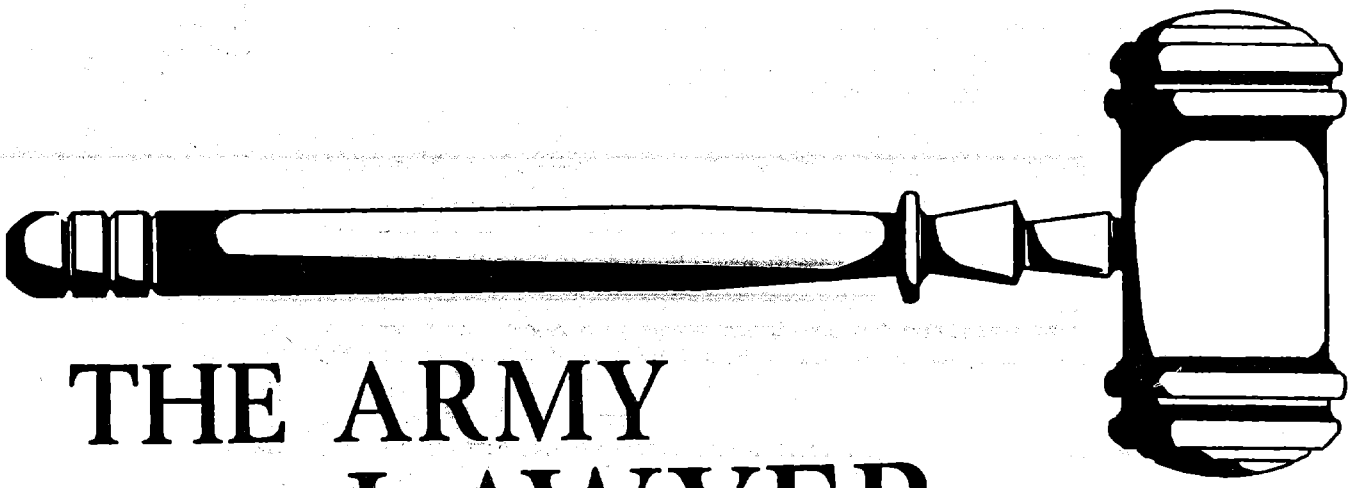

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Editor
Major Thomas J. Feeney

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

REPLY TO
ATTENTION OF

04 APR 1988

DAJA-LA (27-3c)

MEMORANDUM FOR: ALL JUDGE ADVOCATES

SUBJECT: Reserve Component Premobilization Legal Preparation - Policy Memorandum 88-1

1. This memorandum supersedes TJAG Policy Letters 84-1, 16 Feb 84 (The Army Lawyer, March 1984), and 86-9, 8 Jul 86 (The Army Lawyer, September 1986). It incorporates all current Reserve Component (RC) premobilization legal preparation policies for RC soldiers and their families.

2. Definitions.

a. Premobilization Legal Preparation (PLP) is a proactive initiative designed to alert RC soldiers and their families of the possible consequences of failing to have their legal affairs in order and providing legal services in the event of mobilization. PLP is not part of the Army Legal Assistance Program (ALAP), although it does have common elements of personal affairs counseling and preparation of legal instruments. PLP consists of the following elements:

(1) Premobilization Legal Counseling Program (PLCP). A program which informs RC soldiers and their families of the need to have their personal affairs in order before mobilization. It is identical to the Premobilization Legal Counseling Program required by the FORSCOM Mobilization Plan (FMP), Volume III, Part 1, FORSCOM Mobilization and Deployment Planning System (FORMDEPS).

(2) Premobilization Legal Services (PLS). A program which provides individual advice to RC soldiers and their families concerning legal problems that relate to mobilization. It includes the preparation of simple wills and powers of attorney.

b. Family members of RC soldiers include the spouse and minor children of RC soldiers who would be entitled to identification cards (DD Form 1173) upon mobilization.

3. All RC Judge Advocates (JAs) are authorized to render PLCP and PLS regardless of the training status of the RC JA or the RC soldiers.

4. All JAs are reminded of the importance of preparing RC soldiers and their families for mobilization. Resources must be carefully managed to ensure that legal services are delivered to the maximum extent possible while maintaining the unit's training and mobilization mission.

a. PLCP will be provided to all RC soldiers by RC JAs pursuant to the FORMDEPS. PLCP will be provided to families subject to available resources.

b. PLS will be provided to RC soldiers and their families by RC JAs subject to available resources. PLS should not detract from essential training requirements.

5. RC soldiers and their families are eligible for PLCP and PLS by active duty JA offices when the RC soldier is on orders for OCONUS training.

6. Active duty JAs will provide logistical and personnel support to assist RC JAs in carrying out their mission whenever possible.

7. RC JAs are prohibited from representing RC personnel for a fee on the same matter if the soldier was first seen in their military capacity. Additionally, RC JAs are prohibited from accepting, either directly or indirectly, any compensation or gift for any referral to a civilian attorney while performing duties in a RC JA capacity.

8. The Rules of Professional Conduct for Lawyers (DA Pam 27-26, Dec 1987) apply to all attorneys rendering PLP services.

9. All RC personnel acting within the scope of this policy letter are encompassed by 10 USC 1054 with regard to legal malpractice suits.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

On Teaching—The JAG School Method

Colonel Paul Jackson Rice
Commandant, The Judge Advocate General's School

The Judge Advocate General's School, U.S. Army, has been located on the grounds of the University of Virginia, in Charlottesville, for thirty-six years. The School's reputation has grown through the years to where it is now considered one of the most outstanding military schools in the nation. While many factors contribute to the School's prestige, it is the quality of instruction that sets the School apart.

I am one of those people who has a knack for stating the obvious, such as, the quality of instruction enhances a school's prestige. This does, however, lead to the question: How does the quality stay high year after year while instructors come and go? There is no farm system. It helps to start with outstanding people, though, and the leadership of the JAG Corps wisely has insured that the School receives the finest young judge advocates. Then the shaping begins.

Every new instructor (in fact, every new officer assigned to the School) attends our Method of Instruction Course. This intensive three-day course was developed in 1976 by Dr. John Sanderson, our educational consultant. The American Bar Association inspectors praised it during their last visit. (I never pass up an opportunity to mention that we are an ABA accredited law school). They were impressed both with the course's existence and its content. The course begins with a two-hour session with the commandant. I intend to devote the rest of this article to the general information and guidance I pass on during that session. The emphasis will be on those factors that make an outstanding instructor.

While I have had the good fortune to present this class the last two years, I am just an adjunct contributor to the wealth of ideas that have passed religiously from one generation of instructors to another. They were passed to me when I became an instructor in 1971. So, while the ideas belong to many, I am putting them on paper for the benefit of all.

It is clearly easier to tell someone how to be a successful instructor than to be one. "To be a successful sprinter you must be faster than your opponents." The statement is quite true but not very helpful. I'm afraid that the elements needed to be a successful instructor may also seem too simplistic, but they work.

To be an outstanding instructor you must first know your subject. There is no substitute for being an expert in your area of responsibility. This requires long hours of reading; you must study everything that can be found in the area. Students must see you as a scholar in your chosen subject. This is what makes first year instruction so exhausting and frustrating; fighting your way up the crowded escalator coming down. No matter how much you know, though, a student can pose a question that will stump you. Don't be afraid to say you don't know. The worst thing you can do is to attempt to bluff your way through. You may lose your credibility with the students without ever getting a signal, and they will not, in most cases, give you a second chance to get it back. The successful instructor admits being stumped and has the answer at the beginning of the next class. This ties in with the fourth element, a genuine concern that the student learn, which I will address later.

Next, come up with your own approach to handling the material. Your style has to be right for you. Study other instructors and take note of their approaches. I even studied my minister—they are teachers, too. You must remember, however, that what is right for one instructor may not be right for another. Nor is there one appropriate teaching method for all audiences. Copying what is successful for someone else could be a disaster for you. One instructor may be naturally witty and be able to tie humor into many of the teaching points. Another may be more low key, drawing the students in with problems and scenarios. One instructor may receive great mileage out of graphics while still another instructor uses none.

Some material lends itself better to one approach than another. It would be hard to teach criminal evidence without digging into the cases, while teaching the law of war may not require extensive examination of case law. The secret is developing the right style for you and your material. The key is to be yourself, not someone else.

One of the threads of continuity at the JAG School is that upon an instructor's departure, his or her "teaching notes" are passed on to the next instructor. We pride ourselves in saying that we don't have professors teaching from old, dog-eared notes. At the same time, it is certainly comforting to see the existence of notes developed by some of the legends of the School. There is a tendency, upon starting out, to want to adopt the existing outlines and notes because they are proven. While their use is essential, they must be restructured and modified to accommodate the approach and style of the new instructor. Adopting someone else's notes and style is a loser, but it happens. That is why we sometimes see a metamorphosis take place in a first-year instructor. Halfway through my first year as an instructor I trashed my class outlines and started over. I had been parroting someone else's notes.

The elements of being a successful instructor are like legs on a stool. If any one is missing, it gets wobbly. So along with a complete knowledge of your subject and your own style of presentation, you must generate tremendous enthusiasm for your subject. This excitement must come from within. If you are not excited about the class and the material to be conveyed, how can you expect the student to be excited? Students can sense the electricity in the air (or lack thereof) and you have to generate it. This shouldn't be difficult. If you are devoting most of your professional time and energy to teaching a particular area of law, then the encounter with the students is the climactic joining of the issue. It should start when you wake up in the morning and build until class time. Don't tell me it's hard to get excited about certain dry subjects. I used to teach a dynamite class on legal bibliography. I still get excited when I think about it.

A good instructor can sense whether the students are following or whether they have drifted away. If the students are with you, they will react at certain times in certain ways—A chuckle, a nod, indignation, or confusion. If they look confused, its time to stop and sort it out. Believe me, a confused reaction is better than the glassy stare. When the glazed-over look tells you that you have lost them, the only thing to do is go back and get them. This may require you to be demonstrative or even provocative, but that is better than traveling the road alone.

One way to ensure a lonely trip is to apologize for your material. How many times have you heard an instructor say, "This next area gets a bit confusing," or "I have never completely understood this subject." That is the kiss of death. If you tell the class the subject is fuzzy, they will be satisfied to agree, "Yep, it's fuzzy." Another apology—"I'm sorry I didn't have more time to put my notes in order." The students will not accept the apology. They will readjust their orientation.

Be flexible when the unexpected occurs. I remember a class my boss was teaching in 1972. He was twenty minutes into a two-hour session with our graduate students. At that moment, the Deputy Director of Academics slipped into the back of the room and posted on the bulletin board the next duty assignments of the entire class. A few students turned around and looked at the board. Then a few more looked. Then one student got up and went back to the board. Still another student got up and the instructor knew the class was lost. An instructor who did not care might have just kept going, but this instructor had thoughts to convey. He addressed the problem and told the class to take an extended break, look at the board, make their phone calls, and be ready to return to the classroom in mind and body in twenty-five minutes. He then went looking for the Deputy Director.

The fourth and last element is one that I have observed through the years, but it took me too long to figure it out. An instructor must have a genuine concern that the student take as much away from the class as possible. If you are truly interested in the students, they will sense it. Then the chemistry is at its best. I still remember my JAG School criminal evidence instructor in the basic class. That was a quarter of a century ago. This major started each class by going back and resolving issues that were left hanging from the previous class. We knew he had devoted many additional hours to research the issues so we would have a better understanding. We had a number of sessions with this officer. Then one day in December, 1962, he walked into the classroom wearing silver oak leaves. We gave him a standing ovation. Thirteen years later, in 1975, Major General Wilton B. Persons, Jr. was selected to be The Judge Advocate General.

The engineers have an expression for figuring out what the student needs to know. They call it "systems engineering." They look at what the student will be required to do on the job. It may be operating a crane. Then they work backwards to determine what distinct tasks the crane operator must know. After sufficient analysis, they know exactly what to teach. You may say that's great for crane operators but not for the practice of law. Well, I submit that it's not a bad place to start. In fact, if you want your students to be able to introduce photos and real evidence before the court, it's a great place to start.

I don't envy anyone who is starting out as a new instructor. Perhaps it is good to know that almost all instructors go through the same traumatic experiences. Dr. Spock made a lot of money telling parents that their child was normal because other children did the same thing. Believe me, it is normal for a new instructor to hear a quake in the voice or to have momentary "shakes". I speak from experience. I still remember the first class I taught at the JAG School. A student raised his hand. I stopped in the middle of a sentence, called on him, and didn't understand a word he said. While there is no foolproof elixir, the best way to avoid nervousness is to prepare thoroughly and work far enough ahead.

What about your relationship with your students? Can you be in charge and yet be one of the gang? During my senior year in law school, I was selected to teach a laboratory class in business law at the business school. I felt very confident with the subject and was sure that I could establish an excellent rapport with the students. After all, I was a student, too. And that is how I presented myself the first day. Not as a faculty member, but as just another student, albeit a law student, but one who could relate to them because I was aware of their problems and concerns.

So often in life you get exactly what you strive for. I wanted to be one of the students, and that's exactly what I became. I was never in control. It was a very unsatisfactory experience; one that I rectified the next semester. I was fortunate to have a second chance. The next time I introduced myself as Mr. Rice, their lab instructor. There was no doubt who was in charge. I thoroughly enjoyed that class. There was even an appropriate amount of frivolity, but never a loss of control. The lesson I learned was that instructors must first establish their position with the class. Once their position is firm, then they can step down from the platform for a light moment, well knowing that they can return to their position of authority at will. Bad experiences teach great lessons.

You can be the expert without being arrogant. You can be in charge without losing your cool. If you lose your temper, you will also lose your class. Threatening a student is the kiss of death. Classmates will even support and defend the class clown if he or she is being unfairly attacked.

As a member of a law faculty who teaches other lawyers, there is always a possibility that one of the students knows more about a particular aspect of the instruction than you do. Don't cut the student off. Be diplomatic. Take advantage of the student's knowledge and use it to enrich the quality of the class. Every so often a student will inquire, "Wasn't there a recent case in Oregon on this point?" You are supposed to be the expert, but you have never heard of an Oregon case (and maybe it doesn't exist). At this point, I would quiz the student as to what he or she knows about the case. That may be of little help. Then I would inquire if anyone in the class knows of the case. If a hand goes up, use the information provided to enlighten. If no hand goes up, you can shrug your shoulders, hold the question until the next class session (when you've had a chance to research it), or assign research on the issue to the inquiring student. I had the shrug down to an art.

Instructors need to be reminded that they represent the JAG School when they are on the platform. They need to present the law, including its theory and philosophy, in a dispassionate manner. Once in a while an instructor will be

carried away with how the law should be. It is quite appropriate for instructors to express personal views, as long as they are identified as such, and the existing majority views are clearly defined.

Nothing drives home a teaching point better than an example. If the example is humorous or has a twist, so much the better. Something out of the ordinary will cause the student to better remember. Setting out the specific facts of a case cause it to be more vivid in the student's memory. Compare these examples: (1) A shoots B and drags his body off-post; (2) Specialist Green has been wandering around Fort Swampy for three days with a sawed-off shotgun under his BDU jacket looking for Sergeant Feeber. Finally Green gets Feeber alone, shoots him and drags his body off-post. While the first example is a nice tight legal abstract, it probably will not have the impact on the students of the second example.

Literary license also permits you to expand and enhance those personal experiences that make such great teaching points. All my stories have become better through the years. I submit there is nothing wrong with embellishment for pedagogical reasons. Just don't always make yourself the hero.

Conclusion

The JAG School standard of excellence in teaching is worthy of emulation. The key elements that a successful instructor must have are a complete knowledge of the subject, a style of presentation that suits the instructor and the material, great enthusiasm, and a deep desire that the students take knowledge away from the classroom. I am convinced that use of these elements will make you a better instructor, regardless of your subject or your audience. Try it the next time you are tagged to teach an hour on professional development.

Processing GAO Bid Protests

Captain Timothy J. Rollins
Bid Protest Branch, Contract Law Division, OTJAG

The Contract Law Division, Office of The Judge Advocate General, is responsible for the Army's response to bid protests filed with the General Accounting Office (GAO) against solicitations issued by installations and organizations (other than those falling under the Army Materiel Command (AMC) or the Army Corps of Engineers). Primary responsibility for developing the Army's response, known as the "administrative report," rests with the installation, but the report is forwarded to the Contract Law Division at least five working days before it is due at the GAO for review. The Contract Law Division files the report with the GAO and distributes copies to the protester and other interested parties.

The following guidelines are designed to provide a basic overview of how installation personnel should process GAO bid protests. The guidelines include background information on how the GAO and the Contract Law Division (DAJA–KL) operate, procedural requirements, and some practice tips on how to prepare an effective administrative report. These guidelines are *not* meant to be a comprehensive guide to GAO procedural requirements. Any lawyer practicing in this area must be familiar with the GAO Bid Protest Regulations. Current copies of these regulations, including the latest changes, were recently distributed by the Contract Law Division through the major Commands (MACOMs). Additional copies are available from the Contract Law Division.

GAO Procedures

Organization of GAO Procurement Law Control Group

The "procurement law control group"—the name of the group of people at the GAO who hear and decide bid protests—is actually a part of the Office of the General Counsel of the General Accounting Office. The group is headed by an Associate General Counsel, who is currently Mr. Seymour Effros, and is subdivided into Procurement Law Groups I and II. This division is purely administrative and does not reflect any division of subject matter. A Deputy Associate General Counsel heads each group. Currently these are Mr. Ronald Berger and Mr. Robert Strong.

The two procurement law groups are further subdivided into "teams" for supervisory purposes. A team comprises six or seven action attorneys headed by a supervisor, who is a former action attorney with some seniority. The action attorneys review the file, conduct any non-fact finding conferences, and write all first drafts of decisions. They then forward the entire file for review, first by the action attorney's immediate supervisor, then by the appropriate deputy associate general counsel, and finally by the associate general counsel. It has been said, however, that an action attorney's initial decision sustaining or denying the protest is rarely reversed. At the most, these levels of review seem to focus on the particular reasoning or language that will appear in the decision.

GAO Actions on Receipt of Protests

Assign "B Number." When the GAO receives a bid protest, it immediately assigns it a protest number, or "B number." This number is logged into the automated tracking system and is cross-indexed to the solicitation number.

Notify DAJA–KL. GAO then telephonically notifies the agency's point of contact. For the Army (with the exception of AMC and the Corps of Engineers) the point of contact is the Contract Law Division, Office of The Judge Advocate General. This telephonic notification includes the protester's name; the date the protest was filed at the GAO;

the "B number"; the solicitation number; and a brief statement of the grounds of the protest. This last bit of information is not always accurate—the people making the notification calls are not lawyers and may not be able to interpret the protest correctly.

Send a Copy of the Protest to DAJA–KL. Next, a copy of the protest is mailed to DAJA–KL. GAO has agreed to telefax the protest directly to DAJA–KL, a procedure AMC currently employs.

Send to GAO Deputy General Counsel. After the agency receives telephonic notification, the protest is sent to one of the GAO's two deputy associate general counsels. One of these two people reads *every* protest to see whether the protest is a candidate for immediate dismissal—perhaps because it is untimely on its face, or because the protest clearly involves an issue with which the GAO will not involve itself.

Z-gram Dismissals. If the deputy associate general counsel decides to dismiss the protest immediately, the GAO issues what is known as a "Z-gram" to the parties dismissing the protest. This short (one paragraph) statement is not published in the Comptroller General's Procurement Decisions (CPD) volumes. Z-gram dismissals have decreased over the past two years and probably will not be used as frequently as in the past.

Assignment to Action Attorney. If the deputy associate general counsel decides that the GAO will hear the protest, it is assigned to an action attorney. From the time a protest is received to the time it is assigned to an action attorney takes a minimum of two days, and has been known to take up to five days.

Once a GAO action attorney receives a protest, it is extremely hard to have the protest dismissed without filing an Administrative Report. Action attorneys are reportedly reluctant to second-guess the deputy associate general counsels, and the agency must present clear and uncontrovertible evidence that the protest is untimely or otherwise not for the GAO's consideration. Yet even in clear instances, the action attorneys often still require the submission of an administrative report and will not rule on the procedural issues earlier than they would issue a decision on the merits.

Normal Conferences

GAO Bid Protest Regulation 21.5(a) allows any party to request a conference on the merits. It is usually the more sophisticated protesters (those represented by law firms) that do so, because the conference effectively doubles the time given to protesters to respond to the administrative report. Although the conference is discretionary with the GAO, in practice the GAO rarely denies a request for a conference.

GAO Bid Protest Regulation 21.5(a)(1) states that conferences will be held "as soon as practicable" after the date the protester receives the administrative report. In practice, GAO attorneys have been scheduling the conferences anywhere from five to ten working days after the date set for receipt of the administrative report.

Where no conference is held, the protester has only ten working days to comment on the administrative report. Because protesters have seven working days after the conference to file written comments on the conference, however, (and such comments are really also comments on the administrative report) the conference provision can significantly increase the time given the protester to respond to the administrative report (at a minimum, protesters will have five working days before the conference and the seven working days after the conference).

Rule 21.5(a)(1) also includes the requirement that "all parties should be represented by individuals who are knowledgeable about the subject matter of the protest." This is a new requirement, and it is not entirely clear. The rule does not seem to specify that the person have personal knowledge of the facts, so that it is possible that the requirement could be filled by DAJA–KL attorneys or the installation attorney.

Some members of the private bar have commented that this requirement will allow protesters to directly question government personnel at the conferences. We do not believe this to be the intent of the rule. Rather, we believe that knowledgeable personnel are required to be present at the conference only so that they may be available to answer whatever relevant questions the GAO attorney poses.

GAO confirmed this interpretation at a 15 January 1988 meeting with government agencies about the changes in the bid protest rules. At that meeting, GAO representatives stated that the "knowledgeable person requirement" was not meant to significantly change the way in which non-fact finding conferences are conducted. Rather, it was a response to isolated situations in which agencies sent representatives to conferences who were completely unfamiliar with the issues raised in the protest.

Fact-Finding Conferences

Under Rule 21.5(b), the GAO may convene a "fact-finding conference" to resolve a specific factual dispute that is essential to the resolution of the protest. The GAO will specify which persons must attend the conference and what issues will be discussed. Each party (including the GAO hearing official) may examine witnesses under oath, and there is a written transcript of the proceeding. The Federal Rules of Evidence are used as a "guide," but are not binding.

This is a new proceeding and it is unknown how often it will be used or how formal the proceedings will be. GAO will determine the necessity of such a conference after the receipt of the administrative report, at the earliest, and probably not until after receipt of the protester's comments on the report.

Although the rule specifies that these conferences will be held at the GAO, GAO has indicated that where the circumstances warrant (e.g., all witnesses located at some point distant from Washington, D.C.) it will consider holding the conference elsewhere if all parties agree. In that event, the agency will be responsible for finding a place to hold the conference and for hiring and paying a court reporter.

Although it is not specified in the rules, GAO has decided that fact-finding conferences will be conducted by a "hearing official," who will be a GAO employee, but not necessarily the action attorney assigned to the protest. The hearing official will make a finding of fact regarding the issue(s) about which the conference was conducted; this

finding will be binding on the GAO action attorney deciding the protest.

Comments on the fact-finding conference are due to the GAO three days after the parties receive the transcript of the conference. Because parties may receive the transcript at different times and thus have different due dates, the question arises whether service of comments must be made upon other parties before their comments are due. If this problem arises, we would expect the GAO to allow parties to withhold comments from another party until that party has filed its comments.

Express Option

GAO Bid Protest Regulation 21.8 allows any party to request an "express option," which, when invoked, requires the GAO to issue a decision within forty-five calendar days. In the past, it was *extremely* rare for the GAO to grant such a request. The action attorneys have enough trouble publishing decisions within ninety working days and therefore are *extremely* reluctant to commit themselves to issuing a decision within forty-five calendar days.

GAO has added Rule 21.8(e) to their bid protest regulations, however. This new provision allows GAO to grant the request for the express option and then opt out of the forty-five day limit if it becomes necessary. GAO has stated that this provision was added in an attempt to increase the use of the express option.

Requests for the express option must be received in writing by the GAO no more than three working days after the protest is filed. Rule 21.8(c). Any installation that believes that the express option is appropriate must notify DAJA–KL as soon as it receives a copy of the protest so that a written request may be submitted to the GAO.

Decisions

Dismissals versus Denials. Dismissals are issued for protests that the GAO will not hear because of procedural defects (*e.g.*, timeliness or raising an issue the GAO will not consider). Denials mean that the GAO has considered the merits of the protest and found that the protest has no merit.

Procedures Followed for Notification. GAO telephonically notifies DAJA–KL for each protest that is *dismissed*. It does *not* provide advance telephonic notification for protests that are denied or sustained. DAJA–KL receives notification of those actions only when the decision is issued in writing.

Time Lag. GAO usually provides telephonic notification of a dismissal within one day of the actual dismissal. Written decisions take approximately one week to be issued, however. Part of this time is due to internal processing at the GAO—it seems to take two or three days after a decision is signed before it leaves the GAO building. The rest of the delay is due to the mail. As a result, DAJA–KL usually does not receive notice that a protest has been denied or sustained until at least a week after the date on the printed decision. The GAO recently agreed to begin telefaxing all decisions directly to DAJA–KL, which may reduce the time between decision and notification.

General

GAO is an extremely informal forum. Each action attorney (or at least each team) has a tremendous amount of discretion in handling his or her protests. In addition, the GAO has no formal motion practice and no set rules governing what information it will consider in arriving at its decision. These matters seem to be left entirely up to the individual action attorneys.

Rule 21.3(1) now confirms this practice by stating that the GAO may permit additional filings at its discretion. Thus it will continue to be the practice of DAJA–KL to request permission to respond to the protester's comments on the administrative report (or conference) where necessary to highlight factual or legal errors in the protester's submission.

OTJAG Contract Law Division Procedures

Notice of Protest from GAO

When the Contract Law Division (DAJA–KL) receives telephonic notice of a bid protest from GAO, it opens a file on the case and fills out the initial record-keeping forms. The Division also notifies the pertinent major command (MACOM) by telephone, the same day, if possible. A follow-up letter goes to the MACOM with the following information: the date the Contract Law Division received notice of the protest, the "B number," the solicitation number, the protester's name, the date the administrative report is due at the Contract Law Division, the date the report is due to GAO, and a short statement of the grounds for the protest (if available).

When the written copy of the protest arrives, the responsible Contract Law Division attorney reviews it to see if there are grounds for an immediate dismissal. He or she also coordinates with the installation field office regarding an appropriate response to the issues that the protest raises.

On Receipt of the Administrative Report

After the installation and MACOM have sent the administrative report to DAJA–KL, the responsible attorney checks the report for completeness and reviews the contracting officer's statement and legal memorandum for accuracy and completeness. He or she then checks the report's organization: Does it include irrelevant documents? Are the documents organized logically? Has the contracting officer properly "sanitized" the copies going to the protester and interested parties? ("Sanitization" describes the process of withholding privileged, irrelevant, or exempt documents and information from copies of the report prepared for private parties). If there is a problem with the report, the responsible attorney will contact the field office to make a correction, or correct it at the Contract Law Division.

The responsible attorney then prepares the transmittal letter to the GAO. If the administrative report is accurate and complete, the transmittal letter says little more than "Here is the report." Otherwise, the transmittal letter highlights issues where the legal memorandum is imprecise, and briefs issues that the report did not cover. DAJA–KL then files the report with the GAO, and serves a copy on the protester and other interested parties. If a conference has been called, filing and service are by express mail; otherwise, regular mail is adequate.

Conferences

As noted above, any party may request a conference on the issues. The Contract Law Division does not normally request such a conference, but protesters often do. In the event a conference is scheduled, a division representative attends the conference, which is held at the General Accounting Office. In addition, installations may be required to send someone with knowledge of the subject matter of the protest.

Comments on the Conference

All parties may file comments on the conference within seven working days after a normal conference, and within three working days of the receipt of transcripts after a fact-finding conference. DAJA–KL must coordinate with the technical and legal personnel in the field offices to assemble the Army's comments on the conference within the required time. Depending on the issues involved and the personnel available, DAJA–KL may write these comments, or they may be written by installation personnel and forwarded to DAJA–KL for filing with the GAO.

Acting as the Point of Contact for the GAO Action Attorney

During the course of a protest, GAO attorneys often require additional information or documentation that has not been included in the administrative report. Sometimes they try to act as an arbitrator between the installation and the protester. In either case, they call DAJA–KL with their questions. The division either answers the question or, more typically, contacts the installation for the needed information.

Acting as the Point of Contact for Field Offices

Similarly, installations often have questions about the status of protests against their procurements. DAJA–KL answers those questions which it can and, if necessary, contacts the GAO for information regarding the status of a bid protest. Installations should not contact the GAO directly. All contacts with the GAO must be conducted by (or coordinated in advance with) the Contract Law Division.

In addition, DAJA–KL will provide legal advice to an installation on the merits of particular protests where desired and advice on how to assemble its administrative report when needed. Installation personnel are strongly encouraged to contact the Bid Protest Branch of the Contract Law Division any time there is a question regarding a GAO bid protest.

Organization of Administrative Report

Format of the Report

Reports *must* be bound with some type of stiff protective covers before submission to DAJA–KL. The following methods of binding are acceptable:

a. two-hole punch at top, with stiff cardboard covers;

b. 3-ring binder; or

c. contract folder.

While standard contract folders are acceptable, they are the least desirable of the three methods outlined because they are awkward to use. An administrative report should present the government's evidence in the most favorable light. Presenting the GAO with a file that is difficult to page through does not promote that goal.

Materials that cannot be bound easily (such as blueprints) can be attached to the main report with a rubber band. Such material is listed in the index as "unbound."

The front cover of each report should have a label affixed that contains the following information:

ADMINISTRATIVE REPORT

Protest of [protester's name]

B-xxxxxx

Copy for [GAO; Protester; OTJAG; or interested party]

If a report consists of multiple volumes, there should be a label on the front cover of each volume that has all of the information above as well as the volume number.

Each volume of each copy of the report must be indexed. The index should be the top document in each volume, and should clearly identify each document in the report. Do not put documents in the report that are not listed on the index. The index should also identify the protester's name and B-number. Note: indexes can also indicate what documents have been sanitized from the copies sent to private parties.

Each document should be separately tabbed for easy location; do *not* put multiple documents at the same tab. If a document in the report has attachments, tab each attachment as a subset of the main tab. For example, if the document at Tab C has three attachments, Tab these attachments as Tabs C1, C2, and C3. Alternatively, if you are using numbered tabs for the main tabs, tab attachments as 3A, 3B, and 3C. Again, the goal is to make the information easy to find. Do not bury your documents where the GAO attorney cannot find them.

Contents of the Administrative Report

There are five categories of documents required in the report: a) the statement of the contracting officer; b) the legal memorandum; c) the protest; d) solicitation/contract documents; and e) any other *relevant* documents. Please do *not* simply copy the entire contract file for the report. Put in only documents that are directly relevant to a protest issue. Remember, protesters may file a protest within ten working days of the date they learn the basis of their protest. If you include irrelevant documents in the administrative report you run the risk of giving the protester information on which to file yet another protest against the procurement. Even if the irrelevant documents are sanitized from the protester's copy and go only to the GAO, blemishes that appear in these documents may affect the GAO attorney's view of the overall way in which the procurement was conducted, even if they are completely unrelated to the protest issues. Please restrict the administrative report to only those documents that are directly relevant to an issue raised in the protest.

Bid protesters may also request inclusion of documents in the administrative report. Under Rule 21.3, protesters may file with their protests a list of specific relevant documents they would like the Army to produce. The way the rule is drafted, the Army must provide the GAO with a copy of each requested document even if it is irrelevant to

the protest or exempt from disclosure. We can withhold irrelevant or exempt documents from the protester, but the GAO will make its own determination as to whether the withheld documents should be released and will release them directly to the protester if it finds release appropriate.

All documents specifically requested by the protester pursuant to Rule 21.3 that are relevant to a protest issue should be included in the administrative report and treated identically with all other materials contained in the report. Documents that are not relevant to any protest issue should not be included in the administrative report. Instead, these materials should be separately bound and indexed and clearly identified as requested materials that are irrelevant to the protest. You must include an explanation as to why each document is considered irrelevant. If any of these irrelevant documents are exempt from release for other reasons as well—for instance if they are proprietary or procurement-sensitive—you must identify the documents as such and employ the markings outlined in paragraph II.A.7.g. below. Remember, the GAO will be independently releasing these materials if they are found relevant, so put the GAO on notice of *every* reason the documents should not be released.

Send two copies of these sets of irrelevant requested materials to DAJA–KL—one for GAO and one for DAJA–KL. Do not create sets for the protester or interested parties.

Where the protester has requested a number of documents that are clearly and unequivocally irrelevant to any issue raised by the protest, notify DAJA–KL immediately. We may try contacting the GAO attorney with the complaint that the protester is simply harassing us and ask him or her to prospectively limit the documents we are required to produce. The GAO has already stated that where the protester requests large numbers of irrelevant documents it may allow the agency to simply furnish a list of the irrelevant documents with an explanation of why they are irrelevant.

Every document requested by the protester must be provided to the GAO. If you do not have custody of a requested document, notify DAFA–KL *immediately* so that efforts can be made to either find the document or notify GAO that it will not be produced.

Sanitization of the Administrative Report

The installation is responsible for deleting irrelevant or exempt documents from the copies of the report to be sent to the protester and any interested parties. Initially, there is no need to provide protesters with documents they already possess. *See* Federal Acquisition Reg. 33.104(a)(5)(i)(A) (June 20, 1985). For example: Do not give an offeror/bidder a copy of its own proposal; Do not give these parties a copy of the solicitation if they have already received one; and Do not give them copies of letters or other documents already furnished by the government. Field offices rarely have followed this guidance. Doing so will save money on photocopying and shipping costs.

For other documents, the GAO has stated that it will link the determination of releasability to the standard in the Freedom of Information Act, 5 U.S.C. § 552 (1982). In general, the three most common types of information that should be excluded from administrative reports are: information that is proprietary to another vendor; information that is competitive sensitive (government proprietary information); and personnel resumes.

In general, anything that another vendor has submitted and marked with a proprietary legend should be deleted from the protester's copy of the report as proprietary. So should lists of other offerors' weaknesses or any discussion of their proposals. Unit pricing information in awarded contracts also could be proprietary under certain circumstances—check with your FOIA specialist if you are unsure. Any information you can give the GAO to show that the material is proprietary will strengthen the case for withholding the material. For this reason, installations should attempt to obtain comments from the parties who submitted the materials showing why the materials are exempt from release.

Pre-procurement sensitive information is the hardest type of information to classify. In general, if there is any chance the GAO will recommend a recompetition of the protested procurement, or if the protester has requested such relief, information that you would not normally release during a competitive procurement should be deleted from the protester's copy of the administrative report. You must apply a pre-award standard of releasability even if the protest is post-award if there is any chance that the protested procurement will have to be recompeted. Examples of information that might be withheld include: number and identities of offerors; independent government estimates; names of technical evaluators; documents showing the funding available for the procurement; abstract of offers; and technical evaluation materials for other offerors (these may also be proprietary).

Do *not* expect to withhold key report documents such as the contracting officer's statement or legal memorandum in their entirety. Portions containing sensitive information may be (and should be) withheld, but not the entire document.

Documents in the GAO's copy of the report should have a "FOR OFFICIAL USE ONLY" stamp on each page that contains information that is being withheld from the protester. The GAO copy of any administrative report containing information that should be withheld from a protester or interested party should have the following legend on *both* the front and back covers of each volume that contains protected information:

FOR OFFICIAL USE ONLY

This document contains information

EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s)____ and ____ apply.

These precautions are necessary to prevent the GAO from inadvertently releasing this information in response to a FOIA request for the administrative report.

Where information or documents have been withheld from the protester's copy of the report, the installation must furnish DAJA–KL with a written justification for deleting each document or piece of information. These justifications will be forwarded to the GAO to provide a rationale for withholding the information from the protester.

GAO has stated that nothing in the rules precludes a vendor whose documents have been requested by the protester from submitting comments to the GAO on why those documents should not be released. You should notify each company whose documents you have submitted to the GAO that the GAO has the documents and will be making a determination on whether to release the documents to the protester.

When the GAO disagrees with the Army's justification for withholding information from the protester, it will notify DAJA–KL by telephone that is has found the information to be releasable. If we feel it is necessary to protect the Army, we will then have the option of requesting that the GAO notify us in writing that the information must be released. Actual release will probably be done by the Army for lengthy documents and by the GAO for short documents. The GAO will address these issues in its decisions and thus hopes to build up a body of decisional law to guide protesters and agencies on this matter.

Suggested Order of Documents

Put documents in an order that will best make your case and that makes important documents easy to find. The contracting officer's statement and the legal memorandum should always be first and second in the file (although not necessarily in that order). One possible order for documents follows:

Legal Memorandum

Statement of the Contracting Officer

Statement of the COR/Tech Specialist

Protest

Solicitation/Contract Document

Protester's Proposal/Bid

Awardee's Proposal/Bid

Abstract of Offers/Bids

Evaluation Materials (if relevant)

Legal Office Participation in Organization of The Administrative Report

The selection of materials for the report and the organization of these materials is every bit as important as the development of the contracting officer's statement and the legal memorandum. Lawyers are trained to present evidence in a way that effectively presents their client's position. The legal office responsible for reviewing the administrative report should be closely involved in its creation and organization. Ideally, a lawyer should review the entire contract file, select those documents he or she believes should be included in the report, and indicate the order in which they should appear. To do this, the lawyer *must* be informed of the protest and be involved in preparing the administrative report as soon as notice of protest is received. The Contract Law Division strongly recommends that all installations and activities institute formal procedures requiring this early involvement of the legal office.

Copies For Interested Parties

Any potentially interested party (usually the awardee or other bidder or offeror) that expresses an interest in participating in the protest should be directed to notify the GAO in accordance with Rule 21.3(i). The GAO should then notify the Contract Law Division that that vendor is an interested party.

If the Contract Law Division receives notification from the GAO that an interested party has responded to the notice of protest, we will notify the installation. The installation must then prepare an additional copy of the administrative report for each interested party who has responded to the notice, using the same principles of withholding documents as those employed in preparing the protester's copy of the report. In addition, the installation must provide to DAJA–KL the complete mailing address of each interested party.

III. Tips for Assembling an Effective Report

The Legal Memorandum

Always Consider Procedural Issues. The very first thing a contract lawyer should look at when receiving a protest is whether the protest is timely. This is not always obvious from the face of the protest. The lawyer *must* talk to the contracting officer/specialist and any technical people involved to determine whether the protester had actual knowledge of its grounds of protest more than ten working days before the protest was filed (other than protests against defects in solicitation documents, of course). You should also determine whether the protester filed an agency-level protest and, if so, whether any adverse agency action was taken on that protest.

