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Opportunities and Pitfalls for the ARCOM SJA

Remarks at the Reserve Judge Advocate's Conference, 5 December 1980,
by Colonel Charles E. Brant, JAGC, USAR,
Chief of Staff,
83d US Army Reserve Command.

"General Gibbes, General Harvey, fellow conferees:

If you are a calendar watcher and take note of anniversaries, you may recall that it was ten years ago that the first of these JAG Reserve conferences was held—over on the main grounds at the Red Cross Training Center. I have been privileged to attend each one of the ten succeeding conferences as well as that first one and have to say that, for me, they have been invaluable and enriching training. What we have learned from each other in the general sessions and in the workshops has made us better officers and has helped us to solve our own problems through the experiences of our fellow SJAs and Law Center Commanders.

Some of the preceding speakers have spoken generously of our accomplishments over the past several years and have observed that we, as a Corps, have much to be proud of and we have. The SJA who serves his commander well is highly regarded; General Hul[illegible] tells us

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF

DAJA-ZA

1 March 1981

SUBJECT: The Judge Advocate Officer Basic Course

TO: All Judge Advocates

1. A survey of staff judge advocates and recent Basic Course graduates revealed that our new judge advocates are highly motivated professionals well prepared in the Basic Course in the fundamentals of military law. However, we are not doing everything we can to prepare newly commissioned judge advocates to assume their role as a staff officer. There has been a tendency to emphasize technical legal issues to the exclusion of other matters vital to any SJA office such as staff operations and effective written communications. Moreover, because under present procedures not all newly commissioned judge advocates attend Phase I at Fort Lee, some Basic Course graduates are not qualified for assignment overseas upon completion of the course.

2. To meet these deficiencies and better prepare our new judge advocates, effective July 1981, I have approved a change to the Basic Course curriculum. Under this change the course will continue to be a twelve-week, two-phase course. Phase I, a two-week course conducted at Fort Lee, will consist of accession training and basic military indoctrination. Phase II, at TJAGSA, will be expanded to ten weeks. The instruction will include subjects formerly presented at Fort Lee as well as place greater emphasis on organization of the Army, command and staff procedures, legal services organization, military correspondence, the nature of the modern battlefield, and advocacy in the military. Phase II will be realigned to build upon the Phase I training. This will provide a smoother transition into technical legal subjects and emphasize the relevance of basic military subjects and the role of a judge advocate as a staff officer. All new judge advocates will attend both phases of the course.

3. While the instruction is being changed to give these officers a better introduction into the Army, staff judge advocates and other supervisors are reminded that training of new judge advocates does not end at the JAG School and that the teaching of wisdom must remain where it has always been--with you. I expect staff judge advocates and supervisors to have introductory programs for newly assigned judge advocates. At a minimum new judge advocates should spend some time at the unit level to acquaint them with troops, commanders and the Army. While the details of each program must be a matter of local discretion, JAGC general officers will review local programs during field staff visits.

ALTON H. HARVEY
Major General, USA
The Judge Advocate General

that he considers his staff judge advocate to be a key member of his staff.

But as some of you are aware, this is not a universally held view. In some commands the SJA is quite dispensable and, in fact, is thought to be someone to be avoided. This dichotomy was no better demonstrated than in 1975 when the position of SJA was abolished in the ARCOMs of First Army for two years. The reactions of the MUSARC commanders ran the full gamut between delight and dismay "Fine," said some, "I'm better off without the guy." Yet others decided to take the colonel's slot out of their hide, so to speak, and to keep their SJA instead of another principal staff officer.

Why the marked difference in reaction? In almost every case, the reason could be found in the relationship of the lawyer to his commander. Did the SJA create problems or did he solve them? Did the SJA "lecture" his commander on the law or assist him in accomplishing his mission? Did he listen, or was he always talking? Did he enter into the staffing process or hold himself aloof from it? The First Army SJAs who were kept had made themselves invaluable; those who were allowed to leave had only made themselves a nuisance.

Ten years as an ARCOM SJA, a Law Center Commander and now, an ARCOM Chief of Staff have given me an opportunity to see the relationship from the position of both attorney and client, and have now enabled me to draw some observation which, for want of any better categorizing, can be summarized in three points. They are:

1. Don't leave your brains in your briefcase. It is puzzling how an attorney who is an intelligent, well-educated professional, prosperous, and enjoying the confidence of clients and judges in his private practice can suddenly become a dull, uninformed and unimaginative bureaucrat when he puts on a green uniform. You do not attract and hold clientele in your civilian practice because you have become a short order expert on why something can't be done. The tough problem is your opportunity. You recognize that there are practical as well as legal considerations in the solution. You are innovative; a problem solver, not just a problem spotter. Well, take to your training assemblies the same skills you became successful with in your practice and use them. Don't leave them back at the office, in your briefcase. Your commanders deserve the same professional energy and skill that you give your clientele.

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Issues may be cited as *The Army Lawyer*, [date], at [page number].

2. Be informed about your command. Despite what you may sometimes feel, the JAGC is not a major segment of the Army Reserve and while your role is crucial to the success of your command, it is still a relatively small role. Your client fights; it is an Army, not a social agency or a business enterprize. Personnel management and contract negotiation are not its reasons for being. To serve it well you need to know its business. What kind of units make up your organization? Are they combat or combat support? Are they combat service support? There are differences and their needs and problems are different. Do you know the commanders of these units? The XO's? Have you accompanied them on training exercises to better understand their mission? You can't do it all from behind your desk. With all due respect for what has earlier been said here, the next war will not be fought in the courtroom, and your clients won't spend a lot of time there either. Know your units and their problems. Help subordinates without JAG officers assigned to them.

Strength maintenance is every reserve commander's big problem today. What are you doing to help him with it? There are a number of things you are uniquely qualified to suggest and carry out in this area.

Don't be known as that funny guy in the headquarters whose branch insignia keeps getting mistaken for IG brass. Spend some time learning about your military client's business just as you would learn about a new civilian client's problems. They need your help and they will welcome your informed assistance without having to request it.

3. Advertise. The Supreme Court has said it's O.K., so let's not continue to hide our talents under a bushel. Get involved in the operation of your command; let your Chief of Staff and your fellow staff officers know what you can do to help them with the accomplishment of their mission. Don't assume that they will come to you when they have a legal problem; they may not recognize the legal implications of their work until it's too late for you to do anything except tell them what they shouldn't have done in the first place, and of course, no client is much interested in hearing that. You have the training and the skills that enable you to provide early detection of legal issues hidden in personnel, logistics, budget or operational matters. Get into the staff meetings; if you're not invited, invite yourself. Go see your Chief and sell him on your value, not just as a legal counselor but as a problem solver, a can-do member of his staff. He has very few all-around experts like you and he will be delighted to see how much help you can be. From that time on, you will truly become a key member of the staff, not just a fellow who speaks in riddles and numbers and enjoys certain prequisites, advantages and exceptions that others do not and for no apparent reason other than "That's the way lawyers are."

Make up a list of fifteen or twenty areas where your involvement is indicated to not just solve but to head off legal problems. Give it to your commander, your chief of staff and your staff brethren. Then go see them in their offices, talk with their action personnel. That's meaningful staff interaction. It takes a while to learn that coordination is done with the feet, by moving around,—not with a stubby pencil, adding a few more words to DFs that come across your desk. In summary: don't sit in your office waiting for the phone to ring. Get out and sell your skills to your command. Be positive; show the commander how he can accomplish his goals and avoid the hassles. If the technique selected is impossible, find one that will work; don't leave all of the constructive staff planning to other sections. If you are a new ARCOM or group SJA, you may wonder how such an outreach program will work. I can only say that, after twelve years at the headquarters of one of the largest MUSARCS in the country, it has worked fine for me. If you can keep these three observations in mind as you perform your duties, I believe you will go a long way toward becoming that indispensible member of the staff that General Hultman regards his staff judge advocate as being. Giving that kind of service, gentlemen, is what the Army has a Judge Advocate General's Corps for. Thank You."

Rule 302—An Unfair Balance

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Military Rule of Evidence 302 establishes a new rule of evidence for the Armed Forces and creates a physician-patient privilege in limited circumstances.[1] It was intended to encourage individuals accused of offenses in the military to use military psychiatric services without fear of self-incrimination.[2] This rule, along with changes to paragraph 121 of the Manual for Courts-Martial,[3] protects statements made by an accused at a mental examination held pursuant to paragraph 121, and withholds from the prosecution the report generated by the mental examination. It represents a compromise between the accused's right against self-incrimination[4] and the requirement that the government rebut the insanity defense beyond reasonable doubt. One commentator called his compromise "an excellent balance."[5] Unfortunately, the military practitioner was never given an opportunity to take advantage of this excellent balance. Rule 302 was amended the very day it went into effect[6] and as amended prohibits the government from using expert testimony on the issue of sanity until the defense uses expert testimony. By severely limiting the government's use of expert testimony the balance now appears to have shifted unfairly against government. Before taking a look at this shift, it will be helpful to examine how the "balance" developed.

Development of the Balance

The conflict between the interests of an accused in not incriminating himself and the interests of the government in proving sanity beyond a reasonable doubt was considered by the Court of Military Appeals in *United States v. Babbidge.*[7] Prior to this case the statements made by an accused at a mental examination could be used against him on the prosecution case-in-chief.[8] In *Babbidge* the defense desired to call a psychiatrist on the issue of the mental responsibility of the accused and had resisted

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[1] Rule 302(a) creates a privilege for statements made by the accused at an examination held pursuant to paragraph 121 of the Manual as well as any derivative evidence obtained through the use of such statements. *See* Yustas "Mental Evaluations of the Accused in the Military—An Excellent Balance," *The Army Lawyer*, May 1980 at 24 for an extensive discussion of this privilege and its practical application.

[2] Analysis of the Military Rules of Evidence, 8 M.J. at XCV. The analysis represents the intent of the drafters of the Military Rules of Evidence:

[3] Exec. Order No. 12198, 45 Fed. Reg. 16932 (1980). Change No. 3, Manual for Courts-Martial, United States, 1969 (Rev. Ed).

[4] Article 31b, U.C.M.J. A military suspect must be told of the right to silence and the consequences of waiving that right.

[5] One commentator has described this as a proper balance between the accused and the prosecution. *See* Yustas, "Mental Examinations of the Accused in the Military—An Excellent Balance," *supra*. N.1.

[6] Exec. Order No. 12223, 45 Fed. Reg. 58503 (1980). Change No. 4, Manual for Courts-Martial, United States, 1969 (Rev. Ed).

This Amendment of the Manual for Courts-Martial, published in the Federal Register on 4 September 1980, had an effective date of 1 September 1980. Rule 302(b)(2) now provides:

> An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefore as to the mental state of the accused if expert testimony offered by the defense has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

[7] 18 C.M.A. 327, 40 C.M.R. 39, (1969).

[8] *United States v. Wimberley*, 16 C.M.A. 3, 36 C.M.R. 159, (1966), where the statements made by the accused at a government mental evaluation were admissable upon a showing that he was warned of the consequences of his statements.

efforts by the trial counsel to have Airman First Class Babbidge evaluated by government psychiatrsts. The trial counsel moved to exclude testimony of the defense psychiatrist unless the accused submitted to a mental evaluation conducted by the government. After the motion was granted the defense reluctantly submitted to this procedure.[9] The problem facing the defense was that statements made by the accused, incriminating or otherwise, could be obtained by the prosecution. The Court of Military Appeals approved this procedure, holding that the accused's act of opening his mind to the defense psychiatrist constituted a qualified waiver of his right to silence under Article 31, UCMJ.[10] The use by the defense of expert testimony on the issue of mental responsibility was conditioned on the submission by the accused to government psychiatric evaluation. This became known as the *Babbidge* Rule and was incorporated into the Manual for Courts-Martial.[11] Under this procedure there was nothing to prevent the psychiatric report from reaching the prosecution.[12] This tended to deter an accused from making use of government psychiatric resources because of the realization that communications to government experts would find their way to the trial counsel and later be used against the accused either directly or derivatively. An Army trial judge attempted to solve this problem with a "protective order" in *United States v. Johnson.*[13]

In *Johnson* the accused initially refused to communicate with the psychiatric board. Pursuant to a defense request the military judge directed that Private Johnson undergo a psychiatric examination and imposed the following conditions in an attempt to protect the rights of the accused:

a. No information secured during the examination or board proceedings was to be publicized in advance of presentation in court or termination of the trial.

b. No person examining the accused was to disclose to the trial counsel the substance of any disclosure made by the accused during the examination.

c. Any report of the examination was not to be related to anyone outside technical medical channels without the approval of the court, and the report was to be submitted to the court upon its completion.[14]

Additionally, the military judge stated that when he received the report he would sanitize it and give to the government only the answers to the questions regarding mental responsibility and capacity.[15] Similar protective orders were used subsequent to the *Johnson* decision.[16] Their use, however, was dependent on the initiative of the individual military judge and as such subject to uneven application. There was no guarantee that other trial judges would act similarly unless required to do so by legal precedent.[17] Nevertheless the protective order seemed to strike a fair balance between

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[9] *United States v. Babbidge*, 18 C.M.A., at 328, 40 C.M.R. 40.

[10] *Id.* at 332, 40 C.M.R. 44.

[11] Exec. Order No. 11835, 3. CuF.R. 944 (1975). Change No. 2, Manual for Courts-Martial, United States, 1969 (Rev. Ed.).

[12] Analysis of the Military Rules of Evidence, 8 M.J. at XCIV.

[13] 22 C.M.A. 424, 47 C.M.R. 402 (1973).

[14] *Id.* at 426, 47 C.M.R. 404.

[15] *Id.* at 426, 47 C.M.R. 404, the questions being, did the accused, as a result of mental disease, defect or derangement, lack the ability to distinguish right from wrong or adhere to the right, and does the accused possess sufficient capacity to understand the proceedings?

[16] *See e.g., United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). In this case the defense moved for engagement of a civilian psychiatrist at government expense. The trial judge denied this motion and instead ordered a Military Sanity Board with Article 31 warnings given, defense counsel allowed to be present, and the contents of the report of the board kept from the government until the defense called a psychiatrist as a witness.

[17] Holladay "Pretrial Mental Examinations Under the Military Law: A Re-Examination," 16 A.F.L.Rev. 23 (1975).

the rights of the accused and the needs of the government. The protections instituted by the judge in *Johnson* served as a model for the protections created by Paragraph 121 of the Manual and Rule 302, as originally promulgated.[18]

Initially, Rule 302 and the conforming amendments to Paragraph 121 of the Manual appeared to give the *Johnson* protective order service-wide effectiveness. Under the procedure for a mental examination held pursuant to paragraph 121, the trial counsel would be given answers to specified questions concerning the accused's mental responsibility. There was nothing in the *Manual* amendments or in Rule 302, as originally promulgated, which specifically prohibited a trial counsel from using this highly relevant evidence at a court-martial. The government could not use the testimony of the experts who were members of the paragraph 121 board until the defense first utilized these experts at trial, but could make use of other expert testimony. Psychiatrists and psychologists could respond to hypothetical questions about the personality of the accused or could testify based on examination of medical records and other observations outside the scope of a paragraph 121 examination.[19]

The Balance Shifts

The September 1980 amendments[20] were intended to make it clear that prosecution use of expert testimony was limited,[21] but the change goes too far. Rule 302(b)(2) now states, with the latest additions italicized:

> An expert witness *for the prosecution* may testify as to the reasons for the expert's conclusions and the reasons therefore as to the mental state of the accused *if expert testimony offered by the defense has been received in evidence*, but such testimony may not extend to statements of the accused except as provided in (1).[22] (emphasis supplied)

The change appears to prohibit the government from using any expert testimony on the issue of mental responsibility until the defense does so. The government still retains the burden of proving sanity beyond a reasonble doubt once the issue is raised.[23] While the Rules does not change the government's burden of proof, it allows the defense to control prosecution use of expert witnesses and restricts the government's ability to meet its burden. The result is unfortunate because it is unlikely that preventing prosecution use of experts to rebut an insanity defense furthers the purpose of protecting the accused's right against self-incrimination.

