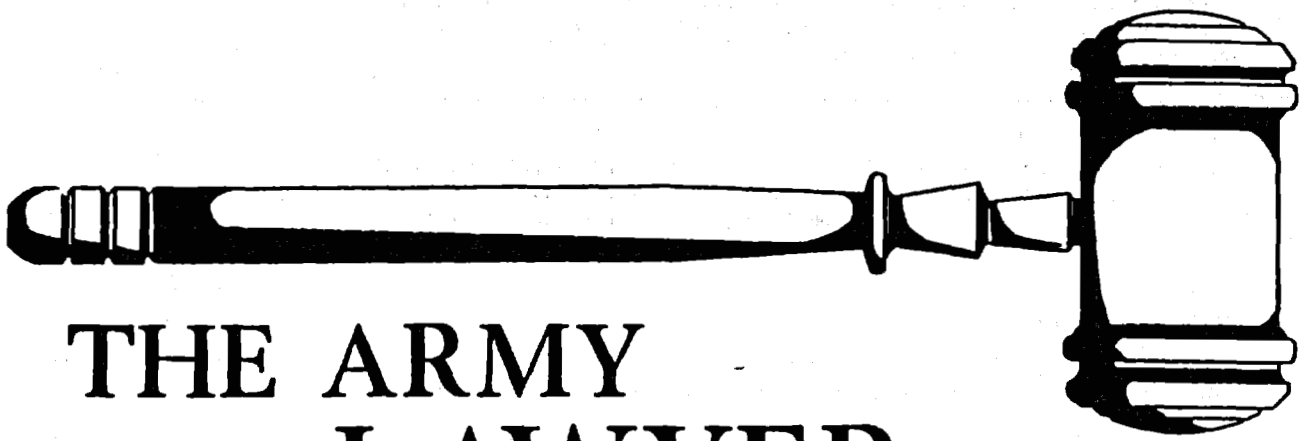

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Major Daniel P. Shaver

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New Changes in a United Germany

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On 23 October 1954, the Foreign Ministers of the United States, the United Kingdom, the French Republic, and the Federal Republic of Germany signed a protocol terminating the occupation regime in Germany and attendant documents governing the future relations of the new German Republic and the Western Powers.[1] The documents, collectively known as the Bonn Conventions, supplemented by Germany's accession to the North Atlantic Treaty on 6 May 1955,[2] established the legal framework within which the United States and other "sending state"[3] forces—Belgium, Canada, France, the Netherlands, and the United Kingdom—are stationed in the Federal Republic.[4]

Thirty-six years later, in September of 1990, the Federal Republic of Germany, on the eve of unification, signed a new series of international agreements with the Four Powers—the United States, the United Kingdom, France, and the Soviet Union—and other nations stationing troops in Germany. These agreements will provide the legal basis for stationing and status in the years to come. This article briefly will review these new agreements and comment on their relation to the United States forces stationed in the Federal Republic. At this early date, the actual implementation of some of these agreements has yet to be worked out and unforseen issues may arise over the course of the next few months and years as the United States and the other sending states adjust to life in the new Germany. Finally, although they do not directly affect the United States forces, this article briefly will review the terms of the German-Soviet Stationing Agreement of 12 October 1990.

Three sets of agreements affecting the United States forces were signed during September 1990. These documents are:

1. The German Final Settlement Agreement, signed on 12 September 1990.[5]

2. The "stationing agreements," signed on 25 September 1990.[6] These agreements give the United States the right to station forces in Berlin and the western *laender*—that is, the German "states." They also provide status for forces in Berlin and the eastern *laender*—that is, the "states" of the former German Democratic Republic.[7]

3. The Note on the Relations Convention and the Berlin Settlement Agreement, signed on 28 September 1990.[8]

German Final Settlement Agreement

The Treaty on the Final Settlement with Respect to Germany, signed on 12 September 1990, in Moscow, is the key document in establishing the relationship of the united Germany with the rest of Europe and the world. In this treaty, the former occupying powers—the French Republic, the Soviet Union, the United Kingdom, and the United States—recognize the existence of a united Germany within the existing territory of the former two German states. In addition, Germany makes a number of promises including the renunciation of the manufacture, use, and possession of nuclear, chemical, and biological weapons. Germany also agrees to limit its armed forces to 370,000 personnel.

Of particular importance to the United States forces are articles four through seven. Article four requires that the Soviet Forces withdraw completely by the end of 1994 and that Germany and the Soviet Union settle, by treaty, the conditions under which Soviet forces will remain

---

[1] Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425.

[2] Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5707, T.I.A.S. No. 3428.

[3] A "sending state" is a nation that has forces stationed in the Federal Republic of Germany pursuant to the North Atlantic Treaty. *See id.*

[4] The document that authorizes the stationing of United States forces in the Federal Republic of Germany is the Convention on the Presence of Foreign Forces in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5689, T.I.A.S. No. 3426. The status of United States forces stationed in Germany is governed by the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter NATO SOFA], and the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany and its Protocol, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351 [hereinafter NATO SA].

[5] 29 I.L.M. 1186 (1990).

[6] 30 I.L.M. 445 (1991) [hereinafter Berlin Stationing Note].

[7] These states are Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thuringia.

[8] 30 I.L.M. 454 (1991).

during the interim period and how they will conduct the withdrawal. This latter condition was completed partially by the negotiation, in late September of 1990, of the Soviet stationing agreement discussed later in this article. A precise withdrawal schedule for Soviet forces, however, has yet to be published.

Article five addresses two distinct periods—the period prior to the 1994 deadline for the completion of Soviet withdrawal and the period subsequent to Soviet withdrawal. During the first period, only German "territorial defense" units not integrated into "alliance structures" of the North Atlantic Treaty Organization (NATO) may be stationed in the eastern *laender*. No armed forces of any other state may be stationed in these *laender* except in Berlin, where the armed forces of France, the United Kingdom, and the United States—all of which were former occupiers of West Berlin—may retain their forces until the completion of the Soviet withdrawal. The final sentence of subparagraph (1) of article 5 also prohibits non-German western armed forces from conducting any "military activity" in the eastern *laender* outside of Berlin.

Subparagraph (2) of article 5 places some additional restrictions on western forces stationed in Berlin. Troop and equipment strengths cannot exceed the levels present on 12 September 1990—the date of signing—and new categories of weapons may not be introduced by the non-German forces. Finally, the German Government will conclude agreements with the nations stationing forces in Berlin. This last requirement was satisfied when Germany entered into the stationing agreements with the western allies on 26 September 1990, and with the Soviet Union on 12 October 1990.

The final subparagraph of article 5 addresses the period subsequent to the withdrawal of Soviet forces from the eastern *laender*. German forces assigned to NATO thereafter may be stationed in the eastern *laender* as long as they do not have systems that are designed exclusively for nuclear weapons. Finally, "foreign armed forces and nuclear weapons or their carriers" may not be stationed or "deployed" in the eastern *laender*.

This last sentence of subparagraph 3 to article 5 is important for the United States and other western forces. Although the western allies do not anticipate stationing forces in the former German Democratic Republic, none of them wanted to preclude the possibility of participating in training exercises there in the future. According to press reports, the desire to conduct these exercises led to some last-minute controversy, which caused Great Britain's Foreign Minister, Douglas Hurd, to balk temporarily at signing the agreement.[9]

After hurried discussions, an agreed note to the treaty was drawn up, allowing the German Government to decide how the term "deployed" should be applied in the future, and taking into account the security of all of the parties. This note, agreed upon by the Soviets after the Federal Republic of Germany promised them an additional three-billion-Deutschmark interest-free loan, opens up at least the possibility of the United States and other western forces training in the former East Germany after the Soviet withdrawal.[10]

Finally, articles 6 and 7 recognize the right of the new united Germany to belong to NATO or other alliances as it chooses and dissolve all quadripartite rights, responsibilities, agreements, practices, and institutions. The Four Powers agreed that Germany would have full sovereignty over its internal and external affairs. Although this treaty does not enter into force until final ratification or acceptance by the Four Powers, Soviet and western allied rights were suspended by mutual agreement on 1 October 1990.

The Western Stationing Agreements

The term "stationing agreements," as used in this article, refers collectively to a number of separate notes exchanged in September 1990 between the German Government and the governments of the six sending states. These notes created three agreements. The first two—the Note on the Extension of the Presence of Foreign Forces Convention and the note "extending" the Status of Forces Agreement[11] (SOFA) and Supplementary Agreement[12] (SA) to the eastern *laender*—involved all seven nations. On the other hand, the third note, known as the Berlin Agreement, was between the German government and only those western allies that had troops stationed in Berlin—that is, France, the United States, and the United Kingdom. Throughout the negotiations for these stationing agreements, a team of advisors from the Department of Defense, the United States European Command (USEUCOM), United States Army Europe (USAREUR), and United States Air Forces Europe (USAFE)—most of whom were attorneys—advised the State Department and embassy negotiators in Bonn.[13]

Note on the Extension of the Presence of Forces Convention

Extending the Presence Convention or replacing it with another agreement was essential to the continued station-

[9] *See* The German Tribune, Sept. 23, 1990, at 3, col. 2.

[10] *See id.*

[11] *See supra* note 4.

[12] *See id.*

[13] The following military attorneys participated in portions of the negotiation process in Bonn: Department of Defense—Mr. Phil Behringer and Colonel Richard Erickson; USEUCOM—Mr. Normand Hamelin; USAREUR—Mr. George Bahamonde and the author; USAFE—Mr. Thomas Keenan; and United States Army Berlin—Colonel William Lantz.

ing of United States and other western forces in the Federal Republic of Germany. This convention was the document that had authorized stationing since the Bonn Conventions came into force. Although the German Government initially was reluctant to extend an agreement that appeared to the German people to be a vestige of the occupation regime, the text to which the parties finally agreed simply extended the Presence of Forces Convention "following the establishment of German Unity and the conclusion of the Treaty on the Final Settlement with respect to Germany, signed on 12 September 1990." The note applies only in the western *laender*, and provisions were added for review and termination.

Note Extending the Status of Forces Agreement and Supplementary Agreement

This note is significant for United States forces stationed in the western *laender* and Berlin. Early in 1990, USAREUR, and subsequently other United States commands, eased travel restrictions to the German Democratic Republic, resulting in an increased number of American soldiers, civilian employees, and family members traveling to the eastern *laender*. Naturally, the United States forces wanted the individual protections enjoyed by service members in the west to be extended, after German unity, to the entire country. Additionally, the United States realized that it may be required to conduct some activities in the eastern *laender* as a force. Ideally, what the United States forces needed was a simple extension of the present SOFA and SA.

That solution, however, was preempted by the West German Government. The West German Government already had been under pressure from political opposition groups who claimed that these treaties were offensive to German sovereignty. Moreover, the West German Government believed that the extension of any "NATO" agreement to East Germany would be objectionable to the Soviets.

The *Einigungsvertrag*, or "Unity Treaty," of 31 August 1990, between the Federal Republic of Germany and the German Democratic Republic, specifically excluded the application of the SOFA and SA to the eastern *laender*.[14] While the validity of this act, without the consent of the other parties to the treaty, was questionable under international law, the political realities of German unification required the parties to find a way around the impasse.

The final note negotiated between the sending states and the German Government declares that no de jure extension of the treaties to the eastern *laender* shall arise. Paragraph 4, however, clarifies and extends much of the substance of those agreements. First, subparagraph 4a limits all official activities of the force in the eastern *laender*—exclusive of Berlin, which is covered under a separate agreement—to those expressly approved by the government of the Federal Republic. These activities could include emergency medical evacuation, legal liaison, procurement, official social visits, and other activities in which the United States may wish to engage. These activities are limited only by the Final Settlement Treaty, which prohibits "military" activities such as maneuvers and unit training, and by the need to get express consent. The exact mechanism by which approval will be requested currently is being worked out with the German Government. The first official activity approved by the German Government was a four-city tour of East Germany by the USAFE Band in mid-December of 1990.

In addition, subparagraph 4b extends to the force, the civilian component, and family members and dependents the "same status as that accorded them" in the western *laender*. Private activities of soldiers and their families in the East require no permission of the German Government, and individuals engaged in them automatically are extended the same rights they would have in the West. Individuals performing nonmilitary force activities, which receive the express consent of the German Government, also enjoy these rights.[15]

Berlin Stationing

The third and most detailed note of the stationing notes of 25 September 1990, is the agreement on Berlin stationing. With the relinquishment of quadripartite rights, agreement with the German Government was required for the continued presence of French, United Kingdom, and United States forces in Berlin. The German Government wanted these forces to remain in Berlin until the completion of the Soviet withdrawal. The Federal Republic was, in general, very supportive of the requests made by the western powers for a system that did not put the Berlin stationed forces at a disadvantage to its eastern counterparts.

The agreement states that, "for a limited period," pursuant to German request, the three western powers may continue to station troops in Berlin up to the force levels in effect on 12 September 1990, which is the date of the final settlement signing. Paragraph 3 of the note gives the force, the civilian component, and family members and dependents stationed in Berlin or traveling between the

---

[14] *Anlage* (enclosure) 1 to the *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik ueber die Herstellung der Einheit Deutschlands* (Unity Treaty), Aug. 31, 1990, BGBl.II § 885 f.s.

[15] Paragraph 4c of the NATO SOFA and SA "extension" note acknowledges the possibility of official activities of the other three sending state forces—Belgium, Canada, and the Netherlands—in Berlin. In November 1990, officials of these three nations met with German officials in Bonn and agreed upon procedures for conducting activities in Berlin. This note will have to be modified upon the withdrawal of forces from Berlin and the termination of the Berlin agreement, if not sooner.

West and Berlin, the same status as in the western *laender*. Accordingly, for the first time since United States forces were sent to Berlin, the provisions of the SOFA and SA—but not these documents de jure—will apply in that city.

The German Government guarantees and agrees to facilitate all air movements of the forces to and from Berlin and all surface movements between Berlin and the western *laender*. With the renunciation of quadripartite rights and responsibilities, the complicated Berlin travel restrictions requiring all surface travel—whether by rail or road—to proceed through Helmstedt became obsolete. Prior to unification and even prior to the negotiation of these agreements, USAREUR had dropped many of the restrictions for unofficial travel throughout the German Democratic Republic. The Berlin agreement confirms France's, the United Kingdom's, and the United States' rights to free and unimpeded direct travel. Subsequent to the unification, USAREUR changed its regulations to authorize direct official travel, which greatly eased the burden—especially for troops in southern Germany.

The German Government was willing to agree to favorable arrangements for the training and financing of Berlin stationed forces. The agreement states that the Federal Republic of Germany will provide training facilities to the French, United Kingdom, and United States forces "in accordance with respective national training standards."[16] Annex 1 to the agreement authorizes the forces "to continue to control and maintain facilities" and to "continue to enjoy the use of training areas" that were available to them on 12 September 1990. Moreover, both individual and collective training may be accomplished within these areas, up to and including training at the battalion task force level.[17]

Funding for Berlin stationing will continue at its present level "for [each of] the same categories of expenditure." The only adjustments in funding will be "to take account of the termination of quadripartite rights and responsibilities and of any reductions in force levels and civilian employees."[18] Additionally, should the use of replacement training facilities and areas—as agreed to by the French, United Kingdom, and United States forces—be necessary, the German Government will provide additional funds to offset the costs.[19]

As the quadripartite arrangements and the organizations that administered them are dismembered, the attention of the United States forces in Berlin will continue to focus on establishing new relationships with the German Government, which now will be responsible for the defense of Berlin. In addition, United States forces also must reestablish their relationships with the other western allies, which now are tenants instead of occupiers of the city. Finally, the forces must establish—when appropriate and allowed by the German authorities—some relationship with the Soviets, as long as their presence requires.

Berlin Settlement Agreement and Termination of Relations and Settlement Conventions

The termination of quadripartite rights and responsibilities required the negotiation of a "one plus three" settlement agreement for Berlin. This agreement attempts "to tie up the loose strings" unravelled by the dissolution of allied institutions. The topics covered include the status of *kommandatura* law, allied regulations, the jurisdiction of German courts, status of allied personnel and civilian employees, claims liability, and the disposition of property.

Of less importance to the issue of United States stationing is the Note on Termination of the Convention on Relations of May 26, 1952, and the Convention on the Settlement of Matters Arising out of the War and the Occupation, of the same date. Certain principles arising out of the latter agreement, such as the principle of restitution to victims of Nazi persecution, will continue to remain in effect.

Soviet Stationing Agreement

While the United States and other western sending state forces were negotiating with one team from the German Foreign Office and Defense Ministry, a second team was negotiating a series of four comprehensive agreements with the Soviets. The first of these is a political treaty regularizing relationships between the two countries. This so-called "transition treaty" essentially is an aid agreement specifying the categories and amounts of aid Germany would pay to the Soviets to cover the expense of their withdrawal, housing, and vocational training. Another agreement is an economic treaty designed to strengthen trade between the Federal Republic and the Soviet Union.

For the United States forces, however, the most interesting of the agreements is the fourth agreement, which is

[16]Berlin Stationing Note, *supra* note 6, para. 6.

[17]*Id.*, annex 1, paras. 1, 2.

[18]*Id.*, annex 2, para. 1.

[19]*Id.*, annex 1, paras. 5, 6.

the so-called Soviet "stationing" agreement of 12 October 1990.[20] Western lawyers will want to compare this agreement to the NATO SOFA and SA. Overall, the Soviet treaty, while comprehensive, is less detailed than comparable western documents. Because of the necessity of substantially completing an agreed upon document in the short time prior to German unification and because this agreement would remain in force for only four years or less, both sides undoubtedly felt that unforseen issues could be resolved satisfactorily or could be left until the Soviet withdrawal. Consequently, article 25 of the Soviet stationing agreement establishes a mixed German-Soviet commission to resolve differences of opinion between the parties concerning the interpretation or application of the treaty.

Just as their western counterparts are obliged to do under article II of the NATO SOFA, the Soviet forces have the obligation to respect German law.[21] The Soviet forces have the right to police their accommodations and to discipline members of their force.[22] Specific limits are put on military training and Soviet air traffic, certain rules concern the use of accommodations, and other proscriptions cover effects on the environment.[23] As in the NATO SOFA and SA, some of the provisions in the Soviet stationing agreement address border crossings, communications, claims, customs, tax relief, and transportation.[24] German courts have civil jurisdiction over members of the Soviet force and their dependents except in cases in which both parties are Soviets. German courts also may exercise criminal jurisdiction, except when the crime is directed against the Soviet Union, the Soviet force, members of that force, or its dependents.[25]

The Future

The agreements signed in September 1990 are the most significant new developments affecting the United States forces in the Federal Republic of Germany in decades. Notwithstanding their significance, however, they do not change materially the way the United States forces operate in Germany, except in Berlin and in the eastern *laender*. Once the Soviet forces withdraw from Germany, new changes will have to be made to some of these agreements.

The rapidity of change in Germany over the past year, however, has far outpaced the predictions of many. Over the next few months and years, the United States' presence will be considerably smaller. Combined with this smaller presence is the pressure from various political circles in Germany, questioning the desirability of maintaining what is regarded as special privileges or vestiges of occupation rights. Accordingly, the German Government soon may request a formal review of the NATO SOFA and SA. What consequences this review would have on the United States and other sending state forces remaining in the Federal Republic are left to be seen.

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[20] *Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken ueber die Bedingungen des befristeten Aufenthalts und die Modalitaeten des planmaessigen Abzugs der sowjetischen Truppen aus dem Gebiet der Bundesrepublik Deutschland*, Oct. 12, 1990, Bulletin of the German Government Press and Information Office, No. 123/S.1281, Oct. 17, 1990.

[21] *Id.* art. 2.

[22] *Id.* art. 9.

[23] *Id.* arts. 2, 6, 7.

[24] *Id.* arts. 11-12, 15-16, 23.

[25] *Id.* arts. 17-18.

The Criminal Liability of Corporations: A Primer for Procurement Fraud Prosecutions

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Introduction

Military criminal law practitioners in the field increasingly are involved in combatting procurement fraud. Bid rigging by corporations bidding on Army contracts, corporate conspiracies to defraud the United States through false claims, and other corporate criminal conduct are being prosecuted by judge advocates appointed as Special Assistant United States Attorneys (SAUSAs). With the majority of continental United States (CONUS) installations now having SAUSAs who can prosecute

corporations for procurement fraud, a primer on corporate criminal liability is needed. This article seeks to provide the practitioner with a concise reference on corporate criminal misconduct under federal law, including a discussion of the extent to which a corporation is liable for the criminal acts of its agents and employees, and an examination of the five federal criminal statutes most often violated by corporate defendants. Finally, the practitioner is given practical guidance on how to charge these by indictment or information in federal court, and is provided with some thoughts on whether a particular procurement fraud prosecution will have enough "jury appeal" for a conviction.

Legal Principles of Corporate Criminal Liability

A corporation is an artificial person created by the law of a state "which is regarded in law as having a personality and existence distinct from that of its several members, and ... [which acts] as a unit or single individual in matters relating to the common purpose of" its members.[1] In particular, a business corporation exists to transact business for profit and may engage in commerce, trade, manufacturing, mining, banking, insurance, and transportation. Title 18 of the United States Code (U.S.C.) fails to define the term "corporation"; instead, it falls within the definition of "organization." An organization is "a person other than an individual,"[2] and a corporation undoubtedly is a "person" under federal law. Title 1 of the U.S.C. defines the word "person"[3] to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[4]

At early common law, a corporation could not commit a crime; rather, only its human agents and employees could be prosecuted.[5] As the importance of corporations and their profits grew in American life, however, this old doctrine gave way to the public policy that a corporation should not be able to benefit from the illegal acts of its employees. Today, the doctrine that Congress "may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents" is well settled.[6] The rationale is "that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent [criminal] violations by employees."[7]

Three factors determine corporate criminal liability today.[8] First, an agent or employee of the corporation must commit a criminal act and have the requisite general or specific mens rea. Second, the agent or employee must act within the scope of employment. Third, an intent to benefit the corporation must exist.

Criminal Act

Generally, if an agent or employee commits a criminal offense, his guilt is imputed to the corporation. If the offense is a general intent crime, corporate liability easily is imposed. In *United States v. Hilton Hotels Corp.*,[9] for example, the court had no difficulty in imputing liability for a violation of the Sherman Antitrust Act, a general intent crime. Moreover, even if no one employee has enough knowledge of a criminal act to prevent its commission, the collective knowledge of all employees can be sufficient to find the requisite general intent to commit an offense. In *United States v. T.I.M.E.-D.C., Inc.*[10] the defendant corporation was convicted of violating the Interstate Commerce Act by "knowingly and willfully" permitting its truck driver employees to operate their vehicles while intoxicated. The corporation argued that it should not be liable for the criminal conduct of its employees because no single employee had the knowledge that the act had been violated. The court disagreed. It held that "the corporation is ... considered to have acquired the collective knowledge of its employees and is ... held responsible for their failure to act accordingly."[11] In sum, the law holds a corporation criminally liable for the combined knowledge of its employees, notwithstanding any corporate claim that it cannot detect criminal violations without some degree of difficulty

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[1] Blacks Law Dictionary 307 (5th ed. 1979).

[2] *See* 18 U.S.C. § 18 (1988) ("organization means a person other than an individual").

[3] 1 U.S.C. § 1 (1988).

[4] A discussion of the criminal liability of business entities other than corporations is beyond the scope of this article. The definition of "organization" in title 18 and "person" in title 1, however, is so expansive that for any business entity to claim to be outside the scope of federal criminal law is inconceivable. Generally, the same legal principles that allow the prosecution of corporations also permit other business entities to be prosecuted for the misconduct of their employees, agents, owners, and similar individuals.

[5] A "corporation cannot commit treason, or felony, or other crime, in its corporate capacity." 1 W. Blackstone, Commentaries 476 (1745). Early American jurisprudence followed this principle. *See also* Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 Fed. Bar J. 49, 50-51 (1979).

[6] United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[7] *Id.* at 1106.

[8] Some commentators suggest that a fourth factor—whether a particular criminal statute applies to a corporation's misconduct—also determines corporate criminal liability. *See* R. Banoun & J. Rubin, Corporate Criminal Liability: The Traditional Rule and its Recent Progeny 6 (undated). Some statutes passed by the Congress, such as the Clayton Act, apply specifically to corporations. When a statute is silent, however, the courts have no difficulty in implying corporate criminal liability. *See Hilton Hotels*, 467 F.2d at 1004. Today, corporations routinely are indicted for the same offenses for which their human agents and employees can be prosecuted under the United States Code.

[9] 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[10] 381 F. Supp. 730 (W.D. Va. 1974).

[11] *Id.* at 738.

when no single employee knows the facts involved. When an offense makes specific intent an element of the crime, the courts also have no difficulty in imputing an employee's specific intent to the corporation.[12]

Scope of Employment

Axiomatically, an agent or employee must act within the scope of employment before his or her act can be imputed to the corporation. Scope of employment includes not only acts that an employee expressly is authorized to perform—at his supervisor's direction, for example—but also acts that a reasonable man would assume the employee has authority to do. This so-called apparent authority was defined in *United States v. Bi-Co Pavers, Inc.*[13] as "the authority which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct."[14] Moreover, even if an agent or employee acts completely outside the scope of employment in committing a criminal act, a court will have no hesitation in finding corporate liability if the corporation acquiesces in, or otherwise ratifies or approves, the misconduct. In *Continental Baking Co. v. United States*[15] the defendant corporation was prosecuted for price fixing in the baking industry. On appeal, Continental Baking Company (Continental) argued that one of its plant's general managers "had no authority to determine prices and [was] instructed not to discuss prices with competitors."[16] Because this employee's price fixing agreement with Continental's competitors was in excess of his authority, the corporation argued that it should not be held criminally liable for the employee's misconduct. The Court of Appeals for the Sixth Circuit rejected this argument. A corporation "cannot divorce itself from its responsible agent to insulate itself from criminal prosecution," and because Continental's competitors were able to fix prices with one of Continental's general managers, the court concluded that he had apparent authority. The court concluded that when the act of an employee "is within the scope of his apparent authority, the corporation is held legally responsible for it, *although it may be contrary to his actual instructions and although it may be unlawful.*"[17]

A related issue is whether the employee's importance in the corporate hierarchy affects corporate criminal liability. In other words, is a corporation liable for the misconduct of a low-level employee? The answer is yes. As long as the employee acts within the scope of employment, liability for his criminal conduct will be imputed to the corporation. In *United States v. Hangar One, Inc.*,[18] for example, the court refused to accept the corporate defendant's argument that corporate liability could be found only when an agent or employee of "substantial responsibility and broad authority"[19] committed the illegal act in question. Similarly, in *Standard Oil of Texas v. United States*[20] the court found that misconduct of "menial"[21] employees may be imputed to the corporation. The rationale is that to permit a corporation to escape liability for the crimes of low-level employees would insulate the corporation from criminal responsibility, while allowing it to profit from wrongdoing.[22]

Some commentators, however, argue that a corporation should not be liable for the criminal acts of lower-level employees when the crime charged requires proof of specific intent—particularly when the corporation would be prosecuted for a single criminal act committed by a low-level employee and when the corporation has made a good-faith effort to get all its employees to comply with the law.[23] Nevertheless, this view is not the prevailing law in the federal circuits[24] and the few reported cases that have adopted it are dated. In *Holland Furnace Corp. v. United States*,[25] however, the Second Circuit reversed the conviction of the defendant corporation because its criminal liability was based solely on the misconduct of *one* employee. A salesman named William Boyd, one of 4000 corporate employees, was convicted of selling a replacement furnace knowing that the required war-time customer certificate was false. The court noted that the War Production Board's General Limitation Order, which served as the basis for the corporation's prosecution, stated "*that anyone who reasonably relies on the truth of the certificate is not to be held responsible if it turns out to be false.*"[26] The court noted that no officer of the

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[12] United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Maher, 582 F.2d 842 (4th Cir. 1982).

[13] 741 F.2d 730 (5th Cir. 1984).

[14] *Id.* at 737.

[15] 281 F.2d 137 (6th Cir. 1960).

[16] *Id.* at 149.

[17] *Id.* at 151 (emphasis supplied).

[18] 563 F.2d 1155 (5th Cir. 1977).

[19] *Id.* at 1158.

[20] 307 F.2d 120 (5th Cir. 1962).

[21] *Id.* at 127.

[22] R. Banoun & J. Rubin, *supra* note 8, at 13; United States v. Fish, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

[23] Miller, *supra* note 5, at 55.

[24] *Id.* at 55-56.

[25] 158 F.2d 2 (6th Cir. 1946).

[26] *Id.* at 3.

corporation was involved in the crime, and that no evidence existed to prove that management had not acted reasonably. It concluded that the misconduct of a single employee was insufficient for criminal liability. The court, however, severely restricted the precedential value of *Holland* when it wrote that its reversal was based "*on the facts of this case.*"[27]

One final issue is worth examining under the scope-of-employment prong of corporate liability. That is, if a corporation's board of directors or management expressly prohibit corporate agents and employees from committing illegal acts, should the corporation be criminally liable when these same agents and employees commit a crime? Can the corporation assert as a defense that these agents and employees were outside the scope of employment when they acted in violation of these express instructions? The answer is no—the courts are unwilling to permit this defense because it effectively would insulate a corporation from liability. The rationale is that a corporation's issuing written and oral guidance to its employees in which it prohibits illegal acts is manifestly too easy, and to allow it to escape criminal liability in this manner would create an absolute defense to prosecution.