For these purposes, encourage your acquisition office to send important correspondence (notifications of exclusion from the competitive range; notifications of award; responses to agency-level protests) certified mail, return receipt requested. Or, if that is too expensive, encourage acquisition personnel to telephonically notify these unsuccessful offerors by telephone the day the letter is sent, with a memorandum for record of the conversation. Doing so will start the clock running for filing a protest. The timeliness rule is the one rule to which the GAO unwaveringly adheres, and it is our most important tool for reducing our bid protest workload.

The concept of "interested party" does not appear as often as the issue of timeliness, but it can be just as effective. If you accept as true all the allegations in the protest, is there a possibility that the protester will either receive a contract award or be given the chance to compete for a contract award? If the answer is no, the protester is probably not an interested party and the GAO will therefore not consider the merits of the protest.

Cite To Documents in the Report. When making an assertion of fact, always provide a citation to the document in the administrative report that supports this assertion. For instance: "The specifications clearly stated the requirement that boards be at least eight feet in length. (See PFP, Tab D, para. C–4.2, p. 7)." Do not send the GAO attorneys thumbing through the file to figure out which document in the report supports your assertion.

Ensure that the legal memorandum refers to each document in the report. The legal memorandum acts as a "roadmap" for the administrative report. If neither the contracting officer's statement nor the legal memorandum refers to a document, either the document is not relevant to the protest and should not be in the report, or the legal memorandum and contracting officer's statement have not synopsized the relevant evidence effectively.

Use A Legal Writing Style. Remember, the GAO is staffed by civilian attorneys. The GAO is not quite as formal as the boards of contract appeals or the federal courts, but it is an administrative forum nonetheless. The legal memorandum will be the main legal reasoning on which the government relies. The general writing style should be similar to that used in any legal brief.

Like a brief, the legal memorandum should start with a statement of facts. Do not merely defer to the contracting officer's statement. Contracting officers may be too busy or may not have the writing skills to present the government's version of the facts properly. Lawyers are trained to present facts in a way that best supports the client's position.

Good advocates write the statement of facts *after* researching the law, not before. By doing so, the attorney ensures that he or she presents the facts to the GAO in a way that makes clear their relevance to the applicable legal standards.

Following the statement of facts, organize the memorandum by issue. Clearly identify each issue the protester has raised and discuss it clearly and concisely. Headings and subheadings can help to organize your points. Do not limit yourself to the numbered paragraph format.

Use Recent Citations. The GAO issues hundreds of decisions each year, many of them on the same issues. Although general principles of procurement law may remain the same, the way in which those principles are applied is constantly shifting. The passage of the Competition in Contracting Act of 1984 (CICA) has caused the GAO to enforce some of its principles with much more vigor. Be particularly wary of citing any decision that predates the passage of CICA and/or the Federal Acquisition Regulation.

Even if a principle of law has remained unchanged, it looks much better if you show that GAO has reaffirmed the principle within the last few months than if you cite only decisions that are three or four years old. In general, GAO practice does not employ the concept of "landmark decisions," which is so familiar in federal court practice. GAO attorneys rarely cite older decisions; their decisions usually cite decisions that were issued within the past year. There is generally no reason to cite a GAO decision more than two years old unless that is the latest decision that is directly on point or the facts underlying that decision are virtually identical to the facts in your protest.

Apply the law to the facts. As with any good legal writing, you must not only state the facts and state the law; you must apply the law to the facts of the protest. Specifically, you must show in detail why the facts of this particular protest combined with the legal standards you have listed dictate the desired outcome. Remember that the GAO attorney is not a technical expert and starts with no familiarity with the protested procurement. Make sure that every step in your reasoning is easy to understand and well documented.

Use the "no prejudice" rule. The GAO employs the principle that protesters must have been actually prejudiced by a violation to have their protests sustained. The protester must not only show a government violation, but must also show that the violation caused the protester competitive harm. "Competitive harm" means that, absent the alleged violation, the protester would have been awarded a contract (or would have been included in the competitive range, if that is the issue), or at least that it would have stood a reasonable chance of being awarded a contract. Use this doctrine to negate the effect of nonprejudicial mistakes in the procurement.

An Effective Contracting Officer's Statement

Coordinate with the legal office before drafting the statement. Contracting officers' statements should not be drafted without a knowledge of the legal issues the protest raises and the standards that GAO uses to deciding those issues. An effective statement provides the facts that the legal memorandum needs to show that the procurement met the appropriate legal standards. Thus, before writing the statement, the contracting officer should discuss with the attorney assigned to the protest what facts he or she needs to make an effective argument, and how to present those facts.

If the contracting officer (or, more correctly, the specialist who usually writes the statement) is too busy to devote time to polishing the statement, or if his or her writing skills are not strong, the legal office should assist in drafting the statement. The contracting officer's statement is often the centerpiece of the administrative report. If it is poorly organized, or uses poor grammar and spelling, it certainly will not contribute to the desired impression of a reasonable decision-maker. Lawyers are trained to write clearly and effectively. Thus it makes good sense to get the legal office involved in helping to draft this crucial document.

Remember Your Audience. The statement must provide a cogent *narrative* summary of the events leading up to the protest. Remember, you are writing for someone with no technical expertise and no familiarity with the procurement. The contracting officer's statement (in addition to supporting the legal memorandum) educates the GAO attorney as to the facts necessary to understand what the protest is about and what the government contends actually occurred. Explain everything in the most basic terms possible, particularly if the subject of the procurement is technical in nature.

Spell out every acronym the first time it appears in the memorandum. Minimize the use of acronyms to the extent possible—spell out the term or phrase unless it really would be burdensome. Remember, you are writing for civilian attorneys who are not necessarily acclimated to our "alphabet soup."

Cite To Documents In the Report. The contracting officer's statement and the legal memorandum are the main documents for conveying the government's case. The statement should synopsize all of the facts favorable to the government. The rest of the documents in the report are there to provide evidentiary support for the statements made in the contracting officer's statement/legal memorandum. You

cannot rely on the supporting documents alone to make your case.

Instead, the statement should discuss every important document, with a brief synopsis of what it says and a citation to its location in the report. For instance: "The specifications clearly required boards that were at least eight feet in length. (See RFP, Tab D, para. C–4.2, p. 4)." The GAO attorneys should not have to thumb through the file to find the piece of paper that supports what you say. In addition, critical passages in documents could be highlighted and/or marked with a paper clip in the GAO's copy of the report to facilitate the GAO attorney's review of the file.

Depending on the issues raised by the protest, an effective contracting officer's statements could consist of nothing but a concise narrative setting forth the Army's version of events. Such a statement could then be used by the legal memorandum, which is normally organized around issues, to respond to the allegations in the protest. If necessary (for instance, if the protester has raised an issue of fact) the statement could also be effective by, after the introductory statement of facts, clearly stating each factual issue and responding to that issue. Legal issues should be left to the legal memorandum.

Conferences

As noted above, there are two types of conferences. The modifications to the previous bid protest regulations place increased responsibilities on the installations.

Normal Conferences

The requirement that a conference be attended by personnel knowledgeable about the subject matter of the protest poses some dangers for the Army. It is important that personnel attending the conference be articulate; thoroughly familiar with the issues and the assertions contained in the administrative report; and aware of the legal standards involved. To achieve this, installation attorneys *must* spend time preparing each person attending the conference in the same way that witnesses must be prepared for litigation.

Remember—if the protester finds out new information at the conference, it may file an additional protest based on that new information. We may expect the private bar to use this requirement to try to find new information on which to base the protest, although we do not at this point believe that this was what the GAO had in mind. Please instruct any personnel attending the conference not to volunteer information and to think through the implications of their statements before saying anything.

Fact-Finding Conferences

As in normal conferences, the witnesses for the Army must be prepared to discuss the factual issue that is the subject of the conference. Again, witnesses must be thoroughly familiar with the factual issue, the representations contained in the administrative report, and any relevant legal standards. Again the installation attorneys must prepare these witnesses in the same manner that witnesses are prepared for litigation. Particular attention should be paid to instructing witnesses not to answer questions that have no relevance to the issue that is the subject of the conference.

In certain circumstances, DAJA–KL may request that the installation attorney involved in the protest attend the fact-finding conference and conduct the examination of witnesses. Such requests will normally depend on the complexity of the issues, the availability of DAJA–KL versus installation resources, and the installation attorney's level of experience.

Suggested Timetable for Actions

The following is a suggested timetable for preparing an administrative report. All days are working days, with day one being the first day a copy of the protest is received. Actions below should be taken by the legal office or the procurement office, as applicable.

Day 1:

Assign an attorney to the protest and provide him or her with a copy of the protest and the entire contract file.

Provide a copy of the protest to any technical experts involved in the procurement and ensure that they will be available to provide necessary documents and/or statements.

Prepare notifications to interested parties.

For post-award protests, if DAJA–KL was notified of the protest within ten calendar days of contract award, prepare stop-work order for awardee.

Attorney assigned to protest should make a preliminary examination of protest and contract file and identify the issues.

Day 2:

Notify in writing all interested parties of the protest. Include a copy of the protest with this notification. If the protest indicates that it contains protected material, delete that material from copies sent to the interested parties. If you do not believe that portions of the protest marked as protected may legitimately be withheld from other parties, contact DAJA–KL.

Attorney assigned to protest should be conducting any necessary legal research to establish the relevant legal standards.

Attorney should discuss the protest with the contracting officer, contract specialist, and any technical experts involved in the procurement. Establish whether the protest is timely. Attorney should also discuss the relevant legal issues and standards with whoever will be drafting the Contracting Officer's statement so that drafting of the statement can begin.

Day 3:

Identify and accumulate all documents that should go into the administrative report. Get them reproduced in the appropriate number of copies (three copies of the report should be forwarded to DAJA–KL, with one additional copy for each interested party that has notified GAO of its intent to participate).

Begin analysis of whether any requested documents should be deleted from protester's copy as irrelevant or exempt.

Begin gathering information to support claims that documents are exempt as proprietary—i.e. contact companies that provided the information and ask for their input. Be

sure to establish a deadline that provides you with adequate time to evaluate any comments received.

Days 3–15:

Draft and finalize contracting officer's statement, legal memorandum, and any other necessary statements. Make appropriate number of copies.

Make TDY arrangements for all necessary personnel if conference is scheduled.

Generate justification to withhold each document or piece of information deleted from protester's copy of the administrative report.

Day 16:

Assemble administrative report. In protester's copy, do *not* include copies of documents already in the protester's possession (RFP, protester's proposal, letters sent to or from protester, etc.)

Sanitize copies of the report to be sent to any private parties, deleting all information that is proprietary or pre-procurement sensitive.

Construct an index for each volume of each copy of the report, listing each document contained in the report that will be sent to GAO.

Day 17:

Transmit three copies of the Report to DAJA–KL so that they will arrive no later than twenty working days after the date the protest was filed. In addition, transmit one additional copy of the report for each interested party that has responded to the notice of protest. Remember, the more time you give us to review the report the more chance we have to review the file, spot any potential weaknesses, and take corrective actions.

After submission of report:

Begin preparing witnesses as necessary.

If a fact-finding conference is scheduled, obtain funding for the transcript and make TDY arrangements.

If at any time you have a question regarding these procedures or about any GAO bid protests, please call Mr. Herbert Kelley, Chief, Bid Protest Branch, DAJA–KL, at Autovon 227–7932.

Command Influence Update: The Impact of *Cruz* and *Levite*

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Introduction

On December 21, 1987, the United States Court of Military Appeals decided *United States v. Cruz*[1] and *United States v. Levite.*[2] These two cases were expected to represent a "fine-tuning"[3] of the unlawful command influence analytical approach adopted by the court in *United States v. Thomas.*[4] Specifically, *Cruz* provided the court with the opportunity to identify the quantum of evidence required to properly raise the issue of unlawful command influence.[5] The two specified issues in *Levite* involved the applicability of Article 37, UCMJ,[6] proscriptions to persons other than a convening authority[7] and the question of whether an accused must demonstrate actual prejudice in command influence cases in order to obtain appellate relief.[8]

Explicitly answering only the question of statutory construction of Article 37,[9] which, as the court recognized in *Levite,* was an issue long considered settled,[10] the court did

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[1] 25 M.J. 334 (C.M.A. 1987).

[2] 25 M.J. 334 (C.M.A. 1987).

[3] Rob, *From* Treakle *to* Thomas: *The Evolution of the Law of Unlawful Command Influence,* The Army Lawyer, Nov. 1987, at 36, 40.

[4] 22 M.J. 388 (C.M.A. 1986), *cert. denied,* 107 S. Ct. 1289 (1987).

[5] Granted Issue I in *Cruz* was: "Whether requiring appellant to produce evidence sufficient to establish specific prejudice and substantial harm before deeming the issue of command influence to be raised destroys the due process and fair trial protections of Article 37, U.C.M.J., and impermissibly shifts the burden of proof to appellant." 25 M.J. at 327.

[6] Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (1982) [hereinafter UCMJ].

[7] Specified Issue A in *Levite* was: "Whether actions impeding a court-martial in violation of Article 98, Uniform Code of Military Justice, 10 U.S.C. § 898, or violative of an accused's right to gather evidence in violation of Article 46, UCMJ, 10 U.S.C. § 846, but not committed by an officer empowered to convene courts-martial, amount to unlawful command influence under Article 37, UCMJ, 10 U.S.C. § 837." 25 M.J. at 335.

[8] Specified Issue B in *Levite* was: "If such acts do amount to unlawful command influence, must an accused demonstrate actual prejudice to warrant appellate reversal or should the doctrine of general prejudice apply?" *Id.*

[9] The court concluded that Article 37 clearly applies to command personnel other than convening authorities. 25 M.J. at 338.

[10] *See id.* at 339 n.6.

not, with clarity, address the two issues of paramount importance to judges and counsel in the field.[11] While the absence of clear guidance for military practitioners in raising and resolving command influence allegations is unfortunate, it is equally vexing that the court in *Levite* opted for an abridged analysis most notable for its condemnations of command influence[12] instead of a straightforward cause and effect analysis which *Thomas* was thought to herald. This article will seek to analyze the implications of these actions by the court and what it portends for the future development of the law of command influence.

United States v. Cruz

Cruz grew out of a mass apprehension conducted at Pinder Barracks, Germany, on March 25, 1983.[13] Colonel (COL) Beavers, the 1st Armored Division DIVARTY[14] commander,[15] upset over the large number of soldiers who tested positive during a recent urinalysis test, directed that a brigade-sized formation be held. At the formation,[16] approximately forty suspected drug abusers were called out of the ranks and escorted by their battery commanders and first sergeants to COL Beavers, who was positioned on a platform in front of the formation. Their unit crests were removed and their salutes were not returned by COL Beavers. He purportedly referred to them as "bastards" and/or "criminals." The suspects were then marched to a wall of a nearby building where they were spread-eagled, searched, and handcuffed by Criminal Investigation Division agents in full view of the formation.

Thirty-five of the arrestees (include Cruz) were members of the 6th Battalion, 14th Field Artillery. They were billeted apart from their unit pending the preferral of charges, at which time they were given the option of returning to their regular barracks or quarters. Twenty-seven chose to remain together and were thereafter known as the "Peyote Platoon." This group stood apart at unit formations and reputedly marched to the chant of "peyote, peyote."

The issue of unlawful command influence was not litigated at trial. Post-trial, however, Cruz alleged the aforementioned activities induced him to plea bargain. An investigation[17] concluded that COL Beavers' actions tainted those cases resolved by summary courts-martial or nonjudicial punishment. Rehearings were recommended. The VII Corps commander thereafter ordered a review of summary courts and nonjudicial proceedings on a case-by-case basis. No post-trial relief was accorded Cruz, who was tried by general court-martial.

As a consequence of Cruz's allegations and the subsequent investigation, the Commanding General, 1st Armored Division, issued a directive restricting the use of mass apprehensions.[18]

It is clear that the precedential value of *Cruz* is as an Article 13 pre-trial punishment case, and not as a command influence case. Nonetheless, as previously noted,[19] Judge Sullivan expressly states that the first issue in *Cruz* (specific versus general prejudice)[20] was decided by *Thomas*,[21] and *Thomas* can only be fairly read as requiring the accused to articulate a claim of specific prejudice.[22] Moreover, the language of the granted issue itself ("requiring appellant to produce evidence sufficient to establish specific prejudice

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[11] While Judge Cox, in his concurrence in *Levite*, submits that the issue of specific versus general prejudice has been left unanswered by the court, 25 M.J. at 340, it is apparent from Judge Sullivan's opinion in *Cruz* that he considered the issue resolved by *Thomas* and that specific prejudice is required. *Cruz*, 25 M.J. at 329. Because Judge Cox, as well as Chief Judge Everett, concurred in the *Cruz* opinion, his statement in *Levite* that *Thomas* did not answer the question is difficult to apprehend. *See also Thomas*, 22 M.J. at 400 (Cox, J., concurring) ("the doors of this Court remain open to hear particularized claims of prejudice"). Moreover, it is patently clear from Judge Cox's concerns in *Levite* (that the accused establish a causal connection between command influence and injury and that the accused "show that the proceedings were unfair") that he requires prejudice be demonstrated. 25 M.J. at 341.

[12] The court in *Levite* variously referred to the actions of the accused's chain of command as "desperate," 25 M.J. at 338, and "corrosive," *id.* at 340; considered the Constitution and the Code to have been "flouted," *id.* at 338, and the environment in which the trial was held to be "polluted," *id.* at 339; and described the nature of the command influence exercised in the accused's case as "pervasive" and "pernicious." *Id.* at 340. In his concurrence, Judge Cox referred to command influence "lurking" in the record of trial. *Id.* at 341. Such language is reminiscent of the court's earlier descriptions of command influence as "evil," United States v. Rosser, 6 M.J. 267, 273 (C.M.A. 1979), and a "spectre," United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983). While such vitriolic language clearly conveys the court's condemnation of unlawful command influence, it is of little practical value to the military practitioner seeking a methodology for litigating the issue.

[13] A more detailed summary of the facts can be found in the Army Court's opinion at 20 M.J. 873, 875–78 (A.C.M.R. 1985) (en banc).

[14] Division Artillery.

[15] COL Beavers was also the installation commander for Pinder Barracks and a special court-martial convening authority.

[16] Approximately 1,200 troops were present.

[17] The investigation, by a general officer, was conducted pursuant to Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977).

[18] *See Cruz*, 25 M.J. at 331 n.3. The directive specifically forbade the removal of unit crests and any other activity associated with an apprehension that would result in unnecessary public identification of an apprehended person as a criminal suspect.

[19] *See supra* note 11.

[20] *See supra* note 5.

[21] 25 M.J. at 329. It should be noted that Judge Sullivan did not participate in the *Thomas* decision. *Thomas*, 22 M.J. at 400.

[22] The following quotes from the *Thomas* opinion are illustrative:

"[W]e are unable to find in the records before us any accused who entered a guilty plea because of the unavailability of witnesses who, in the absence of General Anderson's interference, might have testified at trial. Certainly, no such claim has been brought to our attention." 22 M.J. at 395.

"The possibility that, if General Anderson had not interfered, an accused who entered pleas of guilty might have pleaded not guilty, introduced evidence, and obtained an acquittal is so remote that it does not disturb us—especially where no specific claim to this effect has been made." *Id.*

"Moreover, absent some specific claim to the contrary, we shall not assume that an accused chose trial by judge alone because of concerns about the impartiality of the court members." *Id.* at 396.

"[T]he doors of this Court remain open to hear particularized claims of prejudice." *Id.* at 400 (Cox, J., concurring).

and substantial harm")[23] supports the conclusion that specific prejudice must be demonstrated.[24]

Regrettably, from an analytical viewpoint, Judge Sullivan proceeded in *Cruz* to express "grave doubts" as to the fairness of the sentence hearing without articulating the basis for such reservations.[25] Given the Army court's contrary conclusion after a detailed analysis,[26] it would certainly have been helpful for Judge Sullivan to identify his reasons or the fallacy of the Army court's review.[27] Absent such critical analysis, it was unwise to reject the Army court's methodology, and the military practitioner may wish to continue to apply the lower court's analytical approach in assessing the fairness of court-martial proceedings exposed to unlawful command influence.

United States v. Levite

Unlike *Cruz*, the *Levite* decision is significant in several respects to the study of command influence law. The salient facts in *Levite*[28] are as follows.

Prior to Levite's trial,[29] Sergeant Major (SGM) Mulheron called a unit meeting and disclosed derogatory information concerning Levite. Specifically, SGM Mulheron stated his opinion that Levite was a "pimp" for two female members of the unit, Private First Class (PFC) Fowler and PFC Hemsworth.[30] This information was contained in an informally maintained unit file and was allegedly disseminated to demonstrate that Levite was not being unjustly prosecuted.

PFCs Fowler and Hemsworth were later lectured by SGM Mulheron on their association with Levite, and Major (MAJ) Madden, the company commander, criticized PFC Fowler for associating with Levite and expressed his opinion as to Levite's guilt. PFC Fowler subsequently testified as a defense witness on the merits at Levite's court-martial despite her belief that MAJ Madden did not want her to testify.

Three other defense witnesses, Staff Sergeants (SSG) Hall, Vinson, and Cobb, were ordered by the first sergeant to report to the unit orderly room prior to trial to review Levite's file. This action was directed by MAJ Madden for the stated purpose of ensuring that their testimony at trial would be "current." SSG Hall later testified as a defense witness on the merits and on sentence, while SSGs Vinson and Cobb testified in Levite's behalf on sentencing.

At trial, MAJ Madden, MSG Mulheron, and the unit first sergeant, First Sergeant (1SG) Williams, sat as spectators. SSG Vinson noted that MAJ Madden and 1SG Williams gave him "strange looks" during his testimony, and 1SG Williams was overheard outside the courtroom criticizing noncommissioned officers who condoned drug use.[31]

The day after trial, SSGs Hall, Vinson, and Cobb were counseled by MAJ Madden, MSG Mulheron, and 1SG Williams concerning their testimony in Levite's behalf. MAJ Madden expressed shock that noncommissioned officers could testify favorably for a convicted drug offender and considered their testimony as "unprofessional" and an embarrassment to the unit.

Approximately two weeks after trial, an investigation[32] was initiated to determine, inter alia, whether unlawful command influence was exercised in Levite's case. A military judge was appointed as the investigating officer. The investigative report was released to the staff judge advocate, who initially recommended approval of the adjudged sentence. Following repeated demands by trial defense counsel that he be provided with the full report and that the entire report be made part of the record of trial,[33] the staff judge advocate, in an addendum, recommended that the period of

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[23] *See supra* note 5.

[24] This is certainly not an unreasonable burden to place upon an accused, given the rebuttable presumption that the recipient of unlawful pressure was in fact influenced. United States v. Cruz, 20 M.J. 873, 887 (A.C.M.R. 1985) (en banc) (citing United States v. Treakle, 18 M.J. 646, 657 (A.C.M.R. 1984) (en banc)). Therefore, as the Army court noted in its opinion, an accused, in order to meet the specific prejudice requirement as to witnesses, need only establish that: (1) a person was exposed to unlawful command influence; (2) the individual had some particular knowledge relevant to the accused's case; (3) the particular knowledge was relevant to some material aspect of the case; and (4) its absence caused substantial harm. *Id.* at 887. As to court members, the accused need only establish that a member was actually exposed to unlawful command influence, which fact, coupled with the rebuttable presumption that the member acted in conformity therewith, would suffice to meet the prejudice requirement. While the *Thomas* opinion, 22 M.J. at 396, places the onus on the defense to ascertain, through voir dire, the adverse impact of unlawful pressures communicated to court members, this burden is not inconsistent with the rebuttable presumption of prejudice. Rather, it reflects the court's desire that the issue of command influence, once surfaced, be fully developed in order to better assess its impact on trial proceedings.

[25] 25 M.J. at 329.

[26] *See Cruz*, 20 M.J. at 877–78. Of the numerous individuals who provided sworn statements concerning the mass apprehension, only two soldiers (one officer and one noncommissioned officer) stated that they believed they were not to testify in an accused's behalf or were to dispose of a case in a certain manner. Neither individual was a member of the accused's unit and neither possessed any information that would have qualified him to testify for Cruz. At trial, the defense did not claim any difficulty in obtaining witnesses. Finally, Cruz was tried by military judge alone.

[27] Because the sentence was set aside on the basis of an Article 13, UCMJ, violation, and not because of unlawful command influence, Judge Sullivan's unidentified concerns are mere dicta. Nonetheless, such comments do tend to perpetuate the perception of syncopated analysis which, prior to *Thomas*, seemed to characterize the court's resolution of command influence allegations.

[28] A more complete rendition of the facts is set forth in *Levite*, 25 M.J. at 335–38.

[29] Levite was tried at Stuttgart, Germany, on June 24–25, 1985, by a general court-martial composed of officer and enlisted members. He was convicted of escape from custody and several drug offenses, and was sentenced to a dishonorable discharge, total forfeitures for 10 years, and 10 years confinement. The convening authority later reduced the period of confinement to five years.

[30] Neither PFC Fowler nor PFC Hemsworth were present at the meeting and apparently were not identified by name by SGM Mulheron. *See id.* at 336.

[31] 1SG Williams was described as "ranting and raving," and was alleged to have said that noncommissioned officers who condoned drug use by the troops did so "because . . . [they] smoke it with them." *Id.* at 336–37.

[32] The investigation was conducted pursuant to AR 15–6. *Id.* at 335 & n.2, 337.

[33] The findings, conclusions, and recommendations of the investigating officer were never made part of the record of trial despite trial defense counsel's request. *Id.* at 339.

confinement be reduced, "in an abundance of caution," from ten years to five years.[34]

Judge Sullivan, again writing the opinion,[35] found unlawful command influence to have been clearly established, and, on the basis of *Thomas,* reversed the decision of the Army Court of Military Review.[36] Finding the actions of Levite's chain of command to be unlawful, a fact conceded by the government on appeal, the court held that the government failed to meet its burden to prove the error (command influence) was harmless.[37] In so holding, the court expressed its view that an informal administrative investigation [38] is an inadequate substitute for a *DuBay*[39] hearing in fully developing the facts surrounding an allegation of unlawful command influence.[40] The court also found the post-trial remedial actions exacerbated rather than resolved, the command influence problem.[41] The court was particularly critical of the staff judge advocate's "summary resolution of the prejudice question."[42]

An unfortunate aspect of the court's displeasure with what it considered to be an incomplete record are the views expressed concerning the probable taint of court members. Referencing the command's efforts to influence potential witnesses (by revealing allegations concerning the accused's unsavory background),[43] the court postulated (via the vehicle that "[w]ord travels fast in the military")[44] that court members may have been tainted. Such a presumption, in the absence of some evidence that court members were actually exposed to the comments directed to members of the accused's unit, is purely speculative and ignores the basic premise underlying the *Thomas* decision. As Judge Cox noted in his concurrence in *Levite,* if no casual connection exists between command influence and the injury (*i.e.,* tainted members), no relief is warranted.[45] Moreover, the theory that "[w]ord travels fast in the military" should not be deemed to supply the necessary nexus. As the court cautioned in *Thomas,* "[w]e are not prepared to disqualify members of a court-martial panel simply because they were assigned or were in close proximity to the command where the comments were made."[46] It was the accused's burden in *Levite* to establish a nexus between the influence and the members, and under the circumstances, an incomplete record should have operated to the accused's disadvantage.[47]

Judge Cox's separate concurrence in *Levite* deserves particular attention. It is both puzzling and enlightening. Initially, Judge Cox states that the question of specific versus general prejudice remains unanswered, and, indeed, need not be answered.[48] Yet the *Cruz* opinion, citing *Thomas,* resolved that issue by requiring specific prejudice.[49] Moreover, Judge Cox proceeds in his concurrence to lay out an analytical approach to command influence allegations that is grounded on specific prejudice.

To prevail, an accused's claim of unlawful influence must not only be alleged with sufficient particularity, but must also be substantiated.[50] As stated by Judge Cox, "[A]n appellant's unsubstantiated assertion that unlawful command influence exists is not going anywhere, and relief will not be granted if the court-martial has not been unlawfully influenced."[51] An appellant who claims his court-martial has been unlawfully influenced "had better declare and *show* that the proceedings were unfair."[52] Accordingly, in Judge Cox's mind, an accused is not entitled to relief in the absence of demonstrated harm.

Judge Cox also expressed the view that the court should not attempt to determine which party has the burden of proof in command influence litigation.[53] While Judge Cox apparently considers such an assignment as a technicality

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[34] *Id.* at 337–38.

[35] Chief Judge Everett concurred. Judge Cox concurred in a separate opinion.

[36] 25 M.J. at 335. The lower court's opinion was unpublished. United States v. Levite, CM 447749 (A.C.M.R. 27 Mar. 1986).

[37] 25 M.J. at 339.

[38] The investigation was conducted pursuant to AR 15–6. *See supra* note 32.

[39] United States v. DuBay, 317 C.M.A. 147, 37 C.M.R. 411 (1967).

[40] It is readily apparent that the court in *Levite* was dissatisfied with the record before it, and that the consequences of such dissatisfaction, where the existence of command influence has been established, fall upon the government, which bears the burden of demonstrating the fairness of the proceedings. Conversely, it can be expected that an imperfectly developed record will operate to the detriment of the accused who must initially establish the presence of command influence and its nexus to trial. It therefore behooves both the prosecution and the defense to ensure a fully developed record.

[41] 25 M.J. at 340.

[42] *Id.*

[43] *See id.* at 336 & n.3.

[44] *Id.* at 339–40.

[45] *Id.* at 341.

[46] *Thomas,* 22 M.J. at 396.

[47] Obviously, if trial defense counsel is unaware of the command's attempts to influence the proceedings, it is unlikely counsel's voir dire will reveal its existence. Once discovered, an accused may still properly raise the issue in a post-trial session pursuant to Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1102 [hereinafter R.C.M.], or through court member affidavits on appeal. As a matter of good practice, trial defense counsel should consider incorporating several general questions addressing command influence in every voir dire they conduct.

[48] *Levite,* 25 M.J. at 340 (Cox, J., concurring).

[49] *Cruz,* 25 M.J. at 329; *see also supra* note 11.

[50] *Levite,* 25 M.J. at 341.

[51] *Id.*

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

[53] *Id.*

unnecessary to a resolution of command influence allegations,[54] his analytical approach does, in fact, require both the government and the accused to meet certain burdens in order to prevail.[55] To quote Judge Cox, "Generally speaking, the accused is the one who must come forth with proof."[56] By the language of his concurrence, it would appear that the defense, in order to satisfy its burden, must establish: the existence of unlawful command influence; a nexus between the influence and trial; and a resultant harm or prejudice that affects the fairness of the proceedings. If this burden is met,[57] the government must then bear the burden of persuading the court beyond a reasonable doubt that the accused was fairly and impartially tried and that findings and sentence were not unlawfully influenced.[58]

Conclusion

Cruz and *Levite* do not make new law (in terms of command influence analysis)[59] and are most noteworthy as an affirmation of *Thomas*. Given the opportunity, the court hesitated to further define or refine the law of command influence and is apparently quite comfortable with its current ad hoc approach.

From a practical perspective, counsel should be sensitive to the court's dissatisfaction in *Levite* with what is regarded as an incomplete record of trial that did not properly frame the command influence issue. Defense counsel cannot expect to prevail simply on the basis of an unsubstantiated allegation.[60] Only those command influence claims that have been thoroughly investigated and documented will satisfy the defense's burden of proof. Likewise, trial counsel and staff judge advocates must be equally involved in the investigation and documentation of command influence allegations.[61] Obviously, corrective measures cannot be instituted, or will be ineffective, if a comprehensive understanding of the extent and impact of the unlawful influence is not known. The government's failure to identify and remedy instances of command influence at the trial level will nearly always prove fatal if the defense meets its initial burden of proof on appeal.

The real significance of *Cruz* and *Levite*, however, is not their legal analysis of the command influence issue, but the concerns voiced by the court. The *Levite* opinion, in particular, reflects the court's growing exasperation with the continuing incidents of unlawful command influence. While it would be unrealistic to think that instances of unlawful command influence will ever be totally eradicated, it is certainly reasonable for the court to expect the military, through increased education and detection efforts, to dramatically reduce the number of such incidents.[62]

Unfortunately, in both *Cruz* and *Levite*, the court was confronted with allegations, or suspected on its own, that the staff judge advocate sought to prevent the litigation of the command influence issue or minimize its significance.[63] Given the crucial role of the staff judge advocate in policing the military justice system, staff judge advocates can expect their handling of command influence allegations in the future to be subjected to the highest degree of scrutiny by the appellate courts.[64]

As the Court of Military Appeals implicitedly recognizes, it can grant relief when unlawful command influence occurs, but it cannot prevent its occurrence. That is the job of counsel in the field. Unless instances of unlawful command influence are aggressively investigated and corrected, the military may well learn what Chief Judge Everett meant in *Thomas* when he stated: "[W]e are confident that events like those involved here will not be repeated. However, if

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[54] *Id.*

[55] As the author understands Judge Cox's position, burden of proof (and its two components: burden of production and burden of persuasion) can best be understood, in the context of command influence cases, as a rule of practice fixing the order of proof, as distinguished from a weight of evidence standard. *See generally* Black's Law Dictionary 178 (5th ed. 1979). Approached in this manner, the burdens of production and persuasion would not be severable. Therefore, in the view of Judge Cox, the military practitioner need only recognize that the defense initially bears the burden of proof, which if met, then shifts to the government.

[56] *Levite*, 25 M.J. at 341.

[57] While the court has yet to quantify the degree of evidence required of the defense to sustain its burden, it would appear the standard is by a preponderance of the evidence. *See Levite*, 25 M.J. at 341. *See also* R.C.M. 905(c)(1).

[58] *Levite*, 25 M.J. at 341.

[59] As previously noted, *Cruz* has significance as an Article 13, UCMJ, case. *See supra* text accompanying note 19.

[60] "[G]eneralized, unsupported claims of 'command control' will not suffice" to trigger the government's burden. *See* Green v. Widdecke, 19 C.M.A. 574, 579, 42 C.M.R. 176, 181 (1970).

[61] Beyond the government's own self-interest in resolving command influence allegations, trial counsel and staff judge advocates should be mindful that Judge Cox has surmised that a possible legal and ethical duty may exist on the part of trial counsel and staff judge advocates to come forward and reveal the existence of unlawful command influence. *Levite*, 25 M.J. at 341.

[62] It is perhaps significant in *Levite* that the court considered the action of the accused's chain of command as so egregious as to provide "a possible basis for bringing criminal charges" against those involved. 25 M.J. at 338. Intentional acts of command influence in violation of Article 37, UCMJ, would be punishable under Article 98, which provides in pertinent part:

> Any person subject to this chapter who—
>
> . . . .
>
> (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
>
> shall be punished as a court-martial may direct.

The author's research revealed no published cases in which a conviction was obtained under Article 98 for the exercise of unlawful command influence. While it is purely conjecture on the author's part, the court may view the military's reluctance to pursue such as course of action, in even the most blatant cases, as a tacit acceptance of the problem.

[63] *Cruz*, 25 M.J. at 329, 331; *Levite*, 25 M.J. at 340.

[64] Article 98, UCMJ, arguably imposes a legal duty on the part of trial counsel and staff judge advocates to correct known instances of unlawful command influence, and those persons who attempt to cover up a command influence incident or intentionally fail to pursue a command influence investigation may be subject to prosecution under Article 98. *See supra* notes 61–62.

we have erred in this expectation, this court—and undoubtedly other tribunals—will find it necessary to consider much more drastic measures." [65]

[65] *Thomas*, 22 M.J. at 400.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Putting on the Writs: Extraordinary Writs in a Nutshell

When the need strikes at the pretrial, trial or post-trial phase of a court-martial for immediate appellate review of an important ruling or decision, time for careful and considered research is often lacking. There is no greater fear for trial defense counsel then the need to do something and to do it immediately. The natural reaction is to grab for the largest weapon within reach and throw it at the offending party—often this weapon is the proverbial "writ" with some Latin incantations to do the job. These are truly times for "extraordinary measures." In recognition of this need to act, the following review is offered as a barebones guide to extraordinary writs. [1]

Quick Reference Sources. There are several sources available to explain the nature and use of the extraordinary writ in military practice. The most cited one is *Extraordinary Writs in Military Practice.* [2] A copy of this article should be in all defense counsel deskbooks for quick reference. It provides a detailed review of case law, procedures, and applicable forms greatly simplifying the task of filing writs. Care should be taken, however, to comply with the applicable rules of practice and procedure for the appellate court before which filing will be made. [3] In this regard as well as others, the Writs Branch at the Defense Appellate Division can be a useful source of information. [4] Two other excellent references are chapter 29 of the Department of Army Pamphlet, *Trial Procedure,* [5] and part J of chapter II of *Justice and the Military.* [6]

Prerequisites for Writ. Two prerequisites must always be met: (1) Extraordinary circumstances must exist (i.e., actual or impending harm to petitioner) and (2) the available procedure or appellate process must be inadequate to correct the wrong. [7] Counsel must be prepared to state why exhaustion of administrative and judicial remedies would be futile or otherwise inappropriate. [8] Counsel may want to stress that a grant of the writ is consistent with the concept of judicial economy since it will resolve all outstanding issues without lengthy appellate review. [9]

Requested Relief. Each phase of a court-martial may provide fertile ground for challenging a decision of a military official, a ruling of the military judge or the omissions of either. The following list is a sample of the petitions for extraordinary relief military courts have considered:

[1] The basic legal authority for extraordinary writs is the All Writs Act, 28 U.S.C. § 1651(a) (1982). *See* United States Court of Military Appeals, Rules of Practice and Procedure, Rule 4(b) (1 July 1983, as amended) [hereinafter C.M.A. Rules]; Courts of Military Review, Rules of Practice and Procedure, Rule 2(b) [hereinafter C.M.R. Rules], *published as* Dep't of Army, Reg. No. 27–13, Military Justice—Courts of Military Review Rules of Practice and Procedure (C1, 12 July 1985); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1203(b) discussion [hereinafter R.C.M. discussion].

[2] Peppler, *Extraordinary Writs in Military Practice*, 15 The Advocate 80 (1983) (updated by enclosure 12, JALS–TD Memorandum, 20 Nov. 1984, subject: Training Memorandum 84–5).

[3] For example, the article incorrectly cites to C.M.R. Rule 21, instead of Rule 20, when addressing the contents of a petition. *Id.* at 82. Additionally, counsel should be aware that the Army Court of Military Review has its own Internal Operating Procedures (C1, 30 July 1985) [hereinafter A.C.M.R. IOP]. Chapter 7 of the A.C.M.R. IOP addresses the procedures for extraordinary writs.

[4] The telephone number for the Writs Branch at Defense Appellate Division is Autovon 289–0587/0588 or commercial prefix (202) 756–xxxx.

