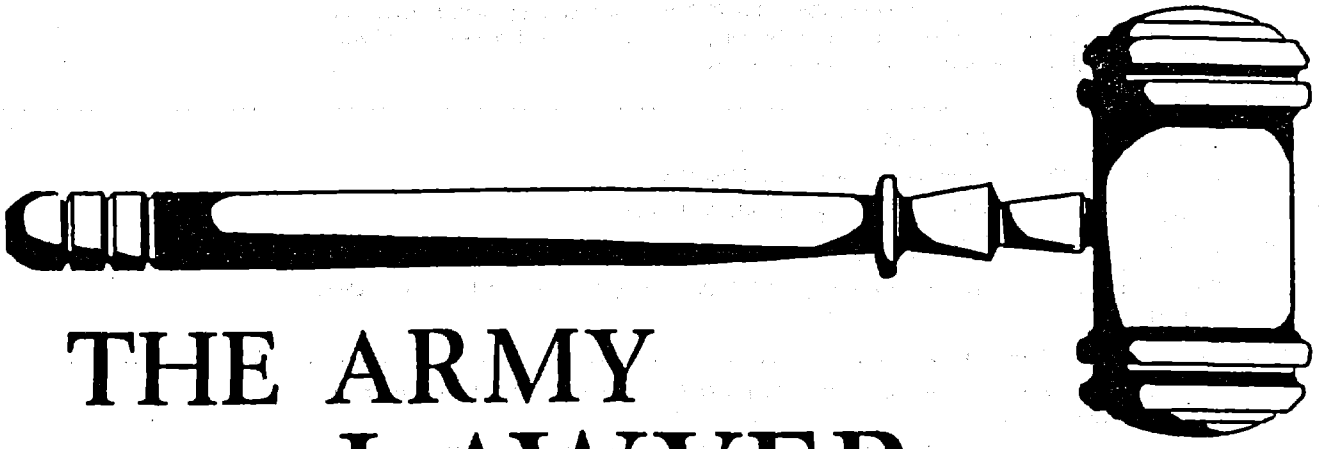

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Editor
Captain Benjamin T. Kash

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZX (27-1a) 25 September 1991

MEMORANDUM FOR COMMAND AND STAFF JUDGE ADVOCATES

SUBJECT: Desert Storm Assessment Team

1. At my direction, the Assistant Judge Advocate General for Military Law and Operations, formed the Desert Storm Assessment Team. This team will:

a. Collect and analyze all of the Regiment's after action reports pertaining to its operations in Southwest Asia.

b. Resolve the issues identified in these reports.

c. Apply the solutions and lessons learned to present doctrine by recommending changes to FM 27-100 and how we train.

d. Preserve the assembled records to facilitate a later history of the Regiment's role in Operations Desert Shield, Desert Storm, Provide Comfort, and the Kuwait Reconstruction.

2. The mission is as demanding as it is important. It cannot be accomplished without the help of all members of the Regiment, both active Army and Reserve Components. The team members are gathering all after action reports and lessons learned, as well as soliciting individual observations and suggestions. Please be timely in your responses to their requests. You may be requested to provide additional after action reports, and some of you may be interviewed; make yourselves available.

3. This team will record your sacrifices, your successes, and the lessons you learned. The end product of this important project will guide us in supporting military operations in the future.

JOHN L. FUGH
Major General, USA
The Judge Advocate General

Battery Without Assault

Major Eugene R. Milhizer
Criminal Law Division, OTJAG

Introduction

Inspired by a recent David Letterman Show, Private *A* tosses a glass punchbowl off of his fourth-floor balcony. Private *A* does not intend to strike anyone; he only wants to hear what kind of sound the punchbowl will make when it crashes on the sidewalk. Although Private *A* knows that the area below is travelled heavily, he does not look to see if anyone is beneath him before throwing the punchbowl. Enroute to the sidewalk, the punchbowl strikes Colonel *B* on the head. Colonel *B* never sees the punchbowl. Indeed, upon regaining consciousness, Colonel *B* has no clue as to the source of the bump on his head or his terrible headache.

On these facts, could a military court convict Private *A* under the Uniform Code of Military Justice (UCMJ)[1] for a battery upon Colonel *B*? A plain reading of the pertinent article of the UCMJ—article 128—indicates that, as a matter of law, Private *A* is not guilty of battery under these circumstances. On the other hand, the relevant paragraph of the 1984 Manual for Courts-Martial[2]—Part IV, paragraph 54b(2)—as well as several court decisions suggest that Private *A* actually could be convicted of this offense.

As the above discussion reflects, military law is ambiguous on whether the crime of battery requires that the accused actually commit an assault. The law does not state decisively that all batteries must be consummated assaults, nor does it state that an accused actually can commit a battery under the UCMJ without also assaulting the victim by either offer or attempt.[3]

Simple Unconsummated Assault

A brief review of military law pertaining to unconsummated assaults may help to clarify the scope and meaning of battery.

Article 128, UCMJ, defines assault as follows:

> (a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault....
>
> (b) Any person subject to this chapter who ... commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or ... commits an assault and intentionally inflicts grievous bodily harm with or without a weapon ... is guilty of aggravated assault....[4]

Subparagraph (a) of article 128 thus expressly provides for two distinct forms of simple, unconsummated assault—assault by offer and assault by attempt.[5] Subparagraph (b) further provides that a simple assault may be aggravated depending upon the instrumentality used—for example, a dangerous weapon or other means likely to produce death or grievous bodily harm—or the accused's intent to inflict grievous bodily harm. By the express terms of the statute, every aggravated assault must be predicated upon at least one form of simple assault.[6]

Assault by offer occurs when the victim reasonably apprehends that he or she is at risk of immediate bodily

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[1] 10 U.S.C. §§ 801-940 (1988) [hereinafter UCMJ].

[2] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[3] *See generally* Note, *The Scope of Assault*, The Army Lawyer, Apr. 1990, at 67, 68 n.69 (the author raises questions about the scope of battery but defers judgment on them).

[4] MCM, 1984, Part IV, para. 54a. Military law further categorizes and punishes assaults based upon the status of victim. *E.g.*, *id.*, Part IV, para. 54b(3) (assault upon a commissioned, warrant, noncommissioned, or petty officer; assault upon a sentinel, lookout, or law enforcement person in execution of duties; assault consummated by a battery upon a child under 16 years); UCMJ art. 90 (assault upon a superior commissioned officer in the execution of office); UCMJ art. 91 (assault upon a warrant, noncommissioned, or petty officer while in execution of office). Other types of assault, requiring special types of specific intent, are proscribed by UCMJ art. 134. *E.g.*, MCM, 1984, Part IV, para. 63 (indecent assault); *id.*, Part IV, para. 64 (assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking). For a discussion of some of the aggravated assaults requiring special types of specific intent, *see* Note, *Mistake of Fact and Sex Offenses*, The Army Lawyer, Apr. 1990, at 65.

[5] Traditionally, assault was defined as an attempt to commit a battery. 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.16 (1986); 2 Wharton's Criminal Law § 179 (C. Torcia 14th ed. 1979). Most civilian jurisdictions today define assault as an attempt or offer to commit a battery. 2 LaFave & Scott, *supra*, at § 7.16; R. Perkins & R. Boyce, Criminal Law 151 (3d ed. 1982).

[6] *See* MCM, 1984, Part IV, para. 54b(4)(a)(i) (pertinent element for aggravated assault by dangerous weapon or other means or force likely to produce death or grievous bodily harm); *id.*, Part IV, para. 54(b)(4)(b)(i) (pertinent element for aggravated assault by the intentional infliction of grievous bodily harm).

harm as a result of an unlawful demonstration of violence by the accused.[7] The focus is solely upon the victim[8]—the accused need not intend to inflict injury nor intend to cause apprehension to be guilty of assault by offer.[9] An accused's mere words or threats of future violence are insufficient to constitute an assault under this theory.[10] Likewise, an assault by offer is not made out if the circumstances, as perceived by the victim, clearly negate an intent on the part of the accused to do bodily harm.[11]

Assault by offer can arise in two forms—assault by intentional offer and assault by culpably negligent offer.[12] In an assault by intentional offer, the accused's ability to inflict injury need not be real; it need be only reasonably apparent to the victim.[13] For example, an accused who deliberately points an unloaded rifle at another as a joke commits an assault by intentional offer if the victim is aware that the rifle is pointed at him or her and reasonably fears that he or she will suffer immediate bodily injury.[14] On the other hand, if the victim is not placed in apprehension, the accused's actions cannot constitute an assault by intentional offer, no matter how premeditated or threatening those actions may be.[15] However, an intentional attempt to commit an assault by offer that fails because the victim does not apprehend immediate injury still could constitute an attempted assault in violation of article 80.[16]

The second form of assault under the offer theory is an assault by culpably negligent offer. To commit an assault by culpably negligent offer, the accused must create in another the reasonable apprehension that some act or omission, arising from the accused's own culpable negligence, has placed him or her at risk of immediate bodily harm.[17] The Manual for Courts-Martial defines culpable negligence as "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission."[18] For example, placing a home-made bomb near living quarters constitutes an assault by culpably negligent offer upon those persons who find the bomb and are placed in reasonable apprehension of being harmed by it.[19] That the accused intended to frighten a different person does not exonerate him or her—"[w]hen an assault is committed by culpable negligence, an absence of intent to do bodily harm is not a defense, and the assailant is chargeable with the foreseeable consequences to others that result from his negligent act."[20]

Assault by attempt, unlike assault by offer, focuses not upon the victim, but upon the accused. Specifically, assault under an attempt theory requires that the accused commit an overt act, amounting to more than mere preparation, with the apparent ability and specific intent to do bodily harm.[21] The requirement for a specific intent to do

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[7] *Id.*, Part IV, para. 54c(1)(b)(ii); United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971).

[8] *See* United States v. Norton, 4 C.M.R. 3, 5-6 (C.M.A. 1952).

[9] *See* MCM, 1984, Part IV, para. 54c(1)(b)(ii).

[10] *See* United States v. Hines, 21 C.M.R. 201 (C.M.A. 1956); MCM, 1984, Part IV, para. 54c(1)(c)(ii).

[11] MCM, 1984, Part IV, para. 54c(1)(c)(iii). "Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault." *Id.*

[12] *Id.*, Part IV, para. 54c(1)(b)(ii); United States v. Head, 46 C.M.R. 709, 711 (A.C.M.R. 1972); *see* United States v. Leach, 22 M.J. 738, 739 (N.M.C.M.R. 1986).

[13] *See Head*, 46 C.M.R. at 711.

[14] *See* United States v. Bush, 47 C.M.R. 532, 535 (N.C.M.R. 1973).

[15] *See Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971) (because the purported victim was unaware of the presence of a claymore mine exploded outside his quarters until after it was detonated, the accused was not guilty of assault by offer against that person); *accord* United States v. Beard, 45 C.M.R. 609 (A.C.M.R. 1972); United States v. Hobbs, 42 C.M.R. 584 (A.C.M.R. 1970).

[16] United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (attempted assault with a dangerous weapon by offering bodily harm was established when the accused grabbed for a military policeman's loaded revolver, intending to gain possession of it and point it at the military policeman).

[17] United States v. Staggs, 49 C.M.R. 690 (A.C.M.R. 1975); MCM, 1984, Part IV, para. 54c(1)(b)(ii).

[18] MCM, 1984, Part IV, para. 44d(2)(a)(i). The complete definition of culpable negligence found in the Manual is as follows:

> Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

Id.

[19] United States v. Pittman, 42 C.M.R. 720 (A.C.M.R. 1970).

[20] *Id.* at 722; *accord* United States v. Redding, 34 C.M.R. 22, 24-25 (C.M.A. 1963) (accused guilty of assault by culpably negligent offer when he unintentionally shot a fellow guard while playing "quick draw," when the other guard apprehended he might be shot).

[21] MCM, 1984, Part IV, para. 54c(1)(6)(i). Whether the victim reasonably apprehends harm is thus immaterial. *Id.*

bodily harm, as set forth in the 1984 Manual, is a change from the definition of assault by attempt expressed in the 1969 Manual for Courts-Martial.[22] As described in the 1969 Manual, assault by attempt required only a general intent to do bodily harm to another.[23] The change in the 1984 Manual conforms the intent element for assault by attempt under article 128 with the intent element for attempt offenses generally under article 80.[24]

Military appellate courts and boards have provided useful guidance in several opinions addressing assault under an attempt theory. For example, one board of review affirmed a conviction of assault by attempt when an accused exposed a knife blade and twice charged another service member, intending to stab him.[25] The board held that the accused was guilty of assault by attempt, even though he never actually stabbed the victim, because the accused formed the specific intent to stab the victim and engaged in an overt act that was more than mere preparation to cause a stabbing.[26] Likewise, a court held that an assault by attempt occurred when an accused, while being apprehended, attempted to grab a patrolman's revolver and shoot him.[27] On the other hand, an accused's act of deliberately firing a pistol over a victim's head does not constitute an assault by attempt because the accused lacks the requisite intent to injure the victim.[28] Similarly, an accused's harsh words or threats of future harm or violence are not sufficient for assault by attempt because the requisite overt act is not present.[29]

To return to the initial fact pattern, Private *A* has not committed a simple, unconsummated assault upon Colonel *B* as that term is defined under military law. Private *A* did not engage in an assault by offer because his actions did not cause Colonel *B* reasonably to apprehend immediate bodily harm. Likewise, Private *A* did not engage in an assault by attempt because he did not intend specifically to harm Colonel *B*.

Private *A* has, however, inflicted bodily injury upon Colonel *B*. Moreover, Colonel *B* would not have suffered these injuries but for the culpably negligent—or even reckless—conduct of Private *A*. Whether Private *A*'s conduct may be held to constitute a battery in violation of article 128, absent an included assault, must depend upon how the crime of "battery" is defined by military law. A brief discussion of battery as recognized in state jurisdictions may help illustrate this definition.

Battery in State Jurisdictions

Assault and battery, which were misdemeanors at common law, presently are proscribed in all American jurisdictions.[30] Many of these jurisdictions define battery as a consummated assault.[31] Their criminal statutes[32] provide that to commit a battery, the perpetrator also must commit an assault by offer or attempt. As Professors Perkins and Boyce have explained, "An assault is an attempt or offer to commit a battery. A battery is the successful

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[22]Manual for Courts-Martial, United States, 1969, (Rev. ed.) [hereinafter MCM, 1969].

[23]*Id.*, para. 207*a*; *see* United States v. Hand, 46 C.M.R. 440, 442 (A.C.M.R. 1972). The authority of the President to make such a substantive change to the law in the Manual for Courts-Martial is discussed *infra* notes 88-89, and accompanying text.

[24]UCMJ art. 80. The 1984 Manual for Courts-Martial provides that attempts under article 80 have four elements of proof:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

MCM, 1984, Part IV, para. 4b(2).

[25]United States v. Crocker, 35 C.M.R. 725 (A.F.B.R. 1965). The accused retreated the first time when the victim picked up a chair; he was blocked by a third party during his second advance. *Id.* at 729-30.

[26]*Id.* at 731. *See generally* United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (court adopts the "substantial step test" for distinguishing between overt acts and mere preparation for attempts under UCMJ article 80).

[27]United States v. Polk, 1 M.J. 1019 (N.C.M.R. 1976).

[28]United States v. Davis, 49 C.M.R. 463 (A.C.M.R. 1974).

[29]MCM, 1984, Part IV, para. 54c(1)(c); *see Hines*, 21 C.M.R. 201 (C.M.A. 1956).

[30]2 W. LaFave & A. Scott, *supra* note 5, § 714.

[31]*E.g.*, People v. Heise, 217 Cal. 671, 20 P.2d 317 (1933); State v. Hamburg, 143 A. 47, 48 (Del. 1928); Harris v. State, 15 Okla. Crim. 369, 177 P. 122, 123 (1919). The Model Penal Code § 211.1, Comment at 176-77 (1980) [hereinafter Model Penal Code], explains that early American statutes commonly defined assault as being "an unlawful attempt, coupled with a present ability," to commit a battery. For a comprehensive collection of modern statutory definitions of assault, see generally 2 W. LaFave & A. Scott, *supra* note 5, § 7.16.

[32]Some states have no statutory definition of simple assault or battery, leaving the courts to refer to the common law for guidance. *See* 2 W. LaFave & A. Scott, *supra* note 5, § 7.14.

accomplishment of that attempt. A battery is a consummated assault. A battery includes an assault."[33]

Professors LaFave and Scott have observed, however, that it is "somewhat inaccurate[] [to say] that every battery necessarily includes an assault."[34] Although a consummated assault by attempt constitutes a battery, and thus subsumes a simple assault, the same is not true for a "battery of the criminal-negligence type."[35] Many jurisdictions recognize that reckless or culpably negligent conduct resulting in injury constitutes a battery, even when the victim does not apprehend the impending harm.[36] LaFave and Scott conclude that "[a]t most it can properly be said only that every *intentional* battery necessarily includes an assault."[37]

Indeed, most state jurisdictions presently recognize that a person may be guilty of a battery when his or her criminally negligent act or omission injures another, even though the perpetrator has not committed an assault by attempt or offer.[38] Some courts use the legal fiction of a constructive assault under an attempt theory as the basis for the battery.[39] Under this theory, the perpetrator's criminal negligence supplies the requisite intent for a battery.[40] Other courts argue that the law explicitly should recognize battery under a criminal negligence theory without relying upon a fictional intent by the perpetrator to injure the victim.[41]

Regardless of the scope of the battery, virtually all civilian jurisdictions have statutes that define battery, or some other legislative guidance describing that offense.[42] The UCMJ follows a pattern common to the criminal codes in approximately half the states. Rather than recognizing a distinct statutory crime of battery, the UCMJ includes battery within its definition of the crime of assault.[43]

Battery Under Military Law

Neither simple assault nor battery were proscribed as separate offenses under the 1916 Articles of War.[44] Article 93 prohibited "[v]arious crimes," including "assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm...."[45] The 1921 Manual for Courts-Martial listed the maximum punishment for several types of assault, but the enumerated forms did not include simple assault or battery.[46] In his contemporaneous treatise on military law, however, Colonel Winthrop wrote that "every battery includ[es] an assault."[47]

The statutory definition of assault remained unchanged in the 1948 Amended Articles of War.[48] The 1949 Manual for Courts-Martial was the first manual to specifically address the relationship between simple unconsummated assault and battery.[49] The 1949 Manual's discussion of

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[33] R. Perkins & R. Boyce, *supra* note 5, at 151 (footnotes omitted).

[34] 2 W. LaFave & A. Scott, *supra* note 5, at 300 n.4; *accord* W. Prosser, Handbook of the Law of Torts 41 (3d ed. 1964).

[35] 2 W. LaFave & A. Scott, *supra* note 5, at 300 n.4.

[36] LaFave and Scott give the following illustrative example: motorist *A*, while driving recklessly, unintentionally injures pedestrian *B*, who is not frightened prior to being struck. *Id.* This would constitute a battery in some jurisdictions, even though the motorist has not committed an assault under either an attempt or offer theory.

[37] *Id.*

[38] *See, e.g.*, Perkins, Non-Homicide Offenses Against the Person, 26 B.U.L.Rev. 119, 125-26 (1946). Jurisdictions have varied on the degree of negligence required for a battery under this theory. Although virtually all jurisdictions agree that more than simple or ordinary negligence is required, they differ or are unclear on whether the perpetrator must be subjectively aware of the risk his actions create. *See* 2 W. LaFave & A. Scott, *supra* note 5, at 305.

[39] *See, e.g., Hamburg*, 143 A. at 48; Fish v. Michigan, 62 F.2d 659 (6th Cir. 1933); State v. Anania, 340 A.2d 207 (Me. 1975); Brimhall v. State, 31 Ariz. 522, 255 P. 165 (1927); Woodward v. State, 164 Miss. 468, 144 So. 895 (1932); State v. Schutte, 87 N.J.L. 15, 93 A. 112 (Sup.Ct. 1915).

[40] *See* 2 W. LaFave & A. Scott, *supra* note 5, at 304.

[41] *E.g.*, Commonwealth v. Hawkins, 157 Mass. 551, 32 N.E. 862 (1893); *see also* Model Penal Code § 211 (for a battery, the bodily injury must be done "purposely, knowingly or recklessly;" negligence is sufficient if the harm is caused "with a dangerous weapon"). Some jurisdictions also have recognized battery based upon an unlawful act, without requiring an included assault or culpable negligence. *See* 2 W. LaFave & A. Scott, *supra* note 5, § 7.15(c)(3). A detailed discussion of this form of battery is beyond the scope of this article.

[42] 2 W. LaFave & A. Scott, *supra* note 5, § 7.14 n.2.

[43] UCMJ art. 128; *see* 2 W. LaFave & A. Scott, *supra* note 5, § 7.14 (outlines state statutes in which the crime of assault is defined to included what is generally classified as battery).

[44] *See generally* J. Snedeker, Military Justice Under the Uniform Code 821 (1953); F. Weiner, The Uniform Code of Military Justice: Explanations, Comparative Text, and Commentary 274 (1950).

[45] *See* Manual for Courts-Martial, United States, 1921, at 527 [hereinafter MCM, 1921].

[46] *Id.* at 280. The types of assault expressly described in the Manual were assault with intent to do bodily harm; assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing; assault with intent to commit any felony except murder or rape; and assault with intent to commit murder or rape. *Id.*

[47] W. Winthrop, Military Law and Precedents 687 (Rev. ed. 1920).

[48] *See* A. Alyea, Military Justice Under the 1948 Articles of War 57 (1949).

[49] Manual for Courts-Martial, United States, 1949, para. 180k [hereinafter MCM, 1949].

these offenses concluded with the observation that "[p]roof of a battery is not essential to a conviction of assault, but proof of battery will support a conviction of assault, for an assault is necessarily included in a battery."[50] Also for the first time, the 1949 Manual included "[a]ssault and battery" in its Table of Maximum Punishments.[51]

With the enactment of the Uniform Code of Military Justice in 1950, assault was proscribed in its present form under article 128.[52] As noted, article 128(a) expressly provides for the two distinct forms of simple unconsummated assault recognized today—assault by offer and assault by attempt. Article 128(a) further provides that an accused may be guilty of assault "whether or not the attempt or offer is consummated," thus recognizing implicitly that a battery is a consummated assault.

But what about the converse—can a battery take place without an included simple assault by offer or attempt? A plain reading of article 128 reveals that a battery must include a simple assault under at least one of the statutorily recognized theories. Article 128 does not contemplate the crime of battery except as a consummated assault. Moreover, both forms of aggravated assault described in article 128—assault with a dangerous weapon or other means likely to produce death or grievous bodily harm and assault with the intentional infliction of grievous bodily harm—expressly require a simple assault as a prerequisite.

The 1951 Manual for Courts-Martial[53] interpreted article 128 in accordance with the plain meaning of the statute. The 1951 Manual explained that "[p]roof of a battery will support a conviction of assault, for an assault is necessarily included in a battery."[54] The Manual further explained that to prove a violation of article 128(a), the Government must show: "(a) That the accused attempted or offered with unlawful force or violence to do bodily harm to a certain person, as alleged, or (b), in the case of a *consummated* assault, that with unlawful force or violence [the accused] did bodily harm to such person."[55] Indeed, the table of maximum punishments in the 1951 Manual described battery as "[a]ssault (consummated by a battery)"[56] and did not otherwise denominate battery as an offense. All of the above-quoted provisions taken from the 1951 Manual appeared without change in the 1969 Manual.[57]

Commentators likewise have interpreted article 128 to provide that a battery is constituted only by a consummated assault. General Snedeker, for example, wrote,

> An assault in which the attempt or offer is consummated by the infliction of harm is called a battery. A battery has been defined as an unlawful, and an intentional or culpably negligent, application of force to the person of another by a material agency used directly or indirectly.... If an assault is consummated by a battery, the battery may be alleged as an aggravation, and if proved has the effect of making applicable a greater maximum punishment for the offense.... Proof of a battery will support a conviction for an assault, since every battery is considered necessarily to include an assault.[58]

Long before his appointment to the Court of Military Appeals, Chief Judge Everett similarly explained,

> It is not necessary for the commission of an assault that any type of "harm" actually be inflicted. If, however, harm occurs—if uninvited force is applied to the victim's person—then the accused is guilty of a battery as well as an assault, and he is subject to a higher penalty.[59]

Early military cases discussing battery as a distinct offense focused generally upon the sufficiency of the evidence to support the accused's conviction. Thus, the boards of review in those cases did not address expressly whether a battery must be predicated upon a consummated assault under either an offer or attempt theory. The facts described by the boards in those cases, however, clearly reflect that, in each case, the accused's battery upon the victim was the consummation of a simple

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[50] *Id.* The manual also explained, without further elaboration, that "[s]ending a missile into a crowd also is battery on anyone whom the missile hits; and so is the use, on the part of one who is excused in using force, of more force than is required." *Id.* These observations are arguably inconsistent with the Manual's guidance that an assault is necessarily included in a battery, because they do not specify that the accused in either example offered or attempted a battery.

[51] MCM, 1949, at 138.

[52] *See supra* note 4, and accompanying text.

[53] Manual for Courts-Martial, United States, 1951 [hereinafter MCM, 1951].

[54] *Id.* at para. 207*a*.

[55] *Id.* (emphasis added).

[56] *Id.* at para. 127c.

[57] MCM, 1969, paras. 207*a*, 127*c*.

[58] J. Snedeker, *supra* note 44, at 824.

[59] R. Everett, Military Justice in the Armed Forces of the United States 61 (1956).

assault. In one typical case, *United States v. Hernandez*,[60] the accused's battery of the victim included simple assault by both offer and attempt when the accused struck his victim several times about the body with his fists.[61] In *United States v. Robitaille*,[62] an included simple assault arose under both theories when the accused slapped his female victim and pulled her hair.[63] Likewise, in *United States v. Lane*,[64] the accused clearly committed a simple assault in two separate incidents of battery—the first when he struck one victim in face for refusing certain requests, and the second when he placed his arm around another victim and fondled her breast.[65] Finally, in *United States v. Rodison*,[66] the Government proved a consummated simple assault under both theories by showing that the accused threw his victim to the ground, hit her on the head, choked her, and threatened to kill her.[67]

The first important case to indicate that a battery need not include an assault by attempt or offer was *United States v. Redding*.[68] Redding was convicted of assault with a dangerous weapon.[69] The reported facts show that he shot the victim at close range while both men were practicing "fast draw."[70] Both the accused and the victim, who were friends, believed that their weapons were unloaded. Redding did not recall aiming the weapon at the victim or fingering the trigger. Both men described the incident as an "accident."

The Court of Military Appeals affirmed Redding's conviction, concluding that the evidence was "legally sufficient to support a finding that he had assaulted his friend with a dangerous weapon by culpable negligence."[71] The court did not address whether the Government had established an assault by offer or attempt; however, the evidence suggests that the Government proved neither. Redding apparently had no intent to shoot his friend. His friend, likewise, had no apprehension of being shot.

The court in *Redding* relied upon several sources to support its apparent conclusion that a battery under article 128 need not be predicated upon a simple assault by attempt or offer.[72] One source was guidance in the 1951 Manual that disclosed that "an assault, or a battery, may be committed by a culpably negligent act or omission."[73] The court's reliance on the 1951 Manual is questionable, however, because the court failed to discuss or distinguish other provisions in the 1951 Manual that indicate that a battery must be predicated upon an assault by offer or attempt.[74]

A second source relied upon by the *Redding* court is *United States v. Berry*.[75] *Berry* is the only military case that the Court of Military Appeals cited in *Redding* as direct support for its interpretation of the elements of battery. The court's reliance on *Berry* is also questionable. In *Berry*, the accused's conviction for aggravated assault with a dangerous weapon was predicated upon his culpably negligent act of firing a rifle into an inhabited home.[76] The court affirmed the accused's conviction because the accused engaged in conduct that caused the victim to fear that force immediately would be applied to his person.[77] Accordingly, the court actually predicated

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[60] 19 C.M.R. 822 (A.F.B.R. 1955).

[61] *Id.* at 836.

[62] 13 C.M.R. 438 (A.B.R. 1953).

[63] *Id.* at 443.

[64] 12 C.M.R. 347 (A.B.R. 1953).

[65] *Id.* at 351-52.

[66] 11 C.M.R. 434 (A.B.R. 1953).

[67] *Id.* at 437.

[68] 34 C.M.R. 22 (C.M.A. 1963). Some earlier cases had suggested, in dicta, that a battery need not be based upon a simple assault by offer or attempt. *E.g.*, United States v. Crosley, 25 C.M.R. 498 (A.B.R. 1957); United States v. Smith, 15 C.M.R. 510 (A.B.R. 1954); United States v. Allen, 10 C.M.R. 424 (A.B.R. 1953).

[69] *Redding*, 34 C.M.R. at 23.

[70] *Id.* at 24-25.

[71] *Id.* at 25.

[72] *Id.*

[73] *Id.* (citing MCM, 1951, para. 207*a*).

[74] *Supra* notes 53-56, and accompanying text.

[75] 16 C.M.R. 842 (A.F.B.R. 1954).

[76] *Id.* at 848-49.

[77] *Id.* at 849 (citing MCM, 1951, para. 207*a*).

the accused's aggravated assault upon a simple assault under an offer theory.

Finally and most significantly, the court in *Redding* apparently relied upon the culpable negligence theory of battery recognized in many state jurisdictions.[78] The court did not discuss battery in these terms; however, it did cite several civilian sources of authority, including *Brimhall v. State*,[79] that supported its conclusion that a culpably negligent act that results in injury to another constitutes a battery even if the perpetrator neither intended nor offered any violence toward the victim.

At least two reported military cases have followed *Redding* to affirm battery convictions based upon culpable negligence without included simple assaults. In *United States v. Head*,[80] the Army Court of Military Review held that

> when injury is actually inflicted, still another type of assault is possible. Notwithstanding the language of Article 128 in terms of "offer" and "attempt," it is an offense thereunder to inflict bodily harm on another by unlawful force or violence through a culpably negligent act or omission without regard to any prior apprehension of harm in the mind of the victim.[81]

The Army court reached a similar conclusion in *United States v. Turner*, upholding the conviction of a soldier who negligently struck a military policeman when he threw a rake in the policeman's direction.[82]

Later cases have relied almost exclusively on two sources of authority to support the conclusion that article 128 recognizes battery under a culpable negligence theory, even absent an included assault. The first is *Redding*. The second is the Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951. The legal and legislative basis declares that "[a] battery, also, may be committed either intentionally or through culpable negligence, but the distinction between attempt and offer which is made in a simple assault is not necessary in battery because of the actual unlawful infliction of bodily harm."[83] The second source, however, does not support the proposition that article 128 contemplates a crime of battery without an included assault. It merely explains that article 128 does not require the Government to establish the specific type of simple assault upon which the battery is predicated. Indeed, a later passage of the legal and legislative basis actually states, "A battery is defined, in effect, as a consummated assault."[84]

The 1984 Manual is ambiguous as to whether battery requires an included simple assault. The elements for battery, as set forth in the Manual, imply that a battery can be constituted without an assault by offer or attempt.[85] The Manual, however, also defines a "battery" as "an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm."[86] The analysis to the Manual, unfortunately, provides no additional guidance regarding the scope or definition of battery.[87]

In any event, the 1984 Manual for Courts-Martial can provide no independent authority for the scope of battery

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[78] *Redding*, 34 C.M.R. at 25; *see supra* notes 38-41, and accompanying text.

[79] 31 Ariz. 522, 255 P. 165 (1927).

[80] 46 C.M.R. 709 (A.C.M.R. 1972).

[81] *Id.* at 712.

[82] 11 M.J. 784, 787 (A.C.M.R. 1981).

[83] Manual for Courts-Martial, United States, 1951, Legal and Legislative Basis, at 285 [hereinafter Legal and Legislative Basis].

[84] *Id.* The following illustrative example, taken from the Legal and Legislative Basis, shows how a culpably negligent battery can be constituted when the offensive touching is a consummated assault by offer:

> Suppose Barney Fireball drives his yellow convertible down a crowded city street at a high rate of speed, weaving from side to side.... [S]uppose that he careens toward Mary Jones who reasonably fears for her life; such conduct might constitute an assault as a culpably negligent act or omission under paragraph 207*a* [of the 1951 Manual] which foreseeably might and does cause another reasonably to fear that force will at once be applied to his person. Now suppose that Barney's car bumps into her—that might be a consummated assault, a battery committed by culpable negligence.

Id.

[85] The elements of battery are as follows:

> (a) That the accused did bodily harm to a certain person; and
>
> (b) That the bodily harm was done with unlawful force or violence.

MCM, 1984, Part IV, para. 54b(2). This is a change from earlier editions of the Manual, which provided that a consummated assault must be proven for a battery. MCM, 1969, para. 207*a*; MCM, 1951, para. 207*a*.

[86] MCM, 1984, Part IV, para. 54c(2)(a).

[87] *See generally id.*, Part IV, para. 54, analysis, app. 21, at A21-97.

under article 128. The scope of an offense is a question of substantive law that exceeds the President's authority under UCMJ articles 36 and 56.[88] At most, presidential pronouncements in the Manual regarding the scope of offenses provide useful interpretive guidance—they are not binding upon the military's appellate courts.[89]

The most recent Court of Military Appeals decision to discuss the meaning of battery suggests that battery can arise only as a consummated assault. In *United States v. Jones*[90] the accused was convicted of involuntary manslaughter[91] on the theory that the accused committed homicide while perpetrating a criminal offense—a battery—that directly affected the victim.[92] The court, after reiterating that simple assault can arise either by offer or by attempt, noted that a "'battery' is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm."[93] The court further observed that

> [a]lthough [the accused's] plea was couched in terms of "culpable negligence," the plea and the ensuing providence inquiry made clear that [he] conceded that he had committed an assault and battery on [the victim]. The circumstance that the battery followed an "offer" type assault resulting from "culpable negligence"—rather than an "attempt" type assault requiring "specific intent"—is immaterial. In either event, [the accused] committed involuntary manslaughter....[94]

Significantly, the court concluded that the accused committed a battery because his conduct amounted to a consummated simple assault. Culpable negligence that results only in an offensive touching of the victim and does not create in the victim a reasonable apprehension of physical injury thus apparently falls short of making out a battery in violation of article 128.

The Proper Scope of Battery Under Article 128

Three important observations may be derived from the above discussion. First, several military appellate court decisions, and apparently the 1984 Manual for Courts-Martial, recognize a crime of battery without an included simple assault. Second, this authority apparently contradicts the plain meaning of article 128. Third, the only compelling support for this expansive interpretation of article 128 is the accumulation of decisions of state jurisdictions that have recognized battery without an included assault.

If these observations are correct, the military cases that recognize battery as a violation of article 128, without the predicate of an underlying simple assault, should be re-examined. As noted above, these cases conflict with the plain meaning and apparent intent of article 128.[95] Black letter law finds "a strong presumption that Congress expresses its intent through the language it chooses";[96] and holds that statutory words should be afforded their plain meaning.[97] Had Congress intended the UCMJ to proscribe culpably negligent battery without an included assault, it surely could have written article 128 to say so explicitly.[98] Congress's failure to do so suggests that it

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[88] *See, e.g.*, United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not include fleeing apprehension, despite language in the Manual to the contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by language in the Manual designed to eliminate the defense of partial mental responsibility); United States v. Jackson, 26 M.J. 377 (C.M.A. 1988) (scope of false official statement offenses under military law expanded to include false or misleading responses given during official questioning of the accused, even when the accused did not have an official duty to account, despite language in the Manual requiring such a duty); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (Everett, C.J.) (military law must recognize a defense of voluntary abandonment as to criminal attempts, even though the Manual's failure to recognize the defense could indicate an intent by the President to reject it); United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (drug distribution can be constituted without physical transfer of the drug, despite language in the Manual which suggests otherwise). *See generally* United States v. Johnson, 17 M.J. 252 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

[89] *See* United States v. Jeffress, 28 M.J. 409, 413 (C.M.A. 1989).

[90] 30 M.J. 131 (C.M.A. 1990).

[91] Involuntary manslaughter is a violation of UCMJ art. 119(b).

[92] *See generally* Note, *Involuntary Manslaughter Based Upon an Assault*, The Army Lawyer, Aug. 1990, at 32.

[93] *Id.* at 130-31 (quoting MCM, 1984, Part IV, para. 54c(2)(a)).

[94] *Jones*, 30 M.J. at 131.

[95] The legislative history of the UCMJ provides no support for the conclusion that Congress intended to proscribe culpably negligent battery without an included assault in article 128. *See generally* 1 W. LaFave & A. Scott, *supra* note 5, § 2.2(e) (discussing use of legislative history for statutory interpretation).

[96] Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12, (1987).

[97] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973); Caminetti v. United States, 242 U.S. 470 (1917). *See generally* 2 A. Sands, Sutherland on Statutory Construction § 46.01 (4th ed. 1975).

