R. 1983).

b. Forcible anal sodomy was multiplicious for sentencing with oral sodomy. *United States v. Wilkins*, CM 442519 (A.C.M.R. 18 Mar. 1983) (unpub.).

d. Fellatio was multiplicious for sentencing with cunnilingus on the same victim. *United States v. Langford*, 15 M.J. 1090 (A.C.M.R. 1983).

e. Attempted sodomy was separate for punishment from rape charge. *United States v. Turner*, 17 M.J. 997 (A.C.M.R. 1984); *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984).

f. Sodomy with child under 16 could be treated separately for punishment purposes with indecent acts committed upon the same child. *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984).

2. Indecent Acts.

a. Indecent assault was multiplicious for findings with violating regulation for same assault. *United States v. Lott*, 14 M.J. 489 (C.M.A. 1983).

b. Indecent exposure separate offense from unlawful entry due to different societal norms. *United States v. Burke*, CM84-0104 (N.M.C.M.R. 29 (Feb. 1984) (unpub.).

c. Indecent language merged with rape charge for sentencing. *United States v. Turner*, 17 M.J. 997 (A.C.M.R. 1984).

3. Fraternization.

a. Issue pending: Multiplicity of fraternization and adultery. *United States v. Walker, petition granted*, 16 M.J. 176 (C.M.A. 1983); *United States v. Jefferson*, 14 M.J. 806 (A.C.M.R. 1982), *petition granted*, 15 M.J. 328 (C.M.A. 1983).

b. Attempted sale of marijuana and fraternization were not multiplicious. *United States v. Brown*, CM 443337 (A.C.M.R. 31 Aug. 1983)(unpub.).

4. Rape.

a. Attempted rape and assault with intent to commit rape were multiplicious for findings. *United States v. Gibson*, 11 M.J. 435 (C.M.A. 1981).

b. Aggravated assault multiplicious for sentencing but not findings with rape and sodomy. *United States v. Glover*, 16 M.J. 397 (C.M.A. 1983).

c. Communication of a threat was dismissed as multiplicious for findings with rape. *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983). Communication of a threat not multiplicious for findings with assault with intent to commit rape where words of assault specification did not "fairly embrace" the communication of a threat. *United States v. Daniel*, CM 443149 (A.C.M.R. 31 Oct. 1983) (unpub.).

d. Adultery charge dismissed as inconsistent with rape. *United States v. McCrae*, 16 M.J. 485 (C.M.A. 1983). Under new MCM, adultery charge was separate for sentencing with rape. *United States v. Lopez*, CM 445099 (A.C.M.R. 8 Feb. 1985) (unpub.).

e. Charge of nonconsensual indecent acts with another was a lesser included offense of rape. *United States v. Cheatham*,

18 M.J. 721 (A.F.C.M.R. 1984); *United States v. Watts*, 19 M.J. 703 (N.M.C.M.R. 1984).

D. Crimes Against Property.

1. Larceny.
   a. Simultaneous larceny of different property from different victims is multiplicious for charging, and merger of two specifications into one was the appropriate remedy. *United States v. Harclerode*, 17 M.J. 981 (A.C.M.R. 1984); *United States v. Pickens*, CM 443356 (A.C.M.R. 17 Oct. 1983) (unpub.); MCM, 1984, paragraph 46*e*(1)(h)(ii).
   b. Larceny was multiplicious for sentencing but not findings with false military I.D. card charge where language of larceny specification did not "fairly embrace" false I.D. charge. *United States v. Holt*, 16 M.J. 393 (C.M.A. 1983).
   c. Larceny of an automatic teller machine card was not multiplicious with the later larcenies committed through the unauthorized use of the card. *United States v. Abendschein*, 19 M.J. 619 (A.C.M.R. 1984).
   d. Larceny not multiplicious for sentencing with altering a public record. *United States v. Ridgeway*, 19 M.J. 681 (A.F.C.M.R. 1984).
   e. Larceny after robbery was not multiplicious for findings with the robbery. *United States v. Dixon*, ___ M.J. ___ (A.C.M.R. 4 Jan. 1985).
2. Wrongful Destruction, Damage, or Disposition of Property; Arson.
   a. Willful damage to government property was not multiplicious with arson. *United States v. Kotulski*, 16 M.J. 43 (C.M.A. 1983).
   b. Numerous willful damages to private property (41 specifications of puncturing tires in one drunken spree) were not multiplicious for sentencing. *United States v. Ennis*, 15 M.J. 970 (A.C.M.R. 1983).
   c. Wrongful sale or disposition of military property was not multiplicious with larceny, *United States v. West*, 17 M.J. 145 (C.M.A. 1984); *United States v. Cabrera*, S23962 (A.F.C.M.R. 16 Sept. 1983) (unpub.), *United States v. McClary*, 27 C.M.R. 221 (C.M.A. 1959); even when both occur at the same time, *United States v. Mott*, 18 M.J. 102 (C.M.A. 1984) (summary disposition).
   d. Attempt to hazard a vessel was multiplicious, as pleaded, with willful destruction of military property. *United States v. Julien*, 17 M.J. 427 (C.M.A. 1984) (summary disposition).
   e. Willful damage to government property, willful damage to private property and larceny were not multiplicious for sentencing. *United States v. Yanke*, 18 M.J. 27 (C.M.A. 1984) (summary disposition).
   f. Wrongful sale of military property was not multiplicious for findings with wrongful concealment of the same property. *United States v. Wolfe*, 19 M.J. 174 (C.M.A. 1985).
   g. Simultaneous burning of different articles of clothing belonging to different individuals was one offense. *United States v. Hicks*. 19 M.J. 574 (N.M.C.M.R. 1984).
3. False Writings.
   a. Larcenies were multiplicious for findings with bad check offenses where bad checks were alleged as the false pretenses by which the property was stolen. *United States v. Allen*, 16 M.J. 395 (C.M.A. 1983); *United States v. Ward*, 15 M.J. 377 (C.M.A. 1983) (summary disposition). But where language of larceny does not "fairly embrace" language of bad checks then offenses are not multiplicious for findings. *United States v. Gibbs*, 17 M.J. 346 (C.M.A. 1984); *United States v. Wood*, 19 M.J. 542 (A.C.M.R. 1984).
   b. Where language of larceny specification did not "fairly embrace" the false official statement allegation, then false official statement and larceny charge were not multiplicious for findings. *United States v. Wilson*, 17 M.J. 319 (C.M.A. 1984) (summary disposition); *United States v. Lee*, 17 M.J. 321 (C.M.A. 1984) (summary disposition).
   c. Larceny not multiplicious for findings with false claim where language of larceny specification did not "fairly embrace" the false claim as the means by which the larceny was accomplished. *United States v. Moore*, 17 M.J. 318 (C.M.A. 1984) (summary disposition); *United States v. McKnight*, (A.F.C.M.R. 15 June 1984) (unpub.). But where larceny does "fairly embrace" the false claim, then charges are multiplicious for

findings. *United States v. Smith*, 17 M.J. 320 (C.M.A. 1984) (summary disposition); *United States v. Robertson*, 17 M.J. 412 (C.M.A. 1984) (summary disposition).

d. Larceny of blank checks was not multiplicious for sentencing with wrongful making and uttering of these checks. *United States v. Mireles*, 17 M.J. 781 (A.F.C.M.R. 1983).

e. The false claim (Art. 132) was multiplicious with false official statement. *United States v. Spring*, 17 M.J. 436 (C.M.A. 1984) (summary disposition).

f. Altering U.S. Treasury check with intent to defraud was multiplicious for findings with attempted larceny. *United States v. Armstrong*, 18 M.J. 141 (C.M.A. 1984) (summary disposition); *United States v. Ragin*, 13 M.J. 42 (C.M.A. 1982) (summary disposition). *United States v. Leader*, 13 M.J. 36 (A.C.M.R. 1982). Not multiplicious: *United States v. Burton*, 15 M.J. 791 (A.C.M.R. 1983).

g. Misuse of I.D. card not multiplicious with simultaneous forgery due to different societal norms. *United States v. Patton*, CM83-1939 (N.M.C.M.R. 31 Aug. 1983) (unpub.).

h. Issue pending: Multiplicity of forgery and larceny. *United States v. Mills, petition granted*, 18 M.J. 4 (C.M.A. 1984).

E. Homicides.

1. Felony murder offense was multiplicious for findings with premeditated murder, rape and sodomy. *United States v. Brown*, CM 443308 (A.C.M.R. 1983). Issue pending: multiplicity for findings of felony murder with premeditated murder. *United States v. Dodson, petition granted*, 17 M.J. 298 (C.M.A. 1984).

2. Drunk driving was multiplicious for findings with involuntary manslaughter. *United States v. McMaster*, 15 M.J. 525 (A.C.M.R. 1983), *petition denied*, 16 M.J. 125 (C.M.A. 1983); but where recklessness consisted of more than mere drunkeness, drunk driving and involuntary manslaughter were not multiplicious for findings, *United States v. Jordan*, 17 M.J. 528 (A.C.M.R. 1983). Multiplicity of drunk driving, manslaughter, and aggravated assault. *Compare United States v. Beene*, 15 C.M.R. 177 (C.M.A. 1954) *with Illinois v. Vitale*, 447 U.S. 410 (1980). Negligent homicide multiplicious for findings with drunk driving. *United States v. Johnson*, CM 443807 (A.C.M.R. 11 June 1984) (unpub.).

3. Involuntary manslaughter, aggravated assault, and destruction of military property were multiplicious for sentencing where accused drove truck into a bus stop thereby killing one bystander and injuring another. *United States v. Harris*, CM 444674 (A.C.M.R. 18 Apr. 1984) (unpub.).

F. Crimes Against Judicial Process.

1. Communication of a threat was multiplicious for findings with endeavoring to influence testimony where the threat was the means used to influence the testimony. *United States v. Green*, 15 M.J. 99 (C.M.A. 1983) (summary disposition); *United States v. DeLeon*, 15 M.J. 378 (C.M.A. 1983) (summary disposition).

2. Issue pending: Whether specification alleging willful altering of a public record by changing two specimen numbers on a urinalysis test record was multiplicious for findings with specification alleging the wrongful endeavor to influence a court-martial by altering the same document. *United States v. Jackson, petition granted*, 19 M.J. 44 (C.M.A. 1984).

G. Military Crimes.

1. Crimes Against Military Superiors.

a. Disrespect was multiplicious for findings with willful disobedience. *United States v. Liddell*, 15 M.J. 183 (C.M.A. 1983), *citing United States v. Virgilito*, 47 C.M.R. 331 (C.M.A. 1973); but also can be separately punished, *United States v. Carroll*, 18 M.J. 108 (C.M.A. 1984) (summary disposition).

b. Communication of a threat was multiplicious for findings with assault upon a superior NCO in the execution of his office. *United States v. Leder*, 13 M.J. 36 (C.M.A. 1982); *United States v. Long*, 7 M.J. 342 (C.M.A. 1979) (both cited in *United States v. Gunter*, 14 M.J. 249 (C.M.A. 1982)).

c. Disrespect was multiplicious for findings with communication of a threat. *United States v. Brown*, 18 M.J. 142 (C.M.A. 1984) (summary disposition).

d. Assault upon, and disobedience of, a superior commissioned officer were not multiplicious for findings with resisting apprehension. *United Staes v. Costello*, 17 M.J. 132 (C.M.A. 1984).

2. Disobedience of Orders and Regulations.
   a. Willful disobedience of an order was multiplicious with the failure to obey the same order. *United States v. Little*, 15 M.J. 333 (C.M.A. 1983).
   b. Unlawful entry of a barracks room of female service member under Article 134 was multiplicious for findings with violation of general order proscribing entry into female billet area. *United States v. Carreiro*, 14 M.J. 954 (A.C.M.R. 1982), *rev'd*, 15 M.J. 403 (C.M.A. 1983), *citing United States v. Lott*, 14 M.J. 489 (C.M.A. 1983). Violation of regulation by accepting cash gratuity from student trainee multiplicious for findings with acceptance of graft from the same person under Article 134. *United States v. Moorer*, 16 M.J. 451 (C.M.A. 1983).
   c. Issue pending: Multiplicity for findings of offenses of conveying, delivering, and communicating classified documents. *United States v. Baba, petition granted*, 18 M.J. 91 (C.M.A. 1984).
   d. Indecent assaults on trainees were multiplicious for findings with fraternization in violation of regulation. *United States v. Bishop*, 18 M.J. 14 (C.M.A. 1984) (summary disposition).
   e. Violating post regulation by possessing certain firearms was not multiplicious for findings with violating post regulation by failure to register the firearms. *United States v. McKernan*, 17 M.J. 415 (C.M.A. 1984) (summary disposition).
   f. Wrongful purchase of tax-free goods in violation of general regulation was not multiplicious for findings with wrongful possession of 80 cartons of cigarettes in violation of a different part of the regulation. *United States v. Burkhardt*, CM 444148 (A.C.M.R. 30 Dec. 1983) (unpub.); *but see United States v. Lee*, CM 444703 (A.C.M.R. 11 May 1984) (unpub.).
   g. Drunk driving in violation of Article 111 was not multiplicious for sentencing with violation of commander's order not to operate a vehicle on post due to application of separate duties' test. *United States v. Smeller*, 17 M.J. 938 (A.F.C.M.R. 1984).
3. Conduct Unbecoming an Officer.
   Underlying offense is lesser included offense of conduct unbecoming an officer. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984); *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1984).
4. AWOLS.
   a. Brief AWOL multiplicious for findings with breach of restriction. *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); *United States v. Doss*, 15 M.J. 409 (C.M.A. 1983); *United States v. Scavinsky*, 15 M.J. 316 (C.M.A. 1983) (summary disposition); *United States v. Jackson*, 15 M.J. 331 (C.M.A. 1983) (summary disposition), *citing United States v. Posnick*, 24 CMR 11 (C.M.A. 1957); *United States v. Bolling*, 16 M.J. 901 (A.C.M.R. 1983) (failure to object did not waive multiplicious findings). Where aggravating factor of length of AWOL pleaded and proved, then AWOL was not multiplicious for findings with breach of restriction. *United States v. DiBello*, 17 M.J. 77 (C.M.A. 1983).
   b. AWOL was not multiplicious for sentencing with refusal to obey an order to return to the military base. *United States v. Pettersen*, 14 M.J. 608 (A.F.C.M.R. 1982), *aff'd*, 17 M.J. 69 (C.M.A. 1983). Failure to obey an order to report not later than 27 February 1981 was multiplicious for finding with AWOL commencing on 28 February 1981. *United States v. Hawks*, 15 M.J. 316 (C.M.A. 1983)(summary disposition), *citing United States v. Granger*, 26 C.M.R. 499 (C.M.A. 1958).
   c. AWOL was multiplicious for findings with escape from lawful custody. *United States v. West*, 15 M.J. 183 (C.M.A. 1983), *citing United States v. Welch*, 26 C.M.R. 35 (C.M.A. 1985). Breach of restraint during correctional custody not multiplicious with AWOL. *United States v. Smith*, 17 M.J. 95 (CMA 1983) (summary disposition); *United States v. Kellner*, 16 M.J. 524 (ACMR 1983). Unauthorized absence from accused's unit not multiplicious for findings with charge of escape from lawful custody of a named person. *United States v. Johnson*, 17 M.J. 83 (CMA 1983). *United States v. McKernan*, 17 M.J. 415 (CMA 1984) (summary disposition); *United States v. Lyles*, 14 M.J. 771 (ACMR 1982), *pet. denied*, 15 M.J. 96 (CMA 1983) (AWOL not multiplicious for findings with escape from confinement).
   d. AWOL for over six months was multiplicious for findings with missing move-

ment through neglect. *United States v. Murray*, 17 M.J. 81 (CMA 1983); *United States v. Labella*, 17 M.J. 415 (CMA 1984) (summary disposition); *United States v. Timblin*, 18 M.J. 427 (CMA 1984) (summary disposition).