In *United States v. Basic Construction Corp.*[28] the Court of Appeals for the Fourth Circuit, in a per curiam opinion, rejected the corporate defendant's argument that the unlawful acts of an agent or employee are not acts for the corporation's benefit—and thus not in the scope of employment—when he or she acts contrary to the corporation's actual instructions forbidding unlawful acts by its employees. The defendant corporation argued that the policy proscribing unlawful acts reflected a corporate intent to obey the law, and that the criminal intent of its low-level employees acting in violation of this corporate policy should not to be imputed to it. The court agreed that evidence that a corporation expressly prohibits unlawful acts by its employees could be considered by the finder of fact. Although such a corporate policy might be weighed by a jury in determining whether the employees were acting for the benefit of the corporation in committing the crime charged, the existence of the policy was not a bar to prosecution and did not control the issue of intent. The court ruled that an employee's acting contrary to corporate policy nevertheless may be found to be within the scope of employment, may be for the corporation's benefit, and may provide proof of the requisite corporate criminal intent.[29] Similarly, in *United States v. Beusch*[30] the Court of Appeals for the Ninth Circuit held that the willfulness of an agent's acts would be imputed to the corporate defendant when the agent's intent was to benefit the corporation. In particular, an intent to benefit the corporation brought the agent's acts within the scope of his employment.[31]

Intent to Benefit the Corporation

The final prong of corporate liability requires the employee to act with the intent to benefit his employer-corporation. This intent to benefit the corporation is intertwined with any scope-of-employment determination, because arguing that an employee was acting in the scope of employment would be unreasonable unless the employee acted with the intention of aiding his employer. Significantly, the benefit to the employer need not be the sole motive behind the employee's acts; instead, an agent or employee may commit a crime with the intent of benefiting not only the corporation, but also another party. As long as some intent to benefit the corporation exists—no matter how indirect—liability may be found. In *United States v. Gibson Products Co.*,[32] for example, the corporate defendant was prosecuted for knowingly making false entries on government forms recording the sale of firearms to foreigners. The corporation defended, in part, on the ground that its employee falsified the documents, not for the benefit of the corporation, but for his own benefit to receive kickbacks from the gun purchasers. The court, however, recognized that regardless of monies the employee may have received as kickbacks, his sales also benefited the corporation. The employee made false entries to "sell merchandise and to encourage customers to return to the store. The major beneficiary of the sales was the corporation."[33] Regardless of any intent to benefit himself as an individual, the employee also intended to benefit the corporation, and the court held that this established the needed intent and scope of employment.[34]

Similarly, in *United States v. Automated Medical Laboratories, Inc.*[35] the defendant corporation argued that its

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[27] *Id.* at 8.

[28] 711 F.2d 570 (4th Cir. 1983).

[29] *Id.* at 572-73.

[30] 596 F.2d 871, 877 (9th Cir. 1979).

[31] *Id.*

[32] 426 F. Supp. 768 (S.D. Tex. 1976).

[33] *Id.* at 769.

[34] *Id.* at 770.

[35] 770 F.2d 399 (4th Cir. 1985).

employee falsified records to further his own career ambitions and promotion aspirations within the corporation. Therefore, the corporation argued, he did not act with an intent to benefit the corporation. The Fourth Circuit rejected this defense. The court ruled that the rationale for the rule that an agent or employee act with the intent to benefit the corporation is to preclude a finding of corporate liability for acts of agents and employees that are "inimical to the interests of the corporation or which may have been undertaken *solely* to advance the interests of [an] agent"[36] or some *other* party. The court concluded that "[i]t would seem entirely possible for an agent to have acted for his own benefit while also acting for the benefit of the corporation."[37] In sum, despite an employee's principal motive to benefit himself in committing a crime, if he or she intended to benefit the corporation, a finding of corporate liability may follow.[38]

Moreover, the corporation actually need not benefit from the act of its agent or employee; rather, the *intent* to benefit the employer is sufficient. Corporate liability has been found even when the corporation suffered financial harm because the employee intended by his criminal act to benefit the corporation. In *Old Monastery Corp. v. United States*[39] the defendant corporation was indicted for conspiring to buy and sell liquor at prices in excess of prices set by regulation under a World War II price control law. Old Monastery argued that no evidence existed tending to prove that it "was to receive any benefit from the conspiracy." In addition, the corporation specifically argued that the criminal acts of its agent "were definitely to its detriment." The Fourth Circuit rejected the argument, stating that benefit is "not a touchstone of corporate criminal liability."[40] In particular, the issue is whether the agent *intended* to benefit the corporation—not whether the corporation *actually* benefited. Only when the corporation defends on the theory that the employee *exclusively* intended to harm the corporation in committing the crime, will the corporation escape criminal liability.[41]

Corporate Conspiracies

Some special rules apply to prosecutions of corporations for conspiracy under 18 U.S.C. sections 286 and 371. The first rule addresses membership in the conspiracy. Related corporations can conspire, but a corporation and an unincorporated division of that corporation cannot.[42] Corporate officers always can conspire with each other with an intent to benefit the corporation,[43] but the federal circuits are split on whether corporate officers and employees can conspire with the corporation. The Fifth and Eleventh Circuits have upheld the convictions of employees charged with conspiring with the corporation.[44] The Third Circuit, however, has not.[45] The second special rule concerning conspiracies addresses intent. Specifically, the intent to conspire, agree, combine, and confederate together may be proved by testimony or may be inferred from the circumstances.[46] The third and final special rule addresses overt acts. In particular, 18 U.S.C. section 286 does not require proof of an overt act, but a prosecution under the general conspiracy statute—that is, 18 U.S.C. section 371—does. A procurement fraud prosecution for several criminal conspiracies, therefore, will require the government to prove some overt acts.

Including overt acts in a section 286 prosecution, while surplusage, will avoid a defense motion for a bill of particulars to discover details of the charged conspiracy. Additionally, because the criminal agreement often must be proved circumstantially using acts amounting to overt acts, a good practice is to include at least one easily proved overt act in a section 286 prosecution.

Common Corporate Criminal Violations: Discussion and Drafting the Charge

Conspiracy to Defraud the United States with Respect to Claims Under 18 U.S.C. Section 286

Section 286 punishes a criminal agreement to defraud the government through the use of false, fictitious, or fraudulent claims.

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[36] *Id.* at 407.

[37] *Id.*

[38] *But see* United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966) (no intent to benefit; therefore, no corporate liability).

[39] 147 F.2d 905 (4th Cir. 1945).

[40] *Id.* at 908.

[41] Miller, *supra* note 5, at 61.

[42] Quigley v. Exxon Co. U.S.A., 376 F. Supp. 342, 350 (M.D. Pa. 1974).

[43] B. Elmer, J. Swennen & R. Beizer, Government Contract Fraud 3-20 (1985); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974).

[44] Dussony v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981); United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983).

[45] Jagielski v. Package Mach. Co., 489 F. Supp. 232 (E.D. Pa. 1980); Rushton v. Shea, 419 F. Supp. 1349 (D. Del. 1976); Tose v. First Penn. Bank, N.A., 648 F.2d 879 (3d Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

[46] *Hartley*, 678 F.2d at 972.

Elements of Proof. The elements necessary to prove a violation of 18 U.S.C. section 286 are: (1) Two or more parties agreed and conspired together; (2) The agreement was to submit or present a false, fictitious, or fraudulent claim to the United States; (3) They knew the claim to be false, fictitious, or fraudulent; and (4) They intended to defraud the United States.

Discussion. Unlike 18 U.S.C. section 371, an overt act need not be alleged or proved in a section 286 prosecution. This difference is largely illusory, however, because convincing the merits of any case to a jury probably will require a showing of some acts having been done in furtherance of the conspiracy to effect the objects of it.[47]

Indictment. The language used in drafting an indictment is:

> From on or about _____, 19__, until _____, 19__, in the _____ District of _____ and elsewhere, the defendants, _____, _____, and _____, [and other persons both known and unknown to the grand jury], knowingly and willfully entered into [an agreement] [a combination] [a conspiracy] [any combination of the three] with each other to defraud the United States [name of department or agency], by [obtaining] [aiding to obtain] the payment [allowance] of a [false] [fictitious] [fraudulent] [any combination of the three] claim in the manner and means as follows:
>
> (1) It was part of the [agreement] [combination] [conspiracy] [any combination of the three] that the defendants [and other persons known and unknown to the grand jury] would [set forth the material facts and circumstances surrounding the conspiracy, to include verbatim contract or form provisions];
>
> (2) all in violation of 18 U.S.C. § 286.[48]

Conspiracy Generally Under 18 U.S.C. Section 371

Section 371 proscribes generally conspiracies directed against the United States that deprive it of its ability to exercise governmental prerogatives or cause the government to suffer other intangible losses.

Elements of Proof. The elements necessary to prove a violation of 18 U.S.C. section 371 are: (1) An agreement or conspiracy was made to violate a federal law; (2) The defendant corporation was part of the conspiracy; and (3) An overt act was committed in furtherance of the conspiracy and to effect its object.

Discussion. Section 371 includes conspiracies in which the only loss suffered by the United States is an intangible loss—for example, depriving the United States of the true and faithful services of an employee or subverting the contract bidding process. Note, however, that if the conspiracy were to violate the mail fraud statute then the loss would need to be a tangible one.[49] In drafting a single count under 18 U.S.C. section 371, charging both a conspiracy to commit an offense and a conspiracy to defraud the United States is permissible.[50] Furthermore, charging a conspiracy to commit more than one offense in a single count is not duplicitous.[51]

Indictment. The language for the information or indictment is as follows:

> (1) From on or about _____, 19__, and continuing thereafter until on or about _____, 19__, in the _____ District of _____ [and elsewhere], the defendants, _____, _____, _____, knowingly and willfully conspired and agreed together and with each other, [and with other persons both known and unknown to the grand jury], to defraud the United States of and concerning its governmental functions and rights, hereafter described; that is:
>
> (a) of and concerning its right to have its business and its affairs, and particularly the transaction of the official business of the _____ Department, conducted honestly and impartially, free from corruption, fraud, improper and undue influence, dishonesty, unlawful impairment, and obstruction;
>
> (b) of and concerning its right to have its officers and employees, particularly the personnel of _____ Department, free to transact the official business of the United States unhindered, unhampered, unobstructed and unimpaired by the exertion upon them of dishonest, corrupt, unlawful, improper and undue influence;
>
> (c) of and concerning its right and governmental function of _____ through and

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[47] Several commentators apparently believe that 18 U.S.C. § 286 does require proof of an overt act. *See* B. Elmer, J. Swennen & R. Beizer, *supra* note 43, at 3-18. The statute, however, clearly does not require proof of an overt act and the courts recognize this.

[48] Criminal Division, U.S. Dept. of Justice, *Guides for Drafting Indictments* (1990).

[49] McNally v. United States, 483 U.S. 350 (1987).

[50] United States v. Manton, 107 F.2d 834, 838 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940).

[51] Braverman v. United States, 317 U.S. 49 (1942).

by means of its officers and employees in the _____ Department to the _____ Company unhindered, unhampered, unobstructed and unimpaired by the exertion upon such officers and employees of dishonest, unlawful, corrupt, improper and undue pressure or influence;

(d) of and concerning its right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions, and performance of his duties by the defendant _____, in his official capacity as _____, from corruption, partiality, improper influence, bias, dishonesty, and fraud resulting from his personal and pecuniary interest in the success of _____ in dealing with the _____ Department in _____ and other matters;

(2) It was a part of the conspiracy that _____; and

(3) In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the _____ District of _____ and elsewhere:

(a) On or about _____, 19__, in the _____ District of _____, the defendant, _____ spoke with _____;

(b) [include additional overt acts as warranted];

(4) all in violation of 18 U.S.C. § 371.[52]

False Statements Under 18 U.S.C. Section 1001

Section 1001 punishes three kinds of knowing and willful misconduct: (1) Concealing or covering up by any trick, scheme, or device a *material* fact; (2) Making any false, fictitious, or fraudulent statement or representation; and (3) Making or using any false writing or document while knowing that it contains any false, fictitious, or fraudulent statement or entry.

Elements of Proof. The elements necessary to prove a violation of 18 U.S.C. section 1001 are: (1) A statement was made; (2) The statement was false; (3) The corporation knew it was false; (4) The statement was material; and (5) The statement concerned a government agency—that is, a "matter within the jurisdiction of any department or agency of the United States."

Discussion. Most prosecutions under 18 U.S.C. section 1001 are for making materially false statements. Statements may be oral or written, sworn or unsworn, and affirmative or negative.[53] An "exculpatory no" doctrine, however, has developed in some federal circuits. That doctrine provides that a simple negative answer to a government inquiry about criminality does not constitute a false statement. If, on the other hand, the corporation goes beyond this simple denial and details false facts to the agency, the exception will not apply—particularly if agency resources are used to investigate these false facts.[54] The government must provide proof that the statement was false and it also must negate any reasonable interpretation that would have made the statement true.[55]

The circuits differ on what constitutes a knowing and willful false statement. Some courts have held that accident, honest inadvertence, or duress do not amount to a "knowing" false statement.[56] Most courts require the government to prove an intent to deceive or induce a false belief.[57] A reckless disregard[58] or conscious avoidance[59] of the truth is the basis for criminal liability in some circuits. The government, however, need not prove any "intent to defraud" the United States.[60]

A statement must be materially false to constitute an offense under 18 U.S.C. section 1001. The statement is material if it has a natural tendency to influence the government's determination based on its contents. No requirement exists for actual deception, for the United

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[52] *See Guides for Drafting Indictments, supra* note 48.

[53] United States v. Carrier, 654 F.2d 559 (9th Cir. 1981).

[54] United States v. Hejecate, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

[55] United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

[56] United States v. Tamargo, 637 F.2d 346 (5th Cir.), *cert. denied*, 454 U.S. 824 (1981).

[57] United States v. Godwin, 566 F.2d 975 (5th Cir. 1978).

[58] United States v. Evans, 559 F.2d 244 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

[59] United States v. Hester, 880 F.2d 779 (4th Cir. 1989); United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v. Petullo, 709 F.2d 1178 (7th Cir. 1983).

[60] United States v. Yermian, 468 U.S. 63 (1984).

States to suffer a loss, or for the government actually to have relied on the false statement.[61]

Finally, for a matter to be within the jurisdiction of any department or agency of the United States as generally defined by 18 U.S.C. section 6, the false statement must be made to one of the three branches of government—executive, legislative, or judicial. Significantly, a subcontractor's false statement to the general contractor with whom the United States has the contract is included within the jurisdiction of the offense, even if the subcontractor does not know that a government department or agency is involved.[62]

Prosecutions under 18 U.S.C. section 1001 for false entries require proof that the false entry is in writing. Not all the circuits, however, require the false entry to be material.[63]

Prosecutions for concealing or covering up a material fact through the use of a trick or scheme require proof of affirmative acts of the trick or scheme; passive nondisclosure is insufficient. In addition, a legal duty to disclose the fact must exist.[64] Omissions, such as leaving blanks on required federal forms, have been held to be a violation of 18 U.S.C. section 1001.[65]

Pleading must be done in the conjunctive, even though the statute is written in the disjunctive. This is important because failing to plead in the conjunctive may require additional proof of the offense.[66]

Examples of 18 U.S.C. section 1001 false statement violations include a corporation's falsely certifying that a percentage of its contract had been completed to obtain a progress payment when that portion of the contract actually had not been completed, and a corporation submitting false licensing certificates which showed that its high-pressure welders were certified when the welders actually lacked the certificates.

Prosecutors and investigators should look for false statements in Standard Forms (SF) 1034 and 1035, Public Voucher and Invoices. They also may find false statements in SFs 1435 and 1436, Settlement Proposals. Examining Department of Defense Forms 250, Certificate of Conformance and Quality; 1411 and 1412, Cost and Pricing Proposal Sheet; and 1195, Request for Progress Payments, also may reveal violations.

Indictment. In drafting an indictment under 18 U.S.C. section 1001, the standard languages are:

(1) For concealing or covering up a material fact: On or about _____, 19__, in the _____ District of _____, in a matter within the jurisdiction of [identify the department or agency] of the United States, the defendant, [name], knowingly and willfully [falsified] [concealed] [covered up] [any combination of the three] by [trick] [scheme] [device] [any combination of the three] a material fact, in that the defendant [generally describe the trick, scheme or device; the matter and the falsification, concealment or cover-up], in violation of 18 U.S.C. § 1001.[67]

(2) For making a false, fictitious and fraudulent statement: On or about _____, 19__, in the _____ District of _____, in a matter within the jurisdiction of [identify the department or agency] of the United States, the defendant, [name], knowingly and willfully [made] [caused to be made] [made and caused to be made] a [false] [fictitious] [fraudulent] [any combination of the three] [material statement] [material representation] [material statement and representation], in that the defendant [generally describe the matter, the false or fictitious, or fraudulent statement or representation, and allege the true facts and the defendant's knowledge of these facts], in violation of 18 U.S.C. § 1001.[68]

(3) For making or using a false writing knowing it to be false: On or about _____, 19__, in the _____ District of _____, in a matter within the jurisdiction of [identify the department or agency] of the United States, the defendant, [name the defendant], knowingly and willfully [made] [used] [made and used] [caused to be made] [caused to be used] [caused to be made and used] [made and caused to be made] [used and caused to be used] [made and used and caused to be made and used] a false [writing] [document] knowing the same to contain a [false] [fictitious] [fraudulent] [any combination of the three] [material statement] [material entry] [material statement and entry], in that the defendant [generally describe the false writing or document and the false or fictitious, or fraudulent statement or entry therein, and allege the true facts and defendant's knowledge of these facts], in violation of 18 U.S.C. § 1001.[69]

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[61] United States v. McIntosh, 655 F.2d 80 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); United States v. Cooper, 493 F.2d 473 (5th Cir. 1973), *cert. denied*, 419 U.S. 859 (1974).

[62] *See Yermian*, 468 U.S. at 63.

[63] United States v. Egenberg, 441 F.2d 441 (2d Cir. 1969), *cert. denied*, 400 U.S. 832 (1970); United States v. Aadal, 368 F.2d 962 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967).

[64] United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

[65] United States v. Mattox, 689 F.2d 531 (5th Cir. 1982).

[66] United States v. Gunter, 546 F.2d 861 (10th Cir. 1976), *cert. denied*, 430 U.S. 947 (1977); United States v. MacKenzie, 170 F. Supp. 797 (D.Me. 1959); United States v. Hicks, 619 F.2d 752 (8th Cir. 1980); *see also* Criminal Division, U.S. Dept. of Justice, *United States Attorneys' Manual*, vol. III(a), at 9-12.326 (1988).

[67] *See Guides for Drafting Indictments, supra* note 48.

[68] *Id.*

[69] *Id.*

Larceny of Goods and Property of the United States Under 18 U.S.C. Section 641

Clause 1 of section 641 punishes the embezzlement or theft of government property. Clause 2 punishes the knowing receipt, retention, or concealment of stolen United States property.

Elements of Proof. The elements necessary to prove a violation of 18 U.S.C. section 641 are: (1) The defendant stole, embezzled, converted, purloined, sold, received, retained, or concealed goods or property; (2) The goods or property belonged to the United States; (3) The value of the goods or property was in excess of $100;[70] and (4) The conduct was knowing and willful.

Discussion. Although the larceny must be knowing and willful, the government need not prove that the defendant had a "bad motive."[71] Furthermore, the government is not required to prove that the defendant knew the property belonged to the United States.[72] This may be significant when a subcontractor corporation steals or converts property given to it by the prime contractor even though title to the property actually lies with the United States.

Indictment. In drafting an indictment under 18 U.S.C. section 641, the language is:

> **For stealing and purloining United States property**: On or about _____, 19__, in the _____ District of _____, the defendant, _____, willfully and knowingly did steal and purloin a _____, of the value of _____, the goods and property of the United States, in violation of 18 U.S.C. § 641.[73]

In drafting an indictment under clause 1, the words "embezzle, steal, purloin, convert, sell" all describe the methods of committing one offense. An indictment that uses all these words in one count is not duplicitous.[74]

> **For receiving, concealing, or retaining stolen United States property**: On or about _____, 19__, in the _____ District of _____, the defendant, _____, willfully and knowingly did receive, conceal, and retain stolen property of the United States, that is, [describe the property] _____, of a value in excess of $100.00, with intent to convert said property to his own use, [defendant's name] then knowing said property to have been stolen, in violation of 18 U.S.C. § 641.[75]

Mail Fraud Under 18 U.S.C. Section 1341

The mail fraud statute punishes the use of the mails to defraud, or to obtain money or property, through false representations.

Elements of Proof. The offense requires the government to prove the following elements: (1) A scheme or plan to defraud; and (2) Use of the mails to further the fraudulent scheme. Examples of activities that would satisfy the second element include mailing a claim, receiving a check or payment, or otherwise causing Postal Service resources to be used.

Discussion. The government need not prove that it was defrauded, or that the scheme to defraud was successful.[76] Only a scheme that seeks to obtain money, property, or other tangibles, however, may be prosecuted under section 1341. Intangible losses, such as the loss of the true and faithful service of a government employee or the loss of fair and equitable competition in the free market economy, cannot be the subject of a section 1341 prosecution.[77] For example, a corporation that used the mails to subvert the contract bidding process through the gain of insider information from a government contracting officer could not be prosecuted using the mail fraud statute. The same activity, however, could be prosecuted under 18 U.S.C. section 371 if the government could prove a conspiracy to defraud the United States. Proof that the scheme to defraud required use of the mails, or that the corporate defendant intended to use the mails, is not required.[78] Furthermore, the requirement that the mails be used to further the scheme to defraud has been interpreted as requiring proof only of any mailing that is "sufficiently closely related" to the scheme, provided the mailing occurs before the plan is complete.[79]

Indictment. In drafting an indictment under 18 U.S.C. section 1341, the language is:

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[70] A value of less than $100 still may sustain a conviction of a misdemeanor.

[71] United States v. Scott, 789 F.2d 795 (9th Cir. 1986).

[72] United States v. Baker, 693 F.2d 183 (D.C. Cir. 1982); United States v. Speir, 564 F.2d 934 (10th Cir. 1977).

[73] *See Guides for Drafting Indictments, supra* note 48.

[74] United States v. Long, 168 F. Supp. 411 (D. Md. 1958); United States v. Selage, 175 F. Supp. 439 (D.S.D. 1959).

[75] *See Guides for Drafting Indictments, supra* note 48.

[76] United States v. Curtis, 537 F.2d 1091, 1095 (10th Cir. 1976).

[77] *McNally*, 483 U.S. at 350.

[78] Pereira v. United States, 347 U.S. 1 (1954).

[79] United States v. Maze, 414 U.S. 395, 399 (1974); United States v. Shepherd, 511 F.2d 119 (5th Cir. 1975); United States v. Giovengo, 637 F.2d 941 (3d Cir. 1980).

[Describe the scheme to defraud]. On or about _____, 19__, in the _____ District of _____, the defendant, _____, having devised the above-described scheme and artifice to [defraud/obtain money or property by means of false pretenses], for the purpose of executing and in order to effect the scheme and artifice to [defraud/obtain money or property], did knowingly cause to be sent, delivered, and moved by the United States Postal Service _____ [describe item sent by mail], in violation of 18 U.S.C. § 1341.[80]

Wire Fraud Under 18 U.S.C. Section 1343

The wire fraud statute punishes a scheme or plan to defraud that uses interstate wire, telephone, radio, or television to further the scheme.

Elements of Proof. The elements necessary to prove wire fraud under 18 U.S.C. section 1341 are: (1) Devising a scheme to defraud; and (2) Transmittal in interstate commerce by means of wire communication—including radio or television—of writings, signs, signals, pictures, or sounds for the purpose of executing the scheme to defraud.

Discussion. The wire fraud statute was modelled after the mail fraud statute; therefore, similar legal principles apply to both. For example, the government need not prove that it actually suffered a loss.[81] Unlike mail fraud, however, wire fraud requires a transmission in interstate commerce; *intra*state wire fraud is not a crime under 18 U.S.C. section 1343.[82]

Indictment. In drafting an indictment under 18 U.S.C. section 1343, the language is:

(1) **Introduction.** [Using numbered paragraphs, set out background information that will explain case to jury].

(2) **Purpose of the Scheme.** From on or about _____ and continuing to on or about _____, the defendant, _____, [devised][intended to devise][devised and intended to devise] a scheme to defraud [identify victim, *e.g.*, United States Department of the Army] of and concerning [describe the property right].

(3) **The Scheme.** [Describe the scheme or artifice].

(4) **The [Wire] [Radio] [Television] Communication.** On or about _____, in the _____ District of _____, the defendant, [for the purpose of executing, and attempting to execute], the scheme, did [transmit] [cause to be transmitted] in [interstate] [foreign] commerce, by means of a [wire communication], certain [signals] [signs] [sounds] [any combination of the three]; that is [describe the telephone conversation by identifying its point of origin and reception], in violation of 18 U.S.C. § 1343.[83]

False Claims Under 18 U.S.C. Section 287

Section 287 punishes the submission of false claims against the government. These claims arise out of defective pricing schemes, collusive bidding under a contract, defective or nonconforming goods under a contract, and similar activities.

Elements of Proof. The elements necessary to prove false claims under 18 U.S.C. section 287 are: (1) A claim was prepared; (2) The claim was presented against the United States; (3) The claim was false; and (4) The person presented the claim knowing it to be false, and with criminal intent.

Discussion. The definition of claim is not rigid or restrictive.[84] It includes any false statement of factual information or data presented in support of a claim, as well as fraudulent attempts to cause the government to "part with" money. For example, a claim may be a voucher, invoice, or any form that demands payment; a statement requesting a loan; a payroll report; or a settlement proposal.[85] The mere intent to make a claim, however, is insufficient; rather, the claim actually must be made.[86]

The claim must be presented to the United States, either directly to a government agency, or indirectly by a subcontractor to the prime contractor. A false claim submitted by a subcontractor to a prime contractor, who then makes a claim against the United States, falls within 18 U.S.C. section 287.

The claim must be "false, fictitious, or fraudulent." Courts have interpreted the words "false or fictitious" to

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[80] *See Guides to Drafting Indictments, supra* note 48.

[81] Lindsey v. United States, 332 F.2d 688 (9th Cir. 1984).

[82] Borfuff v. United States, 310 F.2d 918 (5th Cir. 1962).

[83] *See Guides to Drafting Indictments, supra* note 48.

[84] United States v. Winchester, 407 F. Supp. 261, 272 (D. Del. 1975).

[85] *See, e.g.*, Standard Form (SF) 1034, SF 1035 (Public Vouchers and Invoices); Dep't of Defense Form (DD Form) 1411, DD Form 1412 (Cost and Pricing Proposal Sheet); DD Form 1195 (Request for Progress Payments); SF 1435, SF 1436 (Settlement Proposals).

[86] United States v. Lopez, 420 F.2d 313 (2d Cir. 1969)

mean untrue and known to be untrue when made. "Fraudulent" is defined as untrue, known to be untrue, and made with the intent to deceive. In most of the circuits, the distinction between "false," "fictitious," and "fraudulent" is blurred both in law and in practice. Most courts agree that 18 U.S.C. section 287 requires proof that the party who presented the false claim acted with the knowledge that the conduct was morally wrong—that is, he or she knew the claim was untrue—or in violation of the law. No need exists to prove an intent to deceive the government.[87] In drafting an indictment, however, counsel should charge that the defendant submitted a "false and fictitious" claim. Counsel should allege that the claim was "false, fictitious, *and* fraudulent" only if the evidence can prove deception or fraud. This avoids the defense argument that the government must prove a specific intent to defraud in a fraudulent claim prosecution.[88] To sustain a conviction the government need not prove that the claim was paid, or that the government suffered any loss.[89]

Indictment. In drafting the indictment under 18 U.S.C. section 287, sample language is:

> On or about _____, 19__, in the _____ District of _____, the defendant, _____ [made] [presented] [made and presented] to [identify the individual or organization receiving the claim] a claim [upon] [against] [upon and against] the [United States] [name of agency or department]; that is, [describe the claim], knowing the claim was [false] [fictitious] [fraudulent] [any combination of the three] in that [generally describe the facts], in violation of 18 U.S.C. § 287.[90]

Other Related Statutes Under Which a Corporation May Be Prosecuted

Principals	18 U.S.C. § 2[91]
Anti-Kickback	41 U.S.C. § 54[92]
Bribery, Gratuities, and Conflicts of Interest	18 U.S.C. §§ 201-208[93]
Antitrust	15 U.S.C. § 1[94]
Obstruction of Justice	18 U.S.C. § 1505[95]
Racketeer Influenced and Corrupt Organizations (RICO)	18 U.S.C. § 1962[96]

Prosecuting by Indictment or Information?

The fifth amendment to the United States Constitution does not require a corporation to be prosecuted by indictment.[97] Instead, a corporation may be prosecuted by information.[98] Generally, the SAUSA files the information with the United States District Court and, with leave of the court, begins the prosecution.

Punishments

Corporate officers and employees who are convicted in their individual capacities may be fined and imprisoned like any other natural person.[99] Corporations cannot be imprisoned, but can be given sentences that include community service, probation, and fines.[100] Sentences for corporate defendants also may include forfeiture,[101] notice to victims,[102] and restitution.[103]

The monetary fine is perhaps best suited to punishing corporate wrongdoing. A corporation may be fined up to $200,000 per misdemeanor count conviction and $500,000 per felony count conviction, or twice the gain

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[87] United States v. Maher, 582 F.2d 842 (4th Cir. 1978).

[88] The Ninth Circuit, for example, held in United States v. Milton, 602 F.2d 231 (9th Cir. 1979), that "intent to defraud" was not an element of proof in a false claim prosecution, but that it was an element to be proved in a fraudulent claim prosecution.

[89] 18 U.S.C. § 287 makes no requirement to prove materiality. *See* United States v. Elkin, 731 F.2d 1005 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); United States v. Foster Wheeler Corp., 447 F.2d 100 (2d Cir. 1971).

[90] *See Guides for Drafting Indictments*, *supra* note 48.

[91] Language for the indictment or information should be as follows: "... and did aid, abet, counsel, command another to commit said offense, in violation of 18 U.S.C. § 2."

