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Tales from the CAAF:[1] The Continuing Burial of Article 31(b) and the Brooding Omnipresence[2] of the Voluntariness Doctrine

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Introduction

This is getting kind of spooky. The words in the statute are the same. The Constitution upon which the statute is based is the same. But the scope and applicability of Article 31(b)[3] continues to change before our very eyes. It cannot be evolution; evolution deals with gradual progressive development from a simple to a complex form.[4] I don't think it's magic; magic normally involves some sort of illusion or clever recitation of magic words.[5] Finally, it really cannot be described as erosion, as the figurative banks of Article 31(b) and the Fifth Amendment[6] have not receded an inch.

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1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review (CMR) and the United States Court of Military Appeals (CMA). The new names are the United States Army Court of Criminal Appeals (ACCA), the United States Air Force Court of Criminal Appeals (AFCCA), the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA), the United States Coast Guard Court of Criminal Appeals (CGCCA), and the United States Court of Appeals for the Armed Forces (CAAF). For the purposes of this article, the name of the court at the time of the decision is the name that will be used in referring to that decision.

2. In the course of discussing the limited propriety of judicial rulemaking, Justice Holmes stated:

> I recognize without hesitation that judges do, and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court . . . . The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 221-22 (1916) (Holmes, J., dissenting).

3. UCMJ art. 31(b) (1988). Article 31 has remained unchanged since its enactment in 1950. Article 31(b) provides:

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

4. WEBSTER'S NEW WORLD DICTIONARY 472 (3d College ed. 1988).

5. For example, while conjuring a series of apparitions for the benefit of Macbeth, the three witches chanted the following:

> *First Witch.* Round and round the caldron go:
> In the poisoned entrails throw.
> Toad that under cold stone
> Days and nights has thirty-one
> Swelt'red venom sleeping got, Boil thou first i' th' charmed pot.
>
> *All.* Double double toil and trouble;
> Fire burn and caldron bubble.
>
> *Second Witch.* Fillet of fenny snake,
> In the caldron boil and bake;
> Eye of newt and toe of frog,
> Wool of bat and tongue of dog,
> Adder's fork and blindworm's sting,
> Lizard's leg and howlet's wing,
> For a charm of pow'rful trouble,
> Like a hell-broth boil and bubble.

WILLIAM SHAKESPEARE, MACBETH act 4, sc. 2.

6. The self-incrimination clause of the Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

Several distinct jurisprudential concerns have influenced development of interrogation and self-incrimination law. Early common law limitations on the admissibility of confessions and admissions were based on a doctrine of voluntariness.[7] Driven by the premise that coerced confessions are unreliable, the aim of the voluntariness doctrine was to prevent consideration of such evidence by the trier of fact. Beginning in the late 19th century, however, additional concerns regarding fairness, due process and individual liberties coalesced with the doctrine of voluntariness.[8] Then, with the enactment of Article 31 and the decision in *Miranda v. Arizona*,[9] something of a litmus test became available for threshold assessments of voluntariness.

Twenty years ago, one commentator expressed concern that some practitioners incorrectly presumed that the voluntariness doctrine had been subsumed by the development of procedural safeguards of Article 31, *Miranda*, and their progeny. As he predicted,[10] however, subsequent limitation of these procedural safeguards[11] has led to a resurgence of the voluntariness doctrine as an important element in admissibility analysis.

This article will examine several cases decided by the Court of Appeals for the Armed Forces (CAAF) in 1996 that represent the latest curtailment of the procedural safeguard of voluntariness contained in Article 31(b). These cases continue the internment of Article 31 that began in earnest in *United States v. Loukas*,[12] where the CMA shifted the focus of Article 31(b) applicability analysis from the perspective of the suspect to the subjective designs of the interrogator.[13]

Meanwhile, the voluntariness doctrine has clearly survived the birth and near death of procedural safeguards. In fact, it remains well positioned to compensate for the revision of previous understandings about the applicability of Article 31(b) and *Miranda*-based protections. This article will examine several recent cases from military appellate courts that illustrate this phenomena.

The Applicability of Article 31(b) to Judicial Proceedings

One of the more startling cases of 1996 was *United States v. Bell*.[14] On 17 January 1990, Bell and two fellow Marines were questioned by the Naval Investigative Service[15] (NIS) about a robbery.[16] Bell was advised that he was suspected of aggravated assault, robbery, and conspiracy to commit assault and robbery. Bell waived his rights and provided both an exculpatory statement and an alibi for his friends.[17] A witness, however, identified the other two Marines as the perpetrators of the crime. Based on this witness' statement, the other two Marines were charged with the robberies. Bell was not identified by the witness, and he was not initially charged.[18]

On 20 February 1990, Bell appeared as a defense witness at the joint Article 32[19] hearing for the other two Marines.[20] At the beginning of his testimony, the defense counsel for one of the accused asked Bell if he had been previously advised of his Article 31(b) rights.[21] He responded that he had, and no rights warnings were repeated. Bell then testified consistently with his earlier statement to NIS, exculpating himself and providing

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7. Fredric I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 72 (1976) [hereinafter Lederer, *Voluntariness Doctrine*] (discussing the on-going relevance of the voluntariness doctrine in spite of the more recent development of procedural safeguards in the 20th Century).

8. *Id.* at 72-76.

9. 384 U.S. 435 (1966).

10. Lederer, *Voluntariness Doctrine*, *supra* note 7, at 68.

11. *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. J. 59 (1989) [hereinafter Benner, *Requiem for* Miranda].

12. 29 M.J. 385 (C.M.A. 1985).

13. *See infra* notes 60-84 and accompanying text.

14. 44 M.J. 403 (1996).

15. NIS was renamed as the Naval Criminal Investigative Service (NCIS) in December 1992. For the purposes of this article, the name of the organization at the time of the investigation will be used in referring to that investigation.

16. *Bell*, 44 M.J. at 405.

17. *Id.*

18. *Id.*

19. UCMJ art. 32 (1988). Article 32 provides that no charge may be referred to a general court-martial until a thorough and impartial investigation of all the matters set forth in the charge or charges has been made. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 405 (1984) [hereinafter MCM], sets forth the procedures for the so-called Article 32 pre-trial investigative hearing.

20. *Bell*, 44 M.J. at 405.

alibis for the other two Marines. Following this testimony, Bell was charged with perjury at the Article 32 hearing, false swearing in his statement to NIS, and several offenses arising from his alleged participation in the robbery.[22]

At his own trial, Bell moved to suppress evidence of the statements he made at the alleged co-conspirators' Article 32 hearing, claiming that they were obtained in violation of Article 31(b).[23] The military judge denied the motion for three reasons. First, he found "that for all intents and purposes,"[24] Bell had received an Article 31(b) warning by acknowledging that he had previously been advised of those rights by NIS and that he had waived those rights during the NIS interview. Second, the military judge held that Article 32 officers are not required to give Article 31 warnings. Finally, and mysteriously, the military judge found that Article 31(b) warnings were not required at the Article 32 hearing because Bell's appearance as a defense witness was voluntary.[25] The first and third bases of the military judge's ruling were not addressed by the CAAF. Instead, the court mooted issues concerning adequacy of the unspoken warning and the effect of voluntary appearance before interrogators by broadly declaring that "[t]he Article 31 requirement for warnings does not apply at trial."[26]

As a threshold matter, the court explained that like post-referral court-martial proceedings, pretrial investigations conducted in accordance with Article 32 are judicial proceedings.[27] Based on this classification, the court concludes that Article 32 investigations are "not a disciplinary or law enforcement tool within the context of Article 31."[28] With very limited discussion, the CAAF suggests that its ruling concerning the inapplicability of Article 31(b) at judicial proceedings is merely a reaffirmation of an old rule. In fact, the court lists several sources of purported precedent for its decision.[29] Examination of the cited sources, however, reveals a rather weak foundation for a wall limiting applicability of Article 31(b) to interrogations undertaken outside the courtroom.

The court first relies upon Military Rule of Evidence 301(b)(2).[30] Rule 301(b)(2) dictates that failure to advise a witness about the privilege against self-incrimination does not make the testimony of the witness inadmissible. This aspect of Military Rule of Evidence 301, however, has more to do with *standing* to assert a violation of the statute than with the underlying requirement to warn. As with Fourth Amendment and *Miranda* violations, an accused may not suppress evidence based on government violations of someone else's Article 31 rights.[31] Accordingly, although Military Rule of Evidence 301(b)(2) states that military judges should advise apparently uninformed witnesses of their privilege against self-incrimination if they appear likely to incriminate themselves, the rule also provides that the failure to provide the advice does not make the testimony of that *witness* inadmissible.

The effect of this rule changes, however, when the participants in a case assume different roles in a subsequent court-

21. *See supra* note 3.

22. *Bell*, 44 M.J. at 405.

23. *Id.*

24. *Id.* (quoting the record of trial).

25. The circumstances that give rise to Article 31(b) warning requirements are set forth in Article 31(b). *See supra* note 3. If a service member is a suspect or an accused, it is irrelevant that he voluntarily presents himself for interrogation to a person subject to the provisions of Article 31(b). Voluntary appearance, however, may be a factor in a *Miranda* warning determination because *Miranda* warnings are triggered by custodial interrogation. Miranda v. Arizona, 384 U.S. 435, 467-73 (1966). Custody, however, is not an element of Article 31(b) analysis.

26. *Bell*, 44 M.J. at 405 (citing United States v. Howard, 17 C.M.R. 186 (1954)).

27. *Bell*, 44 M.J. at 405-06.

28. *Id.*, *citing* United States v. Collins, 6 M.J. 256, 258-59 (C.M.A. 1979) (Article 32 officer is a "judicial person" subject to American Bar Association standards for trial judges). The court did not explain how the investigating officer's judicial status affects trial and defense counsel responsibilities under Article 31(b).

29. *See infra* notes 30-47 and accompanying text.

30. MCM, *supra* note 19, MIL. R. EVID. 301(b)(2). The rule states:

> *Judicial advice.* If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such request is made out of the hearing of the witness and, except in a court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

Id.

31. United States v. McCoy, 31 M.J. 323, 328 (C.M.A. 1990). The "exclusionary rule does not apply with respect to coerced or unadvised statements from witnesses which incriminate someone else . . . . Instead, evidence of coercive or illegal investigatory tactics employed by the Government to secure such evidence or subsequent testimony based thereon may be presented to the factfinder for purposes of determining the weight to be afforded this evidence." *Id.* (citations omitted).

martial. For example, when a person who was formerly a witness is cast in the role of the accused in a subsequent proceeding, it defies logic to suggest that he does not have *standing* to challenge the admissibility of his own prior statements. At this point, the issue of standing must be decided in favor of the accused. Then, the question of admissibility should be resolved based upon rules governing the type of evidence in question. Military Rule of Evidence 301(b)(2) dictates that Bell's alleged co-conspirators would not have had standing to suppress Bell's unwarned statements at their trial. I submit, however, that this portion of the rule was inapplicable in the trial of Private First Class Bell. Bell was not a mere witness at his own trial. He was the accused. Accordingly, the court should have been guided by rules concerning admissibility of statements by the accused.

Next, the court cites the 1954 case of *United States v. Howard*[32] to support its ruling that "[t]he Article 31 requirement for warnings does not apply at trial."[33] In *Howard*, the court considered the admissibility of statements the accused had made while testifying in an earlier trial as a government witness.[34] Howard appeared as a prosecution witness during the court-martial of a stockade guard charged with negligently permitting a prisoner (Howard)[35] to escape. On cross-examination, however, Howard indicated that he had assaulted and stolen from the guard prior to his flight. As a result of this testimony, the guard was acquitted of the charge against him, and Howard was elevated from his role as a witness to the position of the accused, with additional charges concerning the admitted larceny and assault.[36]

Howard, like Bell, sought to suppress the statements he made as a witness because they were received in response to unwarned questioning. Although a board of review found that the court-martial had erred in admitting the unwarned statements, the CMA disagreed.[37] The court found that the board of review decision improperly "extended the coverage of [Article 31] beyond its terms and applied it in a manner not contemplated by Congress."[38] Unfortunately, the court's explanation for its ruling reflects discomfort in applying the plain language of the rule, rather than discovery of legislative intent to the contrary.

The *Howard* court refers to the nine pages of questions and answers about Article 31, recorded during Congressional hearings preceding enactment of the Uniform Code of Military Justice, as an indication of "the perplexities" entailed in understanding the statute's application.[39] The reference establishes nothing. Assuming we accept nine pages of discussion as evidence of significant deliberation, the fact remains that nearly six pages of that discussion concerned the little-used provisions of Article 31(c), proscribing the asking of degrading questions at courts-martial.[40] More importantly, the few references in the legislative history to Article 31(b) more reasonably reflect the committee's appreciation of the broad scope of its requirements, rather than an intent to terminate its applicability at the entrance to the courtroom.[41]

As discussed during the House of Representatives hearings,[42] the primary limiting feature of Article 31(b) is apparent on its face. That is, only suspects and accused are entitled to self-incrimination warnings before questioning. The suspect/accused determination is based upon whether, at the time of the questioning, the interrogator believed or reasonably should have believed that the person interrogated committed an offense.[43] A person's transitory role as a witness at someone else's trial does not logically affect that determination.

As discussed in *Howard*, the provision of rights warnings to witnesses at trial does present some practical problems. The court discusses, *inter alia*, the chilling effect such action might

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32. 17 C.M.R. 186 (C.M.A. 1954).

33. *Bell*, 44 M.J. at 405.

34. *Howard*, 17 C.M.R. at 188-89.

35. *Id.*

36. *Id.* At the time he testified as a witness, Howard was facing charges of absence without leave and escape from confinement. The *Howard* opinion does not indicate the basis for his confinement status at the time he fled.

37. *Id.*

38. *Id.*

39. *Id.* at 189-90, *citing Hearings Before House Armed Services Committee on H.R. 2498*, 81st Cong. 983-92 (1949) [hereinafter Hearings].

40. *See id.* UCMJ art. 31(c) (1988) provides that, "No person subject to the Code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him."

41. *See* Hearings, *supra* note 39, at 986, 988, 990-92.

42. *Id.* at 988-91.

43. United States v. Leiffer, 13 M.J. 337 (C.M.A. 1982).

have on the truthfinding process, the burden such an obligation would present to the prosecutor charged with proving the government's case, and the often-discussed dilemma of defense counsel in their dual roles as military officers and ethically bound defenders of the accused.[44] These matters, however, do not justify subversion of the statutory entitlement of suspects to be advised of their rights in accordance with Article 31. Additionally, Military Rule of Evidence 301(b)(2) largely resolves the question of practical implementation of Article 31(b) at trial. Although the truth-finding process may certainly be affected by a witness who invokes his or her constitutional privilege against self-incrimination, the rule calls for necessary warnings to be made outside the hearing of court-martial members.[45] Further, the rule calls for the military judge to provide *sua sponte* rights advice in situations of apparent applicability where neither party has made a preliminary request.[46] Accordingly, although it does support *Bell*, *Howard* itself is set upon an illusory foundation.

The *Bell* court also cites several civilian cases which provide that *Miranda* warnings are not required for grand jury witnesses.[47] This provides little help, however, because the requirement for *Miranda* warnings differs greatly from the requirement set forth in Article 31(b). *Miranda*'s criteria of custodial interrogation as a triggering mechanism for its warning requirements logically removes most situations of witness testimony at judicial proceedings from its realm.

Interestingly, the *Bell* court did not cite its own more recent ruling concerning Article 31 applicability in *United States v. Milburn*.[48] In *Milburn*, the court held that during a court-martial in which "incriminating statements are deliberately sought from a *witness suspect* unrepresented by counsel, it is required as a matter of military due process and fundamental fairness that appropriate warnings be given by the questioning defense counsel."[49] Writing for the *Milburn* majority, Judge Fletcher acknowledged and criticized the court's earlier muddled pronouncement on this issue in *Howard*: "It is not my intention at the present time to adopt an excessively narrow interpretation of this codal provision which would emaciate its protection on the basis of conjectural assumptions."[50] The *Milburn* court recognized that, just as in many other military settings, issues may arise in trial scenarios regarding whether an attorney conducting an examination is a person subject to warning requirements of Article 31(b) or whether a witness is a suspect as contemplated by the language of Article 31(b). *Milburn* clearly answers the question of threshold applicability of Article 31(b) at courts-martial in an affirmative fashion. The *Bell* rule now stands in direct conflict with that decision.

Perhaps an unarticulated premise in *Bell* is that judicial proceedings do not contain a coercive dynamic that might reasonably hinder free exercise of the privilege against self-incrimination. One might also argue that rights warnings are unnecessary during judicial proceedings because they contain other adequate procedural safeguards to ensure the reliability of in-court testimony.[51] Both of these theses are subject to dispute. First, the formal trappings of a court-martial, and the sometimes commanding presence of the military judge and counsel, arguably *do* impose the "pressure to respond" that is traditionally associated with superior military rank and position. Additionally, Article 31(b) serves as a procedural safeguard to dispel *inherent coercion* in a designated circumstance where the power of the government places free exercise of the privilege against self-incrimination at risk. Perhaps the CAAF has now determined that statements received during judicial proceedings contain *other* adequate indicia of reliability. As with *Miranda* warnings, however, a showing of reliability alone does not satisfy Article 31(b) requirements. In this regard, CAAF lacks the authority to summarily override the congressional mandate in situations where the statutory elements for triggering the warning requirement exist.

Despite the problems discussed above, the case-specific result in *Bell* is acceptable. Even if we determine that Article 31(b) warnings were required in Bell's case, the failure to provide required warnings is only a procedural violation. Statements rendered generally inadmissible due to procedural violations are still admissible in subsequent prosecutions for perjury or the making of a false statement.[52] Nevertheless, what if during the unwarned testimony, Bell had implicated himself

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44. *Howard*, 17 C.M.R. at 190-92.

45. *See supra* note 30.

46. *Id.*

47. *Bell*, 44 M.J. at 406 (citing United States v. Washington, 4431 U.S. 181, 186 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976); United States v. Gillespie, 974 F.2d 796, 803 (7th Cir. 1992)). The reference to grand jury testimony arises from the fact that Bell's incriminating statements were made during an Article 32 hearing. The court points out that the Article 32 hearing is the military equivalent of a grand jury. *Id., citing* United States v. Nickerson, 27 M.J. 30, 31-32 (C.M.A. 1988).

48. 8 M.J. 110 (1979).

49. *Id.* at 113 (emphasis added).

50. *Id.* at 112 n.2.

51. *See, e.g.*, United States v. Salazar, 44 M.J. 464, 474 (1996) (Crawford, J., dissenting) (suggesting the focus on admissibility determinations should be on the reliability of the evidence and that the court should "hesitate to use [its] supervisory power to suppress what is otherwise reliable evidence").

with regard to the charged robbery or some other offense? Under the broad language of *Bell*, that evidence would also be admissible at a later trial. When that situation arises, I think the concern expressed by the *Milburn* court about fundamental fairness, the integrity of the system, and the duty of the trial counsel and the military judge, if not military defense counsel, will necessitate clarification of the broad statements made by the court in *Bell*.

The Significance of Police Agents' Subjective Intent During Questioning, and the Continuing Need for a Public Safety Exception to Article 31(b)

United States v. Moses[53] provides another example of the CAAF's piecemeal reduction of the applicability of Article 31(b). In *Moses*, the court decided that questions put to a servicemember by military law enforcement agents during an armed standoff do not trigger Article 31(b) requirements because they "were not undertaken pursuant to a law enforcement investigation or disciplinary inquiry."[54]

Moses is a domestic violence case. In mid-1992, Marine Corps Gunnery Sergeant Moses broke into the on-base quarters of his estranged wife and waited for her to come home from playing Bingo. It was Moses' mother-in-law, however, who first returned to the quarters. After an argument, Moses shot her in the hand and stomach.[55] When the police arrived, the victim managed to escape (and survive), and Moses was left in the house in an armed stand-off. There he sat for twenty-four hours, until tear and pepper gas induced his surrender.[56]

This is an Article 31(b) case because, during the standoff, Moses and agents of the Naval Investigative Service (NIS)[57] engaged in telephone discussions in which the agents tried to induce Moses to surrender peacefully.[58] During these conversations, Moses made a number of statements that were later the subject of a suppression motion at his trial. Moses claimed the statements should be suppressed because the agents failed to provide Article 31(b) warnings prior to the questioning. The military judge denied the motion, holding that "the questioning that led to those statements was conducted for 'public safety' reasons and was designed to induce appellant 'to surrender without risking injury to himself or others.'"[59] On appeal, CAAF affirmed the conviction, but not on the basis of a public safety exception.[60] Instead, the court found that Article 31(b) was not applicable to the facts of the case.

One of the court's earliest discussions of Article 31(b) was in the 1952 case of *United States v. Franklin*[61] as follows:

> It would appear, therefore, that where an interrogation is conducted by military personnel, the failure to give [Article 31 warnings] renders the statement inadmissible *per se*. The fact that a preliminary warning is required in military proceedings and not in civilian is not as anomalous as it might

52. MCM, *supra* note 19, MIL. R. EVID. 304(b)(1) provides:

> Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f) . . . this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

This fact was noted in *Bell* following the court's ruling that Article 31(b) was inapplicable in the first instance. *Bell*, 44 M.J. at 406.

53. 45 M.J. 135 (1996).

54. *Id.* at 136.

55. *Id.* at 133.

56. *Id.*

57. *See supra* note 15. Two NIS Special Agents spoke with Moses during the course of the siege. At the behest of the NIS, a friend of Moses also talked with him over the telephone. The friend asked Moses whether he had been drinking or was tired, what weapons he had with him, and whether he was holding any hostages. *Moses*, 45 M.J. at 133. The *Moses* court drew no distinction between the questioning by the NIS agents and of the friend. The friend was a service member of the same military rank as the accused. Although he was not a certified law enforcement agent, he would presumably have been viewed as an agent of the police authorities had the analysis proceeded beyond the question of threshold Article 31 applicability.

58. *Moses*, 45 M.J. at 133.

59. *Id.* at 134.

60. The Supreme Court has recognized a public safety exception to *Miranda* warning requirements in cases where overriding safety considerations justify police failure to provide Miranda warning requirements prior to questioning. New York v. Quarles, 467 U.S. 649 (1984). The CMA came perilously close to recognizing a similar exception to Article 31(b) warning requirements in *United States v. Shepard*, 38 M.J. 408 (C.M.A. 1993). Although *Shepard* was decided on other grounds, the court stated that warnings "might not" be required in certain circumstances due to "some possible exception to article 31, *e.g.* the 'public safety' exception." *Id.* at 411, *citing* United States v. Jones, 26 M.J. 353, 357 (C.M.A. 1988).

61. 8 C.M.R. 513 (C.M.A. 1952).

> appear at first blush. It is recognized that, where the proceedings are military, the accused, who has been subjected to military discipline with all its concepts of obedience to superior authority, will be more inclined to speak out when interrogated than a civilian without such training and background. It is this influence of implied command or *presumptive coercion* which Congress has attempted to eliminate in its enactment of Article 31(b).[62]

Accordingly, the court's original interpretation of Article 31(b) focused on the effect of military society on a suspect's or an accused's free exercise of the privilege against self-incrimination without regard to case-specific actions of the interrogator. The court determined that the coercive dynamic that Congress sought to address was *inherent* in the questioning of subordinates by military superiors.[63]

Two years later, however, the CMA decided that the true meaning of Article 31(b) could not be determined by a plain reading of the statute. In *United States v. Gibson*,[64] the Court of Military Appeals observed:

> Taken literally, this article is applicable to interrogation by all persons included within the term "persons subject to the code" as defined by Article 2 of the Code . . . . However, this phrase was used in a limited sense. In our opinion, in addition to the limitation referred to in the legislative history of the requirement, there is a definitely restrictive element of officiality in the choice of the language "interrogate, or request any statement," wholly absent from the relatively loose phrase "person subject to this code," for military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of a crime . . . . This is not the sole limitation upon the Article's applicability, however. Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.[65]

Thus, the court set out on a course of defining and redefining the scope of Article 31(b) as a matter of judicial discretion. While its decisions in this regard are purportedly guided by the drafters' intent, the scant legislative history of Article 31 provides little support for the increasingly restrictive reading of its provisions.[66]

In *United States v. Duga*,[67] the CMA reaffirmed the principles of *Gibson*, finding that Article 31(b) applies "only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry."[68] This type of pressure was identified as the factor that might impair service members' free exercise of the constitutional guarantee against self-incrimination. The *Duga* court found that only situations where interrogators are acting in an official capacity give rise to the subtle coercive pressure contemplated by the drafters of the Code.[69]

In *United States v. Loukas*,[70] the court again narrowed the field. The *Loukas* court focused on the statutory language, "No person subject to this chapter *may interrogate, or request any statement from an accused or person suspected of an offense*."[71] as an indication that the drafters did not intend Article 31(b) requirements to apply to conversations conducted for other than

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62. *Id.* at 517 (emphasis added).

63. Concern about inherent coercion based upon the peculiar nature of the military environment is remarkably similar to the view of inherent coercion articulated by the United States Supreme Court fifteen years later in *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* Court provided an extended analysis of police interrogation techniques and concluded that the very atmosphere of custodial interrogation creates and inherent barrier to free exercise of the privilege against self-incrimination. *Id.* at 445-58.

64. 14 C.M.R. 164 (C.M.A. 1954).

65. *Id.* at 170 (citations omitted).

66. *See supra* notes 39-43 and accompanying text. For an in-depth examination of the development of the Article 31(b) officiality doctrine, see Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1, 27-71 (1995) [hereinafter McGillin, *Officiality Doctrine*].

67. 10 M.J. 206 (C.M.A. 1981).

68. *Id.* at 210.

69. *Id.*

70. 29 M.J. 385 (C.M.A. 1990).

71. *Id.* at 387. The "law enforcement or disciplinary authority" aspect of the Article 31 warning trigger was previously discussed in *United States v. Fisher*, 44 C.M.R. 227, 279 (C.M.A. 1972). Interestingly, this language was omitted from the test set forth in *Duga*.

law enforcement or disciplinary purposes. The unstated implication of this rationale is that a service member's free exercise of the privilege against self-incrimination is affected differently--that is more--by questions from a person acting in a law enforcement role or disciplinary capacity than by questions from the same person acting in an operational or private role.

Over the years, *Loukas*-style analyses have subsequently been applied to interrogations conducted by officials serving as medical personnel,[72] disbursing personnel[73] and social workers.[74] If we first apply a *Duga* official capacity analysis, these cases provide examples of apparent threshold Article 31(b) applicability. In each case, however, the interrogator's non-law-enforcement or disciplinary *function* caused the court to conclude that the circumstances surrounding the interrogations did not give rise to the coercive pressure that triggers Article 31(b) warning requirements.

Returning to *Moses*, there is no question but that the accused was suspected of violating a variety of UCMJ provisions at the time of the standoff.[75] Application of a *Duga/Loukas* analysis should lead us to an examination of the function or role of the government agents for the purposes of Article 31(b) and the heretofore separate inquiry whether the negotiation process amounted to interrogation or a request for a statement.[76] In *Moses*, however, the CAAF employs an unfortunate hybrid analysis of these two questions. The result is a reduction of the protective scope of Article 31(b).

The court begins its analysis by comparing police efforts in *Moses* to those of the famous crew chief in *Loukas*,[77] where the court distinguished operational functions from the law enforcement/disciplinary function, and to the physician in *United States v. Fisher*,[78] where questions asked in furtherance of developing a medical diagnosis were found to be outside the scope of Article 31(b) questioning.[79] From an objective standpoint, however, it is difficult to apply the rationale of these earlier cases to a police siege scenario, where the police are clearly performing a law enforcement function. In reality, the government actors in *Moses* are very unlike those in *Loukas* and *Fisher.* The *Loukas* and *Fisher* interrogators were serving in an official capacity that coincidentally uncovered evidence of misconduct. The police in *Moses* were engaged in a law enforcement role, *period*.

Accordingly, the facts of the case preclude resolution of *Moses* based on a straight-forward *Loukas* analysis. The court's ultimate holding in *Moses* was that the *negotiation process* was "not undertaken pursuant to a law enforcement or disciplinary inquiry."[80] Putting the issue of the status of the interrogator aside, this may be a ruling that the negotiation process did not amount to interrogation or a request for a statement for the purposes of Article 31(b). For along with citations to cases that discuss who is a "person subject to this chapter" for the purposes of Article 31(b) applicability, the court also relies on cases that examine the boundaries of the interrogation process.[81]

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72. United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (Army physician not required to provide warnings despite subjective belief of child abuse by the subject); United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1972) (Army physician not required to provide warnings in emergency room where accused was in state of respiratory depression). The rule placing questions in furtherance of medical diagnosis or treatment was arguably extended in *United States v. Dudley*, 42 M.J. 528 (N.M.Ct.Crim.App. 1995) (questions by medical personnel asked for purpose of developing medical diagnosis or treatment are beyond the scope of Article 31(b), even when subject is delivered to the medical personnel by law enforcement agents).

73. United States v. Guron, 37 M.J. 942 (A.F.C.M.R. 1993) (interviews by accounting and finance personnel premised upon discovery of irregularities in pay records, but not primarily for the purposes of disciplinary action or criminal prosecution, does not give rise to Article 31(b) requirements).

74. United States v. Raymond, 38 M.J. 136 (C.M.A. 1993) (social worker employed by Department of the Army (DA) and subject to DA child sexual abuse reporting requirements not subject to Article 31(b) requirements).

75. "The test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the government interrogator, believed or reasonably should have believed that the one interrogated committed an offense." United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982).

76. The CAAF construction of the term "interrogate" for the purpose of Article 31(b) corresponds with the Supreme Court's interpretation of "interrogation" in applying *Miranda* warning requirements. United States v. Byers, 26 M.J. 132, 134 (C.M.A. 1988). In *Rhode Island v. Innis*, 446 U.S. 291 (1979), the Supreme Court held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300-01. The Court described the functional equivalent of questioning as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). Accordingly, any inquiry concerning the "interrogation" portion of the Article 31(b) trigger should focus on the actions of the putative interrogator and not on that person's role or motivation.

77. 29 M.J. 385 (C.M.A. 1990). Loukas was an Air Force crewman engaged in drug suppression operations in South America. During a flight, Loukas began acting irrationally in the cargo section of his aircraft. He appeared to be experiencing a hallucination and described seeing intruders on the flight deck. The plane's crew chief ultimately approached Loukas and asked him if he had taken any drugs. No warnings were provided to Loukas prior to the questioning. Loukas replied that he had taken some cocaine the night before. *Id.* at 386.

78. 44 C.M.R. 277 (C.M.A. 1972). Fisher was brought to the emergency room of an Army hospital in a state of stupor with respiratory depression. Unwarned questions by the treating physician yielded evidence used against Fisher at his court-martial. *Id.* at 278.

79. *Id.* at 279.

80. *Moses*, 45 M.J. at 136.

Finding that negotiations during standoffs do not amount to interrogation does little harm to the established protective scope of Article 31(b). Factually similar scenarios will be relatively rare and would probably be encompassed in a public safety exception,[82] even if the statute's requirements were applicable in the first instance.

The court's prominent reliance on *Loukas* and *Fisher*, however, reveals a developing emphasis on the subjective design of interrogators in determining whether the interrogator was a person subject to Article 31(b) requirements.[83] This sort of progression will ultimately frustrate the function of Article 31(b).

Predicating threshold applicability of Article 31(b) warnings requirements upon the subjective intent of interrogators performing in an apparent law enforcement or disciplinary function ignores the fundamental purpose of the statute. Like *Miranda* warnings, Article 31(b) warnings are designed to advise or remind service members about the constitutional privilege against self-incrimination under circumstances where the superior rank or position of government agents give rise to inherent compulsion to respond to questioning.[84] Subjectively benign or collateral concerns of law enforcement agents do not reduce the inherently coercive aspect of their superiority in rank or position during the interrogation process. The law enforcement agent remains a law enforcement agent and the superior officer remains a superior officer in the objective view of a subject, regardless of the interrogator's subjective designs.[85] It is this objective view of the interrogator's position that gives rise to the inherent coercion that impedes free exercise of the privilege against self-incrimination.

He's Not a Real Policeman, He Just Plays One on the "QT"

United States v. Price[86] is another case addressing the question: Who is a "person subject to the chapter" for the purposes of Article 31(b)? In resolving the question, the CAAF continues to blur established lines of analysis governing the applicability of Article 31(b) warning requirements.

Staff Sergeant (SSgt) Price's road to jurisprudential history began when one of his co-workers (SSgt Moore) reported that he had heard Price was using drugs. The co-worker passed the information to the pair's common supervisor and made a separate report to the Air Force Office of Special Investigations (OSI).[87] In response to this report, an OSI special agent took Moore to lunch to discuss Moore's concerns about Price's drug use. The OSI agent told Moore that OSI did not have an active investigation on Price, but that Moore could continue to provide information on a voluntary basis. Curiously, in an apparent effort to affirmatively deformalize the relationship, the

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81. In its examination of the interrogation issue, the court discusses *United States v. Vail*, 28 C.M.R. 358 (C.M.A. 1960), and a series of cases from civilian jurisdictions considering application of *Miranda* warning requirements. In *Vail*, the court ruled that questions about the location of stolen weapons asked at gun point, in the course of apprehension, did not give rise to Article 31(b) protections. *Id.* at 359-60. Importantly, the *Vail* court focused on the timing and practical necessity of the questioning during ongoing police operations, rather than on some metaphysically changing role of the police agents.

Similarly, the cited *Miranda* cases all deal with the issue of whether certain police actions amounted to interrogation for the purposes of triggering *Miranda* warning requirements. *Moses*, 45 M.J. at 134, *citing* United States v. Mesa, 638 F.2d 582, 589-90 (3d Cir. 1980) (Adams, J., concurring) (conversations between agent and barricaded suspect did not constitute "interrogation"); State v. Reimann, 870 P.2d 1346, 1350 (Kan. App.) (questioning not "functional equivalent" of interrogation when police in siege situation were trying to persuade defendant not to shoot himself); State v. Sterns, 506 N.W.2d 165, 167-68 (Wis. Ct. App. 1993) (negotiations not "interrogation" of suspect, because police purpose was "to secure his nonviolent surrender, not to induce him . . . to incriminate himself").

82. *See supra* note 60.

83. United States v. Pownall, 42 M.J. 682 (Army Ct. Crim. App. 1995), *review denied*, 43 M.J. 229 (C.M.A. 1995), is illustrative of this trend. Pownall was questioned by his unit first sergeant after his earlier explanation for a period of unauthorized absence did not check out. Pownall's responses to the unwarned questions gave rise to charges that resulted in his court-martial. The *Pownall* court found the first sergeant was not conducting a law enforcement or disciplinary inquiry because his questions were "motivated by a desire to solve the soldier's problem, not to charge him with making a false official statement." *Id.* at 687.

84. The "custodial interrogation" trigger for *Miranda* warnings is reflective of the coercive dynamic the Supreme Court sought to dispel in order to ensure free exercise of the privilege against self-incrimination. *Miranda*, 384 U.S. 467-79. Likewise, the trigger for Article 31(b) is designed to require warnings when inherent coercion to respond exists in the military setting. As formerly stated by the Court of Military Appeals, Article 31(b) applies "to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry," United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981) (citing United States v. Gibbon, 14 C.M.R. 164 (C.M.A. 1954)).

85. In *Stansbury v. California*, 114 S. Ct. 1526 (1994), the Supreme Court reaffirmed the validity of an objective analysis of circumstances giving rise to inherently coercive interrogations. "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the persons being questioned . . . . [O]ne cannot expect the person under interrogation to probe the officer's innermost thoughts." *Id.* at 1529-30 (citations omitted).

In his study of interrogation law in the military jurisdiction, Major McGillin compared the confusing nature of Article 31(b) analysis with the relatively simple objective test developed by the Supreme Court for *Miranda* issues. Major McGillin suggests that if Article 31(b) is to provide the protections envisioned by its drafters, a "Mirandaesque" approach must be adopted to govern its application. *See generally* McGillin, *Officiality Doctrine*, *supra* note 66.

86. 44 M.J. 430 (1996).

87. *Id.* at 431.

agent and Moore both signed a "Declaration of Agreement that SSgt Moore was not an OSI agent, and that SSgt Moore was advised 'that if he committed a criminal act, the OSI would investigate' him, and that he must act 'as the OSI told him to do.'"[88] Then, the agent asked Moore to get some information about Price by observation and discussion with another one of Price's co-workers.

The relationship between Moore and the OSI continued when the OSI agent took Moore to lunch on a number of other occasions. During these subsequent meetings, Moore received some sort of drug training[89] and expressed a desire to become an OSI agent.[90]

Subsequent to this activity, a urine sample Price submitted during a random screening tested positive for methamphetamine. In response to the positive drug test, the OSI sought to interrogate Price. After initially waiving his rights under Article 31, however, Price terminated the interview by requesting assistance of counsel.[91] Later still, Moore had three conversations with Price wherein Price made admissions that were used against him at trial. Those statements were the subject of a defense motion to suppress based on Moore's failure to advise Price of his rights under Article 31(b).[92]

The military judge denied Price's motion, finding that a reasonable man in Price's position would not have perceived that Moore was acting in an official law enforcement or disciplinary capacity.[93] The CAAF agreed with this analysis, and it is certainly correct.[94] The military judge *also* found, however, that, although Moore was a person subject to the UCMJ who suspected Price of a crime, he was not acting in an official law enforcement or disciplinary capacity when he initiated contact with Price and received the incriminating statements. The CAAF affirmed the case on this basis as well.[95] Herein lies the damage to previous standards of Article 31(b) applicability.

In *United States v. Gibson*[96] and *United States v. Duga*,[97] the Court of Military Appeals set forth a two-part analysis for determining whether an individual questioning a suspect or an accused was a "person subject to this chapter" for the purposes of Article 31(b): "Accordingly, in each case it is necessary to determine whether (1) a questioner was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[98] Importantly, the court indicates that this is a *two-part test*, not a totality of the circumstances analysis based on two factors.[99]

The distinct functions of each of the two prongs of analysis are also discussed in *Duga*. The first prong examines the *status of the interrogator* at the time of the interview.[100] This is a limiting feature on Article 31(b) applicability, because the court determined that congressional concern about subtle pressure for suspects or accused to respond to questioning was limited to circumstances where the interrogator is acting in an official capacity. If an interrogator is acting on behalf of the armed services, he presumptively carries the weight and authority of rank, or official power, which *may* override a person's free exercise of the privilege against self-incrimination. On the other hand, if service members are asking questions based upon personal motivation,[101] the court views them as questioners who are not reasonably the focus of congressional concern.

The second prong of the *Duga* analysis shifts the focus of analysis from the actual status of the interrogator to the *percep-*

88. *Id.*

89. Although the reported opinion does not explain the nature of this training, we may reasonably assume it had something to do with investigations of *wrongful* drug use, and/or law enforcement actions in response to drug activity. After all, Moore and Price worked in the pharmacy section of an Air Force Medical Group. *Id.*

90. *Id.*

91. *Id.* The court briefly addressed issues raised by the anomalous request for counsel in response to Article 31(b) warnings (Article 31 does not contain a counsel provision). *Id.* at 433. This matter is beyond the scope of this article.

92. *Id.* at 431-32.

93. *Id.* at 432.

94. *See infra* note 102 and accompanying text.

95. *Price*, 44 M.J. at 432.

96. 14 C.M.R. 64 (C.M.A. 1954).

97. 10 M.J. 206 (C.M.A. 1981).

98. *Id.* at 210, *citing Gibson*, 14 C.M.R. at 170.