H. Drug Offenses.

1. Introduction of Drug.

a. Wrongful possession of drug multiplicious for findings with wrongful introduction of the same drug. *United States v. Hill*, 18 M.J. 459 (C.M.A. 1984); *United States v. Zupancic*, 18 M.J. 378 (C.M.A. 1984); *United States v. Arnold*, 17 M.J. 347 (C.M.A. 1984); *United States v. Hendrickson*, 16 M.J. 62 (C.M.A. 1983); *United States v. Miles*, 15 M.J. 431 (C.M.A. 1983); *United States v. Garcia-Lopez*, 16 M.J. 229 (C.M.A. 1983); *United States v. Vallido*, 15 M.J. 63 (C.M.A. 1982) (summary disposition); *United States v. Roman-Luciano*, 13 M.J. 490 (C.M.A. 1982) (summary disposition). Wrongful introduction of marijuana was multiplicious for findings with wrongful possession of a part of the whole introduced two days earlier. *United States v. DeMeio*, 16 M.J. 157 (C.M.A. 1983) (summary disposition). *See also United States v. Moss*, 16 M.J. 183 (C.M.A. 1983).

b. Wrongful introduction not multiplicious with possession with intent to distribute. *United States v. Zupancic.*

c. When the amount of a substance possessed is greater than that introduced, a specification alleging possession of the *excess* amount is not multiplicious for finding with specification alleging introduction. *United States v. Morrison*, 18 M.J. 108 (C.M.A. 1984) (summary disposition).

d. Wrongful importation of drug in violation of regulation multiplicious for findings with wrongful possession of the same drug. *United States v. Beasley*, 14 M.J. 205 (C.M.A. 1982) (summary disposition).

e. Wrongful introduction of marijuana with intent to distribute not multiplicious with wrongful distribution. *United States v. Beesler*, 16 M.J. 988 (A.C.M.R. 1983). Wrongful introduction of marijuana not multiplicious with possession with intent to distribute. *United States v. Zupancic*, 18 M.J. 378 (C.M.A. 1984).

2. Distribution.

a. Possession of marijuana is a lesser included offense of distribution of the same drug. *United States v. Zupancic; United States v. Zubko*, 18 M.J. 387 (C.M.A. 1984); *United States v. Ansley*, 16 M.J. 584 (A.C.M.R. 1983). Possession of marijuana in violation of regulation multiplicious for findings with possession of marijuana with intent to distribute. *United States v. McDonald*, 17 M.J. 347 (C.M.A. 1984); *United States v. Vaughn*, 16 M.J. 129 (C.M.A. 1983); *United States v. Conley*, 14 M.J. 229 (C.M.A. 1982) (summary disposition), *citing United States v. Forance*, 14 M.J. 309 (C.M.A. 1982); *United States v. Franklin*, 14 M.J. 309 (C.M.A. 1982).

b. Simultaneous distribution of marijuana to different buyers was not multiplicious for findings. *United States v. Staples*, 19 M.J. 741 (A.F.C.M.R. 1984).

c. Wrongful possession of marijuana with intent to distribute was multiplicious for findings with wrongful distribution of the identical substance. *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984).

d. Distribution of separate portions of amphetamine and cocaine were separate for findings purposes with allegation of possession of amphetamine and coacine where possession charge was not based on the same substance. *United States v. Fair*, 17 M.J. 1036 (A.C.M.R. 1984).

3. Possession.

a. Wrongful possession of drug paraphernalia in violation of regulation was multiplicious only for sentencing with the simultaneous possession of hashish. *United States v. Bell*, 16 M.J. 204 (C.M.A. 1983) (summary disposition), *citing United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Griffen*, 8 M.J. 66, 70 (C.M.A. 1979); *but see* possession of smoking device found in cupboard below kitchen sink not multiplicious with possession of hashish stuffed in the kitchen sink. *United States v. Ramirez*, S25999 (A.F.C.M.R. 16 Sept. 1983) (unpub.).

b. Wrongful introduction and possession of some drug is multiplicious for findings. *United States v. Hill*, 18 M.J. 459 (C.M.A. 1984).

c. Possession of drug multiplicious for findings with the importation of drug into Germany. *United States v. Magg*, 16 M.J.

183 (C.M.A. 1983) (summary disposition); *United States v. Anderson*, 16 M.J. 444 (C.M.A. 1983) (summary disposition).

d. Two separate possession of drug charges were multiplicious for findings when both possessions resulted from two sales of the drug on the same day from one cache of drugs. *United States v. Hernandez*, 16 M.J. 674 (A.C.M.R. 1983).

e. Wrongful possession of residue of marijuana in a smoking device multiplicious for findings with wrongful possession of 1.54 grams of marjjuana. *United States v. Wilson*, 15 M.J. 67 (C.M.A. 1982); *United States v. Anglin*, 15 M.J. 1010 (A.C.M.R. 1983).

f. Possession of drugs is a lesser included offense of distribution of the same amount of drug at the same time and place. *United States v. Zubko*, 18 M.J. 387 (C.M.A. 1984), *distinguishing United States v. Maginley*, 32 C.M.R. 445 (C.M.A. 1963) which held that possession not multiplicious with sale of same drug.

g. Simultaneous possession of different drugs was multiplicious for sentencing. *United States v. Patton*, 17 M.J. 405 (C.M.A. 1984), *citing United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Holsworth*, 7 M.J. 184, 187 (C.M.A. 1979). Consolidation, not dismissal, was appropriate remedy for simultaneous possession of different drugs. *United States v. Archie*, CM 443354 (A.C.M.R. 13 Oct. 1983) (unpub.).

h. Possession of cache of marijuana seized in one part of town was separate for sentencing from sale of marijuana in another part of town. *United States v. Isaacs*, 19 M.J. 220 (C.M.A. 1985).

i. 90 specifications alleging wrongful possession, use, transfer, sale and introduction of drugs were not multiplicious where each specification represented a separate incident. *United States v. Nugent*, 16 M.J. 419 (C.M.A. 1983) (summary disposition).

j. Possession of remainder of LSD was not multiplicious for sentencing with earlier transfer and use of a smaller portion of his LSD cache. *United States v. Worden*, 17 M.J. 887 (A.F.C.M.r. 1984).

k. Possession of marijuana in plant form was multiplicious for findings with possession of marijuana in hashash form. *United States v. Smith*, CM 445179 (A.C.M.R. 22 June 1984) (unpub.).

4. Use.

a. Use of drug was not multiplicious for sentencing with sale of drug. *United States v. Smith*, 14 M.J. 430 (C.M.A. 1983).

b. Use of heroin was multiplicious for findings with possession of the same amount of heroin at the same time and place. *United States v. Bullington*, 18 M.J. 165 (C.M.A. 1984); *United States v. Bullington*, 18 M.J. 164 (C.M.A. 1984); *United States v. Chandler*, 18 M.J. 435 (C.M.A. 1984)(summary disposition).

Navy Court Fires Torpedo at the Court of Military Appeals

I fear for the stability and soundness of the future of military law and its administration when rules of evidence and other procedural and substantive pronouncements issuing from Congress and the President are disregarded and, in their stead, are erected rules based on the personal predilections and proclivities of judges.[1]

In *United States v. McConnell*, the Navy-Marine Court of Military Review determined that a trial court's decision to exclude defense evidence of the accused's military duty performance was proper under the facts of the case. This opinion, featuring a well-written, sometimes overstated, concurring opinion by Judge Phillip Barr, takes exception to the interpretation of Military Rule of Evidence 404(a)(1)[2]

[1]United States v. McConnell, CM 84-2787, slip. op. at 20 (N.M.C.M.R., 31 Jan. 1985) (Barr, J., concurring).

[2]Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 404(a)(1) [hereinafter cited in text as Rule] provides: Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (1) Evidence of a pertinant trait of the character of the accused offered by an accused or by the prosecution to rebut the same.

by the Court of Military Appeals.

In *McConnell*, the accused was charged with the unlawful use of cocaine in violation of Article 134 of the Uniform Code of Military Justice.[3] The evidence against the accused consisted of the results of a urinalysis. The accused denied ever using cocaine and sought to introduce two Enlisted Performance Reports as evidence of military character. He did not introduce them as evidence of his general character or his reputation for law abidingness.

On appeal, the court found that the case did not involve a peculiarly military offense or violation of specific orders, specific military duties, or a defense concerning the performance of a specific duty or a neglect of such a duty. Furthermore, the court found that there was no other theory of the case to which soldierly virtue was directly relevant. For these reasons, the court held that the evidence was irrelevant under Rule 404(a)(1).

In his concurring opinion, Judge Barr focused on the case of *United States v. Clemons*[4] and its progeny in which the Court of Military Appeals has construed the meaning of "pertinent trait of character" contained in Rule 404(a)(1). Judge Barr argues that the Court of Military Appeals has exercised its power to override the plain meaning of Rule 404(a)(1) and has created its own rule of relevance regarding character evidence:

> The true reason the issue in the instant case has been raised for consideration is that the signals of decision emanating from the Court of Military Appeals have both sounded the reincarnation of the old Manual provisions and indicated that pure federal law, not the intent of the drafters of the Military Rules of Evidence—and hence the President—is to be applied in trials by court-martial. The cases which provide these signals more than hint at an effort toward civilianization—they have all but made the voyage complete.[5]

In *Clemons*, the accused was charged with committing acts of larceny during a period of time in which he was on duty as the unit charge-of-quarters. The Court of Military Appeals held that the proffered evidence of the accused's good military character and character for lawfulness each "evidenced 'a pertinent trait of the character of the accused'."[6]

One year later, in the case of *United States v. Piatt*,[7] the Court of Military Appeals held that the accused's good character as a drill instructor was unquestionably admissible where the accused had been charged with committing an assault against a trainee while acting in his capacity as a drill instructor. Also, on the same day, the Court of Military Appeals held in *United States v. McNeill*[8] that the trial judge had erred when he failed to admit evidence of the accused's good general military character where the accused had been charged with committing sodomy upon a officer candidate trainee while acting in his capacity as a drill instructor. Further, in the case of *United States v. Kahakauwila*,[9] the Court of Military Appeals held that the military judge erred when he denied the defense an opportunity to present evidence of the accused's excellent work performance, his record of dependable leadership, and testimony concerning his outstanding military appearance. The accused in *Kahakauwila* was charged with violating Naval regulations by possessing, transferring, and selling marijuana. The manner in which the accused was charged seemingly provided the Court of Military Appeals the basis for its decision. The Court reasoned that:

> Here the offense of selling marijuana was charged as a violation of Naval regula-

[3]Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982).

[4]16 M.J. 44 (C.M.A. 1983).

[5]*United States v. McConnell*, slip. op. at 6 (Barr, J., concurring).

[6]16 M.J. at 47.

[7]17 M.J. 442 (C.M.A. 1984).

[8]17 M.J. 451 (C.M.A. 1984).

[9]19 M.J. 60 (C.M.A. 1984).

> tions. Evidence of the accused's performance of military duties and overall military character was admissible to show that he conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations.[10]

Will the ***McConnell*** case cause the Court of Military Appeals to "heave to"? It seems not to have affected the Army Court of Military Review. On 21 February 1985, in *United States v. Addison*,[11] the accused, a staff sergeant, was charged with willful disobedience of an order to provide a urine sample, wrongfully ordering a subordinate to provide a substitute urine sample, and obstructing justice. The central issue in this case was whether the accused's defense counsel could properly waive the issue of potential unlawful command influence. In reviewing this issue, the Army Court of Military Review gratuitously offered the following comment: "Under the facts and circumstances of the case under consideration, we find that evidence of the appellant's good military character and his character for lawfulness would have been relevant and material at his trial."[12]

Even so, the *McConnell* case has vitality and provides a thought provoking view of the law which has developed around the issue of character evidence. While Judge Barr views the *Clemons* case as more a gesture of legal altruism than legal acumen, he finds the *Piatt* and *McNeil* decisions to be consistent with, and legitimate off-spring of, *Clemons* and, more appropriately, in consonance with Rule 404(a)(1). He is stridently opposed to the *Kahukauwila* decision because he sees it not only as an errant opinion but one which portends a continued misapplication of Rule 404(a)(1) by the Court of Military Appeals.

The accused's military character is an important and sensitive consideration in nearly every criminal case. Indeed, it can be the single most important aspect of a defense case. An example is the *McNeil* case where, after the accused's character evidence was disallowed on the merits but introduced during sentencing, the panel members sought to reconsider their findings.[13] It is clear that trial counsel are faced with a difficult dilemma in determining whether to challenge the admissibility of this form of evidence and risk reversal of the case on appeal or to refrain from such a challenge. Indeed, trial counsel must have faced this dilemma in *Clemons*.[14] Unquestionably, the key to this dilemma, notwithstanding the admissibility of the character evidence, is to prepare an effective cross-examination of witnesses who testify for the accused. In close cases, or in cases where the character evidence has no logical relevance *to the nature of the offense*,[15] the *McConnell* case provides an excellent basis for thoughtful argument against the admissibility of character evidence, especially the type found relevant by the Court of Military Appeals in the *Kahakauwila* case.

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[10]18i M.J. at 62.

[11]United States v. Addison, CM 2512 (A.C.M.R. 21 Feb. 1985).

[12]*Id.*, slip. op. at 5.

[13]19 M.J. at 62.

[14]16 M.J. at 45 (trial counsel moved *in limine* to prevent introduction of the appellant's general good character).

[15]*United States v. McConnell*, slip. op. at 15 (Barr, J., concurring). In this regard, Judge Barr held: "If the accused in *Kahakauwila* had been charged under Article 112A, UCMJ, as now required, the proffered evidence could not be held admissible under the standard set forth in the case. The same result would have been obtained had the charge been laid under Article 134, as a violation of federal statute. Under either of these two methods of pleading a drug offense, the only way such evidence could be admissible would be to return to the law of para. 138*f*, MCM, 1969—a law which was specifically and unequivocally rejected by the President in promulgating Rule 404(a)(1), Mil. R. Evid." *Id.*

Reader's Note: The "Rescue Doctrine"

[The following reader's note was provided by Captain J. Frank Burnette, Appellate Counsel, Government Appellate Division, USALSA]:

Recently, the Army Court of Military Review, in *United States v. Jones*,[1] adopted a limited exception to the *Miranda* and UCMJ art. 31[2] warning requirements. *Jones* concerned an accused who reported to a Military Police desk sergeant that someone was "hurt real bad." When the desk sergeant asked how badly the reported victim was injured the accused replied, "I stabbed him." The desk sergeant called the dispensary and relayed questions to the accused concerning the extent of the injuries to the victim and queried the accused regarding the location of the injured victim. At trial, the military judge excluded testimony regarding the accused's responses to the desk sergeant's questions on the basis of Article 31. The Army Court of Military Review held that the accused's responses were admissible pursuant to the "military rescue doctrine."[3] The military rescue doctrine excuses the traditional warning rights requirements when the possibility exists of saving human life or avoiding serious injury by rescuing the one in danger, and the situation is such that no course of action other than questioning of a suspect promises relief. The military rescue doctrine is distinguishable from the rule enunciated in *People v. Riddle*,[4] in that an analysis of the questioner's subjective motivation is not required. Rather, the application of the military rescue doctrine is determined through an objective examination of the facts preceding questioning.

[1]United States v. Jones, CM 443520 (A.C.M.R. 27 Feb. 1985).

[2]Uniform Code of Military Justice art. 31, 10 U.S.C. §831 (1982).

[3]Slip. op. at 10-11.

[4]148 Cal. Rptr. 170 (Ca. App. 1978).