[92] *See generally*, Dept. of Defense Office of Inspector General, *Indicators of Fraud in DOD Procurement*, at 4.

[93] *Id.*

[94] *Id.* Note that antitrust cases *must* be referred to the Department of Justice.

[95] *See generally* United States Criminal Investigation Command Pam. 195-8, *Common Violations of the United States Code in Economic Crimes Investigations*, para. 7-3 (1 May 89).

[96] *Id.* paras. 8-1 to 8-5.

[97] United States v. Yellow Freight Sys., 637 F.2d 1248 (9th Cir. 1979), *cert. denied*, 454 U.S. 815 (1980).

[98] United States v. Armored Transp., Inc., 629 F.2d 1313 (9th Cir. 1979), *cert. denied*, 450 U.S. 965 (1980).

[99] 18 U.S.C. § 3551(b) (1988).

[100] *Id.* § 3551(c).

[101] *Id.* § 3554.

[102] *Id.* § 3555.

[103] *Id.* § 3556.

or loss that occurred.[104] In prosecutions under 18 U.S.C. section 287, the statute expressly provides for a fine of up to $1 million for knowingly making or presenting a false, fictitious, or fraudulent claim in relation to a Department of Defense contract. A large fine, if imposed in conjunction with an order for restitution, effectively may preclude a corporation from treating any criminal fine as a cost of doing business.

"Jury Appeal"

After ensuring that the three legal requirements for corporate criminal liability have been satisfied, counsel should pause and consider the case's "jury appeal" before presenting an indictment to the grand jury or filing an information with the court. Although the case law discussed suggests that a corporation can be prosecuted with ease for the misconduct of employees acting in the scope of employment and for the corporation's benefit, a prosecution with little "jury appeal" easily can end in defeat.

Role of Corporate Officers and Management

Probably the most important factor to evaluate is the role of high-ranking corporate officials in the crime. While the rule in *Standard Oil of Texas*[105] is that the criminal acts—even the criminal acts of the most menial employee—can be imputed to the corporation, and while *Continental Baking Co.*[106] stands for the proposition that even express instructions not to commit any unlawful acts will not allow a corporation to escape liability for the misconduct of its employees, these legal principles may not carry much weight with a jury if the defense can present evidence of bona fide corporate policies and actions designed to combat criminal conduct. This is especially true in prosecutions when the corporation's officers and management—usually well-groomed, well-educated, and well-spoken pillars of the community—testify that they knew nothing of any wrongdoing, that the misconduct was the work of "rogue" employees acting in violation of a longstanding boardroom policy against criminal activity, and that they are just as outraged as the jury at the evil deeds done ostensibly on the corporation's behalf.

In small dollar procurement fraud prosecutions, the chief executive officer and vice president of the defendant corporation may be husband and wife. These small "mom and pop" companies often elicit considerable sympathy from a jury. If the defense suggests that the prosecution is unfair, the jury members may refuse to convict, and may vote to acquit out of a sense of "equity."

The "Dirty" Government Witness

Almost any corporate officer or manager compares favorably to the witness the government often must use to prove procurement fraud—especially because this person usually is admitting to criminal acts, may have a criminal record, and may be "disgruntled" after a missed promotion or pay raise. These witnesses often are the target of substantial negative character evidence, and usually display demeanors of persons trying to do nothing more than "save their own skins." Because a jury likes to feel it has done the right thing in reaching a result, counsel should consider the impact of a "dirty" witness.

Nature of Employee's Criminal Act and Any Personal Benefit

Another element to consider in selecting a procurement fraud case for prosecution is the nature of the employee's acts, and the extent to which he or she personally benefited from the criminal misconduct. By way of example, an employee who profits greatly from kickbacks or payoffs, while only tangentially benefiting his or her corporate employer, is not attractive to twelve men and women who must decide whether to convict a corporation for the crimes of a thieving employee. When the evidence is clear that the corporate officers and management are innocent of wrongdoing, a prosecution that relies on this type of employee risks acquittal through jury nullification. In a similar scenario, a sympathetic judge might grant a defense motion for judgment of acquittal[107] at the close of the government's case-in-chief. The government would have no appeal from that decision, even though it is contrary to the legal principles of corporate criminal liability.

"You Get What You Pay For"

Although rarely voiced, some jurors conclude that a particular procurement fraud occurred because the "low bidder" got the contract. By way of example, a prosecution of a painting contractor for putting on a single coat of paint instead of the required two coats, or using stainless steel instead of galvanized steel hardware in construction, invites the comment that the government should expect these events when contracts are awarded to the "lowest bidder." Explaining that the Federal Acquisition Regulations mandate contract award to the

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[104] *Id.* § 3571(c).

[105] 307 F.2d 120 (5th Cir. 1962).

[106] 281 F.2d 137 (6th Cir. 1960).

[107] Fed. R. Crim. P. 29.

lowest responsible and responsive bidder is not enough. Some jurors simply lack the sophistication or are unwilling to appreciate this concept.

Jury Knowledge of Noncriminal Remedies

Usually the jury knows that civil or contractual remedies are available when a corporation defrauds the United States under a contract. The jury members may not have heard of the terms "suspension" and "debarment," but they likely know that the government can refuse to do further business with a corporation that cheats the taxpayer. When the facts of the contract fraud involve menial employees or a "mom and pop" corporation whose owners are innocent of any criminal conduct, or when the dollar loss to the United States is small, a jury may not be willing to find the corporation guilty of a felony charge. Instead, it may conclude that any wrongdoing can be remedied using noncriminal remedies.

Government "Unclean Hands"

Procurement fraud often occurs because the government failed to monitor contract performance adequately. Particularly in construction contracts, government inspectors and contracting officer representatives—through incompetence, neglect, or because of overwork and personnel shortages—fail to police work being performed. The United States has an absolute right to expect that all who deal with it act honestly, and a SAUSA can argue that contract performance never should need to be supervised. Jury members, however, often ask "how" and "why" the crime ever could have occurred if the government inspector had been "doing his job." When the government's failure to monitor the contract's performance contributed to the magnitude of the fraud and loss, the jury members will not be sympathetic to the United States as a victim.

Alternative Options

An unattractive yet legally sufficient case still leaves a SAUSA with several options. A corporation likely will wish to avoid the negative publicity and high potential risk of a grand jury indictment and felony conviction, and may agree to plead guilty to a misdemeanor offense via information. Furthermore, the wide range of civil, administrative, and contractual remedies effectively can be coordinated to have virtually the same effect as a criminal conviction.[108]

Conclusion

Federal civilian criminal law is an exciting field for the practitioner. Judge advocates who have the opportunity to prosecute procurement fraud will be challenged in learning a "new" criminal law and procedure outside of the traditional court-martial setting.

[108] *See* 31 U.S.C. § 3729 (1988) (False Claims Act); 31 U.S.C. § 3801 (1988) (Program Fraud Civil Remedies Act). *But see* United States v. Halper, 490 U.S. 435 (1989) (civil penalty following criminal conviction must be related rationally to government loss or violation of double jeopardy clause).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Keep Trial Counsel in Check: Don't Allow Comments on the Accused's Off-the-Stand Courtroom Behavior

Several cases recently reviewed in the Defense Appellate Division indicate that many trial defense counsel unwittingly may be allowing trial counsel in closing arguments to strike not only hard blows, but also foul ones.[1] In particular, many defense counsel allow trial counsel to comment on the off-the-stand courtroom demeanor of the accused without objection. This note will explore the law applicable to these types of prosecutorial arguments, discuss some common scenarios derived from actual cases, and suggest approaches trial defense counsel might take when dealing with this issue.

A strong line of federal circuit court cases, going back almost two decades, holds that allowing a prosecutor to comment on the accused's nontestimonial behavior and demeanor in the courtroom is reversible error.[2] The courts have employed four separate and independent rationales for this rule.

[1] *See* United States v. Doctor, 21 C.M.R. 252 (C.M.A. 1956) (citing Berger v. United States, 295 U.S. 78 (1935)). *Doctor* appears to be the origin of the oft-quoted "hard blow" as opposed to "foul blow" analogy.

[2] *See, e.g.*, United States v. Pearson, 746 F.2d 787 (11th Cir. 1984); cases cited *infra* notes 3-23.

The first rationale was discussed in *United States v. Wright*:[3]

> [u]nless and until the accused puts his character at issue by giving evidence of his good character or by taking the stand and raising an issue as to his credibility, the prosecutor is forbidden to introduce evidence of the bad character of the accused simply to prove that he is a bad man likely to engage in criminal conduct.... This basic principle cannot be circumvented by allowing the prosecutor to comment on the character of the accused as evidenced by his courtroom behavior.[4]

This rationale ties in with Military Rule of Evidence 404(a),[5] which prohibits the introduction of evidence of the character of the accused solely to prove guilt. As the Ninth Circuit said in *United States v. Schuler*,[6] in discussing the identical provision in the Federal Rules of Evidence, the fact the defendant laughed during trial "was legally irrelevant to the question of his guilt of the crime charged."[7]

A second rationale is that these comments constitute a "deprivation of the fifth amendment right to a fair trial."[8] The *Schuler* court explained that "the due process clause of the fifth amendment ... encompasses the right not to be convicted except on the basis of evidence adduced at trial."[9] The Ninth Circuit quoted the Supreme Court's declaration that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds ... not adduced as proof at trial."[10] The Court of Military Appeals apparently adopted this rationale in *United States v. Clifton*.[11] In *Clifton* the court made clear that counsel's seeking to inflame unduly the passions or prejudices of the panel members is improper. Furthermore, when counsel argues facts not in evidence, he or she violates the principle that courts-martial must render verdicts solely on the basis of the evidence presented at trial—that is, counsel's arguments are not evidence.

A third rationale for not allowing a prosecutor to comment on the accused's nontestimonial behavior and demeanor in the courtroom is that "prosecutorial comment on a defendant's nontestimonial behavior may impinge on that defendant's fifth amendment right not to testify."[12] While two federal circuits have rejected challenges to a prosecutor's comments on the expressionless courtroom demeanor of a defendant in a habeas corpus context,[13] the better view is the one held by the Ninth and Fourth Circuits, as expressed in *Schuler*[14] and *United States v. Carroll*,[15] respectively. As the *Schuler* court explained:

> We are concerned, however, that such statements by the prosecutor during trial, or the fear of such statements in closing argument, will tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor's comments. In effect the defendant would be compelled to testify to explain any actual or possible behavior that the prosecutor might bring to the jury's attention. While this pressure to testify may well be the exception, there is no reason for use of such comments that would justify even a slight opening of the door to an invasion of constitutional rights.[16]

A fourth rationale for the rule is that allowing a prosecutor to comment on the accused's nontestimonial behavior and demeanor in the courtroom implicates the sixth amendment rights to trial by jury and assistance of counsel.[17] While the right to trial by jury does not apply to courts-martial,[18] the statutory substitutes for this right, as well as the right to counsel, allow a military accused to argue that he or she has the right to certain protections at trial. Specifically, if the accused elects not to testify, the fact of his or her presence and nontestimonial behavior in the courtroom cannot be argued or taken as evidence of guilt.[19] Actually, the prosecutor's commenting on the accused's courtroom behavior is always improper, regardless of what that demeanor is—whether it be

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[3] 489 F.2d 1181 (D.C. Cir. 1973).

[4] *Id.* at 1186 (citations omitted).

[5] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(a) [hereinafter Mil. R. Evid.].

[6] 813 F.2d 978 (9th Cir. 1987).

[7] *Id.* at 980.

[8] *Id.* at 981.

[9] *Id.*

[10] *Id.* (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

[11] 15 M.J. 26 (C.M.A. 1983).

[12] *Id.*

[13] *See* Borodine v. Douzanis, 592 F.2d 1202, 1210-11 (1st Cir. 1979); Bishop v. Wainwright, 511 F.2d 664, 668 (5th Cir. 1975), *cert. denied*, 425 U.S. 980 (1976); *see also Schuler*, 813 F.2d at 980 n.1.

[14] *Schuler*, 813 F.2d at 981-82.

[15] 678 F.2d 1208 (4th Cir. 1982).

[16] *Schuler*, 813 F.2d at 982.

[17] *Carroll*, 678 F.2d at 1209-10; *Schuler*, 813 F.2d at 982.

[18] *See* O'Callahan v. Parker, 395 U.S. 258, 261 (1969).

[19] *Carroll*, 678 F.2d at 1209.

"cold, unnerved, uncaring,"[20] "laughter,"[21] knowledgeably assisting his or her attorney in a nontestimonial manner at trial,[22] or "shouting" and behaving disruptively.[23]

Another argument that may assist trial defense counsel in convincing a military judge of the significance of this issue was set out by Judge J. Skelly Wright in the *Wright* case:

> That the jury witnesses the courtroom behavior in any event does not make it proper for the prosecutor to tell them, with the court's approval, that they may consider it as evidence of guilt. What the jury may infer, given no help from the court, is one thing. What it may infer when the court in effect tells it that the courtroom behavior of the accused constitutes evidence against him is something altogether different.

Trial defense counsel should be vigilant during trial counsel's closing argument, especially in cases that are particularly grisly, dirty, appalling or hotly contested. If defense counsel hear arguably impermissible references to their clients' nontestimonial courtroom demeanor they should object on the basis of all four rationales discussed above. Defense counsel should ask the judge to declare a mistrial under Rule for Courts-Martial 915[24] because the comments "cast substantial doubt upon the fairness of the proceeding." Should the military judge propose a curative instruction, defense counsel should remain firm on the request for a mistrial as the only proper remedy for the violation. Insisting on a mistrial, if the granting of a mistrial would be in the best interests of the client, is the most effective way of ensuring a solid record for appellate review. Captain Berrigan.

Challenges for Cause for Senior-Subordinate Relationships: Assuring Fairness Becomes a Burden of the Defense

In its recent decision in *United States v. Blocker*,[25] the Court of Military Appeals further eviscerated the validity of challenges for cause on the basis of senior-subordinate relationships of court members. In *Blocker* the civilian defense counsel challenged two court members for cause on the basis of their military relationship with three other members of the panel. One of the challenged members, a colonel, senior rated a command sergeant major on the panel and was the brigade commander of a sergeant first class on the panel. The other challenged member—also a colonel—reviewed the rating of a fifth court member—a first sergeant—and commanded the military community where the accused met the victim.[26] The challenged members and their subordinates never were questioned about whether their rating relationships had impacts on their abilities to render impartial judgments. The Court of Military Appeals, in a split decision, held that the military judge did not err in denying the challenges without comment or further questioning of the panel.

In *United States v. Murphy*[27] the court upheld the military judge's denial of two challenges for cause based on the senior-subordinate relationships on the panel. In *Murphy*, however, all the members involved in a rating relationship agreed that the rank or position of the senior members would not affect their ability to render an impartial judgment. The court held that a senior member of a court-martial panel who writes or endorses an efficiency report of a junior member is not per se disqualified.

The court in *Blocker*, however, went one step further. The court held that a rating relationship between members generally did not give rise to a challenge for cause; therefore, "the omnipresence of these relationships suggests that a *sua sponte* inquiry by the judge was not required."[28] Because the "burden to establish a basis for a challenge for cause rests with the party making the challenge," the court found no fault in the judge's failure to inquire into the relationships.[29]

As Senior Judge Everett alluded to in his dissent, the court's decision enervates the military judge's role in ensuring the fairness of the proceedings.[30] A number of prior cases had concluded that, in general, the military judge was not free to ignore facts and circumstances of perceived unfairness or possible bias in reaching a decision on a challenge for cause.[31] Cases specifically dealing with challenges for cause based on senior-subordinate relationships, including *Murphy*, had stressed the necessity of proper voir dire on the part of the judge and counsel to assure the impartiality of members involved in these relationships.[32] Now, however—at least with

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[20] Good v. State, 723 S.W.2d 734 (Tex. Crim. App. 1986).

[21] *Schuler*, 813 F.2d at 978.

[22] *Carroll*, 678 F.2d at 1208.

[23] *Wright*, 489 F.2d at 1181.

[24] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 915.

[25] 32 M.J. 281 (C.M.A. 1991).

[26] The accused was found guilty of raping and kidnapping a German teenager after offering the victim and her friend a ride home from a nightclub.

[27] 26 M.J. 454 (C.M.A. 1988).

[28] *Blocker*, 32 M.J. at 287.

[29] *Id.*

[30] *Id.* at 289.

[31] *See, e.g.*, United States v. Smart, 21 M.J. 15 (C.M.A. 1985); United States v. Harris, 13 M.J. 288 (C.M.A. 1982); United States v. Baum, 30 M.J. 626 (N.M.C.M.R. 1990).

[32] *E.g.*, *Murphy*, 26 M.J. at 458; United States v. Garcia, 26 M.J. 844 (A.C.M.R. 1988); United States v. Eberhardt, 24 M.J. 944 (A.C.M.R. 1987).

respect to military relationships between court members—that responsibility no longer rests with the judge.

Blocker does not suggest that challenges for cause on the basis of senior-subordinate relationships are no longer an issue. The *Blocker* case, however, should put trial defense counsel on notice that a successful challenge for cause on this issue will require a specific line of questioning on voir dire to elicit evidence that these relationships may pose particular problems for the members. With this evidence on the record, defense counsel then must articulate the proper basis for the challenge to the court. Captain Boyd.

Procurement Fraud Division Note

Army Procurement Fraud Program—Recent Developments

Introduction and Background

The Army Procurement Fraud Division (PFD) was created in December 1986 to replace the Contract Fraud Branch, Litigation Division, Office of The Judge Advocate General. The division had the primary mission of processing, coordinating, and monitoring all criminal, civil, contractual, and administrative actions relating to cases involving fraud or corruption in the Army procurement process. In addition, the PFD was to be in charge of processing suspension and debarment matters. In December 1986, 429 cases were open. During 1986, 317 debarment and suspension actions were completed. In August 1987, a system was created to facilitate reporting and management of procurement fraud and corruption cases. Primarily, Procurement Fraud Coordinators (PFCs) were established at each MACOM, and Procurement Fraud Advisors (PFAs) were established in subordinate commands throughout the Army. *See* Army Reg. 27-40, Legal Services: Litigation, chap. 8 (2 Dec. 1987). Currently, over 250 civilian and military PFAs serve in Army legal offices. In addition, fifteen military attorneys are authorized to serve as special assistant United States attorneys at their installations. Many of these attorneys are involved in prosecuting procurement fraud as part of their duties.

Growth in Caseload, Recoveries, and Suspension and Debarment Actions in 1990

The most explosive growth in cases since the creation of the PFD occurred in calendar year (CY) 1990. By the end of CY 1990, 980 main cases were open—a thirty-five percent increase over the previous year. In addition 109 indictments and 58 convictions occurred—also a thirty-five percent increase over the previous year. Approximately $17.9 million in criminal fines and restitutions and $19.3 million in civil recoveries were obtained. These amounts represent increases in criminal recoveries from the previous year by eighty-five percent and increases in civil recoveries by 101%.

In CY 1990, a total of 565 Army suspensions and debarments occurred worldwide, representing a substantial ninety-six percent increase over 1989 and the largest number ever imposed by the Army. Significantly, almost half of these actions were not based on indictments or convictions, but on contractor misconduct in cases in which prosecution had not occurred. In addition, twenty-two debarments resulted from contractors' poor performance of government contracts.

This significant growth in cases and recoveries is attributable to increased scrutiny of defense contractors by Army procurement, legal, and investigative organizations, and the Department of Justice; tougher penalties for procurement fraud; and the effectiveness of the system established by the Army in processing cases. In addition, Army commands in Europe and Korea increased their effectiveness in fighting fraud overseas in CY 1990. They were responsible for 240 cases, processed nearly 100 suspensions and debarments, and recovered $4 million. Moreover, USAREUR and EUSA both developed effective command-wide coordinating committees to assist in fighting fraud.

The increase in debarment actions is attributable to the Army's increased use of the remedy when no indictment or conviction has resulted. When the contractor has engaged in misconduct and prosecution has been declined, or when the contractor has failed to perform one or more contracts satisfactorily, its behavior is scrutinized closely to determine whether a debarment action is warranted. Pursuant to Federal Acquisition Regulation (FAR) 9.406.2(b), a debarring official may debar a contractor based upon a finding, supported by the preponderance of the evidence, that the contractor violated the terms of a government contract so seriously as to justify debarment. Examples of debarment justifications include willful failure to perform, a history of nonperformance of one or more contracts, or unsatisfactory performance of one or more contracts. For instance, one contrator was debarred for poor performance after several of its contracts were terminated for default. The contractor appealed the debarment through the courts. The debarment was upheld on appeal, and the United States Supreme Court declined to hear the case.

Pursuant to FAR 9.406-2(c), a contractor may be debarred based on any other cause of so serious or com-

pelling a nature that it affects its present responsibility. This provision is used as a basis for debarment when the contractor has engaged in misconduct, but prosecution has been declined—perhaps due to small dollar amount. The PFD has a "Small Dollar Case Program" in which cases are reviewed to determine if a sufficient basis exists for a debarment action, despite the declination of criminal prosecution and civil action. Contractors have been debarred for various acts of misconduct under this program, including, for example, submission of false claims.

Pursuant to FAR 9.407-2(c), a contractor may be suspended, based on adequate evidence, for any other cause—in addition to indictment for commission of various criminal offenses relating to fraud—of so serious or compelling a nature that it affects its responsibility. This provision has been used to suspend contractors currently under criminal investigation for various acts of misconduct, including falsification of test reports.

In summary, in CY 1990, the increase in procurement fraud cases, recoveries, and suspension and debarment actions was significant. This increase is anticipated to continue.

Army Obtains First DOD Recovery Under the Program Fraud Civil Remedies Act

On 1 March 1991, the Army recovered $15,000 from an Army tank automotive subcontractor. The recovery was the result of the Army's PFCRA complaint against the contractor and its president, which was filed on 14 December 1990. The company falsified certifications in a procurement with the prime government contractor for retainer rings used in the Bradley infantry fighting vehicle transmission. Damages were $2500. The Army recovered double damages, as well as two $5000 penalties under PFCRA. In a separate action, the company was debarred for three years. The company paid the penalties without litigating the case.

This case is only one of many cases reviewed by the PFD for referral under PFCRA. The search continues for suitable cases. The remedy applies to cases involving false claims and certified false statements when the actual loss is not more than $150,000 per claim. Ms. Christine S. McCommas.

Examination and New Trials Division Notes

Article 69(b) Application: Search and Seizure

A recent application granted by The Judge Advocate General under the provisions of UCMJ article 69(b), *Gonyea*, SPCM 1990/0011, highlights the requirement that military police (MPs) be able to articulate a reasonable suspicion of criminal activity based upon articulable fact when conducting a stop of a person pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

In *Gonyea* an off-duty MP observed five men entering a car outside an apartment complex at which a party was occurring. He then observed three consecutive flashes of light in the car, which he believed were caused by a lighter that the men passed around. Based upon this observation alone, the MP concluded that illegal drug use was occurring and called for an MP patrol. A patrol responded, but not until after the five men had exited the vehicle and reentered the apartment building. The off-duty MP could not identify any of the five men he had observed. A check of the vehicle's license plate by the responding patrol revealed that the owner was a Specialist Alcorn, who had received field grade article 15 punishment two years previously for possession and distribution of hashish.

The MPs organized a covert surveillance of the car for the next two hours. During that time, many people arrived at and departed from the building in which the party was located. Two hours after the five men exited the car, two unidentified men entered the vehicle and drove away. Although observing no unusual conduct by the two people in the car, the MPs executed a traffic stop, resulting in discovery of hashish on the person of the applicant, who was driving the car.

The Judge Advocate General found that the military judge's denial of the defense motion to suppress was error because no reasonable suspicion existed to support an assertion that the two men stopped had engaged in wrongdoing. The Supreme Court has held that in conducting a *Terry* stop, "the detaining officers must have a particularized and objective basis for suspecting *the particular person stopped* of criminal activity." *United States v. Cortez*, 449 U.S. 411 (1981) (emphasis added).

The MP's seizure of the two men in *Gonyea* was deficient on two grounds. First, the evidence was insufficient to create a reasonable suspicion that the five men observed in the car had used a controlled substance. In the absence of any evidence that SPC Alcorn had continued illegal drug activity following his punishment, and in the absence of any evidence that SPC Alcorn was present in the car, nothing inherently suspicious derives from the fact that five men use a lighter in a parked car. Second, no evidence existed to link the two men stopped with the prior actions of the five unidentified men. The military police testified that they stopped the two men without any factual basis for believing they had been with the original five men in the car. The MPs further testified that they believed they had sufficient grounds to stop anyone who subsequently entered the vehicle, based upon their suspicion that the five men had been using a controlled substance in that car. In light of the many people

traveling through the area, the passage of two hours, and the lack of any physical descriptions of the original five occupants, the MPs did not have a reasonable basis for suspecting the two particular persons stopped of criminal activity. Under *Cortez* and *Terry*, the MPs' actions in *Gonyea* constituted an unreasonable seizure under the fourth amendment, requiring that the hashish found in the applicant's possession be suppressed. Captain Trebilcock.

Article 69(b) Application: Indecent Language

A recent application for relief under UCMJ article 69(b), *Smith*, SPCM 1990/0056, illustrates the danger of confusing 'indecent language' with mere profanity when charging the offense of indecent language under UCMJ article 134. The applicant was charged with one specification of communicating indecent language under article 134, arising out of an argument he had with a female civilian supervisor over an adverse counseling statement. During the argument, the applicant told his supervisor, "Leave me the f**k alone, why are you fighting me, ain't nobody in this man's army can f**k with me."

The Judge Advocate General set aside the conviction for communicating indecent language based upon legally insufficient evidence to support the conviction. The word "indecent," as employed in the article 134 offense of communicating indecent language, is synonymous with the term "obscene." *United States v. Wainwright*, 42 C.M.R. 997, 999 (A.F.C.M.R. 1970). The Court of Military Appeals in *United States v. French*, 31 M.J. 57, 60 (C.M.A. 1990), stated the definition of indecent language as "whether the particular language is calculated to corrupt morals or excite libidinous thoughts." The court's holding in *French* is consistent with the long line of Supreme Court cases that have defined obscenity in terms of the material's ability to appeal to prurient interests or arouse lustful thoughts. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957). The fact that language is shocking or profane in nature alone does not establish that it is indecent. *See United States v. Durham*, CM 28224 (A.F.C.M.R. 14 Nov. 1990); *see also United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (anonymous phone call that expressed in profane terms the caller's desire to engage in sexual intercourse with the recipient of the call was not 'indecent' because the anonymous nature of the call did not tend to incite lustful thought). Judged by an objective standard, the applicant's profane language in *Smith* expressed anger and frustration concerning the adverse counseling. The applicant's clear message was that he did not agree with his supervisor's disciplinary action. The language could not be interpreted reasonably as tending to corrupt morals or excite libidinous thoughts. Accordingly, the evidence was legally insufficient to convict because a reasonable factfinder could not construe the applicant's message to be an appeal to lustful desires.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The Rape Shield Rule: The Notice Requirement and the Exception for Constitutionally Required Evidence

Military Rule of Evidence 412, the so-called "rape shield rule," generally prohibits introduction of reputation and opinion evidence of the past sexual behavior of an alleged victim of nonconsensual sexual offenses.[1] Specific instances of past sexual behavior of an alleged victim are generally inadmissible, but the rule lists several exceptions.

Specific instances of past sexual behavior constitutionally may be required to be admitted.[2] If evidence is relevant,[3] material, and exculpatory or favorable to the accused, then the evidence is constitutionally admissible.[4] Furthermore, specific instances of past sexual behavior may show another source of semen or injury, thereby rebutting evidence that the accused was the attacker.[5] Finally, evidence of specific instances of sexual behavior between the accused and the alleged victim may be offered on the issue of consent.[6]

Before one of these exceptions to the general rule becomes applicable, however, defense counsel must show that the probative value of the evidence outweighs the prejudicial effect of the evidence.[7] In addition, the accused must give notice to the military judge and the

[1] *But see* United States v. Elvine, 16 M.J. 14 (C.M.A. 1983). The victim's reputation for not discriminating between sex partners could cause the accused to think the sex act was consensual, especially soon after the victim had engaged in sex with another partner who told the accused "she wants you." Evidence of the reputation and contemporaneous sex act may be admissible. The court stated, "We have grave doubts whether MRE 412(a) should be properly construed as an absolute bar to the admission of evidence of a prosecutrix's sexual reputation." *Id.*

[2] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 412(b)(1) [hereinafter Mil. R. Evid.].

[3] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Mil. R. Evid. 401.

[4] *See, e.g.*, United States v. Dorsey, 16 M.J. 1 (C.M.A. 1984); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983).

[5] Mil. R. Evid. 412(b)(2)(A).

[6] Mil. R. Evid. 412(a)(2)(B). *See, e.g.*, United States v. Jensen, 25 M.J. 284 (C.M.A. 1987).

[7] Mil. R. Evid. 412(c)(3). Reflecting a desire to allow the admission of more relevant evidence, Military Rule of Evidence 403 permits the admission of relevant evidence unless its unfair prejudicial effect *substantially* outweighs its probative value. Because Military Rule of Evidence 412 seeks to limit the admission of certain relevant evidence, exception evidence is excluded if its prejudicial effect *simply*—not substantially—outweighs its probative value.

trial counsel of the intent to offer the evidence.[8] The notice must include an offer of proof of the listed exception evidence.[9]

In federal courts, a fifteen-day notice requirement exists.[10] Many states, patterning their rules of evidence after the federal rules, have a similar notice requirement. In *Michigan v. Lucas*[11] the United States Supreme Court recently upheld the constitutionality of precluding defense use of listed exception evidence if notice requirements are not met. In Michigan, the notice and offer of proof must be given within ten days after the arraignment.