[98] *Cf.* UCMJ art. 119(b)(1) (specifically listing "culpable negligence" as a basis for involuntary manslaughter). Of course, one could argue that Congressional inaction regarding the definition of battery under article 128 after *Redding* indicates congressional approval of that decision. Apart from the obvious fictional predicate for this argument, the necessity for curative congressional action may have been ameliorated by *United States v. Jones*, 31 M.J. 131 (C.M.A. 1990).

intended to define battery under article 128 as a consummated assault by offer or attempt.[99]

Military courts have, on occasion, looked to the federal civilian criminal code as the "best source" to assist them with interpreting unclear language in the UCMJ.[100] The federal assault statute[101] proscribes, among other aggravated forms of assault, "[a]ssault by striking, beating, or wounding...."[102] Federal courts have interpreted these forms of assault to be the equivalents of simple battery.[103]

The federal courts are not particularly helpful, however, in explaining whether a battery under the civilian statute *must* include a consummated simple assault by offer or attempt. In *United States v. Jacobs*,[104] for example, the court proclaimed that, as an "established rule ... when an actual battery is committed it includes an assault."[105] In *Jacobs*, the defendant shot the victim before the victim realized that the defendant had a gun.[106] Although the facts of this case failed to make out an assault by offer, the court nevertheless found that a constructive assault occurred and held that the defendant's actions constituted a battery.[107]

Jacobs cites three cases in support of its conclusion.[108] Two of the cases, however, seemingly support the contrary position that a battery must be predicated upon an assault.[109] Indeed, in one of these cases the court writes that "every battery must include or be the culmination of an assault...."[110] The third case cited in *Jacobs* is, at best, ambiguous on this point.[111]

Apart from these federal court decisions, many state courts have concluded that the crime of battery does not require a consummated assault by offer or attempt. The wisdom of relying upon these state court definitions of battery, as a basis for defining that offense under the UCMJ, is doubtful for at least two reasons obvious reasons. First, some of the state decisions interpret state statutes that expressly define battery as not requiring an included simple assault. These cases thus are not persuasive in establishing an assumed but unstated intent by Congress to accomplish the same for battery via article 128.[112] Second, that "[t]he state definition [of battery] does not control the meaning of [the] term[] [as it is] used in the federal statutes...." is well settled. [113] This cautionary note should sound with equal resonance when construing the federal assault and battery statute for the military. Finally, accepted rules of statutory construction argue that any assumed ambiguity in article 128 should be resolved by finding that a battery must be predicated on a consummated simple assault. Black letter law holds that "criminal statutes must be construed strictly in favor of the defendant."[114] Requiring a consummated assault for a battery certainly favors military accused, such as Private *A*. This construction, moreover, serves the related

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[99] The President is permitted to proscribe a greater punishment for those simple assaults which are consummated by a battery. UCMJ art. 56; *see also* United States v. Scranton, 30 M.J. 322, 326 (C.M.A. 1990). Past presidents have done so. *See* MCM, 1984, Part IV, para. 54e(1),(2). Thus, the statutory language in article 128—"whether or not the attempt or offer is consummated"—may represent no more than Congress's intent to address preemption in the context of battery—that is, to make clear that article 128 is intended to reach simple battery and thus resort to article 134 is both unnecessary and inappropriate. *See generally* MCM, 1984, Part IV, para. 60c(5)(a); United States v. Wright, 5 M.J. 106 (C.M.A. 1978). A detailed discussion of how the preemption doctrine operates with respect to assault and battery is beyond the scope of this article; however, for guidance on this issue, *see* United States v. Irvin, 21 M.J. 184 (C.M.A. 1985). *See generally* Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66, 68-69.

[100] *Omick*, 30 M.J. at 1124); *see* United States v. Seeger, 2 M.J. 249, 252-53 (A.F.C.M.R. 1976). *See generally* Note, *Does Drug Distribution Require Physical Transfer?*, The Army Lawyer, Nov. 1990, at 44-45.

[101] "Assault," as used in the context of the federal civilian statute, recognizes both the offer and attempt theories of the offense. United States v. Guilbert, 692 F.2d 1340 (11th Cir. 1982); United States v. Dupree, 544 F.2d 1050, 1051 (9th Cir. 1976); United States v. Bell, 505 F.2d 539, 540-41 (7th Cir. 1974).

[102] 18 U.S.C. § 113(d) (1988).

[103] *Guilbert*, 692 F.2d 1340 (11th Cir. 1982); United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980); United States v. Stewart, 568 F.2d 501, 504-05 (6th Cir. 1978).

[104] 632 F.2d 696 (7th Cir. 1980).

[105] *Id.* at 697.

[106] *Id.* at 696.

[107] *Id.* at 697. Curiously, the court did not discuss whether an included assault by attempt had been shown.

[108] *Id.*

[109] United States v. Masel, 563 F.2d 322, 323 (7th Cir. 1977); *Bell*, 505 F.2d at 540-41.

[110] *Masel*, 563 F.2d at 323.

[111] United States v. Rizzo, 409 F.2d 400, 403 (7th Cir. 1969) (preferred instruction would have advised that a battery requires an included assault, in this case by an attempt; however, failure to so instruct was not prejudicial in light of the evidence).

[112] Quite to the contrary, one can be argue that absent an explicit statutory definition of battery in the UCMJ, the courts should interpret article 128 consistent with its plain meaning—that is, that battery must be predicated upon a simple assault.

[113] *Masel*, 563 F.2d at 324.

[114] 1 W. LaFave & A. Scott, *supra* note 5, § 2.2(d).

goals of providing the accused fair notice of prohibited conduct[115] and ensuring that the legislature, and not the courts, exercises the power to define crimes.[116] For these reasons, the Court of Military Appeals has not hesitated to apply a "rule of lenity" in favor of the accused when construing unclear criminal statutes for the military.[117]

Conclusion

Is Private *A* guilty of battery under article 128? Several military cases and one interpretation of the 1984 Manual, strongly suggest the answer should be yes. *Should* Private *A* be guilty of battery under article 128?—or, put another way, did Congress intend to say that battery can be made out under article 128 independent of a consummated simple assault? For the many reasons discussed above, the answer should be no.

Practitioners should re-examine critically the military law of battery. In appropriate cases, defense counsel should argue aggressively that, as a matter of law, a military accused cannot be found guilty of battery unless his conduct amounts to a consummated simple assault. All parties to the trial must consider these issues when requesting or fashioning appropriate instructions on battery,[118] both as the charged crime and as a lesser-included offense.[119]

Any decision as to whether Private *A* can be held to have committed a battery necessarily shall reveal a crucial facet of the judicial philosophy of the military court. Should the court reject strict adherence to a statute's words in favor of an expansive and arguably more appealing[120] statutory interpretation that is more in keeping with the interpretation found in many civilian jurisdictions? This fundamental question deserves a considered and thoughtful response.

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[115] *See* R. Dickerson, The Interpretation and Application of Statutes 209 (1975); United States v. Bass, 404 U.S. 336 (1971).

[116] *Bass*, 404 U.S. at 336.

[117] *E.g.*, *Scranton*, 30 M.J. at 325; United States v. Guerrero, 28 M.J. 223, 227 (C.M.A. 1989).

[118] The form instruction on battery is, not surprisingly, ambiguous as to whether a simple assault must be included. The portion of the instruction listing the elements of proof does not expressly provide that a consummated simple assault is required. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-107 (C3 15 Feb. 1989). The instruction later provides

> that an assault is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted it [*sic*] called a battery. A "battery" is defined as an unlawful and intentional (or) (culpably negligent) application of force or violence to another.

Id. See *id.*, para. 3-102 for the standard instruction on assault.

[119] For example, battery can be a lesser included offense of the aggravated forms of assault listed *supra* note 4. Other crimes for which battery can be a lesser included offense include resisting apprehension, MCM, 1984, Part IV, para. 19d(1); all forms of murder, *id.*, Part IV, para. 43d(2)(b); voluntary manslaughter, *id.*, Part IV, para. 44d(1)(b); involuntary manslaughter, *id.*, Part IV, para. 44d(2)(a); rape, *id.*, Part IV, para. 45d(1)(a); robbery, *id.*, Part IV, para. 47d(3); maiming, *id.*, Part IV, para. 50d(1); and indecent acts or liberties with a child, *id.*, Part IV, para. 87d(2).

[120] One could well argue that Private *A*'s guilt for battery should not turn on whether Colonel *B* saw the pitcher before it hit him. The gravamen of the battery offense is the unlawful and offensive touching of the victim and not his apprehension of that touching. Even if battery is construed strictly so as not to include Private *A*'s conduct, however, he or she might nevertheless be guilty of another offense. *See, e.g.*, United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (reckless endangerment under article 134); *see also supra* note 99 (discussing preemption).

Assertion of Adjudicatory Jurisdiction by United States Courts Over International Terrorism Cases

Captain Bruce T. Smith
Instructor, Air Force Judge Advocate General's School
Maxwell Air Force Base, Alabama

Introduction

To paraphrase Karl Marx, the specter haunting the face of the world is terrorism.[1] Despite encouraging reports that terrorism declined sharply from 1988 to 1989,[2] terrorist attacks continue to pose a grave threat to world security. The United States Department of State recently identified forty-four active international terrorist organi-

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[1] K. Marx & F. Engels, Manifesto of the Communist Party (London 1848).

[2] United States Department of State, Patterns of Global Terrorism: 1989 at 1 (1990). The number of recorded terrorist incidents dropped from 856 in 1988 to 528 in 1989. *See id.* at 2.

zations[3] that attacked people and property in seventy-four countries in 1989.[4] In that year, terrorists killed 390 people and wounded 397 more.[5]

Terrorists are most active in the Middle East, Latin America, and Western Europe.[6] Although Americans are, by comparison, relatively safe from attack, terrorists have targeted United States' interests abroad in more than 1700 terrorist assaults over the last ten years.[7]

World-wide awareness, heightened emphasis on counterterrorism, and improved East-West relations reduced the terrorist threat during the last two years.[8] Acts of terror increased sharply, however, during the Gulf War, as terrorist organizations responded to Saddam Hussein's call for an Islamic *jihad* against the western world.[9]

Despite the Allied victory in the Persian Gulf, the political future of the Middle East remains uncertain. One fairly can speculate that the specter of terrorism looms ever larger. How, then, is a world at risk to respond? Some commentators advocate direct military action against known terrorists,[10] contending that the use of force will eliminate many terrorists and deter the rest. The "military" option, however, is capable only of limited application—it can be used only in self-defense and only as a last resort.[11] World political opinion generally opposes the use of direct military force.

United States Senator Arlen Specter, a member of the Senate Judiciary Committee, proposes another solution. Senator Specter suggests that the United Nations should grant to the World Court a far-reaching criminal jurisdiction to hear international terrorism cases.[12] He cites the success of the Nuremburg war crimes trials as precedent for a modern-day criminal tribunal.[13]

Past efforts to empower the International Court of Justice with wide jurisdiction over international crimes bogged down amidst cold war haggling.[14] With all the changes that have swept world politics, however, an international criminal tribunal now may be more feasible. The United Nations Crime Congress recently proposed antiterrorism jurisdiction for the International Court of Justice or for a separate international criminal court.[15] This measure evidently marked the congress's response to a 1985 United Nations resolution in which the member nations unanimously condemned as "criminal" all acts of international terrorism.[16] Overtures from Moscow likewise have revitalized plans for compulsory World Court jurisdiction over terrorism.[17] Nevertheless, the dilemma of defining "terrorism" hinders the "single world court" effort. Each state has advanced a different definition of the term;[18] in effect, "one man's terrorist is another man's freedom fighter." Given this difficulty, it may be some time before an effective international court can be convened to try terrorism cases.[19]

While the advantage of direct military action is attractive to some, world opinion limits its use and effectiveness. The notion of a world court is also appealing, but a united effort is hindered by the lack of a consensus definition of terrorism. Perhaps the best near-term solution is for Congress and the courts to expand American judicial

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[3] *See id.* at 55-85.

[4] *See id.* at iii.

[5] *See id.* at 2.

[6] *See id.* at viii. The report comments that terrorists typically disfavor selecting military, diplomatic, and governmental facilities as targets. *See id.* Arson and bombings appear to be the terrorist's weapons of choice. *Id.*

[7] *U.S. Attack on Terrorism Making Progress. At Last*, Los Angeles Times, May 19, 1989, at 1, col. 2.

[8] Patterns of Global Terrorism: 1989, *supra* note 2, at 1. The State Department attributes the major decrease in international terrorism to several factors. These factors include Yasser Arafat's public renunciation of terrorism, dissension within the Abu Nidal organization, the decision of states formerly involved in terrorism—for example, Libya and Syria—to decrease their involvement for fear of retaliation, and a general improvement of counterterrorist abilities among the Western nations.

[9] *State Department Notes Increase in Terrorist Acts; Attacks Up Over Last Year Since War Started*, Washington Post, Feb. 12, 1991, at A15, col. 1.

[10] *See, e.g.*, R. Erickson, Legitimate Use of Military Force Against State-Sponsored International Terrorism (1989).

[11] *See id.* at 211, 212.

[12] Specter, *World Court for Terrorists*, New York Times, July 9, 1989 at 27, col. 1.

[13] *See id.*

[14] *See id.*

[15] United Nations Publications, United Nations Chronicle, (1990), Vol. 27, No. 2, at 41.

[16] *See Was it Terrorism—Or Law Enforcement?*, Christian Science Monitor, Aug. 10, 1989, at 19, col. 1.

[17] *U.S. Cozies Up to Law of Nations*, Los Angeles Times, Nov. 27 1990, at 1, col. 1.

[18] *Efforts to Prosecute Terrorism Still Plagued by Failure to Define the Crime*, Manhattan Lawyer, Mar. 7, 1989, at 13.

[19] *Id.*

jurisdiction to include international acts of terrorism. The United States has the largest, most complex legal system in the world. American interests often are involved directly in many terrorist acts. Perhaps fighting this problem is incumbent upon Congress and the federal judiciary.

To fight terrorists, however, the courts must have jurisdiction over them. This article examines the bases by which American courts can exert jurisdiction over international terrorists.

Defining Terrorism

We must define terrorism before we can discuss jurisdiction. We face the dilemma of deciding whether a killing is a simple murder proscribed by the law of a single foreign state or an international criminal act subject to review by any of the world's courts. Is it an act of legitimate warfare or an unwarranted form of aggression? In short, we must ask, "What is terror?"

The authorities are split on an appropriate definition. Professor Jordan Paust, for example, describes terrorism as "the intentional use of violence ... to communicate a threat of future violence ... to coerce ... behavior and attitudes ... to serve a particular political end."[20] The United States Department of Defense contends that terrorism is the "[u]nlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes."[21] Likewise, the United States Department of State calls it "[p]remeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience."[22] Yet another commentator defines terrorism as "[t]he unlawful use or threatened use of force or violence against individuals to generate fear with the intent of coercing or intimidating governments, societies, or individuals for political, social, or ideological purposes."[23]

These examples accentuate the difficulty of defining terrorism. The second and fourth definitions, for example, beg the question of "unlawfulness". The Palestine Liberation Organization (PLO) asserts a colorable claim that the *intifada* is justifiable self-defense against Israeli oppression, and is, therefore, lawful—does this remove the PLO from the sphere of terrorism? The State Department's definition would appear to exclude the terror bombing of the United States Marine barracks in Beirut because the American forces were a military target. Professor Paust's definition, however, may possess sufficient flexibility to gather a variety of violent acts within its ambit. It conveys a general sense of the social phenomenon of terror[24] and establishes parameters for facts, evidence, and preconditions that enable us to "know [terrorism] when we see it."[25]

The importance of a workable definition becomes clear when we examine the bases for extraterritorial jurisdiction. A flexible definition helps us decide when a given act should be regarded as merely a local crime or as a matter for world consideration.

Domestic Legal Bases for Asserting Criminal Jurisdiction

Once we have defined terrorism, we must ask whether an American federal court is competent to exert jurisdiction over terrorists.

Professor Paust points to the language from *The Paquete Habana*[26], in which the Court pronounced, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[27] Accordingly, United States courts must heed the dictates of international law in matters of jurisdiction.[28] If international law recognizes no basis for jurisdiction, American courts must decline jurisdiction over extraterritorial terrorist acts.[29]

Federal Court decisions and commentators describe five general bases upon which an American court could assert jurisdiction to prosecute extraterritorial terrorism:[30]

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[20] Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FSIA and Act of State Doctrine*, 23 Va. J. Int'l. L. 191 (1983).

[21] R. Erickson, *supra* note 10, at 27.

[22] Patterns of Global Terrorism: 1989, *supra* note 2, at v.

[23] R. Erickson, *supra* note 10, at 28.

[24] *Id.* at 31.

[25] *See generally infra* notes 89-90 and accompanying text.

[26] 175 U.S. 677 (1900).

[27] Paust, *supra* note 20, at 200, 201 (quoting The Paquete Habana, 175 U.S. at 700).

[28] *See generally*, Rose v. Himley, 8 U.S. (4 Cranch) 241 (1808); United States v. Toscanino, 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

[29] Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l. L. 280, 292 (1982). A state may not confer jurisdiction upon itself that it otherwise lacks. *Id.*

[30] Rivard v. United States, 375 F.2d 882, 885, *cert. denied*, 389 U.S. 884 (1967); United States v. Romero-Galue, 757 F.2d 1147, 1154, n.20 (11th Cir. 1985); *Draft Convention on Jurisdiction with Respect to Crime*, 29 Am. J. Int'l. L. Supp. 435 (1935).

1) Territorial: Jurisdiction based upon the situs of the crime.[31]

2) Nationality: Jurisdiction based upon the nationality of the offender.[32]

3) Protective: Jurisdiction based upon protection of significant national interests.[33]

4) Universal: Jurisdiction based on customary law or upon the prosecuting state's physical custody of the offender.[34]

5) Passive Personality: Jurisdiction based on the nationality of the victim.[35]

Before an American federal court asserts extraterritorial jurisdiction, it must address two issues: (1) whether the United States has the power to reach the conduct in question under traditional principles of international law; and (2) whether Congress intended the statutes under which the defendant is charged to have extraterritorial effect.[36] This article will address these issues as it examines each of the bases for extraterritorial jurisdiction.

Territorial Jurisdiction

When considering the applicability of territorial jurisdiction, the court's examination begins at the boundary of its state. The court must determine where the offending "act" took place.[37] This analysis gives rise to two types of territorial jurisdiction: subjective (or "ordinary") jurisdiction and objective (or "impact") jurisdiction.

Subjective jurisdiction obtains when the act occurs either within the territory of the prosecuting state or aboard ships or aircraft subject to its "flag" jurisdiction.[38] The United States has inherent authority to proscribe and punish criminal acts that occur within its territory or on its ships.[39] When a criminal act occurs, literally or constructively, on American soil, the federal courts obviously are not concerned with extraterritorial jurisdiction.

Conversely, objective jurisdiction applies when nearly all of the relevant acts occur outside of the prosecuting state. The court must test for the "impact" of the extraterritorial act upon the prosecuting state. American jurisprudence has long recognized that acts done outside a state, but intended to produce detrimental effects within it, justify a state's assertion of jurisdiction over the actor.[40]

The United States Supreme Court expressly adopted the doctrine of objective territorial jurisdiction in *Ford v. United States*.[41] In *Ford*, federal authorities boarded a British vessel outside the three-mile territorial sea limit of the United States and arrested several Canadian nationals. A federal court subsequently convicted the Canadians of violating the prohibition laws. The Supreme Court ultimately affirmed their convictions, holding that the district court properly exercised jurisdiction over the defendants because their conspiracy "had for its object crime in the United States, and was carried on partly in and partly out of this country."[42] The Court ruled that under these circumstances customary international law bestowed jurisdiction on American courts over an extraterritorial actor, stating,

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[31] Restatement of the Law (Third) of the Foreign Relations Law of the United States § 402 comment c (1986).

[32] *See id.* comment e.

[33] *See id.* comment f.

[34] *See id.* § 404.

[35] *See id.* § 402 comment g.

[36] United States v. Noriega, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990); *see also* Paust, *supra* note 20, at 199.

[37] Restatement of the Law (Third) of the Foreign Relations Law of the United States § 402 (1986).

[38] *See* Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201-03 (1987). This statute, based upon subjective jurisdiction, made it illegal for the Palestine Liberation Organization (PLO) to have an office in the United States or for any person residing in the United States to receive anything of value from the PLO. The statute stemmed from express congressional findings that the PLO was a terrorist organization. *See also* Note, *The Anti-Terrorism Act of 1987: Sabotaging the United Nations and Holding the Constitution Hostage*, 65 N.Y.U. L. Rev. 364 (1990).

[39] *But cf.* The SS Lotus, 22 Am. J. Int'l. L. 8 (1928) (defendant's mere presence in the prosecuting state was insufficient grounds for the exercise of jurisdiction when defendant was not a national of the prosecuting state and did not commit the charged offense while within the prosecuting state's territorial boundaries).

[40] *See, e.g.*, Strassheim v. Daily, 221 U.S. 280 (1911). Justice Holmes, writing for the majority, announced, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *See id.* at 285.

[41] 273 U.S. 593 (1927).

[42] *See id.* at 624.

> The principle that a man, who outside of a country wilfully puts in motion a force to take effect in it, is answerable at the place where the evil is done, *is recognized in the criminal jurisprudence of all countries....* The general rule of law is, that what one does through another's agency is to be regarded as done by himself.[43]

Subsequent federal decisions following *Ford*, particularly in drug smuggling prosecutions, also addressed the issue of whether Congress intended the proscribing statute to have extraterritorial effect.[44] *Chua Han Mow v. United States*[45] is perhaps typical of recent decisions. In *Chua Han Mow* the court overcame its initial reluctance to give penal statutes extraterritorial effect because it could not avoid the conclusion that Congress intended drug laws to apply to criminal activities occurring outside the United States.[46] The court, moreover, hinted that it would infer this intent in future cases even in the absence of an explicit congressional declaration.[47]

Today most federal courts employ a simple two-part test for objective territorial jurisdiction: (1) has the Government "alleged that the actor possessed the intent to commit the act ... ?"; and (2) "did that act produce some effect within the United States, regardless of the presence or absence of the actor?"[48] An American court, accordingly, should not hesitate to assert jurisdiction over a terrorist who planted a bomb on an airplane bound from Germany to the United States, if the bomb exploded while the airplane was over America, killing passengers and people on the ground. Territorial jurisdiction, however, is limited in application; that is, it does not encompass terrorist acts completed *outside* the United States. A terrorist act must have a direct, tangible impact within the boundaries of the United States before an American court may assert objective territorial jurisdiction over the terrorist.

Nationality Jurisdiction

Under the doctrine of nationality jurisdiction, a state may prescribe laws regulating the conduct of its citizens anywhere in the world.[49] In *United States v. Bowman*[50] the Supreme Court ruled that Congress may extend criminal jurisdiction over Americans in foreign countries without offending another state's sovereignty. Later, in *Blackmer v. United States*,[51] the Court declared that international law recognized a state's right to retain jurisdiction over its citizens abroad "by virtue of the obligations of [the defendant's] citizenship."[52]

Perhaps the best-known exercise of nationality jurisdiction appears in the Uniform Code of Military Justice (UCMJ).[53] In the UCMJ, Congress gave military courts extraterritorial jurisdiction over the American military. By virtue of their military status, soldiers, sailors, and airmen are subject to the jurisdiction of the military courts.[54] In courts-martial, the situs of the crime generally is irrelevant to a jurisdictional finding.[55]

Congress also relied on nationality jurisdiction when it enacted legislation prohibiting the attacks on key United States government officials[56] and people protected by international law.[57] Both statutes include express provi-

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[43] *Id.* at 623 (emphasis added).

[44] *See, e.g.*, United States v. King, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); Rivard v. United States, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); Marin v. United States, 352 F.2d 174 (5th Cir. 1965).

[45] Chua Han Mow v. United States, 730 F.2d 1308 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

[46] *See id.* at 1311.

[47] *See id.*

[48] United States v. Wright-Barker, 784 F.2d 161, 178-168 (3rd Cir. 1986); *see also* United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

[49] Blackmer v. United States, 284 U.S. 421 (1932) (holding that a state may regulate the acts of its citizens wherever those acts occur); *accord* United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979); United States v. King, 552 F.2d 833, *cert. denied*, 430 U.S. 966 (1977); United States v. Pizzarusso, 388 F.2d 8, *cert. denied*, 392 U.S. 936 (1968); Rocha v. United States, 288 F.2d 545, *cert. denied*, 366 U.S. 948 (1961); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

[50] 260 U.S. 94, 102 (1922).

[51] 284 U.S. 421 (1932).

[52] *Id.* at 437 n.2. "The law of nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." *Id.*

[53] 10 U.S.C. §§ 801-946 (1988) (as amended) [hereinafter UCMJ].

[54] *But cf.* Reid v. Covert, 354 U.S. 1 (1957) (holding status of forces agreement provision conferring military authority to try dependent spouses unconstitutional).

[55] *See* Solorio v. United States, 483 U.S. 435 (1987).

[56] 18 U.S.C. § 351 (1988) (proscribing assassination or kidnapping of, or assault on, members of Congress, Supreme Court Justices, presidential or vice-presidential candidates, the Director or Deputy Director of Central Intelligence, or the secretary—or chief deputy to a secretary—of a named department of the United States Government).

[57] *Id.* §§ 1116-1117 (proscribing homicide or attempted homicide of diplomatic personnel as well as chiefs of state and foreign ministers travelling outside their own countries).

sions allowing the courts to apply them extraterritorially[58]. The Ninth Circuit examined the validity of these provisions in *United States v. Layton*,[59] a case that began with the killing of a United States congressman by expatriate Americans at the "People's Temple" colony in Jonestown, Guyana.

Layton, an American citizen, contended that the federal court lacked jurisdiction over him because the crimes with which he was charged took place outside the United States. The trial court disagreed, ruling that "American authority over [Layton] could be based upon the allegiance [he] owe[d] this country and its laws...."[60] The Ninth Circuit affirmed appellant's conviction, finding that the district court properly applied the nationality doctrine to assert jurisdiction over the appellant.[61]

Nationality jurisdiction easily satisfies a court's two-part analysis. International law has long recognized a state's authority to proscribe a citizen's conduct abroad, based on no other ties than that person's nationality. Congress, moreover, already has demonstrated its willingness to empower the courts to impose penal sanctions for crimes committed beyond America's borders. American courts could, therefore, easily try United States citizens who commit acts of terror in a foreign country if the sister state relinquishes jurisdiction by recognizing the offense to be a terrorist act and not a mere violation of local law.

Protective Jurisdiction

The concept of protective jurisdiction allows a state to assert judicial authority over a noncitizen whose conduct outside the state threatens the national interest.[62] The Supreme Court implicitly upheld this concept in *Skirotes v. Florida*.[63] In *Skirotes* the Court held that criminal statutes proscribing acts directly dangerous to the United States are applicable to United States citizens upon the high seas or in a foreign country, even if the statute does not expressly so declare. Although the Court's decision focused primarily on the trial court's assertion of nationality jurisdiction, *Skirotes* also expresses the Court's concern with the government's right of self-protection.

The lower federal courts have expanded on *Skirotes*, asserting protective jurisdiction even in the absence of treaties with foreign governments[64] or without the necessity of showing any actual harmful effect on the United States.[65] They have upheld the use of the protective principle to prosecute noncitizens for rendering false statements to obtain a visa from American consular officials in Canada,[66] and for forgery of military passes in Germany.[67] One circuit court applied the protective principle even when defendant's activities threatened only a *potentially* adverse impact upon the United States.[68] Only in the *Yunis* cases,[69] which stem from the hijacking of a Jordanian airliner, may a limit to protective jurisdiction be found. In opinions resolving several successive appeals by an accused Lebanese hijacker, the United States Court of Appeals for the District of Columbia reiterated that the protective theory will not warrant jurisdiction in terrorism cases when no nexus exists between the acts of terror and American governmental interests. The court must find that the defendant's offense had tangible impact on a national interest before it may assert protective jurisdiction.

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[58] *See id.* §§ 351(i), 1116(c).

[59] 855 F.2d 1388 (9th Cir. 1988).

[60] United States v. Layton, 509 F. Supp. 212, 216 (N.D. Cal. 1981).

[61] *Layton*, 855 F.2d at 1397.

[62] United States v. Alomia-Riascos, 825 F.2d 769, 771 (4th Cir. 1987); *see also* Restatement of the Law (Third) of the Foreign Relations Law of the United States § 402(2) (1986).

[63] 313 U.S. 69, 73-74 (1941).

[64] *Alomia-Riascos*, 825 F.2d at 771.

[65] United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987).

[66] United States v. Khalje, 658 F.2d 90 (2d Cir. 1981).

[67] United States v. Birch, 470 F.2d 808 (4th Cir. 1972).

[68] *Khalje*, 658 F.2d at 92.

[69] United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988). Defendant was a Lebanese citizen who hijacked a Jordanian airliner. Three Americans were aboard the plane. The court found no other nexus between the acts and American governmental interests. The court did find other jurisdictional bases, however. Yunis has entered three appeals as of this writing. In United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988) (*Yunis I*) the court dealt with evidentiary issues and affirmed the lower court's findings regarding jurisdiction. In United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989) (*Yunis II*) the court revisited the issue pertaining to discovery of classified information. Finally, in United States v. Yunis, No. 89-3208 (D.C. Cir. 1991) (LEXIS, Genfed library, Courts file) (*Yunis III*) the court reiterates and upholds the District Court's findings, inter alia, regarding jurisdiction. *See also* Trooboff, *Aircraft Piracy and Federal Jurisdiction*, 83 Am. J. Int'l. L 94 (1989).

Congress relied on the protective principle when it enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986.[70] This act proscribes the intentional killing or injuring of Americans abroad "to coerce, intimidate or retaliate against [any] government or civilian population."[71] In a prosecution under this statute, the court need not look beyond the black letter law to find that Congress intended extraterritorial application. The act remains true to the doctrine of protective jurisdiction, however. By its own language it applies only to cases in which the court can find a nexus between the offense and a legitimate government interest.

Universal Jurisdiction

The principle of universal jurisdiction derives from the assumption that some crimes are so widely condemned that the perpetrators are the enemies of all humankind.[72] This theory is relatively new in international law. The traditional view, voiced by the Supreme Court in *American Banana Co. v. United Fruit Co.*,[73] held that the lawfulness of an act must be determined wholly by the law of the country where the act occurs.[74] In time, however, world events upset that position. The atrocities of World War II gave rise to an international consensus that certain acts of terror are truly of world-wide concern. Courts today readily find that some acts warrant universal jurisdiction under the principles of international law.[75] This might explain why a majority of the world's states relied on universal jurisdiction when signing treaties condemning aircraft piracy[76] and hostage taking.[77]

Application of the universality principle depends neither on the nationality of the victim nor the actor. Nor is the situs of the crime significant. The basis for universal jurisdiction is that the offense violates the law of nations and humanity and that, in effect, the prosecuting state is acting on behalf of all nations by bringing the criminal to justice.[78] The doctrine's extraterritorial implication is obvious. Its only restriction is the failure of the international community to arrive at a definition of terrorism that is both clearly focused and universally acceptable.

At present, this inability to define terrorism substantially undermines the efficacy of universal jurisdiction. In *Tel-Oren v. Libyan Arab Republic*,[79] the court, in a patchwork plurality of concurring opinions, observed that terrorism could not constitute a violation of the law of nations because no nation has formulated a universally accepted definition of terrorism.[80]

Passive Personality Jurisdiction

The victim's nationality provides the basis for passive personality jurisdiction.[81] If an American court were to assert jurisdiction under this theory alone, it would do so solely because the victim of an extraterritorial criminal act was a national of the United States. Like universal jurisdiction, this is a new concept in American jurisprudence. As recently as 1979, federal courts rejected passive personality as a jurisdictional basis, ruling that Congress was incompetent to impose criminal sanctions for the murder of an American in a foreign state.[82] One court remarked that a court could not assert jurisdiction when neither the attacker nor the situs of the attack were American, even if the victim returned to the United States before succumbing to his wounds.[83]

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[70] Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. 99-399, 100 Stat. 853 (Aug. 27, 1986) (codified as amended in scattered sections of Titles 2, 5, 10, 18, 22, 33, 37, 42, and 50 U.S.C.). The statute's legislative history, appearing at 132 Cong. Rec. 1382-1388 (1986), reveals four findings in support of protective jurisdiction: (1) that terrorism threatens the government's ability to protect its citizens; (2) that terrorism impairs the government's ability to maintain effective foreign relations; (3) that terrorism threatens interstate and foreign commerce; and (4) that terrorism inhibits travel, trade and tourism. Congress expressly granted the federal courts exclusive extraterritorial jurisdiction over defendants charged with offenses under the Act. *See* 18 U.S.C. §§ 2332, 2338 (1988).

[71] 18 U.S.C. § 2332(d) (1988).

[72] Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); *see also* Restatement of the Law (Third) of the Foreign Relations Law of the United States § 404 (1986).

[73] 213 U.S. 347 (1909).

[74] *See id.* at 356.

[75] *Demjanjuk*, 776 F.2d at 582.

[76] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, T.I.A.S. No. 159 (The Tokyo Convention); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, T.I.A.S. No. 7570 (The Montreal Convention).

[77] International Convention Against the Taking of Hostages, 34 U.N. GAOR, Supp. (No. 39), U.N. Doc. A/34/39 (1979).

[78] *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985).

[79] 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

[80] *See id.* at 795 (Edwards, J. concurring).

[81] United States v. Rodriguez, 182 F. Supp. 479, 487 (S.D. Cal. 1960); Restatement of the Law (Third) of the Foreign Relations Law of the United States § 402 (1986).

[82] United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979).

[83] *See id.* at 360.

The world's efforts to combat drug smuggling has elevated the role of passive personality jurisdiction, however. The federal courts' increasing acceptance of this doctrine is clearly visible in *United States v. Benitez*.[84] In *Benitez*, the United States sought jurisdiction over a Columbian national who assaulted, robbed, and conspired to murder an American national serving as an agent of the United States Drug Enforcement Agency (DEA) in Columbia. The United States contended on appeal that the statute prohibiting attacks on DEA agents had extraterritorial application. While the court recognized the long-standing judicial presumption against extraterritorial application of criminal statutes,[85] it reasoned that "[i]t is inconceivable that Congress ... would proscribe only theft of government property located within the territorial boundaries of the nation.... In addition, ... assault and attempted murder of DEA agents is exactly the type of crime that Congress must have intended to apply extraterritorially."[86] The court concluded that the trial court could assert criminal jurisdiction over Benitez.

As the government seeks new ways to combat drugs and terrorism, the passive personality doctrine is gaining broader acceptance. The Court of Appeals for the District of Columbia cited *Benitez* to support its ruling in *United States v. Yunis*[87] that the United States could exercise passive personality jurisdiction under the Hostage Taking Act.[88]

Potentially, the most far-reaching application of the passive personality doctrine appears in the Omnibus Diplomatic Security and Antiterrorism Act of 1986.[89] As noted above, this statute confers jurisdiction on United States courts to try foreign nationals charged with violent offenses directed against United States citizens abroad. Congress apparently was either unwilling or unable to define terrorist acts.[90] Accordingly, it passed this burden to the Attorney General, stating that

> [n]o prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General ... that ... in the judgment of [the Attorney General] *such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.*[91]

The most momentous objection to this application of passive personality stems not from principles of international law, but from the United States Constitution. A recent commentator challenged the constitutionality of the act on the grounds that federal jurisdiction appears to depend on the Attorney General's personal opinion,[92] rather than upon authority contained in either a treaty or a specific enactment by Congress.[93]

Clearly, the question of constitutionality is born of the confusion over the definition of terror. Congress, like the rest of the world, is undecided upon the meaning. The act's jurisdictional guidelines appear to be a loose conglomeration of at least three of the definitions offered, requiring the prosecuting authority to define on an ad hoc basis the crime the act seeks to punish. Clearly, the constitutionality of this law soon may be tested at the highest federal level.

The Future

Terrorism will continue to plague the world community. Societies and nations must struggle to find effective ways to combat the problem. American courts doubtless will be pressed into the conflict, yet they may be hampered by jurisdictional constraints en route to the fray. Congress may respond by enacting legislation expanding judicial capacity to hear cases that arise beyond the boundaries of the United States. Unquestionably, the nation's political mood will encourage courts to interpret existing laws so that terrorists can be tried and punished in the United States. Even so, our courts will respond as they traditionally have—by asking whether, under international law, American courts have jurisdiction to try the conduct in question.

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[84] 741 F.2d 1312 (11th Cir. 1984).

[85] *Id.* at 1317 (citing United States v. Cotten, 471 F.2d 744, 750 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1973)).

[86] *Id.* at 1317.

[87] United States v. Yunis, No. 89-3208 (D.C. Cir. 1991) (LEXIS, Genfed library, Courts file).

[88] 18 U.S.C. § 1203 (1988) (implementing the International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/39 (1979)).

[89] *See id.* §§ 2331-2332, 2338.

[90] Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 Am. J. Int'l. L. 880 (1989). "Congress did not, apparently, intend the Act to reach 'simple barroom brawls or normal street crime.'" *Id.* at 890 (quoting from H.R. Conf. Rep. No. 783, 99th Cong., 2d Sess. 87 (1986).

[91] 18 U.S.C. § 2332(d) (1988) (emphasis added).

[92] *See* Lowenfeld, *supra* note 90, at 891.

[93] *See id.* at 892.

Courts will find it easy to assert jurisdiction under the concepts of territoriality and nationality. But these forms of jurisdiction are limited in scope and may not give American courts a reach long enough to deal effectively with terrorism. Under the doctrine of protective jurisdiction, courts must continue the struggle to find a nexus between a foreign act and an important governmental interest. Congress and the public will continue to pressure courts to entertain jurisdiction under universal and passive personality jurisdiction because these avenues are the most effective means of widening American judicial authority over global terror. Before the courts may apply these theories, however, the world's political leadership, must be challenged to find and incorporate a valid definition of terrorism into appropriate criminal legislation. Then, and only then, will the courts have the tools needed to vindicate the rule of law over world-wide terror.

Health Care Professionals and Rights Warning Requirements

Captain Joseph L. Falvey, Jr.
Military Law Branch, Judge Advocate Division,
Headquarters, United States Marine Corps

Introduction

Over the last thirty years, the number of reported child abuse cases in the United States has risen dramatically. As a result, the number of child abuse prosecutions also has increased.[1] Counsel only need examine any recent Military Justice Reporter to realize that the same is true for the military. The number of child abuse investigations and prosecutions may continue to grow in the future because of the recent expansion of military courts-martial jurisdiction.[2] Child abuse cases often involve health care professionals—from emergency room doctors to family advocacy and social services personnel—seeking to counsel abusive parents and stepparents and to treat the victims' physical and psychological injuries. Courts-martial frequently call upon these health care professionals to testify against their former patients because the military does not recognize a doctor-patient privilege.[3]

The admissibility of this testimony often depends on whether the law requires the health care professional to provide rights warnings to the "patient." These rights warnings include article 31(b) warnings, *Miranda* warnings, and sixth amendment counsel warnings. This article addresses the need for health care professionals to provide these rights warnings.