The *Babbidge* court spoke of the anomaly of limiting the government in rebutting an insanity defense to: (1) Testimony by lay persons, (2) Cross-examination of psychiatrists testifying for the accused, and (3) testimony of military psychiatrists founded on courtroom observations, hypothetical questions, or both.[24] The *Babbidge* court described these methods as poor and unsatisfactory substitutes for testimony based on psychiatric interviews. The court also pointed out that the absence of expert testimony for the Government on the in-

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[18] *See* Note 3, *supra*.

[19] Observations outside the scope of a paragraph 121 examination might include evaluating the accused's medical records, observing the accused without interview after being hospitalized, and viewing the accused in the courtroom.

[20] *See* note 6, *supra*.

[21] In July of 1980 one of members of the Joint Service Committee that drafted the Military Rules of Evidence indicated that use of this evidence by prosecutors went against the policy behind Rule 302. At the same time he indicated a revision had been proposed that would clarify this situation.

[22] Rule 302 (b)(1), Mil. R. Evid. permits the defense waiver of the privilege by "opening the door," that is, by placing statements of the accused in evidence during presentation of the defense case.

[23] Para. 122a, Manual for Court-Martial, 1969 (Rev. Ed.).

[24] *United States v. Babbidge*, 18 C.M.A., at 332, 40 C.M.R. 44.

sanity issue could result in a failure to meet the burden of proving sanity beyond a reasonable doubt.[25] Yet the change to Rule 302 makes such a failure a real possibility. With the amended rule in operation, if the defense does not offer expert psychiatric testimony, the government has no opportunity for cross-examination of defense experts, and is also prohibited from using experts to respond to hypothetical questions or testify based on observations outside the scope of a paragraph 121 examination.[26]

Prohibiting the government from using experts does not protect the right of the accused against self-incrimination where an accused has not been subject to any questioning. The right against self-incrimination should not shield an accused from being observed by psychiatric experts where that accused is raising an issue of mental responsibility. All this new prohibition seems to do is prevent the government from utilizing a potentially probative resource in trying to shoulder its burden of proving sanity beyond a reasonable doubt.

How likely is it that an accused will raise the issue of mental responsibility solely through lay testimony? In at least two situations it would seem very likely. First, the defense might have ample evidence from lay witnesses (fellow soldiers, family, etc.) that the conduct of the accused is abnormal. Based on this evidence there might be a request to evaluate the accused pursuant to paragraph 121, perhaps even emanating from the defense. The defense can do this without the fear that unfavorable results will be used at trial against the accused. If there are results unfavorable to the accused (an opinion that the accused is mentally responsible), the defense could elect to raise the issue of mental responsibility only through lay testimony. Although the prosecution will know there are expert conclusions tending to negate the insanity defense,[27] Rule 302(b)(2) will require the prosecution to sustain its burden through lay testimony.

In a second scenario the defense again has ample lay testimony to raise a mental responsibility issue. Here, however, the accused refuses to cooperate in an examination held pursuant to paragraph 121. The accused may be concerned about adverse administrative consequences when the report of the paragraph 121 board (including his statements) goes to his commander[28] or the defense may have an opinion of a civilian psychiatrist, unknown to the government, that the accused is mentally responsible.[29] The only section for non-compliance specified in Rule 302 is prohibiting the accused from presenting expert medical testimony on any issue that would have been the subject of the mental examination.[30] In both scenarios the defense has already made this a tactical decision and the prosecution is bound by Rule 302(b)(2) to respond to the issue solely

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[25] *Id.*

[26] *See* N. 23, *supra*. An opinion based on observations outside the scope of an examination pursuant to paragraph 121 may not be afforded the weight given to an opinion based on psychoanalysis of the accused. Nevertheless, such an opinion could be an important factor in proving sanity.

[27] Paragraph 121, Manual for Courts-Martial, 1969 (Rev. Ed). Pursuant to paragraph 121, the board is directed to answer five questions concerning mental responsibility and capacity. Althought the report of the board and statements of the accused are withheld from the trial counsel, the answers to these five questions are given to the accused.

[28] Paragraph 121, Manual for Courts-Martial, 1969 (Rev. Ed). Upon request the report of the board including statements of accused are provided to his commander. Paragraph 121 provides that an administrative action to discharge the accused may be taken based upon the board's report. This raises an issue as to whether an order cooperate with the board would be illegal, in accordance with *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974), which held that the constitutional prohibition against self-incrimination applies to administrative as well as criminal proceedings.

[29] This could raise an ethical question concerning the defense counsel's actions. Disciplinary Rule 7-102 (A)(4) of the American Bar Association's Model Code of Professional Responsibility states that a lawyer should not knowingly use false evidence. However, in this scenario the lay testimony of abnormal conduct on the part of the accused is not false evidence.

[30] Mil. R. Evid. 302(d).

with aggressive cross-examination of the defense witnesses or with lay witnesses of its own. This would be fair if the defense had to establish lack of mental responsibility by a preponderance of the evidence. Once the issue is raised, however, it must be treated as an alement of the offense and the government must establish the accused's mental responsibility beyond a reasonable doubt.[31]

Conclusion

The dual reasons for Rule 302, of both encouraging an accused to use military psychiatric services and protecting the right against self-incrimination, are salutary. If it is necessary to tie the government's hands to protect rights of the individual, then so be it. Yet is is difficult to see how prohibiting the government from using its own psychiatric resources serves any logical purpose when there is no risk of self-incrimination and in some cases no contact whatsoever with the accused. The finder of fact is denied relevant evidence and no rights are guarded. Rule 302, prior to the 1 September 1980 amendment, did represent an excellent balance.[32] In trying to extend the fair state-individual balance[33] that *Babbidge* began, Rule 302 (b)(2) goes too far and requires a result that "violates judicial common sense."[34] Reevaluation of this section of Rule 302 and further amendment or judicial intervention seems necessary to reestablish the balance. What is needed is a rule that can protect the accused without denying the government the use of all expert psychiatric evidence. To accomplish this goal Rule 302(b)(2) could be replaced with the following:

> A member of a board ordered under paragraph 121 of this Manual may testify for the prosecution as to the board member's conclusions and the reasons therefor only if expert[35] testimony has been offered by the defense and received in evidence. Such testimony may not extend to statements of the accused except as provided in (1).

Such a change would limit the use of members of a paragraph 121 board without creating a greater prohibition against the use of other expert psychiatric testimony by the Government. As the rule stands right now, the Government is told it has a burden of proving sanity beyond a reasonable doubt and must find out from the defense how it can sustain that burden. To be told by your opponent what you have to prove as well how you must prove it is both unfair and illogical.

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[31] Para. 122*a*, Manual for Courts-Martial, 1969 (Rev. Ed).

[32] *See* Yustas, Mental Examinations of the Accused in the Military—An Excellant, Balance," *supra.*, N.1.

[33] *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968).

[34] *Alexander v. United States*, 380 F.2d 33 (8th Cir. 1967).

[35] *See* Rule 702, Mil. R. Evid., as to what is expert testimony.

Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence

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Historically recognized,[1] yet infrequently invoked,[2] the executive privileges which favor the nondisclosure of classified and other official information have been codified recently in the

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[1] *See, e.g.*, United States v. Burr, 25 Fed. Cas. p. 30, No. 14692d (C.C.D. Va. 1807); Totten v. United States, 92 U.S. 105 (1875). *See generally* 8 Wigmore, Evidence § 2378 (MgNaughten Rev. 1961).

[2] *See* Halkin v. Helms, 598 F.2d 1, 14, f.n. 9 (D.C. Cir. 1978) (Bazelon, C.J. voting for rehearing en banc). C.J. Bazelon alludes to the notion that the states secret claim has been invoked in a limited number of in-

Military Rules of Evidence.[3] Surprisingly, military jurisprudence itself reflects a marked absence of case law regarding the privileges.[4] Nonetheless, it is imperative for the military practitioner to understand the procedures by which the government's right to withhold information from an accused is implemented. Where litigants are involved in the prospective release of sensitive governmental information, disclosure of the matter can result in a substantial negative impact on a national level.[5]

The object of this analysis is to review Military Rules of Evidence 505 and 506. Rule 505 is concerned with classified information or the "state secrets" doctrine. It provides that "[c]lassified information is privileged from disclosure if disclosure would be detrimental to the national security." Rule 506 deals with government information which is not classified, and thus can be characterized as the "official information" privilege. It states that "[e]xcept where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest."

This article will seek to enhance comprehension, by reordering and fleshing out the Rule's structure. Additionally, efforts will be made to underscore the strengths of the Rules, and point out the weakness inherent in them. The approach will focus on Rule 505 due to the strong interest evinced by the judicial[6] and legislative[7] branches of government concernig the "state secrets" privilege. Thereafter, significant deviations in the structure of Rule 506 from Rule 505 will be explained.[8] Finally, procedural matters pertaining to both rules which necessitate further judicial amplification will be highlighted. An exhaustive, all encompassing historical and substantive review of the privileges is not intended to be included within the scope of this presentation.[9]

The Rules

The military privileges are a by-product of extensive legislative efforts[10] to counter a litigation problem faced by the Department of Justice known as 'graymail.' The term 'graymail' refers to the actions of a criminal defendant in seeking access to, revealing, or threatening to reveal classificed information in connection with his defense."[11] A quick com-

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stances. It is this author's impression, after carefully researching the subject, that the official information privilege has been invoked less frequently.

[3] The Military Rules of Evidence [hereinafter cited as Mil. R. Evid.] were approved by President Carter by Executive Order dated 12 March 1980. They were incorporated in the Manual for Courts-Martial, United States (1969 Rev. Ed.) [hereinafter cited as MCM, 1969] at Chapter 27 with an effective date of 1 September 1980.

[4] *See generally* Welch, *Classified Information and the Courts*, 31 The Federal Bar Journal 358, Section V (1972).

[5] *See, e.g.*, United States v. Attardi, 43 C.M.R. 388 (C.M.A. 1971); United States v. French, 27 C.M.R. 245 (C.M.A. 1959); United States v. Dobr, 21 C.M.R. 451 (A.C.M.R. 1956).

[6] *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); United States v. Reynolds, 345 U.S. 1 (1953).

[7] Mil. R. Evid. 505 is patterned after H.R. 4745, 96th Cong., 1st Sess. (1979). The bill was framed by the Administration. Actually reported out to the floor of the House of Representatives was H.R. 4736 from the Permanent Select Committee on Intelligence. A compromise bill, PL 96–456, was signed into law on 15 October 1980. It was titled the "Classified Information Procedures Act."

[8] These are limited to the initial claim and manner of review.

[9] There are many authoritative treatises which deal with the historical and judicial antecedents supporting the privilege. *See generally* Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875 (1966); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142 (1976); 2 WEINSTEIN'S EVIDENCE, ¶ 509; 4 J. MOORE, FEDERAL PRACTICE, ¶ 26.61.

[10] *See* f.n. 7, *supra*. In fact, the Senate had also considered the same problem, framing its proposed legislation in Senate Bill, S. 1482.

[11] HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT, H.R. 4736, 96th Congress, 2d Sess (1980), [hereinafter cited as Graymail Report].

parison between Rule 505 and 506 reveals that the procedure in both Rules is substantially similar.[12] Each rule opens with a succinct restatement of the governmental protection[13] followed by a method for evaluating whether it has properly been claimed.

All parties to the court-martial are tasked by the Rules with specific obligations. Hence, the best approach to be taken in considering the procedural framework which undergirds the privileges, is to consider each participant's activity separately. A description of the formal process will provide the spring board by which each individual role will be analyzed.

Procedure

Three steps are involved in the process which triggers the roles of counsel, the military judge and convening authority. They include: raising the issue, determining the manner for taking evidence on it and rendering a decision on whether disclosure is in order.

The issue of disclosure is brought on during the early stages of trial.[14] Both the classified and official information rules contemplate expedient disposition of problems concerning the privileges.[15] The rules dispense with any formality relating to who raises the issue. They plainly vest authority in all parties to the litigation to raise questions concerning the privileges.[16] The military judge may also raise the issue.[17] Even if the government provides the impetus to bring on a hearing, it does not have to make any sort of showing of the reason for such actions.

Next, the military judge is charged with establishing an orderly means of moving forward. Thus, the judge must set up a schedule for making discovery motions and timeframes within which the defense must give notice to the government and judge of classified matters which will or might be disclosed.[18] Additionally, the judge must explain to counsel the procedure by which a determination of whether the evidentiary hearing on the motion will be in camera or otherwise.[19]

The second rung in the process concerns the means by which the privileged character of the information is determined. This involves two separate questions. First, should the evidentiary hearing be open to spectators or, alternatively, should it be held pursuant to "Article 39(a) from which the public is excluded"?[20] The latter is denominated as an "in camera proceeding".[21] Second, if the matter is to be considered in camera, what rules govern its conduct?

If the determination is made to hold an in camera proceeding, the rules provide additional measures to maintain the sanctity of the information until a final decision is rendered on the privilege. Although the government must inform the defense of issues which will be litigated, it does not have to fully reveal the nature of the information being placed under judicial scrutiny. Only where information has been previously detailed to the accused must the trial counsel specify the issue. If specific information has not previously been furnished "[t]he government may describe the information by generic category."[22]

The last step of the evaluative process takes place once the evidence has been submitted to

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[12] MCM, 1969, Appendix 18, *Analysis of the 1980 Amendments to the Manual for Courts-Martial* [hereinafter cited as *Analysis*], Rule 506 explains that "[t]he Rule is modeled on Rule 505 but is more limited in its scope in view of the greater limitations applicable to nonclassified information."

[13] Mil. R. Evid. 505(a) and 506(a).

[14] The specific time frame concerned is "[a]t any time after referral of charges and prior to arraignment." Mil. R. Evid. 505(e) and 506(f).

[15] Mil. R. Evid. 505(e) and 506(f).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* Mil. R. Evid. 505(i) and 506(i).

[20] Mil. R. Evid. 505(i)(1) and 506(i)(1).

[21] *Id.*

[22] Mil. R. Evid. 505(i)(4)(A) and 506(i)(4)(A).

the judge and issues have been briefed and argued. This involves the rendering of a decision. The military judge cannot simply render an oral decision in favor of the government. In order to preclude the use of the information the judge must make "a written determination that the information meets the standard"[23] provided by both Rules. On the contrary, if disclosure is ordered the decision may be oral.[24]

Defense Counsel

In order for a litigant to have a proper basis to attempt the acquisition of information the government claims to be privileged, the requesting party must initially establish the existence of two preconditions.[25] First, the accused must make a showing of necessity.[26] The defense, in other words, must show that the information includes "evidence that is relevant and material to an element of the offense or a legally cognizable defense."[27]

Second, the accused must show that the matter requested "is otherwise admissible in evidence in the court-martial proceeding."[28] Therefore, even if the privileged information contains material pertinent to the defense case, it is not discoverable if it could not be moved into evidence itself. For example, the defense team might desire information of privileged nature which, although not admissible in its own right, could lead to information which was. Because of the inadmissibility of the preliminary matter, the defense could never bring about its disclosure.