[5] Dep't of Army, Pamphlet No. 27–173, Legal Services—Trial Procedure (15 Feb. 1987).

[6] H. Moyer, Justice and the Military 642–60 (1972). Although this publication is somewhat dated, it still offers an excellent overview of the development of extraordinary writs in military practice.

[7] Font v. Seaman, 20 C.M.A. 387, 390, 43 C.M.R. 227, 230 (1971); *see also* C.M.A. Rule 27(a)(1)(E); C.M.R. Rule 20(a)(7).

[8] Possible remedies include complaints filed under article 138, of the Uniform Code of Military Justice, 10 U.S.C. § 938 (1982) [hereinafter UCMJ], as well as requests for UCMJ art. 38(a) sessions to litigate challenged action. *See* Font v. Seaman, 20 C.M.A. at 391, 43 C.M.R. at 231; Walker v. Commanding Officer, 19 C.M.A. 247, 41 C.M.R. 247 (1970). *But cf.* Kelly v. United States, 1 M.J. 172 (C.M.A. 1975) (holding that continued violation of statutory prohibition against prior punishment was adequate basis to grant writ for *in propria persona* petitioner).

[9] *See* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (only evidence against petitioner was a urine test and the Department of Defense was following similar procedures in combatting drug abuse throughout the military).

1. Punishment before trial violating Article 13; [10]

2. Lack of jurisdiction over person or crime; [11]

3. Improper imposition of nonjudicial punishment; [12]

4. Improper withdrawal by convening authority from pretrial agreement; [13]

5. Violation of immunity grant; [14]

6. Illegal pretrial confinement; [15]

7. Improper denial of counsel or witnesses; [16]

8. Compliance with discovery orders; [17]

9. Denial of speedy disposition of case; [18]

10. Denial of request for deferment of confinement; [19]

11. Former jeopardy where mistrial improperly declared; [20] and,

12. Unlawful command influence. [21]

Classification of Writs. The rules of practice and procedure provide a nonexclusive list of applicable writs for extraordinary relief. [22] There is no magic to a particular name, and counsel may elect to characterize a specific petition for extraordinary relief as simply one for appropriate appellate relief. [23] For those who find comfort in reciting Latin, the basic common law writs are: certiorari; [24] habeas corpus; [25] mandamus; [26] prohibition; [27] error coram nobis; [28] and my favorite, procedendo. [29] A petition for new trial, on the other hand, is a remedy provided by separate statute and is handled by different appellate procedures. [30]

Time Limitations. There is no specified time period for the filing of an extraordinary writ with the Army Court of Military Review. [31] Court of Military Appeals rules, however, require that petitions for extraordinary relief be filed "no later than 20 days after the petitioner learns of the action complained of." [32] The only exception is a writ of habeas corpus, which can be filed at any time. When counsel advise clients who wish to file for extraordinary relief long after

[10] United States v. Kelly, 1 M.J. 172 (C.M.A. 1975).

[11] United States v. Caputo, 18 M.J. 259, 262 (C.M.A. 1984) (substantial arguments challenging right of military to try reservist could bypass normal appeal procedure); Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981) (unsuccessful challenge to authority of Army to revoke discharge for fraud); Murray v. Haldeman, 16 M.J. at 76–77 (unsuccessful challenge to the pending use of urine sample to prove drug abuse).

[12] Dobzynski v. Green, 16 M.J. 84, 89–91 (C.M.A. 1983) (Everett, C.J., dissenting) (arbitrary action in withdrawing court-martial action and requiring accused to submit to punishment under Article 15, UCMJ).

[13] Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983) (discretionary review of military judge's ruling that permitted convening authority to withdraw from pretrial agreement).

[14] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (bar to prosecution was appropriate remedy where grant of immunity requires enforcement).

[15] United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985) ("resort to the extraordinary-writ jurisdiction would be appropriate in extreme cases"); Fletcher v. Commanding Officer, 2 M.J. 234 (C.M.A. 1977) (summary disposition) (record does not justify pretrial confinement).

[16] Soriano v. Hosken, 9 M.J. 221, 224–240 (C.M.A. 1980) (Cook, J., dissenting) (right to attorney of a foreign bar); Hollywood v. Yost, 20 M.J. 785, 789 (C.G.C.M.R. 1985) (denial of counsel made pretrial agreement invalid); Davis v. Qualls, 7 M.J. 267 (C.M.A. 1979) (summary disposition) (although petitioner made persuasive assertion for need of expert witness, issue was not proper matter for extraordinary writ).

[17] Halfacre v. Chambers, 5 M.J. 1099 (C.M.A. 1976) (summary disposition) (60-day order issued to convening authority to compel compliance with earlier military judge's order granting petitioner and his counsel travel to foreign country for pretrial discovery).

[18] Bouler v. United States, 1 M.J. 299 (C.M.A. 1976) (government failed to overcome presumption that petitioner was denied speedy review and action on his court-martial; appropriate remedy was dismissal).

[19] Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986).

[20] Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986) (military judge abused discretion in declaring mistrial over objection; barred retrial of petitioner).

[21] Cheeks v. United States, 23 M.J. 161 (C.M.A. 1986) (summary disposition) (petition for writ of error coram nobis granted; case remanded to the Army Court of Military Review to determine validity of review and action); Chapel v. United States, 21 M.J. 687 (A.C.M.R. 1985) (petitioner failed to sustain burden of showing that his individual case was affected by unlawful command influence); Silas v. United States, 21 M.J. 108 (C.M.A. 1985) (interlocutory order), *petition for extraordinary relief denied*, 21 M.J. 295 (C.M.A. 1985) (petitioner ordered to state manner in which his court-martial was adversely affected by unlawful command influence).

[22] C.M.A. Rule 4(b)(1); C.M.R. Rule 2(b).

[23] Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113, 118 (1970) (petition for appropriate relief granted where deferment from confinement was rescinded improperly).

[24] Action to grant discretionary review of an appeal. Black's Law Dictionary 1443 (5th ed. 1979); *cf.* UCMJ art. 67(c) and (h). The writ of certiorari in military practice is rare, and its function is unsettled beyond the clearly defined statutory provisions of Article 67.

[25] Action to release petitioner from unlawful imprisonment. Black's Law Dictionary 638 (5th ed. 1979); *see* Johnson v. United States, 19 C.M.A. 407, 42 C.M.R. 9 (1970) (grant of new trial voids authority to confine petitioner as a sentenced prisoner).

[26] Action to confine an inferior court (or officer) to a lawful exercise of its jurisdiction or to compel it to exercise its authority when it has the duty to do so. Black's Law Dictionary 866 (5th ed. 1979); *see* United States v. LaBella, 15 M.J. 228 (C.M.A. 1983) (standard for reversal of discretionary decision by mandamus); LaBuy v. Howes Leather Co., 352 U.S. 249 (1947) (mandamus may lie where there is a clear abuse of discretion).

[27] Action by a superior court preventing an inferior court or tribunal from exceeding its jurisdiction. Black's Law Dictionary 1091 (5th ed. 1979); *see* Petty v. Moriarty, 20 C.M.A. 438, 43 C.M.R. 278 (1971) (enjoined Article 32 investigation against petitioner).

[28] Action to correct a judgment on the ground of error of fact for which no statute provides other relief. Black's Law Dictionary 1444 (5th ed. 1979); *see* Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974) (jurisdictional error raised for first time by writ four years after appellate relief denied).

[29] Action where court of superior jurisdiction orders lower court to enter judgment without specifying any particular judgment. Black's Law Dictionary 1083 (5th ed. 1979); *see* Saunders v. Army Court of Military Review, 25 M.J. 234 (C.M.A. 1987) (summary disposition) (denying petition to compel limited hearing on polygraph admissibility); 62 Am. Jur. 2d *Procedendo* § 1 (1972).

[30] UCMJ art. 73; R.C.M. 1210; C.M.R. Rule 22; A.C.M.R. IOP, ch. 5; C.M.A. Rule 29.

[31] Neither the C.M.R. Rules nor the A.C.M.R. IOP provide any limitations on the period of filing, but A.C.M.R. IOP 7-5(c) recognizes the importance of the filing deadline for extraordinary writs before the Court of Military Appeals.

[32] C.M.A. Rule 19(d). The same time period is applicable under C.M.A. Rule 19(e) to appeal of a decision by a court of military review acting on an extraordinary writ and runs from the date of service of the decision on appellant or appellant's counsel.

their appeals are final and their confinement has ended, the better practice is to file a meritorious writ at the Court of Military Review, and then appeal any denial of relief to the Court of Military Appeals.[33]

Filing Requirements. Each petition for extraordinary relief must include a case history, concise statement of facts relevant to any asserted issues, statement of issues, specific relief sought, reasons for granting the writ, jurisdictional basis, a statement of the reasons why relief cannot be obtained in the ordinary course of appellate review, and a request for appointment of appellate counsel.[34] Except for those submitted *in propria persona*, all petitions must be accompanied by a supporting brief.[35] In addition to the required court copies,[36] a copy must be served on each named respondent as well as The Judge Advocate General. Service on the chief of the Government Appellate Division constitutes service on The Judge Advocate General of the Army.[37] Although electronic message petitions are permitted by both appellate courts, the procedures are different.[38] The Army Court of Military Review provides for direct filing of a petition by electronic message.[39] The Court of Military Appeals requires the electronic message to be transmitted through the chief of the Defense Appellate Division.

General Strategy. Petitions for extraordinary relief are most effective when utilized to enforce recognized rules of law. Where there is a clear violation of statute, regulation or judicial precedent, the extraordinary writ offers an expedited means of protecting a client's vital interests. Nonetheless, counsel should exhaust all reasonable remedies short of the writ in order to perfect the record. Timely consultation with supervising trial defense counsel as well as the Writs Branch of the Defense Appellate Division will improve the opportunity for successful use of the extraordinary writ. Major Marion E. Winter.

Catch the Waive

In a recent unpublished case, *United States v. Rolon*,[40] the Army Court of Military Review again emphasized that the issue of lack of speedy trial is waived unless preserved at trial. Rule for Courts-Martial 707a(2) requires "[t]he accused . . . be brought to trial within 120 days after . . . [t]he imposition of restraint." The government conceded defense counsel's assertion that Rolon had been restricted to post from the date of his apprehension on 10 September 1986 until his trial date on 2 April 1987.[41] Furthermore, appellant's possessions were confiscated.[42]

In a notice-of-forum and motions document submitted to the military judge prior to trial, defense counsel indicated he would move to dismiss the case against Rolon for lack of a speedy trial. Neither the defense counsel nor the military judge directly addressed the issue during the court-martial, however, in which appellant pleaded guilty pursuant to a pretrial agreement. The issue of restriction was not raised until the parties verified the charge sheet during the presentencing phase of the court-martial. The trial counsel stated that there had been no pretrial restraint in the case, at which time the defense counsel corrected him. There was no issue of restriction tantamount to confinement; the military judge, however, indicated that he would consider the length of restriction when deciding an appropriate sentence.

The speedy trial issue would have hinged on whether the restriction violated R.C.M. 707a(2). The information provided to the military judge by both counsel strongly suggested a viable speedy trial issue. The remedy for a violation of an accused's right to a speedy trial is dismissal of all affected charges.

Appellant claimed on appeal that his trial defense counsel was ineffective for failing to raise at trial the denial of appellant's right to a speedy trial. The Army Court of Military Review rebuffed appellant's assertion of ineffective assistance of counsel and stated that "appellant has failed to show that the representation considered as a whole was so seriously deficient as to deny him effective assistance of counsel. We decline to weaken the rule of waiver in the manner requested by appellant."[43] Defense counsel should be familiar with those issues, such as lack of a speedy trial, that are not waived by a guilty plea.[44] Protect the rights of your clients by properly preserving issues during the court-martial. Captain Harry C. Wallace, Jr.

"Counting the Days"

What happens when the adjudged sentence to confinement is in terms of days and the pretrial agreement limits confinement in months (or vice-versa)? The process of converting months to days is not as straightforward as it might

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[33] In McPhail v. United States, 1 M.J. 457, 463 (C.M.A. 1976), the Court of Military Appeals entertained a writ of error coram nobis to allow review of an Article 69, UCMJ application for relief. The decision warned, however, that the court's extraordinary jurisdiction cannot be "invoked for all of the errors that can be reviewed by way of ordinary appeal under Article 67," UCMJ.

[34] C.M.R. Rule 20(a); C.M.A. Rule 27(a).

[35] C.M.R. Rule 20(e); C.M.A. Rule 27(a)(3). The brief must comply with the form specified under C.M.A. Rule 24.

[36] The Army Court of Military Review requires two copies along with the original. A.C.M.R. IOP 7–1. The Court of Military Appeals requests the original and four copies.

[37] A.C.M.R. IOP 7–4.

[38] C.M.R. Rule 20(c); C.M.A. Rule 27(a)(6).

[39] The most recent procedures for filing petitions with the Army Court of Military Review can be found in Clerk of Court Note, *Petitions for Extraordinary Relief*, The Army Lawyer, Mar. 1987, at 44.

[40] United States v. Rolon, ACMR 8700733 (10 Mar. 1988) (unpub.); *see also* United States v. Guerreo, 25 M.J. 829 (A.C.M.R. 1988).

[41] According to the charge sheet, charges were not preferred until 19 February 1987. The lack of speedy trial issue, however, was premised upon the total of 180 days which elapsed between the time restriction was imposed on 10 September 1986 and the date defense counsel requested a psychiatric evaluation of the accused, 10 March 1987. No other defense delays or excludible times were noted in the record of trial or allied papers.

[42] Rolon was left with only two battle dress uniforms (BDUs), a field jacket, a BDU cap, two pairs of boots, and a laundry bag.

[43] *Rolon*, slip op. at 1 (citations omitted).

[44] *Compare, e.g.*, R.C.M. 907(b)(1) (lack of jurisdiction and failure of the specification to state an offense not waived) *with* R.C.M. 910(j) (general rule of waiver by a guilty plea).

appear to be. In *United States v. Hardwick*[45] the Army Court of Military Review cautions that the assumption that one month always equals thirty days is erroneous.[46]

In *Hardwick*, the military judge sentenced the accused to 127 days of confinement.[47] After examining the limitations of the pretrial agreement, the military judge declared that the convening authority could approve a sentence to "confinement for 4 months or 120 days." The trial counsel agreed.[48] The convening authority approved a sentence that included four months' confinement.[49] The four months, however, in Private Hardwick's case actually consisted of 123 days, not 120.[50] The court held that because the "erroneous interpretation of the length of confinement, at the very least, rendered the provision ambiguous," appellant's sentence to confinement could include only 120 days.[51]

The court held that, to determine the length of a sentence to confinement, the number of days in the applicable months are counted.[52] To arrive at the figure of 123 days for the four months in question, the Court referred to Army Regulation [AR] 633–30.[53] A table contained in the regulation is a valuable aid for counting days of confinement. For example, if an accused is sentenced to 300 days' confinement and has a pretrial agreement limitation of ten months' confinement, this may appear at first blush, to be equivalent confinement time. The difference between the two periods of confinement, however, is easily ascertainable using the table in AR 633–30. If the accused was tried on 31 January 1988, the corresponding figure in the table is "16467." Three hundred days from that date is "16767," the figure which corresponds to 26 November 1988. In contrast, ten months from 31 January 1988 is 30 November 1988. Therefore, the adjudged confinement of 300 days is four days shorter than what is provided for in the pretrial agreement.

Trial defense counsel should be prepared to aid the military judge at trial in fulfilling his *Green/King*[54] responsibilities of interpreting the pretrial agreement by having a copy of the AR 633–30 table available should a "days" versus "months" problem surface after sentencing. What seems to be almost trivial is certainly not so in the eyes of the accused, who will be counting the days until his release from confinement. By the time such errors reach the appellate level, very often the accused has already served his confinement, and the only remedy left is to seek recoupment of a few days of forfeitures (assuming forfeitures were adjudged).[55] Captain Lida A. S. Savonarola.

Forgery: A False Signature Is Not Enough

Even though you falsely make or alter a signature or writing, or knowingly utter such a writing with the intent to defraud, the offense of forgery will not lie unless the false writing "would, if genuine, apparently *impose* a legal liability on another or *change* his legal right or liability to his prejudice."[56] That the false writing may be a step in a series of acts that might ultimately create or alter such a legal right or liability is of no consequence, unless the false writing itself, either alone or in conjunction with something else, has legal significance.[57] In *United States v. Thomas*,[58] the Court of Military Appeals tells us that for forgery to lie either on the making or uttering theory, the subject of the forgery must have "legal efficacy."[59]

Thomas applied to the Army Aviation Center Federal Credit Union at Fort Rucker for a $5,000 loan. He was given a credit reference form known as a "Commanding Officer's Letter," which he was instructed to have his unit commander fill out. Thomas returned the completed form, purportedly signed by his unit commander, too quickly and the loan officer became suspicious. A call to the unit revealed that the unit commander had never seen the form and, in fact, contrary to what the form stated, the unit commander had no favorable recommendation for Thomas. Thomas was convicted of uttering a forged document.[60]

The military judge denied trial defense counsel's timely motion to dismiss the charge and specification. Fortunately, defense counsel anticipated appellate litigation and the need for a complete record, and requested that the military judge make special findings of fact. The judge found, inter alia, that the credit union was not obligated to loan money based solely on a favorable "Commanding Officer's Letter"; the credit union could withhold credit even though a favorable letter was presented; the credit union could extend credit even if an unfavorable letter was presented; and the credit union was not required to modify the security interest for a

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[45] ACMR 8701597 (A.C.M.R. 2 Mar. 1988).

[46] The Court noted that, prior to 31 May 1951, a "month" always consisted of 30 days for purposes of calculating confinement, but this is no longer true. *Id.*, slip op. at 2 N.1.

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

[48] *Id.* The opinion does not mention what, if anything, the trial defense counsel had to say about the matter.

[49] *Id.*, slip op. at 2.

[50] *Id.*

[51] *Id.*

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

[53] *Id.*, slip op. at 2; *see* Department of the Army, Reg. No. 633–30, Apprehension and Confinement: Military Sentences to Confinement, para. 15 & tables (Nov. 1964).

[54] United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[55] *See, e.g.*, United States v. Angelo, ACMR 8701523, slip op. at 4 (A.C.M.R. 18 Feb. 1988).

[56] United States v. Thomas, 25 M.J. 396, 401 (C.M.A. 1988) (quoting UCMJ art. 123) (emphasis in original).

[57] *Id.* at 401–02.

[58] 25 M.J. 396 (C.M.A. 1988).

[59] *Id.* at 398.

[60] *Id.* at 396, 397.

particular loan based upon a "Commanding Officer's Letter."[61]

The Court of Military Appeals rejected the government's assertion on appeal that the false "Commanding Officer's Letter" Thomas submitted was a step in a series of acts that might perfect a legal right or liability and that the document was, therefore, a proper subject of forgery. The court said:

> The record before us leaves no doubt that the false document was intended to facilitate (Thomas') . . . obtaining the loan and that, if genuine, it might have had a decisive effect on the application. In that sense, the document could readily be seen "as a step in a series of acts which might perfect a legal right or liability."[62]

The court noted that such is not the test, however. The test is whether the false document would, if genuine, impose a legal liability on another or change a legal right or liability to someone's prejudice. In this case, the document "did not, by itself or in conjunction with anything else, purport that he (Thomas) was entitled to any benefit or that he was a member of a class entitled to any benefit. The document also did not reflect or assert that the credit union was under any obligation to, or owed any duty to . . . (Thomas) or anyone else."[63] Therefore, the document lacked legal efficacy and could not be the subject of forgery.

In his opinion for the court, Chief Judge Everett describes the legal efficacy requirement of Article 123 as a "trap for unwary prosecutors."[64] Defense counsel should seriously try to spring that trap in every forgery case. Remember, however, to create a proper record for appeal, as did the defense counsel in the *Thomas* case. Captain Keith W. Sickendick.

[61] *Id.* 400–01.

[62] *Id.* at 401.

[63] *Id.* at 401–02.

[64] *Id.* at 402.

Trial Defense Service Notes

The Case of the Famous Client: Effects of the Media on Ethics, Influence, and Fair Trials

Major Jack B. Patrick
U.S. Army Trial Defense Service Training Officer

The early morning sun steps boldly over the mountains to the east as the young defense counsel strides confidently across the asphalt parking lot toward his office. Off to his right he observes a suspicious-looking woman and her male companion, whom he mistakes for his first two morning Article 15 appointments. Suddenly, the woman draws a microphone from behind her back and her partner cooly aims a loaded video camera at the counsel's head. In a flashing moment the counsel hears for the first time that his client, Sergeant Benny Arnold, has been apprehended while handing over to his foreign national lover, Martina, classified documents pertaining to the Army's secret formula for Meals-Ready-To-Eat (MREs). Further, Sergeant Arnold has been identified as the widely-sought suspect in recent multiple homicides. The defense counsel waits for a voice to announce that he has just crossed over into the Twilight Zone. Instead, he only hears the plaintive tones of the woman, who is a network news reporter.

"Why did Sergeant Arnold do it?" the reporter demands.

"No comment," the counsel replies, giving it his best Clint Eastwood squinting glare.

The reporter smiles into the camera sending this scene to thirty million homes coast-to-coast and righteously counters, "THE PEOPLE HAVE A RIGHT TO KNOW."

This article describes the difficulties and professional considerations when a defense counsel comes face to face with the Media, the great three-headed television, radio, and newsprint monster, as it focuses special attention on the counsel's client.

The Problem

A defense counsel may have a client who achieves exceptional notoriety by virtue of the alleged crimes, commonly involving espionage, serial murders, trainee abuse or AIDS. These offenses sell newspapers and raise rating points for radio and television broadcasts. The Media seeks out the victims, witnesses, and anyone else with information, including the accused and the accused's lawyer. When conventional requests for an interview fail, the news reporters may resort to "ambush" journalism, directly confronting their prey with a burst of questions calculated to intimidate the victim into a newsworthy reaction. A response can result in a misquote or can be taken out of context while a failure to respond may evoke the complaint "You Army guys are all the same; you always stonewall." Questions may be phrased such that silence is taken as a "yes" or a "no". The Media are persistent because the client's story is a sellable item, about which the public wants to know.

Professional Concerns

Before defense counsel emulate what they imagine Kuntsler, Bailey, Matlock, Perry Mason or anyone on *L.A. Law* might do, they must be aware of the regulatory restrictions on their actions as attorneys and as judge advocates.

The Judge Advocate General has issued a policy letter instructing that the public affairs office will normally answer news media inquiries.[1] Judge Advocates assigned to the U.S. Army Trial Defense Service (USATDS) are reminded to refer media to the installation public affairs officer. No member of the U.S. Army Trial Defense Service (USATDS) will "provide a written statement for publication, provide information for publication, or permit himself to be quoted on official or legal matters without the prior approval of the Chief, USATDS."[2] The Army Rules of Professional Conduct [Rules] in DA Pam 27-26[3] recognize the need to balance the public's right to know, the right to free expression, and the right to a fair trial. Just as the public has a stake in the outcome of trials of people accused of crime, the public also has an interest in knowing that the trial is conducted properly. The Rules focus on actions that might have a prejudicial effect:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.[4]

Rule 3.6(b) explains that such prejudice is likely to occur when the statement refers to a "civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, discharge from the Army or other adverse personnel action" and the statement relates to a variety of listed items, including the character of suspects and witnesses, examination or test results, confessions, inadmissible evidence, and opinions of guilt or innocence. Also prohibited is a statement concerning the "credibility, reputation, motives, or character of civilian or military officials of the Department of Defense."[5]

Rule 3.6(c) does provide some statements that a lawyer may make "*without elaboration.*"[6] In a criminal case, these statements can provide the name of the accused and the fact of his apprehension. The lawyer can note proceedings that will follow, such as an article 32 investigation. Clearly, these statements are allowed because they will provide assurance to the public that action is being pursued. Little aid to the defense can be found in the allowable statements, although assistance in obtaining evidence and information can be solicited.[7]

Effect of Media Attention

Anyone who sees, reads, or hears anything about a criminal case will be affected by it, even if a fixed opinion is not consciously formed. In extreme cases, media coverage could so prejudice an accused's right to a fair trial that a change of the place of trial (venue) would be required.[8] A defense counsel, however, is more likely to be concerned with the effect media coverage will have on commanders, court members, judges, and witnesses.

Media coverage focuses attention on the client, and may influence what happens to the client. For example, a commander might go forward with a court-martial in a case where he or she perceives that the Media, as the self-appointed voice of the public, demands a court-martial and the commander wants to show the public that suspected offenders are not sheltered in the military. On the other hand, when the Media appears critical of a decision to refer a case to a court-martial, a commander could nevertheless proceed with the court-martial, in part, to show that he is not influenced by the Media. Once the court-martial has concluded, if the accused has been found guilty and sentenced, media attention could also affect the commander's decision, as convening authority, to approve or disapprove portions of the findings and sentence.[9] If the sentence is severe and loudly applauded by the Media, the convening authority is unlikely to grant much relief to the accused.

Court members and military judges also read newspapers, watch television, and listen to radios. Before trial, potential court members are not usually cautioned to avoid media coverage. The information they get from the Media may be inaccurate, incomplete, and biased. Once a case is brought to trial, in response to the reasonable likelihood that pretrial or trial publicity could interfere with a fair trial, the military judge could order court members not to discuss the trial outside of court and direct them to avoid news reports.[10]

Defense counsel should conduct voir dire to determine the extent and basis of a court member's knowledge of the case and to ensure the court member is impartial, if not favorably inclined toward the accused. A distorted understanding of the facts of a case is not the only danger. The attention a case receives from the Media, and especially comments attributed to the command, could influence a court member's decision against an accused. Although a

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[1] Letter, DAJA-CL, Office of The Judge Advocate General, U.S. Army, to Staff and Command Judge Advocates, subject: Relations with News Media—Policy Letter 86-3, 17 March 1986, *reprinted* in The Army Lawyer, May 1986, at 4.

[2] Paragraph 1-9, United States Army Trial Defense Services Standard Operating Procedures.

[3] Dep't of Army, Pamphlet No. 27-26, Army Rules of Professional Conduct, rule 3.6 comment (1987), [hereinafter Rules].

[4] *Id.* rule 3.6(a).

[5] *Id.* rule 3.6(b)(7).

[6] *Id.* rule 3.6(c)(7) (emphasis added).

[7] *Id.* rule 3.6(c)(5)

[8] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 906(b)(11) [hereinafter R.C.M.].

[9] *But see* United States v. Kepler, ACM 25967 (ACMR, August 7, 1987). The base newspaper published on its front page the results of the court-martial after trial but before action by the convening authority. The court noted that a court-martial is a public matter and failed to see how the accused was adversely affected. The court did not believe the convening authority "of the highest rank" would be influenced by the publication.

[10] *See* United States v. Garwood, 20 M.J. 148 (C.M.A. 1985).

court member, who has knowledge of the case based on media coverage, may be unwilling to admit bias or partiality, there is perhaps a greater chance that the court member simply is not conscious of the effect. A court member might not even realize that he had been exposed to the media coverage.[11]

In any event, courts are reluctant to disqualify court members who profess impartiality, although they will determine if "the impact of the quantity and character of pretrial publicity is so patently profound that the juror's personal belief in his impartiality is not sufficient to overcome the likelihood of bias."[12] Mere knowledge of the case will not be enough to sustain a challenge for cause under R.C.M. 912(f). A court member, who initially indicates a potential bias or partiality, unless he wants to be removed or is painfully honest, can be "rehabilitated" into agreeing that he can follow the judge's instructions and adhere to the law and, of course, will gladly affirm that he has no fixed, inelastic attitude about anything, let alone the guilt, innocence, or punishment of the accused. Where a challenge for cause is denied and the defense counsel elects to peremptorily challenge the court member, to preserve the issue for later appellate review the defense counsel must state on the record that he or she would have exercised his peremptory challenge against another member if the challenge for cause has been granted.[13]

The military judge, like an elected or appointed civilian judge, is under an intense spotlight in a widely-publicized case. A military judge is not immune from media effects but hopefully, owing to experience and legal training, may be better able than court members to put aside knowledge of the case. Although a judge may be accustomed to the scrutiny of the appellate review process, though surely never comfortable with it, appellate review is not the same as having rulings immediately, openly, and often inartfully criticized by the Media. Several years ago, one military judge expressed less dismay with errors in the local newspaper's report of the court-martial proceedings than with their artist's sketch of him, which in his view, incorrectly made him look more like a man from Mars than a colonel from south Georgia. Defense counsel should ordinarily conduct a voir dire of the military judge in a media-hot case.

Media attention will also affect the individuals who might give evidence in a case. Some will be reluctant to get involved because of the attention; others may "expand" their testimony to ensure even greater attention. A few may fear retribution, particularly character witnesses, and either not give evidence or not be entirely truthful. Just as it may drive away potential witnesses, media attention may bring out witnesses who might be unaware of the case or of the significance of their testimony. One of the statements that a defense counsel clearly can make under the Army Rules for Professional Responsibility is to request assistance in obtaining evidence and information.[14] Such an approach is not recommended, of course, where the client actually committed the offense.

Perceived Value to the Defense Case

In addition to free advertising and ego inflation, civilian defense counsel frequently respond to the Media because they believe there are real benefits to the defense. As noted earlier, requests for information can encourage favorable witnesses to step forward. Beyond the call for witnesses, which is ethically permissible, military defense counsel must be wary not to fall into the Media trap, no matter how enticing the lure appears.

Because the client's reputation can suffer by a particular version of the facts, a counsel might seek to point out errors in the Media reports, "setting the record straight", or to cast the facts in a light more favorable to the client.[15] The difficulty with this course is that there always seems to be one more question asked or one more detail that the Media wants to draw out. When the counsel responds to one question and not to another, the omission is highlighted, leading to speculation that may be harmful to the client. Counsel in these cases must also restrain their clients from responding to the Media. Some clients, who on advice of counsel can maintain their right to silence when queried by the most deceptive police investigator, will talk freely, angrily, and illogically to the Media.

As a case begins to take on a life of its own in the Media, counsel may feel the need to "sell" the case in the Media or, at least, to create a climate that is not unfavorable to the client. Some civilian counsel think they can scare off a court-martial by using the Media, though usually this is a badly misplaced belief. Aside from slowing the train toward court-martial, counsel may legitimately be concerned that witnesses, court-members and the judge are being adversely influenced by the Media version. There is a temptation to react by claiming that the military has selected the client as a "scapegoat." Recall that the Army Rules of Professional Conduct ordinarily would prohibit a statement relating to the motives of civilian or military officials of the Department of Defense.[16] Even if the "scapegoat" theory is valid, or if the accused is being blamed for what many have also done, prosecution generally proceeds when there is sufficient evidence to believe the client committed the offense, although sharing that guilt with others.

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[11] *Id.* at 151, 152. Defense counsel in *Garwood* argued that it was inevitable, due to the extensive media coverage, that some of the descriptions in the media of the military judge's remarks were conveyed to the court members subconsciously. The defense profferred that an expert witness would testify that court members could hear information and not realize they had heard it. This information, received at a subliminal level, could then affect the members. The court noted that the expert did not suggest the subliminal perceptions would "necessarily override the evidence presented to the members in open court or the explicit legal instructions provided by the military judge." As the court concluded, "were we to accept the proposition that unconsciously received perceptions were sufficient to disqualify otherwise qualified court members from participating in courts-martial, then it would appear that relatively few serious crimes could ever be prosecuted before members."

[12] Irvin v. Dowd, 366 U.S. 717, 728 (1961), *cited in* U.S. v. Calley, 22 C.M.A. 534 48 C.M.R. 19 (1973).

[13] R.C.M. 912(f)(4).

[14] Rule 3.6(c)(7).

[15] Publicity can have an effect in determining whether or not a crime has been committed! *See* U.S. v. Scott, 24 M.J. 578 (N.M.C.M.R. 1987) where the publicity in a local newspaper article was a factor in finding that the accused had flouted military authority.

[16] Rule 3.6(b)(7).

Conclusion

Military defense counsel must be aware that the Media can affect a client's case, to the client's advantage or to his disadvantage. The Army Rules of Professional Conduct and policy established by The Judge Advocate General and USATDS, however, restrict a military defense counsel's response to Media inquiries. Counsel should review these requirements and be careful to abide by them. In a particular case, the defense counsel may find it useful to request that the public affairs officer limit information released, amend the information to correct inaccuracies, or even add information favorable to the client. To ensure media coverage has not adversely influenced the military judge and court members, the defense counsel should conduct a voir dire, and then raise and preserve challenges for cause.

Finally, even though the military defense counsel will rarely communicate directly with the Media, adverse media coverage can be minimized. By looking and acting like good citizens and good soldiers whenever the camera is turned toward them, the counsel and the client can send an important, favorable message through the Media to the public, witnesses, commanders, judges, and court members.

An Outline Approach to Defending Urinalysis Cases

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Introduction

Army defense counsel rarely confront a more challenging case than that of a solider accused of wrongful use of a controlled substance. The members or the military judge may believe that the accused must be guilty because of a positive urinalysis. The results of a supposedly objective, scientific test will have a tremendous impact on the fact-finder. Even a person who might concede that the urinalysis program is imperfect will find it difficult to ignore. This article presents "by the numbers," an outline for defense to follow when attacking validity of positive urinalysis results.

The "bible" for understanding the Army's biochemical testing program is Army Regulation (AR) 600–85, chapter 10.[1] Any defense counsel confronted with a urinalysis case rapidly becomes an expert on this regulation. Chapter 10 and its Appendix E set out the procedures established for biochemical testing and the chain of custody, respectively. Mastering the concepts of the testing program is a prerequisite to formulating a successful attack on the government's case. At trial, defense counsel must be the foremost expert on this regulation in order to identify and use violations of the regulation as a sword to dissect the government's case.

When confronted with a "use" case under Article 112a,[2] after counsel first has ruled out the defenses of innocent ingestion and passive inhalation, other theories of defense to pursue are defective laboratory analysis or defective chain of custody. An attack on defective laboratory analysis problems is ill-advised without expert testimony that the scientific reliability of the Army's laboratory analysis through gas chromatography mass spectrum is flawed or has been misinterpreted or that there was a defect in the chain of custody at the laboratory. The defense counsel is left with one final theory of defense, defective local chain of custody.

At a recent court-martial, the military urinalysis expert, the officer-in-charge at the biochemical testing laboratory in Hawaii, testified that the weakest link in the urinalysis program is the local chain of custody. The expert also testified on cross-examination that, because neither he nor anyone else at the laboratory observed collection of urine samples and he was not part of the local chain of custody, he could not testify that the urine in the bottle was the urine of the accused. The only thing the expert can say is that the urine sample contained urine from an unknown person who tested positive for a controlled substance.

As the old saying goes, "A chain is only as good as its weakest link." Through artful cross-examination, oftentimes counsel can elicit testimony from government experts suggesting that the position of Unit Drug and Alcohol (UADC) Coordinator is assigned to a sergeant who is unworthy of supervising other unit missions. An attack on the local chain of custody is directed at debunking the "infallible aura" surrounding test results.

Pretrial Scientific Test

Defense counsel should not overlook scientific testing that may benefit a client. Examples include retest of the sample, the polygraph test, and the secreter test. Counsel should always request a retest of their client's urine sample.[3] If the retest is negative, counsel has a strong defense.

Counsel should discuss with their client use of the polygraph. Have the test first conducted by a civilian examiner without the government's knowledge. If the client is found "deceptive," do not allow a Criminal Investigation Division (CID) agent to conduct a polygraph examination. If the client is found "truthful," ask the government to dismiss the charge. Many commanders will view tests coming from a reputable examiner favorably. Often, trial counsel will insist that the accused submit to a CID polygraph examination. If the client tested "truthful" at a civilian polygraph, chances are much greater he will do the same at the CID examination. In light of a recent military case discussing

[1] Dep't of Army, Reg. No. 600–85, Personnel—General—Alcohol and Drug Abuse Prevention and Control Program, ch. 10 (3 Nov. 1986) [hereinafter AR 600–85].

[2] Uniform Code of Military Justice art. 112a, 10 U.S.C.A. § 912a (West Supp. 1987).

[3] AR 600–85, para. 10–8.

the admissibility of polygraphs, it may be possible to use their results as evidence at courts-martial.[4]

In urinalysis cases in which the accused denies use of controlled substances, defense counsel should advise the client to take a secretor test. Scientifically, this type of test is known as blood group serology or ABO typing. A secretor test is a way to blood-type body fluids such as saliva, sweat, urine, and semen, from a specific type of individual referred to as "secretors;" about 80 percent of the population falls into this category.[5] The secretor test determines whether the urine sample is that of a secretor or a nonsecretor. If the urine is that of a secretor, it is possible to blood-type the urine.

The beauty of the secretor test is it cannot be used to identify a drug user, but it may identify positively that the client did not give the urine sample in issue. For example, if the accused is a secretor and the urine sample came from a nonsecretor or vice versa, then positive evidence is provided that the client did not give the sample; on the other hand, if the client is a secretor, blood-type O+, and the sample is from an individual, secretor blood-type O−, the client did not give the sample.[6]

Civilian laboratories in most metropolitan areas have the resources to administer the test; the cost is about $100.00 to $175.00.[7] To obtain urine from the sample in issue, defense counsel must make a written request to the Forensic Toxicology Drug Testing Laboratory that did the test. Counsel should include in that letter:

a. The laboratory to which the urine sample should be mailed;

b. The name and social security number of the tested individual;

c. ADAPCA Service Area Code;

d. Unit Code;

e. Julian date specimen was collected;

f. Forensic Toxicology Drug Testing Laboratory Number; and

g. The Julian date specimen was received.

All of the above information can be found on Form 5180–R,[8] used to collect the client's urine.

"By the Numbers" Attacks on the Chain of Custody

If the scientific results are unpromising, counsel may still attack the chain of custody—the proof that the urine sample came from the client. This article will, "by the numbers," observe points of attack on the local chain of custody. It will show various requirements of the regulation that might be ignored, subverted, disregarded, or violated by the UADC and his assistants.

After counsel has mastered the regulation and interviewed potential witnesses, he must outline his theory of attack on the chain of custody; again, this can be done "by the numbers." Number one in counsel's trial strategy is a comparison of the regulatory requirements[9] and the local Letter of Instruction (LOI). Chapter 10, AR 600–85, along with appendix E, is the controlling regulation; the LOI merely explains, specifies, and provides details for implementation of appendix E. If the LOI is contrary to, or fails to set out instructions that follow the intent of the regulation, and such digressions could prejudice tested individuals, counsel should argue that the local testing program is in violation of a lawful regulation. Where a regulation safeguards important privacy interests of the citizenry, an exclusionary rule may be an appropriate sanction for violations.[10] Counsel should argue that serious violations of AR 600–85, chapter 10 and appendix E, should trigger the exclusionary sanction. The regulation establishes an important safeguard to protect the soldier's privacy from arbitrary and capricious collection of bodily fluids by embarrassing methods.