Article 31, UCMJ

Congress enacted article 31(b) of the Uniform Code of Military Justice (UCMJ) to counter the subtle pressure rank might play in the interrogation process and to prevent compulsory self-incrimination.[4] Article 31(b)[5] requires persons subject to the UCMJ who wish to question[6] a suspect or a criminal accused[7] to inform that individual of the nature of the accusations and to warn the individual that his or her responses may be used at trial.

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[1] *See generally* Christoffel, *Violent Death and Injury in U.S. Children and Adolescents*, Am. J. Dis. Child, June 1990; Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash. L. Rev. 493 (1988).

[2] *See, e.g.*, United States v. Solorio, 483 U.S. 435 (1987).

[3] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 501(d) [hereinafter Mil. R. Evid.] "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." *Id.* The Manual provides exceptions to this general rule when the accused makes incriminating statements to a sanity board, *see* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 706 [hereinafter R.C.M.], and when the medical officer qualifies as a lawyer's representative; Mil. R. Evid. 502(a); *see also* United States v. Toledo, 25 M.J. 270, 275 (C.M.A. 1987). For a discussion of the need for a psychotherapist privilege, see Hayden, *Should There be a Psychotherapist Privilege in Military Courts-Martial*, 123 Mil. L. Rev. 31 (1989).

[4] *See* United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981); United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

[5] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1988) [hereinafter UCMJ]. Article 31 provides, in pertinent part,

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

[6] Mil. R. Evid. 305(b)(2) provides that the term "questioning" includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."

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

When does questioning by health care professionals become "official" interrogation triggering article 31(b)? To answer this question, one first must address the officiality requirement in general.

Who Must Warn?—Officials!

Article 31(b) provides that "[n]o person subject to this chapter" may question an accused or suspect without first providing rights warnings. Congress did not intend that the courts apply this language restrictively.[8] The President, moreover, in promulgating the Military Rules of Evidence, specifically extended the rights warning requirement to include civilians acting as knowing agents of military law enforcement authorities.[9] Article 31(b) does not require warnings, however, from a military member or a civilian acting in a purely personal capacity.[10] It applies only when an individual questions a suspect or accused in an official capacity.

In *United States v. Duga*[11] the Court of Military Appeals ruled that questioning is official when: (1) a questioner subject to the UCMJ conducts an inquiry in an official capacity, rather than through personal motivation; and (2) the person questioned perceives the inquiry to be more than a casual conversation. In *United States v. Loukas*[12] the court further defined the first part of the *Duga* "officiality plus perception" test[13]—requiring rights warnings only when "questioning is done during an official law-enforcement investigation or disciplinary inquiry."[14]

If the questioner is a military policeman or a criminal investigator conducting an official investigation, article 31(b) requires him or her to issue a rights advisement before questioning an accused or a suspect. Article 31(b) does not require a questioner to issue these warnings, however, if the questioner is acting in a private capacity, motivated by curiosity, or engaged in casual conversation.[15] Difficulties of interpretation arise in the area between these two extremes.

Application of the Duga-Loukas *Standard to Persons Other Than Military Personnel*

Military courts apply article 31(b) to civilians—including civilian doctors—only when these individuals act as agents for military law enforcement. The Court of Military Appeals, for example, does not require civilian law enforcement personnel to provide article 31(b) warnings unless "the scope and character of the cooperative efforts demonstrate 'that the two investigations have merged into an indivisible entity'" or "the civilian investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military.'"[16]

In *United States v. Quillen*[17] the court applied this standard to an interrogation conducted by a base exchange detective. The court found the detective had acted "at the behest of the military authorities and in furtherance of their duty to investigate crime."[18] The suspect, moreover, had perceived the detective's question to be more than casual conversation.[19] The court further remarked that military authorities controlled the exchange and that the detective's position was both governmental in nature and military in purpose. Noting that regulations required the exchange to file reports on crime with military officers, that the exchange had tasked the detective

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[8] Mil. R. Evid. 305(b)(1) analysis; *accord Gibson*, 14 C.M.R. at 170.

[9] *See* Mil. R. Evid. 305(b)(1).

[10] United States v. Trojanowski, 17 C.M.R. 305 (C.M.A. 1954); United States v. Bartee, 50 C.M.R. 51 (N.C.M.R. 1974).

[11] 10 M.J. 206, 210 (C.M.A. 1981).

[12] 29 M.J. 385, 387 (C.M.A. 1990).

[13] Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 198 (1989).

[14] *Loukas*, 29 M.J. at 387.

[15] United States v. Jones, 24 M.J. 367, 369 (C.M.A. 1987). In *Jones* the accused's former platoon sergeant approached the accused, who was handcuffed and under escort, and asked him about the shooting. The court held that the circumstances were insufficient to cause "the sergeant's questions to be so 'clearly official or so demanding of an answer by virtue of his superior rank' as to transform his personal curiosity into an official inquiry" even though the accused probably perceived them as official. *Id.*; *see also* United States v. Stroud, 27 M.J. 765, 772 (A.F.C.M.R. 1988) (NCO was "acting in an official capacity as far as his escort duties were concerned but ... was not acting in an 'official investigatory capacity'"). The conversation with the accused was "personally motivated and initiated only out of curiosity"; therefore article 31 did not apply. *Stroud*, 27 M.J. at 712.

[16] United States v. Penn, 39 C.M.R. 194 (C.M.A. 1969). The lower appellate courts generally follow this rule closely. *See, e.g.*, United States v. Kellam, 2 M.J. 338, 342 (A.F.C.M.R. 1976) (applying *Penn* to hold civilian police instruments of the military when local deputy sheriff acted at the direction of and in concert with Air Force investigators); United States v. Foley, 12 M.J. 826, 831 (N.M.C.M.R. 1981) (applying *Penn*, court held civilian police not acting as instrumentality of the military when no evidence suggested that the civilian police were in any way acting on behalf of the military).

[17] 27 M.J. 312 (C.M.A. 1988).

[18] *Id.* at 314.

[19] *Id.* at 315.

with developing information for these reports, and that the detective therefore had advanced the military's duty to investigate crime at base exchanges, the court concluded that the detective was an "instrument of the military," and should have provided the accused with article 31(b) warnings.[20]

Quillen applied article 31(b) to the civilian detective because she acted as an agent of the military and asked questions for law enforcement investigation purposes. A recent Navy-Marine Corps Court of Military Review decision, however, distinguished *Quillen* and held that article 31(b) did not apply to an investigation by civilian intelligence agents. In *United States v. Lonetree*[21] intelligence agents had conducted a damage assessment to determine what classified information the accused had compromised. The court found these agents had acted independently of military criminal investigators.[22] The intelligence and criminal investigations, moreover, had not been an indivisible entity. The intelligence damage assessment, completed before the military criminal investigation began, was entirely independent of the military's criminal investigation.[23] The court found that despite the close coordination between the civilian agents and military law enforcement officials and the obligation the government had placed on the agents to share information with military criminal investigators, the military neither controlled nor substantially influenced the civilian investigation.[24] The court also stressed that the intelligence agents' duties, although governmental in nature, were not military in purpose. The agents had attempted to learn the extent of damage to the United States, not to conduct a military criminal investigation.[25] The court ruled, accordingly, that the civilian intelligence agents had not been instruments of the military and, therefore, had been under no obligation to warn the accused in accordance with article 31.[26]

Application to Health Care Professionals

Military health care professionals need not provide article 31(b) warnings before asking general diagnostic questions. The leading case supporting this proposition is *United States v. Fisher*.[27]

In *Fisher* the accused arrived at the emergency room of an Army hospital. He was near death, apparently suffering from a drug overdose. The Army doctor asked the accused questions "for treatment and diagnostic purposes."[28] The court held that article 31(b) did not require the doctor to warn the suspect before asking him questions necessary to prescribe medical treatment, ruling that

> [a] medical doctor who questions an individual *solely* to obtain information upon which to predicate a diagnosis, so that he can prescribe appropriate treatment or care for the individual, is not performing an investigative or disciplinary function; neither is he engaged in perfecting a criminal case against the individual. His questioning of the accused is not, therefore, within the reach of article 31.[29]

Counsel should note two key points in the *Fisher* decision. First, the court's inquiry focuses on the intent of the health care professional. Any inquiry that seeks more than the minimum information necessary to make a diagnosis or prescribe proper treatment implies a subjective intent to use this information for nonmedical purposes, and thus may require warnings. Second, the court left open the issue of whether article 31(b) requires warnings if the medical practitioner's duties require the practitioner

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[20] *Id.* at 314-15. The court also emphasized that the detective was responsible for detaining suspects for additional questioning by military authorities, the questioning occurred in the exchange manager's office, and the detective was not engaged in frolic of her own. *Id.*

[21] United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990).

[22] *Id.* at 867-69.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 869.

[26] *Id.*

[27] 44 C.M.R. 277 (C.M.A. 1977); *see also* United States v. Malumphy, 31 C.M.R. 225 (C.M.A. 1962) (psychiatrist under no obligation to warn suspect prior to questioning). The court in *Malumphy* held,

> It is clear that accused was not, in the eyes of the psychiatrists, a suspect ... at the time they saw him ... [a]nd it is manifest ... that accused was admitted to the hospital for medical examination. The latter, and not whether accused had committed any offense nor other possible legal eventualities, was the concern of the doctors. They interviewed him, as was their duty, with a mind toward medical diagnosis as to whether he was a sick man mentally, possibly in need of care and treatment.... [T]he inquiries were not in any sense a criminal investigation.

Id. at 226.

[28] *Fisher*, 44 C.M.R. at 278.

[29] *Id.* (emphasis added).

to ask questions for purposes other than diagnosis or treatment. For example, social workers who have the dual responsibilities of investigating reports of child abuse and treating its effects may ask questions for purposes that are not *solely* diagnostic; these questions, therefore, also may require warnings.

This issue presented itself in *United States v. Hill*.[30] In *Hill*, the Army Court of Military Review held inadmissible the accused's child abuse admissions to social services personnel. Although the court did not disclose verbatim the questions involved, it found the questioning "too closely connected" with the criminal investigation to conclude that the social workers' inquiries were solely for medical purposes.[31]

Similarly, in *United States v. McClelland*[32] the court held admissions to the director of a social services clinic inadmissible due to the lack of article 31(b) warnings. The court found the director was "not acting in the scope of assisting the family, but rather as an *investigator for the child advocacy council*" and thus as an instrument of military law enforcement.[33] The court noted that the director, an Army major, was aware of sexual misconduct allegations against McClelland and of Army regulations that required him to report allegations of child abuse to military authorities.[34] His attitude and function, the court remarked, "was that of an investigating Army official."[35] The court also commented on the dichotomy of rank between the director and the accused, which, "coupled with [the] tenor of the meeting ... [proved] that the appellee's perception of the event was considerably more than that of a casual conversation."[36] Applying the *Duga* standard, the court upheld the order of the military judge suppressing all evidence derived from the director's inquiry.[37]

In *United States v. Moore*[38] the Court of Military Appeals determined whether article 31(b) required a nurse to warn a suspect before questioning him. In *Moore* the accused, then under investigation for child sexual abuse, went to a military hospital to seek help for depression. The doctor admitted him as a suicide risk. In the hospital, when speaking to a civilian nurse, the accused admitted to acts of sexual misconduct. At the accused's subsequent court-martial, the military judge permitted the nurse to testify about these admissions.

Comparing the nurse to the exchange detective in *Quillen*, the defense contended that the nurse was acting in an official capacity as a government employee at a military hospital when she questioned Moore. The defense noted that the nurse's official duties included a duty to file reports of suspected child abuse. As a government official, the defense argued, the nurse was obliged to advise the accused of his article 31 rights before she questioned him.[39]

The court found no evidence that the nurse acted directly or indirectly in any law enforcement or disciplinary capacity when she questioned the accused. Instead, it found she "acted only in a *legitimate medical capacity* in asking these questions ... in response to appellant's voluntary request for emergency medical treatment. Such questioning is clearly outside the scope of article 31."[40]

Arguably, the court's use of the "legitimate medical capacity" standard in *Moore* narrows article 31(b)'s applicability with respect to health care professionals. Under the "solely medical purpose" standard of *Fisher* and *Hill*, article 31(b) required warnings whenever a health care professional asked questions beyond those necessary for valid medical purposes. The "legitimate medical capacity" standard, however, recognizes that health care professionals' inquiries may have dual purposes. If one purpose of an inquiry relates to a legitimate medical need, *Moore* apparently would not require article 31(b) warnings even if the other purpose is law enforcement investigation. This interpretation, however, may read *Moore* too narrowly. In *Moore* the court did not reject *Fisher* or *Hill* expressly—indeed, the court cited *Fisher* in support of the "legitimate medical capacity" standard.[41] The court, moreover, refused to rule whether the influence of Army Regulation 608-18, which expressly requires soldiers and military employees to report incidents of child abuse[42], rendered the nurse's

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[30] 13 M.J. 882 (A.C.M.R. 1982).

[31] *Id.* at 886 n.3.

[32] United States v. McClelland, 26 M.J. 504 (A.C.M.R. 1988).

[33] *Id.* at 507 (emphasis added).

[34] *Id.*

[35] *Id.* at 508.

[36] *Id.*

[37] *Id.* Government appellate counsel argued that because of the regulatory reporting requirement, the Government inevitably would have discovered the contents of McClelland's statement. The court rejected this argument because counsel had not developed it at trial. *Id.*

[38] 32 M.J. 56 (C.M.A. 1991).

[39] *Id.* at 60.

[40] *Id.* (emphasis added).

[41] *Id.*

[42] *See* Army Reg. 608-18, Personal Affairs: The Army Family Management Program, para. 3-9 (18 Sept. 1987) [hereinafter AR 608-18].

inquiry official per se. The court stated that this regulation, "irregularly proffered by appellant for the first time at oral argument to show an agency relationship between the government nurse and the military police," did not undermine the court's conclusion that the nurse was not an instrument of the military because "[the regulation] was not in effect on ... the day the challenged interview ... occurred."[43]

Regulations—Create Officiality?

In *Moore* the Court of Military Appeals—like the Army Court of Military Review in *McClelland*—left unanswered the question of whether the Army's family advocacy regulation creates an agency relationship between health care professionals and military law enforcement personnel. Because this issue likely will return to the Court of Military Appeals in the future, counsel should examine the applicable service regulation on family advocacy.

As required by Department of Defense directive,[44] each service has issued a family advocacy regulation.[45] Although each regulation implements the same directive, each service has adopted a unique approach to address this issue. To determine whether these regulations make the health professional's inquiry "official" under article 31(b), this article will compare the Army's and the Marine Corps' regulations.[46]

Policies and Objectives

The statements of Army and Marine Corps policy and objectives reflect the differences in their approaches to family advocacy. Army Regulation 608-18 purports to establish Army policy on the "prevention, identification, reporting, *investigation*, and treatment of spouse and child abuse."[47] The objectives of the Army family advocacy program are "to prevent spouse and child abuse, to *encourage reporting* of all instances of such abuse, to ensure the prompt *investigation* of all abuse cases, to protect victims of abuse, and to treat all family members affected...."[48]

MCO 1752.3A states the Marine Corps policy that child and spouse abuse is incompatible with the high standards required of Marines.[49] The role of the Marine Corps family advocacy program is to break the cycle of abuse by identifying and treating child abusers.[50] The program's primary objective is to stop the abuse.[51] The Marine Corps regulation does not stress the investigative role of the family advocacy program as does the Army regulation.

Investigation

Army Regulation 608-18 emphasizes the investigative role of the Army family advocacy program even more clearly in the section devoted to investigation of abuse incidents.[52] The Marine Corps' regulation contains no similar provisions.

According to Army Regulation 608-18, collection of physical evidence and fact gathering are the primary purposes of the spouse and child abuse investigation.[53] The regulation stresses that family advocacy and law enforcement personnel should work together to investigate abuse, declaring that

> [s]ocial workers, medical personnel, and law enforcement personnel share a common interest in ensuring that all reports of spouse and child abuse are promptly and fully investigated.... In child abuse cases, the prompt gathering of physical evidence, before it disappears or is destroyed, is essential .... Both social workers and law enforcement personnel have a responsibility to protect the victim of abuse.... [54]

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[43] *Id.* at 61.

[44] Dep't of Defense Directive 6400.1, Family Advocacy Program (19 May 1981).

[45] *See generally* AR 608-18; Air Force Reg. 160-38, Medical Service: Air Force Family Advocacy Program (5 Nov. 1981) [hereinafter AFR 160-38]; SECNAV INSTR. 1752.3, Family Advocacy Program (27 Jan. 1984) [hereinafter SECNAVINST 1752.3]; OPNAV INSTR. 1752.2, Family Advocacy Program (6 Mar. 1987) [hereinafter OPNAVINST 1752.2] (implements SECNAVINST 1752.3 for the United States Navy); Marine Corps Order 1752.3A, Marine Corps Family Advocacy Program (6 Apr. 1987) [hereinafter MCO 1752.3A] (implements SECNAVINST 1752.3 for the United States Marine Corps).

[46] I selected AR 608-18 and MCO 1752.3A because they represent different ends of the spectrum. AR 608-18 is the most detailed of the regulations and emphasizes the investigative role of family advocacy to a greater degree than do the other regulations. MCO 1752.3A is much less detailed and emphasizes the prevention, identification, cessation, and treatment missions of family advocacy. OPNAVINST 1752.2 is similar to the MCO. AFR 160-38 falls between the other services' regulations and attempts to strike a balance between treatment of the problem and investigation and punishment.

[47] AR 608-18, para. 1-1 (emphasis added).

[48] *Id.*, para. 1-5 (emphasis added).

[49] MCO 1752.3A, para. 4(a).

[50] *Id.*, para. 4(e).

[51] *Id.*, para. 5(a). The other objectives of the program are to help Marines deal with family abuse; to provide rehabilitative counseling; and to identify, support, and treat "at risk" families. *Id.*, para. 5(b).

[52] *See generally* AR 608-18, sec. IV.

[53] *Id.*, para. 3-14(a).

[54] *Id.*, para. 3-14(b)-(c).

Under the Army regulation, law enforcement officials and social workers share a common goal—that is, to gather evidence as quickly as possible by any lawful means.[55] The regulation "mandates a cooperative effort by law enforcement, medical, and social work personnel in all spouse and child abuse investigations, to include a sharing of information and records...."[56] Moreover, the regulation advises family advocacy and law enforcement personnel to conduct joint interviews of abuse victims.[57]

Significantly, the Army regulation advocates the use of search authorizations, authorizations to apprehend, and article 31(b) warnings.[58] The emphasis it places on these evidentiary and constitutional safeguards reflects the primary purpose of the investigation—the collection and preservation of evidence for use in criminal prosecutions.

Family Advocacy Case Management Team

The responsibilities of the family advocacy committee also reflect the investigative role of the Army family advocacy program. The Family Advocacy Case Management Team (FACMT) normally includes representatives of the office of the staff judge advocate, the provost marshal's office (PMO), and the local Criminal Investigation Command (CID) office.[59] This team is responsible not only for obtaining thorough psychological evaluations of the parents and children and establishing a treatment plan for identified child abusers, but also for completing and sending reports to higher headquarters, deciding whether to report or refer a case to the local child protective service, recommending possible corrective measures when the soldier refuses to cooperate, and *determining whether a civilian court or civilian law enforcement agency should intervene in the case.*[60]

By contrast, the family advocacy committee under the Marine Corps' regulation is responsible for recommending treatment for child abusers and evaluating the rehabilitative potential of each subject, and for facilitating an "integrated team approach" among all agencies involved in the family advocacy program.[61] Although, like the Army FACMT, the committee is made up of representatives of the office of the staff judge advocate, provost marshal's office, and the local Naval Investigative Service office,[62] the scope of the committee's responsibilities is much narrower than that of the FACMT. The Marine Corps committee, moreover, focuses not on criminal investigation, but on treatment and rehabilitation.

Reporting

Both the Army and the Marine Corps require family advocacy representatives to report suspected and substantiated incidents of child abuse. Only the Army regulation, however, requires family advocacy representatives and medical personnel to report the information directly to law enforcement personnel.[63] The Marine Corps regulation merely requires the representative to report the information to command personnel.[64]

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[55] *See id.*, para. 3-15.

[56] *Id.*, para. 3-16.

[57] *Id.*, paras. 3-17(b), 3-20(a)(2).

[58] *Id.*, para. 3-15. The regulation states,

> The objectives of any investigation for reported spouse or child abuse case are
>
> a. To gather all of the evidence by every lawful means available, including, when appropriate, the use of ... [s]earch authorizations (M.R.E. 315, MCM) or warrants[,] ... [a]uthorizations to apprehend (... R.C.M. 302, MCM)[,] or warrants for arrest....
>
> b. To gather the evidence as quickly as possible to prevent its destruction.
>
> c. To gather the evidence in a lawful manner by ... [p]roperly advising soldiers suspected of criminal acts of abuse of their rights under article 31, UCMJ, before questioning them [and] ... [e]nsuring appropriate command and law enforcement involvement in any medical or social work inquiry of a child abuse case whenever there is probable cause to believe that a criminal act of abuse has occurred.

Id; *see also id.*, para. 3-20(a)(1) ("Where the person making the report of abuse is a soldier suspected of a criminal offense under the UCMJ, such questioning will be preceded by an advisement of rights under Article 31, UCMJ, when appropriate"); *id.*, para. 3-23 (discussing search authorizations); *id.*, para. 3-24 (discussing article 31).

[59] *Id.*, para. 2-3.

[60] *Id.*, para. 2-5 (emphasis added).

[61] MCO 1752.3A, para. 9(a).

[62] *Id.*, para. 9(b).

[63] *See* AR 608-18, para. 1-7(e)(4) (requiring medical treatment facilities to report suspected abuse cases to provost marshal's office (PMO) and Criminal Investigation Command (CID)); *see also id.*, para. 1-7(h) (requiring PMO to conduct an initial investigation into suspected abuse and provide a copy of the serious incident report to the family advocacy program manager); *id.*, para. 1-7(i) (requiring CID to investigate certain abuse cases and provide reports to the commander); *id.*, para. 3-9 (requiring "[e]very soldier, employee, and member of the military community" to report information about known and suspected child abuse to the report point of contact or to the appropriate law enforcement agency).

[64] *See* MCO 1752.3A, para. 9(b)(3). Noting that all fifty states require family services personnel to report child abuse or neglect, the MCO requires family advocates to report all incidents of suspected or substantiated abuse directly to the family advocacy representative (FAR). *See id.* The FAR is responsible for reporting the incident to state or local agencies and to command personnel. *Id.*

A reporting requirement alone may not suffice to make the family advocacy personnel agents of law enforcement.[65] The Army regulation's reporting requirement, however, interpreted in the context of the regulation as a whole, reinforces the argument that Army family advocacy personnel are instruments of law enforcement.

Cooperation with Local Authorities

Army Regulation 608-18 encourages Army installations to establish "a cooperative relationship with local communities in identifying, reporting, [and] *investigating*" child abuse cases.[66] The regulation recommends the use of memoranda of agreements (MOAs) between the installation and local communities to carry out this cooperative approach.[67] Each MOA should set forth the legal authority of the installation commander over military discipline on the installation, as well as the legal basis for the MOA and for the exercise of jurisdiction by local authorities over incidents occurring on the military installation. The MOA also should establish the extent to which military and civilian authorities will share reports of child abuse and case information and designate which agency will bear primary "responsibility for investigating child abuse cases."[68]

MCO 1752.3A similarly encourages the use of MOAs between the installation and state agencies. The purpose the Marine Corps assigns to these agreements, however, is to ease identification, evaluation, and treatment of abusive parents, and to promote agency intervention and follow-up in severely dysfunctional parent-child relationships.[69]

If a family advocacy regulation makes family advocacy personnel agents of law enforcement, civilian authorities operating on a military installation under an MOA also may be agents. This result is more likely under Army MOAs because Army MOAs expressly assign civilian authorities investigative responsibility.

Self-Referral and Limited Privilege

The Army regulation encourages soldiers who engage in child abuse to refer themselves for counselling, but does not prevent commanders from taking disciplinary or administrative action against a soldier based on information derived from the soldier's voluntary disclosure.[70] The Army regulation merely advises the commander to consider the soldier's self-referral when determining appropriate disciplinary or administrative action.[71] The Marine Corps also encourages self-referrals.[72] The Marine Corps, however, provides a limited privilege to individuals who voluntarily disclose past incidents of child abuse. MCO 1752.3A expressly forbids the use of these disclosures as the sole source of information upon which to base disciplinary or adverse administrative action against the member.[73]

The totality of the Army family advocacy regulation clearly reflects the dual role of family advocacy personnel within the Army. On the one hand, family advocates are health care providers responsible for identifying abuse and treating its effects. On the other hand, they are instruments of law enforcement. Accordingly, military courts should require family advocates to give article 31(b) warnings unless they are acting *solely* within their roles as health care providers.

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[65] *See* United States v. Lonetree, 31 M.J. 849, 869 (N.M.C.M.R. 1990) ("the existence of an understanding between military authorities and civilian investigators that a suspect will later be prosecuted by the military does not render the civilian investigators instruments of the military"). *But cf.* Commonwealth v. A Juvenile, 402 Mass. 275, 521 N.E.2d 1368 (1988) (holding assistant director of private detention facility to be an agent of law enforcement because of his duty to report to the police if he learned a juvenile had committed a crime).

[66] AR 608-18, para. 2-12 (emphasis added).

[67] *See id.*, para. 2-13.

[68] *Id.*, para. 2-15.

[69] MCO 1752.3A, para. 9(b)(8).

[70] *See* AR 608-18, para. 3-31.

[71] *Id.*, para. 4-4(b)(2). The Marine Corps also requires that commanders consider self-referral when determining whether to impose disciplinary or administrative action on abuse suspects. *See* MCO 1752.3A. para. 4(f)(1). Both the Army and the Marine Corps regulations, moreover, indicate that disciplinary or administrative action generally is more appropriate when sufficient evidence exists to support a conviction. AR 608-18, para. 4-4(b)(1); MCO 1752.3A para. 4(f)(4). This presents an abuse suspect with a dilemma. He or she can disclose abuse in the hopes of receiving help and avoiding prosecution; however, this disclosure may provide the Government with strong evidence towards conviction. On the other hand, the suspect can exercise the right to remain silent and, if discovered, run an increased risk of prosecution for failure to admit responsibility and cooperate. Whether these self-referral provisions violate due process as unlawful inducements, or compel confessions that extract a penalty for assertion of the right to remain silent is beyond the scope of this article. *See generally* United States v. McClelland, 26 M.J. 504, 504 n.1 (A.C.M.R. 1988).

[72] *See* MCO 1752.3A, para. 9(b)(9).

[73] MCO 1752.3A, para. 9(b)(9)(d). Not included within the limited privilege are admissions made in response to official questioning in connection with military or civilian investigations. *Id.*, para. 9(b)(9)(f). Admissions by an offender, moreover, are not "privileged" within the legal meaning of the term and, therefore, personnel with knowledge of these admissions must notify appropriate authorities and testify when required to do so at pretrial investigation, court-martial, or other official proceedings. *Id.*, para. 9(b)(9)(h).

Miranda Warnings

Even if article 31(b) does not apply to them, government agents must obey civilian criminal rights warnings requirements.[74] *Miranda v. Arizona*[75] requires a law enforcement officer to warn a suspect of his or her fifth amendment rights before subjecting the suspect to custodial[76] interrogation.[77] Because *Miranda* applies only to custodial interrogations, it affects health care professionals to a lesser extent than does article 31(b). A *Miranda* situation can arise in the context of health care, however, when a commander orders the accused to submit to an interview by psychiatric, family advocacy, or social services personnel or when these personnel question an accused who is confined or otherwise in custody.

Courts commonly resort to two theories to reject arguments that health care professionals must issue *Miranda* warnings before questioning suspects. First, the court may hold that the accused was not in custody when questioned and that *Miranda*, therefore, did not apply.[78] The United States Supreme Court significantly reduced *Miranda*'s potential impact on health care professionals by narrowing the definition of custodial interrogation in several post-*Miranda* decisions.[79] Second, the court may hold that the health care professional is not equivalent to a law enforcement officer. *Miranda* exists primarily to prevent law enforcement personnel from coercing self-incriminating statements from suspects in custody. Accordingly, "courts have generally held that government agents [who are] not primarily charged with enforcement of the criminal law are under no obligation to comply with *Miranda*."[80] Moreover, absent evidence of police subterfuge or intimidation, *Miranda* generally does not apply to incriminating statements suspects make to private persons, absent evidence of police subterfuge or intimidation.[81] When a suspect does not know that he is speaking to a government agent, no reason normally exists to assume coercion, and the courts, accordingly, do not require *Miranda* warnings.[82]

Some courts, however, require warnings even when individuals other than the police conduct the questioning. They are especially likely to require a warning when government investigators ultimately share the results of their

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[74] Mil. R. Evid. 305(h).

[75] 384 U.S. 436 (1966). The fifth amendment privilege against self-incrimination applies to "custodial interrogations." The prosecution may not use statements stemming from questioning initiated by law enforcement officers after a person has been "taken into custody or otherwise deprived of his freedom in any significant way absent appropriate rights advisement." *Id.* at 444. *Miranda* applies to the military. United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

[76] Courts apply an objective test from the viewpoint of the suspect to determine if he was in custody. Mil. R. Evid. 305(d)(1)(A); *see also*, Berkemer v. McCarty, 468 U.S. 420 (1984).

[77] Interrogation includes the "functional equivalent" of interrogation—actions or conversations designed to elicit an incriminating response from a suspect. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[78] *See, e.g.*, Edwards v. State, 24 Ark. 1145, 429 S.W.2d 92 (1968) (medical exam conducted by physician under circumstances in which he had no reason to suspect the accused of criminal involvement); People v. Salinas, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (1982) (defendant's statements to physician and police officer while not in custody were admissable); People v. Lipscomb, 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (1968) (physician's exam of arrested man prior to civil commitment); Franklin v. State, 114 Ga. App. 304, 151 S.E.2d 191 (1966) (incriminating statement made in hospital in presence of doctors and nurses who were concerned only with the defendant's physical welfare); State v. Hathorn, 395 So. 2d 783 (La. 1981) (statements made by defendant to child protection center caseworker in hospital emergency room); Commonwealth v. Roberts, 6 Mass. App. Ct. 891, 376 N.E.2d 895 (1978) (defendant's confession to hospital social worker overheard by hospital police admissable testimony); State v. Ward, 745 S.W.2d 666 (Mo. 1988) (defendant's inculpatory statement to social service investigator was admissable); People v. Easter, 90 Misc. 2d 748, 395 N.Y.S.2d 926 (Albany County Ct. 1977) (social worker not required to give warning before discussing suspicions with defendant); State v. Brown, 528 P.2d 569 (Or. 1974) (statements made by defendant who accompanied officers to crime scene and who was free to leave at any time); Davis v. State, 687 S.W.2d 78 (Tex. Ct. App. 1985) (social worker's interview not "custodial interrogation"). *But see* People v. Hagar, 160 Ill. App. 3d 370, 513 N.E.2d 628 (1987) (use of statement given to social service investigators under circumstances that would lead a reasonable person to believe he was not free to leave the interrogation violates the defendant's *Miranda* rights).

[79] *See* Arizona v. Mauro, 481 U.S. 520 (1987) (taping conversation between suspect and spouse not custodial interrogation); Berkemer v. McCarty, 468 U.S. 420 (1984) (on-scene questioning of person detained for routine traffic violation not custodial interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977) (warnings not required when police asked the suspect to come to the police office for questioning; told him that he was not under arrest; and allowed him to leave at the end of interrogation); *see also* California v. Beheler, 463 U.S. 1121 (1983); Beckwith v. United States, 425 U.S. 341 (1976) (when the individual is free to leave or to break off questioning, the warnings need not be given). *But see* Orozco v. Texas, 394 U.S. 324 (1969) (warnings required when defendant interrogated in his boardinghouse room at four a.m. by four police officers and the defendant was not free to leave but was under arrest).

[80] W. Lafave & J. Israel, Criminal Procedure § 6.10(c) (1985); *see, e.g.*, United States v. Dreske, 536 F.2d 188 (7th Cir. 1976) (tax investigator); United States v. Harmon, 486 F.2d 363 (10th Cir. 1973) (selective service board); United States v. Irion, 482 F.2d 1240 (9th Cir. 1973) (customs officer).

[81] *Mauro*, 481 U.S. at 529-30; Colorado v. Connelly, 479 U.S. 157, 166 (1986).

[82] Hoffa v. United States, 385 U.S. 293 (1966); *see also* Illinois v. Perkins, 110 S. Ct. 2394, 2399 (1990) ("We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response").

inquiries with police or prosecutors[83] or when the suspect feels substantial governmental pressure to cooperate.[84]

As a general rule, however, courts do not require medical professionals to give *Miranda* warnings before questioning suspects *solely* for purposes of diagnosis or treatment.[85] Indeed, under these circumstances, some courts will decline to apply *Miranda* to exclude the defendant's incriminating statements even if the health care worker questioned the suspect in the presence of law enforcement personnel.[86]

One court, however, expressly recognized the dual roles of social services personnel who must act as criminal investigators as well as health care providers. In *Cates v. Texas*[87] the Texas Court of Criminal Appeals equated a social worker's inquiry to a criminal investigation and ruled that the social worker officially operated to help police. The court held that *Miranda* required the social worker to advise the defendant of his rights before questioning him. The court distinguished its earlier decision in *Paez v. State*,[88] noting that the social worker in *Paez* had not acted as an agent for the police and had not been conducting a child abuse investigation when she had questioned the defendant.[89]

The social workers in *Cates* and *Paez*, much like Army family advocacy personnel, functioned as agents of law enforcement. They were responsible for pursuing child abuse allegations, for discovering child abuse and reporting it to the police, and for providing police with documentation to justify arrests of child abusers. The state paid the social workers for the express purposes of discovering and investigating allegations of child abuse, requiring them to disclose their findings to aid in the prosecution of the child abuse offender.[90] Defense counsel, consequently, should argue that civilian social workers *and* family advocacy personnel should provide *Miranda* warnings when acting in their investigative roles.

Sixth Amendment Right to Counsel

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."[91] The military codified this right to counsel by requiring persons *acting in a law enforcement capacity* to advise an accused of his or her right to counsel before conducting interrogation "subsequent to the preferral of charges or the imposition of pretrial restraint under R.C.M. 304."[92]

Normally, the military's counsel warnings requirement will not present a problem to health care professionals. The accused's right to counsel does not attach until the initiation of judicial proceedings—which the military interprets to occur upon preferral of charges.[93] The military, moreover, will detail a defense counsel to assist

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[83] *See, e.g.*, Estelle v. Smith, 451 U.S. 454 (1981) (holding court appointed psychiatrist examining the defendant to determine competency to stand trial must provide *Miranda* warnings before questioning the defendant concerning specifics of offense). "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him ...." *Id.* at 468; *see also* Mathis v. United States, 391 U.S. 1 (1968) (apparently rejecting the notion that *Miranda* applies only to criminal investigators or law enforcers). In *Mathis* the Supreme Court acknowledged that a tax investigation differs from criminal investigation because it may be initiated for civil purposes as well as for criminal prosecution. The court concluded, however, that this distinction did not control because a strong possibility existed that the Government ultimately would use any information collected in a tax investigation to prosecute the subject of the investigation. *See Mathis*, 391 U.S. at 4.

[84] United States v. Deaton, 468 F.2d 541 (5th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973); Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982) (holding routine interviews by parole officers governed by *Miranda* because convict felt heavy psychological pressure to cooperate with individuals who could recommend imprisonment).

[85] *See* United States v. Romero, 897 F.2d 47 (2d Cir. 1990) (accused's admissions made while in a hospital emergency room to a nurse involved in the routine performance of medical duties without any indication of police influence are not subject to *Miranda* warnings); *see also* United States v. Webb, 755 F.2d 382, 391-92 (5th Cir. 1985) (Army psychiatrist); People v. Hagen, 269 Cal. App. 2d 175, 74 Cal. Rptr. 675 (1969) (doctor); State v. Jones, 386 So. 2d 1363 (La. 1980) (psychiatrist); Commonwealth v. Allen, 395 Mass. 448, 480 N.E.2d 630 (1985) (nurse); State v. Hall, 183 Mont. 511, 600 P.2d 1180 (1979) (neurologist, social worker, pediatrician, orthopedist).

[86] *See, e.g.*, United States v. Borchardt, 809 F.2d 1115 (5th Cir. 1987) (incriminating statements to attending nurse overheard by prison official did not require *Miranda* warnings or suppression because the nurse's *sole* purpose was to confirm her diagnosis so she could treat suspect appropriately). *But see* State v. Ybarra, No. 18,506, 48 Cr. L. Rep. 1221 (N.M. Sup. Ct., Nov. 28, 1990) (despite absence of collusion between police officer and nurse, atmosphere of compulsion demanded *Miranda* warnings).

[87] 776 S.W.2d 170 (Tex. Crim. App. 1989).

[88] 681 S.W.2d 34 (Tex. Crim. App. 1984).

[89] *Cates*, 776 S.W.2d at 172-73. The court stressed that in *Paez* the defendant was the social worker's client, and that the social worker questioned defendant, who had just been admitted to hospital, out of concern for the welfare of defendant's family. *See id.* at 172.

[90] *See id.* at 173.

[91] U.S. Const. amend. VI.