The Advocate A Journal for Military Defense Counsel

1984 Guilty Plea Checklist

Table of Contents*

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Topic G—Pretrial Agreement

1. Did the MJ ascertain whether a pretrial agreement (PTA) existed?
   (a) RCM 910(f)(2) provides that parties shall inform MJ if a PTA exists.
   (b) Key #150.
   Elmore, 1 M.J. 262 (C.M.A. 1976) (concurring opinion sets forth MJ's responsibilities in dealing with pretrial agreement).
   (c) Key #151, 152.
      (1) *Green*, 1 M.J. 453 (C.M.A. 1976) (failure to conduct *Elmore* inquiry will affect providence).
      (2) *King*, 3 M.J. 458 (C.M.A. 1977) (substantial compliance with *Green* required).
      (e) *Wilson*, 4 M.J. 687 (N.C.M.R. 1977) (non-compliance with *Green* required reversal).
2. If a PTA existed, did the MJ assure on the record:
   (a) Key #150.
   Cooper, 17 M.J. 1062 (A.F.C.M.R. 1984) (record did not establish that formal or informal PTA existed regarding substitution of general discharge for BCD in return for accused's cooperation in other cases).
   (b) That the accused understood the meaning and effect of each condition of the PTA by questioning accused?
      (1) RCM 910(f)(4)(A) provides that the MJ shall insure that the accused understands each condition.
      (2) Key #150.
      Mann, 16 M.J. 571 (A.C.M.R. 1983)(where both counsel explained consequences of guilty plea, MJ conducted extensive inquiry, and accused was not naive recruit, accused was not pressured into PTA).
      (3) Key #151.
      Campbell, 17 M.J. 666 (A.F.C.M.R. 1983) (on the record, MJ must insure that accused understands all PTA terms); *Crawford*, 11 M.J. 336 (C.M.A. 1981).
   (c) That his understanding of the PTA *comports* with the understanding of TC and DC regarding each condition of the PTA by questioning them?
      (1) RCM 910(f)(4)(B) provides that the MJ shall insure that the parties agree to the terms.
      (2) Key #150.
      Hollcroft, 17 M.J. 1111 (A.C.M.R. 1984) (court has obligation to carefully scrutinize PTA terms and impact).
      (3) Key #151, 152.
         a. *Campbell*, 17 M.J. 666 (A.F.C.M.R. 1983) (MJ must insure that his understanding of the PTA is the same as the accused's and counsel for both sides).
         b. *Williams*, 13 M.J. 843 (A.C.M.R. 1982) (where *sub rosa* clemency agreement (which was not a part of the plea bargain) was conditional on accused giving testimony and not on his guilty plea, and dispute existed over whether TC was required to recommend clemency or to consider recommending clemency, PTA terms were interpreted in accused's favor).
      (4) Key #301.
      Dyer, 5 M.J. 643 (A.F.C.M.R. 1978) (CA properly ordered limited post-trial hearing to correct MJ's omission during his inquiry into circumstances surrounding PTA).
      (5) Key #321.
      Cameron, 12 M.J. 598 (A.C.M.R. 1981)(DC may be guilty of fraud if he denies the existence of *sub rosa* agreements and constraints on motions at trial and then later asserts them on appeal).
   (d) That accused understood the sentence limitations imposed by the PTA by questioning accused?
      (1) RCM 910(f)(4)(A) provides that the MJ insure that the accused understands the PTA.
      (2) Key #151, 152.
         a. *Campbell*, 17 M.J. 666 (A.F.C.M.R. 1983) (MJ, on the record, must insure that the accused understood the sentence limitations).
         b. *Craig*, 17 M.J. 540 (A.C.M.R. 1983) (MJ's failure to review PTA sentence limitations did not render plea improvident where inquiry revealed that accused and counsel had clear understanding of PTA terms).
         c. *Passini*, 10 M.J. 108 (C.M.A. 1980) (counsel have duty to reveal any discrepancy between PTA and their understanding); *Dinkel*, 13 M.J. 400 (C.M.A. 1982), *Griego*, 10 M.J. 385 (C.M.A. 1981), *Hinton*, 10 M.J. 136 (C.M.A. 1981), *Williamson*, 4 M.J. 708 (N.C.M.R. 1977).

(e) That no *sub rosa* agreements exist?
Key #151.
(1) *Campbell*, 17 M.J. 666 (A.F.C.M.R. 1983)(on the record, MJ must insure that no *sub rosa* agreements exist between the parties).
(2) *See Cameron; Passini.*
(3) *Rosario*, 13 M.J. 552 (A.C.M.R. 1982) (court may consider counsel's affidavits concerning any possible undisclosed pretrial agreements).

3. Does PTA require accused/co-actor to testify against another?
(a) RCM 705(c)(2)(B) provides that an accused may promise to testify as a witness.
(b) Key #291, 294.

4. Does PTA inhibit exercise of appellate rights?
Key #150.
RCM 705(c)(1)(B) prohibits any restriction of appellant's exercise of appellate rights.
(a) *Sharper*, 17 M.J. 803 (A.C.M.R. 1984) (PTA terms which inhibited accused from exercising his appellate rights were unenforceable).
(b) *Mills*, 12 M.J. 1 (C.M.A. 1981) (Congress provided for full appellate review of court-martial convictions).

5. Does PTA prohibit motions, objections, etc.?
Key #150, 152.
RCM 705(c)(1) sets forth prohibited terms.
Holland, 1 M.J. 58 (C.M.A. 1975) (PTA which provided that accused would enter plea prior to presentation of evidence on merits or presentation of motions was null and void).

6. Did PTA waive Article 32 investigation? Witnesses?
(a) RCM 705(c)(2)(E) provides for waiver of Article 32 investigation and witnesses.
(b) Key #128.
Schaffer, 12 M.J. 425 (C.M.A. 1982) (Article 32 waiver may be valid when proposed by accused and DC, but waiver may be improper if command or prosecutorial overreaching existed).
(c) Key #150.
West, 13 M.J. 800 (A.C.M.R. 1982) (accused's waiver of personal presence of witnesses stationed in Korea was provident where accused assured MJ that he voluntarily and knowingly gave up right to personal appearance of witnesses).

7. Does the PTA contain ancillary restrictive/invalid provisions?
Key #150.
RCM 705(c)(1) discusses prohibited terms.
(a) *Dawson*, 10 M.J. 142 (C.M.A. 1981) (post-trial misconduct clause was void because it did not render due process).
(b) *Gibson*, 13 M.J. 687 (N.M.C.M.R. 1982) (*Dawson* was retroactively applicable).

8. Did TC/SJA attempt to withdraw PTA during course of trial?
Key #150.
RCM 705(d)(5) discusses withdrawal.
(a) *Williams*, 17 M.J. 893 (N.M.C.M.R. 1984) (generally, if government does not comply with PTA terms, reviewing court must either order compliance or allow accused to withdraw his pleas).
(b) *Shephardson v. Roberts*, 14 M.J. 354 (C.M.A. 1983) (discussion of government withdrawal from PTAs).
(c) *Cameron*, 12 M.J. 598, 600 n.2 (A.C.M.R. 1981) (unilateral withdrawal by government was not authorized under ACMR interpretation of PTA).

9. Is PTA ambiguous?
Key #150.
RCM 910(f)(4) provides that if the PTA is ambiguous, MJ should obtain clarification.
Cifuentes, 11 M.J. 385 (C.M.A. 1981) (parties' understanding at trial controlled interpretation of meaning and effect of PTA).

10. Did the PTA attempt to preserve pretrial motions/create a conditional guilty plea?
RCM 910(a)(2) provides for conditional pleas. *See* Section F, Item 20, in the March 1985 issue of *The Army Lawyer.*

11. If trial by MJ alone, did MJ delay looking at the sentence portion of the PTA until after he had determined sentence?
(a) RCM 910(f)(3) provides that MJ ordinarily shall not examine any sentence limitation contained in the agreement until after announcing sentence.
(b) Key #151.
Rabago, 10 M.J. 610 (A.C.M.R. 1980) (MJ should not examine quantum portion until after he has announced the sentence).
(c) Key #269, 325.
Sallee, 4 M.J. 681 (N.C.M.R. 1977) (error for judge to base sentence on PTA sentence limits).

12. May defendant enforce PTA&
RCM 705(d)(4) provides that the CA may either accept or reject accused's offer to enter into PTA.

Topic H—Findings

1. RCM 918-924.
   MCM 74; UCMJ arts. 51-53.
2. Key #245, 246.
   (a) *Logan*, 15 M.J. 1084 (A.F.C.M.R. 1983) (failure to make findings to a charge is immaterial because an accused's criminality is determined by the findings as to the specifications, not the charge; failure to designate an article of the Code in the charge, or designating the wrong article, is also immaterial).
   (b) *Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973) (failure of the court to announce findings as to a specification is the equivalent of no finding and requires reversal).
   (c) *Barnes*, 50 C.M.R. 625 (N.C.M.R. 1975) (failure of court to make findings as to three specifications was not prejudicial where each specification was the only specification under three different charges and the accused pled guilty to these specifications and charges; however, result would be different if there had been more than one specification under the charge or if the offenses had been contested).
   (d) *Duncan*, 16 C.M.R. 346 (A.B.R. 1945) (where court did not expressly find accused guilty of the specific allegations contained in the specification but only made findings with respect to the excepted and substituted words, findings and sentence must be set aside).
   (e) *Massie*, 4 C.M.R. 828 (A.F.B.R. 1952) (no finding of guilty to the specification having been announced, a finding of not guilty thereto was the only alternative).

Topic I—Multiplicity

Multiplicity is a complex, fast-changing topic whose scope is outside the 1984 GPC.

Topic J—Assembly of the Court and *Voir Dire*

1. Was rank used as a device for deliberate exclusion of court members?
   (a) MCM 4*c*.
   RCM 502(a),(1) sets forth qualifications to serve as a member. RCM 912(f)(1) sets forth disqualifications to serve as a member.
   (b) Key #80.
   Yager, 7 M.J. 171 (C.M.A. 1979) (routine exclusion of members below E-3 was permitted).
   (c) Key #85.
   Daigle, 1 M.J. 139 (C.M.A. 1975) (generally, rank may not be used as a device for excluding court members).
2. Are at least three members present for SPCM or at least five members present for GCM?
   MCM 4*a*; UCMJ art. 16.
   RCM 805(b) requires the presence of court members except in certain situations.
3. Were a substantial number of members absent without CA approval?
   (a) Key #91; MCM 41*c*.
   RCM 805(b) requires the presence of court members except in certain situations.
   Colon, 6 M.J. 73 (C.M.A. 1978) (unexplained absence of 40% of court members required reversal).
   (b) Key #321.
   Flowers, 7 M.J. 659 (A.C.M.R. 1979) (unauthorized absence of one of seven members was insubstantial).
4. Was counsel allowed adequate *voir dire*?
   Key #92; MCM 62*b*.
   RCM 912(d) discusses conduct of *voir dire*.
   (a) *Tippitt*, 9 M.J. 106 (C.M.A. 1980) (it is appropriate to allow counsel wide latitude in *voir dire*, but there is some limit to hypothetical questions).
   (b) *Slubowski*, 7 M.J. 461 (C.M.A. 1979) (MJ may conduct *voir dire* and provide counsel opportunity to ask additional questions).
5. Did any member exhibit "inelastic attitude" during *voir dire*?
   Key #88, MCM 62*f*(13).
   RCM 912(f)(1)(N) discussion states that an inelastic opinion regarding sentence is ground for challenge.
   (a) *Davenport*, 17 M.J. 242 (C.M.A. 1984) (presidposition was overcome by articulate disclaimer by member).
   (b) *Hayden*, 17 M.J. 749 (A.C.M.R. 1984) (predisposition is inelastic when it will not yield to the evidence presented and the MJ's instructions; members predisposition was inelastic when he said there was no place in the Army for this type of offender and there was 95% probability he would adjudge a punitive discharge).
   (c) *Harris*, 13 M.J. 288 (C.M.A. 1982) (disclaimers insufficient as matter of law to overcome bias; must be delivered in truthful manner; and even if sincere may be overcome by facts on record).
   (d) *Trippitt*, 9 M.J. 106 (C.M.A. 1980) (merely leaning toward discharge and willingness to consider other evidence was only predisposition, not inelastic attitude). *McGowan*, 7 M.J. 205 (C.M.A. 1979); *Rojas*, 15 M.J. 902 (N.C.M.R. 1983).

(e) *Karnes*, 1 M.J. 92 (C.M.A. 1975) (predisposition to discharge accused based on nature of offense with inability to conceive of any mitigating circumstances was inelastic).

6. Did appellant use peremptory challenge?
   Key #92; MCM 62*e*; UCMJ art. 41.
   RCM 912(g) provides that each party may challenge one member peremptorily.
   (a) *Holley*, 17 M.J. 361 (C.M.A. 1984) (MJ has no discretion to grant additional peremptory challenge).
   (b) *Harris*, 13 M.J. 233 (C.M.A. 1982) (use of peremptory challenge against member waives challenge for cause against him unless some evidence in record that would have used peremptory challenge against someone else).
   (c) *Brown*, 13 M.J. 890 (A.C.M.R. 1982) (if possible, picking law enforcement personnel to serve on courts-martial should be avoided; if unavoidable, search carefully for bias).
   (d) *Lenoir*, 13 M.J. 452 (C.M.A. 1982) (where challenge for cause erroneously denied, ACMR's reassessment of sentence was not appropriate remedy and sentencing rehearing was required at least).
   (e) *Lee*, 31 C.M.R. 743 (A.F.B.R. 1961) (even if last challenge causes additional members to be appointed, it is still last peremptory challenge).
7. Did any court members have knowledge of prior convictions not admitted at trial?
   Key #88; MCM 62*b*.
   RCM 912(f) provides various grounds for disqualification.
   (a) *Watson*, 15 M.J. 784 (A.C.M.R. 1983) (knowledge of prior misconduct of accused by members was found not prejudicial).
   (b) *Warborg*, 36 C.M.R. 188 (C.M.A. 1966) (without limiting instruction, knowledge by member of prior convictions not admitted in evidence was prejudicial).
8. Are all court members on orders to sit?
   (a) MCM 61*a*.
   RCM 912(f)(1)(B) disqualifies member not properly detailed.
   (b) Key #81.
   Robertson, 7 M.J. 507 (A.C.M.R. 1979) (initial orders may appoint EM as long as they serve only pursuant to accused's written request for trial with EM).
   (c) Key #91.
   Herrington, 8 M.J. 194 (C.M.A. 1980) (member excused by CA may return to court without new orders).
   (d) Key #280.
   Garcia, 15 M.J. 864 (A.C.M.R. 1983) (if CA excuses member after assembly, good cause must be established on the record).
   (e) Key #317.
   Gladden, 1 M.J. 112 (C.M.A. 1975)(post-trial orders confirming oral orders placing a member on the court were subject to rebuttal and discovery by appellate defense counsel).
9. Are ⅓ of court members present EM if trial with EM was requested?
   MCM 61*a*; UCMJ art. 25(c)(1).
   RCM 805(b) requires ⅓ EM if enlisted accused requested EM.
   See also Topic D in the March 1985 issue of *The Army Lawyer*.

Topic K—Sentencing: Matters in Aggravation and Rebuttal

See McLeod, *Opening the Door: Scope of Government Evidence on Sentencing*, 12 Advocate 77 (1980); Ferrante, *Sentencing Arguments: Defining the Limits of Advocacy*, 13 Advocate 268 (1981); AR 27-10.

1. Are Article 15s properly completed in all respects?
   (a) MCM Chap. XXVI; UCMJ art. 15; MCM, 1984, Part V, discusses NJP.
   (b) Key #264.
   Haynes, 10 M.J. 694 (A.C.M.R. 1981) (opinion contains all relevant case law to date concerning properly completed DA Form 2627: NJP record with immaterial mistakes is admissible. Material mistakes in NJP record may be supplemented by independent credible evidence and considered in sentencing. Apparently proper NJP record may be shown by independent credible evidence to be inadmissible. Sometimes, MJ may interrogate accused to obtain independent evidence necessary to make NJP record admissible. Material omissions in NJP record include failure to advise of right to counsel, failure to show personal waiver of right to trial, failure to show personal waiver of right to appeal, and if appeal made, failure to reflect its outcome and an appropriate legal review. Lack of legible date in NJP record is immaterial omission unless there is double punishment issue. Failure to object to minor deficiency in NJP record is waived unless plain error.
   (c) Key #272.
   Beaudion, 11 M.J. 838 (A.C.M.R. 1981) (incomplete Article 15 was inadmissible because of illegible signature and elections but was waived by failure to object).

(d) Key #314.
McGary, 12 M.J. 760 (A.C.M.R. 1981) (failure to object to Article 15 form which did not reflect legal review waived defect).

2. Have NJP records been maintained in accordance with law and regulations?
MCM 133*c*. MCM, 1984, Part V(8) provides that the Secretary may prescribe regulations for NJP records. *See* AR 27-10, para. 3-15.
(a) *Dyke*, 16 M.J. 426 (C.M.A. 1983) (admission of NJP record without signatures was plain error requiring sentencing rehearing).
(b) *Cisneros*, 11 M.J. 48 (C.M.A. 1981) (for enlisted accused with less than three years of service, NJP record must be removed from accused's records after two years).

3. Did trial counsel introduce evidence of military or civilian convictions of the accused?
RCM 1001(b)(3) governs admissibility of convictions. Note that there is no longer any time limit. Basically, any conviction is admissible once a sentence has been adjudged, whether or not currently under review. Proof is by any evidence admissible under MRE.

4. Do summary court-martial convictions reflect compliance with *Booker* (requisite written consent/waivers)?
(a) Key #262.
(1) *Yanez*, 16 M.J. 782 (A.C.M.R. 1983) (typewritten entry on unauthenticated DD Form 458 containing record of trial by SCM was sufficient proof of *Booker* compliance to allow admission of SCM promulgating order).
(2) *Booker*, 5 M.J. 238 (C.M.A. 1977) (requirements not met in SCM record itself may be shown by other documents in allied papers).
(b) Key #263.
(1) *Taylor*, 12 M.J. 561 (A.C.M.R. 1981) (failure to establish compliance with *Booker* in SCM was waived by DC's failure to object).
(2) *Booker*, 5 M.J. 238 (C.M.A. 1977) (*Booker* requirements for SCM are the same as for Art. 15; where record failed to establish valid waiver of counsel in SCM, it cannot be used to enhance punishment in subsequent CM proceedings).

