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Hell Hath No Fury Like . . . A Hostile Third Party Granting Consent to Search.

MAJ Stephen A. J. Eisenberg, JAGC
Instructor, Criminal Law Division, TJAGSA

Place yourself in the following setting:

You have been happily married for a period of approximately five years. During this time frame, which has generally been one of connubial bliss, there have been the normal ups and downs associated with any marriage. It's near the end of the month, funds are a little tight, and emotions ride high when you inform your spouse that you won't be able to dine out Saturday evening. After you leave your government quarters to 'cool' off, military police investigators stop by the house and request permission from your somewhat disturbed marriage partner to search the dwelling for items of government equipment missing from the post legal office, to wit: a typewriter, a wooden 'executive'-type desk and a chair. Knowing the equipment to have been brought home, and, in a moment of vindictive emotion, your 'beloved' says, "Sure, the bum has everything you want in the den—you can look around and take whatever you want!" You now find yourself facing a general court-martial for wrongful appropriation of the foregoing items.

The question for consideration is: Are the seized items admissible in evidence against you at the court-martial? The instinctive answer is 'yes'—a consent " . . . obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected"[1] provides a legally valid basis by which government law enforcement officials can enter into an area in which an individual has a reasonable expectation of privacy and thereby seize evidence. The answer derived from a more deliberate analysis is considerably more elusive.

The quintessence of the foregoing scenario resolves to the question of whether a cotenant's *state of mind* has any relationship to the legality of a consent to conduct a search. More particularly, will a state of "antagonistic hostility" vitiate consent provided by a third party to conduct an intrusion into an area subject to fourth amendment[2] protections? Reflection on this question of law is most appropriate for the military criminal practitioner. The number of situations in which the question can arise is no less varied than in the civlian community. There are an untold number of govenrment quarters available for families where any one of many individuals can provide consent for a search. What of the barracks situation where one service member, in a two or more person room, has entree to another's foot or wall locker? In another vein, relationships may be created where a service member enters into a business arrangement with a third party either on or off post thereby resulting in joint control and access to a place or thing. The possibilities are limitless!

The purpose of this article is to analyze the notion of whether a third party's malevolent intent justifiably can, or should nullify an otherwise valid consent to search. As a background to an evaluation of the question, a limited restatement of the law relative to consent searches will be proffered. The analysis will concern itself with the legal bases, and their place in the foundation of the problem, counsel must be familiar with in order to advance a legally sound argument concerning the proposition.

Despite the potential opportunities available for this legal question to arise, the instant issue has never been addressed in a published opinion by a military appellate tribunal.[3] On a broader spectrum, there are scant number of military decisions dealing with the question of third party consent searches.[4] The cases which have been decided rely heavily on decisio[illegible]

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holdings from the federal bench, and to a considerably more limited degree, on state court authorities. Despite a paucity of decisions focusing on the concept being advanced, there are some federal and state holdings which address the issue, or at a minimum recognize the vitality of its existence. The cases fall neatly into four camps. There are those cases which recognize the efficacy of the proposition,[5] those cases which recognize the theory, but reject it under the circumstances,[6] those cases which outright reject the viability of the concept,[7] and those where the question of a hostile third party is demonstrated by the facts but the legal question is never raised for adjudication.[8] There is one common thread to all the cases. Nowhere is there to be found a detailed, in-depth statement analyzing the bases upon which the use of the consent is predicated. Where any explanation appears, it revolves around the thought that public policy mandates the party consenting to respect the interests of the target, as well as that of the unit taken as a whole.[9]

In order for one to coherently approach and fully comprehend the extent of the problem at hand, a limited statement of general background information will be detailed with regard to consent searches. Moreover, certain assumptions will be made to simplify analysis. At the outset it must be recognized that the framers of the Constitution recognized two distinct foundations upon which governmental agents could interfere with a private citizen's personal sanctity. On one hand, police could obtain a warrant issued in conformity with fourth amendment requirements. Alternatively, it was recognized 'reasonable' searches and seizures would support a constitutionally permissible incursion. The latter basis has not been judicially favored. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[10] It is within the group of 'reasonable' searches that the consent search is classified. Unlike its siblings[11] it is *not* the urgency of the circumstances—the exigent need for immediate law enforcement intrusion into the realm of personal privacy which undergirds the search, but instead, it is the 'waiver' of the constitutional protection which legitimates the action.[12]

As one directs attention to the action of third party authorizations versus the rights of the putative defendant, the underlying legal predicates become somewhat more diffused.[13] Under present judicial philosophy consent so acquired is normally bottomed on any one, or combination of, three different theories. At the forefront is the concept that an individual with a requisite degree of interest in the property can sanction an official examination of the protected place or item.[14] The required relationship is not measured solely in terms of properly law principles.[15] Equally supportive of a governmental intrusion into an area in which one might expect a reasonable expectation of privacy is the notion that a person who shares access to a privileged sanctuary with others, "assumes the risk" that the third party will open the protected area to which he or she is privy, to parties the other is not desirous of admitting.[16] In a considerably more limited approach, at least one jurisdiction has deviated from the requirement that the third party giving consent be cloaked with actual authority, but has substituted in its stead the requirement that law enforcement officers secure their consent from one whom they reasonably believed had the ability to authorize the search.[17] The aforementioned do not represent the only bases upon which non-defendant consent searches are upheld. They do represent those theories most frequently adopted and which have the strongest legal underpinnings. Other predicates have been invoked to have either fallen into disfavor[18] or not yet matured into full judicial acceptance.[19]

With the basic principles underscored, certain assumptions will be made to thereby provide a smooth, uncluttered platform from which to analyze the effect of emotion on third party consent. In dealing with consent cases any number of collateral factors are considered by jurists in resolving the basic fourth amendment issue. Among those 'problem' areas which will

tion does not define what are unreasonable searches and, regrettably, in our discipline we have no ready litmus paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circum-

posited that the group consists of three forces. Initially one must consider application of the elemental substantive aspect of fourth amendment practice. Did the target have a reasonable expectation of privacy within the area

be set aside and viewed as neutral will be questions relating to: voluntariness, standing, procedural lapses (*e.g.*, failure to timely object), other legal foundations which might support the intrusion into the protected area (*e.g.*, search incident to an apprehension); consent to enter versus consent to search, and private searches.[20] Thus, with the characters in place and the scene set, we are now prepared to analyze the question: Can the hostile attitude of a consenter vitiate that which would be an otherwise valid consent?

At the outset it must be noted that the concept of consent occupies a weak position in American jurisprudence, for what is involved is the waiver of a person's consitutional rights. Courts in the military community have been quite loathe to find the "waiver" of such fundamental privileges absent intensive introspection.[21] The seminal decision of the Supreme Court, *Schneckloth v. Bustamonte*,[22] was not without dissent. Mr. Justice Marshall could not agree with the result emanating from the balancing process which the majority adopted. The analysis favored the law enforcement community's needs for effective and efficient action over certain protections individuals were normally accorded in constitutional practice. Among other defects he found in the majority's position was the fact that consent could be demonstrated by a lack of police coercion. A 'knowing' choice was imperative, and in his view this included a decision made in light of a presentation of advice as to alternatives.[23]

Lower courts have reached similar conclusions, thus drawing the proposition close to the issue at hand "since consent is the weakest possible basis for a search and must be shown to have been freely and voluntarily given (citations omitted), it is even less persuasive where given . . . [by a third party] to effect a waiver of . . . [a] constitutional right against unreasonable search."[24] And perhaps in the light of a most recent ruling the issue has become more

lock[25] as rather straightforward and definitive. The opinion rendered in *Rakas v. Illinois*[26] creates a fault in the law. In asking itself, ". . . whether the facts of a particular case give rise to a legitimate expectation of privacy"[27] the Court, instead of clearly answering the question, poses two new mind-teasers. "[I]f one's privacy is not absolute, how is it bounded? If he risks governmental intrusion 'with consent,' *who may give that consent*[28] (emphasis supplied). The Court in *Rakas* divests itself of a simple phrase[29] which has been used as a stepping-off point to determine standing to contest a search, and embraces in lieu, the broader, more basic concept of determining whether one has a reasonable expectation of privacy under a given set of circumstances.

Having painted the picture of a rather complex problem, is there any fundamental tenet that can be seized upon and which will clear the murky waters? The linchpin which must be utilized in measuring the propriety of any nonwarranted search is quite elementary, emanating from the Fourth Amendment itself. It is the concept of "reasonableness."

The Supreme Court underscored this notion in *Pennsylvania v. Mimms*.[30] "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' "[31] (citation omitted) Answers to such questions as: what does 'reasonable' mean, what specific factors salient to our issue should be considered in defining the parameters of reasonableness and how do these concepts interrelate, are the swords which will cut the Gordian knot and enable us to determine the effect of hostility toward the target suspect in a third party consent situation.

The term "reasonable" is rather elusive in definitional terms. It has been most simply explained by the words, "[just]; proper,"[32] but

that any intimacies unveiled may be opened for public inspection. On the other hand, when individuals have entered into equal control over an area by virtue of a relationship which was thoughtfully entered into should the result be the same? Dissenting in *United States v. Stone*[41] Chief Judge Swygert opined:

The last aspect relative to joint possessors which is worthy of evaluation relates to the effect of an intrinsic 'force' on the decisional process of the consenter. It is beyond cavil that law enforcement officers cannot effectuate a valid consent if the authority was granted under a coercive atmosphere or merely as a submission to official authority.[45] Similarly it is

urgency but one moving under the design of a vexatious third party. This being the case, the factor's *in*significance in the "reasonableness" equation buoys to the surface.

Another important philosophical consideration which permeates the reasonableness requirement of fourth amendment practice is the concept that law enforcement activity should not be constrained by the warrant requirement in all situations. Conversely, however the effectiveness of law enforcement action should be engendered by dispensing with its need on certain occasions. The proposition has been enunciated by the Supreme Court on several occasions.[49] The questions thus brought into the foreground for reflection are: Is law enforcement activity made more efficient where emotional impulses are triggering investigatory conduct, or in the alternative, does general law enforcement become bogged down in frivolous criminal complaints at a point in time when most police departments do not have sufficient resources to cope with crime for which stronger underpinnings mandate investigatory intrusions? In short, does antagonistically motivated consent serve as the handmaiden of effective law enforcement?

The last policy consideration which must be squarely addressed relates to the level to which the judiciary wishes to rise in maintaining certain traditionally recognized relationships. The alienation between members of a unit which can result in a third party consent must also be reflected upon in light of social values and policy considerations. In the areas of criminal and civil law, legislation[50] and judicial interpretation[51] have given rise to protective devices which foster harmonious relationships between certain classes of individuals. Notable, although far from singular, among these prophylactic statutes and rules are those relating to the divulgence of confidences which grow out of the marital relationship. The theory behind the use of procedural rules of this nature is that if the value in question is worth sustaining, then the law must extend every accommodation necessary to reach the end. "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake [is] a belief that such a policy [is] necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well."[52] It would therefore seem to be appropriate to extend the rationale not only in the case of the marital relationship, but to other interpersonal dealings as well which involve the essential characteristics of respect, belief and trust when the issue of consent is concerned. By vitiating the legal basis by which one party may use law enforcement officials as the instrument of vindictiveness against another, individuals are more apt to find more salutory means by which to ease strained relationships.

With the key criteria outlined above, the next step in the conceptual framework is determining what to do with the collective group of ideas—how should they be treated? Fourth amendment practice is honeycombed, our particular question being no exception, with the invocation of the "balancing test."[53] Just as in the preparation of any fine culinary delight it is necessary to blend a measured quantity of given ingredients, so to with the determination of 'reasonableness' of a third party consent search is a balancing in order. Jurists are thus thrust into the frying pan of harmonizing the three different, often competing interests of the target putative defendant, the consenting third party and the need for a viable law enforcement program. A panel of judges of the Seventh Circuit in recognizing that " 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either' [find] . . . [t]he considerations most applicable to the third person's consent in such cases . . . concern the reasonableness, under all the circumstances."[54]

To underscore, and further refine a proposition which has become rather complex, jurists are saddled with the responsibility in determining reasonableness of not only weighing the number of factors against one another, but with evaluating these factors in light of two additional notions. The latter are " . . . the belief of the officer making the search, and the attitude

of the person giving the consent. The first deals with whether the police officer receiving the consent could validly assume that the person giving the consent had the right or the authority to do so; the second deals with the attitude of the person giving the consent."[55] Moreover the yardsticks by which the 'reasonable' concept is being measured against must be evaluated for appropriateness in terms consonant to the support of police function.