[92] Mil. R. Evid. 305(d)(1)(B).

[93] Brewer v. Williams, 430 U.S. 387 (1977). "Whatever else it may mean, the right to counsel granted by the Sixth ... Amendment means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id.* at 398 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1971)); *see also* Illinois v. Perkins, 110 S. Ct. 2394 (1990) (sixth amendment right to counsel not implicated when suspect made incriminating statements to undercover government agents posing as his cellmate *before* the Government filed charges).

each accused upon preferral of charges. A competent defense counsel will not knowingly allow an accused to discuss incriminatory matter in his or her absence. Finally, as with article 31(b) and *Miranda* warnings, the application of the sixth amendment right to counsel warning turns on whether the health care professional is acting as an agent for law enforcement. If the health care worker is not a law enforcement agent, the worker's inquiry is not state action and the sixth amendment does not apply.

Nevertheless, health care workers—particularly family advocacy personnel—often act in an investigative role. Defense counsel profitably may attempt to equate their inquiries to the operations of undercover agents or informants.

Once a defendant's sixth amendment right to counsel attaches, government agents deny the defendant that right if they "deliberately elicit" incriminating statements in the absence of the defendant's attorney.[94] The government may not use an undercover agent to circumvent the sixth amendment right to counsel once criminal proceedings begin. Nor may it circumvent this rule by using an informant. In *United States v. Henry*,[95] the police told an informant to listen for statements made by federal prisoners. They expressly warned him not to initiate conversations with the prisoners or question them in any way. Even so, the Supreme Court found the informant deliberately elicited incriminatory responses in violation of the right to counsel. The Court reasoned that although the informant acted under instructions as a paid agent of the government, the defendant perceived him to be no more than a fellow inmate. The Court found, moreover, that the informant did not listen passively, but used his position of trust and confidence to stimulate conversation and get incriminatory responses.[96] Similarly, a court might find that a health care professional gathering information for law enforcement purposes abused his or her position of trust to obtain an incriminatory response. Defense counsel, therefore, should scrutinize the conduct of medical personnel who—despite their apparent sympathies for the accused—actually intended to share the results of their inquiries with the government.

A sixth amendment violation also might arise if the defense counsel sends the accused to a psychiatrist or family advocacy representative to establish a defense or to gain extenuation or mitigation evidence. The psychiatrist or family advocacy representative could violate the accused's right to counsel if he or she questions the accused after the preferral of charges—even if the accused initiates the discussion.[97] The doctrine of waiver would permit the Government to offer the accused's admissions only if the accused knowingly, intelligently, and voluntarily waived his or her right to the presence of an attorney during questioning.[98] The accused arguably would not make a knowing waiver unless he or she realized that the psychiatrist or family advocacy representative was a potential agent of law enforcement.

The same requirement for knowing waiver would apply if a psychiatrist or family advocacy representative initiates the discussion after attachment of the right to counsel.[99] If government agents initiate the discussion after the accused expressly requested counsel, however, *any* purported waiver of the accused's right to counsel is per se invalid.[100] The government likewise violates the accused's right to counsel if, after preferral, the convening authority orders the accused to undergo psychiatric examination or to submit to interviews with family advocacy without permitting the accused's attorney to attend.[101]

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[94] Massiah v. United States, 377 U.S. 201 (1964) (federal agents listened to incriminating statements made by the accused to codefendant who was wired and acting as an agent of the government).

[95] 447 U.S. 264 (1980).

[96] *Id.* at 269; *cf.* Kuhlman v. Wilson, 477 U.S. 436 (1986) (placing in close proximity to the defendant a jailhouse informant who merely listens and makes absolutely no effort to stimulate conversation with the defendant does not violate the defendant's right to counsel). "[T]he defendant must demonstrate that the police and their informant took some action, beyond merely listening to elicit incriminating remarks." *Kuhlman*, 477 U.S. at 459.

[97] *See* Maine v. Moulton, 474 U.S. 159 (1985) (wired codefendant acting as an informant discussed crimes with the accused in violation of his sixth amendment right to counsel). The Court dismissed as irrelevant the State's contentions that the *defendant* had initiated the conversation and that the police had wired the codefendant to investigate offenses other than those with which defendant had been charged. It emphasized that "the Sixth Amendment is violated [whenever] the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.* at 176.

[98] Michigan v. Harvey, 110 S. Ct. 1176, 1181-82 (1990); *accord* Patterson v. Illinois, 487 U.S. 285, 292 (1988) (defendant whose sixth amendment right to counsel has attached by virtue of indictment may execute a knowing, intelligent, and voluntary waiver of that right in the course of police initiated interrogation).

[99] *Harvey*, 110 S. Ct. at 1179; *Patterson*, 487 U.S. at 291.

[100] Michigan v. Jackson, 475 U.S. 625, 636 (1986) (holding defendant's waiver per se invalid when police initiated an interrogation after defendant asserted sixth amendment right to counsel). The Court further held that when a defendant asserts his or her right to counsel after arraignment or similar proceedings, the knowledge of one government agent will be imputed to all—that is, one set of investigators may not claim ignorance of request for counsel made to another set of investigators. *Id.* at 634.

[101] *See, e.g.*, Estelle v. Smith, 451 U.S. 454 (1981) (Government violated accused's sixth amendment right to counsel when it ordered the accused questioned during court ordered psychiatric examination conducted after indictment without his lawyer present).

The Case of *United States v. Moreno*

In *United States v. Moreno*[102] the Army Court of Military Review addressed the rights warnings required by article 31(b),[103] *Miranda*,[104] and the sixth amendment[105] with respect to a civilian social worker operating on the installation under a memorandum of agreement. The social worker questioned the accused, eliciting an incriminating response, without first warning him of his rights under any of these authorities.

Article 31

The court held that article 31(b) did not require a civilian investigator for the Texas Department of Human Services to issue a rights warning statement before questioning the accused. Applying the *Penn* analysis,[106] the court found that the civilian investigation had not merged with the military investigation and the civilian investigator, therefore, had not acted as an instrument of the military[107]—even though the civilian investigator had acted under a memorandum of agreement between the state and the local command authorities. The court noted that the investigator had a duty independent of the MOA to interview the accused and investigate child abuse cases on the installation from the social services standpoint. It added that the investigator did not discuss the case with the criminal investigators or the prosecutor before conducting the interview, that the government already had closed the criminal investigation and that charges already had been preferred before the interview took place.

Applying Miranda

The court held that the investigator did not have to give *Miranda* warnings because she was not a law enforcement agent.[108] To support this finding, the court cited *Paez v. State*,[109] which the court interpreted as persuasive authority that an investigator for the Texas Department of Human Services is not a law enforcement agent.[110] The court also held that *Miranda* did not apply because the investigator's interview of the accused was not custodial. The court had a much firmer basis for this conclusion. The investigator and the accused met off-post at the request of the accused. No one escorted the accused to the meeting, nor did anyone place him in custody during the meeting. After the meeting, the accused was free to go and left for a destination of his choice.[111]

Sixth Amendment

The Court of Military Appeals granted the accused's petition to decide whether the Army court correctly decided the article 31(b) and *Miranda* issues discussed above and to determine whether the social worker took the accused's confession in violation of his sixth amendment right to counsel.[112] The Court of Military Appeals set aside the Army court's decision and directed a *DuBay* hearing[113] to "determine the extent of [the] attorney-client relationship and whether appellant properly waived his sixth amendment right to counsel prior to this interview."[114] The court did not reach the issue of whether the investigator violated the accused's rights under article 31(b) or *Miranda*. To date, the Army court's reasoning on these issues effectively remains unchallenged.

After conducting the *DuBay* hearing, the military judge ruled that the accused had established a full attorney-client relationship with two trial defense attorneys before his interview with the social worker and had not made a proper waiver of his sixth amendment rights

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[102] 25 M.J. 523 (A.C.M.R. 1987), *rev'd and remanded*, 28 M.J. 152 (C.M.A. 1989), *on remand*, 31 M.J. 935 (A.C.M.R. 1990).

[103] *Moreno*, 25 M.J. 523 (A.C.M.R. 1987).

[104] *Id.*

[105] United States v. Moreno, 31 M.J. 935 (A.C.M.R. 1990).

[106] *Penn*, 39 C.M.R. 194; *see also supra* note 16 and accompanying text.

[107] *Moreno*, 25 M.J. at 525. The court's decision ignored several facts that appear to cloud the issue. First, the investigator videotaped the interview of the victim at the request of military criminal investigators. Second, she had a duty under state law to report incidents of child abuse to law enforcement officials. Finally, the investigator had the installation social services schedule the appointment with the accused. The court mentioned the videotaping and the social worker's coordination with the installation in passing, but did not include these facts in its analysis. *See id.* at 524.

The state investigator clearly acted as an agent for the installation social services despite her independent duty under state law. Arguably, if the installation social service and family advocacy personnel are arms of law enforcement, civilian agents working with social services under an MOA are law enforcement personnel as well.

[108] *Id.* at 525-26.

[109] 681 S.W.2d 34 (Tex. Cr. App. 1984).

[110] *Moreno*, 25 M.J. at 526. The court's reliance on *Paez* appears tenuous in light of the Texas court's later decision in *Cates v. Texas*. *See Cates*, 776 S.W. 2d at 172-72. *See generally supra* notes 87-89 and accompanying text.

[111] *Moreno*, 25 M.J. at 525-26.

[112] United States v. Moreno, 26 M.J. 207 (C.M.A. 1988).

[113] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967) (factfinding hearing).

[114] United States v. Moreno, 28 M.J. 152 (C.M.A. 1989).

before or after this interview. Eventually, the case returned to the Army Court of Military Review. The Army court ruled that the investigator owed no duty to warn appellant of his counsel rights. The court distinguished *Maine v. Moulton*,[115] *United States v. Henry*,[116] and *Kuhlman v. Wilson*,[117] stating that the investigator was not acting as a police agent when she took the accused's statement.[118]

The Army court's second *Moreno* decision raises several questions. The summary disposition of the Court of Military Appeals apparently determined that the human services investigator was acting as a law enforcement agent. The court remanded the case solely to permit a military judge to determine the extent of any attorney-client relationship and whether the accused waived his right to counsel before questioning. These questions would require resolution only if the social worker were an agent of law enforcement. In reaching its decision, the Army Court of Military Review disregarded both the questions and their implications. Further, the appeals court's implicit ruling that the investigator was a law enforcement agent casts doubt on the Army court's resolution of the article 31(b) and *Miranda* issues.[119] The Court of Military Appeals undoubtedly will address these issues as *Moreno* passes once more through the appellate process.

Conclusion

Military and civilian health care professionals who work at military health care centers normally need not provide article 31(b) warnings. Questions posed solely to obtain information upon which to base diagnosis or treatment are not within the reach of article 31(b). Questions beyond those necessary to make a diagnosis or prescribe treatment, however, may require warnings. Questions by personnel who have the dual responsibility of investigating reports of abuse and treating its effects also may require warnings—particularly if the questioner is a family advocacy representative and is compelled by regulation to assume the investigative role of a law enforcement agent. Civilian social workers operating on the installation under a memorandum of agreement likewise may be agents and subject to article 31(b).

Civilian health care professionals acting in a secondary role as government law enforcement agents must obey constitutional criminal rights warnings requirements even if article 31(b) does not apply. *Miranda* thus may require warnings whenever a health care professional conducts a custodial interrogation. The sixth amendment right to counsel warnings also turns on whether the health care professional is participating actively in the law enforcement process. When a health care worker takes part in the collection or preservation of criminal evidence, he or she should take care to provide each accused with a counsel warning before an inquiry. Defense counsel, moreover, should examine rights warnings issues whenever state law or military regulation impose on a health care professional the dual responsibilities of health care provider and law enforcement investigator.

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[115] *Moreno*, 31 M.J. at 937-38 (citing *Moulton*, 474 U.S. at 176-77); *see also supra* note 97 and accompanying text.

[116] *Moreno*, 31 M.J. at 938 (citing *Henry*, 447 U.S. at 269); *see also supra* note 95 and accompanying text.

[117] *Moreno*, 31 M.J. at 938 (citing *Kuhlman*, 477 U.S. at 460); *see also supra* note 96.

[118] *Moreno*, 31 M.J. at 937-38. In addition to the findings of fact the court originally had used to hold the investigator was not a law enforcement agent for article 31(b) purposes, the court relied on the following: The investigator had an independent duty to interview; she was acting on her own and not at the request of military law enforcement or the prosecutor; she advised the defense counsel of the interview; the defense counsel said he would tell the accused to keep the appointment; neither CID nor the prosecution knew of the interview in advance; she told the accused that she was subject to subpoena; she objected to providing the information; the prosecutors discovered the statements through the accused's wife not the investigator; at the time of the interview the state did not consider a human services investigator to be a law enforcement agent, nor did she consider herself a law enforcement agent. *Id.* at 938. The court dismissed *Cates* as a mere example of how the Texas courts examine the role of DHS agents on a case-by-case basis. *Id.* at 939.

[119] *See id.* at 940 (Varo, J., dissenting).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

No Harm—No Foul: Absent Actual Injury, Army Court Finds No Criminal Offense in Child Neglect

The Army Court of Military Review recently examined a parent's obligation to provide care for his or her child. In *United States v. Wallace*[1] the court, acting at the direction of The Judge Advocate General,[2] considered whether a soldier's failure to provide appropriate care for his children constituted an offense under Uniform Code of Military Justice (UCMJ), article 134. The Army Court's

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[1] 33 M.J. 561 (A.C.M.R. 1991).

[2] The Judge Advocate General directed the court to consider this issue pursuant to his authority under article 69 of the Uniform Code of Military Justice (UCMJ). *See* Uniform Code of Military Justice art. 69(b), 10 U.S.C. § 869(b)(1988) [hereinafter UCMJ].

thought-provoking decision may cause parents of young children—especially in families in which both spouses work—to review the adequacy of the care they provide to their children. The decision also marks the first time that the Army court has ruled whether child neglect may be charged as a criminal offense when the parent's neglect does not result in harm to the child.[3]

In *Wallace* both the accused and his wife were soldiers. While she was away on temporary duty, the accused was responsible for the care of his three children—aged seven, six, and one. One night, Wallace entertained friends at his quarters. After they left, he realized that he needed money. He therefore decided to go to an automatic teller machine to withdraw cash. He left his oldest child in charge and warned all of the children not to answer the telephone.[4]

The accused's search for money proved futile. He eventually stopped at a barracks, where he met a friend who needed a ride to the airport. The accused agreed to drive the friend to the airport; when they arrived there, they enjoyed several beers before the accused left. Finally, after leaving his children alone for over four hours, the accused returned home at 2:30 in the morning.

In the meantime, the accused's wife discovered his frolic when she called home and found the children unattended. With the help of her unit, she sent a neighbor—an experienced child abuse counselor—to the house. The neighbor eventually persuaded the children to let her in and stayed with them until the accused returned. She later testified at the accused's court-martial that she had found the children in good health and that the accused's quarters showed no signs of neglect.[5]

The UCMJ defines some offenses in terms of negligence, rather than intent.[6] To establish negligence as an element of an offense, the Government normally must prove a higher degree of negligence than would be necessary to establish liability in a civil suit.[7] Prosecution for crimes of negligence has a long history in military jurisprudence.[8] The *Wallace* court, however, found a paucity of decisions dealing with the issue of child neglect as a crime. The court noted that in an unreported case, *United States v. Foreman*,[9] the Air Force Court of Military Review had concluded rather summarily that child neglect was cognizable as an offense under the service discrediting prong of article 134.[10] The accused in *Foreman* had ingested cocaine while pregnant, had kept her quarters in a filthy condition after her child's birth, and had failed to provide the baby with adequate hygienic care. The Army court, wary of the consequences of creating precedent by affirming this type of prosecution, refused to follow *Foreman*, stating, "[t]he few cases [addressing this issue] indicate the potential dark morass in which courts may fall should child neglect be recognized as an offense under Article 134."[11] The court, moreover, placed particular emphasis on the lack of harm to the accused's children, remarking on the neighbor's testimony that the children not only had suffered no physical injury from the incident, but also showed no symptoms of psychological trauma.[12] The Army court opined that, absent discernable injury to the children, the article 134 child neglect charge must fail because of constitutional due process defect—that is, because the accused was not on notice that his conduct was a criminal offense.[13] It added that if an accused's conduct had resulted in harm to children, other existing provisions of the UCMJ could have provided the proper charge. The court also suggested that if the Department of the Army were to draft an adequate punitive regulation, the Government could prosecute child neglect, in the absence of injury, under article 92.[14]

Trial defense counsel should recognize that *Wallace* provides them with enough legal ammunition to gun down many article 134 child neglect specifications. The decision winnows considerably the options trial counsel may consider when determining what offenses it should charge—indeed, *Wallace* implies that, at present, trial counsel should consider seeking an administrative, rather than a criminal, resolution to many neglect cases.[15] If an

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[3] *See Wallace*, 33 M.J. at 562.

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, UCMJ arts. 87 (missing movement through neglect); 92 (negligent dereliction of duty); 108 (through neglect, damaging military property of the United States); 110 (hazarding a vessel); 111 (reckless driving); 119 (involuntary manslaughter); 134 (negligent homicide).

[7] *See generally*, 21 Am. Jur. 2d, *Criminal Law* § 132 (1981).

[8] *See, e.g.*, Yamashita, 327 U.S. 1, (1946); United States v. Henderson, 23 M.J. 77 (C.M.A. 1986); United States v. Alexander, 18 M.J. 84 (C.M.A. 1984); United States v. Klatil, 28 C.M.R. 582 (A.B.R. 1959); United States v. Bull, 9 C.M.R. 520 (A.B.R. 1953).

[9] CM 28008 (A.F.C.M.R. 25 May 1990) (unpub.).

[10] *Wallace*, 33 M.J. at 56 (citing *Foreman*, CM 28008 (A.F.C.M.R. 25 May 1990)).

[11] *Id.*

[12] *Id.* at 562.

[13] *Id.* at 564.

[14] *Id.*

[15] *Id.* at 564 n.2. *See generally* Army Reg. 608-18, The Army Family Advocacy Program, para. 2-4(o) (18 Sept. 1987) (suggesting that a substantiated child neglect case in which the soldier-parent shows no progress in treatment following discovery or self-referral may form the basis for a bar to reenlistment).

accused's children are unharmed, the trial defense counsel should attack any child neglect specification in which the Government uses article 134 as the vehicle to charge his or her client. Major Kelleher.

Few Reversible Errors Found

What are the odds of "winning" an appeal of a court-martial conviction? Do those odds vary depending on the offenses charged? Are civilian appellate courts more likely to grant relief than military ones? The answers probably will not surprise many defense attorneys, but could be unsettling for their clients.

Overall, the Army Court of Military Review (ACMR) affirmed 92.6% of all Army court-martial sentences eligible for appellate review during calendar year 1990. In comparison, "Understanding Reversible Error in Criminal Appeals," published by the National Center for State Courts in Williamsburg, Virginia,[16] reveals that, in civilian courts, about eighty percent of all criminal convictions are affirmed.

State by state, the results of the National Center study were generally consistent. Approximately seven percent of all civilian criminal appeals resulted in a new sentence hearing or in a modification of the adjudged sentence. Another 4.8% resulted in "other" relief, such as reversal of one of several convictions. State appellate courts granted new trials in 6.6% of cases, and fully acquitted the appellant about two percent of the time. The study used data from four intermediate state courts and one court of last resort in a state without an intermediate court (Rhode Island).

A breakdown of 1990 ACMR decisions revealed that the Army court affirmed the sentences—after affirming or modifying the findings—of 1722 out of 1859 cases on mandatory appeal. In 111 cases the court modified both the findings and sentences. In twelve cases the court ordered rehearing on the sentences and in eleven cases, the court set aside the findings and sentences and dismissed the charges against the appellants. In one case, the ACMR set aside the findings and ordered a new trial; in another, it directed the convening authority to undertake new review and action on both the findings and the sentence. Finally, in one case, the Army court abated proceedings because the appellant died.

The "success rate" on appeal varied somewhat, depending on the type of offense charged. Out of a total of twenty-six appeals involving homicide convictions in calendar year 1990—including convictions for murder, voluntary manslaughter and involuntary manslaughter—the Army court affirmed the findings and sentences of twenty-two. In the remaining four cases, the court affirmed the findings, but modified the appellants' sentences. If a sentence modification equates to appellate "relief," a soldier convicted of homicide had a 15.4% chance of achieving some measure of success on appeal.

The odds were not nearly so favorable for soldiers convicted of a charge involving theft: less than five percent received any form of relief from the ACMR. The ACMR affirmed sentences stemming from larceny or robbery convictions in 594 out of 624 appeals. In twenty-six decisions, the court modified the findings and sentences; in three more, it set some findings aside and sent the cases back for sentence rehearings. Finally, in one case, the court abated the findings and sentence because the appellant died.[17]

Soldiers charged with the use or distribution of drugs fared somewhat better, receiving relief about eight percent of the time. In 551 of 598 appeals from drug-related convictions, the ACMR affirmed or modified the findings and affirmed the sentences imposed at courts-martial. In forty appeals, the Army court modified the appellants' sentences, and in six more, it set aside the findings and sent the cases back for full rehearings. In one case, the court set aside the findings of guilty and the sentence and dismissed the charges.

The ACMR granted relief in eleven percent of all appeals in which the appellant was convicted for an act or acts of sexual assault upon an adult. In 145 court-martial convictions of this type, the court affirmed or modified the findings and affirmed the sentences. In sixteen cases, the ACMR either modified the sentences or sent the cases back for sentence rehearings. When the victims were under the age of sixteen, however, the appellants' chances of prevailing on appeals were less than three percent—the Army court upheld the trial courts' findings and sentences in thirty-nine of forty appeals.

Interestingly, an informal review of issues raised by Defense Appellate Division attorneys during 1990 revealed that the most common challenge to the court-martial process on appeal was the claim that the accused's plea of guilty had been improvident. Other oft-recurring issues were insufficiency of the evidence and ineffective assistance of counsel.

As discouraging as the ACMR's affirmation rate may be to an appellant, defense appellate clients may find the Court of Military Appeals (CMA) statistics even more disheartening. Of 970 petitions for review from the ACMR—excluding writs—in 1990[18], the CMA granted

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[16] Chapper & Hanson, Understanding Reversible Error in Criminal Appeals (1990).

[17] This decision does not figure in this note's percentage calculations.

[18] As of this writing, 24 calendar year 1990 cases await resolution by the CMA.

but eighty-two. Furthermore, of the eighty-two appeals that the CMA considered, it reversed, modified, or remanded only nine decisions of the Army court. Although this indicates that eleven percent of all granted petitions resulted in some measure of relief for the client, the nine cases culminating in "successful" appeals constituted less than one percent of all appeals to the CMA during 1990. Ms. Kinane, Legal Intern.

Consensual Heterosexual Sodomy: A Constitutionally Protected Zone of Privacy?

The Air Force Court of Military Review recently recognized a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults.[19] In the instant case, the accused was an eighteen-year-old airman who pleaded guilty at trial and admitted to engaging in oral sex—both cunnilingus and fellatio—with his sixteen-year-old girlfriend on numerous occasions.[20] On appeal, the court considered whether the government could charge a soldier with a violation of article 125 for committing a private, consensual, heterosexual, adult act of oral sodomy.[21]

The Constitution of the United States does not address the right to privacy expressly. Nevertheless, the Supreme Court over the years has recognized a constitutional "zone of privacy" to protect certain personal rights. As the Air Force court stated, "[a]lthough the Constitution does not mention any specific 'right to privacy,' it was noted long ago that the framers of the Constitution 'sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.*'"[22] Further, over the past twenty-five years, the Supreme Court not only has upheld these privacy rights—it has expanded them. In 1965, the Court in *Griswold v. Connecticut* held that a state had no right to regulate the distribution of contraceptives to married couples. The Court found a "zone of privacy" was implicitly included among the enumerated rights in the Constitution.[23] In 1972, the Supreme Court extended this same right to unmarried persons in *Eisenstadt v. Baird*.[24] In *Eisenstadt* the Court found that the right to privacy was the right of the *individual* to be free from governmental intrusion.

Of course, this right to privacy is not absolute—courts have not extended it to protect all consensual sex acts. The Supreme Court, for instance, has ruled expressly that homosexual sodomy is not a protected privacy right. In *Bowers v. Hardwick*,[25] the Court upheld a statute—similar to article 125—that prohibited all acts of sodomy. The Court very carefully limited its opinion to address only homosexual sodomy, however, clearly stating it intended to express "no opinion on the constitutionality of the ... statute as applied to other acts of sodomy."[26]

Bowers is as close as a majority opinion of the Supreme Court has come to addressing the mechanics of heterosexual copulation. Justice Stevens, however, stated in his dissent in *Bowers* that a state clearly "may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' ... or, indeed, between unmarried heterosexual adults."[27]

Even before the Air Force court's decision in *Fagg*, military courts recognized a right to privacy applying to members of the military. The military acknowledges that the wholly private moral conduct of an individual cannot be regulated.[28] Nevertheless, the Government has prosecuted individuals in the past under article 125 for acts that normally would be considered protected by an individual's right to privacy. In reaching its decision in *Fagg*, the Air Force court apparently has added an additional element that the Government must establish before the court will sustain a conviction under article 125 for the commission of these protected acts—that is, the Government now must show a compelling government interest that justifies prosecution.[29] Reviewing the appellant's conduct in *Fagg*, the Air Force court found no compelling government interest.

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[19] United States v. Fagg, CM 29129 (A.F.C.M.R. 6 Aug. 1991).

[20] *Id.* slip op. at 2.

[21] UCMJ art. 125.

[22] *Fagg*, slip op. at 2 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[23] 381 U.S. 479, 484-85 (1965).

[24] 405 U.S. 438 (1972).

[25] 478 U.S. 186 (1986).

[26] *Id.* at 188 n.2.

[27] *Id.* at 218 (Stevens, J., dissenting) (quoting *Griswold*, 381 U.S. at 485, and *Eisenstadt*, 405 U.S. at 453) (citations omitted)).

[28] *Fagg*, slip op. at 3 (quoting United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952)).

[29] *But see* United States v. Henderson, 32 M.J. 941, 946 (N.M.C.M.R. 1991) (expressly holding that no compelling government interest is required to sustain prosecutions under statutes whose purview implicates sexual freedom or affects adult sexual relations).

In *Fagg*, the appellant and his girlfriend engaged in acts of sodomy in a private home off of the military installation. These acts were entirely private and apparently presented no threat to public morality. The court specifically found that, "[i]n the many Article 125 prosecutions this Court has reviewed, none has resulted from a fact situation as *un*aggravated as the appellant's. Only had the appellant and his partner been married to each other would this case present less aggravation."[30] After examining all the circumstances surrounding appellant's actions, the Air Force court expressly concluded that the Government had no compelling interest to justify the intrusion into this relationship between the accused and his girlfriend.[31]

The court was careful to limit the scope of its opinion; it did not attempt to invalidate article 125 entirely. The court's decision, however, recognized that to convict an individual for a private, heterosexual, noncommercial, consensual adult sex act under article 125, an aggravating factor must exist which would support a compelling governmental interest.[32]

Fagg presents defense counsel with an excellent tool to use in situations in which an accused is charged with the offense of consensual sodomy. Although it is not binding authority in Army courts-martial, counsel can use this decision to try to force the Government to articulate to the military judge why an accused's act of sodomy was so aggravated that it should be regulated and not protected by a "zone of privacy." Captain Meier.

Limitations on Aggravation Evidence for Sentencing

One aspect of military justice that continues to become more specifically defined is the delineation of the types and forms of evidence that the Government may present in aggravation during the presentencing phase of a court-martial. Two recent decisions of the Army Court of Military Review further have defined the limitations on the Government's ability to present matters in aggravation pursuant to Rule for Courts-Martial 1001.[33]

In an unpublished opinion, *United States v. Young*,[34] the Army court held that the military judge improperly relaxed the rules of evidence when it permitted the Government to introduce a hearsay document over defense objection during the Government's case in aggravation. The Army court properly recognized that pursuant to R.C.M. 1001(c)(3), the military judge may, with respect to matters in *extenuation* or *mitigation*, relax the rules of evidence to admit letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability. The Army court further noted that if the military judge relaxed the rules of evidence during the defense's presentation of extenuation or mitigation evidence, the judge could relax them to the same degree during the Government's rebuttal and surrebuttal—but *not* during the Government's case in aggravation.

In *Young*, the defense counsel objected to the admission of a letter, signed by a staff clinician and a consulting psychologist, which stated that the victim of an indecent act by the accused suffered from trichotillocomania,[35] and that this condition was exacerbated—if not triggered—by the molestation. The Army court agreed that the letter was hearsay, ruling that although the military judge had relaxed the evidentiary rules to permit appellant to submit evidence, the Government improperly offered the letter, and the military judge improperly admitted it, *before* the defense case in extenuation and mitigation. The judge should have admitted the letter only as rebuttal evidence. The *Young* decision favors the defense by protecting the accused not only from improper evidence, but also from any unfavorable aggravation evidence that fails to meet the strict admissibility requirements under Rules for Courts-Martial (R.C.M.) 1001 and the Military Rules of Evidence.

In a second opinion, *United States v. Childress*,[36] the Army court examined the cumulative effect of a number of errors that occurred during the presentencing phase of a court-martial. In *Childress*, the accused entered mixed

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[30] *Id.*

[31] *Fagg*, slip op. at 4.

[32] The Air Force Court cited numerous decisions in which the Government clearly demonstrated a compelling interest in prosecution. *See, e.g.*, United States v. Scoby, 5 M.J. 160, 164 (C.M.A. 1978) (sexual acts were not private); United States v. Womack, 29 M.J. 88 (C.M.A. 1989) (sexual acts were nonconsensual); United States v. Romey, 32 M.J. 180 (C.M.A. 1991) (sexual acts involved a minor); United States v. Ciulla, 29 M.J. 868 (A.F.C.M.R. 1989) (sexual acts were incestuous); United States v. Wilson, 28 M.J. 48 (C.M.A. 1989) (Government established that a duty relationship existed between partners, implicating injury to military discipline).

[33] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001 [hereinafter R.C.M.].

[34] CM 9001489 (A.C.M.R. 2 July 1991) (unpub.).

[35] The victim's stepmother testified that he became extremely withdrawn and reclusive; he began performing poorly in school; and suffered from repeated headaches, nausea, and vomiting. The victim also pulled out his eyelashes and large patches of his hair—symptoms of the mental condition known as trichotillocomania.

[36] United States v. Childress, CM 9000178 (A.C.M.R. 31 July 1991).

pleas. The court members acquitted appellant of the charges and specifications to which he pleaded not guilty. The military judge then began the presentencing phase by revealing to the court members that they had not been informed about all of the prosecution case. The judge later instructed the members to ignore an improper prosecution reference to summarized records of proceedings under article 15, UCMJ. The members also heard a witness testify about a bar to reenlistment and saw the prosecution offer an unidentified document—a blank bar to reenlistment form—in spite of defense's vigorous objection that the Government was trying to admit a document that had not been filed in accordance with regulations. The military judge refused to admit the document, but failed to instruct the members to disregard the witness's testimony concerning the bar to reenlistment. The members therefore gained the impression that the accused had been barred from reenlisting and that they had not been allowed to see the document.[37]

The members also heard the accused's first sergeant testify improperly on direct examination that the accused had no rehabilitative potential in the Army and—in response to subsequent questions by the military judge—that the accused had no rehabilitation potential as a law-abiding citizen.[38] Finally, the court members heard the assistant trial counsel argue improperly about the impact of appellant's offenses upon German-American relations. Reviewing these facts, the Army court held that *Childress* fell under "the doctrine of cumulative error, under which a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate reversal."[39] Citing *United States v. Walters*,[40] it set aside the appellant's sentence.

Young and *Childress*, read in conjunction with other recent appellate decisions, provide trial defense counsel with an effective tool to limit the Government's ability and opportunity to present improper aggravation evidence. They also warn defense counsel to proceed with caution in offering evidence during extenuation and mitigation that can expose the accused to what may otherwise be inadmissible rebuttal evidence. Defense counsel must remain alert and vigorously protect their clients against the Government's use of improper aggravation evidence. Captain Moran.

Clerk of Court Note

The United States Army Court of Military Review

The Judge Advocate General established the United States Army Court of Military Review pursuant to article 66, UCMJ, enacted by Congress in 1950. The UCMJ is an exercise of the congressional power to regulate the land and naval forces and to create tribunals inferior to the Supreme Court, granted by article I, section 8, of the Constitution of the United States. Other article I courts include the United States Court of Military Appeals—which also was established pursuant to the UCMJ—and the Claims Court, the Tax Court, and the recently-formed Court of Veterans Appeals.

The 1950 Uniform Code of Military Justice, however, did not mark the beginning of appellate review of courts-martial in the United States Army. In November 1917, as a result of the so-called Houston Riot Court-Martial, the nation suddenly realized that at least in wartime a commander in the field could punish severely—or even execute—a soldier convicted by court-martial without any centralized review of the case in Washington. The Secretary of War decreed that sentences to death or dishonorable discharge could no longer be carried out until the record of trial had been reviewed by The Judge Advocate General. Soon thereafter, The Judge Advocate General established a Board of Review of senior officers to review cases in which courts-martial had imposed punishment of this type.

In 1920, when the Articles of War next were revised, article 50 1/2 was inserted to codify the requirement for a Board of Review (Board). The Board examined all cases requiring action by the President and all other cases involving a sentence to death, unsuspended dismissal or dishonorable discharge, or confinement in a penitentiary—a punishment available under the Articles of War when a court-martial convicted the accused of certain listed offenses and the sentence included confinement for more than one year. The Board's decision was not effective, however, unless The Judge Advocate General concurred. If The Judge Advocate General dissented, the matter went to the Secretary of War or the President for resolution. Moreover, except in cases requiring presidential action, neither the Board of Review nor The Judge Advocate General could weigh the evidence, judge the credibility of witnesses, or determine controverted

[37] The Army court could not determine whether the assistant trial counsel attempted to present fraudulent evidence, but found that the court members should have received limiting instructions from the military judge concerning the bar to reenlistment. *Id.*

[38] The military judge sustained the defense objection to the first sergeant's initial opinion concerning the accused's rehabilitative potential. The judge, however, neither instructed the court members to disregard that opinion nor explained to them why he excluded the first opinion regarding the accused's military rehabilitative potential, but allowed the second opinion regarding the accused's rehabilitative potential as a productive law-abiding citizen. *Id.*

[39] *Id.*, slip op. at 7.

[40] 16 C.M.R. 191, 209 (C.M.A. 1954).

questions of fact. Their reviews were limited to questions of law.

The short-lived 1948 Articles of War introduced both the term, "appellate review," and an additional tribunal named the Judicial Council. The council consisted of three general officers of the Judge Advocate General's Corps. The functions of the boards of review—several were authorized then—remained essentially the same. The new articles, however, required the board of review to send to the Judicial Council any cases in which: (1) the board found the record legally sufficient to support the findings and sentence, but deemed modification "necessary to the ends of justice;" (2) the Board found the record legally insufficient to support the findings and sentence, but The Judge Advocate General disagreed; or (3) the sentence imposed at court-martial extended to imprisonment for life, or dismissal of a commissioned officer or cadet, or required action by the President. If The Judge Advocate General did not agree with the decision of Judicial Council, the case advanced to the Secretary of the Army for decision.

The Uniform Code of Military Justice at first retained the name "Board of Review"—Congress later adopted the name "Court of Military Review" in the Military Justice Act of 1968—but effected three major changes to the existing law. First, the UCMJ empowered the boards to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

Second, UCMJ charged each board with "affirm[ing] only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." A court of military review today, consequently, may not affirm a finding of guilty unless it is convinced of guilt beyond a reasonable doubt, and may affirm only so much of a sentence as it finds appropriate as well as legal—and even then, may determine that, on the basis of the entire record, a particular finding of guilty or punishment should not be approved.

Finally, the UCMJ made the decisions of the Army boards of military review binding on The Judge Advocate General and, by implication, binding on the Secretary of the Army and the President as well.

The Military Justice Act of 1968 welded the services' various Boards of Review (the Army customarily had three to five boards) into a single appellate court for each service, redesignated them as courts of military review, provided each court with a chief judge—each appointed by the Judge Advocate General of his or her respective service—and enabled the court either to sit en banc or in panels, empowering the chief judge to designate the senior, or presiding, judge for each panel. Subsequent legislation further authorized each court to sit en banc to reconsider decisions of law by any of its panels.

Legislative history indicates that Congress viewed the courts of military review as intermediate appellate courts comparable to the United States courts of appeal for the several circuits. Given the more far-reaching powers of the courts of military review over cases within their jurisdictions, the selection of appellate military judges is—if anything—even more important than the selection of federal circuit judges. Indeed, Congress apparently believed that only the most senior and experienced judge advocates would be selected—perceiving this implicit requirement to be consistent with the courts' essential role in monitoring unexplained disparities in sentences.

The jurisdiction of the courts of military review since has grown beyond the mandatory review of cases in which the approved sentence extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more. The All Writs Act empowered each court of military review to issue extraordinary writs—such as habeas corpus, mandamus, and prohibition—in aid of its jurisdiction. The Military Justice Act of 1983 gave the courts additional power, permitting them to entertain interlocutory appeals by the Government from certain adverse trial rulings by the military judge. Most recently, Congress expanded the authority of The Judge Advocate General under UCMJ article 69(a) to refer to the Army Court of Military Review records of trial in court-martial cases undergoing examination. The Judge Advocate General now may direct the court to review not only general courts-martial, but also—if the accused expressly requests a review pursuant to article 69—special and summary courts-martial.

From the courts of military review, an appellant may make a discretionary appeal to the United States Court of Military Appeals and—if the case is reviewed by the Court of Military Appeals—a further discretionary appeal to the Supreme Court of the United States.