5. Did MJ question accused to establish *Booker* criteria?
Key #264.
Sauer, 15 M.J. 113 (C.M.A. 1983) (compelling accused to establish the basis of admissibility of Article 15 violated his constitutional right against self-incrimination), *reversing Spivey*, 10 M.J. 7 (C.M.A. 1980) and *Matthews*, 6 M.J. 357 (C.M.A. 1979).

6. Do specifications in previous convictions and NJP records state an offense?
Key #15.
(a) *Atchison*, 13 M.J. 798 (A.C.M.R. 1982) (Article 15 form was admissible even if specification was insufficient for a court-martial, as long as accused was apprised of the nature of the misconduct constituting specific UCMJ violation).
(b) *Eberhardt*, 13 M.J. 772 (A.C.M.R. 1982) (NJP allegation must be sufficient to protect against double punishment).

7. Have the entries in the personnel records been made in accordance with law and regulations?
MCM 75*b*(2).
RCM 1001(b)(2) discusses introduction of personnel records.
(a) Key #261.
Brown, 16 M.J. 36 (C.M.A. 1982) (where no evidence that accused apprised of entries of adverse matter in his record and offered opportunity to make written response, record not maintained in accordance with regulation and inadmissible).
(b) Key #264.
Yong, 17 M.J. 671 (A.C.M.R. 1983) (where NJP records not made or maintained in accordance with departmental regulations, error to admit over objection; government may not prove NJP by commander's testimony).

8. Did trial counsel introduce letters of reprimand?
RCM 1001(b) governs introduction of personnel records.
(a) *Boles*, 11 M.J. 195 (C.M.A. 1981) (letter of reprimand for uncharged misconduct inadmissible).
(b) *Boister*, 12 M.J. 44 (C.M.A. 1981) (likewise, even without defense objection where it would tend to prejudice accused as to sentence).

9. Were all forms properly authenticated?
Key #262.
Jaramillio, 13 M.J. 782 (A.C.M.R. 1982) (document showing accused was in Retraining Brigade inadmissible without evidence authenticated by someone who had a duty to maintain record).

10. Were accused's admissions during providency inquiry used in aggravation?
Brooks, 43 C.M.R. 817 (A.C.M.R. 1971) (accused's responses during providence inquiry may not be considered in determining sentence).

11. Did government witness recommend specific sentence?
Key #261, 331.
Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979) (MJ abused discretion in permitting government witness to recommend to court that accused be given maximum imposable punishment).
12. Did government rebuttal evidence exceed proper rebuttal?
Key #165.
Sheumake, 6 M.J. 710 (N.C.M.R. 1978) (government may rebut facts but may not impeach accused's credibility).
Key #262
(a) *Armstrong*, 12 M.J. 766 (A.C.M.R. 1981) (where accused testified that he liked the Army and wanted to stay in, was error to admit rebuttal evidence he was a poor soldier and committed other acts of misconduct).
(b) *Hughes*, 6 M.J. 783 (A.C.M.R. 1978) (TC may not use administrative discharge request to rebut accused's testimony of desire to remain in service).
Key #266.
Warren, 13 M.J. 278 (C.M.A. 1982) (accused's apparently false testimony may not be used to enhance sentence, but may be used to consider likelihood of accused's rehabilitation).
13. Did TC present opinion evidence as part of the case in aggravation?
RCM 1001(b)(5) provides that TC may present opinion evidence concerning accused's duty performance and protential for rehabilitation.

Topic L—Sentencing: Matters in Extenuation and Mitigation

1. Did MJ personally advise the accused of his rights to allocution (present sworn testimony or unsworn statement, remain silent, witnesses, documents)?
(a) MCM 75.
RCM 1001(a)(3) requires MJ to personally advise accused of allocution rights.
(b) Key #266.
(1) *Norman*, 16 M.J. 937 (A.C.M.R. 1983) (MJ's failure to advise accused of his right to remain silent during presentencing portion of trial was error; no prejudice but reassessed sentence anyway).
(2) *Hawkins*, 2 M.J. 23 (C.M.A. 1976) (MJ's failure to personally advise accused of allocution rights is error).
(c) Key #323.
Barnes, 6 M.J. 356 (C.M.A. 1979) (MJ's failure to advise accused of right to remain silent was error, but no prejudice).
(d) Key #325.
Pilgrim, 2 M.J. 1072 (A.C.M.R. 1976), *petition denied*, 3 M.J. 92 (C.M.A. 1977) (MJ's failure to advise accused of right to remain silent was error, but no prejudice).
2. Did DC fail to offer available evidence in extenuation and mitigation?
MCM 75c.
RCM 1001(c)(1) provides for matters in mitigation. *E.g.*, *Wood v. Georgia*, 450 U.S. 261 (1981) (DC has duty to convince court to be lenient; failure to do so is 6th amendment violation).
3. Were character witnesses improperly denied?
Key #186; MCM 75*e*.
RCM 1001(e) discusses production of witnesses.
(a) *Courts*, 9 M.J. 285 (C.M.A. 1980) (right to have testimony of witness in trial or sentencing includes only witness whose testimony is material).
(b) *Scott*, 5 M.J. 431 (C.M.A. 1978) (denial of testimony of material witness at sentencing hearing required sentence rehearing).
4. Did MJ preclude or limit accused from testifying about the offenses of which accused had been found guilty?
Key #261, 262; MCM 75*c*(2).
RCM 1001(c)(2) provides for statements by the accused. *Teeter*, 16 M.J. 68 (C.M.A. 1983)(MJ did not err in excluding accued's alibi testimony, which did not even marginally relate to matters in extenuation or mitigation, during sentencing phase of trial).
5. What evidence is admissible in extenuation and mitigation?
(a) MCM 75*c*(3).
RCM 1001(c)(3) deals with the relaxed rules of evidence in matters of extenuation or mitigation.
(b) Key #261.
Morgan, 15 M.J. 128 (C.M.A. 1983) (if TC on sentencing offers part of accused's personnel records, the DC may require him to produce relevant omitted portions; also, if TC is compelled to produce favorable parts of personnel file, he is not entitled to rebut them).
(c) Key #323.
Williams, 12 M.J. 1038 (A.C.M.R. 1982)(if evidence was admissible under MCM for TC, evidence was also admisible for DC).
6. Was a summary court-martial/Article 15 used to impeach a defense witness?
Key #193, 323; MCM 75*d*.
RCM 1001(d) discusses rebuttal and surrebuttal during sentencing.

(a) *Warren*, 15 M.J. 776 (A.C.M.R. 1983) (MJ did not abuse his discretion by declining to rule in advance of accused's testimony that his previous conviction by summary court-martial could not be used to impeach him where no indication existed that defense was prejudiced in any way).
(b) *Wilson*, 12 M.J. 652 (A.C.M.R. 1981) (Art. 15 punishments may not be used for impeachment purposes).
(c) *Cofield*, 11 M.J. 422 (C.M.A. 1981) (summary court-martial convictions may not be used for impeachment purposes).

7. Did any improper cross-examination of accused/defense witness occur?
Key #325; MCM 75*d*; MRE 611(b); RCM 1001(d).
Donnelly, 13 M.J. 79 (C.M.A. 1982) (no prejudicial error in allowing TC's cross-examination of defense witness regarding accused's prior misconduct).
8. RCM 1001(c) provides that accused may also present matters in rebuttal. *See also* MCM 75*c*(2).

Topic M—Trial Counsel's Argument

See Adams, *Improper Trial Counsel Argument*, 15 Advocate 64 (1983); Ferante, *Sentencing Arguments: Defining the Limits of Advocacy*, 13 Advocate 268 (1981); *Clifton*, 15 M.J. 26 (C.M.A. 1983) (complete discussion).
RCM 919; MCM 1969, para 72.
RCM 919(c) provides that failure of DC to object to improper argument before MJ begins to instruct the members on findings constitutes waiver of that objection.

1. Did TC argue facts:
(a) Not supported by evidence before the court?
MCM 72*b*.
RCM 929(b) provides that arguments may properly include reasonable comment on the evidence, including inferences to be drawn therefrom.
Key #236.
Smart, 17 M.J. 972 (A.C.M.R. 1984)(counsel must limit their arguments to evidence of record; MJ had obligation to act *sua sponte* when fair risk existed that improper argument would have appreciable effect upon court members); *see also Young*, 8 M.J. 676 (A.C.M.R. 1980), *petition denied*, 9 M.J. 15 (C.M.A. 1980).
(b) Elicited solely during providence inquiry?
Key #236, 265.
Brown, 17 M.J. 987 (A.C.M.R. 1984) (where trial counsel referred to information drawn from accued's unsworn statement during providence inquiry, MJ had duty to stop argument *sua sponte*; sentence was reassessed); *see also Richardson*, 6 M.J. 645 (N.C.M.R. 1978); *Brooks*, 43 C.M.R. 817 (A.C.M.R.) *petition denied*, 43 C.M.R. 413 (C.M.A. 1971).

2. Did TC refer to witnesses who did not testify?
(a) MCM 72*b*, RCM 919(b), M.R.E. 512.
(b) Key #265, 325.
(1) TC may not comment on failure of defense to call witnesses.
See generally Tawes, 49 C.M.R. 590 (A.C.M.R. 1974).
(2) *But see Simmons*, 14 M.J. 832 (A.C.M.R. 1982) (TC's erroneous argument was not prejudicial where accused received BCD instead of DD and CA reduced confinement from three years to 18 months); *see also Shows*, 5 M.J. 892 (A.F.C.M.R. 1978).

3. Did TC argue evidence for purposes other than for which it was admitted?
(a) *See generally* M.R.E. provisions.
(b) Key #193, 323.
Wilson, 12 M.J. 652 (A.C.M.R. 1981) (TC cannot use Article 15s to impeach accused's truthfulness).
(c) Key #236, 332
Collins, 3 M.J. 518 (A.F.C.M.R. 1977), *aff'd* 6 M.J. 256 (C.M.A. 1979) (TC's argument that accused's sale of LSD while assigned to security police organization violated his trust was improper, but no prejudice was found).

4. If TC argued a specific intent greater than that encompassed by the charges, did appellant admit the intent or was it proved by the evidence?
Key #236.
Bethea, 3 M.J. 526 (A.F.C.M.R. 1977) (TC acted improperly in attributing to accused a specific criminal intent neither admitted by him nor proved by the evidence).

5. Did TC ask court members to put themselves in the place of the victim?
Key #236, 265.
(a) *Hutchinson*, 15 M.J. 1056 (N.M.C.M.R. 1983) (where TC told jurors that accused had brought agony to decedent's family, no opportunity had existed for the family to say goodbye to the victim, and that fathers could perhaps sympathize, the argument was improper, but neither inflammatory nor prejudicial).
(b) *Shamberger*, 1 M.J. 377 (C.M.A. 1976) (TC's argument which suggested that court members place themselves in victim's husband's place exceeded bounds of propriety).

6. Did TC appeal to class prejudice?
   Begley, 38 C.M.R. 488 (A.B.R. 1967) (TC acted improperly by addressing his argument to enlisted panel members).
7. Did TC suggest a specific sentence for the appellant?
   Key #265; MCM 75*f*.
   RCM 1001(g) provides that TC may recommend a specific lawful sentence.
   (a) *Pegg*, 16 M.J. 796 (C.G.C.M.R. 1983)(TC's argument raising sentence considerations was neither inflammatory nor beyond the bounds of permissible comment on the information before general court-martial members).
   (b) *Barus*, 16 M.J. 624 (A.F.C.M.R. 1983) (TC's argument on general policies which did not suggest particular sentence was proper).
   (c) *Rich*, 12 M.J. 661 (A.C.M.R. 1981)(TC can argue for specific sentence greater than PTA); *cf. Razor*, 41 C.M.R. 708 (A.C.M.R. 1970) (TC acted improperly in recommending a specific sentence).
8. Did TC argue that he was expressing the views of the CA?
   (a) RCM 1001 (g) provides that TC may not in argument purport to speak for the CA. MCM, 1969, para. 75*f*.
   (b) Key #236.
   Kiddo, 16 M.J, 775 (A.C.M.R. 1983) (TC may not in argument purport to speak for CA or refer to views of such an authority).
9. Did TC express contempt for court members who would not render a severe sentence?
   Poteet, 50 C.M.R. 73 (N.C.M.R. 1975) (threatening court members with spectre of contempt or ostracism if they reject TC's appeal for a severe sentence exceeded the bounds of fair argument.
10. Did TC misstate the law?
    Key #236.
    Johnson, 1 M.J. 213 (C.M.A. 1975) (TC cannot argue by implication that plea of not guilty is a matter in aggravation).
11. Did TC comment on appellant's silence?
    MCM 72*b; see generally* M.R.E. 512.
    Gordon, 34 C.M.R. 94 (C.M.A. 1983) (TC may not remark on accused's failure to testify).
12. Did TC comment on military-civilian relations?
    MCM 72*b*.
    RCM 919(b) discussion provides that the TC may not comment on the probable effect of the court-martial's findings on relations between the military and civilian communities.
    Cook, 28 C.M.R. 323 (C.M.A. 1959) (appeal to court to predicate its verdict upon the effect it would have upon military/civilian relations was improper).
13. Did TC argue general deterrence to exclusion of all other factors?
    Key #265.
    RCM 1001(g) provides that TC may refer to generally accepted sentencing philosophies, including general deterrence.
    (a) *Fisher*, 17 M.J. 768 (A.F.C.M.R. 1983)(where TC emphasized "deterrence," MJ's detailed curative instruction served to cure any prejudice).
    (b) *Kauble*, 15 M.J. 591 (A.C.M.R. 1983) (where general deterrence was merely mentioned as one factor for proper consideration in sentencing, MJ did not err in his failure to *sua sponte* correct TC's argument); *see Wattenbarger*, 15 M.J. 1069 (N.M.C.M.R. 1983); *Geidl*, 10 M.J. 168 (C.M.A. 1981); *Lania*, 9 M.J. 100 (C.M.A. 1980).
14. Did TC cite legal authority to court members?
    MCM 72*b*.
    RCM 919(b) states that counsel may not cite legal authorities when arguing to members on findings.
    Rinehart, 24 C.M.R. 212 (C.M.A. 1957).
15. Did TC argue his own personal opinions?
    Key #236.
    Horn, 9 M.J. 429 (C.M.A. 1980). *Falcon*, 16 M.J. 528 (A.C.M.R. 1983) (TC argued improperly in expressing personal opinion).
16. Did TC use language to inflame the passions of the members?
    Key #236.
    RCM 919(b) provides that TC should not make arguments calculated to inflame passions or prejudices.
    See Turner, 17 M.J. 997 (A.C.M.R. 1984); *Clifton*, 15 M.J. 26 (C.M.A. 1983); *Nelson*, 1 M.J. 235 (C.M.A. 1975); *Garza*, 43 C.M.R. 376 (C.M.A. 1971); *Weller*, 18 C.M.R. 473 (A.F.B.R. 1954); *Jernigan*, 13 C.M.R. 396 (A.B.R. 1953).
17. Did TC urge that higher ranking witnesses are more credible than lower ranking witnesses?
    Key #236, 248.
    Ruggiero, 1 M.J. 1089 (N.C.M.R.) *petition denied*, 3 M.J. 117 (C.M.A. 1977) (TC may not assert that a person has increased credibility because of his higher grade; *Ryan*, 44 C.M.R. 63 (C.M.A. 1971).
18. Did TC argue that accused lied/committed perjury?
    (a) Key #236.
    Turner, 17 M.J. 997 (A.C.M.R. 1984) (where TC argued from the evidence that accused's

testimony on a particular point was false under circumstances in which he would have known the truth, TC did not exceed the bounds of permissible advocacy by branding the testimony a lie).

(b) Key #325.
See Cabebe, 13 M.J. 303 (C.M.A. 1982) (MJ's incomplete instructions which did not provide adequate guidelines of the effect of appellant's possible lying during his testimony had improper effect on accused's sentence).

Topic N—Defense Counsel's Argument

See Bellows, *The Importance of the Closing Argument for the Defense in a Criminal Case*, 12 Advocate 82 (1980).