Number two in trial strategy in an attack on the chain of custody is to point out at trial every aspect of the regulations violated by the UADC. What follows is a brief walk through the regulation, identifying problem areas for counsel to exploit.

The standing operating procedures (SOP) for collecting urine samples are at AR 600–85, appendix E. The UADC, and only the UADC, will, after receiving specimen bottles, record the Julian date, specimen number, and tested individual's social security number on the bottle and attach the label to the bottle.[11] Counsel should look for the following common violations: The UADC wrongfully delegated responsibility to an unauthorized assistant to fill out labels; The UADC neglected to label bottles until after the testing individual had returned for his urine sample; and the tested individual's social security number is in error.

The UADC, and only the UADC, initiates the DA Form 5180–R.[12] There must be only one observer per DA Form 5180–R. The regulation dictates that the UADC is to control all paperwork, and no clerical work is to be delegated.[13] Common errors include: Delegation of clerical responsibilities by the UADC to untrained and unauthorized subordinates; and UADC delegation of multiple observers per DA Form 5180–R.

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[4] United States v. Gipson, 24 M.J. 343 (C.M.A. 1987).

[5] *See* K. Boorman, B. Dodd & P. Lincoln, Blood Group Serology 46–52 (1977); Chase, *ABO Typing Studies on Liquid Urines*, 31 J. Forensic Sci. 881 (1986).

[6] If a client has a common blood type (e.g., O+), a secretor test has minimal probative value for the government's case, even if it shows that the urine sample has the same blood type as the client. If the client has a rare blood type, however (e.g., AB+), the risks are higher. Evidence that the urine sample came from an individual with the same rare blood type as the accused will help solidify the government's case.

[7] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703; Mil. R. Evid. 702, 706.

[8] Dep't of Army, Form No. 5180–R, Urinalysis Custody and Report Record (Aug. 1986).

[9] AR 600–85, ch. 10 & app. E.

[10] United States v. Caceres, 440 U.S. 741 (1979); United States v. Hilbert, 22 M.J. 526 (N.M.C.M.R. 1986).

[11] AR 600–85, app. E–2.

[12] *Id.* app. E–3.

[13] *Id.*

The UADC and all observers must be grade E–5 or above; must possess sufficient skill, integrity, and maturity to carry out their highly sensitive duties; and have sufficient time before transfer to become proficient.[14] The noncommissioned officer (NCO) tasked to be the UADC may be considered "unworthy" of a more important mission. A commander who fears that an NCO's performance will negatively affect the unit if given a "real" job may assign that NCO numerous "busywork" responsibilities. All too often the command views the UADC slot as falling into this category. Rarely will a senior NCO be tasked with the UADC responsibility. If there is a transient NCO in the unit, chances are he may be the UADC until the unit decides where to put him. On rare occasions, a unit will appoint a soldier in the grade of E–4 or below to be UADC; more often, E–4s and below will act as observers. Counsel's argument here is the UADC or the observer has not met the criteria for appointment.

The UADC must maintain a urinalysis ledger.[15] Again, watch for unauthorized delegation. The UADC distributes the specimen bottle to the soldier in the presence of the observer, and both, by initialing, verify the information on the labeled bottle and ledger.[16] The observer directly observes the testing individual give a sample and replace the cap on the bottle. The observer takes custody of the bottle to assure it is not contaminated or altered. The observer returns control of the sample to the UADC.[17] Observers may neglect to observe, or allow more than one person to give a sample at the same time outside their presence. Unlabeled bottles or uncapped bottles returned to the UADC out of the presence of the tested individual constitute other flaws in regulation implementation. Sometimes the observer forgets to sign the chain of custody upon return of the specimen.

The UADC initials the labels on bottles and signs the chain of custody. The UADC secures the specimens to ensure that no tampering occurs. Improper security presents a ripe area of attack on the chain of custody. Examples of such attacks are:

a. Bottles left unsealed and unsecured on the first sergeant's desk;

b. Bottles left in an improperly secured room; for example:

(1) the master key to room is available;
(2) a civilian janitor opens room at night;
(3) the windows do not lock.

c. Bottles not maintained under military security; for example:

(1) the UADC takes them home;
(2) the UADC gives them to the first sergeant, who claims to have locked them in the trunk of his car;
(3) the bottles are stored in a room in the billets, and keys to the room are available (e.g., the charge of quarters' keys).

Counsel should look for evidence that the UADC had an ulterior motive in removing the samples, such as tampering with labels for a fee, or extorting soldiers for guaranteed results, etc. If counsel forwards the "good soldier" defense and implies that a sample could have been tampered with, that may raise enough reasonable doubt to overcome the government's case. In other words, give the military judge and/or members something to "hang their hat on" to acquit a soldier they do not want to see convicted.

If samples were screened at the installation biochemical collection point, be certain of compliance with appendices E–10, 14, and 17, and that samples were properly secured and shipped to the drug testing lab.[18]

The Five Rules

Rarely will defense counsel have the good fortune to hear a member of the chain of custody openly admit to a violation of the regulation. Rule Number One: Interview the members of the chain of custody early. Interview all members of the chain of custody and get their sworn statements before trial counsel has an opportunity to refresh their knowledge of the regulation. Carefully directed questioning may get the witnesses to unknowingly reveal violations of the regulation. If defense counsel interviews them early, chances are they will not have read, or at least will not have reviewed the regulation, recently. Ask the chain of custody members to give a play-by-play description of the collection process. The discrepancies between their version and what is required by the regulation often are substantial.

Rule Number Two: Never take the UADC's version of the process at face value. If the test was done improperly, he has the most to lose. A UADC found to be negligent may be relieved, and, in addition, could receive negative counseling, letters of reprimand, and, when performance is particularly derelict, an Article 15. If a UADC senses a chain of custody problem, he may quickly gain the expertise he lacked at the time the accused was tested; therefore, it is essential that counsel interview him as soon as possible.

Rule Number Three: Interview as many other tested individuals as possible about the chain of custody. At the very least, interview all twelve individuals whose test results also appear on the accused's urinalysis worksheet. Interview the noncommissioned officer-in-charge (NCOIC) of the local biochemical testing lab. It is his duty to teach UADCs the regulation and correct testing procedures. His testimony can be powerful ammunition to show that there is no excuse for a UADC to violate the regulation. Counsel can use the NCOIC of the lab to educate the court on proper testing procedures and the reason obedience to each paragraph of Appendix E is necessary to ensure reliable testing. Counsel may discover through the interview whether the NCOIC of the lab was derelict in the educational process or creation of the local letter of instruction (LOI). Such evidence may be relevant to show there is a widespread testing problem that may concern the judge or panel

[14] *Id.* paras. 10–4*e*(1), (2).

[15] *Id.* app. E–4.

[16] *Id.* app. E–5.

[17] *Id.* apps. E–6, E–7.

[18] Positive prescreening results are preliminary until confirmed as positive by the drug testing laboratory. They may not be used (unless corroboration of an admission) for adverse administrative or disciplinary action. *Id.* para. 10–7*b*(6)(a).

members, because they, too, must submit to urinalysis testing.

Rule Number Four: Never base your entire defense on a single, isolated violation of the regulation. A good trial counsel through savvy advocacy may be able to overcome an isolated digression. If possible, the defense should establish that there are so many defects in the chain of custody that it is untrustworthy. Produce evidence that there was such a disregard for the regulation; such incompetency and dereliction by the UADC; such lack of concern, not only for the accused, but for the entire unit; that the test is inconclusive, unreliable, and unlawful. No one's career or livelihood rest on a procedure that shows such a lack of regard for the rights of the soldier. The regulation was promulgated to protect soldiers from such shoddy tests.

Defense counsel's artful voir dire, opening statement, and cross-examination, should convince the military judge, or the members, that they themselves would feel unsafe and would not want to be administered such an inept urinalysis.

Rule Number Five: Defense counsel should never forget that the burden of proof is on the government. Although counsel's job is not to prove his client innocent, counsel must vigorously assert that innocence. The minor premises should be that a series of regulatory violations creates a reasonable doubt. Such reasonable doubt should lead the judge and/or panel to believe not only that the results on the accused's purported sample are unreliable, but that the unit test in general is untrustworthy. Counsel's major premise is always the innocence of the accused. If you also have raised a reasonable doubt, they may not be convinced your client is innocent but have the option of falling back and deciding the test was so poorly controlled and untrustworthy that no solider's future should be dictated by its results.

Conclusion

A single diversion from or violation of the regulation is rarely going to be enough to convince a court the test results are unreliable. Counsel must, "by the numbers," lay the building blocks of one violation of the regulation after another. Each violation alone may not be case-dispositive but, added together, they may serve as crushing blow to the validity and reliability of the test. Evidence that the accused is a reliable, honest soldier, and that the test was administered in a sloppy, chaotic fashion in an uncontrolled environment by a derelict UADC who violated numerous aspects of the regulation may spell acquittal.

Remember your goals in attacking the chain of custody:

a. "By the numbers," paint a picture, through exposing violations of the regulation, of incompetence, unreliability, and lack of validity of the test results;

b. Present evidence the accused is a good soldier, and good soldiers do not use drugs;

c. The major premise is innocence of the client, with a minor premise of raising a reasonable doubt in the mind of the panel or judge; but remember, the burden of proof is on the government;

d. Attack the urinalysis program at its weakest point—the chain of custody.

e. Finally, counsel should always design their closing argument so that panel members go into deliberation with the following thought: "We do not want an innocent soldier to suffer because of someone else's mistake."

Waiver and Recall of Primary Concurrent Jurisdiction in Germany

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Introduction

Jurisdiction over criminal offenses committed by soldiers is a central issue in military criminal practice in the Federal Republic of Germany. When both German and United States authorities have jurisdiction, which has the primary right to exercise it? An understanding of the operation of waiver and recall of waiver of primary jurisdiction by German authorities is essential to the effective practice of trial defense counsel in Germany. This note explains the waiver process and areas of particular interest to defense counsel.

The Original SOFA

Any discussion of criminal jurisdiction between nations must recognize the venerable international law principle that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."[1] Under the provisions of the NATO Status of Forces Agreement of June 19, 1951 (NATO SOFA),[2] the parties to the North Atlantic Treaty did not surrender jurisdiction but did agree to share it. A state receiving soldiers into its territory from a sending state party to the agreement granted the military authorities of the sending state the right to also exercise jurisdiction over the criminal acts of their soldiers.[3] Where an offense is criminal under

[1] Wilson v. Girard, 354 U.S. 524, 529 (1957) (citing The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); United States v. Murphy, 18 M.J. 220 (C.M.A. 1984).

[2] 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 (effective Aug. 23, 1953).

[3] *Id.* art. VII, para. 2(a)(b).

the applicable law of just one of the States that State has exclusive jurisdiction over the case.[4] If both systems of law criminalize the act, the SOFA recognizes the principle of concurrent jurisdiction.[5] The SOFA also recognizes the general undesirability of having both sides exercise jurisdiction,[6] and has double jeopardy provisions which will be discussed later.[7] So, which side has the initial opportunity, the primary right, to exercise or waive jurisdiction? How is primary jurisdiction waived and what is the effect of a waiver? May the waiver be recalled? The SOFA and subsequent amending agreements attempt to resolve these questions.

Article VII of the SOFA provides that the military authorities of the sending State have primary jurisdiction over a soldier of that State concerning "offenses solely against the property or security of that state or offenses solely against the person or property of another member of the force or civilian component of that state or a dependent,"[8] and other "offenses arising solely out of any act or omission done in the performance of official duty".[9] The agreement assigns primary jurisdiction to the receiving state in all other cases.[10]

The SOFA apparently anticipated exercise of jurisdiction by the receiving State in the majority of cases in which the receiving State had the primary right. The agreement did not address the waiver of primary jurisdiction, other than to require notification to the other State in each case where a State decided not to exercise the right.[11] Requests for waiver from the State not having primary jurisdiction were to be given sympathetic consideration.[12]

The SOFA and subsequent agreements amending it did not take effect in Germany until July 1, 1963. Between the end of World War II and the return of German sovereignty on May 6, 1955, the United States and other allied forces exercised jurisdiction over their military members in Germany under the occupation powers. Thereafter, jurisdiction questions were governed by the "Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany of May 26, 1952" as amended by a "Protocol of July 26, 1952", and the "Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany of October 23, 1954". The net result of these agreements was the general recognition after 1955 of the right of Germany as a sovereign nation to exercise jurisdiction over persons, including foreign soldiers, within its border in accordance with the principles of the SOFA. In the years following 1955, however, it became increasingly clear that the provisions of the SOFA dealing with concurrent jurisdiction were inadequate, given the wholesale willingness of German authorities to waive primary jurisdiction in the great majority of cases.

The Supplementary Agreement

On August 3, 1959, an agreement between the parties to the North Atlantic Treaty was signed to supplement the SOFA.[13] The Supplementary Agreement (SA) dealt specifically with the status of foreign forces stationed in Germany and clarified many of the provisions of the original SOFA. Concurrent jurisdiction was one of the areas affected.

Article 19 of the SA established an automatic waiver rule in concurrent jurisdiction cases. Upon notification and a request for waiver by the sending State, primary jurisdiction by German authorities is waived unless recalled within twenty-one days of the notification.[14] The SOFA had provided for retention of primary jurisdiction by the sending State unless expressly waived in specific cases. Under the SA, waiver by German authorities is automatic and recalled only in specific cases where "major interests of German administration of justice make imperative the exercise of German jurisdiction."[15]

The SA provision for automatic waiver accommodated the goal of U.S. military authorities to exercise jurisdiction in every case involving a servicemember as well as the complementary desire of the German authorities to allow military authorities of the sending State to prosecute all but the most violent, and therefore, politically sensitive crimes committed by soldiers of that State. In practice, U.S. military authorities and local German prosecutors had agreed-upon procedures that served the interests of both sides. The supplementary provisions validated this system of cooperation by encouraging such arrangements "to facilitate the expeditious disposal of offenses of minor importance."[16] The arrangements can be tailored to the demands of a particular relationship to the extent of dispensing with notification and modification of the period of time allowed for recall.[17]

The policy of waiver in all but the most significant cases that involve the "major interests of German administration

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[4] *Id.*

[5] *Id.* para. 3.

[6] *See also* United States Army Europe, Reg. No. 550–50, Exercise of Foreign Criminal Jurisdiction Over U.S. Personnel, para. 16(b) (29 Nov. 1980) [hereinafter USAREUR Reg. 550–50].

[7] NATO SOFA art. VII, para. 8.

[8] *Id.* para. 3(a)(i).

[9] NATO SOFA art. VII, para. 3(a)(ii). For a discussion of problems in determining whether an offense arose in the performance of official duty, see J. Snee & K. Pye, Status of Forces Agreement: Criminal Jurisdiction 46–54 (1957).

[10] NATO SOFA art. VII, para. 3(b).

[11] *Id.* para. 3(c).

[12] *Id.*

[13] 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, Aug. 3, 1959, 1 U.S.T. 531, T.I.A.S. No. 5351 (effective July 1, 1963) [hereinafter NATO SOFA Supp. Agreement].

[14] *Id.* art. 19, paras. 1, 2, 3, 5(b).

[15] *Id.* para. 3.

[16] *Id.* para. 7.

[17] *Id.*

of justice"[18] was spelled out in the Protocol of Signature to the Supplementary Agreement, which acknowledged the "Agreed Minutes and Declarations Concerning the NATO SOFA."[19] The Protocol consists of comments and clarifications to the original and the supplementary agreements, and states that the exercise of German jurisdiction may be imperative in cases involving "offenses causing the death of a human being, robbery, [and] rape except where these offenses are directed against a member of a force" of the sending State (including civilian components and dependents).[20]

The U.S. goal of maximizing jurisdiction derives from the mandate of the U.S. Senate found in the Resolution accompanying the Senate's consent to ratification of the SOFA.[21] The Resolution directs military authorities implementing the agreement to protect, to the maximum extent possible, the rights of all U.S. personnel subject to the exercise of jurisdiction of foreign courts. Department of Defense directives and regulations promulgated to realize the policy state that the most effective method of protecting those rights is to exercise of jurisdiction over U.S. personnel whenever possible.[22] United States Army Europe (USAREUR) Regulation 550–56 implements the policy with respect to U.S. personnel in the Federal Republic of Germany.[23] This regulation establishes a Legal Liaison system as the primary means of ensuring compliance with the policy directive.[24] The regional or Local Legal Liaison Authority coordinates with local German prosecutors in cases of concurrent jurisdiction.[25]

The System Today

The typical system of waiver and recall currently in operation in Germany dispenses with notification in all but the types of major cases delineated in the Protocol. Notification requirements are usually set out in an agreement between the local German authorities and the regional or Local Legal Liaison Authority.

In these agreements specific offenses requiring notification are spelled out. In addition to the offenses referred to in the Protocol these offenses normally include cases involving serious bodily injury as well as death, and increasingly, violations of narcotics laws involving large quantities of narcotics. Waiver of jurisdiction is automatic with regard to offenses not mentioned in the agreement. There has been no modification of the twenty-one-day period for recall of primary jurisdiction by German authorities. Indeed, the period is strictly observed by U.S. military authorities to buttress the proclamation that "[t]he USAREUR and DA position is that once there is a waiver of jurisdiction to the U.S. forces, the German authorities may not unilaterally reassert jurisdiction".[26] Sympathetic consideration will be given to a request for return of jurisdiction on a case-by-case basis.[27] Authority to make an affirmative decision on such a request is retained by the Department of Defense, however. The U.S. position of strict enforcement of the twenty-one-day rule also affects double jeopardy issues under the SOFA.

Double Jeopardy

The SOFA provides that where an accused has been tried by the authorities of one contracting party "and has been acquitted, or convicted and is serving, or has served, his sentence, or has been pardoned, he may not be tried again for the same offense within the same territory" by another contracting party.[28] The issue raised by the provision focuses on the type of action by the authorities of a State that will bar subsequent prosecution by another State.

Strict construction of the language of the SOFA supports the position that only a trial bars subsequent prosecution. The Supplementary Agreement and the Protocol do not address the issue. In accordance with the U.S. policy of maximizing jurisdiction and protection of rights of soldiers, U.S. military authorities take the position that, after German authorities waive primary jurisdiction, either formally or by expiration of the twenty-one-day recall period, they cannot unilaterally recall the waiver, even where disposition by the U.S. authorities does not result in acquittal or conviction by court-martial.[29]

Three German Superior State Courts *(Oberlandesgerichte)* have ruled in favor of this position. The most ringing affirmation came from the *Oberlandesgericht* Frankfurt in 1973 in a case where the accused was charged with aggravated assault with a knife and indecent assault. After waiver of jurisdiction by the German authorities the case was dismissed at a special court-martial when the military judge granted the defense counsel's motion to dismiss for lack of speedy trial. In response to the German prosecutor's application to reassert jurisdiction the German court ruled that, once waived, the German authorities cannot thereafter

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[18] *Id.* para. 3.

[19] Protocol of Signature to the NATO SOFA Supplementary Agreement, Aug. 3, 1959, 14 U.S.T. 631 [hereinafter Protocol of Signature to the NATO Supp. Agreement].

[20] *Id.* (discussing art. 19, para. 2(a)(ii)).

[21] Statement Accompanying Senate Advice and Consent to Ratification of NATO SOFA, *reprinted in* 4 U.S.T. 1828 (July 15, 1953) [hereinafter Senate Statement].

[22] Dep't of Defense Directive 5525.1, Status of Forces Policies and Information (Aug. 7, 1979): Dep't of Army, Reg. No. 27–50, Status of Forces, Policies, Procedures, and Information (1 Dec. 1984); USAREUR Reg. 550–50.

[23] United States Army Europe, Reg. No. 550–56, Exercise of Jurisdiction By Federal Republic of Germany Courts and Authorities Over U.S. Personnel (11 Oct. 1983) [hereinafter USAREUR Reg. 550–56].

[24] *Id.* para. 2.

[25] Id. para. 6.

[26] United States Army Europe, 7th Army International Affairs Division, Recall of Jurisdiction Following Waiver (No. 103–05: 45) [hereinafter Recall of Jurisdiction].

[27] *Id.*

[28] NATO SOFA art. VII, para. 8.

[29] Recall of Jurisdiction, *supra* note 26.

exercise jurisdiction without the approval of the authorities of the sending state.[30]

The rulings of the other two Superior State Courts that have addressed the issue, though favorable, have not been so sweeping. In a 1974 case before *Oberlandesgericht* Nuernberg, the accused was charged with negligent homicide. The German prosecutor failed to recall the waiver of jurisdiction within twenty-one days. The charges were also dismissed after referral to trial by special court-martial because of a lack of a speedy trial. The Nuernberg court held that the dismissal of the charges by the military judge was tantamount to an acquittal within the meaning of paragraph 8, Article VII, NATO SOFA. Subsequent prosecution by the German authorities was therefore barred.[31] While the court's opinion rejected the Frankfurt court's ruling that once jurisdiction is waived it cannot be unilaterally withdrawn, the holding did support the U.S. military authorities' contention that actions by the military other than conviction or acquittal at court-martial could constitute exercise of jurisdiction and bar subsequent prosecution in German courts.

An even stronger affirmation of this contention is found in a 1976 decision of the *Oberlandesgericht* Stuttgart. The accused was charged with drunk driving and negligent homicide. The German prosecutor did not recall waiver. After preferral of the charges the general courts-martial convening authority returned the charges to the special courts-martial convening authority (SPCMCA) for disposition. The SPCMCA dismissed the charges. The Stuttgart State Superior Court held that the action of the convening authority was judicial in nature and equated to a trial that finally disposed of the case within the meaning of Article VII, paragraph 8 of the SOFA.[32]

These cases clearly support the proposition that action by U.S. military authorities other than trial can bar exercise of jurisdiction by the German side. The decisions, made by state courts, are not reviewable at the Federal *(Bundesgerichtshof)* level, so the differing results will apparently not be resolved by the German judicial system.[33]

Recall of jurisdiction has become increasingly rare. Moreover, due to the close cooperation of U.S. military and German authorities, disputes over jurisdiction are almost always resolved at the local level.

Current Rate of Recall

AR 550–56 contemplates a system of cooperation involving "close, continuous, frank, and personal communications" between U.S. military and German authorities so as to ensure successful implementation of DOD policies and representation of U.S. interests in German primary jurisdiction cases.[34] The close cooperation envisioned by AR 550–56 is largely a reality in Germany today. The rate of recall of primary jurisdiction by German authorities has dropped dramatically since 1978. Out of a total of 14,144 cases in 1978 in which the German authorities had primary jurisdiction, 72 cases, or about 5%, were recalled. In 1985 the total was 14,557 cases with just 8 recalls, or .079%. In 1984 just 6 cases, or .054%, were recalled.[35] The decrease results from a number of factors.

An analysis of the recall rate, prepared by the Seventh Army International Affairs Division,[36] attributes the decline to the growing confidence of German public prosecutors and courts in the U.S. military justice system. This results from closer and more personal communication between the two sides, as well as recognition of the fact that military courts generally deal more firmly with military offenders than German courts. Another consideration that contributes to the trend is that many of the soldiers accused of concurrent jurisdiction offenses are under the age of twenty-one and probably would be tried in accordance with the Youth Court Law if the Germans exercised jurisdiction. Such juvenile offenders are not automatically dealt with under the provisions of this law, but in most cases it is applied as being appropriate considering the age, and social and psychological development of the offender where U.S. soldiers are involved. Offenders tried under this law are subject to a maximum of ten years' confinement, regardless of the offense, with parole typically between five and ten years.[37] These factors, together with the desire of the German authorities to conserve judicial and law enforcement resources, as well as the natural preference to allow sending States to handle their own citizens, account in the main for the extremely low rate of recall.

Local political considerations also influence the German decision to recall cases. Cases of homicide that might be referred capital by U.S. military authorities illustrate the point. The recall rate analysis cited above notes a marked tendency on the part of the German authorities to recall jurisdiction in such cases.[38] Absence of the death penalty under German law and a changing political climate contribute to this trend. The philosophies of the legislatures regarding this issue and others vary widely throughout the nine German states, or "Laender". The political makeup of the governing body in a particular German state can play a significant role in the recall decisions of state prosecutors. This fact must also be taken into account by U.S. military authorities in their dealings with German prosecutors in a particular region.

Given the myriad considerations implicit in the decision of whether to recall an important case, German authorities are sometimes hesitant to make the decision within twenty-one days. Such a case may be recalled before the deadline, pending a final decision by the German authorities. If the

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[30] Oberlandesgerichte Frankfurt, file #3 ws 5/73.

[31] Oberlandesgerichte Nuernberg, file #3 ws 386/74.

[32] Oberlandesgerichte Stuttgart, file #3 ws 9/76.

[33] Recall of Jurisdiction, *supra* note 26.

[34] USAREUR Reg. 550–56, para. 6.

[35] United States Army Europe, 7th Army International Affairs Division, Recall Rate, Ten-Year Analysis: 1977–1986 (1986).

[36] *Id.*

[37] *Id.*

[38] *Id.*

German authorities ultimately opt against exercising jurisdiction, the Supplementary Agreement provides that the case may be transferred to the military authorities with their consent.[39] Due to the U.S. policy of maximization of jurisdiction consent is always forthcoming.

Defense Counsel's Role

The policy of the United States to attempt to obtain a release of jurisdiction in all cases does not always work to the benefit of the accused. For example, in 1985 Private First Class (PFC) Todd A. Dock was tried by general court-martial and sentenced to death for the premeditated murder and robbery of a German cab driver. If PFC Dock, who was 19 years old at the time, had been tried by German authorities under the Youth Court Law, the maximum imposable punishment would have been confinement for ten years.[40]

The *Dock* case raises the question of the extent to which trial defense attorneys can or should attempt to influence German authorities to recall the waiver in a particular case. Assuming the existence of an attorney/client relationship concerning the charged offenses it would seem within the purview of zealous representation for the defense counsel to contact German authorities to express the desires of the accused. The U.S. Army Trial Defense Service Standing Operating Procedures (SOP) are silent on this issue. This particular topic was also not addressed by Congress at the time of enactment of the Senate Resolution concerning the SOFA.[41] At least one Army regulation seems dispositive, however. USAREUR Regulation 550–56 provides that "The Local LLA (Legal Liaison Authority) is the sole point of contact for the U.S. Forces with German judicial and prison authorities in his assigned geographic area."[42] As members of the U.S. Forces, military trial defense counsel appear to fall under the ban on contact by anyone other than the Legal Liaison Authority. This prohibition, however, seems inconsistent with a military defense counsel's role of advancing the client's interests where prosecution in a German court would likely result in a lesser punishment. USAREUR Regulation 550–56 goes on to state that one of the LLA's principal functions is "Actively seeking proper consideration by German judicial authorities of U.S. interests in cases involving U.S. personnel and full protection of the rights of such personnel."[43] While protection of an accused's rights is correctly sought by all U.S. military authorities, advancing U.S. interests in maximizing jurisdiction may run counter to the best interests of an accused. To appoint a LLA to advance governmental interests is undeniably proper. To deny the trial defense counsel, who is charged with championing the interests of the accused, the opportunity to contact German authorities to press for retention of primary jurisdiction is inconsistent with the "full protection of the rights" of the accused, that is, his right to zealous representation by an independent counsel.

Although the regulation apparently forbids trial defense counsel to contact German authorities, a counsel is arguably free to assist the client in working with a German attorney or other private citizen in urging retention of primary jurisdiction as long as the military attorney scrupulously avoids contact with German authorities. Even this course of conduct appears to run counter to the Logan Act,[44] however. This U.S. statute makes it a crime if

> any citizen of the United States, wherever he may be, . . . without authority of the United States, directly or indirectly, commences or carries on any correspondence or intercourse with any foreign government or any officer thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.[45]

Thus, if maximization of jurisdiction over U.S. Forces is a "measure(s) of the United States," a U.S. citizen defense counsel who even assists another in influencing German authorities to withhold jurisdiction may be criminally liable under the act. Under the broad language of the statute a U.S. defense counsel arguably violates it by merely advising client to take measures to effect retention of German jurisdiction. Even more so than the regulation, this restriction on the ability of the counsel to advance a client's interests tangibly abrogates the accused's right to independent counsel. Given the goal of establishing the Trial Defense Service as an independent organization it would be consistent with that aim to empower counsel to act as an advocate for the accused in the matter of jurisdiction.

The question of the extent to which U.S. counsel can act to influence exercise of German jurisdiction has not been litigated. The issue of whether the accused has standing to object to waiver of primary jurisdiction at a court-martial has been brought before military courts several times. The trial and appellate courts have consistently ruled that the accused has no standing to contest jurisdiction based on a treaty between two sovereigns.[46] Thus, once German authorities have decided to surrender jurisdiction, the accused has no recourse. The accused must undertake any efforts to achieve exercise by German authorities at the outset of the case, before waiver becomes effective. Of course, if the accused is a U.S. citizen the Logan Act, as well as the regulation, prohibits him from acting to influence the jurisdictional decision. Such an interpration would truly be an anomaly given what should be the inherent right of an accused to act on his own behalf in his best interests.

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[39] NATO SOFA Supp. Agreement art. 19, para. 5(b).

[40] *Dock* is currently pending appellate review. No attempt was made to convince German authorities to recall the waiver of jurisdiction in *Dock* because of the desire of the accused to be tried by military authorities.

[41] Senate Statement, *supra* note 21.

[42] USAREUR Reg. 550–56, para. 6.b.(1).

[43] *Id.* para. 6.b.(1)(b).

[44] 18 U.S.C. 953 (1982).

[45] *Id.*

[46] *E.g.*, United States v. Hardison, 17 M.J. 701 (N.M.C.M.R. 1983); United States v. Evans, 6 M.J. 577 (A.C.M.R. 1978), *petition denied*, 6 M.J. 239 (C.M.A. 1979).

Speedy Trial

The practice of recall pending final decision on whether to exercise jurisdiction raises an issue squarely in the defense counsel's province. To what extent does delay in the disposition of a court-martial case attributable to determination of the jurisdictional question count against the government for speedy trial purposes when charges have been preferred? R.C.M. 707 does not specifically address the issue.[47] There are few cases in the area, possibly because of the close cooperation between U.S. and foreign authorities, which in turn results in expeditious resolution of jurisdiction problems. In practice U.S. military authorities will normally delay formal notification until the question of jurisdiction can be expeditiously resolved. USAREUR regulations notification to be delayed, subject to local agreements, so long as prompt reports of all incidents involving U.S. personnel are made to German authorities.[48] The government is accountable for the time after preferral of charges until notification is made but what of the period after notification until recall or waiver?

United States v. Young[49] held the government responsible for the notification period. In *Young* the accused was confined in Japan on December 13, 1972. Notification of Japanese authorities was not attempted until after January 3, 1973. The Japanese prosecutors refused to accept notification pending further investigation. The Japanese finally notified the U.S. authorities on April 5, 1973 of their decision to waive jurisdiction. Trial was held on May 11, 1973. The Court of Military Appeals held the entire 149-day period from confinement to trial was attributable to the government for speedy trial purposes. There was no formal recall of jurisdiction in the case and the court stated that the government should have continued preparing the case for trial pending a decision on its request for waiver of jurisdiction. Clearly then, the speedy trial clock runs until jurisdiction is recalled by foreign authorities.

Can the Government ever be held responsible for the period between recall of jurisdiction and subsequent withdrawal of the recall in the few cases where this occurs? The sparse precedent on this subject suggests the possibility of such a result under limited circumstances. It is important to note that when the points of recall and release of jurisdiction are clear the government will not be held accountable for the time between. Thus, where an accused is confined in a U.S. confinement facility awaiting trial before a foreign court the time is not counted against the Government at a subsequent court-martial.[50] This is in consonance with the provisions in the Supplementary Agreement that direct sending State authorities to retain or receive custody of soldiers pending trial in a German court,[51] and with the U.S. policy of securing custody of all accused military personnel until completion of foreign criminal proceedings.[52] Speedy trial issues can arise when the date of recall is not certain, as in *Young*, or when the time of release of jurisdiction after recall cannot be precisely determined.

The latter circumstance was present in *United States v. Larner*,[53] which arose in the Phillippines. The local authorities asserted primary jurisdiction over a U.S. servicemember shortly after a military criminal investigation identified him as a principal suspect.[54] Sometime thereafter the accused was placed in a U.S. confinement facility pending his trial in foreign court. Court-martial charges were preferred against the accused after he was placed in confinement. The Phillippine authorities subsequently withdrew their recall of jurisdiction. The Court of Military Appeals, emphasizing that the record was unclear as to when recall was withdrawn, held that Government accountability began on the day charges were preferred. In reaching its decision, the court noted "It seems to us that it became apparent that the Phillippine Government would defer to the United States sometime after the accused was confined."[55]

Inability to ascertain the formal date of withdrawal of recall is unlikely to occur in most cases. Still, the *Larner* decision gives credence to the argument that government accountability could begin prior to formal notice of withdrawal where it was clear that German authorities would release jurisdiction prior to actually doing so. Given the *Young* and *Larner* cases, the speedy trial issue in cases of recall and subsequent release of jurisdiction by German authorities appears susceptible to litigation.

Conclusion

The system in effect in Germany today to facilitate the waiver or recall of primary jurisdiction over U.S. soldiers by German authorities is the evolutionary product of the endeavor to interpret and implement the provisions of the SOFA to the mutual benefit of both sides. The objective of the U.S. side to decide the fate of its soldier offenders has been complemented by the German willingness to allow the U.S. exercise of jurisdiction in almost every case. This system can function to the detriment of the military accused, however. Although there is no articulated role in the process for defense counsel, effective representation requires an understanding of the system to identify potential opportunities to advance the interests of the client.

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[47] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(c).

[48] USAREUR Reg. 550–56, para. 6.b.(2)(a).

[49] United States v. Young, 1 M.J. 71 (C.M.A. 1975).

[50] United States v. Murphy, 18 M.J. 220 (C.M.A. 1984); United States v. Frostell, 13 M.J. 680, 685 (N.M.C.M.R. 1982) (citing United States v. Reed, 2 M.J. 64 (C.M.A. 1976)).

[51] NATO SOFA Supp. Agreement art. 22, para. 1(b).

[52] USAREUR Reg. 550–50, para. 14.

[53] 50 C.M.R. 521 (N.C.M.R. 1975).

[54] The United States and the Phillippine government are signatories to a SOFA that is similar, in pertinent part, to the NATO SOFA.

[55] 50 C.M.R. at 523.

Working With Child Abuse Victims

Captain Vito A. Clementi
Trial Counsel Assistance Program

Death, taxes, and PCS moves. If you have ever prosecuted a child abuse case, you probably know that another certainty of life is that your victim will be very reluctant to speak to you. We often believe that the child will "clam up" solely under pressure from the nonabusing spouse, who sees the vision of "winged paycheck in flight." The victim's reluctance to talk about what has happened is more likely a coping mechanism, part of what is otherwise known as the "Child Abuse Accommodation Syndrome."[1] Failing to anticipate and plan for the victim's feelings of secrecy, guilt, and isolation may result in the child recanting the allegation and damaging the government's case.

While we are now generally well prepared to litigate the various legal issues that commonly arise in these difficult cases,[2] this article focuses on the human dimension: building rapport with child victims.

Why? The "Reg," The "Right Thing," and The "Reality."

We care for the victim because it benefits our case to do so. The victim cooperates more and is more likely to be present at trial. Furthermore, it is the Department of the Army's policy: "[where] a victim has been subjected to attempted or actual violence, every reasonable effort should be made to minimize further traumatization. Utmost care and compassion will be accorded these victims, especially where a victim is a child or has been sexually assaulted.[3]

In short, the message for trial counsel is clear. We treat our victim/witnesses with respect because the Army tells us we must. More importantly, it is the "right thing."

Too often at trial, the only party to be "humanized" is the accused. The victims and the witnesses become so many chattels paraded in and out of the courtroom by the trial counsel. The accused tells his human story: "good" soldier, "hard worker," troubled mind, future hopes and dreams.

What of the victim? Will the court hear about the formerly good student who now has trouble concentrating in class? Will the members know that this withdrawn and timid child used to be the most popular kid in class? Most importantly, will the panel realize that this child also has a future beyond what happens today in court? We often fail to convey to the court that the ultimate victims are the children, who have had their humanity stripped from them by the most inhumane of acts.

Before the Fire: Coordinate Early and Often

Few trial lawyers would doubt the wisdom of early involvement in the investigation and preparation of any criminal case. While this may be "advisable" in the "typical" action, it is imperative in the prosecution of the child abuser.

The Regulations: Ensure that you are among the first to know of any incoming child abuse reports. Build a coordination network based upon Army Regulation 608–18, which provides that the "SJA" is one of the "key people and agencies . . . that should be involved in any cooperative approach of handling child abuse cases."[4] If you are not the staff judge advocate's designated contact, ensure that you are notified of reports as soon as they are received.

The regulation also calls for a "report point of contact" (RPOC). This will usually be the medical emergency room or military police desk.[5] Remember that a "single" point of contact does not necessarily mean that there will be a single investigation. The victim may be repeatedly reinterviewed. This depends on a number of factors, including the identities of the victim or the alleged abuser. Repeated interviews may confuse children, or cause them to think that no one believes them. Avoid this problem by speaking regularly with the RPOC. Early involvement by the trial counsel can help limit the number of interviews.

The Social Workers: Get the social workers on your side early, by cooperating as much as you can in their work. While it is true that you as trial counsel view the case from a different perspective, all parties will agree that the goal of the investigation is to get an accurate picture of the case. Everyone wants to know the truth. Share information with the case workers. Avoid becoming an adversary by keeping the social work staff up to date on your case.

Preparing for the Interview

The best way to describe how you work with and prepare the child victim is to emphasize what not to do. Do not call

[1] R. Summit, The Child Abuse Accommodation Syndrome: Child Abuse and Neglect (1983). Aspects of the syndrome include secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction. Summit states that there is a "typical behavior pattern or syndrome . . . which allows for immediate survival of the child within the family but which tends to isolate the child from eventual acceptance, credibility, or empathy within the larger society." *Id.* at 179–81.

[2] *See, e.g.*, Andrews, *The Child Sexual Abuse Case: Parts I & II*, The Army Lawyer, Nov. 1987, at 45 & Dec. 1987, at 33; Rickert, *Child Abuse and Hearsay: Doing Away With the Unavailability Rule*, The Army Lawyer, Nov. 1987, at 41.

[3] Dep't of Army, Reg. No. 27–10, Legal Services: Military Justice, para. 18–2*b* (18 Mar. 1988).

[4] Dep't of Army, Reg. No. 608–18, Personnel Affairs: The Army Family Advocacy Program, para. 2–14 (18 Sept. 1987).