99. United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981). The court held that "[u]nless both prerequisites are met Article 31(b) does not apply." *Id.* (footnote omitted).

100. This prong of the analysis was later modified in *Loukas*. *See supra* notes 70-73 and accompanying text.

tion of the interrogator by the suspect or accused. As stated in *Duga*, even if the officiality prerequisite is met in a particular case, if the suspect or accused does not perceive that the interrogator is acting in an official capacity, there is no risk of coercive pressure emanating from the interrogator's actual status.[102] The second prong, therefore, should only come into question when the status of the interrogator is determined to be within the realm of Article 31(b) applicability. Once the interrogator's status is determined to be official in nature, however, the second prong may operate to remove the official questioning from the scope of Article 31(b) applicability.

The outcome in *Price* is in accord with existing Article 31(b) standards. Regardless of Moore's status at the time he spoke to Price and received the incriminating statements, there is no indication that Price perceived Moore as being anything but a co-worker at his place of duty.[103] The problem with *Price* is that the court uses the obvious answer to the second part of the *Duga* test to buttress the military judge's arguably erroneous finding that Moore was not acting in an official capacity when he received the incriminating statements.

SSgt Moore was a service member who reported a suspected violation of the UCMJ within his unit, discussed the development of an investigation with the Air Force OSI, and received some training (and several lunches) from OSI. He then proceeded to make contact with the accused for the purpose of gathering information with the intention of reporting back to his point of contact at OSI. It defies reality to characterize the actions of SSgt Moore as anything other than official action pursuant to a law enforcement or disciplinary purpose.[104]

The second prong of the *Duga* test is tailor made for application in undercover investigations. It is obviously unreasonable to require exposure of covert law enforcement agents through the reading of rights warnings. As explained in *Duga*, it is also unnecessary to fulfill the statutory purpose of Article 31(b). An analysis of the perception of the suspect or the accused, however, should not become a factor in determining the *actual status* of an interrogator in the first instance. As in a two-step dance, each part of the *Duga* analysis plays an important part. This is no time for the court to start shuffling its feet.

Interrogations After Invocations

The break-in-custody rule has been clarified! In *United States v. Vaughters*,[105] the CAAF tied up a long-standing loose end concerning interrogations after invocations of a suspect's Fifth Amendment right to counsel. In *Edwards v. Arizona*,[106] the United States Supreme Court reinforced the counsel right created in *Miranda v. Arizona*[107] with a veritable bright line rule governing initiation of interrogations after *Miranda* counsel invocations. Once an in-custody suspect asserts the right to counsel under the Fifth Amendment, "the subject is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[108]

In 1990, the CMA addressed how the *Edwards* rule was affected by a break-in-custody. In *United States v. Schake*,[109] the court found that the *Edwards* barrier arising from the accused's request for counsel at an earlier interrogation period was dissolved during a six day break in custody before a second custodial interrogation initiated by the police.[110] The break-in-custody addendum to the *Edwards* rule was subsequently called into question in some quarters following the United States Supreme Court's decision in *Minnick v. Mississippi*.[111] Without considering issues concerning prospective breaks in custody, *Minnick* held that in order for the counsel availability aspect of *Edwards* to be satisfied, the counsel must be present during any subsequent re-initiation of interrogation by the government.[112]

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101. *See, e.g.*, United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (questions by accused's immediate supervisor who was also acting as escort of accused when accused left post in pretrial status were not within scope of Article 31(b), because supervisor was motivated out of curiosity).

102. *Id.* at 211; *see also* United States v. Harvey, 37 M.J. 140 (C.M.A. 1993) (conversations with accused tape recorded by cooperating co-conspirator acting as agent of Air Force OSI); United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd on other grounds*, 34 M.J. 112 (C.M.A. 1992) (accused not aware that her former lover was acting as agent for OSI in telephoning accused and eliciting incriminating statements).

103. In fact, Price was Moore's technical supervisor. *Price*, 44 M.J. at 431.

104. The military judge went so far as to characterize Moore's targeted conversations with Price as 'casual' exchanges between co-workers." *Id.*

105. 44 M.J. 377 (1996).

106. 451 U.S. 477 (1981).

107. 384 U.S. 436 (1966).

108. *Edwards*, 451 U.S. at 484-85.

109. 30 M.J. 314 (C.M.A. 1990).

110. *Id.* at 319.

111. 498 U.S. 146 (1990).

Strict application of the *Minnick* rule, however, would have been problematic. *Edwards* protection is not limited to a prohibition against improper re-interrogation about the matter under investigation at the time of the suspect's request for counsel. So long as the barrier is in place, the suspect may not be interrogated about any offense.[113] Additionally, the *Edwards* prohibition against government initiated re-interrogation is not limited in applicability to the law enforcement agent who received the request for counsel. Instead, knowledge of the counsel request is imputed to all government agents. Accordingly, the barrier applies to all law enforcement agents regardless of the fact that they may not have actual knowledge of the original request for counsel.[114] Taking these factors together, a strict reading of *Minnick* would dictate that, following an invocation of a *Miranda* right to counsel, a suspect could never be approached by the police for any type of questioning outside the presence of counsel.

Fortunately, the Supreme Court moved relatively quickly to limit the potentially dramatic effect of *Minnick* in *McNeil v. Wisconsin*.[115] There, in dictum, the court indicated that *Minnick's* "availability means presence" rule only applies to cases involving continuous custody between the invocation of the right to counsel and the subsequent interrogation attempt by the government.[116]

Unfortunately, however, because the clarification in *McNeil* was only *dicta*, doubt lingered in some quarters whether the break-in-custody rule was still good law. The most notable source of confusion was the case of *United States v. Grooters*.[117] Specialist Grooters' conviction for attempted murder was affirmed by the Army Court of Military Review in 1992 despite the court's ruling that the military judge had erred by admitting a statement made by Grooters during an interrogation initiated by the government after Grooters' invocation of the *Miranda* right to counsel.[118] Although the record established a twenty-two day break between Grooters' request for counsel and the re-initiation of interrogation by the government, the Army court addressed neither the break-in-custody nor the effect of *Schake* and *McNeil* on the prohibitive rules set forth in *Edwards* and *Minnick*.

The break-in-custody issue was also left unaddressed by the majority of the CMA.[119] A concurring opinion by Judge Crawford questioned the majority decision to forgo correction of what she viewed as a "clearly erroneous ruling by the Court of Military Review . . . ."[120]

Falling, perhaps, in the category of "better late than never," the CAAF's 1996 decision in *Vaughters* puts the matter to rest.[121] In *Vaughters*, the court directly addressed the appellant's claim that the break-in-custody rule established in *Schake* has been superseded by the Supreme Court decision in *Minnick*.[122] Reaffirming its previous ruling in *Schake*, the court reviewed the Supreme Court cases in this area and concluded that "*Edwards* and its progeny did not intend to preclude further interrogation by police where a suspect has been provided what *Schake* describes as a 'real opportunity to seek legal advice.'"[123]

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112. *Id.* at 151-56. The Court ruled that the protection of the *Edwards* rule does not terminate once counsel has consulted with the suspect. "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from coercive pressure that accompanies custody and that may increase as custody is prolonged." *Id.* at 153.

113. Arizona v. Robeson, 486 U.S. 675 (1988).

114. *Id.* at 687-88.

115. 501 U.S. 171 (1991).

116. *Id.* at 177.

117. 35 M.J. 659 (A.C.M.R. 1992), *rev'd*, 39 M.J. 269 (C.M.A. 1994).

118. *Grooters*, 35 M.J. at 662-63. The court found the statement was cumulative with other evidence presented at trial and was satisfied that its admission was harmless beyond a reasonable doubt.

119. The court ruled that "[s]ince the correctness of the ruling by [the Army court] as to the admissibility of the statements has not been challenged either by petition of the appellant or certification by the Judge Advocate General, we will treat it as the law of this case." *Id.* at 269-70, *citing* United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986) (unchallenged ruling by Court of Military Review constitutes the law of the case and binds the parties).

120. *Id.* at 273-74 (Crawford, J., concurring).

121. The Army court previously sought to dispel confusion left in the wake of *Grooters.* In *United States v. Faisca*, 43 M.J. 876 (Army Ct. Crim. App. 1996), the court held that in the absence of continuous custody, it will look at a totality of circumstances to determine whether an accused's ultimate waiver of his right to counsel was voluntary and knowing. With regard to *Grooters*, the court stated: "To the extent that the holdings in *Grooters* and *Schake* are inconsistent, we will not follow *Grooters*." *Id*. at 878.

122. Vaughters requested counsel during an initial interview with Air Force Security Police on 10 February 1993. He was released from custody that same day. Air Force OSI agents contacted Vaughters for a second interview on 1 March 1993. *Vaughters*, 44 M.J. at 377-78.

123. *Id.* at 370 (citations omitted).

Accordingly, rules regarding the limits of the *Edwards* barrier are now consistent within military and federal jurisdictions. Where counsel has been requested in response to a *Miranda* warning, following a break in custody, the *Edwards* barrier will be dissolved once the accused has either shown a desire to reinitiate conversation with the police about the investigation[124] or had a real opportunity to seek legal advice.[125]

Totality of Circumstances Review Remains the Key for Voluntariness Beyond Procedural Safeguards

Even if an interrogation is preceded by proper rights warnings and a proper waiver, and even when police agents have provided temporary respites from the interrogation process and reasonable opportunities to seek counsel when necessary in accordance with *Michigan v. Mosely*[126] and *Edwards v. Arizona,*[127] a statement by the accused is still subject to suppression at trial if it was not voluntarily made.[128]

The voluntariness doctrine predates use of procedural safeguards against involuntary confessions and admissions by approximately 224 years.[129] The doctrine's operation under several different names during its long tenure belies the fact that it has been a constant element of American confessions law.[130] Despite reliance of many practitioners on *Miranda* and Article 31 as the *alpha* and *omega* of admissibility, the voluntariness doctrine remains a vital element self-incrimination analysis.

The United States Supreme Court has noted that there is "no talismanic definition of 'voluntariness.'"[131] That being said, the Court frames its voluntariness analysis as follows: "Is the confession the product of an essentially free and unconstrained choice by its maker?"[132] This seemingly simple question, how-

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124. *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039 (1983).

125. *Vaughters*, 44 M.J. at 379. Whether or not the accused takes advantage of the opportunity to consult with counsel is essentially besides the point in an *Edwards* analysis. The test is whether or not he or she had an opportunity to exercise the entitlement to do so.

126. 423 U.S. 96 (1975) (*Miranda* does not create a *per se* prohibition against further interrogations once accused indicates a desire to remain silent, but police must scrupulously honor suspect's invocation of the right to silence).

127. 451 U.S. 477 (1981); *see supra* notes 106-07 and accompanying text.

128. Arizona v. Fulminante, 499 U.S. 279 (1991).

129. In his discussion of the voluntariness doctrine, Professor Lederer noted:

> Lord Chief Baron Geoffrey Gilbert, in his *Law of Evidence*, written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, 'this confession must be voluntary and without Compulsion; for our Law . . . will not force any man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation; and therefore Pain and Force may compel Men to confess what is not the truth of Facts, and consequently such extorted Confessions are not to be depended on.

Lederer, *Voluntariness Doctrine*, *supra* note 7 at 72 (citing L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 327 (1968)).

130. *See generally* Lederer, *Voluntariness Doctrine*, *supra* note 7. Voluntariness challenges may be based upon common law principles, due process concerns, or violations of either Article 31(d), or Military Rule of Evidence 304. Whatever the basis for the challenge, the analysis is largely the same. *See* United States v. Bubonics, 40 M.J. 734 (N.M.C.M.R. 1994).

Common law voluntariness doctrine took on constitutional dimensions in *Brown v. Mississippi*, 297 U.S. 278 (1936) (criminal conviction based on confession obtained by brutality and violence is invalid under the Due Process Clause of the Fourteenth Amendment).

UCMJ art. 31(d) (1988) provides that "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."

MIL. R. EVID. 304(c)(3) provides that "a statement is 'involuntary' if it is obtained in violation of the self-incrimination privilege *or* due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, *or* through the use of coercion, unlawful influence, or unlawful inducement." (emphasis added).

Some measure of government involvement is needed to support a voluntariness challenge based upon due process, or unlawful influence or inducement under Article 31. Colorado v. Connelly, 479 U.S. 157, 170 (1980) ("[t]he sole concern of the fifth amendment, on which *Miranda* was based, is governmental coercion."). Since the Constitution establishes fundamental principles concerning the relationship between the government and the citizenry, governmental action may reasonably be considered a vital element in a constitutional analysis. It does not necessarily follow, however, that such a requirement must exist in the scope of a common law voluntariness analysis. *Connelly* discusses only constitutional voluntariness. Matters beyond constitutional concerns were deemed within the province of state rules of evidence. *Id.* at 159. In drawing this distinction, the Court explained that although constitutional voluntariness is concerned with the presence of police coercion, it "has nothing to do with reliability of jury verdicts." *Id* at 168. For a more complete discussion of *Connelly*, and its effect on the voluntariness doctrine, see Benner, *Requiem for* Miranda, *supra* note 11.

Accordingly, a private party may presumably still be shown to have coerced an involuntary statement. *See* MCM, *supra* note 19, MIL. R. EVID. 304(c)(2) analysis, app. 22, at A22-10; *see, e.g.*, United States v. Trojanowski, 17 C.M.R. 305 (1954) (accused's confession inadmissible where larceny victim slapped accused following initial denials of guilt).

ever, becomes complex upon application. As with many issues of constitutional inquiry, voluntariness analysis involves balancing individual liberties against legitimate interests of the state.[133] To achieve the balancing of interests in a particular case, the Court has directed assessment of the totality of the circumstances.[134]

In *United States v. Bubonics*,[135] the CAAF reaffirmed that determinations concerning the voluntariness of a confession are based upon an assessment of the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation.[136] Applying this standard, CAAF ruled that a government interrogator's threat to turn Bubonics over to civilian authorities unless he confessed, combined with use of "Mutt and Jeff" interrogation ploys and the relatively inexperienced nature of the accused, rendered Bubonics' resulting incriminating statements inadmissible.[137] The import of *Bubonics* lies, not in a change wrought upon the voluntariness doctrine, but rather in its resistance to notions of *per se* categories of coercive government action.

The issue of a *per se* category of coercive government action came to the CAAF via the Navy-Marine Corps Court of Military Review (NMCMR). Bubonics was apprehended at 0130 on 17 October 1991 by base security personnel at Naval Air Station Oceana, Virginia, in connection with an alleged theft from a fellow sailor.[138] He was handcuffed and transported to the base security office where he was placed in a small windowless interrogation room. After being left alone in the room for fifteen to twenty minutes, Bubonics was interrogated by two petty officers working as base security investigators.

Prior to the interrogation, Bubonics was read and waived his rights under *Miranda* and Article 31(b). During the initial phase of the interrogation, Bubonics denied culpability in the crime. He appeared very nervous, however, and the interrogators suspected that he was lying. Accordingly, the interrogators took a break and, after conferring with their supervisor, decided to employ the "Mutt and Jeff" (or good guy/bad guy) routine during the next phase of the interrogation.[139]

When the interrogation resumed, one of the petty officers assumed the role of the "bad guy" and angrily accused Bubonics of lying and wasting the investigators' time. In the course of this play acting, "bad guy" also stated that because Bubonics was wasting his time, he "could sign a warrant to have him arrested by the Virginia Beach police."[140] The "bad guy" then left the room. The remaining investigator then continued the stratagem by seeking to calm Bubonics' rattled nerves. He sought to gain Bubonics' trust by stressing that the "bad guy"

131. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1972).

132. Culombe v. Connecticut, 367 U.S. 568, 602 (1960).

133. *Schneckloth*, 412 U.S. at 224-25. The Court's application of the voluntariness doctrine reflects,

> an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws . . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Id.

134. *Id.* at 226.

135. 45 M.J. 93 (1996), *aff'g* 40 M.J. 734 (N.M.C.M.R. 1994).

136. *Id.* at 95.

137. *Id.* at 96.

138. United States v. Bubonics, 40 M.J. 734, 736 (N.M.C.M.R. 1994).

139. *Id.* at 737. At trial, one of the interrogators described the "Mutt and Jeff" procedure as follows:

> The good-guy/bad guy routine, in interrogation, is widely used. It's actually a very good method, I've found in my seven years, eight years, of doing them. What it is, is you get the initial contact with the suspect. Initial, you know, police officer, whoever is doing the interrogation. And he, you know, is sympathetic with them, and is very nice and cordial with them. And then he'll go out and he'll get, like in my--case, what I played. The bad guy. The other guy will come in and be, you know, just doesn't want to hear, doesn't want to hear your lies. 'Look, I don't have time to--play around here. I got better things to do,' you know. Raising your voice, slamming doors, stuff -- stuff to that effect. Stays in for a very short period of time, says what he's got to say and leave.

Id. (quoting Record at 41).

The "Mutt and Jeff" act was one of the commonly used techniques discussed by the Supreme Court in its description of the inherently coercive nature of police interrogations in *Miranda v. Arizona*, 384 U.S. 436, 452 (1966).

140. *Bubonics*, 40 M.J. at 738 (quoting record at 106, 143).

was not in charge of the investigation. The ploy worked, and Bubonics signed a sworn written confession at 0330.[141]

The NMCMR set aside Bubonics' conviction. The court ruled that, despite Bubonics' initially valid waiver of his rights under Article 31 and *Miranda*, the statement was not the product of Bubonics' free will. The NMCMR discussed two separate aspects of the interrogation techniques used by the police agents in extracting Bubonics' confession. The court first found that the classic "Mutt and Jeff" routine does not render a confession *per se* inadmissible, but rather it is a psychological ploy which must be examined based on a totality of the circumstances.[142]

The NMCMR court took a less charitable view of the interrogator's threat to deprive Bubonics of his liberty and subject him to prosecution by civilian authorities. In fact, the court suggested that its own precedent provided that threats to prosecute or hold an accused in custody unless a statement is made render a resulting statement *per se* inadmissible.[143] Perhaps in an effort to deal with the issue before a *per se* interpretation became the accepted view, the Navy-Marine Corps Government Appellate Division sought review of *Bubonics* from the CAAF.[144]

On review, the CAAF affirmed the NMCMR's decision setting aside Bubonics' conviction.[145] The government can claim some measure of victory in *Bubonics*, however, because even though the facts of this case enabled Bubonics to win the battle for his freedom, the Navy-Marine Corps Government Appellate Division won the larger victory of holding the line on the standard for voluntariness determinations. Although the CAAF agreed that Bubonics' statement was inadmissible, it read the lower court's opinion in a decidedly narrow fashion. While the CAAF declared full support of the NMCMR's analysis, it clarified the lower court's discussion about the relevant police interrogation techniques. It also quashed the notion of bright line prohibitions replacing traditional voluntariness analysis based on a totality of the circumstances.

The CAAF ruled that, when read in its entirety, the lower court opinion "clearly articulated its responsibility to assess the 'totality of all the surrounding circumstances.'"[146] With regard to the heavy weight assigned to the threat to turn Bubonics over to civilian authorities in the NMCMR's analysis, the CAAF simply stated: "The court's responsibility to consider the surrounding circumstances, however, does not translate into a prescription to weigh all factors *evenly.*"[147]

Read in conjunction with *United States v. Martinez*,[148] *Bubonics* illustrates that challenges based on good old fashioned voluntariness determinations are a valuable hedge against the shrinking protection of Article 31(b).[149] In *Martinez*, the court addressed a government appeal of the military judge's ruling that the accused's pretrial statement was involuntary. The military judge found that the statement was the product of psychological coercion despite the absence of custody and despite proper provision of rights warnings and a valid waiver of Article 31 rights by the accused.[150] On appeal, the CAAF indicated

141. *Id.* at 737.

142. *Id.* at 740.

143. *Id., citing* United States v. Jones, 34 M.J. 899, 907 (N.M.C.M.R. 1992). As pointed out by the CAAF, this is only one possible reading of the Navy-Marine Corps court's opinion. *See infra* notes 145-46 and accompanying text.

144. The issue for appeal was framed as follows:

> Did the Navy-Marine Corps Court of Military Review err as a matter of law in reversing the military judge's finding that appellee's confession was inadmissible when:
>
> 1. It held, implicitly, that a confession is *per se* inadmissible when a statement which could be construed to be a threat to prosecute or hold an accused in custody unless he confessed is made during an interrogation . . .

Bubonics, 45 M.J. at 94.

145. *Id.* at 96.

146. *Id.* at 95 (quoting *Bubonics*, 40 M.J. at 739, 741).

147. *Id.* Discussing how the same factor may receive different weight in different cases, Senior Judge Everett again adds color to the military justice landscape: "In fact, it seems self evident--from the mandate, itself, to consider the totality of the circumstances--that the risk of havoc posed by a bull in a china shop is distinctly different from such a risk posed by the same bull in a pasture." *Id.*

148. 38 M.J. 82 (C.M.A. 1993).

149. Application of the voluntariness doctrine is not limited to questions of admissibility. Military Rule of Evidence 304(e)(2) allows the defense,

> to present evidence with respect to voluntariness to the members for the purpose of determining what weight to give the statement. When trial is by judge alone, the evidence received by the military judge on the question of admissibility also shall be considered by the military judge on the question of weight without the necessity of a formal request to do so by counsel. Additional evidence may, however, be presented to the military judge on the matter of weight if counsel chooses to do so.

that the record did not clearly describe circumstances of outrageous police conduct.[151] The court noted, however, that a totality of the circumstances voluntariness determination "does not connote a cold and sterile list of isolated facts; rather it anticipates a holistic assessment of human interaction."[152] Given the complex nature of *ad hoc* voluntariness determinations, the court concluded that military judges are in a superior position than appellate courts for decision making in this area.[153]

What this means to practitioners is that resolution of voluntariness questions is very dependent on the presentation of the issue at trial. Because resolution of this issue is based on a totality of the circumstances, advocates must be sure to present evidence concerning *all* the facts that might reasonably affect a subject's decision to speak. Simply putting the accused, or the interrogator, on the stand to "explain what happened," is not enough. Instead, advocates should take the time to develop a complete picture of the circumstances of the interrogation. Vehicles for accomplishing this task might include any of the following: pictures or video presentations of the interrogation site; inspection of the interrogation site by the military judge; demonstrative exhibits describing the chronology of the interrogation process (to include pre-interrogation events that might affect the accused's decision to speak); or expert testimony concerning the susceptibility of the accused to coercive pressure.[154]

Conclusion

Reports regarding the death of Article 31(b) are at least slightly exaggerated. Article 31(b) rights warnings are still required in many situations where the coercive pressure of superior military rank or position might interfere with a service member's free exercise of the privilege against self-incrimination.[155] The scope of applicability of Article 31(b) requirements is gradually being reduced, however, as the CAAF increasingly looks to the subjective designs of interrogators as a guide to the existence of coercive pressure. The problem is compounded by the fact that the CAAF provides precious little analysis or explanation of how current Article 31(b) decisions square with prior decisions in this area.

At the same time, the CAAF has strengthened the foundation of the voluntariness doctrine. As Article 31(b) struggles to maintain relevance in interrogations outside of mainstream police investigations, the voluntariness doctrine may become an increasing feature of courts-martial litigation. But after all, it has been a valid basis of consideration all along.

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150. *Id.* at 83-84.

151. The court noted: "Surely, there are worse recorded cases of psychological coercion. On the other hand, the military judge's detailed findings about what went on during the session and the atmosphere surrounding the session just as surely do offer support to a legal conclusion of involuntariness." *Id.* at 86.

152. *Id.* at 87.

153. The court observed: "[T]he military judge was in a unique position to decide the appropriate weight to give appellant's assertion of an overborne will. His vantage point is one that simply cannot be reproduced, either by the Court of Military Review, or by this Court." *Id.* at 86. That is not to say that decisions of the military judge are necessarily conclusive. The court also noted that the issue of voluntariness is a legal question, and that the CAAF owes no special deference to the view of the CMR or the military judge. *Id.* at 86.

154. *See* United States v. Doucet, 43 M.J. 546 (N.M.Ct.Crim.App. 1995). In *Doucet*, expert testimony was admitted that accused suffered from a "Receptive Language Developmental Disorder." The expert testified that "under normal circumstances, the appellant 'probably does okay,' but that when under stress, the problem may become 'moderate or even severe,' resulting in difficulty in understanding and making decisions." *Id.* at 658 (citation omitted).

155. One commentator has quipped that according to the CMA, the trigger portion of Article 31(b) now means the following:

> No person subject to this chapter except medical personnel and persons acting out of purely personal curiosity, but including post exchange detectives and possibly state and foreign social workers and police who have a congruent investigation, may interrogate, for purposes of criminal, or quasi-criminal civil, prosecution clearly contemplated at the time of interrogation, or may request any statement from an accused or person suspected, either objectively or subjectively, of an offense, only if the person being questioned is aware that the person asking the questions is acting in a law enforcement or disciplinary fashion, without first informing him . . . .

McGillin, *Officiality Doctrine, supra* note 66, at 2.

Driving 'Naked'; Privacy in Cyberspace; and Expansive 'Primary Purpose' Developments in Search, Seizure, and Urinalysis

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Introduction

The judicial shepherding of the Fourth Amendment this year was marked by interesting contrasts. While on the one hand, the courts reemphasized the Fourth Amendment's protective vitality, they also expanded the authority and discretion of law enforcement personnel and military commanders. Three of the four Supreme Court Fourth Amendment opinions issued this past year involved police authority over automobiles and their drivers. Taken together, the cases clearly recognize greater police authority and discretion over motorists, leaving one to ponder whether drivers are, in effect, "constitutionally naked" in an automobile. The Court of Appeals for the Armed Forces (CAAF)[1] and the service courts were slightly more active in the Fourth Amendment arena and reflect some of the more striking contrasts. With vigor and zest, the CAAF resuscitated the protective spirit of the Fourth Amendment in the area of expectations of privacy and in its refusal to apply the good faith exception. In contrast, however, the CAAF continued its deference to commanders in the inspection context by adopting an expansive view of acceptable primary purpose.[2]

Unfortunately, in many of the CAAF opinions, there is a remarkable absence of analysis and explanation. The impact of such omissions is enormous and is highlighted throughout this article. Without providing an analytical atlas to the trial lawyer, the court's opinions are vulnerable on a number of levels. First, the court is open to attacks by the dissenters who "take the high road" and persuasively paint the "rest of the story." When the court fails to respond to such attacks, coupled with its conclusory analysis, the critiques of result-oriented jurisprudence are inevitable and seemingly well-founded. Finally, in many of its opinions, the CAAF misses an opportunity to improve the trial bar's general understanding of military law.

This article will highlight the more significant cases, and provide analysis and critique to aid the practitioner in assessing the impact of these cases on life "in the trenches."

Coverage: Expectations of Privacy

The CAAF Finds Privacy Surfing the Net

United States v. Maxwell[3] is one of the first bold judicial steps into "cyberspace." Whether traditional Fourth Amendment analysis is adaptable to law enforcement activity on the information superhighway is an issue of great concern to all criminal law practitioners. In one of the first reported cases on this issue, the court comfortably applies traditional Fourth Amendment rules to "the virtual reality of cyberspace."[4]

"[T]he Fourth Amendment protects people, not places."[5] The central question, therefore, is whether a person has a reasonable expectation of privacy in the invaded place. This is answered through a two-part test: first, whether the person has a subjective expectation of privacy in the location, and second, whether society recognizes the expectation as reasonable.[6] Only when both are present is there Fourth Amendment protection.

In *Maxwell*, the CAAF concluded that a person generally has a reasonable expectation of privacy in electronic mail (e-mail)

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1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision.

2. MANUAL FOR COURTS-MARTIAL, United States (1995 ed.), Mil. R. Evid. 313(b) [hereinafter MCM]. The "subterfuge" rule grants the commander broad authority to conduct preemptive strikes on drugs and contraband without probable cause. Using his inspection authority the commander may order, for example, an "examination of the whole or part of a unit . . . as an incident of command . . . ." *Id.* When the inspection is conducted immediately after the report of an offense and was not previously scheduled, or personnel are targeted differently or are subjected to substantially different intrusions, the examination is presumed to be an unlawful search. If such is the case, the government must prove by clear and convincing evidence that the commander's primary purpose was administrative, not disciplinary.

3. 45 M.J. 406 (1996).

4. *Id.* at 410.

5. Katz v. United States, 389 U.S. 347, 347 (1967).

6. Smith v. Maryland, 442 U.S. 735, 740 (1979)

sent, received, or stored in on-line services.[7] Colonel Maxwell was a subscriber to America On-line (AOL) through his personally purchased home computer system. Although he had only one account with AOL, he created four separate screen names (Redde1 [as in Ready One], Zirloc, and two others) through which he could access AOL and then send and receive e-mail.[8] His account was accessed through a password. The Federal Bureau of Investigation (FBI) began investigating the illegal transmission of pornography on the Internet after it received a list of "participating" screen names from a concerned AOL user. The accused's Redde1 screen name was on the list provided to the FBI.[9]

Apparently, this concerned user had also sent his list via e-mail to AOL management. In response to a FBI query, AOL refused to release any information without a search warrant. Unbeknownst to the FBI while it sought the warrant, AOL began writing a software program to extract the anticipated requested information. This was accomplished based on information gleaned through its meeting with the FBI and the list of screen names provided already to AOL by the concerned user. AOL then began extracting transmissions from the various screen names.[10] Significantly, AOL's extraction program included all screen names used by a subscriber. Thus, all four of Colonel Maxwell's screen names were searched. The FBI then executed the warrant and discovered that one of the screen names belonged to Colonel Maxwell.[11] The FBI then released the evidence from Colonel Maxwell's account to the Air Force Office of Special Investigations (AFOSI).[12]

Charged with two specifications of communicating indecent language in violation of Article 134, Uniform Code of Military Justice and two specifications of transmitting obscene material,[13] the accused moved to suppress based on a variety of Fourth Amendment grounds. The central issue facing the court was whether there is a reasonable expectation of privacy in one's e-mail. The court clearly held that there is a reasonable expectation of privacy, at least with respect to e-mail accessed by a user password and stored or sent to or received from another user.[14] Given the subjective and objectively reasonable expectation of privacy, the interception or seizure of e-mail requires probable cause and a warrant.

After finding a reasonable expectation of privacy in AOL e-mail, the court then examined the warrant. It found the FBI had probable cause with respect to the "Redde1" screen name, because it was part of the initial evidence provided to the FBI.[15] The court, however, found there was no probable cause as to the "Zirloc" screen name, from which incriminating evidence was seized. There being no probable cause and no warrant for "Zirloc," the court found it quite easy to rule that the seizure of evidence from this screen name was illegal and must be suppressed.[16] Consequently, the first two specifications of communicating indecent language were dismissed and a rehearing on sentence suggested.

Maxwell's treatment of the expectation of privacy tracks that of the Air Force Court of Criminal Appeals opinion. It also comports comfortably with the historical development of the Fourth Amendment, expectations of privacy, and the guiding principle that it "protects people, not places."[17]

Remaining unresolved is the nature of Fourth Amendment protection in the military office environment, where govern-

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7. *Maxwell,* 45 M.J. at 417. The court made clear that "AOL differs from other systems, specifically the Internet . . . in that e-mail messages are afforded more privacy than similar messages on the Internet, because they are privately stored for retrieval on AOL's centralized and privately-owned computer bank. . . ." *Id*.

8. *Id.* at 413.

9. *Id.*

10. Some confusion exists over whether AOL ran its extraction before or after service of the warrant. The court concluded the extraction was completed before service of the warrant. *Id.* at 421-22.

11. *Id.* at 414.

12. *Id.* "Many of the e-mail transmissions made by appellant as 'Zirloc' were to another junior Air Force officer known as 'Launchboy.' The [e-mail to 'Launchboy'] discussed appellant's feelings regarding his sexual orientation and desires, and appellant answered questions regarding his sexual preferences." *Id.* These transmissions were the basis for the indecent language specifications. *Id.*

13. The two specifications charged assimilated offenses under 18 U.S.C. §§ 1465 (obscene materials) and 2252 (child pornography), respectively. *Maxwell,* 45 M.J. at 410.

14. *Id.* at 417. The court acknowledged that, like conventional mail, once the e-mail is transmitted, the sender's privacy expectations may be incrementally diminished because the receiver may choose to send it to others. *Id.*at 417-18.

15. Interestingly, when the FBI transcribed the list of suspected screen names to the warrant application, the accused's screen name "Redde1" was capitalized and mistakenly written as "REDDEL." In cyberspace terms, this represents a fundamental change. Indeed, had AOL worked off the actual warrant, "REDDEL" would not be a valid screen name for Colonel Maxwell and no information from his "Redde1" account would have been discovered. *Id.*at 413. In one of its many holdings in *Maxwell*, the CAAF found this "scrivener's" error "a minor and honest mistake" that did not invalidate the warrant. *Id*. at 420, *citing* United States v. Arenal, 768 F.2d 263 (8th Cir. 1985) (upholding search despite transposed address numbers in search warrant) (citations omitted)).

16. *Id.* at 422. For an examination of the court's treatment of the good faith exception to the "Zirloc" seizure, see *infra* notes 149-65 and accompanying text.

ment computers are routinely accessed by military personnel with single or multiple passwords. In many offices, computer systems, e-mail networks, and Internet connections provide servicemembers potentially unlimited communication opportunities. To what extent traditional views of "government property issued for official business" give way to the reality of personal communications tacitly authorized remains an open question. It seems clear that system administrators can control the degree to which local users possess a subjective and objective expectation of privacy. Indeed, whether user passwords are seen as security mechanisms or privacy screens may be a matter of local office practice. Counsel must assess their own environments and their units to determine the nature of expectations.[18]

Privacy in the In-Law's "Castle"

In *United States v. Salazar*,[19] the CAAF ordered even more sweeping relief, reversing the service appellate court and applying a generous view of expectations of privacy. Apparently in search of marital tranquillity, Private First Class (PFC) Salazar opted for a peculiar remedy. He moved his family into his sister-in-law's apartment. Unfortunately, the accused was ordered by his commander into the barracks after only a few days. He was reportedly beating his wife.[20]

During his short stay in the home, the accused and his wife had exclusive use of the bedroom, nursery, and hall closet. The sister-in-law and her husband shared the common areas such as the living room, dining room, and kitchen. After the accused's departure to the barracks, the wife continued to live in her sister's home.[21]

At some point, Military Police Investigations (MPI) interviewed PFC Salazar regarding the theft of electronic equipment.[22] The MPI agent then called Mrs. Salazar and stated PFC Salazar "wanted her to bring all the electronic equipment that was at the house"[23] to the military police station. Reluctantly, Mrs. Salazar complied with the request, which she later discovered was an outright fabrication.[24]

At trial, the accused moved to suppress the equipment, arguing it was an unreasonable search and seizure. The trial judge found no reasonable expectation of privacy and therefore no standing; because the owners had right of access to the entire house and the accused no longer lived there, he was not expected to return and therefore had no control over who came and went from the house.[25] The Army Court of Criminal Appeals affirmed.

The CAAF, palpably disturbed by the police fabrication tactics, set aside the conviction finding that indeed PFC Salazar had an expectation of privacy that was both subjectively held and reasonable;[26] he therefore had standing to contest the seizure of the equipment. "The temporary departure of PFC Salazar because of military orders does not convert the marital home into an abandoned guest house or a former residence."[27]

Although the court found the commander's order to enter the barracks lawful, it was only temporary in their view. He was expected to return to the apartment after his pending administrative separation.[28] The CAAF then equated the order to enter the barracks with an order to deploy or even go on leave. Such orders do not divest one of an expectation of privacy in the home. In a disturbingly cynical passage, the court observed "it would be illogical if the existence of a servicemember's expectation of privacy in his . . . private residence depended solely on military orders. *The issuance of orders would then be the predicate event to every search.* We will not create a policy whereby

17. Katz v. United States, 389 U.S. 347, 351 (1967). In *Katz*, the Supreme Court first established the role of expectations of privacy in Fourth Amendment jurisprudence.

18. Although the Army has not yet issued overall guidance on personal use of government computers, the TJAG of the Army recently issued a permissive use policy letter applicable to personnel in OTJAG. After authorizing very limited personal use of e-mail on government computers, the policy letter closes with the following admonition: "You should be aware that any use of Government communications resources is with the understanding that such use is generally not secure, not anonymous, *and serves as consent to monitoring*." (emphasis added).

19. 44 M.J. 464 (1996).

20. *Id.* at 465.

21. *Id.* at 466 n.2.

22. *Id.* at 468.

23. *Id.*

24. Upon learning of the deception, she broke down at the police station and threatened to kill her unborn child.

25. *Salazar*, 44 M.J. at 466 n.2.

26. *Id.* at 476.

27. *Id.* at 467.

28. *Id.*

the existence of standing turns upon the command's wishes, rather than the [soldier's] legitimate privacy expectations."[29] The court then highlighted that the unique familial relationship[30] allowed PFC Salazar to retain his expectation of privacy in the home while away.[31]

Staleness

In *United States v. Agosto*,[32] the Air Force Court of Criminal Appeals (AFCCA) provided excellent guidance to the military justice practitioner on the importance of a staleness analysis in probable cause determinations. Airman Agosto was charged with a number of crimes involving sex with underage females at Dyess Air Force Base, Texas. Approximately three months after his encounter with one of the girls, a report of the crime was made to authorities.[33] The girls explained that during the encounter the accused had taken photos. The accused had since moved to a new dormitory on Dyess AFB. In an effort to corroborate the girl's story, the investigators obtained a search authorization from a military magistrate for the photos in his new living area. The photos were found, and, at trial, the accused moved to suppress on the ground that there was no probable cause because the information was stale (almost three and a half months elapsed between the offense and the search).[34]

The AFCCA upheld the trial judge and reminded practitioners of the importance of staleness in probable cause determinations. The court highlighted four factors which assist in the staleness assessment: (1) the nature of the article sought; (2) the location involved; (3) the type of crime; and (4) the length of time the crime continued.[35] In this case, the photos "were not necessarily incriminating in themselves, were not consumable over time, like drugs; and were of a nature . . . [to] be kept indefinitely."[36] Therefore, under a totality of the circumstances test, a reasonable person might conclude the accused moved the photos to his new dormitory.

Agosto is a classic application of Fourth Amendment doctrine. It is noteworthy not because it breaks new ground, but because it reemphasizes for the practitioner the fundamental elements of the staleness analysis in probable cause assessments. Counsel should use *Agosto*'s four staleness factors in every probable cause assessment. This will aid both trial and defense counsel in clarifying and refining their positions both in the investigation and trial phases. The factors are particularly important in the training and education of commanders and investigators. Trial counsel should routinely include training emphasis on the staleness prong of the probable cause inquiry.

Automobile Exception

Time is Not on Your Side

In *Pennsylvania v. Labron*,[37] the Supreme Court reemphasized fundamental Fourth Amendment law regarding the automobile exception, as well as warrantless searches based on probable cause and exigent circumstances.

In *Labron*, Philadelphia police officers observed Labron and others complete a drug sale from the trunk of Labron's car. The police arrested Labron and immediately conducted a warrantless search of his car, finding bags of cocaine in the trunk.[38]

The Pennsylvania Supreme Court reversed, however, holding that "the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search."[39] Because the police had time to secure a warrant, the evidence is inadmissible.

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29. *Id.* (emphasis added).