1. Did DC argue directly or indirectly for a punitive discharge without client's express consent?
   (a) *Adams*, 17 M.J. 604 (N.M.C.M.R. 1983) (DC did not err in arguing for suspended BCD which was consistent with accused's desires).
   (b) *Cf. McNally*, 16 M.J. 32 (C.M.A. 1983) (DC erred in arguing for a BCD where there was no indication in the record that he did so pursuant to accused's wishes). *See also Cox*, 46 C.M.R. 833 (A.C.M.R. 1972), and *Tinch*, 43 C.M.R. 565 (A.C.M.R. 1970) (although record did not indicate whether accused desired to remain in the service or be separated, DC's argument conceding appropriateness of a punitive discharge was overly broad in GCM cases since a dishonorable discharge could be encompassed therein. Sentences reassessed).
   (c) *Cf. Webb*, 5 M.J. 406 (C.M.A. 1978) (DC's argument for a suspended discharge where accused indicated a desire to remain in the Army was error. Sentence reversed).
2. Did DC fail to argue?
   Key #232
   (a) *Sadler*, 16 M.J. 982 (A.C.M.R. 1983) (accused was denied his right to effective assistance of counsel where DC failed during sentencing to make an argument on sentence on his behalf).
   (b) *See Wood v. Georgia*, 450 U.S. 261 (1981) (DC has duty to convince court to be lenient; failure to do so constituted 6th amendment violation).

Topic O—Instruction on Sentence

See MJ Benchbook, Chapter 2, Section V.

1. Did the MJ instruct on the correct maximum authorized punishment?
   (a) MCM 76*b*(1), 81*d*, 110*a*(1), 127*c*; UCMJ arts. 18-20.
   RCM 1005(e)(1) provides for instructions on the maximum authorized punishment.
   (b) Key #248.
      (1) *Huggins*, 12 M.J. 657 (A.C.M.R. 1981) (substantial errors in MJ's instructions on sentencing were not waived by failure to object).
      (2) *Lewis*, 29 C.M.R. 319 (C.M.A. 1960) (misinstruction by MJ may be cured by immediate correction by MJ).
2. Multiplicity.
   The law of multiplicity is changing rapidly. Please insure that any sentencing instructions reflect current multiplicity law.
3. Did MJ tailor instructions to the evidence adduced in extenuation and mitigation?
   (a) MCM 76*b*(1).
   RCM 1005(d)(4) provides that members should consider all matters in extenuation and mitigation.
   (b) Key #266, 325.
      (1) *Davidson*, 14 M.J. 81 (C.M.A. 1982) (MJ's general instruction to consider all matters in extenuation and mitigation was inadequate; as a matter of law, MJ had duty to particularly instruct on pretrial confinement).
      (2) *Morrison*, 41 C.M.R. 484 (A.C.M.R. 1969); *Wheeler*, 38 C.M.R. 72 (C.M.A. 1967) (failure to tailor instructions to evidence presented was error).
      (3) *Cook*, 29 C.M.R. 395 (C.M.A. 1960) (failure to instruct on mental impairment as mitigating factor was error).
4. Did MJ instruct that confinement at hard labor or punitive discharge automatically reduces appellant to lowest enlisted grade?
   UCMJ art. 58(a).
   Koleff, 36 C.M.R. 424 (C.M.A. 1966) (MJ must instruct on automatic reduction provisions).
5. Where increased punishment is authorized because of multiple offenses/prior convictions, did MJ so instruct?
   RCM 1003(d); MCM, 1969, paras. 76*b* and 127*c*.
   (a) *Cavalier*, 17 M.J. 573 (A.F.C.M.R. 1983) (accused was not entitled to instruction on sentence that BCD in effect was more severe punishment than confinement at hard labor for one year and total forfeitures).
   (b) *Timmons*, 13 M.J. 431 (C.M.A. 1982) (failure of MJ to give augmented punishment instruction did not constitute prejudicial error where neither counsel requested the instruction).
6. Did MJ instruct on voting procedures:
   Key #266, 333.
   Horner, 1 M.J. 227 (C.M.A. 1975) (failure to in-

struct on voting procedure was error); *Pryor*, 41 C.M.R. 279 (C.M.A. 1970); *Morrison*, 41 C.M.R. 484 (A.C.M.R. 1969).

(a) That vote would be by secret written ballot?
MCM 76*b*(2).
RCM 1005(e)(2) provides that the MJ shall state the procedures for deliberation and voting.
RCM 1006(d)(2) provides that proposed sentences shall be voted on by secret written ballot.

(b) That balloting would be on each proposed sentence in its entirety beginning with the lightest?
MCM 76*b*(1).
RCM 1005(d)(2) provides that the MJ shall state the procedures for deliberation and voting.
RCM 1006(d)(3)(A) provides that the MJ instruct that the members start voting on the least severe sentence.
Lumm, 1 M.J. 35 (C.M.A. 1975) (MJ erred by failing to instruct court members to begin with the lightest proposal. Sentence reversed).

(c) That adoption of the sentence required concurrence of ⅔ of the members present?
MCM 76*b*(3).
RCM 1005(e)(2) provides that the MJ shall state the procedures for deliberation and voting.
RCM 1006(d)(4)(c) addresses this requirement.

(d) That any sentence which includes confinement at hard labor in excess of ten years requires the concurrence of ¾ of the members present?
MCM 76*b*(3).
RCM 1005(e)(2) provides that the MJ shall state the procedures for deliberation and voting.
RCM 1006(d)(4)(B) discusses confinement for more than ten years.

7. Did MJ instruct that the court could consider that the accused lied?
Key #266.
Warren, 13 M.J. 278 (C.M.A. 1982) (discusses prior instructions when accused's inconsistency warrants an instruction).

Topic P—Deliberations and Announcement of Sentence

1. Did any extraneous/outside influence reach court members/MJ?
(a) *See* Dean, *The Deliberative Privilege under M.R.E. 509*, The Army Lawyer, Nov. 1981, at 1.
(b) Key #245; MCM 76*a*.
RCM 1008 deals with impeachment of sentence.
M.R.E. 509 and 606(b).
(1) *Martinez*, 17 M.J. 916 (N.M.C.M.R. 1984) (member may not testify concerning anything during deliberations except to determine if members were subjected to extraneous prejudicial information, improper outside influence, or unlawful command influence).
(2) *Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (jurors cannot impeach their verdict except when extraneous information has been improperly considered).

2. Did president properly announce sentence?
(a) MCM 76*c*.
RCM 1007(a) provides that president shall announce sentence.
(b) Key #245.
Martinez, 17 M.J. 916 (N.M.C.M.R. 1984) (announcement of findings which failed to mention either that secret written ballot was taken or that required percentage of members concurred was nonprejudicial absent some other indication that members did not follow MJ's instructions); *see also Jenkins*, 12 M.J. 222 (C.M.A. 1982).
(c) Key #260.
Schultz, 23 C.M.R. 353 (C.M.A. 1957) (no reasons need be announced as to why particular sentence was adjudged).
(d) Key #266.
Perkinson, 16 M.J. 400 (C.M.A. 1983) (perusal of sentencing worksheet by MJ, TC, and DC for error prior to reading of sentence by president did not amount to an announcement); *see also Justice*, 3 M.J. 451 (C.M.A. 1977).

3. Did president use wording which did not reflect intent of the court?
MCM 76*c*.
RCM 1007(b) deals with erroneous announcement of sentence.
(a) *Liberator*, 34 C.M.R. 279 (C.M.A. 1964) (where TC told president of inconsistency on sentence work sheet, decision whether to reconvene was that of court members).
(b) *Nicholson*, 27 C.M.R. 260 (C.M.A. 1959) (announcement was final if wording, although not expressing actual intent, was in fact the wording agreed upon).

(c) *Robinson*, 15 C.M.R. 12 (C.M.A. 1954) (if president used wording which did not reflect intended wording of members, announcement was not final and members may correct sentence).

4. Reconsideration.
   (a) If an illegal sentence was announced, did MJ correct by instructing members so that they could reconsider?
   Key #266; MCM 76*c*.
   RCM 1009(d)(1) states that MJ shall intruct members on procedure for reconsideration.
   Jones, 3 M.J. 348 (C.M.A. 1977) (MJ may correct illegal sentence by instructing the members so that they may reconsider sentence, however, reconsidered sentence may not increase punishment).
   (b) If reconsideration occurred, did the MJ instruct that punishment could not be increased but could be decreased?
   Key #266; MCM 76*d*.
   RCM 1009(d)(3) deals with view to increasing and decreasing.
   Vazquez, 12 M.J. 1022 (A.C.M.R. 1982) (MJ must instruct that sentence can be decreased/entirely reconsidered).
   (c) If member requested reconsideration, did MJ properly instruct?
   MCM 76*d*.
   RCM 1009(c) discusses reconsideration.
5. Did any ambiguity exist in the sentence?
   Key #266; MCM 76*c*.
   (a) *King*, 13 M.J. 838 (A.C.M.R. 1982)(when MJ initiated reconsideration to rectify ambiguous or illegal sentence prior to announcement, reconsideration balloting requirements of paragraphs 76*c* and *d* were not required and MJ did not have to instruct on how to ballot).
   (b) *Gragg*, 10 M.J. 286 (C.M.A. 1981) (sentence ambiguities were to be resolved in accused's favor); likewise, *Smith*, 43 C.M.R. 660 (A.C.M.R. 1971).
6. Did MJ consider providency inquiry responses in sentencing?
   Key #331; MCM 70*b*.
   Richardson, 6 M.J. 654 (N.C.M.R. 1978) (MJ erred in considering providency responses in sentencing); likewise, *Brooks*, 43 C.M.R. 817 (A.C.M.R. 1971).
7. Did the MJ examine quantum portion of the PTA prior to announcing sentence?
   (a) RCM 910(f)(3) provides that MJ shall not examine any sentence limitation in the PTA until after the sentence has been announced.
   (b) Key #150, 151.
   Rabago, 10 M.J. 610 (A.C.M.R. 1980) (MJ should not examine quantum portion until after sentence has been announced); likewise, *Walters*, 5 M.J. 829 (A.C.M.R. 1978).
   (c) Key #325.
   Sallee, 4 M.J. 681 (N.C.M.R. 1977) (MJ erred in basing his sentence on PTA limits).
8. Did MJ obtain accused's/counsel's concurrence as to effect of PTA limitations on sentence adjudged?
   See Lukjanowicz, *The Providency Inquiry: An Examination of Judicial Responsibilities*, 13 Advocate 333 (1980).
   RCM 910(f)(4) states the MJ shall insure that accused and parties understand the PTA.
9. Was the sentence highly inappropriate?
   Key #267.
   (a) *Smith*, 15 M.J. 948 (A.F.C.M.R. 1983) (exception to rule against sentence comparison occurs when other cases are closely related and sentences are truly disparate; for exception to apply though: (1) direct correlation between each accused and their respective offenses must exist, (2) sentences must be highly disparate, and (3) no good reason for substantial difference in punishment must exist); likewise, *Skinner*, 17 M.J. 1042 (C.G.C.M.R. 1984). *See also Olinger*, 12 M.J. 458 (C.M.A. 1982).
   (b) *Walker*, 13 M.J. 982 (A.C.M.R. 1982) (disparity exception in closely related case applied to punitive discharge as well as to length of confinement).
10. Did MJ communicate with members about sentence?
    Key #325.
    RCM 1007(c) provides that except under M.R.E. 606, members may not be questioned about their deliberations and voting. *King*, 13 M.J. 838 (A.C.M.R. 1982) (unlawful participation by MJ in sentencing deliberations gave rise to rebuttable presumption of prejudice).

Topic Q—Record of Trial and Authentication

1. Was the record complete/verbatim? Were testimony/exhibits missing or summarized?
   (a) Key #280, 281; MCM 82*b*(1), 83*a*; UCMJ art. 19. RCM 1103(b)(2) states that the record shall be complete and include exhibits received in evidence.
   McCullah, 11 M.J. 234 (C.M.A. 1981) (where there is omission from record, every inference will be drawn against government regarding prejudice; "complete record" is

not necessarily "verbatim record"; omission of certain exhibits was substantial).

2. Did a recording malfunction occur?
   Key #281; MCM 82*i*.
   (a) *Skinner*, 17 M.J. 1042 (C.G.C.M.R. 1984) (where exhibits admitted during time recording equipment was malfunctioning, yet were all included in the record, record was "substantially verbatim").
   (b) *Spring*, 15 M.J. 669 (A.F.C.M.R. 1983) (where, following equipment malfunction, TC and DC reconstructed their argument on sentence after sentence had been announced, record found verbatim); likewise, *Dornick*, 16 M.J. 642 (A.F.C.M.R. 1983).
   (c) *Hall*, 6 M.J. 24 (C.M.A. 1978) (summary disposition) (significant omissions in GCM required sentence to be reduced to that of regular SPCM).
   (d) *Averett*, 3 M.J. 201 (C.M.A. 1977) (unrecorded discussion regarding challenges was substantial omission).
3. Were any sidebar/out-of-court conferences not reported?
   Key #281; MCM 82*b*(1).
   RCM 1103(b)(2) discussion states that a verbatim transcript includes sidebar conferences.
4. Has government rebutted prejudice from substantial omissions?
   Key #281; MCM 82*e*.
   McCullah, 11 M.J. 234 (C.M.A. 1981) (where there is omission from record, every inference will be drawn against government regarding prejudice; where there is substantial omission, rebuttable presumption of prejudice arises). *Accord Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *see also Griffin*, 17 M.J. 698 (A.C.M.R. 1983).
5. Authentication.
   (a) Has the MJ or proper substitute authenticated the ROT? Key #280; MCM 82*f*; UCMJ art. 54.
   RCM 1104(a)(2) deals with authentication.
   (b) When someone other than MJ authenticates, is the MJ genuinely unavailable for a lengthy period of time?
   Key #280; MCM 82*f*.
   RCM 1104(a)(2)(B) deals with substitute authentication.
      (1) *Lott*, 9 M.J. 70 (C.M.A. 1980) (PCS of MN overseas was emergency situation authorizing authentication by TC). Likewise, *Miller*, 4 M.J. 207 (C.M.A. 1978).
      (2) *Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976) (MJ was available so error for TC to authenticate record).
6. Was accused served with copy of record immediately after authentication?
   Key #300; MCM 82*g*.
   RCM 1104(b) provides for TC to cause copy of record of trial to be served on accused.
   (a) *Leslie*, 16 M.J. 714 (A.F.C.M.R. 1983) (SJA review or any document utilized in lieu thereof must be included in record and served upon accused).
   (b) *Beard*, 15 M.J. 768 (A.F.C.M.R. 1983) (reversible error when accused and counsel never obtained a copy of ROT for preparation of *Goode* response); *see also Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).
7. Certificates of correction.
   (a) Was notice given to parties and hearing held for changes requiring certificate of correction after authentication?
   Key #280; MCM 82*e*.
   RCM 1104(d)(2) requires notice to all parties. *Anderson*, 12 M.J. 195 (C.M.A. 1982) (when, after authentication, it becomes necessary for the MJ to propose substantive changes in ROT to accurately reflect the proceedings pursuant to a Certificate of Correction, he should give notice to all parties and provide them an opportunity to be heard).
   (b) Were procedures for submitting the certificate on appeal followed?
   See Memo from ACMR Clerk of Court, Subject: Certification of Correction, dated 10 July 1981, setting forth ACMR procedures for submitting certificates of correction during appellate review.
8. Did anyone make unauthorized corrections/insertions to the record?
   MCM 82*e*.
   Harris, 44 C.M.R. 177 (C.M.A. 1971) (court condemned adding to or otherwise tampering with the record, but found no prejudice).

Topic R—Post-trial Comment and Review

1. Staff judge advocate's post-trial recommendation.
   (a) Was SJA qualified to act?
   RCM 1106(b) governs disqualification of SJAs.
   (b) RCM 1106(d) governs the materials the SJA shall use in preparing the recommendation.
   (c) Did the SJA's recommendation contain the required contents?
   RCM 1106(d)(3) lists the required contents:
      (1) The findings and sentence adjudged by the court-martial;
      (2) A summary of the accused's service record, to include length and character

of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(3) A statement of the nature and duration of any pretrial restraint;

(4) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(5) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(d) Did the SJA examine the record for legal errors? Under RCM 1106(d)(4), the SJA does not have to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether the findings or sentence should be corrected when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. No analysis or rationale for the staff judge advocate's statement is required.

(e) Was the SJA's recommendation served on the accused?
RCM 1106(f)(1) provides that the SJA shall cause a copy of the recommendation to be served on the counsel for the accused.

(f) Did the accused designate which counsel will receive the recommendation?
RCM 1106(f)(2) provides that the accused may designate which counsel will be served.