[5] *Id.* para. 3–8.

the child into the office, sit him in a hard backed chair, and demand "Tell me about what (the accused) did to you!"

Consider that you are now at least the fourth or fifth grown-up that has asked this kid to "spill his guts" on what can only be the most embarassing event or series of events he has experienced. The child is apt to be guilt-ridden and increasingly distrustful of all adults, especially if he or she is beginning to receive pressure to recant from other family members.

Where? Where you have your meetings with the child is as important as what you talk about. Try to meet away from your office, in a place that has as little potential for outside distraction as possible. There should be toys around, soft-backed chairs or a couch, and enough room for your witness to get up and move around. Much as you would with any guest, consider having refreshments available (cookies and milk). Be wary, of course, of unconsciously using the refreshments as a reward. It is also a good idea to have a small chalkboard or some paper, crayons, or pens handy. These may be used by the child to "doodle" during breaks. You should be prepared to take as many breaks as necessary. Also, the child may draw pictures of where he or she was touched, in what part of the house or school, etc.[6] Wherever you meet, the child must be comfortable in that place and comfortable with you.

With Whom? Whether you should interview the child alone or with someone else present depends on a number of factors. If you are a male interviewing a female, take the standard precaution of having another female present. If you have a good rapport with your social worker and are working with a particularly young victim, you may be able to get the case worker to sit in on the interview. This assumes the child trusts the case worker. Instruct the case worker to say nothing during the interview.

Avoid allowing a parent or other relative to sit in, especially if the accused is a family member. Even if the witnessing parent does not consciously try to influence the child's answers, looks of surprise, revulsion, shock and pity will have an impact. Consider too how you will react to the third party. You must ensure that all you convey is trust and interest in the child and his or her welfare. If any relationship you have with the third party may impede this message, reevaluate who will sit in on the interview.

Finally, think about cultural differences between you and the child. We cannot always relate to everyone equally, regardless of our best efforts. This is especially true if we are trying to reach a child of different sex, color, or ethnic origin. Consider using a third party observer of the same race or cultural background as the victim. Likewise, if you use dolls in the interview to describe the abuse, try getting dolls with the same race and/or hair color as the victim. Some children will have problems identifying with different ethnic and racial characteristics.[7]

The Interview: Letting the Kid be a Kid

"Getting to Know You:" Let the child know from the outset that you like kids and you like him, by getting to know him. When working with young children, interview those who know the child first. Find out his nickname, likes and dislikes, best school subjects, pets, television shows, etc. Schoolteachers, siblings, and babysitters are particularly good sources.

Armed with this information, you have an instant rapport as you begin the interview by disclosing that you too like basketball, hated math, and think it would be neat to have someone like "Alf" around the house. Build a trust by sharing some personal experiences, perhaps telling him a harmless secret from your past. This will induce a freer exchange.

Tell the child who you are and what your job is in simple terms. Let the child know that you stop bad things from happening. Don't say that you "put bad people in jail," although this sometimes happens. Most importantly, convey that you or others in your job have helped other kids before, and that he or she is not alone. Ensure that the child understands that it is not your job (or the victim's choice) to decide what happens to the accused.

Pitfalls and How to Avoid Them: At all costs, avoid making judgments about the accused. This is especially true if the accused is a family member. The victim often still has affection for the defendant. Because abusers will often cover their behavior by blaming the child, derail these "guilt trips" as much as possible by using analogies the child can understand. Many experienced counsel use something like, "You're riding your bike, and a big kid comes along and knocks you down. Do you feel guilty about that?"

By the time of your first meeting, the child probably will have been interviewed by the military police as well as the social worker. You should, of course, have made yourself thoroughly familiar with all these prior statements. It is often valuable not to disclose to the child all that you know. If he or she is forced to repeatedly tell his story to adults who already know what happened, he or she may perceive that as a sign that no one believes the story.[8] Many children also do not reveal everything that has happened in the first interview. You may find out something the earlier interviewers did not.

The Approach: As with any other witness, it is best to first ask the child, "Can you tell me what happened?" Allow the child at that point to ramble freely about the incident. The child will warm up, get more comfortable about talking, and, most importantly, give you a chance to gauge the child's memory, demeanor, and current attitude toward the offender and the offenses. Take no notes during this time. Just listen. If you show paper and pen, you will look like a school monitor and the child will think he or she is the one who is in trouble.

The victim's initial rendition should give you a good idea of where to concentrate next. If the child gives you the basic happening without any great detail (i.e., "I was there," "he asked me to do this," "I did that," etc.), you need only pin down the specifics a bit more. In so doing, do not confront the child in any manner that may appear to him as disgust, alienation, or incredulity.

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[6] Note, however, that such drawings may be "statements" within the meaning of the Jenks Act, 18 U.S.C. § 3500 (1982). *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 914(f)(1).

[7] S. Goldstein, The Sexual Exploitation of Children 211 (1987).

[8] *Id.* at 223; *see, e.g.*, United States v. Quaries, 25 M.J. 761 (N.M.C.M.R. 1987).

If the child responds haltingly, or not at all, you will need to patiently draw the details from him, constantly providing reinforcement:

"This must be really hard for you to talk about."

"Do you know (the accused)?"

"Do you remember (the accused) being at your house around (the date of the offense)?"

"I've talked with a lot of kids that have had bad things happen to them, so I know this isn't easy for you."

Gradually get into the specifics, again using open-ended questions. After the child has responded, go back through the same line of questioning, and rephrase questions to insure both your understanding and the accuracy of the child's responses. If the child seems to deviate in large part from what was said previously, do not confront the child with the inconsistency. Rather, ask for further clarification: "You said before that _____. Do you mean _____ or _____?"

Remember too in dealing with young children that they are very sensate. You can well use their heightened awareness of smell, taste, touch, hearing and sight to discuss issues in terms they understand. Avoid "adult" concepts. For example, when trying to have the child describe if the accused's penis was erect, do not ask the child if it was "hard" or "soft." Rather, ask if it was "sticking out" or "hanging down."[9] One expert suggests the use of multiple choice answers, based upon a child's experience:

> Whenever I have to get a child to describe ejaculate (which is already a sensitive subject), I use a little humor. I use a multiple choice question like: . . . "was it water, . . . hair conditioner (if he knows what it is), Jello, Cheerios cereal, or something else?" If the child picks the cereal, I know I have problems . . . if the child selects one of the other options, it tells me the child can relate to the concept of different textures.[10]

Show and Tell: After your initial meeting with the victim, meet a few days before the trial or hearing and "practice." It may be a good idea to practice twice, but no more than that, or the child will begin to think you do not believe him. Worse is the possibility that his testimony may ultimately sound rehearsed.

Take children into the courtroom, show them around, and let them sit in the chairs of the participants. Tell them who will do what in terms they can understand: "This is where the judge sits. He wears a black robe, like the preacher does on Sunday. He's kind of like the (referee) (playground monitor) (umpire). He makes sure everyone follows the rules."

Have the child sit in the witness chair, and with you standing where you are going to be during the hearing, practice talking with and without a microphone. Make sure the victim speaks loudly enough to be heard throughout the room. Practice some background questions you will ask. This will accustom the child somewhat to the flow of questions, and instill confidence. It may be a good idea to go over the direct examination at this time, with any demonstrative evidence you plan on using.

In preparing the victim for cross-examination, make certain the child knows that all you have asked for is the absolute truth, to avoid the inevitable defense inquiry "You've talked to the prosecutor about this, haven't you?" Tell the child the defense counsel will probably ask if he has made up the story, and all the victim needs to do is to tell the truth. Let the victim know that if he or she does not understand the lawyer's questions, it is okay to say "I don't understand." At the same time, let the child know that, if he or she feels like crying in court, it's okay to do that too, because adults do it all the time.

Conclusion

When dealing with child sexual abuse victims, trial counsel should expect and allow kids to be kids. Remember that the victim has already been forced into an adult role by the alleged abuser. We compound the crime if the criminal justice system continues the abuse in a different way. Allowing the victim to return to his or her status as a child will not only make the courtroom experience more bearable, but it will also ensure a more successful prosecution.

[9] S. Goldstein, *supra* note 7, at 225.

[10] *Id.* at 222.

Military Character: Relevant for All Seasons?

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> "That a person has given good, honorable, and decent service to his country is *always* important and relevant evidence for the triers of fact to consider." [1]

Adoption in 1980 of the Military Rules of Evidence [2] promised not only a reliable framework for the development of military evidentiary law (which had been sorely lacking), but also a potential source for expanding the frontiers of admissible evidence. Military Rule of Evidence (M.R.E.) 401, [3] which clarified the boundaries of "relevant evidence" and M.R.E. 402, which, but for obvious exceptions, [4] provided that "[a]ll relevant evidence is admissible" made this potential a reality. With little hesitation, the respective courts of military review and the Court of Military Appeals have applied these rules in an effort to do away with barriers to relevant evidence.

The military appellate courts benefitted from the federal appellate courts' experience with the Federal Rules of Evidence, which had been in effect since 1975. Even so, the military appellate courts have blended into this "federal experience" the essence of military law such that the decisional law interpreting the military rules of evidence has its own unique character. This is particularly true with regard to "character evidence," especially as it relates to the accused's military character. The Court of Military Appeals has been extremely gracious in expanding the boundaries of admissible character evidence regarding the accused, even though M.R.E. 404(a)(1) limits the admissibility of such evidence to "pertinent" character traits. Thus, the court has recognized an almost unlimited panorama of character traits. For example, in *United States v. Elliot,* [5] the court found the accused's "trusting nature" to be a character trait that was "pertinent" to the accused's defense to charges of stealing two television sets where the defense theory was that the accused received the television sets as a gift from someone he had only recently met. In rejecting the government's position that a trait of character of the accused, within the meaning of M.R.E. 404(a)(1), was limited to a "moral disposition . . . such as honesty, peacefulness or truthfulness," [6] the Court of Military Appeals, relying on Dean Wigmore's treatise on evidence, [7] held that a character trait included both moral and psychical dispositions. The court then listed several cases in which it had recognized other traits such as "good military character . . . character as a drill instructor and . . . dedication to being a good drill instructor . . . and lawfulness . . ." [8] as admissible character traits.

By explaining character evidence in this manner, and by apparently signalling in a recent decision, *United States v. Court,* [9] that "good military character" *may* be "pertinent" in nearly every case, the Court of Military Appeals has created confusion with respect to the scope of M.R.E. 404(a)(1). Because the court's views in this regard ensure that the accused's character will nearly always be an issue during trial, both trial advocates and trial judges must know what constitutes "good military character" and whether it is pertinent. This article will focus on the development of the concept of "good military character" in an effort to provide military judges and trial advocates with a basis for accurately determining whether M.R.E. 404(a)(1) evidence is now "admissible for all seasons."

I. M.R.E. 404(a)(1): A Departure from Former Military Practice?

Clearly the drafters of M.R.E. 404(a)(1) intended to depart from prior military practice where character evidence was concerned. The drafters' analysis notes their departure from paragraph 138(f) of the 1969 Manual for Courts-Martial:

> Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a *significant change* from paragraph 138(f) of the 1969 Manual which [allowed] evidence of "general good character" of the accused to be received in order to demonstrate that the accused [was] less likely to have committed a criminal act. [10]

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[1] United States v. Court, 24 M.J. 11, 16 (C.M.A. 1987).

[2] Exec. Order No. 12,198, 3 C.F.R. 151 (1981).

[3] Mil. R. Evid. 401 provides: " '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."

[4] Mil. R. Evid. 402 provides:
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to the members of the armed forces, the Uniform Code of Military Justice, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

[5] 23 M.J. 1 (C.M.A. 1986).

[6] *Id.* at 5.

[7] J. Wigmore, Evidence § 52, at 1148 (Tillers rev. 1983).

[8] 23 M.J. at 5.

[9] 24 M.J. 11 (C.M.A. 1987).

[10] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 404 analysis, at A22-32 (emphasis added).

Even so, the drafters of the military rules also recognized that the rule would permit the defense to "introduce evidence of good military character when that specific trait is pertinent." [11] It seems apparent that the drafters believed that "good military character" evidence would be pertinent only in the narrow context of military offenses, such as "a prosecution for disobedience to orders." [12] Commenting on this view, the authors of the *Military Rules of Evidence Manual* stated: "Although the military version of 404(a)(1) is identical with its federal counterpart in prohibiting . . . [general good character] . . . evidence, the drafters' *Analysis* suggests that the defense will still be able to introduce general good military character if the accused is charged with *a uniquely military offense*." [13]

Consequently, it can be argued that the drafters did not envision M.R.E. 404(a)(1) as a basis for admitting evidence of good military character in cases involving such common law offenses as burglary, larceny, or sodomy. There is also little question that this was a departure from past military practice. [14]

II. A Significant Change—Why?

Why did the drafters of the military rules conform the treatment of character evidence to the federal rule? The analysis to M.R.E. 404(a)(1) does not answer this question, but there are several possible reasons. For instance, in adapting the federal rule to military practice, the drafters probably realized that good military character, as developed in military case law, had become synonymous with general good character. For example, in *United States v. Monroe* [15] the accused was permitted to establish his "good character" through a witness who testified that he had performed admirably in combat. Among other things, the defense witness testified that the accused "saved the life of me and the people that were in his platoon." [16] In *United States v. Gagnon,* [17] the Court of Military Appeals found error where the law officer failed to instruct the members of a court-martial concerning the accused's good character where there was evidence that the accused had received an honorable discharge from the Navy, and testimony from a government witness that he "had every confidence in the honesty and reliability of the accused." [18]

Consequently, the drafters may have concluded that, rather than opening a trial to a plethora of nonpertinent character evidence, the rule would allow the trial judge to assess whether the proffered character evidence was really pertinent to the issues. This view would be consistent with the purpose of the rules themselves—allowing relevant evidence to be accurately focused. Furthermore, the rule would permit the crystallization of any potential issues surrounding the admissibility of this form of evidence before trial, thereby serving the interests of judicial economy and would prevent the needless production of witnesses assigned far from the trial situs, thereby serving the interests of military necessity. With respect to witnesses, the Court of Military Appeals had rendered several decisions before the adoption of the Military Rules of Evidence that gave the accused a right to the personal presence of essential character witnesses, notwithstanding the whereabouts of the witnesses or the difficulties attendant to producing them. [19]

Another possible reason for the change may have been the drafters' acknowledgment that a changed form of military life had lessened the traditional value ascribed to evidence of good military character. Many Court of Military Appeals decisions had relied on Professor Wigmore's view that:

> The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his "service record," which follows him throughout his army career and serves as the basis for the terms of his final discharge. [20]

But this view of military life was rendered long before the inception of the "All-Volunteer Force." Perhaps the drafters acknowledged that the days of the open-bay barracks, of noncommissioned officers residing in the barracks, of the soldier who had to earn a weekend pass, and the weekly uniform inspection which had provided ample opportunity for a soldier to be "carefully observed by his superiors," had ended. They had been supplanted by days where a weekend pass was no longer a requisite for a soldier to leave the installation, where uniform inspections were no longer a weekly occurrence, where soldiers often "kept a room in the barracks" but resided elsewhere, and where noncommissioned officers resided in the barracks only rarely.

Perhaps none of these reasons influenced the drafters. But, even if they did not, they are excellent reasons why M.R.E. 404(a)(1) represents a more stabilizing evidentiary rule in military practice.

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[11] *Id.*

[12] *Id.*

[13] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 359 (2d ed. 1986) (emphasis added).

[14] *See e.g.*, United States v. Gagnon, 5 C.M.A. 619, 18 C.M.R. 243 (1955); United States v. Stone, 24 C.M.R. 454 (A.B.R. 1957) (the Army Board of Review stated that good military character evidence was essential where an accused was charged with sodomy); *see also* United States v. Graddoph, 36 C.M.R. 688 (A.B.R. 1966) (the Army Board of Review held that it was error for the law officer to deny a defense request for character evidence instructions in a case where the accused was charged with burglary with intent to commit indecent assault).

[15] 34 C.M.R. 479 (A.B.R. 1969).

[16] *Id.* at 480.

[17] 5 C.M.A. 619, 18 C.M.R. 243 (1955).

[18] *Id.* at 622, 18 C.M.R. at 246.

[19] *See, e.g.*, United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

[20] *See, e.g.*, United States v. Browning, 5 C.M.R. 27, 29 (C.M.A. 1952); United States v. Harrell, 9 C.M.A. 279, 283, 26 C.M.R. 59, 63 (1958) (citing J. Wigmore, *supra* note 7, § 59 (3d ed.)).

III. The Application of 404(a)(1) by the Court of Military Appeals

The Court of Military Appeals has not applied M.R.E. 404(a)(1) in a manner consistent with the drafter's comments. Shortly after the military rules were adopted, the court faced whether M.R.E. 404(a)(1) presented a departure from past military practice in *United States v. Clemons.*[21] *Clemons* became the point of departure for the court's own peculiar resolution of issues involving military character evidence.

The accused was charged with several specifications of burglary and larceny. The prosecution claimed that Sergeant Clemons, while acting as the unit Charge-of-Quarters, purposely singled out several of the less reputable soldiers in the unit to perpetrate the offenses using the ruse that he was making sure that they were securing their personal property and—if not—then "securing" the property by appropriating it himself.[22] Although the prosecution was aware of the probable theory of the defense (that the accused was acting in his official capacity as charge-of-quarters with no intent to either unlawfully enter any barracks room of the unit or to permanently deprive any of the victims of their property) the prosecution had not been advised before trial that the accused intended to call any character witnesses. Indeed, the prosecution was unaware that the accused had favorable character witnesses. Shortly before the accused's trial was scheduled to begin, however, several noncommissioned officers were discovered seated in the witness waiting room adjacent to the courtroom. They indicated that the accused's civilian defense counsel had requested that they testify concerning the accused's *good duty performance while under their supervision in another unit on a previous assignment.* Recognizing the impact of such testimony, coupled with the fact the victims of the alleged crimes were not exceptional witnesses in terms of their military bearing, appearance, and ability to testify, the prosecution moved by motion *in limine* to exclude the character evidence, arguing that it was not pertinent.[23] The accused's defense counsel argued that the accused's past duty performance was pertinent to the accused's defense and also that the defense intended to present additional evidence through each of the character witnesses that the accused was a law-abiding soldier. He further argued that the admissibility of this latter evidence was supported by a Fifth Circuit Court of Appeals opinion—*United States v. Hewitt.*[24] The trial judge granted the prosecution motion. Nevertheless he permitted the witnesses to testify regarding the accused's "trustworthiness" including specific instances of conduct which supported this form of testimony.

The Court of Military Appeals reversed the conviction, citing *Hewitt. Hewitt* had held that a defendant has a right to establish the character trait of being a "law abiding citizen." The court found "no inconsistency with military practice and the application of Federal precedent to the interpretation of Mil. R. Evid. 404(a)(1),"[25] and concluded: "The military judge's expressed . . . opinion flies in the face of the scope of the Military Rules of Evidence, and does not pay sufficient deference to the application of Article III Federal court precedent."[26] It was clear to the court that "the traits of good military character and character for lawfulness each evidenced 'a pertinent trait of the character of the accused' *in light of the principal theory of the defense case.*"[27]

Chief Judge Everett concurred, but also wrote a separate opinion. He noted that there was "very little difference between a person's being of 'law-abiding character' and 'good character,' " and stated that he "suspected that over the years many witnesses who have testified about a defendant's 'good' character really meant to say that he was 'law-abiding.' " Further, "the 'goodness' of someone's character as a 'trait' of his character may involve an unusual construction"[28] of that term. Just as the Fifth Circuit in *Hewitt*, and later in *United States v. Angelini,*[29] had "stretched 'trait' to include 'law abiding' character in order to avoid an unjust—possibly unconstitutional—result," he would "take the same approach with respect to evidence of 'general good character'. "[30] Chief Judge Everett could find "very little support in public policy for applying M.R.E. 404(a) in a manner that would prohibit appellant from offering the evidence of his 'law-abiding' character."[31]

Clemons was followed in 1984 by *United States v. Piatt*[32] and *United States v. McNeil.*[33] In *Piatt*, the accused, a Marine sergeant, was charged with assault and battery, aggravated assault, and maltreatment of a subordinate. These offenses allegedly occurred while the accused was performing his assigned duties as a drill instructor. Several defense witnesses were called to testify regarding the accused's character for being "a good drill instructor." The prosecution argued that such evidence was not evidence of a pertinent trait of character under M.R.E. 404(a)(1) and that, accordingly, it amounted to no more than impermissible evidence of general military character. The trial judge agreed. On appeal, the court acknowledged that, under the federal rules of evidence, general good character was not

[21] 16 M.J. 44 (C.M.A. 1983).

[22] Although these facts are not evident in the reported case, the writer was a member of the prosecution at the time this case was tried and is therefore aware of the factual background of the case.

[23] United States v. Clemons, 16 M.J. 44, 45 (C.M.A. 1983).

[24] 634 F.2d 277 (5th Cir. 1981).

[25] *Clemons,* 16 M.J. at 46.

[26] *Id.*

[27] *Id.* at 47.

[28] *Id.* at 50.

[29] 678 F.2d 380 (1st Cir. 1982).

[30] *Clemons,* 16 M.J. at 50.

[31] *Id.*

[32] 17 M.J. 442 (C.M.A. 1984).

[33] 17 M.J. 451 (C.M.A. 1984).

relevant to disproving criminal intent. Nevertheless, the court pointed out that the drafters' analysis of M.R.E. 404(a)(1) would admit evidence of an accused's military character where the charged offenses had a military context, and held that evidence of the accused's military character *may be a relevant factor* for a court-martial "*depending upon the issue for which it is offered.*"[34] The court found that evidence of Piatt's character "as a good drill instructor" was pertinent to the accused's intent to commit the charged offenses.[35]

Whether *Piatt* represented a retreat from the *Clemons* rationale was put to rest by *McNeil*, which was decided on the same day. In *McNeil*, the accused was charged with sodomy. The accused allegedly committed the offense while on duty as a Marine Corps drill instructor; the victim was an officer candidate. The accused denied that the alleged offense occurred and testified that he acted completely professionally at all times towards the victim. At trial, the defense unsuccessfully attempted to introduce evidence of the accused's good military character to support his testimony. After the accused was convicted, evidence of his good military character as a drill instructor was presented during sentencing. This evidence was apparently so compelling that "the members requested permission to reconsider their findings."[36] Unaccountably, the military judge ruled that the members could not reconsider their findings. Citing both *Piatt* and *Clemons*, the Court of Military Appeals held, per curiam, that the military judge had erred to the substantial prejudice of the accused's rights.

United States v. Kahakauwila[37] departed further from both the plain meaning of M.R.E. 404(a)(1) and the text of *Clemons*. The Court of Military Appeals ruled that the military judge erred by excluding proffered character testimony, including testimony from the accused's platoon commander that the accused's "work performance was excellent;" that "his military appearance was outstanding;" and that "his conduct as a squad leader was very dependable."[38]

In *Kahakauwila*, the accused was charged with possession, transfer, and sale of marijuana, in violation of UCMJ article 92[39] (i.e., as violations of a lawful general regulation). According to the court, because the accused was charged in this manner, the "[e]vidence of . . . performance of military duties and overall military character was admissible to show that he was not the sort of person who would have committed such an act in violation of regulations."[40] Discussing how the accused's military character was "pertinent," in light of M.R.E. 404(a)(1), the court observed:

> The military rule is taken from the Federal Rules of Evidence. However, *the peculiar nature of the military community makes similar interpretation inappropriate.* Unlike his civilian counterpart, the conduct of a military person is closely observed both on and off duty, and such observation provides the material upon which performance reports and other evaluations are based.[41]

In *United States v. Vandelinder*,[42] the court expanded its views to include Enlisted Performance Reports. The accused was once again charged with wrongfully possessing, transferring, and selling illicit drugs in violation of Navy regulations. Following the government's case on its merits, the accused testified and denied that he had ever participated in the alleged offenses. In addition to other testimony designed to bolster the accused's veracity, the defense offered the accused's Enlisted Performance Record from the date of his enlistment in 1979 through 1982. The evaluation reports included ratings as to five separate traits of the accused: (1) professional performance; (2) military behavior; (3) leadership and supervisory ability; (4) military appearance; and (5) adaptability. The prosecution argued that the records were not admissible under M.R.E. 404(a)(1). The defense maintained that the records were admissible because they demonstrated a relevant character trait—military character. The trial judge excluded the records because they were not pertinent to the issues of the case.[43] The Court of Military Appeals rejected both the trial judge's ruling and the reasoning of the Navy Court of Military Review.[44]

Chief Judge Everett, the author of the *Vandelinder* opinion, recognized that admissibility of character evidence in a drug case "should not hinge on whether the prosecution is under Article 92 or Article 134; or under . . . Article 112(a)."[45] He acknowledged that "a diversity of views may exist as to the precise limits of 'good military character' " and that "[p]erhaps it does not include all the five 'traits' rated on the Reports of Enlisted Performance; or perhaps it includes additional 'traits'. "[46] Nevertheless, he felt that good military character "has a generally understood core of meaning and that, when a witness testifies about an accused's military character, the fact-finder understands generally what is meant."[47] Thus, as to *testimony* of good character, Chief Judge Everett concluded that "a court-member or military judge sitting as fact-finder will be aided

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[34] *Piatt*, 17 M.J. at 446 (emphasis added).

[35] *Id.*

[36] *McNeil*, 17 M.J. at 452.

[37] 19 M.J. 60 (C.M.A. 1984).

[38] *Id.* at 61.

[39] Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) [hereinafter UCMJ].

[40] 19 M.J. at 62.

[41] *Id.* at 61.

[42] 20 M.J. 41 (C.M.A. 1985).

[43] *Id.* at 43.

[44] 17 M.J. 710 (N.M.C.M.R. 1983).

[45] *Vandelinder*, 20 M.J. at 44.

[46] *Id.* at 45.

[47] *Id.*

by such testimony in deciding whether an accused is a person who would be unlikely to engage in drug transactions."[48] In then assessing whether *records*, of the type offered by the defense, were similarly admissible, Chief Judge Everett stated that:

> [T]he opinions about a service-member's military character contained in Enlisted Performance Reports are admissible as 'other written statements' within the meaning of Mil.R.Evid. 405(c). The admissibility of these opinions fulfills an important purpose of Mil.R.Evid. 405(c) by permitting a service-member to reap the benefits of the 'good military character' he has demonstrated in years past, even though because of death, distance, or other reasons, his former superiors and associates may be unavailable to testify for him at his trial.[49]

Because personnel records often recite specific instances of a soldier's conduct, the court recognized that admitting such evidence could present to the fact-finder evidence clearly not permitted by M.R.E. 405(a).[50] Its solution was to grant the trial judge wide discretion in determining whether the court members could disregard the specific instances of conduct described![51] If the trial judge was not satisfied that the court members could disregard the specific acts, he or she could "redact or cover a portion of the document, or . . . require that the parties stipulate as to the material contents of the document."[52]

Later, recognizing that its rulings could lead to endless appellate litigation concerning whether the improper exclusion of character evidence required reversal of an otherwise valid conviction, the court, in *United States v. Weeks*[53] adopted a test for *appellate courts* to test errors for prejudice.

In *Weeks*, the accused, a Marine Gunnery Sergeant with eighteen years of military experience, was charged with possessing, transferring, and selling marijuana in violation of Navy regulations. At trial, the defense attempted to introduce evidence of the accused's good military character. The military judge ruled that he would "not allow evidence of general good character to come in on the merits."[54] Holding that the exclusion of the accused's evidence of good military character was error, but was not reversible error per se, the court adopted the following four-pronged appellate test for prejudice:

> (1) Is the Government's case against the accused strong and conclusive?
>
> (2) Is the defense's theory of the case feeble or implausible?
>
> (3) What is the materiality of the proffered testimony? Is the question whether or not the accused was the type of person who could engage in the alleged criminal conduct fairly raised by the Government's theory of the case or by the defense?
>
> (4) What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial?[55]

On remand, the Navy-Marine Court of Military Review held that the military judge's exclusion of the accused's character evidence was not prejudicial error.[56] The Navy-Marine court observed that, although the accused's record was excellent, it was by no means spectacular, and the proffered character evidence "was not the crux of the defense."[57] This decision was finally affirmed by the Court of Military Appeals.[58]

When the Court of Military Appeals next had the opportunity to apply its own *Weeks* analysis in a case where the trial judge had excluded evidence of the accused's "military proficiency," it chose instead to expand even further the limits of admissible military character evidence. In *United States v. Court*,[59] the accused, an Air Force captain, was charged with committing an indecent assault and indecent, lewd and lascivious acts upon a fellow officer's wife. The accused was also charged with conduct unbecoming an officer.

At trial, the prosecution moved to exclude evidence of the accused's "military proficiency," arguing that the gravamen of the charged offenses was not "a purely military type offense."[60] The defense argued that, as the accused was charged with a violation of Article 133 (conduct unbecoming an officer) his "record of military proficiency, [and] his integrity both as an officer and as a member of the community [were] in question."[61] In turn, the prosecution claimed that "the mere charging of an offense under Article 133 [does] not place an accused's good military character into issue."[62] Observing that the alleged offenses occurred off-duty and off-base, did not involve a subordinate as a victim, and did not occur during an official unit party, the

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[48] *Id.*

[49] *Id.* at 46.

[50] M.R.E. 405(a) provides that: "In all cases in which evidence of character or a trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

[51] 20 M.J. at 46.

[52] *Id.*

[53] 20 M.J. 22 (C.M.A. 1985).

[54] *Id.* at 24.

[55] *Id.* at 25.

[56] 21 M.J. 1025 (N.M.C.M.R. 1986).

[57] *Id.* at 1028.

[58] United States v. Weeks, 22 M.J. 386 (C.M.A. 1986).

[59] 24 M.J. 11 (C.M.A. 1987).

[60] *Id.* at 13.

[61] *Id.*

[62] *Id.*

military judge granted the motion in limine.[63] Even so, several defense witnesses were permitted to testify regarding the accused's reputation concerning his traits for being law-abiding, truthful, and not being physically aggressive toward women.[64]

The Court of Military Appeals found, first, that the offenses of indecent assault and indecent acts were multiplicious with the charge of conduct unbecoming an officer. After dismissing the former as "lesser included offenses," the court focused on the pertinence of the excluded military proficiency evidence in light of whether "the alleged conduct did . . . occur and . . . even if it occurred [whether the conduct] was . . . 'unbecoming' within the meaning of Article 133."[65] According to the court, "[i]t is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is 'pertinent'."[66] Included within this equation was the accused's "intoxication defense." The accused apparently testified that he could not specifically remember much of what had occurred on the evening when the offenses allegedly took place because he had been drinking. He testified that it would have been totally out of character and contrary to his principles for him to have forced himself on any woman who indicated to him that his sexual advances were unwelcome.[67] Chief Judge Everett, writing for the court, held that an officer's good military character "may be relevant in showing that such a person would never engage in the charged conduct." Further, "[i]t also may be relevant to the element which is unique to Article 133" . . . because . . . "it provides a basis for the fact-finder" to infer that the charged conduct was not 'unbecoming' because an officer of such fine character would never do anything that would seriously compromise his standing as an officer."[68] Accordingly, the military judge had erred in excluding evidence of Captain Court's military proficiency. Chief Judge Everett left to the Air Force Court of Military Review the determination whether, under the *Weeks* analysis, this error substantially prejudiced the accused's case.

In a partial dissent, Judge Cox asserted that the court should, without returning the case to the Air Force Court of Military Review, perform the *Weeks* analysis. He reasoned that the excluded evidence was of minimal importance to the overall posture of the accused's case. Nevertheless, in concurring with Chief Judge Everett regarding the admissibility of the excluded evidence, Judge Cox rendered a seemingly limitless view of the relevancy of military character evidence:

> [T]he fact that a person has given good, honorable, and decent service to his country is *always* important and relevant evidence for the triers of fact to consider. . . . [I]f an individual has enjoyed a reputation for being a good officer or service-member, that information should be allowed into evidence.[69]

This view no doubt will underscore the difficulties trial judges will have in the future in determining the proper application of M.R.E. 404(a)(1).

IV. The Conundrum

The decisions of the Court of Military Appeals as to the relevancy and admissibility of military character evidence have at least partially eclipsed the clear meaning of M.R.E. 404(a) and M.R.E. 404(a)(1). The judge must now decide whether the proffered military character evidence is admissible because it relates to a pertinent character trait or whether the evidence is simply admissible because the charged offense is "uniquely military." This is so because the Court of Military Appeals has been neither clear nor consistent in applying its own precedent as to these issues. The court has said in effect, especially as to offenses with some uniqueness to military life, that such evidence is admissible, not necessarily because it is pertinent, but because its admission may be constitutionally compelled. Even more perplexing is the court's indication that relevancy may depend on the manner in which the accused has been charged or, alternatively, upon the principle theory of the defense case.

Ultimately, a trial judge may simply avoid any issue in this regard and rule that proffered evidence of the accused's military character will always be admissible. Indeed, such a safe haven position would seem to be countenanced by Judge Cox's concurring opinion in the *Court* case. This reasoning, however, misses the mark as to the relevancy issues surrounding such evidence. Judge Cox's view of military character evidence stems from his observation that: "Commanders consider [military character] when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense."[70]

Such a view obscures the objective truth-seeking function of the military rules of evidence themselves. In many cases it presents the same sort of conundrum that United States Attorney James Blackburn spoke of in the famous trial of Doctor Jeffrey McDonald:

> Ladies and gentlemen, the defendant's theory of defense in this case has sort of been like this: 'I tell a story and you are to trust me. I loved my family. . . . Trust me. I couldn't have done this. There has been a lot of character testimony. They say I can't do this; and therefore, because I am not the type of person, I couldn't do that.' Ladies and gentlemen, if we convince you by the evidence that he did do it, *we don't have to*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 15.

[66] *Id.* at 14.

[67] *Id.* at 15.

[68] *Id.*

[69] *Id.* at 16.

[70] *Id.*

show you that he is the sort of person that could have done it. [71]

V. Military Character: A Framework for Analyzing Its Relevancy

A. Pretrial Resolution of the Issues.

Most of the issues involving the admissibility of military character evidence have arisen in a pretrial setting. Trial judges and counsel should attempt to resolve those issues at the pretrial stage to facilitate both judicial economy and the best interests of military necessity. The pretrial setting also allows the trial judge and counsel a full opportunity to examine the nature, quality, and probity of the evidence, in light of the charged offense and the theory of the defense. The opportunity to deliberate that this setting provides is rarely available during the conduct of the actual trial; trial judges should take advantage of it as a positive means of avoiding prejudicial error.

B. Assess the Nature of the Evidence.

The party challenging the introduction of military character evidence has a legitimate need to know what form the evidence will take. The Court of Military Appeals recognized in *Vandelinder* that introduction of the accused's military character through his or her military records may inappropriately present evidence of specific instances of conduct by the accused. Furthermore, as acknowledged by Chief Judge Everett in the *Clemons* case, character witnesses many times do not understand the framework and limitations governing the admissibility of their testimony. Frequently, at trial such witnesses go beyond these limitations and support their testimony with specific instances of conduct. A trial judge, upon specific request by the challenging party, should identify the limitations governing the introduction of military character evidence and to instruct the party seeking its introduction to ensure that it meets the requirements outlined in M.R.E. 405.

C. Assess the Quality of the Evidence.

Careful assessment of the quality of proffered evidence of military character is vital to the central issue under M.R.E. 404(a)—pertinency. Such an inquiry may also consider issues under M.R.E. 403 [72] regarding whether the evidence is cumulative, confuses the issues of the case, or fails to assist the trier of facts. Evidence of military character frequently subsumes many traits. It is extremely important to ascertain what specific traits the moving party is seeking to present and for what purpose. In *Clemons*, for example, it would have been important to consider both the actual scope and the foundations of the proffered testimony of noncommissioned officers who were acquainted with the accused from previous assignments. As another example, it would have been helpful if the military judge in *Court* had explored what purpose the defense had in introducing evidence of Captain Court's military proficiency. Was such evidence going to illuminate his leadership ability or his ability to conduct himself as an officer during duty hours as opposed to non-duty hours, or would the evidence indicate whether Captain Court was a great pilot or great administrator. By answering these questions at the trial level, the trial court could have assisted the Air Force Court of Military Review and might have avoided further review by the Court of Military Appeals.

D. Assess the Probity of the Evidence.

Once the trial judge assesses the nature and quality of military character evidence and is satisfied that it is in proper form and pertinent, the final assessment of its probative nature may be made.

Whether this inquiry is even necessary is a key part of the tension between the apparent requirements of M.R.E. 404(a)(1) and the expansive interpretation of the Court of Military Appeals. The trend of the Court of Military Appeals' decisions seems to be that, once the accused has demonstrated that his military character, by its *general* nature and quality, bears some relationship to the charge, it is pertinent and consequently is admissible. Military Rule of Evidence 404(a)(1) is in general agreement with this view, but only if the accused is charged with a uniquely military offense. Also not in complete agreement with M.R.E. 404(a) is the court's apparent view that good military character is a specific trait. The court has skirted a direct confrontation with M.R.E. 404(a)(1) by propounding differing bases for each of its decisions. In the *Weeks* opinion, the court apparently recognized that appellate courts need more definite guidance, and established that such evidence must at least be "material."

Trial judges should have the same rational approach. When called upon to apply M.R.E. 404(a)(1) fairly to these issues, they should properly assess the probity of the proffered character evidence within the framework of this rule *and* any applicable case law. One useful approach that seems to satisfy both the rule and the case law is the court's approach in *Piatt*. In that case the court found that sufficient probative value existed once a nexus was shown between a substantive factor in the case and the proffered evidence of military character. This is a more workable approach than that used in *Clemons*. For example, in *Clemons*, the only purpose for offering Sergeant Clemons' military character was to demonstrate that the accused was unlikely to have committed the charged offenses. If the same testimony would have demonstrated that the witnesses knew or had heard that Sergeant Clemons was the type of noncommissioned officer who, when serving in the position of charge-of-quarters, was sensitive to security or who routinely took extra care in this regard, such evidence would unquestionably have been probative and hence more clearly admissible and understood by the parties to the trial.

E. Application of Federal Precedent?

In *Clemons*, the Court of Military Appeals took umbrage with the trial judge's ruling that he was not necessarily bound by a decision of the Fifth Circuit Court of Appeals that seemed to support the admissibility of Sergeant Clemons' military character. Judge Fletcher, the author of the *Clemons* opinion, observed that there was no "inconsistency with military practice in the application of Federal

[71] J. Maginnis, Fatal Vision 566 (1983).