Having now completed a convoluted journey through the perimetric considerations necessary to resolving the issue at hand, what then is the 'bottom line'—the black letter of law as it would be, concerning the injection of hostility in third party consent cases? There is no pat answer. Except for an occasional decisional oasis in the legal desert, the resolution rests with sound arguments being advanced by counsel in an ad hoc fashion.

In order to litigate effectively, trial attorneys above all must be sensitive to the legal strictures as articulated above which must be adhered to. Understanding these, a rational, cohesive argument may be proferred depending on the particular facts of a case and the point of view of the cause being championed. The key is BALANCING! Under any given factual setting it would appear that courts almost will depart their legal role and instead act in chancery. Many of the courts deciding the question posed have dealt with the marital relationship. Is the concept thus limited to this realm? There is no reason why it should be. It would seem that an equally rational argument could be presented in any situation where two or more individuals exercise control over the same place or thing *and* a close relationship abounds. For example, do not entrepreneurs closely scrutinize one another before entering into a business relationship (perhaps even more extensively than when one enters into marriage) thereby triggering the requisite reasonable expectation of privacy essential to vitiate a deleteriously oriented consent? As a final thought, and perhaps the most important of all, counsel must appreciate that courts may must very well bottom their decisions in this area not on the law at all, but as one observer has so keenly stated, that in many situations to decide otherwise "just 'taint fair."

FOOTNOTES

[1] *United States v. Matlock*, 415 U.S. 164, 171 (1974).

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[3] The author has utilized the FLITE (Federal Legal Information Through Electronics) data bank to search for military courts' approach to the resolution of this problem with negative results.

[4] *See United States v. Boyce*, 3 M.J. 711 (A.F.C.M.R. 6977); *United States v. Yarbrough*, 48 C.M.R. 449 (N.C.M.R. 1974); *United States v. Mathis*, 16 C.M.A. 522, 37 C.M.R. 142 (1967); *United States v. Garlich*, 15 C.M.A. 362, 35 C.M.R. 334 (1965); *United States v. Sumner*, 34 C.M.R. 850 (A.F.B.R. 1964); *United States v. Maher*, 5 C.M.R. 313 (N.B.R. 1952).

[5] *United States v. Stone*, 471 F.2d 170 (1972) (Swygert, C.J., dissenting); *United States v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970); *In re Lessard*, 399 P.2d 39 (1965); *People v. Carter*, 312 P.2d 665 (1957); *Kelly v. State*, 197 S.W.2d 545 (1946).

[6] *United States v. One 1967 Cessna Aircraft*, 454 F. Supp. 1352 (C.D. CA, 1978); *Commonwealth v. Hrynkow*, 330 A.2d 858 (1975); *Commonwealth v. Martin*, 264 N.E. 2d 366 (1970).

[7] *McCravy v. Moore*, 476 F.2d 281 (6th Cir. 1973); *State v. Crevina*, 266 A.2d 319 (1970).

[8] *See, e.g., State v. McCarthy*, 253 N.E.2d 789 (1969); *People v. Helmus*, 269 N.Y.S.2d 613 (1966); *Hook v. State*, 181 N.Y.S.2d 621 (1958).

[9] *Cf. Kelly v. State*, 197 S.W.2d 545 (1946).

[10] *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

[11] *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk); *United States v. Robinson*, 414 U.S. 218 (1973) (search incident to an apprehension); *Carroll v. United States*, 267 U.S. 132 (1925) (vehicle search); *United States v. Ramsey*, 431 U.S. 606 (1977) (border searches); *Warden v. Hayden*, 387 U.S. 294 (1967) (exigent circumstances).

[12] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[13] *See generally* Comment, *Third-Party Searches: An Alternative Analysis*, 41 U. Chi. L. Rev. 121 (1973); Comment, *Relevance of the Absent Party's Where-*

abouts in Third Party Consent Searches, 53 B. Univ. L. Rev. 1087 (1973); Comment, *Third Party Consent Searches: The Right to Exculpate*, 69 J. Crim. L.&C. 92 (1978); Wefing & Miles, *Consent Searches and The Fourth Amendment*, 5 Seton Hall L. Rev. 211 (1974); Comment, *The Unsettled Law of Third Party Consent*, 11 J. Mars. J. of Prac. & Proc. 115 (1977); Note, *Third Party Consent to Search and Seizure*, 1967 Wash. U.L.Q. 12.

[14]*United States v. Matlock*, 415 U.S. 164 (1974).

[15]*Id.*, 171.

[16]"Petitioners in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside." *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

[17]*People v. Gorg*, 45 Cal2d 776, 291 P.2d 469 (1955). The California Supreme Court has reaffirmed this rationale. *See People v. Hill*, 69 Cal.2d 550, 446 P.2d 521 (1968), *aff'd* 401 U.S. 797 (1971).

[18]*See, e.g., United States v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970) (Gibbons, J. dissenting), "Only an attorney realistically possesses implied authority to waive another's constitutional rights and in practical experience the legal niceties of the existence of implied authority are too complex to be pragmatically determined by a policeman in the field."

[19]*See, e.g.*, Comment, *Third Party Consent Searches: The Right to Exculpate*, 69 J. Crim. L.&C. 92 (1978).

[20]*See generally* Note, *Third Party Consent to Search and Seizure*, 1967 Wash. U.L.Q. 12, 14–20, for an excellent treatment of these factors and their influence in the development of the law consent searches.

[21]*Johnson v. Zerbst*, 304 U.S. 458 (1938).

[22]412 U.S. 218 (1973).

[23]412 U.S. 218 (1973) (Marshall, J., dissenting). *Cf. United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), and other inquiries required of military judges in accordance with U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges' Guide (1969).

[24]*People v. Gonzalez*, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (1966).

[25]415 U.S. 164 (1974).

[26]58 L.Ed.2d 387 (1978).

[27]*Id.* 402.

[28]*Id.* 403.

[29]"legitimately on premises."

[30]54 L.Ed.2d 331 (1977).

[31]*Id.*, p. 335. *See also Delaware v. Prouse* 47 U.S.C.W. 4323 4325 (U.S. March 27, 1979) "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials including law enforcement agents, in order " 'to safeguard' the privacy and security of individuals against arbitrary invation (sic) . . . .' " (citations omitted). Thus, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individuals' Fourth Amendment interest against its promotion of legitimate governmental interests." (footnotes omitted)

[32]Black's Law Dictionary 1431 (Revised 4th ed. 1968).

[33]*See generally* Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. Rev. 1087 (1973). The author indicates that this results in a dual consequence of on one hand of not providing rigid rules which must be applied in every case by trial courts, but thus creating a patchwork-type of legal approach to third party consent searches throughout the country.

[34]*United States v. Rabinowitz*, 339 U.S. 56, 63 (1950).

[35]*United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

[36]*United States v. Airdo*, 380 F.2d 103 (7th Cir.) *cert. denied*, 389 U.S. 913 (1967). *See also United States v. Hughes*, 441 F.2d 12, 17 (5th Cir. 1971), and cases cited therein at fn. 7.

[37]*See generally* Comment, *Third Party Consent to Search and Seizure*, 1967 Wash. U.L.Q. 12, 20–36; Wefing & Miles, *Consent Searches and The Fourth Amendment*, 5 Seton Hall L. Rev. 211, 262 (1974); Annot., 31 A.L.R. 2d 1078 (1953).

[38]Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B. Univ. L. Rev. 1087, 1106 (1973).

[39]Note, *The Unsettled Law of Third Party Consent*, 11 J. Mars. J. of Prac. & Proc. 115, 139 (1977).

[40]*People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), vacated, 409 U.S. 33, *reaff'd*, 8 Cal.3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973); *Bull. v. State*, 57 Wis.2d 653, 205 N.W.2d 353 (1973); *State v. Chapman*, 250 A.2d 203 (Me. 1969). *But see United States v. Shelby*, 573 F.2d 971 (7th Cir. 1978); *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1972).

[41]471 F.2d 170, 176–177 (7th Cir. 1972).

[42]Comment, *Third Party Consent Searches: An Alternative Analysis*, 41 U. Chi. L. Rev. 121, 133 (1973).

[43]*See e.g., United States v. Lawless*, 465 F.2d 422 (4th Cir. 1972); *United States v. Hughes*, 441 F.2d 12 (5th Cir. 1971). *Cf. McCravy v. Moore*, 476 F.2d 281 (1973).

[44]*See e.g., United States v. Diggs*, 544 F.2d 116 (3d Cir. 1976); *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967); *Stein v. United States*, 166 F.2d 851 (9th Cir. 1948).

[45]*Bumper v. North Carolina*, 391 U.S. 543 (1968).

[46]*Cf. United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977); *United States v. Stone*, 471 F.2d 170 (7th Cir. 1970) (Swygert, C.J., dissenting).

[47]*See* fn. 11 *supra*. *See also Chimel v. California*, 395 U.S. 752 (1969); *Rochin v. California*, 342 U.S. 165 (1952).

[48]Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. Rev. 1987, 1113–14 (1973).

[49]*See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968). *Cf. United States v. Calandra*, 414 U.S. 338 (1974).

[50]*See e.g.*, Fed. R. Evid. 501 (privileges), Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* (protection of customer transactions with financial institutions), and Uniform Commercial Code (conduct of relations between individuals in business dealings).

[51]*See, e.g., United States v. Doughty*, 460 F.2d 1360 (7th Cir. 1972); *United States v. Pugliese*, 153 F.2d 497 (2d Cir. 1945).

[52]*Hawkins v. United States*, 358 U.S. 74, 77 (1958).

[53]*See, e.g., United States v. Harris*, 5 M.J. 44 (C.M.A. 1978); *United States v. Hines*, 5 M.J. 916 (A.C.M.R. 1978).

[54]*United States v. Airdo*, 380 F.2d 103, 106–107 (7th Cir. 1967).

[55]Wefing & Miles, *Consent Searches and the Fourth Amendment*, 5 Seton Hall L. Rev. 211, 262 (1974). *See generally* Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B. U.L. Rev. 1087, 1106–1111 (1973).

"Crowley: The *Green* Inquiry Lost in Appellate Limbo"

CPT Glen D. Lause, Government Appellate Division, USALSA

In early 1976, the Court of Military Appeals, under the tutelage of a new chief judge, endeavored, through *United States v. Elmore*,[1] to again resolve the continuing legal battle over what language and conditions were permissible in pretrial agreements. The majority opinion did not mark any new or major alteration in the law. Chief Judge Fletcher's concurring opinion, however, which recognized the ever-present appellate problem of interpreting what various pretrial agreement provisions had meant to the participating parties, would eventually affect the entire guilty plea procedure. His opinion, while not constituting law, clearly acted as a harbinger to the military court system that military judges would soon be the heirs apparent to additional *sua sponte* duties (above and beyond those required by *Care*)[2] when an accused pleaded guilty pursuant to an agreement. That foreshadowing mandate was later fully enunciated in *United States v. Green*[3] in terms that at first blush appeared unambiguous. Under closer scrutiny, however, those same concepts became susceptible to various interpretations that would unfortunately form the arena for over two years of appellate controversy.

In *Green*,[4] Judge Fletcher formally placed the primary responsibility on the trial judge to ensure "on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by any existing pretrial agreement". Judge Fletcher also observed that where the plea bargain contains conditions which violate the judge's notions of fundamental fairness, appellate case law, or public policy, he must, with the consent of the parties, strike those provisions. Finally, the Chief Judge opined that the trial judge is also required to ascertain from both counsel their assurance on the record that there are no *sub rosa* agreements, "and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain".

Private Curtis D. Crowley was tried by a special court-martial two months to the day after the *Green*[5] decision. He pleaded guilty to one specification of larceny in consonance with a pretrial agreement. After the trial judge had completed the *Care*[6] inquiry, he determined that there was a pretrial agreement. Reviewing the agreement with Crowley, in the presence of

both counsel, the military judge ascertained that Crowley had read, understood, and had no questions about the bargain's provisions. The military judge also discussed the cancellation clauses that were not moot and assured himself that Crowley understood the sentence limitations. Unfortunately, the judge did not specifically inquire of counsel if there were any *sub rosa* agreements, and did not ask the "magic" question, whether his interpretation of the agreement comported with that of the counsel.

