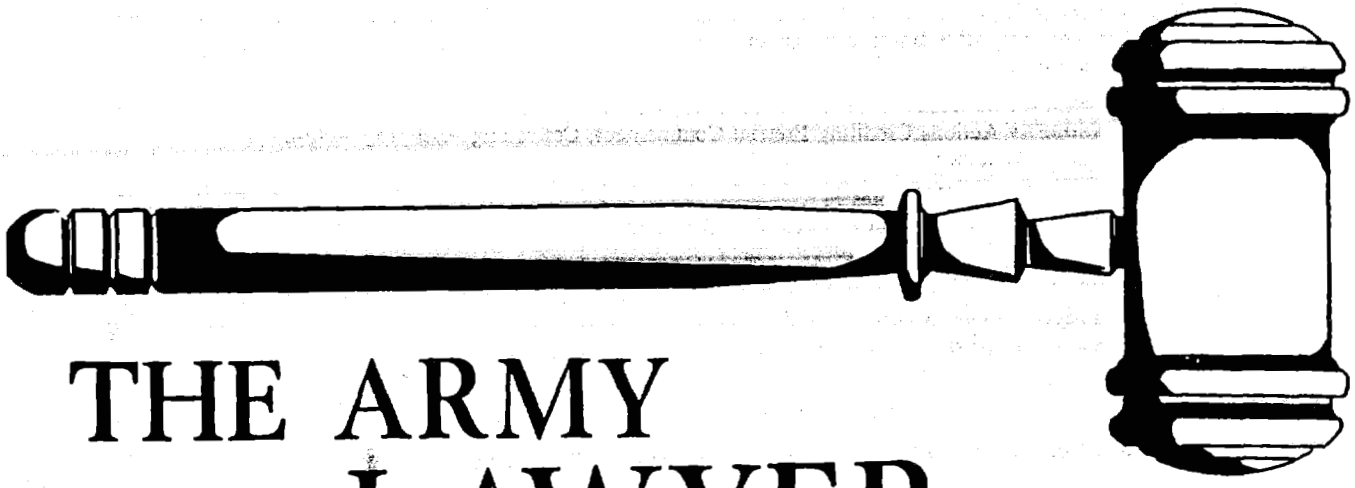

# THE ARMY LAWYER

## Headquarters, Department of the Army

**Department of the Army Pamphlet 27-50-175**

**July 1987**

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**Editor**
**Captain David R. Getz**

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

REPLY TO
ATTENTION OF

8 MAY 1987

DAJA-ZA

SUBJECT: Alternative Disputes Resolution

COMMAND AND STAFF JUDGE ADVOCATES

1. Because of jurisdictional impediments, expense, and inconvenience, soldiers and their families have a more difficult time than their civilian counterparts gaining access to civilian courts. Voluntary programs that give soldiers, their families, and third parties such as landlords and merchants an opportunity to resolve problems without going to court can provide a much needed service. Fort Hood has an arbitration program to resolve disputes in family housing areas. The Air Force has a voluntary small claims court program at Ramstein Air Force Base. Other dispute resolution programs are being explored by other commands.

2. I encourage you to give serious attention to initiating programs for local alternative disputes resolution. Enclosed is a package of materials that can be the basis for a local "small claims court" for legal assistance clients. These materials can be adapted to the situation at your installation.

William K. Suter

Enclosure

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

*The enclosure to this letter is at page 54 of this issue of* The Army Lawyer.

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

REPLY TO
ATTENTION OF

DAJA-ZX 29 May 1987

SUBJECT: Publication of TJAG Policy Letters

STAFF AND COMMAND JUDGE ADVOCATES

1. As a means of reducing costs, policy letters of The Judge Advocate General are normally distributed by publication in The Army Lawyer. This practice also extends to other letters from The Judge Advocate General intended for all staff and command judge advocates.

2. Staff and command judge advocates should be aware that this policy change may result in taskings from The Judge Advocate General appearing in The Army Lawyer.

3. Time-sensitive correspondence will continue to be individually mailed.

FOR THE JUDGE ADVOCATE GENERAL:

JOHN R. BOZEMAN
Colonel, JAGC
Executive

# Reserve Component Jurisdiction: New Powers for the Reserve Component Commander and New Responsibilities for the Reserve Component Judge Advocate

*Major Harry L. Williams, Jr.*
*Instructor, Criminal Law Division, TJAGSA*

"War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline." [1]

## Introduction

The Armed Forces of the United States depend on almost one and one-half million ready reservists in addition to its active forces of over two million members. [2] Reserve Components not only provide invaluable support to the active forces, but today their missions are so closely integrated with the Active Components that the failure of either is necessarily the failure of both. For example, almost 300 Naval reservists relieved active duty personnel aboard the U.S.S. *New Jersey* while that battleship was serving off the coast of Lebanon. [3]

Unfortunately, as Senior Judge Cook of the Court of Military Appeals noted in *United States v. Caputo,* when Congress prescribed rules for disciplinary controls over reservists in 1950, it simply never considered the present amalgamation of the reserve forces into the "total force" concept of today. [4] Consequently, Reserve Component commanders faced significant impediments to jurisdiction, and challenges to military discipline, because they were operating under laws that were constructed to govern the Reserve Components when they were truly a "separate force." Time and time again, reservists committed serious crimes and escaped through holes in the jurisdictional net. [5] Naturally, as the strength of the reserve forces grew, and the total force concept became a reality, so did problems with reserve jurisdiction.

In response to these problems, the military services proposed, and Congress has now passed, new legislation governing the Reserve Components, as part of the Military Justice Amendments of 1986. [6] This legislation significantly enlarges the powers of Reserve Component commanders and the responsibilities of Reserve Component judge advocates. This article will address the historical development of reserve jurisdiction, the new legislation, and its implementation.

## Historical Development

As noted, the previous rules governing reserve jurisdiction were adopted some thirty-six years ago with the initial enactment of the Uniform Code of Military Justice. [7] And, notwithstanding the then-existing view that the Reserve Components were a "separate force," some disciplinary controls were established. [8]

For example, Article 2(a)(1), UCMJ, provided for jurisdiction over persons ordered to active duty. Thus, the call of any individual or unit of the reserve forces to active duty included the extension of court-martial jurisdiction over that person or unit. [9] Article 2(a)(1) also covered reserve personnel called to active duty for training. Thus, all short duration *active* training also produced Federal court-martial jurisdiction. [10] Article 2(a)(1) is not changed by the new Reserve Component legislation.

What about inactive duty training (IDT)—The weekend drill? Article 2(a)(3) provided statutory authority for court-martial jurisdiction over the reserve forces on weekend drill, but only if a restrictive four-part test was first satisfied: the person must actually be performing inactive duty training; the IDT must be detailed in written orders; the orders must be voluntarily accepted by the soldier; and the order must specify that the person is subject to the UCMJ during the inactive duty training period. [11] The Army, however, throughout the history of the UCMJ, elected not to use this power while the Navy has.

During the initial hearings on the UCMJ in 1949, the Army and Air Force indicated that they did not need this

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[1] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 29 (1955) (Reed, J., dissenting).

[2] Letter from Department of Defense General Counsel Chapman Cox to Speaker of the House Thomas P. O'Neill (Nov. 18, 1985) (accompanying proposed Reserve Component legislation) [hereinafter Cox letter]. The Reserve Components of the United States Army include the Army National Guard and the United States Army Reserve.

[3] *Id.*

[4] United States v. Caputo, 18 M.J. 259, 275 (C.M.A. 1984) (Cook, J., dubitante).

[5] *See, e.g.,* Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986).

[6] Pub. L. No. 99-661, §§ 801-808, 100 Stat. 3816, 3905-10 (1986) (signed into law by President Reagan on 14 Nov. 1986, to be added to Uniform Code of Military Justice articles 2, 3, 136 and 137, 10 U.S.C. §§ 802, 803, 936, and 937) [hereinafter UCMJ articles 2, 3, 136, and 137 (as amended)].

[7] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ]. The Uniform Code of Military Justice, first enacted in 1949, consolidated and revised the existing laws governing the separate branches of the service (Articles of War, Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard), into one standard code.

[8] For an excellent discussion of the history of this legislation, see Clevenger, *Federal Court-Martial Jurisdiction Over Reserve Component Personnel,* 33 Fed. B. News & J. 418 (1986).

[9] *Id.* at 418. National Guard personnel are also subject to these rules and the new Reserve Component legislation, but only while in "federal service." *See* 10 U.S.C. § 672 (1982).

[10] Clevenger, *supra* note 8, at 418.

[11] UCMJ art. 2(a)(3).

power over inactive duty training, a power heretofore unavailable to them under the Articles of War.[12] The Navy, on the other hand, wanted to retain the broad jurisdictional power that it had under the Articles for the Government of the Navy, which provided:

> All members of the Naval Reserve when employed on active duty, authorized training duty with or without pay, drill, or other equivalent instruction or duty, or when employed in authorized travel to or from such duty or appropriate duty, drill or instruction, or during such time as they may by law be required to perform active duty or while wearing a uniform prescribed for the Naval Reserve, shall be subject to the laws, regulations, and orders for the government of the Navy.[13]

As a compromise between these antipodal positions, having no jurisdiction over reserves on inactive duty training and having complete jurisdictional powers, Article 2(a)(3) was added to the UCMJ.[14] The law's purpose was to provide disciplinary controls over reservists who were weekend operators of dangerous and expensive equipment.[15] Army reservists are routinely entrusted with state-of-the-art weapon systems—Abrams tanks, Bradley fighting vehicles, and Blackhawk helicopters—that are certainly both dangerous and expensive equipment.[16] Nevertheless, over the history of the UCMJ, the Army, consistent with its position during the legislative hearings, opted not to exercise this power. The Navy, in comparison, has continuously exercised this grant of authority under Article 2(a)(3).[17] Perhaps the Navy's furthest attempted extension of this power occurred in *United States v. Caputo*,[18] the case that led to new reserve jurisdiction legislation.