[72] M.R.E. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

precedent to the interpretation of Mil.R.Evid. 404(a)(1)."[73] Additionally, the court in *Clemons* and other subsequent cases, in principal reliance upon the Supreme Court decision in *United States v. Michelson*,[74] indicated that evidence of good military character may be more a matter of privilege than a question of evidentiary law under M.R.E. 404(a)(1). Yet, in *Kahakauwila*, the court also observed that, although M.R.E. 404(a) was taken from the Federal Rules of Evidence, "the peculiar nature of the military community makes similar interpretation inappropriate."[75] There is no question that this is the proper perspective that military judges should adopt when considering the applicability of federal case law.

VI. Conclusion

The Military Rules of Evidence provide trial judges and advocates with a comprehensive framework within which to assess, analyze, and present evidence in a manner that advances the truth-seeking process at trial. Since the adoption of these rules, the Court of Military Appeals, as well as the respective courts of military review, have performed admirably in adapting them to the emerging realities of both the law and military life. When confronted with issues involving scientific evidence, expert testimony, residual hearsay, and "uncharged misconduct," these courts have provided clear directions. Yet, with respect to the more basic issues surrounding the relevancy of military character evidence, the Court of Military Appeals has not provided this same clear direction. While the court's decisions rightly remind those at the trial level of the sanctity and important dynamic of military character evidence, it has failed to place its views totally within the context of the ultimate aim of the rules. In effect, the court's legal altruism has overlooked the existence of a rule of evidence that trial judges and counsel must grapple with in almost every case. Resort to prior military practice is of no real assistance in this regard because even there the law fails to establish clear or reliable standards for the admissibility of this form of evidence. Nevertheless, trial judges and trial advocates must accomplish this task. This article was designed to demonstrate that this task is possible, given both the operable rule of evidence and the court's rulings, and with the additional hope of securing a firmer basis to enhance the truth-seeking process.

[73] United States v. Clemons, 16 M.J. 44, 46 (C.M.A. 1983).

[74] 335 U.S. 469 (1948).

[75] *See supra* note 40.

Practical Considerations in Trials by Courts-Martial

Colonel Raymond C. McRorie
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Why do those of us involved in the administration of courts-martial, whether as trial counsel, defense counsel, staff judge advocate, or military judge, often leave common sense and practical considerations at the door when we enter the forum of military justice? The answer to this question defies an explanation and yet all too frequently that is precisely what occurs.

When properly administered, the military justice system is a justice system worthy of emulation by any society. Yet it appears that those of us involved in its administration all too frequently are unsure of ourselves or are not adequately educated in its laudable objectives, purposes, and rules. The military justice system envisions that only those whose guilt can be established by legally competent evidence will be subjected to trial by courts-martial. Additionally, the system envisions that, upon conviction, the punishment imposed will be that which is, in the eyes of the military society, fair and equitable for the offense and the particular offender.

Assuming these impressions are correct, one must then wonder why we occasionally encounter at the trial level what even to a layman are an unnecessary multiplication of charges against a soldier. Aside from the obvious risk such a situation creates a reversal of an otherwise valid conviction, the practical effect is to lessen in the eyes of the members of the military society and those of the accused the perception that the system is fair and equitable. Any case that has such an adverse impact clearly has not served the principle of deterrence as to either the society or the particular accused.

By the same token, one must find perplexing those fortunately rare situations where charges have been referred to courts-martial even though a serious legal question exists as to the admissibility of evidence critical to a successful prosecution, and the government has also referred other valid charges having no such shortcoming. More times than not, the defective evidence relates to a comparatively minor offense. Perhaps such a situation may present an opportunity to resolve a meaningful legal question on admissibility. It frequently appears, however, that no one has considered the potential practical consequences of such action. Assuming the military judge erroneously admits the evidence at trial, whether due to counsel's persuasive argument or the judge's own unfamiliarity with the applicable law, there may very well be a reversal of an otherwise valid conviction, even as to the nonaffected charges. Such a result in no way enhances the purposes sought to be served in the fair administration of military justice.

Equally bewildering are those situations, where, after many arduous hours of case preparation and trial, the government representative inserts or induces potentially reversible error in areas having little or no potential impact on the outcome of a case. For example, it is difficult to understand why during argument a government representative

will attempt to appeal to the passions of the fact-finder or sentencing authority without first having ascertained that the argument is legally permissible. Equally dumbfounding are those situations where the government representative has successfully presented a case and, upon sentencing, will attempt to introduce clearly inadmissible aggravating evidence.

More frequently than not, the practical consequences of either of these situations are not those intended or envisioned by counsel. Should the military judge, through oversight or otherwise, not be alert, an inexcusable potential for reversal arises. Further, as to such argument, regardless of the forum, the attempted appeal to passions may be regarded by the fact-finders as an insult to their intelligence, and have the opposite effect of that intended. In addition, legally questionable argument or evidence on sentencing may very well have no impact whatsoever upon the fact-finder or sentencing authority's decision. Thus, this unnecessary risk has been introduced for no useful purpose.

This article has attempted to emphasize the writer's perception that, for whatever reason, there are those of us who apparently have lost sight of some practical considerations in the administration of military justice. If it serves to cause us to give appropriate consideration to such factors the article will have served its purpose.

Clerk of Court Note

Affirmative Obscuration Program

These pages have included over the years frequent warnings that the documentary exhibits accompanying records of trial sent for appellate review must be unmistakably clear. That is required both of the document offered in evidence and of any copy the military judge allows to be substituted for it in the record.

For the most part, those complaints have been directed at the negligent use of indistinct copies. Now, however, we have discovered an affirmative obscuration program: Personnel records custodians are pasting their authentication certificates on documents, such as the forms used in Article 15 proceedings, thereby obscuring text, signatures, or both.

This practice can be particularly dangerous when it is recognized that appellate review in a Court of Military Review is not *necessarily* limited to matters that were contested at the trial, or even to those raised by appellate counsel. Even when an error probably was harmless, the court must consider the matter before holding it harmless. Unnecessary issues prolong appellate review unnecessarily.

Recently, Judge Sullivan of the U.S. Court of Military Appeals observed that "Military judges must insure that all exhibits in the record are easily readable." United States v. Lee, 25 M.J. 457, 461 n.3 (C.M.A. 1988). Counsel and court reporters must assist military judges to insure that all exhibits in the record are easily readable. That includes assuring that documents otherwise readable are not deliberately obscured.

Court-Martial Processing Times

Armywide average processing times for general courts-martial and bad-conduct discharge special courts-martial for the first quarter of FY 1988 (records received October–December 1987) are shown in the table below:

	GCM	BCDSPCM
Records received by the Clerk of Court	405	168
Days from charges or restraint to sentence	45	34
Days from sentence to Action	48	52
Days from Action to dispatch	5	5
Days from dispatch to receipt by the Clerk	9	10

Armywide Court-Martial Statistics, First Quarter, FY 1988

The following report, listing information pertaining to cases tried between October and December 1987, was obtained from the Army Court-Martial Management Information System (ACMIS).

Army Quarterly GCM/SPCM Report

	GCM	BCDSPCM	SPCM	Total
Courts-Martial				
Cases tried	391	222	55	668
Convictions (% of tried)	371 (94.8%)	214 (96.3%)	46 (83.6%)	631 (94.4%)
Guilty plea trials (% of tried)	260 (66.4%)	153 (68.9%)	26 (47.2%)	439 (65.7%)
BCD/DD/Dismissals Adjudged				
BCD	189	144	0	333
DD	138	0	0	138
Dismissal	3	0	0	3
Total (% of convictions)	330 (88.9%)	144 (67.2%)	0	474 (75.1%)

	GCM	BCDSPCM	SPCM	Total
Courts Composed of: (% of tried)				
Judge alone	270 (69.0%)	167 (75.2%)	37 (67.2%)	474 (70.9%)
Enlisted Members	84 (21.4%)	32 (14.4%)	12 (21.8%)	128 (19.1%)

Because the information is in a different data base, the ACMIS report did not include summary courts-martial and nonjudicial punishment. During the above period, there were 361 summary courts-martial, of which 339 (93.9%) resulted in convictions, and 22,040 punishments imposed under article 15 of the Uniform Code of Military Justice. Drug offenses accounted for 11.4% of the trials and 12.3% of the nonjudicial punishments.

Court-Martial and Nonjudicial Punishment Rates Per Thousand

First Quarter Fiscal Year 1988; October–December 1987

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	0.50 (1.99)	0.37 (1.49)	0.77 (3.06)	0.69 (2.75)	0.31 (1.24)
BCDSPCM	0.29 (1.15)	0.29 (1.17)	0.34 (1.35)	0.11 (0.45)	0.37 (1.49)
SPCM	0.07 (0.28)	0.08 (0.31)	0.08 (0.31)	0.00 (0.00)	0.12 (0.50)
SCM	0.46 (1.86)	0.43 (1.72)	0.56 (2.23)	0.54 (2.16)	0.31 (1.24)
NJP	28.39 (113.54)	29.06 (116.24)	28.51 (114.04)	30.84 (123.35)	34.53 (138.12)

Note: Figures in parentheses are the annualized rates per thousand.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Notes

Rehabilitative Transfer Requirement Under AR 635–200, Paragraph 1–18

Army Regulation 635–200, paragraph 1–18c, provides that a soldier being processed for separation under chapter 11 (Entry Level Performance and Conduct), chapter 13 (Unsuitability), or chapter 14, paragraphs 14–12*a* and 14–12*b* (Minor Disciplinary Infractions and Pattern of Misconduct, respectively) will be rehabilitatively transferred prior to initiation of the separation action. Paragraph 1–18*d* allows the separation authority to waive the requirement for a rehabilitative transfer where the separation authority determines that further duty of the soldier would (1) create serious disciplinary problems or hazard to the military mission or to the soldier, or (2) be inappropriate because the soldier is resisting rehabilitation attempts, or (3) rehabilitation would not be in the best interests of the Army as it would not produce a quality soldier.

MILPER Message 88881, subject: Counseling and Rehabilitative Prerequisites to Enlisted Administrative Separations, 181330Z Dec 87, advised the field that the waiver of the rehabilitative transfer requirement had to be obtained prior to initiating the separation action. This represented a significant change from prior practice. It also advised commands on how to treat separation actions that had been initiated without the prior waiver of the rehabilitative transfer.

Subsequent to release of the 18 December 1987 message, ODCSPER and TAPA reconsidered the question of when the waiver should be submitted and approved. They agreed that the real issue was their concern that soldiers receive a rehabilitative transfer when warranted, not the timing of a waiver of that transfer requirement. Unfortunately, the proposed change to paragraph 1–18*d* requiring a prior waiver of the rehabilitative transfer requirement had already been sent to the publishers for inclusion in Change 11 to AR 635–200, and it was too late to delete that language. An errata sheet was prepared to advise users that the language was added in error and should be lined through.

Thus, requests for waiver of the rehabilitative transfer may be submitted with the administrative separation packet.

Practitioners should ensure that the words "prior to initiation of separation action" are stricken from paragraph 1–18*d* in their copy of AR 635–200. The change should be highlighted to clerks and AG personnel who typically prepare and review administrative separation packets to avoid an erroneous rejection on grounds that the waiver of the rehabilitative transfer had not been secured prior to initiation of the separation action.

The Invisible Spouse

"[A]n outstanding officer who gives his all in every endeavor. This officer's spouse strongly supports all community activities and provides a role model for junior officers' wives. Promote and give a command immediately."

With the change in Department of Defense's policy these words should never again appear on servicemembers' performance appraisals. Dep't of Defense, Directive No. 1400.33, Employment and Volunteer Work of Spouses of Military Personnel, prohibits any reference about the employment, educational, or volunteer service activities of a

servicemember's spouse on a member's performance appraisal, including officer and enlisted efficiency or fitness reports. In addition, the marital status of a servicemember or the employment or non-employment of a spouse shall no longer affect, favorably or adversely, the assignment or promotional opportunities of a servicemember (with limited exceptions). The National Defense Authorization Act mandated this new policy, which is embodied in a directive issued by Secretary of Defense Frank C. Carlucci on 10 February 1988. The law states:

> The Secretary of Defense shall prescribe regulations to establish the policy that—
>
> (1) the decision by a spouse of a member of the Armed Forces to be employed or voluntary participate in activities related to the Armed Forces should not be influenced by the preference or requirements of the Armed Forces; and
>
> (2) neither such decision nor the martial status of a member of the Armed Forces should have an effect on the assignment or promotion opportunities of the member.

Under the new law, the spouse becomes an invisible partner when a decision is made concerning a servicemember's assignment, promotion, or performance appraisal. The spouse may be considered when making a personnel decision only in the following circumstances: when necessary to ameliorate the personal hardship of a member or spouse; to facilitate the assignment of dual-career military married couples to the same geographic area; when there is a conflict of interest between the official duties of a military member and the employment of the member's spouse; or for reasons of national security when martial status is an essential assignment qualification for a particular military billet or position.

The catalyst for the new law was a complaint by two senior officers' wives at Grissom Air Force Base, Indiana, that their husbands' commanders pressured them to resign their full-time employment and participate more in base activities. The ensuing investigation received national attention. Their complaints were substantiated. The Air Force, however, took no action against the commanders because they had not violated any law, policy, or regulation. The Women's Equity Action League took the plight of the two women and thousands of other military spouses to Congress. The passage of section 637 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 was the result of their efforts.

The Army will find it simple, but time consuming to change its regulations; changing the traditional military mind-set that a servicemember's spouse is an inseparable part of every aspect of the member's career, will prove to be an arduous task. Major McMillion.

Contract Law Note

New Interim Rules for the Small Disadvantaged Business Set Aside Program

In this space in the August 1987 edition of *The Army Lawyer* I reviewed for you the 4 May 1987 interim rules that established a small disadvantaged business set aside program within the Department of Defense. Briefly, Section 1207 of the 1987 National Defense Authorization Act, Pub. L. No. 99–661, 100 Stat. 3973, established an objective for the Department of Defense of awarding five percent of its contract dollars during Fiscal Years 1987, 1988, and 1989 (approximately $5 billion per year) to "small disadvantaged business concerns" ("SDB's"). SDB's are defined in the same manner as those firms qualifying as "8(a) contractors" under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1982): they must be owned and controlled by socially and economically disadvantaged persons. Prior to FY 1987, DOD was nowhere near this goal using only the 8(a) program, so something had to be done. DOD's solution was to establish the SDB set aside program. Interim rules were issued on 4 May 1987, which amend the DFARS where appropriate. 52 Fed. Reg. 16,263 (1987) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, and 252).

Since these interim rules were issued, the Defense Acquisition Regulatory (DAR) Council received numerous Congressional and public comments on their contents. Also, in part because the SDB set aside program got started late in the fiscal year, the five per cent goal for FY 1987 was not met (the actual figure for DOD was 2.3% (3.7% for the Army), up from 2.1% in FY 1986. Fed. Cont. Rep. (BNA) No. 48, at 663 (November 2, 1987)). Congress therefore included a requirement for "substantial progress" in reaching the goals for FY 1988 and FY 1989 in Section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100–180, 101 Stat. 1019. The provision contained no real substantive changes to Section 1207(a) of the FY 1987 DOD Authorization Act, however, in part because Congress recognized the need to allow DOD's program a chance to get into full operation before assessing its success or failure. But the section *did* mandate some more DOD regulations to provide further guidance to DOD's SDB set aside program, in the hope that DOD can achieve more "substantial progress" in reaching the Section 1207(a) goals. The provisions required in these new regulations include advance payments, subcontracting plans and incentives to reach subcontracting goals, and technical assistance to SDB concerns. Also, the provision required DOD to issue guidance to define the relationship between the SDB set aside program, the small business set aside program, and the Section 8(a) program. The provision also stated that the SDB set aside program was to provide *new* opportunities for contract awards, and not to affect the procurement process, or current levels of awards, in the other two programs. Finally, DOD's SDB set aside program had to provide for partial set asides, something that the old interim rules did not do.

As a result of this, the DAR Council recently issued a *new* set of interim rules on 19 February 1988, which became effective on 21 March 1988, replacing the old interim rules. The text of these new rules may be found in 53 Fed. Reg. 5114 (1988) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, 226, 235, and 252). For practitioners, the key changes to the rules occurred in four areas. First, the conditions that must be met for total set asides for SDB's were changed slightly. The contracting officer must determine that there is a reasonable expectation of competition (i.e., bids or offers) from two or more responsible SDB concerns (no change in this requirement from the old interim rules); the contract price will not exceed the "fair market price" by more than ten percent (again, no change from the old interim rules); and scientific and/or technological talent

consistent with the demands of the acquisition will be obtained (this is new). 53 Fed. Reg. 5123 (1988) (to be codified at 48 C.F.R. 219.502–72). The new interim rules also create several exceptions to the total set aside requirement: the product or service has been previously acquired successfully by the contracting office on the basis of a *small business* set aside; the acquisition is for construction, including maintenance and repairs and dredging, between $5,000 and $2 million (for dredging, $1 million); the acquisition is for architectural and engineering services or construction design for military construction projects; the acquisition has been reserved for the 8(a) program (see FAR 19.803); or the acquisition is conducted using small purchase procedures (under $25,000—see FAR Part 13). The purpose of these exceptions, of course, is to maintain the procurement process, or the current levels of awards, or both, of other special programs such as the small business set aside program and the 8(a) program.

The second major change to the interim rules is the creation of a partial SDB set aside program. Actually, the rules provide for a *preference* for SDB's within the portion of an acquisition already set aside for small businesses (a partial small business set aside) when three conditions are met: the general circumstances for partial set asides are met (see FAR 19.502–3(a)(2), (4), and (5)); one or more responsible SDB's are expected to have the technical competence and productive capacity to satisfy the set aside portion; and the set aside price will not exceed the "fair market price" by more than ten percent. 53 Fed. Reg. 5122 (1988) (to be codified at 48 C.F.R. 219.502–3(70)). Under this procedure, negotiations for the set aside portion are to be conducted with the firms in the following order of preference: 1) SDB's that are also labor surplus area concerns; 2) small businesses that are also labor surplus area concerns; 3) other SDB's; and 4) other small businesses. 53 Fed. Reg. 5130 (1988) (to be codified at 48 C.F.R. 252.219–7010).

The third change from the new interim rules concerns the order of preference for set asides, which is the following: 1) total SDB set asides; 2) combined small business/labor surplus area concern set asides; 3) partial set asides for labor surplus area concerns; 4) total set asides for small businesses; 5) partial set asides for small businesses, with preferential consideration for SDB's; and 6) partial set asides for small businesses. 53 Fed. Reg. 5124 (1988) (to be codified at 48 C.F.R. 219.504).

The fourth change of note in the interim rules is the creation of a ten percent evaluation preference for SDB's when competing against non-SDB's in certain competitive acquisitions. Similar to the cost differentials found in the Buy American Act area (see FAR 25.105 and 25.108), the new provision states that "offers will be evaluated by adding a factor of ten percent to offers from concerns that are not SDB concerns." 53 Fed. Reg. 5129 (1988) (to be codified at 48 C.F.R. 252.219–7007). This preference will not be used in the following situations, however: small purchases; total SDB set asides; partial set asides for labor surplus area concerns; partial small business set asides; purchases under the Trade Agreements Act that exceed the dollar threshold in FAR 25,402; and purchases inconsistent with international agreements or memoranda of understanding. 53 Fed. Reg. 5126 (1988) (to be codified at 48 C.F.R. 219.7000). The purpose for this preference is to encourage awards to SDB's in more industries, especially where small businesses have not been dominant.

The interim rules also contain less significant provisions regarding eligibility of firms as SDB's (*see* 53 Fed. Reg. 5120–21 (1988) (to be codified at 48 C.F.R. Subpart 219.3)), subcontracting requirements and incentive awards to reach subcontracting goals (*see* 53 Fed. Reg. 5125–26 (1988) (to be codified at 48 C.F.R. Subpart 219.7)), and minimum percentage performance requirements with the SDB's own employees in service, supply, and construction contracts (*see* 53 Fed. Reg. 5129 (1988) (to be codified at 48 C.F.R. 252.219–7007(c))).

These provisions, taken together with all of the other previously mentioned changes, however, represent a significant departure from the old interim rules, and from the way that we have done business in the past. It remains to be seen whether these new rules will enable the Department of Defense to reach the possibly unattainable Section 1207 goal of five percent of all contract dollars going to small disadvantaged businesses. Major McCann.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

Travel Scams

As we approach summer, travel scams typically increase. Consumers should be wary of vacation promoters that promise too much for too little. The following travel packages typify the scams that are likely to tempt consumers in the coming months.

Bonanza Advertising, which operated a telephone solicitation scheme in the San Diego area, has been the subject of a consumer fraud complaint by the California attorney general. The complaint alleges that Bonanza representatives telephonically advised consumers that they had won a trip to London or Hawaii and that they would receive 100 free rolls of film and a camera for $49.95.

The attorney general's investigation revealed, however, that the consumer was subsequently informed that participation in the program required that a companion purchase a second airfare ticket at a price substantially greater than the cost of two excursion fare tickets purchased directly through the airline or a travel agent. In addition, the promise of "free film" was satisfied by the issuance of coupons that could be exchanged for film only when the consumer paid for film processing through Bonanza's supplier at whatever price the supplier chose to charge. The "free camera" was also not received unless the consumer sent the company a certificate and an additional fee, and sometimes not even then.

Carefree Vacations, of Chicago, which recently ceased operations without warning, allegedly failed to provide refunds when reservations were cancelled, failed to forward hotel reservation fees to the hotels involved, and misrepresented the quality of the accommodations they were

arranging for customers. The Illinois attorney general has taken action to freeze the company's assets and entered an agreement with the Department of Transportation and two separate travel firms to help cover the travel plans of some of the consumers who were affected by Carefree's unannounced closing.

Credit Card Travel Services, a Chicago travel club which has done business in Missouri and other states under the names of Bankcard Travel Club and Credit Card Services Inc., has entered an agreement with the Missouri attorney general. The company will stop making unauthorized charges against consumers' credit cards for membership fees, will stop telling consumers that the club has a free membership period and then charging the consumers' accounts before the "free" trial membership period had expired, will notify consumers in writing of the date on which travel club membership begins, will refrain billing consumers for new membership fees unless certain qualifications are met, and will work with the Missouri attorney general's office to handle future complaints against the company.

A separate consent injunction initiated by the Missouri attorney general will provide nearly $6,000 to consumers who complained about Premium Vacations, Inc., a North Hollywood, California, vacation club which also did business under the name of Vacation Services. The injunction permanently bars the club from telling consumers that, in consideration for paying membership fees, they will receive a free vacation for two, including round-trip airfare and accommodations, when in fact they received no such free services.

Discount World Travel, another Illinois travel service which had been doing business under several other names as well, has been barred from doing any future business in the State of Illinois. The Illinois attorney general sought the court order because the firm had failed to make refunds, failed to advise consumers of penalties for cancellations, and failed to provide the services they advertised. Pursuant to the court order, the travel company must also pay a $15,000 civil penalty and pay $1,000 a month into a restitution account.

Bliss Holidays International, a Florida company doing business in Illinois and elsewhere, is also currently subject to an Illinois court order designed to prevent the company from selling deceptive travel certificates. In obtaining the court order, the Illinois attorney general alleged that Bliss Holidays had mailed certificates to consumers claiming that the recipients had won an expenses-paid cruise to the Bahamas. When the consumers contacted the company, however, they were told that it would cost $198 to join a travel club before they could take advantage of the offer, and they were encouraged to furnish their credit card number telephonically to pay the club fee. Even after paying this fee, consumers were told they must pay numerous additional taxes and fees to take the cruise.

The Wisconsin attorney general has announced a default judgment against Travel Centers of America, Inc., a Miami firm doing business in Wisconsin and elsewhere, that requires the payment of $150,072 in civil forfeitures. The judgment prohibits the defendant from engaging in deceptive practices, including misrepresentations that customers will be offered a trip at no further expense when additional sums are required for travel services, that minimal restrictions are imposed with respect to the use of the vacation when in fact there are numerous restrictions, and that prospective customers are being offered a special travel package at a special price for a limited time, when actually such offers were routinely made to all prospective purchasers.

Another Florida firm, Sunrise Vacations, which does business in Missouri and elsewhere, allegedly informed consumers in telephone solicitations that they had won free travel packages but then charged the consumers from $199 to $239 for the trips, sometimes placing unauthorized charges on the consumers' credit cards. The Missouri attorney general has asked the court to order restitution to consumers and to issue preliminary and permanent injunctions against the company, barring it from future violations of the law. The petition also seeks penalties of $1,000 per state law violation and payment to the state equal to ten percent of the total restitution award.

Another typical "travel scam" involves time share developers. The Virginia attorney general has entered a consent agreement with The Great North Mountain Corporation, which had offered a free, 8-day/7-night Hawaii vacation, including airfare for one, to couples who toured its properties. After the prospective buyers had completed the tour, they received a vacation certificate that included conditions on the Hawaii trip of which they had not previously been informed. These conditions included the requirement that one of the travellers purchase a "Y-Class" airfare from a designated travel agent in order to use the free accommodations and airfare for the second person, without disclosing that the Y-Class airfare is the highest available fare. The developer agreed to disclose the nature of its "free" travel offers in the future and to pay $16,000 in civil penalties.

Although most travel scams involve trips to exotic locales such as Hawaii, apparently these locations can be subject to scams of their own. The Hawaii attorney general recently announced an indictment stemming from the alleged fraudulent sales of airline tickets from Ault Travel Bureau, Inc. The monetary loss created by these charges amounts to over $61,000.

In some good news regarding travel clubs whose success is built on deceptive practices, the Wisconsin attorney general has announced that Wisconsin has obtained a $205,359 judgment against five out-of-state companies and two individuals who were charged with deceptive advertising in the sale of vacation certificates. The judgment was filed against: Amy Travel Services, Inc., Resort Performance, Inc., and James Weiland of Naperville, Illinois; Resort Telemarketing, Inc., of Indianapolis; Resort Telemarketing of Texas, Inc., and Texas Communications & Travel, Inc., both of Houston, Texas; and Thomas McCann of New Palestine, Illinois. The judgment against these defendants, who are all out of business, requires them to pay a total of $179,630 in civil forfeitures and penalties and $25,729 in restitution.

Obviously, even this lengthy list does not include all travel scams that will plague vacationers this spring and summer. The list should, however, enable legal assistance attorneys to warn potential consumers that plans offering "free" travel or other benefits should be investigated carefully and that credit card account numbers should be guarded closely. Major Hayn.

Changes Made To VA Home Loan Program

Recent changes to the Veteran's Home Loan Program should bring good news for veterans planning to buy, sell, or refinance homes using VA backed financing. Veteran's Home Loan Program Improvements and Property Rehabilitation Act of 1987, Pub. L. No. 100–198, 101 Stat. 1315 (1987). Most of the provisions of the new law were effective on or before 1 March 1988.

The VA loan guaranty program began as a 5 year program to assist veterans returning from World War II who were unable to obtain home financing. Due to its popularity, Congress made this program permanent in 1970. Veterans' Housing Act of 1970, Pub. L. No. 91–506, 84 Stat. 1108 (codified as amended at 38 U.S.C. §§ 1802–1819 (1982)).

Historically, the cost to the government of providing the VA loan guaranty has been quite small. Recently, however, high default and foreclosure rates involving VA-guaranteed loans have generated significant deficits. Congressional intent in making the recent changes to the program was to reduce the program's dependency on taxpayers' funds without compromising its basic purpose.

Among the attractive features of the legislation is the increase in the maximum VA loan guaranty amount from $27,500 to $36,000. This increase will help veterans keep pace with the rising costs of existing homes, the average of which has risen by 36.5% since 1980. Since most lenders are willing to finance up to four times the guaranty amount without a downpayment, credit-worthy veterans searching for housing in high-cost areas should be able to borrow up to $144,000 without a downpayment.

The maximum amount of the loan the VA will guaranty is limited to 60%. For example, if a veteran finances $40,000, the maximum amount the VA will guaranty is $24,000. Congress considered a proposal by the VA to decrease the maximum amount, but decided to retain the 60% limitation to help veterans at the lower end of the housing spectrum. Congress reasoned that reduction of the 60% maximum would discourage leaders from serving veterans who might not otherwise meet conventional loan underwriting criteria.

Perhaps the best news for veterans in the new legislation is the establishment of a procedure to release veterans from liability when their VA loans are assumed. Although veterans were allowed to seek release from liability on assumed loans prior to 1988, only a small percentage of them did so. Consequently, many veterans were held responsible for paying deficiencies upon the default of subsequent owners.

Under the new procedure, the VA must conduct a credit check on a buyer assuming a loan using the same standards as are used to evaluate the credit-worthiness of a veteran. The lender is authorized to charge a fee, not to exceed $500, for conducting a credit check. If the purchaser is found creditworthy, the veteran is automatically released from liability on the assumed loan.

The bill allows the veteran to accept the risk of possible default by an unapproved purchaser, but only pursuant to the veteran's positive election following disclosure of the veteran's options and potential liabilities. Although instances where a veteran agrees to remain liable should be rare, a veteran may want to exercise this option to avoid the expense of a credit check or to assist a relative buy a home. Even in these cases, the veteran will be automatically released from joint liability after the purchaser has made payments on the note for 5 years.

Although the new procedures will make it significantly easier for veterans to obtain release from liability when their loans are assumed, veterans who allow other parties to assume their VA loans lose their entitlement for additional VA guaranteed loans until the assumed mortgage is fully paid off. The veteran can restore his entitlement either by completely paying off the loan or by selling the mortgaged home to another veteran who agrees to assume the VA loan using his entitlement.

Another piece of good news for veterans in the legislation is the retention of the one percent loan origination fee charged to veterans to obtain VA financing. Congress rejected a VA proposal to raise the fee to 2.5%, expressing the view that the home loan guaranty program is a benefits program that does not have to be entirely self-sustaining. As under prior law, veterans have the option of paying the one percent fee in cash at the time of settlement or of financing it as part of the initial principal amount of the loan.

More veterans should be able to meet VA underwriting standards under a change that requires the VA to now use state data rather than regional data for establishing a standard of income. Under the prior regional standard, veterans living in predominately rural states, such as Wyoming, were required to meet the same residual income standards as veterans residing in high-cost states such as California.

Veterans facing possible default on VA loans should also benefit from a new two year trial program requiring the VA to provide financial counseling assistance to the veteran. Upon notice of default, the VA must provide the veteran with information regarding alternatives to foreclosure, the veteran's and the VA's liability in the event of foreclosure, and the availability of financial counseling. Congress strongly encourages the VA to make personal contact with the veteran, but when impractical, the required information could be sent to the veteran by letter.

In a change made to respond to the high default rate of loans for the purchase of manufactured housing, veterans will now be required to make a five percent downpayment when purchasing homes in this category. Prior law allowed the VA to guaranty 100% of the value of a manufactured home.

Another favorable change in the act will allow veterans to refinance homes they no longer occupy. Prior law limited VA refinancing loans only to homes actually occupied at the time of the refinancing. Now veterans can refinance using the VA guaranty if they can certify that they either live in the home or have formerly occupied it. Veterans should note, however, that under the new law, equity refinancing loans will be limited to 90% of the appraised value of the property.

Veterans shopping for home financing should seriously consider taking advantage of the VA Home Loan Program. While the program has always offered the advantages of a low interest rates, no downpayments, and easy assumability, the recent legislative improvements make this method of financing even more attractive. Major Ingold.

Veterans Relying on VA Employee Advice Beware

Veterans seeking to determine their liability on a loan assumed by another should not accept oral advice from Veterans Administration (VA) officials, according to a recent case from the 11th circuit. *United States v. Vonderau*, 837 F.2d 1540 (11th Cir. 1988). In the case, the veteran, Vonderau, sold his mobile home, financed by a VA-backed guaranty loan, to a third party who assumed the loan. Vonderau did not apply for a release from liability on the assumed loan.

The purchaser of the mobile home made two payments and defaulted. The VA sent Vonderau notice of the default and of its intent to foreclose. In response to the notices, Vonderau testified that he called the VA and spoke to an employee who told him that, if the VA did not proceed on the guaranty obligation, it would write off the debt and not hold him liable. Instead of taking this action, however, the VA foreclosed on the property and brought suit against Vonderau to recover the deficiency.

The trial court instructed the jury that the defense of equitable estoppel could apply if Vonderau's testimony on what the VA employee told him was truthful. The jury apparently found that it was and returned a verdict for Vonderau.

On appeal, the circuit court held that the district court improperly charged the jury that estoppel might lie against the government. The court concluded that the government cannot be estopped by the action of an agent who acts outside his authority. The employee Vonderau spoke with did not have authority to release him from liability because this authority has been delegated by law to a committee on waivers and compromises. 38 U.S.C.A. § 1820(a) (West Supp. 1987); 38 C.F.R. § 1.955(a) (1987).

This case highlights the need for veterans to know the VA procedures for seeking release from liability on assumed loans. Legal assistance attorneys should also be familiar with these procedures to help educate and assist veterans seeking to avoid liability on the default of assumed loans. Major Ingold.

NAF Employees May Be Audited by IRS

The Internal Revenue Service (IRS) has announced that it will audit some military employees who are paid out of nonappropriated funds (NAF). The IRS believes that many NAF employees working overseas have been improperly claiming the foreign earned income exclusion.

The foreign-earned income exclusion allows Americans working abroad to exclude up to $70,000 of foreign-earned income per year. I.R.C. § 911 (West Supp. 1988). Foreign-earned income, however, does not include amounts "paid by the United States or an agency thereof to an employee." I.R.C. § 911(b)(1)(A) (West Supp. 1988).

Some NAF employees working abroad have claimed the foreign earned income exclusion on the basis that they are not employees of the U.S. Government. The IRS has long taken the position, however, that compensation paid by NAF instrumentalities overseas is not foreign-earned income, and thus, is subject to tax. Rev. Rul. 54–612, 1954–2 C.B. 169. *See also* I.R.S. Publication No. 54, Tax Guide For Citizens and Resident Aliens Abroad (Rev. Nov. 1987); I.R.S. Publication No. 516, Tax Information For U.S. Government Civilian Employees Stationed Abroad (Rev. Nov. 1987).

A consolidated case pending before the U.S. Tax Court on this issue should help NAF employees determine what position to take on this issue when preparing their federal income tax returns. *Commissioner v. David W. and Christa Mathews*, Docket Nos. 4254–87 and 7717–87 (U.S. Tax Court filed Feb. 19, 1987). If the court rules in favor of the taxpayer, NAF employees should consider filing amended returns for the past three years. Employees who plan to claim, or who have already claimed, the foreign-earned income exclusion can expect a stiff challenge from the IRS. Major Ingold.

Court Refuses To Reform Life Insurance Policy To Benefit After-Born Child

Soldiers who think their life insurance policies will automatically be modified to benefit children born after the policy was signed should heed a recent decision from the District of Columbia. In *Penn. Mut. Life Ins. Co. v. Abramson*, 530 A.2d 1201 (D.C. App. 1987), the court considered whether a life insurance policy may be reformed to designate as a beneficiary the insured's son, who was born to the insured's wife after his death.

The insured, Ibn-Tamas, purchased a life insurance policy in 1974 after he had divorced his first wife and remarried. He name his second wife as the primary beneficiary of the policy and designated his two children by his first marriage as the alternate beneficiaries of half of the policy proceeds. He named his only child of the second marriage as the alternate beneficiary for the other half.

The insured designated all beneficiaries by name and provided a trust for all proceeds due a minor child. A clause in the policy required that all changes in beneficiaries be made in writing.

In 1976, the insured was murdered by his second wife. Five months later she gave birth to the insured's fourth child.

The insured's wife was ineligible to receive the proceeds of the policy under District of Columbia law upon her conviction of second-degree murder. Thus, the insurer paid one-half of the proceeds to the two children of the first marriage and instituted an interpleader action for an order governing distribution of the remaining one-half.

The district court ruled as a matter of law that the insurance policy should be reformed. The court considered evidence establishing that, before his death, the insured expressed a desire to provide for his yet-to-be-born child and reasoned that reformation was appropriate to effectuate the insured's intent.

The circuit court disagreed with the lower court decision and held that reformation was not appropriate. The court cited with approval the general rule that, absent fraud or negligence by the insurer, proof of mutual mistake is necessary for reformation of an insurance policy. *Id.* at 1210 (citing 13A J. Appleman, Insurance Law and Practice § 7608, at 304 (1976)). Because the insured knew his child was conceived before his death, there was, in the opinion of the court, no foundation for reformation of the policy on a theory of mutual mistake.

The court also rejected the application of the equitable doctrine of substantial compliance to find that the insured had complied with the policy's change-of-beneficiary requirements. Instead, the court referred to local law in concluding that for a change of beneficiary designation to be effective, it must be evidenced in writing. The court therefore concluded that, as a matter of law, the insured's third child was entitled to one half of the policy proceeds.

By naming specific children as beneficiaries of a policy, an insured may unintentionally exclude other children from taking. A method to preclude this from happening would be to merely designate "children" as the beneficiary. Under the law of most states, the term "children" is broad enough to include after-born children, even those born of subsequently contracted marriages, and adopted children. In any event, legal assistance attorneys should remind soldiers to review beneficiary designations whenever changes in the family occur. Major Ingold.

Buying Clubs: The Problem and a Solution

The following note was provided by Captain Paula Ramsbotham, a legal assistance attorney in the Office of the Staff Judge Advocate, Redstone Arsenal, Alabama.

Buying clubs have recently been added to the mass of entities that typically cluster around the outskirts of a military base. Such growth has contributed to an increase in questions for legal assistance attorneys.

A buying club is a commercial entity that offers consumer goods at a reduced cost or discount if the consumer pays a usually generous membership fee. Membership fees vary, but the unwary consumer often fails to realize that he or she must purchase a substantial quantity of goods to gain any true savings. For instance, for a membership fee of $500.00 with a promised twenty-five percent discount, the soldier would have to spend $2,000.00 to reap any gain. A buying club's active use of a collection agency or finance company is an indication that consumers may not be able to afford their membership fees or make their payments. It does not make good business sense for a consumer to go into debt to save money.

Legal assistance attorneys in the Office of the Staff Judge Advocate (SJA), Redstone Arsenal, Alabama, received over forty complaints within a period of less than a year on buying clubs. Soldiers and dependents complained of high pressure sales tactics where they were taunted by salespeople if they hesitated in the spot for fear of losing their "one-time opportunity to save." Clients also alleged that they were promised free gifts but that the receipt of such tokens either required them to sign a contract or to attend other sales presentations. Promises of substantial savings and prompt delivery were unfulfilled. One club falsely maintained that it was a member of the Better Business Bureau (BBB). Lastly, some soldiers were offered a $100.00 discount in exchange for providing the buying club with twelve names of potential customers.

The first approach by the SJA office was to address these allegations in letters to the buying clubs, copies of which were furnished to the local BBB. The BBB assisted the legal assistance office by providing information concerning the companies' histories and the clubs' methods of handling consumers' complaints. The BBB could also prove that the buying clubs were targeting military personnel by their zip codes in mass mailings. Unfortunately, however, letters from the SJA failed to alter the practices of the buying clubs.