30. No further explanation of this reference is provided by the court. Presumably, the court was referring to his wife's remaining in the apartment with certain of his possessions. *Id.*

31. *Id.* It is interesting to contrast the court's view of a soldier's expectation of privacy in *Salazar* with those views expressed in *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1994). Salazar has a reasonable expectation of privacy in a place where it is a crime for him to be present (the commander ordered him to stay out of the home), where he had no control over who entered the home or any particular room therein, where the police never entered, searched, or seized anything, and in which he lived for no more than eight days. In *McCarthy*, the court found that McCarthy, who, at 0400 hours was sleeping behind a locked barracks room door, had no reasonable expectation of privacy. *Id.* at 403. Obviously, distinctions and rationalizations are abundant if one wishes to distinguish the two, but nevertheless the incongruity is striking. The court's effort to find an expectation of privacy in *Salazar* is arguably strained and is possibly explained by its abhorrence of shady police tactics.

32. 43 M.J. 745 (A.F. Ct. Crim. App. 1995).

33. *Id.* at 745.

34. Members sentenced Airman Agosto to a bad conduct discharge, confinement for 18 months and reduction to E1. *Id.* at 747.

35. *Id.* at 749.

36. *Id.*

37. 116 S. Ct. 2485 (1996).

The United States Supreme Court reversed, stating "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more."[40] The court recalled the long history of the automobile exception beginning with *Carroll v. United States*[41] and more recent caselaw focusing on a reduced expectation of privacy in automobiles.[42] Whether police have time to secure a warrant is irrelevant for Fourth Amendment analysis.[43]

Pretextual Stops and the Great Beyond

The Supreme Court issued its most significant Fourth Amendment case this year in *Whren v. United States*.[44] In *Whren*, the Supreme Court resolved disagreement among the circuits by permitting police to use the pretext of a de minimis offense to pursue mere suspicion of a more serious offense.

In *Whren*, District of Columbia police were patrolling a known high drug crime area at night. They observed a car whose driver was looking into the lap of his passenger. When the officers made a U-turn to return to the car, the suspect's car immediately made a right turn without a signal and sped away. The officers made a stop based on the failure to signal and immediately observed cocaine in plain view in the passenger's lap.[45]

At trial and on appeal, the defendant argued that the stop for a traffic violation was merely a pretext for investigating their hunch about a more serious drug crime. Given the potential for abuse, defendants argued, the test for whether a stop is constitutional is whether a reasonable officer *would have* made the stop, absent the improper purpose or pretext.[46]

A unanimous Court rejected this test, stating it is "plainly and indisputably driven by subjective considerations."[47] Justice Scalia, who authored the opinion of the Court, continued, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[48] "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation."[49] Adopting the "could have" test and rejecting the "would have" test, the court flatly dismissed the idea that an ulterior motive might operate to strip the agent of legal justification.[50]

Given that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"[51] courts must use a purely objective test for evaluating the reasonableness of a stop. Thus, so long as probable cause exists for a traffic stop, police may stop a car to pursue other more serious suspicions.

Whren leaves unresolved the methods by which police may pursue these hunches. *Whren* was arrested based on an immediate plain view observation of evidence of crime, drugs on the

38. The Supreme Court granted certiorari in two related cases decided by the Pennsylvania Supreme Court, *Labron* and *Pennsylvania v. Kilgore*. *Kilgore* involved the search of a truck parked outside a home where drug transactions were taking place. The defendants were seen walking to and from the truck around the time of the transactions. After their arrest, the truck was searched and more drugs were found. As in *Labron*, the Pennsylvania Supreme Court found that, although there was probable cause, there were no exigent circumstances to justify the lack of a warrant. Applying the same analysis as in *Labron*, the United States Supreme Court reversed *Kilgore*.

39. *Labron*, 116 S. Ct. at 2486.

40. *Id.* at 2487.

41. 267 U.S. 132 (1925).

42. California v. Carney, 471 U.S. 386, 391-92 (1985) (owing to its pervasive regulation, citizens have a reduced expectation of privacy).

43. Interestingly, on 26 February 1997, despite the Supreme Court reversal, a plurality of the Pennsylvania Supreme Court reinstated the suppression order in *Labron*. The court stated explicitly that its prior decision, 669 A.2d 917 (Pa. 1995), "was, in fact, decided upon independent grounds," that is, the Pennsylvania Constitution, not the United States Constitution. 60 CRIM. L. RPTR. 1543 (Mar. 19, 1997).

44. 116 S. Ct. 1769 (1996).

45. *Id.* at 1772.

46. *Id.* at 1773.

47. *Id.* at 1774.

48. *Id.* at 1775 (emphasis in original).

49. *Id.* at 1772 (quoting United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995) (emphasis in original)).

50. *Id.* at 1774 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983)).

51. *Id.* at 1774.

passenger's lap. Practitioners must note, however, that *Whren* does not appear to create additional authority outside of that granted by the initial stop. In *Whren*, plain view allowed the officers to pursue their actual intent. For the average traffic stop, unless probable cause develops as in *Whren* or, for example, consent is obtained, further pursuit of a hunch will be problematic. Counsel must be vigilant to this issue. The issues are indeed difficult, as some of the newest cases interpreting *Whren* make clear.[52]

Whren Applied to the Military

The Gun-Running Sailor

United States v. Rodriguez[53] is the first military case to apply *Whren*. The Bureau of Alcohol, Tobacco and Firearms (ATF) and Naval Investigative Service (NIS) suspected Rodriguez of gun-running from his home in Northern Virginia to New York City. On a weekend trip to New York City, ATF and NIS followed Rodriguez. Apparently overzealous in the tail of the accused, a Maryland State Trooper stopped the ATF vehicle for speeding.[54] Like a scene from an old Western, ATF successfully enlisted the aid of the trooper, and the posse[55] set off after Rodriguez. At some point the trooper stopped Rodriguez for "following too closely."[56] The trooper later admitted his primary purpose was to stop the accused's car to allow ATF agents to search it for guns.[57] Ultimately, the accused consented to a search of his car and then made incriminating statements. At trial he objected to the stop as a pretext used to pursue their gun-running investigation and sought to suppress his statements as the product of an unreasonable seizure.[58]

The Navy-Marine Court, expressly invoking *Whren*, found the stop, "even if pretextual, . . . constitutionally sound because there was probable cause to stop appellant's car based on the traffic infraction which Trooper Pearce observed."[59] Applying the *Whren* "could have" test, the stop was reasonable.

The court added some guidance regarding the extent of authority in such a pretextual stop. During a routine traffic stop an officer "may take the time necessary to review the driver's license and . . . registration, run a computer check on the car and driver, and issue a citation."[60] Once produced, the officer "must allow him to continue without delay."[61] Additional questioning unrelated to the initial stop requires "an objectively reasonable articulable suspicion that illegality has occurred or is occurring."[62]

The duration of the stop in *Rodriguez* was "hardly temporary."[63] The court concluded that Rodriguez' consent to search, which it concluded was voluntary, *gave the police the necessary authority to continue the stop beyond the initial detention.*[64] This result confirms the concept that the pretext only gets the police "through the door," so to speak. Other bases of search authority, *i.e.* consent or plain view, must arise to permit the officer to lawfully pursue his suspicion.[65]

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52. In *Illinois v. Thompson*, 670 N.E. 2d 1129 (Ill. App. 1996), on the pretext of a broken tail light, officers stopped a car suspected of containing guns and drugs. The driver was asked to exit the vehicle and, after a fruitless frisk, the passenger was also asked to come out. The court ruled the pretextual nature of a stop is "not . . . totally irrelevant to questions that accompany" such a stop. *Id.* at 1135. Once a stop's pretextual nature is established, the true objective is to find a legal excuse to accomplish a warrantless search. Ensuing events are therefore subject to careful scrutiny. An officer's failure to immediately remove and frisk the passenger undercut his alleged fear and the legal basis for the safety frisk. The court ordered further hearings to determine what the officers reasonably believed. *Id.* at 1135.

53. 44 M.J. 766 (N.M.Ct.Crim.App. 1996).

54. *Id.* at 769.

55. "[A] body or force armed with legal authority." RANDOM HOUSE COLLEGE DICTIONARY (1975).

56. *Rodriguez*, 44 M.J. at 771.

57. *Id.*

58. *Id.* at 770.

59. *Id.* at 772.

60. *Id.* (citing United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993)).

61. *Id.* (citing United States v. Pena, 920 F.2d 1509, 1514 (10th Cir. 1990), *cert. denied*, 501 U.S. 1207 (1991)).

62. *Id.* (citing *Soto*, 988 F.2d at 1554).

63. *Rodriguez*, 44 M.J. at 772.

64. *See id*. at 773.

65. The NMCCA also noted another independent basis "on which the detention of appellant and his car and the ensuing search and interrogation were appropriate." *Id.* Based on their surveillance, evidence of gun purchases and an informant's tip, NIS and ATF had reasonable suspicion, supported by articulable facts, that criminal activity was afoot. *Id.* This would permit the police to conduct a forcible *Terry*-type stop. *Id.* (citing United States v. Sokolow, 490 U.S. 1, 10-11 (1989), and Alabama v. White, 496 U.S. 325, 330-31 (1990)).

For practitioners, *Whren* and *Rodriguez* are instructive. It is safe to conclude *Whren* applies to military practice. Second, *Rodriguez* clarifies the extent of authority in the context of a traffic stop. It seems clear that police have no additional authority beyond that already inherent in a traffic stop. The stop, however, creates an opportunity to interact and to act upon any information or evidence thereby obtained.

The Great Beyond--Whren to Arrest, Whren Not to Arrest

Equally troubling and unanswered in *Whren* is its potential use in areas unrelated to traffic infractions, such as the arrest and search arenas. When officers lack probable cause to arrest or search in more serious offenses, can they use the *Whren* analysis to justify an arrest or search warrant for a minor offense for which there may be no prosecutorial interest, in order to pursue their more serious suspicions? While it seems clear that a pretextual stop must stay within its pre-established legal framework, it also seems clear the pretext imprimatur might encourage more aggressive use of such a technique. Although it is "mere sniveling" to complain about "aggressive use of the law," the judicial acceptance of "pretext" will no doubt push its use to new frontiers.

For criminal law practitioners, *United States v. Hudson*[66] is just such an example of the "pushed envelope" and expansion of the *Whren* doctrine to the arrest context. Hudson, a member of the Hessian Outlaw Motorcycle Gang, was suspected by the ATF of manufacturing methamphetamine. ATF agents had purchased 1/16th of an ounce of methamphetamine from Hudson for sixty dollars four months earlier.[67] Federal prosecutors, however, were not interested in Hudson. Not to be denied pursuit of their manufacturing suspicions, and aware they had insufficient information to obtain a search warrant, ATF agents succeeded in securing an arrest warrant for the four month old sale from a state prosecutor.[68] ATF hoped that an arrest in the home would reveal evidence of the greater crime.

Hudson was arrested in his bedroom,[69] where police found drug paraphernalia (glassware) and a rifle.[70] The Ninth Circuit, acknowledging *Whren's* traffic context, began by stating "we have long followed identical principles in both the traffic stop context and the arrest context."[71] In this court's view, *Whren*'s rationale applies to arrests. "Where police conduct . . . is justifiable on the basis of probable cause . . . we may not inquire into whether the officer . . . had improper motives or deviated from the typical practice of reasonable officers."[72]

The court found that the arrest was supported by probable cause, based on the felony drug sale (albeit four months earlier) and the evidence seized in plain view. *Hudson* legitimizes pretext in the arrest context. Once again, plain view is the method by which investigators capitalize on the opportunity created by the pretext.

Practitioners can expect state, federal, and military courts to wrestle with the meaning and impact of *Whren*. Most interesting will be its role in the arrest and search context. Trial counsel may want to test these waters with investigators. Defense counsel must aggressively litigate pretextual actions and be aware of the potential for government abuse.

"Driving with the Justices" Naked!

Fanning the flames of those who argue the average motorist is well-nigh constitutionally naked,[73] the Supreme Court continued to enhance the tools of the police when dealing with automobiles in its first Fourth Amendment case of the 1997 term. According to the Supreme Court in *Ohio v. Robinette*,[74] a

66. 100 F.3d 1409 (9th Cir. 1996).

67. *Id.* at 1425 (J. Reinhardt, dissenting).

68. *Id.* at 1413.

69. *Id. Hudson* also illustrates the continued wrestling with the role of the knock and announce rule. In one of the major new developments two years ago, the Supreme Court, in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), reinvigorated the knock and announce rule, making it a part of the reasonableness prong of Fourth Amendment jurisprudence. Although already statutorily required under Federal law for many years in 18 U.S.C. § 3109, the Supreme Court made the knock and announce rule a constitutional imperative. "[W]e have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold." *Wilson*, 115 S. Ct. at 1918. When and under what circumstances it can be avoided is the subject of frequent litigation. *Hudson* involved a "mild exigency," *i.e.*, a weapon and potential for escape, which justified a knock and announce, but required no pause for a response. *See, e.g.*, Richards v. Wisconsin, No. 96-5955, 1997 WL 202007 (U.S. Apr. 28, 1997). In *Richards*, the Wisconsin Supreme Court, in spite of *Wilson*, approved a blanket exception to the knock and announce rule in felony drug cases. The potential for violence or destruction of evidence is so likely in drug cases that officers can dispense with the knock and announce requirement, the court ruled. The Supreme Court rejected the blanket exception to the knock and announce requirement but affirmed the Wisconsin Supreme Court judgment on the facts of Richards. *Id*.

70. *Hudson*, 100 F.3d at 1413. Federal prosecutors ultimately decided to prosecute Hudson on federal firearms and drug trafficking charges. *Id.* at 1414.

71. *Id.* at 1415.

72. *Id*. at 1416. The court also held that *Hudson* does not present one of the "rare exceptions" contemplated in *Whren* where "extraordinary" police conduct, otherwise supported by probable cause should, nevertheless, be subjected to a balancing analysis to determine its reasonableness. *Id.*

73. Kathryn Urbonya, *The Fishing Gets Easier, Supreme Court Report*, 46 A.B.A. J. (Jan 1997).

request to search a car following a lawful traffic stop does not require a bright-line "you are free to go" warning for subsequent consent to be voluntary. The test, as with any consent issue, is the totality of the circumstances.[75]

Robinette was stopped for speeding in Ohio. After a clean license check, officer Newsome asked Robinette to exit his car.[76] Newsome started his video camera, issued an oral warning, then returned the license. Newsome then asked, "one question before you get gone: [A]re you carrying any illegal contraband . . . weapons . . . drugs?" Robinette answered, "no."[77] Newsome then asked if he could search the car and Robinette consented. Newsome discovered a small amount of amphetamine.[78]

At trial the defense moved to suppress the evidence, arguing, in part, that the detention became unlawful after Newsome decided to give only a warning[79] and that this occurred before Robinette was asked to exit the car. Therefore, the defense argued that anything found after he stepped out of the car was the product of an unlawful seizure, which also tainted the consent to search.[80] The Ohio Supreme Court agreed and also established a bright line rule requiring a "you are free to go" warning prior to such a request to search.[81]

Chief Justice Rehnquist began his discussion of the Fourth Amendment with the predicate issue of whether the "continued detention" was unlawful. He thereupon rejected the Ohio Supreme Court's analysis, citing with approval *Whren,* saying "the subjective intentions of the officer did not make the continued detention . . . illegal . . . ."[82] Although it is not necessary to issue a warning, asking Robinette to exit the car is something the officer "could have" done under the Fourth Amendment. Thus, the continued detention was not outside the scope of the initial stop.[83] Following *Whren's* analysis, Officer Newsome's motives were irrelevant.

The Chief Justice then took on the "free to go" warning and not surprisingly assailed any notion of a bright line rule in the Fourth Amendment area. The test for whether one has consented to a search is whether it was voluntary under the totality of the circumstances.[84] He recalled how, in *Schneckloth v. Bustamonte*,[85] the argument that consent could be valid only if the person knew he had a right to refuse was similarly dismissed. "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent."[86] Chief Justice Rehnquist concludes with this rationale for rejection of a bright line rule: "[J]ust as it 'would be thoroughly impractical

74. 117 S. Ct. 417 (1996). At the time this article went to press, the court had just issued its opinion in *Maryland v. Wilson*, 117 S.Ct. 882 (1997), the second Fourth Amendment case of the term. In *Wilson,* a vehicle was stopped for speeding, and noting passenger Wilson's nervousness, the officer ordered him out of the car. As Wilson stepped out, an amount of crack cocaine fell to the ground. *Id* at 884. Wilson successfully suppressed the evidence at trial on the theory that ordering a passenger out of a car is an unreasonable search since probable cause to stop goes only to the driver. The trial court found that *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), permits an officer to order only the *driver* out of a car during a routine traffic stop.

The Supreme Court reversed, holding the *Mimms* principle also extends to passengers. Finding, as in *Mimms*, an overriding officer safety concern, coupled with the *de minimus* intrusion of ordering an already stopped passenger out of the car, the court held that an officer making a traffic stop may order passengers out of a car pending completion of a stop. *Wilson,*.117 S. Ct. at 886.

Wilson raises a number of interesting questions for practitioners. Will police departments now require officers to order passengers out of cars? Further, in light of *Whren*, is there any objection to police stopping a driver for a traffic violation, solely because they wish to pursue more serious suspicions regarding the passenger for whom there is no original probable cause to stop at all?

75. *Robinette*,117 S. Ct. at 421.

76. *Id.* at 419.

77. *Id.*

78. *Id.*

79. If Officer Newsome decided to give a warning, so the argument goes, he did not intend to further detain Robinette for the purpose of ticketing; therefore, any detention beyond what was required to issue the warning was without authority and unlawful. *Id.* at 420.

80. *See generally id.* at 419-20.

81. *Id.*

82. *Id.* at 420.

83. *Id.* at 421.

84. *Id.*

85. 412 U.S. 218 (1973).

86. *Id.* at 227.

to impose on the normal consent search the detailed requirements of an effective warning,'[87] so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[88]

Taken together, the Court's Fourth Amendment jurisprudence for the last year has involved almost exclusively automobiles. In *Labron*, *Whren* and now *Robinette*, the Court has upheld and expanded the authority of police to deal with motorists. And while *Labron* may be straightforward to many--and *Whren* troubling to some--*Robinette* is certainly perplexing to most. Why is it unrealistic to expect police to inform a motorist he is free to leave? It takes only seconds, and if it is too much to expect the officer to know when to alert the motorist to this moment, how can the untrained and nervous motorist know when he is free to leave? Arguably, because there is no requirement to affirmatively arm a citizen with his constitutional rights when "asked" to come to the station for non-custodial interrogation, there should be no difference with a traffic stop. In most cases of requests for consensual interrogation at a police station, however, one has not already been seized by a government agent in uniform, as in a traffic stop. This reality and its influence on drivers cannot be underestimated.

In any event, the Fourth Amendment rulings of the Supreme Court must be understood by counsel on both sides of the bar, incorporated into daily practice and highlighted in training to law enforcement personnel.

Plain View and Exigent Circumstances

"Smoking Weed" and Spontaneous Combustion

In *United States v. Dufour*,[89] Navy security police received an anonymous tip of drug use in on-base quarters. Two police officers went to the quarters and from the front sidewalk, 15-20 yards from the quarters, looked through a six to twelve inch opening in the window curtains to observe people leaning over a light or flame. One officer then approached to within two feet of the window, onto the home's curtilage[90] and, peering through the opening, observed two people smoking a glass pipe.[91] The officer returned to the sidewalk, and backup arrived shortly thereafter.[92] Just then, a person left the home and, as he approached the officers, he spontaneously "combusted," announcing "we've been smoking weed!"[93] The police immediately entered the home, apprehended the participants and seized the drugs.

At trial and on appeal the accused moved to suppress the evidence as an unreasonable search and seizure. The Navy-Marine court affirmed, stating it need not consider whether the "view from the curtilage"[94] was an unreasonable search. There was more than sufficient probable cause, even without the curtilage view, to justify the search. The anonymous tip, combined with the observations from the sidewalk and the corroborative statement from the departing guest more than provided sufficient probable cause.[95] The view or search from the curtilage was not needed to establish probable cause and does not vitiate the authority created from the remaining observations.

Furthermore, the court concluded, no warrant was required because there is "no greater exigency requiring immediate action than the . . . present active use of debilitating drugs,"[96] *Dufour* is classic, garden variety application of plain view and exigent circumstances.[97]

Search Incident to Apprehension

"Out Damn Spot!"

87. *Robinette*, 117 S. Ct. at 421 (citing *Schneckloth*, 412 U.S. at 231).

88. *Id.*

89. 43 M.J. 772 (N.M.Ct.Crim.App. 1995), *rev. denied*, 45 M.J. 16 (1996).

90. "The inclosed space of ground and buildings immediately surrounding a dwellinghouse . . . . [It] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 346 (5th ed. 1979).

91. *Dufour*, 43 M.J. at 775.

92. *Id.*

93. *Id.*

94. Practitioners must always remember that the viewing, by itself, may constitute a search. Thus, a viewing from a place one is not authorized to be, i.e., the curtilage, is a warrantless search.

95. *Dufour*, 43 M.J. at 776.

96. *Id.* at 777 (citing United States v. Acosta, 11 M.J. 307, 313 (C.M.A. 1981)).

97. Practitioners should also emphasize that the use, or burning and thus destruction of drugs, also creates a legitimate exigency.

In *United States v. Curtis*,[98] the CAAF, as in any capital case, reviewed virtually every conceivable issue. In this process, the court provided some helpful guidance to trial practitioners regarding a search incident to apprehension.

Curtis was convicted of murder and sentenced to death. His contact with police began when he overturned a car after the slaying of a lieutenant and his wife. Following arrest and processing at the scene, questioning, a confession at the police station and incarceration, the police finally noticed blood on his clothing.[99] His clothing was seized after he was placed in confinement. The actual period of delay from arrest to seizure is not stated in the court's opinion.

A "full search" of a person incident to a "lawful custodial arrest" is permitted as an exception to the warrant requirement.[100] Although acknowledging there are, indeed, temporal and spatial limitations on a search incident to arrest, the court upheld the seizure of Curtis' clothing, holding that even a "substantial delay will not invalidate a search."[101] Relying on *United States v. Edwards*,[102] the court emphasized by comparison the more lengthy ten hour delay in *Edwards*, which the Supreme Court approved.[103] Again, although not specified in *Curtis*, something less than ten hours from arrest is permissible.

Although *Curtis* does not specifically create an outer limit on the timing of a search incident to arrest, by incorporating *Edwards* the CAAF has effectively given trial advocates a useful ten hour benchmark.

Exceptions to the Probable Cause Requirement

Consent: The Pen is Often More Destructive Than the Sword

The CAAF was active in the consent to search arena, examining not only the nature and scope of the consent, but also providing insights on the permissible use of deception in obtaining consent.

In *United States v. Reister*,[104] the court examined the doctrine of actual authority to consent in the context of a house-sitter/paramour. First Lieutenant (1LT) Reister invited Hospitalman Apprentice N to house-sit his apartment for three weeks while he was away. He gave her full use of the apartment during his absence. According to N, there were "no restrictions as far as what I could or couldn't do."[105] The night before he went on leave, he invited N to his apartment for dinner. Following dinner, they had sexual intercourse.[106]

Troubled and ruminating on her actions the next day, N began to look around the apartment. Out of curiosity, she opened a green, cloth-covered military record book she found on a bookshelf. In the book she found information regarding his flight experiences as a pilot. She then flipped to the back of the book. Her eyes widened as she read the word "Conquests" at the top of the page. Below "Conquests," she found explicit descriptions of sexual encounters with other women.[107] Her anxiety likely piqued, she next looked in a bedside table and found a slip of paper with the word Zovirax written on it. To her dismay, she soon discovered Zovirax is used to treat herpes.[108]

Following her discoveries, she discontinued living in the accused's apartment, but was unsuccessful in reaching 1LT Reister to terminate their arrangement. Until his return, she kept the key and continued to feed "Spike," the cat.[109]

Shortly after her discoveries, she reported to NIS that she was raped and forcibly sodomized. She then consented in writing to a search of the apartment.[110] She returned with two NIS agents, trial counsel, and her supervisor. NIS then took photos

98. 44 M.J. 106 (1996).

99. *Id.* at 142.

100. *Id.* at 143 (citing United States v. Robinson, 414 U.S. 218, 235 (1973)).

101. *Id.*

102. 415 U.S. 800 (1974).

103. *Curtis*, 44 M.J. at 143 (citing *Edwards*, 415 U.S. at 807).

104. 44 M.J. 409 (1996).

105. *Id.* at 411.

106. *Id.*

107. *Id.* at 412.

108. *Id.*

109. *Id.*

110. *Id.* at 413. NIS conducted the search to corroborate her story.

of the apartment, including the logbook, and contacted the listed women. A motion to suppress the photographs based on lack of authority to consent was denied at trial.[111]

The CAAF affirmed, holding that N had actual authority to consent to the search and seizure of evidence in the apartment.[112] Alternatively, the court held that, even if her authority did not include opening the logbook or the nightstand, any invasion was a private search and, therefore, outside the scope of the Fourth Amendment.[113] The court stated that, in general, a person with "common authority over the premises" may consent to a search,[114] and a person who "exercises control over property" may grant consent to search.[115] Given N's "unrestricted access to the apartment," the court had little trouble finding actual authority. Additionally, the court paid close attention to the opening of the logbook, which itself was a search. Examining the book's placement, appearance and location, and significantly, the accused's failure to secure the book, the court upheld the trial court's finding that the accused had no subjective expectation of privacy and, therefore, no standing to object.[116]

In the alternative, the court held that, even if N had no actual authority to show NIS the logbook and Zovirax note, any invasion of accused's privacy was the product of a private search. The exclusionary rules only apply to government searches. N's exploration of the apartment was motivated by curiosity and confusion resulting from the unwanted sexual encounter.[117] Because N had authority to invite others into the apartment, there is no constitutional difference between bringing the evidence to NIS or bringing NIS to the evidence.[118]

Consent Urinalysis: "What If I Refuse?"

In *United States v. Radvansky,*[119] the CAAF put a fresh and slightly different colored stain on its approach to voluntariness and consent for a command requested urinalysis.

Airman Radvansky's supervisor, MSgt D suspected Radvansky of using drugs. MSgt D took him to the First Sergeant to discuss the matter.[120] The accused met for the first time MSgt I, the First Sergeant trainee, who just happened to be a security policeman wearing his security police badge and beret. Following pleasantries, MSgt I asked Radvansky for his consent to a urinalysis.[121] The accused, a 20 year old, had been an airman for 14 months. According to MSgt I, Radvansky consented to the test and signed the standard consent form. Prior to signing the form, however, the accused asked, "what would we do next"[122] if he refused. MSgt I then explained "we would have to go in and approach the commander . . . [b]ut at this point there was no reason to do that . . . it was strictly up to him if he wanted to make the decision or not."[123] According to MSgt D, MSgt I told the accused "that he can give a sample of his own free will or we could have the commander direct you to do so."[124] Both MSgts I and D emphasized they asked for consent, did not demand it and made no threats.[125]

Radvansky said he believed the First Sergeant trainee was there to apprehend him and that he was either to consent or the commander was going to order the urinalysis.[126] No explanation was given to Radvansky as to the difference between con-

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 414 (citing United States v. Matlock, 415 U.S. 164 (1974)).

115. MCM, *supra* note 2, Mil.R.Evid. 314(e)(2).

116. *Reister*, 44 M.J. at 414.

117. *Id.* at 416.

118. *Id.*

119. 45 M.J. 226 (1996).

120. *Id.* at 228.

121. *Id.*.

122. *Id*.

123. *Id.* at 229.

124. *Id*.

125. *Id*.

126. *Id.* at 228.

sent and an order. Radvansky testified that he believed he had no option.

On appeal, the defense requested a bright line rule requiring a full explanation of options anytime the possibility of a commander-directed search is mentioned to a servicemember as part of a request for consent to a urinalysis. In response, the CAAF dismissed any possibility of a bright line rule in the command-requested urinalysis context, adhering instead to the long-standing totality of the circumstances test with its clear and convincing burden.[127]

The court first considered its precedent in the area of consent urinalysis. In *United States v. White*,[128] it held that mere acquiescence is not consent. "Failure to advise an accused" in a meaningful manner "of the critical difference between a consent and a command-directed urinalysis, once the subject is raised, can convert what purports to be consent to mere acquiescence."[129] Finally, in *United States v. McClain*,[130] Judge Cox set out the rules in a chart to assist practitioners in this area.[131] In addition, he wrote, "[a]n official seeking consent from a servicemember may explain that he will attempt to obtain from an appropriate commander or military judge a search authorization based upon probable cause if consent is not forthcoming, but it must be done in an appropriate manner so as to make the resulting consent truly voluntary."[132] The *Radvansky* court looks to this last point and emphasizes that voluntariness is a question of fact.[133] Knowledge of the right to refuse is one factor among many. "The mere remark that a commander can authorize a search does not render all subsequent consent involuntary."[134]

The court reiterated its preference for a totality of the circumstances test for voluntariness and rejected Radvansky's request for a bright line rule requiring a "precise" explanation of the consequences of command alternatives. Viewing the totality of circumstances, the accused "was not forced or coerced into giving consent to furnish a sample of his urine . . . [He] was not intimidated or misled into giving consent . . . . He was not threatened or made any promises."[135] Further, the accused read, understood and signed a consent to search form.[136] Under a totality of the circumstances, the court found that the accused voluntarily consented.[137]

Radvansky clearly represents at least a modest departure from the traditionally paternalistic approach the court has previously taken in consent urinalysis cases. While the court's leanings may motivate some counsel and depress others, its most significant teaching point may lie in the importance of a clear factual predicate. Well-prepared witnesses win the day in almost any case. When it involves issues of consent and higher

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127. *Id.* at 230-31.

128. 27 M.J. 264 (C.M.A. 1988).

129. *Radvansky*, 45 M.J. at 230 (citing United States v. Cook, 27 M.J. 858, 859 (A.F.C.M.R. 1989)).

130. 31 M.J. 130 (C.M.A. 1990).

131. *Id.* at 133. See chart below:

Consent to Search

Circumstances of Consent	**Result**
1. Consent obtained without threat of "command-directed" urinalysis or search warrant under Mil. R. Evid. 315(e).	Admissible.
2. Consent obtained with threat of "command-directed" urinalysis United States v. White, *supra.*	Not Admissible.
3. Consent obtained with threat of potential search warrant or search authorization. United States v. Salvador, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).	Possibly Admissible; depends on circumstances.
4. Consent obtained with threat of actual search warrant or search authorization. Bumper v. North Carolina, 391 U.S. 543 (1968).	Not admissible by virtue of consent; Admissible by virtue of warrant.

132. *Id.* at 133.

133. *Radvansky*, 45 M.J. at 231. "'Voluntariness' has long been 'a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse' consent 'is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" (citing Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973)). *Id.* at 231.

134. *Id*.

135. *Id.* at 231-32.

burdens of proof, preparation, a command of the facts and witness credibility are at a premium.

When training commanders and NCOs, it is also important to stress the use of consent forms. This played a significant role in the court's opinion. This is especially true when, as here, the form explains the consent option about which the accused originally inquired.[138]

The courts will also look to the command representative's ability to "explain" the consequences of a refusal. Although the court rejects in *Radvansky* the requirement of a "precise" explanation of consequences, something of an explanation is expected, and inaccuracy will likely not be tolerated. Practitioners must anticipate and train commanders and NCO's in this regard.

Finally, *Radvansky* is significant for what it does not say. Indeed, Judge Sullivan's strongly worded lone dissent posits that *Radvansky* effectively overrules *White* and *McClain*. In what are, indeed, troubling excerpts from the record, Judge Sullivan highlights a picture of the First Sergeant's conversation that is somewhat different from that painted by the majority:

> MJ: Okay, at what point was there a comment about the command could order a sample?
>
> MSgt D: Well, it was, to the best of my knowledge, in between the time Airman Radvansky had become resistant to consenting on his own free will and between the time when he signed the form. He--gosh . . . he was resistant to signing the form. Sergeant Isley then mentioned that if he did not give a sample of his own free will that we could always have the commander direct him to do so.[139]

Admittedly, Sullivan quotes only a portion of the record, but his view that *Radvansky* represents an "impromptu jettisoning"[140] may find a sympathetic audience among trial judges. The quoted language and "atmosphere" is very similar to the language and "atmosphere" the court found objectionable in *White*.[141] Defense counsel may find success arguing *Radvansky* as an aberration.

Salazar and "The Tissue of a Lie" Revisited

As discussed above,[142] PFC Salazar's theft of stereo equipment caused MPI to contact Mrs. Salazar at her home and say that PFC Salazar "wanted her to bring all the electronic equipment that was at the house to the station."[143] She ultimately took the equipment to the station and then learned the police had lied to her. PFC Salazar never asked that she bring in the equipment. Mrs. Salazar, who was then eight months pregnant, became extremely upset and threatened to kill her unborn child. No consent form was ever signed.

Following its discussion of standing, the court recognized that the issue of consent was not ripe, because the trial court found no standing.[144] Consent, therefore, was not litigated. Nevertheless, the CAAF felt compelled to expound on the propriety of deliberate misrepresentation by government authorities to gain consent. The court first reminded practitioners that voluntary consent is examined under the totality of the circumstances.[145] The court also recognized the government's ability

136. *Id.* at 232. The consent form read in part:

> I know that I have the legal right to either consent to a search, or to refuse to give my consent. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law . . . . Before deciding to give my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful influence or benefit, or immunity having been made to me . . . I have read and understand this entire acknowledgment of my rights and grant my consent for search and seizure.

Id. at 228 n.5

137. *Id.* at 232.

138. *Radvansky,*45 M.J. at 228 n.5. "I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law." *Id.*

139. *Id.* at 233.

140. *Id.* at 232.

141. In *White*, the accused was brought by her supervisor to her commander for questioning about a confidential informant's tip of drug use. Airman White asked what would happen if she did not consent. [T]he commander replied that he would then 'command direct' it; that he would "order her to provide the sample." *White*, 27 M.J. at 264.

142. *See supra* notes 19-31 and accompanying text.

143. United States v. Salazar, 44 M.J. 464, 468 (1996).

144. *Id.* at 467.

to use sting operations and informants to obtain consent or to induce criminals to bring stolen goods into plain view.[146]

The court then equated the officer's misrepresentation of "I have consent," with "I have a warrant."[147] In the court's view, the result is acquiescence, not lawful consent. The court finds no meaningful distinction between "I have consent" and "I have a warrant," and suggests that on remand, the court below analyze the issue in this light.

Finally, after citing fairly obscure Pennsylvania Supreme Court precedent, the court frames the "question" as whether a soldier's "spouse . . . may 'depend' upon military authorities to tell the truth in official matters."[148] The court's intense disapproval of such tactics is unmistakable. In fact, its desire to write on this issue combined with the tenor may cause the cynical reader to conclude the earlier resolution of the standing issue was, in reality, driven by the court's outrage over the police tactics. The chivalrous gauntlet having been thrown by the court, it seems clear even to the casual observer that while the court's logic and analysis may be flawed and result-driven,[149] such investigative tactics are forever "beyond the pale."[150] Agents and investigators must be so advised.

The Good Faith Exception

Maxwell Revisited: Applying the Brakes to Good Faith

In an unexpected twist, the CAAF refused to apply the good faith doctrine in *Maxwell*, resulting in the dismissal of two specifications.[151]

Although Colonel Maxwell had one AOL account in his name, he had subdivided his account into four distinct screen names, which the court analogized to separate mailboxes. The two relevant screen names were "Redde1" and "Zirloc." The FBI's first request for access to transmissions was denied by AOL which required a search warrant. AOL, anticipating the warrant, began extracting all e-mail from a list of screen names. Evidently, AOL did this based on a list provided originally by the person who later became the FBI source. While "Redde1" was on the list, "Zirloc" was not. AOL, however, expanded the extraction to all screen names owned by each subscriber. Thus, AOL extracted e-mail from all of Colonel Maxwell's screen names. When the FBI returned to execute the warrant, it contained only the "Redde1" screen name, not "Zirloc." Nonetheless, AOL having already preset its extraction procedure based on the initial list, released to the FBI e-mail from all of Colonel Maxwell's screen names. The CAAF found no evidence that AOL acted in bad faith or that it intentionally maneuvered "beyond the scope" of the warrant in extracting mail from both accounts.

Since incriminating evidence was seized from the "Zirloc" account, for which there was no probable cause, the court ruled this evidence inadmissible unless an exception was present. The government ultimately argued good faith, and the AFCCA upheld the search of "Zirloc" on this ground.[152]

The CAAF rejected the good faith exception. AOL's anticipatory compilation of e-mail from all of Colonel Maxwell's screen names shows "no reliance on the language of the warrant for the scope of the search."[153] "In order for the 'good faith' exception . . . to apply . . . it must be clear that the agents doing the search were relying on a defective warrant."[154] The "seizure of the e-mail in the 'Zirloc' mailbox was not authorized by the warrant and . . . AOL did not rely on the language of the warrant to formulate its search."[155] It is clear AOL really relied on the list of names already in its possession--albeit the identical list provided in the warrant--and their conversations with the FBI prior to the search. Having rejected good faith and there being

145. *Id.* at 468.

146. *Id.* (citing Lewis v. United States, 385 U.S. 206, 209 (1966) (federal undercover agent who misrepresented identity on the telephone and was invited to petitioner's home to execute narcotics transactions could properly seize illegal narcotics in petitioner's home as legitimate invitee); Hoffa v. United States, 385 U.S. 293, 302 (1966) (no rights violated under Fourth Amendment by failure of government informant to disclose identity to petitioner; Hoffa relied not on 'security of the hotel room' to make incriminating statements, but on 'misplaced confidence' that informant 'would not reveal' statements).

147. *Id.* at 469.

148. *Id.* at 469 (citing Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963)).

149. *See, e.g., id.* at 470-74 (Everett, J., concurring in part and dissenting in part, and Crawford, J., dissenting).

150. "[B]eyond the limits of propriety, courtesy, protection, safety . . . ." RANDOM HOUSE COLLEGE DICTIONARY (1980).

151. This will necessitate a rehearing on sentence.

152. United States v. Maxwell, 45 M.J. 406, 414 (1996).

153. *Id.*

154. *Id.*

155. *Id.* at 420.

no other basis for admission, the CAAF dismissed the two specifications based on the "Zirloc" screen name.[156]

What is most troubling about the court's reluctance to apply good faith is its failure to distinguish this case from other applications of the good faith doctrine. The court appears to concede there is no evidence of bad faith by either AOL or the FBI.[157] Indeed, AOL in large measure used and responded to information it had received from a private citizen, acting in his private capacity and expressing his concern about the improper use of the on-line service. Why exclude evidence from the Zirloc screen name?

Indeed, this appears to be the first CAAF good faith case that fails to include the standard mantra discussion of the purpose of the exclusionary rule and the good faith exception. In previous opinions, the court has routinely explained that the exclusionary rule is designed to "deter police misconduct rather than punish . . ." judges, magistrates or the police.[158] In the absence of bad faith, the court has repeatedly told us that the exclusionary rule is not appropriate. This discussion is oddly and noticeably missing from *Maxwell*.

Perhaps more significant is the court's failure to explain, beyond the conclusory, "they didn't rely on the warrant." This failure can be explained by the fact that despite the absence of bad faith or misconduct, the CAAF was simply not inclined to further expand the perceived "Mack Truck" quality of the good faith exception. Excusing a well-meaning commander in the scope of his authority,[159] in the probable cause determination itself,[160] or in cases where officers reasonably rely on defective warrants, is appropriate.[161] To now excuse a "pre-warrant" search, albeit by well-meaning "agents of the government," is "a bridge too far."[162] Still, if the purpose of the exclusionary rule is not met, that is, to deter bad behavior, what is the reason for the exclusion?