### *United States v. Caputo*

Caputo, who had prior Navy enlisted service, enlisted in the Navy Reserve for a two-year tour. On 7 February 1983, pursuant to his obligation as a reservist, he was ordered from his home in New York to active duty training at the Naval Supply Center at Pearl Harbor, Hawaii. He reported as ordered. Six days later, he was stopped and arrested by civilian police for drinking in public. During the arrest, he was searched and found to be in possession of a large amount of L.S.D. Two days later, however, local authorities, without taking any action against Caputo, returned him to military control. His unit knew about his arrest and the charges, but released him from active duty training and permitted him to go home. On 2 March 1983, well after his active duty training was over, charges against Caputo were prepared and sworn to at the Naval Reserve Center at Staten Island, N.Y. On 12 March 1983, Caputo reported for his regularly scheduled weekend drill at his assigned unit. He was arrested and placed in pretrial confinement. The Navy then extended his inactive duty training status and referred the charges to a special court-martial. Caputo filed an application for extraordinary relief, alleging that the court had no jurisdiction over him. The Court of Military Appeals agreed.

The Court of Military Appeals, relying on the 1969 Manual for Courts-Martial,[19] held that jurisdiction as to an offense committed during a period of service or status once terminated cannot be revived by the accused's subsequent return to duty.[20] In this case, the court found that Caputo's separation from active duty training terminated his active status and that jurisdiction could not be revived by Caputo's subsequent return to weekend drill or inactive duty training.[21] Thus, despite continuous military status as a reservist, the Court of Military Appeals dismissed the offenses for a lack of personal jurisdiction.

### New Reserve Component Jurisdiction

*Caputo* was the catalyst that pushed reserve jurisdiction problems to the attention of Congress. In fact, many call the new reserve jurisdiction provisions the *Caputo* legislation. The amendments to reserve disciplinary controls bridge the jurisdictional gaps recognized in *Caputo* and provide new authority during inactive duty training.

The legislation has several major provisions. First, the act deletes the restrictive requirements of Article 2(a)(3). The previous Article 2(a)(3), as noted earlier, provided statutory authority to exercise jurisdiction over inactive duty periods, but *only* if a demanding four-part test was first satisfied. The new standard will extend jurisdiction over reservists on *all* types of training—inactive duty training or active duty training—without any threshold requirements.[22] If the member is training, he or she is subject to in personam jurisdiction.

The legislation's second purpose was to resolve problems with losing jurisdiction because a soldier's training status terminated when he or she went home. Article 2(d), UCMJ, now authorizes calling or ordering to *involuntary active duty* Reserve Component personnel who violate UCMJ provisions for Article 32 investigations, courts-martial, and

---

[12] *See* Duncan v. Usher, 23 M.J. at 32.

[13] *See id.* (quoting 34 U.S.C. § 855).

[14] *See id.*

[15] *See id.* at 33.

[16] Cox letter, *supra* note 2.

[17] Clevenger, *supra* note 8, at 418.

[18] 19 M.J. 259 (C.M.A. 1984).

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

[20] 18 M.J. at 266.

[21] *Id.* There are exceptions to this general rule. For example, jurisdiction can be "revived" if the discharge is fraudulently obtained, (Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981)), or if the soldier returns to active duty, the offense is punishable by five or more years confinement, and the offense is not cognizable by a United States civilian court (UCMJ art. 3(a)).

[22] UCMJ art. 2(a)(3) (as amended). For National Guard personnel, the training must be in the Federal service to subject them to jurisdiction.

even nonjudicial punishment.[23] Third, it amends Article 3, UCMJ, by exempting a member of a Reserve Component who violates the UCMJ, while subject to the Code, from termination of his or her amenability to court-martial jurisdiction by his or her release from active duty or inactive duty training.[24]

Thus, there should no longer be the problem of discovering that a crime has been committed by a member of the Reserve Components, only to discover that he or she has been released by self-executing orders. Jurisdiction is not revived, it simply never stops. The reservist's continuing status *qua* reservist provides the requisite jurisdictional nexus.

There are two collateral issues covered as well in the legislation. First, under Article 136, UCMJ, officers in inactive duty training status are added to the list of persons who can administer oaths.[25] Therefore, Reserve Component commanders who have access to a Reserve Component judge advocate or adjutant can investigate crimes and initiate sworn charges over Reserve Component and active duty personnel while the commander is still in an inactive duty training status.

Second, the act also seeks to protect Reserve Component personnel by extending the Article 137 educational process to reservists, to ensure that they are properly introduced to the new disciplinary provisions of the reserve jurisdiction legislation.[26] The current Article 137 provides certain articles of the UCMJ must be explained to active component members of enlistment, six months after enlistment, and on reenlistment.

Thus, under the new legislation, Caputo's release from active duty training would have no jurisdictional significance. The Reserve Component commander could have investigated and preferred the charges without any active duty personnel being involved. More importantly, instead of extending Caputo in a training status, he simply could have been permitted to return home until needed. Then he could have been ordered to active duty for an Article 32 investigation or simply to be court-martialed.

### *Involuntary Recall*

One of the biggest problems in getting the reserve jurisdiction legislation through Congress was the Senate's uneasiness with the involuntary recall procedures. As originally drafted, the Reserve Jurisdiction Act placed almost total discretion in the respective service Secretaries as to how involuntary recall would be exercised. The final bill, however, included several limitations on the exercise of this power, some of which were completely unexpected by the Armed Forces.

First, the authority to order a member to active duty will be prescribed in regulations provided by the President.[27] Second, a Reserve Component member can only be involuntarily ordered to active duty under this provision by a *regular* component general court-martial convening authority.[28] Third, unless the order to involuntary active duty is also approved by the appropriate service Secretary, the member may not be sentenced to confinement or made to serve any punishment involving a restriction on liberty except while the member is on inactive duty training or regular active duty.[29] Thus, Secretarial involvement is guaranteed in every major case, because if "jail time" is sought for the accused, the Secretary or his delegee will have to approve the recall to active duty.

Although the reserve jurisdiction legislation details involuntary recall procedures, it leaves the majority of its implementation to Executive Order. And, as with any new procedure, the initial implementation will be cautious.

### Implementation

In recognition of the significance of this change to jurisdictional authority and the number of personnel involved, implementation of the UCMJ amendments to Reserve Component jurisdiction will be accomplished in two phases. The first phase will be a training phase and is scheduled from 1 July 1987 until 30 June 1988.[30] During this phase, Reserve Component commanders will receive instruction in command implementation while reserve judge advocates will be trained in their supporting roles. Planned training includes: Reserve Component officers will receive UCMJ instruction prior to or within 30 days of taking command; one-time unit training in the UCMJ for all personnel currently assigned to the Reserve Components, including officers; and Reserve Component commanders and judge advocates will be instructed on a one-time basis in both substantive and procedural criminal law issues.[31] Concurrently, the Article 137 instruction will be provided to Reserve Component soldiers.[32]

In the second phase, UCMJ jurisdiction will be fully implemented within the Reserve Components. This phase will incorporate the legislation, Manual changes, and regulatory guidance, much of which is still forthcoming, into one cohesive effort.[33]

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[23] UCMJ art. 2(d)(1) (as amended). It should be noted that involuntary recall may not be necessary in all cases. If the Reserve Component soldier is performing active duty or active duty training, he or she may simply be retained by taking an "action with a view toward trial" prior to the termination date of his orders. *See* United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). This would eliminate the need to get Secretarial approval for post-trial confinement.

[24] UCMJ art. 3(d) (as amended).

[25] UCMJ art. 136 (as amended).

[26] UCMJ art. 137 (as amended).

[27] UCMJ art. 2(d)(3) (as amended).

[28] UCMJ art. 2(d)(4) (as amended).

[29] UCMJ art. 2(d)(5) (as amended). A normal period of IDT does not include periods that are scheduled solely for the purposes of court-martial proceedings.

[30] Letter from Office of the Deputy Chief of Staff for Personnel to all Major Commands, United States Army, subject: Military Justice within the Reserve Components, 20 Apr. 1987 [hereinafter Reserve LOI]. This letter is the key to the operation of Reserve Component military justice in its initial phase.

[31] *Id.*

[32] *See* UCMJ art. 137 (as amended).

[33] Reserve LOI, *supra* note 30.

Although many of the procedures are still being formulated, the first Manual change implementing the reserve jurisdiction legislation has been signed by the President,[34] proposed changes to Army Regulation 27–10[35] have been submitted, and the Office of the Deputy Chief of Staff for Personnel has prepared a letter of instruction on how military justice should operate in the Reserve Components in the next year.[36] These documents further define responsibilities in three key areas: nonjudicial punishment, trials by court-martial, and speedy trial.

*Nonjudicial Punishment*

The power to give nonjudicial punishment will be given to the appropriate reserve or active component commander during active and inactive duty training periods.[37] No longer will the Reserve Component soldier on weekend drill be immune to punitive measures for misconduct. Moreover, should the reservist refuse to accept punishment under Article 15, UCMJ, he or she faces the much more stringent requirements of a trial by court-martial. A court-martial, as discussed below, has serious implications for the reserve soldier. There are two limitations planned for the exercise of nonjudicial punishment. The first is in the area of officer misconduct and the second is in the imposition of punishment.