As a matter of appellate history, Crowley attacked the trial judge's "*Green* inquiry" on several bases. He particularly averred that the military judge's inquiry failed in the following respects: (1) he did not explain the significance of not entering into a stipulation of fact after discovering that there was no stipulation of fact; (2) he did not insure on the record that Crowley understood the sentence limitations; (3) he did not assure himself that his interpretation of the agreement comported with that of counsel; and, (4) he did not secure assurances from counsel that the written agreement encompassed all of the understandings of the parties. The Government responded generally that the Court of Military Appeals intended the *Green*[7] decision only to establish guidelines for the trial judges and that the Court never meant to impose ritualistic rules that required blind adherence. Consequently, if the record of trial, taken as a whole, demonstrated a provident guilty plea and, by fair implication, an accused's understanding of his agreement with the convening authority, including the appurtenant sentence limitations, the mandate of *Green*[8] had been substantially accomplished. Moreover, the discussion of moot conditions constituted padding of the record and if, in fact, procedural error had occurred it was the accused's burden to establish that the error was prejudicial to him within the meaning of Article 59*a* of the Uniform Code of Military Justice.[9]

The *Crowley*[10] case had been assigned to one panel of the Army Court of Military Review. That panel declined to render a decision on the merits of the case and therefore *Crowley*[11] was referred to the Court sitting *en banc*. Supplemental pleadings were filed by both the Government and Defense Appellate Divisions and on 5 May 1977, the cause was orally argued before the Court sitting *en banc*. Pursuant to that Court's order, the respective trial and trial defense counsel filed affidavits assuring the Court that there were no *sub rosa* agreements and that the military judge's interpretation of the agreement comported with their own understanding.

On 20 July 1977, the Army Court of Military Review rendered its decision with ten of the twelve participating judges finding that appellant's plea of guilty was provident. The majority of the Court specifically found that a military judge's failure to follow each specific guideline of *Green*[12] with respect to a plea bargain inquiry would not necessarily result in an improvident plea because "substantial compliance with such guidelines is sufficient", provided there is a "sufficiently high level of compliance so the Court of Military Appeals can assure itself from the record by direct responses or justifiable inferences that all the inquiries have been satisfactorily covered and answered", Interestingly, the Army Court also observed that no purpose would be served by a trial judge's inquiry into moot conditions of the agreement; that where the sentence limitations were simple and straightforward, the military judge could assure himself that the accused understood those limitations by reading them to the accused (especially where counsel assured the judge that he had gone over the agreement with the accused); that where both counsel were present throughout the "*Green* inquiry", it could be inferred, absent counsel objection, that the military judge's interpretation of the agreement comported with counsels' understanding; and that the military judge's failure to ask if there were any *sub rosa* agreements could be rectified through affidavits provided by the trial attorneys.

Three months later, the Court of Military Appeals rendered a decision which appeared to be the demise of the "substantial compliance" theory and the final answer to the "*Green* controversy". Judge Fletcher writing for the majority in *United States v. King*,[13] specif-

ically observed that substantial compliance (as espoused in *Crowley*[14] with the "*Green* requirements" was insufficient and that only strict adherence to those guidelines would be acceptable. Moreover, that Court was unwilling to "fill in" a record left silent because of a trial judge's omissions.

On 31 October 1977, Crowley, through his appellate attorney, petitioned the Courty of Military Appeals for a grant of review pointing out the various inadequacies in the trial judge's "*Green* inquiry". In spite of its recent decision in *King*,[15] the Court of Appeals denied Crowley's petition for a grant of review. Six days later, however, apparently recognizing the confusion that decision had caused, the Court citing *King*,[16] reconsidered and granted Crowley's petition, reversed the decision of the Army Court of Review, and set aside the trial court's findings and sentence. The Government immediately petitioned the Court of Military Appeals for reconsideration of that order, noting that it was contrary to judicial policy to summarily reverse an *en banc* decision from an intermediate appellate court; that the *Green* and *King*[17] decisions were ambiguous, and finally, there were issues presented in *Crowley*[18] that did not exist in *King*[19] and would therefore remain unresolved. In a simple order (9 February 1978) the Court granted the petition for reconsideration.

During the four month hiatus between the *King*[20] decision and the granting of reconsideration of *Crowley*,[21] approximately twenty-five petitions for grant of review, which presented several variations of the "*Green* issue", were denied by the High Court. In spite of the *King*[22] edict, the Court of Military Appeals continued to deny petitions raising the "*Green* error", even where the lower Court had been supplied affidavits "filling in" the record; where trial judges failed to ask about *sub rosa* agreements or seek assurances about comportment; where the trial judge did not explain all the cancellation clauses or did not discuss moot conditions. The Government even attempted to concede error in several cases, yet the Court of Appeals refused to grant the petitions, much less reverse the decision of the Army Court of Review.

Finally, in April of 1978, it appeared as though the High Court wished to hear oral argument on the various interpretations of the *Green* and *King*[23] decisions. *United States v. Hendon*,[24] was a pretrial agreement case which the Government had initially attempted to concede. The concession was refused and the Court ordered the "*Green* issue" briefed and orally argued. Among other omissions, the trial judge in *Hendon*[25] failed to explain all of the automatic cancellation clauses and did not receive counsels' accession that their understanding of the agreement comported with his. The Government attempted to breathe life back into a modified version of the "substantial compliance" theory, arguing that there was no "magic" form of inquiry and that it was only necessary to demonstrate on the record that the accused understood his agreement with the convening authority. Argument by both counsel provoked considerable questioning by the appellate judges. Judge Perry even evinced some acceptance of the theory that the substance of a "*Green* inquiry" should take precedence over its form.

Ten months passed after the oral argument and no definitive guideline, answer, or position was invoked by that Court. The legal battlefield became even less discernible in that time frame in light of the fact that another fifty petitions raising the exact or similar trial judge omissions as in *Hendon*[26] and *Crowley*[27] were denied review by the High Court. Finally, on 5 February 1979, the *Hendon*[28] decision was rendered. Devoting less than fifty words to the plea bargain inquiry, the Court citing *Green*[29] and *King*,[30] noted its satisfaction that the plea bargain "inquiry was adequate".

The impact of *Hendon*,[31] the "Un"-*King*[32] decision, may never fully be understood. It is apparent however, that the Court of Military Appeals has authored an epilogue to what has become a too technical and at times an uninspiring book on the plea bargain process. For *Crowley*[33] advocates, there still remain some unanswered questions; *i.e.*, may affidavits be

used to "fill in" a silent record, and does silence of counsel mean that they agreed with the trial judge's explanations of the agreement. For others, the answers are all too plain. The Court of Military Appeals has accomplished its goal. Most military judges now religiously follow the *Green*[34] mandate, and where the trial record demonstrates a substantive "*Green* inquiry", the plea will be provident. After two years, though, there remains at least one person, Curtis Crowley, who still wonders: Have I won or have I lost?

FOOTNOTES

[1] United States v. Elmore, 1 M.J. 262 (CMA 1976).

[2] United States v. Care, 18 USCMA 535, 40 CMR 247 (1969).

[3] United States v. Green, 1 M.J. 453 (CMA 1976).

[4] *Id.*

[5] *Id.*

[6] United States v. Care, *supra.*

[7] United States v. Green, *supra.*

[8] *Id.*

[9] 10 U.S.C. Section 859.

[10] United States v. Crowley, 3 M.J. 988 (ACMR, en banc 1977); *pet. for reconsideration granted* 4 M.J. 272 (CMA 1978).

[11] *Id.*

[12] United States v. Green, *supra.*

[13] United States v. King, 3 M.J. 458 (CMA 1977).

[14] *Id.*, at 3 M.J. 459, n. 5.

[15] United States v. King, *supra.*

[16] *Id.*

[17] United States v. Green, King, *both supra.*

[18] United States v. Crowley, *supra.*

[19] United States v. King, *supra.*

[20] *Id.*

[21] United States v. Crowley, *supra.*

[22] United States v. King, *supra.*

[23] United States v. Green, King, *both supra.*

[24] United States v. Hendon, 6 M.J. 171 (CMA 1979).

[25] *Id.*

[26] *Id.*

[27] United States v. Crowley, *supra.*

[28] United States v. Hendon, *supra.*

[29] United States v. Green, *supra.*

[30] United States v. King, *supra.*

[31] United States v. Hendon, *supra.*

[32] United States v. King, *supra.*

[33] United States v. Crowley, *supra.*

[34] United States v. Green, *supra.*

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Mobilization Designee Vacancies

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Lieutenant Colonel William Carew, Reserve Affairs Department, Charlottesville, Virginia 22901. Current Positions available are as follows:

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
COL	03	01	01	Staff Judge Advocate	USA Garrison	Ft Hood
COL	18C	02	01	Asst C Clas Invt	OTJAG	Washington
COL	04	01	01	Staff Judge Advocate	USA Garrison	Ft Bragg
CPT	03E	03	01	Asst SJA	USA Garrison	Ft Stewart
CPT	01H	02A	02	Judge Advocate	Cdr, Ft McCoy	Sparta

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
CPT	04	07	01	Asst SJA	USA Garrison	Ft Sam Houston
CPT	01H	02A	01	Judge Advocate	Cdr, Ft McCoy	Sparta
CPT	52C	01	01	Asst SJA	USA Garrison	Ft Stewart
CPT	08	03A	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	03C	06	01	Admin Law Officer	USA Garrison	Ft Devens
CPT	03D	05	02	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	02B	04	01	Asst JA	1st Inf Div	Ft Riley
CPT	03B	02	01	Defense Counsel	101st Abn Div	Ft Campbell
CPT	02C	02	01	Asst JA	1st Inf Div	Ft Riley
CPT	03A	02	01	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03B	03	02	Def Counsel	5th Inf Div	Ft Polk
CPT	03B	03	03	Def Counsel	5th Inf Div	Ft Polk
CPT	08	03A	01	Asst JA	172d Inf Bde	Ft Richardson
CPT	03D	03	01	Asst SJA	9th Inf Div	Ft Lewis
CPT	01H	02A	03	Judge Advocate	Cdr, Ft McCoy	Sparta
CPT	03E	03	02	Legal Asst Off	9th Inf Div	Ft Lewis
CPT	28C	03	01	Defense	USAAD Cen	Ft Bliss
CPT	03B	03	04	Def Counsel	5th Inf	Ft Polk
CPT	03B	01	02	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	01	03	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03E	03	01	Legal Asst Off	9th Inf Div	Ft Lewis
CPT	03A	02	02	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03F	01	01	Ch, Claims Br	9th Inf Div	Ft Lewis
CPT	03B	02	02	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	04	Defense Counsel	101st Abn Div	Ft Campbell
CPT	04	08	02	Asst SJA	USA Garrison	Ft Sam Houston
CPT	21J	01	01	Judge Advocate	9th Inf Div	Ft Lewis
CPT	04	08	01	Asst SJA	USA Garrison	Ft Sam Houston
CPT	52B	03	01	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	01H	02A	04	Judge Advocate	Cdr, Ft McCoy	Sparta
CPT	62C	05	01	Asst Crim Law Off	USA Forces Cmd	Ft McPherson
CPT	03C	02	01	Asst SJA	101st Abn Div	Ft Campbell
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft Polk
CPT	03D	01A	01	Asst JA	USA Garrison	Ft Sheridan
CPT	03B	01	04	Defense Counsel	101st ABN Div	Ft Campbell
CPT	03B	04	01	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	03	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	02	03	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	03	01	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	05	02	Defense Counsel	USA Garrison	Ft Devens
CPT	03D	01	01	Asst SJA—Claims Off	USA Garrison	Ft Devens
CPT	08	04	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	03D	05	01	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	52C	01	02	Asst SJA	USA Garrison	Ft Stewart
LTC	03A	01	01	Ch, Crim Law Br	9th Inf Div	Ft Lewis
LTC	05B	03	02	Claims JA	USA Claims Svc	Ft Meade
LTC	03	02	01	Staff Judge Advocate	5th Inf Div	Ft Polk
LTC	11A	04	01	JA Opinions Br	OTJAG	Washington
LTC	12	01	01	Judge Advocate	ARNG ISA Cp	Edinburg
LTC	03	02	01	Deputy SJA	USA Garrison	Ft Hood
LTC	05B	03	01	Claims JA	USA Claims Svc	Ft Meade
LTC	05A	02	01	Deputy Chief	USA Claims Svc	Ft Meade
LTC	09B	01	01	ASJA—Res Affrs	Fifth US Army	Ft Sam Houston
LTC	03B	01	01	Chief, Crim Law	USA Garrison	Ft Hood
LTC	05B	02	01	Deputy Chief	USA Claims Svc	Ft Meade
MAJ	09D	01	01	Ch, Crim Law	USA Garrison	Ft Stewart
MAJ	12	02	02	Asst JA	ARNG ISA CP	Edinburg