(g) Did the accused's counsel request a copy of the record of trial?
RCM 1106(f)(3) provides that, upon request, the SJA shall provide a copy of the record of trial for use in preparation of the response to the recommendation.

(h) Did the accused's counsel submit comments?
RCM 1106(f)(5) provides that the DC has five days from receipt in which to submit comments on the recommendation.

(i) Did the DC fail to comment?
RCM 1106(f)(6) provides that failure to comment shall waive later claim of error with regard to such matter in the absence of plain error.

2. Matters submitted by the accused.

(a) RCM 1105 provides that after a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule. Matters which may be submitted: The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Such matters are not subject to the Military Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence;

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(3) Matters in mitigation which were not available for consideration at the court-martial; and

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

(b) Did the accused submit these matters within the respective time period?

(1) For a general courts-martial and special courts-martial with a BCD:
RCM 1105(c)(1) provides that the accused has 30 days after the sentence announcement or seven days after the service of the record of trial on the accused, whichever is later.

(2) For special courts-martial in which a BCD was not adjudged:
RCM 1105(c)(2) provides that the accused has 20 days after the sentence announcement or seven days after the service of the record of trial on the accused, whichever is later.

(3) For summary courts-martial RCM 1105(c)(3) provides that the accused has seven days after the sentence is announced.

(c) Did the accused submit matters within the time prescribed?
RCM 1105(d) provides that failure to submit matters within the time prescribed waives the right to submit such matters.

Topic S—Action, Deferment, and Promulgating Order

1. Action by convening authority.

(a) Before taking action, did the CA consider the required matters?

Key #267, 301.
See MCM 86*b*.
Under RCM 1107(b)(3), the CA shall consider the record of trial, SJA's recommendation, and matters submitted by the accused.

(b) Forfeitures.

(1) Are forfeitures based on the pay scale in effect on the date the sentence was adjudged?
Wright, 47 C.M.R. 309 (A.C.M.R. 1973) (amount of forfeitures was calculated at time of sentence even if pay raise occurred before CA's action).

(2) Are partial forfeitures applied to pay only?
MCM 126*h*(2).
RCM 1003(b)(2) states that allowances shall be subject to forfeiture only when the sentence includes forfeiture of *all* pay and allowances.
Key #267, 301.
Evans, 16 M.J. 951 (A.F.C.M.R. 1983) (forfeitures to allowances set aside).

(3) Are there approved forfeitures in excess of ⅔ pay for 6 months without an approved discharge or approved confinement for the period of forfeitures?
MCM 88*b*; Paragraph 6-19*f*, AR 190-47; RCM 1107(d)(2).
Stroud, 44 C.M.R. 480 (A.C.M.R. 1971); *Skinner*, 37 C.M.R. 588 (A.B.R. 1966).

(4) Are TF approved for accused no longer in confinement?
RCM 1107(d)(2) discusses rule when accused is not in confinement.

(5) Do the partial forfeitures specify the amount that will be forfeited per month and the number of months?
RCM 1003(b)(2) states that a sentence to forfeitures shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.
Johnson, 32 C.M.R. 127 (C.M.A. 1962) (failure to include words "per month" resulted in forfeiture for one month).

(6) If no confinement was adjudged/approved, did the CA improperly apply forfeitures prior to execution of the sentence?
MCM 88*d*(3), 126*h*(5); UCMJ art. 57(a).
Key #267.
Midkiff, 15 M.J. 1043 (N.M.C.M.R. 1983) (where sentence did not include confinement, forfeitures may not be applied until sentence is ordered into execution).
Key #301.
Hall, 3 M.J. 969 (N.C.M.R. 1977) (CA remitted confinement but then erroneously applied forfeitures prematurely to pay becoming due on or after the date of his action; forfeitures are not applied until sentence is ordered executed).
Ferguson, 44 C.M.R. 701 (N.C.M.R. 1971) (forfeitures may not be applied prior to ordering sentence into execution unless sentence includes unsuspended confinement.

(c) Has the CA converted the sentence to a non-equivalent punishment?

(1) MCM 88*a*, 127*c*(2).
RCM 1107(d)(1) states that the CA may change a punishment to one of a different nature as long as the severity of the punishment is not increased.

(2) Key #267, 301.
Goetz, 17 M.J. 744 (A.C.M.R. 1983) (CA may change nature of punishment but may not approve any sentence which court-martial might not itself have legally adjudged).
Bullington, 13 M.J. 184 (C.M.A. 1982) (where BCD was not lawfully adjudged, CA's conversion of BCD to 2 months CHL cannot cure error).
Loft, 10 M.J. 266 (C.M.A. 1981) (where only reasonable interpretation of CA's action was approval of BCD, supervisory authority did not increase punishment by approving BCD).

(3) Key #304.
Williams, 6 M.J. 803 (A.C.M.R. 1979) (CA can only change sentence to something within level of court's sentencing power, and sentence may not be more severe than original).

(d) Does the sentence, as approved, exceed the sentence in companion cases?
Key #267.

(1) *Skinner*, 17 M.J. 1042 (C.G.C.M.R. 1984) (precedent has little application in determining sentence appropriateness because each case has to be judged on the basis of its own facts).

(2) *Smith*, 15 M.J. 948 (A.F.C.M.R. 1983) (sentence comparison should only occur when other cases are connected or closely related and sentences are truly disparate; before this exception applies,

three requirements must be met: (1) direct correlation between each accused and their respective offenses must exist, (2) sentences must be highly disparate, and (3) no good reason for substantial difference in punishment as between offenders must exist).

See Olinger, 12 M.J. 458 (C.M.A. 1982).

(e) Does any suspension extend beyond accused's period of enlistment?

MCM 88*e*.

RCM 1108(e) provides that separation which terminates status as a person subject to the Code shall result in the remission of the suspended portion of the sentence.

Harty, 49 C.M.R. 628 (A.C.M.R. 1974) (suspension may not extend beyond current enlistment or period of service).

(f) Do any ambiguities or irregularities exist in the CA action?

(1) MCM 89*b*.

RCM 1107(g) provides that if CA's action is ambiguous, authority who took ambiguous action may be instructed to withdraw the original action and substitute a corrected action.

(2) Key #267.

Massey, 17 M.J. 683 (A.C.M.R. 1983) (failure to specify limits of restriction included in sentence imposed by summary court-martial was error and rendered sentence ambiguous).

(3) Key #332.

House, 15 M.J. 1007 (A.C.M.R. 1983) (when CA's action is ambiguous, ACMR may return case to CA for a new and unambiguous action).

(g) Does CA action exceed the limits of the PTA as interpreted by parties at trial?

(1) RCM 1007(d)(1) provides that the PTA may affect what punishments may be changed by CA.

(2) Key #143.

Cifuentes, 11 M.J. 385 (C.M.A. 1981) (understanding of parties at trial controlled interpretation of agreement; if CA did not comply with trial understanding, court must order compliance or allow accused to withdraw guilty plea).

(3) Key #269.

House, 15 M.J. 1007 (A.C.M.R. 1983) (PTA must be interpreted within context of maximum imposable sentence as well as adjudged sentence).

Mills, 12 M.J. 1 (C.M.A. 1981) (where CA failed to comply with PTA after completion of appellate review, filing of extraordinary writ was appropriate).

(h) Did delay in CA action cause any prejudice to appellant?

Key #292.

(1) *Boldon*, 17 M.J. 1046 (N.M.C.M.R. 1984) (accused is entitled to dismissal of charges if supervising authority's action is not completed within a certain number of days, provided record of trial is short in length and offenses involved were not serious).

(2) *Echols*, 17 M.J. 856 (N.M.C.M.R. 1984) (15 month delay between trial and supervisory authority's action was unreasonable and mandated reversal because accused suffered specific prejudice).

(3) *McGinn*, 17 M.J. 592 (C.G.C.M.R. 1983) (accused's claim impairment of his ability to obtain employment was some evidence of prejudice from lengthy, unexplained post-trial delay).

(4) *Milan*, 16 M.J. 730 (A.F.C.M.R. 1983) (absent demonstrated prejudice, inordinate delay after CA acts does not, in and of itself, justify dismissal of charges).

(i) Did CA/subordinate commander grant immunity to a witness whose pretrial statement/testimony was used against the accused at trial?

Key #294.

Smith, 1 M.J. 83 (C.M.A. 1979) (CA is precluded from reviewing and taking action in a case where he has granted immunity to a witness).

Cf. United States v. Newman, 14 M.J. 474 (C.M.A. 1983) (CA not automatically disqualified).

(j) Did the accused receive administrative credit for illegal pretrial confinement?

Key #267.

RCM 1107(f)(4)(F) provides that when the MJ has directed that the accused receive credit, the CA shall so direct in the action.

(1) *Allen*, 17 M.J. 126 (C.M.A. 1984) (in light of the Department of Defense instruction requiring that procedures employed by military services for computation of sentence conform to those published by the Department of Justice, accused was entitled to sentence credit for pretrial confinement).

(2) *Schuring*, 16 M.J. 664 (A.C.M.R. 1983) (administrative credit may be appropriate remedy for illegal pretrial confinement). *See also Malia*, 6 M.J. 65 (C.M.A. 1978); *Larner*, 1 M.J. 371 (C.M.A. 1976); *White*, 38 C.M.R. 9 (C.M.A. 1967).

2. Deferment.
   (a) Who deferred confinement?
   Key #5; MCM 88*f*.
   RCM 1101(c)(2) provides who may defer confinement.
   (b) Did the accused sustain his burden on his deferment request?
   Key #304; MCM 88*f*.
   RCM 1101(c)(3) provides that the accused has the burden to show that his interests and the community's interests in release outweigh the community's interests in confinement; *see Trotman v. Haebel*, 12 M.J. 27 (C.M.A. 1981).
   (c) For judicial review of the deferment decision, was abuse of discretion the standard used?
   Key #304; MCM 88*f*.
   RCM 1101(c)(3) provides judicial review only for abuse of discretion.
   Alicea-Baez, 7 M.J. 989 (A.C.M.R. 1979) (summary denial of deferment request was not abuse of discretion where the defense failed to carry its burden by only addressing clemency matters and not addressing facts relevant to deferment).
   (d) If the CA granted deferment, were unreasonable conditions placed upon the accused?
   Key #304; MCM 88*f*.
   RCM 1101(c)(5) provides that an accused may be restricted to specified limits or conditions may be placed on his liberty during the period of deferment provided it is ordered for a proper reason and not as a substitute for punishment.
   (e) Did the CA abuse his discretion in rescinding the deferment?
   Key #304; MCM 88*g*.
   RCM 1101(c)(7)(B) provides that the CA has discretion in rescinding deferment; however, the accused must be given notice and a seven-day period to respond before confinement may be ordered executed.

3. Promulgating order.
   Pages A15-1 and A15-2, MCM; Pages A17-1 and A17-2 RCM.
   (a) Does the CMO have the same date as the action of the CA who published it?
   MCM 90*a*; RCM 1114 (c)(2).
   (b) Are all orders convening the court which tried the case correctly cited in the CMO?
   MCM 90*a*; RCM 1114.
   (c) Are the appellant's name, grade, SSN, organization, and armed force correctly shown in the CMO?
   (d) Are all charges and specifications, including amendments, upon which the appellant was arraigned correctly shown in the CMO?
   RCM 1114(c)(1) provides that the order promulgating the initial action shall set forth the charges and specifications.
   (e) Are the pleas, findings, and sentence copied verbatim in the CMO?
   RCM 1114(c)(1) provides that the order promulgating the initial action shall set forth the pleas, findings, and sentence.
   (f) Does the CMO correctly indicate the number of previous convictions considered?
   (g) Does the CMO show the date the sentence was adjudged?
   MCM 90*a*.
   RCM 1114(c)(2) provides that the promulgating order shall state the date the sentence was adjudged.
   (h) Does the CMO correctly show the sentence announced?
   (i) Is the action of the CA copied verbatim from the record to the CMO?
   RCM 1114(c)(1) provides that the order promulgating the initial action shall set forth the action of the CA verbatim.
   (j) Is the CMO signed by CA or subordinate "by direction"?
   RCM 1114(e) provides that the promulgating order shall be authenticated by the signature of the convening or other competent authority, or a person acting under the direction of such authority.
   (k) Was the CA qualified?
      (1) Key #84.
      Beauchamp, 17 M.J. 590 (A.C.M.R. 1983) (where accused's division commander had an interest in punishing accused's willful disobedience, commander was disqualified from acting as CA.)
      Corcoran, 17 M.J. 137 (C.M.A. 1984) (CA was an accuser and thus disqualified to convene CM).
      Flowers, 13 M.J. 571 (A.C.M.R. 1982) (CA was disqualified from acting in defendant's case where, at behest of TC, CA withdrew charges against two others

to allow them to become witnesses against defendant).

(2) Key #294.
Decker, 15 M.J. 416 (C.M.A. 1983) (SJA's recommendation that CA grant immunity did not disqualify either party absent indication that such action would create risk that either person would be unable to evaluate objectively and impartially all evidence).
Andreas, 14 M.J. 483 (C.M.A. 1983) (GCMCA was not disqualified because of invalid promise of transactional immunity to civilian witness made by SJA serving SPCMCA).
Newman, 14 M.J. 474 (C.M.A. 1983) (grant of testimonial immunity to defense witness did not disqualify CA).

Topic T—Appellate Rights

1. Do the allied papers indicate that the accused was advised by the DC of his appellate rights?
   (a) RCM 1010 provides that the MJ shall inform the accused of his right to appellate review and the effect of waiver or withdrawal of such rights, and shall inquire of the accused to insure that he understands the advice.
   RCM 502(d)(6)(iv) provides that DC must explain to the accused his right to appellate review and must advise him concerning the exercise of that right.
   MCM, 48*k*.
   Note: Appellant may choose to waive appellate review in most cases. RCM 1110.
   (b) Key #230, 311. *See*:
      (1) *Sterling*, 5 M.J. 601 (N.C.M.R. 1978) (circumstances under which TDC may be relieved of post-trial responsibilities or representation).
      (2) *Wiles*, 3 M.J. 380 (C.M.A. 1977) (affidavits showed that no advice was given).
      (3) *Palenius*, 2 M.J. 86 (C.M.A. 1977) (discussion of full range of rights and duties of DC).
2. Do the allied papers contain an executed "request for appellate DC" form?
   (a) *See* RCM 502(d)(6), 1202.
   MCM, 48*k*(3).
   (b) Key #317.
   Knight, 16 M.J. 691 (A.C.M.R. 1983) (TDC should insure that appellate representation request form is attached to record and retain copy until appellate review has commenced).
3. Does the appellate request form, or any communication from the accused, list any errors/matters to be raised on appeal?
   Key #311.
   (a) *Arroyo*, 17 M.J. 224 (C.M.A. 1984) (*Grostefon* holding requires appellate DC to identify those issues which his client wishes to have raised on appeal; DC has minimal responsibility of assuring that CMR and CMA attention was directed to the points which his client desired to have raised); *see Grostefon*, 12 M.J. 431 (C.M.A. 1982).
   (b) *Hullum*, 15 M.J. 261 (C.M.A. 1983) (court discussed duties of appellate counsel in cases in which non-frivolous issues existed but were not raised on the appellate rights form or in correspondence from the accused. Court held that merely because argument was not frivolous did not mean that argument must be raised by appellate counsel. Court measured appellate counsel by same standard as that for trial lawyer: was the appeal handled with the competency expected of an appellate advocate in the military justice system? Court found that appellate counsel's failure to argue the appropriateness of the sentence was a violation of that standard where the accused claimed at trial and in a petition for clemency that his absence was the result of duress and the MJ had recommended suspension of the BCD).
   (c) *Knight*, 15 M.J. 202 (C.M.A. 1983) (court discussed duties of appellate DC in cases in which issues were raised on appellate rights form *and* in correspondence with appellate counsel. Court specified several issues to "highlight the issues identified by the accused" and ordered briefs thereon. The findings of guilty of one charge and its specification were set aside and case was remanded to ACMR for further review).

Topic U—Appellate Review

1. Waiver.
   See Saunders, The Resurgent Doctrine of Waiver, The Army Lawyer, Aug. 1984, at 24 (this article is a broad review of recent waiver cases, and is especially useful concerning effects of the MRE on waiver); *Issues Waived by Provident Guilty Plea*, 13 Advocate 354 (1981); Vitaris, *The Guilty Plea's Impact on Appellate Review*, 13 Advocate 236 (1981).
2. For relevant RCM provision, *see* MCM, 1984, index.
3. For relevant cases, *see generally* Key #310-333.