The imposition of nonjudicial punishment (Article 15s) for officer misconduct will be tightly controlled, as it is in most Active Component units. Policy now places the authority to administer nonjudicial punishment to Reserve Component officers in Active or Reserve Component general court-martial convening authorities or the first commanding general in the Reserve Component or Active Component chain of command.[38]

Because of the part-time status of the reservist, punishments are also subject to special rules and limitations. If the punishment includes a deprivation of liberty (restriction, extra duties, correctional custody, or arrest in quarters), and it is imposed on the reserve member during inactive duty training, that punishment can only be served during regularly scheduled training.[39] The reservist cannot be required to work "overtime" to serve punishment tours. The unserved punishments, however, can be carried over to subsequent periods of training.[40] For example, if a reservist is given seven days extra duty, that punishment will carry over into subsequent periods of normally scheduled training until it is all served. This carryover provision also includes the collection of forfeitures during those subsequent periods of duty.[41]

*Trial by Court-Martial*

The level of court-martial determines how and where the case will be tried. Under the new rules, a member of the Reserve Components must be on active duty prior to arraignment by a general or special court-martial.[42] This, of course, ensures active component involvement and support, because an active component general court-martial convening authority must authorize the recall to active duty.[43] Needless to say, this is a drastic procedure that separates a member from his or her home and job, and should be reserved for more serious offenses. Moreover, because some cases may be tried in either a civilian or military court, Reserve Component commanders are required to consult with a government legal advisor before preferring court-martial charges.[44]

The convening authority will be the supporting Active Component general court-martial convening authority.[45] That supporting installation will also be the primary source of support for logistical and technical expertise in the actual court-martial of reservists. It is recognized that in many cases Reserve Component judge advocates will be unable to schedule the number of duty periods that a trial by court-martial may require. Therefore, the Active Component staff judge advocate of the supporting installation will be primarily responsible for the conduct of trials by court-martial.[46] Reserve Component judge advocates, nevertheless, should be utilized whenever feasible to include prosecuting, defending, and hearing these cases as military judges.

Summary courts-martial, on the other hand, may be held entirely within the reserve structure and during inactive duty training periods.[47] Many of the same limitations, however, on the execution of punishments mentioned earlier in the execution of punishment under Article 15 also apply. For example, a summary court-martial conducted during IDT may only be in session during normal training periods, and the accused cannot be held past the end of the

[34] Exec. Order No. 12,586, 52 Fed. Reg. 7,103 (1987) (amendments to the Manual for Courts-Martial, 1984) [hereinafter amendments to MCM, 1984].

[35] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice (1 July 1984) [hereinafter AR 27–10].

[36] Reserve LOI, *supra* note 30.

[37] Implementation of Article 15 powers will be further delineated in upcoming changes to AR 27–10. *See* amendments to MCM, 1984, R.C.M. 204(a): "The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction and nonjudicial punishment authority over reserve component personnel under articles 2(a)(3) and 2(d), subject to the limitations of this manual and the UCMJ."

[38] Reserve LOI, *supra* note 30.

[39] Amendments to MCM, 1984, Part V, para. 5e.

[40] *Id.*

[41] *Id.* Reservists can also be involuntarily called to active duty for nonjudicial punishment. Expense and common sense, however, dictate that this will be the rare case.

[42] Amendments to MCM, 1984, R.C.M. 204(b)(1).

[43] UCMJ art. 2(d)(4) (as amended).

[44] Reserve LOI, *supra* note 30.

[45] *Id.*

[46] *Id. See* U.S. Dep't of Army, Reg. No. 5–9, Management—Intraservice Support Installation Area Coordination, App. B (1 March 1984).

[47] Amendments to MCM, 1984, R.C.M. 204(b)(2).

training period to serve adjudged punishment.[48] Additionally, confinement is not an available punishment for a summary court-martial held during inactive duty training.[49]

Correspondingly, pretrial confinement, as a practical matter, will not be available during IDT periods. To impose pretrial confinement under this legislation, the soldier must be involuntarily activated to active duty and that activation must be approved by the supporting Active Component general court-martial convening authority.[50] The practical effect of the rule makes pretrial confinement for offenses committed during weekend drill improbable, if not impossible. It should also be noted that pretrial confinement cannot be the sole purpose of calling a reservist involuntarily to active duty.[51]

*Speedy Trial*

Special rules are also provided in the area of speedy trial. The requirements of the 120 day rule under R.C.M. 707 are still generally applicable. Consistent with that intent, the speedy trial clock will begin to run on notice of preferral of charges or when the member is involuntarily ordered to active duty in cases where charges have not yet been preferred.[52] Up to sixty days in processing and implementing disciplinary action against the reservist within the Reserve Component chain of command is excludable, however.[53] This excludable delay ends when the reservist is involuntarily activated.[54]

**Conclusion**

The original provisions addressing reserve jurisdiction were drafted some thirty-six years ago. In these past thirty-six years, the Reserve Components have experienced an unprecedented growth in structure and mission, changes simply not contemplated by the original drafters of that legislation. The new reserve jurisdiction legislation conforms the UCMJ to the "total force" concept by subjecting members of the United States Army Reserve and the National Guard while in Federal service to the same disciplinary standards as their active counterparts. It is not, however, without critics.

Ordering the part-time soldier to a trial by court-martial not only separates the soldier from his or her home and job, but from the Constitution's full protections.[55] It should be remembered that the part-time soldier is also a part-time civilian and many differences exist between the de jure status of a member of the Reserve Components and that of a member who is on active duty.[56] Substantial litigation may accompany the first cases.

More important, however, military practitioners should note the two-phased approach to this legislation. The key is that there is still time during the training phase to meaningfully influence how this legislation is actually put into effect. It is a rare opportunity to participate in making legislation effective.

[48] *Id.*

[49] Amendments to MCM, 1984, R.C.M. 1003(c)(3)(A)(i).

[50] Reserve LOI, *supra* note 30.

[51] *Id.*

[52] Amendments to MCM, 1984, R.C.M. 707(a)(3).

[53] Amendments to MCM, 1984, R.C.M. 707(c)(8).

[54] *Id.*

[55] Those rights include the right to trial by jury and grand jury indictment. *See* O'Callahan v. Parker, 395 U.S. 258 (1969). The special status of National Guard soldiers should also be noted. While members of the United States Army Reserve have a continuing Federal status upon which to base jurisdiction, National Guard members generally have no continuing Federal service nexus upon which to base their recall to active duty under this new legislation. The sole basis for their recall will be their status at the time of the offense, a status now terminated.

[56] *See* Duncan v. Usher, 23 M.J. 29, 31 (C.M.A. 1986).

# Operational Law—A Concept Comes of Age

*Lieutenant Colonel David E. Graham*
*Chief, International Law Division, TJAGSA*

**Introduction**

The past several years have focused an increasing amount of attention on an evolving body of law relating to the conduct of U.S. military operations overseas. Referred to, appropriately, as operational law (OPLAW), this legal discipline has quickly moved from conceptual discussion to practical curriculum at The Judge Advocate General's School, U.S. Army (TJAGSA) and concerted efforts at implementation by judge advocates in the field.

Lest there be any doubt, OPLAW is a *new* concept. It is not simply a modified form of international law, as traditionally practiced by Army judge advocates, dressed in a battle dress uniform and given a "catchy" name. As it is related almost exclusively to overseas operations, this new discipline does necessarily require a close working relationship with international law and thus falls, functionally, within the international law ambit. It is important to note also that the advent of OPLAW does not presage a move away from traditional judge advocate international law responsibilities, particularly those involving the Law of War and stationing arrangements. Every effort will be made to

continue to improve upon the ability of judge advocates to meet the demands of these areas. Indeed, much of the substantive law relating to these subjects forms an integral part of the OPLAW discipline. Accordingly, international law and OPLAW will function in tandem. This combination of subject areas has resulted in consideration by the Office of The Judge Advocate General (OTJAG) of establishing an international/OPLAW specialty program.

What, then, is OPLAW? In what way is this discipline a new approach toward better preparing the judge advocate to resolve legal issues arising in an overseas operational environment? The current working definition of OPLAW, now undergoing revision, is as follows:

> Operational Law: Domestic and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, Law of War, law related to security assistance, training, mobilization, predeployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti- and counter-terrorist activities, status of forces agreements, operations against hostile forces, and civil affairs operations.

In essence, then, OPLAW is that body of law, both domestic and international, affecting legal issues associated with the deployment of U.S. forces overseas in peacetime and combat environments.

By its nature, OPLAW transcends normally defined military legal disciplines and incorporates, for the first time in one legal regime, relevant substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law. It constitutes a much more comprehensive, yet structured, approach toward resolving legal issues evolving from the overseas deployment of U.S. military forces. Its function is to enable the judge advocate to provide a wider range of informed legal advice to the commander, thus contributing in a more positive fashion to the overall success of the mission.

### The Genesis of OPLAW: U.S. Military Activities in Grenada

For a number of years prior to 1983 and "Operation Urgent Fury," the U.S. military action in Grenada, there had been a general consensus that more needed to be done to better prepare judge advocates for the wide range of legal issues associated with combat and peacetime overseas deployments. The Army, and TJAGSA in particular, had established effective programs in both the training and substantive aspects of the Law of War, and judge advocates were proving to be adept at providing advice concerning Law of War matters. The same was essentially true, moreover, for legal responsibilities associated with status of forces agreements and other forms of overseas stationing arrangements. The individuals principally concerned with addressing legal issues arising in the context of overseas operations, however, continued to examine the nature and scope of the training and reference materials provided to judge advocates. Almost invariably, the question most often posed was, "Is that all there is?" Other questions followed. "Should we not be doing more to provide more extensive information on a broader range of legal issues confronted by judge advocates functioning in an operational environment?" "Is there not some process by which we can collect and disseminate all relevant aspects of the diverse, but interrelated, military legal disciplines affecting overseas deployments?" In the final analysis, however, the pivotal question voiced was "Are you conceptualizing a nonexistent problem? That is, is there really a need for a new approach toward training for and providing substantive legal advice concerning overseas operations?" The events of October and November, 1983, provided definitive answers to these questions.