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
MAJ	12	02	01	Asst JA	ARNG ISA CP	Edinburg
MAJ	03C	01	01	Ch, Leg Asst Off	USA Garrison	Ft Devens
MAJ	03E	01	01	Chief	USA Garrison	Ft Stewart
MAJ	04	04	01	Asst SJA	USA Garrison	Ft Sam Houston
MAJ	03C	02	01	Ch, Admin Law	USA Garrison	Ft Devens
MAJ	21	02	01	Leg Asst Off	USA Depot Red River	Texarkana
MAJ	03B	02	01	Ch, Trial Counsel	5th Inf Div	Ft Polk
MAJ	03A	01	01	Ch, Trial Counsel	101st Abn Div	Ft Campbell
MAJ	28D	02	01	PRCC/Fiscal Law C	USA AD Cen	Ft Bliss
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft Polk
MAJ	03C	01	01	Asst SJA	5th Inf Div	Ft Polk
MAJ	03B	01	01	Ch, Defense Counsel	101st Abn Div	Ft Campbell
MAJ	02A	04	01	Ch, Trial Counsel	1st Inf Div	Ft Riley
MAJ	28B	02	01	Justice Off	USA AD Cen	Ft Bliss
MAJ	03C	01	01	Ch, Admin Law Br	101st Abn Div	Ft Campbell
MAJ	28B	04	01	Trial Counsel	USA AD Cen	Ft Bliss
MAJ	28D	03	01	Admin Law	USA AD Cen	Ft Bliss
MAJ	03B	01	01	Ch, Trial Counsel	9th Inf Div	Ft Lewis
MAJ	03E	01	01	Ch, Legal Asst Br	9th Inf Div	Ft Lewis
MAJ	06	04	01	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston
MAJ	62C	04	01	Asst Crim Law Off	USA Forces Cmd	Ft McPherson
MAJ	06	04	04	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston
MAJ	62D	04	01	Fiscal Law Off	USA Forces Cmd	Ft McPherson
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis
MAJ	03C	01	01	Ch, Defense Counsel	9th Inf Div	Ft Lewis
COL	06	02	19	Mil Judge	USA Leg Svcs	Falls Church
CPT	04B	02A	02	Asst JA	USA Garrison	Ft Meade
LTC	04H	02	01	Deputy SJA	HQ USACERCOM	Ft Monmouth
CPT	011	02	02	Mil Af Le Ast Of	Cdr, Ft McCoy	Sparta
CPT	011	02	01	Mil Af Le Ast Of	Cdr, Ft McCoy	Sparta
COL	02	01	01	Staff Judge aedvocate	USA Garrison	Ft Riley
LTC	02	02	01	Asst SJA	USA Garrison	Ft Riley
LTC	02A	01	01	Ch, Crim Law	USA Garrison	Ft Riley
MAJ	02A	02	01	Ch, Defense Counsel	USA Garrison	Ft Riley
MAJ	02A	04	01	Ch, Trial Counsel	USA Garrison	Ft Riley
MAJ	02B	02	01	Asst Judge Advocate	USA Garrison	Ft Riley
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley

2. Additional positions will be approved in the near future. Judge Adovcates wishing to be considered for *any* available MOB Des position should so annotate DA Form 2976.

2. After Action Report: 4th Mutual Support Conference, FT Sheridan, IL

The fourth annual JAG Mutual Support Conference was held on 18 November 1978 at Fort Sheridan, Illinois. It was co-hosted by COL James E. Caldwell, the Commander of the 7th Military Law Center, and LTC James E. Su-Brown, Staff Judge Advocate, Fort Sheridan, Illinois. This conference, like its predecessors, was designed to provide an opportunity for the active and reserve components to exchange information and to review the past activities to develop more effective interaction of active and reserve components in furtherance of the military mission. This year the conference enjoyed participation by active and reserve attorneys from all services.

A series of speakers discussed the mutual support provided by the 7th Military Law Center to the active Army establishment, covering such subjects as the services rendered by unit members as counsel for respondents at hearings conducted in the Chicago area by the U.S. Army Discharge Review Board; claims activities in support of the Fort Sheridan claims officer; the legal assistance program; the unit's support of the Fort Sheridan procurement activities; efforts in teaching military law to ROTC units at colleges and universities; and

enlisted activities, including the court reporter training and the services rendered to Fort Sheridan.

Other speakers discussed activities not placed on a regular basis that were performed by unit members in support of active and reserve components, including: instruction provided in the international law area to reserve units in the 86th USARCOM area; the unit activities of the Madison and Wisconsin units, including JAG support of training exercises and area military activities; participation in the preparation for Operation Graphic Hand, in which military reserve forces would have been utilized for maintaining U.S. mail service, had not a recent postal strike been settled without that necessity.

LTC Oscar L. Carroll, Chief, Special Officer Division of the Reserve Components Personnel and Administration Center, spoke briefly of the RCPAC support to reserve activities. He discussed the services that RCPAC provided to the unit, and assured the attendees that mutual support was also being adopted to other branches. He provided slides to illustrate the RCPAC mission. LTC William L. Carew, Chief, Reserve Affairs, The Judge Advocate General's School also spoke of the support of his office for the JAG reserve mission.

Only in Korea

Mr. Samuel Pollack, Chief, International Law, Judge Advocate Division, U.S. Forces, Korea

"Korea provides the first example in history of a collective security organization in actual operation" (Secretary of State John Foster Dulles, at the 1954 Geneva Conference on Korea.)

A quarter century has elapsed since Geneva tried but failed to achieve any settlement of the United Nations' "police action"[1] in Korea. During this long period, which has seen other regions of the troubled world entering upon the process of resolving old feuds, either by force of logic if not good will, the Korean Peninsula has remained stationary in a strange interlude of an interminable armistice and a de jure state of war; and a final resolution of the Korean conflict seems as distant as ever.[2] Neither true peace nor even a sense of pervasive calm has descended in the "Land of the Morning Calm" and a continual series of incidents during the past, the most recent of which has been the discovery of tunneling under the Demilitarized Zone (DMZ), which was established by the Armistice Agreement of 1953[3] has at times caused the level of tension in the Republic of Korea (ROK) in the southern portion of the Peninsula to rise dramatically. Indeed, the resumption of large scale hostilities in Korea is one possible factor in the strategic equation that must be included in any objective evaluation of the overall situation.

From a purely legal veiw, however, and if we exclude the aura of danger, Korea becomes one of the most interesting and fascinating places of duty, where the unique and extraordinary become almost the commonplace. For an example, the Armistice has now become, certainly, the oldest, most violated,[4] suspension of hostilities in history. For another, the United Nations command (UNC)—the international army established by the Security Council of which Secretary Dulles spoke in 1954—has turned out to be not just the first, but the only, collective security enforcement organization ever established to fight a major conflict on behalf of the principles of the UN Charter.

While some problems will arise in Korea that can arise in no other foreign country where United States military personnel are stationed, there will also, naturally, be the more routine tasks associated with the normal functions of every military legal office servicing US military authorities and personnel in any friendly, foreign country. In any case, JAGC personnel in Korea will see a country that, despite a past of war and desolation, and a present of sporadic tension, has paradoxically developed into a rel-

atively prosperous nation, offering reasonably comfortable, and comparatively economical, tours of duty. The following discussion, presenting the author's views on basic legal aspects of the Korean situation, may, hopefully, also serve as a general summary of useful information necessary for JAGC personnel coming to the mountainous Peninsula.

I. *General Background.*

The first major test for the Security Council's power to take effective collective measures for the suppression of aggression came in the early morning hours of June 25, 1950, when news flashed to the world that the armed forces of North Korea had smashed their way across the 38th Parallel separating their regime from the territory of the ROK. This was an act of aggression which clearly constituted a violation of the principles of Article 2, paragraphs 3 and 4, of the UN Charter, which requires states to settle their disputes by peaceful means and to refrain in their relations from the threat or use of force against the integrity or independence of any other state.

It cannot be denied that Korea had been a potential source of conflict ever since the end of World War II. Divided at that war's ending, and then separated politically by actions of the Soviet authorities in the northern half, quite in violation of the promises made by the Allied leaders including the Soviets at Cairo and Potsdam,[5] there had been a definite cold war atmosphere growing on the Peninsula. The UN General Assembly, acting at US request, ordered, on November 14, 1947, UN supervised elections to be held in Korea to form a national government but the Soviets refused permission for the Commission to enter their northern zone. The elections were held in the south and the ROK Government formed on August 15, 1948. When United States occupation forces were withdrawn in 1949 the situation became tense, with infiltrations and skirmishes on the border occurring frequently. To add fuel to the volatile situation, an unfortunate speech was made in early 1950 by Secretary of State Acheson, which cast doubt that the US would consider the ROK within its "perimeter" of interests.[6]

However, when the North Korean attack did come in June, President Truman recognized the great significance of the threat and he immediately initiated action to call the Security Council into an emergency session, based on the provisions of Article 37 of the UN Charter which encouraged submission of all serious and unresolved disputes to the Council. During this crucial period, the Soviet representative had absented himself from the Security Council in protest against a prior refusal to seat the representative from China. Unhampered, therefore, by the absentee's veto power, the Council issued a resolution, dated June 25, 1950 (the same day as the attack) formally declaring that the armed attack by the North Korean forces constituted a breach of the peace; calling on the North Koreans to withdraw; and also calling on all member states to assist in executing the resolution.[7] In a subsequent resolution of June 27, 1950, the Council noted that the North Koreans had not complied with the prior resolution and recommended that the members furnish aid to the ROK to repel the armed attack.[8] Meanwhile, a United States decision to commit its armed forces to go to the aid of the ROK had been made on June 26, at governmental level.[9]

On July 7, 1950, the North Korean attack continuing, and the ROK in a desperate situation, the Security Council recommended that the assistance should be made available to a "unified command" authorized to fly the flag of the United Nations and under United States command. The mission of the "unified command," or UNC, was: to repel the invasion and "to restore international peace and security in the area."[10]

The action to enforce the Security Council's decisions of June and July 1950 in the Korean affair eventually cost over 200,000 UN casualties, and far more in Korean lives, leaving Korea devastated and ravaged. The 16 member states, including the US, that contributed forces to the UNC had to battle both the North Korean and later the Chinese forces before the war finally ground to a halt approximately at

where it had started. After a long series of negotiations at Panmunjom in the DMZ, the Armistice was signed in 1953, leaving the country divided slightly above the old border of the 38th Parallel and establishing detailed arrangements for the repatriation of prisoners, the establishment of a Military Armistice Commission (MAC) to supervise the carrying out of the agreement, as well as a Neutral Nations Supervisory Commission (NNCS).[11]

II. *The UNC.*

The genesis of the UNC is a matter of considerable legal interest, since it sheds light on the precise nature of the international armed force. Under the provisions of Article 42, the Security Council is empowered to take appropriate action, including the use of armed force, to deal with international delicts, such as aggression or threats to the peace. Article 43 of the Charter is designed to permit UN member states to contribute forces to a sort of permanent UN force for possible use by the Security Council in dealing with incidents within the scope of Article 42.[12] However, neither at the time of the Korean crisis, nor since, has such a permanent force ever been established. Consequently, as the United Kingdom representative to the Security Council explained,[13] it was considered necessary by the Council to seek a legal source of authority other than Article 42 as a basis for action in the Korean crisis. It found such source in Article 39 which authorized "recommendations" to the member states on appropriate measures to repel aggression, and to restore international peace and security. Accordingly, the Council acted under Article 39, and it was on this precise basis that the UNC was established by the July 7, 1950, resolution.

From the above, the question arises whether the UNC is a true agency of the UN, since it was not established "by" the Security Council, but only pursuant to its "recommendation." While opinions have differed on this issue, the better view would seem to be that the UNC, on the basis of its substantive nature, and its actions during the hostilities and afterward, which were generally approved and supported by the world organization, should be considered a UN agency.[14] One could perhaps conclude, on the basis of the circumstances of its origin, that the UNC constitutes an international army serving ad hoc in Korea in lieu of the permanent UN force that should have been established under the provisions of Article 43 of the Charter.

It is also noteworthy that the UNC's legal right to be present in Korea is not materially dependent on the consent of the local sovereign, the ROK. Reason for this lies in the fact that the UNC is not a collective "defense" organization such as the North Atlantic Treaty Organization, or the several other equivalent regional security organizations, all of which are derivative from the inherent right of collective self-defense, a right also recognized in the UN Charter.[15] All collective defense organizations would appear to require the consent of the parties to be collectively defended, as such consent normally would reflect itself in a treaty or agreement of mutual defense or security. Since the basis for the UNC is not derived from a treaty or agreement but from the power of the Security Council to take action in the area of peace and security, the factor of consent becomes legally immaterial.[16]

Although now almost entirely bereft of all its former UN contingents, with the exception of a small member of United States personnel engaged in carrying out Armistice duties in Seoul and Panmunjom, the UNC is no "paper tiger" if only because CINCUNC continues to exercise operational control over the substantial armed forces of the ROK, by virtue of an agreement with the United States.[17] Moreover, the UNC, in event of an emergency, could be augmented by the United States or other UN armed forces, as it was during the hostilities. There is good reason to believe that, while the UNC remains as a UN force in Korea, Japan would furnish bases for use of the UNC, in event of hostilities.[18] For these reasons, it would seem, the continued usefulness of the UNC continues to be supportable, and its premature dissolution would seem to be under present circumstances inconsistent with the interests of the

United States, the ROK and collective security.[19]

Nevertheless, it is perhaps as a symbol that the UNC appears most valuable to those who continue to believe that the rule of law in international affairs may yet emerge once more as a force to reckon with in international affairs. While the UN flag continues to fly in Seoul, a potential aggressor will hesitate, and perhaps refrain, from what will appear as another calculated assault on an agency of the world organization. In 1950, it should be remembered, the UN flag did not yet fly in Seoul when the attack came.