Because there was no Expanded Legal Assistance Program (ELAP) in effect, the office turned to the Armed Forces Disciplinary Control Board (the Board) and the Alabama Attorney General's Office. One of the more critical roles for the legal assistance attorney was to convince the board that Army Regulation (AR) 190–24 did not require a finding of illegal activity to place a company off limits but, rather, required only that the board find the buying clubs negatively affected the health, safety, morale, welfare, or discipline of the armed forces personnel.[1] Procedural safeguards were another primary concern. In March 1987, the board convened for the first time and the legal assistance attorney presented the clients' allegations against the buying clubs and instructed the board on the application of AR 190–24. The president of the local BBB and a representative from the Alabama Attorney General's Office provided colorful and realistic examples to encourage the board's action. After the board moved to place the buying clubs on notice, the investigation of the buying clubs became both covert and overt through the assistance of the investigations division of the local military police.

In late June 1987, the investigations of the buying clubs were complete and the board met again to finalize its recommendation. Notice was sent through certified mail, personal service, and telephonic communication to ensure that the proprietors were given notice and an opportunity to appear.[2]

The regulation directs that, before calling the proprietors, the board's president will review the findings and decision of the previous meeting, call for inspection reports, and afford an opportunity to those present to ask questions and to discuss the case.[3]

In this particular hearing, the board members unanimously agreed to include the proprietors, their representatives, and counsel in the recitation of these preliminary matters. The reasoning for this decision was to provide the buying clubs with every opportunity to exercise their right to learn of the allegations against them and to conduct cross examination. Although the board did not sit as a tribunal, the evidence was presented as in a judicial proceeding: first, presentation by the government and cross-examination questions from the buying clubs; then presentation of the buying clubs' defenses and cross-examination by the government through the legal assistance attorney and the board members. The parties were afforded the opportunity to present introductory and closing statements.

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[1] Dep't of Army, Reg. No. 190–24, Military Police—Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement Services, para. 2–1*a*(1) (15 Nov. 1982) [hereinafter AR 190–24].

[2] *Id.* para. 2–6*e* and app. B.

[3] *Id.* app. B, para. B–6*g*

These procedural safeguards ensured that the board did not act in an arbitrary manner.[4]

The JAGC petitioner presented three witnesses: an investigator from military police, the president of the BBB, and an agent carrying an official statement on behalf of the Alabama Attorney General's Office. The investigator testified and played a tape that recorded the buying clubs' presentations from a covert wire. The president gave a detailed explanation of the Bureau's dealings with these buying clubs. The letter from the Attorney General's Office noted specific provisions of the Alabama Deceptive Practices Act that the buying clubs were believed to have violated.[5] The letter stated that there were at least three bases for civil action against one club in particular under the Deceptive Practices Act: misrepresentations made by employees as to membership with the BBB, misrepresentations made by the employees as to potential savings with the buying club; and the use of a chain referral sales plan in connection with the sale of memberships. The correspondence also predicted that, as the business may have engaged in continuous and willful violations, imminent suit by the Alabama Attorney General's Office was possible. Lastly, the document reflected the opinion that the Armed Forces Disciplinary Control Board would be negligent if it did not move to place the buying clubs off limits. These witnesses provided credible evidence to support the petitioner's argument and encourage strong action by the board.

After the board recommended an off limits action, the case was sent to the commanding general for his approval. The general requested that the SJA provide an opinion of the board's recommendation to assist him in reaching his decision. The SJA's concurrence included a procedural explanation: that a letter of notification was sent, that an opportunity to appear before the board had been extended, and that further investigation indicated that improvements had not been made.[6]

Once the commanding general approved the board's recommendation, the order was published through the command, the post newspaper, and the local newspaper through the Public Affairs Office. The board's recommendation was not retroactive, so the original complaints had not been resolved. The petitioners responded by corresponding with the proprietors, explaining that one of the most effective means of lifting an off limits sanction would be to show an example of good faith: void the contracts made prior to July 21, 1987, and refund the clients' money. Although no refunds have been made to date, no further complaints have been received and improper business practices have ceased on several occasions following notice to a company that the firm has been referred to the Armed Forces Disciplinary Control Board.

In summary, in dealing with the buying clubs, the limits of the legal assistance office may be extended by relying on other entities such as the Armed Forces Disciplinary Control Board, the Attorney General's Office, and the Better Business Bureau. Active legal assistance attorney involvement in these areas will not only serve as a watchdog for the system, but will also enable the office to be more visible and useful to the Army community as a whole.

Shipment and Pick-Up of Privately-Owned Vehicles

Captain John D. Noel, Assistant Staff Judge Advocate, Bayonne, New Jersey, submitted the following note.

The Joint Travel Regulations and DOD Regulation 4500.34–R (May 1986) entitle a servicemember to ship one privately-owned vehicle (POV) at government expense. The vehicle may be titled in the servicemember's name, or that of a spouse or a dependent. Under normal circumstances, parents and siblings are *not* dependents, and a servicemember may not ship their POVs at government expense.

A recurring problem at various military ocean terminals arises when a spouse (or agent) arrives to pick up a POV, but does not possess a valid special power of attorney authorizing the pick-up. Due to the possibility of separation, divorce, or fraud (shipping more than one POV at government expense), a vehicle will not be released to a spouse unless the spouse possesses a special power of attorney authorizing release. Furthermore, because the entitlement to ship at government expense extends only to the servicemember, the special power of attorney is needed even if the vehicle is titled in the spouse's (or dependent's) name.

Legal assistance attorneys should make sure that servicemembers execute a special power of attorney authorizing pick-up of POVs before a PCS or ETS if a spouse or agent will pick-up the vehicle.

[4] *Id.* app. B, para. B–6*a*.

[5] Ala. Code §§ 8–19–5(5), 8–19–5(22), and 8–19–5(8) (1975).

[6] AR 190–24, app. B, para. b–6*h*.

Claims Report

United States Army Claims Service

This month, the Claims Report is devoted to overseas claims issues. Colonel Tom DeBerry and his staff at the U.S. Army Claims Service, Europe, prepared the report. We plan to make this overseas report an annual feature.

Centralized Recovery Operations in USAREUR

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Introduction

In January 1982, the U.S. Army Claims Service, Europe (USACSEUR) centralized European carrier recovery to improve the recovery performance level over that achieved by field claims offices. Centralization revealed deep-rooted and systemic problems in claims administration, transportation, and contracting practices that contributed to a low rate of carrier recovery and had gone undetected in a decentralized environment. USACSEUR analyzed unsuccessful recovery actions for reasons why the government could not assert a demand on a carrier. Centralized recovery provided the opportunity to identify systemic problems in the personal property shipment program and then address the possible corrective actions.

This article focuses on these problems and the solutions that USACSEUR, the U.S. Army Contracting Command, Europe (USACCE) and various transportation agencies implemented to create a more effective recovery program. Finally, it examines the potential uses of the automated claims reporting system to enhance file accountability and timeliness of carrier recovery actions.

Field Claims Offices

The first issue posed to centralized recovery was, how much of it is out there? By late 1982, a serious shortfall developed in the number of files being received from field offices. Four field offices failed to forward any files at all and a division headquarters forwarded one file and reported none on hand. In contrast, some relatively small claims offices forwarded over 100 files for recovery during the year. A USACSEUR analysis of shipments in USAREUR indicated that USACSEUR should receive 5,000 recovery actions annually; the actual number received in 1982 was 1,328. USACSEUR's first step was to use Army Claims Service automated data processing reports to establish an approximate figure for European recovery actions for each field claims office. This effort defined accountability because field offices were advised of the number of recovery actions USACSEUR would expect them to forward annually.[1] The effect was an increase in the number of files received in 1983 to over 4,000 and, in 1984 and 1985, to over 5,000.

USACSEUR also identified an immediate need for a recovery training program for field claims personnel. Though years of decentralized recovery should have created a significant body of field experience, a U.S. Army Audit Agency (USAAA) report in early 1983 documented numerous deficiencies in file accountability, identification of shipment modes, unwarranted closing of recovery actions, incorrect liability calculations and lack of uniformity in the preparation of demands. To correct the USAAA finding, USACSEUR implemented a recovery workshop where field offices would bring their recovery files to USACSEUR. USACSEUR personnel provided class instruction and supervised the hands-on processing of the files. The workshop provided practical reinforcement to the class and enhanced morale by an on-the-spot reduction of the field office backlog.

Centralized recovery also resulted in a reassessment of the claims training program. The single annual claims workshop was inadequate to provide both clerical instruction and attorney-level presentations worthy of a continuing legal education course. Although the hands-on recovery workshop did provide some recovery instruction, its primary purpose was to address office backlogs, not to develop clerical skills across the entire range of claims administration. To address this need, USACSEUR started a four-day workshop designed exclusively for clerical personnel in 1984. Due to the rapid turnover of claims clerks in this theater, the clerical workshop is conducted twice a year. Freed of the clerical issues, the annual claims workshop could then better address subjects for attorneys, paralegals, and senior adjudicators, such as medical malpractice investigations, comparative negligence, and claims system management.

USACSEUR was also able to improve its oversight of field performance. As an organization charged with the technical supervision of an entire theater, greater involvement in the work product of those field offices strengthened USACSEUR's credibility. For the first time, USACSEUR had a large body of files representing the work product of every office, thus providing the opportunity to implement a post-settlement review program. The files also provided a

[1] Made retroactive for deliveries after 1 Jan 81.

reference source for preparing management assistance visits. Items of interest were identified, training needs assessed and time more effectively used during the visit.

Thus, one result of centralized recovery was an entire range of new training and management tools for USACSEUR. Hands-on recovery workshops for short term impact, redesigned claims workshops to develop long term skills, post-settlement review of field office performance and more informed management assistance visits all combined to produce a better work product from field claims offices. The ultimate compliment came from the carrier industry, which acknowledged the improvement and resulted in USACSEUR compromising fewer claims. The rate of recovery also increased from an average of $113.00 per action in fiscal year (FY) 1984 to $163.00 in FY 1987.

Transportation

Centralized recovery also disclosed theater-wide problems for agencies involved in transportation activities. The most critical area was direct procurement method (DPM) shipments.

DPM is a series of contracts moving property along a predetermined route. Each contractor in the chain is an independent contractor, providing a single service and only liable for loss or damage incurred while the shipment is in his possession. The packing and containerization (P&C) contracts, against which DPM orders are placed, provide that, in the absence of evidence establishing who was responsible for loss or damage, the destination contractor will be presumed liable. This contractual presumption is subject to rebuttal by the destination contractor by alleging that the damage occurred elsewhere in the transit chain or that damages resulted from poor packing. In contrast, International Through Government Bill of Lading (ITGBL) shipment modes provide for "through" responsibility by one carrier for the entire route of shipment, whether handled by himself or through his agents. Thus, the motivation and opportunity of DPM contractors to shift liability does not exist to the same extent under ITGBL. Additionally, denials of liability from ITGBL carriers are primarily for failure to provide timely notice or failure to substantiate transit damage.

In addition to the inherent problems of enforcing contractor liability based on a contractual presumption, systemic abuses were identified in transportation offices that jeopardized DPM recovery actions. One problem was that the Department of Defense (DD) Form 1840, Notice of Loss or Damage, was sometimes being dispatched to origin transportation offices, packers, or freight haulers. One transportation office even dispatched notices to itself. Because the destination DPM contractor was not receiving notice, it had a contractual defense against liability. It was apparent that lower echelon transportation personnel did not understand the significance of identifying DPM shipments and dispatching notice to the destination contractor presumed liable for loss or damage in shipment.

The DD Form 1841, Government Inspection Report, provided another source of abuse. Inspectors would routinely enter comments on the report that purported to relieve the destination contractor of liability. Those "inspections" frequently occurred months after delivery or, in fact, never took place. Thus, what was, intended to protect the Government's interests, instead became, a DPM contractor's defense to liability.

Identifying these abuses was a major USACSEUR initiative. Over twenty requests for assistance were forwarded to the Transportation Management Branch, Office of the Deputy Chief of Staff for Logistics, documenting practices that jeopardized carrier recovery. All the actions were favorably endorsed and implemented by V Corps, VII Corps and the Southern European Task Force (SETAF). In addition, the Joint Traffic Management Agency invited claims participation in their training workshops, the 4th Transportation Command requested claims input for their inspection visits to installation transportation offices, and the European Personal Property Council provided a ready and receptive forum for problem solving and information exchange among several Government agencies.

While every agency in the transportation community that USACSEUR contacted was extremely supportive, given the inherent vulnerability of DPM, these could not cure the problem completely. The Military Traffic Management Command—Field Office Europe took the major corrective action. Recognizing the carrier recovery problems associated with DPM, as well as other management detractors in the system, it took action to authorize the use of ITGBL Code J as an alternative to DPM for inbound shipments to Germany. Another remedial action was the Department of Defense (DOD) decision to make carrier notification a claims responsibility. Removing this duty from transportation offices eliminated the primary reason for loss of carrier recovery in the European theater. The change in notification procedures was coupled with a USAREUR deemphasis on the use of transportation personnel to perform claims inspections, thus removing another DPM problem area.[2]

DPM contractors tested the area of judicial relief in 1985. P&C contracts provide contractors with a right of appeal to the Armed Services Board of Contract Appeals (ASBCA) and two DPM contractors did appeal claims offsets. The ASBCA denied relief in both cases and the decisions proved to be a turning point in USACSEUR's negotiating posture with the German carrier industry. The first case, *D-Trans, Umzuege*, ASBCA No. 30170 provided an excellent decision covering numerous DPM issues. The decision is relied upon as authority by USACSEUR in carrier negotiations and in requesting offsets from contracting officers. While the second case, *Viktoria International Spedition* did not produce a decision with the academic content of *D-Trans, Umzuege*, it did have a decided effect on other members of the carrier industry and government contracting officers, because the appellant was the second largest transportation contractor in Europe. Completed offsets increased from 93 in fiscal year 1985 to 403 in fiscal year 1987, without a contractor appeal.

Contracting

Centralized recovery also identified problem areas with the U.S. Army Contracting Command, Europe (USACCE).

[2] Implementation date was 1 Apr 85.

Personnel property shipments are transacted either by tenders of service or contracts. An important distinction between the two is that for tenders, the Claims Service has authority under paragraph 11-37a, Army Regulation (AR) 27-20 to initiate offsets directly against a carrier's account. For claims arising under contracts, the Federal Acquisition Regulation (FAR) and paragraph 11-37c, AR 27-20 require that a request for offset be forwarded to the administrative contracting officer (ACO) responsible for the administration of the contract under which the liability was incurred. The ACO will then conduct an independent review and determine whether offset is warranted.

The request for offset required forwarding a complete a copy of the file to the ACO, with a statement of facts setting forth the attempts to collect from the contractor, the basis of his denial, if any, and the factual or legal precedents to rebut that denial. In addition, ACOs frequently requested on-site assistance to explain claims or transportation documents, claims adjudication and carrier liability calculations. Processing offsets became a time consuming, labor intensive, high volume activity for relatively small amounts of recovery. One regional contracting office (RCO) failed to achieve even one voluntary settlement under eighteen contracts over a three-year period. Another RCO had a backlog of over a thousand claims. RCOs frequently took over two years to complete offsets and three years was not unusual. Additionally, contractors often left the "system" after a contract expired, thereby rendering an offset impossible.[3]

USACCE recognized that the government's collection ability would be greatly improved if the time-consuming step of routing offsets through an RCO could be eliminated. It began to study the feasibility of appointing an ACO within USACSEUR. This required a review of the authority to make the appointment, the qualifications of the appointee, and the procedural steps necessary to implement the action.[4] FAR 2.10 defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings". Because an ACO assigned to USACSEUR would not require such an extensive scope of authority, it would be necessary to restrict the appointment through a limited warrant to those activities necessary to collect the money owed by a contractor.[5]

The sum of these efforts was an ACO appointment on 19 October 1987. The limited warrant allowed USACSEUR to issue final decisions establishing a contractor's liability for damage to household goods under local drayage, packing, and containerization contracts. USACSEUR would also prepare the Rule 4 file in the event of a contractor appeal to the ASBCA. The appointment applied to regional contracting offices accounting for over half the claims offices in Germany. The initial phase will serve as a test period to assess possible extension to all regional contracting offices in Germany and USAREUR.

The benefits of USACSEUR's limited ACO have been immediate. Contractors are foreclosed from "forum shopping" between claims and contracting channels and the 120-day settlement period now has the same impact for contractors as carriers. Moreover, the ACO appointment results in a significant reduction of work for USACSEUR because it is no longer necessary to prepare a statement of facts to justify a request for offset on each individual claim or forward a complete copy of the claim file to an RCO. The ACO letter merely refers to all the claims covered by the final decision. Of the first eighteen final decisions, six resulted in full settlement by the contractors.

Automation

For the future, automation is providing new applications for system management tools within centralized recovery. First, the automated claims reporting system has the capability to develop a data base for information sharing with sister agencies and to monitor compliance of field claims offices with processing standards. Secondly, under the automated claims reporting system, additional transportation coding is required that distinguishes European from CONUS recoveries to a 99% accuracy level. File accountability is now a specific, not an anticipated quota. When field offices forward a floppy disc to USACSEUR monthly to document their claims expenditures, two months later that same disc can determine if files reflecting potential European recovery have been forwarded. If not, the field office can be contacted for a status report.

A related benefit may be improved timeliness in forwarding recovery actions. The 1985 USAAA report set a forty-five day processing standard from the date a claimant is paid until a file is forwarded.[6] In 1987, only eight USAREUR field offices met that standard for European recovery actions. Timely processing is critical because most recovery actions involve local drayage and P&C contracts which expire annually. Some contractors remain in the "system" year after year and are still subject to offset. Others, who drop out, have little motivation to settle claims when they are no longer under contract. "Processing" of recovery actions extending over a year by some field offices worsens this problem.

Automation, combined with centralized recovery, provides data that was not previously available. This data can be used by both USACSEUR, and in the event of an audit, by agencies with oversight responsibilities such as the General Accounting Office, the Inspector General Office and the USAAA. Carrier recovery is easily quantifiable and is an appropriate inspection target for fraud, waste and abuse,

[3] USACSEUR currently has over 1500 claims awaiting the possibility that former contractors will reenter the Government contracting system.

[4] The appointment of an ACO, even under a limited warrant, is personal to the individual and not inherent in his duty position. FAR 1.603-2 requires the appointing official to consider the candidate's experience in Government contracting and administration, his knowledge of acquisition policies and procedures, his specialized knowledge in the particular assigned field of contracting, and his satisfactory completion of acquisition training courses.

[5] Normally, the Principal Assistant Responsible for Contracting (PARC) delegates the contracting authority vested in him by appointing ACOs from within the contracting activity. The appointment of an ACO outside the organizational structure of USACCE must be carefully tailored to ensure agency safeguards by the use of a limited warrant. By providing clear written instructions to the ACO as to the limits of his authority, e.g., monetary limitations, type of contracts, specific tasks, time restrictions, etc., the PARC ensures that the appointment does not result in unfettered discretion. Other concerns, such as lack of supervision and operational control over the appointee, can be addressed by a monitoring program and requiring a legal sufficiency review of final decisions. Ultimately, the PARC can cancel the appointment whenever such action appears to be in his activity's best interest.

[6] AR 27-20, para. 11-36.

accordingly, claims offices with unaccounted for files, recovery backlogs or poor carrier recovery performance can anticipate being a subject for such audits and are vulnerable to adverse findings.

Conclusion

Centralized recovery was expected to improve recovery performance within the theater. This prediction proved accurate when between fiscal years 1983 and 1987, recovery from European carriers increased by 300%. Because centralized recovery was able to identify and quantify systemic problems within the personal property shipment program, sister agencies were also able to adopt improved methods of doing business. Transportation commands have implemented shipment modes that afford better potential for carrier recovery and contracting agencies have streamlined procedures for the collection of money due the Government.

Finally, automation will develop new tools to assist in the management of all aspects of the recovery program. Just as centralized recovery identified the need to develop new training programs for field claims offices, automation will broaden the base of technical assistance that USACSEUR can provide those offices. Though file accountability and timeliness will be immediate items of interest, data collection for information sharing with sister agencies will also be explored. The ultimate test will be to use automation to ensure the government is obtaining maximum performance from both its personnel and its contractors.

What Every USAREUR Victim/Witness Liaison Counsel Should Know About Foreign Claims

Captain Robert H. Pope
Chief, Commissions Branch, U.S. Army Claims Service, Europe

The policy of the United States is to assist victims of crimes committed by servicemembers.[1] This policy seeks to mitigate physical, psychological, and financial hardships, and foster full cooperation with the military criminal justice system.[2] Under the supervision of staff judge advocates (SJAs) Victim/Witness Assistance Programs have been established to accomplish these objectives.[3] Though SJAs appoint one or more Victim/Witness Liaisons (VWLs) to coordinate this program, the VWL is not personally responsible to provide specific victim/witness services.[4] As the possibility of compensation is often a special concern to a crime victim, VWL counsel who are knowledgeable about restitution can provide valuable victim assistance. In addition, AR 27–10 provides that victims who suffer a personal injury or property loss as a result of a violation of the Uniform Code of Military Justice[5] should be informed of the various means available to seek restitution.[6]

Most victims involved in USAREUR courts-martial are local national citizens of the Federal Republic of Germany. These victims generally have four methods of restitution available: private lawsuit; German victim compensation law;[7] an Article 139 claim against the soldier;[8] or a foreign claim against the United States.[9] Given the time and difficulty of recovery in a lawsuit, the last three methods are the only ones in which the victim has any genuine chance of recovery. Additionally, German victim compensation law and Article 139 are both very limited concerning the types of crimes and injuries for which compensation can be paid.[10] Certainly, VWL counsel ought to encourage German victims to claim under one of these provisions if they qualify. Because the Foreign Claims Act can provide much broader coverage than either German victim compensation law or Article 139, however, VWL counsel ought to be familiar with this form of restitution and be aware of foreign claims procedures.

To maintain friendly foreign relations, the Foreign Claims Act permits payment of meritorious claims of foreign residents for property damage or loss and personal injury or death caused by the tortious acts or omissions of members of the United States Force and its civilian component.[11] In USAREUR, foreign, or *ex gratia,* claims are limited by the NATO Status of Forces Agreement to those

[1] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, ch. 18 (18 Mar. 1988) [hereinafter AR 27–10], which implements the Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, 96 Stat. 1249.

[2] AR 27–10. para. 18–3.

[3] *Id.* para. 18–6.

[4] The Victim Witness Liaison should be a commissioned officer, a warrant officer, or a civilian in the grade of GS–11 or above. When necessary, an enlisted person in the grade of E–6 or above, or a civilian in the grade of GS–6 or above, may serve in the position. Often the victim witness liaison is merely a point of contact who distributes victim information packets. *See* AR 27–10, paras. 18–7, 18–8c.

[5] 10 U.S.C. §§ 801–940 (1982) [hereinafter UCMJ].

[6] AR 27–10, para. 18–2*b*.

[7] Gesetz Uber die Entschadigung fur Opfer von Gewalttaten (Law Concerning the Compensation of Victims of Acts of Violence), BGBI 1976I, S.1181, *as amended in* BGBI 1978I, S.1217.

[8] UCMJ art. 139.

[9] The Foreign Claims Act, 10 U.S.C.A. § 2734 (West Supp. 1987), is implemented in Dep't of Army, Reg. No. 27–20, Legal Services—Claims ch. 10 (10 July 1987) [hereinafter AR 27–20].

[10] The German victim compensation law provides pensions for permanent bodily injuries and loss of wage-earning capacity that result from assaults. *See supra* note 7. UCMJ art. 139 covers willful or reckless property damage or loss; payments are limited to $5,000.00.

[11] *See* 10 U.S.C.A. § 2734 (West Supp. 1987).

involving an act or omission outside the scope of employment.[12] Although damages or injuries caused by simple negligence are compensable, most meritorious *ex gratia* requests involve crimes against person or property committed by military personnel. Each year, the U.S. Army Claims Service, Europe (USACSEUR) compensates hundreds of foreign victims of soldiers' crimes through the payment of *ex gratia* awards.

German crime victims need only contact their local Defense Cost Office (DCO) for instructions about filing their request for compensation and for advice about necessary documentation. Retaining private legal counsel is neither required nor advisable. The DCO makes an advisory recommendation on each request and forwards it to the pertinent Foreign Claims Commission (FCC) at USACSEUR for an award determination.[13] FCC's have discretionary power to decide awards in individual cases, although guidelines limit the size and type of *ex gratia* award that particular FCC's can grant. Requests arising from contracts, private or domestic obligations, deceit or misrepresentation, trespass, or tortious acts of the claimant are among those not compensable.[14] Requests by insurers and other subrogees, and requests for interest, legal fees, court costs, and similar charges are also precluded.[15]

Foreign claims provide the best method of implementing the policy of the United States to accept financial responsibility for the criminal acts of those wearing the American uniform abroad. USAREUR VWLs, by adequately advising crime victims, can play an invaluable role in carrying out this policy. Too often, however, German crime victims are merely advised to consult local legal counsel—advice that may do more harm than good.[16] Advising a victim interested in restitution to seek local counsel wastes that victim's time and money and hinders U.S. compensation efforts. In the *ex gratia* procedure, with no basis for suit against the United States Government and with an extensive DCO system eager to help claimants, noncompensable attorney fees unnecessarily erode a victim's compensation. The best advice a VWL can give to crime victims is twofold: inform them about NATO SOFA *ex gratia* claims procedures in general, and recommend that they consult the local DCO.[17]

[12] Though the Foreign Claims Act governs both "in scope of duty" and "not in scope of duty" claims, under the NATO Status of Forces Agreement (SOFA), "in scope" claims are processed and paid by Defense Cost Offices (DCOs), with seventy-five percent reimbursement by the United States Government. *See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 7 U.S.T. 1792, T.I.A.S. No. 2845 art. VIII (effective 1953) [hereinafter NATO SOFA].

[13] *See* Administrative Agreement Concerning the Procedure for the Settlement of Damage Claims (Except Requisition Damage Claims) Pursuant to Article VIII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, dated June 19, 1951, in Conjunction with Article 41 of the Supplementary Agreement to that Agreement, as well as for the Assertion of Claims Pursuant to Paragraph 9, Article 41 of the Supplementary Agreement, paras. 63–65a.

[14] AR 27–20, para. 10–9.

[15] AR 27–20, paras. 10–7*c*, 10–10*a*.

[16] United States Army Europe, Reg. No. 27–10, Legal Services—Military Justice, app. D, para. 3e(2) (3 July 1985) (cl 1 Jan 1987).

[17] *See* AR 27–10, para. 18–12*b* (victims should be informed of the possibility of remedies, including claims, and of the points of contact to assist them).

Maneuver Damage Claims May Never Be The Same

Major Horst G. Greczmiel
NATO SOFA Claims Branch, U.S. Army Claims Service, Europe

United States forces conduct approximately 1000 annual maneuvers on public and private land in the Federal Republic of Germany (FRG) using maneuver rights granted under Article 45 of the Supplementary Agreement to the NATO SOFA. Claims for damages that result from these maneuvers are processed by German Defense Costs Offices (DCOs) who have the sole responsibility for adjudication and payment. Before adjudication, the DCOs request a certification of involvement from the nation whose forces allegedly created the damage. For U.S. forces, the U.S. Army Claims Service, Europe (USACSEUR) certifies involvement of U.S. personnel and reimburses the FRG for the U.S. share of damage costs (usually seventy-five percent of the amount paid to the claimant). The total cost of these reimbursements has averaged seventy-five to eighty-five million Deutsche Marks per year, but with the recent drop in the value of the dollar, costs have gone up rapidly. Accordingly, the system for processing these claims is periodically scrutinized by agencies inside and external to the Army.

Several of these recent evaluations, including a late 1987 study by the General Accounting Office and a USAREUR maneuver study during September–November 1987, have recommended improvement of the maneuver damage verification system. This note focuses on recent changes to the maneuver damage claims process that have increased USACSEUR's ability to verify maneuver damage claims.

The Administrative Agreement to the NATO SOFA, which governs maneuver claims processing, has been amended to allow USACSEUR to focus its resources upon road damage and other high cost damage claims by increasing the simplified procedure limit from Deutsche Mark (DM) 1500 to DM 3000. Simplified procedure claims are for small amounts of money and are claims for damage to agricultural land and minor forest damage. These claims are inspected and adjudicated by DCOs, using established crop and land value tables. The emphasis is on fast payment to the claimant. For this reason, claims are not forwarded to USACSEUR for certification of involvement. USACSEUR only checks simplified claims when they are

submitted for reimbursement by the DCO. The amendment allows the simplified procedure to apply to a high percentage of maneuver damage claims, but which represent only a small percentage of the total cost of maneuver damage.

Other amendments to the Administrative Agreement give USACSEUR better notice of claims that may require inspection. DCOs are now required to send USACSEUR a notice of the amount finally claimed when no particular amount was initially asked for by the claimant. Previously, USACSEUR had to ask for this information on each of these claims. Additionally, DCOs will now provide USACSEUR with notice of their inspections of high value road damage claims processed under conference procedures. These procedures are commonly used after large multinational exercises to divide the maneuver area into separate areas of claims responsibility. This division is based on the amount of maneuver damage caused by each force, the size of the forces and the areas in which national forces exercised. This change allows USACSEUR the opportunity to join DCO officials when they make their inspections of maneuver damage shortly after the end of the exercise.

The need to improve verification has also changed the way USACSEUR uses the conference procedure. For many years, post-maneuver conferences had set high (or even unlimited) monetary limits for those claims that had to be forwarded to USACSEUR for certification. The practical effect of these limits was that USACSEUR rarely examined claims below this limit until they were presented for reimbursement. Thus, most high value conference claims received virtually the same treatment as small simplified procedure claims. The need to verify and certify all high value claims has led to a gradual elimination of the monetary limits for certification of conference claims. DCO's will now forward all claims not processed under the simplified procedure to USACSEUR for certification of involvement, whether or not a post-maneuver conference was held. Obtaining the personnel to process and inspect these additional claims is a top priority of USACSEUR.

In 1986 and 1987, V Corps conducted a test program of assigning an investigator a geographic area of responsibility for maneuver coordination. Familiarity with the area, local officials and the maneuvering units yielded valuable information that was used to conduct investigations and inspections with DCO personnel. The test's success was one factor that led to the implementation of a maneuver area management program, which divides the four V Corps managing commands' maneuver areas among brigade maneuver damage prevention specialists. These specialists participate in pre- and post-maneuver surveys, coordinate with local authorities and assist commanders in reporting maneuver damage. Their knowledge of the condition of the area before and after maneuvers, and their ability to identify and assess potential claims, increases the ability of the U.S. to verify maneuver damage claims.

When USAREUR reviewed the maneuver damage issue with a task force in late 1987, the V Corps program was used as a model for improving verification of maneuver damage and for training soldiers in the prevention of damage. The study recommended use of the area maneuver management system throughout USAREUR. An additional recommendation was that the brigade level maneuver management specialists' job descriptions be standardized and that they include providing claims verification assistance to USACSEUR. The recommendations are expected to be approved through an implementing directive and reflected in a Summer 1988 change to United States Army Europe, Regulation No. 350–22, Training—Maneuver and Field Training Exercise Rights in the Federal Republic of Germany. When fully implemented, the use of area maneuver management specialists will provide better coordination between maneuvering units and local officials, more timely feedback to commanders on maneuver damage, and a resource to help USACSEUR with verification.

USACSEUR's participation in the REFORGER 87 field training exercise, CERTAIN STRIKE, highlighted the value of using qualified engineer personnel to help in damage verification. USACSEUR funded engineers from the Corps of Engineers to participate in pre-maneuver surveys and inspections of maneuver damage during the exercise. The assessments and training that they provided to USACSEUR proved extremely valuable in evaluating the cost of damages and in making sure that claims were actually based on maneuver activities.

As a result of the REFORGER 87 experiences, the GAO and USAREUR studies, and USACSEUR's own evaluation that the key to reliable verification is increased inspection of damage claims, USACSEUR established a temporary task force to coordinate USACSEUR's participation in exercises and on site inspections. The task force military personnel, borrowed from other USACSEUR branches, monitor exercises and inspect and verify high cost maneuver damage claims. This has resulted in a refinement of new procedures to inspect claims. USACSEUR hopes to replace these personnel with permanent personnel in the near future.

USACSEUR has also recently acquired new automation equipment that will substantially improve program evaluation and enhance verification. This equipment is a mix of personal computers and a UNISYS 5000/80 minicomputer. USACSEUR plans to improve its database of maneuver damage and tort claims, develop methods for automated verification of claims and provide evaluations of maneuver damage to commanders.

The result of all of these changes will be to institute dependable internal controls monitoring the verification function and to improve the ability of USACSEUR to insure that maneuver damage funds are being properly obligated. For many years, it was assumed that the fact that the FRG usually bore twenty-five per cent of the cost of maneuver damage was enough to guarantee reliability. The increased need to maneuver outside training areas with faster and heavier vehicles, the increased cost of maneuver damage in dollars as a result of the low exchange rate, and the need to independently verify damage as a national responsibility, however, has required that USACSEUR take a more active role in the verification effort.

Medical Malpractice Claims Update

Captain Maria Fernandez-Greczmiel
Chief, Personnel Claims Branch, U.S. Army Claims Service, Europe

Until recently, U.S. Army Claims Service, Europe (USACSEUR) exercised supervisory authority for all European medical malpractice claims. Area claims offices investigated medical malpractice claims that arose in medical facilities in their area jurisdiction. The 7th Medical Command (7th MEDCOM) prepared a medical-legal opinion and recommendation before review and action by the Commander, USACSEUR. Claims within the settlement authority of a local claims office were returned to the field for appropriate action.

A recent change to this procedure gives the 7th MEDCOM Command Judge Advocate an increased role in the processing of the medical malpractice claims in Europe. USACSEUR delegated authority to pay, settle and disapprove claims for $25,000 or less to the Command Judge Advocate, 7th MEDCOM, but retained the authority to act on appeals. To implement these new procedures, USACSEUR designated the 7th MEDCOM Command Judge Advocate an area claims authority.

The new procedures emphasize the investigation of potentially compensable events (PCEs). Area claims offices remain primarily responsible for screening PCEs and reporting all serious PCEs involving potentially high value claims to 7th MEDCOM. Investigation and processing of medical malpractice claims in amounts of $15,000 or less remain the responsibility of the area claims office, with technical assistance from 7th MEDCOM. Claims above $15,000 will be investigated in the field under the supervision of 7th MEDCOM and forwarded to 7th MEDCOM following a new "Medmal Memo" format (reproduced below), unless 7th MEDCOM assumes immediate investigative jurisdiction. In all cases, the field office will forward a copy of the medical malpractice claim form directly to 7th MEDCOM. These requirements will be included in the next revision of the USAREUR Supplement to AR 27–20.

Under this new plan, the investigation and settlement responsibilities of the area claims offices remain consistent with AR 27–20. The realignment of supervisory responsibility is designed to mirror the CONUS medical center claims judge advocate program. The goal of the plan is to improve the quality of the medical malpractice claims program in the European theater.

Format For Medmal Memorandum

1. Administrative Facts:
   —Name of claimant(s), current address, phone number (if not represented).
   —Name of patient(s) (if different from the above) & SSN.
   —Date claim filed.
   —Amount claimed.
   —Date/place of incident.
   —Allegation(s) of malpractice (i.e., claimant's theory of liability).
   —Attorney's name and address (if any), phone number.

2. Medical Facts:
   —Identification of key players (name, rank, SSN, position, board certification (for doctors), role in the incident, present location, interviewed (yes/no?; when), ETS or PCS date, permanent address).
   —Claimant interviewed (yes/no? when?).
   —Identification of relevant medical records (type, facility, time period, retrieved—yes/no?, if not, where can they be located?).
   —Medical history of patient (if known).
   —Chronological (and detailed) description of operative facts of claim; if witnesses/records vary in their accounts of events, describe the various possible scenarios.
   —Sequelae/present condition of patient.

3. Relevant German Law: e.g. contributory negligence, applicable local standard of medical care; if none, so state.

4. Opinion on the Merits: i.e., a full and frank discussion of the Army's potential liability exposure, with candid remarks concerning credibility of witnesses and medical records.

5. Additional Action Required/Recommendation

The first document under the memorandum should be a list of all enclosures forwarded with the memorandum.

Claims Judge Advocates in Germany Do Not Have to Worry About Processing Affirmative Claims

Captain Michael J. Romano
Chief, Affirmative Claims Branch, U.S. Army Claims Service, Europe

The Affirmative Claims Branch, U.S. Army Claims Service, Europe (USACSEUR) is the largest Recovery Judge Advocate office within the Department of Defense. It has single-service responsibility for processing all Army, Air Force, Navy and Marine Corps claims arising under the Federal Medical Care Recovery Act and the Federal Claims Collection Act in Germany. The branch discovers, processes, and asserts claims under these statutes and collects between two and three million dollars annually.

Affirmative Claims are divided into two substantive areas. A medical section processes claims for the reasonable value of medical care furnished U.S. service members, family members, and retirees injured in Germany through the

negligent or wrongful acts of third parties. A property section processes claims for the repair or replacement of government property damaged or destroyed in Germany by the negligent or wrongful acts of third parties.

Medical care claims resulting from motor vehicle accidents occurring in Germany are asserted in accordance with a 1971 Agreement between the United States and the Association of Liability, Accident and Traffic Insurers, Hamburg (commonly referred to as the HUK Agreement). The HUK Agreement limits Government claims for medical care costs to 62.5% of the Office of Management and Budget (OMB) rate for care rendered in U.S. Government medical facilities located in Germany, in exchange for the German insurance industry's agreement not to challenge either the standing of the United States to assert such claims or the reasonableness of the OMB rates. Since over 98% of the claims asserted in Germany involve motor vehicle accidents and all privately owned vehicles (POVs) operated in Germany are required to have liability insurance coverage, the HUK Agreement, in effect, applies to almost all medical care claims.

The absence of attorney representation agreements is unique to the processing of medical care claims in Germany. The German Federal Code of Lawyers' Fees establishes minimum fees that German attorneys must charge. Because 5 U.S.C. § 3106 (1982) permits an injured party's attorney to represent the United States only on a no-fee basis, German attorneys representing injured parties may not assert claims on behalf of the United States in Germany. Thus, the Affirmative Claims Branch asserts U.S. claims directly against the insurance companies of third party tortfeasors.

Claims for the repair or replacement of damaged or destroyed government property, caused almost always by and to motor vehicles, are also usually asserted directly against German insurance companies. In those cases where a local national tortfeasor has also suffered damage and has filed a claim against the United States at a German Defense Costs Office (DCO), however the United States is required to assert its claim with the DCO as a counterclaim. The DCO applies German law in adjudicating the claims and, to the extent justified, sets-off the U.S. property damage claim against that of the local national claimant. The DCO then either pays, subject to reimbursement from the United States, any balance remaining after the set-off to the claimant or collects any excess owed to the United States from the claimant.