Judge advocates involved in the Grenada operation were confronted with a wide array of legal issues. It was their collective view that they had been much better prepared for and thus dealt more effectively with some of these matters than with others. As a parallel observation, they agreed that the legal expertise required of the judge advocate went far beyond a working knowledge of the Law of War. Though many Law of War problems arose, involving careful interpretation of the applicable provisions of the Hague Regulations and Geneva Conventions, judge advocates on the scene also dealt with a significant number of other legal issues. These included, but were not limited to, claims matters, contracting requirements, the requisitioning of private property, the treatment of foreign nationals (civilians and diplomatic personnel), the taking of war trophies, status of forces questions, legal assistance requests, military justice concerns, and a wide range of civil affairs issues. As so aptly stated by one judge advocate involved, somewhat tongue-in-cheek, "You can only tell the C.O. that he can't shoot the prisoners so many times. You reach a point at which, when the boss has run out of beans and bullets, has certain equipment requirements, and has the locals clamoring to be paid for property damage, you have to be prepared to provide the best possible legal advice concerning these issues as well."

These personal observations of judge advocates were substantiated by the "Urgent Fury" After-Action Report, produced by the Office of the Staff Judge Advocate, Headquarters, 82d Airborne Division. This document has proven to be valuable in identifying and detailing the manner in which the diverse number of legal issues encountered in Grenada were resolved. Perhaps even more importantly, however, this report removed any lingering doubts concerning the necessity for developing a specific discipline dealing with legal issues arising in an overseas operational context.

### TJAGSA OPLAW Initiatives

Drawing upon the impetus toward developing an OPLAW discipline provided by the events in Grenada, a study of TJAGSA in 1986 made a series of recommendations concerning the implementation of a practical and viable OPLAW program. Principal among these were the formulation of an agreed definition of OPLAW, the development of an intensive OPLAW curriculum at TJAGSA, and the publication of an OPLAW Handbook. As noted, a working definition of OPLAW has been developed. It will be further refined in order to produce a more concise explanation of the parameters of this particular legal discipline. With respect to the formulation of TJAGSA OPLAW instruction, significant developments have occurred.

To meet the task of structuring OPLAW curriculum for the TJAGSA 1986–87 academic year, the International Law Division focused most of its attention on revising existing graduate course international law instruction. While

leaving first quarter curriculum dealing exclusively with the Law of War intact, second quarter instruction was revised completely and devoted solely to OPLAW. To achieve the necessary scope of instruction, the division used an interdisciplinary or matrix approach toward formulating and presenting OPLAW curriculum. Additionally, in developing a structural format for this instruction, five distinct forms of overseas deployments were identified as giving rise to diverse legal issues: U.S. forces stationed overseas (under a stationing arrangement); deployment for conventional combat missions; deployment for security assistance missions; deployment for overseas exercises; and deployment for non-conventional missions.

As a preface to an analysis of the legal concerns associated with these forms of overseas deployments, initial instruction focused on the applicability of international agreements to these movements. In doing so, an effort was made, as was the case in all OPLAW instruction, to examine issues from a practical, "hands-on" perspective. Thus, in dealing with international agreements, students considered such questions as "To what countries is your unit scheduled to deploy?" "Are there international agreements in effect between these countries and the U.S.?" "Do you have copies of these agreements?" "If not, do you know how to secure such agreements, *i.e.,* where to look, who to call?" "If no agreements are in effect, will some form of agreement be necessary?" "What Army regulation speaks to the authority to negotiate and conclude international agreements?" "To what extent will you be involved in the negotiating process?" "What subjects should such agreements address?" These and other related questions provided practical insight concerning the impact of international agreements, or the lack thereof, on any form of overseas deployment.

In examining the stationing of U.S. forces overseas under formal stationing arrangements, OPLAW instruction dealt with a wide range of interdisciplinary legal issues, including matters of military justice, administrative law, off-shore procurement, legal assistance, and claims.

In dealing with deployments for conventional combat missions, initial attention was focused on the domestic and international law applicable to such operations. Discussion thus centered around the international legal bases for U.S. combat activities abroad and specific domestic legislation affecting the overseas commitment of U.S. armed forces, with particular emphasis on the War Powers Resolution. Instruction then turned to the review of operations plans (OPLANs) and rules of engagement (ROEs), with an analysis of an extensive OPLAN review checklist, an examination of current ROEs now being used in the field, and the study of a comprehensive deployment checklist. This latter checklist, recently developed at TJAGSA specifically for OPLAW purposes, deals with legal issues that arise in each functional OPLAW area at the pre-deployment, deployment, and post-deployment stages. The checklist includes an extensive listing of applicable references, by functional area. This document has proven to be beneficial for instructional purposes and for use in the field.

In keeping with the interdisciplinary approach toward OPLAW, instruction concerning conventional combat deployments also dealt with the subjects of "combat contracting" and "combat claims." The former emphasized such considerations as the need for identifying deploying commanders authorized to contract for necessary supplies and services in the absence of contracting officers with warrants. Small purchase and other simplified purchase procedures, to include the appropriate use of the Purchase Order-Invoice Voucher (SF 44), were also discussed. Claims considerations included the procedure by which single-service claims responsibility is established and the processing of both non-combat and combat related claims under the Military Claims Act and the Foreign Claims Act.

OPLAW curriculum dealing with deployments for security assistance missions constituted the first formal instruction in this area ever provided by TJAGSA. Primary attention was focused on the security assistance structure and process, to include the role played by judge advocates in providing advice concerning legal issues associated with security assistance missions, that is, mobile training teams (MTTs) and technical assistance teams (TATs). Basic security assistance legislation, essentially the Foreign Assistance Act and the Arms Export Control Act, was also discussed, and the most common legal problems arising within the context of this legislation were examined. Student response to this instruction was very positive, and plans now call for expanding the treatment of this subject in order to provide more detailed instruction in foreign military sales.

Deployments associated with overseas exercises have increased substantially over the past several years, as the Department of Defense continues to expand its worldwide exercise program. As a result, judge advocates have increasingly faced legal issues relatively unique to such exercises. In examining this form of operational deployment, particular emphasis was placed on three specific forms of exercise activities: construction undertaken in conjunction with overseas exercises; training activities; and humanitarian assistance and civic action projects. The number of legal issues associated with exercise activities continues to increase, and new legislative developments in this area will inevitably result in even more judge advocate involvement in this type of deployment.

In examining the fifth form of overseas deployment, that for non-conventional missions, primary attention was focused on low intensity conflict and counter/anti-terrorism measures. The fact that essentially all legal issues inherent in most of the other forms of operational deployments could easily surface in low intensity conflict missions was emphasized. This subject thus served as an appropriate means by which to demonstrate the interrelationship of all OPLAW legal matters. Counter and anti-terrorism instruction dealt with the manner in which host country and U.S. law dictate the measures that U.S. forces may take to combat terrorism overseas.

Graduate course OPLAW instruction will continue to be refined and expanded as a result of input provided by students and attorneys involved in OPLAW matters in the field. The current instructional format reflects those subject areas that fall within the OPLAW ambit and the basic approach being taken toward developing a distinct OPLAW discipline.

A second significant curriculum initiative has been the development of an OPLAW continuing legal education course, Judge Advocate and Military Operations Overseas (JAMO). Available to attorneys of all of the armed services, this course provides OPLAW instruction very similar to that offered during the second quarter of the graduate

course. The course places increased emphasis on the interdisciplinary OPLAW areas of criminal law, combat contracting, and legal assistance. Additionally, students receive instruction on current operational doctrine, JAG operational assets, the unified command system, the International Committee of the Red Cross, and the SJA's role in Corps-level exercises. Each student is given the most comprehensive compilation of OPLAW materials currently available. Each of the two JAMO courses offered thus far has been well received, and it will continue to be offered at least annually. The next JAMO course will be conducted from 7 to 11 December 1987.

The effectiveness of the OPLAW program in the field depends in large part upon the degree to which commanders understand and support it. With this in mind, OPLAW instruction has been incorporated into all senior and general officer legal orientation (SOLO and GOLO) courses. Again the response to this instruction has been positive, and it is anticipated that this exposure of commanders to OPLAW will begin to show tangible benefits in the near future.

The third principal recommendation of the TJAGSA study concerning OPLAW was that TJAGSA prepare, at the earliest possible date, a comprehensive OPLAW Handbook suitable for use by deploying judge advocates. Work on such a handbook is currently underway, drawing largely upon OPLAW materials currently utilized in the graduate and JAMO courses, and the handbook should be published in the 1987–88 academic year.

### OPLAW in the Field

Regardless of the number or quality of OPLAW initiatives undertaken by TJAGSA, the successful development and implementation of an OPLAW discipline will depend, ultimately, upon those judge advocates who "practice" OPLAW on a daily basis. In this regard, the position of Chief of International/Operational Law has been created at the Corps and Division level, and the position of Chief of Operations, Plans, and Training has been created at the Corps level. Moreover, from the inception of the OPLAW program, judge advocates have worked to expand their participation in the operational planning and plan review process. This has often entailed extensive efforts to secure scarce security clearances and positions in operational command centers. A U.S. Army Forces Command message dealing with the requirement for judge advocates to become active participants in OPLAN review, dated 29 October 1984, has been a positive step forward in the OPLAW arena. Because it was transmitted through judge advocate, rather than command, channels, this message did not require commanders to ensure that judge advocates become active and direct staff participants in the planning and implementation of military operations. As a result, individual judge advocate participation in the operational planning process has been based, almost exclusively, on the extent of the personal working relationship developed with the G–3 and other key staff members. Rapid turnover in these positions has forced the judge advocate to constantly "rebuild" personal rapport in order to effectively perform his or her OPLAW functions. Absent some formal requirement entailing direct judge advocate participation in the planning and conduct of military operations, it is apparent that "personality-dependent" OPLAW advice may continue to be the rule. Hopefully, continued and expanded exposure of OPLAW to future commanders through SOLO and GOLO courses will help to alleviate this situation. In turn, judge advocates must ensure that, having advised the commander and his staff that OPLAW advice is critical to the success of the overseas mission, those responsible for providing such advice are capable and well prepared.