III. *The Mutual Defense Treaty, and the SOFA.*

A basic cornerstone of the relationship between the United States and ROK is, and has been, the Mutual Defense Treaty of 1954.[20] As indicated, the Treaty, like others of its kind, is derivative of the inherent and traditional right of collective self-defense and as a regional defense arrangement within the meaning of Article 52, of the UN Charter.

The Treaty obligates the parties to cooperate to maintain and develop a credible deterrence to aggression in Korea, and to take appropriate action, subject to constitutional process, should the security of the ROK be threatened by "external armed attack." In ratifying the Treaty, the Senate did make it clear, however, that the United States would be bound to respond only if the attack came on territory "lawfully placed under the administrative control" of the ROK, *i.e.*, south of the DMZ as established by the Armistice. Recently, also, as a measure in pursuance of the mutual cooperation provisions of the Treaty, a United States-ROK Combined Forces Command (CFC) was established in Seoul to serve as a means of more effectively using the forces of both parties in the event of an external armed attack.

Article IV of the Treaty gives the United States the right to station its troops in the ROK "as determined by mutual agreement." A United States-ROK Status of Forces Agreement (SOFA)[21] has been in force since 1967, patterned after similar agreements with Japan and the NATO countries. The SOFA has the usual provisions permitting US military personnel to be tried by local courts for serious offenses, such as murder, rape, serious assaults, *etc.* As is normal in all such agreements, each trial of a United States accused is observed by an experienced trial observer. The United States-Republic of Korea SOFA is unusual, however, in that a lengthy listing of special judicial protections is contained in an Agreed Minute to guard against any conceivable deprivation of United States constitutional rights which could arise under the Korean legal system. The SOFA also contains the usual articles dealing with customs and taxes exemptions, entry and exit procedures, claims, non-appropriated fund activities, *etc.* These are generally similar to those in other analogous status of forces agreements.

V. *The United States Withdrawal.*

The present United States administration has stated its policy to reduce United States strength in Korea, over a 4 to 5 year period, by the withdrawal of ground combat forces. There has been recent intelligence indicating that North Korean capabilities are much greater than previously estimated[22] and this has aroused some controversy in the US as to whether the policy should not be drastically curtailed in the interest of deterrence. However, even if the withdrawal takes place as planned, the administration has announced that the following important conditions will be observed:

1. United States obligations to defend the territory of the ROK, against external attack, as provided by the Mutual Defense Treaty of 1954 will remain unaffected;

2. The withdrawal should not upset the military balance in Korea; and

3. United States air, intelligence and logistical support elements will remain in Korea.

Section 23 of the International Security Act of 1978[23] constitutes an essential step to satisfy some of the conditions. The law provides au-

thority, for a five-year period, to effect transfers, without reimbursement, to the ROK armed forces, of United States-owned defense articles located in Korea in the custody of departing United States units, as well as to furnish certain services, including training. The statutory authorization follows in the path of a similar 1971 statue,[24] when another reduction in force took place. Unlike the previous law, however, the current one reflects the grave concern of Congress that the action may have a destabilizing effect on the peninsula and its accordingly requires the President to furnish, 120 days prior to each withdrawal phase, a report on the viability and impact of the withdrawal, with an assessment of the overall balance in Korea, the adequacy of the United States assistance, ROK defense developments and other related aspects. The Congressional fear is that the withdrawal may "seriously risk upsetting the military balance in that region." This fear is credible in the absence, to date, of any valid indication that the North Koreans have given up their dream of uniting the Korean Peninsula by force of arms.[25]

VI. *Conclusion.*

The Korean Peninsula, a critical epicenter of the northern Pacific, is no longer a hermit kingdom but a place that converges major strategic and economic interests of the United States, Japan, the Soviet Union and China. In an earlier, idealistic era, many nations of the free world, through the World Organization, chose to make a stand there to defend a small nation menaced by aggression, and to enforce major principles of international law. The international armed force that then fought for the rule of law in international affairs still stands, perhaps as a symbol that the enforcement of international law may yet become a rule rather than an exception. For the present, however, it may be sufficient that JAGC personnel assigned to Korea will see the UN flag over the powerful ROK Army, backed by the potential might of the United States, alert in the defense of its country. There will be a sense, as in no other foreign country, of playing a more than routine role in a more than routine command. "Only In Korea" will the novelty and mystique of the orient, coupled with legal features to the Korean Peninsula convey feelings of deep professional pride and interest to all JAGC personnel serving with the Eighth United States Army.

FOOTNOTES

[1] The 1950-1953 hostilities in Korea were distinguished from war in its accepted sense since they constituted, in principle, a collective enforcement of the principles of the UN Charter. For this reason, apparently, the term "police action" has been sometimes used to characterize that conflcit. In this connection, see Oppenheim International Law, Lauterpacht, Volume II, 7th edition, p. 224, and McDougal and Feliciano, Law and Minimum World Public Order, Yale University Press, pp. 18, 20 and 256.

[2] As Stone has suggested, an unresolved armistice situation stretches the concept of war into the realm of peace, Legal Controls of International Conflict, New York, Rinehart (1954) p. 646; see, also, Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?" (48 A.J.I.L., 98 (1954)), and McDougal and Feliciano, op.cit., pp. 8-9. In principle, an armistice constitutes only a presumably temporary suspension of hostilities and cannot terminate *per se* a previous state of war. Article 36, Chap V, Annex to the Hague Convention No. IV Respecting the Law and Customs of War on Land, signed at The Hague, October 18, 1907, 36-Stat. 2277; TS 539; see, also, FM 27-10 (1956) No. 1, para 479; See, also, Levie, Nature and Scope of the Armistice Agreement, 50 A.J.I.L. 880 *et seq.* From the above, it may be deduced that the state of war which existed in Korea during the hostilities still prevails there. On the other hand, it can also be argued that the very passage of time has converted the Armistice in Korea into a de facto final settlement, at least to the extent of establishing the legal border between the two Korean states. See, in this connection, Wright "International Law and Civil Strife" 1959 Proceedings, American Society of International Law 145, 151.

[3] Agreement concerning a Military Armistice in Korea signed July 27, 1953, by the Commander in Chief, United Nations Command; the Supreme Commander of the Korean Peoples Army and the Commander of the Chinese Peoples Volunteers (4 UST 234; TIAS 2783; hereinafter, the Armistice.)

[4] The statistics on Armistice "violations" truly are staggering: a grand total of more than 272,000 as of the end of 1978! Of these, the UNC has reported 43,000 and the other 229,000 by the North Koreans.

[5] In the Cairo Declaration of November 27, 1943, the US, China, and the UK agreed that, in due course, Korea

which had been subjugated by Japan since 1905, should become free and independent. This goal was confirmed in the Potsdam Declaration of July 26, 1945 in which the USSR participated.

[6]On January 12, 1950, Acheson spoke at the National Press Club and pointedly excluded Korea from the US's "defensive perimeter." See, in this connection, Hoyt, United States, Reaction to the Korean Attack, 55 A.J.I.L. 45, 48.

[7]UN Doc S/1501, June 25, 1950; S.C. Res. 82 (1950).

[8]UN Doc S/1511; June 27, 1950; S.C. Res. 83 (1950).

[9]See Hoyt, op cit, pp. 52-55 Incl.

[10]UN Doc S/1588; July 7, 1950; S.C. Res. 84 (1950).

[11]The MAC, composed of US, north Korean and (sometimes) Chinese Representatives has met over 390 times since 1953 to "discuss," often polemically, Armistice violations. Administrative matters are normally handled by the Secretaries to the MAC; the US Secretary is usually the Chief of the Armistice Affairs Division of UNC Headquarters in Seoul. The NNSC is an inactive, body composed of representatives from Sweden, Poland, Switzerland and Czechoslovakia. Seven UN member states still maintain liaison groups with UNC Headquarters.

[12]See, in this connection, Sohn, Authority of the United Nations to Establish and Maintain a Permanent United Nations Force, 52 A.J.I.L. 229-231.

[13]Digest of International Law, Whiteman, volume 13, p. 410.

[14]See, in this connection, Halderman, Legal Basis for United Nations Armed Forces, 56 A.J.I.L. 971, 975. During the course of the hostilities, the General Assembly, in a resolution dated February 1, 1956, affirmed "the determination of the United Nations to continue its action in Korea to meet the aggression."

[15]"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . " (from Article 51 of the Charter). Article 51 appears to restrict this right to some extent by limiting its exercise only for such period as necessary for the Security Council to take appropriate action.

[16]Sohn, *op. cit*, at p. 239. Of course, the consent of the ROK to the presence of the UNC has, as a practical matter, never been in the slightest doubt.

[17]The ROK has agreed with the United States to "retain Republic of Korea forces under the operational control of the United Nations Command while that Command has responsibilities for the defense of the Republic of Korea . . . " pursuant to an Agreed Minute relating to continued cooperation in economic and military matters of November 17, 1954; 6 UST 3913; TIAS 3396.

[18]It is not too well known that a UNC (Rear) Headquarters has been present in Japan ever since the hostilities. Also, in the Whereas clause of an Agreement Regarding the Status of UN Forces in Japan of February 19, 1954 (5 U.S.T.; TIAS 2995) Japan has stated its intention to "permit and facilitate support in and about Japan, by the member or members, of the forces engaged in such United Nations actions. See, also, Article 2, para 5, of the UN Charter which requires Member states to cooperate and assist in all UN "preventive or enforcement" actions.

[19]The United States, as a permanent member of the Security Council, possesses the power of veto under Article 27 of the Charter and, accordingly, could effectively obstruct any move to rescind the July 7, 1950, resolution which forms the basis for the UNC. In this connection, also, it should be noted that, at the 30th U.N.G.A., September 22, 1975, Secretary of State Kissinger stressed the critical importance to world peace of maintaining the armistice in Korea pending agreement by all of the parties to replace it with new arrangements and stated that it would be "foolhardy" to terminate the UNC without such alternate arrangements.

[20]1 UST 137; TIAS 2019.

[21]Agreement under Article IV of the Mutual Defense Treaty of October 1, 1953, regarding facilities and areas and the status of United States armed forces in Korea, with agreed minutes and exchange of noted, July 9, 1966; entered into force February 9, 1967 (17 UST 1677; TIAS 6127) (SOFA). See, also, Smallwood v. Clifford, 286 F. Supp. 97 (1968) which held that the SOFA was the agreement comtemplated by the Treaty.

[22]Recent assessments place the size of the north Korean Army at 600,000 men and 2,600 tanks, a boost of 25% over the last United States estimate (Time Magazine, issue of February 5, 1979, p. 43).

[23]92 Stat. 730 et seq.

[24]P.L. 91-652, 84 Stat. 1943, approved January 5, 1971, as amended by P.L. 92-225, 86 Stat. 27, 35, Approved February 7, 1972.

[25]The President of the ROK, on January 19, 1979, appealed once more to the north Korean regime to reopen negotiations, broken off in 1973, to lead to a more peaceful modus vivendi. The response, to date, has not been especially encouraging: no Korean Sadats or Begins seem to be present to start the process towards peace.

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JUDICIARY NOTES

U.S. Army Judiciary

ADMINISTRATIVE NOTES

1. Preparation of transcripts of proceedings. *(The following is reprinted from the May 1973 Army Lawyer due to recurring problems of this nature.)*

If charges are referred to a court-martial for trial, and proceedings take place but are permanently terminated either before arraignment or findings for any reason, the following action should be taken to complete the disposition of the case:

a. A record of proceedings held should be transcribed and authenticated.

b. A copy of the transcript should be furnished to the accused.

c. If a general court-martial, a review limited to the question of jurisdiction should be prepared by the staff judge advocate.

d. An initial special or general court-martial order should promulgated in accordance with Appendix 15, Manual for Courts-Martial, United States, 1969 (Revised edition), reflecting the proceedings, the disposition of the charges, the usual recitals up to point where the pleas are shown, and the fact that the accused "appeared" rather than "was arraigned and tried" in the initial recital, if the proceedings were terminated prior to arraignment. Following the recitation of the charges and specifications, a statement should be included in the order reflecting the reason for the termination of the proceedings at an intermediate stage. A sample statement is as follows:

> The accused having (appeared) (been arraigned), the proceedings were terminated by (a declaration of a mistrial) (other _____ by the military judge. Due to the subsequent administrative discharge of the accused from the service under the provisions of Chapter 13, Army Regulation 635-200, the charges and specifications are dismissed. All rights, privileges, and property of which the accused may have been deprived by virtue of these proceedings are hereby restored.

e. The transcript of proceedings with the allied papers specified in Appendix 9*e* of the Manual should be transmitted in general court-martial cases to JALS-CC, Nassif Building, Falls Church, Virginia 22041.