More surprising still, however, is the Court's insistence on narrowing the scope of the warrant to a subscriber's single screen name, here "Redde1." The language of the warrant arguably contemplated a much broader search.

As the dissent points out, "[t]he terms of the warrant authorized a search of the e-mail of 'the below listed customers/subscribers' known by the listed screen names."[163] The court "erroneously treats each screen name as a separate user."[164] "The warrant authorized a search of the e-mail of the 'customer/subscriber' using the screen name Redde1, but the warrant was not limited to e-mail using that screen name."[165]

The majority says itself that *Maxwell* "takes us into the new and developing area of the law addressing the virtual reality of cyberspace."[166] The dissent, latching onto this, highlights the essential element of the problem and the role of the good faith exception:

> The long analysis set forth by the majority dramatically demonstrates the difficulty of the issues in this case and the likelihood that reasonable minds would interpret the terms and limitations of the warrant differently. [T]he FBI agents and AOL reasonably interpreted the warrant to authorize the search of the e-mail of customers, not screen names, and they did so in good faith. Hence, even if the warrant was intended to authorize

156. *Id.* at 423.

157. *Id.* at 422.

158. United States v. Chapple, 36 M.J. 410, 413 (1993) (citing United States v. Leon, 468 U.S. 897, 916 (1984), and United States v. Mix, 35 M.J. 283 (C.M.A. 1992)).

159. *Id.*

160. *See, e.g.*, United States v. Lopez, 35 M.J. 35 (C.M.A. 1992).

161. Arizona v. Evans, 115 S. Ct. 1185 (1995).

162. Again, although not articulated by CAAF, one commentator has likely expressed the CAAF's unspoken concern as follows:

> [A] broader good faith exception . . . would be perceived and treated by the police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule 'is that police officers may feel that they have been unleashed' and consequently may govern their future conduct by what passed the good faith test in court . . . rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances and the like . . . . [I]t fosters 'a careless attitude toward detail on the part of law enforcement officials'. . . .

WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT 95-96 (1996) (citations omitted).

163. *Maxwell*, 45 M.J. at 434 (Gierke, J., and Crawford, J., dissenting).

164. *Id*.

165. *Id*.

166. *Id.*

searches only of the listed screen names, the search of the Zirloc e-mail was lawful because it was conducted in good faith.[167]

While the dissent is much more helpful to counsel in understanding the nuances of the good faith issue, we must, in the end, look to the majority. The primary lesson of *Maxwell* is that good faith is not applicable simply in the absence of bad faith. The exception and requisite analysis is far more rigorous than it might first appear. Unfortunately, the CAAF fails to provide counsel even a glimpse of the "rigor" required, and we are all left to speculate.

Developments in Urinalysis

Although a relatively slow year for urinalysis in the courts,[168] it was not without significant precedent. The most significant case, *United States v. Shover,*[169] continued the CAAF's trend of deference to the commander's inspection authority. Remarkably, the court approved a commander's "inspection" for drug use *during* an *active* investigation of drugs in the same unit. In another important case, the Air Force Court of Criminal Appeals, in a case of first impression, provided valuable guidance in the effective use of hair analysis as the sole evidence of drug use.

Subterfuge

The Problem of Euphemisms

In *Shover,* the CAAF upheld a urinalysis inspection intended to "either clear or not clear" personnel of drug "planting" during an intimately linked criminal investigation which also sought to find the "planter."[170] One day, Major Adams found marijuana in her briefcase and reported the discovery. OSI cleared her and then widened the investigation to the unit. Three people were identified as potential "planters." Shover was not among them. As OSI conducted its investigation, the Chief of Justice in the Office of the Staff Judge Advocate asked OSI if a urinalysis of the unit[171] would help the investigation.[172] As OSI conducted its investigation, the acting commander accepted the suggestion from "the Judge Advocate's office"[173] to conduct a urinalysis. The commander did so, and the accused tested positive for methamphetamine. At the suppression hearing, the commander said he ordered the building-wide inspection primarily to end the "finger pointing, hard feelings,"

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167. *Id.* (Gierke, J., dissenting).

168. Recently released national statistics indicate a disturbing increase in the use of drugs, particularly more sophisticated, harder to detect drugs, among teenagers. This represents a potential threat to the Army's recruiting pool:

Cocaine:	1994-95	166% increase
Marijuana:	1992-95	141% increase (37% in 1995)
LSD:	1992-95	183% increase (54% in 1995)

Source: The Washington Times, 21 August 1996

The Army has also seen a modest rise in the use of certain drugs, although this is primarily attributable to improvements in technology that allow the routine testing of four to six drugs per sample. The totals below represent Active Army positive specimens:

1995	**1996**
Opiates/7	Opiates/421 (includes prescribed drugs)
PCP/0	PCP/5
Amph/339	Amph/157
Cocaine/1294	Cocaine/1262
THC/4058	THC/4111
LSD/40	LSD/13

Source: United States Army Drug & Alcohol Operations Agency

169. 45 M.J. 119 (1996).

170. For a complete discussion of *Shover* and its consequences, see Major Charles N. Pede, *Subterfuge, Commander's Intent and Judicial Deference*, ARMY LAW., Feb. 1997, at 41.

171. The propriety of ordering a unit wide urinalysis during an investigation for drug misconduct is certainly questionable. This case is a good illustration of the dangers inherent in such a course of action.

172. The agent testified he did not think it would help identify who tried to frame Major Adams, but it might indicate drug problems in the unit. *Shover*, 45 M.J. at 120.

173. *Id.* Apparently, the SJA's office conveyed the same message not only to OSI but also to the commander.

and "tension, . . . [and] to get people either cleared or not cleared."[174]

In a disturbingly conclusory discussion, CAAF affirmed. It first reminded practitioners that, when deciding whether a urinalysis is a valid inspection, the focus is on the commander.[175] It then found the commander's primary purpose was unequivocal and that no person was targeted.[176]

Shover demonstrates the court's expansive view of a proper primary purpose in the subterfuge arena. This merely continues a trend, of which *United States v. Taylor*[177] is a significant recent example. In upholding a urinalysis inspection in *Taylor*, the court focused on the commander who ordered the urinalysis and what he knew when he ordered it. The court refused to impute compromising "subterfuge knowledge" of subordinates to the commander.[178] Indeed, the court has recently questioned the scope of the subterfuge rule, observing that "Mil. R. Evid. 313(b), which makes a distinction between administrative inspections and inspections for prosecutorial purposes, is probably more restrictive than it need be."[179] The CAAF is not alone in its dislike of Military Rule of Evidence 313(b). The service courts have similar views. In *Shover*, Chief Judge Dixon echoed this concern when he said, "[w]e interpret Mil.R.Evid. 313(b) as we find it, not as we might like it to be."[180]

Most troubling about *Shover* is the absence of any meaningful discussion confronting the likely critiques, to include some sharp dissents. The court simply fails to address the obvious argument that the commander's statement "to either clear or not clear" individuals was merely a euphemism to identify a perpetrator and prosecute. The majority ignores the dissent's excellent argument that "the urinalysis was ordered to assist an investigation of . . . [OSI], not out of some general concern for the well-being of the unit."[181] Judge Sullivan pushed even more, saying "[a]ny other construction of [the commander's] words ignores their plain meaning and renders Mil.R.Evid. 313(b) meaningless."[182] The omission of any response only lends credibility to the criticism that *Shover* is simply result-oriented distaste of Military Rule of Evidence 313(b).

In addition to CAAF's apparent dislike of Military Rule of Evidence 313(b), *Shover* demonstrates the importance of witness preparation. Regardless of whether one is a trial counsel or defense counsel, early discussions with the commander may be the key to success. Word choice in such a motion is at a premium, and locking the commander in early may guarantee the success of one side or the other.

Hairnetting Drugs

In *United States v. Bush*,[183] a case of first impression, the Air Force court upheld the use of hair analysis to prove drug use. Previous judicial encounters with hair analysis were problematic.[184] *Bush* is the first time that hair analysis was not only admitted to prove drug use, but where it was the only evidence produced on the issue of drug use.

During a normal unit inspection, the accused provided a urine sample. Months later, the lab determined that the sample was saline.[185] Aware that drug use is only detectable for a short period of time in urine, the command opted for hair analysis, as evidence of drug use may be present in hair for months. The commander then granted a search authorization for Bush's hair.

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174. *Id.* at 122.

175. *Id*. (citing United States v. Taylor, 41 M.J. 168, 172 (C.M.A. 1994)).

176. *Id.*

177. 41 M.J. 168 (C.M.A. 1994).

178. *Id.* at 172.

179. *Id.* at 171-72.

180. United States v. Shover, 42 M.J. 753, 758 (A.F. Ct. Crim. App. 1995) (Dixon, C.J., dissenting) (quoting United States v. Parker, 27 M.J. 522, 528 (A.F.C.M.R. 1988)).

181. *Shover,* 45 M.J. at 123 (Everett, S.J., concurring in part and dissenting in part).

182. *Id.* at 124 (Sullivan,J., dissenting).

183. 44 M.J. 646 (A.F. Ct. Crim. App. 1996). *See also* Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., April 1997, at 92.

184. United States v. Nimmer, 43 M.J. 252, *recon. denied*, 43 M.J. 409 (1995). In *Nimmer*, the defense attempted to introduce the negative results of hair analysis. The court rejected the evidence because the test would not rule out a one-time use of the drug.

185. At trial the government introduced evidence that the accused was capable of "reverse catheterization," replacing the urine in his bladder with a saline solution! *Bush*, 44 M.J. at 647. Such an effort demonstrates just how committed some drug users are not only to their drugs, but to beating the test. The importance of "smart" testing cannot be exaggerated. Serious attention must be paid to selecting conscientious Drug and Alcohol Coordinators, and attentive and serious observers. Further, counsel must encourage clever testing patterns at units that will enhance the ability to detect drugs with shorter detection times.

The evidence was plucked and sent to the lab, where it tested positive for cocaine.

At trial, Bush was convicted of dereliction of duty for his original failure to provide a urine specimen and of use of cocaine based on the hair test results.[186] Hair analysis was the sole basis for the finding of use. The Air Force Court began with the very important lesson for practitioners that a commander's ability to simply reissue an inspection order, even months later, is unquestioned.[187] Although this was not done, the court reminded practitioners that a servicemember "facing a valid, random inspection . . . may [not] by his own misconduct frustrate that inspection and require the government to produce probable cause for any subsequent search or seizure."[188] The accused must not profit by the "delayed discovery of his subterfuge."[189]

The court wasted little time finding probable cause to support the seizure of hair.[190] All parties conceded that the substitution of saline provided probable cause to authorize a search. The court then took up its lengthy, instructive and thorough review of the admissibility of hair analysis. Using the framework recently announced by the Supreme Court,[191] the Air Force Court found the tests performed were scientifically reliable and valid and, therefore, affirmed Bush's conviction.

Bush is significant for many reasons, not least of which is the lesson that efforts to avoid a urinalysis inspection should first be met with the re-issuance of the original lawful order. *Bush* is also significant because of the potential use by both trial counsel and defense counsel of hair testing. Whether it serves as corroboration or rebuttal evidence for government counsel, or as exculpatory or client control evidence for defense counsel, it will certainly become a fixture of our practice. The availability of commercial labs willing and able to do such testing is also noteworthy.[192]

Also of interest to both trial and defense is the issue of charging. To what extent could or should trial counsel charge long-term use of drugs revealed in the hair follicle testing? Because hair analysis shows historical use, should trial counsel charge use on "divers occasions" or construct multiple specifications for artificially divided periods of time? The latter practice almost certainly would run afoul of the rule against unreasonable multiplication of charges. In the end, *Bush* will provide many new areas for counsel and the courts to explore the limits of the law on hair analysis.

186. *Id.* at 648.

187. *Id.* at 649.

188. *Id.*

189. *Id.*

190. *Id.*

191. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), *aff'd on remand*, 43 F.3d 1311 (9th Cir. 1995). *Daubert* rejected the old *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "general acceptance within the scientific community" standard and replaced it with a non-exclusive five factor test. The trial judge acts as evidentiary gatekeeper when it comes to novel scientific techniques. The focus of this initial judicial inquiry shifts from acceptance of the scientific proposition itself to acceptability of the methodology used to reach it. The factors the trial judge uses in making this determination include: (1) whether the technique or theory can be tested; (2) whether the technique or theory has been subjected to publication or peer review; (3) the error rate of the scientific method; (4) the existence of any control standards; and (5) the degree to which the technique or theory has been accepted within the scientific community.

192. *See* Sam Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10.

Command Direct

In *United States v. Streetman*,[193] the accused was initially reluctant to submit to a routine random urinalysis inspection. The commander, who was stationed in another state, faxed a memorandum to the accused restating the order to provide a sample. Unfortunately, the commander styled the subject line of the memo, "Commander Directed Urinalysis Test."[194] In the Air Force, this phrase is a term of art whose equivalent in the Army is "fitness for duty." Thus, at trial, the accused argued this urinalysis was transformed into a limited use test and therefore not the proper subject of a court-martial.

The court rejected this contention on the fairly simple ground that an inartfully worded order and inadvertent mistake by a commander does not operate to transform an order that merely reinforced the accused's obligation to comply with the original random inspection order into a fitness for duty order. Furthermore, the commander provided convincing testimony that it was not her intent to transform the order.

The accused also argued that his refusal to give a sample and his comment, "I've done something stupid" following the first order and before the second, invalidated the subsequent inspection order because clearly he was a suspect at this point.[195] Any order at this point required a probable cause determination. The court makes similar short work of this clever argument that "two wrongs (drug use and disobedience) don't make a right." Citing two cases,[196] the court simply found unworkable an approach whereby a soldier's admission or confession and disobedience of an order divests a commander of the ability to continue an ongoing inspection. Much like limited use and self-referral under AR 600-85, soldiers cannot successfully self-refer as they enter the latrine with bottle in hand in the hope of avoiding the ongoing inspection.[197]

Conclusion

There are many lessons in this year's Fourth Amendment jurisprudence for criminal law practitioners. Counsel must devote time to understanding not only the "new" rule regarding pretextual stops, but also the nature of expectations of privacy and the limits of good faith. Counsel must also decide for themselves to what extent they will push or risk the subterfuge envelope. It is also clear that defense counsel must be even more vigilant in these new and expanding areas of the law. Issues of privacy, standing, pretext, and euphemisms should be litigated vigorously.

193. 43 M.J. 752 (A.F. Ct. Crim. App. 1995), *review denied*, 44 M.J. 270 (1996).

194. *Id.* at 754.

195. *Id.*

196. United States v. Moeller, 30 M.J. 676 (A.F.C.M.R. 1990); United States v. Nand, 17 M.J. 936 (A.F.C.M.R. 1984).

197. Dep't of Army, Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 6-3 (21 Oct. 1988).

In with the Old: Creeping Developments in the Law of Unlawful Command Influence

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Introduction

On the surface, 1996 might give the impression of providing no significant developments in the law of unlawful command influence. Neither the Court of Appeals for the Armed Forces (CAAF) nor the service courts issued a command influence opinion likely to be of great precedential value. The year did, however, feature several opinions that start to make clear which opinions from prior years will be of enduring significance in clarifying the burden of proof in command influence cases, and in giving clearer guidance to counsel on how to litigate these issues. The message in short is as follows: rely on *Ayala*[1] and *Stombaugh*,[2] ignore *Gleason*,[3] argue aggressively if you represent the government, and raise the issue promptly and vigorously as defense counsel.

Burden Shifting

The contentious issue of how the defense shifted the burden to the government to force it to disprove the existence of command influence generated the *Ayala* opinion in 1995. In that decision, the CAAF found that an affidavit asserting command influence, compiled after trial and in presumed good faith by a specialist who was a friend of the accused, was insufficiently specific to require the government to answer.[4] In this term the courts relied on *Ayala* several times, most notably to find that the burden did not shift in a case where a senior commander of the accused clearly made intemperate statements.

'Now go give the low lifes a fair trial'

In *United States v. Newbold*,[5] the commander of the accused's ship held an "all hands" formation the day after the accused and four others were arrested for rape. In the formation, Lieutenant Commander (LCDR) Casto, the commander, talked about the incident and called the alleged participants "low lifes and scumbags," who should be punished.[6] He held a second such meeting two weeks later, at which he read a letter from a co-accused apologizing for the conduct.[7] At this formation the commander said he "could not understand how some of the crew could 'welcome these rapist[s] back into our arms.'"[8] An affidavit, generated by a female seaman apprentice also said that the commander told women sailors, at a separate meeting, that a number of male sailors had little regard for females; the commander, according to the affidavit, referred to such men as "animals."[9]

The CAAF dismissed the accused's allegation of unlawful command influence on three primary grounds: (1) the ship commander was not a convening authority in the accused's case, (2) Newbold pled guilty, and (3) he did not complain in any of his motions or post-trial submissions about possible unlawful command influence.

A number of facts worked together in *Newbold* to limit the potentially damaging nature of the commander's statements. The fact that none of the panel members was from the accused's ship removed one possible effect of command influence,[10] assuming the members who served on Newbold's panel were

1. 43 M.J. 296 (1995).

2. 40 M.J. 208 (C.M.A. 1994) (suggesting that command influence can only be exerted by one acting with the "mantle of command authority").

3. 43 M.J. 69 (1995) (overturning the conviction of a sergeant major for, *inter alia*, solicitation to murder, because a lieutenant colonel made remarks that the three-person majority found to have intimidated witnesses).

4. *Ayala*, 43 M.J. at 300 (the accused's friend, Specialist Slack, cited seven NCOs and officers whom he contacted and who, he asserted, did not support the accused for a variety of command-induced reasons).

5. 45 M.J. 109 (1996).

6. *Id.* at 110.

7. *Id.*

8. *Id.*

9. *Id.* at 110-11.

10. "No members of the court-martial were from appellant's ship." *Id*. at 113.

ignorant of (or, because of the absence of a command relationship, impervious to) the commander's statements. The CAAF strongly relied, however, on Newbold's waiver of the Article 32 investigation, his plea of guilty, and his evident disinclination to raise the issue at trial or at the clemency stage.[11] Unlike some command influence cases, the majority opinion did not offer even cursory criticism of the ship's commander.[12]

Still, the decision is important because it reinforces the significance of *Ayala*, signaling if not a "hard line" on command influence claims, at least a continued willingness to require a significant and specific showing of prejudice *to the case at hand* before shifting the burden to the government, much less granting relief. The CAAF reinforced the three-part test laid out in *Stombaugh* for litigating command influence issues.[13] In choosing not to even address the ship commander's comments, which would be highly significant if issued by a convening authority,[14] the CAAF raised the question about the vitality of the area of "apparent command influence," in which the court looks not just at the effect on a particular case but the effect on the perceptions of fellow servicemembers and the general public.[15] It is arguable that the comments made on a ship have little effect on the general public, but the effect on fellow sailors was potentially significant. With no analysis, the court simply quoted with approval the service court opinion that Newbold "failed . . . to establish . . . apparent command influence."[16] It relied quite heavily on the fact that the statements were not issued by a convening authority, though clearly by a person in command authority,[17] and that the accused pled guilty. The court simply pronounced itself satisfied that there was no "apparent" command influence.[18]

Newbold contains important lessons for all practitioners. It counsels the government not to be intimidated simply because a commander makes remarks that, if made by a convening authority, might disqualify the convening authority and require other corrective action, such as re-initiation of the charging process, panel re-selection, or liberal granting of challenges for cause. For defense counsel, it reinforces two points that have become increasingly obvious in recent years: (1) command influence not only is waiveable, but a conscious decision not to raise it when aware of it will be considered to be waiver in most circumstances, and (2) counsel need to be persistent, creative, timely and specific in linking actions or comments by commanders or convening authorities to a specific harm in the case at hand, such as intimidated witnesses or junior commanders, or compromised panel members.

Squaring *Newbold* with *Gleason*

It is most instructive to contrast *Newbold* with *United States v. Gleason*,[19] one of the 1995 command influence cases, and an instance in which the court took the extraordinary step of disapproving findings and sentence because of the prejudicial state-

11. *Id.* at 111.

12. In a terse concurrence, Judge Sullivan wrote, "The comments made by the ship's captain were improper. However, the defense did not present any evidence that this conduct impacted on appellant's trial." *Id*. at 113 (Sullivan, J. concurring) (citations omitted). This contrasts, at least in tenor, from two bitter dissents that Judge (then Chief Judge) Sullivan wrote in the 1995 term.

13. *Newbold*, 45 M.J. at 111. In *Stombaugh*, the unanimous court said the defense "must (1) 'allege sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair, and (3) show that the unlawful command influence was the proximate cause of that unfairness." *Stombaugh*, 40 M.J. at 211.

14. *See, e.g.*, United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990) (post commander and convening authority wrote post newspaper article characterizing drug dealers as "slime," "filth," and "unspeakably sordid . . . criminals [who] have no place in a free society"); United States v. Griffin, 41 M.J. 607 (Army Ct. Crim. App. 1994) ("There is no place in our Army for illegal drugs or those who use them." This statement suggesting an inflexible disposition by the convening authority was in a policy letter on health and fitness).

15. United States v. Cruz, 20 M.J. 873, 880-84, *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

16. *Newbold*, 45 M.J. at 111 (quoting the Navy-Marine Court's unpublished opinion at 4).

17. The opinion notes that "the commander was [not] the special court-martial convening authority." *Id*. The CAAF also mentions that "there is nothing in the record to indicate that the commander made any recommendation as to the disposition of the charges," suggesting that Lieutenant Commander (LCDR) Casto may have been a summary court-martial convening authority. *Id*. The court cites *United States v. Nix*, 40 M.J. 6 (C.M.A. 1995) to reinforce the significance of LCDR Casto's not acting as special court-martial authority in this case. The court found significant the fact that LCDR Casto did not convene the court in question--which, in *Nix* (a case having to do with disqualifying of an accuser-convening authority), happened to have been a special court-martial. The opinion does not make clear whether LCDR Casto was a summary court-martial convening authority--and, more importantly, whether his having *some* level of convening authority was at all significant in the court's analysis. It seems unlikely that Casto had any convening authority, as the court observed that "there is nothing in the record to indicate that the commander made any recommendation as to the disposition of the charges." *Newbold*, 45 M.J. at 111. Even this, however, is ambiguous, as the absence of anything in the record could mean that he chose not to make a recommendation in this case or that he had no authority to make such a recommendation. *See generally* R.C.M. 401(c)(2)(A). "When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted." *Newbold*, 45 M.J. at 111.

18. *Newbold*, 45 M.J. at 111. For a treatment of the concept of apparent command influence, see *Cruz*, 25 M.J. at 889-92.

19. 43 M.J. 69 (1995).

ments of a lieutenant colonel battalion commander. The officer who made the intemperate comments in *Gleason*, an Army lieutenant colonel and battalion commander stood in no appreciably greater position of authority to the accused than the navy lieutenant commander in *Newbold*.[20] The statements of the commander in *Gleason*, Lieutenant Colonel (LTC) Suchke, were not obviously more objectionable than those of LCDR Casto.[21] In addition, LTC Suchke issued several public retractions, while LCDR Casto issued none.[22] Two key distinctions, however, should inform the analysis and likely actions of counsel and courts in future such cases: Newbold pled guilty, and was able to find someone from his unit to testify on his behalf.[23] In the *Weasler*[24] opinion in 1995, the majority opinion affirmed that a soldier can make an informed, uncoerced choice to waive an unlawful command influence issue.[25] In that vein, Newbold's choice to forego litigating the possible command influence issues is unremarkable and legally defensible, if not endorsed by the CAAF. *Gleason* turned, more than anything, on the issue of witness availability or intimidation. The CAAF marveled that no one from the accused's unit (though he had other witnesses) testified for this "almost God-like" sergeant major.[26] Regardless of the clumsy link that the CAAF endorsed--assuming an absence of witnesses derived from the intemperate comments of a mid-level commander[27]--the *Newbold* prosecutors seem to have been vaccinated against it by the defense's calling "a senior petty officer from appellant's ship with 27 years service."[28] To be clear, there are significant factual distinctions between *Newbold* and *Gleason*. Though both involved statements by a field grade officer, *Gleason* also involved other actions that the court found created "a command climate . . . that bordered on paranoia."[29] Still, the courts allowed an impression of a negative "command climate" to justify the extraordinary step of disapproving findings and sentence in an extremely serious case. Regardless, Gleason has minimal precedential value and, because the courts focused on atmospherics, provides no reliable guidance to practitioners on what actions or combinations of actions constitute command influence.[30] Beyond the prosaic understanding that a finding of command influence will depend on the unique facts of the case, *Gleason* does not drive that analysis further by clearly explaining what type of conduct rises to the level of paranoia that constitutes unlawful command conduct.[31]

In *United States v. Drayton*,[32] the CAAF found that statements made by a command sergeant major (CSM), prompted by the arrest of the accused, an Army staff sergeant (E-6) for

20. LTC Suchke, was an Army O-5 (fifth officer pay grade) and Gleason's summary court-martial convening authority, while LCDR Casto, was a Navy O-4 with no court-martial convening authority. *See supra note* 16 and accompanying text. This is not to say that possessing authority to convene courts is not a matter of some weight. However, under the circumstances of *Gleason*, it is not the possession of convening authority that made a difference. There was no reasonable prospect that solicitation to commit murder would result in anything other than a general court-martial. Therefore, it is not LTC Suchke's possession of convening authority but his position of commander of those who heard his statements that is most relevant--and which places him in an equivalent position to the ship commander in *Newbold*.

21. LTC Suchke said he believed the accused was guilty, characterized the defense counsel as the "enemy" and trial counsel as "friend," and discouraged witnesses from testifying for Gleason. *Gleason*, 43 M.J. at 72-75. LCDR Casto, among other things, called the accused and his fellow sailors "rapists" and animals who targeted women for sexual intercourse, keeping score of their conquests. *Newbold*, 45 M.J. at 110-11.

22. The Army Court of Criminal Appeals found LTC Suchke's retractions and clarifications, issued on at least three occasions, including the day after the comments were first made, to be ineffectual, and the CAAF ignored them. *United States v. Gleason*, 39 M.J. 776, 780-81 (A.C.M.R. 1994).

23. Again, key to the *Gleason* decision was that he pled not guilty and the court linked the absence of witnesses to the statements of the commander. *Gleason*, 43 M.J. at 74-75.

24. United States v. Weasler, 43 M.J. 15 (1995).

25. Both (then) Chief Judge Sullivan and the late Judge Wiss issued stinging dissents in *Weasler.* Chief Judge Sullivan wrote that the majority had sanctioned "private deals between an accused and a command to cover up instances of unlawful command influence . . .[,] a 'blackmail type' option to those who would engaged in unlawful command influence." *Id*. at 20-21 (Sullivan, C.J., dissenting). Judge Wiss wrote that the majority opinion would enable a convening authority to "buy off that accused's silence and go on his merry way." *Id*. at 21 (Wiss, J., dissenting).

26. *Gleason*, 43 M.J. at 75.

27. The majority opinion states, "we do not believe that--absent command influence--these same [sentencing] witnesses would have been any less willing to testify as character witnesses on the merits . . . ." *Id*. Judge Gierke's dissent, joined by Judge Cox, asserted the dubious causal link between LTC Suchke's statements and the lack of witnesses from the accused's unit, noting that "a good-soldier defense would have been dead on arrival" and that the majority irrationally inflated the significance of the comments of one lieutenant colonel "that virtually the entire United States Army was intimidated by him from rallying" to the defense of the 26-year veteran, who had served in many units and assignments during a distinguished career. *Id*. at 77 (Gierke, J., dissenting). The case was the subject of considerable press attention, and was featured on CBS' "60 Minutes" television program.

28. *Newbold*, 45 M.J. at 111.

29. *Gleason*, 43 M.J. at 72-73 (quoting the Army Court of Military Review). The CAAF continued: "We find that the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy." *Id*. at 73 (quoting the Army Court of Military Review).

30. The *Gleason* majority (it was a 3-2 decision) included Senior Judge Everett, who is likely to sit much less in the future, now that the CAAF again has five permanent members with the addition of Judge Effron, and the late Judge Wiss. Judge Crawford did not participate in the case.

shoplifting, again failed the *Ayala* test for shifting the burden to the government. In *Drayton*, the CSM addressed a Noncommissioned Officer Development Program (NCODP) meeting two weeks after the accused's arrest for shoplifting. At the meeting where generic tapes of the Post Exchange's video monitoring system were displayed, the CSM talked broadly about shoplifting as well as about, according to Drayton, "the NCO in the Battalion," opining that "it didn't look good for him."[33] The majority, relying on *Ayala*, said the defense failed to meet the burden of showing who might have been intimidated from testifying. While lightly chiding the CSM for the comments,[34] the court found he "merely recited a truism, that 'it didn't look good for'" Drayton.[35] More complicated for future cases is the majority's implicit sanction of the language because of the intent of the speaker. Judge Gierke wrote that the defense failed to prove that the CSM "intended to influence his subordinates" and that his comments were aimed at "deterring them from shoplifting, not deterring them from testifying for appellant."[36] The CAAF relied heavily on the fact that Drayton called five noncommissioned officers, including two senior to him from his company, to refute any suggestion that witnesses were intimidated. "We are left to speculate who, if anyone, from appellant's battalion was intimidated into silence by the" CSM.[37] To the extent that this follows traditional analysis--absence of proof of intimidated witnesses--it bolsters a clearly-developing line of healthy precedent. Judge Gierke's suggestion, however, that the CSM's *intent* was relevant--*i.e.*, that he only intended to deter shoplifting, not testimony--would entail a significant broadening of the government's defenses in analyzing command influence statements. Most commonly, such statements are interpreted in light of the reasonable *receiver* of the communication, so that the speaker's intentions are irrelevant. The CAAF may find itself having to clarify or restrict Judge Gierke's interpretation of the CSM's statement in this case, to make clear that his intent was irrelevant but that the effect of his good faith--an absence of effect on witnesses--was the relevant measure of the absence of command influence.

Assessing Your Prospects

If the CAAF cannot find some tangible prejudice, it seems inclined to find "command influence in the air"[38] but not to require corrective action. Still, practitioners can draw some direction from recent cases which steer practitioners to focus more of their analytical attention on cases such as *Ayala* and *Stombaugh* and to treat the rarely cited *Gleason* as a dramatic, fact-bound opinion designed to show that the courts will, out of sheer pique, reverse findings and sentence when sufficiently outraged by a commander's conduct, notwithstanding attempted or actual corrective measures.[39]

Defense counsel need to assess their cases with cold realism. Presumably, Newbold and his counsel concluded that the intemperate statements alone probably were not going to win the accused long term relief. The statements could have affected panel selection and witness availability, but even if the panel had included members from the accused's ship (or others "infected" by the comments), that issue could have been resolved at that stage of the trial.[40] Witness availability seems frequently to be the linchpin of these issues, and the fact that the defense was able to call a compelling witness may have been an additional factor that motivated Newbold to limit the signifi-

31. The opinion of the Army Court gives a better catalogue of some of the actions--other than the comments of LTC Suchke--that the court found damaging and offensive. They include returning the accused to Okinawa in leg irons and chains under a Marine guard, limiting visitors to immediate family and lawyers unless LTC Suchke approved, and search and interrogation of members of the accused's company for evidence of gun and drug smuggling (related to some of the accused's alleged offenses). *Gleason*, 39 M.J. at 780.

32. 45 M.J. 180 (1996). The issue of waiver of defects in the preferral process is probably the more significant portion of the *Drayton* decision and it is addressed later in this article. *See infra* text accompanying notes 88-93.

33. *Id.* at 182 (quoting accused's affidavit).

34. The court said, "It is risky for a person in authority to comment on the merits of a pending case, especially in front of subordinates." *Id.*

35. *Id.*

36. *Id.* at 182-83.

37. *Id.*

38. Frequently cited quotation the CAAF uses as a preface to holding that the conduct in question was not ideal, but is insufficiently proven or insufficiently serious to warrant relief. United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992) (citations omitted) ("Proof of [command influence] in the air, so to speak, will not do.").

39. Key to the *Gleason* decision was the link the three-judge majority drew between the battalion commander's comments and the fact that no one from Gleason's unit testified in his behalf. This is a possibly logical but crude tautology that was criticized by Judge Gierke in his dissent. *See Gleason*, 43 M.J. at 77-78 (Gierke, J., dissenting) ("The majority opinion rests on . . . [the assumption that] Lieutenant Colonel (LTC) Suchke's influence was so great that virtually the entire United States Army was intimidated by him from rallying to SGM Gleason's defense . . . . The majority opinion does not explain how one battalion commander's actions could deprive SGM Gleason of 'good soldier' testimony from officers senior to LTC Suchke or witnesses from other battalions and earlier assignments.").

40. A court could have treated the charges as unsworn if the preferral process was seen as tainted, or have required new panel selection if the members' objectivity were seen to be compromised.

cant risk of contesting a rape charge at trial, in exchange for the certainty provided by a pretrial agreement.[41]

Perhaps in this vein, the CAAF has continued to place command influence in context. The term itself is insufficiently descriptive[42] because it does not fully embrace actors such as LCDR Casto who, though commanders, are not convening authorities. Their comments clearly have the potential to affect witnesses and members, but other individuals convene the courts and have some potential to "cleanse" the process, if not affected individuals, from the impact of improper statements. The CAAF owes practitioners some clarity on this issue: will the statements of non-convening authority commanders be evaluated differently, perhaps more indulgently, than those by commanders who also happen to be convening authorities? *Newbold* seems to suggest that this is true, but there are enough other variables in the case (most notably, defense pleas of guilty and witness production issues) that, in the absence of clear statements by the court, practitioners may draw misleading conclusions.

By applying the one-two *Ayala-Stombaugh* punch, the courts can avoid issues of waiver and avoid assessing the relative harm of arguable command influence. By consistently applying a method of analysis that heavily scrutinizes--and effectively screens out--command influence claims at the outset, the courts ensure that only the most consequential claims of command influence are addressed on the merits at the appellate level. A critic (*e.g.*, Judge Sullivan) may find this to be a continued "papering over" of command influence claims. Others, however, will see it as a now-predictable method that reliably sifts command influence claims based on whether there is a clear initial production of sufficient evidence requiring the government to marshal the resources to respond.

Issue Preservation

Newbold focuses on an issue of increasing importance when litigating command influence: at what point is it wiser for the defense to preserve an issue at the considerable risk of potentially harsh consequences for the client after the issue is resolved? This issue also arises in *United States v. Fisher*[43] where the convening authority, a Navy captain, evidently questioned the ethics of "any lawyer that would try to get the results of the urinalysis suppressed."[44] The challenge occurred during a recess after the captain had testified on a defense pretrial motion. He made the statements when the defense counsel interviewed him during a recess immediately following his direct examination.[45] Immediately after the recess, the defense cross-examined the captain but made no mention of the challenge. After losing the motion, the defense entered an unconditional plea of guilty; the claim regarding the disputed ethics was raised for the first time before the Navy-Marine Court of Criminal Appeals. The CAAF rejected "the naked request that we 'set aside the finding and sentence'" and dismissed the defense proposal that the court evaluate the case as though the convening authority had approved a conditional guilty plea, preserving the suppression motion.[46] The court operated on the assumption that the decision to plead guilty was an informed and intelligent decision, abetted by competent counsel. Whenever a potentially significant issue, such as command influence, is waived, the specter of ineffective assistance of counsel obviously looms. The court is sensitive to this whipsaw, however. It assumed that a competent counsel would not have waived such an issue and found no ineffective assistance in this case.[47]

Ultimately, the court found that the captain's comments did not affect the trial process, but that the comments reflected "a regrettable insensitivity to the adversarial process and the roles of the various participants in that process in ensuring a reliable and fair result."[48] Because the captain was a convening authority and because the court was "not confident that Captain Major

41. Newbold was sentenced to, *inter alia*, fifteen years' confinement, which was reduced to ten years by the convening authority, pursuant to a pretrial agreement. *Newbold*, 45 M.J. at 110.

42. Several commentators have noted the limitations of the term "command influence." *See, e.g.*, Deana M.C. Willis, *The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence*, ARMY LAW., Aug. 1992 at 3 (among other observations in this excellent and comprehensive article, the author makes the point that the term "'command influence' is a misnomer" and that accurately assessing and preventing it requires broadening the understanding of the actors--staff officers and other non-convening authorities--who can "commit" command influence, often without the knowledge, much less the indulgence, of a commander or the person who convened the court). *Cf.* United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994) (finding that individuals--in this case lieutenants--cannot be said to have asserted unlawful command influence unless they acted with the "mantle of authority").

43. 45 M.J. 159 (1996).

44. *Id.* at 160.

45. According to the defense counsel, the captain said "any lawyer that would try to get the results of the urinalysis suppressed was unethical. As I was the only lawyer in the room at the time, I concluded that he was clearly referring to me." *Id.*

46. The defense suggested that it did not pursue a conditional guilty plea because it "concluded that the convening authority would not consent to a conditional guilty plea . . . [because] BM1 Fisher had been acquitted months earlier at a previous court-martial for an earlier positive urinalysis." *Id.* (quoting defense counsel's affidavit to the Navy-Marine Court).

47. The court noted that nothing has come to light to suggest that the decision to plead guilty (and thereby waive the command influence issue) "resulted from legal advice that reflected either an understanding of the law or a tactical judgment that is so unreasonable as to constitute ineffective representation." *Id.* at 162 (citation omitted).

had the necessary objectivity to perform his post-trial responsibilities and exercise his unique discretion,"[49] it ordered that the case be returned to a new convening authority for a new action. In reaching its conclusion that Captain Major had forfeited his ability to take post-trial action, the CAAF gave significant weight to the fact that he chose not to accept the military judge's recommendation that he suspend the bad-conduct discharge. "While it was his lawful prerogative to decline to follow that recommendation, the very fact that he was required to exercise discretion on such an important question emphasizes the need for a convening authority who will be appropriately open-minded to the competing interests."[50]

This decision is instructive in several respects. It means that, to some degree, the military judge can put the convening authority in a box when there have been allegations of command influence pertaining to the convening authority personally. It also means that a Staff Judge Advocate can potentially defuse a command influence issue by recommending to the same convening authority that he grant such relief, especially when given the opportunity by the military judge to appear "open-minded."[51] This possibility of a sort of self-executing "defusing" of a command influence issue, however, raises anew, albeit in a slightly different context, the concerns of the two critical concurring judges in *Weasler* who questioned whether a convening authority should ever be able to approve a waiver of command influence in a case in which he has an acknowledged self-interest.[52] *Weasler* itself, however, did not involve allegations of command influence directed at the convening authority who approved the pretrial agreement.[53]

Another lesson from this case is that defense counsel must make tough choices between timely disclosure that might yield mild short-term relief and issue preservation that might yield more significant long-term relief (such as disapproval of findings and sentence) to their clients. Here the court pointedly noted that the defense counsel "did not disclose to the military judge Captain Major's recess comment or make any reference to it during his cross-examination of Captain Major,"[54] which it commended as "aggressive and effective."[55] "Inexplicably, as earlier implied, defense counsel said nothing about this matter even prior to Captain Major's taking his final action on the case as convening authority."[56] This makes it particularly tough for the court to prescribe the relatively radical remedial measures (disapproving findings and sentence, treating the case as though it were a conditional guilty plea) the defense proposed on appeal. It may also mean that the language did not automatically trigger a response by the defense because, in context, it was the inarticulate rant of a non-lawyer, expressing his frustration with a system that seems to suppress probative evidence--as opposed to his literally questioning the defense counsel's ethics as an Army officer or licensed attorney. Standing alone in dissent,[57] Judge Crawford suggested that nothing more than a *DuBay* hearing was required, because the defense had not shown that "the remarks showed the lack of objectivity and were not just an unfortunate choice of words, and second, that they had an impact on the proceedings."[58] The dilemma for the

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48. *Id.*

49. *Id.* at 162.