After Lucas failed to give the required ten-day notice of his intent to introduce evidence of his past sexual conduct with the victim, the trial court disallowed the evidence at trial. The Michigan State Court of Appeals reversed and adopted a per se rule that use of the notice requirement to preclude listed exception evidence violates the sixth amendment. The United States Supreme Court disagreed, stating that preclusion of this evidence is not necessarily unconstitutional in all cases. The Court pointed out that the notice requirement allows for a hearing, which can be closed to the public, on the admissibility of sensitive evidence. Notice requirements serve legitimate state interests such as protecting the prosecution against surprise and protecting rape victims against surprise, harassment, and unnecessary invasions of privacy. These interests may justify precluding evidence potentially favorable to the accused when notice is not given as required by statute.

Justice O'Connor, writing for a seven-justice majority, noted that notice requirements have been upheld in other settings even though the accused was precluded from offering favorable evidence. For example, in *Williams v. Florida*,[12] the accused was not permitted to introduce alibi witnesses when he failed to give statutorily required advance notice. Suspects do not have "an absolute right to conceal their cards until played."[13]

Would a military judge be upheld after precluding favorable evidence in a *Lucas* situation? Probably not. The military practitioner should note that the defense must serve notice of listed exception evidence, but a certain number of days is not specified.[14] The drafters of the military rule felt that a fifteen-day notice requirement would be impracticable in view of the necessity for speedy disposition of military cases.[15] Therefore, any preclusion of listed exception evidence in the military would have to be based on a finding that no notice was given. The military rule does not require that the amount of time between notice and the introduction of the evidence be reasonable. The military actually drops the federal requirement that notices and offers of proof be in writing.[16] This indicates that the drafters contemplated oral notice at an article 39(a)[17] session or in the midst of trial. Therefore, even if this notice is perceived as "late," military judges would be ill-advised to follow the lead suggested by *Lucas*. Instead, the proper recourse would be to grant the trial counsel whatever continuance is necessary. Disallowing defense evidence because of late notice almost certainly would result in overturning any resulting court-martial conviction for either abuse of the military judge's discretion or incompetency of counsel.

The military does not seem to have a serious problem with late exception notices. The current military notice requirement supports the tradition of providing the military accused with greater protections than those afforded the civilian defendant. While the United States Supreme Court recognizes that important governmental interests may be served by advance notice requirements, the military should not move to fix a rule that is not broken.

The day after the Supreme Court vacated the Michigan Court of Appeals decision in *Lucas*, the same Michigan Court of Appeals decided *Michigan v. Wilhelm*.[18] Wilhelm had been in a bar and had observed a woman publicly exposing her breasts and allowing at least one stranger to fondle her. Wilhelm then offered the woman a

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[8]Mil. R. Evid. 412(c)(1).

[9]Mil. R. Evid. 412(c)(2).

[10]Fed. R. Evid. 412(c)(1):

> [T]he accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case.

[11]49 Crim. L. Rep. (BNA) 2156 (May 20, 1991).

[12]399 U.S. 78 (1970).

[13]*Id.* at 82.

[14]Mil. R. Evid. 412(c)(1).

[15]*See* S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 406 (2d ed. 1986) (Mil. R. Evid. 412, Drafters' Analysis).

[16]*Compare* Mil. R. Evid. 412(c)(2) *with* Fed. R. Evid. 412(c)(1).

[17]*See* Uniform Code of Military Justice art. 139(a), 10 U.S.C. § 839(a) (1988) [hereinafter UCMJ].

[18]No. 91-227 (Mich. App. May 20, 1991).

ride home. Upon stopping at his own home to pick up something, Wilhelm coaxed the woman onto his boat and engaged in sexual intercourse. The woman claimed she did not consent and that she had been raped. Wilhelm, however, claimed everything was consensual. He contended that the woman was simply upset that she had banged her head against the wall in the heated sexual encounter and that he had failed to stop before ejaculating as she had requested.

The trial court did not allow Wilhelm to present evidence of the woman's sexually provocative conduct in the bar a short time prior to the sexual intercourse. Wilhelm felt her conduct reasonably led him to believe that she would be willing to have sex with him, and that he therefore had not committed rape. Even though the evidence did not fit neatly within a listed rape shield rule exception,[19] the Michigan Court of Appeals reversed the conviction, finding the evidence to be "relevant, both logically and legally, to the issue of the complainant's willingness, at least as perceived by defendant, to engage in sexual activity on the night in question."[20]

The *Wilhelm* decision rests in large part on its analysis of the victim's privacy interests, which rape shield laws intend to protect. The defense tactic of revealing a victim's complete—and usually private—sexual history often amounts to undue harassment on matters of little or no probative value. The Court of Appeals, however, noted that little significance could be given to the complainant's privacy interests in displaying sexually provocative behavior in a public bar.[21] Accordingly, any unfair prejudicial effect of admitting the sexually provocative conduct failed to outweigh the probative value of Wilhelm's evidence, and, as a result, Wilhelm had a constitutional right to present the evidence.

The *Wilhelm* analysis may be useful to military defense counsel. Because the sexually provocative conduct of the victim in the bar was not between the accused and the victim,[22] *Wilhelm* serves as one of the few examples of evidence that constitutionally could be required to be admitted under the military rape shield rule.[23] In a broader sense, *Wilhelm* teaches the proponent of any evidence to look closely at the basis of any rule that would admit or exclude the evidence. If the basis is of little significance under the circumstances of the matter at hand, then the rule may not come into play.

Military Rule of Evidence 412 is a complicated rule with general guidelines and potentially broad exceptions. It is a rule of relevance that, with the best of intentions, attempts to protect victims of nonconsensual sexual offenses. The constitutional right of the military accused to present relevant evidence and a defense, however, must be included in the balancing process before excluding the evidence. The valid but countervailing interests of the government, the accused, and the victim provide educated military counsel with a wide range of advocacy opportunities. Major Warner.

Supreme Court Addresses Willfulness and the Defense of Mistake

Introduction

In *Cheek v. United States*[24] the Supreme Court sought to resolve a split among several circuit courts of appeals regarding whether ignorance or mistake of law is a defense to tax offenses requiring willfulness. In doing so, the Court has announced a complex and arguably inconsistent formulation of the defense. The merits of the Court's opinion and its applicability to military criminal practice are discussed below. First, a brief review of the circumstances and holding in *Cheek* is appropriate.

The Facts

The defendant in *Cheek* was an avowed tax resister.[25] He was convicted of several tax offenses for failing to file federal income tax returns and attempting to evade paying income tax.[26] These offenses expressly require that the defendant's misconduct be willful.

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[19]Michigan's rape shield law grants exceptions to the rule against evidence of specific instances of the victim's sexual conduct for only: (1) evidence of the victim's past sexual conduct with the actor; and (2) evidence of specific instances showing the source of semen, pregnancy, or disease. *See* Mich. Comp. Laws § 750.520j; Mich. Stat. Ann. § 28.788(1) (Callaghan 1990).

[20]*See Wilhelm*, No. 91-227, slip op. (Mich. App. May 20, 1991).

[21]The Court of Appeals cited then State Justice Souter's words in a nearly identical case, State v. Colbath, 130 N.H. 316; 540 A.2d 1212 (1988):

> [D]escribing a complainant's open, sexually suggestive conduct in the presence of patrons of a public bar obviously has far less potential for damaging the sensibilities than revealing what the same person may have done in the company of another behind a closed door. On the other hand, evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners.

[22]*See* Mil. R. Evid. 412(b)(2)(B).

[23]*See* Mil. R. Evid. 412(b)(1).

[24]111 S. Ct. 604 (1991).

[25]*Id.* at 607.

[26]*See* 26 U.S.C. §§ 7201, 7203 (1988). He also was convicted of a related false claim charge under 18 U.S.C. § 287 (1988).

At trial the defendant admitted to the factual circumstances of the charged offenses.[27] He nevertheless contested his guilt, claiming that he sincerely believed that he was not required to pay income tax.[28] This belief was based on his conclusion that the federal tax system was unconstitutional and that the tax laws were being enforced unconstitutionally.[29] The defendant, therefore, argued that he had acted without the requisite willfulness for his alleged crimes.

Prior to and during the course of jury deliberations, the judge gave a series of instructions pertaining to the defense of mistake or ignorance of the law as it applied to offenses requiring willfulness.[30] Among the instructions was the advisement that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness."[31] In a similar vein, the judge instructed, "Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense."[32]

The Intermediate Appeal

The defendant appealed his convictions to the Court of Appeals for the Seventh Circuit. That court rejected the defendant's contentions and affirmed.[33] This result was consistent with precedent of the Seventh Circuit, which holds that actual ignorance or mistake is not a defense to a crime requiring willfulness unless the mistake is objectively reasonable.[34] Because this interpretation of willfulness conflicted with the interpretation given by the appellate courts in other circuits,[35] the Supreme Court granted certiorari.[36]

The Holding and Rationale

In its opinion in *Cheek*, a majority of the Supreme Court[37] concluded that the trial judge erroneously had instructed on the defense of mistake or ignorance of law as it applied to tax offenses requiring willfulness. Accordingly, the judgment of the court of appeals was vacated and the case was remanded.[38]

The Court initially acknowledged the existence of the "general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution."[39] The Court explained that "[b]ased on the notion that the law is definite and knowable, the common law presumed that every person knew the law."[40] The Court cited several cases showing that this presumption has been applied to criminal statutes.[41]

The Court next explained that with the proliferation of complex tax statutes and regulations, the presumption that people know and understand the law became increasingly strained. Congress responded by requiring willfulness as an element of certain criminal tax offenses. The Court observed that it therefore had long ago "carv[ed] out an exception" to the common-law rule for certain tax offenses that mistake of law was no defense when willfulness was an element of the crime.[42] Tracing

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[27] *Cheek*, 111 S. Ct. at 607.

[28] The evidence established that the defendant was aware that his beliefs were not shared by the federal courts. The defendant was involved in several civil cases challenging aspects of the federal income tax system. He lost each claim, some having been dismissed as frivolous, with costs and attorneys' fees imposed. *Id.* at 607 n.3. The defendant also attended criminal trials of other persons charged with tax offenses and was advised by an attorney that the courts had rejected his arguments. *Id.* at 607.

[29] These conclusions, in turn, were based upon indoctrination received by the defendant from others and his own study of income tax law. Specifically, the defendant presented evidence showing that he had attended seminars sponsored by tax protest groups and began following the advice given at them. He also introduced a letter from an attorney stating that the sixteenth amendment did not authorize taxing wages and salaries.

[30] *See id.* at 607-08.

[31] *Id.* at 608.

[32] *Id.*

[33] Cheek v. United States, 882 F.2d 1263 (7th Cir. 1989).

[34] *E.g.*, United States v. Buckner, 830 F.2d 102 (7th Cir. 1982), *cited in Cheek*, 111 S. Ct. at 609; *see also Cheek*, 111 S. Ct. at 609 n.7 (citing several Seventh Circuit cases holding that an honest but unreasonable mistake is not a defense to a tax offenses requiring willfulness).

[35] *E.g.*, United States v. Whiteside, 810 F.2d 1306, 1310-11 (5th Cir. 1987); United States v. Phillips, 775 F.2d 262, 263-64 (10th Cir. 1975); United States v. Aitken, 755 F.2d 188, 191-92 (11th Cir. 1985), *cited in Cheek*, 111 S. Ct. at 609.

[36] *Cheek*, 111 S. Ct. at 609.

[37] Justice White wrote the majority opinion in *Cheek*. He was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justice Scalia filed an opinion concurring in the judgment. *See id.* at 613 (Scalia, J., concurring in the judgment). Justice Blackmun, who was joined by Justice Marshall, filed a dissenting opinion. *See id.* at 614 (Blackmun, J., dissenting). Justice Souter did not participate in the consideration or decision in the case. *Id.* at 613.

[38] *Id.* at 613.

[39] *See id.* at 609, and the authorities cited therein.

[40] *Id.*

[41] United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971); Hamling v. United States, 418 U.S. 87, 119-24 (1974); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952), *cited in Cheek*, 111 S. Ct. at 609.

[42] *Cheek*, 111 S. Ct. at 609. The court wrote that "[t]his special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Id.* (citing United States v. Murdock, 290 U.S. 389 (1933)).

the decisional law applying this exception, the Court wrote that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'"[43] The Court expressed this standard in the form of a three-part test for willfulness—that is, for the defendant's misconduct to be willful, the government must prove that: (1) the law imposed a duty on the defendant; (2) the defendant knew of this duty; and (3) the defendant voluntarily and intentionally violated that duty.[44]

Applying this test to the circumstances in *Cheek*, the Court explained that the government would fail to prove willfulness if the defendant acted pursuant to a good-faith belief that he was not violating the tax statutes because of ignorance or mistake of law.[45] As the Court put it,

> This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In this end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.[46]

The Court therefore concluded that the trial judge had instructed erroneously on the ignorance or mistake of law defense. The jury should have been instructed instead that an honest but unreasonable mistake by the defendant on whether the tax code required him to pay income tax on wages would constitute a defense to crimes requiring willfulness. Of course, the government would be permitted to introduce evidence tending to show that the defendant did not entertain an honestly mistaken belief about whether he was required to pay taxes. Similarly, the jury could have concluded that the government proved beyond a reasonable doubt that the defendant was not honestly mistaken regarding his duties under the tax code, despite evidence and the defendant's claims to the contrary. In the final analysis, however, whether the defendant entertained a good-faith but mistaken belief regarding his responsibilities under the law was properly a question of fact for the jury, guided by instructions that accurately described the full scope of the ignorance or mistake of law defense.

The Court also was careful to contrast the legal import of an honest mistake of the law with that of an honest disagreement with the wisdom of a law.[47] The Court explained that a defendant has no mistake or ignorance defense if he understands that the tax code imposes upon him a duty to pay taxes but disagrees with merits of the law imposing that duty. The Court, in short, made clear that an honest disagreement with the law does not constitute an honest mistake of the law.

The Court lastly addressed whether the ignorance or mistake of law defense can extend to a defendant's good-faith belief that the income tax law is unconstitutional as applied, and therefore legally could not impose a duty upon him of which he would be aware.[48] The Court held that the defense would not apply in these circumstances.

In rejecting the mistake of law defense for claims of unconstitutionality, the Court relied upon two interrelated sources: (1) its past decisions addressing the origins of the mistake of law defense in tax cases; and (2) Congress's intent in requiring willfulness as an element of proof for certain tax offenses. With respect to the first basis, the Court explained that its *Murdock-Pomponio* line of cases teach that the mistake of law defense was recognized in tax cases because of the likelihood of innocent mistakes by taxpayers caused by the tax code's complexity. A belief that the tax code is unconstitutional, on the other hand, "reveal[s] a full knowledge of the provisions at issue and a studied conclusion ... that [they] are invalid or unenforceable."[49] That belief, therefore—even if honest—does not entitle the defendant to the mistake of law defense under Supreme Court precedent.

With respect to the second basis, the Court explained that it did not believe that Congress, by requiring willfulness, "contemplated that ... a taxpayer ... could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions."[50] The Court noted, for example, that the defendant in *Cheek* could have paid his taxes, filed for a refund, and, if denied, presented his claims to the courts. The Court concluded that when a defendant willfully refuses to comply with a duty that he recognizes the law imposes upon him, he thereby assumes the risks associated with being wrong.

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[43] *Id.* at 610 (citing United States v. Pomponio, 429 U.S. 10 (1976) (per curiam); United States v. Bishop, 412 U.S. 346 (1973)).

[44] *Id.* at 610.

[45] *Id.* at 610-11.

[46] *Id.* at 611.

[47] *Id.* at 611-12.

[48] *Id.* at 612-13.

[49] *Id.*

[50] *Id.* at 613.

The Concurring and Dissenting Opinions

Justice Scalia concurred in the judgment. He reasoned that if a defendant had a good-faith but erroneous belief that the tax laws were unconstitutional, then he did not violate a "known legal duty" by failing to comply with those laws.[51] As Justice Scalia put it, "I find it impossible to understand how one can derive from the lonesome word 'willfully' the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (*i.e.*, the legal nonexistence) of a textual prohibition does not."[52]

In his dissenting opinion, Justice Blackmun challenged the majority's premise that *Cheek* presented a question involving the complexity of tax laws.[53] Justice Blackmun wrote that it instead presented the "most elementary and basic" questions of whether "a wage earner [is] a taxpayer and are wages income?"[54] Justice Blackmun concluded that these issues have been resolved fully—contrary to the defendant's assertions—with respect to anyone of "minimum intellectual competence."[55] He warned that the Court's opinion "will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity."[56]

The Holding Applied to Military Law

Before addressing how *Cheek* would be applied to particular military offenses, one must consider whether *Cheek* applies at all to military criminal practice. Stated another way, is *Cheek* limited to specified tax offenses or does it announce a methodology for all crimes requiring willfulness?

The majority, concurring, and dissenting justices in *Cheek* all emphasized that their analyses of the mistake or ignorance of law defense and willfulness were undertaken in the context of tax offenses. Moreover, all the opinions focused upon Congress's intent for requiring willfulness as an element of proof for tax-related crimes because of the notice problems created by the long and complex federal tax code and related materials. Accordingly, *Cheek*, by its own terms, appears to limit itself to criminal cases involving tax statutes that require willfulness.

Assuming that *Cheek* applies more generally to military offenses, how it applies and the wisdom of that application is both complicated and unclear. This is perhaps best illustrated by the following two examples.

Assume that a military accused is charged with willfully disobeying the order of a superior commissioned officer to get a military haircut.[57] Assume further that the accused attempts to interpose a mistake of law defense premised upon two bases. First, he argues that he unreasonably but honestly believed that he need not obey the order because of his interpretation of the Uniform Code of Military Justice (UCMJ); specifically, the accused believed Congress did not intend that commissioned officers be "superior" to enlisted soldiers for purposes of UCMJ article 90. Second, he argues that he honestly but unreasonably believed that he need not obey the order because of his interpretation of the Constitution; specifically, he believed that commissioned officers were not his "superiors" because he lacked military status. This constitutional contention was premised upon the accused's genuine—albeit frivolous—belief that his enlistment contract amounted to involuntary servitude in violation of the thirteenth amendment.[58]

Applying *Cheek*, the accused would be entitled to the mistake of law defense in the first case, which involved an honest but mistaken interpretation of the pertinent statute. If willfulness is defined as being a "voluntary, intentional violation of a known legal duty,"[59] then the accused's misconduct was not willful.[60] The accused, under the *Cheek* analysis, could not knowingly violate a law that he honestly believed did not apply to his conduct based upon his understanding of the statute.

The military's appellate courts, however, previously had not recognized a mistake of law defense in similar situations.[61] Quite to the contrary, black-letter military law has long held that an order is presumed to be lawful and is disobeyed at one's own risk.[62] For example, in

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[51] *Id.* at 613-14 (Scalia, J., concurring in the judgment).

[52] *Id.*

[53] *Id.* at 614 (Blackmun, J., dissenting).

[54] *Id.*

[55] *Id.* at 615.

[56] *Id.*

[57] *See* UCMJ art. 90.

[58] U.S. Const. amend. XIII.

[59] *Cheek*, 111 S. Ct. at 610.

[60] *See also* United States v. Ferenczi, 27 C.M.R. 77, 81 (C.M.A. 1958); United States v. Soukup, 7 C.M.R. 17, 20 (C.M.A. 1953).

[61] *See generally* R.C.M. 916(l); United States v. Bishop, 2 M.J. 741 (A.F.C.M.R. 1977).

[62] United States v. Smith, 45 C.M.R. 5, 8 (C.M.A. 1972).

Unger v. Ziemniak[63] the petitioner, a commissioned officer, believed that an order requiring her to provide a urine sample under the direct observation of an enlisted female service member constituted improper fraternization.[64] The Court of Military Appeals gave no suggestion that this erroneous belief, even if honestly held,[65] could raise a defense to willful disobedience. Actually, the court recast the petitioner's contention[66] before addressing it, thereby refusing to consider her mistaken understanding of the law in her own, subjective terms.[67]

Cheek might instead be understood as recognizing only that an honest mistake as to a separate, nonpenal law can be exonerating. This interpretation of *Cheek* is consistent with the scope of the mistake of law defense as recognized by both the Manual for Courts-Martial[68] and military decisional law.[69] This interpretation of *Cheek*, however, is by no means certain. Although the Internal Revenue Code (IRC) is comprised primarily of standards and procedural requirements that are not in and of themselves punitive, violations of most of these provisions are made criminal by other sections of the IRC, provided that the actor has the requisite intent. In this sense, the IRC is not a separate, nonpenal law.

Cheek and accepted military decisional law, however, both agree that the accused's mistaken belief as to the constitutionality of an order is not a defense to willful disobedience.[70] For the reasons discussed by Justice Scalia in his concurring opinion in *Cheek*, the propriety and wisdom of drawing distinctions between statutory and constitutional mistakes is uncertain.[71]

One final situation should be examined. Assume that the accused unreasonably but honestly believed that he complied with the order to get *a* military "hair" cut by having a single hair cut to military standards. Rather than interposing a mistake or ignorance of law defense, the accused here would instead have raised the defense of mistake of fact.[72] In this context, willfulness clearly is recognized as one of the special *mens rea* elements under military law that can be negated by an honest but unreasonable mistake of fact.[73] Accordingly, the accused should be acquitted if evidence supporting such a mistake creates a reasonable doubt as to whether he acted willfully in disobeying the order. Of course, the accused nevertheless may be guilty of some less serious offense not requiring a special *mens rea*.[74]

Conclusion

No military case yet has considered *Cheek*. As the above discussion amply should demonstrate, whether and how *Cheek* will be applied to crimes under the UCMJ requiring willfulness is difficult to predict. Trial practitioners nevertheless must evaluate how to deal with the decision and the methodology it provides. In particular, judges and counsel in contested cases must address the relevance of evidence pertaining to the accused's mistaken interpretation of the law and how to instruct regarding that mistake. In guilty plea cases, judges must consider what, if any, mistakes of law raised during the providence inquiry or in the stipulation of fact require further inquiry or rejecting the plea. Perhaps all that is clear is that *Cheek* has injected great uncertainty in what seemed to be a well-settled area of military law. Major Milhizer.

Court Rejects Voluntary Intoxication Defense

Introduction

In two recent cases, *United States v. Watford*[75] and *United States v. Ledbetter*,[76] the Court of Military Appeals rejected an accused's contention that he was entitled to the defense of voluntary intoxication. In each case, the court concluded that the evidence did not reflect that the accused was so intoxicated that he was unable to form the intent required for his respective crimes. Before discussing these cases in detail, a brief review of the meaning of "intoxication," as used in the context of the voluntary intoxication defense, is appropriate.

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[63] 27 M.J. 349 (C.M.A. 1989).

[64] *Id.* at 358.

[65] Actually, the court in *Unger* never questioned the sincerity of the petitioner's beliefs.

[66] The court characterized the petitioner's argument as more properly being that the conduct required by the order was demeaning and degrading. *Id.* at 358.

[67] *Id.*

[68] R.C.M. 916(l) discussion.

[69] *See* United States v. Ward, 16 M.J. 341 (C.M.A. 1983); United States v. Sicley, 20 C.M.R. 118 (C.M.A. 1955).

[70] *E.g.*, United States v. Stockman, 17 M.J. 530 (A.C.M.R. 1983).

[71] *Cheek*, 111 S. Ct. at 613-14 (Scalia, J., concurring in the judgment).

[72] *See* R.C.M. 916(j). *See generally* Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 4.

[73] Other special *mens rea* elements under military law that can be negated by an honest mistake of fact and most state of mind defenses include specific intent, premeditation, and actual knowledge. *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 148-56 (1990).

[74] *E.g.*, UCMJ art. 92(2).

[75] 32 M.J. 176 (C.M.A. 1991).

[76] 32 M.J. 272 (C.M.A. 1991).

Intoxication Generally

The words "intoxicated" or "drunk," as used in common parlance, do not necessarily equate to the legal term "intoxication."[77] To constitute intoxication in the legal sense, most civilian jurisdictions require that the defendant's consumption of intoxicants be so debilitating as "to create a state of mental confusion, excluding the possibility of specific intent."[78] Military decisional law likewise has recognized that an accused can be "high" without being intoxicated for purposes of a voluntary intoxication defense. In *United States v. Herrera*,[79] for example, the Army Board of Review observed that merely because a person was under the influence of an intoxicant does not necessarily mean that he was so intoxicated as to render him mentally incapable of forming a specific intent. In *United States v. Haas*[80] the Air Force Board of Review went even further, holding that a substantial impairment because of alcohol consumption is insufficient to raise a voluntary intoxication defense if the accused nevertheless retains the capacity to form the requisite specific intent.[81]

When resolving voluntary intoxication issues, the military's courts and boards routinely consider all aspects of the accused's conduct during the general time frame of the charged offenses that are pertinent to the issue of his sobriety. These tribunals, on the other hand, do not focus upon the extent of the accused's intoxication in the abstract; nor do they rely upon quantitative measurements of intoxication such as "blood alcohol content" levels. In *United States v. Bright*,[82] for example, the accused's ability to perform various tasks, recall events, fabricate an excuse, and understand instructions established that he was sufficiently sober to form the requisite specific intent to wrongfully appropriate a van.[83] This methodology for assessing claims of voluntary intoxication has been called the "functional approach."[84]

The Cases of Watford *and* Ledbetter

The accused in *Watford* was convicted of premeditated murder.[85] The special *mens rea* element of premeditation[86] can be negated by the defense of voluntary intoxication.[87] The accused in *Watford* argued that the military judge erred by failing to instruct on the defense after it was raised by the evidence in that case.[88]

The Court of Military Appeals disagreed. The court noted that although the accused apparently had consumed alcohol prior to the homicide,[89] the evidence did not show that this consumption was "excessive."[90] The court also observed that none of the witnesses had testified that the accused appeared drunk and that the accused denied being intoxicated shortly after the crime.[91] The court actually characterized the accused's recollection of events as being "lucid and straightforward," and therefore inconsistent with being intoxicated.[92] Finally, the

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[77] *See generally* Milhizer, *supra* note 73, at 143-46.

[78] People v. Henderson, 138 Cal. App. 2d 505, 292 P.2d 267 (1956); *see* R. Perkins, Criminal Law 1013 (1982). Under military law, voluntary intoxication is also relevant to issues of premeditation, actual knowledge, and willfulness. R.C.M. 916(l)(2).

[79] 28 C.M.R. 599 (A.B.R. 1959).

[80] 22 C.M.R. 868 (A.F.B.R.), *pet. denied*, 22 C.M.R. 381 (C.M.A. 1956).

[81] *Accord* United States v. Wright, 19 C.M.R. 331 (C.M.A. 1955); *see, e.g.*, United States v. Burroughs, 37 C.M.R. 775 (C.G.B.R. 1966) (accused could plead guilty providently to disobeying an order even though he was drunk when he received it, provided that he was not too intoxicated to comply with the order); United States v. Stone, 13 C.M.R. 906 (A.F.B.R. 1953) (accused could be convicted of resisting apprehension while he was intoxicated, provided that he was not so drunk as to be incapable of recognizing the status of the air policemen trying to apprehend him).

[82] 20 M.J. 661 (N.M.C.M.R.), *pet. denied*, 21 M.J. 103 (C.M.A. 1985).

[83] *Id.* at 665; *see also* United States v. Hagelberger, 12 C.M.R. 15 (C.M.A. 1953) (instruction on voluntary intoxication not required given the accused's ability to plan and outline all the details of his crimes and his ability later to recall and relate those details in his confession); United States v. Box, 28 M.J. 584 (A.C.M.R.), *pet. denied*, 28 M.J. 451 (C.M.A. 1989) (instruction on voluntary intoxication not required when the accused's testimony was that he clearly remembered events, knew what he was doing, and intended to do what he did); United States v. Reece, 12 M.J. 770 (A.C.M.R. 1981) (evidence does not support the accused's contention that he was intoxicated, when the accused was able to converse coherently, manipulate and enter a locked car, empty the contents of a glove box, and set the items and the car on fire).

[84] Milhizer, *supra* note 73, at 146.

[85] *See* UCMJ art. 118(1).

[86] R.C.M. 916(l)(2). The Manual defines premeditation as follows:

> A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

See Manual for Courts-Martial, United States, 1984, Part IV, para. 43c(2)(a) [hereinafter MCM, 1984].

[87] Milhizer, *supra* note 73, at 154-56. It will not, however, reduce murder to manslaughter or any other lesser offense. MCM, 1984, R.C.M. 916(1)(2) discussion; *id.*, Part IV, para. 43c(2)(c); *see* United States v. Judkins, 34 C.M.R. 232 (C.M.A. 1964).

[88] *See generally* United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981). The accused did not raise the voluntary intoxication defense at his court-martial. *Watford*, 32 M.J. at 179.

[89] According to the court, the accused had consumed two rum drinks and two beers during a period of several hours prior to the crime. *Watford*, 32 M.J. at 176-77.

[90] *Id.* at 178.

[91] *Id.* at 177-78.

[92] *Id.* at 178 n.5.

court found that expert testimony regarding the potential emotional effects of the accused's *consumption* of alcohol[93] were irrelevant to the defense of voluntary intoxication, given "the utter absence of any evidence of alcohol *intoxication*."[94]

The accused in *Ledbetter* was convicted of larceny[95] and housebreaking.[96] Each of these offenses has a specific intent element of proof[97] that can be negated by voluntary intoxication.[98] Because the accused was tried by military judge alone,[99] no instructional issue was raised. Rather, the accused contended on appeal that his voluntary intoxication created a reasonable doubt as to whether he had formed the specific intent required for his crimes.