If an accused is administratively separated or discharged from the Army subsequent to the findings and sentence of a court-martial but prior to the convening authority's action, jurisdiction will continue until the appellate process is complete. This means that a transcript of proceedings should be prepared; that, in the case of general courts-martial, a review should be prepared by the staff judge advocate; and that the transcript and allied papers should be forwarded to the US Army Judiciary in general court-martial cases. Other records should be reviewed for jurisdiction and filed as in the case of a complete summary or special court-martial. A sample action of a general court-martial case in which an accused is discharged pursuant to Chapter 10, Army Regulation 635-200, after the sentence and findings but before the convening authority's action, is as follows:

> In the foregoing case of _____, the findings of guilty are approved. Only so much of the sentence as provides for confinement at hard labor for (insert the actual time served) is approved and ordered executed. The accused having requested discharge for the good of the service pursuant to the provisions of Chapter 10, Army Regulation 635-200, which was approved, was discharged from the service on _____, with (a) (an) _____ discharge. The record of trial is forwarded for action under Article 69.

2. **Undated Documents.**

The Court of Military Review continues to observe that many important documents in records of trial are undated. These include offers to plead guilty and acceptances by the convening authority, motions and supporting legal memoranda, stipulations, requests for clemency, and rebuttals or waivers of rebuttal to the Staff Judge Advocate's Review. In particular circumstances, the date on which these documents were executed can be especially important. Counsel should ensure that they are dated and that the date shown is accurate.

3. **Initial Court-Martial orders.**

Recently, it has been noted that SJA offices have been publishing court-martial orders utilizing reduced print. This causes undue hardship to appellate judges and administrative personnel attempting to compare the data contained on the order with the information in the record of trial. All such orders should be published with a larger, more readable type (*i.e.*, elite or pica).

It is not necessary to rescind the initial promulgating order after a new review and action has been taken.

4. **Supplemental Court-Marial Orders.**

Paragraph 12-5d, Army Regulation No. 27-10, requires copies of every supplemental order in which the initial action included an approved punitive discharge or dismissal be distributed as provided in paragraph 12-5b(1) and (3) through (12), AR 27-10. In this regard, GCM authorities when listing the original convening authority in the "distribution" block, should show "ATTN: SJA" in the address line. This listing will allow staff judge advocate offices in the command where the accused was originally tried to properly dispose of their file copy of the record of trial upon receipt of the final order, in accordance with the provisions of File Nos. 404-02 and 404-03, AR 340-18-4, as changed.

5. **Review of the Staff Judge Advocate.**

Staff judge advocates are reminded that Change 18 to Army Regulation No. 27-10, paragraph 2-8b, requires that in addition to the original and two copies of the SJA review that are forwarded with the original record and defense and government copies to JALS-CCR, one additional copy of the review be forwarded expeditiously to the commander of the confinement facility to which the accused has been transferred.

6. **Action of the Convening Authority.**

After the convening authority has taken action and the promulgating order has been published and distributed, he cannot withdraw his previous action and take a new action without being ordered to do so by an appellate court. See paragraph 89*b*, MCM, 1969 (Revised Edition).

7. **Accused's Receipt for his Copy of Record of Trial.**

SJA offices are requested to print or type the accused's name below the signature line on the receipt for accused's copy of the record of trial and to assure that they are forwarded expeditiously to JALS-CCR for inclusion in the record. Many receipts are either illegible or never forwarded by the responsible office to JALS-CCR.

DIGESTS-ARTICLE 69, UCMJ, APPLICATIONS.

1. In the *Lea* cases, SPCM 1978/4323 and SUMCM 1978/4324, The Judge Advocate General considered contentions that the courts-martial that tried the applicant lacked jurisdiciton because he was under age at the time of his enlistment and at the time of trial.

The applicant enlisted in the Army on 20 May 1960. In enlisting, he declared his birthdate to have been 15 July 1942. Had this declaration been true, the applicant would have been 17 years of age at the time of enlistment. In fact, the applicant's birthdate was 15 July 1943; the applicant was, therefore, 16 years of age at the time of enlistment.

Five days before his seventeenth birthday, the applicant went AWOL. He returned to Fort Hood, Texas, on 22 July 1960. On 27 July 1960,

the applicant was tried for this offense and found guilty by a summary court-martial.

Subsequently, on 26 September 1960, the applicant again went AWOL. He remained AWOL until 9 November 1960. He was tried for this offense and found guilty by special court-martial on 19 December 1960.

The applicant was discharged from the Army on 17 January 1961, being then 17 years of age, because of his minority. He reentered the Army on 12 April 1962 and has served intermittently since that day. Relief was granted as to the summary court-martial and denied as to the special court-martial.

An enlistment by a person 16 years of age is void and an individual whose enlistment in thus void is not subject to the jurisdiction of a court-martial. United States v. Brown, 23 U.S.C.M.A. 162, 48 C.M.R. (1974); United States v. Graham, 23 U.S.C.M.A. 75 (1972); United States v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957). Thus, at a minimum, no court-martial jurisdiction over the applicant existed until 15 July 1960, the day on which the applicant attained the age of 17. The government may, however, show a constructive enlistment where an individual under the age of 17 enlists and continues to serve after passing the minimum statutory age. United States v. Brown, *supra*; United States v. Overton, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958).

It was concluded that the applicant's initial enlistment was void and that the summary court-martial did not have jurisdiction over the offense committed on 10 July 1960, when the applicant was 16 years of age. United States v. Graves, 39 C.M.R. 438 (A.C.M.R. 1968).

As to the special court-martial, it was determined that the principle of constructive enlistment governed. The applicant entered basic training; received pay and benefits from 23 July 1960 until he again went AWOL on 26 September 1960. Although the applicant's father stated, in an affidavit accompanying the applications for relief, that he had approached the applicant's first sergeant in early June 1960 about getting the applicant out of the Army, the applicant's minority did not then really surface. The first real effort that the applicant's father made to get the applicant discharged occurred after the charges for the second AWOL were preferred.

2. In *Martin*, SPCM 1979/4351, The Judge Advocate General considered a contention that the applicant was denied his constitutional right to confront and cross-examine a witness by the Government's use at trial of the witness' former trial testimony after the Government allowed the witness to become nonamenable to process.

The applicant was tried twice. The first trial, held at Frankfurt, Germany, started on 3 March 1978. On the second day of trial, 9 March 1978, a defense/prosecution request for a mistrial was granted.

On 3 March 1978, Private H, the principal Government witness testified and was cross-examined exhaustively. She was then permitted to return to the United States for discharge under the provisions of paragraph 5-31, AR 635-200, The Expeditious Discharge Program.

On 14 March 1978, the original charges as well as an additional charge were referred for trial. This trial was held on 24 March 1978. In spite of repeated and varied Government requests, Private H steadfastly refused to return to Germany to testify. The defense objected to the use of the witness' former testimony at the second trial. This objection was overruled.

Unavailablity of the witness was the only issue of real concern. Unavailability at trial includes nonamenability to process (United States v. Burrow, 16 U.S.C.M.A. 94, 36 C.M.R. (1960)) and foreign residence of the witness (Mancusi v. Stubbs, 408 U.S. 204 (1972)). In military practice, the Government must not only show due diligence in attempting to locate the witness, but must also show unavailability in fact. *See* United States v. Quigley, 44 C.M.R. 718 (N.C.M.R. 1971); United States v. Bienick, 43 C.M.R. 954 (A.F.C.M.R. 1971).

There is no statutory or regulatory authority that would have subjected the witness in question to compulsory process of the United States at a foreign trial site. *See* United States v. Boone, 49 C.M.R. 709 (A.C.M.R. 1975). Here, the witness must be viewed as unavailable for trial because she was not only not amenable to process but was living in a "foreign country" where local military process could not reach.

In this case, at the time the witness was excused there was no possibility that the Government or the command could have anticipated a mistrial. No objection was made by the defense to permanently excusing the witness. Further, the defense knew that the witness was due to depart for the United States and discharge from the Army as soon as she finished testifying.

Viewed in its totality, it was determined that the Government fully complied with the legal prerequisites to enable it to use the former trial testimony of the recalcitrant witness. The applicant's constitutional rights were not violated. Relief was denied.

3. In *Staley*, SPCM 1979/4632, the appliant contended that the court-martial lacked jurisdiction over the offense of transfer of marihuana because it was not service connected. He did not contest the possession offense which occurred on post; as to the transfer, he asserted that it took place off post and after duty hours.

Court-martial subject matter jurisdiction must be resolved on a case-by-case basis by carefully balancing the *Relford* (401 U.S. 355) criteria to determine whether the military interest in deterring the offense is distinct from and greater than that of the appropriate civilian jurisdiction. United States v. Alef, 3 M.J. 414 (C.M.A. 1977). In drug transactions, the occurrence of initial negotiations on post has been found to be a significant factor weighing in favor of military jurisdiction.

In this case, the negotiation and agreement as to the transfer was entered into while both the informant and the applicant were on post, performing military duties. It was determined that there was adequate service connection within the *Relford* criteria to allow military jurisdication. Relief was denied.

4. In *Rodriquez*, SPCM 1979/4364, The Judge Advocate General considered contentions involving the use at trial of the applicant's inculpatory pretrial statements.

During an Article 39(a) session, the defense objected to testimony of a Government witness, Specialist M, regarding inculpatory statements made by the applicant upon being apprehended. This objection was based upon the question of whether the applicant had been properly advised of his rights under Article 31. The military judge deferred ruling upon this matter until further evidence was presented. During cross-examination of Specialist M, the defense counsel placed into evidence a prior statement (Defense Exhibit A) of the witness (evidently for the purpose of impeachment) wherein the inculpatory statement of the applicant was noted. Subsequently, the military judge granted the defense objection.

During cross-examination of Specialist M on the merits, the defense counsel used and placed into evidence another pretrial statement (Defense Exhibit B) of the witness, again evidently for the purpose of impeachment. Defense Exhibit A was also used by the defense for the same purpose.

The applicant asserted in his application that his defense counsel made a motion, after the presentation of evidence by both the Government and defense, to excise the inculpatory statements of the applicant from both of the defense exhibits. The summarized record of trial did not mention such motion. He contended, nevertheless, that the military judge erred in denying the defense motion, an action that was inconsistent with his prior ruling restricting Specialist M's testimony on the matter.

In the United States v. Kittell, 49 C.M.R. 225, (A.F.C.M.R. 1974), the court, relying on United States v. Gustafson, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967), held that when, in the course of impeaching a witness's credibility, the defense purposely elicits evidence that

would be otherwise inadmissible because of a defective Article 31 warning, the accused has no basis to complain on appeal. It was determined that this principle was applicable to the applicant's contention. The defense counsel introduced the two exhibits. He must have had some purpose in presenting them to the fact-finders.

The applicant also contended that the military judge should have instructed the court members, *sua sponte*, on the issue of voluntariness when he denied the defense request to excise the inculpatory statements contained in Defense Exhibits A and B. This contention was considered nonmeritorious. The issue of voluntariness was not before the court members. The issue was not raised by the prosecution to the detriment of the applicant. *Sua sponte* instructions on the issue of voluntariness are usually reserved for those instances in which testimony or declarations are offered against an accused. United States v. Hurt, 19 U.S.C.M.A. 206, 41 C.M.R. 206 (1970). Relief was denied.

5. In *Brown*, SPCM 1979/4386, the applicant contended that the court-martial lacked jurisdiction to try the offenses (assault and battery upon his superior commissioned officer then in the execution of his office; disrespect towards the same officer) because they were not service connected.

The evidence of record showed that the officer, in civilian clothes, saw the applicant and another noncommissioned officer sitting in the rear of a lounge in an off-post restaurant, wearing fatigues. Believing that the applicant and his companion were breaking a dress regulation of the local military post, he encountered them to ascertain their identities. A "battle" ensued and continued in the restaurant parking lot until several patrons successfully separated the combatants.