The foregoing elements of necessity are part and parcel of a motion for appropriate relief. Rule 505(d) envisions such a motion to be the mode by which the accused attacks a governmental withholding of information. Hence, in requesting discovery, the movant must show the material is relevant and admissible.

Another important aspect of the privilege is the defense's responsibility to disclose to the government privileged information it is aware of, and intends to use, in order to provide an opportunity for objection to such release. The Rules clearly preclude the defense from causing ex parte disclosures.[29]

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[23] *Id.*

[24] In the case of classified information alternatives to full release are permitted. Mil. R. Evid. 505(i)(4)(D). *Alternatives to full disclosure.* If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the government elects not to contest the relevance, materiality, and admissibility of any classified information, the government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

[25] The rules do not express the manner or degree of probity required to make this implicit demonstration. It appears to be a rather low threshold of proof as both Mil. R. Evid. 505(f) and 506(e) use the term "apparently contains" as the level of proof. It seems to be almost a guess. Nevertheless, the Supreme Court in United States v. Reynolds, 345 U.S. 1, 10 (1953), expressed the fact that "it was entirely proper to rule initially that petitioner had shown *probable cause* for discovery of the documents" (emphasis supplied). The reason for the fulfillment of preconditions is expressed in Freeman v. Seligson, 405 F.2d 1326, 1338 (D.C. Cir. 1968) as follows:

> matters of privilege can appropriately be deferred for definitive ruling until after the production demand has been adequately bolstered by a general showing of relevance and good cause. . . . This technique may, as to particular items, eliminate a 'showdown' on privilege (footnote omitted).

[26] *See generally* United States v. Reynolds, 345 U.S. 1, 11 (1953); American Civil Liberties v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

[27] Mil. R. Evid. 505(f) and 506(e).

[28] *Id.*

[29] Mil. R. Evid. 505(h). *Notice of the accused's intention to disclose classified information.*

(1) *Notice by the accused.* If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military

The duty to inform the government of defense intention to disclose is interesting for a number of reasons. Preliminarily, it must be noted that the requirement does not derive from a judicial order, hence, it is in effect at the outset of the legal action.[30] No request for a judicial mandate is necessary. Next, the duty to put the government on notice is a continuing one.[31] It does not lapse after the defense acts on a first occasion. Moreover, the Rule provides the government with a "grace period" in which it can seek to interpose an executive privilege before the accused can release any of the information.[32] Finally, a rather onerous sanction is incorporated into the Rule to prevent noncompliance. Should a defendant disregard the procedures detailed, "the military judge *may* preclude disclosure of any classified information not made the subject of notification and *may* prohibit the examination by the accused of any witness with respect to such information."[33] (emphasis added)

Once the defense places the government on notice of its intent and demonstrated need, the procedural situation focuses on actions the government must take to maintain the privilege. The Rules lay out the path which must be followed.

Trial Counsel

Three factors constitute important procedural considerations for the government. The first of these is the need for a high level official to actually invoke the claim.

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal considerations by that officer.[34] (citations omitted)

The Rules incorporate this concept by providing that a privilege "may be claimed by the head of the executive or military department or government agency concerned."[35] Additionally, before an authority can legally prevent disclosure of the information, she or he must find that:

1. the information is properly classified *and*

2. that disclosure would be detrimental to the national security.[36]

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judge under subdivision (e) or, if no time has been specified, prior to arraignment of the accused.

(2) *Continuing duty to notify.* Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) *Content of notice.* The notice required by this subdivision shall include a brief description of the classified information.

(4) *Prohibition against disclosure.* The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

(5) *Failure to comply.* If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

Just because information is classified or closely held by the government does not necessarily mean that an accused is oblivious to its precise content. Information of this sort may be acquired by the accused in any number of ways. These may include illicit or legal means. For example, an individual may have had some previous employment which provided entree to the information (*e.g.*, F.B.I., C.I.A., C.I.D. agents).

[30] Mil. R. Evid. 505(h)(1).

[31] Mil. R. Evid. 505(h)(2).

[32] Mil. R. Evid. 505(h)(4).

[33] Mil. R. Evid. 505(h)(5).

[34] United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

[35] Mil. R. Evid. 505(c) and 506(c).

[36] *Id.* The rationale for the rule of claim is twofold. To ensure deliberate evaluation in the consideration process and insure uniformity. "To permit any government

The official who asserts the privilege need not be present in court. This can be accomplished by either the trial counsel or a witness.[37]

The second concept of procedural significance to the trial counsel relates to the burdens of proof which must be shouldered. More discretely put, the questions become: who has the responsibility to carry them, and what level must be obtained to convince the military judge in the various stages.

As indicated earlier, questions concerning privileged material are raised by a motion for appropriate relief. Although normally the moving party on a motion has the burden of proof,[38] this general rule does not hold when dealing with the classified or official information privileges. The burden in both instances appears to rest with the party (the government) claiming the privileged informatoon should not be disclosed.[39] The logic supporting the allocation of the burden is eminently reasonable under the circumstances. All information relating to the motion, more often than not, is within the control of the government.

One last matter merits reflection by the trial counsel. It may be in the best interest of the government to release some classified information to the defense team. In certain situations the government may not possess any relevant information to support the accused's case. By releasing a limited quantity of properly privileged facts to the defense the accused and counsel would recognize the truth of the situation and thus, curtail their requests. In short, in litigation terms this move is cost-efficient.[40] This situation does not imply that action of this sort cannot be taken without some protection against disclosure. The Military Rules provide a means by which the government can have its cake and eat it also. The government may agree to disclose information in an unaltered form, protected by a court order which controls the way in which the information is safeguarded and used.[41] In another way, the gov-

attorney to assert the privilege would derogate both of these interests. It would be extremely difficult to develop a consistent policy of claiming the privilege. Moreover, the judgment of attorneys engaged in litigation is very likely to be affected by their interest in the outcome of the case." Pierson v. United States, 428 F. Supp. 384, 395 (D. DE 1977). *See also* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C. 1966); Kaiser Aluminum & Chemical Co. v. U.S., 157 F. Supp. 939 (Ct. of Claims 1958).

[37] Mil. R. Evid. 505(c).

[38] *See generally* MCM, 1969, Chapter XII.

[39] *See* Mead Data Cent. Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977); Smith v. F.T.C., 403 F. Supp. 1000 (D. DE. 1975); United States v. Article of Drug, 43 F.R.D. 181 (D. DE 1967). *See also* Analysis, Rule 506(i).

[40] Although the accused *is* present at a military in camera proceeding, *see* PROCEDURE, infra, still the defense team does not *of right* have access to the contested material. As suggested in United States v. Lopez, 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971), there may be overwhelming societal interests in keeping the accused and counsel apprised of what is presented to the judge for consideration. The interests in question are related to constitutional, judicial and pragmatic considerations. "There could hardly be anything more rankling to a defendant and destructive of his morale and incentive to reform than to have the nagging suspicion that something was presented to the Court which should not have been."

[41] Mil. R. Evid. 505(g). *Disclosure of classified information to the accused.*

(1) *Protective order.* If the government agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(C) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified informa-

ernment may desire to only release limited portions of the information. The Rules similarly provide authority for the military judge to permit a course of action of this nature.[42]

The upshot of the trial counsel's role in dealing with sensitive information is that this attorney serves as a messenger. Decisions as to the extent of divulgence of the information previously has been made at senior levels of authority. The advocate's role is to deliver some material for judicial reflection and thereafter assume the requisite burdens to persuade the detached official that the decision should be affirmed.

Military Judge

The most difficult areas to detail are related to the military judge's responsibilities. Essentially, these duties encompass two separate determinations. Initially, the judge must resolve the question of whether an in camera hearing is the proper setting for resolving the government's contention that the matters are privileged and subject to withholding. Thereafter, he or she must resolve the propriety of the claim for privilege. Outlining standards supporting the courses of action is a simple proposition. Determining how closely the judge will scrutinize the documents in question is a little more complex.

When it appears to the trial counsel that the matters in contention are of such a sensitive nature that general exposure will compromise the interest of the nation, an in camera session may be called for.[43] The government has a right to exercise its privilege at this type of proceeding even though it may appear as a matter of law that the defense may discover the material. The release of statements normally available to the defense by virtue of the Jenck's Act[44] are subject to review at a closed session. Thus, although statute provides the defense with an opportunity to review government witness statements, the privilege may limit the exercise of this right.

When dealing with classified information,[45] the procedures and standards to be followed

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tion in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

See also Mil. R. Evid. 506(g).

[42] Mil. R. Evid. 505(g). (2) *Limited disclosure.* The military judge, upon motion of the government, shall authorize:

(A) the deletion of specified items of classified information from documents to be made available to the defendant;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The government's motion and any materials submitted in support thereof shall, upon request of the government, be considered by the military judge in camera and shall not be disclosed to the accused.

[43] The rationale for the in camera review is to provide a check on the prior executive action which classified the information on the one hand while at the same time maintaining its integrity during the exercise of judicial review. *See* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971).

[44] 18 U.S.C. § 3500 (1976). 19 U.S.C. § 3500(b) provides in part:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

[45] *Compare* Mil. R. Evid. 505 *with* Mil. R. Evid. 506. Note that the latter evidentiary rule does not address itself to Jenck's Act material. Presumably, the reason is that the government has waived any arguable right to the protection of the official information privilege under judicial nudging.

differ slightly among the two privileges. If information other than prior government witness statements are involved in the dispute, the prosecutor must preliminarily establish a need for the closed session by submitting two items for consideration *solely* by the military judge.[46] These are:

1. the classified material involved, and

2. an affidavit which evidences "that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable order, statute, or regulation."[47]

Once the foregoing information is provided to the judge and the regulatory standard is met, the judge must conduct an in camera proceeding.[48]

The standard which must be fulfilled is "that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation."[49] The degree of probity required does not create an onerous burden for the government. It is not proof beyond a reasonable doubt, but instead more closely approximates a probable cause standard.[50] On the contrary, where Jenck's Act statements are involved the Rules provide an automatic in camera session when the trial counsel invokes the privilege and delivers:

1. the statements and

2. a sworn declaration which identifies

   a. "the portions of the statement that are classified and"

   b. "the basis for the classification assigned."[51]

Having reached the proper atmosphere for litigation, the parties are brought to the crux of the litigation. That is, the bench mark which guides the judge in determining whether the information must be divulged. The treatment of classified information differs from official information in this regard. Hence, the latter will be analyzed separately below.

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[46] *Compare* Mil. R. Evid. 505(i)(3) *with* Mil. R. Evid. 506(i)(3). It must be recognized that the standard of damage to the national interest which would be brought about varies between the two rules. *See also* Committee for Nuclear Responsibility Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971); Freeman v. Seligson, 405 F.2d 1326, 1338 (D.C. Cir. 1968). In Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973), the court points out that in camera proceedings are a difficult proposition at best for the discoverant. The party which seeks disclosure frequently is not privy to matters the judge and government are relying on, and thus as an interested party cannot be a true devil's advocate. As previously indicated in the text though, the Military Rules of Evidence do allow the government to make some disclosures for motion practice purposes which are portectable. *See* Mil. R. Evid. 505(g)(1) and (2) and Mil. R. Evid. 506(g).

[47] Mil. R. Evid. 505(i)(3). *Cf.* Mil. R. Evid. 506(i)(3). The standard of damage in the official information privilege is of such a nature "that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest." In either case, what is involved is *not* a pro forma statement of damage as set forth in the pertinent Rule. *Cf. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 326 (D.C. DC 1966). Instead, an explanation of how and why such damage will take place is in order.

[48] Mil. R. Evid. 505(i)(4)(A) provides "upon finding that the government has met the standard set forth . . . with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding." *Cf.* Mil. R. Evid. 506(i)(4)(A).

[49] *Id.*

[50] *Compare* Mil. R. Evid. 315(f)(2) "Probable course to search exists when there is a reasonable belief . . ." *Compare also* 10 U.S.C. § 807(b) (1976), Article 7, Uniform Code of Military Justice which provides in part that an apprehension may be effected "upon a reasonable belief . . ."

[51] Mil. R. Evid. 505(g)(3)(B). Before moving to an evaluation of the privileged nature of the statement or parts of it, the judge must first examine its consistency with the witnesses prior statements. Finding the requisite degree of harm to national security interests, if the statement is consistent, all the judge need to do is delete the classified information and release the remainder for the defense. On the other hand, if those aspects of the statement containing classified material are inconsistent, then a full hearing on its privileged character is in order.

Although it facially appears that the military judge's attention is only directed toward two criteria, relevance to litigation and admissibility,[52] in fact he or she must be concerned with four facets of the information. The first two are as just stated. The arbiter must decide from the *defense's* point of view whether:

1. "the information is relevant and material to an element of the offense or a legally cognizable defense" and

2. "[it] is otherwise admissible in evidence."[53]

From the perspective of the *government*, the arbiter must assess whether, in fact, the information is properly privileged. This causes the judge to review, in the case of classified information, whether:

3. the material is "classified information"[54] and

4. "if disclosure would be detrimental to the national security."[55]

Where official information is concerned, the judge must evaluate requirements three and four differently. It must be decided, instead, if:

3. the material is "government information"[56] and

4. "If disclosure would be detrimental to the public interest."[57]

If a single condition is not properly fulfilled by either side, that party will not prevail. For example, if the defense fails to show the need for the information; it is not entitled to it. Similarly, if the government is unable to show the information was properly classified, it will not be able to prevent disclosure.

On the other hand, if the information is privileged the privilege is absolute. "Disclosures that would impair national security or diplomatic relations are not required by the courts."[58] The options available to the government are limited. It may either withhold the information and take the risk that the case will be dismissed or disclose the proceed with the litigation.[59]

The judge must be concerned with one final matter. To what extent may he or she delve into the information while reviewing it? May all the materials in issue be read by the judge in reaching a decision or, is this official limited to the statements propounded by the various parties concerned? Although a bright line approach is not provided in the Rules, it appears a court should wherever possible temper its action so as not to expose the very information

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[52] Mil. R. Evid. 505(i)(4)(B) and 506(i)(4)(B).

[53] *Id.* The first element is articulated in a slightly different way for the official information privilege. Mil. R. Evid. 506(i)(4)(B) states that the requesting party must show "a specific need for information containing evidence that is relevant, to the guilt or innocence of the accused." Quaere: what does this language mean? Does it refer to the general privilege itself *or* perhaps it is an allusion to the fact that it must meet other evidentiary criteria such as an exception to the hearsay rule *or* does it mean both?

[54] Mil. R. Evid. 505(b)(1). *Classified Information.* "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in section 2014(y) of title 42, United States Code.

[55] Mil. R. Evid. 505(b)(2). *National security* "National security" means the national defense and foreign relations of the United States.

[56] Mil. R. Evid. 506(b) provides that:

"Government information" includes official communications and documents and other information within the custody or control of the federal government. This rule does not apply to classified information (rule 505) or to the identity of an informant (rule 507).