The Court of Military Appeals, again looking to the circumstances surrounding the offenses, disagreed. The court observed that two witnesses who spoke to the accused or observed him shortly before the crimes noticed no signs that he was intoxicated.[100] The court then wrote that

> although it is fair to conclude that [the accused] progressively came to be more intoxicated as the night wore on—to the point that he fell asleep—when the military police arrived at the [crime scene], he was rational enough to challenge them and offer an explanation of how the alarm had been activated. Conclusively, the crime itself was committed by a person fully capable of planning and executing an elaborate break-in and theft.[101]

Conclusion

As *Watford* and *Ledbetter* demonstrate, the Court of Military Appeals will continue to focus upon the circumstances surrounding the accused's crimes in evaluating whether he or she raised or was entitled to the defense of voluntary intoxication. Among the factors that are potentially relevant to the issue of intoxication are the observations and opinion testimony of witnesses regarding the accused's intoxication or sobriety; the accused's contemporaneous statements concerning the degree of his intoxication; the detail with which the accused remembers events; and the extent to which the planning and execution of the offenses are inconsistent with it having been perpetrated by a drunken person. Trial practitioners should evaluate and litigate voluntary intoxication issues with these traditional guideposts in mind. Major Milhizer.

Court Declines to Find Waiver of the Statute of Limitations Defense

Military law long has required that any waiver of the statute of limitations defense[102] be express or obvious.[103] Over thirty years ago in *United States v. Rodgers*,[104] the Court of Military Appeals wrote:

> It is well established in military jurisprudence that whenever it appears the statute of limitations has run against an offense, the court "will bring the matter to the attention of the accused and advise him of his right to assert the statute unless it otherwise affirmatively appears that the accused is aware of his rights in the premises."[105]

This requirement has been reiterated repeatedly by the Court of Military Appeals[106] and the service courts of

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[93] The defense contended that the accused's culpability was reduced because of emotional problems associated, in part, with his alcohol consumption. The military judge properly instructed upon this partial defense. *Id.* at 178-79. *See generally* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

[94] *Watford*, 32 M.J. at 179.

[95] *See* UCMJ art. 121.

[96] *See id.* art. 130.

[97] *Id.* art. 121 (larceny requires the accused to have "an intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner"); *id.* art. 130 (housebreaking requires the accused to "unlawfully enter the building or structure of another with intent to commit a criminal offense therein").

[98] *See, e.g.*, United States v. Kauble, 15 M.J. 591 (A.C.M.R. 1983), *aff'd in part and rev'd in part on other grounds*, 22 M.J. 179 (C.M.A. 1986) (larceny); United States v. Daniel, 7 C.M.R. 777 (A.F.B.R.), *pet. denied*, 9 C.M.R. 139 (C.M.A. 1953) (housebreaking).

[99] *Ledbetter*, 32 M.J. at 272 n.1.

[100] *Id.* at 273.

[101] *Id.*

[102] UCMJ art. 43.

[103] For a discussion of the statute of limitations defense generally and the application of the waiver doctrine to that defense, see TJAGSA Practice Note, *Courts Strictly Construed Waiver for the Statute of Limitations Defense*, The Army Lawyer, Oct. 1990, at 46.

[104] 24 C.M.R. 36 (C.M.A. 1957).

[105] *Id.* at 38 (quoting Manual for Courts-Martial, United States, 1951, para. 68c).

[106] *E.g.*, United States v. Salter, 20 M.J. 116, 117 (C.M.A. 1985).

review.[107] In addition, it is incorporated into the 1984 Manual for Courts-Martial.[108]

The Court of Military Appeals recently addressed the issue of waiver of the statute of limitations in *United States v. Moore*.[109] The accused in *Moore* was charged with twelve specifications of rape or carnal knowledge of his stepdaughter.[110] The defense counsel successfully moved to have ten of the specifications dismissed because they were barred by the statute of limitations.[111] In a contested trial before military judge alone, the accused was convicted of the remaining two rape specifications. One of the specifications alleged, in part, that the accused had raped his stepdaughter repeatedly "on or about or between May and June 1985."[112] In finding the accused guilty of this specification, the military judge, by exceptions and substitutions, found that only a single rape occurred during the alleged time period.[113] The judge did not specifically find whether the rape took place before 20 May 1985, in which case it would have been barred by the statute of limitations.

On appeal, the Navy-Marine Corps Court of Military Review reversed the accused's rape conviction.[114] The court held that because a portion of the period encompassed by the rape charge was barred by the statute of limitations, the military judge erred by failing to advise the accused, sua sponte, of his right to have that portion of the specification dismissed.[115] Moreover, the court found that it could not determine whether the rape actually was barred by the statute of limitations, because it was unable to determine whether the rape took place before or after the 20th of May.[116]

A majority of the Court of Military Appeals in *Moore* agreed that the defense did not make a "knowing and voluntary waiver" of the statute of limitations defense.[117] The court explained that the record provided no explanation regarding why the defense did not assert the statute of limitations to the affected portion of the specification. The court also emphasized that the accused vigorously contested his guilt to this offense. Accordingly, the court was not satisfied that the defense was aware of the availability of the statute of limitations defense for a portion of the specification at issue, despite having raised it with respect to other specifications. The court implied that if the defense were aware of a successful defense to a vigorously contested charge, it logically would have raised that defense absent compelling reasons to the contrary.[118]

Cases like *Moore* continue to vex the military's appellate courts despite the categorical requirement for an affirmative waiver of the statute of limitations defense at trial. Given the strictness of the waiver requirements under military law, trial practitioners must ensure that all potential statute of limitation issues are raised and resolved adequately on the record. Major Milhizer.

Federal Sentencing Guidelines and Drug Offenses: United States Supreme Court Decides Weight of LSD Includes Medium Used to Distribute Drug

In *Chapman v. United States*[119] the United States Supreme Court decided by a vote of seven to two that Congress intended the weight of the "carrier medium,"[120] such as blotter paper, sugar cubes, and like

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[107] Several recent court of review cases have addressed UCMJ article 43 in some detail. In virtually all of these cases, the appellate courts have construed the defense quite favorably for the accused, especially with respect to whether the defense has been waived effectively. In United States v. Lee, 29 M.J. 516 (A.C.M.R. 1989), for example, the Army court held that the accused's guilty pleas alone were not sufficient to constitute a waiver of the statute of limitations. *Id.* at 517-18. The court concluded that the accused nevertheless could be convicted of offenses that were established independently by evidence presented by the government on the merits. *Id.* at 518. In United States v. Brown, 30 M.J. 907 (A.C.M.R. 1990), the Army court held that the defense counsel's erroneous conclusion that the statute of limitations had been tolled did not constitute waiver of the defense in a guilty plea case. *Id.* at 909. Finally, in United States v. Souza, 30 M.J. 715 (N.M.C.M.R. 1990), the Navy-Marine Corps court held that the accused's guilty pleas to offenses that might fall outside of the statute of limitations were improvident, because the defense was not waived effectively. *Id.* at 717. *But cf.* United States v. Colley, 29 M.J. 519, 522-23 (A.C.M.R. 1989) (expiration of the statute of limitations with respect to the first day of the period of the alleged crimes did not require reversal under the circumstances, but only required that the specifications be corrected to reflect convictions for crimes beginning one day later).

[108] R.C.M. 907(b)(2)(B) instructs that the statute of limitations defense may be waived, "provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right."

[109] 32 M.J. 170 (C.M.A. 1991).

[110] *See* UCMJ art. 120.

[111] *Moore*, 32 M.J. at 171.

[112] *Id.*

[113] *Id.* at 172.

[114] United States v. Moore, 30 M.J. 962 (N.M.C.M.R. 1990). The court reversed the accused's conviction of the other rape specification because the evidence was insufficient to prove the requisite force and lack of consent. *Id.* at 967.

[115] *Id.* at 965.

[116] *Id.* at 966.

[117] *Moore*, 32 M.J. at 173.

[118] The defense could make a tactical decision to wait until findings are announced and then move to dismiss if the government failed to prove beyond a reasonable doubt that the crime had occurred within the statute of limitations. *Id.* at 173 n.3. As the Court of Military Appeals suggests, the government should consider having the military judge make special findings regarding whether the crime occurred during the statutory period. *Id.*

[119] 111 S. Ct. 1919 (1991).

[120] *Id.* at 1923.

materials, to be included in calculating the weight of lysergic acid diethylamide (LSD) under the United States Sentencing Guidelines (Sentencing Guidelines or USSG). This is a significant decision for special assistant United States attorneys (SAUSAs) prosecuting LSD offenses because the weight of virtually all carrier mediums used in LSD trafficking exceeds one gram. Because 21 U.S.C. section 841(b)(1)(B) requires a mandatory five-year term of imprisonment for all defendants convicted of distributing "a mixture or substance containing"[121] LSD weighing more than one gram, most SAUSA prosecutions of LSD distributors now will carry this mandatory sentence.

The dose or "hit" of LSD sold to drug users is so small that it must be distributed on a "carrier." Typically, the carrier is blotter paper that often is printed with designs such as Mickey Mouse or the Lucky Charms breakfast cereal character. This blotter paper then is cut into one-hit sections, which are sold for between five and fifteen dollars. Users lick, chew, or swallow the paper, or put the paper into a drink, to release the LSD and get "high." In its pure form, LSD weighs virtually nothing. For instance, in *Chapman* the defendant's 1000 doses of LSD weighed only fifty milligrams. If the weight of the blotter paper were included, however, the weight of the distributed LSD "mixture" easily can exceed one gram.

What substances may be included in weighing this LSD is crucial under the Sentencing Guidelines because weight determines the base offense level for all drug offenses under title 21 of the United States Code. For example, under USSG section 2D1.1, less than fifty milligrams of LSD is a base offense level 12. That means an LSD defendant who has no criminal record would receive between ten and sixteen months of imprisonment, and a defendant with a prior criminal conviction would not be exposed to more than thirty-seven months of imprisonment. When the LSD distributed weighs more than one gram, however, a five-year jail term is required. Consequently, weight calculations that exclude any LSD carrier medium will result in significantly "lighter" sentences than calculations that include the weight of blotter paper, sugar cubes, or other material.

Nevertheless, Chief Justice Rehnquist, writing for the *Chapman* majority, decided that Congress intended the carrier medium to be included in LSD offense level calculations under the Sentencing Guidelines. Congress "knew how to indicate that the weight of the pure drug was to be used to determine sentence"[122]—which it did with methamphetamine and PCP. With heroin, cocaine, and LSD, however, Congress intended "the dilutant, cutting agent, or carrier medium"[123] to be included in weight calculations for sentencing purposes.

In *Chapman* the defendant argued that including the carrier medium in weight calculations would produce irrational and unintended sentence disparity in violation of the fifth amendment due process clause. For example, a major drug dealer caught with 19,999 doses of pure LSD would *not* receive the five-year mandatory minimum sentence, but a small dealer with 200 "hits" on blotter paper—or even *one* dose on a sugar cube—would receive the mandatory minimum of five years in jail.[124] The Supreme Court, however, rejected this argument.

The Chief Justice pointed out that Congress, recognizing that street-level retailers keep sales moving, did not intend to punish them less severely than major drug wholesalers. Instead, Congress "adopted a 'market-oriented' approach to punishing drug trafficking under which the total amount of what is distributed, rather than the amount of the pure drug involved, is used to determine the length of the sentence."[125] Blotter paper, sugar cubes, and other materials, are carrier media that Congress intended to be part of the drug "mixture" distributed. Chief Justice Rehnquist concluded that this is a rational approach to establishing criminal penalties, and not unconstitutional.

LSD use by military personnel is increasing—particularly because it is not one of drugs for which the current urinalysis program tests. Consequently, the increased penalties for LSD distribution after *Chapman* make it an important new tool for the SAUSA practitioner fighting LSD use on the local installation. Major Borch.

Aggravated Assault Not Allowed as a Lesser-Included Offense to Involuntary Manslaughter

The accused in *United States v. McGhee*[126] was convicted, *inter alia*, of the involuntary manslaughter[127] of her minor daughter.[128] On appeal, the Army Court of Military Review held that the evidence was insufficient to support the accused's conviction for involuntary man-

[121] 21 U.S.C. § 841(b)(1)(B) (1988).

[122] *Chapman*, 111 S. Ct. at 1924.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] 32 M.J. 322 (C.M.A. 1991).

[127] *See* UCMJ art. 119.

[128] *McGhee*, 32 M.J. at 322.

slaughter. Instead, it affirmed the "lesser included offense" of aggravated assault by a means likely to inflict grievous bodily harm.[129]

In a recent opinion, the Court of Military Appeals held that the lower appellate court erred by affirming the aggravated assault conviction as a lesser-included offense. The court rested its decision primarily upon two distinct bases.

First, the court concluded that the law of the case precluded the accused from being found guilty of aggravated assault as a lesser-included offense of involuntary manslaughter.[130] In support of this conclusion, the court observed that the court members were not instructed that aggravated assault was a lesser-included offense of involuntary manslaughter in that case.[131] Additionally, the Manual for Courts-Martial does not recognize explicitly that aggravated assault can be a lesser-included offense of involuntary manslaughter.[132] Trial and defense counsel also agreed that negligent homicide was the only possible lesser-included offense of the involuntary manslaughter charge.

Second, the court expressed more general reservations about the status of aggravated assault as a lesser-included offense of involuntary manslaughter by culpable negligence in any case.[133] The court's concern seemed to be premised upon the intent required for aggravated assault—at least under an attempt theory, which is not required for involuntary manslaughter based upon culpable negligence.[134]

The court concluded, however, that negligent homicide[135] was a potential lesser-included offense to the involuntary manslaughter charge in *McGhee*. In this regard, the court noted that the Manual recognizes this relationship[136] and that the court members were so instructed. Accordingly, the court remanded the record so that the court of review could consider whether negligent homicide should be affirmed as a lesser-included offense in this case.[137] Major Milhizer.

General Order Need Not Be Signed by the General

The accused in *United States v. Bartell*[138] was convicted, pursuant to his pleas, of violating a lawful general order.[139] The specification alleged that the order was issued by the accused's commanding general.[140] On appeal, the accused contended that his conviction should be reversed because the commanding general personally did not sign the order—it was signed instead by the general's Chief of Staff "By Direction."[141]

The Court of Military Appeals held that "Article 92(1) requires only that the order be *issued* as a result of the personal decision of a general officer."[142] The court explained further that the manner in which the order is communicated to subordinates is not determinative of its legality, and its implementation may vary depending upon the customs, practices, and procedures of the services.[143] The court concluded that "[t]he singular decisive fact in these cases is who issued the order. So long as

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[129] *See* UCMJ art. 128; United States v. McGhee, 29 M.J. 840 (A.C.M.R. 1989).

[130] *McGhee*, 32 M.J. at 325 (citing United States v. McKinley, 27 M.J. 78, 80 (C.M.A. 1988)).

[131] *Id.* at 325.

[132] *See* MCM, 1984, Part IV, para. 44d(2). The court acknowledged that the Manual recognizes that aggravated assault can be found as a lesser-included offense of voluntary manslaughter. *Id.*, Part IV, para. 44d(1).

[133] *McGhee*, 32 M.J. at 325 (citing United States v. Emmons, 31 M.J. 108, 112 n.4 (C.M.A. 1990)).

[134] The Court of Military Appeals alluded to a third problem with the court of review's decision. In convicting the accused of involuntary manslaughter, the court members found that the accused acted with "culpable negligence." The convening authority later approved this finding. The court of review, in affirming the aggravated assault charge, found that the accused acted with "gross neglect." The Court of Military Appeals was concerned that this "change in terminology" may have resulted in an appellate finding of a greater degree of negligence than was found by the factfinder at trial and was approved by the convening authority. That result, of course, is not permitted. *Id.* at 324-25 (citing United States v. Brown, 18 M.J. 360 (C.M.A. 1984); United States v. Kelly, 14 M.J. 196, 199-200 (C.M.A. 1982)).

[135] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 85.

[136] MCM, 1984, Part IV, para. 44d(2)(b).

[137] *McGhee*, 32 M.J. at 325.

[138] 32 M.J. 295 (C.M.A. 1991).

[139] *See* UCMJ art. 92. The elements of this offense are "(a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation." *See* MCM, 1984, Part IV, para. 16(b)(1).

[140] *Bartell*, 32 M.J. at 296. The authority to issue general orders is limited to "(1) an officer having general court-martial jurisdiction; (ii) a general or flag officer in command; or (iii) a commander superior to [those in category] (i) or (ii)." MCM, 1984, Part IV, para. 16(c)(1)(a).

[141] *Bartell*, 32 M.J. at 296.

[142] *Id.*

[143] *Id.*

'the *decisional* authority, which is discretionary in nature, remains with the commander, ... the *signature* authority, which is delegated, is wholly ministerial in nature."[144]

The court acknowledged, however, that the method used in *Bartell* was ambiguous. Specifically, the language "By Direction" does not indicate whether the subordinate was directed to promulgate the regulation or merely to communicate it. The court nevertheless resolved these ambiguities against the accused because he admitted during the providence inquiry that the order was lawful and the person who signed it was empowered to do so.[145]

Bartell should signal a note of caution. Staff judge advocates should ensure that all general orders are signed personally by the issuing general officer. Alternatively, they should verify that the order clearly indicates on its face that it was issued by the general, but signed by a subordinate at the general's direction.[146] Additionally, prosecutors in contested cases must be prepared to prove that a proper authority issued the general order.[147] In this regard, commands should consider creating a record, or otherwise memorializing, that the commanding general—and not a subordinate—actually issued the order. Major Milhizer.

Simultaneous, "Knowing" Use of Two Controlled Substances

In *United States v. Mance*[148] the Court of Military Appeals held that an accused must possess or use a controlled substance *knowingly*[149] for the conduct to be wrongful.[150] The court explained that "for possession or use to be 'wrongful,' it is not necessary that the accused have been aware of the precise identity of the controlled substance, so long as he is aware that it is a controlled substance."[151] The court then illustrated, by example, that if an accused believed he possessed cocaine when he actually possessed heroin, he could be convicted of wrongful possession of heroin because he had the requisite knowledge to establish wrongfulness.[152]

More recently, in *United States v. Myles*[153] the Court of Military Appeals addressed whether a mistake as to the nature of the controlled substance was exculpatory if the accused was thereby exposed to a greater maximum punishment because of his or her error.[154] The accused in *Myles* was convicted of wrongful use of cocaine.[155] He unsuccessfully defended on the basis that marijuana cigarettes, which he knowingly smoked, had been laced with cocaine without his knowledge. The court wrote that, "in our view, this variation in the maximum punishments prescribed by the President for use of controlled substances does not alter the basic principle that the identity of the controlled substance ingested is not important in determining the wrongfulness of its use."[156]

Because the accused in *Myles* was charged with the cocaine offense only—he was not also charged with a marijuana offense—the court left unanswered whether he could have been convicted for wrongfully using both cocaine and marijuana. This issue was addressed in the court's recent opinion in *United States v. Stringfellow*.[157] The accused in *Stringfellow* pleaded guilty to wrongfully using cocaine and amphetamine/methamphetamine.[158] He said during the providence inquiry that he knowingly and

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[144] *Id.* at 296-97 (quoting United States v. Breault, 30 M.J. 833, 837 (N.M.C.M.R. 1990)).

[145] *Bartell*, 32 M.J. at 296 (citing United States v. Harrison, 26 M.J. 474 (C.M.A. 1988)). *See generally* United States v. Thompson, 32 M.J. 65 (C.M.A. 1991).

[146] This could be accomplished by additional language below the subordinate's signature block.

[147] *See generally* United States v. Thompson, 31 M.J. 781 (A.C.M.R. 1990) (discussing judicial notice and waiver with respect to filing, authentication, and issuing of a general regulation); S. Saltzburg, L. Schinasi & D. Schlueter, *supra* note 15, at 719 (editorial comment to Military Rule of Evidence 902(5) addresses whether general orders and regulations are self-authenticating).

[148] 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988).

[149] *Id.* at 253-54.

[150] *See* UCMJ 112a.

[151] *Mance*, 26 M.J. at 254.

[152] *Id.* Leaving aside multiplicity problems, the accused presumably would be guilty of attempted possession of cocaine as well. *See generally* UCMJ art. 80. As the court correctly noted in *Mance*, if the accused actually possessed sugar, believing he possessed cocaine, he could at most be convicted of attempted possession of cocaine. *Mance*, 26 M.J. at 254 n.2.

[153] 31 M.J. 7 (C.M.A. 1990).

[154] The maximum punishment for possession and use of cocaine and heroin—the drugs at issue in *Mance*—are identical. MCM, 1984, Part IV, para 37e(1). Therefore, the court in *Mance* did not address expressly whether an accused's mistake as to the nature of the controlled substance he or she possessed or used would be exculpatory, when the controlled substance intended to be possessed or used by the accused was "less serious" than the substance actually involved. This was the situation presented to the Court of Military Appeals in *Myles*, in which the accused contended that he used both cocaine and marijuana, intending to use marijuana only. As the marijuana purportedly used by the accused totalled less than 30 grams, the maximum punishment to confinement faced by the accused for the marijuana offense he intentionally committed was substantially less than the cocaine offense of which he was convicted. Significantly, the accused was not charged with a marijuana offense. *Compare* MCM, 1984, Part IV, para. 37e(1)(b) (maximum punishment to confinement for wrongful possession or use of less than 30 grams of marijuana is two years) *with id.*, Part IV, para. 37e(1)(a) (maximum punishment to confinement for wrongful possession or use of cocaine is five years).

[155] *Myles*, 31 M.J. at 7.

[156] *Id.* at 9-10 (footnote omitted). For a discussion of these issues as addressed in *Myles*, see TJAGSA Practice Note, *Mistake of Drug Is Not Exculpatory*, The Army Lawyer, Dec. 1990, at 36.

[157] 32 M.J. 335 (C.M.A. 1991) (affirming 31 M.J. 697 (N.M.C.M.R. 1990)).

[158] *Id.* at 335.

voluntarily used cocaine and that he knew that this conduct was prohibited by law. He also told the military judge, however, that he did not realize at the time that the cocaine he was snorting had been laced with amphetamine/methamphetamine. He nevertheless acknowledged, based on his review of the laboratory report of his urine specimen, that he actually had used amphetamine/methamphetamine as well.

The Court of Military Appeals in *Stringfellow* held that the accused need not know the precise pharmacological identity of the drug or drugs he is using to be guilty of wrongful use under article 112a.[159] The court noted that had the facts been as the accused believed them to be—that is, he actually had ingesting cocaine only—his conduct nevertheless would have been wrongful.[160] The court therefore concluded that the accused's "admission that he intended to use a substance listed in Article 112a(b)(1) ... satisfies our requirement that the plea conform with the facts."[161]

One remaining issue should be noted. Because the accused in *Stringfellow* was convicted of a single, consolidated specification that alleged the wrongful use of both cocaine and amphetamine/methamphetamine,[162] the court did not address whether the simultaneous use of different drugs was multiplicitous for any purposes. Prior precedent, however, indicates that they would be multiplicitous for findings and sentencing.[163] Accordingly, consolidation was appropriate. Major Milhizer.

United States v. Cowan: Read the Dissent!

Background

Rule for Courts-Martial 1108 allows the convening authority to suspend all or part of an approved sentence. The accused receives a "probationary period" during which the suspended portion of the sentence is not executed. The convening authority defines the conditions and the length of the period of probation.[164] The authority who suspends execution of part of an approved sentence must specify in writing the conditions of the suspension and serve a copy of the conditions of the suspension on the probationer.[165]

How much power does the convening authority have in defining the length and the conditions of the suspension? As to the length of the suspension, R.C.M. 1108(d) states that the period of the suspension "shall not be unreasonably long." The rule allows service secretaries to limit further by regulations the length of the period of suspension.[166]

Neither the UCMJ, nor the Manual, provide much guidance on the convening authority's power to define the particular conditions of a suspension. Article 60(c)(2) simply states, "The convening authority ... in his sole discretion, may ... suspend the sentence in whole or in part."[167] Likewise, UCMJ article 71(d) does not provide much help, stating that "[t]he convening authority ... may suspend the execution of any sentence or part thereof."[168]

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[159] *Id.* at 336.

[160] This situation should be distinguished from the case in which the accused lacks knowledge that he or she is ingesting any controlled substance. *See generally* Milhizer, *supra* note 73, at 141-42; United States v. Wiles, 30 M.J. 1097 (N.M.C.M.R. 1989).

[161] *Stringfellow*, 32 M.J. at 336.

[162] *Id.* at 335 n.*.

[163] United States v. White, 28 M.J. 530 (A.F.C.M.R. 1989); *see* United States v. Griffen, 8 M.J. 66 (C.M.A. 1979); United States v. Hughes, 1 M.J. 346 (C.M.A. 1976); United States v. Williams, 22 M.J. 953 (A.C.M.R. 1986).

[164] *See* R.C.M. 1108(b) (defining who may suspend court-martial punishment).

[165] R.C.M. 1108(c). Note that the government must secure a receipt of the conditions from the accused. *But see* United States v. Myrick, 24 M.J. 792 (A.C.M.R. 1987) (must be "substantial" compliance with R.C.M. 1108).

[166] "Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulations the period for which the execution of a sentence may be suspended." R.C.M. 1108(d); *see also* Army Reg. 27-10, Legal Services: Military Justice, para. 5-29 (22 Dec. 1989):

> A reasonable period of suspension shall be calculated from the date of the order announcing the suspension and shall not extend beyond—
>
> (1) Three months for an SCM.
>
> (2) Nine months for an SPCM in which no BCD was adjudged.
>
> (3) One year for an SPCM in which a BCD was adjudged.
>
> (4) Two years or the period of any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer, for a GCM.

[167] UCMJ art. 60(c)(2).

[168] *Id.* art. 71(d).

The only guidance that can be found in the Manual for Courts-Martial concerning conditions of suspension is in R.C.M. 1108(c). This rule provides that "[u]nless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code."[169] This rule makes sense—if a probationer violates the UCMJ, the suspension can be vacated. The rule, however, still fails to answer the question, "How imaginative can a convening authority be when defining conditions of suspension?"

The Case of United States v. Cowan

In *United States v. Cowan*[170] the accused pleaded guilty at her general court-martial to larceny, three specifications of forgery, and two specifications of false swearing.[171] The military judge sentenced the accused to a bad-conduct discharge, confinement for fifteen months, forfeiture of all pay and allowances, and reduction to private E-1. The accused asked the convening authority for a method by which she could serve her confinement and still support her then six-year-old child. As a result, the convening authority approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of $724.20.[172] The convening authority conditioned suspension of the forfeitures upon:

> (1) The initiation of an allotment payable to the accused's sister (guardian of the accused's daughter) in the amount of $278.40 for the benefit of the accused's then six-year-old daughter; and
>
> (2) The maintenance of the allotment during the time the appellant is entitled to receive pay and allowances.[173]

The Army Court of Military Review specified one issue on appeal: Did the convening authority have the authority to define these conditions of suspension?[174]

The Army Court of Military Review held that the convening authority had the power to define these conditions of probation. Specifically, the court pointed out, "Because the convening authority has the power to suspend forfeitures on condition the money be used to support the appellant's dependent, he has the power to require the money be directed specifically to the child's temporary guardian."[175]

The court found support for allowing these conditions in Army Regulation 608-99,[176] which requires soldiers to support their dependents. The court wrote that the convening authority "was permitting her to elect to do what the law requires of all soldiers."[177] Accordingly, the *Cowan* court appears to hold that convening authorities have the power to suspend forfeitures, conditioned on support allotments. The prudent practitioner, however, will go beyond the majority's opinion and consider the points addressed by the *Cowan* dissent.

In Judge Johnston's dissenting opinion, he notes several reasons for not allowing a convening authority to create these conditions of suspension. In the first instance, he notes that convening authorities lack "a clear grant of statutory authority to impose conditions of suspension unrelated to additional offenses, misconduct, or conduct violative of good behavior."[178] He adds that convening authorities cannot be compared to federal judges who have clear statutory authority to impose conditions of probation.[179] As a result, Judge Johnston defines *two* distinct tests for evaluating the lawfulness of

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[169] R.C.M. 1108(c).

[170] CM 9002323 (A.C.M.R. 10 Jun. 1991).

[171] *See* UCMJ arts. 121, 123, 134.

[172] This action created a forfeiture of only $724.20 pay for one month because all other forfeitures were suspended. The court wrote, "We are unable to determine whether this was the intended result, but will enforce the suspension as written." *Cowan*, slip op. at 3 n.3. Whether this was the convening authority's intent when he signed the action clearly is questionable.

[173] *Id.*, slip op. at 1.

[174] *Id.*, slip op. at 1-2.

[175] *Id.*

[176] Personal Affairs: Family Support, Child Custody, and Paternity, para. 2-4 (4 Nov. 1985).

[177] *Cowan*, slip op. at 2.

[178] *Id.*, slip op. at 3 (Johnston, J., dissenting); *see also* United States v. Lallande, 46 C.M.R. 170 (C.M.A. 1973) (Duncan, J., dissenting). In *Lallande* the court held the following conditions of suspension legal:

> [T]hat the probationer ...
>
> 3. conducts himself in all respects as a reputable and law abiding citizen;
>
> 4. does not associate with any known users of, or traffickers in, dangerous drugs or narcotics, or marijuana; and
>
> 5. submits his person, vehicle, place of berthing, locker and/or other assigned personal storage areas aboard a Naval vessel or command, to search and seizure at any time of the day or night, with or without a search warrant or appropriate command authorization, whenever requested to do so by his Commanding Officer or authorized representative.

Lallande, 46 C.M.R. at 173. Note that these conditions of suspension were submitted by the accused to the convening authority as part of offer to plead guilty.