Critics have suggested that a court on which the judges have no tenure, such as for life or a term of years, is not a court at all. The absence of a statute or regulation protecting appellate military judges from arbitrary removal from office, however, does not mean that this protection does not exist. Custom and practice have isolated appellate military judges from the threat of peremptory removal. The Court of Military Appeals, moreover, has shown clearly its intolerance for interference in the judicial processes established by the Uniform Code of Military Justice. Finally, federal statutes prohibit members of a court of military review to prepare, review, or submit reports or documents used to determine the qualifications for promotions, assignments, or retention in the service of any other member of the court.

The Judge Advocate General recently approved specific selection criteria for Army appellate judges, delin-

eating grade, experience, and military education requirements. All appellate judges must be colonels, absent specific waiver by The Judge Advocate General. Each judge, moreover, should have two years of experience as a general court-martial trial judge, previous service as an appellate judge, two years experience as the staff judge advocate of an active general court-martial jurisdiction, or two years experience as a regional defense counsel. In addition to the experience described above, appellate judges also should have at least two years of military justice experience as a trial counsel, chief of military justice, criminal law instructor, or trial defense counsel. Appellate judges must be graduates of the Command and General Staff College or its equivalent.

The Personnel, Plans, and Training Office (PP&TO), Office of the Judge Advocate General, prepares a list of qualified officers, from which the chief judge nominates officers to fill vacancies arising on the court. Final selection authority rests with The Judge Advocate General. Judges of the Army Court of Military Review are bound by the American Bar Association *Model Code of Judicial Conduct* and the court's operations are guided by the *Standards Relating to Appellate Courts* adopted by the American Bar Association Commission on Standards of Judicial Administration.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

United States Supreme Court Creates New "Bright-Line" Rule for Searches of Containers in Vehicles

Although the courts traditionally favor probable cause and warrants in deciding fourth amendment questions, practitioners quickly learn that courts recognize three exceptions to the warrant requirement. First, no warrant is required for a probable cause search based on "exigent circumstances."[1] Second, no warrant is required for a search incident to an apprehension based on probable cause.[2] Third, no warrant is needed to search a vehicle when police have probable cause to believe that contraband or evidence of a crime are located in the vehicle.[3] The United States Supreme Court recently expanded this last exception in *California v. Acevedo*.[4]

Acevedo creates a new "bright-line" rule for the search of closed containers in vehicles. It provides that if the police have probable cause to believe that a closed container in a vehicle contains contraband or evidence of a crime, they may search that container without a warrant.

In *Acevedo*, Officer Coleman of the Santa Ana, California, Police Department learned that Federal Express was delivering a package containing marijuana to a man named Jamie Daza. Coleman went to the Federal Express office and waited to arrest any person who came to claim the package. A short time later, a man—subsequently identified as Jamie Daza—arrived at Federal Express. Officer Coleman watched him take the package, return to his car, and drive away. Coleman and his partners then followed Daza to his apartment.

Over the next few hours, the police officers saw Daza leave his apartment to "drop the box and paper that had contained the marijuana into a trash bin."[5] They also saw a man named St. George leave the apartment carrying a rucksack. The police stopped St. George as he was driving away, searched the rucksack, and found marijuana. Next, the police saw the defendant, Acevedo, enter Daza's apartment. Acevedo left after only ten minutes, "carrying a brown paper bag."[6] He put the bag into the trunk of a car, then got into the car and started to drive off. Afraid that Acevedo, like St. George, was taking marijuana from the apartment, the police stopped his car. Opening the trunk, they removed the paper bag and found that it contained a quantity of marijuana.

At trial, the defense moved to suppress the marijuana, contending that the search of the bag in the trunk had violated the Acevedo's fourth amendment rights. The trial court denied the motion. On appeal, the California appellate courts reversed Acevedo's conviction. Both the

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[1] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 315(g) [hereinafter Mil. R. Evid. 315(g)]; Warden v. Hayden, 387 U.S. 294 (1967) (police chased armed robber into house then searched house); United States v. Murray, 12 M.J. 139 (C.M.A. 1981) (commander and police entered accused's barracks room and searched it after controlled buy; held valid exigent search).

[2] *See* Mil. R. Evid. 314(g); Chimel v. California, 395 U.S. 752 (1969).

[3] Mil. R. Evid. 315(g); Chambers v. Maroney, 399 U.S. 42 (1970).

[4] 111 S. Ct. 1982 (1991).

[5] *Id.* at 1983.

[6] *Id.*

court of appeals and the California Supreme Court acknowledged that the police had had probable cause to search the paper bag, but both concluded that *United States v. Chadwick*[7] and *Arkansas v. Sanders*[8]—mandating suppression of the marijuana—controlled the facts in Acevedo's case, rather than *United States v. Ross*[9]—under which the marijuana could have been admitted.

In *Chadwick*, the police had probable cause to believe that a locked footlocker, weighing approximately 200 pounds, contained drugs. They followed the defendant in *Chadwick* as he carried this footlocker from a train to his car. When the defendant put the closed container in the trunk of his car, the police apprehended him, and searched the footlocker. The Supreme Court ruled that the seizure of the footlocker was illegal, because the police failed to obtain a warrant. The Court refused to apply the "automobile exception" because the government's probable cause to believe the footlocker contained contraband related only to the closed container, and not the vehicle. Two years later, in *Sanders*, the Court reaffirmed that when probable cause relates *solely* to a container located in a vehicle, the "automobile exception" to the warrant requirement does not apply.[10] In sum, the *Chadwick-Sanders* doctrine, followed by the California appellate courts, forbids warrantless searches of luggage and similar containers when the police have "probable cause to search only a container in the vehicle."[11]

On the other hand, in *Ross* the Supreme Court upheld the search of closed containers in a vehicle when police had probable cause to believe that evidence of a crime was contained in the vehicle *generally*. The Court permitted the warrantless search of closed containers in a car because the search of those containers was part of the general probable cause search for contraband.[12]

The issue in *Acevedo* was whether two rules should govern the search of closed containers in vehicles. Justice Blackmun, writing for the five to four majority, said they should not. He fashioned a bright-line rule to replace the rationale of *Chadwick-Sanders*. After *Acevedo*, if a suspect places a suitcase, locker, box, or other closed container in a vehicle, the need for a warrant simply disappears—a police officer who lawfully could not search the container an instant before it was deposited in the vehicle now may open it and seize its contents.

Justice Blackmun gave several reasons for adopting this new rule. First, he wrote that the police needed a clear rule to follow in conducting vehicle searches. The *Chadwick-Sanders* rule was confusing, and "impeded effective law enforcement."[13] Second, to require a warrant when probable cause relates only to a container in a car advanced no important constitutional interests. Justice Stevens noted that "[t]o the extent that the *Chadwick-Sanders* rule protects privacy, its protection [was] minimal."[14] Third, *Chadwick-Sanders* actually was of diminished importance in modern law enforcement operation because peace officers often could avoid its restrictions by conducting a search of a closed container incident to apprehension. For these reasons, the majority decided to do away with two separate rules governing the search of closed containers in vehicles.

The most interesting language in *Acevedo* appears in Justice Scalia's concurring opinion. He stated that he would reverse the appellate court decisions in *Acevedo*, not because of any need to accord all containers the same treatment under the "automobile exception, but because "the search of a closed container, *outside a privately owned building*, with probable cause to believe that the container contains contraband ... is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant."[15] Justice Scalia's comments reflect an emerging judicial trend to focus on the reasonableness clause in deciding fourth amendment questions.[16] Major Borch.

Charging Anabolic Steroid Offenses Under the Uniform Code of Military Justice and Title 21 of the United States Code

Abuse of anabolic steroids by soldiers involved in body building, weightlifting, and athletics is increasingly

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[7] 433 U.S. 1 (1977).

[8] 442 U.S. 753 (1979).

[9] 456 U.S. 798 (1982).

[10] *Sanders*, 442 U.S. at 754-56. In *Sanders*, the police saw the defendant put a suitcase known to contain marijuana in the trunk of a taxicab. After following the cab a short distance, the police stopped it, opened the trunk, and searched the suitcase. *Id.*

[11] 111 S. Ct. at 1984.

[12] *Ross*, 456 U.S. at 825.

[13] *Id.*

[14] *Id.*

[15] 111 S. Ct at 1994 (Scalia, J. concurring) (emphasis added).

[16] The Court of Military Appeals already has followed *Acevedo*. In *United States v. Schmitt*, 33 M.J. 24 (1991), Judge Cox wrote that "[t]he Supreme Court has made it quite clear that a warrantless search of an automobile which is founded upon probable cause will not violate the Fourth Amendment's prohibition against unreasonable searches and seizures." *Id.* at 25.

prevalent on some installations. Previously, anabolic steroids were not "controlled substances," so guidance for deciding how to charge a criminal offense was not clear-cut.

Congress, however, recently amended title 21, United States Code, section 812, to add anabolic steroids to Schedule III. Because anabolic steroids now appear on the schedule of controlled substances, trial counsel may charge soldiers under article 112a, Uniform Code of Military Justice (UCMJ), for their possession, use, or distribution. Similarly, special assistant United States attorneys (SAUSAs) prosecuting possession or distribution of steroids in United States District Court now should indict individuals suspected of use, possession, or distribution of steroids under sections 841 or 844 of title 21, United States Code.

A nonexclusive list of anabolic steroids (defined as "any drug or hormonal substance ... related to testosterone ... that *produces muscle growth*") appears at section 802, subsection 41 of title 21, United States Code. Both trial and defense counsel and SAUSAs should examine this list. Counsel also should note that the effective date of steroid scheduling under title 21 is ninety days after Congress enacted the 1990 amendments to title 21 on November 29, 1990. Major Borch.

Defense Counsel: Witness for the Prosecution—An Ethical Dilemma

Every prosecutor dreams of calling the accused's defense counsel to the witness stand to testify against his or her client. After all, who, other than the accused, is more likely to know the "inside scoop" about a case? As far-fetched as it may seem, this situation does happen. How can this be—and what should the defense counsel do if confronted with being called as a witness?

A recent case from the Air Force examines this unusual occurrence. In *United States v. Smith*,[17] the prosecution had charged the accused with the theft of some military property. The larceny charge arose from an inspection of the accused's room in which inspectors found several items of military property, which the accused—a military prisoner—should not have had in his possession.[18] In preparation of the defense case, the accused gave his defense counsel an official inventory form that reflected that the government had issued him the items that he was charged with stealing. The defense counsel showed a copy of the inventory form to the trial counsel, apparently in anticipation of having the charges dismissed. Subsequent investigation by the trial counsel, however, revealed that the inventory form was falsified. The convening authority consequently referred an additional charge of obstruction of justice against the accused based upon the falsified inventory.[19] The trial counsel then called the defense counsel as a witness on the additional charge. The defense counsel moved *in limine* to prevent the prosecution from calling her as a witness,[20] but the military judge denied her motion.

Why did the military judge so rule? Would not the substance of the testimony that the defense counsel would offer involve protected attorney-client communications? At first blush, one might think so, but an analysis of the applicable ethical and evidentiary rules shows otherwise.[21] The ethical rule of confidentiality is very broad in its coverage and protection: "A lawyer shall not reveal information relating to the representation of a client...."[22] The rule contains only four exceptions: (1) disclosures to which the client expressly has consented;[23] (2) implied disclosures necessary to carry out the representation;[24] (3) disclosures necessary to establish a claim or defense in a controversy with the client;[25] and (4) disclosures necessary to prevent the client from committing a crime likely to result in imminent death or substantial bodily harm or significantly impair national security.[26] Absent one of these four exceptions, the attorney must keep information relating to the client's representation confidential—no matter what its source.

The ethical rule, however, yields to the narrower evidentiary attorney-client privilege whenever "evidence is sought from the lawyer through the compulsion of law."[27] While the ethical rule prohibits disclosure of any

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[17] 33 M.J. 527 (A.F.C.M.R. 1991).

[18] *Id.* at 529-30.

[19] *Id.* at 530.

[20] *Id.*

[21] For a comparison and analysis of the ethical and evidentiary rules relating to confidential communications, see Holland, *Confidentiality: The Evidentiary Rule Versus the Ethical Rule*, The Army Lawyer, May 1990, at 17.

[22] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter Army Rule].

[23] Army Rule 1.6(a).

[24] *Id.*

[25] *Id.* 1.6(c).

[26] *Id.* 1.6(b).

[27] *Id.* 1.6 comment.

information relating to the representation, the evidentiary privilege essentially protects only communications between the client and the attorney. To come within the purview of the evidentiary privilege, a communication thus must fall within the definition of confidential communication.[28] "If there is a communication to the attorney, with the intention that the matter be passed on to others, privilege does not attach to the communication."[29] Nor does the evidentiary rule afford any privilege to communications that clearly contemplate "the future commission of a fraud or crime or [to communications arising when] ... the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."[30]

Examining these two attributes of the attorney-client privilege, the court in *Smith* found that the privilege did not apply to Smith's communications with his counsel concerning the falsified inventory. The court noted that Smith had intended to use the inventory form to exonerate himself from the crime by having his attorney disclose it to other parties. Accordingly, the court concluded that he had not intended his communication to the defense counsel to be confidential.[31] The court also refused to apply the evidentiary privilege "because Smith's production of the form and his explanation of its source to [his defense counsel] constituted Smith's use of his lawyer to "commit or plan to commit" what he "knew or reasonably should have known" was a crime or fraud."[32]

Because the communication between Smith and his counsel was neither confidential, nor covered by the evidentiary privilege, the defense counsel had no right to refuse to testify about the communications about the falsified inventory form. The defense counsel thus found herself in the awkward and conflicting position of potentially being both an advocate for, and a witness against, her client. The ethical rules state:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the nature and quality of legal services rendered in the case; or
>
> (3) disqualification would work a substantial hardship on the client.[33]

The defense counsel recognized her dilemma and, after the judge denied her motion *in limine*, she properly requested permission to withdraw from the case "because she did not believe she would be an effective counsel and also because of her ethical obligation to withdraw after she was identified as a witness against her client."[34] The military judge granted the request.

As the defense counsel, military judge, and appellate judges in *Smith* apparently recognized, a lawyer's professional conduct must co-exist with the lawyer's duty to the overall justice system. Being a zealous advocate for one's client does not necessarily require the lawyer to become the client's alter ego. Instead, counsel must operate within the law and the applicable ethical rules. Smith's defense counsel fulfilled her obligation to Smith not only when she sought to have the prosecution prohibited from calling her as a witness, but also when she withdrew after losing the motion *in limine*. The ethical rules "presuppose a larger legal context shaping the lawyer's role."[35] As *Smith* reflects, one larger legal context that counsel must remember is the attorney-client privilege. Our ethical rules "are not intended to govern or affect judicial application of either the lawyer-client or work product privilege."[36] Lieutenant Colonel Holland.

Legal Assistance Items

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

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[28] Mil. R. Evid. 502(b)(4).

[29] *Smith*, 33 M.J. at 531.

[30] Mil. R. Evid. 502(d)(1).

[31] *Smith*, 33 M.J. at 531.

[32] *Id.* at 532.

[33] Army Rule 3.7(a).

[34] *Smith*, 33 M.J. at 531; *see* Army Rules 1.16 and 3.7.

[35] Army Rules, preamble.

[36] *Id.*

Assisting Victims of "Fly-by-Night" Auto Leasing Agencies

Third-party automobile leasing appears to be a growth industry. Many leasing agencies now offer car purchasers who no longer can afford to make the payments on their cars an opportunity to avoid repossession by leasing the cars to third parties. The third party lessee then makes the payments on the vehicle through the agency, which in turn pays off the initial bank loan the lessor obtained to purchase the car.

At first glance, third party leasing appears to be a logical scheme, capable of pleasing everybody. The lessors escape debts they cannot afford, the lessees get the cars of their dreams, the banks get their money—at least in theory—and the leasing agencies get a percentage of every payment. Unfortunately, the security agreements or sales contracts, to which the original buyers of the vehicles are parties, generally prohibit the assignment or lease of the collateral. If a contract contains these restrictions, a lessor breaches his or her security agreement by leasing his or her car through the agency—and this breach may move the lender to assert its right to repossession. To repossess the car, however, the lender must seize it from the lessee—a party with clean hands.

Advising legal assistance clients who have stumbled into third-party leasing schemes can be difficult. The tendency of third-party leasing agencies to drop out of the picture when state authorities begin to scrutinize them only adds to the confusion. Legal assistance attorneys, however, can find ways to avoid or minimize the unpleasant results that the leasing schemes may have on their clients.

Representing the Borrower/Lessor

When a client consults a legal assistance attorney before entering into a third-party lease arrangement through a "fly-by-night" agency to avoid repossession, advising the client is simple. The attorney should warn the client that the arrangement probably would violate his or her contract, state law, or both, and that to commit to a lease agreement could expose the client to tremendous liability both to the lender and to the lessee.

The equation becomes more complicated, however, if the client already has leased to a third party through an agency. Under the Uniform Commercial Code (UCC) a secured party may recover possession of the vehicle after a breach of the security agreement.[37] The secured party then may dispose of the collateral by sale and sue the borrower for any deficiency.[38] Because the client is no longer the party in possession of the vehicle, the client's main concern usually is not the possibility of repossession, but rather the secured party's right to charge the client for payment.[39] Indeed, under provisions of the UCC, a secured party apparently may require the borrower in breach to pay off the entire amount of the debt regardless of the third-party arrangement.[40] Many automobile sales contracts and security agreements, moreover, contain similar provisions, explicitly empowering the secured party to accelerate the debt in the event of a breach by the borrower.

Probably the best solution for a client trapped as the lessor in the third-party leasing snare is to pursue another arrangement that will allow the client to discharge and satisfy the debt. A secured party normally cannot seize property or compel payment once the borrower has paid off the underlying debt.[41] If the client can refinance the loan—using some alternative collateral—then he or she could use the new loan to pay off the old and thus escape the civil consequences of an unlawful third party leasing arrangement. Another possible escape route for the client would be to negotiate a sales contract with the lessee. If the lessee is willing to accommodate the lessor and can obtain financing for the purchase, the lessee can pay off the lessor, permitting the lessor, in turn, to pay off the secured party.

Liability of the Agency

By orchestrating contracts that violate the secured interests of lenders, a third-party leasing agency may violate state laws—or at least commit civil infractions that render the contracts voidable. In Maryland, for instance, a leasing agency may be guilty of a deceptive trade practice for failing to divulge that a security agreement prohibits leasing the vehicle.[42] In cases involving deceptive trade practice, the Consumer Protection Division of the Maryland Attorney General's Office has authority to seek civil penalties of up to $1000 for a first offense and $5000 for

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[37] U.C.C. § 9-503 (1987).

[38] *Id.* § 9-504.

[39] *See id.* § 9-504.

[40] *Id.*

[41] *See, e.g.*, McCarthy v. Bank, 423 A.2d 1280, 1283 (Pa. Super. Ct. 1980).

[42] *See* Md. Com. Law Code Ann. § 13-301 (1975 & Supp.); *see also id.* § 14-2003 (prohibiting false or misleading statements by automobile lessors).

subsequent offenses.[43] Violators also may be subject to criminal penalties not exceeding a $1000 fine and confinement for one year.[44]

Other states expressly prohibit the specific practice of third-party leasing. In South Carolina, for instance, any person who induces third parties to enter subleases as sublessees is known as a sublease arranger. A new statute prohibits arranging a third-party lease, or sublease, without prior written authorization from the vehicle's secured party.[45] Violators of this statute may be fined as much as $5000 and imprisoned for as long as five years.[46] In Tennessee, state law now punishes as a felony any attempt to obtain a vehicle for the purpose of leasing it to a third party without first obtaining permission from the secured party. Moreover, any party that prevails in an action against a third-party leasing agency for violation of this law may recover treble damages plus attorney's fees.[47]

In addition to these statutory sanctions, traditional contract law renders the contract unenforceable against an innocent party if the leasing agency induced the transaction through fraud. Indeed, some courts have held even innocent misrepresentations may render a contract voidable.[48] Accordingly, if a third-party lessee wished to terminate the lease unilaterally, he or she normally could do so without fear of being held to the lease contract by the agency.

Representing the Third-Party Lessee

Legal assistance attorneys should consider some conditions "red flags" when a client seeks advice before leasing a vehicle. For instance, if a client is considering leasing a recent-model used vehicle, the attorney should advise the client to investigate the vehicle title to determine whether any person holds a lien on the car. The attorney, moreover, should ask the client if the dealer has made unlikely promises to the client because these promises could indicate a sham in progress. Finally, a good preventive law program can curb many potential problems by alerting soldiers to the existence of the "fly-by-night" agencies.

If the client already has entered a third-party lease, however, the legal assistance attorney's task becomes more complicated. The lending institution that perfected a secured interest in the property against the buyer may desire to exercise its right of repossession against the third-party lessee. The lender understandably fears that its secured interest in the property has been undermined—though this will not prevent bank officials from viewing the collateral as "theirs" because of the security interest the lender holds in it.

By travelling through a statutory maze, however, a third-party lessee may evade any interest the lender has in the vehicle. Under the UCC, a "buyer in the ordinary course of business ... takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."[49] The code defines "buyer in the ordinary course of business" as any person who "buys in ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind...."[50] A lessee who arranges a lease through third-party leasing agency arguably buys an interest in goods from a "person in the business of selling goods of that kind," because, by leasing the vehicle, the lessee bought a possessory right in the vehicle from an agency established for the purpose of selling rights in vehicles. This argument gains validity from a UCC provision that states that the code should "be liberally construed and applied to promote its underlying purposes and policies."[51] Thus, one could argue that because the UCC protects purchasers of title in the ordinary course of business, it should protect purchasers of other interests in property—that is, lessees—as well.

The UCC itself also protects buyers of goods for consumer purposes if they bought unaware of the secured interest;[52] whether the item was purchased from a person in the business of selling the item is immaterial. A buyer qualifies for this protection if he or she purchases the goods "for his [or her] own personal, family or household purposes."[53] Some states, however, may have weakened this consumer protection by adopting the UCC with local variations. In Maryland, for instance, the legislature provided that it would not extend this protection to purchasers of "high-dollar" items—expressly limiting the maximum amount of goods affected to $500.[54]

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[43] *Id.* § 13-410.

[44] *Id.* § 13-411.

[45] 1991 S.C. Acts 132.

[46] *Id.*

[47] *See* 1991 Tenn. Pub. Acts ch. 479.

[48] *E.g.*, Silberstein v. Massachusetts Mut. Life Ins. Co., 55 A.2d 334, 337 (Md. 1947).

[49] U.C.C. § 9-307(1) (1987).

[50] *Id.* § 9-307(9).

[51] *See id.* § 1-102(1).

[52] *See id.* § 9-307)(2).

[53] *Id.*

[54] *See* Md. Com. Law Code Ann. § 9-307(2) (1975 & Supp.).

If states adopt the 1987 amendments to the UCC, which include an article specifically governing leases, this issue may be settled. Under Uniform Commercial Code article 2A, a lessee takes his or her leasehold interest free of any security interest the lessor may previously have created in the goods even if the lessee knows of the security interest before signing the lease agreement.[55]

Nevertheless, under the UCC as presently adopted by most states, a third-party lessee's arguments against repossession remain tenuous. While a lessee may prevail, his or her arguments still are vulnerable to judicial interpretation. One court, at least, already has rejected a lessee's defense under the code.[56] Thus, a client's safest course of action is to settle the dispute by negotiating a buyout with the lessor.

If a buyout will not satisfy the lessee, the attorney should describe to the lessee the probable outcome of his or her case. If the lessee chooses not to buy the car, the lending institution may attempt to repossess it. The secured party need not even resort to judicial action to do so if it can repossess the vehicle "without breach of the peace."[57] After repossession, the secured party may sell the collateral and sue the borrower for the deficiency.[58] Because the bank can exercise self-help in repossessing the vehicle, it likely will conduct this sale with little if any notice to the lessor or lessee. If, however, the lessee learns of the sale, he or she either may buy the car from the secured party or may sue the secured party before the sale to assert his or her right to the vehicle. The latter course, obviously, is more time-consuming, and the lessee is, by no means, certain to recover the car.

Conclusion

The best way to handle the "fly-by-night" leasing problem is to avoid it altogether. Legal assistance attorneys should warn their clients that third-party leasing is not a proper way to get out from under an automobile loan and that it usually violates purchase contracts and local consumer fraud statutes. Attorneys should report to their respective state attorney general's offices any leasing agency they believe is fraudulently leasing vehicles that are secured by liens or security agreements. Finally, if the client already has entered into a lease agreement, whether as a lessor or as a lessee, a negotiated buy-out appears to be the safest way for all parties to get out of the bind. If the parties cannot arrive at an agreement, however, the lessee still may have the option to challenge the lending institution in court, leaving the lessor exposed as the ultimate victim of the flawed arrangement. Captain Wilcox, Legal Assistance Attorney, Aberdeen Proving Ground, Maryland.

Credit Card Liability: But I Told Him (Her) Not to Charge That Much!

The Truth in Lending Act (Act) limits credit cardholders' liabilities to fifty dollars for "unauthorized" uses of their credit cards by other parties.[59] For example, if a thief steals a cardholder's credit card and uses it, the cardholder will be liable for no more than fifty dollars of any unauthorized charges the thief makes before the cardholder notifies the card issuer of the theft. After the cardholder gives notice he or she will not be liable for any unauthorized charge the thief subsequently may make.[60]

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[55] U.C.C. § 2A-307(2) (1987).

[56] *See* Sea Harvest, Inc. v. Rig & Crane Equip. Corp., 436 A.2d 553, 556 (N.J. Super. Ct. Ch. Div. 1981).

[57] U.C.C. § 9-503 (1987).

[58] *Id.* § 9-504.

[59] 15 U.S.C. § 1602(o) (1988), defines "unauthorized use" as the "use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1643 (1988), addresses the liability of credit card holders:

> (a) Limits on liability:
>
> (1) A cardholder shall be liable for the unauthorized use of a credit card only if
>
> (A) the card is an accepted credit card;
>
> (B) the liability is not in excess of $50;
>
> (C) the card issuer gives adequate notice to the cardholder of the potential liability;
>
> (D) the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement ... or on a separate notice accompanying such statement;
>
> (E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the card has occurred or may occur as the result of loss, theft, or otherwise; and
>
> (F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it....

Id.

15 U.S.C. § 1643(b) (1988), further provides that

> [i]n any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the authorized use of a credit card, as (set forth above) have been met.

Id.

[60] *See* 15 U.S.C. § 1643(d) (1988): "Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card."

Suppose, however, that a cardholder voluntarily gives a credit card to a second party—subject to a mutual understanding that the second party will limit his or her purchases to a certain amount. Unfortunately, the second party subsequently makes several unauthorized charges exceeding these limits, and the card issuer seeks recovery from the cardholder. To what extent—if any—will the Act shield the cardholder from liability? Is the cardholder responsible for all the charges the second person incurs—or merely for fifty dollars over and above the amount he or she originally authorized the second person to spend? If the cardholder notified the issuer at the outset of the limits he or she placed on the second person's authority to use the card, will this afford the cardholder complete protection? If not, can the cardholder at least avoid further liability by notifying the card issuer as soon as the cardholder discovers that the second party has misused the card? When no theft or loss of the card occurs, is the excess amount charged truly "unauthorized," as defined in the Act?

These issues may arise in the legal assistance office when a disgruntled client admits lending a credit card to a friend who, taking advantage of the situation, charged far more than the client contemplated or authorized. Likewise, a separated spouse who formerly had access and permission to use the client's credit card may refuse to return the card and may continue to use it. In each scenario, the card issuer turns to the unsuspecting cardholder for payment. What is the client's liability and what self-protective steps should the client take?

Many state courts interpret the Act's definition of "unauthorized use" to protect cardholders only against theft, loss, or similar wrongdoing. Accordingly, they consider cardholders who voluntarily give their credit cards to others to be liable for all charges incurred.[61] Not all courts agree, however, that a cardholder is liable for another person's charges after the cardholder informs the card issuer that he or she granted this person only limited authority to use the card and that this person subsequently abused that privilege.

In Alabama, notifying the card issuer of restrictions the cardholder has placed on the use of the card will not protect the cardholder from subsequent charges.[62] In Louisiana, however, the cardholder's liability ceases once he or she notifies the issuer that a second party is making unauthorized charges and that the cardholder has withdrawn this individual's actual authority to use the card.[63] Ohio also limits liability after the cardholder notifies the issuer.[64]

Utah does not always limit liability after notice to the card issuer. For example, Utah may not limit liability when a separated spouse uses a credit card that originally was issued to both spouses in their respective names, even when one cardholder notifies the issuer that he or she will no longer be liable for the charges of the other party. Utah does not consider these charges "unauthorized" as contemplated in the Act. To obtain protection against liability, the cardholder must follow

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[61] Martin v. American Express, 361 So. 2d 597 (Ala. Civ. App. 1978). In Alabama, the courts have interpreted the Act's definition of "unauthorized use" to protect cardholders against only theft, loss, or similar wrongdoing. A cardholder who voluntarily gives a credit card drawing on his or her account to another is responsible for all charges made by that person, regardless of any limitations the cardholder may set on the use of the card. In the instant case, Martin and McBride entered into a joint business venture. Martin verbally authorized McBride to charge up to $500 on Martin's credit card. Martin also sent a letter to American Express asking it not to allow charges to his account to exceed $1000. McBride disappeared after charging $5300 to Martin's account. The court identified the crucial issue to be "whether the use of a credit card by a person who has received the card and permission to utilize it from the cardholder constitutes 'unauthorized use' under the Truth in Lending Act." Martin argued that the law of agency precludes liability of the principal when an agent acts outside the scope of authority without the knowledge of the principal. The court, however, saw no need to look to agency law, stating that it found the Act's language clear and unambiguous. Because Martin permitted McBride to use his card, Martin was liable for all charges.

The Wisconsin Court of Appeals later rendered a similar opinion, in which the court held that "where a credit cardholder authorizes another to use the card for a specific purpose, and the other person uses it for another purpose, such use is not an 'unauthorized use' within the meaning of 15 U.S.C. § 1602(o)." Mastercard v. Town of Newport, 396 N.W.2d 345 (Wisc. Ct. App. 1986). Once a cardholder voluntarily gives the card to another, the cardholder is liable for all charges. *Id.* Louisiana also follows Alabama in this regard. *See* Cities Serv. Co. v. Pailet, 452 So. 2d 319 (La. Ct. App. 1984).

[62] *Martin*, 361 So. 2d at 600. The court held that Martin's letter asking American Express to limit credit on his account to $1000 did not shield him from liability for McBride's excess charges. The court remarked," We are unaware of any requirement ... which would compel a credit card issuer to undertake a policy whereby the issuer would see to it that charges on a cardholder's account do not exceed a specified amount." *Id.*; *accord Mastercard v. Town of Newport*, 396 N.W.2d at 345. Unlike Alabama, Wisconsin has not addressed specifically the issue of whether liability ceases after the cardholder notifies the issuer of misuse, though the court in *Mastercard* cited *Martin* as persuasive. *See Mastercard*, 396 N.W.2d at 345.

[63] *Pailet*, 452 So. 2d at 319. Pailet voluntarily gave his credit card to an employee, Jordan, to use for limited business purposes. The court held Pailet was not liable for charges Jordan made on the card after Pailet notified the issuer that he had revoked Jordan's authority to use the card. Pailet, however, was liable for Jordan's charges made before Pailet notified the issuer because he voluntarily gave the card to Jordan; the card, therefore, was not lost, stolen, or wrongfully obtained.

[64] Standard Oil Co. v. Steele, 489 N.E.2d 842 (Ohio Misc. 1985) (holding cardholder who voluntarily gave her card to a friend liable for all charges her friend made before she notified card issuer of unauthorized use, but not for charges made after notification).

the card issuer's procedures for closing accounts and may have to return all cards to the issuer.[65]

Recently, a Georgia district court held that because a cardholder is protected only from liability arising from "unauthorized use" of a credit card, he or she is not protected from misuse by an "authorized user." A cardholder asked the issuer to provide his girlfriend with a credit card. She subsequently used this card to charge over $27,000 to his account. The cardholder eventually notified the issuer that the girlfriend was misusing the card, but this did not convert the girlfriend into an "unauthorized" user; the cardholder therefore was liable for all the charges.[66]

The various state courts have interpreted the Act so inconsistently that the United States Supreme Court finally may agree to resolve the issue. The New York case of *Towers World Airways, Inc. v. PHH Aviation Systems, Inc.*, now is pending grant of certiorari by the Supreme Court.[67]

In *Towers*, PHH Aviation leased a corporate jet to Towers World Airways (Towers) and provided Towers with a credit card for fuel purchases. Towers designated a pilot and entrusted him with the card, instructing him to use it only for noncharter flights by Towers' executives. Without permission, the pilot used the card to buy $89,000 worth of fuel for chartered flights. Seeking to limit its liability for this unauthorized use of the credit card, Towers attempted to invoke the protection of the Act. Towers acknowledged that it failed to cancel the card. It argued, however, that once PHH learned that the pilot lacked authority to make certain charges, any transaction of this kind that the pilot subsequently entered became an "unauthorized use" of the card—even if the fuel sellers reasonably perceived that the pilot had apparent authority to charge fuel purchases.[68] The District Court for the Southern District of New York rejected this contention, finding Towers liable for all charges. The United States Court of Appeals for the Second Circuit affirmed. The Second Circuit recognized the split of authority on whether notifying card issuers of misuse will protect the cardholder from liability by limiting the user's apparent authority. It found, however, that Towers' pilot had apparent authority to use the card for all charges and ruled that Towers' notification to the card issuer did not render these charges "unauthorized."[69] The court concluded that cardholders always could protect themselves from unauthorized use by persons they entrust with their credit cards by repossessing the cards, by cancelling their accounts without returning the cards—if their agreements with their issuers permitted this—or by reporting as stolen any cards they could not recover if the agreements required cardholders to return cards to close their accounts.[70]

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[65] *See* Walker Bank and Trust Co. v. Jones, 672 P.2d 73 (Utah 1983), *cert. denied*, 466 U.S. 937 (1984). "Notification to the card issuer has no bearing whatsoever on whether the use is authorized, so as to entitle a cardholder to statutory limitation of liability." *Id.* In *Walker* two cardholders asked the issuer to provide their husbands with credit cards, drawing on the cardholder's accounts, but bearing the husbands' names and signatures. "The cards were, therefore, a representation to the merchants ... to whom they were presented that defendants' husbands ... were authorized to make charges upon the defendants' ... accounts. This apparent authority conferred upon the defendants' husbands by reason of the credit cards thus precluded the application of the TILA (Truth in Lending Act)." *Id.* Examining the agreement between the credit card issuer and the cardholders, the court noted that the cardholders could revoke the agreement only by returning all credit cards drawing on their accounts. When the couples had separated, the wives had notified the issuer that they would no longer be liable for their husbands' charges—but despite repeated requests by the issuer, neither the cardholders, nor their estranged husbands, had returned the credit cards. Consequently, the court ruled that the issuer was justified in disregarding notification that the defendant wives no longer would be liable for charges by their husbands. *See id.*; *accord* First Nat'l Bank of Findlay v. Fulk, 566 N.E.2d 1270 (Ohio Ct. App. 1989) (before their separation, husband allowed his wife to use his credit card; husband was liable because he was the sole cardholder and his wife was merely an "authorized" user with no credit arrangement with the card issuer).

[66] American Express Travel Related Services Co. v. Web, 1991 W.L. 124625 (Ga. July 3, 1991). Web applied for a credit card for himself and had one issued to his girlfriend, Lazich, as an additional applicant. After their breakup, Lazich charged over $27,000 to Web's account. At first, Lazich used the card itself; later, after Web retrieved the card, she used the account number. Web argued that American Express took no steps to stop Lazich from using the card after Web notified it that Lazich was using the card without his permission, pointing out that American Express continued to allow her to use the account number even after Web confiscated the card. The Court of Appeals, citing Walker Bank and Trust Co. v. Jones, 672 P.2d 73 (Utah 1983), acknowledged that the agreement between Web and American Express rendered Web liable for any charges "unless the card(s) is (are) cut in half and both halves are returned." Nevertheless, the court agreed with Web that American Express should have taken steps to prevent the charges. The state supreme court reversed. It held that Lazich was an "authorized user" under the Act, that state law imposed no duty on the issuer to mitigate, and that Web was liable for the charges.

[67] *See* Consumer Cred. Guide 607 (CCH) § 95,636 (July 18, 1991). Towers World Airways Inc. v. PHH Aviation Systems Inc., 933 F.2d 174, (2d Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3006 (U.S. June 26, 1991) (No. 90-1980).

[68] *See Towers*, 933 F.2d at 175.

[69] *Id.* at 174. The court held that the limits Towers placed on the card failed to provide adequate notice to third-party fuel suppliers that the pilot had authority to charge fuel only for nonchartered flights. The court did not decide the issue of whether voluntary relinquishment of a credit card for one purpose "creates in every case apparent authority to incur other charges." Though agency law generally permits a principal to qualify an agent's authority by notifying merchants of limitations the principal has placed on the agent, the court found that

> to whatever extent a cardholder can limit the authority of a card user by giving notice to a merchant, we do not believe he can accomplish a similar limitation by giving notice to a card issuer.... It is totally unrealistic to burden the card issuer with the obligation to convey to numerous merchants whatever limitations the cardholder has place on the card user's authority.

Id.

[70] *Id.* at 179.

The *Towers* case bears watching, though if the Supreme Court grants certiorari, it likely will decide *Towers* narrowly.[71] The legal assistance client should take all steps reasonably possible to limit personal liability. In particular, the client should notify the card issuer immediately of any credit card misuse by a second party; retrieve the credit card at once; cancel the account and ask the issuer to provide a new card solely in the client's name; and notify all merchants who may accept the old card that the client will not be responsible for charges made by the second party. Preventive law classes, moreover, should stress the danger in giving others credit cards, even for limited use. Major Hostetter.