[57] Mil. R. Evid. 506(a).

[58] Kaiser Aluminum and Chemical Corp. v. United States, 157 F. Supp. 939, 944-945 (Ct. Cl., 1958).

[59] "[T]he government must choose; either it must leave the transaction in the obscurity from which a trial will draw them, or it must expose them fully." United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). *See also* Mil. R. Evid. 505(i)(4)(E).

which the privilege is designed to protect.[60] Thus, under some circumstances the role of the court will be limited to a review of the actions of the agency head[61] for an abuse of discretion.[62] At other times, the court will swing to the other end of the spectrum for a de novo[63] review.[64]

Succinctly stated, the court cannot automatically look to one method or another before a course of conduct is chosen.[65] A balancing test serves to direct the judge to a determination of how much is revealable to him or her at the hearing stage. The factors considered in this balance are set out in *United States v. Reynolds*.[66] In certain instances the Court suggests an abuse of discretion standard.

> It may be possible to satisfy the court from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by judge alone, in chambers.[67]

Some situations will provide a basis for a full review of the classified documents. In these circumstances,

> . . . the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity the claim of privilege should not be lightly accepted . . .[68]

In the last analysis, it depends on the persuasiveness of argument of counsel which will define how deeply the judge will probe in considering the privilege issue.

In summary, the military judge's involvement in the evaluation process is threefold: a decision must be made as to the manner of taking evidence, attention must be directed toward relevant information, and a decision must be made regarding the degree to which material itself is to be reviewed and a finding imposed.

Convening Authority

The convening authority has been given significant power by the Rules. This official may act prior[69] or subsequent[70] to referral of the

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[60] *Cf.* Ethyl Corp. v. E.P.A., 478 F.2d 47, 50 (4th Cir. 1973). *See* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum L. Rev. 142, 169, f.n. 162 (1976). (The suggestion is made that secret documents can never be reviewed by the judge.) *See also*, Fletcher, *United States v. Grunden: A Scalpel Not an Ax*, The Army Lawyer, April 1978, at 2,3. (The suggestion is made by Judge Fletcher that the judge "is concerned only with whether proper authorities acting pursuant to proper authorization classify the material" and "does not look behind the classification.").

[61] Mil. R. Evid. 505(c).

[62] *See* Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978); Siglar v. LeVan, 485 F. Supp. 185 (D.C. MD. 1980); United States v. Grunden, 2 M.J. 116, 122-123 (C.M.A. 1977).

[63] "Anew; afresh; a second time." BLACK'S LAW DICTIONARY, 483 (4th Ed. 1968).

[64] *See* American Civil Liberties Union v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980); Halkin v. Helms, 598 F.2d 1, 14-16 (D.C. Cir. 1978) (Bazelon, C.J. voting for rehearing en banc).

[65] *See* United States v. Reynolds, 345 U.S. 1, 10 (1953). *Cf.* United States v. Nixon, 418 U.S. 683, 707-713 (1974).

[66] 345 U.S. 1 (1953).

[67] *Id.* at 10.

[68] *Id.* at 11.

[69] Mil. R. Evid. 505(d). *Compare* Mil. R. Evid. 506(d). The latter rule does not speak in terms of the convening authority. It requires "the government," which is left undefined, to act. Who represents the government is relegated to the imagination of counsel. Suggestably, it could be the trial counsel, chief, criminal law, staff judge advocate or convening authority, to name just a few individuals.

[70] Mil. R. Evid. 505(f) and 506(e).

charges to resolve disputes on the availability of information. However the decision is not final. The accused may renew the matter at trial.[71]

The rules which allow the government to take a position on the request for information provide for two distinct types of activities. Before a matter is referred to a court the government's conduct is related to making the information available. Thus, the Rules generally provide the following avenues of relief:

The convening authority may:

(1) Delete specified items of classified information from documents made available to the accused;

(2) Substitute a portion or summary of the information for such classified documents;

(3) Substitute a statement admitting relevant facts that the classified information would tend to prove;

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.[72]

After a case has been referred to a court the scope of conduct permitted the convening authority relates to his or her attempts to effectuate the disposition of the case.[73] This basically means taking action to win judicial approval

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[71] Mil. R. Evid. 505(d) provides that "[a]ny objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session." Mil. R. Evid. 505(f) and Mil. R. Evid. 506(f) set forth the idea that "[i]f after a reasonable period of time, the information is not provided to the military judge (in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused), the military judge shall dismiss the charges or specifications or both to which the (classified) information relates" (language in brackets found only in Mil. R.Evid. 505(f)). Mil. R. Evid. 506(d) does not have language similar to Mil. R. Evid. 505(d) although action by the accused could still be taken in accordance with the provisions of Mil. R. Evid. 506(e).

[72] Mil. R. Evid. 505(d). The differences with Mil. R. Evid. 506(d) are basically in terminology and are underscored below:

The *government shall*:

(1) delete specified items of *government* information *claimed to be privileged* from documents made available to the accused;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the *government* information would tend to prove;

(4) provide the document subject to conditions *similar to those set forth in subdivision (g) of this rule*; or

(5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the *public interest*.

[73] The situation the government places itself in when dealing with classified or official information it wishes to withhold from the defense is not as secure as it might appear. In fact, the circumstances are rather untenable. One observer expressed the problem in the following terms:

> When you embark on one of these prosecutions, you are buying a ticket to go down a very long and difficult road, and at that moment you really can only see the first few feet of the way. You do not know what lies beyond. You do not know how the case is going to be defended. You do not know what discovery will be directed against you or how far it will be allowed by the judge, or under what conditions it will be allowed. You do not know what rulings the judge is going to make or even what issues he will have to rule on. Much of that is unknowable and unforseeable when these cases begin.
>
> You can say that the Government always has the ultimate trump in these situations because if the disclosure demands mount up too high and if the going gets too tough, you can always back out. The prosecution can always be dismissed. But I want to assure you it is not that simple because these cases, once they are started, tend to develop a great deal of momentum. Some are very, very important cases in which the interest in success if very high and compelling, and it always seems when you have started on this course that it is better, more prudent, to give up the one additional piece of information that is being asked, hoping that that will end it rather than quit the whole process. Plus, if you ever play that

of the privilege while still permitting the case to go forward or halting the judicial action. The classified and official information rules are almost identical. They allow the convening authority to:

(1) institute action to obtain the classified information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charge or specifications or both to which the information relates; or

(4) take such other action as may be required in the interests of justice.[74]

In sum then, appropriate conduct by the convening authority at the outset of the action can bring about great benefits for all parties concerned. From the trial counsel's point of view vast efforts in litigation can be conserved by disclosure of the requested information or dismissal of the charges. The defense can expect to receive information it needs to litigate effectively or be precluded from having to defend against specifications to which the privileged information is salient.

Distinguishing Features of Official Information Privilege

Although this privilege[75] is almost exactly the same in format and procedure as the classified information privilege, some significant differences exist.

Claim of Privilege

Two major features set the official information privilege apart from its sibling in terms of its exercise. These relate to the broader group of individuals who can properly claim the right, and the standard employed in the characterization process.

Unlike the classified information privilege, authority in the official information privilege to classify material as privileged extends below high level officials.[76] The rule provides that "[t]he privilege for investigations of the Inspectors General may be claimed by the authority ordering the investigation or any superior authority."[77] The potential result is self-evident. Any number of individuals are invested with the right to direct an investigation.[78] Hence, these same persons can denominate the results as being privileged. This is a far cry from "the head of the executive or military department or government agency concerned,"[79] which is the level demanded by the Supreme Court.

The second matter which distinguishes this rule from the classified information rule is the

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trump and back out of one of these things, you have to understand that at that point there will develop a very considerable pressure to understand why it happened. The press will want to know if the case goes down for national security reasons, what the reason was, and they will scan around looking for the particular reason, and indeed, by backing away, you can very well achieve what you are trying to avoid, which is more highlighting on your problem and enhanced likelihood that the information will come out through another channel.

Statement of Anthony A. Lapham, *Graymail Report*, pg. 7-8.

[74] Mil. R. Evid. 505(f). The sole difference between Mil. R. Evid. 505(f) and 506(e) is that the latter omits the word "classified" at 506(e)(1).

[75] *See* f.n. 3, *supra*.

[76] *Compare* Mil. R. Evid. 506(c) *with* Mil. R. Evid. 505(c).

[77] *See generally* Army Reg. 20-1, Inspections and Investigations Inspector General Avivities and Procedures (15 June 1978). Paragraph 4-3 states "Heads of HQDA staff agencies and commanders whose staffs include a detailed Inspector General may direct investigations or inquiries by an Inspector General into matters pertaining to their activities."

[78] *See generally* Army Reg. 20-1, Inspections and Investigations Inspector General Activities and Procedures (15 June 1978). Paragraph 4-3 states "Heads of HQDA staff agencies and commanders whose staffs include a detailed Inspector General may direct investigations or inquiries by an Inspector General into matters pertaining to their activities."

[79] Mil. R. Evid. 506(c) and 505(c). *See* f.n. 23, *supra*. Quaere: will this deviation from the mandate of the Supreme Court be upheld by military courts?

lack of an explicit standard to gauge the applicability of the rule to the information. The classified privilege rule incorporates a specific measure the official of the executive branch must employ to properly determine the existence of a privilege. No such expression appears here. A prudent course of action would dictate that an official charged with making a decision on the existence of official privilege would be best advised to look to the scope of the rule[80] and statement of the rule[81] before rendering a decision.

Military Judge

The decision making process in which the military judge is placed also presents procedures for consideration. These are threefold. One question relates to the interrelationship, if any, which exists between the official information privilege and the Freedom of Information Act.[82] Another issue revolves around the actual process employed by the judge in camera to decide if the information in question is properly withholdable. Lastly, the reviewing official must be cognizant of a different test utilized in determining the efficacy of the privilege.

Comparison between F.O.I.A.[83] and the general privilege[84] reflect a marked resemblance. Although it is clear that there is no legal nexus between the two concepts,[85] it is equally apparent that the statute and the privilege are founded on similar legal and philosophical underpinnings.[86] The similarity should not go without notice to a judge, or counsel for that matter, involved in privilege litigation. The resolution of F.O.I.A. questions well-serve

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[80] Mil. R. Evid. 506(b) defines what is meant by the term "government information." *See* f.n. 56, *supra*.

[81] "[G]overnment information is privileged from disclosure if disclosure would be detrimental to the public interest." Mil. R. Evid. 506(a).

[82] 5 U.S.C. § 552 (1976) [hereinafter referred to as F.O.I.A.].

[83] 5 U.S.C. § 552(b). This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

[84] Mil. R. Evid. 506(a).

[85] Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 152 (1976).

[86] Note, *Discovery of Government Documents and the official Information privilege*, 76 Colum. L. Rev. 142, 153 (1976).

parties to the trial, for the protected values are the same and the evaluative process concerning their sanctity will not be much different. The key recognition is that there is a difference between "open disclosure to the public at large under F.O.I.A. and the much more restricted disclosure which occurs under the discovery rules."[87]

The second distinction is the extent to which the judge evaluates the documents. When the classified information privilege is invoked by the government, a preliminary question to reviewing the documents themselves fully is a concomitant problem of how much of the documents the judge ought actually look at personally. The situation is much easier to bear for the judge when the official information privilege is claimed.

> The disclosure of such materials involves a far lesser danger to the possible interest than the disclosure of "state secrets" and has always been subject to a much less stringent rule for discovery and a broader scope of judicial review. In camera examination by the Court of the contested documents in order to determine the acceptability of the claim is generally an accepted practice in this situation.[88]

The last matter is the approach employed in a determination that the government has properly invoked the privilege. Unlike the case with the state secrets doctrine,[89] it is not an all or nothing proposition in determining the propriety of the privilege. Just because the government fulfills its showing of the predicate elements to the claim[90] does not mean the privilege springs forth. Instead, the court must balance competing interests. Basically, this means the scales must match the discoverant's need for the information against the pubilc's interest in confidentiality.[91] Only then can a proper result be adjudged. Once the privilege is deemed to be in force, the government must relinquish the information in question. A failure to divulge brings about the ultimate remedy. "[T]he military judge shall dismiss the charges or specifications or both to which the information relates."[92]

Unresolved questions

The articulation of the rules themselves inherently raise issues for judicial review and analysis, or executive modification. Some of these questions are framed below.[93] Aligned with each issue, an approach is suggested which will attenuate the void or deficiency noted. Three ideas will be evaluated. These are: the application of the rule of completeness, the right of the government to appeal and the lack of reciprocity in the notice provision.

Rule of Completeness

The rule of completeness[94] essentially mandates that where a party to litigation employs

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[87] *Id.*

[88] Ethyl Corp. v. E.P.A., 478 F.2d 47, 49–50 (4th Cir. 1973). *See also* Smith v. F.T.C., 403 F. Supp. 1000, 1019 (D.DE 1975); Union Oil. Co. of California v. Morton, 56 F.R.D. 643 (C.D. CA 1972); Pilar v. S.S. Hess Petrol, 55 F.R.D. 159 (D.MD 1972). *Cf.* 5 U.S.C. § 552(a)(4)(B) (de novo review in FOIA litigation provided by statute).

[89] *See* text and accompanying f.n. 58 and 59, *supra*.

[90] *See* text and accompanying f.n. 56 and 57, *supra*.

[91] Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 143–145 (1976) *See also* Smith v. F.T.C., 403 F. Supp. 1000 (D.DE 1975); Black v. Sheraton Corp., 371 F. Supp. 97 (D.D.C. 1974).

[92] Mil. R. Evid. 506(i)(4)(D).

[93] Others are left for future comment. Among these are: how may the accused protect himself or herself against the use of incriminatory statements which are made during motion practice on privilege questions? In another vein, Mi.. R. Evid. 505 and 506 uniformly address the role of the military judge in deciding questions. What course of conduct (if there is any difference at all) is followed if the court-martial is convened without a military judge?

[94] The rule is codified within the Military Rules of Evidence as follows:

> Rule 106. Remainder of or Related Writings or Recorded Statements
>
> When a writing or recorded statement or part thereof is introduced by a party, an adverse party

the use of a writing, a complete picture must be painted by the documentary evidence. The evidence must provide the total picture of the proposition presented. A half-truth is insufficient.[95]

Notwithstanding this general standard espoused within Military Rule of Evidence 106, specific criteria found within the state secret and official information privileges of the Rules run counter to this proposition.[96] Thus, inspection of various parts of the privilege sections condone the use of only parts of writings to be introduced. The problem is evident. It allows either party to present a partial statement thereby detracting from the overall responsibility of the court in its truth finding responsibility.[97]

Rectifying the problem can be approached from two directions. As an expedient, counsel finding themselves in the posture of having an objection lodged against them for withholding information should advance the superiority of the specific rule, *i.e.*, the privilege procedure, versus the general rule of completeness set forth in Military Rule of Evidence 106. The contention advanced should be that the various provisions within the executive order should be read in a harmonious manner, "but in the event they are in irreconcilable conflict, the specific provision will control, unless the statute, considered in its entirety, indicates a contrary intention."[98]

As perhaps a more satisfying, long run approach, the rule ought to be amended so as to grapple with the problem directly. The addition should establish a procedure whereby the court can review the material as a whole and decide, if as a matter of fairness, additional information should be revealed to the finder of fact.[99]

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may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

[95] *See generally* S.A. Saltzburg and K.R. Redden, Federal Rules of Evidence Manual, 55-57 (2d. ed. 1977).