[179] *Cowan*, slip op. at 6-8.

conditions of probation. If the condition was submitted by the accused as part of an offer to plead guilty, the conditions should be evaluated "in terms of surrendering fundamental rights and violations of public policy."[180] On the other hand, if the condition is imposed by the convening authority "as a matter of law,"[181] the issue is whether an appropriate statute contains a grant of authority.[182] In this case, the convening authority created the conditions. Because no statutory authority appears in the UCMJ for these specific conditions, he believes them to be improper.

Judge Johnston's second objection is that numerous practical difficulties arise in attempting to monitor and enforce conditions that are "instruments for a social welfare system."[183] Practitioners reading the dissenting opinion should consider this second objection before they advise their convening authorities to include similar conditions of probation. Judge Johnston notes that common sense reasons exist for not allowing these conditions. These reasons include: (1) the possibility a future windfall might make support payments unnecessary;[184] (2) the possibility of the guardian, or the recipient of the allotment, being involved in misconduct or mismanagement of assets;[185] as well as other unforseen contingencies.[186] His dissent also questions whether imposing a condition of probation is wise if a violation of the condition results in forfeiture of pay and stoppage of payments to the needed beneficiary. For example, if the allotment is not set up, the suspension is vacated, resulting in total forfeitures—how would this help the six-year-old daughter?

Conclusion

Although the *Cowan* majority held that conditions of probation generally are permissible, the dissent stated that because the conditions were not a part of the offer to plead guilty,[187] the analysis must be whether a convening authority possesses the statutory authority to define conditions beyond R.C.M. 1108(c)'s condition that the probationer not violate the UCMJ. Both the majority and dissent, however, agreed that conditions which require extensive monitoring and interpretation often are impractical. Accordingly, the *Cowan* case teaches military practitioners to scrutinize the efficacy of these conditions carefully. Major Cuculic.

Contract Law Notes

Default Terminations and Claims Court Jurisdiction

The TJAGSA Contract Law Division reported at the 1991 Government Contract Law Symposium and in its latest year-in-review article in *The Army Lawyer* that several Claims Court decisions issued in 1990 reflected a continuing split in opinions among Claims Court judges on whether that court has jurisdiction over appeals from terminations for default in the absence of a monetary claim.[188] The United States Court of Appeals for the Federal Circuit recently issued a definitive answer to the controversy in its decision on one of those cases.

The difference in viewpoints among Claims Court judges first became evident in *Claude E. Atkins Enterprises v. United States*,[189] in which one Claims

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[180] *Id.* at 6; *see* United States v. Hobart, 22 M.J. 851 (A.F.C.M.R. 1986).

[181] *Cowan*, slip op. at 6.

[182] *Id.*

[183] *Id.* at 10. The *Cowan* majority also recognized these problems, stating:

> By this opinion, we do not mean to encourage provisions of suspension such as that utilized in the case before us. We also share the strong reservations of our dissenting Brother that the condition on suspension in this case may present practical problems of interpretation and potential problems of administration, especially if circumstances change regarding the temporary guardian of the appellant's child.

See id. at 2-3 (footnotes omitted).

[184] *Id.* at 8.

[185] *Id.*

[186] *Id.* These other circumstances might include illness, death, or other casualties.

[187] An accused may offer the following condition in an offer to plead guilty:

> A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement.

R.C.M. 705(c)(2)(D). The reader should note that Change 5 to the Manual for Courts-Martial has amended R.C.M. 705(d)(1) to allow the government to propose the conditions of pretrial agreements.

[188] Dorsey, Aguirre, Murphy, Jones, Cameron & Helm, *1990 Contract Law Developments—The Year in Review*, The Army Lawyer, Feb. 1991, at 3, 47; *see also* Nash, *Postscript II: Claims Court Jurisdiction Over Default Termination Claims*, 4 Nash & Cibinic Reporter ¶ 72 (1990).

[189] 15 Cl. Ct. 644 (1988).

Court judge ruled that the court had jurisdiction over default termination decisions by government officials whether or not a monetary claim is asserted by either party. The judge reached this result through a two-step analysis. First, he noted that in *Malone v. United States*[190] the Federal Circuit "clearly and unequivocally determined that the agency boards of contract appeals have jurisdiction to address a default determination claim unaccompanied by any claim for specific monetary relief."[191] The judge then interpreted the Contract Disputes Act of 1978[192] and the Tucker Act[193]—which is the Claims Court's primary jurisdictional statute—as granting the same scope of jurisdiction over decisions of contracting officers to the Claims Court as is possessed by boards of contract appeals. The *Atkins Enterprises* judge concluded from these two factors that a contract default termination decision is within the Claims Court's jurisdiction, even if monetary damages are not in issue.

A number of Claims Court cases addressing this jurisdictional issue have been decided since the *Atkins Enterprises* decision was issued. Several of those opinions[194] articulate support for the rationale and result rendered in *Atkins Enterprises*.

On the other side of the controversy, however, are numerous cases that articulate the "traditional view" of Claims Court jurisdiction over nonmonetary default termination decisions—that the court has no such jurisdiction. Under this traditional view of the court's jurisdiction, the Claims Court has authority only over "claims" that assert a monetary amount as being presently due, but the court has no authority to issue declaratory judgments.[195]

The roots of this controversy go back to *United States v. King*,[196] in which the Supreme Court held that the Court of Claims did not have authority to issue declaratory judgments because Congress had not given an express grant of that authority. Advocates of Claims Court jurisdiction over nonmonetary default termination decisions contend that enactment of the Contract Disputes Act in 1978 and amendment of the Tucker Act in 1982—both of which have occurred since the 1969 *King* decision was issued—actually have bestowed authority upon the Claims Court to issue a declaratory judgments on the propriety of a contracting officer's decision to terminate a contract for default. The proponents of the traditional view—that the Claims Court lacks jurisdiction over default termination decisions alone—assert that neither the enactment of the 1978 Contract Disputes Act, nor the 1982 Tucker Act amendments, constituted a grant of declaratory judgment authority from Congress to the Claims Court. These opposing contentions finally were confronted and resolved by the Federal Circuit in its decision in *Overall Roofing and Construction, Inc. v. United States*.[197]

The contracting officer handling Overall Roofing and Construction's roof repair contract with the Navy terminated the contract for default, after which the contractor sought review of the default determination by the Claims Court without asserting any monetary claim against the government. The Claims Court held that it did not have jurisdiction to review a contracting officer's default termination decision until one of the parties to the contract asserted a specific monetary claim. The court's reasoning was that until a specific monetary claim is asserted, no disputed claim actually exists between the parties to which the court's jurisdiction attaches.[198]

The Federal Circuit unequivocally upheld this delineation of the Claims Court's jurisdiction, but it clarified that the reason for the lack of jurisdiction is the Claims Court's lack of declaratory judgment authority. The court first held that the Federal Courts Improvement Act of 1982,[199] which created the Claims Court, did not grant the court any general declaratory judgment authority. The

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[190] 849 F.2d 1441 (Fed. Cir. 1988).

[191] *Id* at 1444-45.

[192] 41 U.S.C. §§ 601-613 (1988).

[193] Congress amended § 1491(a)(2) of the Tucker Act in 1982 by adding the following sentence: "The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978." *See* 28 U.S.C. § 1491(a)(2) (1982).

[194] *See* Crippen & Graen Corp. v. United States, 18 Cl. Ct. 237 (1989); R.J. Crowley, Inc. v. United States, Nos. 330-87C, 577-87C, 35-88C (Cl. Ct. 1989); Moser Industrienmontage GmbH, No. 254-88C (Cl. Ct. 1989); Russell Corp. v. United States, 15 Cl. Ct. 760 (1988); *see also* Nash, *Postscript: Claims Court Jurisdiction Over Default Termination Claims*, 3 Nash & Cibinic Reporter ¶ 15 (1989).

[195] Scott Aviation v. United States, 20 Cl. Ct. 780, 9 FPD ¶ 109 (1990), *aff'd on reconsideration*, 21 Cl. Ct. 782 (1990); Continental Heller Constr. v. United States, 21 Cl. Ct. 471 (1990); SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990); Industrial Coatings, Inc. v. United States, 11 Cl. Ct. 161 (1986); Alan J. Haynes Constr. Sys. v. United States, 10 Cl. Ct. 526 (1986); Williams Int'l Corp. v. United States, 7 Cl. Ct. 726 (1985); *see also* AAI Corp. v. United States, 22 Cl. Ct. 541 (1991).

[196] 395 U.S. 1 (1969).

[197] 20 Cl. Ct. 181, 9 FPD ¶ 59 (1990), *aff'd*, 929 F.2d 687 (Fed. Cir. 1991).

[198] *Id.* at 184.

[199] 96 Stat. 40 (1982).

court then discussed the Contract Disputes Act's amendment of the Tucker Act and held that the amendment did not expand Claims Court jurisdiction because the term "claim," as used in reference to the court's authority, must be interpreted with its historical meaning as referring only to a claim for money actually due.

Finally, the court determined that section 609(a) of the Contract Disputes Act, which states that "a contractor may bring an action directly on a claim to the United States Claims Court notwithstanding any contract provision, regulation, or rule of law to the contrary,"[200] does not grant jurisdiction over nonmonetary default termination decisions because these decisions are not "claims" within the scope of the court's jurisdiction. Regarding this last issue, the Federal Circuit clarified that *Malone v. United States*[201] concerned boards of contract appeals cases that fall under a jurisdictional provision[202] different from the one that governs the Claims Court. Consequently, *Malone's* assertion that a government decision to terminate a contract for default constitutes a government claim is correct in reference to board jurisdiction, but is inapplicable to the Claims Court.

The *Overall Roofing and Construction* decision by the Federal Circuit should put an end to the conflict between decisions of Claims Court judges regarding the scope of their jurisdiction over contracting officers' default termination decisions.[203] The decision, however, raises at least one additional problem of which contracting officers and contracting attorneys should be aware. The decision clarifies that, when no monetary claim is being asserted, contractors must appeal default termination decisions to the appropriate board of contract appeals within ninety days of the contractor's receipt of the default termination notice. It also makes clear that no alternative forum with jurisdiction exists, as would be the case for monetary claims. The *Overall Roofing and Construction* decision also reaffirmed the Federal Circuit's earlier decision in *Malone*, which held that contracting officer default termination decisions constitute government claims for the purposes of board of contract appeals jurisdiction. Consequently, contracting officers must be careful when referring to appeal rights in issuing termination notices[204] or final decisions[205] relating to default termination decisions. Specifically, they should clarify that, in the absence of assertion of a monetary claim, the default termination decision is appealable only to the applicable board of contract appeals. This clarification will prevent a contractor from alleging that it was misled on its appellate rights if it fails to appeal timely to the appropriate board of contract appeals. Lieutenant Colonel Murphy.

Armed Services Board of Contract Appeals Expands Jurisdiction Over Nonmonetary Claims

As reported in the note above, the Federal Circuit limited the jurisdiction of the Claims Court over nonmonetary claims. The Armed Services Board of Contract Appeals (ASBCA or Board), however, recently expanded its jurisdiction over nonmonetary claims by enlarging the scope of these claims to include directions by contracting officers under the standard inspection clause. Responding to three appeals before it,[206] the ASBCA, in a divided opinion by its Senior Deciding Group,[207] ruled that a contracting officer's direction to a contractor to correct or replace previously accepted work because of apparent latent defects, without demanding or asserting any right to the payment of money therefor, was a government claim. The Board held further that this government claim could be the subject of a contracting officer's final decision that a contractor could appeal under the Contract Disputes Act (CDA).[208]

In *General Electric Co.* the two underlying disputes revolved around postacceptance problems with a component of jet aircraft engines that the Navy had purchased from General Electric (GE) under a number of contracts. The first dispute arose when the government, after determining that the problem was caused by a latent defect in GE's engine design, concluded that GE should replace the component in the accepted engines at no cost to the government. General Electric refused, and after an exchange of correspondence between the parties, the con-

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[200] 41 U.S.C. § 609(a) (1988).

[201] 849 F.2d 1441 (Fed. Cir. 1988).

[202] 41 U.S.C. § 607(d) (1988).

[203] For a strongly critical view of the *Overall Roofing and Construction* analysis and result, see Nash, *Postscript III: No Jurisdiction In Claims Court Over Default Termination Claims*, 5 Nash & Cibinic Reporter ¶ 33 (1991).

[204] Fed. Acquisition Reg. 49.402-3 [hereinafter FAR].

[205] FAR 33.211.

[206] General Elec. Co., ASBCA Nos. 36005, 38152 (Apr. 23, 1991); Bayport Constr. Corp., ASBCA No. 39696 (Apr. 23, 1991).

[207] This opinion is unusual because of the presence of three dissenting opinions and because of the infrequency with which the Senior Deciding Group hears appeals. The group last issued an opinion in Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶ 14774.

[208] *See* 41 U.S.C. § 605(a) (1988) (CDA section 6(a)); *id.* § 606 (CDA section 7).

tracting officer issued a "final decision" requiring correction of latent defects in the afterburner liner.

The second dispute with GE began when the Navy later discovered cracking in some of the redesigned components. After investigation, GE determined that the cracking resulted from the redesign; it therefore proposed a solution, but refused to redesign the retrofitted engines again without charging the government. The contracting officer responded by issuing another "final decision," vitiating final acceptance of all delivered engines incorporating the defective redesigned component. The contracting officer also directed GE to modify production of all engines under the contracts with no change in price.

In *Bayport Construction Corp.* a third appeal also was taken from a contracting officer's purported "final decision." In that decision, the contracting officer determined that the acceptance of installation of an exterior insulation system by Bayport Construction Company (Bayport) was not conclusive under that contract's inspection clause because of latent defects. The contracting officer directed Bayport, pursuant to the clause, to replace the defective installation system at no cost to the government.

All three of the contracting officers' final decisions fully comported with statutory and regulatory requirements,[209] and in each situation the contracting officer informed the contractor of its right to appeal. Furthermore, in each case the nonmonetary remedy chosen by the contracting officer was a permissible alternative pursuant to the inspection clause in each contract.[210]

In making its determination, the Board focused on two questions:

> (1) Is the government's assertion of its postacceptance right to order the contractor to correct or replace defective work a government "claim" that may be the subject of a contracting officer's final decision which is appealable under the CDA?
>
> (2) Should the Board exercise jurisdiction over nonmonetary government claims other than termination for default?

The Board responded affirmatively to both questions.

In response to its first query, the Board concluded that a contracting officer's direction to correct a latent defect was a "claim" despite the fact that it was not a demand for payment of money because it was a demand for "other relief" arising under the contract.[211] The Board found that because the contracting officer's directions were government "claims" for which a contracting officer's final decision was appropriate, it would have jurisdiction over a subsequent appeal of that final decision.

The Board answered the second question by determining that government claims against contractors under the CDA were not necessarily limited to claims seeking payment. The Board stated that a demand for correction or replacement under the inspection clause, absent a demand for monetary relief, should be treated for jurisdictional purposes in the same way as a termination for default under the standard default clause. A termination for default, the Board explained, long had been recognized as a proper government claim before any monetary claim by either party existed. In this case—as with a case in a termination for default situation—the ASBCA had jurisdiction, under the CDA, over the nonmonetary claim before it.[212] Actual disputes existed between the government and GE, as well as between the government and Bayport. Accordingly, as in a termination for default, those disputes still were "money oriented" even though they were not demands for monetary relief.[213] The Board further commented that jurisdiction over contracting officers' decisions made pursuant to the inspection clause was similar to jurisdiction over any other of the various types of nonmonetary government claims.

The holding is unusual in that the Board, by determining it had jurisdiction over appeals relating to nonmonetary demands by contracting officers, set into motion a dispute process that previously was not clearly permissible. Prior to this holding, whether or not these final decisions actually constituted government claims that were permissible under the CDA was unclear. The Board's ruling suggests that what was not a "claim" in

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[209] The contracting officers' decisions met the requirements as prescribed by FAR 33.211(a)(4) or DAR 1-314(i)(a)(i) as applicable, and 41 U.S.C. § 605(a) (1988) (CDA section 6).

[210] The inspection clause in each of the contracts provided that latent defects were among the exceptions to the conclusiveness of acceptance and permitted the government to require correction or replacement by the contractor at no cost, or to demand partial refund of the contract price.

[211] FAR 33.201 sets forth three distinct types of claims: (1) the payment of money in a sum certain; (2) the adjustment or interpretation of contract terms; or (3) other relief arising under, or relating to, the contract. The assertion fell within the definition of a "claim" under the third type. That definition of "claim," or a substantially similar one that embraced claims by either of the contracting parties, was included in the disputes clause of all of the contracts involved in the three appeals before the Board.

[212] *See* Contract Disputes Act of 1978, § 8(d) (granting ASBCA jurisdiction over appeals from contracting officers' decisions related to contracts made by their agencies), *amended by* 41 U.S.C. § 607(e) (1988).

[213] The Board deemed a demand for correction or replacement under the inspection clause—like the clauses present in the GE and Bayport contracts—to be money related, supporting the Board's argument in favor of taking jurisdiction over the government's nonmonetary postacceptance claim before it.

the past may be a claim now, and it clearly indicates that contractors are entitled to an appeal from a contracting officer's final decision.

The dissent[214] indicated that it would favor completion of performance before the filing of a claim is permitted, and expressed its concern that the majority's decision may lead to increased difficulties and delays in the completion of government contracts. It would have declined jurisdiction on grounds that the appeal was premature, as the Board had done in other situations.[215] The dissent argued that in the past, a direction by the contracting officer to correct work under the inspection clause had not resulted in a claim over which the Board had jurisdiction, and that now was not the proper time for the Board to depart from precedent. The dissent concluded by questioning the Board's assumption of jurisdiction and its expansive interpretation of "other relief," wondering whether the Board might in some later case accept jurisdiction when a contractor is directed to perform under the changes clause.[216] Ms. Kerry L. Cuneo.

Legal Assistance Items

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

Legal Assistance Branch Transition

This summer brought two new faces to the Legal Assistance Branch—Major George Hancock and United States Marine Corps Major Mary Hostetter. They replace Major Bernie Ingold and Major Jim Pottorff, respectively. Because of these personnel changes, Legal Assistance instructor responsibilities have been revised. Listed below are the primary areas of responsibility for the current Legal Assistance Branch instructors. Legal assistance attorneys may find this information useful in directing inquiries to Legal Assistance instructors.

Major Hancock: Legal Assistance Programs & Administration; Legal Assistance Automation; Estate Planning and Wills; Federal Tax; and Real Property.

Major Connor: Family Law and Immigration.

Major Hostetter: Consumer Law; Interviewing & Counseling; Landlord/tenant; Soldiers' and Sailors' Civil Relief Act; State Tax; and Survivor Benefits.

Availability of Legal Assistance Branch Publications

Legal assistance attorneys will find that they can obtain most legal assistance guides by downloading them from the OTJAG Bulletin Board System (OTJAG BBS). This is often the fastest way to obtain the desired publication. Under some circumstances, downloading from the OTJAG BBS is the only means by which an office properly can obtain a copy of the desired materials. Watch the **Current Material of Interest**, OTJAG Bulletin Board System, section of *The Army Lawyer* for updated lists of the available guides. That section contains detailed instructions on obtaining access to the OTJAG BBS and downloading files. Major Hancock.

Consumer Law Note

Telemarketing and "900" Numbers

With increasing regularity, state attorneys general are receiving consumer complaints about telemarketers using "900" numbers to sell everything from "free" vacations to consumer credit cards and services. In the solicitation, the seller baits the consumer with sketchy information about the service or product and then directs the consumer to call a "900" number for more details. The caller is charged for the call at rates that often are higher than regular long distance services, and the seller receives a portion of the fee. Seldom will the seller disclose the cost of the call in the solicitation.[217]

All too often, the offer itself is fraudulent. For example, consumers have complained of "phony job offers,

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[214] Spector, Gomez, and Riismandel, A.JJ, each wrote a dissenting opinion.

[215] *See* General Elec. Co., ASBCA Nos. 36005, 38152, at 21.

[216] Under the changes clause, a contractor may be entitled to an equitable adjustment for changes ordered by the contracting officer. This clause, however, also requires the contractor to proceed with the contract as changed, even if the parties cannot agree on either entitlement to, or the amount of, the adjustment. The dissent questioned whether a broad interpretation of the Board's holding in *General Electric Co.* might lead contractors to delay or halt performance in contravention of the changes clause by litigating change-related matters *before* performing the change ordered by the contracting officer. The dissent warned the Board to hesitate before becoming entangled in matters of contract administration.

[217] National Association of Attorneys General, Consumer Protection Report 1-2 (Mar. 1991):

> The provision of "900" service typically involves four parties: the interexchange carrier (IXC) which provides the telecommunications service and billing and collection service; the information provider (IP) or sponsor which, among other things, supplies the information product or entertainment source and sets the price to be charged the caller; the local exchange carrier (LEC) which, through an arrangement with the IXC, provides billing and collection services; and the service bureau which takes service from the IXC on behalf of the IP.

misleading credit card solicitations, and supposedly free vacations with enormous hidden costs."[218]

The consumer protection divisions of the attorneys general offices are successfully pursuing fraudulent telemarketers and are reaching settlements in many cases. For instance, in Indiana, a business made telephone representations that a vacation was free, but the consumer had to call a "900" number to get the details. The call alone cost $19.95 and was not preceded by the caller's permission to play the recorded message, contrary to state law. The company settled by agreeing to pay the costs of investigation and to limit its use of automatic dialing.[219]

In another case, effective advocacy by the New York State Attorney General's office resulted in $32,000 in consumer refunds from a company that advertised credit cards "guaranteed to callers." The seller induced the consumers to call "900" numbers without informing them that the call would cost at least fifty dollars, that the charge card would cost an additional five dollars, and that the card was usable only for catalog purchases from a particular company.[220] Using a similar scheme, a Maryland company used automatic dial calls to advertise a $1000-limit credit card and told customers to use a "900" number to apply. The callers then were charged up to thirty dollars for the call and could use the credit card to purchase only company merchandise.[221]

Some states are regulating telephone solicitations for the sale of consumer goods and services. They require that many telephonic agreements be reduced to written contracts that must detail the terms of the agreement, list costs and fees, provide the identity, address, and telephone number of the seller, and state that the consumer is under no obligation to pay until the contract is signed and returned to the seller. A common provision is that the seller cannot charge the consumer's credit account until after the seller receives the signed contract. Further, the contract cannot exclude any representation made by the seller to the consumer in connection with the transaction.[222]

Would "900" transactions fall within these requirements for written contracts? It depends on what product or service is being sold and the state law. For example, Maryland's Telephone Solicitations Act of 1988[223] was amended, effective July 1, 1991, specifically to include "credit services" within the definition of "consumer services." It requires written contracts for credit services solicitations that involve additional separate toll calls by consumers and in which the seller receives part of the toll fee.[224] Kansas recently enacted a statute that was approved April 17, 1991—and which will be effective upon publication in the statute book—requiring written contracts between telemarketers and consumers when the telemarketer requests the consumer contact the seller to initiate the transaction.[225] The Kansas law should encompass the "900" number transaction.

What of the "hidden" and undisclosed charge for the "900" call itself? In its notice of proposed rulemaking, the Federal Communication Commission (FCC) proposed, among other things, to require the common carriers for all interstate 900 services to make the information provider—that is, the seller—begin its message with a notice to the caller of the cost of the call and an accurate description of what the caller will receive. The FCC also seeks comments on its proposal to prohibit termination of phone services for failure to pay "900" tolls.[226]

The law is changing rapidly in this area, and attorneys should be alert in advising clients faced with "surprise" telephone bills for "900" numbers and fraudulent telephone marketing schemes. Major Hostetter.

Family Law Note

Advising Soldiers on Paternity Allegations

Army attorneys often are called upon to advise soldiers alleged to have fathered an illegitimate child. Typically, these soldiers either deny paternity, or admit paternity but indicate an unwillingness to support the child voluntarily. In advising these clients, attorneys must consider not only the Army's policy on support of illegitimate children, but also the potential for, and ramifications of, avoiding a paternity adjudication.

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[218] National Association of Attorneys General, Consumer Protection Report 15 (Jan. 1991).

[219] *Id.*

[220] *Id.* at 16.

[221] National Association of Attorneys General, Consumer Protection Report 15-16 (Mar. 1991).

[222] Fla. Stat. § 501.059 (1990); Md. Com. Law Code Ann. §§ 14-2201 to 14-2204 (1988).

[223] A contract made pursuant to a telephone solicitation is not valid and enforceable against a consumer unless it is reduced to writing; signed by the consumer; describes the goods or services used in the solicitation; has the name, address, and telephone number of the seller; contains the total price of the contract; has a description of the goods or services sold; and contains a statement that the consumer is under no obligation to pay any money unless he or she signs the contract and returns it to the seller. The contract cannot exclude from its terms any oral or written representations made by the merchant to the consumer in connection with the transaction. A merchant engaging in a telephone solicitation may not make or submit any charge to the consumer's credit account until after the merchant receives the copy of the signed contract. Md. Com. Law Code Ann. §§ 14-2203 to 14-2204 (1988).

[224] "Credit services means providing or offering to provide any service in return for the payment of money or other consideration, to assist a consumer with regard to improving the consumer's credit history, rating or record or obtaining an extension of credit for the consumer." Act of July 1, 1991, *reviewed by* Consumer Cred. Rep. 603 (CCH) Md. §§ 6531-6535.

[225] Consumer Cred. Rep. 603 (CCH) Ka. §§ 6351-6354 (May 29, 1991).

[226] 56 Fed. Reg. 14051 (1991) (proposed Mar. 14, 1991).

Army Regulation 608-99, entitled Family Support, Child Custody, and Paternity, requires that soldiers provide "family members" with "adequate and continuous support."[227] In the absence of a court order or a written support agreement, AR 608-99 mandates "minimum support requirements" for support of a soldier's family members.[228] Failure to satisfy these obligations constitutes a violation of a lawful general regulation and requires commanders to take appropriate adverse administrative, nonjudicial, or judicial action against the soldier.[229]

As used in AR 608-99, however, the term "family members" does not include illegitimate children.[230] Actually, even if the soldier acknowledges the illegitimate child as his own, the child is not a family member unless the soldier's paternity has been decreed judicially and he has been ordered to pay support for the child.[231] Accordingly, a soldier's failure to support an illegitimate child that has not been determined judicially to be the soldier's child will not result in the Army taking adverse action against the soldier.

Soldiers must be informed, however, that they are not "home free" just because the Army does not take an aggressive role in resolving paternity disputes. Recent developments in federal and state law have given mothers of illegitimate children an increased ability to pursue putative nonsupporting fathers through judicial processes.

Some states now provide that sexual intercourse within the state resulting in the conception and birth of a child gives that state's courts in personam jurisdiction over the putative nonresident father.[232] When such a long-arm statute is not available, the mother often[233] can use the Uniform Reciprocal Enforcement of Support Act[234] (URESA) or the Revised Uniform Reciprocal Enforcement of Support Act[235] (RURESA) to obtain an adjudication in a court of the state where the soldier is stationed.

Moreover, soldiers cannot count on the mother's lack of financial resources to be a significant impediment to a paternity action. Because of the nationwide "IV-D" program,[236] custodial parents can be represented in state administrative or judicial hearings to establish paternity

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[227] AR 608-99, para. 1-5a(1).

[228] *Id.* para. 2-4. These support requirements are summarized as follows:

> (1) **Single family unit living on post with a civilian spouse:** the difference between BAQ at the with-dependents and the without-dependents rate for the soldier's pay grade.
>
> (2) **Single family unit living off-post with a civilian spouse:** the full amount of BAQ at the with-dependents rate for the soldier's pay grade.
>
> (3) **Multiple family units, none including a spouse in the Armed Forces:** each family member is entitled to a pro rata share of the with-dependent BAQ rate for the soldier's pay grade.
>
> (4) **Both spouses in the Armed Forces with—**
>
> (a) **—no children of the marriage:** no support obligation, regardless of any disparities in pay grade.
>
> (b) **—the children of the marriage in the custody of one spouse:** the difference between BAQ "with" and BAQ "without" for the noncustodial parent's pay grade.
>
> (c) **—custody of children of the marriage split between the two parents:** neither parent owes a support obligation to the other.
>
> (5) Commanders can require soldiers to pay more than these guidelines in exceptional cases. A commander cannot, however, excuse payment of lesser amounts.

[229] *Id.* para. 1-4e(8).

[230] A "family member" is defined to include a soldier's: (1) present spouse; (2) former spouse, if court-ordered; (3) natural and adopted minor children; (4) illegitimate children of female soldiers and illegitimate children of male soldiers, if support is ordered by a court; and (5) any other person the soldier has an obligation to support under the laws of a soldier's or supported person's domicile. *See* AR 608-99, Glossary, section II.

[231] *Id.* In cases in which the soldier admits paternity, but no court order exists, the soldier "will be urged to provide the necessary financial support for the child." *Id.* para. 3-1.

[232] *See, e.g.*, Cal. Civ. Code § 7007(b) (West Supp. 1991); N.J. Stat. Ann. § 9:17-46 (West Supp. 1991); Ohio Rev. Code. Ann. § 3111.06 (Baldwin Supp. 1990); Wash. Rev. Code Ann. § 26.26.080 (West 1986).

[233] Currently, seventeen jurisdictions have enacted versions of URESA: Ala., Alaska, Conn., Del., D.C., Guam, Ind., Md., Mass., Miss., Mo., N.Y., P.R., Tenn., Utah., V.I., and Wash. Thirty-six jurisdictions have enacted versions of RURESA: Ariz., Ark., Cal., Colo., Fla., Ga., Haw., Idaho., Ill., Iowa., Kan., Ky., La., Me., Mich., Minn., Mont., Neb., Nev., N.H., N.M., N.C., N.D., Ohio., Okla., Or., Pa., R.I., S.C., S.D., Tex., Vt., Va., W.Va., Wis., and Wyo.

[234] 9B U.L.A. §§ 1-43 (1958).

[235] 9B U.L.A. §§ 1-43 (1968).