Tax Notes

Tax Administration

Now is not too early for legal assistance attorneys to begin work on their local income tax assistance programs for next tax season.[72] Attorneys preparing tax assistance programs should review a recent General Accounting Office report,[73] which identifies the five most common taxpayer errors[74] of the 1991 filing season. The chart below lists these errors and the number of returns each error affected in 1991 and 1990:

	Number of returns affected	
Error	1991	1990
Taxpayer used incorrect income when figuring earned income credit	241,962	212,376
Taxpayer used incorrect amount for standard deduction	234,156	277,012
Taxpayer failed to claim earned income credit to which he or she was entitled	226,351	249,311
Taxpayer made math error when figuring refund	171,715	313,947
Taxpayer claimed earned income credit to which he or she was not entitled	140,494	230,843

Note that three of the five most common errors involved earned income credit. Instructors should place special emphasis on this topic in classes for tax preparers. Major Hancock.

Withholding and Income Tax Refunds

As of May 3, 1991, the IRS had issued over sixty-three million tax refunds for the more than 107 million returns filed for 1990.[75] Some taxpayers who received refunds might have been able to increase their monthly take-home pays had they reduced the amount of income taxes withheld. Although they ultimately would have received smaller tax refund checks, taxpayers would have gained the use of these monies as they earned them, instead of having to wait for the IRS to repay what were, in essence, interest-free loans borrowed from the taxpayers.

A taxpayer who did not itemize this year, but who expects to itemize deductions next year, is in an excellent position to increase his or her take-home pay by reducing monthly tax withholding. To reduce withholding, each taxpayer should file a new Form W-4, Employee's Withholding Allowance Certificate.[76] This form contains worksheets to adjust withholding allowances based on itemized deductions, adjustments to income, or two-earners or two-job situations.

Using Form W-4, the taxpayer first determines the number of his or her personal exemptions by completing the personal allowances worksheet, making sure to take personal exemptions for himself or herself, and for each of his or her dependents.

Next, if the taxpayer plans to itemize or claim adjustments to income, and he or she wants to reduce the amount withheld for income taxes, the taxpayer must complete the deductions and adjustments worksheet on the back of Form W-4. This worksheet enables the taxpayer to adjust his or her withholding to reflect deductions—for example, qualifying home mortgage interest, charitable contributions, state and local taxes (but not sales taxes), medical expenses in excess of 7.5%

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[71] Another interesting issue is whether card issuers may be deemed negligent for allowing excess charges above a preset credit limit. In *Michigan National Bank v. Olson* the trial court found the cardholder liable when a bank approved $52,500 in charges allegedly made by a cardholder's friend, though the cardholder's credit limit was only $1000. Michigan Nat'l Bank v. Olson, 723 P.2d 438 (Wash Ct. App. 1986). The appellate court reversed and remanded. The appeals court focused, in part, on the issue of whether the bank assumed a duty to the cardholder in setting credit limits on the account and establishing a system for approving charges beyond the cardholder's credit limit. *See id.*; *accord American Express Travel Related Servs. Co.*, 191 W.L. 1214625; Martin v. American Express, 361 So.2d 597, 600 (Ala. Civ. App. 1978). The Supreme Court has yet to render a definitive decision on this issue, but in several jurisdictions it may provide defendant cardholders with a compelling argument.

[72] Legal assistance attorneys may find referring to the most recent edition of *The Model Tax Assistance Program* for information on a model program helpful. *See generally* Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, JA 275, The Model Tax Assistance Program (Sept. 1990).

[73] General Accounting Office, General Government Division, Report to the Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, *Tax Administration: A Generally Successful Filing Season in 1991*, (June 1991) (B-243950).

[74] *Id.*, appendix II at 15. Taxpayer errors include errors on returns prepared by individuals, paid preparers, volunteer preparers, and IRS assistors. *Id.*

[75] *Id.* at 7.

[76] A taxpayer must complete a new Form W-4 within ten days after a divorce (if taxpayer previously had been claiming married status) or any event that decreases the withholding allowances the taxpayer can claim. *See* Internal Revenue Service, Pub. 505, Tax Withholding and Estimated Tax 2 (1991) (publication includes detailed explanations and an example on figuring income tax withholding).

of income, and miscellaneous deductions) or adjustments to income—for instance, alimony or deductible individual retirement account (IRA) contributions—that he or she expects to itemize upon filing. The greater the value of these deductions and adjustments, the more withholding exemptions the taxpayer may claim on the Form W-4.

For example, a soldier who undertook a $100,000 mortgage at ten-percent interest at the beginning of 1991 will pay about $9975 in deductible mortgage interest during the year. If the soldier claims $5000 in other itemized deductions and adjustments, the soldier's total deductions and adjustments would be $14,975. The standard deduction, by comparison, is $5700 for joint filers and $3400 for a single filer. Accordingly, a taxpayer will have between $9275—if filing jointly—and $11,575—if filing singly—in additional deductions that he or she cannot claim until he or she files a tax return next year. Unless the soldier files a new Form W-4, the IRS, in the course of a year, will withhold from the soldier's pay $2600-3250 more than the soldier actually is obligated to pay.[77]

The taxpayer should determine how many additional allowances he or she may claim on the Form W-4 by completing the deductions and adjustments worksheet. In the example above, the soldier would divide his or her additional deductions—$9275 if he or she is filing jointly; $11,575 if he or she is single—by $2000. The answer, for joint filers, is 4.78—or 5.78, if the soldier is single. The soldier then must drop the fraction to arrive at the number of additional allowances to claim—four if filing jointly, five if single. The soldier then adds this number to the personal exemptions determined in the personal allowances worksheet and enters the total on line 4 of the Form W-4. Form W-4 also contains a "Two-Earner/Two-Job Worksheet" for use in certain circumstances.[78]

Legal assistance attorneys should make a special effort to inform soldiers, especially those who recently have undertaken a home mortgage, of the benefits of preparing an updated Form W-4. This information will help soldiers plan their tax withholdings to break even with the IRS and give them more money to use during the year. Major Hancock.

Administrative and Civil Law Notes

Digest of Opinion of The Judge Advocate General

Off-Duty Employment by United States Army Health Care Providers

The Dual Compensation Act, 5 U.S.C. section 5536 (1988), prohibits soldiers and Department of Defense (DOD) civilians from accepting additional Federal pay for the performance of "any other service or duty, unless specifically authorized by law...." This prohibition against accepting dual compensation generally applies when the other service or duty is in some way connected with the official duty performed or is incompatible with federal service. For example, an Army doctor, moonlighting at a civilian hospital, could not accept compensation from the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS)—directly or indirectly—because the doctor has a preexisting duty to render care to any CHAMPUS eligible patient. Likewise, for one already employed by the Federal Government to perform services for the same or different federal agency, while retaining the original government position, would be incompatible with federal service.

In 1986, the Office of The Judge Advocate General (OTJAG) concluded that the Dual Compensation Act prohibited paying off-duty DOD physicians with Medicare or Medicaid funds. *See* DAJA-AL 1986/1922, *as digested in* The Army Lawyer, Mar. 1987, at 49. This opinion comports with Army Regulation 40-1, paragraph 1-7b, which states, "AMEDD personnel on active duty or full time ... civilian employees are prohibited by Federal law from receiving additional U.S. compensation of any nature, whether received directly or indirectly, for health services rendered to any person." Army Reg. 40-1, Composition, Mission, and Functions of the Army Medical Department, para. 1-7b(2) (1 July 1983) (IO1 1 Aug. 1990) [hereinafter AR 40-1 (IO1, 1990)].

The Surgeon General recently asked OTJAG to review existing Army policy and guidance regarding the application of dual compensation restrictions to United States Army Medical Department personnel, including Reservists. OTJAG responded that

> [b]ased on [its] review and additional judicial decisions interpreting the receipt of dual compensation by off duty military personnel, including reservists called to active duty, [OTJAG] interposes no legal objection to the treatment of non-DOD patients who may be entitled to compensation by Medicare or Medicaid by DOD health providers working in an off-duty non-Governmental position. Accordingly, [OTJAG] interposes no legal objection to changes to Army regulations reflecting this policy.

DAJA-AL 1991/1485, 23 Apr. 1991.

The Surgeon General's office will publish an interim change to AR 40-1, reflecting this authorization in the near future. Major Emswiler.

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[77] This estimate assumes the soldier falls within the 28% tax bracket.

[78] The taxpayer must complete this worksheet only if the following conditions apply: (1) he or she is single, has more than one job and earns over $27,000 per year; or (2) he or she is married, he or she has either a working spouse or more than one job, and the combined income from all jobs held by the taxpayer and his or her spouse exceeds $46,000 a year. By completing this worksheet, the taxpayer can avoid having too little tax withheld.

Patronage of Morale, Welfare, and Recreation Activities—Use of Army Golf Courses by Non-Department of Defense Personnel

Patronage of morale, welfare, and recreation (MWR) activities must comply with Army Regulation 215-2, Morale, Welfare, and Recreation: The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities, chapter 2 (10 Sept. 1990) [hereinafter AR 215-2]. The Department of the Army completely revised chapter 2 when it reprinted AR 215-2 in Morale, Welfare, and Recreation (MWR) UPDATE Number 16. AR 215-2, paragraph 2-3, regulates the use of most MWR activities, including Army golf courses.

A recent DOD Inspector General's investigation found that many Army installation commanders or MWR managers offer golf course memberships to corporations to induce them to become corporate members of various private organizations. *See* Message, HQ, Dep't of Army, DAPE-ZA, 152100Z Jul 91, subject: Use of Army Golf Courses by Non-DOD Personnel. This practice violates DOD Directive 5410.18, AR 215-2, and Army Regulation 600-20. Non-DOD personnel cannot be granted membership in any MWR facility as a reward for membership in a private association.

Installations may permit non-DOD personnel to use MWR activities under limited conditions. Installation commanders may extend honorary memberships to individuals who have contributed significantly to their soldiers, their installations, or the Army—for example, members of Congress, local or state officials, and community leaders. Commanders also may permit the guests of actual members to use military golf courses. Finally, commanders may allow persons who are neither guests, nor actual or honorary members, to use courses on a space available basis, within the limits prescribed by AR 215-2, paragraph 2-3c(4).

All installation commanders should scrutinize the use of their MWR facilities—particularly golf courses. The DOD Inspector General will make a follow-up survey to verify field compliance. Major McCallum.

Claims Report

United States Army Claims Service

Sources of Medical Care Recovery in Automobile Accident Cases

Captain Dominique Dillenseger
Chief, Affirmative Claims Branch
Captain Milo H. Hawley, USAR
Affirmative Claims Branch
Personnel Claims and Recovery Division
United States Army Claims Service

Introduction

Annual expenditures for military medical care constitute a significant federal expense.[1] As a result, Congress places great emphasis[2] on programs designed to recover money from third party payers for medical care provided to injured beneficiaries—active duty and retired military personnel and their family members[3]. In calendar year 1990 alone, Army field claims offices collected over ten million dollars in medical care claims.[4]

The United States most commonly asserts medical claims to recover medical expenses incurred on behalf of beneficiaries injured in automobile accidents. The potential third party payers on these claims are the persons at fault in the accident and the automobile insurers that provide them—and in some cases, the persons receiving government health care—with coverage. Because these claims have generated considerable litigation, claims personnel should take pains to understand the various approaches the United States may use to obtain reimbursement for treatment provided to individuals injured in automobile accidents.

Generally speaking, the United States may recover medical expenses under the Federal Medical Care Recovery Act (FMCRA),[5] under the insurance contract, or under 10 U.S.C. section 1095.[6] This article will discuss the various sources of recovery in automobile accident

[1] *See generally* General Accounting Office, GAO/NSIAD-90-49, Military Health Care: Recovery of Medical Costs from Liable Third Parties Can Be Improved (Apr. 1990) [hereinafter Military Health Care]. Annual government expenditures for military medical activities rose from $4.1 billion in 1979 to $11.5 billion in 1987. *Id.*

[2] *Id.*

[3] Medical care benefits are authorized to active duty personnel, retirees and family members. *See* 10 U.S.C.A. §§ 1072, 1074, 1076, 1079 (West Supp. 1991); 38 U.S.C.A. §§ 601-34 (West Supp. 1991).

[4] Affirmative Claims Branch, Personnel Claims and Recovery Division, U.S. Army Claims Service, 1990 Annual Report (1990).

[5] 42 U.S.C.A. §§ 2651-53 (West 1973).

[6] 10 U.S.C.A. § 1095 (West Supp. 1991).

cases and provide an overview of the case law relating to each.

Background

During World War II, the Army filed claims against third party tortfeasors to recover the cost of medical care provided to an injured soldier, plus the amount of salary paid during the period when the soldier was incapacitated. The authority for this collection was Army Regulation 25-220.

The United States continued to assert and collect these claims until 1947. In that year, the Supreme Court, in the landmark decision of *United States v. Standard Oil of California*,[7] denied the United States claim for the recovery of the value of medical care it furnished to a soldier hit by a truck negligently operated by the defendant. The Court indicated that the federal government could not impose liability on the tortfeasor because Congress had not passed legislation authorizing the government to do so.[8]

Congress waited fifteen years before attempting to remedy this problem. The impetus for Congress to act came from a 1960 Comptroller General Report, which revealed that the lack of statutory authority to collect from tortfeasors cost the United States substantial monies each year.[9] Congress responded in 1962 by enacting the Federal Medical Care Recovery Act.

The Federal Medical Care Recovery Act

The Federal Medical Care Recovery Act, which became effective on 1 January 1963, provides in part,

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment ... to a person who is injured ... under circumstances creating tort liability upon some third person ... to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured ... person ... has against such third person to the extent of the reasonable treatment so furnished or to be furnished.[10]

The act further provides that:

> The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured ... person ... against the third person who is liable for the injury ...; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury ... involved, institute and prosecute legal proceedings against the third person who is liable for the injury ... in a State or Federal court, either alone (in its own name or in the name of the injured person ...) or in conjunction with the injured ... person.... [11]

Numerous courts have reviewed and clarified the key provisions of the act.

Requirement for Tort Liability

The FMCRA specifies that recovery is allowed when the injury occurred "under circumstances creating tort liability upon some third person."[12] Courts uniformly have held that the law of the state where the injury takes place determines whether or not a tort has occurred.[13] The United States' cause of action is directly against the tortfeasor and not the insurance carrier.[14] Thus, the Government may assert no cause of action under the FMCRA unless the third person is liable in tort under pertinent state law.[15]

Reasonable Value of the Treatment Furnished

The FMCRA provides that the United States "shall have a right to recover ... the reasonable value of the care ... furnished."[16] Section 2652 of the FMCRA delegates to the executive branch the authority to determine and establish the "reasonable value" of the medical care.[17]

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[7] 332 U.S. 301 (1947).

[8] *Id.* at 314-16.

[9] Comptroller General of the United States, Review of the Government's Rights and Practices Concerning Recovery of the Cost of Hospital and Medical Services in Negligent Third Party Cases (1960).

[10] 42 U.S.C.A. § 2651(a) (West 1973).

[11] *Id.* § 2651(b).

[12] *See id.* § 2651(a).

[13] United States v. Greene, 268 F. Supp. 976 (N.D. Ill. 1967).

[14] United States v. Farm Bureau Ins. Co., 527 F.2d 564 (8th Cir. 1976).

[15] United States v. Travelers Indemnity Co., 729 F.2d 735 (11th Cir. 1984); United States v. Allstate Ins. Co., 573 F. Supp. 142 (W.D. Mich. 1983).

[16] *See* 42 U.S.C.A. § 2651(a) (West 1973).

[17] *Id.* § 2652(a).

Each fiscal year, the Office of Management and Budget (OMB) publishes the rates for inpatient and outpatient care, as well as rates for treatment at the Burn Center at the Brooke Army Medical Center.[18] Generally, courts have rejected claims that these rates are unreasonable or arbitrary.[19]

The federal government assesses rates for treatment provided in civilian facilities differently. By statute, the government must base its reimbursements for hospital care under the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS) on a Diagnosis Related Group (DRG) payment system.[20] CHAMPUS payments thus are based not on OMB rates or the rates the hospital would charge for a particular hospitalization. Rather, they are based on a scheduled amount per discharge for each diagnosed illness or injury. Because hospitals are required by statute to accept the CHAMPUS determined allowable charges, these charges, like the OMB rates, are considered the correct charges for purposes of asserting a claim for reimbursement.

Independent Right of Recovery

Generally, the courts have reasoned that subrogation, as used in the FMCRA, is subsidiary to the United States' primary independent right of recovery.[21] Most courts have held that this independent right of recovery in the United States against the tortfeasor is limited only by state substantive law on the issue of liability.[22] Moreover, although substantive defenses, such as contributory negligence or lack of negligence on the part of the tortfeasor, often will bar the United States from recovery under the act, many courts have held that the contributory negligence of persons other than the injured party is not a defense against a third-party action by the United States.[23]

Most courts also have held that state statutes that create some form of immunity for reasons of public policy—for example, interspousal immunity[24] or guest-passenger laws[25]—do not defeat the United States' cause of action under the FMCRA. Courts have evaluated these state statutes on the basis of whether they are substantive or procedural in nature—that is, whether the law has anything to do with the circumstances surrounding the injury that created a tort. In *United States v. Haynes*[26] the Fifth Circuit held that the standing requirements of Louisiana's community property law were a procedural bar that did not defeat the United States' right to recovery. On the other hand, in *United States v. Oliveira*[27] the district court held that the South Dakota guest statute, which requires willful or wanton negligence to prove a tort under South Dakota law, is substantive because it creates rights and obligations. Under South Dakota law, therefore, the United States would have to allege and prove willful or wanton negligence, rather than mere negligence, to recover under the FMCRA.

Because the United States has an independent right to recovery under the FMCRA, federal courts also have held the following: (1) the United States need not obtain an assignment from the injured party to pursue a cause of action under the act;[28] (2) the United States is not subject to a state statute of limitations;[29] (3) the United States' cause of action against the tortfeasor is not affected if the injured party has executed a release promising to hold the tortfeasor harmless for the injury;[30] (4) the United States need not notify the tortfeasor or his or her insurer of its claim;[31] and (5) the United States may assert its independent right of recovery through several permissive procedural alternatives[32]—by intervention, by joinder, by filing an action in its own name, or by filing in the name of the injured party.

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[18] *See* 55 Fed. Reg. 40,963 (1990).

[19] United States v. Jones, 264 F. Supp. 11 (E.D. Va. 1967); Phillips v. Trame, 252 F. Supp. 948 (E.D. Ill. 1966). In United States v. Wall, 670 F.2d 469 (4th Cir. 1982), however, the court held that these rates were not entitled to a presumption of reasonableness.

[20] 10 U.S.C.A. §§ 1079(j), 1086(d) (West Supp. 1991).

[21] United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968); United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967).

[22] *Merrigan*, 389 F.2d at 21; United States v. Allstate Ins. Co., 573 F. Supp. 142 (W.D. Mich. 1983); United States v. Thomas Jefferson Corp., 309 F. Supp. 1246 (W.D. Va. 1970); United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967); United States v. York, 389 F.2d 582 (6th Cir. 1968); Babcock v. Maple Leaf, Inc., 424 F. Supp. 428 (E.D. Tenn. 1976); United States v. Greene, 266 F. Supp. 976 (N.D. Ill. 1967); United States v. Nation, 299 F. Supp. 266 (W.D. Okla. 1969); United States v. Bartholomew, 266 F. Supp. 213 (W.D. Okla. 1967).

[23] United States v. Housing Auth. of Bremerton, 415 F.2d 239 (9th Cir. 1969); Cox v. Maddux 255 F. Supp. 517 (E.D. Ark. 1966), *rev'd on other grounds*, 382 F.2d 119 (8th Cir. 1967).

[24] United States v. Haynes, 445 F.2d 907 (5th Cir. 1971); United States v. Moore, 469 F.2d 788 (3d Cir. 1972), *cert. denied*, 411 U.S. 905 (1973).

[25] Government Emp. Ins. Co. v. Bates, 414 F. Supp. 658 (E.D. Ark. 1975) (Arkansas guest statute); United States v. Forte, 427 F. Supp. 340 (D. Del. 1977) (Delaware automobile guest statute).

[26] 445 F.2d 907 (5th Cir. 1971).

[27] 489 F. Supp. 981 (D.S.D. 1980).

[28] United States v. York, 398 F.2d 582 (6th Cir. 1968); United States v. Bartholomew, 266 F. Supp. 213 (W.D. Okla. 1967); United States v. Wittrock, 268 F. Supp. 325 (E.D. Pa. 1967).

[29] United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967); United States v. Gera, 409 F.2d 117 (3d Cir. 1969); Cockerham v. Garvin, 768 F.2d 784 (6th Cir. 1985).

[30] United States v. Winter, 275 F. Supp. 895 (E.D. Pa. 1967); United States v. Greene, 266 F. Supp. 967 (N.D. Ill. 1967).

[31] *York*, 398 F.2d at 584; *Bartholomew*, 266 F. Supp. at 215.

[32] Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692 (E.D. Pa. 1972); Leatherman v. Pollard Trucking Co., 482 F. Supp. 351 (E.D. Okla. 1978).

The FMCRA and its line of favorable court cases provide the government with a solid basis for recovery of medical expenses against third-party tortfeasors responsible for automobile accidents in fault-based jurisdictions. Moreover, even though the express language of the FMCRA provides a cause of action only against the tortfeasor and not against the insurance company, the United States has had no difficulty in collecting from the liability insurer of the tortfeasor once it has met the requirements for tort liability in each case.

The FMCRA is of limited value as a means of recovery, however, when the government must collect from sources other than the tortfeasor and his or her liability insurer. This situation usually occurs when: (1) the tortfeasor has insufficient liability insurance—or no insurance at all; (2) no third party bears tortious liability for the injury—when, for example, the injured party is at fault; or (3) the accident took place in a jurisdiction that has modified tort liability. In these situations, the United States must consider other approaches to recovery.

Recovery Under the Insurance Contract

Unlike the statutory right to recovery under the FMCRA, the United States' ability to recover under the uninsured and underinsured, medical payments, personal injury protection, or no-fault provisions of an injured party's insurance policy is subject to the specific terms of the policy, state substantive law governing insurance and contracts, and state procedural law on the statute of limitations.

Uninsured and Underinsured Motorist Coverage

The standard uninsured and underinsured motorist clause in an automobile insurance policy provides that the insurer will pay the insured for medical expenses sustained in an accident that is caused by a motorist who is at fault and who has no or insufficient liability insurance. The policy generally requires the insurer to pay the insured the amount that he or she would have recovered as damages from the tortfeasor, had the tortfeasor been insured adequately.

The term "insured" usually includes the policyholder, his or her family members, and passengers in the policyholder's vehicle.[33] Although these contracts thus do not name specifically the United States as "insured," most courts have interpreted policy definitions to confer "insured" status on the United States."[34]

In *United States v. Commercial Union Insurance*,[35] for example, the policy expressly defined "insured" to include not only the policyholder and the policyholder's guests, but also "any person [from whom] with respect to damages [the insured] is entitled to recover for care or loss of services because of bodily injury." The district court reasoned that because the United States could recover under the FMCRA from an uninsured motorist for medical care provided to the insured who was injured as a result of an "uninsured vehicle," the United States qualified as a "person" under the terms of the policy and was therefore an insured.[36] Focusing next on the state insurance code, the court stated that the terms of the New York uninsured motorist provision must be construed in favor of the insured. To interpret the policy differently, the court held, would defeat the purposes of the insurance law of the state of New York.[37]

The Fourth Circuit, in *Government Employees Insurance Co. v. United States*,[38] also looked at the express terms of the policy. The uninsured motorist provision similarly defined "insured" to include "any person [from whom] with respect to damages [the insured] is entitled to recover because of bodily injury...."[39] The court found that the right of the United States to recover did not rest wholly on the FMCRA, but also derived from "the express language of the policy, which provides that one entitled to recover of the uninsured third party is in turn entitled to payment under the policy as an insured."[40]

The United States may be barred from recovery under uninsured or underinsured motorist's coverage if the policy expressly denies the government "insured" status. In *United States v. Allstate Insurance Co.*[41] the court held that the FMCRA gave the United States a right of action against the tortfeasor only and ruled that the United

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[33] G. Couch, Couch Cyclopedia of Insurance Law 2d § 45:620 (rev. ed. 1981).

[34] United States v. United Servs. Auto. Ass'n, 312 F. Supp. 1314 (D. Conn. 1970); United States v. Commercial Union Ins. Group, 294 F. Supp. 768 (S.D.N.Y. 1969); Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); United States v. Hartford Accident & Indem., 460 F.2d 17 (9th Cir. 1972), *cert. denied*, 409 U.S. 979 (1972).

[35] 294 F. Supp. 768 (S.D.N.Y. 1969).

[36] *Id.* at 777.

[37] *Id.*

[38] 376 F.2d 836 (4th Cir. 1967).

[39] *Id.* at 837.

[40] *Id.*

[41] 306 F.2d 1214 (N.D. Fla. 1969).

States was not an "insured" under the Allstate policy. Under the policy, "insured" included only the policyholder, his relatives and residents of his household, and other persons while in or upon, entering into or alighting from the policyholder's automobile.[42] The court relied upon this restrictive language to distinguish *Government Employees Insurance Co. v. United States* and *United States v. Commercial Union Insurance*.[43]

Medical Payments Coverage

Usually, medical payments provisions of insurance policies obligate the insurer to pay for medical expenses "to or for the benefit of the insured" or for the expenses of "any person or organization rendering medical services." To recover under these provisions, the United States first must examine the specific and implicit terms of the policy. The Government then must argue that, by providing medical care to the injured party, it became a "third party beneficiary" to the insurance contract. State law ultimately determines whether the United States actually is a third party beneficiary to the contract. The United States has argued this theory successfully in a number of cases.

In *United States v. United Services Automobile Association*[44] the United States brought an action against the United Services Automobile Association (USAA) under the medical payment provisions of the soldier's insurance policy to recover the cost of the medical treatment that it provided to the soldier's son, who had been injured in an auto accident. The pertinent section in the policy, titled "Expenses for Medical Services," required the insurer "to pay all reasonable expense incurred within one year from the date of accident for necessary medical, X-ray and dental services ... to or for the named insured and each relative who sustains bodily injury ... through being struck by an automobile or trailer of any type.[45] In the section titled "Conditions" the policy further provided that "the Company may pay the injured person or any person or organization rendering the services and such payments [to the health care provider] shall reduce the amount payable [to the insured] for such injury."[46] Focusing solely on its construction of the policy language, the Fifth Circuit concluded that the United States clearly was a third party beneficiary of the policy issued to a military member because the United States was required by law to provide the soldier's dependents with medical care if they were injured in an accident of that nature.[47]

In *United States v. Government Employees Insurance Co.*[48] (*GEICO*) the Fourth Circuit followed the *USAA* rationale. In *GEICO*, the United States sought to recover from a retiree's automobile insurer for medical treatment the government provided to a retiree who had been injured in an accident.[49] The policy language in this case obligated the insurer to pay for "all expenses incurred on behalf of the insured in connection with an accident." The "Conditions" section of the policy added that the insurer "may pay the insured person or any person or organization rendering the services."[50] Expanding on the rationale of *USAA*, the court stated,

> It must be assumed that the insurer knew that its insured in this case was entitled to obtain medical services at the expenses of the United States, as provided under Section 1074(*b*), 10 U.S.C. It had included as a separate part of its contract of insurance, for which it unquestionably charged a portion of its premium, this provision obligating itself to pay the medical expenses incurred as a result of an accident on behalf of the insured. To allow it to eliminate from its obligation, under this provision, any expenses incurred by the United States under the latter's statutory obligation to the insured would

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[42] *Id.* at 1215.

[43] *Id.*

[44] 431 F.2d 737 (5th Cir. 1970).

[45] *Id.* at 736-37.

[46] *Id.* at 737.

[47] *Id.* In a 1989 unpublished decision, the District Court for the Northern District of California held that the United States was a third party beneficiary under the USAA contract. *See* United States v. United Servs. Auto. Ass'n, No. C88-2477-DLJ (N.D. Cal. Jan. 5, 1989). The insurer contended that the policy required it make payments only when the policyholder, and not a third party, incurred expenses and that the United States was not entitled to reimbursement because it was required to provide free medical treatment to the insured. *Id.* slip op. at 6. The court rejected this argument, basing its decision on the lack of any explicit exclusion of third parties under the terms of the contract—and on its own conclusion that the insurer knew at the time of contracting that the United States had a statutory requirement to pay for the policyholder's medical care. *Id.*

[48] 461 F.2d 58 (4th Cir. 1972).

[49] *Id.* at 59.

[50] *Id.*

> mean that the insurer actually would have been incurring no liability, or at least a most limited one, under this part of its policy, for which it had charged a portion of its premium. Certainly, the insurer had not intended—it undoubtedly had not adjusted its premium to take into account—any such 'windfall' as would result in its favor by limiting its obligation under the Expenses for Medical Services portion of its policy as it now asks of the Court. It would be unconscionable so to limit it.[51]

A federal appeals court again named the United States a third party beneficiary to a soldier's medical payment coverage in *United States v. State Farm Mutual Insurance*[52]. The operative language in the State Farm policy required the insurer to "pay the injured person or any person or organization rendering the services."[53] The Tenth Circuit found that the United States was "an organization rendering the services" within the meaning of the policy. Following an earlier Fifth Circuit decision, the court held that "where a contract creates a right or imposes a duty in favor of a third party, the law presumes that the parties intended to confer a benefit on the party and allows the party a remedy."[54] The Tenth Circuit concluded that State Farm would reap an undeserved windfall if the court permitted it to collect premium payments for coverage that State Farm did not expect the insured ever to use.[55]

In *United States v. California State Automobile Association*[56] a California district court found the United States to be a third party beneficiary of the medical coverage of an insurance policy that provided for payment "to or for the named insured and each relative ... who sustains bodily injury," and "to or for any other person who sustains bodily injury ... while occupying the automobile."[57] The court noted that the policy defined "persons injured" as "any other person or organization but only with respect to his or its liability because of acts or omissions of a named insured, or a person using the automobile."[58] This definition, the court held, included the United States. The Ninth Circuit affirmed, holding that the United States was an "insured" under the policy and entitled to indemnification because it had incurred an expense in providing care to the insured.[59]

In *United States v. Metropolitan Life Insurance*,[60] however, the Ninth Circuit denied recovery because the policy conditioned the right to reimbursement upon the insured personally "incurring expenses." Since the policyholders, as veterans, had been granted a waiver of hospital costs, the court found that they had incurred no actual medical expenses, and thus did not meet the condition precedent for recovery. The United States therefore had no basis for a claim as a third party beneficiary.[61] The court distinguished *California State*, noting that the Metropolitan policy, unlike the California State policy, did not include any provisions allowing payment to any person or organization rendering services "to or for" the named insured.[62]

In *United States v. Allstate Insurance Co.*[63] the Fifth Circuit analyzed policy language different from the language examined in previous decisions. Unlike the policies discussed above, the Allstate policy did not contain language requiring the insurer to pay either the injured person or the person or organization rendering the services.[64] The pertinent provision instead provided for payment because of bodily injury sustained by a "covered person."[65] Allstate defined "covered person" as the insured and his or her family members.[66] Contrasting this

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[51] *Id.* at 60. Focusing on this "windfall" argument, the court in *United States v. State Farm Mutual Auto Insurance Co.* likewise held that the government was a third-party beneficiary of boating and automobile policies. *See* 717 F. Supp. 1207 (S.D. Miss. 1989). The operative language in the auto insurance policy allowed for payment to "the insured person or any person or organization performing [medical] services." *Id.* at 1208. The court also held that, absent a showing that the insurer charged a lesser premium for soldiers and their dependents, failure to reimburse the Government for medical services would provide the insurer with an undeserved windfall. *Id.* at 1211.

[52] 455 F.2d 789 (10th Cir. 1972).

[53] *Id.* at 790.

[54] *Id.* at 791-92 (citing Ohio Casualty Ins. Co. v. Beckwith, 74 F.2d 75 (5th Cir. 1934)).

[55] *Id.*

[56] 385 F. Supp. 669 (E.D. Cal. 1974), *aff'd*, 530 F.2d 850 (9th Cir. 1976).

[57] *Id.* at 670-71.

[58] *Id.* at 671.

[59] 530 F.2d 850 (9th Cir. 1976).

[60] 683 F.2d 1250 (9th Cir. 1982).

[61] *Id.* at 1251.

[62] *Id.* at 1252.

[63] 910 F.2d 1281 (5th Cir. 1990).

[64] *Id.* at 1282.

[65] *Id.*

[66] *Id.*

definition with the policy language of *USAA* and *GEICO*, the court noted that the Allstate policy presented a "mixed" picture—although the policy was in some respects more "tightly written" than the USAA and GEICO policies, it was in other respects "more vague and indefinite."[67] The Allstate policy not only failed to specify certain payees of the benefits but also failed to limit who could be a payee, other than in the assignment clauses.[68] The United States, noting that Allstate expressly had agreed to pay medical expenses for bodily injury sustained by the covered person, argued that the Government should be a third party-beneficiary of the insurance proceeds because it provided medical care to a covered person at its own expense.[69] The Fifth Circuit found this argument had "compelling equitable force, for otherwise Allstate will have collected premiums from service personnel for which it assumed no insuring risk because the military personnel and their dependents were entitled to 'free' medical treatment."[70] The court declared that it was only reasonable to assume that "when military personnel secured the Allstate ... policy and paid the premium, they expected to receive an appropriate *quid pro quo* in coverage."[71] The *quid pro quo* for military policy holders, the court held, would be reimbursement to the government for medical services that the government was obliged to provide. The court concluded that because the policy neither specified nor limited who might qualify as a payee, this absence or ambiguity would be construed against the insurer.[72]

Opinions reviewing government claims under the third party beneficiary theory yield various results depending on the specific language of a particular insurance policy. The courts have granted the United States third party beneficiary status when the policy language defined "insured" or "person" broadly, when it used a "to or for" construction, or when it was vague or ambiguous. In addition, many courts have expressed their aversion to permitting an insurance company to collect premiums from military policyholders without ever having to pay on the policy. Some courts have implied that an insurance company might be able to exclude the United States, but have stressed that this exclusion must be express and intentional.

Personal Injury Protection Coverage

The advent of state "no-fault" automobile insurance laws dealt a serious blow to medical care recovery in some jurisdictions. These laws differ from state to state, but they share a common feature—that is, all seek to some extent to modify common-law tort liability. No-fault states such as Kentucky,[73] Colorado,[74] Hawaii,[75] Michigan,[76] and Kansas[77] all impose various restrictions on a party's standing to sue in tort. These limitations range from threshold requirements for medical expenses to limitations based on the nature of the injury or the subjective intent of the tortfeasor.

In states that have enacted some form of no-fault automobile insurance law, the injured party does not look to the third party tortfeasor for recovery of medical expenses. Rather, he or she must seek reimbursement from his or her own insurance carrier under the personal injury protection (PIP) provision of his or her automobile insurance policy. As it has with uninsured and underinsured motorist and medical payments provisions, the United States has argued that it is a third party beneficiary under PIP provisions. This argument, however, generally has been less successful in no-fault states than it has been in fault-based states. To determine the United States' beneficiary status in no-fault states, the courts have examined both the terms of the insurance contract and the state statute enacting the no-fault scheme.

In two cases construing the Pennsylvania no-fault statute, *Hohman v. United States*[78] and *Heusle v. National Mutual Insurance Co.*,[79] the Third Circuit denied the United States claim for reimbursement against the no-fault insurer. In *Hohman*, the court simply held that because the Pennsylvania no-fault statute had eliminated tort liability with regard to medical expenses, neither the

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1284.

[72] *Id.*

[73] Ky. Rev. Stat. Ann. § 304.39-020(2) (Baldwin 1988).

[74] Colo. Rev. Stat. §§ 10-4-701 to 723 (1987).

[75] Haw. Rev. Stat. § 431:10C-306 (1988).

[76] Mich. Comp. Laws § 500.3101-.3179 (1979).

[77] Kan. Stat. Ann. § 40-3107 (1986).

[78] 628 F.2d 832 (3d Cir. 1980) (per curiam).