50. *Id*.

51. The court acknowledged here that it was the convening authority's "lawful prerogative to decline to follow that recommendation, [but] the very fact that he was required to exercise discretion on such an important question emphasizes the need for a convening authority who will be appropriately open-minded to the competing interests." *Id*.

52. Chief Judge Sullivan wrote that such deals provide "a 'blackmail type' option" to implicated convening authorities, meaning that "[a]ny accused who finds out about command influence can blackmail the guilty commander into giving him a lenient deal," creating a system of "bartered justice." United States v. Weasler, 43 M.J. 15, 21 (1995) (Sullivan, C.J., concurring). Judge Wiss was no less severe, writing that the majority's rationale in the case means that when an issue of command influence arises, "all that the commander has to do is buy off that accused's silence and go on his merry way . . . ." *Id*. (Wiss, J., concurring). In neither *Fisher* nor *Brown* does the court use the term "waiver" as such, but both courts seem to be finding constructive waiver when the defense chooses not to waive and litigate a command influence issue on which it is on notice at the time of trial. The *Fisher* majority addresses waiver in the context of the defense's choice or failure to pursue Captain Major's disqualification to act post-trial, choosing to "decline to invoke waiver," because it was not clear that the accused was made aware of the statement, and to invoke waiver "probably would serve only to raise a substantial question as to the effectiveness of counsel's representation at that stage." United States v. Newbold, 45 M.J. 109, 163 (1996).

53. The case arose from a company commander's order to her acting commander to prefer charges against the accused while the commander was away on leave. *Weasler*, 43 M.J. at 16.

54. *Newbold*, 45 M.J. at 160. The majority reiterated this point later in the opinion, writing about its "puzzlement as to why trial defense counsel did not make Captain Major's statement a matter of record at trial or contest" his post-trial qualifications. *Id*. at 163.

55. *Id.* at 160.

56. *Id.*

57. Judge Sullivan appears to have written a concurring opinion just to marvel at the path the case took and that the decision, which reverses a unanimous decision of the Navy Court, nearly did not make it to the CAAF. "A very close thing is Justice!" *Id*. at 163 (Sullivan, J., concurring).

defense counsel is one for which trial counsel will have little sympathy: how to best preserve an issue without giving the government such clear and obvious notice that the defense ends up with the worst of both worlds (i.e., having raised an issue and having the government correct it so that it does not survive on appeal). The defense must make other difficult strategic decisions without the specter of command influence to use as leverage for a better deal or other disposition.

As in *Fisher*, the issue in *United States v. Brown*,[59] an unpublished opinion of the Army Court of Criminal Appeals, concerned statements by a convening authority that the defense chose not to attack until after trial. Unlike *Fisher*, the statements in *Brown* were not specific to the accused's case, but stemmed from articles appearing under the convening authority's by-line in the post newspaper in which he wrote, "there is no place in our Army or our community for child abusers." The accused was convicted of two specifications of indecent acts[60] and sentenced to a bad-conduct discharge and reduction to E-1. Again, the court returned to the fact that the defense had ample notice of the questionable conduct and chose to take no action at the trial stage. "Considering both articles as a whole, the time period when they were written, and *the fact that appellant's trial defense team chose not to voir dire the members concerning their knowledge of the articles*," the Army Court found no evidence that members knew of the articles or that they affected their impartiality on findings or sentence.[61]

The majority cites *United States v. Martinez*[62] in support of its ruling. *Martinez*, however, involved a more benign set of circumstances. In *Martinez*, the convening authority sent a letter to all servicemembers on an installation, emphasizing the dangers of drinking and driving and then impermissibly suggesting possible punishments. The CAAF found harmless error because of the good faith of the author, prompt, credible clarification, and the absence of effect on a subsequent court-martial.[63] *Brown*, by contrast, involved a more personally crafted, widely dispersed letter to a broader audience on a topic more likely to be inflammatory, and there was no retraction or attempt to limit the effect of the letter. The court would have done better to squarely find waiver, based on the absence of defense activity in the case than to cite *Martinez* in which the problem was more narrow in scope and more easily addressed, and in which waiver was not an issue.[64]

Gerlich and the Fig Leaf of "Systemic" Concerns: "Is the Boss Trying to Tell Me Something?"

In *United States v. Gerlich*,[65] the last command influence case of 1996, the CAAF again relied on *Ayala*,[66] in holding that the burden of proof for disproving command influence does not shift until the defense meets its burden of production.[67]

The controversy arose when the government tried Gerlich for assault after he received an Article 15 for drunk and disorderly conduct arising out of the same incident, from his commander, Major Shogren.[68] After the Article 15, the victim met with Colonel Mayfield, the special court-martial convening authority (SPCMCA), who took no action at the time, and then with the Inspector General (IG). In response to the official inquiry, Colonel Mayfield wrote back to the IG, "I feel Gerlich was appropriately punished [by the Article 15] for his wrongdoing."[69] The IG then sent a letter to the general court-martial convening authority (GCMCA), Major General Link, in which he wrote, "I believe military justice should punish perpetrators appropriately and serve to deter others . . . . I don't think that's been achieved in this case."[70] The general then wrote to Colonel Mayfield in almost identical language,[71] adding, "request

58. *Id.* (Crawford, J., dissenting).

59. No. 9501370 (Army Ct. Crim. App. Nov. 14, 1996).

60. It is not clear from the opinion whether the charge was indecent acts *with a child*. If it were, the defense case regarding the effect of the articles would be stronger.

61. *Brown*, slip op. at 2.

62. 42 M.J. 327 (1995).

63. *Id.* at 331-33.

64. The opinion is relatively terse, however, and the court provides no context for the articles and does not address the timing of their publication, readership, or related issues that might be relevant, especially when comparing the case to *Martinez*.

65. 45 M.J. 309 (1996).

66. United States v. Ayala, 43 M.J. 296 (1995).

67. *Gerlich*, 45 M.J. at 310.

68. He received an Article 15 for drunk and disorderly conduct. When drunk on the night in question, Gerlich entered the victim's room and committed an indecent assault. *Id.* at 311.

69. *Id*. Colonel Mayfield made clear in his memo that he considered the assault on the "innocent victim who did not deserve what happened to her" at the time of the Article 15, but concluded that "Gerlich was appropriately punished for his wrongdoing." *Id*.

you consider a further investigation of the incident itself and the larger base 'climate' factors which may have been involved. This investigation could focus on answering [several] questions."[72] He concluded: "*Given that you agree further investigation is appropriate*, I would welcome hearing how you decide to address" the incident and "the overall living and working environment" here.[73]

Colonel Mayfield then sought an additional investigation, directed Major Shogren to set aside the Article 15, and ultimately referred the case to the special court-martial which found Gerlich guilty, reduced him to E-1 and adjudged a bad conduct discharge. Colonel Mayfield testified at a motion hearing that he felt no coercion from Major General Link, and that while he read the letter "with earnest," he wondered "Is the boss trying to tell me something? . . . . What is the boss trying to say? Is he trying to say anything on this? . . . . It was an innocent question and certainly not a coercive, pressure question, I didn't think."[74]

The CAAF reversed the Air Force Court of Criminal Appeals, finding command influence based on the peculiar rerouting of the case after the victim's complaint. The government failed to overcome the burden of proving the absence of command influence after the defense clearly shifted the burden. The court wrote that "[t]he Government may overcome its burden by either proving that command influence does not exist or, assuming that it does, that the accused was not prejudiced. However, *Ayala* did not specifically discuss the burden of proof as it relates to the two factors involved in overcoming the aforementioned presumption."[75]

The CAAF moved to squarely address an issue that has puzzled practitioners for several years: whether the burden of proof in command influence cases differs at the trial level (generally described as clear and convincing evidence or clear and positive evidence) from the appellate level (beyond a reasonable doubt, per *United States v. Thomas*[76]). The court said that *Thomas* "was predicated on the existence of unlawful command influence and addressed the issue of potential harm to an accused. This standard in *Thomas* was, in turn, predicated on the legal analysis involved in the finding of a constitutional violation in *Chapman v. California* . . . ." [77] The court continued: "Subsequent cases of this Court have not specifically delineated any distinction between the presumption of the existence of command influence and the presumption of prejudice or harm to an accused."[78] On the brink of clarity, however, the court retreated, saying, "we need not resolve the issue here" because "even assuming the lower standard of clear and convincing evidence is applicable, we hold that the Government did not meet its burden of proof."[79] The court reversed the findings and sentence, setting aside the opinion of the Air Force Court that had upheld the conviction.

Chief Judge Cox's opinion for the four-person CAAF majority found the sequence of events too jarring to dismiss. He wrote as follows:

> [I]t is clear from Colonel Mayfield's own testimony that he concluded that an Article 15 proceeding was appropriate and adhered to this view after discussing the incident with the victim and subsequently so advised the IG . . . . Only after receiving a letter from his superior did he conclude that some reexamination of his position was appropriate. Although he asserted that he was exercising his independent judgment when he concluded that a special court martial was a more appropriate forum, we have previously recognized *the difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate.*[80]

70. *Id.*

71. The general's letter to Colonel Mayfield said, in part, "I believe our military justice system should punish perpetrators appropriately *and* serve to deter others from committing similar acts.'" *Id.* at 312 (emphasis in original).

72. *Id.*

73. *Id.* (emphasis added).

74. *Id.* at 313.

75. *Id.* at 310.

76. 22 M.J. 388, 394 (C.M.A. 1986).

77. *Gerlich*, 45 M.J. at 310-11.

78. *Id.* (citations omitted).

79. *Id.*

80. *Id.* at 313 (citations omitted) (emphasis added).

It is noteworthy that the court was unpersuaded by the couching of the reexamination of the case and preferral of court-martial charges in the language of a "systemic" examination of the climate at the Air Force base. Three times in the general's letter to the SPCMCA he makes some reference to examining "climate" issues, ostensibly larger than the case itself.[81] The CAAF did not directly address what appears to be the wrapping of a direction to rethink a case in the cloak of "systemic" concerns, but neither did it permit such language to derail its clear perception of the message the general was sending to his subordinates.

No Mentoring?

In her one paragraph dissent, Judge Crawford writes, "The majority's message to superior commanders appears to be that they may not exercise responsible command leadership by suggesting reconsideration of a particular disposition of a case. Instead, the only option is to forward the case to the superior commander for action."[82] While Judge Crawford cites *United States v. Wallace*[83] in support of her criticism, the majority accurately distinguishes *Wallace* on the grounds that Colonel Mayfield, unlike the subordinate in Wallace, "was aware of the full scope of appellant's activities prior to receiving a letter from his superior officer." The answer is not as neat as Judge Crawford seeks to pigeon-hole the majority opinion; *i.e.*, that a senior may never ask a junior to reconsider though it is not far from that. The majority opinion, unfortunately, is devoid of the sort of clarity or guidance that Judge Crawford seeks to impart by exception. The majority is clearly (and to this author, understandably) concerned about a transparent change of heart that worked to the considerable detriment of an accused. The majority could have further buttressed the quality and strength of its opinion by making clear the lawful options that were available to the command, such as withdrawing or withholding disposition authority.[84]

Whither Waiver?

For several years, the CAAF has wrestled with the issue of under what circumstances can an allegation of unlawful command influence be waived by the accused. In *United States v. Weasler*,[85] the ideologically fractured court[86] held that an accused may expressly waive unlawful command influence as part of a pretrial agreement. In *United States v. Hamilton*[87] the CAAF had held in 1994 that improper conduct in the accusatory stage was effectively waived if not raised at the time. Now, in the blizzard of cases released on the last day of the 1996 term, the CAAF ruled in *United States v. Drayton*[88] that the defense's failure to raise a claim of coerced preferral at trial equated to waiver. In *Drayton*, the defense alleged that the company commander recommended a special court-martial empowered to adjudge a bad-conduct discharge only because of pressure from his superior, the battalion commander. The defense raised the issue for the first time on appeal, and the CAAF majority, in an opinion by Judge Gierke, relied on *Hamilton* to rule that "any defects based on coercion were waived."[89]

With characteristic fervor and occasional hyperbole, Judge Sullivan dissented in *Drayton* but illuminated what may be the path of the court in future cases: considering such pre-referral decisions to lie outside the ambit of conventionally-analyzed command influence, and therefore to be examined independent of Article 37(a). Judge Sullivan criticized the majority for its "embrace of 'Army jurisprudence' and its hyper-technical approach to unlawful command influence in derogation of our own case law."[90] He repeatedly cites *United States v. Blaylock*[91] and *United States v. Hawthorne*[92] for the proposition that com-

81. In paragraph 3, he wrote, "Therefore, request you consider a further investigation of the incident itself, and the larger base 'climate' factors which may have been involved." In paragraph 3c he wrote, "In the interest of a healthier overall Air Force operation at Chicksands, how can those attitudes be modified?" In paragraph 4 he wrote, "I would welcome hearing how you decide to address not only the incident itself, but the overall living and working environment at RAF Chicksands." *Id*. at 312.

82. *Id.* at 314 (Crawford, J., dissenting).

83. 39 M.J. 284 (C.M.A. 1994).

84. *See* R.C.M. 306, 401-07 for options available to commanders, including dismissal, forwarding of charges to a superior or subordinate, and directing a pretrial investigation. In particular, see R.C.M. 306 and its provisions permitting a superior commander to "withhold the authority to dispose of offenses in individual cases, types of cases, or generally," and forbidding a superior from "limit[ing] the discretion of a subordinate commander to act on cases over which authority has not been withheld."

85. 43 M.J. 15 (1995).

86. *Weasler* was a 5-0 decision, but both concurring judges barely agreed with the result while bitterly criticizing the majority's rationale. *Id.*

87. 41 M.J. 32 (C.M.A. 1994).

88. 45 M.J. 180 (1996).

89. *Id*. at 182. The Army Court had found waiver but also moved to the merits of the claim, joining the many cases to rely on *Ayala* for the proposition that the assertion of command influence in this case was "not sufficient to shift the burden of disproving [command influence] to the government beyond the point of equipoise or inconclusiveness." *Id*., *quoting* United States v. Drayton, 39 M.J. 871, 875 (A.C.M.R. 1994).

90. *Id.* at 183 (Sullivan, J., dissenting). Judge Sullivan does not further define "Army jurisprudence," but it is clear that, to him, it is not a favorable concept.

mand influence cannot be waived. He asserts that the majority has determined that pretrial coercion in the preferral of charges "is no longer to be considered unlawful command influence," so that it is not violating the injunction of *Blaylock* that it cannot be waived.[93] He writes that the majority "pays lip service to this Court's decisions in" *Blaylock* and *United States v. Johnston*,[94] but it in fact pays no service to them at all, citing only *Hamilton*, a case in which the defense never asserted the applicability of Article 37.[95] Judge Sullivan's critique of the majority for "this unprecedented narrowing of Article 37(a),"[96] is misplaced as there is hardly a clear line of precedent--not to mention the plain language of Article 37 itself[97]--making clear that Article 37 applies to accusatory-stage command influence.

Finally, Judge Sullivan criticized the CSM who stated at the NCODP that "it didn't look good" for Drayton. He writes that the CSM "should have refrained from asserting his opinion to the NCO's beneath him."[98] He continues: "What damage was done, we'll probably never know. Without the evidentiary hearing that should have been ordered by our court or the court below, we have no chance of ever knowing."[99] This observation is most interesting coming from a judge who joined in the *Gleason* majority opinion. In *Gleason*, Senior Judge Everett assumed a link between the battalion commander's statements and the absence of defense witnesses from the accused's unit; he required no further analysis or inquiry.[100] Here, by contrast, despite five NCO witnesses for the accused (including two senior to him from his own unit), Judge Sullivan laments the absence of a fact-finding hearing to discern the operation of command influence. To live by the *Gleason* reasoning--a superficial link between a superior's statements and the absence of witnesses gives the opportunity to die by that same reasoning--the majority's suggestion here that the CSM's statements cannot have been consequential because witnesses testified anyway.

More Than Academic Interest

Recent high profile cases have generated the opportunity to "make law," in the area of command influence. The sexual harassment cases at Aberdeen Proving Grounds and elsewhere have generated command responses and public comments by military and congressional leaders that are likely to generate litigation and further discussion.

Most command influence litigation stems from the statements or actions of individual commanders, frequently in unremarkable cases. There are, however, the huge command influence cases, most notably those from Third Armored Division in the early 1980s,[101] that stem from "systemic" concerns broached by high-ranking officers. Practitioners will be watching several recent incidents and cases closely for possible resolution on command influence grounds.

Black Hawk, "Accountability," and "Zero Tolerance"

The first major issue concerns the United States Air Force. After the accidental shooting down of an Army Black Hawk helicopter in Northern Iraq in 1994, an exhaustive investigation was conducted. Ultimately, one Air Force officer faced court-

91. 15 M.J. 190 (C.M.A. 1993).

92. 22 C.M.R. 83 (1956).

93. *Drayton*, 45 M.J. at 184 (Sullivan, J., dissenting).

94. 39 M.J. 242 (1994).

95. The *Hamilton* opinion (a unanimous ruling in which Judge Sullivan wrote a separate concurrence that presaged the strain that carries through *Drayton*) expressly intended to preserve the vitality of *Blaylock*, which it cites with approval for the proposition that command influence "at the referral, trial, or review stage is not waived by failure to raise the issue at trial." *Hamilton*, 41 M.J. at 37. It then explains that preferral and forwarding "defects" are not waived--and Article 37 would then apply--*if* the failure to raise them is because "a party is deterred by unlawful command influence." *Id*. In other words, Article 37, standing alone, does not apply to the accusatorial process, but it does apply if command influence keeps a party from raising defects at that stage. The court also noted, importantly for its precedential value and to limit the sweep of Judge Sullivan's criticism in *Drayton*, that Hamilton "does not assert a violation of Article 37 in the case before us." *Id*.

96. *Drayton*, 45 M.J. at 183 (Sullivan, J., dissenting).

97. Article 37 provides in pertinent part: "No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case." The plain language of the statute points to the adjudicative process.

98. *Drayton*, 45 M.J. at 184 (Sullivan, J., dissenting). This unremarkable criticism tracks with the majority's similar characterization of the CSM's remarks. *See supra* note 33 and accompanying text.

99. *Id.*

100. *See generally* United States v. Gleason, 43 M.J. 69, 74-76 (1995).

101. *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (division commander's remarks calling for "consistency" in court-martial recommendations were interpreted to impinge on recommendations for disposition and discourage witnesses from testifying).

martial and was acquitted. Numerous other individuals received various administrative sanctions. Many of the sanctioned individuals later received promotions, favorable ratings, and awards. This concerned Major General Ronald Fogleman, Chief of Staff of the Air Force, who then taped a message that was distributed worldwide for viewing by all Air Force officers. In the tape he spoke of the need for "accountability" by individuals for their actions.[102] He was frustrated by what he saw as the inconsistency that many of the actors involved in the shootdown continued their careers unscathed. He called for standards to be "consistently applied, nonselectively enforced . . . holding ourselves and each other accountable."[103] Actions such as an officer receiving a letter of reprimand followed by a "firewall OER or a choice job," he said, "leads me to question the lack of accountability following the breaking of our standards."[104] Nowhere in the tape did General Fogleman recommend or direct a particular disposition of any case, and in fact he went to great lengths to emphasize his faith in the military justice system. Still, it left the clear implication that *something* must be done, contributing to the argument that his speech affected potential actions or levels of disposition in future cases. On the other hand, of course, is the argument that the Chief of Staff of an armed force is entitled to express his dissatisfaction with good order and discipline, and to speak of the need for accountability--greater attention to justice in addressing misconduct--and that to remove or significantly limit his authority to do so is to remove one of the fundamental aspects of command which is the authority and responsibility to lead troops and set and enforce the appropriate level of discipline.

Congress also had concerns about the Black Hawk shootdown, issuing subpoenas to several officials involved in the decision not to prosecute two Air Force officers for their roles in the shootdown. Subpoenaed were the general court-martial convening authority, his staff judge advocate, a major general who chose not to charge the pilots, and the Article 32 investigating officer.[105] The subpoenas triggered a strong response from the Department of Defense. Undersecretary John White responded that such an inquiry "risks fostering the perception that officials discharging their duties under the [UCMJ] must now be concerned with whether their deliberations and decisions will be subjected to congressional scrutiny, possible congressional criticism or public censure."[106] None of which is to say that Congress's role in investigating the exercise of military justice is per se inappropriate. The specter of command influence arises in this situation, not so much because of congressional pressure, because there is no *command* aspect to oversight of the Uniform Code by the body that wrote the Code. It does, however, give rise to the colorable argument that commanders, conscious of the possibility of congressional scrutiny, will tailor their dispositions of cases in such a manner as to evade uncomfortable scrutiny. The argument would be that a commander in a high profile case (*e.g.*, the Black Hawk shootings, sexual harassment prosecutions, or other highly publicized incidents) will be more likely to initiate or recommend a harsher disposition to avoid the criticism of those who would characterize the actions as soft on crime or indifferent to victims. So long as the military justice system is a commander-run system, any factors that would tend to affect the independence of these commanders--which in turn could affect the disposition of cases--merits special scrutiny. Some officials, according to the *Washington Post*, suggested that Congress may inquire into military justice just as it does on occasion when it calls United States attorneys to testify about criminal cases.[107] The analogy is imperfect, however, because United States attorneys do not hold equivalent positions to commanders and, *inter alia*, they are not required to rely on grand juries to issue indictments in cases they want to prosecute.

Versions of this criticism appeared in the wake of the sexual harassment prosecutions in the Army, following a highly publicized aircraft accident at Spangdahlem Air Force Base, Germany, and after the crash of the aircraft carrying Commerce Secretary Ronald H. Brown to Croatia in 1996.[108] Sixteen officers received varying levels of punishment after the crash, according to Air Force officials. Some sources attributed the sanctions against those officers directly to the climate of height-

102. General Ronald R. Fogleman, Air Force Chief of Staff, *Air Force Standards and Accountability* videotape (1995) [hereinafter Fogleman tape] (on file with author).

103. *Id.*

104. *Id.* ("firewall OER" is an Air Force term for superior or "waterwalker" officer evaluation report).

105. Bradley Graham, *Panel Summons Air Force Prosecutors in Helicopter Downing*, WASH. POST, Nov. 2, 1996, at A10.

106. *Id.*

107. *Id.*

108. For a critical but detailed treatment, *see* Steven Watkins, *The High Cost of Accountability*, AIR FORCE TIMES, Dec. 23, 1996. The issue also has arisen in the controversy over the investigation and efforts to assess responsibility for possible dereliction in failing to take action before the bombing of the 1996 Khobar Towers housing complex in Saudi Arabia, which housed American airmen. Several news accounts have suggested that the pressure for more definitive action has stemmed from General Fogleman's tape and the heightened culture of "accountability." *See, e.g.*, Bradley Graham, *Air Force Report Already Rebuts Saudi Bombing Critics*, THE WASH. POST, Mar. 15, 1997, at A9 (discussing "continued demands in Congress and elsewhere for accountability in the deaths" and injuries, and claim that "Pentagon civilian leadership has pressed the Air Force into extending the inquiry and focusing on whether any nonjudicial administrative action may be warranted"). Defenders of General Fogleman would argue that these congressional demands vindicate the propriety of the statements, and that only the starting point for discussions was altered without dictating particular dispositions in particular cases.

ened attention fostered by General Fogleman's accountability videotape.[109]

The highly-publicized charges of sexual misconduct against a number of Army drill sergeants at Aberdeen Proving Ground and elsewhere have raised similar questions, because the Army leadership, including the Chief of Staff and Secretary of the Army, have made several public statements pledging to address the problem, and stating the Army's "zero tolerance" for such conduct. The defense already has filed several motions, unresolved at this writing, relating to potential command influence in the cases, but the defense still faces the considerable challenge of linking statements by high-ranking officers with provable effects, under the *Ayala-Stombaugh* rubric, on the parties (witnesses, intermediate commanders, panel members) that the law regarding command influence is designed to protect.

Events such as the General Fogleman tape, congressional hearings, or highly public cases are not likely to trigger the more traditional command influence charges. It is exceedingly difficult to show that actors at that level, indirect and diffuse as they are, have a direct and measurable effect on a particular case. Defense counsel are more likely to argue that the level of disposition was altered or "ratcheted up" because of the perceived pressure and in anticipation of having to account for one's actions in another forum. Even this line of argument is not unique,[110] but it has not been lodged in such a systematic fashion since the command influence cases in the Third Armored Division, and even there, the language came from the division commander who actually convened the courts.

The Higher They Go . . . The Lighter They Fall?

Related to this area of inquiry is the question of whether command influence, paradoxically, becomes more attenuated at the very highest level of command. Although in rare instances even the Secretary of the Army can convene courts-martial,[111] virtually all courts are convened by the two and three star officers who hold traditional command billets at divisions, corps, and equivalent levels. While the defense no doubt will argue that having the Chief of Staff or the Secretary of the Army proclaiming "zero tolerance" may chill potential witnesses,[112] the Government can counter that these individuals are least likely to intimidate witnesses, deprive commanders of discretion, or "crawl into the deliberation room" and affect deliberations. The essence of the prohibition against command influence is to free the primary actors in courts-martial from command pressure. A persuasive case can be made that those at the very highest levels are less likely to wield such an intimidating impact and that more immediate superiors--at the battalion, brigade and division levels--who are immediately visible to soldiers, and to whom subordinates feel accountable (and who depend on the superiors for ratings, assignments, and reputations), carry greater potential impact, and that it is their actions that warrant the greatest scrutiny. For example, in the Aberdeen cases, a memorandum from the commander of the Ordnance School, home of the accused soldiers, contained potentially objectionable language.[113] The author of the memo, however, was not the general court-martial convening authority and therefore not involved in panel selection. Obviously other issues arise from such a memo, including the issue raised in *Newbold*--whether improper or inflammatory statements by a high-ranking non-convening authority can still amount to command influence. Unanswered is the extent to which such statements can contribute to an atmosphere in which it may become difficult to recruit witnesses, but the fact that the author is not the ultimate convening authority improves the government's posture, although his proximity to the soldiers and witnesses helps the defense.

Conclusion

It is very unlikely that the CAAF is going to issue *the* comprehensive command influence ruling at any time. This is largely because of the diversity and complexity of the command influence area, as the term is only defined by the context of the particular case. Practitioners, therefore, need to be less alert to landmark decisions and more closely attuned to each

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109. Rowan Scarborough, *Air Force Penalties in Brown Crash Hew to General's Line,* WASH. TIMES, Aug. 8, 1996, at A4. General Fogleman's edict, distributed worldwide and mandatory viewing for all officers, explains why the Air Force reached deep down the chain of command to punish officers in the April crash.

110. *See, e.g.*, United States v. Martinez, 42 M.J. 327, 331 (1995) (defense asserted that negligent homicide charge against the accused "would not have gone to court if it occurred at any other time or any other base").

111. *See* UCMJ, art. 24(a)(2) (1988). Also relevant to the discussion, of course, is the Secretary's authority to approve dismissals and to take other post-trial action. *See id.* art. 71(b).

112. A separate issue, of course, is whether such language, standing alone, connotes command influence. A strong argument can be made that zero tolerance merely suggests that action of the same sort will be taken upon confirmation of objectionable conduct. Still, language that suggests inflexibility invariably generates strict scrutiny by the military appellate courts. *See, e.g.*, United States v. Griffin, 41 M.J. 607 (Army Ct. Crim. App. 1994).

113. Memorandum, Commander, United States Army Ordnance Center and School, Aberdeen Proving Ground, Maryland, subject: Level I Video on Prevention of Sexual Harassment (1 Oct. 1996). The memo includes the following paragraph:

> Possibly the worst event in the life of a soldier, short of death, is sexual abuse. Our Army has always taken care of its own better than any other organization I can think of; that will be the case here . . . . All of our soldiers must understand that sexual abuse and sexual harassment are intolerable acts no human should have to endure; ones that will not be overlooked or forgiven. You and I will not allow even the slightest trace of such behavior to linger.

command influence case, each of which can give a creeping indication of the direction in which the courts are moving. Clearly the courts are moving toward severing pre-referral command influence from the ambit of Article 37. Whether they characterize the failure to raise these issues as waiver or simply remove them from Article 37 (preserving the veneer from *Blaylock*, *et al*. that command influence cannot be waived at any stage), they will analyze these cases on a more indulgent plane. Less clearly but increasingly apparent, there seems to be a trend to analyze the speech of individuals senior to the accused (as was the case with the boat commander in *Newbold* or the CSM in *Drayton*) strictly in terms of its provable effect on a case, and a decreased willingness to provide a windfall to the accused merely because of the intemperate statements of someone in the chain of command.

Annual Review of Developments in Instructions: 1996

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Introduction

This article is a review of courts-martial instruction law for calendar year 1996. This review discusses the September 1996 publication of the *Military Judges' Benchbook*[1] and developments in case law that affected courts-martial instructions. In seeking justice, counsel need to realize that they, as well as military judges, are responsible for ensuring that instructions provided to panel members are correct.

New Military Judges' Benchbook

From a practical standpoint, one of the most important developments in instructions during 1996 was the republication of the *Military Judges' Benchbook*. This revamped document updates its predecessor which had become somewhat unwieldy.[2] In addition to including relevant case law, the new *Benchbook* incorporated the 1996 amendments to the Uniform Code of Military Justice (UCMJ).[3]

Trial practitioners must review this new *Benchbook* in detail--for it is counsels' thoughtful consideration and careful inclusion of applicable instructions into the themes of their cases, to include voir dire, opening statements, questioning of witnesses, and closing arguments, that win or lose cases.[4]

As a companion to the 1996 *Benchbook*, the Army Trial Judiciary developed an easy to use computer version. All *Benchbook* files were converted to Microsoft Word (MS Word) with a special template--providing instant access to the entire *Benchbook* from within MS Word. The Computer Benchbook runs from a comprehensive menu allowing users to navigate through all *Benchbook* instructions, trial scripts, and appendices. Using the Computer Benchbook, military judges, counsel, and clerks can take *Benchbook* material and instantly create MS Word files. This not only assists military judges in assembling, tailoring, and delivering instructions, but it also permits counsel to tailor the instructions that they wish military judges to give, to copy and insert form specifications in charge sheets, to create customized trial scripts, or for any other use that requires the manipulation of *Benchbook* materials.[5] Wanting to keep the

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1. DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) [hereinafter BENCHBOOK].

2. The previous edition of the pamphlet, DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 May 1982) had three changes and fifteen published U.S. Army Trial Judiciary Benchbook Update Memoranda.

3. Pub. L. No. 104-106, 110 Stat. 186 (1996); *see* BENCHBOOK, *supra* note 1, para. 3-19-5 (describing Fleeing Apprehension). Prior to the 1996 amendments, fleeing apprehension was not a violation of Article 95 of the UCMJ. *See also* BENCHBOOK, *supra* note 1, Chapter 2, Trial Procedures and Instruction, at 66-67 (describing effect of Article 58(b)).

4. For example, in a court-martial for larceny in which the accused is found in the knowing, conscious, and unexplained possession of recently stolen property, the members may be instructed concerning a permissible inference. The *Benchbook* Instruction 3-46-1, Larceny, Note 4, provides:

> You are advised that if the facts establish that the property was wrongfully taken . . . from the possession of . . . [the owner] . . . and that shortly thereafter it was discovered in the knowing, conscious, and unexplained possession of the accused, you may infer that the accused took . . . the property. The drawing of this inference is not required.
>
> The term "shortly thereafter" is a relative term and has no fixed meaning. Whether property may be considered as discovered shortly thereafter if it has been taken depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case.

This instruction is replete with issues that could be developed within a consistent, logical theme.

Benchbook current while providing trial practitioners an accessible location for review and discussion of *Benchbook* issues, the Army Trial Judiciary created the Benchbook Forum within the JAGC Bulletin Board. Counsel should access this forum periodically to review developments.

Instructions on Offenses

Homicide: Distinguishing Premeditation and Intent to Kill

The Uniform Code of Military Justice (UCMJ) expressly prohibits seven forms of homicide,[6] including those murders committed by an accused with a premeditated design to kill[7] as well as those committed with an intent to kill or inflict great bodily harm upon a person.[8] These two offenses differ only in the mental state required for each,[9] a distinction that has been called "too vague and obscure for any jury to understand."[10] The Court of Appeals for the Armed Forces (CAAF) nevertheless held in *United States v. Loving*[11] "that there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster."[12] The court reasoned that the offenses are distinct because premeditated murder requires proof of the element of a premeditated design to kill, an element not required for other forms of murder, and further observed that premeditation and its associated terms were "commonly employed . . . . and are readily understandable by court members."[13]

In the aftermath of *Loving*, attention has shifted from litigating the constitutional significance of the distinction between the two offenses to the task of describing this distinction to the trier of fact.[14] The pattern instruction contained in the *Military Judges' Benchbook*[15] already provides, in relevant part:

> The term "premeditated design to kill" means the formation of a specific intent to kill and the consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.[16]

In *United States v. Eby*,[17] the defense requested that the military judge give this additional instruction:

> Having a premeditated design to kill requires that one with a cool mind did, in fact, reflect before killing. It has been suggested that, in order to find premeditation, you must find that AT1 Eby asked himself the question, "Shall I kill her?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway." Intent to kill alone is insufficient to sustain a conviction for premeditated murder.[18]

5. The Computer Benchbook is available for download from the JAGC Bulletin Board. Copies of the Computer Benchbook were also sent to Chief Trial Judges of all Services. Non-Army personnel should contact their Chief Trial Judges as some of the Services may make Service-specific changes. Those who have either no access or unreliable access to the JAGC Bulletin Board may send two, blank and formatted 3.5" diskettes to: Clerk of Court, 3d Judicial Circuit, Fort Hood, Texas 76544. Include a pre-addressed return envelope.

6. *See* UCMJ arts. 118-19 (1988); *cf.* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 85 (1995 ed.) [hereinafter MCM] (describing negligent homicide as an offense arising under UCMJ art. 134).

7. UCMJ art. 118(1) (1988).

8. *Id.* art. 118(2).

9. *Compare* MCM, *supra* note 6, pt. IV, para. 43.b.(1) *with* para. 43.b.(2).

10. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 2 SUBSTANTIVE CRIMINAL LAW § 7.7(a), at 240-41 (1986) (citing BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 99-100 (1931)) [hereinafter LAFAVE & SCOTT]; *cf.* United States v. Loving, 41 M.J. 213, 279 (1994) (considering whether requiring premeditation genuinely narrows the class of persons eligible for the death penalty), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

11. 41 M.J. 213 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

12. *Id.* at 279-80. *But see infra* notes 27-29 and accompanying text.

13. *Id*. at 280 (citations omitted).

14. *See, e.g.*, United States v. Levell, 43 M.J. 847 (N.M.Ct.Crim.App. 1996) (considering the form of instructions to the trier of fact concerning premeditation).

15. BENCHBOOK, *supra* note 1.

16. *Id.* para. 3-43-1.d.

17. 44 M.J. 425 (1996).

The military judge incorporated the substance of the first and last sentence of the requested instruction, but declined to adopt the remainder.[19] On appeal from his conviction for premeditated murder, Eby asserted that the military judge erred by refusing to give the relevant portion of the requested instruction;[20] the requested language had been cited with approval by the Court of Military Appeals (COMA) in *United States v. Hoskins*[21] and was taken from *Substantive Criminal Law*, a respected treatise by Professors Wayne LaFave and Austin Scott, Jr.[22]

The CAAF nevertheless concluded that the military judge did not abuse his discretion by refusing to give the requested instruction.[23] The unanimous opinion of the court emphasized "that no particular length of time is needed for premeditation, and no specific questions need be asked."[24] To the extent that the requested instruction implies such requirements, it "runs the risk of confusing . . . . [or] misleading the jury."[25] As such, the military judge "correctly declined" to give the requested instruction.[26]

Decisions like those in *Loving* and *Eby* send an ambiguous message to the trial practitioner. On the one hand, the military appellate courts are vigorously asserting that "[t]here is critical distinction between a premeditated design to kill and an intent to kill."[27] However, these same courts have repeatedly held that a military judge does not err by refusing to depart from a pattern instruction that could be said to minimize the difference between the two offenses,[28] even when the requested instruction is an accurate statement of the law.[29] This apparent inconsistency could be confusing unless two lessons from *Eby* are kept in mind.

As a threshold matter, the court reinforces the point that parties to courts-martial are *not* entitled to a requested instruction unless it is a correct statement of the law, necessary to address a matter not substantially covered in the standard instruction, and critical in that a failure to give the requested instruction would deprive the accused of a defense or seriously impair its effective presentation.[30] Therefore, being correct is not enough; the requested instruction must add a new matter essential to the effective presentation of a defense. In any event, military judges always have "substantial discretionary power in deciding on the instructions to give," and their decisions in this regard are reviewed only for an abuse of discretion.[31]

Eby also makes clear that what may be inappropriate as a requested instruction may, in some circumstances, be properly delivered as argument to the trier of fact.[32] For example, the court in *Eby* held that the military judge did not abuse his dis-

18. *Id.* at 427; *cf. Levell*, 43 M.J. at 849-50 (considering denial of request for instruction that "the government must prove to you beyond a reasonable doubt that the killing was committed by the accused 'after reflection by a cool mind'").

19. *Eby*, 44 M.J. at 427-28.

20. *See id.* at 426.

21. 36 M.J. 343 (C.M.A. 1993).

22. *Eby*, 44 M.J. at 428.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. United States v. Curtis, 44 M.J. 106, 147 (1996); United States v. Loving, 41 M.J. 213, 279 (describing the distinction as "meaningful"), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

28. For example, the pattern instruction concerning premeditation in the *Benchbook* does provide that premeditation requires "the formation of a specific intent to kill and the consideration of the act intended to bring about death," but then goes on to reduce the significance of this requirement by providing that "[t]he 'premeditated design to kill' does not have to exist for any measurable or particular length of time. The *only* requirement is that it must precede the killing." BENCHBOOK, *supra* note 1, para. 3-43-1.d (emphasis added). No further explanation of premeditation, or the critical distinction between premeditated and unpremeditated murder, is provided.

29. *E.g.*, United States v. Levell, 43 M.J. 847, 851 (N.M.Ct.Crim.App. 1996) (holding military judge did not err in refusing to give "cool mind" instruction even though it "was not an incorrect statement of the law").

30. *See Eby*, 44 M.J. at 428 (observing defense not entitled to requested instruction unless "correct, necessary, and critical") (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 2760 (1994)).

31. *Eby*, 44 M.J. at 428 (citation omitted).