In balancing the *Relford* (401 U.S. 355) criteria, it was determined that the military interest could not be vindicated adequately in the civilian courts. The applicant was required to follow installation directives and regulations that prohibited the wearing of fatigues off post in a social context. He had the affirmative duty not to be disrespectful to or assault a superior commissioned officer. The victim in this case was complying with what he correctly viewed as his military duty as a commissioned officer to correct violations of general and local regulations when he saw them occur, even if off post. The nature of the offenses themselves, taken as a whole or separately, represented a blatant flouting of military authority. No civilian court could have taken jurisdiction over these offenses without sacrificing an important deterrent element. Relief was denied.

6. In the *Stewart* trial, SPCM 1979/4380, after the government rested, the defense moved for dismissal of the charges because the Government failed to prove that exclusive federal jurisdiction existed at all places within Fort Pickett, Virginia. Defense counsel argued that he had been advised that there were areas of exclusive and concurrent jurisdiction on the post, in addition to areas of mere proprietary interest. The Government did not offer proof on that issue. The military judge took judicial notice of the fact that Fort Pickett was a military reservation (not, it should be noted, that it had exclusive federal jurisdiction) and denied the motion. This ruling was correct.

It was proper for military judge to take judicial notice of the fact that Fort Pickett was a military reservation. In United States v. Rowe, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962), the court allowed judicial notice to be taken of the location of a military facility within a given geographic area.

Exclusive jurisdiction over the situs of the offense is not required to support court-martial jurisdiction over an offense; a mere proprietary interest by the military is sufficient. *See* United States v. Martin, 3 M.J. 744 (N.C.M.R. 1977); United States v. Fuller, 2 M.J. 702 (A.F.C.M.R. 1976). Once it is established that the offense took place within the geographic boundary of a military post and thus violated the security of the post, then other service-connection factors need not be weighed. The "exclusivity allegation" set out in the various specifications was surplusage. Relief was denied.

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A Matter Of Record

Notes from
Government Appellate Division, USALSA,
to Improve Court-Martial Prosecutions

Jurisdiction:

a. A specification alleged that appelant committed an offense at 123 Avon Street, Fort Blank, Missouri. The record of trial contained no evidence that Avon Street was located on Fort Blank, Missouri.

b. Appellant was charged with accepting money to process allotment forms between September 1976 and August 1977 and soliciting another to do the same during the period March 1977 to June 1977. The charge sheet disclosed that appellant was discharged and re-enlisted on 7 June 1977. Although appellant's pretrial statement indicated some of the offenses occurred after her re-enlistment, all corroborative evidence related to the time prior to re-enlistment. A part of the specifications could have been sustained had trial counsel introduced in evidence the forms improperly processed after re-enlistment. See United States v. Ginyard, 16 USCMA 512, 37 CMR 132 (1967).

Re-referral:

While the record of trial reflected that appellant's charges had initially been referred to a special court-martial, no explanation was given on the record why the referral was withdrawn and the charges subsequently referred to a special court-martial empowered to adjudge a bad conduct discharge. See United States v. Hardy, 4 M.J. 20 (CMA 1977).

Drugs:

a. In a prosecution for cocaine and marijuana possession, a CID agent identified drugs by noting his initials, time, and date on the seized substances. However, the record of trial only reflected general verbal descriptions of the prosecution exhibits. Trial counsel should insure that photographs of the exhibits are attached to the records. Such practice would enhance the Government's ability to rebut arguments based upon supposed gaps in the chain of custody.

b. Trial counsel proved the identity of marijuana seized from appellant by use of a chain of custody form and a laboratory report. An MPI investigator testified regarding his custody of the marijuana. He also testified that he had conducted a field test on the marijuana. Trial counsel did not ask the investigator the results of his field test. As the Court of Military Appeals is presently reviewing the admissibility of chain of custody documents and laboratory reports, a positive field test will prove the identity of the drug without recourse to either of the aforementioned documents. See United States v. Sanchez, 50 CMR 450 (AFCMR 1975).

Charges and Specifications:

A specification lodged under Article 108 alleged the total value of the item damaged, rather than the amount of the damage. The amount of the damage should be alleged in "damage" specifications; the total value of the item should be alleged in "destruction" specifications.

Ration Control Cases:

In a trial by court members for a ration control violation, the prosecution relied on cards, indicating purchases, which were encoded to indicate rank, unaccompanied status, and dependents in Korea. Only the part of the regulation making overpurchase a crime was offered for judicial notice; the portion interpreting the code was not and there was no testimony interpreting the information encoded on the cards. The predictable result is an appellate assignment of error based on insufficiency of the evidence.

Sentence:

In aggravation, trial counsel introduced a record of special court-martial where he had both served as trial counsel and reviewed the record for legal sufficiency. See Article 6(c), Uniform Code of Military Justice.

CLE NEWS

1. The following is the substance of a message issued in April 1979 from the Office of the Judge Advocate General:

SUBJECT: Registration Requirement for New York Attorneys

1. This Headquarters has received information that the four appellate departments of the New York State Court of Appeals enacted rules of court, effective 1 April 1979, requiring all attorneys admitted to practice in New York to register with the Office of Court Administration prior to 1 June 1979 and every two years thereafter.

2. All judge advocates admitted to practice in New York should immediately write to Mr. Andy Onda, Office of Court Administration, Attorney Registration Statements, P.O. Box 3171, Church Street Station, New York, NY 10008, to obtain the necessary registration forms.

2. **Trial Advocacy Seminar.** The Judge Advocate General's School and the Military Law Institue will jointly host a continuing legal education seminar on trial advocacy. The seminar is to be held at The Judge Advocate General's School in Charlottesville, Virginia, on 21 through 23 June 1979. The course is designed for active duty members of The Judge Advocate General's Corps who prosecute or defend courts-martial. Enrollment is limited to 45 and members of all services are encouraged to attend. Space can be reserved on a first come, first served basis, by calling Mrs. Kathryn Head, TJAGSA, Autovon 274-7110, extension 293-6286, or commercial (804) 293-6286.

3. **Civilian Sponsored CLE Courses.**

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

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committe on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

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

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

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

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

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

NJC: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

NPI: National Practice Insitute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, Il. Phone: (312) 649-8462

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

JUNE

1-2: ALI-ABA, Taiwan: Legal Fallout of Derecognition, Washington, DC.

1-2: FBA, Conference on Federal Trial Practice, Washington, DC.

May 31-June 1: PLI, Secured Creditors and Lessors Under the Bankuptcy Act of 1978, New York Hilton Hotel, New York, NY.

4-5: FPI, Contract Disputes, International Inn, Washington, DC. Cost: $450.

8-9: PLI, Product Liability Update, The Ambassador West Hotel, Chicago, IL.

8-9: FBA, Workshop on Federal Tort Claims Act Medical Malpractice, Mayflower Hotel, Washington, DC. Cost: $75.

10-16: NCDA, Executive Prosecutor Course, Houston, TX.

14-15: PLI, Construction Contracts 1979, New York Sheraton Hotel, New York, NY. Cost: $185.

14-16: ALI-ABA, The New Federal Bankruptcy Code, San Francisco, CA.

14-16: FPI, Practical Negotiation of Government Contracts, Sheraton National/Arlington, VA, Washington, DC. Cost: $525.

17-22: ALI-ABA, Modern Real Estate Transactions, Villanova, PA.

17-23: NJC, General Jurisdiction (for judges), University of Nevada, Reno, NV. Cost: $750.

17-29: NJC, The Judge and the Trial (graduate, for judges), University of Nevada, Reno, NV. Cost: $450.

18-20: FPI, Practical Negotiation of Government Contracts, Fairmont Hotel, Dallas, TX. Cost: $525.

18-22: AAJE, Practicalities of Judging, Jurisprudence and the Humanities, Cambridge, MA.

18-27: AAJE, Seminar on the British Justice System, Birmingham, England.

24-29: NJC, Evidence (graduate, for judges), University of Nevada, Reno, NV. Cost: $300.

24-29: ALI-ABA, Estate Planning in Depth, Madison, WI.

24-29: ALI-ABA, Trial Evidence in Federal and State Courts: A Clinical Study of Recent Developments, Madison, WI.

24-29: NJC, Evidence (graduate, for judges), University of Nevada, Reno, NV. Cost: $300.

25-26: PLI, Breach of Contract Under the UCC, Stanford Court Hotel, San Francisco, Ca. Cost: $185..

25-27: FPI, Changes In Government Contracts, Tropicana Hotel, Las Vegas, NV. Cost: $525.

25-29: NWU, Short Course for Defense Lawyers, Northwestern University School of Law, Chicago, IL.

28-29: PLI, Construction Contracts 1979, Hyatt Regency Hotel, Chicago, IL. Cost: $185.

JULY

1-6: NJC, Criminal Law (graduate, for judges) University of Nevada, Reno, NV.

8-13: ALI-ABA, Environmental Litigation, University of Colorado School of Law, Boulder, CO.

8-13: NJC, Sentencing, Corrections and Prisoner's Rights (graduate, for judges), University of Nevada, Reno, NV.

9-20: AAJE, The Trial Judges Academy, School of Law University of Colorado, Boulder, CO.

22-27: ALI-ABA, The New Federal Bankruptcy Code—In Depth, Stanford Law School, Stanford, CA.

AUGUST

6-17: AAJE, The Trial Judges Academy, University of Virginia School of Law, Charlottesville, VA.

6-19: NWU: Short Course for Prosecuting Attorneys, Northwestern University School of Law, Chicago, IL.

5. TJAGSA CLE Courses.

June 18-29: JAGSO (CM Trial).

June 21-23: Military Law Institute Seminar.

July 9-13 (Contract Law) and July 16-20 (Int. Law): JAOGC/CGSC (Phase VI Contract Law) Int. Law.

July 9-20: 2d Military Administrative Law (5F-F20).

July 16-August 3: 19th Military Judge (5F-F33).

July 23-August 3: 81st Contract Attorneys' Course (5F-F10).

August 6-October 5: 90th Judge Advocate Officer Basic (5-27-C20).

August 13-17: 48th Senior Officer Legal Orientation (5F-F1).

August 20-May 24, 1980: 28th Judge Advocate Officer Graduate (5-27-C22).

August 27-31: 9th Law Office Management (7A-713A).

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

JAGC Personnel Section

PP&TO, OTJAG

1. Ra Promotions

COLONEL

ALLEY, Wayne E.	11 Mar 79
MARDEN, Jack M.	1 Jan 79
MUNDT, James A.	23 Feb 79
TRAIL, Sebert L.	3 Jan 79

MAJOR

BOGAN, Robert	12 Mar 79

FRYER, Eugene D.	22 Mar 79
RUSSELL, Richard D.	29 Mar 79
CAPTAIN	
CORK, Timothy R.	20 Aug 78
HEMMER, Paul C.	30 Apr 79
MARTIN, Robert W.	7 Jan 79
MC MENIS, James E.	17 Nov 77
ST AMAND, Gerald A.	8 Jan 79
1ST LIEUTENANT	
NELMS, Russell F.	4 Jun 79

2. Aus Promotions

COLONEL	
LOFTUS, Martin R.	5 Mar 79
RYKER, George C.	8 Jan 79
MAJOR	
FRYER, Eugene D.	22 Mar 79
KOREN, Philip F.	11 Feb 79

3. Reassignments

NAME	*FROM*	*TO*
	COLONELS	
Clause, James D.	Pentagon	ACMR, USALSA
Davis, Thomas	USALSA	Pentagon
DeFord, Maurice	USALSA	FT Sill, OK
Garner, James	FT Jackson, SC	USAREUR
Loftus, Martin	SHAPE	MDW
Meengs, Philip	FT Bliss, TX	Presidio of SF, CA
Mundt, James	Japan	Korea
O'Donnell, Matthew	FT McNair, DC	ACMR, USALSA
Rector, Lloyd	FT McPherson, GA	OTJAG
Russell, George	FT Riley, KS	FT Hood, TX
Thornton, James	FT Knox, KY	FT Monroe, VA
Tocher, Patrick	FT Carson, CO	FT McPherson, GA
	LIEUTENANT COLONELS	
Adams, Allen D.	FT Sam Houston, TX	Korea
Babcock, Charles	FT Bragg, NC	Korea
Beans, Harry	TJAGSA	FT Hood. Tx
Bonfanti, Anthony	FT Bragg, NC	82d Abn Div
Creekmore, Joseph	USAREUR	FT McClellan, AL
Felder, Ned	USALSA	Nellingen, Germany
Fugh, John	Carlisle Barracks, PA	Pentagon
Garn, George	FT Meade, MD	ACMR, USALSA
Gilligan, Francis	Frankfurt	Bad Kreuznach, Germany
Green, Fred	FT Leavenworth, KS	USAREUR
Haight, Barrett	FT Leavenworth, KS	FT Jackson, SC
Harris, Harold	Canal Zone	FT Leonard Wood, MO
Hemmer, William	Vicenza, Italy	Heidelberg, Germany
Herkenhoff, Walter	FT Eustis, VA	NATO SHAPE, Belgium
Hug, Jack	Korea	FT Ord, CA
Hunt, Dennis	TJAGSA	FT Stewart, GA
Jacob, Gustave	Mannheim, Germany	FT Carson, CO