Automation Developments

US Army Legal Services Agency

VDT Regulation

At least eleven states have considered legislation which would regulate video display terminal (VDT) use by workers performing word processing, data entry, and other computer functions. Proponents of such controls are concerned about the health of workers performing these functions. Opponents argue that there is no evidence of harm from VDT use. Nevertheless, such proposals promise to add controversy to management of automated office systems (including JAGC office information systems).

Proposals include requirements to offer non-VDT work to pregnant employees and employees with various medical problems, to provide radiation shielding and testing and physical examinations, to give notice periods to employees before new hardware is installed, to limit heat and noise, to provide various lighting, glare reduction, adjustable furniture and other features at VDT work stations, to mandate rest or alternative work periods for VDT workers, and to mandate a maximum number of work hours per day.

The stakes are high as managers seek to balance newly achieved productivity gains against employee health and morale.

Legal Office Automation Publications and Training Programs

Automation requirements for an Army legal office are not much different than those for a corporate counsel or private law office. The primary functions are the same: word processing, research, attorney support, and case management. The differences—accounts receivable and profit distribution—are minor. Requirements for staffing actions vary little between corporate and Army legal offices.

Standard Army-wide systems will be developed centrally for military justice (USALSA), claims (Claims Service), and legal assistance (TJAGSA) functions. Data elements, forms, reports, and procedures will be standardized to some degree.

Most other JA office functions are local in nature. The JA office automation system should be integrated with the local staff section's system for electronic messages and document distribution and retrieval. However, the office cannot overlook primary law office functions in a rush to embrace local staff integration efforts or Army TOE efforts.

USALSA managers have found two educational programs particularly helpful in understanding modern legal office automation technology. These programs are the Practising Law Institute, Computer Seminars (212-765-5700, ext 286), and the Price-Waterhouse, Legal Tech Conferences (212-877-5619). Several specialized newsletters also are available in the legal automation field, including the Leader's Legal Tech Newsletter, published by Price Waterhouse (212-741-8300), and the Attorney's Computer Report (404-455-7600). Additionally, for Army legal offices using the IBM or IBM-compatible personal computer, PC Week is an extremely useful guide on IBM standard microcomputer systems (212-503-5120).

These materials and programs describe the contemporary use of computers in various types of legal offices. Understanding this subject is essential to sound long-range planning for the JA office information system.

Litigation Support Redefined

The rapid spread of litigation support technology to corporate, private, and government law offices has changed established opinions on when to employ such systems and on what a litigation support system is capable of accomplishing. The magnitude of this change is similar to that experienced by the engineering profession when the hand calculator replaced the slide rule.

Litigation support was developed by the IBM Corp. in the late 1960s to support its defense of the *IBM Anti-Trust Case*. The Department of Justice soon followed with its own system. Until recently, it was believed that automated

solutions were limited to high-volume, high stakes anti-trust cases and should be used only as a last resort. The costs to automate were frequently eight dollars per document or more.

Today, lawyers are turning to litigation support in a wide variety of cases; in many areas, sole practitioners are leading the way. Many of these applications are highly tailored to specialized practice areas and utilize spreadsheet software technology as well as traditional database technology. Essentially, litigation support is being redefined to include any software application designed to assist the attorney in making decisions on a case or action.

Vendors of integrated law office systems (Barrister, Informatics, IBM, and others) are adding powerful litigation support tools to their mini-line of office computers. Significantly, these support tools may be connected to an IBM PC or other personal computer which will operate popular commercial software products such as dBASE II or III or LOTUS 1,2,3. The personal computer connection appears to be an important emerging standard for legal office systems. It also provides the flexibility required as the JAGC continues to develop automated systems, many of which will rely on personal computers.

According to a recent Amicus Research Group, Ltd. study, the litigation support industry will grow 17% each year and will have total revenues of $853 million by 1990. Using litigation support systems in a JAGC legal office is still largely untested. Their utility can be determined only after a lengthy trial and error process and by sharing experiences (successes and failures) in The Army Lawyer or by contacting the TJAG Information Management Officer.

Hard Discs for the Personal Computer

The advantages of a hard disc are that it:

a. holds more data than floppy disk drive (e.g., 10-MB hard disc holds 30 times more data than a 320,000-byte floppy disc).

b. finds and reads data into the computer memory (RAM) faster (usually 10 times faster or more with a hard disc).

c. elminates "floppy shuffling" (a frequent irritation for busy lawyers, it is time consuming and an unnecessary barrier to the computer novice).

d. speeds the operation of most programs (amount depends on how frequently the program makes "disk accesses" for data and how often "overlaps" are used in the program, execution time for a database manager can be reduced to a tenth or a twentieth of the time of two floppy discs).

e. permits reassignment of RAM to printer buffers for productivity improvement.

The disadvantages of a hard disc are that it:

a. costs $750 or more (depending on size and vendor).

b. head crashes are possible from dust, pollen, or cigarette ashes (this is a problem for sealed units as well as removable hard discs).

c. requires many floppy discs and more machine and operator time to back up the contents of a hard disc (30 320k-byte floppy discs for 1 10-MB hard disc).

To solve the question of whether or not to use a hard disc, you may:

a. buy a second hard disc for back-up (the chance of two hard discs going out at the same time in an office environment is miniscule).

b. buy a streaming tape back-up (this solution costs less and is very fast).

For either solution, removable cartridges are available which will permit remote storage of the back-up and efficient back-up scheduling.

Criminal Law Notes

Criminal Law Division, OTJAG

Errors in Records of Trial

P041535Z FEB 85
FM DA WASHDC//DAJA-CL//
UNCLAS
FOR SJA/JA/TDS/Mil Judge/Legal Counsel/ Professor of Law/USMA
SUBJ: Errors Noted in Records of Trial
A. R.C.M. 1105, MCM, 1984.
B. R.C.M. 1106(F), MCM, 4984.
C. DA Pam 27-50-139 (Army Lawyer, July 84), at pg. 59.
D. App 17, MCM, 1984.
E. AR 27-10, 1 Jul 84, pg. 52.
F. R.C.M. 1112(A), MCM, 1984.
G. Para 94*a*(2), MCM, 1969 (rev.).
H. R.C.M. 1112(D), MCM, 1984.
I. R.C.M. 1112(E), MCM, 1984.

1. Review of records of trial reveals that errors in post-trial administration, as noted below, have occurred in several jurisdictions.
2. The requirements of refs A and B are being misinterpreted in a few jurisdictions. Refs A and B operate independently, but both must be considered in determining the earliest date that the convening authority (CA) may take action. In each case, the dates of both the service of the record of trial and the service of the SJA recommendation must be documented. The "earliest action date" must be calculated separately under each rule. The later of these two dates will be the correct "earliest action date" for action on each case, absent written waiver of one or both provisions. For example, service of the record and the recommendation on the same day will not allow action after five days under ref B, because ref A (seven days) is later and controls in this situation. Ref C provides further explanation.
3. The staff judge advocate personally must sign the post-trial recommendation to the convening authority. No one should sign the recommendation "for" the SJA. If the SJA is not present for duty, a designated subordinate may sign as "acting staff judge advocate."
5. In initial promulgating orders, the summarized specification must include the date(s) of each offense. *See* ref D. Ref E is in error in this regard, and will be corrected in the next edition.
5. Per ref F, the record of trial in summary courts-martial and some special courts-martial must be reviewed by a judge advocate. The inked stamps commonly used to document review under ref G do not suffice. An inked stamp may be applied to DD Form 2329 or the promulgating order to reflect legal review, but records forwarded for review under article 69, UCMJ, must have the written review attached covering the matters listed in ref H. *See* ref I.

MCM Corrections

The following corrections to Appendix 12, MCM, 1984, should be made:

1. Art. 86 (Absence, more than 30 days: *Add* "DD."
2. Art. 92 (Violation, failure to obey other order): *Change* "6 yrs." to "6 mos."
3. Art 98 (Knowingly, intentionally failing to comply, enforce code): *Change* "1 yr." to "5 yrs."
4. Art. 128 (Assault consummated by battery): *Change* "3 mos." to "6 mos." and *Change* "2/3 3 mos." to "Total."
5. Art. 133: *Change* "As prescribed" to "Total."
6. Art. 134 (Bribery): *Change* "15 yrs." to "5 yrs."
7. Art. 134 (Graft): *Change* "2 yrs." to "3 yrs."
8. Art. 134 (Indecent exposure): *Change* "None" to "BCD" and *Change* "2/3 6 mos." to "Total."
9. Art. 134 (Indecent language—Other cases): *Delete* "DD" and *Change* "1 yr." to "6 mos."
10. Art. 134 (Jumping from vessel into the water): *Change* "2/3 6 mos." to "Total."
11. Art. 134 (Parole, violation of): *Delete* entire entry (not in Part IV, MCM).
12. Art. 134 (Prisoner, allowing to do unauthorized act): *Delete* entire entry (not in Part IV, MCM).

13. Art. 134 (Refusing, wrongfully, to testify): *Change* title to "Testify, wrongfully refusing to."

14. Art. 134 (Sentinel, lookout, offenses by or against): *Delete* the words "offenses by or against" and *Delete* punishments and categorize as follows:

—Disrespect to	None	3 mos.	⅔ 3 mos.
—Loitering or wrongfully sitting on post by			
—In time of war or while receiving special pay	DD	2 yrs.	Total
—Other cases	BCD	6 mos.	Total

15. Art. 134 (Soliciting another to commit an offense): *Change* "109e" to "105e."

16. Art. 134 (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button): *Change* "None" to "BCD" and *Change* "⅔ 6 mos." to "Total."

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Tax News

Deductibility of Mortgage Interest

Whether service members may deduct the interest paid on their home mortgages has been under study for some time. The Treasury Department recently announced that interest payments on a home mortgage will be deductible at least through tax year 1986, *i.e.*, any interest payments on a home mortgage which are made during 1985 or 1986 will be deductible. This question is, however, still under study and there is no guarantee that home mortgage interest paid beginning in 1987 will be deductible. The issue concerns I.R.C. § 265(1) which disallows deductions for amounts which are allocated to income which is wholly exempt from taxes. The IRS position is that because service members receive tax-free BAQ as a housing allowance, they should not be permitted to deduct interest paid on a home mortgage to the extent of their tax-free BAQ. The concern first arose when the IRS applied this theory to deny an interest deduction to ministers who receive a tax-free parsonage allowance. The final resolution of this issue may be found in any tax reform legislation this year or next, as part of the Treasury Department's plan to change the tax characterization of military benefits such as BAQ. For 1985 and 1986, however, military homeowners are assured that they can deduct their interest payments on a home mortgage.

Home Installment Sales

The summer moving season is rapidly approaching. It appears that with interest rates coming down, many people will be selling homes. The slow real estate market of the past few years caused many service members to rent their homes rather than sell. It is likely that legal assistance officers will be asked to give advice to these homeowners when putting together a sale. Counsel should be aware of a change in the tax law made by the Tax Reform Act of 1984 concerning installment sales.

Often, the real estate seller agrees to finance part of the purchase by taking back a second mortgage. This generally results in the seller receiving payment for the property in installments. Under the old law, each installment would be split between a return of capital and some type of gain. If the property had been depreciated at a rate in excess of the straight line rate, then some portion of the gain would be recaptured as ordinary income. Under the old law, the characterization of each installment payment would be split, resulting in the recaptured ordinary income being spread out over the various payments. This is no longer true.

Under I.R.C. § 453, for sales of property after 6 June 1984, any depreciation recaptured will be included in income in the year of sale, even

though the gain is to be included in income under the installment method. The result is that the seller will have to recognize all of the depreciation which is to be recaptured in the year of sale, even though he or she may not receive payments in the year of sale equal to the recaptured amount. Therefore, it becomes important that the seller arrange the transaction so that he or she will receive enough cash up front to cover the tax burden caused by having to recapture as ordinary income all of the accelerated depreciation in the year of sale. Many service members who have previously rented their homes and have taken depreciation under the Accelerated Cost Recovery System (ACRS) potentially have this problem. The problem will be avoided, however, if the purchaser obtains new financing and the seller does not take back a second mortgage.

Home Warranties

Although it is generally true that one who purchases a home second hand buys at his or her own risk and has no recourse against the builder if the contruction is defective, the New Jersey Supreme Court recently handed down a decision which expands the liability of a contractor. In *Aronsohn v. Mandara*, 98 N.J. 92 (1984), the original homeowners hired a contractor to build a patio on the home. The original owners subsequently sold the home to the plaintiffs who sued the contractor for negligent construction. The issue was whether the contractor should be subject to an action by the new owners even though there was no privity of contract. The court examined the contract between the original owners and the contractor and found no prohibition against the original owners assigning their rights under the contract. The court found that the contractor had made an implied promise of reasonable workmanship to the original owners. The court analogized that implied promise to a real property covenant which runs with the land and determined that the original owners had assigned the promise to the purchasers at the time of sale. The result was that the second owners were permitted to bring an action against the contractor for negligent construction under a contract with the original owners.

Work-at-Home Plans

Spouses of military members who desire to work are often hampered by the vagaries of military service—numerous moves, absence of the member from the home on military duty, *etc.* As a result, many choose not to work outside the home, either full or part-time. Instead, these spouses may be intrigued by small advertisements appearing in magazines or newspapers, which frequently read: "Earn $500 a month. Address envelopes in your home. Five dollars provides you with all the information you need to start."

As a result of military family members responding to such advertisements, legal assistance officers receive calls and complaints from those who have lost money on such enterprises. As background when such complaints are received and for preventive law handouts when inquiries are received from those who are thinking of getting involved in "work-at-home" plans, the following information is provided:

Stuffing and addressing envelopes is one of the most common work-at-home plans. The promoter places an ad in a newspaper or magazine stating that up to $500 to $800 can be earned monthly through this type of plan.

To find out how to make this money, however, the consumer almost always must pay money. These small payments from consumers, although probably only a few dollars, are the heart of the work-at-home scheme. Dollars sent to companies by hundreds or thousands of interested consumers, usually to an out-of-state post office box, for further information or a training manual, insures that the promoter will make a profit.

Often the consumers receive (after sending their money) only a list of companies which are supposedly interested in having consumers stuff and address envelopes for them. Consumers must contact all the companies at their own expense and await a possible reply. More often than not, the companies on the list ask for additional money before sending details. These details may consist of nothing more than another list. It is not uncommon to find that those companies listed are no longer in busi-

ness. If the companies are interested, and the chance of that is slim, the consumer typically ends up buying envelopes and stamps out of his or her own money and working on a commission basis. The magic "commission" and "income" figures advertised rarely materialize.

Another popular "work-at-home" promotion is the homemade crafts plan. It often starts out the same way as the envelope-stuffing enterprise: the consumer sends money to the company for the craft kits, the company agrees in advance to buy back the finished product at an attractive price, and the consumer assembles the crafts at home. Regardless of the high quality work done by some consumers, goods are often judged inferior by the company and returned. The consumer is then stuck with the goods and the company keeps the consumer's money.

Other variations involve home mail-order operations and other home-based advertising and mail operations. For example, one type of plan may be circular: after responding to an ad for a "get-rich-quick" scheme by sending money for more information to the addressee, the consumer will often receive information telling the consumer how to make money by placing a similar ad in the local newspaper. If the consumer places such an ad, any persons who respond are merely sent the same plan.

Clients should be advised to use extreme caution when considering sending money in response to any work-at-home offer, especially when the mailing address is outside the state in which the consumer is located.

For clients who have lost money in such ventures, most state attorneys have a consumer protection office, division, or bureau and the client may be referred there to lodge a complaint.

Does Support Obligation Include VHA?

Legal assistance attorneys often encounter questions concerning a service member's obligation to include any Variable Housing Allowance (VHA) received in support payments the member may be making (or required to make) in the absence of a court order or separation agreement.

In the past, legal assistance officers representing the nonsupported family members of the soldier could argue that if the soldier's receipt of Basic Allowance for Quarters was based solely on the member's requirement to provide support for dependents, then the member should also pay any VHA which the member received.

A change to 37 U.S.C. § 403a, contained in the DOD Authorization Act, 1985 (Pub. L. No. 98-525 (1984)), somewhat clarifies this issue. Section 602 of the Authorization Act provides that if a service member is authorized to receive BAQ at the rate prescribed for a member with dependents solely by reason of a court order requiring the member to pay support for dependents, then the member is not authorized to receive VHA and will receive only BAQ.

Final DOD Former Spouses' Act Regulation Issued

The final Department of Defense (DOD) rule implementing the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, and the amendments to the Act contained in the DOD Authorization Act, 1985, Pub. L. No. 98-525 (1984), has been issued.