[79] 628 F.2d 833 (3d Cir. 1980).

injured party nor the United States as a subrogee could collect from the no-fault insurer for them.[80] In *Heusle*, the United States asserted its claim for reimbursement under three theories: (1) the FMCRA, (2) as a third party beneficiary, and (3) as an additional insured.[81] The court rejected all three theories.[82] It did not find persuasive the Government's argument that the Pennsylvania statute substituted the no-fault insurer for the actual tortfeasor.[83] The court noted that the FMCRA expressly conditions government recovery on tort liability. Because Congress enacted the FMCRA before Pennsylvania adopted the no-fault law abolishing tort liability, Congress clearly did not contemplate applying the FMCRA to the Pennsylvania no-fault system. Before the United States could recover under this theory, the court held, Congress would have to amend the FMCRA.[84] Addressing the third party beneficiary theory, the court determined that the Pennsylvania no-fault act barred providers of health and accident insurance from seeking subrogation against the no-fault carrier.[85] On the "additional insured" theory, the court concluded that policy language providing that the insurer "may pay the insured or any person or organization providing the medical services" merely granted the insured an option to pay *either* the "provider" *or* the insured, and did not impose an obligation enforceable by the "provider."[86] Significantly, the court also dismissed the Government's "windfall" argument as a misleading concept. Remarking that ultimately one large group—premium payers—or the other—taxpayers—would have to shoulder the burden and that Congress had chosen to subrogate the United States claim only when tort liability was present, the court stated that Congress best could decide whether the United States' interest outweighed the state's aim of reducing the cost of insurance.[87]

Michigan, North Dakota, and Kentucky also have been unreceptive to the third party beneficiary theory. Like the Pennsylvania statute, the Michigan No-Fault Automobile Insurance Act modifies tort liability for medical expenses arising out of automobile accidents.[88] The Michigan no-fault act specifically excludes benefits paid by a state or the United States from "insurance benefits otherwise payable for the injury."[89] In *United States v. Allstate Insurance Co.*[90] the court held that, under the Michigan no-fault act, the United States could not recover either under the FMCRA or as a third party beneficiary and that the United States was neither an "insured" nor an "assignee" under the policy.[91] The following year, however, in *United States v. Spencley*,[92] the same court reversed its position, holding that the Michigan No-Fault Act does *not* bar the United States from recovering medical expenses under the FMCRA.[93] The court ruled that the federal interest in reimbursement predominated over Michigan's no-fault policies.[94] To support this decision, the court cited *United States v. Ferguson*,[95] a decision in which the Sixth Circuit held that the Michigan No-Fault Act did not limit the government's right to recover for property damage. The district court stated that the Sixth Circuit's emphasis on the "supremacy of federal interests" and its "broad adoption of the principles enunciated in *Standard Oil*[96] and in *United States v. Warner*"[97] "implicitly overruled" the decision in *United States v. Allstate Insurance Co.*[98]

In the North Dakota case of *United States v. Dairyland Insurance Co.*[99] the Eighth Circuit rejected the United States' claims for recovery under the FMCRA, under the North Dakota no-fault law, and as a third party benefici-

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[80] *See Hohman*, 628 F.2d at 832.

[81] *See Heusle*, 626 F.2d at 833.

[82] *Id.*

[83] *Id.* at 837.

[84] *Id.* at 838.

[85] *Id.* at 838-39.

[86] *Id.* at 839.

[87] *Id.* at 840. Pennsylvania later repealed its no-fault law, replacing it with the new Pennsylvania Financial Responsibilities Law which gives policyholders the option of selecting either "full tort" or "limited tort" coverage. *See* 75 Pa. Cons. Stat. § 1701 (1990). This modification of state law may undermine the precedential value of *Hohman* and *Heusle* substantially.

[88] Mich. Comp. Laws Ann., §§ 500-3101, (1979).

[89] *Id.*

[90] 573 F. Supp. 142 (W.D. Mich. 1983).

[91] *Id.* at 146.

[92] 589 F. Supp. 103 (W.D. Mich. 1984).

[93] *Id.* at 106.

[94] *Id.*

[95] 727 F.2d 555 (6th Cir. 1984).

[96] 332 U.S. 301 (1947).

[97] 461 F. Supp. 729 (W.D. Mich. 1978) (holding that the Michigan no-fault act did not bar government claim for recovery of property damage).

[98] 589 F. Supp. 105 (W.D. Mich. 1984).

[99] 674 F.2d 750 (8th Cir. 1982).

ary under the insured's policy, essentially for the same reasons the Michigan district court enunciated in *Allstate*. Addressing the government's third party beneficiary argument, the Eighth Circuit found "no intent by the parties to benefit a third person."[100] The court found, moreover, that the contract allowed the insurer only to pay benefits directly to the health care provider and not to the insured and that the United States was neither an "optional payee," nor an organization rendering services "for a charge"—a prerequisite for recovery under the North Dakota statute.[101]

Finally, in the recent Kentucky case of *United States v. Trammel*,[102] the Sixth Circuit held that the Kentucky modified no-fault law, which abolished tort liability for the first $10,000 of medical expenses, barred the United States from recovery under the FMCRA.[103]

Courts in a few no-fault jurisdictions have allowed the United States to collect under a no-fault insurance policy as a third party beneficiary. In *United States v. Leonard*,[104] a New York case, the district court held that the United States was a beneficiary of the injured party's no-fault policy. After reviewing the language of the New York no-fault law and the insurance policy, the court decided that the language of the policy did not limit the right to reimbursement for basic economic loss to the person who sustained the injury. The right to recovery therefore extended to whomever incurred the expense on behalf of the injured person.[105] The court found that interpretation consistent with the New York Insurance Law, which also allowed reimbursement for any basic economic loss sustained by an eligible person.[106]

Likewise, in *United States v. Criterion Insurance*,[107] the Colorado Supreme Court held that, under the Colorado no-fault statute, the United States was a third party beneficiary and could maintain an action against Criterion. Because the Colorado no-fault statute allows direct payments to private medical service providers, the court concluded that the United States was also a third party beneficiary.[108] To deny the United States the right to recover for medical care it provides to soldiers and their dependents would yield an inequitable result.[109] More importantly, the court also found that a clause in the insurance policy that expressly purported to preclude the United States from recovery as a third party beneficiary was contrary to the state legislature's intent in enacting the no-fault law. The United States, accordingly, still could maintain an action as a third party beneficiary despite the prohibitory contract language.[110]

Finally, in *United States v. Allstate Insurance Co.*,[111] the Supreme Court of Hawaii ruled that, under Hawaii's no-fault insurance law, the United States could recover from a no-fault insurer for the "loss" sustained because of the insured's accident. The court based its decision on several legal theories. First, it examined the no-fault law within the context of the state legislature's intent in enacting the law. The court found that the legislature intended that every insured person suffering loss from an automobile accident should have a right to benefits under the law.[112] Remarking that the United States had been "victimized" by the accident, the court held that permitting the United States to recover its medical expenses comported with the legislature's avowed intent to provide speedy, adequate and equitable relief to persons suffering physical or financial injury as the result of an accident.[113]

The Hawaii Supreme Court also pointed out that Allstate's position in this instance did not comport with its practice of routinely reimbursing a health maintenance organization (HMO) for treating Allstate policyholders

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[100] *Id.* at 753.

[101] *Id.* at 753-54.

[102] 899 F.2d 1483 (6th Cir. 1990).

[103] *Id.* at 1489-90.

[104] 488 F. Supp. 99 (W.D.N.Y. 1978).

[105] *Id.* at 102.

[106] *Id.*

[107] 596 P.2d 1203 (Colo. 1979).

[108] *Id.* at 1204.

[109] *Id.* at 1205.

[110] *Id.* at 1206.

[111] 740 P.2d 550 (Haw. 1987).

[112] *Id.* at 553.

[113] *Id.*

who are injured in accidents.[114] The court found that a soldier receiving health care from the United States is in the same position as the HMO member because the soldier—like the HMO member—is entitled to prepaid medical care as part of his or her compensation. Accordingly, the court held that the United States should be treated no differently than the HMO.[115] The court further found that the United States sustained a "loss" as a consequence of the insured's accident and was entitled to the no-fault benefits.[116] Unlike the lower court, the Hawaii Supreme Court read the terms "person," "insured," and "loss from accidental harm" in Hawaii Revised Statute 294-3(*a*) expansively to effectuate the legislative purpose of the Hawaii Motor Vehicle Accident Reparations Act.[117]

Finally, the court stated that for Allstate to charge the military member the same premium as another insured and then to disclaim liability for the benefits it had agreed to pay, because the United States paid the care, would create a windfall in Allstate's favor, bringing about an unconscionable and inequitable result.[118]

10 U.S.C. Section 1095

Recognizing that state no-fault insurance laws seriously were hampering the United States' ability to recover medical costs, a 1990 GAO study advised Congress to enact legislation expressly empowering the United States to recover medical expenses in states with no-fault insurance laws.[119]

When its attempts to amend the FMCRA in this manner proved unsuccessful, Congress enacted legislation amending 10 U.S.C. section 1095. Before this amendment became effective, this statute allowed military treatment facilities (MTFs) to collect for military hospital inpatient care provided to retirees and family members. Section 713 of Public Law 101-511 expanded the government's collection authority under 10 U.S.C. section 1095 to permit the United States to collect from third party payers such as no-fault automobile insurance carriers.[120]

The revised statute provides the United States with a statutory basis to recover from "no-fault" insurers in states that have modified tort liability and that refuse to recognize the United States as a third party beneficiary under no-fault, PIP, medical payments, or uninsured and underinsured motorist coverage. In states that already recognize the United States as a third party beneficiary, the change to 10 U.S.C. section 1095 gives the United States an additional basis for recovery. Guidelines for the implementation of this new recovery authority appear in a Claims Service Memorandum dated 6 May 1991, reprinted in the August 1991 edition of *The Army Lawyer*.

Conclusion

The ability of the United States to recover medical care expenses has made great strides since *Standard Oil*. The FMCRA and a well-developed body of favorable case law in fault-based jurisdictions have eased the way for the government to recover against tortfeasors and automobile liability insurers. The amendment of 10 U.S.C. section 1095 also may facilitate recovery in no-fault jurisdictions. Claims offices also should rely on the third party beneficiary theory whenever possible because most states appear to be willing to grant the United States beneficiary status. The more familiar claims personnel are with the various theories and sources of recovery, the easier they will find it to pursue medical care claims aggressively and successfully.

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[114] *Id.* at 555.

[115] *Id.*

[116] *Id.* at 556.

[117] *Id.*

[118] *Id.*

[119] *See* Military Health Care *supra* note 1.

[120] 10 U.S.C.A. §§ 1095(h), (i) (West Supp. 1991).

Personnel Claims Note

Personnel Claims by AWOL Personnel

This Claims Policy Note amends the guidance found in paragraph 11-3 of Army Regulation 27-20, Legal Services: Claims (28 Feb. 1990) [hereinafter AR 27-20]. IAW paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

Occasionally, a claims office must process a personnel claim from a soldier who is absent without leave (AWOL). In addition to the practical problems involved in locating such persons to obtain additional evidence or mail a check, there is a philosophical dilemma in using a gratuitous payment statute to compensate such persons.

Accordingly, claims offices should hold personnel claims from soldiers who have been AWOL less than 30 days at the time the claim is adjudicated. If an AWOL claimant is dropped from the rolls (DFR), the claims office will deny the claim and send a denial letter to the claimant's last known civilian address. If the soldier later returns to military control and submits a request for reconsideration within one year in accordance with paragraph 11-19, AR 27-20, the office should consider the reconsideration request normally. Colonel Fowler.

Management Note

Area Code Change

Starting in November 1991, Maryland will have two area codes. Fort Meade and Aberdeen Proving Ground will change to area code 410; Fort Detrick and Fort Ritchie will retain area code 301. Until November of 1992, however, the Claims Service may be reached by dialing either 410 or 301. Lieutenant Colonel Thomson.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Office of the Staff Judge Advocate, and TJAGSA Administrative and Civil Law Division

Civilian Personnel Law

Harmful Error Rule Revisited

The Merit Systems Protection Board (MSPB or Board) recently abandoned a rule it had maintained throughout a long line of decisions. In *Stephen v. Department of the Air Force*,[1] the Board held that an agency's failure to accord an employee the procedural protection guaranteed by title 5, United States Code (5 U.S.C.), sections 4301 to 4305 and 7511 to 7513 does not automatically constitute harmful error.

In *Stephen* the Air Force dismissed the appellant from her job, attempting to remove her before the end of her probationary period. It ignored clear guidance in the Federal Personnel Manual (FPM), however, that alerts agencies to the hazards of making removals effective on the last day of an employee's probationary period. The FPM explains that a probationary period ends at close of business while a removal generally is effective at midnight. A removal effective on the last day of an employee's probationary period, therefore, is *not* imposed during that employee's probationary period.

On review, the administrative judge found that by removing the appellant on the last day of her probation, the Air Force actually dismissed appellant after her probationary period ended—thus giving her standing to appeal and entitling her to the procedural protection of 5 U.S.C. chapters 43 and 75. Ruling that the Air Force had committed harmful error by failing to afford the appellant an opportunity to respond to the decision to remove her, the judge then reversed the dismissal. The MSPB granted the Air Force petition for review.

The Board agreed with the administrative judge that the appellant had completed her probationary period prior to the removal. It then examined the agency's conduct in light of the opinion of the United States Supreme Court in *Cleveland Board of Education v. Loudermill*[2]. In *Loudermill*, the Court ruled that the government's failure to

[1] 47 M.S.P.R. 672 (1991).

[2] 470 U.S. 532 (1985).

provide a tenured public employee with an opportunity to respond to an action terminating his employment deprived him of his constitutional right of due process.[3] The Board stated that, under *Loudermill*, it will reverse any appealable action that an agency takes "without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond...."[4] It concluded, however, that appellant actually had received the minimal due process that *Loudermill* requires, noting that the Air Force had provided appellant advance notice of her termination and the opportunity to respond.[5]

The Board then examined the Air Force's action under the harmful error rule of 5 U.S.C. section 7701(c)(2)(A). This rule requires the MSPB to reverse an agency action if an employee proves that the agency committed a procedural error that most likely had a harmful effect on the outcome of the case before the agency.[6] The Board also considered the relevance of 5 U.S.C. section 7701(c)(2)(C), which requires the Board to reverse any agency decision that it finds is "not in accordance with law."[7] Finally, the Board articulated three rulings. When an agency has taken an appealable action against a nonprobationary employee without the minimal procedures guaranteed by *Loudermill*, the Board will reverse the action for failure to withstand constitutional scrutiny.[8] If the agency has no legal authority to take the action in question—for example, if the agency orders the emergency suspension of an employee in a situation in which the crime provision is not applicable—MSPB will reverse the action because it is "not in accordance with law."[9] If the action in question meets *Loudermill* due process and is otherwise lawful, however, the Board will reverse for harmful error only if the "evidence and argument of record shows [sic] that the procedural error was 'likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.'"[10] Because the administrative judge had considered no evidence on this issue, the Board remanded the appeal for hearing.[11] It also ruled that, regardless of the outcome of her appeal, the appellant was entitled to thirty days of back pay because the Air Force dismissed her before her statutory notice period had elapsed.[12]

Alcoholic's Drinking Not Necessarily Caused by Alcoholism

In *Gleim v. United States Postal Service*[13] the MSPB modified an initial decision sustaining the appellant's dismissal for drinking on the job and for several other acts of misconduct. The administrative judge previously had found that the appellant failed to establish that he was handicapped by his alcoholism or had lacked control of his actions when he misbehaved. Overturning the judge's ruling that the appellant was not handicapped, the Board expressly reaffirmed its position that "an employee who shows that he is an alcoholic ... has established that he [or she] is handicapped...."[14] The Board then considered whether the agency erred in dismissing the appellant without first offering him rehabilitative assistance. It noted that to afford reasonable accommodation to an employee whose misconduct or poor performance stems from a substance abuse problem, an agency must offer the employee rehabilitative assistance before initiating disciplinary action.[15] An agency, however, need not offer rehabilitative assistance to an alcoholic employee unless the employee's misconduct resulted from, or was entirely a manifestation of, the employee's alcoholism.[16] Consistent with its reasoning in *Bolling v. Department of the Navy*,[17] the Board refused to "establish a per se rule that drinking by an alcoholic, or use of any drug by an addict,

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[3] *Id.*

[4] *Stephen*, 47 M.S.P.R. at 680-81.

[5] *Id.* at 680, 686.

[6] 5 U.S.C. § 7701(c)(2)(A) (1988).

[7] *Id.* § 7701(c)(2)(C).

[8] *Stephen*, 47 M.S.P.R. at 681.

[9] *Id.* at 683-84.

[10] *Id.* at 685 (quoting 5 C.F.R. § 1201.56(C)(3) (1990)).

[11] *Id.*

[12] *Id.* at 689.

[13] 47 M.S.P.R. 502 (1991).

[14] *Id.* at 505.

[15] *Id.* (citing Ruzek v. General Serv. Admin., 7 M.S.P.B. 437, 443-44 (1981)).

[16] *See id.*; *accord* Brinkley v. Veterans' Admin., 37 M.S.P.R. 682 (1988).

[17] 43 M.S.P.R. 688 (1990) (involving employee's unauthorized possession of alcohol in the workplace).

is entirely a manifestation of the addiction."[18] Every disciplinary action that punishes misconduct relating to substance abuse must be examined on its own merits. In the instant case, the Board noted that the appellant had presented no evidence that he had been intoxicated when he reported for duty or that his judgment then had been impaired by his addiction to alcohol. The appellant therefore failed to prove that his alcoholism had caused his misconduct or that it had affected his ability to understand the nature of his actions.[19] His handicap defense failed accordingly.[20] The Board, however, mitigated the appellant's punishment to demotion to a nonsupervisory position. To justify its clemency, the Board remarked on the length and quality of the appellant's service, his decision to seek medical assistance for his addiction immediately after being dismissed, and his supervisor's condonation of the appellant's misconduct.[21]

Improper Service of Removal Notice Excuses Late Appeal

In *Kamakea v. Department of the Army*[22] the MSPB accepted an appeal filed seventy-one days after the deadline for filing the appeal. The Army had removed Kamakea from his position as unit administrator in a Reserve unit for his failure to follow orders and report for duty. It had issued the decision letter in February and had mailed it to Kamakea's last known address. When Kamakea appealed in May, the administrative judge dismissed his appeal as untimely filed.[23] In his petition for review, the appellant presented evidence that the Army had informed him in September 1990 that it was holding an undeliverable letter for him—implying that the Army knew or should have known that he would not receive materials mailed to his last known address. He also alleged that the Army had continued paying him until April. The Board accepted Kamakea's argument that he had never received the removal decision and that he had assumed that he was on administrative leave awaiting the decision on his proposed removal.[24] The Board found good cause for waiving the time limit for filing the appeal.[25] It remanded the appeal to the regional office to hear the merits of the appeal.[26]

"Light Duty" Handicap Accommodation Keyed to Essential Functions of Position

In two recent decisions, the MSPB clarified an agency's duty to reassign handicapped employees. In *Joyner v. Department of the Navy*[27] the Board sustained the removal of an employee for physical disability. The Navy had removed Joyner from his position as a machinist after finding him medically unfit for the job. Over the next ten years, it assigned him successively to various light duty administrative positions. At length, the Navy abandoned its attempts to place Joyner and dismissed him. Joyner appealed.

Finding that the appellant was able to perform "other lines of work," the administrative judge ruled that the appellant was not handicapped and sustained the removal. The Board disagreed with the judge's analysis, but not with his conclusion. The MSPB reiterated that it will consider an employee handicapped only if the employee's impairment "'foreclose[d] generally the type of employment involved.'"[28] Noting that administrative duties are "not ... included in the same type of employment as machinist work," the Board determined that the appellant was handicapped.[29] It refused to find, however, that Joyner was a "qualified" handicapped employee. Remarking that Joyner had failed to identify in his petition positions, other than the light duty positions in which he had worked, for which he was qualified, the Board ruled that he had failed to show that the Navy had discriminated against him because of his physical impairments.[30] It stated, "A prior assignment to light duty does not establish entitlement to permanent light duty once it

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[18] *Gleim*, 47 M.S.P.B. at 506.

[19] *Id.* at 507.

[20] *Id.*

[21] *Id.*

[22] 47 M.S.P.R. 570 (1991).

[23] *Id.* at 572.

[24] *Id.* at 573-74.

[25] *Id.* at 574.

[26] *Id.*

[27] 47 M.S.P.R. 596 (1991).

[28] *Id.* at 599 (quoting Anderson v. Dep't of the Navy, 45 M.S.P.R. 136, 141 (1990)).

[29] *Id.* at 599-600.

[30] *Id.* at 600.

is clear that the employee's handicap is permanent."[31] The Navy, therefore, was not obliged to assign the appellant permanently to light duty.

In *Green v. United States Postal Service*[32] the appellant had developed a physical disability that prevented him from performing the lifting and sweeping functions of his job as a sorting machine operator. At first, the Postal Service retained the appellant, allowing him to operate a sorter without performing the lifting and sweeping duties—a task it characterized as "light duty."[33] Eventually, however, the Postal Service removed him, stating that he had failed to meet the physical requirements of his position.[34] Reviewing this decision, the Board recognized that "[a]n agency need not accommodate a handicapped employee by permanently assigning him to light duty tasks when those tasks do not comprise a complete and separate position."[35] It warned, however, that the agency's obligation to restructure a job to accommodate handicapped employees does not terminate merely because this restructuring would create jobs that the agency considers "light duty."[36] The Board noted that a "qualified handicapped employee" is an employee who, with or without accommodation, can perform the *essential functions* of his or her position or one to which he or she could be reassigned. An agency, therefore, "may be required to accommodate an employee by reassigning him [or her] to a light-duty position, as long as the essential duties [of that position] remain."[37] If a handicapped appellant demonstrates that the agency could have assigned the appellant to this sort of position, the agency can justify its decision not to retain the appellant only by showing that eliminating nonessential duties from the position would have imposed an undue hardship on the agency's operations.[38] Because the Postal Service failed to show undue hardship, the Board ruled that the service discriminated against the appellant by not allowing him to remain in the restructured "light duty" position.[39] It ordered the appellant reinstated.[40]

Labor Law

Cleanup Time Is Bargainable

The Federal Labor Relations Authority (FLRA or Authority) recently resolved a negotiability appeal covering five proposals.[41] The first proposal would require the Army to pay overtime to a grievant attending an adjustment meeting, if the grievant works a shift other than that of his or her union representative and if the adjustment occurs during the representative's shift. The proposal also would permit the Army to reassign the grievant to his or her representative's shift to avoid the overtime obligation. Reviewing this proposal, the FLRA distinguished two earlier decisions holding that union representatives and union witnesses appearing at a meeting scheduled after the representatives' or witnesses' regular workday are not entitled to overtime compensation.[42] The Authority noted that regulations implementing the Fair Labor Standards Act (FLSA)[43] define time spent by an employee adjusting his or her grievance (or any appealable action) as "hours of work."[44] The proposal's overtime provision was therefore consistent with Office of Personnel Management (OPM) regulations. Moreover, because the proposal permits management to choose to pay overtime rather than to reassign the grievant it neither requires nor prohibits the reassignment of an employee to another shift.[45] The FLRA, accordingly, ruled that the proposal would not interfere with the Army's right to assign employees and work. A second proposal would allot up to ten minutes before lunch and again at the end of the workday for personal clean-up time. Distinguishing an earlier decision it had made on this issue, the FLRA found this proposal advanced an

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[31] *Id.*

[32] 47 M.S.P.R. 661 (1991).

[33] *Id.* at 663.

[34] *Id.*

[35] *Id.* at 668.

[36] *Id.*

[37] *Id.* at 668-69.

[38] *Id.* at 669.

[39] *Id.* at 669-70.

[40] *Id.* at 670.

[41] American Fed'n of Gov't Employees, Local 2022, 40 F.L.R.A. 371 (1991).

[42] *Id.* at 377 (distinguishing National Treasury Employees Union v. Gregg, No. 83-546 (D.D.C. Sept. 23, 1983)); American Fed'n of Gov't Employees, Local 987, 23 F.L.R.A. 270 (1986).

[43] 29 U.S.C. §§ 201-219 (1988).

[44] American Fed'n of Gov't Employees, Local 2022, 40 F.L.R.A. 371, 376 (1991) (citing 5 C.F.R. § 551.424(a) (1990)).

[45] *Id.* at 377-78.

appropriate, negotiable arrangement.[46] After examining the FLSA and the OPM's implementing regulations, as well as other statutory and regulatory provisions covering FLSA-exempt employees, the Authority concluded that no statute or regulation prevents an agency from assigning clean-up during an employee's regular tour of duty or on overtime.[47] It then considered whether the provision would interfere with management's right to assign work. It determined that the proposal would interfere directly with that right, but recognized that allowing employees to cleanse themselves of toxic substances would benefit both employees and management by eliminating safety risks and by increasing productivity.[48] It concluded that the proposal's potential interference with the Army's right to assign work would not be excessive.[49] The FLRA found that a third proposal, which would grant employees up to forty hours of excused absence annually to participate in Boy Scout or Girl Scout activities, properly reflected a condition of employment but would interfere excessively with management's right to assign work.[50] The fourth proposal would limit to the garrison commander the authority to approve plans requiring employees to work more than sixteen hours of any twenty-four hour period. If implemented, this proposal would have forced Fort Campbell to reorganize its chain of command because the garrison commander presently lacks managerial authority over some members of the bargaining unit. The FLRA noted that, if adopted, this proposal would impinge substantially on the government's authority to organize its own command structure.[51] It therefore concluded that the proposal outlined an improper arrangement that would interfere excessively with the government's right to assign work.[52] The fifth proposal would require the government to grant unit employees preferential hiring considerations for new positions. The FLRA, following precedent, found that this proposal would preclude the agency from assessing the quality of all available candidates from the outset. The proposal therefore would interfere directly with management's right to select employees.[53]

Picketing Permitted on Installation

The FLRA recently adopted its administrative law judge's recommended decision that the Army violated 5 U.S.C. section 7116(a)(1) by refusing to allow a union to conduct informational picketing on Fort Benjamin Harrison.[54] The union had sought to picket from 0630-0800, 1100-1300, and 1530-1700 hours outside the headquarters building of the Defense Finance and Accounting Service (DFAS). The administrative law judge rejected the Army's suggestion that he evaluate alternative means of access for the union to publicize its opinions.[55] Noting that Fort Benjamin Harrison is an open post, and that all of the picketers presumably would be off-duty DFAS employees, the judge decided to apply National Labor Relations Board decisions on access to an employer's property by its own employees, rather than the Board's decisions regarding access by nonemployees.[56] He also noted that in *Third Combat Support Group*[57] the FLRA expressly applied the NLRB's lenient standard concerning access for picketing employees when it allowed a union to distribute handbills on an Air Force base.[58] The judge commented that one essential lesson of *Third Combat Support Group* "is that employees covered by the Statute, including those employed on military bases, have a right to conduct union activities concerning unit employees' conditions of employment in appropriate locations within the Government property of their employing agency or activity, subject only to restrictions necessary to avoid disruption of the agency's mission."[59] In the present case, the judge noted, the union had requested an appropriate location for picketing. "The Army's restriction was not supported by any ... showing of necessity and was therefore unlawful."[60]

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[46] *Id.* at 392 (distinguishing American Fed'n of Gov't Employees, Local 987, 37 F.L.R.A. 197 (1990)).

[47] *Id.* at 388, 390.

[48] *Id.* at 393, 395-96.

[49] *Id.* at 396.

[50] *Id.* at 379-81.

[51] *Id.* at 399.

[52] *Id.* at 400.

[53] *Id.* at 402.

[54] *See* American Fed'n of Gov't Employees, Local 1141, 40 F.L.R.A. 558 (1991).

[55] American Fed'n of Gov't Employees, Local 1141, 40 F.L.R.A. 562, 565-66 (1990).

[56] *Id.*

[57] 29 F.L.R.A. 1044 (1987).

[58] *Id.*

[59] *Id.*

[60] *Id.*

The Authority upheld the judge's decision and ordered Army facilities on Fort Benjamin Harrison to post copies of a notice of government noninterference with union informational picketing.[61] The FLRA rejected the union's contention that the notice must be signed by the Secretary of the Army and posted Army-wide. The Authority reasoned that the general commanding Fort Benjamin Harrison had the authority to exercise independent discretion and was therefore an appropriate signatory.[62]

As practical guidance, Army policy generally does *not* permit on-post picketing absent certain extraordinary circumstances. When addressing this issue, each installation must coordinate with its major command and with Headquarters, Department of the Army, because the Army must address circumstances surrounding possible picketing on an individual basis.

FLRA Reverses Arbitrator's Award of Hazard Pay

The Authority threw out most of an arbitrator's remedies in a grievance filed on behalf of employees exposed to toxic fumes at their workplace.[63] The Internal Revenue Service (IRS) had occupied office space adjoining a manufacturer who regularly used a cleaning solvent in its production process. The solvent's toxic fumes entered the agency's area, and a number of workers became sick. They were forced to use sick and annual leave for examination and treatment. The union sought hazard pay differential for employees who were exposed to the fumes, as well as restorations of their leaves, and reimbursements for their medical costs. The arbitrator ruled that the IRS had violated the contractual requirement to maintain safe and healthful working conditions.[64] He ordered the agency to pay hazard pay, or—if regulations prohibited this—to ask the OPM to amend appendix A of title 5, Code of Federal Regulations (5 C.F.R.), part 550, subpart I, which contains the schedule of duties authorized hazard pay differentials.[65] He also ordered the IRS to restore the grievants' leaves and reimburse them for their medical costs.[66]

The FLRA reversed the portion of the award requiring payment of the differential. It noted that appendix A requires agencies to pay employees a twenty-five percent differential for "irregular or intermittent duty" involving "exposure to hazardous agents including working with or in close proximity to ... [t]oxic chemical materials."[67] The Authority stated that the arbitrator had concluded erroneously that "because employees worked in proximity to danger from toxic chemical fumes, and were subjected to such danger on an intermittent basis throughout the time they were co-located with the urethane manufacturer, the employees were entitled to hazard pay."[68] The proper standard, which the arbitrator had failed to apply, requires the fact-finder to determine that the employees "are assigned to and perform irregular or intermittent duties involving toxic chemicals."[69] The Authority concluded that OPM regulations did not authorize hazard pay under the circumstances presented in the instant case and held this portion of the arbitrator's award deficient.[70]

The FLRA also requested an opinion from the Office of Workers' Compensation (OWCP) of the Department of Labor on the leave and medical costs. The OWCP opined that the Federal Employees Compensation Act (FECA)[71] provides an exclusive remedy for grievants seeking to recover the costs of medical examination and treatment arising from on-the-job injuries. The arbitrator lacked the requisite authority to direct the IRS to make payments that are governed exclusively by FECA and its implementing regulations.[72] The FLRA, therefore, ruled that the arbitrator's reimbursement remedy was contrary to law and vacated that portion of the award.[73] The FLRA also accepted the OWCP opinion that leave entitlements are *not* specifically governed by the FECA. It sustained that portion of the award, as well as the alternative hazard pay remedy of requesting the OPM amendment of appendix A.[74]

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[61] American Fed'n of Gov't Employees, Local 1141, 40 F.L.R.A. 558, 558-59 (1991).

[62] *Id.* at 559 n.1.

[63] National Treasury Employees Union Chap. 51, 40 F.L.R.A. 614 (1991).

[64] *Id.* at 616-17.

[65] *Id.* at 617-18.

[66] *Id.* at 618.

[67] *Id.* at 621 (citing 5 C.F.R. part 550, subpart I, app. A (1991)).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 622.

[71] 5 U.S.C. §§ 7101-7135 (1988).

[72] *See id.* at 631.

[73] *Id.* at 633.

[74] *Id.* at 628-29, 634.

Practitioners should remember that the threshold issues for entitlement to hazardous duty pay are whether the duties at issue are regular and recurring and whether they already have been factored in the evaluation and grade determinations of the positions in question. Under 5 U.S.C. section 5545(d)(1) (1988), authorized differentials do not apply to employees in positions "the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof." If a union proposes to negotiate over payment of hazardous duty pay and the agency holds that the proposal is nonnegotiable because the duties already have been considered properly in the classification process, the union's proper avenue of redress is a classification appeal to the OPM. The FLRA has dismissed several negotiability appeals as premature when unions failed to seek redress through the OPM, expressly holding that the appeal could be renewed if the OPM determined through the classification procedures that the hazards had not been taken into account in the classification process.[75] Responding to the recent passage of legislation amending the Federal Pay Comparability Act of 1970,[76] the OPM is reexamining this issue and may lift these restrictions. To date, however, it has rendered no final decision.

Practice Pointer

Sample EEO Settlement Agreement

Many labor counselors have expressed the need for some "standard" pleadings and documents in their daily practice. The following is a sample settlement agreement suitable for equal employment opportunity (EEO) complaints, modified from Figure 2-9 in Army Regulation 690-600. As always, counselors will have to customize this sample to fit the needs of a particular installation and the facts of a particular case. Counselors should *not* use some provisions in the settlement except in extremely unusual circumstances—for example, the fourth option for paragraph five, in which the Army waives settlement of the amount of attorney fees within the agreement. Similarly, this sample does not include some specialty clauses that might be particularly useful under certain circumstances—for example, a standard nondisclosure paragraph. Labor counselors should address any questions concerning EEO settlement agreements to their MACOM labor counselors or the Labor and Employment Law Office at OTJAG.

NEGOTIATED SETTLEMENT AGREEMENT

IN THE MATTER OF:

(Name) EEOC No.
Complainant Agency No.

AND

(Activity)

1. In the interest of promoting its Equal Employment Opportunity Program and to avoid protracted litigation, the Army agrees to settle the above-captioned complaint on the basis shown below.

2. By entering into this settlement the Army does not admit that it has violated the Civil Rights Act of 1964, as amended, or any other Federal or State statute or regulation.

3. The Army agrees to

4. Complainant's signature on this agreement constitutes the withdrawal of the complaint. In addition, the complainant agrees that complainant waives the right to sue over the matters raised in the complaint and that they will not be made the subject of future litigation. Complainant waives any and all entitlements to back pay and/or benefits not specifically provided for above. Complainant acknowledges that s/he has had the opportunity to seek legal counsel.

5. It is agreed between the parties to this agreement that no attorney fees or costs shall be awarded as part of this settlement agreement.

[OR, if the agreement includes a specific amount for attorney fees]:

5. It is agreed between the parties to this agreement that attorney fees and costs in the amount of _____ dollars ($_____) shall be paid by the Army to the complainant.

[OR, if the agreement includes "reasonable attorney fees" under $5000]:

5. It is agreed between the parties to this agreement that the Army will reimburse the complainant for reasonable attorney fees and associated legal costs relating to the subject complaint. The complainant and the complainant's attorney must provide all requested documentation

[75] *See* American Fed'n of Gov't Employees, Meat Graders Council, 8 F.L.R.A. 118 (1982); National Fed'n of Fed. Employees, Local 862, 3 F.L.R.A. 454 (1980).

[76] Pub. L. No. 91-656, 84 Stat. 1946 (codified as amended in scattered sections of 2 and 5 U.S.C.)

pertaining to such fees and costs to the agency representative. The total amount of the reimbursement will be less than $5,000.00. It is further agreed between the parties that the matter of attorney fees and costs are a separate and discrete matter from the other terms of this agreement which settle the substance of the complaint. Accordingly, the parties to this agreement expressly agree that any dispute concerning the amount or payment of attorney fees or costs does not constitute a breach of this agreement. Rather, the parties agree that the substantive terms of this agreement remain valid and enforceable even in the event of a dispute over attorney fees or costs. It is agreed that any such dispute would be grounds for a separate appeal based solely on the issue of the reasonableness of attorney fees and costs, and would not affect the validity of the other terms of this agreement. The provisions of paragraph 6, infra, do not apply to disputes over attorney fees and costs.

[OR, if the agreement includes "reasonable attorney fees" which may amount to $5000 or more]:

5. It is agreed between the parties to this agreement that the Army will reimburse the complainant for reasonable attorney fees and associated legal costs relating to the subject complaint. The complainant and the complainant's attorney must provide all requested documentation pertaining to such fees and costs to the agency representative. The parties to this agreement understand that any reimbursement for a total amount of $5,000.00 or more is subject to approval by Headquarters, Department of the Army. It is further agreed between the parties that the matter of attorney fees and costs are a separate and discrete matter from the other terms of this agreement which settle the substance of the complaint. Accordingly, the parties to this agreement expressly agree that any dispute concerning the amount or payment of attorney fees or costs does not constitute a breach of this agreement. Rather, the parties agree that the substantive terms of this agreement remain valid and enforceable even in the event of a dispute over attorney fees or costs. It is agreed that any such dispute would be grounds for a separate appeal based solely on the issue of the reasonableness of attorney fees and costs, and would not affect the validity of the other terms of this agreement. The provisions of paragraph 6, infra, do not apply to disputes over attorney fees and costs.

6. If the complainant believes that the Army has failed to comply with the terms of this settlement agreement for any reason not attributable to acts, omissions or conduct of the complainant, the complainant shall notify the Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA), ATTN: SFMR-RBE, Washington, D.C. 20310-1813, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. A copy should also be sent to the activity EEO officer. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, the complaint be reinstated for further processing from the point processing ceased under the terms of this settlement agreement. If the EEOCCRA has not responded to the complainant in writing or if the complainant is not satisfied with the attempts to resolve the matter, the complainant may appeal to the Equal Employment Opportunity Commission for a determination as to whether the Army has complied with the terms of this settlement agreement. The complainant may file such an appeal 35 days after service of the allegation of noncompliance upon the EEOCCRA but no later than 20 calendar days after receipt of the Army determination.

7. I have read this Negotiated Settlement Agreement and accept and agree to its provisions. This Negotiated Settlement Agreement constitutes the complete and total agreement of the parties.

FOR THE ARMY:

_____

(Approval Authority)

(Title)

_____

(Labor Counselor)

Agency Representative

Date: _____

FOR THE COMPLAINANT:

_____

Complainant

_____

(Complainant's Attorney)

Complainant's Representative

Date: _____

Criminal Law Note

OTJAG Criminal Law Division

Analysis of Change 5 to the Manual for Courts-Martial

Colonel Francis A. Gilligan
Major Thomas O. Mason

Introduction

On 27 June 1991, President Bush signed Executive Order 12,767,[1] authorizing a fifth change to the Manual for Courts-Martial, 1984.[2] The President ordered several modifications to the Manual that will improve the efficiency and effectiveness of the military justice system. These changes will ensure that the Manual fulfills its essential purposes as a comprehensive body of law governing military justice procedures and as a guide for lawyers and nonlawyers in the operation and application of military law.[3] The President authorized change 5 pursuant his authority to prescribe pretrial, trial, and posttrial procedures[4] and to set limits on the maximum punishments that may be adjudged for acts violating the Uniform Code of Military Justice.[5]

Executive Order 12,473, as amended by Executive Order 12,484, requires the Department of Defense to review the Manual for Courts-Martial annually. Following each annual review, the Secretary of Defense must recommend to the President any appropriate amendments to the Manual. To achieve these objectives, the Secretary of Defense established the Joint Service Committee on Military Justice (JSC).[6] The JSC consists of five voting members, representing the Army, Navy, Air Force, Marine Corps, and Coast Guard,[7] and one nonvoting member, who represents the United States Court of Military Appeals.[8] Each year, the JSC reviews the Manual in light of current judicial and legislative developments. Its members ensure that the Manual, the discussion, and the appendices accurately apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States District Courts, to the extent that these principles and rules are practicable and consistent with the UCMJ.[9]

The amendments contained in change 5 are the product of the 1988, 1989, and 1990 annual reviews of the Manual. They can be grouped into four procedural areas: pretrial, trial, posttrial and sentencing. Amendments to pretrial procedures include a major revision of the military's speedy trial rule, as well as changes to the rules governing pretrial investigations, pretrial agreements, and discovery. Amendments to trial procedures increase the military judge's authority to conduct conferences and adopt a new evidence rule excluding from evidence the results of polygraph examinations. Amendments to posttrial procedures add new provisions governing advisement and waiver of appellate rights and staying judges' rulings pending Government appeals. Finally, change 5 contains six amendments modifying the military's sentencing procedures and the explanations found in Part IV of the Manual. This note will discuss the specific amendments included in change 5 in the context of these four areas of procedure.