32. *Id.*

cretion by refusing to give the requested instruction, but also observed that the requested instruction "marshals questions that would be an appropriate vehicle for argument to the fact finders."[33] This observation, however, does not apply to requested instructions that are declined because they are *inaccurate* statements of the law, but instead applies only to those requested instructions that, while correct, were found by the military judge to be either unnecessary or inconsequential.[34]

Homicide: Premeditation and Heat of Passion

The scenarios that typically give rise to allegations of premeditated murder can occasionally raise the issue of whether the killing was done in the heat of sudden passion.[35] Evidence of this passion is relevant to the charge in at least two ways: the passion may affect the ability of the accused to premeditate,[36] or it may place the lesser included offense of voluntary manslaughter in issue.[37] If the military judge determines that either of these matters is in issue,[38] then "[t]he military judge shall give the members appropriate instructions on findings."[39]

The decision by the military judge that a matter is "in issue," as well as the form of any instruction ultimately given, are both subject, in appropriate circumstances, to appellate review.[40] Both these issues are considered in the latest CAAF opinion in *United States v. Curtis*.[41] The accused was charged with a variety of offenses including two specifications of premeditated murder in violation of Article 118(1), UCMJ.[42] At approximately midnight on 13 April 1987, the accused gained entry to the home of his supervisor, First Lieutenant James Lotz, by telling Lotz that "one of his friends needed help because he had been in an accident."[43] The accused had a knife with an eight inch blade that he had stolen from the unit supply room earlier that evening.[44] The opinion of the court tells what happened next:

> When LT Lotz tried to telephone for help, appellant "plunged" the knife into Lotz chest. Although at this time Lotz was still alive, this wound turned out to be the fatal injury because it punctured the victim's heart. LT Lotz struggled and picked up a chair to defend himself. Appellant then went around the chair and stabbed Lotz a second time. During this struggle, LT Lotz called for his wife, Joan. She appeared on the scene, ran up to her husband, and then turned to appellant and called out his name. She started kicking him, albeit with her bare feet. Then appellant stabbed her eight times, the fatal wound being a heart puncture. Appellant grabbed Joan by the legs as she was dying, pulled her toward him, "ripped off her panties," and fondled her genitalia.[45]

According to the court, "[t]he strategy of the defense both at trial and at sentencing was to present appellant as a young man adopted at age 2 1/2 and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz' racist treatment of him."[46] In light of this defense, the military judge gave a tailored instruction on voluntary manslaughter as to the killing of Lieutenant Lotz; no such instruc-

33. *Id. But cf. Levell*, 43 M.J. at 852 (asserting without citation to authority that accused "was not free to use" the language from the requested instruction in argument).

34. *See supra* note 30 and accompanying text.

35. *E.g.*, United States v. Curtis, 44 M.J. 106 (1996). The *Benchbook* provides that "[p]assion means a degree of anger, rage, pain, or fear which prevents cool reflection." BENCHBOOK, *supra* note 1, para. 3-43-1.d., at 401 n.5; *cf.* MCM, *supra* note 6, pt. IV, para. 44.c.(1)(a) ("Heat of passion may result from fear or rage.").

36. BENCHBOOK, *supra* note 1, para. 3-43-1.d, n.5.

37. *Id.* n.6.

38. MCM, *supra* note 6, R.C.M. 920(e) discussion.

39. *Id.* at 920(a).

40. *E.g.*, United States v. Mance, 26 M.J. 244, 255 (C.M.A.) (describing standards for appellate review of instructions relating to elements of offense), *cert. denied*, 488 U.S. 942 (1988). *But cf.* MCM *supra* note 6, R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.").

41. 44 M.J. 106 (1996). The appellant actually raised these and seventy-four additional issues that were considered by the court in this opinion. *See id.* at 113-16.

42. *Id*. at 116.

43. *Id*. at 117.

44. *Id.*

45. *Id.*

46. *Id.* at 120.

tion was given with regard to the killing of Mrs. Lotz.[47] The accused was convicted of the premeditated murder of both victims, sentenced to death by the members, and the convening authority approved the sentence.[48] On appeal, the accused alleged that the military judge erred by failing to instruct the members on voluntary manslaughter with regard to the killing of Mrs. Lotz.[49] The defense apparently asserted that the rage that the accused testified that he possessed toward Lieutenant Lotz was transferred to Ms. Lotz, thereby justifying an instruction on voluntary manslaughter for the killing of *each* victim.[50] The CAAF held that no such instruction was required, reasoning that "[i]n this instance, there was no adequate provocation by Joan Lotz, and a transfer of rage would not be adequate provocation."[51]

The opinion of the court in *Curtis* raises a number of issues of concern to practitioners, especially in the law of instructions. The most important issue in this area concerns the concept of "transferred rage." It is not explained in either the court's opinion in *Curtis*[52] nor in the *Manual for Courts-Martial*;[53] no pattern instruction on the topic is found in the *Military Judges' Benchbook*,[54] and no discussion of the theory is found in military precedent.[55] The CAAF nonetheless asserted that "a transfer of rage would not be adequate provocation" to warrant an instruction on voluntary manslaughter,[56] a conclusion that is potentially confusing to the practitioner and may be a problematic statement of the law in this area.

In their treatise *Substantive Criminal Law*,[57] Professors LaFave and Scott make the following observation concerning provocation by one other than the victim of a homicide.

> It sometimes happens that the source of the provocation is a person other than the individual killed by the defendant while in a heat of passion. This may happen (1) because the defendant is mistaken as to the person responsible for the acts of provocation; (2) because the defendant attempts to kill his provoker but instead kills an innocent bystander; or (3) because the defendant strikes out in a rage at a third party.[58]

Military law provides that the first two examples offered by LaFave and Scott may still be voluntary manslaughter, rather than some other form of homicide.[59] The third example describes the concept of transferred rage, and it is less clear what type of homicide has been committed in this circumstance. The majority of jurisdictions that have considered the issue hold that "[i]f one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder."[60]

Nevertheless, some statutory systems do not so limit provocation; the Model Penal Code, for example, provides that "[c]riminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance

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47. *See id.* at 151.

48. *Id.* at 116.

49. *Id.* at 151. The accused also challenged the form of the voluntary manslaughter instruction given concerning the killing of Lieutenant Lotz, but the court found waiver and, in any event, no error. *Id.*

50. *See id.*

51. *Id.* The CAAF also held that the evidence was legally sufficient to support the conviction for the premeditated murder of Mrs. Lotz. *Id.* at 146-49.

52. *See id.* at 151.

53. *See* MCM, *supra* note 6, pt. IV, para. 44.

54. *See* BENCHBOOK, *supra* note 1, paras. 3-43-1, 3-43-2, & 3-44-1. The notion of transferred *intent* is discussed in the instructions cited, but this is a distinct legal concept from transferred rage or passion. *See infra* notes 57-60 and accompanying text.

55. Electronic search of the relevant military justice databases revealed that the instant case is the only military decision to explicitly refer to the term "transferred rage."

56. *Curtis*, 44 M.J. at 151.

57. *See* LAFAVE & SCOTT, *supra* note 10.

58. *See* LAFAVE & SCOTT, *supra* note 10, § 7.10(g), at 268 (footnotes omitted).

59. *See* BENCHBOOK, *supra* note 1, para. 3-44-1.d., n.4. It is interesting to note that some civil jurisdictions have limited by statute the availability of voluntary manslaughter to instances when the defendant can show provocation by the homicide victim. LAFAVE & SCOTT, *supra* note 10, § 7.10, at 269 n.103.

60. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 102 (3rd ed. 1982) [hereinafter PERKINS & BOYCE]; *see* LAFAVE & SCOTT, *supra* note 10, § 7.10(g).

for which there is reasonable explanation or excuse."[61] This form of the offense is broader than that of the majority of jurisdictions in that "the provocation need not have come from the victim."[62] Article 119(a), UCMJ, is very similar to the Model Penal Code provision, and provides that "[a]ny person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter."[63] Like the Model Penal Code, the text of Article 119(a), UCMJ, does not limit the offense to those circumstances in which the accused was provoked by the homicide victim.[64] As such, the assertion that "a transfer of rage would not be adequate provocation" cannot be grounded in the plain text of the statute, and its source should therefore be explained to the practitioner in the field to allow the crafting of appropriate instructions in this regard.[65]

Defenses

Involuntary Intoxication

It is well-settled in military law that "[v]oluntary intoxication, whether caused by alcohol or drugs, is not a defense."[66] Evidence of voluntary intoxication may nevertheless be "introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense."[67] Nevertheless, the status of involuntary intoxication as a defense in the military justice system was, until recently, less certain.[68] Most civil jurisdictions recognize a defense of involuntary intoxication,[69] and "[w]here the defense is permitted, it most commonly has a formulation parallel to one of the formulations of the insanity defense."[70] Other jurisdictions, while declining to link involuntary intoxication and insanity, may limit the defense to cases of involuntary intoxication resulting from mistake, duress, or medical advice.[71] Until now, however, neither judge nor counsel could be certain of which form the defense took in the military legal system;[72] this situation may now be remedied.

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61. MODEL PENAL CODE § 210.3(1)(b), *cited in* LAFAVE & SCOTT, *supra* note 10, § 7.10(g), at 269 & n.105.

62. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 102(a), at 482 (1986) [hereinafter ROBINSON].

63. UCMJ art. 119(a) (1988).

64. By reference to the statutory text, the victim need only be "a human being," and the provocation need only be "adequate." *See id. But cf.* Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994) (observing that similar language in civil voluntary manslaughter statute "should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim"), *cited in* LAFAVE & SCOTT, *supra* note 10, § 7.10 n.103 (Supp. 1996).

65. This is not to suggest that the doctrine of transferred rage should be recognized by the military appellate courts, but simply suggests that it is unclear whether the basis for CAAF's assertion in *Curtis* was legal, *i.e.*, rage can never be transferred to an innocent victim, or factual, *i.e.*, the failure to instruct in this particular factual scenario was not error. The ramifications are significant; if the doctrine of transferred rage is inapplicable as a matter of law, then the *Manual*, if not Article 119, UCMJ, itself, should be amended to reflect that construction. If the specific facts of *Curtis* simply do not raise the issue, then that would seem to indicate that the doctrine is recognized as a matter of military law; explanation of the doctrine in the *Manual* and pattern instructions in the *Benchbook* would therefore be appropriate, as neither currently exist.

66. MCM, *supra* note 6, R.C.M. 916(l)(2).

67. *Id.*

68. *See* United States v. Hensler, 44 M.J. 184, 187 (1996) (observing that the CAAF had not expressly ruled on this issue). *But cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

69. *See* ROBINSON, *supra* note 62, § 176(a), at 338.

70. *Id.* at 339.

71. *See* LAFAVE & SCOTT, *supra* note 10, § 4.10, at 558-60.

72. *Cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

In *United States v. Hensler*,[73] the CAAF considered the questions of the viability and form of the involuntary intoxication defense in military law. The accused, a commissioned officer, was charged with unbecoming conduct and fraternization, both charges stemming from her social and sexual relationships with subordinates.[74] The defense at trial was that the accused "lacked mental responsibility because of 'a confluence of her drugs, her personality traits, her depression, and the introduction of alcohol.'"[75] Evidence placing this defense in issue was introduced by the defense, and "[t]he military judge provided the members the traditional instruction on the insanity defense."[76] On appeal from her convictions for the charged offenses, Hensler alleged that the military judge erred because the instruction concerning lack of mental responsibility "did not include involuntary intoxication as a basis upon which the members may find that the appellant lacked mental responsibility."[77] The service court found the military judge did not err in giving a general instruction on the defense of mental responsibility because "there was no evidence to support an instruction tailored to involuntary intoxication."[78]

The CAAF affirmed the decision of the lower court,[79] reasoning that "[i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility."[80] The opinion of the court concluded that "[t]he instructions could have been better tailored to the evidence, but we are satisfied, based on this record, that the question of appellant's mental responsibility was fully presented to the members in a correct legal framework."[81]

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73. 44 M.J. 184 (1996).

74. *Id.* at 185-86.

75. *Id.* at 187. The accused was apparently intoxicated during some of her misconduct, and was taking a number of prescription drugs. United States v. Hensler, 40 M.J. 892, 894-95 (N.M.C.M.R. 1994). At least one defense witness testified that the accused "suffered from decreased liver function, the result of a prior bout with hepatitis. This condition affected her body's ability to process alcohol and drug medication with the result that the effects of those substances may have lasted longer than normal." *Id.* at 895. Even more significant was the expert testimony that "the intoxicating effects of the different prescribed drugs and the alcohol 'potentiated' each other, i.e., that the effect of each was magnified by the presence of the others. " *Id.* at 899. The defense theory was that the accused was probably unaware, at least initially, of these effects, and as such her intoxicated state during some of her misconduct was involuntary. *Id.*

76. United States v. Hensler, 40 M.J. 892, 895 (N.M.C.M.R. 1994), *aff'd*, 44 M.J. 184 (1996). The service court opinion described the instructions as follows:

> Specifically, he instructed them that they could presume the accused to be sane unless they were persuaded by clear and convincing evidence that she suffered from a severe mental disease or defect and that, as a result of her severe mental disease or defect, she was unable to appreciate the nature and quality or wrongfulness of her acts. He added that the appellant had the burden to establish that she was not mentally responsible. The military judge further instructed the members that intoxication resulting from the compulsion of alcoholism or chemical dependence was not a defense, although voluntary intoxication could raise a reasonable doubt that the appellant knew that the men with whom she was fraternizing were enlisted men. The appellant voiced no objection to the instructions given by the military judge, although she did offer her own version of an insanity instruction which he rejected. The proposed instruction directed the members to find the appellant not criminally responsible only if they found that, as a result of the combination of her decreased liver function, chronic psychological problems, and ingestion of prescription medications, she suffered from a delusion that caused her to believe that her behavior was not criminal or that compelled her to commit the offenses.

Id. at 895-96.

The CAAF described the instructions somewhat differently:

> The military judge instructed the members: "An issue before you is the accused's sanity at the time of the offenses." He defined mental responsibility. He advised the members "that the term, 'severe mental disease or defect' can be no better be defined in the law than by the use of those terms themselves." He used the term "involuntary intoxication" with respect to the issue of whether appellant "knew that she was fraternizing with enlisted personnel." He instructed the members that "alcoholism and chemical dependency is recognized by the medical profession as a disease involving a compulsion towards intoxication." He did not specifically link the term "involuntary intoxication" with lack of mental responsibility.

Hensler, 44 M.J. at 187.

The use of quotations from the record of trial in appellate opinions concerning the form of instructions cannot but help the judge and counsel seeking to understand the nature and breadth of the court's holding.

77. *Hensler*, 40 M.J. at 896. The service court also considered whether the military judge had erred by failing "to distinguish between voluntary and involuntary intoxication when discussing the effect of the former on her knowledge of the enlisted status of her fraternizing partners." *Id.* at 896-97. The court concluded that the military judge did not err in the instruction. *Id.* at 900.

78. *Id.* at 900.

79. *Hensler*, 44 M.J. at 188.

80. *Id.*

The decision in *Hensler* has a number of effects on the practitioner. As a threshold matter, the CAAF confirms that involuntary intoxication is indeed a defense under military law.[82] It is, however, a limited defense; involuntary intoxication excuses misconduct only if it causes a lack of mental responsibility, and "is not available if an accused is aware of his or her reduced tolerance for alcohol but chooses to consume alcohol anyway."[83] Moreover, because the defense is "treated like legal insanity,"[84] the accused has the burden of proving by clear and convincing evidence that she was "not mentally responsible at the time of the alleged offense."[85]

There are also a number of issues that remain unanswered in the wake of *Hensler.* The CAAF's opinion appears to equate involuntary intoxication solely with pathological intoxication,[86] the latter being "defined as grossly excessive intoxication given the amount of the intoxicant, to which the actor does not know he is susceptible."[87] However, some military decisions have observed that "[i]nvoluntary intoxication exists when intoxication occurs through force, the fraud or trickery of another, or an actual ignorance of the intoxicating character of a substance."[88] Similarly, the Army Court of Military Review has stated that in cases when an accused asserts involuntary intoxication as a defense, "[t]he question then becomes whether his mental disease or defect was culpably incurred."[89] As such, counsel cannot be certain after *Hensler* whether pathological intoxication is the only form of involuntary intoxication recognized under military law, or if a more general inquiry into whether the intoxication was culpably incurred is appropriate in these cases.

Another issue is raised by the CAAF's observation in *Hensler* that the military judge failed to distinguish between involuntary and voluntary intoxication when instructing the members; as such, the potential defense of involuntary intoxication was "gratuitously extended . . . to all six episodes" that were the subject of the charges in this case, even though the CAAF found involuntary intoxication to be in issue only as to one.[90] Such an outcome can be avoided by military judges simply by following the advice offered by the Navy-Marine Corps Court of Military Review in its decision in *Hensler*: "When evidence of involuntary intoxication is introduced, it is essential to distinguish it from voluntary intoxication through proper instructions and, in particular, to avoid reference to the generic term 'intoxication' without defining it as one term or the other."[91] The problem confronting the military judge is that there is currently no pattern instruction available in the *Benchbook* that distinguishes involuntary from voluntary intoxication; indeed, there cannot be a pattern instruction until the CAAF determines whether pathological intoxication is the only form of involuntary intoxication recognized as a defense under military law, or if some broader formulation of the defense is applicable.[92]

Evidentiary Instructions

The military judge ordinarily has no *sua sponte* duty to give evidentiary instructions. However, the military judge may have an obligation to instruct when faced with the improper introduction of constitutionally excludable evidence.[93] In *United States v. Riley,*[94] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the military judge erred when he failed to give a curative instruction after a witness commented on the accused's invocation of his right to remain silent.

Dental Technician Third Class Leonardo Riley was charged with various child sexual abuse offenses committed upon a ten year old girl. At trial, the Naval Criminal Investigative Service

81. *Id.*

82. *See id.* at 187-88.

83. *Id.*

84. *Id.* at 188.

85. MCM, *supra* note 6, R.C.M. 916(k)(3).

86. *Hensler,* 44 M.J. at 187.

87. *Hensler,* 40 M.J. at 897.

88. United States v. Travels, No. 31437, slip op. at 2 (A.F. Ct. Crim. App. 1996) (citing United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982)).

89. United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982).

90. *Hensler,* 44 M.J. at 188. *But cf.* 40 M.J. at 899 (stating "there is no evidence that the appellant suffered from 'pathological intoxication'").

91. 40 M.J. at 900 n.8.

92. *See supra* notes 86-89 and accompanying text.

93. *See, e.g.,* United States v. Earnesty, 34 M.J. 1179, 1181 (A.F.C.M.R. 1992). (Stating "The lack of a defense objection does not relieve the military judge of his paramount responsibility to instruct the members regarding . . . improper evidence").

94. 44 M.J. 671 (N.M.Ct.Crim.App. 1996).

(NCIS) agent in charge of the case testified on direct examination that he had, at the beginning of his investigation, brought the accused in for an interview. The agent said that he advised Riley of his constitutional and military rights against self-incrimination, which Riley invoked. The agent further testified that Riley called him the next day, said he had spoken to an attorney and, based on that advice, would continue to remain silent and not participate in any further interrogation.[95] There was no objection from the defense during or following the NCIS agent's testimony.[96] Neither counsel made any reference to the accused's invocation during the remainder of the trial and the military judge did not mention it during his instructions to the members.[97]

It is error to bring to the court's attention evidence that the accused exercised his pretrial rights to remain silent or to request a lawyer,[98] and the agent should not have referred to it during his testimony.[99] Not every constitutional error requires reversal but such errors must be harmless beyond a reasonable doubt.[100] In assessing the impact the evidence had on Riley's conviction, the court pointed out that the agent's testimony was brief, only part of it concerned Riley's invocation of his right to remain silent, and counsel did not mention it during argument.[101] Under these circumstances, the court held that the error was harmless beyond a reasonable doubt.[102]

As the court noted, the lack of a defense objection does not relieve the military judge from the paramount duty to instruct the members regarding the improper introduction of evidence.[103] Therefore, when evidence is introduced concerning the accused's invocation of constitutional and statutory rights through argument or examination, the better practice is for the military judge to give a curative instruction even absent a defense objection. To do so "may judicially salvage an otherwise sinking appellate case."[104]

From the accused's perspective, one of the most important instructions is the reasonable doubt instruction. The instruction contained in the old *Military Judges' Benchbook* included language that "proof beyond a reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty."[105] While appellants claimed this language violated due process,[106] the Supreme Court recently concluded that instructions incorporating use of "moral certainty" verbiage do not violate due process.[107] The Court nevertheless criticized the use of such language and recommended adoption of a more precise definition.[108] In *United States v. Meeks*,[109] the Court of Military Appeals, following the rationale set forth by the Supreme Court, held the military judge did not err in giving a reasonable doubt instruction incorporating moral certainty language, but likewise suggested reexamination of the instruction.[110] The new *Military Judges' Benchbook* has, in fact,

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95. *Id*. at 673

96. *Id.*

97. *Id.*

98. "The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused." MCM, *supra* note 6, MIL. R. EVID. 301(f)(3).

99. *See, e.g.,* Wainwright v. Greenfield, 474 U.S. 284 (1986).

100. United States v. Earnesty, 34 M.J. 1179, 1182 (A.F.C.M.R. 1992).

101. United States v. Riley, 44 M.J. 671, 677 (N.M.Ct.Crim.App. 1996).

102. *Id.* (emphasis added).

103. *Id.* at 673 n.3.

104. United States v. Barrow, 42 M.J. 655, 664 (A.F. Ct. Crim. App. 1995).

105. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 2-34 (1 May 1982) (C2, 15 Oct. 1986).

106. *See* United States v. Czekala, 42 M.J. 168 (1995); United States v. Loving, 41 M.J. 213, 281 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

107. Victor v. Nebraska, 114 S. Ct. 1239 (1994).

108. *See* Holland & Masterton, *Annual Review on Developments in Instructions*, ARMY LAW., Mar. 1995, at 11.

109. 41 M.J. 150, 157 n.2 (C.M.A. 1994).

110. The military appellate courts addressed the reasonable doubt instruction in one case last year. In *United States v. Stockman*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the military judge's explanation of "beyond a reasonable doubt," by equating reasonable doubt to moral certainty rather than evidentiary certainty, was not plain error.

replaced "moral certainty" with "evidentiary certainty," so future problems with this instruction should be eliminated.[111]

Procedural Instructions

It is not uncommon for the government to allege multiple acts in one specification.[112] In *United States v. Fitzgerald*,[113] the accused was charged with two specifications of sodomy with a child and with two specifications of indecent acts with a child.[114] The two specifications of indecent acts with a child allegedly occurred on divers occasions over sequential periods of time--at the accused's prior and then current duty stations. Specification one alleged five different indecent acts and specification two alleged four different indecent acts.[115] During findings instructions, the military judge gave the standard instruction on findings by exceptions and substitutions.[116] In response to this instruction, the members began a "discussion" with the military judge concerning how they were to decide what portions of the specifications to except out if they believed the accused committed some but not all of the misconduct. Among other "instructions"[117] given by the military judge during his colloquy with the members, he informed them as follows:

> You [members] would be talking about the specifications of what you believe, and the *members would reach a consensus as* to what they didn't have a reasonable doubt about--what they were convinced beyond a reasonable doubt about. For example--I'm just trying to help you in your deliberations--say that Colonel Padgett was talking about it and you were all talking about it. *In your discussions, seven or more members decided, well, we believe that he did all of these things except this.* Let's vote on that.[118]

There were no objections from either side to this instruction, nor to any instruction *or discussion* between the military judge and the members. On appeal, it was alleged that the instructions on voting by exceptions were incorrect in that they allowed the members to vote more than once on each specification.[119]

The CAAF began its analysis by defining the standard for appellate review: absent plain error, failure to object to instructions constitutes waiver.[120] Additionally, CAAF noted that the appellant had the burden of proving plain error.[121] Next, CAAF explained that when two acts are alleged within the same specification, the military judge may instruct the members that they may find the accused guilty of either or both of the criminal acts alleged in the specification. For this proposition the court cited *United States v. Cowan*,[122] in which the accused was charged with unpremeditated murder of another sailor. The Article 118 specification alleged the murder by two very different means--"by means of stabbing him with a knife, and by wrongfully, intentionally, omitting to render timely assistance after . . . [the victim] had been stabbed."[123] The military judge in *Cowan* informed the members that they could find either the stabbing, the failure to render assistance, or both, as the basis for a conviction of murder or the lesser included offenses of involuntary manslaughter and negligent homicide. While holding incorrect the instruction that the accused's failure to act *without a legal duty to act* could support a finding of guilty to involuntary man-

111. BENCHBOOK, *supra* note 1, at 52.

112. *See* United States v. Mincey, 42 M.J. 376 (1995) (holding maximum punishment for bad-check mega-spec is computed by adding the maximum punishments as if all checks had been separately charged). *But see* MCM, *supra* note 6, R.C.M. 905(b)(5) (concerning severance of a duplicitous specification into two or more specifications).

113. United States v. Fitzgerald, 44 M.J. 434 (1996).

114. UCMJ arts. 125 & 134 (1988).

115. *Fitzgerald*, 44 M.J. at 434-35.

116. BENCHBOOK, *supra* note 1, para. 7-15.

117. Counsel should note that even though the military judge appeared to be having a "discussion" with the members, this discussion is an *instruction*. As a result, the test on appeal, absent an objection, will be plain error. *See* MCM, *supra* note 6, R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.").

118. *Fitzgerald*, 44 M.J. at 436.

119. *Id.* at 434.

120. MCM, *supra* note 6, R.C.M. 920(f).

121. United States v. Olano, 507 U.S. 725, 734 (1993).

122. 42 M.J. 475 (1995).

123. *Id.* at 475.

slaughter by culpable negligence,[124] the court nonetheless recognized the basic premise that an accused charged with multiple acts within a specification could be found guilty of one, some, or all of the acts and the resulting specification. Having reaffirmed this premise, the issue in *Fitzgerald* was whether the military judge committed plain error in his procedural instructions to the members in response to their questions concerning how to procedurally vote on "component" acts within specifications.

The CAAF did not find plain error[125] in this "straw votes"[126] instruction. The CAAF held that permissible straw votes were taken when "the members would *reach a consensus* as to what they didn't have a reasonable doubt about"[127] and when "*seven or more members decided* . . . that he did all of these things except this."[128]

United States v. Fitzgerald illustrates two important points. First, military judges must carefully word their answers to members' questions.[129] Even though the appellate court affirmed on the basis of "straw vote" instructions, these "informal" votes have never been encouraged and can lead to additional questions and issues.[130] Second, counsel must remain attentive throughout instructions. This is especially true when military judges enter into dialogues with members that deviate from standard *Benchbook* instructions and attempt to navigate uncharted waters. If counsel fail to object, the standard for review will be "plain-error."[131]

In *United States v. Miller*,[132] it was alleged that the accused committed numerous criminal acts with teenage children.[133] In two specifications it was alleged that the accused "compelled, enticed, or procured an act or acts of sexual intercourse."[134] The military judge instructed the members that they could add the term "and sodomy" after the phrase "sexual intercourse" in these two specifications. The accused did not object, and the members found the accused guilty with the additional words "and sodomy."

On appeal, the issue was whether these were proper findings by exceptions and substitutions to conform to the evidence.[135] R.C.M. 918(a)(1) provides, "Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it."[136]

The appellate court held that adding "and sodomy" to the specifications changed the nature of the offenses and increased the severity of the offenses. Additionally, the court noted that the accused was not provided proper notice that these alleged offenses included solicitation of sodomy. The court disapproved the findings as to the words "and sodomy" in both specifications and reassessed the sentence.[137]

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124. MCM, *supra* note 6, para. 44c(2)(a)(ii).

125. The court wrote that "There were no objections to these possible voting options because the instructions inured to the appellant's benefit . . . As a result, we hold that there was an absence of plain error and a waiver of any objection." *Fitzgerald*, 44 M.J. at 438.

126. A straw poll is an informal, non-binding vote. Although they are not prohibited, they are discouraged because of the potential for abuse of superiority in rank. *See* United States v. Lawson, 16 M.J. 38 (C.M.A. 1983); United States v. Loving, 41 M.J. 213, 235 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

127. *Fitzgerald*, 44 M.J. at 436.

128. *Id.*

129. In this case, the military judge never mentioned the words straw vote or practice vote. Nonetheless, the appellate courts affirmed on that basis. The recommended solution is to reread the Benchbook instruction on findings by exceptions and exceptions and substitutions. *See* BENCHBOOK, *supra* note 1, para. 7-15.

130. For example, what happens if members decide the straw vote is the verdict? Must they vote again, or just adopt the straw vote? What happens if a member does not understand that it was a practice vote and demands that the straw vote be the single vote of the court in accordance with MCM, *supra* note 6, R.C.M. 921(c)(3)? How many straw votes can the president of the panel order before the issue of undue influence of rank arises? *See* MCM, *supra* note 6, R.C.M. 923 (impeachment of findings); Mil. R. Evid. 606 (competency of court member as witness).

131. MCM, *supra* note 6, R.C.M. 920(f).

132. United States v. Miller, 44 M.J. 549 (A.F. Ct. Crim. App. 1996).

133. The accused was charged with pandering, obstruction of justice, indecent acts with a minor, showing pornography to minors, supplying alcohol to minors, assault, attempted indecent acts with a minor, and rape. UCMJ arts. 134, 128, 92, 80, & 120, respectively. *Miller*, 44 M.J. at 552-53.

134. *Id.* at 556.

135. MCM, *supra* note 6, R.C.M. 918(a)(1).

136. *Id.*

137. *Miller*, 44 M.J. at 557.

Miller provides the following instructions lesson: If new misconduct is discovered for the first time at trial,[138] all parties to the trial must apply the R.C.M. 918(a)(1) standard to that new evidence prior to the military judge providing the variance instruction.[139] However, *Miller* also provides defense counsel an important trial advocacy lesson. Defense counsel should object in an Article 39(a) session prior to the introduction of uncharged misconduct that is not relevant to proving a charged offense.[140] Solicitation of sodomy was not charged, violated the test of R.C.M. 918(a)(1), and should never have been presented to the members in the first instance.

Sentencing

In *United States v. Weatherspoon*,[141] the accused was convicted of premeditated murder and breaking restriction.[142] After deliberating on an appropriate sentence for nine minutes, the members returned and asked, "The question is, must we impose confinement for life or must we merely vote for life?" The military judge instructed them as follows: "The bottom line is, you must vote for a sentence which includes confinement for life. You can, as a court, collectively or individually, recommend clemency with respect to that length of confinement." The military judge also instructed them that for clemency to be recommended "by the court," the same number of members as required to vote for the sentence being imposed would have to vote to recommend clemency. The military judge instructed that because confinement for life was a required punishment, three-fourths or seven of the nine members would have to vote for clemency for it to be "the court's" recommendation.

On appeal, the issue was the required number of members for a clemency recommendation to be of "the court-martial." The CAAF recognized two possibilities: (1) the same percentage that is required to adjudge the sentence; or (2) a simple majority.[143] The court did not find the answer in the *Manual*.[144] Resolving this case, CAAF held that the record provided that only four of the nine members would have recommended clemency; therefore, there was not even a bare majority. The facts mooted the issue.[145] The court did recommend that the issue be reviewed, and that the President amend an appropriate Rule for Courts-Martial to resolve the issue.[146]

Until the President clarifies the issue,[147] military judges should answer members' clemency questions by using the appropriate *Benchbook* instruction on Clemency (Recommendation for Suspension)[148] or on Clemency (Additional Instructions).[149] These instructions allow a clemency recommendation

138. A trial advocacy comment--new misconduct should not be discovered for the first time at trial. Counsel must establish a rapport with witnesses and ask "uncomfortable" questions (such as asking a teenage girl if the accused solicited sodomy).

139. *See* BENCHBOOK, *supra* note 1, para. 7-15.

140. MCM, *supra* note 6, Mil. R. Evid. 401, Definition of "relevant evidence." *See also* Mil. R. Evid. 403 & 404(b).

141. 44 M.J. 211 (1996).

142. UCMJ arts. 118 & 134 (1988).

143. *Weatherspoon*, 44 M.J. at 213.

144. *But see* UCMJ art. 52, para. c: "All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote . . . ."

145. *Weatherspoon*, 44 M.J. at 214.

146. *Id.* n.2.

147. One could debate whether the President should follow CAAF's recommendation and amend a Rule for Courts-Martial such that it clarifies the number needed for a clemency recommendation to be "the court's." There is no requirement that a clemency recommendation be of "the court." One, some, or all of the members can recommend clemency. *See id.* at 214 (Sullivan, J., concurring in the result) (citing C. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 166 (1874)).

by one, some, or all the members. They avoid the issue of defining a number required for a recommendation to be of "the court."

Lastly, in *United States v. Figura*,[150] the stipulation of fact in a guilty plea case failed to note the dates of forged checks, and when and where the forged checks were cashed. Counsel for both sides agreed that the military judge would provide this information as part of an instruction to the members. There was no defense objection to the instruction once given. On appeal, CAAF held: "There is no demonstrative right or wrong way to introduce evidence taken during a guilty plea inquiry . . . . The judge should permit the parties ultimately to choose a method of presentation. That was done in this case."[151] Judge Sullivan, concurring *cum admonitu*, provides advice as follows: "My suggestion to the military judges--use your power under R.C.M. 920 to give the jury a good, exhaustive, accurate, and fair view of the facts in the case so the jury can do its job on a more informed basis."[152]

Conclusion

Members who lack proper instructions cannot perform their duties, and all parties to the trial have a responsibility to work with the military judge and ensure that the members receive clear and concise instructions. The *Military Judges' Benchbook* and the Computer Benchbook are useful tools for creating these instructions. Counsel need to remain ever vigilant. When there is no established jurisprudence or when military judges stray from the *Benchbook*, issues arise. When military judges enter into dialogues with members, counsel should pay very close attention to what is stated. If counsel fail to object to alleged erroneous instructions, the appellate standard of review will typically be "plain error"--a difficult standard for appellants to meet.

148. The instruction on page 129 of the BENCHBOOK *supra* note 1, provides as follows:

> You are advised that, although you have no authority to suspend either a portion of or the entire sentence that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the convening or higher authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted even if the convening or higher authority refuses to adopt your recommendation or suspension.
>
> *If fewer than all members of the court* wish to recommend suspension of a portion of, or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the sentence worksheet.
>
> Where such a recommendation is made, then the president, after announcing the sentence, may announce the recommendation, and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion or the sentence in entirety is solely a matter within the discretion of the court.
>
> However, you should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the convening or higher authority.

149. This instruction, on page 130 of the BENCHBOOK, *supra* note 1, provides:

> You are reminded that it is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, *if any or all of you* wish to make a recommendation for clemency, it is within your authority to do so after the sentence is announced.

150. 44 M.J. 308 (1996).

151. *Id.* at 310.

152. *Id.* at 311.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Consumer Law Note

The Truth-in-Lending Act Can Help With Home Improvement Contracts

A recent case decided by the United States Court of Appeals for the Fifth Circuit highlights the utility of the Truth-in-Lending Act (TILA) protections when home improvements are financed with credit secured by a principal residence. In *Taylor v. Domestic Remodeling, Inc.*[1] [hereinafter *Taylor*], the Court held that a consumer had a three-year extended right to rescind a home improvement contract where notices required by the TILA were not properly given by the third party financing company and where the work began prior to the completion of the rescission period.[2]

The Court recounted the following facts in their decision:

> In May, 1991, defendant Domestic Remodeling, Inc. ("Domestic") approached Mrs. Taylor about remodeling her home. Mrs. Taylor and her son Tom authorized Domestic to construct an addition onto the house and roof it. The total cash price of the agreed-upon remodeling was $17,500.00. At the same time, the Taylors signed a loan application to obtain financing for the remodeling through Green Tree. On June 4, 1991, Green Tree approved the loan, and on June 11, 1991, Mrs. Taylor signed a deed of trust granting a security interest in her home to Green Tree. That same day, she also signed a Notice of Right to Cancel which advised her that she had until midnight of June 14, 1991, or three business days from the date she received the Truth in Lending disclosures, or three days from the date she received the instant notice to cancel the transaction. Domestic and Green Tree did not *give* the Taylors the referenced Truth in Lending disclosures documenting particulars about the loan on June 11, 1991.
>
> Whatever construction was done on the Taylor home began and ended on June 27, 1991. On that date, Mrs. Taylor signed a Completion Certificate and verified via telephone with Green Tree that the work was satisfactory. On that same day, Green Tree and Domestic finally gave Mrs. Taylor the Truth in Lending disclosures referenced in the Notice of Right to Cancel.[3]

The Taylors filed suit on 27 June 1994, and both parties consented to trial before a magistrate.[4] The Taylors alleged that the work was in fact *not* completed nor satisfactory.[5] They also asserted TILA violations and their TILA right to rescind, as well as state and common law claims.[6] That court found for the Taylors on their claim that they had a right to rescind the contract under the TILA.[7]

The TILA provides a "cooling-off period" of three business days for any nonpurchase money credit transaction secured by the consumer's principal dwelling.[8] However, the TILA does not begin the running of this three business day period until the consummation of the transaction or the delivery of the material disclosure forms, whichever occurs later.[9] Failure to deliver the required forms or required information extends the rescission

1. 97 F.3d 96 (5th Cir. 1996).
2. *Id.* at 99.
3. *Id.* at 97 (emphasis added).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 98.

period for three years after the date of the consummation of the transaction.[10]

The regulations promulgated under the TILA require certain content in the notices and prohibit certain behavior during the rescission period. The notice of the right to rescind must disclose "clearly and conspicuously" the following:[11]

1. The security interest in the dwelling;
2. How to exercise the right to rescind;
3. A form on which to exercise the rescission right;
4. The effects of rescission; and
5. The date the rescission period expires.

Further, these regulations provide that "no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded."[12]

The court in *Taylor* noted that, in its precedent, it had identified a two-fold intent behind these disclosure requirements.[13] This intent was to provide for a right of rescission first, "upon the creditor's failure to disclose material information about the transaction itself,"[14] and second, "upon the creditor's failure to disclose the required information regarding the consumer's right to rescind."[15]

In *Taylor*, the Court found that the second intent of the disclosure provisions was violated by a combination of two errors. First, the disclosed date of the expired rescission period was incorrect because the rescission period did not actually begin to run until the proper notices were delivered on 27 June 1991.[16] Second, by the time the Taylors received the notice, "the construction was as complete as it would ever be, and they were facing a fait accompli."[17] The Court noted "that while the TILA does not demand unyielding compliance with detail, full and honest disclosure is exacted."[18] The Court held that this full and honest disclosure had not been made because the two errors worked together to produce "a material failure to disclose to the Taylors their right to rescind."[19] Because of this improper disclosure, the Taylors had three years to rescind.[20] The Court went on to hold that the filing of the complaint in the case satisfied the requirement of notice of rescission.[21]

The case raises some important points for the legal assistance practitioner to remember. First, the TILA provides important remedies for home improvement situations. These transactions often involve credit that is secured by the home being improved. If the home is the principal dwelling for the

8. 15 U.S.C.A. § 1635 (a) (West 1996). The regulation implementing this statute provides:

> In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction . . . . To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business. The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice [of the rescission right], or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, upon sale of the property, whichever occurs first.

12 C.F.R. § 226.23 (a) (1997) (footnotes omitted). The rule also exempts certain loans from this provision. These are, essentially, purchase-money loans secured by the property. *Id.* § 226.23(f).

9. 12 C.F.R. § 226.23(a)(3) (1997). *See also supra* note 8.

10. 12 C.F.R. § 226.23(a)(3) (1997).

11. *Id.* § 226.23(b).

12. *Id.* § 226.23(c).

13. Taylor v. Domestic Remodeling, Inc., 97 F.3d 96, 99 (5th Cir. 1996) *citing* Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983).