The regulation is DOD Directive 1340.16 and will be codified at 32 CFR § 63. It was published at 50 Fed. Reg. 2665 (Jan. 18, 1985) and effective on 2 January 1985. The draft regulation was initially published for comment in January 1983 and extensive comments were received. These comments, and changes made by the DOD Authorization Act, delayed implementation of the final rule.

VA Attorney Fee Limitations Under Attack

Legal assistance attorneys are occasionally consulted by retired military personnel on matters pertaining to adjudications of veteran's benefits, often because of the statutory limit of $10 on attorneys fees. The statues, 38 U.S.C. §§ 3404(c) and 3405, impose criminal penalties for attorneys who charge more than $10 for representing clients before the Veterans Administration.

Although bills in prior sessions of Congress

which would modify the attorney fee limitation have passed the Senate, a similar proposal in the House has never made it out of committee. However, in *Nat'l Assoc. of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (N.D. Cal. 1984), a federal district court recently held that the $10 statutory cap on attorney's fees for a VA claim violates due process and the veteran's first amendment rights to petition the government for redress of grievances and to speak and associate freely.

The government filed a direct appeal of that decision to the Supreme Court and on 27 September 1984, Justice William Rehnquist stayed an injunction the district court had issued enjoining the statutory attorney fee limit. *Walters v. Nat'l Assoc. of Radiation Survivors*, No. A-214 (U.S. Sup. Ct., Sept. 27, 1984)).

An excellent synopsis of this case and other cases relating to developments in veteran's law during 1984 may be found at 18 Clearinghouse Rev. 1077, January 1985.

Forty-Nine State Legislatures Convening in 1985

The legislatures of 49 states and Puerto Rico, have convened, or will convene, in 1985. Forty-five states and Puerto Rico began to meet in January, Alabama and North Carolina began to meet in February, and Florida and Louisiana began to meet in April. Kentucky is not scheduled to hold a regular legislative session in 1985.

Amended USPS Rule on Postal Solicitations

The U.S. Postal Service has issued a final rule amending the regulation implementing statutory provisions on the mailing of solicitations in the guise of bills, invoices, or statements of accounts. Generally, such solicitations are considered "nonmailable" matter in violation of the Domestic Mail Manual § 123.4 unless certain warnings are printed on the face of the solicitation making it clear that the solicitations are merely offers and not bills that have to be paid.

The regulations require warnings to be displayed in capital letters of a color prominently contrasting with the background against which they appear. The regulations also specify alternative locations for the warnings. One alternative location is that the warning may be centered *diagonally* across the face of the solicitation. However, in recent litigation to enforce the regulation, it was argued that under the prior wording of the regulation, solicitors were free to print the warning *horizontally* on the face of the solicitation itself. Additionally, some recent solicitations resembling invoices have surrounded the required warning with printed matter so similar in style and size of type to the warning as to camouflage the warning and render it less conspicuous to the consumer.

The amended regulation, published at 40 Fed. Reg. 5581 (Feb. 11, 1985), clarifies these ambiguities and rquires that the warning, "THIS IS NOT A BILL," be placed conspiciously on the page so that it stands apart. Additionally, the warning may not be preceded, followed, or surrounded by words, symbols, or other matter which reduces its conspiciousness, or which introduces, modifies, qualifies or explains the warning, such as "Legal Notice Required by Law."

Legal assistance officers with clients complaining about such solicitations may advise the clients that all post offices and mail carriers have postage-free Consumer Service Cards available for reporting these and other postal complaints. If the problem cannot be resolved using the Consumer Service Card or through direct contact with the local post office, complaints may be forwarded to one of the following:

Consumer Advocate
United States Postal Service
Washington, D.C. 20260

Chief Postal Inspector
United States Postal Service
Washington, D.C. 20260

Attorney General Credit Suit Filed

The California Attorney General's Consumer Law Section has filed suit against a chain of appliance and electronics stores in the Southern California area, a financial services operation, and the common officers of these enterprises

charging them with unfair and unlawful practices, primarily against young, low-ranking military recruits.

The suit names as defendants World Financial Services Center, Inc., its retail stores, Bargain Furnishings, Appliances, and Electronics, and three corporate officers. Customers were primarily young military personnel or others with poor credit histories or no credit experience who were charged exhorbitant prices for appliances and audio and video equipment. The stores then transferred the installment sales contracts to World Financial Services, which disclaimed responsibility for the merchandise and allegedly used abusive and illegal debt collection practices, such as using profane language, harrassing family members and commanders of the military personnel, and the employers of other debtors when the purchasers fell behind in their payments.

The suit also alleges that customers were told they were required to purchase credit life and disability insurance. Some customers were allegedly charged for insurance without their consent or knowledge, or charged for insurance that did not exist.

Legal assistance officers with clients who purchased goods from these stores may contact California Deputy Attorney General Albert N. Shelden at (619) 237-7754 for further information.

Wisconsin Consumer Protection Packet

The Office of Consumer Protection of the Wisconsin Attorney General has a useful packet of consumer protection materials which legal assistance officers may request. Although many of the materials contained within the packet are specific to Wisconsin, all can be adapted by legal assistance attorneys to produce handouts or fact sheets for local use or articles in installation newspapers.

The packet may be ordered by writing: Office of Consumer Protection, 123 W. Washington Ave., Post Office Box 7856, Madison, Wisconsin 53707. The item appearing below on "work-at-home" plans is adapted from one such handout in the packet.

Legal Assistance Publications in DTIC

Two additional legal assistance publications produced by The Judge Advocate General's School are now available for ordering through the Defense Technical Information Center. These publications and the numbers by which they may be ordered are:

—All States Guide to State Notarial Laws, DTIC No. B-089092;
—The Legal Assistance Officer's Federal Income Tax Supplement, 1985 edition, DTIC No. B-089093.

The 1985 edition of the federal income tax supplement replaces the 1984 edition, which has been withdrawn from DTIC. Legal assistance offices may wish to retain the 1984 edition, however, to answer questions which may arise from service members about 1983 tax returns.

Information on how to order these publications and other publication produced by TJAGSA may be found elsewhere in this issue under the section entitled, "Current Materials of Interest".

Operation Stand-by Contact Persons

Legal assistance officers should be aware of a project undertaken by the American Bar Association's Standing Committee on Legal Assistance For Military Personnel (the LAMP Committee), to foster the creation of "Operation Stand-by" committees in most states, particularly those with a large number of military personnel.

Operation Stand-by committees are to be created on a state-by-state basis through the particular state bar association's military law committee or equivalent, if one exists. State attorneys are invited to place their names on the Operation Stand-by list for their state and then may be contacted by active duty military attorneys who have questions about the law in that state. The project is not designed as a referral service for clients. Instead, it functions as an attorney-to-attorney conduit of information. For example, a legal assistance attorney in Bamberg, Germany may have a question concerning the execution of wills in Florida. The

legal assistance attorney may contact an attorney on the Operation Stand-by list of the Florida State Bar's Military Law Aid to Servicemen Committee for an answer to the question. There is no fee or other charge for the contact. Rather, it is rendered as a special public service for military personnel.

The LAMP Committee currently has seven states participating in the Operation Stand-by project and hopes to add three more states within a year. The Legal Assistance Branch has requested complete lists from the seven states and plans to publish these as a part of the next revision of the Legal Assistance Officer's Information Directory.

In the interim, legal assistance attorneys may contact one of the individuals listed below for further information about their state:

Connecticut

Richard C. Noren, Chairman
Connecticut Bar Association
Veterans and Military Affairs Committee
Box 191
Putnam, CT 06281

District of Columbia

Neil B. Kabatchnick, Chairman
Military Law Committee
Bar Association of District of Columbia
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036

Florida

John S. Morse, Esq.
Military Law Aid To Servicemen Committee
4600 W. Kennedy Boulevard
Tampa, Florida 33609

Maryland

Wallace Dann, Chairman
Committee on Legal Assistance
for Military Personnel
Maryland State Bar Association
305 W. Cheasapeake Ave.
Cheasapeake Building, Suite 517
Towson, Maryland 21204

New Jersey

Sanford Rader, Chairman
State Military Law Committee,
Operation Stand-By
Box 621
Perth Amboy, New Jersey 08862

North Carolina

Mark S. Sullivan, Director
Special Committee on Military Personnel,
c/o Sullivan and Pearson, P.A.
1306 Hillsborough Street
Raleigh, North Carolina 27605

Virginia

Stephen Glassman, Chairman
Special Committee on Military Law
1101 Connecticut Ave., N.W.
Suite 409
Washington, D.C. 20036

The foregoing list was compiled by Ms. Tobiane Schwartz, a member of the LAMP Committee, who has been appointed by LAMP Committee Chairman Clayton B. Burton to work on expanding Operation Stand-by to additional states. She has indicated that feedback from military attorneys who use Operation Stand-by lists would be appreciated. Any comments may be furnished to: Ms. Tobiane Schwartz, 419 6th Street, N.E., Unit 7, Atlanta, GA 30308.

Professional Responsibility Opinion 84-2

The Judge Advocate General's Professional Responsibility Advisory Committee

A conversation between the judge advocate of a separate brigade and a soldier facing elimination proceedings instituted by that brigade led to a complaint that the judge advocate had engaged in unethical conduct. After investigation, the judge advocate was found not to have violated the ABA Model Code of Professional Responsibility. However, the Professional Responsibility Advisory Committee has been asked to comment on three questions arising from this situation.

The first question is whether "an attorney-client relationship [is] formed when a servicemember has a counsel for consultation." The answer is yes. The provisions of Army Regulation 635-200 authorizing a servicemember to consult military counsel with respect to pending elimination proceedings contemplate that a judge advocate will be made available in a professional capacity as a lawyer. When legal advice is sought from, and given by, a professional legal advisor in his or her capacity as such, an attorney-client relationship is formed. This is not affected by the fact that, under the terms in which the lawyer's services are made available, the attorney's role is limited to that of an adviser or consulting counsel as distinguished from an advocate or counsel for representation.

The second question is whether, assuming an attorney-client relationship is established as indicated above, the relationship continues if the elimination action is changed. The nature of the elimination action can change in two ways. First, the servicemember may decide not to waive administrative board proceedings and thus become entitled to counsel for representation at the board. Second, the basis for elimination may be changed to one in which no board proceedings are involved.

As to the first situation, while the committee recognizes that the same counsel normally will provide both consultation and representational services for the client, we see no absolute requirement for this result. However, the reasons for terminating any existing attorney-client relationship must be supported in the record. In this respect, AR 635-200 and AR 15-6 protect a servicemember who wishes to retain the same military counsel because they afford the right to individually requested counsel when that counsel is reasonably available.

In the second situation, where the basis for elimination is changed and the servicemember is no longer entitled to a military lawyer, the committee believes that the attorney-client relationship terminates only after all matters encompassing the original relationship have been resolved, and counsel has properly explained the legal implications of the new proceedings to the client. Counsel should continue in the relationship until sure that the client understands the new situation.

The third and final question is whether "a government counsel, either as command legal advisor or trial counsel [may] discuss court-martial or elimination procedures with a servicemember who is the subject of a disciplinary or adminsitrative action but who has not yet seen counsel."

Generally, an Army lawyer's client is the Department of the Army and its officers or agents acting in their official capacities. Without the consent of the Department of the Army, an Army lawyer may not undertake representation (either as advisor or advocate) of an individual servicemember whose interests are adverse to that of the organization. See Disciplinary Rule 5-105(c). Paragraph 2-4(b), AR 27-1, provides that Army judge advocates may only represent individual clients when specifically "detailed or made available to do so." The Army's consent to represent individual servicemembers is set forth in such regulations as AR 27-3 (legal assistance program), AR 27-10

(defense counsel services), and in AR 15-6 and AR 635-200 (consultation and representation services concerning administrative personnel actions).

Nevertheless, there are situations in which a judge advocate (such as a staff judge advocate, claims judge advocate, or trial counsel) is not permitted to represent individual servicemembers, but is authorized to communicate with a servicemember. Typically these communications concern informing the servicemember of (a) the pendency of a proceeding, (b) a decision rendered in a proceeding, or (c) various rights which may be available to the servicemember in connection with the proceeding.

Unless the judge advocate knows that a servicemember has waived representation by counsel, all other communications concerning the matter should be made only after the servicemember's counsel has been informed of the meeting and given an opportunity to attend. Any other advice given the servicemember should be limited to advice to obtain counsel. See Disciplinary Rule 7-104(A). When representation by counsel has been waived and further dealings with the servicemember are officially required, the judge advocate may conduct them if he makes it clear that he is not acting as the servicemember's legal counsel, fully discloses the nature of his actual interests in the case (especially including any conflicts of interest), and otherwise handles the matter with candor and fairness.

Regulatory Law Item

Regulatory Law Office, USALSA

Reports to Regulatory Law Office

In accordance with AR 27-40, all judge advocates and legal advisors are reminded to continue to report to the Regulatory Law Office (JALS-RL) the existence of any action or proceeding involving communications, transportation, or utility services and environmental matters which affect the Army.

The address for the Regulatory Law Office is Cdr, USALSA, ATTN: JALS-RL, Falls Church, Virginia, 22041-5013. The telephone number is commercial (202) 756-2015 or AUTOVON 289-2015.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 21-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JATT.

June 17-28: JAOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

July 1985

7-12: AAJE, The Many Roles of a Judge—and Consequences, Cambridge, MA.

7-12: AAJE, Scholar's Seminar, Cambridge, MA.

7-12: AAJE, Non-Attorney Judges Academy, Cambridge, MA.

8-12: SBT, Advanced Civil Trial, Fort Worth, TX.

10-12: PLI, Institute on Employment Law, San Francisco, CA.

15-19: SBT, Advanced Civil Trial—Personal Injury, Fort Worth, TX.

18-19: PLI, Use of Trusts in Estate Planning, Seattle, WA.

21-26: AAJE, Conduct of a Trial, Moran, Wy.

22-26: SBT, Advanced Civil Trial—Personal Injury, Houston, TX.

25-27: GICLE, Fiduciary Law, Hilton Head, SC.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 383-6516.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, DC 20006. (202) 775-0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6215.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800)CLE-NEWS; (215) 243-1630.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501) 371-2024.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W., Washington, DC 20007. (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037. (800) 424-9890; (202) 452-4420.

CCEB: California Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309,

Madison, WI 53706. (608) 262-3833.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, DC 20006. (202) 337-7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676-6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217) 787-2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257-2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388-5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507-8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 328-4815 ext. 225; (800) 752-4249 ext. 225; (612) 644-0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, DC 20006. (202) 452-0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505) 842-6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One

Elk Street, Albany, NY 12207. (518) 463-3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212) 598-2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036. (212) 790-1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700 ext. 271.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475-6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214) 690-2377.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, DC 20036, (202) 337-7000.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036, (202) 237-7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372-0140.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Mississippi Begins Mandatory CLE

On 16 January 1985, the Supreme Court of Mississippi authorized the Board of Bar Commissioners to implement rules and regulations for mandatory CLE, to be effective on and after 1 January 1985. All attorneys licensed to practice law in Mississippi, unless exempted, must attend a minimum of twelve hours of approved CLE each calendar year. Under Rule 2, all active duty members of the US Armed Forces are exempt from this requirement. Each service member, however, must claim the exemption each year before 31 December on a form supplied by the CLE Commission. To obtain this form, contact the Commission of CLE, Mississippi State Bar, PO Box 2168, Jackson, Mississippi 39225-2168.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/JAGS-ADC-84-2 (100 pgs).

AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-84-3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-84-4 (180 pgs).
AD B086937	Criminal Law, Evidence/ JAGS-ADC-84-5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/JAGS-ADC-84-6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).
AD B078119	Contract Law, Contract Law Deskbook/JAGS—ADK-83-2 (360 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/JAGS-ADA-85-1 (129 pgs).
AD B077738	All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B087847	Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).
AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
AD B087774	Government Information Practices/JAGS-ADA-84-8 (301 pgs).
AD B087746	Law of Military Installations/ JAGS-ADA-84-9 (268 pgs).
AD B087850	Defensive Federal Litigation/ JAGS-ADA-84-10 (252 pgs).
AD B087845	Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations JAGS-ADA-84-12 (321 pgs).
AD B087745	Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).
AD B086999	Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 135-32	Retention in an Active Status After Qualification for Retired Pay		15 Feb 85
UPDATE 3	Officer Ranks Personnel		30 Jan 85
UPDATE 11	Reserve Components Personnel		1 Feb 85
DA Pam 27-162	Legal Services - Claims		15 Dec 84

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