Pretrial Procedures

Pretrial Investigations

Change 5 contains two changes to Rule for Courts-Martial (R.C.M.) 405(g) that will assist article 32 investigating officers in making determinations concerning witness availability and alternatives to live testimony. The first, amending R.C.M. 405(g)(1)(A), specifies that a witness within 100 miles of the site of an article 32 investigation is "reasonably available" to testify. The second, amending R.C.M. 405(g)(4)(B), permits an investigating officer, in time of war, to consider unsworn statements of unavailable witnesses.

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[1] Exec. Order No. 12,767, 56 Fed. Reg. 3026 (1991).

[2] Manual for Courts Martial, United States, 1984 [hereinafter MCM, 1984]. The Office of The Judge Advocate General, Criminal Law Division, provided Army legal offices with the text of change 5 and the changes to the discussion and analysis. *See* Message, HQ, Dep't of Army, DAJA-CL, 021110Z July 91, subject: Amendments to MCM, 1984; Message, HQ Dep't of Army, DAJA-CL, 021200Z July 91, subject: Amendments to MCM 1984.

[3] Dep't of Defense Directive No. 5500.17, Review of the Manual for Courts-Martial (Jan. 23, 1985) [hereinafter DOD Dir. 5500.17].

[4] Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1988) [hereinafter UCMJ]; *see, e.g.*, United States v. Curtis, 32 M.J. 252 (C.M.A. 1991).

[5] *See* UCMJ art. 56.

[6] DOD Dir. 5500.17, Para. D.1.

[7] *See id.*, para. D.1.a. Each service currently is represented by the individual serving as Chief, Criminal Law Division, or Chief, Military Justice Division.

[8] *Id.*

[9] *Id.*, para. D.1.b(1); UCMJ, art. 36. Excellent discussions concerning the operation of the JSC appear in Garrett, *Reflections on Contemporary Sources of Military Law*, The Army Lawyer, Feb. 1987, at 38; and Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 Mil. L. Rev. 5 (1990).

R.C.M. 405(g)(1)(A) requires the Government to produce any witness whose testimony is relevant and not cumulative, if that witness is reasonably available.[10] The investigating officer must perform a balancing test to determine if a witness is reasonably available. If the investigating officer determines that a witness is not reasonably available, he or she may consider an alternative to live testimony.[11] The amendment to R.C.M. 405(g)(1)(A) creates a bright-line rule that simplifies the investigating officer's task of determining witness availability.

The amendment provides that a witness is reasonably available if: (1) the witness is located within 100 statute miles of the location of the article 32 investigation; and (2) the significance of the witness's testimony and personal appearance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness's appearance.[12] A witness located more than 100 miles from the site of the investigation is not reasonably available. The investigating officer may request an appearance by a witness beyond the 100 mile radius, but the authority to decide whether to produce the witness rests either with the witness's commander—if the witness is on active military service—or with the commander ordering the investigation—if the witness is a civilian.[13]

R.C.M. 405(g)(4) outlines alternatives to live testimony. The amendment to R.C.M. 405(g)(4)(B) authorizes the investigating officer to consider, during time of war, the unsworn statements of unavailable witnesses.[14] The analysis accompanying the amendment recognizes that the burdens of war outweigh the benefits to be gained from requiring sworn statements when unsworn statements are available.[15] The amendment complies with article 32, UCMJ, which does not limit an investigating officer's consideration to sworn evidence or evidence admissible at courts-martial. The new analysis emphasizes, however, that the investigating officer should consider the lack of an oath in determining the credibility and weight to give to an unsworn statement.[16]

Discovery

The military justice system, already known for its open discovery procedures, will benefit from four amendments to the discovery rules of R.C.M. 701.[17] The first, amending R.C.M. 701(b)(1), requires the defense to notify the prosecution of the names of all defense witnesses—other than the accused—whom the defense intends to call during the defense case-in-chief. This amendment also requires the defense to provide the prosecution with any written or sworn statements that these witnesses may have made. The second, amending R.C.M. 701(b)(2), requires the defense to notify the prosecution if it intends to raise the defense of innocent ingestion. The third, which modifies R.C.M. 701(a)(3), requires the prosecution to disclose to the defense the identity of its rebuttal witnesses to an innocent ingestion defense. The fourth amendment provides that, if the defense withdraws notice of its intent to rely on alibi, innocent ingestion, or insanity defenses, the prosecution may not introduce evidence showing that the defense abandoned its intention to rely on one or more of these defenses.

Review of the discovery provisions of the Manual and of article 46, UCMJ reveals the need for these amendments. Prior to change 5, the defense was not required to disclose the substance of the testimony of a defense witness unless it had requested the government to produce the witness. Moreover, if the defense did not ask the government production of a defense witness, the rules required the defense only to disclose notice of the defense of alibi or lack of mental responsibility, or to provide the Government access to certain information in response to a Government request for reciprocal discovery.[18] To exercise an accused's right to compulsory process now, however, the defense must submit to the trial counsel a written list of all the witnesses the defense wishes the Government to produce.[19] For each requested witness, the defense also must submit a synopsis of expected testimony sufficient to show the relevance and necessity of the testimony.[20] The rationale for these changes appears in the analysis. The drafters pointed out that the amendment follows the trend in state jurisdictions that gives the prosecution an independent right to receive discovery from the defense.[21]

Significantly, article 46, UCMJ, states that *each* party must be given an equal opportunity to obtain evidence.[22] R.C.M. 701(c) similarly requires that each party have an equal and adequate opportunity to interview witnesses,

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[10] MCM, 1984, Rule for Courts-Martial 405(g) [hereinafter R.C.M.].

[11] R.C.M. 405(g)(4).

[12] R.C.M. 405(g)(1)(A) (C5, 6 July 1991).

[13] *See* R.C.M. 405(g)(1)(A) analysis (C5, 6 July 1991).

[14] R.C.M. 405(g)(4)(B) (C5, 6 July 1991).

[15] R.C.M. 405(g)(4)(B) analysis (C5, 6 July 1991).

[16] *Id.*

[17] *See generally* F. Gilligan & F. Lederer, Court-Martial Procedure § 11-12.20 (1991)(discussing amendment's changes to military discovery procedure) [hereinafter Gilligan & Lederer].

[18] *See* R.C.M. 701(b).

[19] R.C.M. 703(c)(2).

[20] R.C.M. 703(c)(2)(i).

[21] R.C.M. 701(b)(1) analysis (C5, 6 July 1991).

[22] UCMJ art. 46.

inspect evidence, and prepare its case. The affirmative duty the amendment to R.C.M. 701(b)(1) imposes on the defense counsel comports well with UCMJ article 46, and R.C.M. 701(e), and adds a requisite symmetry to discovery in the military. Most importantly, the amendment's mandatory discovery provisions also will enhance the truth-finding process in the military justice system.[23]

The amendment to R.C.M. 701(b)(2) requires the defense to disclose its intent to present the defense of innocent ingestion. This defense, often raised in trials for wrongful use of controlled substances, poses problems similar to the problems generated by the alibi defense. The drafters designed the amendment to eliminate the substantial delays that often occur when the defense fails to notify the Government that it intends to raise the innocent ingestion defense.[24] Balancing this new requirement, the amendment to R.C.M. 701(a)(3)(B) provides that if the defense notifies the government of its intention to raise an innocent ingestion defense, the prosecution in turn must disclose the identity of any witnesses it intends to call in rebuttal.[25] Finally, to protect the accused, change 5 amends R.C.M. 701(b)(5) to state that when the defense withdraws notice of an intent to rely on alibi, insanity, or innocent ingestion, neither evidence of such intention nor any related statements are admissible against the individual who gave the notice.[26] This amendment, based on Federal Rules of Criminal Procedure 12.1 and 12.2, applies regardless of whether the person against whom the Government would offer the evidence is the accused or a witness.[27]

Pretrial Agreements

Two amendments to R.C.M. 705 modernize the military's guilty plea practice. The first amends R.C.M. 705(d) to permit either party to initiate pretrial negotiations while the second, amending R.C.M. 705(c)(2), permits either party to propose the inclusion of terms and conditions in a pretrial agreement. The Manual previously provided that any offer to plead guilty, and every term and condition of any proposed agreement, must originate with the accused.[28]

The drafters note that the amendments to R.C.M. 705 do not change the general rule that no term or condition of a pretrial agreement may violate law, public policy, or regulation.[29] The amendments, however, adopt the federal practice, which recognizes no requirement that negotiations for plea agreements must originate with the accused.[30] The drafters felt that the military did not need a more restrictive rule to protect the integrity of its guilty plea practice. They noted that in the military, the trial judge is required to conduct an extensive inquiry to ensure that an accused's plea is provident and voluntary.[31] The drafters concluded that the former rule was unnecessarily complex, remarking that military courts, in any event, often have great difficulty determining which side initiated negotiations or proposed a particular term or condition.

Speedy Trial Rules

The most significant change to the military justice system appears in the revision of the military's speedy trial rules.[32] Under the new rules, the Government has 120 days[33] from the time it prefers charges to bring an accused to trial, unless the appropriate authority grants the Government's request for pretrial delay.[34] Prior to referral, either the convening authority or the military judge may grant delays and specify the duration of these delays. After referral, however, only the military judge may grant a delay.[35] If the Government does not obtain a pretrial delay, time will run against the Government. The military judge will be able to determine readily at arraignment whether an accused has been provided a speedy trial.

As amended, the rule provides guidance for granting pretrial delays and eliminates after-the-fact determinations of whether certain periods of delay should be

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[23] *See* R.C.M. 701(b)(1) analysis (C5, 6 July 1991).

[24] *See* R.C.M. 701(b)(2) analysis (C5, 6 July 1991).

[25] R.C.M. 701(a)(3)(B) (C5, 6 July 1991).

[26] *See* R.C.M. 701(b)(5) analysis (C5, 6 July 1991).

[27] *Id.*

[28] R.C.M. 705(d).

[29] R.C.M. 705(d) analysis (C5, 6 July 1991).

[30] *Id.*

[31] *See id.*

[32] *See generally* Gilligan & Lederer, *supra* note 17, § 17-72.32.

[33] R.C.M. 707(a) (C5, 6 July 1991).

[34] R.C.M. 707(b)(1) (C5, 6 July 1991).

[35] R.C.M. 707(c)(1).

excluded.[36] The amendment, moreover, eliminates the specific exclusions enumerated in R.C.M. 707(c) and abrogates the former practice of debarring from accountable time the periods covered by these exclusions. The amended discussion to R.C.M. 707(c)(1), which the drafters included to ensure that speedy trial issues are developed fully at trial, explains that the decision to grant a delay is a matter within the sole discretion of the military judge or convening authority. This decision must be based on the facts and circumstances of the case and should be reduced to writing.[37] Any decision granting a pretrial delay will be subject to review for abuse of discretion and unreasonable delay.[38]

To assist convening authorities and judges, the discussion to R.C.M. 707(c) lists several examples of circumstances justifying reasonable delays. A military judge, for example, may grant the Government a delay to allow it to prepare for an unusually complex trial, examine the mental capacity of the accused, recall a member of the Reserve component to active duty for disciplinary action, or obtain appropriate security clearances. This list of examples is not inclusive; accordingly, the appellate courts should not use it to limit the discretion of the convening authority or trial judge.[39]

The changes to R.C.M. 707 follow the general principles of both the Federal Speedy Trial Act[40] and the American Bar Association Standards for Criminal Justice.[41] They also embody the sixth amendment and UCMJ article 10 rights to a speedy trial. The ninety-day rule previously established in R.C.M. 707(d) codified the decision in *United States v. Burton*.[42] The new rule eliminates the ninety-day rule. The drafters intend the 120-day rule to apply to *all* cases regardless of whether the accused is confined. The drafters warned, however, that unless the United States Court of Military Appeals reexamines *Burton* and its progeny, the Government may risk violating the *Burton* rule even if it complies fully with the provisions of R.C.M. 707. Accordingly, until *Burton* is reexamined, counsel should follow the *Burton* ninety-day rule whenever a commander subjects an accused to pretrial confinement or to any other restraint outlined in R.C.M. 304(a)(2) to (4).[43]

Perhaps the most significant change to R.C.M. 707 affects the remedy for speedy trial violations. The prior rule required the military judge to dismiss the charges with prejudice if the Government violated R.C.M. 707.[44] If the Government took 121 days to bring an accused to trial, the military judge was obliged to dismiss the charges without regard to prejudice. The new rule still requires the judge to dismiss the charges, but gives the judge the discretion to dismiss the charges with or without prejudice.[45] The drafters advised judges to dismiss with prejudice only when the Government's failure to bring the accused to trial promptly actually has deprived the accused of his or her constitutional right to a speedy trial.[46]

Trial Procedures

Conferences

The amendment to R.C.M. 802(c) provides military judges with necessary additional authority. R.C.M. 802 authorizes a military trial judge to call conferences to consider matters that will promote a fair and expeditious trial. Prior to change 5 to the Manual, a judge's use of conferences was limited because a military judge could not conduct a conference over the objection of a party.[47] Change 5 eliminates this restriction.[48] As amended, R.C.M. 802(c) permits the judge to conduct a conference whenever the judge deems the conference necessary, even over the objections of the parties. This change significantly enhances the judge's ability to control the court-martial proceeding. It does not, however, empower the military judge to compel a party to resolve an issue or to make any concession at a conference.[49]

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[36] *See* R.C.M. 707(c)(1) discussion (C5, 6 July 1991).

[37] *Id.*

[38] *See* R.C.M. 707(c)(1) analysis (C5, 6 July 1991).

[39] R.C.M. 707(c)(1) discussion (C5, 6 July 1991).

[40] 18 U.S.C. §§ 3152-3156, 3161-3174 (1988).

[41] American Bar Ass'n, Standards for Criminal Justice § 12-1.3 (1986).

[42] 44 C.M.R. 166 (C.M.A. 1971).

[43] R.C.M. 707(a) analysis (C5, 6 July 1991).

[44] R.C.M. 707(e) *amended by* C5, 6 July 1991.

[45] R.C.M. 707(d) (C5, 6 July 1991).

[46] R.C.M. 707(d) analysis (C5, 6 July 1991).

[47] R.C.M. 802(c) *amended by* C5, 6 July 1991.

[48] R.C.M. 802(c) (C5, 6 July 1991).

[49] *See* R.C.M. 802(c) analysis (C5, 6 July 1991).

Admissibility of Polygraph Evidence

Change 5 includes the text of a new rule of evidence. At the drafters' request, the President added Military Rule of Evidence 707[50] to exclude polygraph evidence at courts-martial. The new rule renders inadmissible the results of a polygraph examination; the opinion of a polygraph examiner; and any reference to an offer to take, a failure to take, or the taking of a polygraph examination. The rule—grounded on several public policy concerns—establishes a bright-line rule that polygraph evidence may not be offered by either party to a court-martial even if both parties are willing to stipulate to the evidence.

The analysis, similar to the analysis accompanying Military Rule of Evidence 403, outlines in great detail the rationale for the new rule and the important policy considerations that support it. The drafters reasoned that because polygraph evidence tends to be shrouded with an aura of near infallibility, court members easily might be misled by polygraph evidence.[51] The drafters also warned that, to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' responsibilities to ascertain the facts and adjudge guilt or innocence are preempted.[52] The drafters remarked, moreover, that conflicting polygraph evidence likely will confuse the members. Instead of determining guilt or innocence, the members would have to render a judgment on the validity and limitations of polygraph examinations.[53] The drafters added that polygraph evidence would result in a substantial waste of time if the collateral issues regarding the reliability of the test and the qualifications of the examiner must be litigated in every case.[54] Finally, the drafters feared that the members mistakenly might infer from the admissibility of polygraph evidence that the accused has a right to a polygraph examination by a government polygrapher—even though polygraphers often are not reasonably available.[55]

Perhaps the drafters' most important observation is that the reliability of polygraph evidence has not been established sufficiently. The admission of polygraph evidence, therefore, places a burden on the administration of justice that far outweighs its probative value.[56] Although the new rule invalidates *United States v. Gipson*[57] with respect to the admissibility of polygraph evidence, it does not affect other scientific evidence admissible under *Gipson*.[58] Nor does it prohibit pretrial or posttrial consideration of polygraph evidence.

Posttrial Actions

Change 5 includes five amendments to appellate procedures. These amendments do not represent departures from past practices, but instead clarify current practices. Two amendments to R.C.M. 908 appear in change 5. The first amends R.C.M. 908(b)(4) to state expressly that a ruling of a military judge is stayed pending the appeal of that ruling. Before the amendment clarified this issue, the absence of a statement in R.C.M. 908 explicitly staying the ruling on appeal had confused a number of civilian practitioners.[59] The second amendment to R.C.M. 908 added a new subsection to the existing rule.[60] This new provision addresses the situation in which an accused is in pretrial confinement when the United States files an appeal pursuant to UCMJ article 62. A commander need not release an accused from pretrial confinement merely because the Government has filed an appeal; however, the commander must review the case and determine whether confinement is appropriate pending the outcome of the appeal.[61] R.C.M. 908(b)(9) states that the commander should base this decision on the same considerations that would authorize the commander to impose pretrial confinement under R.C.M. 305(h)(2)(B).[62]

An amendment to R.C.M. 1010 transfers the responsibility for advising an accused of posttrial and appellate rights from the military judge[63] to the defense counsel.[64] Change 5 also adds a discussion to R.C.M. 1010 to alert defense counsel to their new posttrial duties. The discussion states that defense counsel must explain an accused's

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[50] MCM, 1984, Military Rule of Evidence 707 [hereinafter Mil. R. Evid.].

[51] Mil. R. Evid. 707 analysis.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 24 M.J. 246 (C.M.A. 1987); *see also* E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Courtroom Criminal Procedure §§ 634-38 (1987 & Supp. 1990); Gilligan & Lederer, *supra* note 17, § 20-33.33c (in-depth discussion of new rule).

[58] *See* Gilligan & Lederer, *supra* note 17, § 20-33.33c.

[59] R.C.M. 908(b)(4) analysis (C5, 6 July 1991).

[60] *See* R.C.M. 908(b)(9)(C5, 6 July 1991).

[61] R.C.M. 908(b)(4) (C5, 6 July 1991).

[62] R.C.M. 908(b)(4) analysis (C5, 6 July 1991).

[63] *See* R.C.M. 1010 *amended by* C5, 6 July 1991.

[64] R.C.M. 1010 (C5, 6 July 1991).

appellate rights and prepare the written document of this advisement prior to or during the trial.[65]

The final changes in this section concern the waiver of an accused's appellate rights and the execution of a punitive discharge. Change 5 amends R.C.M. 1110(f)(1) to require an accused wishing to file a waiver of appellate rights to do so within ten days of receipt of the convening authority's action. In addition to setting a time limit, the change emphasizes that the accused may sign this waiver at any time after trial before the filing deadline.[66] Change 5 also amends R.C.M. 1113(c)(1) to state specifically that a general court-martial convening authority must consider the accused's posttrial service before ordering the execution of a punitive discharge. Even after approving a punitive discharge, the convening authority may retain a service member on active duty if retention would be in the best interest of the service.[67] The amendment requires the convening authority to consider the advice of his staff judge advocate (SJA) before making this decision if the accused is not on excess leave, and if more than six months have elapsed since the convening authority approved the sentence. The SJA's advice must describe the findings and sentence as finally approved and the nature and character of duty since approval of the sentence. It also must recommend whether the convening authority should order the discharge executed.[68]

Finally, change 5 contains minor amendments to R.C.M.s 1103 and 1107. These amendments require the Government to include the convening authority's action in the record of trial. These amendments create no new substantive rights, but rectify an omission from the 1984 rules.

Crimes and Punishments

Change 5 contains six amendments to the military's sentencing procedures and Part IV explanations. The first, amending R.C.M. 1004(c)(8), conforms the capital sentencing procedure for felony murder to a recent Supreme Court decision. Two amendments to Part IV modify paragraphs 4 and 19 to increase the maximum periods of confinement for attempted murder and for escape from confinement. A fourth amendment modifies paragraph 35 of Part IV, to clarify the definition of "operating" for the offense of drunk driving. The fifth amendment deletes false swearing as a lesser included offense to perjury in paragraph 56, and the sixth amends paragraph 96 to corrects an error in the form specification for obstruction of justice.

The amendment to R.C.M. 1004(c)(8) adds a new aggravating factor for military courts to consider when deciding whether to impose the death penalty for felony murder. As amended, R.C.M. 1004(c)(8) provides that the court may impose the death sentence if the accused is the actual perpetrator of the crime or was a principle whose active and substantial participation in the burglary, sodomy, rape, robbery, or aggravated arson manifested a reckless indifference for human life.[69] The original R.C.M. 1004(c)(8) derived from the Supreme Court's decision in *Enmund v. Florida*,[70] which held that the eighth amendment prohibited imposition of a death penalty on an individual convicted of felony murder who did not actually kill, attempt to kill, or intend that a killing take place.[71] The amendment to R.C.M. 1004(c)(8) is based on the Court's later ruling in *Tison v. Arizona*[72] that *Enmund* is satisfied if a defendant convicted of a felony-murder was a major participant and manifested a reckless indifference to human life.[73]

Two provisions change the maximum permissible confinement for attempted murder and for escape from confinement. Paragraph 4e, as amended, increases the maximum confinement for attempted murder to life.[74] Previously, this paragraph limited the sentence for attempted murder to twenty years.[75] The drafters felt that the change was necessary because the aggravating factors surrounding the commission of some attempted murders are so egregious that a twenty-year limit may be inappropriate.[76] The amendment to paragraph 19 increases the

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[65]R.C.M. 1010 discussion (C5, 6 July 1991). The drafters noted that in many cases, especially immediately after trial, the courtroom is not the most effective location to provide this advice. *See* R.C.M. 1010 analysis (C5, 6 July 1991). Accordingly, they suggested that accused's counsel is better suited to give this advisement in an atmosphere in which the accused more likely will comprehend the rights. *Id.*

[66]R.C.M. 1110(f)(1) analysis (C5, 6 July 1991).

[67]R.C.M. 1113(c).

[68]R.C.M. 1113(c) (C5, 6 July 1991).

[69]R.C.M. 1004(c)(8) *amended by* C5, 6 July 1991.

[70]458 U.S. 782 (1982).

[71]R.C.M. 1004(c)(8) analysis (C5, 6 July 1991).

[72]481 U.S. 137 (1987).

[73]*Id.*

[74]MCM, 1984, Part IV, para. 4e (C5, 6 July 1991).

[75]MCM, 1984, Part IV, para. 4e *amended by* C5, 6 July 1991.

[76]MCM, 1984, Part IV, para. 4e analysis (C5, 6 July 1991).

maximum confinement for escape from confinement to five years when the accused is convicted of escaping from confinement imposed pursuant to an adjudged sentence of a court-martial.[77]

An amendment to paragraph 35(c)(2) clarifies the definition of "operating" for the offense of drunk driving. The amendment specifies that an apprehending official need not actually observe the accused operate a moving vehicle for the charge to apply.[78] Merely starting the engine now constitutes "operating" a vehicle—the accused no longer need place the vehicle into motion.[79]

The final two amendments are minor. The amendment to paragraph 57(d) deletes false swearing as an enumerated lesser-included offense to the offense of perjury. Although closely related to the offense of perjury, the offense of false swearing includes one element is not an element of perjury and must, therefore, be charged separately.[80] An amendment to 96(f) corrects a misleading entry in the form specification for the offense of obstruction of justice. The amendment deletes the parenthesis encompassing the word "wrongfully". The drafters found that "wrongfully" is not optional—trial counsel must include it to draft a legally sufficient specification.[81]

Conclusion

Although change 5 includes several amendments to the Manual for Courts-Martial, the Manual continues to serve as the basis for a potent system of justice. The amendments contained in change 5 enhance the ability of the military justice system to protect the constitutional rights of all service members as it serves the military's and society's interest in promoting discipline and justice.

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[77] *Id.*, para. 19e (C5, 6 July 1991).

[78] *Id.*, para. 35c(2) analysis (C5, 6 July 1991).

[79] *Id.*, para. 35c(2) (C5, 6 July 1991).

[80] *Id.*, para. 57d (C5, 6 July 1991).

[81] *Id.*, para. 96f (C5, 6 July 1991).

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1992 Academic Year On-Site Schedule

The following information updates the 1992 Academic Year Continuing Legal Education (On-Site) Training Schedule in the current (October 91) edition of *The Army Lawyer*.

All changes involve personnel. There are no changes to the schedule that appeared in the August edition of *The Army Lawyer* that involve training dates or training sites.

THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 92

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
12, 13 Oct 91	Minneapolis, MN 214th MLC Thunderbird Motor Hotel Bloomington, MN 55431	AC GO RC GO AD & Civ Law Crim Law GRA Rep	 BG Ritchie MAJ Connor MAJ Hayden Dr. Foley	LTC Randal I. Bichler 760 Seventh St. SW Wells, MN 56097 (507) 553-5021
26, 27 Oct 91	New York, NY 77th ARCOM & 4th MLC Fordham University Law School	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Compere MAJ Hunter MAJ Bowman MAJ Griffin	LTC Harvey Barrison HQ, 77th ARCOM ATTN: AFKA-ACA-JA Flushing, NY 11359 (212) 269-0927
2 Nov 91	Detroit, MI 300th MP Cmd Zussman USAR Center Inkster, MI 48141	AC GO RC GO Int'l Law Crim Law GRA Rep	 BG Ritchie MAJ Myhre MAJ Hunter LTC Hamilton	COL Peter A. Kirchner SJA, 300th MP Cmd 3200 S. Beech Daily Rd. Inkster, MI 48141 (313) 561-9400

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
3 Nov 91	Indianapolis, IN 136th JAG Det Bldg 400 Ft. Ben Harrison, IN 46216	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Morrison MAJ Myhre MAJ Hunter MAJ Griffin	CPT Steven H. David 123rd ARCOM ATTN: AFKE-AC-INSJ Ft. Ben. Harrison, IN 46216 (317) 549-5076
23, 24 Nov 91	Philadelphia, PA 79th ARCOM & 153d MLC Willow Grove Naval Air Station Willow Grove, PA 19090	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Ritchie MAJ Borch MAJ Hancock LTC Hamilton	LTC Robert C. Gerhard 222 South Easton Glenside, PA 19038 (215) 885-6780
13-15 Dec 91	New Orleans, LA 2d MLC/LAARNG Radisson Suites Hotel New Orleans, LA 70130	AC GO RC GO Int'l Law Int'l Law GRA Rep	 BG Compere MAJ M. Warner MAJ Addicott COL Curtis	LTC George Simno 1728 Oriole Street New Orleans, LA 70122 (504) 484-7655
4, 5 Jan 92	Long Beach, CA 78th MLC Long Beach Marriott Long Beach, CA 90815	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Compere LCDR Rolph MAJ Hatch Dr. Foley	MAJ Jeffrey K. Smith 500 S. Bonita Avenue Pasadena, CA 91107 (213) 974-5961
11, 12 Jan 92	Seattle, WA 6th MLC University of Washington Law School Seattle, WA 78205	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Ritchie LTC Holland MAJ Emswiler LTC Hamilton	LTC Paul K. Graves 223rd JAG Det 4505 36th Avenue W. Seattle, WA 98199 (206) 281-3002
14-16 Feb 92	San Antonio, TX Fifth Army SJA Sheraton Gunter Hotel San Antonio, TX 78205	AC GO RC GO Crim Law Crim Law GRA Rep	 BG Ritchie MAJ Warner MAJ Cuculic Dr. Foley	MAJ Dennis Carazza HQ, Fifth U.S. Army ATTN: AFKB-JA Ft. Sam Houston, TX 78234 (512) 221-4329
22 Feb 92	Salt Lake City, UT UTARNG Olympus Hotel Salt Lake City, UT 84101	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Morrison LCDR Rolph LTC Jones ARNG	LTC Barrie Vernon P.O. Box 1776 Draper, UT 84020-1776 (801) 524-3682
23 Feb 92	Denver, CO 116th JAG Det Fitzsimmons Army Medical Center Aurora, CO 80045-7050	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Ritchie LCDR Rolph LTC Jones MAJ Griffin	LTC Thomas G. Martin 523 N. Nevada Avenue Colorado Springs, CO 80903 (713) 578-1152
29 Feb, 1 Mar 92	Presidio of San Francisco, CA 5th MLC 6th Army Conference Facility Presidio of San Francisco CA 94129	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Ritchie MAJ Myhre MAJ Bowman COL Curtis	COL David L. Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
7, 8 Mar 92	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Morrison LTC Elliott LTC Leclair MAJ Griffin	MAJ Edward Hamilton South Carolina Nat'l Bank 1405 Main Street Suite 506 Columbia, SC 29226 (803) 765-3227
13-15 Mar 92	Kansas City, MO 89th ARCOM KCI Airport Marriott Kansas City, MO 64153	AC GO RC GO Ad & Civ Law Ad & Civ Law GRA Rep	 BG Compere COL Merck MAJ McCallum LTC Hamilton	CPT Ted Henderson HQ, 89th ARCOM 3130 George Washington Blvd Wichita, KS 67210 (316) 681-1759
21, 22 Mar 92	Washington, D.C. 10th MLC TBD	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Morrison MAJ Wilkins MAJ McFetridge COL Curtis	LTC Frank Carr 4233 Dancing Sunbeam Ct. Ellicott City, MD 21043 (202) 272-0033
28, 29 Mar 92	Boston, MA 94th ARCOM Days Inn Burlington, MA 01803	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 BG Ritchie MAJ Comodeca MAJ Tate Dr. Foley	COL Gerald D'Avolio SJA, HQ, 94th ARCOM ATTN: AFKA-ACC-JA Bldg. 1607 Hanscom AFB, MA 01731 (617) 523-4860
4, 5 Apr 92	Nashville, TN 125th ARCOM Holiday Inn Crowne Plaza 623 Union Street Nashville, TN 37219	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 BG Compere MAJ Hostetter MAJ Melvin ARNG	LTC Robert Washko U.S. Court House 110 9th Ave. S., #A-961 Nashville, TN 37203 (615) 736-5151
11, 12 Apr 92	Chicago, IL 7th MLC Bldg. 31 Ft. Sheridan, IL 60037	AC GO RC GO Contract Law Ad & Civ Law GRA Rep	 BG Compere MAJ Killham MAJ Lassus COL Curtis	1LT Carolyn Burns 96th JAG Det. Bldg. #82 Ft. Sheridan, IL 60037 (312) 538-0733
2, 3 May 92	Columbus, OH 9th MLC Lenox Inn Reynoldsburg, OH 43068	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Morrison MAJ Warner MAJ Wilkins ARNG	CPT Kent N. Simmons 765 Taylor Station Rd. Blacklick, OH 43004 (614) 755-5434
9, 10 May 92	Jackson, MS 11th MLC Mississippi College of Law Jackson, MS 39201	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Morrison MAJ Hudson MAJ Dorsey LTC Hamilton	MAJ Dolan D. Self 2012 Tidewater Lane Madison, MS 39110 (601) 965-4480 — bpn (601) 856-5953 — h
15-17 May 92	Albuquerque, NM 210th JAG Det Sheraton at Old Town Albuquerque, NM 87104	AC GO RC GO Contract Law Contract Law GRA Rep	 BG Compere MAJ Cameron MAJ Helm COL Curtis	MAJ Darrell Riekenberg 210th JAG Det 400 Wyoming Blvd., NE Albuquerque, NM 87123 (505) 766-1311
19-21 May 92	San Juan, PR 169th JAG Det	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	BG Ritchie/ COL Morrison MAJ Hudson MAJ McCallum MAJ Griffin	MAJ Winston Vidal Suite 1000, Fomento Bldg 268 Ponce de Leon Hato Rey, PR 00918 (809) 753-8224

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

4-8 November: 27th Criminal Trial Advocacy Course (5F-F32).

12-15 November: 5th Procurement Fraud Course (5F-F36).

18-22 November: 33d Fiscal Law Course (5F-F12).

2-6 December: 11th Operational Law Seminar (5F-F47).

9-13 December: 40th Federal Labor Relations Course (5F-F22).

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

January 1992

6-10: UMLC, 26th Annual Philip E. Heckerling Institute on Estate Planning, Miami Beach, FL.

15-16: GWU, ADP/Telecommunications Contract Law, Washington, D. C.

21-24: ESI, Managing ADP/T Projects, San Diego, CA.

27-31: ESI, Federal Contracting Basics, San Diego, CA.

27-31: GWU, Formation of Government Contracts, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1991 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Requirement
Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually of course
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually
Oregon	Date of birth—new admittees and reinstated members report an initial one-year period, thereafter, once every three years
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1991 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is

to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

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

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).

AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135492 Legal Assistance Consumer Law Guide/ JAGS-ADA-89-3 (609 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A226159 Model Tax Assistance Program/ JA-275-90 (101 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD A230991 Legal Assistance Guide: Wills/ JA-262-90 (488 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

*AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

*AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam. 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

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

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard,

Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 37-1	Army Accounting and Fund Control	30 Apr 91
AR 40-68	Medical Services Quality Assurance Administration, Interim Change 101	26 Jun 91
AR 600-200	Personnel-General, Interim Change 101	7 Jun 91
JFTR	Joint Federal Travel Regulations, Uniformed Services, Change 56	1 Aug 91
PAM 25-6-1	Army Acquisition Planning for Information Systems	1 Jul 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	**The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course**
1990YIR.ZIP	**1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA**
330XALL.ZIP	**JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division**
505-1.ZIP	**TJAGSA Contract Law Deskbook, Vol. 1, May 1991**
505-2.ZIP	**TJAGSA Contract Law Deskbook, Vol. 2, May 1991**
506.ZIP	**TJAGSA Fiscal Law Deskbook, May 1991**
ALAW.ZIP	**Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF**
CCLR.ZIP	**Contract Claims, Litigation, & Remedies**
FISCALBK.ZIP	**The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA**
FISCALBK.ZIP	**May 1990 Fiscal Law Course Deskbook in ASCII format**
JA200A.ZIP	**Defensive Federal Litigation 1**
JA200B.ZIP	**Defensive Federal Litigation 2**
JA210A.ZIP	**Law of Federal Employment 1**
JA210B.ZIP	**Law of Federal Employment 2**
JA231.ZIP	**Reports of Survey & Line of Duty Determinations Programmed Instruction.**
JA235.ZIP	**Government Information Practices**
JA240PT1.ZIP	**Claims—Programmed Text 1**
JA240PT2.ZIP	**Claims—Programmed Text 2**
JA241.ZIP	**Federal Tort Claims Act**
JA260.ZIP	**Soldiers' & Sailors' Civil Relief Act**
JA261.ZIP	**Legal Assistance Real Property Guide**

JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

U.S. Postal Service

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

Required by 39 U.S.C. 3685)

1A. Title of Publication	1B. PUBLICATION NO.	2. Date of Filing
The Army Lawyer	0 3 6 4 1 2 8 7	24 Sep. 1991
3. Frequency of Issue: Monthly	3A. No. of Issues Published Annually: Twelve	3B. Annual Subscription Price: $24.00 Domestic, $30.00 Foreign

4. Complete Mailing Address of Known Office of Publication *(Street, City, County, State and ZIP+4 Code) (Not printers)*

The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

5. Complete Mailing Address of the Headquarters of General Business Offices of the Publisher *(Not printers)*

Headquarters, Department of the Army, Washington D.C. 20310

6. Full Names and Complete Mailing Address of Publisher, Editor, and Managing Editor *(This item MUST NOT be blank)*

Publisher *(Name and Complete Mailing Address)*

Colonel John T. Edwards, Commandant, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

Editor *(Name and Complete Mailing Address)*

Captain Benjamin T. Kash, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

Managing Editor *(Name and Complete Mailing Address)*

Captain Benjamin T. Kash, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

7. Owner *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)*

Full Name	Complete Mailing Address
Headquarters, Department of the Army	Washington D.C. 20310

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates *(DMM Section 423.12 only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

☐ (1) Has Not Changed During Preceding 12 Months ☐ (2) Has Changed During Preceding 12 Months *(If changed, publisher must submit explanation of change with this statement.)*

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies *(Net Press Run)*	7823	7892
B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	0	0
2. Mail Subscription *(Paid and/or requested)*	200	200
C. Total Paid and/or Requested Circulation *(Sum of 10B1 and 10B2)*	200	200
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	7535	7609
E. Total Distribution *(Sum of C and D)*	7735	7809
F. Copies Not Distributed 1. Office use, left over, unaccounted, spoiled after printing	88	83
2. Return from News Agents	0	0
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	7823	7892

11. I certify that the statements made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner: Editor

PS Form 3526, Feb. 1989 *(See instructions on reverse)*

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
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