14. *Id.*

15. *Id.*

16. *Id.* at 99.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 99-100.

consumer, he may have a powerful remedy in the TILA rescission right.[22] Second, relatively minor disclosure errors will still provide an extended right to rescind under the contract.[23] Even if the client is "late" approaching you, the situation may fit into the three-year rescission period rather than the three-day period. Third, the rescission process usually will protect the consumer against the contractor *and* the third party creditor. While the consumer normally has to tender any money or property delivered (or the reasonable value of property if return is impracticable) back to the creditor, the TILA still provides some relief on the contract by eliminating credit charges.[24] In cases, as here, where the contractor has performed prematurely during the rescission period, full protection should be provided against any liability for the transaction because the consumer can supposedly cancel the transaction within the rescission period "without cost."[25] Since allowing the contractors to benefit from early performance would effectively foreclose this right, courts most likely will place the risk of early performance on the contractor.[26] Finally, it is important in your preventive law program to place the rescission right in the home improvement context and inform consumers that this rescission period exists for at least some of these transactions. Additionally, they should be advised to allow no work to be done before the rescission period expires. This assures them of their opportunity to consider the situation fully and without cost before they proceed with an obligation that will burden their principal dwelling. Major Lescault.

Family Law Note

Proper Jurisdiction to Divide Military Disposable Retired Pay Is Reinforced by Colorado Court

The Uniformed Services Former Spouses Protection Act (USFSPA)[27] allows states to treat military retired pay as marital property and divide disposable military retired pay during a divorce. This does not create a federal right to a portion of the military retired pay; the division is controlled by state law. The USFSPA does, however, impose on the states a preliminary jurisdictional requirement that must be met before the state applies state law to the division of military retirement pay. A state court cannot divide military retired pay as marital property unless the court has jurisdiction over the military member or retiree under one of three bases: (1) domicile, (2) residence in the state, other than because of military assignment, or (3) consent.[28] This is an area several practitioners and courts overlook. Most courts consider this section of the USFSPA as a limitation on the subject matter jurisdiction over military retired pay.[29] It is therefore a threshold question that must be addressed before any division of the military retired pay. It is important for practitioners to remember that jurisdiction over dissolution of the marriage, awards of child support, and child custody does not necessarily mean a court has jurisdiction over the division of military retirement pay as property.

In the case of *In re the Marriage of Carol Jean Akins and James Akins, Jr.*,[30] James Akins, the military member, challenged the Colorado trial court's jurisdiction to divide his military retirement pay. Mrs. Akins and the children resided in Colorado Springs for twelve years while he was on active duty. He resided in Colorado only four of those years, between 1982 and 1986. He continued to visit his family in Colorado periodically until divorce actions were initiated in January 1994. He maintained Colorado as his state of residence for tax purposes until early 1994 when he switched it to North Carolina. Colo-

22. The rescission right is extremely powerful because of its effect. Rescission *voids* the security interest and eliminates any obligation the consumer has to pay finance or other credit charges (such as closing costs). These effects occur automatically at rescission. 15 U.S.C.A. § 1635 (West 1996); 12 C.F.R. §§ 226.15, 226.23 (1997).

23. Note that some errors will be too small and considered merely technical in nature. For example, the Third Circuit Court of Appeals found that the mere delivery of the loan proceeds during the rescission period did *not* violate the prohibition of performance during that period. Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3d Cir. 1990). Similarly, the Arkansas Supreme Court found a mere technical error when the credit company misstated the end date of the rescission period by one day and there were no other errors. Bank of Evening Shade v. Lindsey, 644 S.W.2d 920 (1983).

24. *See* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING §§ 6.10.5, 6.10.6 (3d ed. 1995 & Supp. 1996). Note that home improvement contractors often try to avoid this result by establishing a "cash" contract with the consumer and then having the consumer get a "direct loan" from the creditor. Courts generally see through this scheme, sometimes referred to as the "two-contract dodge," and provide the TILA protections to the consumer against both parties. *Id.* § 6.8.4.2.2. This scheme is usually part of a course of action known as "spiking" where the contractor begins work before the rescission period ends in order to influence the consumer not to rescind. Courts tend to view this practice as particularly egregious because it tends to effectively foreclose the consumer's right to rescind. Under the rules, the consumer would ordinarily have to tender the property back or its reasonable value. For attachments to a home, the consumer may be stuck paying for work (often substandard) even though he is supposed to be able to rescind "without cost." Courts that recognize the "spiking" scheme should not require the consumer to pay anything--even for the items installed. *Id.* §§ 6.8.4.2., 6.8.4.3

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26. *See* the citations and discussion of "spiking," *supra* note 24.

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All states now recognize a right to divide military retired pay as marital property; therefore, it is essential that the attorney consider the jurisdictional restrictions imposed on the states by the USFSPA when counseling clients on the division of military retired pay. Major Fenton.

Tax Law Notes

Assisting Survivors When Spouse Died in a Combat Zone

A member of the United States Armed Forces who dies in a combat zone[32] is entitled to forgiveness of all income taxes due in the year of death.[33] Thus, the survivor will be entitled to a refund of any income taxes that were from that servicemember's income during the tax year in which the servicemember died. In addition, a service member who dies in a combat zone or hazardous duty area is entitled to forgiveness of taxes for previous years in which the statute of limitations is still open.[34] Thus, the survivor is entitled to a refund of any taxes paid by the decedent in prior years for which the individual, if alive, could file an amended return. As a general rule, an individual can only file an amended return for three years.[35] Thus, if an individual were to die in a combat zone or hazardous duty area in 1996, taxes owed or paid by that individual for 1993, 1994, 1995, and 1996 would be forgiven, provided that the survivor files the appropriate returns prior to 15 April 1997. If the survivor fails to file an amended return by 15 April 1997, he could still receive a refund for tax paid by the decedent in 1994, 1995, and 1996, provided that the survivor files the appropriate returns prior to 15 April 1998.

In order to claim the refund, the surviving spouse needs to file a Form 1040, or a 1040X if it is an amended return, to the Internal Revenue Service Center (ATTN: Stop 2), P.O. Box 267, Covington, Kentucky 41019.[36] The phrase "KITA-see attached" should be entered on the line where total tax would normally be entered. In addition, Form 1310 and a certification from the Department of Defense or the Department of State that the death was the result of terrorist or military action outside the United States must be attached.[37] Finally, if the return in question is for a joint return, an apportionment must be done between the decedent's income and the surviving spouse's income.[38] Major Henderson.

Tax Consequences of the Department of Defense Educational Loan Repayment Program

Service members who enlist and have some of their student loans repaid by the Department of Defense must report the repayment by the Department of Defense as income.[39] In *Vazquez v. Commissioner*, the taxpayer incurred student loans prior to entering active duty in the Army. In 1992, the Army paid $2,985.86 toward his outstanding student loan. This payment was made pursuant to the Department of Defense Educational Loan Repayment Program.[40] The Internal Revenue Service determined that the $2,985.86 was gross income to the service member and determined a deficiency.

The service member filed a petition in tax court to dispute the deficiency. The tax court noted that gross income specifically includes compensation for services and income from discharge of indebtedness.[41] The service member, who was stationed at Fitzsimons Army Medical Center, argued that he

31. *Id.* at 4.

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was being treated unfairly because military personnel in other professions, such as nurses and doctors, receive tax exempt educational subsidies. The tax court stated that even assuming the taxpayer's characterization of the law was correct, the taxpayer's remedy was with Congress.

Legal assistance attorneys who assist enlisted soldiers should determine whether any of their clients participated in this program. If any clients did participate, they need to report the repayment as income on their tax return. The repayment may or may not be reported on their W-2 Form. In fact, in *Vazquez*, the repayment was not reported on that service member's W-2 Form. Major Henderson.

Garnishment of an IRA

Legal assistance attorneys dealing with garnishment actions for clients who have Individual Retirement Accounts need to be especially diligent in ensuring that the IRA itself is not garnished. The tax court recently ruled that a garnishment from an IRA is a premature withdrawal.[42] Thus, the withdrawal must be reported as income in the year of "withdrawal."[43] Further, since the withdrawal will not meet any of the exceptions to the imposition of the additional 10% tax on premature withdrawals,[44] the taxpayer will also have to pay the 10% penalty for early withdrawal.[45]

In *Vorwald v. Commissioner*,[46] the petitioner had fallen behind in child support payments and his ex-spouse obtained and executed a garnishment order against his IRA. The IRS determined a deficiency against the petitioner for the withdrawal from the IRA. The IRS also assessed the additional 10% tax for early withdrawal from the IRA. The petitioner filed a petition with the tax court, but the tax court sided with the IRS. Major Henderson.

Administrative and Civil Law Notes

Standards of Conduct: Change to the Gift Rules

The Deputy Secretary of Defense changed Department of Defense (DOD) Directive 5500.7-R which concerns gift rules.[47] The change allows employees (superiors) to accept gifts from a group of employees (which includes a subordinate in the group) when the value of the gift exceeds $300 in value. This change only applies to gifts to superiors on special, infrequent occasions that terminate the superior-subordinate relationship. The change became effective on 3 January 1997. The following new subsection appears after section 2-203(a):[48]

> (3) Notwithstanding the $300 limitation of section 2-203 of this regulation, gifts from a group that includes a subordinate may exceed $300 if:
>
> (a) They are appropriate for the occasion,
> (b) They are given on a special, infrequent occasion that terminates the subordinate-official superior relationship, such as retirement, resignation, or transfer, and,
> (c) They are uniquely linked to the departing employee's position or tour of duty, and commemorate the same.

This significant change in the gift rules will be particularly challenging for Ethics Counselors. When opining on the legality of retirement, resignation, or transfer gifts, the issue is no longer the definite $300 limit. Now Ethics Counselors have the formidable task of determining whether the gift is "appropriate to the occasion." Department of the Army, Office of The Judge Advocate General, Standards of Conduct Office (SOCO), advises that "appropriate to the occasion" should normally not exceed $300.[49] In other words $300 is a strong indication of what is "appropriate to the occasion." *The Army Lawyer*'s May, 1996 article, *An Overview and Practitioner's Guide to Gifts*, provides practitioners with a resource for analyzing gift issues. Ethics Counselors should note that the article was published prior to this change. Major Castlen.

41. *Id.; See also* I.R.C. §§ 61(a)(1), 61(a)(12) (RIA 1996).

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43. I.R.C. § 408(d) (RIA 1996).

44. *Id.* § 72(t)(2).

45. *Id.* § 72(t)(1).

46. 73 T.C.M. (CCH) 1697 (1997).

47. Joint Ethics Reg. § 2-203(a) (Aug. 1993).

48. Dep't of Defense, Office of Gen. Counsel, SOCO Advisory Opinion 97-02 (Jan. 8, 1997).

49. Telephone Interview with Colonel Ruppert, Department of the Army, Office of The Judge Advocate General, Standards of Conduct Office (Mar. 25, 1997).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Consumer Law Note

The Truth-in-Lending Act Can Help With Home Improvement Contracts

A recent case decided by the United States Court of Appeals for the Fifth Circuit highlights the utility of the Truth-in-Lending Act (TILA) protections when home improvements are financed with credit secured by a principal residence. In *Taylor v. Domestic Remodeling, Inc.*[50] [hereinafter *Taylor*], the Court held that a consumer had a three-year extended right to rescind a home improvement contract where notices required by the TILA were not properly given by the third party financing company and where the work began prior to the completion of the rescission period.[51]

The Court recounted the following facts in their decision:

> In May, 1991, defendant Domestic Remodeling, Inc. ("Domestic") approached Mrs. Taylor about remodeling her home. Mrs. Taylor and her son Tom authorized Domestic to construct an addition onto the house and roof it. The total cash price of the agreed-upon remodeling was $17,500.00. At the same time, the Taylors signed a loan application to obtain financing for the remodeling through Green Tree. On June 4, 1991, Green Tree approved the loan, and on June 11, 1991, Mrs. Taylor signed a deed of trust granting a security interest in her home to Green Tree. That same day, she also signed a Notice of Right to Cancel which advised her that she had until midnight of June 14, 1991, or three business days from the date she received the Truth in Lending disclosures, or three days from the date she received the instant notice to cancel the transaction. Domestic and Green Tree did not *give* the Taylors the referenced Truth in Lending disclosures documenting particulars about the loan on June 11, 1991.
>
> Whatever construction was done on the Taylor home began and ended on June 27, 1991. On that date, Mrs. Taylor signed a Completion Certificate and verified via telephone with Green Tree that the work was satisfactory. On that same day, Green Tree and Domestic finally gave Mrs. Taylor the Truth in Lending disclosures referenced in the Notice of Right to Cancel.[52]

The Taylors filed suit on 27 June 1994, and both parties consented to trial before a magistrate.[53] The Taylors alleged that the work was in fact *not* completed nor satisfactory.[54] They also asserted TILA violations and their TILA right to rescind, as well as state and common law claims.[55] That court found for the Taylors on their claim that they had a right to rescind the contract under the TILA.[56]

The TILA provides a "cooling-off period" of three business days for any nonpurchase money credit transaction secured by the consumer's principal dwelling.[57] However, the TILA does not begin the running of this three business day period until the consummation of the transaction or the delivery of the material disclosure forms, whichever occurs later.[58] Failure to deliver the required forms or required information extends the rescis-

50. 97 F.3d 96 (5th Cir. 1996).

51. *Id.* at 99.

52. *Id.* at 97 (emphasis added).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 98.

sion period for three years after the date of the consummation of the transaction.[59]

The regulations promulgated under the TILA require certain content in the notices and prohibit certain behavior during the rescission period. The notice of the right to rescind must disclose "clearly and conspicuously" the following:[60]

1. The security interest in the dwelling;
2. How to exercise the right to rescind;
3. A form on which to exercise the rescission right;
4. The effects of rescission; and
5. The date the rescission period expires.

Further, these regulations provide that "no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded."[61]

The court in *Taylor* noted that, in its precedent, it had identified a two-fold intent behind these disclosure requirements.[62] This intent was to provide for a right of rescission first, "upon the creditor's failure to disclose material information about the transaction itself,"[63] and second, "upon the creditor's failure to disclose the required information regarding the consumer's right to rescind."[64]

In *Taylor*, the Court found that the second intent of the disclosure provisions was violated by a combination of two errors. First, the disclosed date of the expired rescission period was incorrect because the rescission period did not actually begin to run until the proper notices were delivered on 27 June 1991.[65] Second, by the time the Taylors received the notice, "the construction was as complete as it would ever be, and they were facing a fait accompli."[66] The Court noted "that while the TILA does not demand unyielding compliance with detail, full and honest disclosure is exacted."[67] The Court held that this full and honest disclosure had not been made because the two errors worked together to produce "a material failure to disclose to the Taylors their right to rescind."[68] Because of this improper disclosure, the Taylors had three years to rescind.[69] The Court went on to hold that the filing of the complaint in the case satisfied the requirement of notice of rescission.[70]

The case raises some important points for the legal assistance practitioner to remember. First, the TILA provides important remedies for home improvement situations. These transactions often involve credit that is secured by the home being improved. If the home is the principal dwelling for the

57. 15 U.S.C.A. § 1635 (a) (West 1996). The regulation implementing this statute provides:

> In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction . . . . To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business. The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice [of the rescission right], or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, upon sale of the property, whichever occurs first.

12 C.F.R. § 226.23 (a) (1997) (footnotes omitted). The rule also exempts certain loans from this provision. These are, essentially, purchase-money loans secured by the property. *Id.* § 226.23(f).

58. 12 C.F.R. § 226.23(a)(3) (1997). *See also supra* note 8.

59. 12 C.F.R. § 226.23(a)(3) (1997).

60. *Id.* § 226.23(b).

61. *Id.* § 226.23(c).

62. Taylor v. Domestic Remodeling, Inc., 97 F.3d 96, 99 (5th Cir. 1996) *citing* Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983).

63. *Id.*

64. *Id.*

65. *Id.* at 99.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 99-100.

consumer, he may have a powerful remedy in the TILA rescission right.[71] Second, relatively minor disclosure errors will still provide an extended right to rescind under the contract.[72] Even if the client is "late" approaching you, the situation may fit into the three-year rescission period rather than the three-day period. Third, the rescission process usually will protect the consumer against the contractor *and* the third party creditor. While the consumer normally has to tender any money or property delivered (or the reasonable value of property if return is impracticable) back to the creditor, the TILA still provides some relief on the contract by eliminating credit charges.[73] In cases, as here, where the contractor has performed prematurely during the rescission period, full protection should be provided against any liability for the transaction because the consumer can supposedly cancel the transaction within the rescission period "without cost."[74] Since allowing the contractors to benefit from early performance would effectively foreclose this right, courts most likely will place the risk of early performance on the contractor.[75] Finally, it is important in your preventive law program to place the rescission right in the home improvement context and inform consumers that this rescission period exists for at least some of these transactions. Additionally, they should be advised to allow no work to be done before the rescission period expires. This assures them of their opportunity to consider the situation fully and without cost before they proceed with an obligation that will burden their principal dwelling. Major Lescault.

Family Law Note

Proper Jurisdiction to Divide Military Disposable Retired Pay Is Reinforced by Colorado Court

The Uniformed Services Former Spouses Protection Act (USFSPA)[76] allows states to treat military retired pay as marital property and divide disposable military retired pay during a divorce. This does not create a federal right to a portion of the military retired pay; the division is controlled by state law. The USFSPA does, however, impose on the states a preliminary jurisdictional requirement that must be met before the state applies state law to the division of military retirement pay. A state court cannot divide military retired pay as marital property unless the court has jurisdiction over the military member or retiree under one of three bases: (1) domicile, (2) residence in the state, other than because of military assignment, or (3) consent.[77] This is an area several practitioners and courts overlook. Most courts consider this section of the USFSPA as a limitation on the subject matter jurisdiction over military retired pay.[78] It is therefore a threshold question that must be addressed before any division of the military retired pay. It is important for practitioners to remember that jurisdiction over dissolution of the marriage, awards of child support, and child custody does not necessarily mean a court has jurisdiction over the division of military retirement pay as property.

In the case of *In re the Marriage of Carol Jean Akins and James Akins, Jr.*,[79] James Akins, the military member, challenged the Colorado trial court's jurisdiction to divide his military retirement pay. Mrs. Akins and the children resided in Colorado Springs for twelve years while he was on active duty. He resided in Colorado only four of those years, between 1982 and 1986. He continued to visit his family in Colorado periodically until divorce actions were initiated in January 1994. He maintained Colorado as his state of residence for tax purposes until early 1994 when he switched it to North Carolina. Colo-

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94. *Id.* § 72(t)(1).

95. 73 T.C.M. (CCH) 1697 (1997).

96. JOINT ETHICS REG. § 2-203(a) (Aug. 1993).

97. DEP'T OF DEFENSE, OFFICE OF GEN. COUNSEL, SOCO ADVISORY OPINION 97-02 (Jan. 8, 1997).

98. Telephone Interview with Colonel Ruppert, Department of the Army, Office of The Judge Advocate General, Standards of Conduct Office (Mar. 25, 1997).

Notes from the Field

United States v. Salazar: Search, Seizure, Consent and Deceit

Introduction

In *United States v. Salazar*, the United States Court of Appeals for the Armed Forces (CAAF) considered an issue of military first impression regarding law enforcement deception in searches and seizures.[1] While the court could not resolve the issue, it signaled great dislike for the use of deception in obtaining consent to search.[2] The court ruled, however, that a commander's ordering a soldier into barracks cannot ordinarily terminate a soldier's expectation of privacy in his off-post quarters.

The Facts

In early July 1993, Private First Class (PFC) Salazar and his wife were living in Killeen, Texas, in the home of Mrs. Salazar's sister and brother-in-law, the Buinoses.[3] PFC Salazar was a soldier assigned to nearby Fort Hood, and had only two to four weeks left in the Army before he would be administratively discharged.[4] Most of the Buinos house was of common use for the entire family, but the Salazars had primary use of a bedroom and nursery and PFC Salazar was given the exclusive use of a hall closet to store his military gear.[5] On July 9, PFC Salazar's company commander ordered him to move into the barracks, on-post because of a complaint that PFC Salazar had struck his eight month pregnant wife.[6] The company commander intended to prevent PFC Salazar from seeing his wife without an escort.[7] Contrary to the order of his commander and to the wishes of the Buinoses, PFC Salazar on several occasions went to his in-laws' house and spent the night with his wife.[8]

After the order to move out of the house but before separation from the Army, PFC Salazar was apprehended for breaking into an automobile.[9] As the investigation progressed, he became the suspect in the theft of some stereo equipment, and the Military Police Investigator (MPI) working the case, MPI Gambert, asked PFC Salazar for consent to a search of Salazar's barracks room and his in-laws' house in Killeen. PFC Salazar consented to the search of his barracks room but refused the search of the off-post quarters.[10] MPI Gambert then proceeded to the Buinos house and asked Mr. Buinos for permission to search the house. Mr. Buinos refused.[11]

Undeterred, MPI Gambert returned to the Military Police Station and attempted to reach Mrs. Salazar by telephone. During a subsequent conversation, MPI Gambert intentionally lied to Mrs. Salazar, claiming that her husband, whom MPI Gambert had in custody, had consented to a search of the Buinos house and wanted her to go through the house and bring to the Military Police Station any stereo equipment that was not theirs. At MPI Gambert's direction, Mrs. Salazar, aided by her sister-in-law, collected a variety of stereo equipment and took it to the Military Police Station. At the station, she discovered that her husband had neither consented to the search nor requested her to collect the stereo equipment and bring it to the Military Police Station.[12]

1. United States v. Salazar, 44 M.J. 464 (1996).

2. This case also was unique in that it was perhaps the first appeal in the United States in which two of the five judges participated remotely via video-teleconference. Judge Crawford was located in Fairfax, Virginia, and Senior Judge Everett was in Raleigh, North Carolina. The case was argued in William and Mary's "Courtroom 21."

3. *Salazar*, 44 M.J. at 465.

4. *Id.* at 466.

5. *Id.* at 465.

6. *Id.*

7. *Id.* at 466.

8. The Buinoses, notwithstanding their preferences, tolerated PFC Salazar's frequent visits. *Id.* n.2.

9. *Id.* at 467.

10. Based on information contained in the record of PFC Salazar's original general court-martial as presented in the Amicus Curiae brief, *United States v. Salazar*, 44 M.J. 464 (1996).

11. *Salazar*, 44 M.J. at 467.

12. *Id.*

PFC Salazar was convicted by a general court-martial on a conditional guilty plea of disobedience of a lawful order, damage to property, and two specifications of larceny.[13] The military judge sentenced PFC Salazar to a bad-conduct discharge, fifteen months confinement, and reduction from E-3 to E-1.[14] The Army Court of Criminal Appeals (ACCA) affirmed the findings and sentence without opinion.[15] The CAAF granted review and considered two main issues: first, did PFC Salazar have standing to challenge the search and second, if he did have standing, was there valid consent to search?

Holding

The CAAF held that PFC Salazar had standing to contest the search of the bedroom and hall closet of the Buinos house. The military judge had determined that PFC Salazar had no reasonable expectation of privacy in the house and could not contest the search.

The military judge based this conclusion on several factors.[16] First, the order from PFC Salazar's company commander to vacate the house and not return without an appropriate escort for the remainder of his time in service terminated PFC Salazar's lawful ability to be in the house. Further, Mr. and Mrs. Buinos testified that they did not want him in the house. PFC Salazar, the military judge noted, had no responsibility for the house, no control over the house, and had no possessory interest in the house. The military judge reasoned that all of these factors combined to eliminate any reasonable expectation of privacy PFC Salazar might have had in the Buinos house.

In reversing the military judge and the ACCA, the CAAF found that PFC Salazar did have a reasonable expectation of privacy in the Buinos home, and therefore, had standing to contest the search and subsequent seizure.[17]

Analysis

PFC Salazar's Standing to Contest the Search and Seizure

Two factors served as the basis for the CAAF's reversal. The first was the temporary nature of PFC Salazar's departure from the home. The order given to PFC Salazar to move into the barracks specifically stated that it was only effective for his remaining weeks in the service. After that, he would not be subject to military control and could do as he pleased. Second, and of equal importance, upon being ordered out of the house, he left the bulk of his personal property at the Buinos home. There was no evidence that he did not intend to return. On the contrary, at his trial, the Buinoses testified that PFC Salazar's wife remained in the home and was welcome to continue staying with them. The evidence further showed that on several occasions he returned to the house, with full knowledge of the Buinoses. During these visits, no effort was made to remove his personal belongings, and their continued storage was without objection.[18] No effort was made by anyone to prevent his re-entry into the house. His vacating the house was therefore temporary.[19]

The majority was clearly hesitant to allow a commander's order to vitiate a soldier's off-post expectation of privacy and standing to contest a search. While admitting that there could be instances where an order could terminate an expectation of privacy, the CAAF refused to open that door based on the facts of the case by stating, "it would be illogical if the existence of a service member's expectation of privacy in his or her private residence depended solely on military orders. The issuance of orders would then be the predicate event to every search."[20]

Additionally, the CAAF majority did not think it dispositive that PFC Salazar had no possessory interest in the stolen goods nor control over the house.[21] Based upon these two main factors--the temporary nature of his removal which in no way interrupted his exclusive use of the area in question, and the danger of allowing an order alone to determine privacy interests--the majority concluded that PFC Salazar did have a reasonable expectation of privacy in the home and, therefore, had standing to contest the search.

13. PFC Salazar plead guilty, reserving the right to contest the validity of the search on appeal under Rule for Courts-Martial 910 (a)(2). MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 910(a)(2) (1995).

14. *Salazar*, 44 M.J. at 465.

15. *Id.*

16. *Id.* at 466 n.2.

17. *Id.* at 465.

18. *Id.* at 467.

19. The CAAF did not squarely address the Military Judge's finding that the Buinoses did not want him in the house; however, the CAAF highlighted other factors (i.e. no effort to exclude PFC Salazar nor his belongings) that tended to undercut the Buinoses words.

20. *Id.*

21. *Id.* The majority admits that PFC Salazar had no privacy interest in the stolen property.

In her dissent, Judge Crawford concentrated on the order requiring PFC Salazar to vacate the Buinos home. She conceded that PFC Salazar did not lose his standing to contest a search by being physically absent from the house. However, she argued that his commander's order terminated any legitimate interest he had in the home, and he could not therefore, contest the subsequent search and seizure.[22]

In reaching her conclusion, Judge Crawford overlooked the factors used by the majority to find standing by stating, "our standard of review is to 'give due deference' to the judge's findings of fact and accept them 'unless . . . unsupported by the evidence of record or . . . clearly erroneous'."[23] The dissent, therefore, did not give any weight to the temporary nature of PFC Salazar's absence, the presence of his property and family at the Buinos home, the Buinoses' tolerance of his continued presence, and other facts relied upon by the majority. The dissent reasoned that the commander's order was, therefore, enough to terminate PFC Salazar's privacy expectation.

The Validity of Police Deception to Obtain a Consent to Search

The CAAF further specified the review of whether there was valid consent to the search.[24] This question was not litigated in PFC Salazar's trial. The CAAF therefore remanded the issue for further proceedings.[25] It did, however, write extensively on the issue of consent based upon the facts at hand.

The CAAF defined this question of military first impression as follows: "Under what facts and circumstances can a military dependent wife turn over contraband to a military policeman, thus vitiating the servicemember's own expectation of privacy in the place where the goods are stored?"[26]

In its discussion of this issue, the majority analogized *Salazar* to *Bumper v. North Carolina*.[27] In *Bumper*, dealing with the issue of deceit regarding the existence of a search warrant, the Supreme Court specified that consent to a search must be "more than the acquiescence to a claim of lawful authority" and not the product of coercion.[28]

In *Salazar*, MPI Gambert told Mrs. Salazar that her husband, then in custody, consented to the search and wanted her to bring any and all stereo equipment to the Military Police Station. Mrs. Salazar was not in a position to refuse. She was led to believe that her husband's "consent" gave MPI Gambert a legal means to compel the search. Her husband, in custody, could not refute what MPI Gambert told her. Her consent should be viewed as nothing more than acquiescence to legal authority.

Law enforcement officials may use deception to gain permission to enter a home or other area protected by a person's reasonable expectation of privacy.[29] Misplaced confidences as to a policeman's identity or motive do not invalidate consent to a search because the person consenting to the policeman's entry is not precluded by the deception from saying "no" and closing the front door.

On the other hand, deceit, based on a false assertion of a legal right to which there is no alternative but compliance, has never been upheld by the courts. A policeman may not lie about possessing a warrant,[30] about an exigent circumstance,[31] and by the same logic, should not be permitted to lie about a person's consent to compel a search. All three tactics invalidate any voluntary, meaningful "consent" to a search; any evidence derived from such a search must be suppressed.[32]

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22. *Id.* at 472 (Crawford, J., dissenting).

23. *Id.* at 471.

24. Judge Everett observed that some may argue that there was never a Fourth Amendment "search" in the case. *Id.* at 469. Citing the rationale of a similar Pennsylvania case, the majority held that there was a search and that a service member's spouse should be able to depend upon the authorities to tell the truth. A strong argument can be made that the actions of Mrs. Salazar, *acting as an agent* for MPI Gambert at his behest, constituted a search. It is clear from the facts of the case that, had it not been for MPI Gambert's deception, she would have not searched through the house, found the stereo equipment, and then proceed to deliver it to the Military Police Station. Senior Judge Everett, concurring in part and dissenting in part, on the contrary felt that since MPI Gambert personally did not seize the evidence at issue in Salazar's home, that it was not protected by the Fourth Amendment. His view was that as long as the police received the evidence in question outside the home, their conduct in facilitating delivery was immaterial. From a policy point of view, this approach seems contrary to the spirit of the Amendment's protection, and would encourage the use of "police agents" to accomplish what they the police cannot.

25. *Id.* at 467.

26. *Id.*

27. 391 U.S. 543 (1968).

28. *Id.* at 549.

29. *See, e.g.*, Lewis v. United States, 385 U.S. 206 (1966); Hoffa v. United States, 385 U.S. 293 (1966).

30. *Salazar*, 44 M.J. at 469.

31. United States v. Giraldo, 743 F. Supp. 152 (E.D.N.Y. 1990).

Although the case was remanded for litigation of the consent issue, the majority suggests that deception by the military police as to their legal right to compel a search, unlike a ruse to gain entry, cannot result in valid "consent" to a search. Judge Crawford in her dissent is correct in stating that there is "nothing illegal about outfoxing the criminal and obtaining reliable evidence."[33] This sentiment, however, seems to ignore the more important maxim that the police should not circumvent the protections of the Constitution in order to enforce the laws created by it.

Conclusion

Salazar is a case of military first impression and teaches two important lessons of great practical value to the practitioner in the field.

First, the CAAF limits the effects of a commander's order; an order alone to vacate off-post quarters does not strip a soldier of constitutionally protected expectations of privacy. Investigators cannot rely on an "order to vacate" as license to search and seize in the knowledge that the soldier will not have standing to contest police action. Commanders' orders do not extinguish expectations of privacy, allowing investigators to avoid warrant requirements. Counsel must consider whether probable cause exists to search and whether there are any circumstances which dispose of the need for consent or a warrant. Trial counsel should carefully evaluate the nature of the possessory interests involved and coordinate with company commanders and investigators to analyze whether there are facts indicating a permanent transfer and attenuated, as opposed to exclusive, control over property left behind.

Second, *Salazar* sets clear limits on the police's ability to use deception. Lying under color of legal authority to obtain a vicarious consent to search when no probable cause exists exceeds the bounds of constitutional due process. Defense counsel now have added grounds to challenge government overreaching and prosecutors now have added reasons to control police methods. Captain Drew Swank, Funded Legal Education Program Officer, College of William and Mary.

32. Judge Crawford attempted to justify MPI Gambert's tactics by distinguishing his deception, which prompted Mrs. Salazar to search for and seize specific items, from a deception by a police officer to gain consent for a "general exploratory search." *Salazar*, 44 M.J. at 473. Under this approach, would a deception about the existence of a warrant be allowed so long as only one, specific piece of evidence was desired? It seems the issue in this case is not the specific result which MPI Gambert's deception sought (enumerated items versus general search), but that Mrs. Salazar had little choice but to submit based on the circumstances.

33. *Id.* at 474

Litigation Division Note

The Military Personnel Review Act of 1997

Section 551 of the National Defense Authorization Act for Fiscal Year 1996[1] directed the Secretary of Defense to establish an advisory committee to consider issues relating to the appropriate forum for judicial review of administrative military personnel actions. On 29 March 1996, the Secretary of Defense appointed a five member Advisory Committee on Judicial Review of Administrative Military Personnel Actions (Advisory Committee). The committee's objective was to make findings and provide recommendations as to (1) whether the current scheme of review of administrative military personnel actions in the United States federal district courts was appropriate and adequate; and (2) whether review of military personnel actions should be centralized in a single court and, if so, in which court that jurisdiction should be vested. The Advisory Committee was directed to respond to Congress with its findings and recommendations by 15 December 1996.[2]

After holding monthly meetings and soliciting information from correction board representatives and the various services' litigation attorneys and senior enlisted advisors, the Committee concluded that "[t]he present system serves no one well."[3] They found "that the complex, confusing, and, at times, inconsistent procedural and substantive rules in the various United States district courts and United States Court of Federal Claims do not appropriately or adequately serve our nation's military personnel, its veterans, or the military services",[4] and that the present system of judicial review "requires improvement."[5] The Committee concluded that "it [was] essential to change the current system into one that is straightforward"[6] so as to have a "more equitable and efficient system."[7] To accomplish that, the Committee recommended that Congress adopt their legislative proposal, known as the Military Personnel Review Act of 1997. A number of provisions of this new legislation are noteworthy.

First, the Act would incorporate a jurisdictional requirement for exhaustion of administrative remedies before judicial review;[8] a claimant would be required to pursue his available administrative remedies before the service's Board for Correction of Records[9] prior to seeking relief in federal court.[10] The service Secretary would then be required to provide a concise rationale for decisions failing to grant complete relief in such detail that would be satisfactory for purposes of judicial review.

Second, the Committee recommended that Congress adopt strict time limitations within which a claimant could seek relief from the appropriate Correction Board. A claimant would have three years from the date of discovery of an error or injustice to file his application.[11] The Board could excuse a failure to file within three years if it found it in the interest of justice to do so,

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1. Pub. L. No. 104-106, § 551, 110 Stat. 318 (1996).

2. The subject of judicial review of military personnel decisions has been under considerable scrutiny the last few years. A proposed *Military Personnel Review Act of 1995*, never considered by Congress, was the subject of an *Army Lawyer* article in December, 1995. It was an excellent summary of the Act's history and of other proposals to reform this area of law. *See* Major Michael E. Smith, *The Military Personnel Review Act: Department of Defense's Statutory Fix for Darby v. Cisneros*, ARMY LAW., Feb. 1997, at 3.

3. Report of the Committee on Judicial Review of Administrative Military Personnel Actions of the Department of Defense at 10.

4. *Id.* at 1.

5. *Id.* at 10.

6. *Id.* at 9.

7. *Id.*

8. Currently, the majority of federal circuits require a plaintiff to exhaust his administrative remedies before bringing an action in federal court. *See, e.g.*, Duffy v. United States, 966 F.2d 307 (7th Cir. 1992); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974).

9. The Army Board for Correction of Military Records is convened on behalf of the Secretary of the Army pursuant to 10 U.S.C. § 1552 (1992).

10. With this provision the Committee specifically intended to satisfy the requirements of *Darby v. Cisneros*, 509 U.S. 137 (1993). In that case, the Supreme Court held that courts do not have authority to require exhaustion of administrative remedies as a prerequisite to judicial review unless mandated by statute or agency rules.

11. With this provision, the Committee intended to nullify the District of Columbia Circuit's opinion in *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994). The *Detweiler* court held that the tolling provision of Section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, suspended the ABCMR's three-year statute of limitations during a soldier's period of active service.

but its decision to decline the review of an untimely application would not be subject to judicial review.

Finally, jurisdiction to hear appeals of the Correction Board's final decision would lie exclusively with the Court of Appeals for the Federal Circuit.[12] That Court would hold unlawful and set aside any action it found arbitrary, capricious, or otherwise not in accordance with law.

If adopted, the Military Personnel Review Act would establish a uniform, efficient method of reviewing military personnel decisions. Lieutenant Colonel Chapman.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)* which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically which appears in the environmental files area of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 4, number 6, is reproduced below.

Clean Air Act Credible Evidence Rule

On 13 February 1997, the United States Environmental Protection Agency (USEPA) issued its "credible evidence" rule that allows any "credible" data, such as continuous emissions monitoring data, parametric data, engineering analysis, witness testimony or other information, to be used as evidence to determine whether a facility is violating emission standards under the Clean Air Act.[13] The rule does not alter current emission standards, create any new monitoring or reporting requirements, or change the compliance obligations for the regulated community. Previously, the Agency usually used reference test methods--specific procedures for measuring emissions from facility stacks--to determine compliance. The rule makes it explicit that regulated sources, the EPA, States and citizens all can use non-reference test data to certify compliance or allege non-compliance with the CAA permits. In some instances, the use of non-reference test data to prove compliance will be less expensive than using reference tests. The rule will be published in the Federal Register soon. This rule, while heavily criticized by industry, should not have a major impact on enforcement actions against federal facilities. Lieutenant Colonel Olmscheid.

Did you know? . . . Making cans from recycled aluminum cuts related air pollution (e.g., sulfur dioxides, which create acid rain) by 95%.

Ethics, the Internet, and the Environmental Attorney

You are the new attorney for environmental matters on your installation. You are excited as you receive your first project: assist Environmental Law Division (ELD) counsel in drafting a response to a Comprehensive Environmental Response, Compensation, and Liability Act section 104(e) request from EPA. You turn to your computer to use your e-mail and Internet systems to request assistance from other personnel in the investigation for your response. You then decide to e-mail your draft response to the ELD counsel for review. After all, e-mail is cheaper and faster than the fax or overnight or regular mail. Your other work picks up at the office, the due date for EPA's request is approaching fast, and you find yourself unable to find the time to finish the response. You decide that you will finish the response at home this Saturday and send it to ELD through the Internet from your new home computer. What a great idea . . . or is it?

Army environmental attorneys are finding the Internet and e-mail indispensable tools for effective and efficient communication. But with little guidance from the courts and the legal profession on the ethical ramifications, the attorney who uses the Internet could find himself or herself in the middle of a number of ethical problems, including the breach of attorney-client privilege. Here are some important points to consider before jumping onto the Internet.

Identify what form of technology you are utilizing and your potential audience. While e-mail within your office may maintain the attorney-client privilege and confidentiality, the same is not true for e-mail sent over the Internet, especially if you are going to use the Internet from outside sources, such as your home computer. Check with your Information Management Office (IMO) to assess the different modes of technology you are utilizing. Ask your IMO how many people have access to your information before it gets to its destination. You will be surprised at the answer.

Define whether the information you plan to send over the Internet is classified or privileged. If the information is classi-

12. Currently, plaintiffs obtain judicial review of military personnel actions in all district courts and in the United States Court of Federal Claims. Appeals of those decisions go to the federal circuit courts of appeals. The proposed legislation requires that an applicant bring his claim in the Federal Circuit within 180 days of the ABCMR's final decision. The legislation would leave unaffected, however, the district court's jurisdiction in cases over which the Correction Boards lack authority, such as review of court-martial convictions.

13. 42 U.S C. §§ 7401-7671q (1996).

fied or privileged, then you should not send that information over the Internet unless you are using a protective device known as encryption. If the new environmental lawyer in the above scenario submits his or her draft response or other sensitive information unencrypted through the Internet to ELD from a home computer, he or she could be facing an ethics violation. The ethical and evidentiary issues involving the transmission of an unencrypted, yet classified or privileged, message over the Internet have not been addressed by many states. The states of Iowa and Arizona, however, have stated that attorneys should encrypt their messages before sending them through the Internet to avoid a breach of confidentiality.[14] You should check with your local bar for recent opinions on the issue.