### OPLAW Initiatives Undertaken by Other Services

As in the case of the Army, the other services have recognized the need for focusing greater attention on OPLAW. The Air Force Judge Advocate General's School has conducted two courses dealing, at least partially, with OPLAW issues. Marine Corps attorneys now attend the OPLAW courses conducted at TJAGSA. Additionally, an operational law branch has been established within the office of the Director of Legal Services, Headquarters Marine Corps. The Navy has not yet established a specific course dealing with operational legal matters. Navy judge advocates do attend TJAGSA OPLAW courses, however, and plans call for a comprehensive course focusing on legal issues associated with Naval operations to be conducted at the Naval War College in 1988.

Interservice judge advocate cooperation in the OPLAW arena has been positive, as evidenced by the active participation by Air Force and Marine attorneys in the most recent TJAGSA JAMO course. As greater emphasis is placed on joint operations and individual service OPLAW programs mature, it will be essential that service judge advocates work closely in identifying and resolving common legal issues arising in the operational environment.

In addition to the current OPLAW initiatives being undertaken by the individual services, the Operational Law Symposium should also be noted. This symposium, conducted annually, was last held in conjunction with the Central Command Legal Conference in November 1986. Its purpose is to bring together both attorneys and line officers from each of the services who are actively involved in operational matters. Subject matter is selected and presented on the assumption that all attendees, both attorneys and operators, possess extensive operational experience. The symposium does not purport to teach basic OPLAW. Instead, its focus is directed toward an in-depth discussion of current and substantive OPLAW issues.

### Conclusion

The development and implementation of a distinctive OPLAW discipline will serve to better prepare judge advocates to provide comprehensive legal advice to commanders concerning a broad range of mission requirements. The opportunities afforded the JAG Corps to define, improve upon, and develop this evolving OPLAW discipline are as numerous as they are challenging. The International Law Division, TJAGSA, and the International Affairs Division, OTJAG, welcome suggestions and recommendations that may assist in this evolutionary process.

# Products Liability—A Source of Recovery

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## Introduction

It is Monday morning. As eager as you are to attack your in box, you decide to reread the medical records on a recently-filed medical malpractice claim when your medical care recovery clerk knocks at your door. She just received information from the Patient Administration Division at the post hospital about a potential recovery claim, and she wants your advice. Early Sunday morning, a young soldier was brought to the post emergency room with an eye injury. He was cleaning the windows in his on-post quarters when a can of aerosol window cleaner exploded. The treating physician, an ophthalmologist, has indicated that the soldier will probably lose his eye. Does this case present a Medical Care Recovery Act claim? What theories of liability should be considered? Is products liability a possible basis for recovery?

In 1986, the Army recovered $10,668,166 through an aggressive affirmative claims program.[1] Under the Medical Care Recovery Act,[2] recovery judge advocates collected $9,270,019, more than in any other year since the statute's enactment.[3] In addition, augmenting the report of survey system that recoups losses and damages to Army property caused by Department of the Army personnel, is the Army's property damage recovery program. This program implements the Federal Claims Collection Act[4] by seeking recovery for losses or damages caused by personnel not subject to the report of survey system or other methods of collection. In 1986, the Army recovered $1,398,147, quite an increase over the $741,000 recovered in 1981.[5] These statutes point out that affirmative claims programs protect the government's financial interest. They would not have been so effective if it was not for the recovery judge advocates (RJA) in the Army's claims offices working hard to pursue recovery on behalf of the United States.

The Army's affirmative claims program is based upon authority conferred by to federal statutes—The Medical Care Recovery Act and The Federal Claims Collection Act. The Medical Care Recovery Act enables the United States "to recover the reasonable value of medical care furnished by the United States to a person on account of injury or disease incurred under circumstances creating tort liability upon some third person."[6] The Federal Claims Collection Act provides generally that "heads of Federal agencies or their designees shall attempt to collect all claims of the United States for money or property arising out of the activities of their agencies, and may, on claims that do not exceed $20,000, . . . compromise, suspend, or terminate collection action on such claims."[7] Regardless of which statute is applied to an affirmative claim, RJAs have to research "the law of the place in which [the injury or the] damage occurred" to determine the government's right to compensation.[8]

To ensure that maximum effort is made to assert affirmative claims, the RJA has to be "in touch" with sources of potential claims. Just as a claims judge advocate actively investigates claims against the United States, *e.g.*, Federal Tort Claims Act[9] claims, the RJA has to pursue affirmative claims. To do this effectively, the RJA must receive early notification of potential affirmative claims. One way early notification can be accomplished is to use a variety of sources of information. The following is a list of suggested sources:[10]

(1) Federal medical treatment facility (Patient Administration Division);

(2) narrative summaries provided under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and the Civilian Medical Contingency Hospital System (CMCHS);

(3) civilian care furnished under emergency situations to active duty soldiers under CMCHS;[11]

(4) civilian police reports;

(5) military police blotters and reports;

(6) civilian news releases;

(7) magistrates court proceedings;

(8) requests by attorneys and insurers for medical records and other information;

(9) emergency room records;

(10) line of duty investigations;

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[1] Telephone interview with Captain Bradley E. Bodager, Chief, Affirmative Claims Office, U.S. Army Claims Service, Fort Meade, Maryland (Mar. 3, 1987) [hereinafter Bodager interview].

[2] 42 U.S.C. § 2651 (1982).

[3] Bodager interview, *supra* note 1.

[4] 31 U.S.C. § 3711 (1982)

[5] Bodager interview, *supra* note 1.

[6] Dep't of Army, Reg. No. 27-20, Legal Services—Claims, para. 14-1*c* (10 July 1987) [hereinafter AR 27-20].

[7] *Id.*

[8] *Id.*, paras. 14-8*b* and 14-12.

[9] 28 U.S.C. §§ 2671-2680 (1982).

[10] AR 27-20, para. 14-14. Paragraph 14-14 lists the first 14 sources; the author suggests the remaining 11 sources.

[11] CHAMPUS Form 691, Statement of Personal Injury—Possible Third Party Liability (May 1985).

(11) Army Regulation 15–6[12] investigations;

(12) Article 32[13] investigations;

(13) command reports;

(14) requests for assistance with workers' compensation forms;

(15) post exchange;

(16) gyms;

(17) post theater;

(18) post gas stations;

(19) post bowling alleys;

(20) other nonappropriated fund instrumentalities;

(21) reserve and National Guard units in your area of responsibility;

(22) recruiters;

(23) unit claims officers;

(24) post engineers; and

(25) post safety officers.

This is not an all-inclusive list of sources of information about potential claims, but if the RJA does not either receive information from these sources regularly or visit these components to introduce himself or herself and explain what he or she does, then the RJA has not explored all areas of potential recovery.

When the RJA receives notification of a potential affirmative claim, he or she must investigate to determine the merits of the claim. Additionally, the RJA, where appropriate, must assert a demand, and to the extent of his or her authority, settle medical care and property claims.[14] As part of the investigation, the RJA must consider products liability as a basis for recovery.

This article will not attempt to discuss products liability in any detail. Numerous multi-volume legal texts have been devoted to this subject.[15] This article will introduce the reader to some general terms and theories of recovery to be considered when evaluating products liability law as a basis for recovery.

To properly "come to grips" with this complex body of law, the RJA should begin with the definition of products liability. "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products."[16] When an RJA evaluates a potential products liability case, one of the first questions he or she has to address is; What is a product? The answer is not as clear as one might imagine, and research of case law is imperative to determine if the "offending" object is actually classified as a product.[17] For example, "there is no dispute that chattels resulting from manufacturing, even of such minor commercial processes as canning, purifying, drying, or bottling, are considered products."[18] But what about, for instance, animals,[19] aeronautical navigational charts,[20] genetic or living matter,[21] utilities,[22] or real estate?[23] Once the RJA answers the above question, then he or she has to determine if a product defect exists. Is there a dangerous condition of the product that resulted in injury to the individual or property, or is the product in inferior condition or the "type of condition that may disappoint the purchaser's expectation as to its efficacy or fitness for the purpose intended . . . which is likely to cause economic losses?"[24]

There are several possible theories of recovery available under the complexities or products liability law. Again, it is extremely important for the RJA to be familiar with the relevant case law and the state statutes applicable to a potential affirmative claim to assert one or more of these possible theories as the basis for recovery. The need to explore all possible theories of recovery is important as well

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[12] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977).

[13] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982).

[14] AR 27–20, paras. 14–9 and 14–14.

[15] *See, e.g.* R. Cartwright & J. Phillips, Products Liability (1986).

[16] W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser And Keeton On The Law Of Torts 677 (5th ed. 1984) [hereinafter Prosser On Torts].

[17] Research of state case law and state statutes is imperative to discover if the United States can pursue a direct action against a tortfeasor based on products liability. Some states may not allow recovery by the United States on some of these theories, e.g., strict liability and breach of warranty. Thus, the United States has to proceed in a negligence action. Perhaps subrogation offers a way to recover under the theories of strict liability and breach of warranty that may otherwise be barred. Under subrogation, the United States would step into the shoes of the injured party; its right to recover would depend on the injured party's right to recover. Under a subrogated cause of action, the United States would be subject to any defenses the tortfeasor may have against the injured party. *See also* Kasold, *Medical Care Recovery—An Analysis of the Government's Right to Recover Its Medical Expenses,* 108 Mil. L. Rev. 161 (1985).

[18] R. Cartwright & J. Phillips, *supra* note 15, at 6.

[19] *Id.* at 7.

[20] *Id.* at 9. "Courts have held that aeronautical navigational charts—including dangerous mistakes that have resulted or may result in accidents—are products, for the purpose of applying strict liability." *See* Saloomey v. Jeppsen & Co., 707 F.2d 671 (2d Cir. 1983), *quoted in* R. Cartwright & J. Phillips, *supra* note 15, at 9.

[21] R. Cartwright & J. Phillips, *supra* note 15, at 10.

[22] *Id.* at 12.

[23] *Id.* at 14.