German damage law applies a comparative negligence standard to both medical care and property damage claims. Liability is assessed among all parties contributing to an accident that results in personal injuries or property damage. The distribution of responsibility can range from zero to 100 percent. Thus, a jaywalking pedestrian could be found to carry eighty percent of the blame for his accident, thereby recovering only twenty percent of his loss. Similarly, persons who accept rides from fatigued or drunk drivers, or passengers who fail to use available seatbelts, must also share in the blame for injuries received from their accidents. The United States stands in the shoes of the injured party or the government vehicle driver when asserting its claims for medical care or property damage.

Fixed personnel assets, a comparative negligence jurisdiction, and the inability of the attorneys of injured parties to assert Government claims, have placed a premium on efficient information gathering and aggressive negotiations with German insurance companies to improve claims processing times. The information used by the Affirmative Claims Branch is obtained independently because, unlike staff judge advocate offices in the United States, the absence of military justice and administrative law sections at USACSEUR means that pertinent military traffic accident reports, reports of survey, and reports of claims officers must be obtained directly from units. Judge advocates stationed in Germany can assist USACSEUR in gathering this information by reminding commanders and unit claims officers of regulatory requirements to prepare either a report of survey or a report of claims officer whenever a Government vehicle (GOV) is damaged in an accident with a POV. Surveying officers and unit commanders can be informed about the concepts of joint tortfeasor and comparative negligence, and advised to forward pertinent reports of survey and reports of claims officer directly to the Affirmative Claims Branch, USACSEUR for the processing of Government claims. USACSEUR also welcomes any information submitted directly by SJA offices.

Civilian Personnel Law Note

Labor & Civilian Personnel Office, OTJAG

Army Court Reporters Authorized at EEOC Hearings

Recently, HQDA and the Equal Employment Opportunity Commission (EEOC) executed a Memorandum of Understanding (MOU) that authorizes the use of Army court reporters, both military and civilian, for EEOC hearings at selected locations on a one-year trial basis. Since 1979 EEOC directives have prohibited the use of agency employees to transcribe EEOC hearings of complainants from that agency. The Army had requested to use its own court reporters as a means to expedite case processing and to cut costs. Participating installations, commands, and activities include Fort Carson, Fort Lewis, Fort Sam Houston, Presidio of San Francisco, Fort Rucker, Fort Sill, US Army Europe and Seventh Army, Office of the Secretary of the Army, Fitzsimons Army Medical Center, and White Sands Missile Range.

The trial program is under the technical supervision of the Director, EEO Compliance and Complaints Review Agency (EEOCCRA). The use of Army court reporters is discretionary. The local staff judge advocate makes the determination concerning the availability of court reporters.

The MOU contains several conditions regarding participation in the trial program. First, a completed transcript

must be sent to the Commission Administrative Judge not later than twenty-one calendar days after the hearing. Second, complainants must be informed, prior to the hearing, that an Army court reporter will report and transcribe the hearing proceedings. Third, after completion of the transcript, the Army court reporter shall execute a certificate attesting that he/she maintained the confidentiality of the hearing process. Finally, participating installations, commands or activities must submit monthly reports to the EEOCCRA concerning the use of Army court reporters.

Additional information regarding the trial program may be obtained by contacting DAJA-LC, AUTOVON 225-9476/9481 or Commercial (202) 695-9476/9481.

Warrant Officer and Legal Noncommissioned Officer Training Update

Nonresident Instruction Branch, TJAGSA

The Judge Advocate General's School has developed a new program leading to certification of Judge Advocate General's Corps warrant officers and legal noncommissioned officers as military paralegals. The Military Paralegal Program is designed to provide Judge Advocate General's Corps warrant officers and noncommissioned officers with highly technical training that will enable them to perform specialized functions closely related to, but beyond, the normal scope of their duties.

The program description (including prerequisites and enrollment procedures) is as follows:

Prerequisites

(1) Applicant must be an Active Army, USAR, or ARNGUS warrant officer (MOS 550A), or legal noncommissioned officer in grade E-5 or above who has a primary MOS of 71D or 71E. Applicant must have been awarded primary MOS of 550A, 71D or 71E a minimum of three years prior to date of application for enrollment. MOS 550A and 71E may include prior awarding of MOS 71D or 71E when calculating the three year period. Members of other services and civilian employees are not eligible for enrollment in the program at this time.

(2) Applicant must have a minimum of two years of college (60 semester credit hours).

(3) Applicant must have completed or received equivalent credit for specialized legal and technical training consisting of the following resident and correspondence courses.

Resident Requirements

Applicant must have successfully completed the Legal Specialists Entry Course or Legal Specialists Entry Course (Reserve Component); and either the Law for Legal Noncommissioned Officers Course or the Legal Administrators Course.

Equivalent credit will be awarded for the following resident courses completed within 5 years of student's enrollment date:

Law Office Management Course

Administration and Law for Legal Specialists Course

5th Military Lawyers Assistant Course

Administration and Law for Legal Clerks Course

Correspondence Course Requirements

Applicant must have successfully completed the Law for Legal Specialists Course; and the Administration and Law for Legal Noncommissioned Officers Course or the Army Legal Office Administration Course.

Military Paralegal Program Content

13 subcourses, total credit hours: 81. The student must complete the entire program within two years from date of enrollment.

Special qualification identifier and additional skill identifier (such as "H" for instructor or "L" for linguist) will not be awarded for successful completion of this program.

Enrollment Procedures

Applicants for enrollment in the Military Paralegal Program will complete Department of Army (DA) Form 145, Army Correspondence Course Enrollment Application. The DA Form 145 will then be submitted to the appropriate approval authority listed below for comment on each of the following:

a. Whether the applicant's professional competence and demonstrated technical skills in performance of duties are above that of an average soldier for MOS 71D or 71E.

b. Whether the applicant meets height and weight standards.

c. Whether the applicant passed the most recent physical fitness test.

d. Whether the applicant was awarded a primary MOS of 550A, 71D or 71E a minimum of three years prior to date of application for enrollment.

e. Whether the applicant has a minimum skill qualification test (SQT) score of 85 or higher, if soldier's MOS or skill level has an SQT.

f. Applicant's current level of responsibility and potential for continued service in a military legal office.

g. Whether the applicant meets the civilian education requirement.

The approval authority will forward the DA Form 145 with required comments to: The Judge Advocate General's School, ATTN: Correspondence Course Office, Charlottesville, Virginia 22903-1781.

Active Army and U.S. Army Reserve on active duty will submit the application for enrollment through their Chief Legal Noncommissioned Officer (for enlisted) or Deputy Command/Staff Judge Advocate (for warrant officers) to the Command/Staff Judge Advocate serving the applicant's unit for approval and comment.

U.S. Army Reserve (USAR) unit members not on extended active duty will submit the application for enrollment through the commander who is the custodian of their military personnel records jacket to the staff judge advocate of the applicant's unit, or if assigned to a Judge Advocate General Service Organization (JAGSO) Detachment, to the military law center commander for approval and comment.

Non-unit USAR members will submit the application for enrollment through the Personnel Management Officer, U.S. Army Reserve Personnel Center, ATTN: DARP-EPC-AP, (for enlisted), ATTN: DARP-OPS-JA (for warrant officers), 9700 Page Boulevard, St. Louis, Missouri 63132 to the senior judge advocate in charge of the unit/activity to which assigned for approval and comment.

U.S. Army National Guard members will submit the application for enrollment through their unit commander to the staff judge advocate serving their unit (or higher headquarters if a staff judge advocate is not assigned) for approval and comment.

Additional Information

If you have any questions or need further information about correspondence course studies administered by The Judge Advocate General's School, call the Correspondence Course Office at (804) 972-6308; or AUTOVON 274-7110, extension 972-6308.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Recent Policy Changes to Reserve Component ADAPCP Program

Effective 1 September 1987, the Army implemented significant policy changes to its Reserve Component Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) in Army Regulation 600-85. Perhaps the most significant change was the granting of authority to the U.S. Army Reserve (USAR) and to the Army National Guard (ARNG) to implement the biochemical testing provisions of the regulation. USAR and ARNG commanders may now test their soldiers for the abuse of legal or use of illegal drugs no matter what the RC soldier's duty status may be.

Chapter 9, AR 600-85 was completely rewritten by interim change one. This chapter applies to the ARNG and the USAR, and it implements the Reserve Component ADAPCP program. The chapter 9 ADAPCP provisions are applicable to all Reserve Component soldiers performing military duty except those on active duty (AD) for 30 days or more, Initial active Duty Training (IADT), Special Active Duty Training (SADT) tours for 30 days or more, or involuntary ADT for 45 or more days. Chapter 9 also applies to Reserve Component soldiers who are performing Inactive Duty Training (IDT). For members of the ARNG, it applies whether the guardsmen are in a state or federal status. Reserve Component soldiers who are performing extended (30 days or more) AD, IADT, and SADT, or involuntary ADT (45 days or more) are covered by the ADAPCP provisions in the rest of AR 600-85.

The intent of the regulatory change is to provide Reserve Component soldiers with an opportunity to rid themselves of the harmful effects of all forms of alcohol and drug abuse. The Reserve Component ADAPCP is to be operated by Reserve Component commands, with input from the National Guard Bureau (NGB), Office of the Chief, Army Reserve (OCAR), and the appropriate MACOM headquarters. The Reserve Component ADAPCP set up pursuant to the guidelines of chapter 9 should parallel the active component (AC) ADAPCP as much as possible. Reserve judge advocates assisting Reserve Component commands in setting up an ADAPCP program, therefore, should be thoroughly familiar with all of the provisions of AR 600-85, not just chapter 9. In fact, most of the provisions of AR 600-85 are adopted by reference in chapter 9. With some exceptions for Reserve Component-specific issues, the guidance contained in the introductory provisions of chapter 1, the prevention and control provisions of chapter 2, the identification, referral, and screening provisions of chapter 3, the rehabilitation provisions of chapter 4, the civilian counseling provisions of chapter 5, the legal aspects provisions of chapter 6, and the biochemical testing provisions of chapter 10 are applicable to the Reserve Component ADAPCP. The rest of this article will discuss the significant Reserve Component ADAPCP issues contained in revised chapter 9.

Reserve Component commanders may use a nearby active component ADAPCP, resources permitting, after appropriate coordination with the active component command. Reserve soldiers may also be referred to community-based rehabilitative and counseling services, but this will be at no expense to the Government. The Reserve Components may not establish their own alcohol or other drug abuse treatment centers. Reserve Component commanders will still be responsible for tracking the progress of their soldiers whether they are in the AC ADAPCP or a civilian-based program.

When setting up a local RC ADAPCP, the Reserve Component commander will coordinate with the Alcohol and Drug Control Officer (ADCO). The ADCO function will be established at the State Area Command (STARC) and Major U.S. Army Reserve Command (MUSARC) level. The STARC/MUSARC ADCO will be responsible for coordinating the overall aspects of the RC ADAPCP.

After identifying a soldier as an alcohol or other drug abuser, the commander will refer the soldier to a civilian community-based referral, counseling, and rehabilitation service unless AC resources are available. Upon being counseled by the commander, it is the soldier's responsibility to seek the counseling and/or rehabilitation. It is also his responsibility, in consultation with the command ADCO, to enroll in the community-based program. Should the soldier fail to seek counseling or complete rehabilitation, separation under pertinent ARNG and USAR regulations is authorized. *See* AR 135–175 or AR 135–178.

Chapter 4, AR 600–85 rehabilitation procedures apply to the soldiers in the Reserve Component ADAPCP. The goals of the rehabilitation program are the earliest possible return of a rehabilitated soldier to his unit or identification of soldiers who cannot be rehabilitated. Because the commander has a vital need to know the status of soldiers in a community-based treatment program, the commander should obtain a release statement from the soldier allowing the commander to obtain the necessary information from than community-based agency. The only exception where the commander should not seek to obtain the release is if state or local law prohibits release of such information. Reserve judge advocates should be prepared to advise their command on the ramifications that state and local law will have on the Reserve Component ADAPCP. Failure of the soldier to sign the release in areas where release of this information is legal may be used as a ground for discharge under appropriate regulations.

The legal aspects of the AC ADAPCP in chapter 6, AR 600–85, apply to the Reserve Component ADAPCP unless specifically prohibited by regulation or State law. It is vital that Reserve judge advocates know thoroughly the provisions of chapter 6, such as the limited use policy, release of personal client information, and release of ADAPCP information to the media. In developing a RC ADAPCP in a command, care must be taken that the legal requirements and guidelines for the Reserve Component ADAPCP are consistent with provisions of public law, civil court rulings, DOD directives, and Army regulations. The Reserve judge advocate will be a key player.

The most significant change to AR 600–85, as was indicated earlier, is the provision authorizing Reserve Component commanders to apply the biochemical testing provisions of chapter 10, AR 600–85. Prior to implementation of this change, urine testing was authorized only during AT or IDT for Reserve personnel assigned to aviation positions. Now Reserve Component commanders may apply the chapter 10 biochemical testing provisions to all Reserve soldiers. The duty status of the soldier is irrelevant. Therefore, a soldier may show up on a Saturday morning for a Multiple Unit Training Assembly—Four (MUTA–4) IDT drill and be directed by the unit commander to submit to urine or breath testing as part of a unit inspection. While the Military Rules of Evidence and the provisions of chapter 10 must be followed by the command to ensure a valid urine of breath sample is obtained, this important command tool is now available to the Reserve Component commander.

There are certain differences between the Reserve and the active component biochemical testing programs that should be noted. STARC and MUSARC commanders are responsible for providing policy guidance and procedures for publicizing the command's ADAPCP instead of the Chief of Public Affairs at Headquarters, Department of the Army. Instead of the Chief of Chaplains, the STARC and MUSARC commanders are also responsible for ensuring that religious, spiritual, and moral support is provided for the program. Another difference is that urine specimens may be sent directly from the Reserve Component unit to the drug testing laboratory without having to go through the ADCO. This procedure reflects a recognition of the geographical separation between the command ADCO and most Reserve Component units. Nevertheless, proper chain of custody procedures must be followed. This is another area in which the RC judge advocate will be called upon to provide sound legal advice. Finally, management of urinalysis quotas allocated at the MACOM level will be the responsibility of the STARC and MUSARC ADCO.

The recent policy change to AR 600–85 is further evidence of the increasing integration of the Reserve Components with the Active Components as part of the Army's "Total Force" concept. This policy change is particularly significant this year during the implementation phase of the Reserve Component Jurisdiction Act. The net effect of these two major policies will be an even more active role for the Reserve judge advocate. All Reserve judge advocates must become familiar with AR 600–85, because the Reserve Component commanders and soldiers will expect them to know the regulation. Major Chiaparas.

Special Interest Items for Reserve Component Article 6 Inspections

The following checklist has been distributed by The Judge Advocate General to all MACOM staff judge advocates who have Reserve JAG units or sections within their commands for redistribution to military law center commanders and Major United States Army Reserve Command staff judge advocates. It will be used by Active and Reserve Component general officers when conducting Article 6 visits/inspections. Obviously, some portions may not be applicable to certain JAG units and sections. A primary objective of the checklist is to provide advance notice of likely inquiries by visiting general officers.

1. General Areas for Inquiry.

a. Office appearance and morale. Adequacy of facilities.

b. Relations with commander(s) and staff and legal counterparts (if any), higher headquarters (including CONUSA and FORSCOM) and subordinate commands.

c. Timely submissions of nomination packets for senior tenured officer positions IAW AR 140–10, paragraph 2–28.

d. SJA and/or commander's objectives for coming 12 months.

e. Personnel status (officer, civilian, enlisted): authorizations filled? Critical losses identified to appropriate office?

f. Operational Law. Is the office involved in review of war plans, highlighting law of war issues?

g. Is there a program to support requirements for formal training regarding Geneva and Hague Conventions?

h. Is the unit legal office/JAGSO unit engaged in any non-JAG missions?

i. Status of relations with local officials, including the local bar.

j. Condition of library and library holdings.

k. Does the unit legal office/JAGSO unit have a current, functional SOP, and is it being used to promote office professionalism and efficiency?

1. Training.

(1) What kind of working relationship does the unit legal office/JAGSO unit have with the appropriate Army SJA in his area?

(2) Does the unit legal office/JAGSO unit participate in continuing legal education on-site instruction including enlisted on-site instruction?

(3) Does the unit legal office/JAGSO unit have an effective unit training program?

(4) Is there a Mutual Support Training agreement with an active component or other Reserve Component activity? If so, is part of the training in a functional specialty?

(5) Do all unit personnel participate in annual training (AT)?

(6) Do personnel receive training that is commensurate with their duties and responsibilities?

(7) Is the unit legal office/JAGSO unit following training guidance prescribed by FORSCOM Circular 27–87–1 and the Standardized Training Program at Appendix B thereto?

m. Does the unit legal office/JAGSO unit have a plan for professional development of all personnel? Is budget consideration given for personnel to attend career enhancing conferences or training?

n. What provisions have the unit legal office/JAGSO unit made for mobilization and deployment plans?

o. Does the unit legal office/JAGSO unit have a DTIC account?

p. Enlisted considerations.

(1) Who manages local assignments?

(2) Is there an SQT training program for legal specialists?

(3) Are enlisted soldiers attending NCOES or MOS sustainment training while their officers are attending JATT?

2. Introductory Program for Newly Assigned JAs and Enlisted Personnel.

a. Does the unit legal office/JAGSO unit have one?

b. Do new JAs spend time with troop units?

3. Physical Fitness and Weight Control/Lean Program.

a. Does the unit legal office/JAGSO unit have a regular PT program?

b. Have personnel over 40 been medically screened?

c. When was last PT test? Did all personnel participate?

d. Are overweight personnel in a medically supervised weight control program?

e. Are personnel professional in appearance?

4. Premobilization Legal Preparation.

a. Does the unit legal office/JAGSO unit have a premobilization legal counseling program (PLCP) and follow-up premobilization legal assistance for RC personnel? Is it being implemented aggressively? Has the necessary equipment been requisitioned, or have arrangements been made to borrow it? Are JAGSO units assisting in the premobilization legal counseling program (PLCP); if so, has the CONUSA SJA approval been obtained? Are the JAGSOs assisting in follow-on legal assistance?

b. What percentage of RC personnel serviced by the unit legal office/JAGSO unit have received premobilization legal counseling and premobilization legal assistance including the drafting of wills and powers of attorney? What number of RC personnel have not yet received this service?

c. How does the Commander/SJA determine client satisfaction regarding the delivery of legal services?

5. Claims.

a. Are claims personnel sufficiently trained? Who, if any, have attended TJAGSA courses, claims workshops, etc.?

b. Is the JA section/JAGSO unit properly equipped, receiving adequate admin. support, and presenting a professional image?

c. Does the JA section/JAGSO unit have the current Claims Manual?

6. Labor Counselor Program. (Policy Letter 85–3)

a. Does SJA office/unit have a designated Labor Counselor?

b. Has the Labor Counselor had sufficient training?

c. Are library assets adequate?

7. DA Mandated Training.

Do unit legal office/JAGSO unit personnel participate in required training such as physical training, weapons qualification, and NBC training?

8. Terrorist Threat Training. (Policy letter 85–5)

a. Are personnel properly trained in legal aspects of countering terrorist threats?

b. As a minimum, do all personnel have a working knowledge of AR 190–52, TC 19–16, and the MOU between DOD, DOJ, and FBI on use of Federal military force in domestic terrorist incidents?

9. Recruiting.

Is information about soldiers leaving AD being received from the CONUSA SJAs?

10. Standards of Conduct. (AR 600–50)

a. Does the unit legal office/JAGSO unit have a designated ethics counselor?

b. Is there an active roster of positions in the command for which a DD Form 1555 is to be filed?

c. Where appropriate is there an active discussion with GO and SES personnel concerning their DD Form 278?

d. Are the 278's reviewed with each GO at the time they are first assigned to the command or assume a new duty position in the command?

e. Is there an active standards of conduct training program?

f. Are the SJA and ethics counselor familiar with the filing requirements for 278's and 1555's?

g. Does the SJA have a firm grasp on the proper approach to take if local senior personnel (including the CG) are alleged to have committed violations of the standards of conduct?

11. Ethics and Professional Responsibility.

a. Has an active training/review program been established to sensitize the unit legal office/JAGSO unit personnel to their ethical responsibilities?

b. Have any major issues/problems arisen in past year? How were they resolved?

12. Intelligence Oversight.

a. Is the SJA aware of the mission, organization, and function of intelligence units within his jurisdiction?

b. Does the JA section/JAGSO unit maintain a library of current intelligence directives and regulations?

c. Have intelligence oversight attorneys received INSCOM-sponsored training on intelligence law topics and oversight responsibilities? Do they have the necessary personal security clearances?

13. Military Justice.

a. Do procedures exist for advising on Article 15's and conducting SCM's?

b. Are rates for Article 15's and courts-martial, and courts-martial processing times reasonable?

c. Is UCMJ action being used only as a last resort and is it appropriate?

d. Relations between unit legal office/JAGSO unit personnel and TDS and Trial Judges.

e. What efforts are being made to ensure that JA personnel are involved in the criminal justice process at early stages?

f. Do commanders at all levels receive adequate instruction regarding military justice duties, especially avoidance of unlawful command influence?

g. Has proper UCMJ training been conducted?

h. Are procedures established to use when seeking the assistance of the supporting AC installation on military justice matters?

i. How many soldiers have been activated pursuant to Article 2(d), UCMJ?

j. Has contact been made with local civilian authorities regarding matters of concurrent jurisdiction?

14. TCAP.

a. Are trial counsel using the services of the Trial Counsel Assistance Program?

b. Are the chiefs of military justice and all trial counsel attending TCAP seminars?

c. Are trial counsel satisfied with the assistance rendered by the Trial Counsel Assistance Program?

15. Contract Law.

If JAs are rendering advice, are they contract trained?

16. Courts-Martial Defense Teams.

a. Is AC support adequate?

b. Do the defense teams know the contents of TDS SOP?

c. Are accused/respondents receiving adequate defense services?

17. Military Judge (MJ) Detachments.

a. Is AC support adequate?

b. Is an effort being made to enhance professional development?

c. Are MJ teams integrated into the U.S. Army Judiciary and are they receiving the proper training?

18. Use and Understanding of Technical Channel of Supervision.

a. Does the unit legal office/JAGSO unit understand, respond to, and use the technical channel of supervision?

b. Is the technical channel of supervision operating properly?

19. Operational Law.

a. Are RC JAs familiar with operational law matters?

b. Has at least one JA attended the TJAGSA OP Law Course or its equivalent?

c. Are law of war problems included in ARTEPs, FTXs, and other exercises?

20. Capstone Relationships.

a. Is the unit legal office/JAGSO unit aware of its CAPSTONE alignment?

b. Has CAPSTONE mission guidance been received from the next higher headquarters?

c. Has the unit legal office/JAGSO unit participated in exercises/ODT with higher CAPSTONE headquarters?

21. Correction of Command Inspection Deficiencies.

Has the unit legal office/JAGSO unit responded to deficiencies noted on appropriate command inspection programs?

Automation Note

Automation Management Office, OTJAG

JAGC Defense Data Network Directory

The following updates the JAGC Defense Data Network (DDN) Directory which is published quarterly in *The Army Lawyer*. It is current as of 30 March 1988, but because addresses change frequently, it may not be exhaustive. Please send your corrections or additions to this information to: Office of The Judge Advocate General, Headquarters, Department of the Army, ATTN: DAJA–IM, The Pentagon, Washington, D.C. 20310–2216.

Instructions on how to use E-mail can be obtained from your local DDN host computer management office. Normally, mail sent through the DDN is addressed in the following manner:

To: MAILER!<USERNAME@HOSTNAME.ARPA>
Don't forget, the address must include entire username.

Office of The Judge Advocate General

Office of The Judge Advocate General
HQDA, The Pentagon
Washington, D.C. 20310–2200

Office DDN Address: DROTHLISB@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS DDN host computer. E-mail to them should be addressed in the following manner:

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Office: Senior Staff NCO	
LANFORD, SGM DWIGHT	DAJA_SM
Office: Administrative	
EGOZCUE, CW3 JOSEPH	EGOZCUE
Office: Administrative Law	
BLACK, MAJ SCOTT	BLACK
BLOCKER, MS JILL	BLOCKER
CONTENTO, CPT DENISE	DAJA_AL1
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HOWARD, MS CYNTHIA	CHOWARD
MANUELE, MAJ GARY	GMANUELE
MURDOCH, CPT JULIE	MURDOCH
POPESCU, MAJ JOHN	POPESCU
SMYSER, COL JAMES	SMYSER
WAGNER, CPT CARL	DAJA_ALP1
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Office: Contract Law	
MACKEY, LTC PATRICK	PMACKEY
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SCHWARZ, MAJ PAUL	SCHWARZ
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JOHNSON, MS VERONICA	JOHNSONV
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COOK MISS DEBORAH	DAJA_IM
HOLDEN, MAJ PHILIP	HOLDEN
ROTHLISBERGER, LTC DANIEL	DROTHLISB
Office: International Affairs	
CARLSON, MAJ LOUIS	LCARLSON
CHADA, MS GINGER	DAJA_IA
Office: Legal Assistance	
KIRBY, MS LAURA	KIRBY
Office: Litigation	
ISAACSON, MAJ SCOTT	ISAACSON
Office: Personnel, Plans, & Training	
MARCHAND, LTC MICHAEL	MARCHAND
Office: Procurement Fraud	
MCKAY, MAJ BERNARD	DAJA_PF
Office: Records & Research	
BAKER, MS BARBARA	BBAKER
GRAY, MS JACKIE	GRAY

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HARDERS, MAJ ROBERT	HARDERS
HOWELL, COL JOHN	HOWELLJ
ISKRA, COL WAYNE	ISKRA
JACKSON, LTC ROBERT	RJACKSON
KAPANKE, MAJ CARL	KAPANKE
KINBERG, MAJ EDWARD	KINBERG
LYNCH, MAJ JAMES	JALS_CA2
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GARVER, CPT JOHN	GARVER
GUILFORD, MAJ J	GUILFORD
OLDAKER, MS HAZEL	OLDAKER
SCHOFFMAN, MAJ ROBERT	SCHOFFMAN
STRASSBURG, COL TOM	STRASSBUR
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U.S. Army Criminal Investigation Command

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U.S. Army Strategic Defense Command

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U.S. Army Military Traffic Management Command

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U.S. Army Europe & Seventh Army

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CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN. ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18–22: ~~17th Law Office Management Course (7A–713A).~~ CANCELLED

July 25–September 30: 116th Basic Course (5–27–C20).

August 1–5: 95th Senior Officers Legal Orientation Course (5F–F1).

August 1–May 20, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1988 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

July 1988

3–8: AAJE, A Judge's Philosophy of Law, Cambridge, MA.

5–9: ALIABA, Advanced Law of Pensions and Deferred Compensation, Boston, MA.

5–9: ALIABA, Advising Clients under the Internal Revenue Code, Harriman, NY.

6–8: LEI, Advocacy Skills: Negotiations, Washington, D.C.

7–8: PLI, Institute on Employment Law, San Francisco, CA.

7–8: PLI, Introduction to Qualified Pension & Profit-Sharing Plains, New York, NY.

10–15: NJC, Advanced Evidence, Reno, NV.

10–15: NJC, Constitutional Criminal Procedure, Reno, NV.

10–15: AAJE, Trial Skills Workshop, Boulder, CO.

10–8/5: NJC, General Jurisdiction, Reno, NV.

11–12: WTI, Introduction to International Taxation, Chicago, IL.

11–12: WTI, Tax Aspects of Intercompany Pricing, Chicago, IL.

11–13: EEI, Environmental Regulation Course, Washington, DC.

11–13: ALIABA, Trial Evidence, Civil Practice & Litigation, Snowmass, CO.

11–15: AAJE, Fact Finding and Decision Making, Cambridge, MA.

11–15: ALIABA, Basic Law of Pensions and Deferred Compensation, Palo Alto, CA.

13–15: WTI, Intermediate Seminar on International Taxation, Chicago, IL.

14–15: PLI, Antitrust Law Institute, San Francisco, CA.

14–16: ALIABA, Personal Injury Actions in Federal and State Courts, Snowmass, CO.

14–16: ALIABA, Employment Discrimination and Civil Rights Actions, Snowmass, CO.

17–22: NJC, Advanced Judicial Writing, Reno, NV.

17–22: AAJE, Philosophical Ethics and Judicial Decision Making, Moran, WY.

17–29: NJC, The Decision-Making Process, Reno, NV.

18–22: ALIABA, Business Bankruptcies: Recent Developments Santa Fe, NM.

18–29: AAJE, The Trial Judges' Academy—General Jurisdiction, Charlottesville, VA.

18–29: AAJE, The Trial Judges' Academy—Special Jurisdiction, Charlottesville VA.

23–31: PLI, Trial Advocacy, New York, NY.

25–26: PLI, Institute on Employment Law, Chicago, IL.

25–29: SLF, Short Course on Estate Planning, Dallas, TX.

27–29: ALIABA, Fundamentals of Bankruptcy Law, Anchorage, AL.

28–29: PLI, Workshop on Legal Writing, San Francisco, CA.

31–8/5: NJC, Current Issues in Civil Litigation, Reno, NV.

31–8/5: NJC, Judicial Writing, Reno, NV.

August 1988

1–4: NUSL, 43rd Annual Short Course for Prosecuting Attorneys, Chicago, IL.

1–4: NUSL, 31st Annual Short Course for Defense Lawyers in Criminal Cases, Chicago, IL.

7–12: AAJE, Trial Judges' Writing Program, Williamsburg, VA.

7–12: AAJE, The Many Roles of a Judge—and Judicial Liability, Williamsburg, VA.

12: MBC, Workers' Compensation, Kansas City, MO.

13–20: MLI, Tort Law-Today and Tomorrow, Maui, HI.

14–19: AAJE, Appellate Judicial Writing Program-Advanced, Palo Alto, CA.

14–19: AAJE, Evidence, Palo Alto, CA.

15–16: PLI, Negotiation Workshop for Lawyers, San Francisco, Ca.

15–18: PLI, Basic UCC Skills Week, San Francisco, CA.

18–20: ALIABA, Real Estate Defaults, Workouts, and Reorganization, Coronado, CA.

19: MBC, Workers' Compensation, St. Louis, MO.

25-26: PLI, Workshop on Legal Writing, New York, NY.

25–27: ALIABA, Employment Discrimination and Civil Rights Actions in Federal and State Courts, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1988 issue of *The Army Lawyer.*

Current Material of Interest

1. Attorney Admission to State Bars on Motion

The chart below contains a summary of state admission requirements for practicing attorneys. It shows, by state, whether the state permits admission of attorneys on motion. For states that allow admission on motion, the chart indicates whether time spent practicing law in the military or with a government agency will count toward meeting the required years of practice for admission on motion. The final column lists the number of years of practice required. The chart is adapted from the *Comprehensive Guide to Bar Admission Requirements* (reprinted with the permission of the American Bar Association).

The chart is only a general summary; requirements may vary among states. In addition, some states do not specifically address government agency and military practice, and others treat such practice on a case-by-case basis. Unless noted otherwise, an "X" indicates that the state has not excluded military and government agency practice from its definition for the purpose of admission by motion.

State	Admission on Motion? Yes	No	Does Definition of Practice For Admission on Motion Include: Gov. Agency	Military	No. of Years of Practice Required
Alabama		X	n/a	n/a	n/a
Alaska	X		X	X	5 of past 7
Arizona		X	n/a	n/a	n/a
Arkansas		X	n/a	n/a	n/a
California		X	n/a	n/a	n/a
Colorado	X		X	X	5 of past 7
Connecticut	X		X	X	5
Delaware		X	n/a	n/a	n/a
D.C.	X		X	X	5
Florida		X	n/a	n/a	n/a
Georgia		X	n/a	n/a	n/a
Hawaii		X	n/a	n/a	n/a
Idaho		X	n/a	n/a	n/a
Illinois	X		X	X	5 of past 7
Indiana	X		*	X	5 of past 7
Iowa	X		X	X	5 of past 7
Kansas		X	n/a	n/a	n/a
Kentucky	X		X	X	5 of past 7
Louisiana		X	n/a	n/a	n/a
Maine		X	n/a	n/a	n/a
Maryland		X	n/a	n/a	n/a
Massachusetts	X		X	X	5
Michigan	X		*	X	3 of past 5
Minnesota	X		X	X	5 of past 7

State	Admission on Motion? Yes	No	Does Definition of Practice For Admission on Motion Include: Gov. Agency	Military	No. of Years of Practice Required
Mississippi	X		X	X	5
Missouri	X		X	X	5
Montana		X	n/a	n/a	n/a
Nebraska	X		X	X	5 of past 7
Nevada		X	n/a	n/a	n/a
New Hampshire		X	n/a	n/a	n/a
New Jersey		X	n/a	n/a	n/a
New Mexico		X	n/a	n/a	n/a
New York	X		X	X	5 of past 7
North Carolina	X		X	X	4 of past 6
North Dakota	X		X	X	4 of past 5
Ohio	X		X	X	5
Oklahoma	X		*	X	5
Oregon		X	n/a	n/a	n/a
Pennsylvania	X		X	X	5 of past 7
Puerto Rico		X	n/a	n/a	n/a
Rhode Island		X	n/a	n/a	n/a
South Carolina		X	n/a	n/a	n/a
South Dakota		X	n/a	n/a	n/a
Tennessee	X		X	X	5
Texas	X		no	no	3
Utah		X	n/a	n/a	n/a
Vermont	X		X	X	5 of past 10
Virginia	X		X	X	5
Washington		X	n/a	n/a	n/a
West Virginia	X		X	X	5
Wisconsin	X		X	X	3 of past 5
Wyoming		X	n/a	n/a	n/a

*Government agency practice included if the attorney practices and resides in the state in which admitted.

2. TJAGSA Publications Available Through Defense Technical Information Center

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101 Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).

AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).

AD B100234 Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).

AD B100211 Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).

AD B116100 Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).

AD B116101 Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).

AD B116102 Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pps).

AD B116097 Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).

AD A174549 All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771 All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235 All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054 All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857 Proactive Law Materials/JAGS–ADA–85–9 (226 pgs).
AD B116103 Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).
AD B116099 Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 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.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 10–54	Field Operating Agencies of the Office of the Surgeon General		3 Mar 88
AR 10–87	Major Army Commands in the Continental United States		11 Mar 88
AR 37–80	Army's Security Assistance Programs Finance-Accounting Support for the Army's Security Assistance Programs		
AR 40–330	Rate Codes, Expense and Performance Reporting Systems, Centralized Billing and Medical Services Accounts		26 Feb 88
AR 135–156	Personnel Management of General Officers		1 Mar 88
AR 140–158	Enlisted Personnel Classification, Promotion, and Reduction		21 Oct 87
AR 310–2	Identification and Distribution of DA Pubs and Issue of Agency and Commands Administrative Pubs	103	2 Apr 88
AR 380–5	Department of the Army Information Security Program		25 Feb 88
AR 600–110	Identification, Surveillance and Administration of Personnel Infected with Human Immuno-Deficiency Virus (HIV)		11 Mar 88
AR 690–12	Equal Employment Opportunity and Affirmative Action		4 Mar 88
AR 700–127	Integrated Logistic Support		1 Mar 88
AR 702–16	Chemical Material Stockpile Reliability Program (CMSRP)		4 May 88
AR 735–17	Accounting For Library Materials		3 Feb 88
AR 930–2	U.S. Soldiers' and Airmen's Home		1 Mar 88
Cir 11–88–1	Internal Control Review Checklists		9 Mar 88
Cir 40–88–330	FY 88 Medical, Dental, and Veterinarian Care Rates; Rates for Subsistence and Crediting FY 88 Appropriation Reimbursement Accounts		15 Feb 88
Cir 608–88–1	Voting		1 Apr 88
JFTR Vol. 2	Joint Federal Travel Regulations	269	1 Mar 88
UPDATE 10	Finance Update		2 Mar 88
UPDATE 11	Maintenance Management Update		11 Mar 88

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Belsky, *Summary: The Retaliation Doctrine: Promoting Forensic Misconduct,* 50 Alb, L. Rev. 763 (1986).

Bremer, *Terrorism, the Media, and the Government*, Parameters, Mar. 1988, at 37.

Brower, *The Duty of Fair Representation Under the Civil Service Reform Act*, 40 Okla. L. Rev. 361 (1987).

D'Amato, *International Human Rights*, The Int'l Law., Spring 1988, at 167.

Farrell. *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 Ark. L. Rev. 1 (1988).

Garrett, *Ordinary People: Soviet-American Transnational Marriage and the International Implications of Divided Spouses*, 6 Dick. J. Int'l L. 61 (1987).

Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 64 U. Det. L. Rev. 129 (1986).

Howe, *Ethical Aspects of Military Physicians Treating Servicepersons with HIV/Part Three: The Duty to Warn*, 153 Mil. Medicine 140 (1988).

International Symposium on Government Procurement Law, Part I, 20 Geo. Wash. J. Int'l L. & Econ. 1 (1987).

International Symposium on Government Procurement Law, Part II, 21 Geo. Wash. J. Int'l L. & Econ. 1 (1987).

Kaufman, *Federal and State Handicapped Discrimination Laws: Toward an Accommodating Framework*, 18 Loy. U.L.J. 1119 (1987).

LaFave, *A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 1986 U. Ill. L. Rev. 669.

Leedes, *Court-Ordered Exemptions to Serve Religious Liberty*, 21 U. Richmond L. Rev. 335 (1987).

Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857 (1987).

McCord, *Syndromes, Profiles, and Other Mental Exotica: A New Approach to the Admission of Nontraditional Psychological Evidence in Criminal Cases*, 61 S. Cal. L. Rev. 137 (1987).

Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293 (1987).

Pokrass, *Employment Rights of the Wisconsin Military Reservist Under Federal and State Law*, 71 Marq. L. Rev. 75 (1987).

Pollack, *Self Doubts on Approaching Forty: The United Nations' Oldest and Only Collective Security Enforcement Army, the United Nations Command in Korea*, 6 Dick. J. Int'l L. 1 (1987).

Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 Cornell L. Rev. 430 (1987).

Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 Wm & Mary L. Rev. 439 (1987).

Comment, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. Chi. L. Rev. 1335 (1987).

Note, *Jury Discrimination*—Batson v. Kentucky, *106 S. Ct. 1712 (1986)*, 70 Marq. L. Rev. 736 (1987).

Note, United States v. Inadi: *Co-conspirators Lose the Battle Between the Confrontation Clause and Hearsay*, 21 Loy. L.A.L. Rev. 543 (1987).

*U.S. G.P.O. 1988-201-420:80278