Consider whether the missent or intercepted unencrypted e-mail is a waiver of privilege or confidential communications. The answer may depend on your local state bar. As with any waiver of privilege or waiver of confidentiality, you should look to whether your State uses either the traditional rules, in other words, finds it a waiver, or a more recent trend that bases the answer on the facts of the situation. If your State follows the latter, your answer may depend on whether the disclosure was intentional or inadvertent, and, if inadvertent, on the impact of disclosure.

To protect yourself, talk to your IMO about the security of your e-mail and the Internet. Ask whether you can obtain the encryption software to protect your sensitive e-mail. This is a costly method of protection and may not be readily available to many personnel.

Discuss this issue with your client. Explain to your client and support personnel the risks of the Internet and the potential for unconfidential communications. Make an informed decision and establish a policy on whether or when to use the Internet. Remember it is necessary to obtain your client's consent before you disclose any confidential information through the unsecured Internet.

Consider placing the following warning on your Internet e-mail:

> This Internet e-mail contains confidential, privileged information intended only for the addressee. Do not read, copy or disseminate it unless you are the addressee. If you have received this e-mail in error, please call us immediately at _____ and ask to speak to the message sender. Also, please e-mail the message back to the sender at _____ by replying to it and then deleting it. We appreciate your assistance in correcting this error.

This warning will communicate your intent that this information is considered confidential, and places a duty on the receiver to avoid reviewing the contents and abide by the instructions. Some, however, feel warnings are not effective and argue that encryption is the best protection.

When you consider using e-mail or the Internet to assist you on your next project, think again. Do not send information through the Internet that you would not want published in the local paper. Consider obtaining a software package that encrypts your messages so you can handle those urgent situations by using the Internet. Also, consider obtaining encryption software on your home computer for those occasions when you want to e-mail your work from home. Ms. Greco.

Did you know? . . . The wood pallet and container industry is the largest user of hardwood lumber in the United States.

Considering NAFTA

Even though you may not be located near the borders of Mexico or Canada, a side agreement to the North American Free Trade Agreement (NAFTA)[15] regarding environmental cooperation may soon warrant your attention. The North American Agreement on Environmental Cooperation (NAAEC),[16] signed by Canada, Mexico and the United States, came into force on 1 January 1994, at the same time as NAFTA. Under the NAAEC, the signatories sought to protect, conserve, and improve the environment in North America. Environmental law specialists (ELSs) should be aware of the following two specific provisions within the NAAEC.

Under Article 10.7 of the NAAEC, the United States, Canada, and Mexico agreed to develop a process to consider and analyze, and provide advance notice of, actions that may have transboundary environmental impacts. The deadline for the development of a recommendation on this process is early 1997. Accordingly, the U.S. State Department and the U.S. Environmental Protection Agency initiated negotiations with Canada and Mexico to develop such a process, and are now seeking input from the Department of Defense and other federal agencies on a preliminary draft process. Issues of discussion include: notification to neighbor countries for certain categories of actions conducted within 100 kilometers of the border, notification and opportunity to comment on actions that will

14. *See, e.g.*, Iowa Ethics Opinion 95-30.

15. Pub. L. No. 103-182, 107 Stat. 2057 (1993).

16. 59 Fed. Reg. 25,775 (1994).

likely have significant transboundary environmental impacts, and timing and detail of notifications. This office will provide further information on the details of this process as they become final or available.

As opposed to Article 10.7, Articles 14 and 15 already are in force under the NAAEC. Under Article 14 of the NAAEC, any non-governmental organization or person residing in a signatory country may file a petition asserting that a Party to the Agreement (U.S., Mexico, or Canada) failed to effectively enforce its environmental laws. The Commission for Environmental Cooperation (CEC) then determines if the petition meets the criteria in Article 14, and determines whether the petition merits a response from the concerned country. In light of the signatory nation's response, the CEC may then request the preparation of a factual record, in essence a fact-finding hearing, under Article 15 of the NAAEC. A final factual record may be made publicly available upon a two-thirds vote of the CEC's governing body. For the United States, response to petitions are submitted by the EPA, after coordination with interested federal agencies.

While several Article 14 petitions have already been filed with the NAAEC, the NAAEC recently ruled for the first time that the United States must respond to a submission by a non-governmental organization alleging ineffective enforcement of environmental laws by the United States. The petition centers upon the Army's compliance with the National Environmental Policy Act at a specific Army installation. The U.S. response to the petition was closely coordinated between the installation, this office, the Department of Justice, the Department of State, and the U.S. Environmental Protection Agency. Major Ayres.

Did you know? . . . Yard waste is the second largest component (by weight) of the municipal solid waste stream.

EPA Rethinks Hazardous Waste Identification Rules

The United States Environmental Protection Agency (USEPA) is rethinking both of the proposed Hazardous Waste Identification Rules (HWIR) that address standards for managing industrial process waste and contaminated media. The proposed HWIR-media applies only to wastes and contaminated media generated during remediation activities. Proposed in April 1996, one approach under the rule would delegate cleanup control to the States for wastes that fall below a risk-based "bright line." Industry opponents to this approach favor a "unitary" method that would exempt wastes from the Resource Conservation and Recovery Act,[17] as long as they are managed under an approved State or the USEPA cleanup plan. While the USEPA considers other options, legislative proposals to relax remediation standards and speed cleanups are priorities for industry groups, the Senate Environment and Public Works Committee, and the House Commerce Committee. The USEPA has pushed the rule's promulgation back to Spring 1998.

The USEPA was required to finalize the HWIR-waste rule by February 1997 under a consent agreement with the Environmental Technology Council and the Edison Electric Institute. The USEPA is negotiating the rulemaking schedule with the petitioners and has received an extension of the deadline to 28 March 1997 from the court. Exit levels for hazardous constituents set in the proposed rule were based on a pathway risk assessment model which has been severely criticized. The USEPA is now negotiating for time to overhaul the risk assessment. The USEPA's Science Advisory Board made numerous recommendations for incorporating the "best available science" in a revised multi-pathway analysis. As with HWIR-media, there are legislative initiatives aimed at Congress enacting exemption standards rather than waiting for the revised risk assessment. The reworking of the risk assessment and rule could take the USEPA from two to four years; however, the litigants could push for a much shorter time frame. Major Anderson-Lloyd.

Did you know? . . . Every ton of new glass produced contributes 27.8 pounds of air pollution, but recycling glass reduces that pollution by 14-20%.

Army Corps of Engineers Revises Wetlands Permitting

On 11 February 1997, the Army Corps of Engineers (Corps) gave final notice of issuance, reissuance, and modification of the Nationwide Permits (NWP) in the Corps NWP Program.[18] The original thirty-seven NWPs expired on 21 January 1997, and the new permits took effect on 11 February 1997. The changes included NWP 26, which addresses discharges of dredged and fill materials into headwaters and isolated waters of the United States--typically recognized as wetlands areas. The changes to NWP 26 reflect a Corps effort to regionalize the NWP program, especially NWP 26. During the transition to regionalized, activity-specific permits, the Corps has reissued NWP 26 as an interim permit for a period of two years. Following this period, the interim permit will be replaced by industry specific permits. The Corps expects that this change will allow for clear and effective evaluation of potential impacts to the aquatic environment, while also allowing the Corps to effectively address specific group needs.

17. 42 U.S.C. §§ 6901-6992k (1988).

18. *See* 61 Fed. Reg. 65,874 (1997) (to be codified at 33 C.F.R. § 330).

The former NWP 26 allowed discharges of dredged or fill materials into waters of the United States provided the discharge did not cause the loss of more than ten acres of wetlands. If such activity would cause the destruction of more than one acre of wetlands, the Corps required preconstruction notice (PCN) in writing as early as possible prior to commencing the activity. Unless informed otherwise by the Corps, within thirty days of providing notice the permittee could proceed with the planned activity.

The revised NWP 26 reflects substantial changes imposed to ensure only minimal adverse effects from the use of the NWP and to provide greater protection of the aquatic environment. Most notably, the new NWP 26 only allows discharges of dredged or fill materials provided the discharge will not cause either the loss of greater than three acres of wetlands or the loss of waters of the United States for a distance greater than 500 linear feet of a stream bed. Discharges that will cause a loss of greater than one-third acre of wetlands are now required to follow the notification procedure. The PCN review period, however, has been extended to forty-five days. After this time, unless the Corps has stated otherwise, activities may proceed. Finally, all discharges causing a loss of less than one-third of an acre require filing a report with the Corps within thirty days of completing construction. The report must contain the following information:

1. The name, address, and telephone number of the permittee;
2. The location of the work;
3. A description of the work, and;
4. The type and acreage (or square feet) of the loss of waters of the United States.

The Corps is presently accepting comments regarding the proposed industry specific NWPs, and expects to publish a list of proposed permits in May 1998. Although the Corps recognizes that these changes will result in an increased workload, the Corps does not expect a delay in publishing the replacement permits. At a recent panel discussion where Deputy Assistant Secretary (Policy and Legislation) Michael Davis, of the Office of the Assistant Secretary of the Army (Civil Works), outlined the interim NWPs, one panelist representing regulated entities predicted that changing the allowable level of wetlands impact to three acres from ten would result in the Corps receiving between 500 and 1000 new applications for individual permits in wetlands areas. As a result of the increased impact, the Corps anticipates a request for increased funding to meet these demands. At the time of the discussion, there was no indication that such a request would not be approved. Captain DeRoma.

Did you know? . . . the ELD Bulletin is now available via the ELD Environmental Law Links Page (http://160.147.194.12/eld/eldlinks.htm).

ELS Update

The ELD is updating the Army ELS list. Please provide a current listing of your ELS staff to Staff Sergeant Stannard via e-mail (stannard@otjag.army.mil). Include the following information: Name of all ELSs; mailing address; telephone number; FAX number; and e-mail address. The ELD will distribute the updated list via the Internet in early April. In order to meet the April distribution date, please forward your updates no later than 1 April 1997. Lieutenant Colonel Bell.

Claims Report

United States Army Claims Service

Personnel Claims Note

Direct v. Consequential Damages Under Article 139

When claims are presented against soldiers under Article 139, Uniform Code of Military Justice,[1] for willful damage or wrongful taking of property, it is the responsibility of the Special Court Martial Convening Authority (SPCMCA), upon investigation and legal review,[2] to determine whether the claim is meritorious and how much money to assess against the offender's pay.[3] Because victims often claim amounts exceeding the value of their property at the time of its loss, SPCMCAs must ensure they only approve claims for the actual amount of "damages sustained."[4] The replacement cost of items must account for depreciation.[5] Similarly, an assessment may not exceed the amount of direct damages suffered by the victim.[6] Indirect or consequential damages may not be assessed.[7]

The upcoming revision to *Department of Army Pamphlet 27-162, Chapter 9*, sets forth two guidelines for determining whether damages may be assessed against an offender's pay. First, expenses necessary to repair a damaged item are compensable if they result directly from the offender's crime. This includes the reasonable cost of a rental car when the offender steals or willfully damages the victim's automobile. Expenses incurred to pursue an Article 139 claim, however, are consequential and, therefore, not compensable. This includes the cost of telephone calls, mileage, postage, copies, and attorney's fees. Consequential damage also includes loss of revenues or earnings, carrying charges, interest, and amounts attributed to inconvenience.

The following scenario demonstrates the application of these guidelines. Specialist Malcontent is angry at his squad leader, Staff Sergeant Hardcore, for supporting an administrative separation action currently pending against Malcontent. One afternoon after close of business, Hardcore drives to the installation gymnasium to workout. Unbeknownst to Hardcore, Malcontent follows him at a distance. After Hardcore enters the building, Malcontent vandalizes Hardcore's automobile and steals his wallet, which Hardcore had placed under the passenger seat. Malcontent discovers that Hardcore has a savings account at the bank located on the installation. Malcontent locates Hardcore's account number and proceeds to the bank's "drive-thru" window, where Malcontent withdraws a substantial sum of cash from Hardcore's account.

Some time later, after discovering the perpetrator and the full extent of his loss, Hardcore files an Article 139 claim against Malcontent and lists the following damages: repair cost to the automobile, towing cost (drayage) to move the automobile to the repair shop, cost of a rental car for use while the automobile is being repaired, value of the cash stolen during the banking transaction, interest lost on the stolen principal, and the fee paid to the bank to develop photographs of the "drive-thru" transaction revealing the identity of the thief.

The repair cost is compensable provided it does not exceed the depreciated replacement cost of Hardcore's automobile. The drayage is compensable as an expense necessary to repair a damaged item. The rental cost also is compensable to the extent it does not exceed the rental cost of an automobile comparable in value to Hardcore's automobile. The stolen cash is compensable as direct damage, whereas the interest is not. The fee paid to the bank to develop the photographs is not compensable as it was incurred solely to pursue the Article 139 claim.

It is essential that investigating officers and approval authorities accurately assess damages when presented with meritorious Article 139 claims. This result is more likely when claims attorneys and claims judge advocates thoroughly brief investigating officers at the commencement of their investigation. Captain Metrey.

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1. UCMJ art. 139 (1988).

2. When an Article 139 claim appears cognizable, an informal investigation is conducted pursuant to DEP'T OF ARMY, REG 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, ch. 4 (11 May 1988) and DEP'T OF ARMY, REG 27-20, LEGAL SERVICES: CLAIMS, para. 9-7(c)(1) (1 Aug. 1995) [hereinafter AR 27-20]. The findings and recommendation of the Investigating Officer are subject to legal review. AR 27-20, para. 9-7(e).

3. AR 27-20, *supra* note 2, para. 9-7(f).

4. UCMJ art. 139 (1988).

5. The Military Allowance List-Depreciation Guide should be used to determine depreciated replacement cost. DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 10-5(e)(3) (15 Dec. 1989) [hereinafter DA PAM 27-162].

6. AR 27-20, *supra* note 2, para. 9-6(c).

7. *Id.*

1996 Table of Adjusted Dollar Value

This table updates the *1995 Table of Adjusted Dollar Value (*ADV) previously printed in *The Army Lawyer,* April 1996, at page 54. In accordance with *Army Regulation 27-20*, paragraph 11-14c, and *Department of Army Pamphlet 27-162*, paragraph 2-39e, claims personnel should use this table *ONLY* when no better means of valuing property exists.

Year Purchased	Multiplier for 1996 Losses	Multiplier for 1995 Losses	Multiplier for 1994 Losses	Multiplier for 1993 Losses	Multiplier for 1992 Losses
1995	1.03				
1994	1.06	1.03			
1993	1.09	1.05	1.03		
1992	1.12	1.09	1.06	1.03	
1991	1.15	1.12	1.09	1.06	1.03
1990	1.20	1.17	1.13	1.11	1.07
1989	1.26	1.23	1.20	1.17	1.13
1988	1.33	1.29	1.25	1.22	1.19
1987	1.38	1.34	1.30	1.27	1.24
1986	1.43	1.39	1.35	1.32	1.28
1985	1.46	1.42	1.38	1.34	1.30
1984	1.51	1.47	1.43	1.39	1.35
1983	1.57	1.53	1.49	1.45	1.41
1982	1.63	1.58	1.54	1.50	1.45
1981	1.73	1.68	1.63	1.59	1.54
1980	1.90	1.85	1.80	1.75	1.70
1979	2.16	2.10	2.04	1.99	1.93
1978	2.41	2.34	2.27	2.22	2.15
1977	2.59	2.51	2.45	2.38	2.32
1976	2.76	2.68	2.60	2.54	2.47
1975	2.92	2.83	2.75	2.69	2.61
1974	3.18	3.09	3.01	2.93	2.85
1973	3.53	3.43	3.34	3.26	3.16
1972	3.75	3.65	3.55	3.46	3.36
1971	3.87	3.76	3.66	3.57	3.46
1970	4.04	3.93	3.82	3.72	3.62

NOTES:

1. Do not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

2. To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Then multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG). For example, the adjudicated value for a comforter purchased in 1990 for $250, and destroyed in 1995, is $219. To determine this figure, multiply $250 times the 1990 "year purchased" multiplier of 1.17 in the "1995 losses" column for an "adjusted cost" of 292.50. Then depreciate the comforter as expensive linen (item number 88, ALDG) for five years at a five-percent yearly rate to arrive at the item's value of $219 (*i.e.*, $250 x 1.17 ADV = $292.50 @ 25% depreciation = $219).

3. The Labor Department calculates the cost of living at the end of a year. For losses occurring in 1997, use the "1996 losses" column.

4. This year's ADV table only covers the past 25 years. To determine the ADV for items purchased prior to 1970 or for any other questions concerning this table, contact Mr. Lickliter, United States Army Claims Service, telephone (301) 677-7009 ext. 313. Ms. Holderness and Mr. Lickliter.

Professional Responsibility Notes

Standards of Conduct Office, OTJAG

Dating Follies and Other Shenanigans

The Standards of Conduct Office (SOCO) normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. Those inquiries which involve isolated instances of professional impropriety, poor communications, lapses in judgment, and similar minor failings typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC).

The following two PRC opinions, which apply the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*,[1] the *Joint Ethics Regulation (JER)*,[2] and other regulatory standards[3] to cases involving allegations of attorneys' attempts to date clients, are intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, we edited the PRC opinions to change the names and installations of the subjects.[4] Mr. Eveland.

Professional Responsibility Opinion 95-1

Army Rule 1.7(b)
(Conflict of Interest: Lawyer's Own Interests)

Army Rule 2.1
(Exercising Independent Professional Judgment)

Army Regulation (AR) 27-1, para. 7-3d
(Preponderance of Evidence Required to Establish Violation of Ethical Standards)
Allegation that attorney improperly asked his military domestic relations client for a date was not established by a preponderance of the evidence.

Army Rule 8.4(a)
(Lawyers Shall Not Counsel or Assist in Criminal Conduct)
Attorney properly counseled military domestic relations client that adultery was a crime under UCMJ, and if she did have extramarital relations not to tell anyone.

Facts

First Lieutenant *A* is a male legal assistance attorney at Fort Strong. On 9 December, Lieutenant *A* advised Sergeant *C*, a female NCO, during an office visit in connection with her marital separation.

Sergeant *C* alleges that during the course of the appointment, Lieutenant *A* advised her not to have sexual relations outside her marriage, but if she did, not to tell anyone. Sergeant *C* also alleges that as she was leaving Lieutenant *A*'s office, he asked if she wanted to go out for drinks. She alleges that when she declined, he offered his business card with his home telephone number, and he explained that the card and number were provided in case she changed her mind.

When discussing the details of a separation agreement, Sergeant *C* told her husband (Mr. *C*) that a legal assistance attorney had asked her out on a date. On 20 January, Mr. *C* contacted the Fort Strong Deputy Staff Judge Advocate (DSJA) to report the incident. Sergeant *C* and her husband have since reconciled.

Sergeant *C* was extremely reluctant to provide information about the incident. Both Sergeant *C* and her husband indicated that her reluctance to provide information was because she did not want to hurt the attorney involved. Sergeant *C* initially agreed to meet with the DSJA on 27 January and provide a statement. However, on 26 January, she called the DSJA and canceled the appointment stating that she did not want to go through with it. She agreed to discuss the incident on the telephone and did verify that Lieutenant *A* was the attorney involved. She refused, however, to give a sworn statement.

The DSJA repeatedly attempted to get a statement from Mr. *C*, but Mr. *C* did not return the DSJA's telephone calls.

In March, the Fort Strong Staff Judge Advocate (SJA) conducted a preliminary screening inquiry (PSI) and concluded that Lieutenant *A* attempted to date Sergeant *C* and provided her unclear advice concerning extra-marital relations. The SJA recommended the issuance of a written censure and admonition and closing the inquiry. The major Army command (MACOM) SJA reviewed the evidence and determined that Lieutenant *A*

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1. Dep't of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (1 May 1992) [hereinafter AR 27-26].

2. Dep't of Defense, Reg. 5500.7-R, Joint Ethics Regulation (30 Aug. 1993) (authorized by Dep't of Defense Directive 5500.7 (30 Aug. 1993)) [hereinafter JER].

3. *See* Dep't of Army, Reg. 27-1, Legal Services: Judge Advocate Legal Service (3 Feb. 1995) [hereinafter AR 27-1] (The 15 September 1989 edition of *AR 27-1* was in effect at the time of the events.); Dep't of Army, Reg. 27-3, Legal Services: The Army Legal Assistance Program (10 September 1995) [hereinafter AR 27-3] (The 10 March 1989 version of *AR 27-3*, which was in effect at the time of events, was reissued on 30 September 1992 and 10 September 1995).

4. Sequentially numbered footnotes have been added to both PRC opinions.

violated the *Rules of Professional Conduct for Lawyers (Army Rules), AR 27-26*,[5] but considered the violations minor and directed the SJA, Fort Strong, to censure and admonish Lieutenant *A* in writing. In May, the Fort Strong SJA recommended to the Chief, Standards of Conduct Office (SOCO), that the matter be closed.

In June, the Chief of SOCO forwarded a copy of Lieutenant *A*'s response to the initial PSI report to the MACOM, with instructions that both the MACOM SJA and the Fort Strong SJA reconsider the report in light of information submitted by Lieutenant *A*. The MACOM SJA contacted the Fort Strong SJA, noting that Sergeant *C* had not made a written complaint, and advised the Fort Strong SJA to obtain a sworn statement from Sergeant *C*.

In July, Sergeant *C* finally made a sworn statement. She also provided a copy of Lieutenant *A*'s business card with his home telephone number written on the back of the card.

The Fort Strong SJA and the MACOM SJA concluded that Sergeant *C* was credible and forwarded a supplemental PSI report to SOCO for further action.

Lieutenant *A* maintains that he did not ask Sergeant *C* out for a drink. He does not recall giving her a business card and notes that it is not his practice to give his home telephone number to clients. He admits that he advised Sergeant *C* that adultery is an offense under the UCMJ. He does not recall advising her not to tell anyone if she did have extra-marital sexual relations. While noting that it is not part of his usual advice, Lieutenant *A* acknowledges that it is possible he advised her neither to admit nor to volunteer information about a violation of the UCMJ.

Rules of Professional Conduct for Lawyers

The *Army Rules* are applicable in this matter and *Army Rule* 1.2(d) provides as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[6]

Army Rule 1.7(b) also provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.[7]

Army Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct.[8]

Discussion

There is insufficient evidence to establish by a preponderance of the evidence[9] that Lieutenant *A* attempted to date a client. Lieutenant *A* denies Sergeant *C*'s allegation, and there is insufficient evidence to conclude that Sergeant *C* is more credible than Lieutenant *A*.

In evaluating the credibility of Lieutenant *A* and Sergeant *C*, The Judge Advocate General's Professional Responsibility Committee considered the following:

a. Sergeant *C* may have fabricated the story in discussions with her husband during a period of separation.

b. Sergeant *C*'s husband, not Sergeant *C*, reported the incident to the DSJA.

c. Sergeant *C* was extremely unwilling to cooperate in the investigation. She initially refused to meet with the DSJA and refused to provide a sworn statement. She resisted the DSJA's efforts to obtain a sworn statement and did not provide one until seven months after the incident.

d. Although Sergeant *C* did have one of Lieutenant *A*'s business cards with his home telephone number on the back, Lieutenant *A* may have inadvertently handed her a card with his home telephone number. The Committee notes that Sergeant *C*'s sworn statement is not consistent with her initial report of the incident. The sworn statement does not include the claim that Lieutenant *A* told her to call him if she changed her mind (as he handed her his card). Given that this is not a factually complicated case in that Lieutenant *A* allegedly made two comments in an attempt to date a client, the difference between Ser-

5. AR 27-26, *supra* note 1.

6. *Id.* Rule 1.2(d).

7. *Id.* Rule 1.7(b).

8. *Id.* Rule 8.4(a).

9. AR 27-1, *supra* note 2, para. 7-3d.

geant *C*'s initial report and her sworn statement regarding one of the comments is significant.

In the course of providing legal assistance regarding a marital separation, Lieutenant *A* counseled Sergeant *C* not to commit adultery. He also advised her not to tell anyone if she did have extra-marital sexual relations. Lieutenant *A*'s advice did not violate *Army Rule* 1.2(d).[10] He properly counseled her that adultery was a crime. He did not counsel her to commit a crime or assist her in criminal activity when he advised her not to tell anyone if she did have extra-marital relations.

Findings and Recommendation

The Committee found by a preponderance of the evidence that Lieutenant *A* did not violate *Army Rules* 1.2(d), 1.7(b), or 8.4.[11] The Committee recommended that The Judge Advocate General return the action to the Chief, SOCO, to close the inquiry and notify the subject.

Professional Responsibility Opinion 95-2

Army Rule 1.7(b)
(Conflict of Interest: Lawyer's Own Interests)

Army Rule 2.1
(Exercising Independent Professional Judgment)
Legal Assistance Attorney improperly attempted to initiate sexual relationship with domestic relations client.

Joint Ethics Regulation (JER), Subpart 2G (5 C.F.R. § 2635.702)
(Use of Public Office for Private Gain)

Army Rule 8.4(c)
(Conduct Involving Dishonesty, Fraud, Deceit, Or Misrepresentation)
Army Legal Assistance Attorney deceptively solicited $600 fee.

Facts

Mr. *B*, an attorney working at an Army installation Staff Judge Advocate (SJA) office, saw Mrs. *D* on three occasions in his capacity as a legal assistance attorney. On each occasion, Mrs. *D* sought assistance in obtaining a divorce from her husband, a soldier stationed at the same installation. She also alleged that her husband had stolen property from the government and stored that property in their home. An attorney-client relationship between Mr. *B* and Mrs. *D* existed for seven months until the divorce became final.

In two statements, Mrs. *D* complained that Mr. *B* engaged in inappropriate personal and professional conduct with her at various times while he was serving as her attorney. She specifically alleged that: (1) Mr. *B* provided her inappropriate advice (such as "a wife is not supposed to blow the whistle on her husband"); (2) Mr. *B* made unwelcome, sexual overtures and comments to her, including statements containing sexual overtones, such as references to her body or referring to her by inappropriate names ("honey" or "girly"), as well as inviting her to come to his house; (3) Mr. *B* called her at home late in the evening on numerous occasions to discuss topics outside of their professional relationship, to include sexual topics; and (4) Mr. *B* offered to handle her divorce "outside the office," for a fee of $600 plus court costs. In addition to her statements, Mrs. *D* subsequently produced tape recordings of some of the telephone conversations she had with Mr. *B.*

The allegations were referred to the major Army command (MACOM) SJA, who appointed the installation SJA as a preliminary screening inquiry (PSI) officer to investigate the allegations. The SJA investigated the matters and concluded that Mr. *B* engaged in unprofessional conduct, violating provisions of the *JER,*[12] the *Army Rules* contained in *AR 27-26*[13] and pertinent Army regulations. The SJA, who was considering imposing disciplinary personnel action against Mr. *B*, recommended to the Chief, SOCO, that the PSI be closed.

Mr. *B* submitted a statement denying not only that he attempted to charge Mrs. *D* a fee for professional services, but also that he ever became emotionally involved with or made sexual advances toward her.

The SJA reviewed Mr. *B*'s statement but adhered to his original findings and recommendations. The SJA then forwarded his PSI report through the MACOM SJA to SOCO. The Assistant Judge Advocate General subsequently appointed the Professional Responsibility Committee (PRC) to review the matter and to advise The Judge Advocate General.

Applicable Law

Joint Ethics Regulation

The *JER* provides that an employee shall not use public office for private gain. "An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person . . . to provide any benefit, financial or otherwise, to himself."[14]

10. AR 27-26, *supra* note 1, Rule 1.2(d).

11. *Id.* Rules 1.2(d), 1.7(b), and 8.4.

12. JER, *supra* note 2.

13. AR 27-26, *supra* note 1.

Army Rules

AR 27-26, Rules of Professional Conduct for Lawyers, is applicable in this matter. *Army Rule* 1.7(b) provides as follows:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.[15]

The comments to *Army Rule 1.7* note that loyalty is an essential element in the lawyer's relationship to a client. Loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The critical questions are whether a conflict is likely to arise, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[16]

Army Rule 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation, but not in conflict with the law.[17]

The comments to this rule note that a client is entitled to straightforward advice expressing the lawyer's honest assessment. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deferred from giving candid advice by the prospect that the advice will be unpalatable to the client.[18]

Army Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[19] The comments to this rule note that many kinds of conduct reflect adversely on fitness to practice. However, some kinds of offenses carry no such implications. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." Although a lawyer should not engage in any criminal offense, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.[20]

Army Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[21] In this regard, it is also important to consider that no member of the Judge Advocate Legal Service (JALS) may accept payment or other compensation (excluding Department of the Army pay and allowances) for providing legal services to persons authorized to receive services at the Army's expense.[22] No member or employee of the JALS should advise, recommend, or suggest to persons authorized to receive legal services at the Army's expense that they should receive those services from the member or employee while off duty or from someone associated with the member or employee unless the services are furnished without cost.[23] Also, clients requesting assistance for services outside the legal assistance program should be referred to civilian lawyers or other offices or agencies from which such assistance may be obtained.[24]

Discussion

14. JER, *supra* note 2, ch. 2, subpart 2G, § 2635.702 (reprinting 5 C.F.R. § 2635.702).

15. AR 27-26, *supra* note 1, Rule 1.7(b).

16. *Id.* Rule 1.7(b) comment.

17. *Id.* Rule 2.1.

18. *Id.* Rule 2.1 comment.

19. *Id.* Rule 8.4(a).

20. *Id.* Rule 8.4(a) comment.

21. *Id.* Rule 8.4(c).

22. AR 27-1, *supra* note 3, para. 4-3b.

23. *Id.* para. 3-7h (15 Sept. 1989). This self-referral restriction was abandoned in *AR 27-1* (3 Feb. 1995) so as not to duplicate provisions of the *JER*, *supra* note 2, and the legal assistance regulation, *AR 27-3*, *supra* note 3. *See* AR 27-3, para. 2-7*c* (10 March 1989); *Id.* para. 4-7d (30 Sept. 1992); and *Id*. para. 4-7*d* (10 Sept. 1995). *See also* AR 27-26, *supra* note 1, Rule 1.5(h), which states, "An Army lawyer, in connection with the Army lawyer's official duties, may not request or accept any compensation from any source other than that provided by the United States for the performance of duties."

The PRC found by a preponderance of the evidence that, despite his assertions to the contrary, Mr. *B* engaged in conduct with his client that was contrary to his professional responsibilities to her. Specifically, the PRC found that Mr. *B* engaged in inappropriate discussions with her in an attempt to initiate a sexual relationship with her. These actions significantly impaired Mr. *B*'s professional loyalty to Mrs. *D* and his ability to provide her clear, independent, unbiased, and sound legal counsel regarding her pending divorce action. Mr. *B* attempted to use his official office and the resulting professional relationship with Mrs. *D* for personal gain by attempting to charge Mrs. *D* a fee and attempting to initiate a sexual relationship with her. Because of these financial and personal interests, Mr. *B* was unable to provide Mrs. *D* counsel with her best interests in mind.

The PRC also found that Mr. *B* not only violated Army policy, but also engaged in deceit and dishonesty by calling Mrs. *D* at her home and soliciting a fee for his professional legal services. Such actions cast doubt on his integrity, honesty, trustworthiness and fitness as a lawyer.

Findings and Recommendations

The PRC found that Mr. *B* violated 5 C.F.R. § 2635.702 contained in the *JER*; *Army Rules* 1.7(b), 2.1, and 8.4(a) and (c); as well as the policies set forth in *AR 27-1*, paragraph 4.3(b) and *AR 27-3*, paragraph 3-7*h*(5).

In light of the above findings, the Committee recommended:

1. That the action be returned to the SJA for consideration of appropriate disciplinary action; and

2. Notifying Mr. B's state bar about the professional misconduct.

Pro Se Pleadings

The following message on the next page was prepared and distributed by the Legal Assistance Division, Office of The Judge Advocate General, to disseminate information regarding the Iowa Board of Professional Ethics and Conduct (Iowa Board) opinions relating to the preparation of pro se pleadings by lawyers. The message provides important guidance for all Judge Advocate Legal Services (JALS) attorneys who provide legal assistance service as part of their duties. While the opinions of the Iowa Board require Iowa licensed JALS attorneys to exercise greater caution when assisting clients in the preparation of pro se pleadings, the opinions are limited in scope and should not significantly affect our legal assistance practice. As stated in the message, JALS personnel who are considering requesting an advisory ethics opinion from a state licensing authority should first consult with their supervisory judge advocate, the Office of The Judge Advocate General Division responsible for the subject area relating to the inquiry, or the Standards of Conduct Office. Timely consultation may help resolve the question, or if an advisory opinion is required, ensure that the special considerations of military practice are fully articulated in the question and ancillary matters submitted for state bar review. The text of the message follows on page eighty-seven. Lieutenant Colonel Meyer.

24. AR 27-3, *supra* note 3, para. 3-7h(5). Paragraph number 3-7h(5) remained unchanged in the 10 March 1989, 30 September 1992, and 10 September 1995 editions of *AR 27-3*.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978, ext. 380.* Major Rivera.

1996-1997 Academic Year On-Site CLE Training

On-Site instruction provides an excellent opportunity to obtain CLE credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Legal automation instruction provided by the Legal Automation Army-Wide Systems Office (LAAWS) personnel and enlisted training provided by qualified instructors from Fort Jackson will also be available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Remember that *Army Regulation 27-1,* paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army judge advocates, National Guard judge advocates, and Department of Defense civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program.

If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380. You may also contact me on the Internet at *riveraju@otjag.army.mil.* Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....tromeyto@otjag.amy.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

LTC Peter Menk, ...menkpete@otjag.army.mil
ARNG Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera, ...riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCTION TRAINING SCHEDULE 1996-1997 ACADEMIC YEAR

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
17-18 May	Des Moines, IA 19th TAACOM Airport Holiday Inn 611 Fleur Drive Des Moines, IA 50309 (515) 287-2400 or 283-1711	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Cooke COL R. O'Meara MAJ J. Little LTC K. Ellcessor LTC P. Menk	MAJ Patrick J. Reinert P.O. Box 74950 Cedar Rapids, IA 52407 (319) 363-6333 FAX 1990

* Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATTRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZHA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code--**181**

Course Name--133d **Contract Attorneys Course** 5F-F10

Class Number--133d Contract Attorney's Course **5F-F10**

Class Number--**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states requiring mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1997

May 1997

12-16 May:	48th Fiscal Law Course (5F-F12).
12-30 May:	40th Military Judges Course (5F-F33).
19-23 May:	50th Federal Labor Relations Course (5F-F22).

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Workshop (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	AC (Phase II) (5F-F55).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-55A0-RC).
22 June-12 Sept.:	143d Basic Course (5-27)C20).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July:	Professional Recruiting Training Seminar
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference

August 1997

4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
4-15 August:	139th Contract Attorneys Course (5F-F10).
5-8 August:	3d Military Justice Managers Course (5F-F31).
11-15 Aug.:	8th Senior Legal NCO Management Course (512-71D/40/50).

11-15 August:	15th Federal Litigation Course (5F-F29).
18-22 August:	66th Law of War Workshop (5F-F42).
18-22 August:	143d Senior Officers Legal Orientation Course (5F-F1).
18 August 1997-28 May 1998	46th Graduate Course (5-27-C22).

September 1997

3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
8-10 September:	3d Procurement Fraud Course (5F-F101).
8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
8-19 September:	8th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1997

April

26-1 May, AAJE	Advanced Evidence Carmel, CA

May

2-3, ABA	Environmental Law Victoria Inn, Eureka Springs, AR

June

27, ABA	ABA Legal Assistance for Military Personnel (LAMP) Seattle, WA

July

30 July-2 Aug, AGACL	Death Penalty Litigation and Appeals Conference San Antonio, TX

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

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

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, Va 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

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

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

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

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

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

UT: The University of Texas School of School of Law
Office of Continuing Legal Education
727 Est 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth--new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the November 1996, *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

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

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through your installation library. Most libraries are DTIC users and would be happy to identify and order the material for you. If your library is not registered with DTIC, then you or your office/organization may register for DTIC services.

If you require only unclassified information, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1, fax (commercial) (703) 767-8228, fax (DSN) 426-8228, or e-mail to reghelp@dtic.mil.

If you have a recurring need for information on a particular subject, you may want to subscribe to our Current Awareness Bibliography Service, a profile-based product, which will alert you, on a biweekly basis, to the documents that have been entered into our Technical Reports Database which meet your profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents document for a case may obtain them at no cost.

You may pay for the products and services that you purchase either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard or American Express credit card. Information on establishing a NTIS credit card will be included in your user packet.

You may also want to visit the DTIC Home Page at http://www.dtic.mil and browse through our listing of citations to unclassified/unlimited documents that have been entered into our Technical Reports Database within the last eleven years to get a better idea of the type of information that is available from us. Our complete collection includes limited and classified documents, as well, but those are not available on the Web.

If you wish to receive more information about DTIC, or if you have any questions, please call our Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1 or send an e-mail to bcorders@dtic.mil. We are happy to help you.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A263082	Real Property Guide--Legal Assistance, JA-261-93 (293 pgs).
AD A305239	Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
*AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-95 (517 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A280725	Office Administration Guide, JA 271-94 (248 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
*AD A322684	Tax Information Series, JA 269-97 (110 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

Administrative and Civil Law

AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311351 Defensive Federal Litigation, JA-200-96 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-96 (45 pgs).

Labor Law

AD A323692 The Law of Federal Employment, JA-210-97 (288 pgs).

*AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Ad-*

ministrative Center (PAC). A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33 you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed

by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States Income Tax guide for use with 1994 state income tax returns, April 1995.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA of actual class instructions presented at the school in Word 6.0, May 1997.
CHILDSPT.TXT	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.

DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, November 1995.
FOIA2.ZIP	January 1995	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
ALM1.EXE	September 1996	Administrative Law for Military Installations Deskbook
JA200.EXE	September 1996	Defensive Federal Litigation, March 1996.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA231.ZIP	January 1996	Reports of Survey and Line Determinations--Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, November 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1997	Federal Tort claims Act, June 1996.
JA260.ZIP	September 1996	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide--Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law guide--Part II, June 1994.
JA267.ZIP	September 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA269.DOC	December 1996	Tax Information Series, December 1996.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.

JA275.EXE	December 1996	Model Income Tax Assistance Program, August 1993.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.EXE	February 1997	15-6 Investigations, December 1996.
JA280P1.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 1 & 5, (LOMI), February 1997.
JA280P2.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	February 1997	Administrative and Civil Law Basic Handbook (Part 4, Legal Assistance), February 1997.
JA285V1.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA285V2.EXE	January 1997	Senior Officer Legal Orientation, February 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3,ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.

JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95.ZIP	January 1996	Operational Law Deskbook 1995.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.

YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

5. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP MAY.97.ZIP

At this point, the system will explode the zipped files and they At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. In paragraph 3 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

6. Articles

The following information may be useful to judge advocates:

John S. Blackman, *Alternative Dispute Resolution and the Future of Lawyering*, 23 LINCOLN L. REV. 1 (1995 Revised).

A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook* (Including Compendia of State and Federal Court Rules Concerning Citation Form), 26 STETSON L. REV. 55 (1996).

Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455 (1996).

Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

7. TJAGSA Information Management Items

a. The TJAGSA has upgraded its network server to improve capabilities for the staff and faculty and many of the staff and faculty have received new pentium computers. These initiatives have greatly improved overall system reliability and made an efficient and capable staff and faculty even more so! The transition to Windows 95 is almost complete and installation of Lotus Notes is underway.

b. The TJAGSA faculty and staff are accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling IMO.

c. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.