As stated in the landmark case of *Schipper v. Levitt & Sons, Inc.*, the courts have considered "that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobile and the pertinent overriding policy considerations are the same." The defendant builder-vendor in *Schipper* was therefore held liable for a breach of the implied warranty of habitability when a baby was severely burned by water that was unnecessarily hot because of the lack of an inexpensive mixing valve.

R. Cartwright & J. Phillips, *supra* note 15, at 14 (discussing *Schipper,* 44 N.J. 70, 207 A.2d 314 (1965)).

[24] Prosser on Torts, *supra* note 16, at 667–78.

because proof problems may be encountered under one theory and not under another, and recovery may be maximized by alleging all possible permissible causes of action. Also, multiple theories of recovery can provide protection in case the statute of limitations bars one action but not another.[25]

## Theories of Recovery

### *Negligence Liability*[26]

"It is generally recognized that a manufacturer or even a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective."[27] An RJA exploring this theory must determine if the elements for a cause of action for negligence exists. The standard formula for this cause of action are stated as follows:

(1) A duty or obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

(2) A failure on the person's part to conform to the standard required; a breach of the duty.

(3) A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.

(4) Actual loss or damage resulting to the interests of another.[28]

The landmark case in this area is *MacPherson v. Buick Motor Co.*,[29] a 1916 New York state court case, in which Judge Cardozo held Buick liable for negligence when the purchaser of the car was injured when a defective wood wheel collapsed. Buick was negligent in failing to inspect the wheel, which was made by a supplier.[30]

The rule that has finally emerged is that the seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective. Since the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable person under the circumstances. . . . He may, for example, be negligent in failing to inspect or test his materials, or the work itself, or the finished product, to discover possible defects, or dangerous propensities; and in doing so he is held to the standard of an expert in the field. At the other extreme, he must use reasonable care in his methods of advertising and sale, to avoid misrepresentation of the product, and to disclose defects and damages of which he knows.[31]

Remember that the existence of a contract between the seller and the buyer does not negate the existence of a tort duty to a third person who will be affected by the seller's conduct.[32]

### *Strict Liability*[33]

What is meant by the term strict liability is tort? In the *Restatement (Second) Of The Law of Torts*, the American Law Institute has defined strict liability in section 402A which has been adopted in most state courts.[34] Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

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[25] R. Cartwright & J. Phillips, *supra* note 15, at 138–39.

[26] Prosser on Torts, *supra* note 16, at 678.

[27] *Id.* at 682.

[28] *Id.* at 164–65.

[29] 217 N.Y. 382, 111 N.E. 1050 (1916), *discussed in* Prosser on Torts, *supra* note 16, at 682–83.

[30] Judge Cardozo stated:

> If the nature of a thing is such that it is reasonable certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case.

*MacPherson*, 217 N.Y. at 389, 111 N.E. at 1053.

[31] Prosser on Torts, *supra* note 16, at 683.

[32] *Id.* at 682.

[33] *Id.* at 692.

[34] Prosser on Torts, *supra* note 16, at 694; R. Cartwright & J. Phillips, *supra* note 15, at 75. Strict liability in tort was established in California more than 20 years ago. In the landmark case of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), in language that is still frequently quoted in opinions throughout the country, the court stated:

> [I]t was not necessary for plaintiff to establish an express warranty. . . . A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. . . . Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

*Id.* 62–63, 377 P.2d at 900, 27 Cal. Rptr. at 700 (citations omitted).

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[35]

This rule does not require all the elements of proof required under the negligence theory in order for a plaintiff to be successful. "Theoretically, strict liability will impose liability for a defective product regardless of fault, and without consideration for the degree of care or caution the seller might have exercised."[36]

A word of caution. This rule has to be thoroughly researched to determine its applicability because, like other rules, it has numerous broad, undefined terms that have to be interpreted and applied to an affirmative claim.

Was the product defective? A product is defective if it is unreasonably dangerous.[37] "Generally, an [unreasonably dangerous] product is a product that, when used in an anticipated or foreseeable way, will not be viewed as safe by a reasonable person."[38] The following reasons could give rise to an unreasonably dangerous therefore defective product: a flaw in the product that was present in the product at the time the defendant sold it;[39] a failure by the producer or assembler of a product adequately to warn of a risk or hazard related to a way the product was designed;[40] or a defective design.[41]

Did the product cause personal injury or property damage? "This element of a strict liability case is straightforward. . . . The defective product must hurt someone, or damage some property, before the strict liability analysis usually may be employed."[42]

Who is a potential defendant? "The seller of the product need not be tied in directly to the buyer, or to the injured person,"[43] but "[o]nly a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind involved in the case is subject to strict liability . . . in tort."[44] While "strict liability originated with actions against assembler-manufactures,"[45] other defendant-parties may be included. For instance, one "who vouches for the manufacturer-assembler by selling a product assembled by another as his own,"[46] "component part sellers" (if the defect is in a component part),[47] retailers,[48] or "endorsers, licensors of trademarks, and licensors of patents."[49]

Was the product sold without substantial change? This question also poses difficulty in interpretation and application to a strict liability case. What happens when there is a substantial modification or alteration to the product? "The analysis" of "substantial modification" considers: all uses that could have been intended or expected by the manufacturer; whether adequate warnings were given for all intended or expected uses; and whether a purchaser's ability to make the expected modification rendered the product not reasonably safe when it left the manufacturer's hand."[50]

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[35] Restatement (Second) of Torts § 402A (1965).

[36] D'Antonio, *Some Practical Guidelines for Minimizing Tort Liability for Defective Products*, Prac. Law., July 1986, at 66.

[37] Prosser on Torts, *supra* note 16, at 695.

[38] D'Antonio, *supra* note 36, at 67. An example would be a highly pressurized bottle of soda, which would be defective if the cap is blown off the bottle prior to opening it because of extreme pressure. If, however, the extreme pressure is created by tossing the bottle around and then the cap comes off when the bottle is rapped against an object to open it, the product is not likely to be considered unreasonably dangerous at the time of sale. *Id.*

[39] "A flaw in a product is defined as an abnormality or a condition that was unintended, and makes the product more dangerous than it would have been as intended." Prosser on Torts, *supra* note 16, at 695. A manufacturing defect exists when a product has an unintended weakness or flaw in its physical makeup that causes it to fail. Examples are: hoses that rupture because in the manufacturing process they were nicked and weakened; bottles of soda that explode because they were pressurized too highly; and axles that break because the steel was formed at too low a temperature, causing fatigue and fracture at a stress point during operation. D'Antonio, *supra* note 36, at 69.

[40] Prosser on Torts, *supra* note 16, at 695, 697. According to the generally accepted view, one who seeks recovery has to prove that the manufacturer-designer was negligent.

> There is one aspect of this so-called strict liability in addition to the matter of defenses and limitations on liability that distinguish it from negligence liability. When a manufacturer or assembler markets without adequate warnings, a reseller is subject to liability without negligence in reselling the product without adequate warning. Thus, all those in the marketing chain subsequent to a sale by the manufacturer are liable without negligence for the negligence of the manufacturer in failing to warn or adequately to warn.

*Id.*

> Manufacturers are obligated to include adequate and clear warnings about dangers that may not be obvious to intended or foreseeable users of their products, and labeling which properly instructs the potential user. . . . Failure to warn cases focus on the universe of potential users, uses, and known misuses of the product, and the likelihood that the warning, if present, would have made the product reasonably safe, or that an amendment of an existing warning should have been clearer and would have prevented the product from being unreasonably dangerous.

D'Antonio, *supra* note 36, at 70.

[41] Prosser on Torts, *supra* note 16, at 695, 698.

> There are essentially two different approaches that have been utilized in evaluating design hazards—a consumer-contemplation test and a risk-utility test. Under the consumer-contemplation test . . . a product is defectively dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics. . . . Under the [risk-utility test], a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product.

*Id.* at 698–99.

[42] D'Antonio, *supra* note 36, at 67.

[43] *Id.*

[44] Prosser on Torts, *supra* note 16, at 705.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 704.

[49] *Id.* at 707.

[50] D'Antonio, *supra* note 36, at 68, 69.

Strict liability is not absolute liability, but it is an alternative theory of recovery to a theory based on negligence.

*Breach of Warranty Liability*[51]

Historically, a cause of action for breach of warranty was a tort but then became a hybrid between contract and tort. "From the recent cases it is apparent that a breach of warranty resulting in injury is now also considered as a tortious wrong separate and apart from the sales contract."[52]

When applying this theory of recovery to an affirmative claim, the RJA has to look for breaches both in expressed warranty and in implied warranty. These terms are defined and discussed in the Uniform Commercial Code (U.C.C.)[53] or in state consumer protection statutes; sources that can provide a RJA a starting point to research this theory.

Section 2–213 of the U.C.C. defines express warranty as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. . . .
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[54]

The fact that recovery based on a breach of an express warranty is substantiated does not bar liability on the previously discussed theories of products liability. Regardless of the theory or theories relied on by the RJA to assert recovery, it is necessary for the RJA to establish that the personal injury or property damage was proximately caused by the product in question.[55]

> There is a breach of an express warranty when the goods do not conform to the standards established by the express warranty. . . . To constitute a breach of an express warranty, there must be a departure of the product from the standards stated in the express warranty and this departure must be as to a material matter.[56]

Implied warranties "that arise under Code §§ 2–314 [and 2–315] are 'ipso facto' warranties that arise by virtue of the fact that a contract for sale is made, as contrasted with the 'contractual' warranties that arise because they are a part of the basis of the bargain."[57]

> At common law there were at first no implied warranties and the concept of the law was literally "let the buyer beware," but with time the seller was deemed to make implied warranties. These have been codified by the Code as implied warranties of merchantability and of fitness for a particular purpose.[58]

Section 2–314 of the U.C.C. defines implied warranty of merchantability as follows:

> (1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of good or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

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[51] R. Anderson, Uniform Commercial Code §§ 2–313, 2–314, 2–315 (3d ed. 1983).