[96] *See, e.g.*, Mil R. Evid. 505(d)(2) and 506(d)(2) as well as Mil. R. Evid. 505(i)(4)(D). The most blatant rejection of this principle is found within Mil. R. Evid. 505(j)(2) and 506(j)(1). Except for the words "classified information" in 505(j)(2) which are replaced with the term "government information," the provisions are identical. Mil. R. Evid. 505(j)(2) expresses the concept thusly;

Precautions by the military judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

[97] The Permanent Select Committee on Intelligence recognized this defect in its Graymail Report. At page 29 an explanation is rendered of why the Administration's bill, which contained exactly the same provision as Mil. R. Evid. 505(j)(2) and 506(j)(1), was significantly modified. In short, the Committee saw the deficiences as "containing no standards and granting blanket authorization to make deletions."

[98] E.T. Crawford, *Statutory Construction*, 265 (1940).

[99] An example of this is reflected by sections 109(d) and (e) of the bill proposed by the Permanent Select Committee on Intelligence. They provide:

(d) When a writing or recorded statement (or a part thereof) is introduced into evidence by the United States, the court, upon motion of the defendant may require the United States at that time to introduce any other writing or recorded statement (or any other part of the statement introduced) which ought in fairness to be considered contemporaneously with the statement introduced and which is relevant to the defendant's case. If such other writing or recorded statement or such other part, contains classified information, the court, at the request of the United States, shall conduct the hearing on the defendant's motion in camera. If at the conclusion of such hearing, the court requires the United States to introduce classified informtion, the procedures of section 103 shall apply.

(e) The United States may notify the court and the defendant before trial if it intends to introduce during the trial only a part of a writing or recorded statement containing classified information. Upon such modification, the course shall conduct, before the trial, an in camera proceeding to make the determinations required by section 109(d).

The Classified Information Procedures Act modified the foregoing by providing the following at Section 8(b):

PRECAUTIONS BY COURT.—The court, in order to prevent unnecessary disclosure of classified infor-

Notice Reciprocity

Both privileges require the defense to put the government on notice before attempting to use privileged information.[100] By itself, there is no problem with requiring the accused to indicate to the government in advance, its intention to use certain types of information. Other sections of the Military Rules of Evidence have similar provisions.[101]

The real problem is that within the privilege rules the necessity for notice as to the use of protected information is a one way street. Only the defense has an obligation to state its intention. The government has no similar responsibility. The rationale favoring the lack of such a requirement does not rise to the level of a constitutional "due process" mandate.[102] The logic, instead, is that:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state.[103]

This problem can be handled variously by the government. In one tack, trial counsel can advance the idea that alibi-notice statutes in substance and character are completely different from privilege rules. In the alibi situation neither side is aware of the information possessed by the other. Each party has sole control over the factual material at its disposal. Hence, the efficient forward process of the trial is stunted by the lack of open discovery and access to the position which each adversary will advocate. This is not the case when dealing with privileged information. In this situation, the information always emanates from the same source. It is within the government's control and was the government's creation. The only matter for litigation is whether the communications which are involved can be made public without an adverse impact on national interest. It is an issue which requires the defense to inform the government of potential future use in order to allow evaluation of the material and an opportunity to protect it. The government, if it intends to make such decision to go forward with its use for the case, will inherently resolve the question of effect and, presumably determine that no untoward action will be brought about.

There is, of course, another avenue to follow. This involves an executive decision that fundamental fairness[103] requires the need for an even handed approach on the notice question. In short, not a "do as I say, not as I do" type of attitude. This path would require a modification to the privilege rules. Although, an addition to procedure this result would be neither difficult nor complex, the change to procedure would obviate significant questions and litiga-

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mation involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

[100] Mil. R. Evid. 505(h) and 506(h). The sections are quite different from one another as the former is considerably more specific than the latter in the guidance provided. More importantly, the expression of the information envisioned in the requirements presents interesting problems. Mil. R. Evid. 505(h) extends to the disclosure of "classified information." The accused could always intend, after presenting information without notice, that either procedurally or substantively, information within the defense possession was improperly classified, ergo, was not classified at all. Mil. R. Evid. 506(h) attempts to cover this problem in a better way. It implicitly requires notice as against "any information known or believed to be subject to a claim of privilege."

[101] *See, e.g.*, Mil. R. Evid. 412(c)(1) (notice of proposed use of evidence of specific instances of the alleged victim's past sexual behavior). *Cf.* Mil. R. Evid. 311(d)(3) (notice of specific grounds of objection where motion to suppress is made).

[102] *Cf.* Wardius v. Oregon, 412 U.S. 470 (1973) and Williams v. Florida, 399 U.S. 78 (1970) (dealing with notice requirements vis-a-vis notice-of-alibi statutes).

[103] The judiciary has not been reticent in applying this doctrine as leverage in nudging military procedure toward a particular direction. *See, e.g.*, United States v. Jackson, 5 M.J. 223 (C.M.A. 1978).

tion. A model which has been considered and refined is presently in existence.[104] It would serve to make the discovery process of the trial more efficient on the one hand, yet still has a safety valve to protect those matters which clearly aren't essential to the defense of the accused.[105]

Government Appeal

The last area worthy of consideration is a faulty impression which can be extracted from the Rules. It is that a judicial decision to divulge sensitive information to the defense is inalterable, notwithstanding an abiding belief by the government team that the military judge erred in one way or another in rendering it. The inference is drawn, as the Rules are silent on the question of a government appeal.[106]

The situation the government finds itself in when it has had its charges dismissed for not providing the defense with material it perceives as protected is not fixed in cement. The government can do by indirection that which it cannot accomplish directly. Although the government is not entitled to an appeal[107] per se, it may immediately challenge the correctness of the trial judge's ruling by taking a writ for extraordinary relief. In the leading case *Dittinger v. United States*,[108]

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[104] Again, guidance can be drawn from the "graymail" bill proposed by the Permanent Select Committee on Intelligence. Section 107 provides:

RECIPROCITY: DISCLOSURE BY THE UNITED STATES OF REBUTTAL EVIDENCE

Sec. 107. (a) Whenever the court determines, in accordance with the procedures prescribed in section 102, that classified information may be disclosed in connection with a criminal trial or pretrial hearing or issues an order pursuant to section 103(a), the court shall—

(1) order the United States to provide the defendant with the information it expects to use to rebut the particular classified information at issue; and

(2) order the United States to provide the defendant with the name and address of any witness it expects to use to rebut the particular classified information at issue if, taking into account the nature and extent of the defendant's disclosures, the probability of harm to or intimidation or bribery of a witness, and the probability of identifiable harm to the national security, the court determines that such order is appropriate.

(b) If the United States fails to comply with an order under subsection (a), the court, unless it finds that the use at trial of information or a witness reasonably could not have been anticipated, may exclude any evidence not made lthe subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

(c) Whenever the United States requests a pretrial proceeding under section 102, the United States, upon request of the defendant, shall provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pretrial proceeding. The bill of particulars shall be provided before such proceeding.

(d) The provisions of this section shall not apply to classified information provided by the United States to the defendant pursuant to a discovery request, unless the court determines that the interests of fairness so require.

In lieu of this provision, The Classified Information Procedures Act substituted at Section 6(f):

RECIPROCITY.—Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

[105] *See* Graymail Report at 25 which explains the underlying rationale for Section 107(e) of the proposed bill.

[106] The proposed graymail bill of the Permanent Select Committee on Intelligence has a specific provision, Section 108, which provides the government with an appellate route. This projects against the far ranging negative consequences of an improper trial court decision.

[107] *See* United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

[108] 7 M.J. 216 (C.M.A. 1979).

the Court of Military Appeals allowed the government by way of such a writ to challenge the ruling of a trial judge which brought about the dismissal of charges because of unreasonable delay. A cursory comparison reveals that by not disclosing information directed by a military judge, the government would probably find itself in the same procedural posture as in *Dittinger*.[109] Hence, a similar course of action would be in order.

Summary

At this stage, a number of facts should be evident. First, the Military Rules of Evidence have established a sound *basic* framework for dealing with questions related to privileged governmental material. This structure must be understood in order to bring about an expedient, yet logical, determination of discovery questions brought on by the defense. Essentially, the evaluation process focuses on the actions of the individual who invokes the privilege and the military judge. Next, it must be recognized that the Rules do not cover every aspect of the decision process. The litigation must look past the executive directive itself, to decisional law, to clarify all aspects of the evaluative framework. Lastly, a number of voids still manifest themselves. It is incumbent on counsel to know where these potholes in the road are located so they can be dealt with in an appropirate fashion. Meshing all these matters together provides litigants with the opportunity necessary to acquire all the information to a fair adjudication of guilt or innocence on one side of the coin, but still protect paramount public interests on the other.

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[109] *Id.*

Tax Immunity and Exemption for DA Personnel While Performing Travel Incident to Official Duties

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A question posed frequently to the Contract Law Division is whether a soldier or Department of the Army civilian emmployee is subject to various state and local taxes imposed upon transactions incurred during performance of official duties. Examples of such transactions include: room rental, car rental, meal purchases and various transportation expenses.

This question involves the separate issues of constitutional tax immunity and tax exemption.

For the United States to assert constitutional immunity from a state and local tax, it must demonstrate that the legal incidence of the tax falls directly upon it. In this regard, the Supreme Court has held that a state and local tax, the legal incidence of which falls upon a taxpayer other than the United States, does not violate the constitutional immunity principle. *Alabama v. King and Boozer*, 314 U.S. 1 (1941).

Although the Army may be obligated to reimburse its soldiers or civilian employees for state and local taxes imposed upon transactions incurred during performance of official duties, reimbursement of such taxes does not cause their incidence to shift to the Army. This is because the Army is not a party to the transactions and hence, is not the taxpayer. Consequently, the principle of constitutional immunity does not arise even though the economic burden of these taxes is ultimately borne by the Army.

The second issue associated with this question involves tax exemption. A tax exemption excuses a taxpayer from the payment of an otherwise legitimate tax. This is accomplished through the legislative grace of the taxing jurisdiction. Information available to this office indicates that only a few municipalities permit an exemption from city hotel and motel occupancy taxes when government employees travel on government busi-

ness. In those jurisdictions which do allow a tax exemption for lodging, those personnel who determine that the amount of the tax exceeds the administrative cost of obtaining an exemption are required to comply with the exemption procedures of that particular jurisdiction. Although there are no United States tax exempt forms that have been designed solely for this purpose, Standard Form 1094, United States Tax Exemption Certificate, may be used by personnel on travel status if the form is acceptable to the taxing jurisdiction and the instructions identified on the back of Form 1094 are complied with. Use of any other form is unauthorized and may be a violation of Army's policy to pay all legitimate taxes. Should any questions arise concerning this subject, they should be directed to the Contract Law Division, HQDA (DAJA), for resolution.

Judiciary Notes

US Army Legal Services Agency

Administrative Errors in Records of Trial

A substantial number of recurring errors have been found in records of trial recently received in the U.S. Army Judiciary. These errors occasion needless expenditure of time and effort in the appellate review process and could generally be avoided by attention to detail in the initial review and forwarding process. A list of the recurring administrative errors is set forth below.

a. *Convening orders*. General court-martial convening orders fail to show that the military judge was "designated" and "assigned", in addition to being certified.

b. *Records of trial*.

(1) Records of nonjudicial punishment (DA Form 2627) admitted into evidence have not been executed in the manner suggested by the lead opinion in US v. Mack, 9 MJ 300 (CMA 1980), and, as a result, were not properly admitted into evidence in some instances. *See* US v. Mathews, 6 MJ 357 (CMA 1979); US v. Booker, 5 MJ 238 (CMA 1977).

(2) Multipage exhibits are assembled with pages facing in different directions.

(3) Applicable local regulations are not attached either as appellate exhibits or in the allied papers.

(4) The accused's receipts for records of trial, or certificates in lieu of receipts, are not being forwarded for inclusion in the records.

(5) Copies, rather than originals, of Charge Sheets, Investigating Officer's Reports, Pretrial Advices, Requests for Enlisted Members, Requests for Trial by Military Judge Alone, and Requests for Deferment appear in the records.

(6) Records of trial do not include notations to show that the court members were sworn.

(7) Arraignment sheets do not conform to charges as shown on the Charge Sheets (DD Form 458).

(8) Records of trail do not contain all pertinent court-martial convening orders.

c. *Promulgating Orders*.

(1) They do not reflect post-arraignment amendments of specifications and changes of pleas.

(2) They do not set forth correctly the findings or sentence, or both.

(3) They do not reflect that motions for findings of not guilty were granted by the military judge.

(4) They fail to state that the sentence was imposed by military judge.

(5) They do not indicate that previous convictions were considered by the court-martial.

(6) They do not set forth correctly, or at all, the date the sentence was adjudged.

(7) They fail to show that findings of guilty were to lesser included offenses.

(8) They do not set forth correctly, or at all, the accused's social security number.

(9) They do not show that pertinent court-martial convening orders were corrected copies.

d. *Post-trial Review.*

(1) Allied papers do not contain proper documentation as to whether defense counsel submitted a *Goode* (US v. Goode, 1 MJ 3 (CMA 1975)) response and, if so, whether it was noted by the convening authority.

(2) Post-trial reviews fail to inform the convening authority of limitations on forfeitures (paragraph 6–19*f*(1), AR 190–47) when neither confinement nor discharge is approved.

(3) Post-trial reviews fail to inform the convening authority of military judge's recommendation for clemency.

(4) Post-trial reviews omit discussion of defenses raised at trial and of the legal guidelines to assess the merits of those defenses.

(5) Data Sheets (DD Form 494) are not completed or signed.

(6) Chronology Sheets (DD Form 490) are not completed or signed.

(7) Post-trial reviews are served on accused before the dates shown on the faces of the reviews.

(8) Post-trial reviews are undated.

(9) Post-trial reviews do not show that they were signed by the staff judge advocate or by the *acting* staff judge advocate.

e. *Action of Convening Authority.*

(1) Actions incorrectly apply sentence of partial forfeitures to pay *and allowances.*

(2) Actions incorrectly apply forfeitures as of the date of sentence *approval* when no confinement was adjudged or approved.

(3) Actions incorrectly include application clause for forfeitures where the sentence is ordered into *execution.*

(4) Actions are not in strict compliance with the terms of guilty plea agreements.

(5) Actions do not designate places of confinement in accordance with the format prescribed by paragraph 4–2*c*, AR 190–47.

(6) Actions are taken before the accused's defense counsel have been afforded five days in which to submit *Goode* response.

(7) Actions approve forfeitures which are in violation of paragraph 6–19*f*(1), AR 190–47, i.e., forfeitures which exceed two-thirds pay per month for six months where sentence, as adjudged and approved, does not include a punitive discharge or unsuspended confinement for the period of such forfeitures.

(8) Actions fail to show that the service of confinement has been deferred.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Convening Authority Actions

Staff judge advocates should insure that the sentence approved by the convening authority does not exceed the sentence adjudged by the court-martial. Several cases have been received in which the convening authority approved or applied forfeitures of pay and allowances when the court-martial sentence included forfeiture of pay only.