[236] *See* Title IV-D of the Social Security Act Amendments of 1975, Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified at 42 U.S.C. §§ 651-657 (1988)). IV-D programs exist in every state. They are administered by the states within guidelines set by the federal government.

or to establish and enforce support orders by a lawyer employed by the state. This representation is provided free to a custodial parent, although mothers not receiving welfare benefits may be required to pay a small application fee.[237] As an added benefit, federal law now requires states to provide genetic testing in IV-D paternity cases upon the request of either party to a contested paternity action.[238]

If advised that ultimately they probably will have to resolve the issue in court, many soldiers will want to delay a paternity determination for as long as possible. Delay, however, may be unwise. In an increasing number of states, retroactive child support is awarded to illegitimate children to cover the period back to the date of the child's birth.[239] In those states, delay can equate to significant support arrearages. At the same time, delay potentially disqualifies the soldier from eligibility for quarters allowances at the with-dependents rate. Accordingly, the soldier not only could face a substantial arrearage, but also could lose out on money that could have been used to support the child.[240] Major Connor.

Tax Note

Deductible Moving Expenses

Traditionally, many military members move during the summer. Although moving is often hectic, income tax preparation next spring will be easier if the military member takes a few minutes to record moving expenses *as the move occurs* instead of trying to reconstruct moving expenses next April. To help soldiers in accounting for their deductible moving expenses, legal assistance attorneys should periodically remind the members of their military communities about specific moving expense deductions and recordkeeping. The following may be of use in this regard.

Military members who itemize may deduct unreimbursed moving expenses incurred as a result of a permanent change of station (PCS). Unreimbursed moving expenses consist of the relocation costs that a soldier's family incurs that exceed cash reimbursements or allowances received in settlement of the PCS. Examples of cash reimbursements may include dislocation allowance, trailer allowance, temporary lodging allowance, and mileage and per diem travel allowances. If allowances and reimbursements received exceed deductible moving expenses, the excess must be reported as income. These allowances are reported as gross income only to the extent that they exceed actual moving expenses.[241] They are not subject to withholding, nor are they included on the military member's Form W-2. Consequently, military taxpayers should keep records of all moving expenses to establish allowable deductions properly.

Military members often incur unreimbursed moving expenses beyond the allowances and reimbursements—particularly if the member buys or sells a residence, or incurs costs associated with ending a lease as a result of the move. These "qualified real estate expenses"[242] include—

> —costs of selling the old home. Examples include attorney's fees, title fees, escrow fees, state transfer taxes, real estate commissions, and loan placement charges or "points."
>
> —costs of buying a new home. This may include attorneys' fees, title fees, escrow fees, appraisal fees, and similar home purchase expenses.
>
> —unexpired lease expenses. Examples include payments to the lessor for releasing the member from the lease on the former home, attorneys' fees, and real estate commissions.

Most homeowners find that deducting some of their home purchase or sale expenses as moving expenses is advantageous. If they deduct enough of these transaction expenses to reach the $3000[243] moving expense limit on premove househunting, temporary living and real estate expenses, homeowners may realize a more immediate tax benefit because moving expenses are an itemized deduction from the member's income for the tax year in which the move occurs. Any home sale expenses not deducted because of the dollar limit should be used to reduce the gain from the sale of the former home. Home buying expenses incurred in purchasing the new home that cannot be deducted because of the dollar limit should be used to increase the basis of the new home, which ultimately will affect the realized gain when that home is sold.

For more information, see Internal Revenue Service Publication 521, *Moving Expenses*. The Legal Assistance Federal Income Tax Information Series[244] also contains a detailed handout on the moving expense deduction and recordkeeping forms. Legal assistance attorneys should consider making this handout available at inprocessing stations or including it in installation welcome packets. Major Hancock.

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[237] *See* 45 C.F.R. § 302.33(2) (1990) (currently, the application fee for non-AFDC custodial parents does not exceed $25).

[238] 42 U.S.C. § 666(a)(5) (1988).

[239] *See, e.g.*, Mason v. Reiter, 564 So.2d 142 (Fla. Dist. Ct. App. 1990); Weaver v. Chester, 393 S.E. 2d 715 (Ga. Ct. App. 1990); Napowsa v. Langston, 381 S.E. 2d 882 (N.C. Ct. App. 1989); Wilson v. Edley, 17 Fam. L. Rep. (BNA) 1368 (D.C. Ct. App. May 21, 1991).

[240] For information regarding entitlement to BAQ, see the Dep't of Defense, Military Pay and Allowances—Entitlements Manual, part. 3, chap. 2.

[241] IRC § 217(g)(2) (1986).

[242] Treas. Reg. § 1.217-2(b)(7) (as amended in 1982).

[243] This limit is $6000 on a foreign move from the United States or within a foreign country.

[244] Administrative and Civil Law Division, The Judge Adocate General's School, U.S. Army, JA269. For information on obtaining this publication, see the **Current Material of Interest** section of this issue of *The Army Lawyer*.

Claims Report

United States Army Claims Service

Policy Memorandum—Recovery of Medical Care Costs

The following memorandum addresses recent changes in the way the Army may recover medical care costs from third-party payers. A November 5, 1990, amendment to 10 U.S.C. section 1095 permits a military treatment facility to recover costs for both inpatient and outpatient medical care provided by the facility after the date of the amendment. The amendment specifically adds automobile liability insurance and no-fault insurance contracts, including those providing "medicare supplemental" insurance, to the statute's coverage. The policy memorandum discusses how the amendment changes the assertion of third-party claims by claims offices, including the depositing of recovered monies and the procedures claims offices must institute to effect the amendment.

JACS-Z (27)
MEMORANDUM FOR
STAFF AND COMMAND JUDGE ADVOCATES
CHIEF, COMMAND CLAIMS SERVICES

SUBJECT: Guidance on Using 10 U.S.C. Section 1095 to Recover Medical Care Costs

1. Section 713 of Public Law 101-511 (Nov. 5, 1990), amending 10 U.S.C. section 1095, significantly expands the authority of the Department of Defense (DOD) to collect from third-party payers. These changes have a profound impact on judge advocate medical care recovery procedures.

2. Previously, military treatment facilities ("MTFs") used 10 U.S.C. section 1095 to collect from a retiree's or family member's health insurance for inpatient hospital care. The amendment to 10 U.S.C. section 1095 now permits the MTF to assert claims for both inpatient and outpatient care provided by the MTF. It also permits the MTF to assert claims against so-called "medicare supplemental" insurance. More importantly, 10 U.S.C. sections 1095(*h*) and 1095(*i*) now provide:

> (*h*) In this section:
>
> (*1*) The term "third-party payer" means an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no fault insurance contract.
>
> (2) The term "insurance, medical service, or health plan" includes an insurance plan described as Medicare supplemental insurance.
>
> (*i*) (*1*) In the case of a third party payer that is an automobile liability insurance or no fault insurance carrier, the right of the United States to collect under this section shall extend to health care services provided to a person entitled to health care under section 1074(*a*) of this title.
>
> (2) In cases in which a tort liability is created upon some third person, collection from a third-party payer that is an automobile liability insurance or no fault insurance carrier shall be governed by the provisions of Public Law 87-693 (42 U.S.C. 2651, et seq).

3. In essence, subsection (*h*)(*1*) now allows DOD to assert claims under 10 U.S.C. section 1095 against automobile insurers, including no-fault insurers, as well as against health care insurers. Subsection (*i*)(*1*) now allows DOD to assert claims under 10 U.S.C. section 1095 against an automobile insurance carrier, including a no-fault insurance carrier, for care provided by an MTF to active duty personnel, as well as retirees and family members. Finally, subsection (*i*)(2) provides that whenever local law creates tort liability on some third party, DOD will use the provisions of the Federal Medical Care Recovery Act (FMCRA) to effect recovery from an automobile liability or no-fault insurance carrier.

4. Enclosed herewith are guidelines for the implementation of this new recovery authority, developed by Mr. Robert Frezza, Acting Chief, Personnel Claims and Recovery Division. Army claims offices will adhere to these guidelines, which are binding under the provisions of paragraph 1-9*f*, AR 27-20.

5. Questions concerning these guidelines should be addressed to Mr. Frezza, DSN 923-4240, or CPT Dillenseger, Chief, Affirmative Claims Branch, DSN 923-7526.

Encl

JACK F. LANE, JR.
COL, JA
Commanding

Enclosure

GUIDELINES ON USING 10 U.S.C. SECTION 1095 TO RECOVER MEDICAL CARE COSTS

I. CHANGES EFFECTED BY THE AMENDMENT IN THE ASSERTION OF THIRD-PARTY CLAIMS BY CLAIMS OFFICES.

The changes to subsections (*h*) and (*i*) of 10 U.S.C. section 1095 primarily were intended to allow DOD to

recover from no-fault insurers in states that have abolished automobile tort liability. Claims offices currently assert medical care claims against automobile insurers in two different ways: (1) using the government's independent right to recover on a tort liability theory under the FMCRA from a tortfeasor's liability insurance in states that have not abolished automobile tort liability; or (2) against issuers of no-fault insurance, personal injury protection (PIP) coverage, automobile medical payments, uninsured and underinsured motorists coverage, and similar automobile policies on a third-party beneficiary theory in states that recognize the right of the United States to do so.

In states that have abolished automobile tort liability and do not recognize the United States as a third-party beneficiary of a no-fault, PIP, medical payments, or uninsured and underinsured motorists policy, the change to 10 U.S.C. section 1095 allows DOD to recover for medical care provided by an MTF to active duty personnel, retirees, and family members when no right previously existed. Because the change to 10 U.S.C. section 1095 pertains to care provided by an MTF, however, in these states the change does *not* allow DOD to recover for care provided in a civilian hospital under the Civilian Hospital and Medical Program for the Uniformed Services (CHAMPUS) or under a Civilian-Military Contingency Hospital System contract.

In states that already recognize the United States as a third-party beneficiary of automobile insurance contracts, the change to 10 U.S.C. section 1095 gives DOD an additional basis for asserting recovery.

The amendment to 10 U.S.C. section 1095 does not, however, replace the FMCRA, nor does it apply in all instances in which claims offices recover on a third-party beneficiary theory. Even as amended, 10 U.S.C. section 1095 *only* applies to recovery from health or automobile insurance. Claims offices could *not* use 10 U.S.C. section 1095 to recover from uninsured tortfeasors, to recover on a products liability theory, to recover from homeowner's or renter's insurance, or to recover from a workers' compensation fund. Moreover, the right to recover under 10 U.S.C. section 1095 applies *only* to inpatient or outpatient care provided in an MTF.

Additionally, the amendment to 10 U.S.C. section 1095 applies *only* to care provided after the enactment date of the amendment. Subsection (*e*) of section 713 states:

> The amendments ... shall apply ... to health care services provided in a medical facility of the uniformed services after the date of the enactment of this Act, but not with respect to collection under any insurance, medical service, or health plan agreement entered into before the date of enactment of this Act that the Secretary of Defense determines clearly excludes payment for such services. Such an exception shall apply until the amendment or renewal of such agreement after that date.

Section 713 was signed into law on November 5, 1990, and would not apply to care provided on or before that date. Although the language written into subsection (*e*), excepting plan agreements that clearly exclude the United States, was intended to apply mainly to MTF assertions against medicare supplemental insurance, some automobile insurance policies also may "clearly exclude" the United States.

II. CHANGES EFFECTED BY THE AMENDMENT IN DEPOSITING MONIES RECOVERED BY CLAIMS OFFICES.

Some medical care recovery cases now can be asserted under both 10 U.S.C. section 1095 and the FMCRA or a third-party beneficiary theory. This potential "overlap" is particularly apparent in two instances. The first instance arises in cases in which care was provided both before and after the November 5, 1990, enactment date of section 713. The second instance arises when two or more different insurance policies are available for DOD to assert against in a particular case. For example, the claims office might be able to assert against both the tortfeasor's liability insurance and the injured party's PIP coverage. This overlap is significant for reasons not directly addressed in the amendment to 10 U.S.C. section 1095.

Money recovered under the FMCRA must be deposited into the Miscellaneous Receipts Account of the General Treasury. Conversely, 10 U.S.C. section 1095(*g*) specifically provides that money recovered under 10 U.S.C. section 1095 is credited to the appropriation supporting the maintenance and operation ("O&M") account of the facility that provided the care. In effect, money recovered under 10 U.S.C. section 1095 is used to support the local hospital commander's mission, while money recovered under the FMCRA must be returned to the General Treasury and cannot be used by DOD. For this reason, distinguishing the money that claims offices recover under the FMCRA from the money they recover under 10 U.S.C. section 1095 is not merely an academic issue; it becomes vitally important for claims personnel to distinguish between these monies accurately. To distinguish situations in which claims offices deposit money recovered into the General Treasury from situations in which offices use 10 U.S.C. section 1095 and deposit money recovered into the MTF's O&M account, the following "bright-line" rules have been established.

a. Recovery effected from *automobile* insurance—not homeowner's or renter's insurance—on a *third-party beneficiary theory* for inpatient or outpatient medical care *provided in an MTF* is considered recovery under 10 U.S.C. section 1095 and should be deposited in the O&M account of the MTF providing the care. *But see* paragraph

c below for care provided before November 5, 1990. *This includes recovery from no-fault, PIP, medical payments, and underinsured motorists coverage.* Claims offices will continue to deposit money recovered on a third-party beneficiary theory that does not meet these tests in the General Treasury. If a claims office compromises a claim by accepting less than the amount asserted when more than one MTF provided medical care, the office will apportion the amount recovered between the MTFs on a pro rata basis.

b. Recovery from a tortfeasor's automobile liability insurance is considered recovery under the FMCRA and is deposited in the General Treasury. The amendment to 10 U.S.C. section 1095 now mentions "automobile liability insurance," and the Office of the General Counsel for DOD is considering changes to the Code of Federal Regulations that would allow DOD to deposit money collected from automobile liability insurers for care provided in an MTF in the MTF's O&M account. Pending publication of this guidance, however, Army claims offices will continue to deposit money collected from automobile liability insurers in the General Treasury.

c. In some cases, the MTF provided medical care recoverable under a third-party beneficiary theory both before and after the enactment date of the change to 10 U.S.C. section 1095.

(1) If the MTF provided care in discreet increments, such as seven outpatient visits between August 1990 and February 1991, claims offices will deposit money recovered for visits before the effective date of the statute in the General Treasury, and deposit money recovered for care provided after November 5, 1990, in the MTF's O&M account. If the MTF did not provide care—such as inpatient care—in discreet increments, claims offices will compute the amount allocable to each account by multiplying the number of inpatient days by the applicable Office of Management and Budget rates.

(2) If the claims office compromises the claim and accepts less than the amount asserted—typically because the cost of the care provided far exceeds the maximum policy coverage—the office may reduce the amount payable into the General Treasury to zero before reducing the amount payable into the MTF's O&M account.

d. In some cases, DOD will have more than one source of recovery that exceeds the value of the medical care provided. To maximize the money available for the injured victim to recover from a tortfeasor, as well as to maximize the amount deposited in the MTF's O&M account, claims offices will coordinate with their MTFs and ensure that potential recovery under 10 U.S.C. section 1095 is exhausted before the claims office effects recovery under the FMCRA. This often will require close cooperation with claims offices and MTFs belonging to other military services.

(1) If the MTF can recover from an injured party's health benefits coverage and the claims office can recover from the tortfeasor's automobile liability insurance coverage, the MTF first should try to recover from the injured party's health benefits coverage. The claims office then would try to recover any remaining portion of the government's assertion from the tortfeasor.

(2) If the claims office can recover both from the injured soldier's PIP and from the tortfeasor's liability coverage, the claims office first should attempt to recover from the injured soldier's PIP and then should try to recover any remaining portion of the government's assertion from the tortfeasor. Note, however, if recovering from the PIP coverage would create undue hardship for the injured party, the claims office would waive or compromise the government's assertion against the PIP and assert against the tortfeasor's liability insurance instead.

III. CLAIMS OFFICE PROCEDURES FOR EFFECTING 10 U.S.C. SECTION 1095 RECOVERY.

Claims offices should begin to make changes in their office procedures immediately. Offices should change their assertion letters to reflect 10 U.S.C. section 1095 as the basis for recovery when appropriate. If care was provided in an MTF after 5 November 1990, assertion letters against insurers providing no-fault, PIP, medical payments, or uninsured and underinsured motorists coverage should state that the United States asserts its right to recovery under the provisions of 10 U.S.C. section 1095 and applicable state law.

Claims offices also should coordinate with their MTF on depositing money recovered under 10 U.S.C. section 1095. The intent of the 1986 amendment, which authorized MTFs to deposit money recovered under 10 U.S.C. section 1095 in their O&M accounts, was to provide the MTFs with an incentive to devote resources to maximize their third-party recovery. To help ensure the complete cooperation of the MTF in identifying potential medical care recovery cases, claims offices are strongly encouraged to provide both the staff judge advocate and the MTF commander with a monthly or quarterly report detailing the amount the office deposited in the MTF's O&M account.

In states that previously did not recognize the United States as a third-party beneficiary of no-fault and other types of insurance contracts, recovery judge advocates should make a special effort to inform insurance companies and the plaintiffs' bar of the change in the law. If an insurer asserts that its policy "clearly excludes" the United States under subsection (*e*), the recovery judge

advocate must forward a copy of the policy to the Affirmative Claims Branch, USARCS, to obtain a ruling.

USARCS plans to revise the Affirmative Claims Management Program to reflect this policy. Pending receipt of this revised program, claims offices will keep track of 10 U.S.C. section 1095 deposits separately from deposits to the General Treasury—preferably in the Affirmative Claims Journal.

SUMMARY OF CHANGES—10 U.S.C. SECTION 1095

	PREAMENDMENT	POSTAMENDMENT
Care provider:	MTFs	MTFs
Type of care:	inpatient only	inpatient/outpatient
Injured party:	retirees/family members	retirees/family members; active duty only for automobile insurance
Insurance type:	private health insurance	private health insurance; medicare supplemental insurance; automobile insurance (no-fault, med pay, PIP, uninsured/ underinsured)

Notes:

1. Monies recovered under the Federal Medical Care Recovery Act are deposited into the General Treasury regardless of whether care was provided in an MTF or in a civilian hospital.

2. Monies recovered under a workers' compensation statute, on a products liability theory, or from a homeowner's or renter's insurer are deposited into the General Treasury.

3. Monies recovered from an automobile insurer on a third-party beneficiary theory for care provided in a civilian hospital, or for care provided in an MTF on or before 5 November 1990, are deposited into the General Treasury.

4. Monies recovered under 10 U.S.C. section 1095 from a health insurer, or from an automobile insurer on a third-party beneficiary theory for care provided in an MTF after 5 November 1990, are deposited in the O&M account of the MTF providing the care.

Tort Claims Note

"Supplemental" Jurisdiction Under the Federal Tort Claims Act

Claims filed under the Federal Tort Claims Act (FTCA), in which federal and nonfederal joint tortfeasors are named, present interesting questions of law that have a practical impact upon the negotiation of administrative claim settlements. This is particularly true in instances in which a federal district court clearly has jurisdiction regarding the federal tortfeasor, but has no independent basis for jurisdiction over the nonfederal tortfeasor.

A typical example is a multivehicle collision in which the fault lies with both a federal driver and a nonfederal driver. This would include a situation in which a passenger could bring an action against both the driver of the vehicle in which the passenger was riding and the driver of the other vehicle. Another example is substandard care rendered in a military medical facility by a health care provider who is under a contract arrangement with the United States, such as a so-called "CHAMPUS partner."

In theory, a plaintiff who is not satisfied with the administrative resolution of the FTCA claim and who files suit against the United States could not resolve the claims against all of the joint tortfeasors in one forum. The plaintiff would have to bring suit in federal court to recover from the United States and sue separately in state court to recover from the nonfederal tortfeasor. The expenses and problems, such as inconsistent adjudications, are easy to imagine. To avoid these problems and to enhance judicial economy, courts have developed the doctrine of "pendent party jurisdiction" under which the federal district court could assume jurisdiction over all pendent claims arising from the acts of the joint tortfeasors.

In those cases, the plaintiff who has brought suit in a federal district court has to request that the court exercise pendent jurisdiction to adjudicate claims against the nonfederal joint tortfeasor as well as the claims against the federal tortfeasor. Historically, the decision to exercise pendent jurisdiction over the nonfederal joint tortfeasor was left to the discretion of the federal district judge. If the federal judge refused to exercise this jurisdiction, then the plaintiff had to initiate a separate action in state court to reach the nonfederal tortfeasor. The results have varied from district to district. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the United States Supreme Court stated that the requisite relationship for pendent jurisdiction exists between state and federal claims when they "derive from a common nucleus of operative fact" and are such that the claimant "would ordinarily be expected to try them in one judicial proceeding." *Id.* at 725. Subsequently, in *Aldinger v. Howard*, 427 U.S. 1 (1976), the Court interpreted jurisdiction over a federal claim under 28 U.S.C. section 1343 more narrowly, resulting in disparate decisions when federal claims were considered under the FTCA. *See* Dep't of the Army, U.S. Army Claims Service, *FTCA Handbook* 164.

The Supreme Court, however, squarely held in *Finley v. United States*, 109 S. Ct. 2003 (1989), that no pendent party jurisdiction arises in an FTCA case. The holding

was based on the text of the FTCA, which states that district court jurisdiction exists over "civil actions on claims against the United States." In effect, the Court held that if Congress had wanted to include pendent party jurisdiction, the original text would have stated that in explicit language.

Finley effectively was overruled by the Federal Courts Study Committee Implementation Act of 1990, *see* 28 U.S.C. § 1367, which provides "supplemental" federal district court jurisdiction over state claims involving nonfederal defendants arising from the same constitutional case or controversy as the FTCA claim against the United States. The act is applicable to suits filed after 1 December 1990. The district court may decline supplemental jurisdiction in any of four circumstances listed in the act. The act is discussed in more detail in Mengler, Burbank & Rowe, *Civil Procedure*, Nat'l L. J., Dec. 31, 1990, at 29-30.

Whether the legislation will "cure" the problem recited above remains to be seen. Difficulties may arise when a state law requires that to bring a medical malpractice claim against a nonfederal tortfeasor—such as a CHAMPUS partner—a complaint must be filed before a state screening panel prior to filing suit in state court.

For claims personnel in the field, this legal matter relates back to negotiating potential settlements of administrative claims. The reestablishment of the "old" pendent jurisdiction as "supplemental jurisdiction" can be used as a negotiating tool to avoid needless litigation. In the negotiation and processing of multitortfeasor claims, claims officers must stress the availability of this new remedy to both the claimant and the insurer of the nonfederal joint tortfeasor. The claimant initially may be reluctant to pursue the nonfederal joint tortfeasor because of policy limits and, instead, seek a greater recovery against the United States even though the nonfederal tortfeasor is principally liable. Knowledge of supplemental jurisdiction, however, may persuade the claimant to involve the nonfederal tortfeasor in negotiating. In the medical malpractice case, state screening may delay filing of suit for several years, whereas the FTCA suit can be brought six months after the filing of the claim. Nevertheless, the provisions of the new act should be advocated forcefully to the claimant as a reason to settle, rather than to litigate. The objective is to pay the fair share owed by the United States without unnecessary litigation. Mr. Rouse.

Personnel Claims Note

Vandalism Claims When the Vandal Is Known

Most personnel claims for vandalism involve unknown perpetrators. When a vandal is identified, however, the government has an interest in ensuring that he or she—rather than the government—ultimately compensates the crime victim.

Whether or not the vandal's identity is known, a soldier or other proper party claimant under the Personnel Claims Act, 31 U.S.C. section 3721, can present a claim and be compensated for an on-post vandalism loss. Compensation, of course, is subject to the normal requirements that the loss must have occurred incident to service, that the loss must be substantiated, and that the victim must use his or her private insurance, if any.

If a known vandal is a soldier, the victim must assert a claim against the vandal under Uniform Code of Military Justice (UCMJ) article 139, 10 U.S.C. § 939 (1982), and chapter 9 of Army Regulation 27-20, Legal Services: Claims (22 Feb. 1990) [hereinafter AR 27-20], before the claims office can process the victim's personnel claim. Pursuant to paragraph 11-2*d.1* of AR 27-20, if settlement of the article 139 claim will be protracted unduly, the claims judge advocate may pay the victim's personnel claim and counsel the victim to repay the United States if he or she later receives payment under article 139 from the vandal's military pay.

Often, however, the vandal is a family member of a soldier or another person who is not subject to the UCMJ. If the vandal does not reimburse the claimant voluntarily, the claims office should pay the victim's personnel claim and pursue recovery from the vandal under local law. Restitution often can be obtained in connection with adverse administrative actions, such as suspending the vandal's privileges or barring the vandal from the installation. On installations with a magistrate's court program, the magistrate's court may be able to assist. Frequently, the vandal is a minor child. Accordingly, in states that hold the parents of these children liable, the claims office should pursue recovery from their parents.

Claims personnel should note that the limitations in chapter 14 of AR 27-20, on recovering from negligent, uninsured soldiers for damage to government property, do *not* apply to personnel claims recovery actions against soldiers for their intentional damage to personal property.

Claims personnel should categorize recovery from a vandal or other tortfeasor on a personnel claim as "Non-GBL Recovery," enter "refund from tortfeasor" in the "Contractor" field of the Personnel Claims Management Program, and deposit the money in the carrier recovery account. Mr. Frezza.

Personnel Claims Recovery Note

Entering Correct SCAC Codes

Claims personnel must be extremely careful to enter the correct Standard Carrier Alpha Code (SCAC) into the Revised Personnel Claims Management Program when they begin a new claim record involving a government

bill of lading (GBL) carrier. The SCAC, which is the four-letter identifier of a GBL carrier, is found in block two on the GBL. Field claims personnel must copy it carefully.

If the U.S. Army Claims Service (USARCS) has to accomplish carrier recovery through offset action, USARCS will initiate a request for this action to the Defense Finance and Accounting Service (DFAS). This process is automated. Accordingly, the USARCS typist enters only the Army claim number and the SCAC; other important information is printed automatically. DFAS works primarily from the SCAC in identifying the GBL carrier to offset. If the claims office enters the wrong SCAC into the automated record, DFAS will offset the wrong carrier.

Recently, USARCS has been receiving too many requests for refunds from carriers who were offset wrongly. These refunds involve a lot of unnecessary work that could have been avoided if field claims personnel had taken more care at the onset. Ms. Schultz.

Affirmative Claims Notes

Ambulance Services

In 1984, an affirmative claims bulletin was published, stating that ambulance services were not "hospital, medical, surgical, or dental care and treatment" for purposes of the Federal Medical Care Recovery Act (FMCRA). The bulletin cited *In re Andrew L. Kulp*, 57 Comp. Gen. 781 (1978), which addressed whether administrative leave qualifies as medical treatment under the FMCRA, but did not discuss ambulance services.

Upon review, USARCS has opined that ambulance and air ambulance services should be considered medical "care and treatment" under the provisions of the FMCRA. Claims offices are authorized to obtain ambulance or air ambulance costs and assert claims for these amounts, whether the recovery is based on the FMCRA, workers' compensation, or a third-party beneficiary theory. Because these amounts are not included in the Office of Management and Budget rates, offices must request a specific breakdown of the costs from the medical treatment facility. Mr. Frezza.

Recovery of Burial Expenses

In some instances, soldiers die from injuries received in accidents. When a soldier is buried at government expense, the installation mortuary affairs office completes DD Form 2063 and itemizes expense data on this form. Many insurance policies routinely include clauses that provide for the payment of burial expenses.

The FMCRA provides legal authority only for the recovery of medical care expenses. The FMCRA does *not* provide any authority for recovery of burial expenses. Claims offices, however, *may* assert claims for burial expenses incurred by the government *if* the insurance contract provides for payment of these expenses and state law recognizes the United States as a third-party beneficiary of that contract.

Accordingly, if the claims office is asserting a claim for the recovery of medical care expenses under the FMCRA in a death case, the office must assert the claim for burial expenses under a different legal theory in a separate paragraph of the demand letter. The following sample paragraph may be used:

> In addition, because [the injured party] died as a result of [his/her] injuries and was buried at government expense, the United States asserts its right to recover [amount] in burial expenses, itemized on the attached DD Form 2063, as a third-party beneficiary of your insurance contract.

If, however, the claims office is attempting to recover the medical care expenses as a third-party beneficiary of the insurance contract, the burial expenses simply may be included in the total amount demanded.

In asserting claims for burial expenses, claims personnel should consider waiving or compromising the government's claim in appropriate cases—such as when insurance proceeds are inadequate to cover burial expenses—to avoid undue hardship to the deceased soldier's next of kin. Mr. Frezza.