NAME	*FROM*	*TO*
Kane, Peter	USAREUR	FT Carson, CO
Kelley, Oliver	FT Sill, OK	Canal Zone
Kenney, Peter	TJAGSA	FT Monroe, VA
Kiernan, Thomas	FT Buchanan, PR	FT Leavenworth, KS
Knapp, Thomas	FT Monroe, VA	USAREUR
Lasseter, Earle	FT McClellan, AL	FT Benning, GA
McHardy, John	FT Rucker, AL	FT Meade, MD
Mowry, Richard	Alexandria, VA	St Louis, MO
Murray, Charles	FT Leavenworth, KS	Korea
Naughton, John	FT Leavenworth, KS	Falls Church, VA
O'Brien, Francis	USAREUR	OTJAG
O'Roark, Dulaney	USAREUR	OTJAG
Raby, Kenneth	FT Stewart, GA	FT Knox, KY
Rice, Paul	OTJAG	FT Riley, KS
Stockstill, Charles	USALSA	Korea
Thornock, John	USALSA	FT Carson, CO
Tracy, Curtis	USAREUR	FT Gordon, GA
Turner, John	FT Sill, OK	FT Leavenworth, KS
Wasinger, Edwin	FT Monroe, VA	FT Bliss, TX
Wold, Pedar	Denver, CO	FT Bragg, NC
Yawn, Malcolm	Korea	Denver, CO
	MAJORS	
Adams, John	OTJAG	Korea
Artzer, Paul	FT Bliss, TX	Canal Zone
Baker, James	TJAGSA	FT Hood, TX
Bozeman, John	FT Leavenworth, KS	USAREUR
Carmichael, Harry	FT Eustis, VA	FT Bragg, NC
Carpenter, Bernard	USAREUR	West Point, NY
Cooch, Francis	TJAGSA	OTJAG
Crean, Thomas	FT Leavenworth, KS	S&F, TJAGSA
Crow, Patrick	Korea	USAREUR
DeBerry, Thomas	FT Huachuca, AZ	S&F, TJAGSA
Devlin, Terrance	Munich, Germany	FT Monroe, VA
Devine, Frank	Korea	USALSA
Fontenot, Russel	USAREUR	FT Bragg, NC
Gates, E. A.	FT Hood, TX	OTJAG
Gravelle, Adrian	TJAGSA	FT McPherson, GA
Graves, Joseph	TJAGSA	USAREUR
Green, Herbert	FT Gordon, GA	S&F, TJAGSA
Haggard, Albert	TJAGSA	St Louis, MO
Haas, Michael	USAREUR	28th Advanced Course
Hamilton, John	Kwajalein Missile Range	Def. Language Inst., CA
Huffman, Walter	FT Ord, CA	28th Advanced Course
Johnston, Wayne	TJAGSA	OTJAG
Lane, Jack	FT Leavenworth, KS	OTJAG
Leonardi, Kenneth	TJAGSA	USALSA
Limbaugh, Daniel	FT Leonard Wood, MO	28th Advanced Course

NAME	*FROM*	*TO*
Mitchell, Kenneth	USACIDC, FT Meade, MD	USACS, FT Meade, MD
Roberson, Gary	Hawaii	FT Ben Harrison, IN
Ruppert, Raymond	FT Bragg, NC	28th Advanced Course
Sandell, Lawrence	FT Carson, CO	Falls Church, VA
Schwabe, Charles	TJAGSA	FT Sill, OK
Smith, Edgar	Redstone Arsenal, AL	Aber. Prov. Gds, MD
Strassburg, Thomas	FT Leavenworth, KS	FT Lewis, WA
Taylor, Daniel	TJAGSA	FT Huachuca, AZ
Taylor, Thomas	TJAGSA	OTJAG
Terry, Guyton	FT Gordon, GA	Presidio of SF, CA
Tiedemann, John	FT Benning, GA	FT Eustis, VA
Vernon, Albert	FT Hood, TX	USAREUR
Weber, John	FT Jackson, SC	FT Buchanan, PR
Weinberg, Paul	FT Leonard Wood, MO	Mannheim, Germany
Williams, Herbert	FT Bragg, NC	USAREUR
Zimmerman, Charles	Korea	OTJAG
	CAPTAINS	
Altenburg, John	TJAGSA	USAREUR
Alvarey, Joel	TJAGSA	S&F, TJAGSA
Anderson, Paul	FT Benning, GA	28th Advanced Course
Baboian, Richard	TJAGSA	Dallas, TX
Barnes, Joseph	FT Stewart, GA	28th Advanced Course
Bazzle, Ervin	USAREUR	28th Advanced Course
Beardall, Charles	TJAGSA	FT Knox, KY
Beeson, John	S&F, TJAGSA	28th Advanced Course
Boonstoppel, Robert	TJAGSA	FT Leonard Wood, MO
Bornhorst, David	TJAGSA	FT McPherson, GA
Boucher, David	TJAGSA	USAREUR
Braga, James	Korea	FT Devens, MA
Brodeur, Donald	Korea	FT Ord, CA
Burton, John	FT Leonard Wood, MO	28th Advanced Course
Campbell, William	FT Benning, GA	Contract Appeals Division, USALSA
Canner, Demmon	TJAGSA	FT Carson, CO
Casida, Gary	TJAGSA	USAREUR
Caulking, John	TJAGSA	USAREUR
Cefola, Richard	TJAGSA	FT Benning, GA
Cole, Joe	Korea	FT Rucker, AL
Cornelius, Roger	FT Leavenworth, KA	Huntsville, AL
Cunningham, William	TJAGSA	USAREUR
Curtis, Howard	USAG, FT Meade, MD	USACIDC, FT Meade, MD
Czarnowsky, Christyne	USAREUR	West Point, NY
Dale, Buris	FT Sill, OK	28th Advanced Course
Dean, Larry	FT Carson, CO	28th Advanced Course
Deckert, Raymond	TJAGSA	FT Lee, VA
Denny, Michael	TJAGSA	FT Stewart, GA
Elkins, Estel	FT Jackson, SC	Canal Zone

NAME	*FROM*	*TO*
Ferm, Dennis	Korea	Tripler AMC, HI
Fievet, Harold	USMA	28th Advanced Course
Finch, William	USALSA	28th Advanced Course
Fitzgibbons, John	USAREUR	Fitzsimons AMC, Denver, CO
Flanagan, Kevin	USAREUR	28th Advanced Course
Fligg, Warren	FT Dix, NJ	28th Advanced Course
Frick, Ralph	TJAGSA	FT Lewis, WA
Garrett, Robert	USAREUR	FT Belvoir, VA
Gasperini, Richard	TJAGSA	S&F, TJAGSA
Gillian, James	FT Wainwright, AK	Corpus Christi, TX
Gonzales, Robert	TJAGSA	S&F, West Point
Graham, David	USAREUR	OTJAG
Greszko, Timothy	USAREUR	Contract Appeals Division, USALSA
Hall, Warren	Rock Island, IL	FT Dix, NJ
Hamelin, Norman	OTJAG	USAREUR
Hansen, Donal	TJAGSA	FT Meade, MD
Heffelfinger, H.	FT Lewis, WA	Korea
Helmcamp, Dewey	TJAGSA	S&F, TJAGSA
Hennessey, David	USAREUR	28th Advanced Course
Hewitt, James	USALSA	28th Advanced Course
Holeman, Jacob	USALSA	28th Advanced Course
Hood, Gene	TJAGSA	FT Carson, CO
Hoskey, Frankie	USAREUR	OTJAG
Jewell, Wendell	Dugway PG, UT	FT Lewis, WA
Johnson, Jon	Hawaii	28th Advanced Course
Johnston, Paul	FT Rucker, AL	28th Advanced Course
Jones, Dwight	Korea	FT Monroe, VA
Joyce, John F.	FT Carson, CO	28th Advanced Course
Kaplan, Marshal	Korea	FT Leavenworth, KS
Kennerly, Phillip	FT Ord, CA	FT Meade, MD
Key, William	TJAGSA	FT Devens, MA
Kirk, William	Korea	FT McNair, DC
Lantz, William	TJAGSA	USAREUR
Lause, Glen	USALSA	28th Advanced Course
Lazarex, James	TJAGSA	FT Jackson, SC
Lewis, William	Korea	28th Advanced Course
Long, Clarence	FT Bragg, NC	28th Advanced Course
Long, James	TJAGSA	USALSA
Lundberg, Steve	TJAGSA	FT Campbell, KY
Manning, Jay	FT Devens, MA	Korea
Marchand, Michael	FT McPherson, GA	28th Advanced Course
McCarthy, Daniel	TJAGSA	FT Hood, TX
McDade, Lawrence	FT Dix, NJ	USALSA
McDonald, Peter	FT Stewart	Kwajalein Missile Range
McGowan, William	FT Bragg, NC	28th Advanced Course
McManus, James	FT Meade, MD	28th Advanced Course

NAME	*FROM*	*TO*
McMenis, James	TJAGSA	S&F, TJAGSA
Meixell, John	TJAGSA	USALSA
Minor, Wilsie	Redstone Arsenal, AL	Korea
Mogabgab, Stephen	USAREUR	28th Advanced Course
Monroe, Glenn	TJAGSA	USALSA
Morgan, Donald	West Point	28th Advanced Course
Mura, Steven	Korea*	FT Lewis, WA
NacCarato, Timothy	FT Riley, KS	28th Advanced Course
Nardotti, Michael	USAREUR	28th Advanced Course
Newberry, Robert	USALSA	28th Advanced Course
Noreen, Robert	Presidio of SF, CA	FT Wainwright, AK
Norsworthy, Levator	OTJAG	28th Advanced Course
Nyman, Willard	USALSA	28th Advanced Course
Ott, Robert	USAREUR	28th Advanced Course
Pangburn, Kenneth	TJAGSA	FT Polk, LA
Perrin, John	USAREUR	USMA
Podbeilski, Thaddeus	USAREUR	USMA
Pollard, Ivry	FT McPherson, GA	FT Hood, TX
Powell, Gayle	Korea	28th Advanced Course
Price, Wayne	USMA	28th Advanced Course
Proudfit, Larry	USMA	28th Advanced Course
Ramsey, William	USALSA	28th Advanced Course
Reade, Robert	Korea	28th Advanced Course
Recasner, James	USALSA	28th Advanced Course
Resen, William	Korea	Presidio of SF, CA
Retson, Nicholas	TJAGSA	S&F, TJAGSA
Riggs, Ronald	TJAGSA	USAREUR
Ross, Joseph	FT Campbell, KY	28th Advanced Course
Scanland, Gerald	Canal Zone	Vint Hill, VA
Schon, Alan	USAREUR	USALSA
Shewan, James	FT Campbell, KY	28th Advanced Course
Short, Robert	USAREUR	28th Advanced Course
Shull, David	OTJAG	28th Advanced Course
Smith, Brian	TJAGSA	USAREUR
Smith, Michael	TJAGSA	FT Bragg, NC
St. Amand, Gerard	USMA	28th Advanced Course
Stokesberry, John	TJAGSA	Korea
Studer, Eugene	FT Devins, MA	Korea
Switzer, Joseph	Walter Reed, DC	28th Advanced Course
Thwing, James	TJAGSA	FT Benning, GA
Tomes, Jonathan	FT Knox, KY	FT Campbell, KY
Torvinen, Mark	FT Wainwright, AK	Dugway Prov. Gds., UT
Tromey, Thomas	TJAGSA	USARERU
Wing, Dennis	USMA	28th Advanced Course
Youmans, Robert	FT Campbell, KY	28th Advanced Course
Zimmerman, John	Korea	USAREUR

Current Materials of Interest

Forkner, CPT Larry E., *A Report of Eighth Air Force's Test to Randomly Select Court Members*, 8 AF JAG Rptr 15 (Feb. 1979).

Trial Judiciary Division, Air Force TJAG, *'Deterrence' Argued by Trial Counsel*, 8 AF JAG Rptr 17 (Feb. 1979).

Note, Criminal Law: *Sniffer Dogs for Drug Searches in the Military*, 31 Okla. L. Rev. 709 (Summer 1978).

Lawry, Robert P., *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Federal Bar Journal 61 (Fall 1978).

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

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

☆U.S. GOVERNMENT PRINTING OFFICE: 1979