2. Guilty Pleas

Trial counsel are reminded that while their active participation in the providence inquiry is not required, they should insure that the inquiry is complete both as to the elements of the offense and the factual basis for the plea. Not infrequently military judges omit critical material from the providence inquiry, thus requiring corrective action by the appellate courts. Prompt action by

trial counsel when omissions are noted can prevent these errors.

3. Making a Complete Record

Trial counsel are reminded that they should insure that all relevant portions of regulations are attached to the record. This is essential when dealing with regulations below Army level which may not be available to appellate counsel. Trial counsel should also insure that state statutes are attached to the record in cases where the offense is charged as a violation of state law assimilated by 18 USC § 13.

4. Nonjudicial Punishment

Trial counsel should insure that all records of nonjudicial punishment offered into evidence are legible. A recent message from Criminal Law Division, Office of the Judge Advocate General lists possible solutions to some of the problems which may arise. DA Message 291400Z Jan 81, Subject: Illegible Copies of Article 15.

5. Sentence and Punishment

Although sentence multiplicity of serious charges tried at a special court-martial may seem to be an irrelevant issue, this is not the case. The military judge, where appropriate, should instruct a court with members that certain charges are to be considered multiplicious for sentencing.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Walter B. Huffman
Administrative and Civil Law Division, TJAGSA

The primary purpose of the legal assistance section of *The Army Lawyer* is to provide up to date information on Federal and State laws that affect legal assistance practice to Army attorneys world wide. Often, significant changes in State law are known first by attorneys who are present in the jurisdiction where the change occurs. To speed the dissemination of such changes, the Administrative and Civil Law Division would welcome submissions from legal assistance attorneys for inclusion in this section of *The Army Lawyer*.

Items of interest should be submitted to:

The Judge Advocate General's School, U.S. Army
ATTN: ADA
Charlottesville, Virginia 22901

There is no prescribed format for legal assistance items, but all submissions should be typed in double spaced draft and should include a citation to the case or statute which effected the described change.

To recognize those attorneys who are willing to take the time to assist their contemporaries, the name of the person submitting an item will be published with the item in this section.

(TJAGSA Advice To Legal Assistance Officers)

Although instructors at The Judge Advocate General's School have always advised legal assistance attorneys informally, The Judge Advocate General has directed the School to formalize its role in the Army's legal assistance program. While a number of long range projects are in the works, the immediate task is to give as much assistance as possible to those of you doing legal assistance at the installation or division level.

To accomplish that task and to make the best possible use of resources at the School, legal assistance attorneys requiring assistance or advice are asked to comply with the following guidelines. For assistance on both policy and substantive legal assistance questions, the attorney should first attempt to research the issue locally and then to use technical channels to the MACOM. If School assistance is still required and lengthy research will be required, write to the Legal Assistance Branch of the Administrative and Civil Law Division. Urgent questions or those that will not require a great deal of re-

search may still be handled telephonically by calling the instructor for the specific area as listed below.

The phone numbers for the Administrative and Civil Law Division are:

Commercial: 804-293-4095/9850
FTS: 938-1308
Autovon: 274-7110, then ask for 293-4095/9850

The following instructors are responsible for the subject matters indicated:

LTC Tom Crean and MAJ Joe Fowler—Ethics

MAJ Joe Fowler—Legal Assistance Programs and Administration, Real Property and Family Law

MAJ Walt Huffman—Estate Planning, Survivor Benefits and Federal Taxation

MAJ Joel Alvarey—Consumer Affairs and Bankruptcy

MAJ Phil Koren—Civil Rights

CPT(P) John Joyce—State Taxation

CAPT Rob Stuart (USMC)—Soldiers' and Sailors' Civil Relief Act

CPT Ben Anderson—Personal Liability and Official Immunity

(Legal Assistance Videotapes) During the recently completed 8th Legal Assistance Course, several presentations were videotaped for inclusion in the School's Video and Audio Tape Catalog. If your office would like to obtain copies of any of the tapes listed below, send a blank three quarter inch videocassette to the School (ATTN: Television Operations) and your tape will be dubbed and returned to you. The following tapes are now available:

Interviewing and Counseling Clients
Speaker: Mr. Morton Spero of Petersburg, VA
Part I: JA 272–1 (52 minutes)
Part II: JA 272–2 (36 minutes)

Immigration Law
Speaker: Mr. Stanley Davis, Supervisory Immigration Examiner, Immigration and Naturalization Service
JA 272–3 (49 minutes)

Naturalization Law
Speaker: Mr. Keith Williams, Acting Assistant Commissioner for Naturalization, Immigration and Naturalization Service
JA 272–4 (43 minutes)

Current Developments In The Army Legal Assistance Program
Speaker: BG Hugh R. Overholt, Assistant Judge Advocate General For Military Law
Part I: JA 272–5 (49 minutes)
Part II: JA 272–6 (30 minutes)

The Bankruptcy Reform Act of 1978 (with Emphasis on Chapter 7 Liquidation Proceedings and Chapter 13 Adjustment of Debts of An Individual with Regular Income)
Speaker: Major Hugh I. Biele (USAR), Mobilization Designee to the Administrative and Civil Law Division
Part I: JA 273–1 (50 minutes)
Part II: JA 273–2 (53 minutes)
Part III: JA 273–3 (50 minutes)

(Estate Planning and Wills—New Missouri Probate Law) Submitted by CPT Steven J. McDonald, OSJA, Ft Leavenworth, Kansas.

Missouri recently enacted over 120 new sections of law relating to the administration and distribution of estates. The new laws apply to the estates of persons whose deaths occur on or after 1 January 1981. Four changes made by the new law significantly effect will drafting and estate planning for Missouri domiciliaries in the Armed Forces.

One significant change is that Missouri will now allow a non-resident to serve as the personal representative of a decedent's estate. *Mo. Rev. Stat.* § 473.113 (Supp. 1981). If a non-resident is named as personal representative, a resident agent for service of process must be designated to the probate court. The new law did not change the requirement that the guardian of a minor must be a Missouri resident.

A second change of interest is the repeal of Missouri's heavy State inheritance tax. Under the new law, Missouri will now impose a "pick-up tax"—a State estate tax equal to the credit allowed by the Federal estate tax laws for State death taxes paid. *Mo. Rev. Stat.* § 145.00 (Supp. 1981).

The new Missouri law also allows incorporation by reference of separate writings or lists which contain specific bequests of the decedent's tangible personal property. Such a writing may be referred to in the will as being prepared before or after the execution of the will and may be altered by the testator after its preparation. To be admissible in a probate proceeding, the writing must either be in the handwriting of the testator or be signed by him. It also must be dated and it must describe each item and intended beneficiary with reasonable certainty. *Mo. Rev. Stat.* § 474.333 (Supp. 1981).

Perhaps the key change, at least with respect to legal assistance practice, is Missouri's adoption of a self-proving provision. Because the form adopted by Missouri differs from the Uniform Probate Code form adopted by most states which recognize self-proving wills, it is reproduced here in its entirety:

THE STATE OF . . .

COUNTY OF . . .

I, the undersigned, an officer authorized to administer oaths, certify that . . ., the testator, and . . . and . . ., the witnesses, respectively, whose names are signed to the attached or foregoing instrument, having appeared together before me and having been first duly sworn, each then declared to me that the testator signed and executed the instrument as his last will, and that he had willingly signed or willingly directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind, and under no constraint or undue influence.

In witness whereof I have hereunto subscribed my name and affixed my official seal this . . . day of . . ., 19 . . .

(Signed) . . .

(SEAL) . . .

(Official capacity of officer)

It should also be noted that Missouri is a State which authorized judge advocates acting under 10 U.S.C. § 936 to sign official documents in the absence of a Missouri notary.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

ANCOC Revision. Based on varying comments concerning the course content of the Advanced Noncommissioned Officer Course (ANCOC) received from graduates in the past, last November I requested and received written critiques from the legal clerks and court reporters who graduated from the ANCOC class held at the Soldier Support Center at Fort Benjamin Harrison during August-October 1980. Most of the comments provided were either strongly favorable to the course as presented, or highly critical. In the latter category, a number of attendees felt that the course was not geared for legal clerks and court reporters. Some said that the course was good for administrative specialists or any MOS other than 71D/71E.

From my own experience over the years in carrying out the duties and responsibilities of a chief legal clerk, I feel that the majority of the material presented was beneficial. In any SJA Office, whether large or small, general administration is the basic duty of the chief legal clerk, and ANCOC is designed to prepare personnel for supervisory administrative positions at that level. However, I agree that some changes are needed. TRADOC officials have come to the same conclusion, and have directed that changes be made to correct deficiencies in the areas of leadership and management, effective communications, and training management. To counter these inadequacies, ANCOC is being redesigned around a central core of common military subjects (including instruction in the Battalion Training Management System (BTMS) and other mandated combat survival skills), followed by technical tracks of varying lengths for each MOS. A 71D/71E technical track of 30 hours is currently planned. I will have more on this subject when the revised curriculum has been fully developed and finally approved.

US Army Sergeants Major Academy (USASMA) Nonresident Course (FY 83). CDR USAMILPERCEN message 092200Z Jan 81 announced the convening of a USASMA Nonresident Course Selection Board on 14 July 1981 to consider eligible NCOs for enrollment in Class 9 commencing in April 1982. The program of instruction of the nonresident course closely parallels the resident course. The nonresident course is accredited by the Southern Association of Colleges and American Council on Education. Soldiers completing the nonresident course do not incur a service obligation.

All eligible NCOs are encouraged to submit their application for enrollment. Requests must be submitted in the format shown at Appendix C, AR 351-1, through command channels to reach MILPERCEN prior to June 1981. Prerequisites for enrollment are:

a. RA NCO in an active status (pay grade E-7(P) through E-9).

b. Have not completed more than 23 years Active Federal Service as of April 1982 (waivable, depending upon retainability).

SQT. Notices for this year's testing will be distributed on 1 April 1981. The next testing period will be 1 May 1981-1 October 1981. I encourage all chief clerks who do not have a training program to prepare one. In addition, SFC Wilhite and SFC Thoma at the Soldier Support Center will assist in providing the latest changes or update.

Master Sergeant Promotion List. The following legal clerks and court reporters have been selected for promotion to Master Sergeant.

NAME	MOS	PSN
ADAMS, Stanley E.	71D	3411
BROWN William J.	71D	3358
*FIX, Eugene R.	71E	3986
FLEWELLING, Maurice	71D	3205
GREEN, Lloyd R.	71E	0542
GILLIAM, Howard L.	71D	3380
KONDIK, Thomas, Sr.	71D	2993
NICHOLAS, Gary E.	71D	2504
NICHOLAS, Tex A.	71D	2386
*THOMAS, William	71D	4056
RINGSTAD, Michael T.	71D	3305

*Indicates selection from secondary zone.

How to Become an "ACE" Legal Clerk. SFC Curtis A. Rose, the Chief Legal Clerk at the NATO/SHAPE SJA Office, provided his views on how to become an "ace" legal clerk. I am very pleased to share his comments with you.

Recently I have found myself giving more and more guidance to young legal clerks on career management. Do some of these questions sound familiar?

Where do I go after being at a division SJA Office?

Why must I always be assigned to a battalion?

Why can't I get promotedP

I like working in Military Justice, so why can't I just stay there?

If I get stuck in one more claims shop, I quit.

What is a legal clerk, MOS 71D? Go to AR 611-201 and find the description for MOS 71D, Legal Clerk. As you can see by reading the "job description", you are responsible for quite a bit. I am not saying that in every legal clerk assignment you will perform all those tasks. I am saying that during your military career, be that four years or thirty years, you will perform at least three or more of those functions. Yet you are still required and responsible to be proficient in all those tasks.

Now read the legal tasks in your Legal Clerk Soldier's Manual, FM 12-71D1/2/3. Again, a never-ending list of tasks which would take an entire lifetime to completely master—even if there were no changes. Proficiency means the ability to understand how and why the task is performed. And there is a big difference between being proficient and being an expert in a specialty area.

For the sake of illustration, think of three levels of assignment—those being SCM, SPCM, and GCM. Next, think of every SJA office as having only five branches—those being Administration, Administrative Law, Claims, Legal Assistance, and Military Justice. Now, an "ideal" legal clerk has worked at all three levels and in all five branches. In what time frame? My answer is that, for a successful career, you should attempt to be positioned in all of them.

Here is a checklist. Fill it out completely, as each item pertains to you at this point in your career.

Assignment Level	**Yes**	**No**
SCM level	___	___
SPCM Level	___	___
GCM Level	___	___
Positions Held	**Yes**	**No**
Legal Clerk (SCM/SPCM Level)	___	___
Administration	___	___
Administrative Law	___	___
Claims	___	___
Legal Assistance	___	___
Military Justice	___	___
International Affairs	___	___
Lawyer's Assistant	___	___
Military Judge's Clerk	___	___
Law Library Clerk	___	___
Instructor/Trainer	___	___
SQT Developer/Writer	___	___
NCOIC of a GCM Section	___	___
NCOIC of a Branch Office	___	___
Chief Legal Clerk of SJA Office	___	___

If you can answer **Yes** to all of these items, then *Immediately* call Mr. Reca at OTJAG and tell him your warrant officer packet is on the way. Seriously, though, I urge you to use this checklist as a guide in mapping your career.

LEGAL CLERK—LAWYER'S ASSISTANT—PARA-LEGAL—We seem to think titles are the key factor. A good legal clerk can and should be all of these, and have at least the basic qualifications to successfully work in any position. Personnel shortages, commanders' refusals to release you, overstrengths, and a host of other indirect and direct causes can prevent the Warrant Officer or Chief Legal Clerk from moving you to the positions you need for training and professional development. To be able to work in any position at any level you must be willing to **Train Yourself.**

You are a soldier and a legal clerk. If you want a goal, I challenge you to become an "Ace" Legal Clerk.

An "Ace" Legal Clerk:

Knows that promotions are based on productivity, professional ability, and demonstrated potential for increased responsibility.

Seeks challenging assignments—even at personal sacrifice—and documents these desires in a current Enlisted Preference Statement (DA Form 2635).

Realizes that assignments are what he/she makes them (always informs the assignment

manager and supervisor at the new duty station of personal qualifications and positions desired).

Understands that the needs of the service and the mission of the local SJA come first.

Strives, on own initiative and on own time, if necessary, to improve his/her military and civilian educational credentials.

Actively solicits additional duties and responsibilities.

Always sets the highest standards for duty performance and appearance.

Sets the example for other legal clerks to follow.

My advice to all legal clerks is to talk to their Chief Legal Clerk or Warrant Officer in planning their career. The responsibility for this planning, however, as well as the initiative required to see those plans develop and stay on track, rest squarely on the shoulders of each individual. Take up the challenge and become an "ACE" Legal Clerk.

The Staff Judge Advocate/Judge Advocate and Mobilization

MAJ William B. Woodward, US Army Health Services Command,
Fort Sam Houston, formerly Executive for Reserve Affairs,
Office of The Staff Judge Advocate, US Army Forces Command

1. Mobilization Defined

Mobilization, as distinguished from deployment, is defined as the ordering (calling) to active duty of units and members of the reserve components in preparing for war or other national emergency. Depending upon the purpose and scope of the mobilization, it may be selective, partial, full or total. Full mobilization is the focus for mobilization planning and is defined as the expansion of the active Armed Forces resulting from action by Congress and the President to mobilize all units in the existing approved force structure and all individual reservists, and the resources needed for these units.