[52] *Id.* § 2–313:5, at 11.

[53] *Id.* at 1, 94, 283. "The Uniform Commercial Code is generally regarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to persons or harm to a tangible thing other than the defective product itself." Prosser on Torts, *supra* note 16, at 680.

[54] All states have either adopted the U.C.C. verbatim or have similar state statutes.

[55] R. Anderson, *supra* note 51, at 11, 167.

[56] *Id.* § 2–313:19, at 18–19.

> There is no requirement that a buyer rely on express warranty and any such pre-Code requirement has been abandoned by the Code. . . . In order to eliminate the difficulties and problems of affirmatively showing "reliance" in order to establish an express warranty, the Code has substituted the less stringent requirement of establishing only that a particular statement or representation be a part of the basis of the bargain. . . . It was the intention of the drafters of the U.C.C. not to require a strong showing of reliance. In fact, they envisioned that all statements of the seller became part of the basis of the bargain unless clear affirmative proof is shown to the contrary.

*Id.* §§ 2–313:48 to 2–313:49, at 42–43.

[57] *Id.* § 2–314:3, at 103.

[58] *Id.*

(3) Unless excluded or modified (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.[59]

"The implied warranty of merchantability arises by operation of law and not by agreement of the parties,"[60] and, like an express warranty, there is the possibility, if facts will support the particular case, that a plaintiff may recover on other theories of products liability. "The sole criteria for the existence of the implied warranty of merchantability is that there be a contract for the sale of goods and that the seller be a merchant seller,"[61] i.e., "a merchant who sells regularly the kind of goods in question."[62] Again like express warranty, reliance by the buyer is not required to impose liability upon a warranty defendant.[63] For the RJA, it is important to research the case law and applicable statutes to determine who are the parties entitled to sue and who are the parties liable for breach of warranty.

Section 2–315 of the U.C.C. defines implied warranty of fitness for a particular purpose as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgement to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The implied warranty of fitness for a particular purpose, like implied warranty of merchantability, arises by operation of law and not by agreement of the parties, and "is to be contrasted with the implied warranty of merchantability by a regular merchant seller, which includes a warranty of fitness for ordinary purposes."[64] The existence of a breach of this warranty and resultant property damage or personal injury does not negate other theories of products liability.

> As the implied warranty of fitness for a particular purpose is, as its name, indicates, a warranty that the goods will meet the purpose of the buyer, it is obvious that there is a breach of the warranty when in fact the goods are not fit for the particular purpose of the buyer. If the plaintiff establishes that the goods are not fit, he has sustained his burden of proof with respect to the warranty. There is no need to prove that the goods malfunctioned or that there was a defect.[65]

"The warranties of merchantability and of fitness for a particular purpose are distinct . . ., [and] may co-exist and be cumulatively available to the plaintiff"[66] and to the RJA. The RJA cannot lose sight of the following facts in determining the elements of each warranty: proximate cause, application of privity, potential defendants, buyer's reliance, seller's knowledge, and resultant personal injury or property damage.[67]

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[59] The RJA has to pay attention to what law governs to properly analyze the case.

> Whether a breach of warranty suit is regarded as a contract or a tort action becomes important in determining what law is to govern the action if the court is going to follow the traditional rules of conflicts of laws. A court following traditional conflict of laws rules and classifying the warranty action as contractual, will apply the law of the state of contracting to determine the warranty rights and liabilities; and the law of the state of injury if the action is one for tort.

*Id.* § 2–314:22, at 130.

[60] *Id.* § 2–314:25, at 133. "An express warranty and the implied warranty of merchantability are generally cumulative and the facts that establish the breach of one ordinarily establish a breach of the other." *Id.* § 2–314:46, at 148.

[61] *Id.* § 2–314:51, at 159.

[62] *Id.* § 2–314:52, at 159.

[63] *Id.* § 2–314:55, at 161. "It is not necessary to show that a person in the consumer chain 'relied' on the manufacturer's implied warranty because the fact that the injured person stays in the presence of the product is sufficient evidence that he relied on its being fit for use." *Id.* § 2–314:55, at 162.

> Initially the question of who may sue and who may be sued for breach of warranty is a matter of general contract law, the principles of which have not been displaced by the Code and therefore continue in force. . . . A constantly growing number of courts have flatly abandoned the privity concept. In a number of states this result has been attained by statute.

*Id.* § 2–314:92, at 199.

> The modern trend is to abolish the requirement of privity of contract and to adopt foreseeability as the criterion for liability. There is a growing trend to eliminate the requirement of privity when the plaintiff suing the manufacturer is a third person injured by the defective product, such as a bystander, pedestrian, or driver of the other car, or a garage mechanic working on the car, where such third person is injured because of a defect in the car, produced by the manufacturer. Privity is not required in an action on an implied or an express warranty.

*Id.* § 2–314:97, at 203.

[64] *Id.* 2–315:3, at 288.

[65] *Id.* 2–315:22, at 298. "Proximate cause has the same meaning as in the case of the implied warranty of merchantability." *Id.*, § 2–315:24 at 299.

> A warranty of fitness for a particular purpose arises when (a) the buyer relies on the seller's skill or judgement to select or furnish suitable goods, and (b) the seller at the time of contracting has reason to know the buyer's purpose and that the buyer is relying on the seller's skill and judgement. It is mandatory that the elements specified in UCC § 2–315 be satisfied in order to give rise to a warranty for a particular purpose; with the consequence that no such warranty arises where the seller had no special skill or knowledge, the buyer did not rely on the seller's skill or knowledge, or the buyer purchased the goods for a general and not a particular purpose.

*Id.* § 2–315:29, at 301–02.

[66] *Id.* § 2–315:20, at 296.

[67] When one thinks of a remedy for breach of warranty, expressed or implied, one thinks of a remedy for the damaged product, *e.g.*, the drive train on an automobile fails and the car is under an express warranty of "five years or 50,000 miles." Nevertheless, there are remedies for personal injury or property damage.

> An action may be brought for breach of warranty although the damages sustained are personal injuries. This is directly recognized by a combined reading of UCC § 2–714 and § 715. Additional confirmation is provided by UCC § 2–719.
>
> UCC § 2–714(3) entitles the buyer to recover consequential damages as defined in UCC § 2–715. The latter section declares that "(2) . . . damages resulting from the seller's breach include . . . (b) injury to person . . . proximately resulting from any breach of warranty." The recoverability of damages for injury to the person is implicit in UCC § 2–719(3) which specifies when a "limitation of consequential damages for injury to the person" is to be deemed unconscionable.
>
> Although the above provisions are stated in terms of "seller" and "buyer" and thus apparently assume the existence of privity of contract between the plaintiff and the defendant, there is no reason to believe that a court that would ignore the absence of privity would refuse to allow recovery for personal

### *Fraud or Deceit*[68]

An RJA will probably not rely on this theory of recovery as much as the previously discussed theories. "The action for [fraud or] deceit is the oldest action by a purchaser against a seller, either immediate or remote [and] [i]n some cases, especially those involving economic loss, an action for fraud may be the only one available to the plaintiff who no longer enjoys the advantage of a warranty."[69] Even though this theory appears to be used more in products liability cases involving economic loss, there may be situations where recovery for personal injury or property damage lies through the theory of fraud. For example, state consumer protection statutes may offer a remedy based on fraud.

> In *Pope v. Rollins Protective Services Co.*, the defendant persuaded the plaintiff, a sixty-year old widow, to install its burglar alarm system. He informed her that even if the exposed wires of the system were cut, the alarm would still go off, and the recorded message relayed by the system would be received by Rollins personnel, who would notify the police immediately. Instead, the wires, when actually cut by burglars, shut off the outside alarm and the message was received by an answering service that did not reach the police until it was too late to prevent the burglars from escaping. In the meantime, they held a gun to the plaintiff's head, robbed her, and searched the house.
>
> Plaintiff claimed that the misrepresentation induced her to lease the system. To recover under the Texas Deceptive Trade Practices Act, the plaintiff was required to show that the defendant's representations were a "producing cause" of her damages. . . . Affirming the jury verdict, the court observed that had the plaintiff known of the malfunction that an easy snipping of the wires would cause, she would have had the wires run behind the wall or would even have installed a more effective system. It held that "the natural result of Rollin's misrepresentations was Pope's reliance on a deficient system and the exploitation of those deficiencies by burglars to her detriment.
>
> The jury awarded Mrs. Pope $15,250 for loss of property, and $150,000 for past and future mental anguish based . . . on the testimony of a psychiatrist that a stress disorder occasioned by the life-threatening situation would take years to overcome.[70]

### Research Materials

It is a major undertaking to educate yourself about a product, the technical data, codes, safety standards, reports, etc. If plaintiff's attorney refuses to represent the government's interest, the RJA has to "arm" himself or herself with this data to evaluate a products liability case. The following research materials may be useful to the RJA in this endeavor.

(1) DIALOG of Dialog Information Services, 3460 Hillview Avenue, Palo Alto, CA 94304. All the technical information that is needed on liability and medical aspects is available.

(2) WESTLAW, MEDLIARS, and DIALOG on in-house computers.

(3) Lawyers Desk Reference (two volumes), which contains the names and addresses of most associations involved in manufacturing, safety, and engineering in the United States and elsewhere. It also lists experts in almost every discipline, and it has government-prepared guidelines to literature, liability checklists, safety standards, codes, and so forth.

(4) Copies of the patent of the product in question from the U.S. Patent Office. Every patent issued has a brief recitation of the state of the art for that type of product, and often it lists other patent numbers for similar products. Obtaining other patents is mandatory. Frequently, they will reveal safer designs or other safeguards that could have prevented the accident.

(5) Foreign patents . . . may be obtained from the Rapid Patent Service, Research Publications, Inc., 1921 Jefferson Davis Highway, Suite 1821D, Arlington, VA 22202.