Criminal Law Division Note

OTJAG Criminal Law Division

Supreme Court—1990 Term, Part V

Colonel Francis A. Gilligan and Lieutenant Colonel Stephen D. Smith

Florida v. Jimeno—Opening Containers During Consent Searches

In *Florida v. Jimeno*[1] the United States Supreme Court addressed the scope of consent searches. The specific question was whether containers found within the area of a consent search may be opened and examined without first obtaining separate consent to search the container. Justice Rehnquist, writing for the majority, held that

[1] 49 Crim. L. Rep. (BNA) 2175 (U.S. May 23, 1991).

containers within the area of a consent search may be opened when "it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted [the officer] to open a particular container."[2] Justice Marshall, joined by Justice Stevens, dissented, claiming that separate and unambiguous consent is necessary to support intrusion into a container found within the area of an otherwise lawful consent search.[3]

Suspecting that the accused had made arrangements for a drug transaction over a public telephone, a police officer followed Enio Jimeno's vehicle. After Jimeno failed to stop at a red light, the officer made a traffic stop to issue a citation. The officer informed Jimeno that he believed Jimeno was carrying narcotics, and asked permission to search the car. Jimeno, claiming he had nothing to hide, consented. On the passenger side, the officer found a folded paper bag on the floorboard. Upon opening the bag, the officer found cocaine.[4]

The trial court suppressed the cocaine because the "consent to search the car did not carry with it specific consent to open the bag and examine its contents."[5] The Florida District Court of Appeal affirmed the lower court, setting forth a per se rule that "consent to a general search for narcotics does not extend to 'sealed containers within the general area agreed to by the defendant.'"[6] The Florida Supreme Court affirmed.[7]

Focusing on the fourth amendment's call for objective reasonableness, however, the United States Supreme Court reversed. The question for determination is whether the reasonable officer would have concluded that the suspect's consent to the search included consent to examine the container in question. In this case, the fact that the suspect was made aware that the officer was looking for narcotics was important. Accordingly, when the suspect consented, the officer could reasonably conclude that the consent went not only to the limited area of the car, but also to those items or areas within the car in which contraband narcotics could be secreted.[8] The majority cited *United States v. Ross*[9] for the proposition that "[t]he scope of a search is generally defined by its expressed object."[10]

An unfortunate aspect of the majority opinion is the fact that it once again invites speculation upon what is a "worthy" or "unworthy" container. *Ross* had dissolved the arguments about relative expectation of privacy to be afforded differing containers with respect to probable cause searches. Under *Ross*, if the container is capable of holding the item to which probable cause extended, then the container could be searched during the course of a lawful search based upon probable cause. In *Jimeno*, on the other hand, the majority opinion says, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."[11]

The defect in resurrecting this argument is the lack of any definition against which law enforcement officials may assess their conduct and then conform that conduct to the requirements of the fourth amendment. In light of *Jimeno*, the officer knows that during a consent search a folded paper bag may be searched, but a locked briefcase may not. What then of a stapled paper bag or unlocked briefcase? Where does the majority expect the officer on the street to draw the line between containers and their associated expectations of privacy that yield to consent, and containers and expectations of privacy that do not? Perhaps officers eventually will carry a list of "worthy" and "unworthy" containers developed from appellate court opinions.

The Court should reject affirmatively any "container doctrine." Instead, reliance should be placed upon the standard set forth in *Jimeno*, unqualified by any reference to relative worth of containers—that is, "[if a suspect's] consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."[12] The question is not the worth of containers, but the knowing waiver of fourth amendment protections by the

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[2] *Id.* at 2175.

[3] *Id.* at 2176-77 (Marshall, Stevens, JJ., dissenting).

[4] *Id.* at 2175.

[5] *Id.*

[6] *See* State v. Jimeno, 550 So. 2d 1176 (1989) (quoting Shelton v. State, 549 So. 2d 236 (1989)).

[7] *Id.*

[8] *Jimeno*, 49 Crim. L. Rep. at 2176.

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

[10] 49 Crim. L. Rep. at 2175.

[11] *Id.* at 2176.

[12] *Id.*

suspect, and the reasonableness of government conduct under the circumstances. The focus should be upon the nature of the request for consent and what a suspect knew when he or she consented. Under this analysis, a broad request for consent to search a car would give no reasonable basis to conclude that the officer also could intrude into anything he or she found in the car. As in *Jimeno*, however, when the suspect consented while knowing that the officer sought narcotics, more intrusive conduct by the officer is objectively reasonable.

Justice Marshall's dissenting opinion notes that the Court had rejected arguments about the relative worth of containers in *Ross*.[13] The dissent, however, wants to carry the rule to the other extreme—that is, all containers should be accorded a degree of privacy that requires separate consent to search.[14] Therefore, a consent search of Jimeno's car essentially would have to stop at the appearance of the folded paper bag, and the officer would have to seek specific consent to search the bag. This extension of the container theory would mean that a snapped coin purse discovered in the bag once again would stop the search until a third consent could be obtained—ad nauseam. The dissent made a much more appealing argument when it noted that Jimeno's actual consent was ambiguous with respect to containers found in the car.[15] Ambiguity in the facts and circumstances actually will reflect upon the reasonableness of government conduct pursuant to consent.

Lankford v. Idaho—Notice of Death as a Sentencing Option

Lankford v. Idaho[16] presents a rather unusual fact situation dealing with the imposition of capital punishment. After his conviction for two counts of first degree murder, Lankford's counsel asked that the State give notice of whether it would seek the death penalty and, if so, that the State file a statement of the aggravating factors in support of the death sentence. The State responded affirmatively that it would not seek the death sentence.[17] From that point in the trial forward, no overt discussion of the death sentence occurred. Actually, both the government and the defense counsel argued for forms of life imprisonment.[18] At the end of the sentence hearing, the trial judge announced the options available to the court—including death—and indicated he would announce his decision on the following Monday. On Monday, after spending the entire day conducting the presentencing hearing for the accused's brother,[19] the judge sentenced Lankford to death.[20]

Lankford claimed that the trial judge "violated the Constitution by failing to give notice of [his] intention to impose the death sentence in spite of the State's notice that it was not seeking the death penalty."[21] Idaho courts denied relief, finding that advice provided to Lankford at arraignment to the effect that the maximum punishment included death,[22] as well as the terms of the pertinent statute,[23] provided adequate notice of the availability of the death option.

The United States Supreme Court, however, noted that the Idaho courts' assertions concerning the advice given Lankford would be true, but for the State's affirmative indication that it would *not* seek the death penalty. The Court noted, "[T]he silent judge was the only person in the courtroom who knew that the real issue that they should have been debating was the choice between life or death."[24] Not surprisingly, the Court found a lack of adequate notice that "created an impermissible risk that the adversary process may have malfunctioned in this case."[25]

The Court did not dispute the state's authority to impose the sentence. The Court, however, clearly was troubled by the State's affirmative notice and the absence of contrary advice thereafter. The Court set the stage for its conclusion by likening the State's declination to a

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[13] *Id.* (Marshall, J., dissenting).

[14] *Id.*

[15] *Id.*

[16] 49 Crim. L. Rep. (BNA) 2160 (U.S. May 20, 1991).

[17] The State's response was that "the State through the Prosecuting Attorney *will not* be recommending the death penalty." *Id.* at 2161.

[18] *Id.*

[19] The accused, Bryan Lankford, alleged that his brother, Mark Lankford, actually killed the victims. *Id.* at 2160-61 n.2.

[20] *Id.* at 2162.

[21] *Id.*

[22] *Id.* at 2160.

[23] Idaho Code § 18-4004 (1987): "[E]very person guilty of murder of the first degree shall be punished by death or by imprisonment for life." *Lankford*, 49 Crim. L. Rep. at 2165 (Scalia, J., dissenting).

[24] *Id.* at 2162.

[25] *Id.* at 2165.

"pretrial order limiting the issues to be tried."[26] The Court then found that defense counsel reasonably relied on the State's assertion, and likely would have made several arguments against death had the situation been otherwise.[27] The Court's final condemnation of the trial lay in the following statement:

> Although the trial judge in this case did not rely on secret information, his silence following the State's response to the presentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing. Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.[28]

Military capital sentencing cannot suffer from the defect that occurred in *Lankford.* The most obvious reason is that sentencing by judge alone is prohibited when death is a sentencing option.[29] Accordingly, no question can arise concerning a trial judge's concealed intentions with respect to capital punishment. Perhaps even more significant, however, is that military capital trial procedure provides abundant notice of death as a sentencing option. From referral[30] and written notice of aggravating factors,[31] through unanimous findings required for guilt,[32] to detailed sentencing instructions,[33] notice of this "principal issue" is clear.

Notice is a prelude to the real concern of the justices—that is, preserving the adversary process and assuring "a just result under the standards governing decision."[34] This same concern should be shared by military counsel to enhance the perception of fairness in the military justice system.

Michigan v. Lucas—Rape Shield Law

In *Michigan v. Lucas*[35] a seven-justice majority held that the Michigan State Court of Appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under the state's rape shield law always violates the sixth amendment.

Lucas was convicted on two counts of criminal assault. At trial his defense was consent. As of August 31, 1984, Lucas and the victim had been boyfriend and girlfriend for approximately six to seven months. The victim testified that they broke up two weeks before that date. The victim stated that on August 31, 1984, the defendant, at knife point, forced her to go to his apartment. She testified that she was beaten physically, was forced to perform fellatio and sexual intercourse, and later that night again was forced to have sexual intercourse. She did not leave the house, however, until about ten o'clock at night on September 1, 1984.

The trial court held that evidence as to the prior sexual relationship between Lucas and the victim could not be introduced because of the failure of defense counsel to give notice. The court of appeals reversed the trial court and indicated that the trial court erred by excluding the evidence because of the failure to give notice.[36] The court noted that the notice requirement lost its "logical underpinnings" under the facts presented.[37] The court of appeals also indicated that the trial court did not exclude the evidence for lack of materiality or relevancy, nor did the trial court exclude the evidence because it would have been more unfairly prejudicial than probative.[38]

The Supreme Court noted that the notice and hearing requirement under the state statute served a legitimate state interest in protecting against surprise, harassment, and undue delay.[39] Whether evidence may be excluded for violating the state rule depends upon a number of factors, including whether the failure to comply was willful or negligent, the impact on the opposing sides, and other alternatives that are available to protect the legitimate interest of the state in requiring discovery.

Justice Stevens, dissenting, again voiced the objection that the Court should not have taken this case on appeal.[40] Addressing the issue, however, he questioned whether the exclusion of the evidence under the facts of

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[26] *Id.* at 2162.

[27] *Id.* at 2163.

[28] *Id.* at 2164.

[29] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 201(f)(1)(C), 903(a)(2) [hereinafter R.C.M.].

[30] *See* R.C.M. 201(f)(1)(A)(iii)(b): "[T]he death penalty may not be adjudged if ... [t]he case has been referred as noncapital."

[31] R.C.M. 1004(b)(1).

[32] R.C.M. 1004(a)(2).

[33] R.C.M. 1004(b)(6).

[34] *Lankford*, 49 Crim. L. Rep. at 2164 (quoting Strickland v. Washington, 466 U.S. 668, 686-87 (1984)).

[35] 49 Crim. L. Rep. (BNA) 2156 (U.S. May 20, 1991).

[36] People v. Lucas, 160 Mich. App. 692, 408 N.W.2d 431 (1987).

[37] *Id.* at 693, 408 N.W.2d at 432 (quoting People v. Williams, 95 Mich. App. 1, 289 N.W.2d 863 (1980)).

[38] *Id.*, 408 N.W.2d at 432.

[39] *Lucas*, 49 Crim. L. Rep. at 2157. These reasons also may be employed in excluding evidence under Military Rule of Evidence 403. *See* Manual for Courts-Martial, United States, Mil. R. Evid. 403.

[40] *Lucas*, 49 Crim. L. Rep. at 2158 (Stevens, J., dissenting):

> The fact that a state court's opinion could have been written more precisely than it was is not, in my view, a sufficient reason for either granting certiorari or requiring the state court to write another opinion. We sit, not as an editorial board of review, but rather as an appellate court.

the case ever would be appropriate when the alleged victim was a girlfriend of the accused. Specifically, that the evidence would surprise the prosecutor is extremely doubtful.[41]

The Court asserted that a number of alternatives to exclusion of evidence existed, but it did not state whether exclusion would have been proper.[42] The Court implicitly sought to give some control to the trial judges to enforce disclosure rules to ensure judicial economy. It declined to express a view on what was conceded to be the shortest notice requirement in the nation.[43]

The alternatives include: (1) ordering the party to disclose the information; (2) granting a continuance; (3) striking the testimony of the witness; (4) assuming facts against the party not making disclosure; (5) granting a mistrial; (6) holding a party in contempt; (7) reporting an attorney to the bar for discipline; or (8) dismissing the specification affected. In determining which sanction would be appropriate, a number of factors need to be examined.

In *Lucas* the Court indicated that exclusion was permissible in *Taylor* because of willful conduct designed to obtain a tactical advantage.[44] The Court also recognized that surprise could be a factor. Before the Supreme Court, Lucas did not try to defend the broad holding of the state court, but indicated that the prosecution was not surprised.[45] Actually, Justice Stevens, for that reason alone, agreed with the Michigan Court of Appeals—that is, because prosecution was aware of the evidence since it had been adduced at the preliminary hearing, no reason arose to exclude it.[46]

The *Lucas* case applies to a number of rules requiring notice. Military counsel specifically should consider the notice requirements of Military Rules of Evidence 412, 609, 803(24), 804(b)(5), 304(d)(1), 311(d)(1), and 321(c)(1).

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[41] *Id.* at 2159 (Stevens, J. dissenting): "We did not hold in *Taylor* [*v. Illinois*, 484 U.S. 400, 413 (1988)] that preclusion is permissible every time a discovery rule is violated. Rather we acknowledge that alternative sanctions would be 'adequate and appropriate in most cases.'" *Id.* at 2158.

[42] *Lucas*, 49 Crim. L. Rep. at 2158.

[43] *Id.* at 2157.

[44] *Id.* at 2158. While not mentioned by the Court in *Lucas*, the facts in *Taylor* were more aggravated than willful misconduct merely designed to obtain a tactical advantage. The evidence indicated that this was the third time that the attorney displayed this type of misconduct.

[45] *Id.*

[46] *Id.* at 2159 (Stevens, J., dissenting). Exclusion is not proper when surprise is not an issue.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

The Judge Advocate General's School Continuing Legal Education (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, and local action officers for The Judge Advocate General's School Continuing Legal Education (On-Site) Training program for academic year (AY) 1992. The Judge Advocate General has directed that all Reserve component judge advocates assigned to the Judge Advocate General Service Organizations (JAGSOs) or the judge advocate sections of United States Army Reserve and Army National Guard troop program units attend the training in their geographical area, in accordance with Army Regulation 135-316. All other judge advocates—that is, active, Reserve, National Guard, and other services—are strongly encouraged to attend the training sessions in their areas.

The On-Site program features instructors from The Judge Advocate General's School, U.S. Army (TJAGSA), and has been approved for continuing legal education (CLE) credit in most states. Some on-sites also feature instruction by judge advocates from other services and from local civilian attorneys. The civilian bar is invited and encouraged to attend on-site training.

Action officers are required to coordinate with all Reserve component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area.

Limited funding from United States Army Reserve Personnel Center (ARPERCEN) is available on a case-by-case basis for IRR members to attend on-sites in an active duty for training (ADT) status. Applications for ADT should be submitted eight to ten weeks prior to the scheduled on-site to Commander, ARPERCEN, ATTN: DARP-OPS-JA (LTC Kuklok), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR also may attend for retirement point credit pursuant to Army Regulation 140-185. These actions provide maximum opportunity for interested Judge Advocate General Corps (JAGC) officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists, legal noncommissioned officers (NCOs), and court reporter training to run concurrently with on-site training. In the past, enlisted training programs have featured Reserve component JAGC officers and NCOs as instructors, as well as active duty staff judge advocates and instructors from the Army Legal Clerk's School at Fort Benjamin Harrison. A model training plan for enlisted soldier On-Sites has been distributed to assist in planning and conducting this training.

JAGSO detachment commanders and SJAs of other Reserve component troop program units will ensure that unit training schedules reflect the scheduled on-site training. Attendance may be scheduled as regularly scheduled training (RST), as equivalent training (ET), or on manday spaces. Units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the days of instruction.

Questions concerning the on-site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Captain Natalie Griffin, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (telephone 804/972-6380).

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 92

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
12, 13 Oct 91	Minneapolis, MN 214th MLC Thunderbird Motor Hotel Bloomington, MN	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 COL Morrison MAJ Connor MAJ Hayden Dr. Foley	LTC Randel I. Bichler 760 Seventh St., SW Wells, MN 56097 (507) 553-5021
26, 27 Oct 91	New York, NY 77th ARCOM & 4th MLC Fordham University Law School New York, NY	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Compere MAJ Hunter COL Merck CPT Griffin	LTC Harvey Barrison HQ, 77th ARCOM ATTN: AFKA-ACA-JA Flushing, NY 11359 (212) 269-0927
2 Nov 91	Detroit, MI 300th MP Cmd Zussman USAR Center Inkster, MI	AC GO RC GO Int'l Law Crim Law GRA Rep	 BG Ritchie MAJ Myhre MAJ Hunter LTC Hamilton	COL Peter A. Kirchner SJA, 300th MP Cmd 3200 S. Beech Daily Rd. Inkster, MI 48141 (313) 561-9400
3 Nov 91	Indianapolis, IN 136th JAG Det Bldg 400 Ft. Ben Harrison, IN	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Morrison MAJ Myhre MAJ Hunter CPT Griffin	CPT Steven H. David 123d ARCOM ATTN: AFKE-AC-INSJ Ft. Ben Harrison, IN 46216 (317) 549-5076
23, 24 Nov 91	Philadelphia, PA 79th ARCOM & 153d MLC Willow Grove Naval Air Station Willow Grove, PA	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Ritchie MAJ Borch MAJ Hancock LTC Hamilton	LTC Robert C. Gerhard 222 South Easton Glenside, PA 19038 (215) 885-6780
13-15 Dec 91	New Orleans, LA 2d MLC/LAARNG Radisson Suites Hotel New Orleans, LA	AC GO RC GO Int'l Law Int'l Law GRA Rep	 BG Compere MAJ M. Warner CPT Hudson COL Curtis	LTC George Simno 1728 Oriole Street New Orleans, LA 70122 (504) 484-7655
4, 5 Jan 92	Long Beach, CA 78th MLC Long Beach Marriott Long Beach, CA	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Compere LCDR Rolph MAJ Hatch Dr. Foley	MAJ Jeffrey K. Smith 500 S. Bonita Avenue Pasadena, CA 91107 (213) 974-5961

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
11, 12 Jan 92	Seattle, WA 6th MLC University of Washington Law School Seattle, WA	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Ritchie LTC Holland MAJ Emswiler LTC Hamilton	LTC Paul K. Graves 223d JAG Det 4505 36th Avenue W. Seattle, WA 98199 (206) 281-3002
14-16 Feb 92	San Antonio, TX Fifth Army SJA Sheraton Gunter Hotel San Antonio, TX	AC GO RC GO Crim Law Crim Law GRA Rep	 BG Ritchie MAJ Warner MAJ Cuculic Dr. Foley	MAJ Dennis Carazza HQ, Fifth U.S. Army ATTN: AFKB-JA Ft. Sam Houston, TX 78234 (512) 221-4329
22 Feb 92	Salt Lake City, UT UTARNG Olympus Hotel Salt Lake City, UT	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Morrison LCDR Rolph LTC Jones TBA	LTC Barrie Vernon P.O. Box 1776 Draper, UT 84020-1776 (801) 524-3682
23 Feb 92	Denver, CO 116th JAG Det Fitzsimmons Army Medical Center Aurora, CO	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Ritchie LCDR Rolph LTC Jones CPT Griffin	LTC Thomas G. Martin 523 N Nevada Avenue Colorado Springs, CO 80903 (713) 578-1152
29 Feb, 1 Mar 92	Presidio of San Francisco, CA 5th MLC 6th Army Conference Facility Presidio of San Francisco	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Ritchie MAJ Myhre MAJ Bowman COL Curtis	COL David L. Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030
7, 8 Mar 92	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC	AC GO RC GO Int'l Law Crim Law GRA Rep	 COL Morrison LTC Elliott LTC Leclair CPT Griffin	MAJ Edward Hamilton South Carolina Nat'l Bank 1405 Main Street Suite 506 Columbia, SC 29226 (803) 765-3227
13-15 Mar 92	Kansas City, MO 89th ARCOM KCI Airport Marriott Kansas City, MO	AC GO RC GO Ad & Civ Law Ad & Civ Law GRA Rep	 BG Compere COL Merck MAJ McCallum LTC Hamilton	CPT Ted Henderson HQ, 89th ARCOM 3130 George Washington Blvd Wichita, KS 67210 (316) 681-1759
21, 22 Mar 92	Washington, D.C. 10th MLC TBD	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 COL Morrison CPT Wilkins MAJ McFetridge COL Curtis	LTC Frank Carr 4233 Dancing Sunbeam Ct. Ellicott City, MD 21043 (202) 272-0033
28, 29 Mar 92	Boston, MA 94th ARCOM Days Inn Burlington, MA	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 BG Ritchie MAJ Comodeca MAJ Tate Dr. Foley	COL Gerald D'Avolio SJA, HQ, 94th ARCOM ATTN: AFKA-ACC-JA Bldg. 1607 Hanscom AFB, MA 01731 (617) 523-4860
4, 5 Apr 92	Nashville, TN 125th ARCOM TBD	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 BG Compere MAJ Hostetter MAJ Melvin TBA	LTC Robert Washko U.S. Court House 110 9th Ave. S., #A-961 Nashville, TN 37203 (615) 736-5151

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
11, 12 Apr 92	Chicago	AC GO		1LT Carolyn Burns
	7th MLC	RC GO	BG Compere	96th JAG Det.
	Bldg. 31	Contract Law	MAJ Killam	Bldg. #82
	Ft. Sheridan, IL	Ad & Civ Law	MAJ Lassus	Ft. Sheridan, IL 60037
		GRA Rep	COL Curtis	(312) 538-0733
2, 3 May 92	Columbus, OH	AC GO		CPT Kent N. Simmons
	9th MLC	RC GO	COL Morrison	765 Taylor Station Rd.
	Lenox Inn	Int'l Law	MAJ Warner	Blacklick, OH 43004
	Reynoldsburg, OH	Crim Law	CPT Wilkins	(614) 755-5434
		GRA Rep	ARNG	
9, 10 May 92	Jackson, MS	AC GO		MAJ Dolan D. Self
	11th MLC	RC GO	COL Morrison	2012 Tidewater Lane
	Mississippi College of Law	Int'l Law	MAJ Addicott	Madison, MS 39110
	Jackson, MS	Contract Law	MAJ Dorsey	(601) 856-5953
		GRA Rep	LTC Hamilton	
15-17 May 92	Albuquerque, NM	AC GO		MAJ Darrell Riekenberg
	210th JAG Det	RC GO	BG Compere	210th JAG Det
	Sheraton at Old Town	Contract Law	MAJ Cameron	400 Wyoming Blvd., NE
	Albuquerque, NM	Contract Law	MAJ Helm	Albuquerque, NM 87123
		GRA Rep	COL Curtis	(505) 766-1311
19-21 May 92	San Juan, PR	AC GO	BG Ritchie/	TBA
	TBD	RC GO	COL Morrison	
		Int'l Law	CPT Hudson	
		Ad & Civ Law	MAJ McCallum	
		GRA Rep	CPT Griffin	

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: autovon 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

9-13 September: 10th Operational Law Seminar (5F-F47).

23-27 September: 4th Installation Contracting Course (5F-F18).

7-11 October: 1991 JAG Annual Continuing Legal Education Workshop.

15 October-20 December: 126th Basic Course (5-27-C20).

21-25 October: 108th Senior Officers Legal Orientation (5F-F1).

21-25 October: 9th Federal Litigation Course (5F-F29).

28 October-1 November: 49th Law of War Workshop (5F-F42).

28 October-1 November: 29th Legal Assistance Course (5F-F23).

4-8 November: 27th Criminal Trial Advocacy Course (5F-F32).

12-15 November: 5th Procurement Fraud Course (5F-F36).

18-22 November: 33d Fiscal Law Course (5F-F12).

2-6 December: 11th Operational Law Seminar (5F-F47).

9-13 December: 40th Federal Labor Relations Course (5F-F22).

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

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

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: Professional Recruiting Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

November 1991

1: NYSBA, Enforcement of Judgments, Albany, NY.

1: NYSBA, Strategy & Tactics in Business and Commercial Litigation, Albany, NY.

1: NYSBA, New York Appellate Practice, Long Island, NY.

1: NYSBA, The Art of Cross Examination, New York, NY.

1-2: LSU, 1991 Recent Developments in Legislation and Jurisprudence, Baton Rouge, LA.

4-5: FP, Business Immigration Law Today, San Diego, CA.

4-5: FP, Working with the FAR, Washington, D.C.

4-5: FP, The GSA Schedule, Washington, D.C.

5-8: ESI, Contract Pricing, Washington, D.C.

6: NYSBA, Bankruptcy Litigation for the Non-Bankruptcy Attorney, various cities, NY.

6-8: FP, Understanding Overhead in Government Contracts, San Diego, CA.

6-8: FP, Government Contract Audits and Reviews, Los Angeles, CA.

6-8: FP, Subcontracting, San Francisco, CA.

7-8: FP, Rights in Technical Data & Patents, San Diego, CA.

8-9: NYUSL, Corporate Tax Planning Workshop, San Francisco, CA.

8-9: LSU, 21st Annual Estate Planning Seminar, Baton Rouge, LA.

10-15: AAJE, Judicial Problem Solving: Creative and Constructive Techniques, San Antonio, TX.

11-12: FP, Franchising, Los Angeles, CA.

11-13: FP, Changes in Government Contracts, Washington, D.C.

11-13: FP, Practical Negotiation of Government Contracts, Las Vegas, NV.

12-15: FP, Fundamentals of Government Contracting, Washington, D.C.

12-15: ESI, Small Purchases, Arlington, VA.

12-15: ESI, ADP/Telecommunications Contracting, Washington, D.C.

13-14: ESI, International Offsets, Phoenix, AZ.

13-15: FP, Advanced Subcontracting and Teaming Agreements, Washington, D.C.

14-15: FP, Foreign Military Sales, Washington, D.C.

15: NYSBA, The Art of Cross Examination, Rochester, NY.

15-16: LSU, 10th Institute on Real Estate Law, Baton Rouge, LA.

18-22: FP, Concentrated Course in Construction Contracts, Las Vegas, NV.

19-22: ESI, Contract Pricing, Denver, CO.

20-22: FP, Government Contract Claims, Washington, D.C.

23: CHBA, Environmental Developments Affecting Real Estate, Chicago, IL.

30: UMC, Charitable Tax and Estate Planning Strategies, Kansas City, MO.

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

AAJE: American Academy of Judicial Education, 1613 15th Street-Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

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

BNA: The Bureau of National Affairs Inc., 1231 25th Street, NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

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

CHBA: Chicago Bar Association, CLE, 29 South LaSalle Street, Suite 1040, Chicago, IL 60603. (312) 782-7348.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

EEI: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, NW., Washington, D.C. 20006-3604. (202) 638-0252.

FP: Federal Publications, 1120-20th Street, N.W., Washington, D.C. 20036. (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885,, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 777 N. Capitol Street, N.E., Suite 405, Washington, D.C. 20002. (202) 408-0990.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

HICLE: Hawaii Institute for CLE, UH Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

JMLS: John Marshall Law School, 315 South Plymouth Court, Chicago, IL 60604. (312) 427-2737, ext. 573.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

LRP: LRP Publications, 421 King Street, P.O. Box 1905, Alexandria, VA 22313-1905. (703) 684-0510; (800) 727-1227.

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

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

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

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MICPEL: Maryland Institute for Continuing Professional Education of Lawyers, Inc. 520 W. Fayette Street, Baltimore, MD 21201. (301) 238-6730.

MILE: Minnesota Institute of Legal Education, 25 South Fifth Street, Minneapolis, MN 55402. (612) 339-MILE.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

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

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NHLA: National Health Lawyers Association, 522 21st Street, N.W., Suite 120, Washington, DC 20006. (202) 833-1100.

NIBL: Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

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

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NPI: National Practice Institute, 330 Second Avenue South, Suite 770, Minneapolis, NM 55401. (612) 338-1977, (800) 328-4444.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452 .

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

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

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

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, P.O. Box 577, Helena, MT 59624-0577 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

STCL: South Texas College of Law, 1303 San Jacinto Street, Houston, TX 77002-7006. (713) 659-8040.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

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

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

USTA: United States Trademark Association, 6 East 45th Street, New York, NY 10017. (212) 986-5880.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually of course
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually

Oregon	Initially date of birth—thereafter every three years except new admittees and reinstated members report an initial one-year period
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1991 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, autovon 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD A229148	Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).
AD A229149	Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).
AD B144679	Fiscal Law Course Deskbook/ JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B136218	Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135492	Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).
AD B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
AD B147096	Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
AD A226159	Model Tax Assistance Program/ JA-275-90 (101 pgs).
AD B147389	Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).
AD B147390	Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).
AD A228272	Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD 230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD 230991 Legal Assistance Guide: Wills/ JA-262-90 (488 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

*AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

*AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

*AD A236860 Senior Officers Legal Orientation/JA 320-91 (254 pgs).

AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).

*AD B140543L Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

*AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

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

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Armywide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms are in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements are in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, one may be requested by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. They may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. *New publications and changes to existing publications.*

Number	Title	Date
AR 25-1	Information Management The Army Information Resources Management Program, Interim Change 102	8 Apr 91
AR 210-13	General/Flag Officer's Quarters (GFOQ) and Installation Commander's Quarters (ICQ) Management	31 May 91
AR 700-4	Logistics Assistance Program (LAP)	22 Apr 91
JFTR	Joint Federal Travel Regulations, Uniformed Services, Volume 1, Change 54	1 Jun 91
PAM 25-96	The Army Library Program	18 Mar 91
PAM 50-6	Chemical Accident or Incident Response and Assistance (CAIRA)	17 May 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to *D*ownload a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for *X*-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to *A*bandon the conference. Then enter [g] for *G*ood-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to *D*ownload a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here, until you hear a beep, which signals that file transfer is complete. The file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say *G*ood-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed file, it will be usable on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA

22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA recep-

tionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Literature and Publications Office Item.

The School currently has a large inventory of back issues of *The Army Lawyer* and the *Military Law Review*. Practitioners who desire back issues of either of these publications should send a request to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Not all issues are available and some are in limited quantities. Accordingly, we will fill requests in the order that they arrive by mail.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

PATRICIA P. HICKERSON
Colonel, United States Army
The Adjutant General

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US Army
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