2. The Mobilization Process

The mobilization process concentrates upon fifty-three installations shich are designated as "mobilization stations." The majority are active installations, although some state-operated (e.g., Camp shelby) and semi-active (e.g., Fort McCoy) installations also have received this designation. While other installations continue to have coordinating and supporting responsibilities under AR 5-9 during mobilization, the mobilization stations are primarily responsible for preparing units for deployment.

Reserve units are ordinarily mobilized at their home stations (typically an Army Reserve Center) where preparations for deployment begin. Units then proceed to mobilization stations for final preparations before moving to ports of embarkation for deployment. A few units are "direct deploying" and move directly to ports of embarkation. Individual reservists report to specified mobilization stations where they fill expanded TDA requirements as well as bringing deploying TOE units to strength. Retirees, both Regular Army and Army Reserve, are subject to order to active duty upon full mobilization. There are currently pilot programs to integrate retirees into the personnel systems which support mobilization.

The FORSCOM Reserve Component Mobilization Plan (RCMP) provides overall guidance on mobilization and delineates responsibilities for its various aspects. Reserve component units report to and depart their assigned mobilization stations based on the FORSCOM Mobilization Troop Basis Stationing Plan (MTBSP) (U). Individual re-

servists report to mobilization stations to which they have been preassigned under either the Mobilization Preassignment Program or the Mobilization Designee Program, or to which they are ordered to report by mailgram orders under the Mobilization Personnel Processing System.

3. Mobilization Concerns of the SJA/JA

a. Installation Points of Contact

SJA/JAs at mobilization stations must prepare to deal with the increase in demand for legal services which primarily stems from the dramatic expansion of the installation's military population as reserve component Units report enroute to their ports of embarkation. This preparation requires working closely with the Installation Mobilization Planner and the Installation Military Personnel Officer.

b. Special Mission Requirements of the Installation

One of the first steps in preparing for mobilization is to determine whether any special mission requirements will arise. In some cases, an active installation will have a supporting relationship with a state-operated or semi-active installation. Similarly, some state-operated installations become sub-installations of active installations. These special relationships and general guidance concerning planning to meet requirements arising from them are found at p. A–2–1, Annex A, and Appendix 2, Annex Q, Section One, RCMP. The Installation Mobilization Planner should be able to provide an explanation of the particulars of these special relationships at each installation. It should be noted that some installations will change MACOMs as mobilization progresses (p. A–2–1, Annex A, Section One, RCMP.)

c. Size of the Military Population Served

It is equally important to understand the size of the military population which must be supported during mobilization. This will require the assistance of the Installation Mobilization Planner who can explain and provide access to the Mobilization troop Basis Stationing Plan (MTBSP) (U), a classified document of limited distribution. The Mobilization Station Sequence version of the MTBSP (U) lists the station at which each unit mobilizes. It reflects each unit's arrival and departure date from the mobilization station. The Installation Mobilization Planner should be able to provide access to an extract, based upon the MTBSP (U), reflecting the military population for each of the first six months following mobilization.

d. Nature of the Population Served

The MTBSP (U) must be examined to determine the nature of the units mobilizing at the installation. Some of the units, such as US Army Reserve Garrisons and Training Divisions, have judge advocate sections organic to them and will not deploy. Some deploying units have judge advocates. These include 117 Judge Advocate General Service Organizations (AR 27–4 and TOE 27–600H), sometimes known as JAG Detachments, and nearly 200 units of the Army National Guard and US Army Reserve from company level and up.

e. Special Mission Requirements of the SJA/JA Office

It is necessary to determine if the installation will have any special mission requirements impacting on the SJA office. For instance, even though direct deploying units do not have a mobilization station, support installations are required (AR 5–9) to develop and maintain mobilization processing support teams to assist direct deploying units. A legal officer is suggested as a member of such teams (para 10–4e, AR 135–300). Another example is the possible requirement for an installation to supply judge advocates to provide legal assistance to dependents being evacuated from oversees to escape the hostilities. The Installation Mobilization Planner should be aware of such special requirements and must be consulted to be certain plans encompass them.

f. The Installation Mobilization Plan Legal Annex

With this information in hand, the SJA/JA is prepared to write the Legal Annex for his Installation Mobilization Plan. General guidance con-

cerning the provisions of the Annex are found at Annex Q, Section One, RCMP. Special considerations relating to preparation of Legal Annexes where active installations have supporting relationships are found at Appendix 2 to that Annex. An outline for use in drafting the Legal Annex is located at Annex Q, Section Two, RCMP. The aim is to have a general statement of the manner in which the SJA office will function upon mobilization with special emphasis upon the changes from peacetime operations which will become effective upon mobilization.

g. The SJA/JA Office Personnel Augmentation

Having planned how support will be rendered, the next concern is where the personnel will come from to effectively carry out the plan. Personnel augmentation needs must be determined and documented in the Installation Mobilization TDA. Guidance concerning preparation of the Mobilization TDA is contained in Annex V, Section One, RCMP. In essence, the process involves determining a mobilization planning population by averaging the high three months' military populations within the first six months of mobilization and applying the SJA office tables of the Garrison Staffing Guide (DA Pam 570–551), with appropriate adjustments for such things as the fact that the mobilization workweek will be 60 hours whereas the Staffing Guide is based on a 40 hour workweek. It should be recalled that military population figures for the first six months after mobilization should be available from the Installation Mobilization Planner. After gross augmentation requirements are obtained, they must be refined as follows:

(1) Non-deploying mobilizing legal personnel assets must be considered in determining if there is actually an unfilled augmentation requirement. These assets may be found in such units as US Army Reserve Garrisons and Training Divisions. Information concerning such units should be available through the Installation Mobilization Planner.

(2) Augmentation positions must be assessed to determine if they should be established as Mobilization Designee positions (AR 140–145). Upon mobilization, such positions are filled by designated members of the Individual Ready Reserve who perform two weeks annual training in the job which they would hold in order to insure that they are trained to meet the special requirements of the position.

(3) Augmentation positions must be evaluated to determine which cannot appropriately be filled by retirees. For example, a Mobilization Designee position is not suitable for fill by a retiree who has not received annual training in the position.

h. SJA/JA Office Facilities Expansion

Plans must be made to provide adequate office space and equipment for the augmented office force. Equipment entries should be made on the Mobilization TDA, where appropriate (para 3–9, AR 310–49), and the Installation Facilities Engineer should be made aware of office space requirements to insure they are incorporated within the Installation Master Plan for Emergency Post Expansion (AR 210–23). Special attention should be given to planning for access to library facilities by both the expanded office force and judge advocates of deploying units while they are at the mobilization station. Additional courtroom facilities may be required as well. Modifications to office SOPs may be required to adjust to conditions implicit in mobilization.

i. The Mobilization Personnel Processing System and Assignment of Judge Advocates

As was earlier mentioned, Individual Ready Reservists will be ordered to active duty at specific mobilization stations under the Mobilization Personnel Processing System (MOBPERS) to fill augmentation positions on mobilization TDAs and to bring TOE units up to strength. MOBPERS is a so-called "push" system which does not require personnel requisitions ("pull"). Instead, computers simply match requirements of the installation against the pool of individual reservists in the geographical area and order them to report to active duty at installations with a requirement for their grade and skill qualifications.

All mobilization stations receive monthly printouts (DCSPER 472 Reports) reflecting by name those reservists who would be ordered to

report to that installation upon mobilization. Orders to report will be accomplished by mailgram. As a rule, the Mobilization Station Commander "cross levels" or assigns individuals to positions as he sees fit. However, by virtue of 10 USC 806, TJAG must recommend the assignment of all judge advocates. Judge advocates are to be listed separately under the DCSPER 472 Reports to permit their ready identification by the SJA/JA. Contact should be established at once with the Installation Military Personnel Officer to insure he is aware of the requirement that TJAG recommend the assignment of all Judge Advocates and copies of the appropriate DCSPER 472 Reports are provided. It is necessary for SJA/JA to obtain the monthly MOBPERS listings of Judge Advocates to be ordered to report to the installation as, upon mobilization under current procedures, the SJA/JA is to coordinate with PPTO, OTJAG, to obtain TJAG's assignment recommendations concerning the judge advocates "earmarked" for the installation by MOBPERS. The SJA/JA is expected to interview individual reservists as they arrive to become familiar with their training and experience, determine which vacant mobilization TDA or TOE position he/she could best fill, and make a recommendation to PPTO, OTJAG, leading to receipt of a final assignment recommendation from TJAG. This final assignment recommendation is provided the Military Personnel Officer after which the reserve judge advocate is assigned to a specific position.

j. Premobilization Interaction with Reserve Component Judge Advocates for Planning and Training

The SJA/JA must not overlook the need to establish and maintain contact with reserve component judge advocates who would report to the installation upon mobilization. In this way, day-to-day working relationships can be defined and SOPs developed in advance where there is a judge advocate component of a nondeploying reserve component unit such as a US Army Reserve Garrison or Training Division. While judge advocates within deploying reserve component units will be primarily concerned with preparing for deployment while at the mobilization station, it is possible that they may be available to provide at least limited general legal support to the installation. (Note, however, that there are specific limitations in this regard concerning Judge Advocate General Service Organizations set out at para 1b, Annex Q, Part One, RCMP). This possibility should be discussed and planned in advance.

Training opportunities must not be overlooked either. Reserve Component units will normally perform annual training at their mobilization stations at least once every three years (para 3–19, AR 140–1). This provides a unique opportunity to contribute to the training of reserve judge advocates who would mobilize at the installation as with prior coordination it is often possible to have the judge advocate component of a unit perform some or all of its training in the SJA/JA's office. At a minimum, it provides an opportunity to become better acquainted and discuss informally such matters as recent military law developments of interest. SJA/JAs should become involved, to the extent possible, with the annual training of all reserve judge advocates performed at the installation even where the unit will not mobilize at that installation. To make the most of these training opportunities, the SJA/JA must coordinate with the Staff Judge Advocate the responsible Continental US Army (CONUSA). There are three CONUSA (First, Fifth and Sixth Armies) which are responsible for developing annual training schedules for units within their geographical areas.

At this point, it is not certain if the judge advocate listings provided monthly to each mobilization station will be stable in the sense that basically the same group of judge advocates will be repetitively "earmarked" for a given installation. If there is stability, this will be an additional opportunity for the SJA/JA to establish contact in advance with reserve judge advocates. At a minimum, letters could be written by the SJA/JA furnishing such basic information as the location of the office and soliciting information concerning the individual's experience and training. Social contact could be invited. There would also be the possibility of Active Duty for Training (ADT) being performed by the reserve judge advocate in the SJA/JA office of his "earmarked" mobilization

station. Such ADT tours would be arranged through the JAG Personnel Management Officer, Special Officer Branch, RCPAC (AV 693-7312 or AC 1-800-325-1862).

k. Mobilization Exercises

While the true test of the mobilization planning effort would be an actual mobilization, the mobilization exercises (MOBEXs) which are conducted by JCS every two years present an opportunity to make a realistic assessment under simulated conditions of mobilization. Selected installations participate in the MOBEX, representing a cross-section of the types of installations and MACOMs which are involved in a mobilization. The exercise is conducted under conditions defined in the FORSCOM Exercise Directive which implements a DA Exercise Directive. The FORSCOM Exercise Directive will contain a Legal Annex which defines the legal objectives and provides general legal guidance for the play of the exercise. There will also be data collection forms completed during the exercise to permit evaluation of the legal objectives. The SJA/JA should review these documents (in conjunction with the RCMP) prior to the exercise. During the exercise, the SJA/JA should attend the MOBEX command briefings and actively participate where possible. At the very least, the SJA/JA will be required to perform responsibilities incident to exercise play of MOBPERS as discussed supra.

NOTE: Questions arising during the course of mobilization planning or MOBEXs which are beyond the scope of the Installation Mobilization Planner, or those whom he may suggest to answer, should be referred to Reserve Affairs, Plans and Operations, FORSCOM SJA Office, AV 588-2354/3836.

Reserve Affairs Items

Reserve Affairs, Department, TJAGSA

1. Reserve ID Cards.

The Judge Advocate General's School does not issue Reserve Component ID cards. A Reserve officer who needs an ID card should follow the procedure outlined below:

1. Fill out DA Form 428 and forward it to Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-PSE-VC, 9700 Page Boulevard, St. Louis Missouri 63132. Include a copy of recent AT orders or other documentation indicating that applicant is an actively participating Reservist.

2. RCPAC will verify the information and the individual's entitlement, prepare an ID card, and send it back to the Reservist.

3. The Reservist must sign it, affix fingerprints, attach an appropriate photograph, and return the materials to RCPAC.

4. RCPAC will affix the authorizing signature and laminate the card, and will send the finished card to the applicant. Also inclosed will be a form receipting for the ID card.

5. Applicant must execute the receipt form and send it to RCPAC.

2. Judge Advocate Reserve Components General Staff Course.

For Officers Enrolled with TJAGSA.

Reminder. All correspondence subcourse materials for the Judge Advocate Reserve Components General Staff Course have been mailed to students. Completion of all correspondence subcourses is a prerequisite to attendance at the resident phase. *All* correspondence course enrollments will be terminated on 6 July 1981. No extensions of enrollment or waivers of the prerequisite will be granted. If you have not received your materials or are having difficulties, contact the Reserve Affairs Department.

For Officers Transferring to JARCGSC.

Transfer to JARCGSC must be completed before a quota or orders can be obtained for the resident phase.

JAGC Personnel Section

PP&TO, OTJAG

1. Reassignments

COLONEL	*FROM*	*TO*
ANDREWS, Thomas	FT Campbell, KY	Korea
BROWN, Terry	FT Bragg, NC	FT Lewis, WA
LIEUTENANT COLONEL		
BOZEMAN, John	HQ USAREUR 7A	USAREUR, 3D Armd Div
BRIGGS, David	Ofc General Counsel, WASH, DC	TSARCOM, MO
BURNS, Thomas	USARCPAC, MO	HQ EA MTMC, NJ
COLEMAN, Gerald	USAREUR	FT Shafter, HI
CORRIGAN, Dennis	USAREUR	USA ELM OJCS, WASH, DC
DARLEY, Roger	FT Sam Houston, TX	Aberdeen Proving Gd, MD
DEGIULIO, Anthony	FT Monroe, VA	FT Carson, CO
DEKA, David	WESTCOM	FT Shafter, HI
ENDICOTT, James	FT Hood, TX	HQ AFSE, Italy
O'BRIEN, Maurice	TAF Staff College	Ofc Gen Counsel, WASH, DC
NICHOLS, John	FT Belvoir, VA	AF Exc, Dallas, TX
WATKINS, Charlie	USALSA, WASH, DC	USALSA, w/dty Germany
MAJOR		
ALTIERI, Richard	Ft Leavenworth, KS	USAREUR
BEHUNIAK, Thomas	Presidio, CA	OTJAG
BLACK, Richard	TJAGSA, Stu Det	USAREUR
BONNEY, Charles	FT HOOD, TX	FT Leavenworth, KS
BRAWLEY, Michael	West Point, NY	Presidio, CA
CAIRNS, Richard	TJAGSA, Stu Det	USAREUR
CARDEN, Grifton	USALSA, WASH, DC	USALSA (Trial Judiciary), WASH, DC
CASEY, Peter	USAREUR	FT McPherson, GA
COUPE, Dennis	USAREUR, 3D IN DIV	USAREUR, 2D ARMD DIV FWD
CURTIS, Howard	TJAGSA, Stu Det	OTJAG
DEBUSK, Michael	TJAGSA, Stu Det	USALSA, WASH, DC
DODSON, Roy	OTJAG	Ft Campbell, KY
WAGNER, Anthony	FT Leavenworth, KS	USAREUR
CAPTAIN		
BREEDEN, William	FT Sill, OK	Schofield Barracks, HI
BRUNSON, Frank	TJAGSA, Stu Det	Korea
BRYANT, Thomas	TJAGSA, Stu Det	USAREUR
BUSH, Brian	TJAGSA, Stu Det	FT Carson, CO
CAPOFARI, Paul	FT Jackson, SC	TDS, FT Jackson, SC
CASHIOLA, Louis	FT Leonard Wood, MO	Korea
CHAPIN, Donna	FT Ord, CA	Panama
COHEN, Richard	FT Huachuca, AZ	USALSA, WASH, DC

CAPTAIN	*FROM*	*TO*
COSGROVE, Charles	TJAGSA, Stu Det	USAREUR
CUNNINGHAM, Clarence	TJAGSA, Stu Det	USALSA, WASH, DC
HARDCASTLE, Allan	FT Benning, GA	TDS, Ft Benning, GA
HIGGINS, Adele	FT Ord, CA	FT Campbell, KY
KELLEHER, Michael	FT Dix, NJ	FT Irwin, CA
LOVELL, Orlando	FT Ord, CA	TDS, FT Ord, CA
MARTIN, Thomas	FT Bliss, TX	FT Carson, CO
McCARTHY, Nancy	TDS FT Hood, TX	FT Hood, TX
McDERMITT, Donald	FT Stewart, GA	FT Meade, MD
McVAN, Brian	FT Dix, NJ	TDS, FT Dix, NJ
MUSE, Stephen	FT Sill, OK	FT Sam Houston, TX
RIFFE, Rebecca	FT Campbell, KY	TDS, FT Campbell, KY
SCOTT, Charles	FT Bragg, NC	JFK, FT Bragg, NC
SWANDAL, William	FT Ord, CA	FT Ord, CA
YOUNG, Henry	USALSA, WASH, DC	TDS, USALSA, WASH, DC

2. Promotions

The following officers have been promoted from Captain to Major:

Barbee, Jon R.	Hall, Warren D.	Nagle, James
Baxley, George C.	Holeman, Jacob	Neurauter, Joseph
Beardall, Charles	Hood, Gene	Peluso, Andrew
Boucher, David W.	Lundberg, Steve	Pritchett, James
Fischer, William G.	McMenis, James	Thwing, James B.

3. School Attendees

The following officers have been selected to obtain an LL.M degree on a fully funded basis in FY 82:

Name	*Current Duty Station*	*Discipline*
CPT(P) Robt Boonstoppel	Ft. Leonard Wood, MO	Environmental Law
MAJ H. Wayne Elliott	TJAGSA	International Law
MAJ Michael Fighny	HQ, TDS	Labor Law
MAJ James Gravelle	OTJAG	International Law
MAJ George Sisson	TDS, III Corps Ft Hood, TX	Labor Law

Revised Judge Advocate Officer Graduate Course Policy

(Effective FY 81)

1. Judge Advocate Officer Course.

The purpose of the Judge Advocate Officer Graduate Course is to provide career judge advocates with training in each major functional area of military law. It is designed to prepare officers for middle and senior grade legal positions, with emphasis on the role of the deputy and staff judge advocates. It is an essential element in career development and should be completed by all career officers by resident or nonresident instruction.

2. Judge Advocate Officer Resident Graduate Course.

a. The course is academically demanding and oriented toward graduate level legal education comparable to LL.M. graduate programs of civilian law schools. The American Bar Association has approved the course as meeting its standards of graduate legal education. The resident course is conducted over a two-semester academic year, totaling approximately 42 credit hours. Class size will vary, but normally will be about 60–70 Army officers. Individuals selected to attend must display the intellectual ability, professional qualifications, and motivation for career development. Moreover, they must have demonstrated the potential for increased legal responsibility. A two-year service obligation is incurred by those who attend the resident Judge Advocate Officer Graduate Course.

b. A Graduate Course Selection Board composed of JAGC officers appointed by TJAG will convene annually in November to select the best qualified officers for resident course attendance.

c. Eligibility criteria for resident attendance are as follows:

(1) Officers must be serving in a career status, either as Regular Army officers, or Reserve officers serving in a Voluntary-Indefinite (VI) status. Officers detailed to the JAGC, or serving an Obligated Voluntary tour (OBV) are not eligible for consideration.

(2) Officers must normally have completed not less than four nor more than eight years of commissioned service since attaining the Grade of Captain, AUS, as of 1 September of the academic year in which the course is to begin. However, any officer who has passed the time of eligibility for selection to attend the Graduate Course without being considered for selection at least two times, will be considered by successive selection boards, until such officer has been given two opportunities for selection.

(3) Officers must have served at least one year as a JAGC officer in a JAGC field assignment after completing the Basic Course as of 1 September of the academic year in which the Graduate course is to begin.

(4) Officers must normally have completed their current overseas tour of duty or 36 months of a CONUS assignment as of 1 September of the academic year. No officer, however, will miss an opportunity to be selected because of reassignment orders. Consequently, officers who are reassigned between their fourth and eighth year of service and will not complete their next duty assignment until after the eighth year of service, will be considered for the Graduate Course beginning after completion of such assignment. Time-on-station criteria can be waived by TJAG.

(5) Officers who have completed the Judge Advocate Officer Advanced Correspondence Course, who have obtained an advanced degree at government expense, or who have attended a resident advanced course in another branch, will be eligible to attend the Judge Advocate Officer Graduate Course.

d. The board will consider an officer's entire record to determine whether the officer can be expected to complete the Graduate Course and perform the duties and exercise the responsibilities of a career judge advocate in positions of increased importance. Officers selected normally will not be deferred to a subsequent academic year.

e. An officer selected to attend the Graduate Course may decline to attend. Declinations will be made in writing addressed to HQDA (DAJA-PT), WASH, DC 20310. Officers who decline attendance normally will not be eligible for selection a second time. An officer selected for attendance may request deferment based on military necessity or compassionate reasons, as defined by AR 614–101. Requests will be submitted in writing through the SJA, or Commander concerned, to HQDA (DAJA-PT), WASH, DC 20310.

f. An officer may be removed from the selection list based on any of the following: misconduct, relief for cause, incidents involving moral

turpitude, substantial performance, or serious medical debilitation.

3. Judge Advocate Officer Advanced Correspondence Course. The purpose of this course is to provide a working knowledge of the duties and responsibilities of field grade JAGC officers. This course is the nonresident version of the Judge Advocate Officer Graduate Course. Officers who do not attend the resident Graduate Course are encouraged to complete the nonresident course. Credit for the Graduate Course is a prerequisite for selection for G&CSC or AFSC and essential for promotion to higher grades. Enrollment procedures and other information may be obtained from The Judge Advocate General's School, U.S. Army, ATTN: Correspondence Course Office, Charlottesville, Virginia 22901.

CLE News

1. TJAGSA Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, US Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Courses

April 6–10: 59th Senior Officer Legal Orientation (5F–F1).

April 13–14: 3d U.S. Magistrate Workshop (5F–F53).

April 27–May 1: 11th Staff Judge Advocate Orientation (5F–F52).

May 4–8: 60th Senior Officer Legal Orientation (Army War College) (5F–F1).

May 4–8: 3d Military Lawyer's Assistant (512–71D20).

May 11–15: 1st Administrative Law for Military Installations (TBD).

May 18–June 5: 22nd Military Judge (5F–F33).

June 1–12: 88th Contract Attorneys (5F–F10).

June 8–12: 61st Senior Officer Legal Orientation (5F–F1).

June 15–26: JAGSO Reserve Training.

July 6–17: JAGC RC CGSC

July 6–17: JAGC BOAC (Phase IV).

July 20–31: 89th Contract Attorneys (5F–F10).

July 20–August 7: 23d Military Judge Course (5F–F33).

July 26–October 2: 96th Basic Course (5–27–C20).

August 10–14: 62nd Senior Officer Legal Orientation (5F–F1).

August 17–May 22, 1982: 30th Graduate Course (5–27–C22).

August 24–26: 5th Criminal Law New Developments (5F–F35).

September 8–11: 13th Fiscal Law (5F–F12).

September 21–25: 17th Law of War Workshop (5F–F42).

September 28–October 2: 63d Senior Officer Legal Orientation (5F–F1).

2. Civilian Sponsored CLE Courses

June

FBA, 2nd Annual Federal Practice Institute (Date and site unknown)

1–2: NYULT, Estate Planning Conference, New York City, NY.

1–5: FPI, Government Construction Contracts, Vail, CO.

3–5: PLI, EEOC Institute, New York City, NY.

5: GICLE, Residential/Small Business Real Estate, Macon, GA.

5–13: NCDA, Executive Prosecutor Course, Houston, TX.

7–12: ALIABA, Civil Trial Practice, Villanova University School of Law, Villanova, PA.

9: FBA, Conversations in Air Law—Recent Legislative Developments in Air Transportation Law, Washington, DC.

9–11: SLF, Psychological Issues in Law Enforcement, Dallas, TX.

11: AICLE, Domestic Relations, Huntsville, AL.

11–12: PLI, Legal Assistant Workshops, New York City, NY.

11–12: PLI, Representing Government Officials in Litigation, San Francisco, CA.

11–12: ALIABA CCEB, Trial Evidence in Federal/State Courts, San Francisco, CA.

11–13: ALIABA, Trial Evidence and Techniques in Federal and State Courts: A Clinical Study of Recent Developments, San Francisco, CA.

12: NYSBA, Collections/Enforcement of Judgments, New York City, NY.

12: AICLE, Domestic Relations, Birmingham, AL.

14–7/3: Tenth Annual Intense National Session on Trial Advocacy, Boulder, CO.

15–19: NPLTC, Public Benefits/Entitlements, Washington, DC.

17–18: PLI, Trademark Infringement, New York City, NY.

17–19: PLI, EEOC Institute, San Francisco, CA.

18: AICLE, Domestic Relations, Mobile, AL.

18–19: PLI, Managing the Medium Sized Law Firm, New York City, NY.

18–19: PLI, Managing the Small Law Firm, New York City, NY.

18–19: PLI, Managing the Large Law Firm, New York City, NY.

19: Copyright Infringement, New York City, NY.

19: AICLE, Domestic Relations, Montgomery, AL.

21–7/3: NJC, Special Court Jurisdiction—General, Reno, NV.

21–7/3: NJC, Non-Lawyer—General, Reno, NV.

21–26: NJC, Evidence in Special Courts—Speciality, Reno, NV.

21–26: NJC, Sentencing Misdemeanants—Specialty, Reno, NV.

22–26: NWU, Criminal Defense Lawyers, Chicago, IL.

22–26: NPLTC, Legal Advocacy Skills, Washington, DC.

28–7/17: NCDA, Career Prosecutor Course, Houston, TX.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, Woodward Building, 1426 H Street

NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, Il 60637.

AICLE: Alabama Institute for Continuing Legal Education, Box CL, University, AL 36486.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

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

ATLA: The Association of Trial Lawyers of America, 20 Garden Street, Cambridge, MA 02138.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

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

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

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

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

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

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

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

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

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

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

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65101.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

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

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

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, MN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036

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

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

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

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

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

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

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

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

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

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

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

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

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

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

Law Day 1981

The theme for the 1981 Law Day observance is "Law—the Language of Liberty." It was chosen to restate the fact that our law is the basis of individual rights. Without freedom of speech, freedom of assembly, freedom of religion, freedom of the press, equal protection of the laws, and other

inalienable rights, we could not govern ourselves intelligently.

Judge advocate officers are invited to participate in conveying the spirit of Law Day to both the military and civilian communities. To assist with Law Day preparation, the American Bar Association has made available the 1981 Planning Guide and Program Manual. This booklet can be obtained at no expense from the American Bar Association, Law Day '81 Observance, 77 South Wacker Drive, 6th Floor, Chicago, Illinois 60606. The planning guide contains an order form for promotional materials. The deadline for orders is 10 April.

Recent Criminal Law Decisions

United States v. McDonagh

United States v. McDonagh, 10 MJ (27 Jan 81), the Army Court of Military Review (ACMR) ruled on the effects of the recent amendment to article 2, UCMJ, which purported to overrule the decision rendered in *United States v. Russo*, 1 MJ 134 (CMA 1975).

McDonagh raised a jurisdictional issue in that he informed his recruiter of his marijuana, amphetamines, and barbiturates usage but, notwithstanding this, the recruiter facilitated his enlistment. The trial judge held that since there was no question as to McDonagh's capacity to contract or as to the voluntariness of his enlistment, the amendments to article 2 of the UCMJ applied and *Russo* need not be followed.

All three judges of the ACMR agreed that amendments to article 2 apply retroactively to validate existing enlistments contracted before the amendments were enacted. They split, however, on whether the amendments could constitutionally be applied so as to permit trial by court-martial for offenses committed prior to their enactment. Two judges held that an accused could be tried by court-martial for offenses committed prior to the enactment of the amendments without violating the ex post facto provisions of the constitution.

The case stands for the proposition that amendments to article 2, UCMJ, (2(b), (c)) apply retroactively to validate existing enlistment contracts entered into before the amendments were enacted and jurisdiction exists to try servicemembers who may have committed offenses prior to the enactment of the amendments.

Current Materials of Interest

1. Book Reviews

White, Welsh S., Interrogation Without Question: Rhode Island v. Innis and United States v. Henry, 78, No. 8, Mich. L. Rev. 1209–1251 (Aug. 1980). Business office address: Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan 48109

PROJECT: Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979–1980, with FOREWORD: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts by Stephen A. Saltzburg, 66, No. 2 The Georgetown Law Journal (Dec. 1980). Publisher: The Georgetown Law Journal Association, 600 New Jersey Avenue, N.W., Washington, D.C. 20001

2. Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 28–1	Army Morale Support Activities	901	27 Jan 81
AR 60–21	Exchange Service: Personnel Policies	1	15 Dec 80

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 190–24	Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement	901	30 Jan 81
AR 190–47	United States Army Correctional System	1	1 Nov 80
AR 310–2	Identification and Distribution of DA Publications and Issue of Agency and Command Administrative Publications	901	26 Jan 81
AR 600–33	Line of Duty Investigations	901	23 Jan 81
AR 608–1	Army Community Service Program	1	1 Dec 80
AR 635–200	Personnel Separations—Enlisted Personnel	903	16 Jan 81
AR 390–4	Army Emergency Relief		1 Feb 81

3. Notes.

DOD Directive 1332.14, Enlisted Administrative Separations, dated 16 January 1981, was published in the Federal Register on 29 January 1981.

AR 27–4, Judge Advocate General Service Organizations: Organization, Training, Employment, and Administration, dated 1 January 1981, effective 1 February 1981, reflects the reorganization of the Judge Advocate General Service Organizations (JAGSO) detachments and includes changes in training, employment, and administration of JAGSO units.

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:
J. C. PENNINGTON
Major General, United States Army
The Adjutant General

☆ U.S. GOVERNMENT PRINTING OFFICE: 1981: 341-809/7