(6) Indexes to the literature of industry trade associations. Generally you will find discussions in the relevant literature pertaining to the very risk or danger at issue and how it could have been avoided. Consult *Encyclopedia of Associations*, published by Gale Research Company, Book Tower, Detroit, MI 48226, for a complete listing of associations.

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injuries in a non-privity case. A contrary conclusion would be illogical and in effect would be reviving the requirement of privity by making the non-privity plaintiff "inferior" to the privity plaintiff. It would be contrary to the pre-Code law of damages that is not displaced.

*Id.* § 2–314:143, at 238.

Section § 2–318 of the U.C.C. provides for third party beneficiaries of expressed or implied warranties when it states:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

When the product that has caused personal injury or property damage is a product contracted for by the United States, it is important for the RJA to review the contract entered into by the United States and the manufacturer/independent contractor. The contract may contain several provisions that specifically address available remedies, *e.g.*, insurance, disclaimers, etc. Also, the RJA has to determine if the manufacturer/independent contractor can assert any defenses, especially any defense that would put the manufacturer contractor "in the shoes of the United States," thus enabling them to argue defenses available to the United States.

[68] Fraud is

> [a]n intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right [; a] false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or *by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.*

Black's Law Dictionary 594 (5th ed. 1979) (emphasis added).

[69] R. Cartwright & J. Phillips, *supra* note 15, at 30; *see also* R. Anderson, *supra* note 51, § 2–313:9.

[70] R. Cartwright & J. Phillips, *supra* note 15, at 32–33 (discussing *Pope*, 703 F.2d 197 (5th Cir. 1983)).

Most associations have annual conferences. Get copies of the minutes or transcripts of their meetings, since they may reveal the very hazard involved in your product and the safeguards that would have eliminated the hazard.

(7) The monthly trade magazine of the association in question for the past several years. You may find articles written by experts about the danger of the very product with which you are concerned.

(8) Pertinent government agencies like the Consumer Product Safety Commission. A list of government agencies is in *Information U.S.A.*, published by Viking Penguin, Inc., 299 Murray Hill Parkway, East Rutherford, NJ 07073.

(9) Data sheets outlining hazards connected with the use of products, published by the National Safety Council, 444 N. Michigan Avenue, Chicago, IL 60611. These contain many safety articles concerning product hazards. The index to such data can be obtained from the Council.

(10) [American Trial Lawyers Association (ATLA)] Products Liability-Medical Negligence Exchange, 1050 31st St., N.W., Washington, DC 20007. For a fee, the Exchange will furnish you with information concerning cases similar to yours.

(11) *Product Liability—The First Twenty-Five Years* (two volumes), published by ATLA. It sets forth summaries of cases for the last 25 years up to 1983 reported in the *ATLA Law Reporter.* For more recent summaries, consult the *ATLA Products Liability Law Reporter.* [71]

### Conclusion

People are injured and government property is damaged or lost through defective products. When these unfortunate events occur, products liability law has to be consulted. Products liability law provides several possible theories of recovery: negligence liability in tort; strict liability; liability based on expressed or implied warranty; and fraud or deceit. Any one or more of these theories may be applicable to an affirmative claim, and an RJA has to research them all to determine if any of them might be meritorious. This area of law cannot be overlooked, as it is another source of recovery.

[71] Cartwright & Phillips, *The Expert in a Product Case,* Trial, Nov. 1986, at 23, 24.

# The Judicial System of Nigeria

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### Introduction

Throughout a rather turbulent recent history, the Nigerian judicial system remains a firm pillar of law, order, and justice in civilian and military government. This article describes the institutions responsible for that phenomenon. To understand this judicial system, however, it is necessary to understand Nigeria's geography and history that have shaped it.

### Geography

Nigeria lies between 4°N and 15°N latitudes and 2°20′ E and 14°40′ E parallels. It is in West Africa. It is bordered by the French-speaking countries of Benin Republic to the west, Niger and Chad to the north, and the Cameroons to the east. The Atlantic provides Nigeria's 1500 kilometers of coastal boundary to the south. The country covers an area of over 359,660 square miles. [1] Nigeria has a population of over 100 million. The next three largest cities in Africa after Cairo, Egypt, are in Nigeria. The country is made up of nineteen states and a federal capital, now being moved from Lagos to Abuja. The government is a federal presidential democracy, often punctuated by military rule. There are three tiers of government—federal, state, and local. There are over two hundred ethnic communities in the country, the largest groups being Hausa-Fulani, Yoruba, and Ibo, who account for over forty percent of the national population. Nigerians have diverse religious beliefs. There are adherents of traditional African religions, Muslims, who are by far the majority in the north, and Christians, by far the majority in the middle-belt and south. The Constitution recognizes English, Hausa, Yoruba, and Ibo as official languages, but English is taught in the country's twenty-eight universities and in all other levels of education.

### History

Before the coming of the British, [2] the area now known as Nigeria comprised the Sokoto Califate (eastern Songhai Empire) and Kanem-Bornu Empire to the north, and Oyo, Benin, and Opobo Kingdoms to the south. There were also numerous other groups that were never parts of either the empires or kingdoms. These comprise the middle-belt of Nigeria today.

By 1862, the British had, through gunboat diplomacy, firmly established their rule over the area. It was not until

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[1] Nigeria is about the combined size of Alabama, Florida, Georgia, South Carolina, North Carolina, Tennessee, Kentucky, and Virginia.

[2] The Europeans came to the west coast of Africa much earlier, but 1760 is generally accepted as when they started showing colonial intentions.

1914, however, that they were able to bring the Northern Protectorate, the Southern Protectorates, and the Colony of Lagos into one unit called Niger area, later Nigeria. By his policy of indirect rule,[3] Sir Lord Frederick Lugard as Governor General consolidated British authority over Nigeria. Nigeria became a federation in 1954. The country was divided into the Northern, Eastern, Western, and later, Mid-Western regions.[4] Even then, government was three-tiered—the federal government, at Lagos, as capital; the regional government; and the third tier in the provinces.

Nigeria gained independence from the British on 1 October 1960 and became a Republic on 1 October 1963.[5] The country adopted the Westminster model of government, but soon realized that for a heterogenuous society like Nigeria's, the Westminster type of government would not work. States were thus "created" in 1967, just in time to save the country from disintegration due to a thirty-month civil war. On 1 October 1979, a new constitution—the Presidential Constitution—came into effect. The Constitution is modeled after the United States Constitution. A National House of Assembly, composed of a Senate and House of Representatives at the Federal level and State Houses of Assembly at the State level, became operative. Though the country is currently under military rule, only constitutional provisions relating to partisan political parties and political-elective offices have been suspended.[6]

## Sources of Nigerian Law[7]

### *Legislation*

Upon colonization of Nigeria, the British introduced the Common Law into the country. Using the Foreign Jurisdiction Act of 1830, which allowed the Governor General to make laws for the colonies, the British enacted the Interpretation Act[8] for Nigeria. By that act, all laws that were in force in England on 1 January 1900 were to apply to Nigeria. Section 45(1) of that Act allowed change of only names, locations, counties, offices, and penalties (higher), and other changes as may be necessary to render the same applicable to the circumstances. The various regions adopted the act as their laws.[9] Later, but before independence, a number of English Acts or Orders in Council were enacted that applied directly to Nigeria. Although after independence there were many acts passed by the regions in an effort to reflect indegenous values, some of the English laws remain today.

Little new legislative enactment was done by the second Nigerian civil legislature from 1979–1983. The decrees and edicts that the military government had promulgated between 1970 and 1979 were reviewed and some passed as Federal Acts or State Laws, while others were abrogated. That period of nine years has therefore remained a period of the greatest law reform in the country. The National Youth Service Act of 1973, the Land Reform Act of 1972, the Marriages Act of 1968, and the Companies' Act are examples of this.

### *Criminal Law Legislation*

Nigeria has two penal laws, one for the north and the other for the south. It has already been stated that there are more Muslims in the north and more Christians in the south, and that all laws in force in Britain on 1 January 1900 applied to Nigeria. While the British allowed some customary practices to apply in the civil affairs of the various ethnic groups, British criminal law, which was a potent instrument of colonialism, was strictly enforced. Southern Nigeria achieved self-governing status in 1956. English law then in force was only slightly modified and continued to apply both in the western region and the eastern region. In 1959, Northern Nigeria also became self-governing. The Muslims in the north then became uncomfortable with a criminal law system that they had always considered incompatible with their way of life. They advocated the passing of Islamic legislation that would reflect their ethics and values. But the wholesale passage of Islamic legislation would have put the large non-Muslim community in the same position that the Muslims had rejected as incompatible with their culture. The British had a solution to the problem. British criminal law had been modified over the years in a similar situation in India and was operating satisfactorily. The Indian situation had in turn been successfully applied in an African setting in the Sudan. Faced with a similar situation in Northern Nigeria, they considered the Chief Justice of the Sudan, himself a Muslim, best qualified to draft a penal law for the north. The compromise Penal Code of Northern Nigeria that was then enacted remained in force until the creation of states. Though each state now has its own penal law, the penal laws of the northern states reflect common similarities with the original Penal Code, while those of the southern states reflect common similarities with the original British Criminal Code.

Though the overall effect of maintaining law and order by apprehension, trial, and punishment of criminals is achieved by either system in its appropriate territory, there are significant differences between the codes. For instance, adultery is a crime in the north, but in the south it is a tort. "Murder" under the Criminal Code is broader than "culpable homicide punishable by death" under the Penal Code. There is also a marked difference between "theft" and "stealing."[10] Territorial jurisdiction thus becomes very important in border states. In *Njovens vs. State,*[11] the

[3] This system ensured ruling the natives through the use of native kith and kin, often not acting according to their will.

[4] The Mid-Western region was established in 1963.

[5] Nigeria's National Day is 1 October 1960.

[6] The military has promised restoration of these on return to civil rule.

[7] These are: statutory legislation; ordinances of Lagos Settlement 1862–1894; proclamations 1900–1913; regional laws 1954–1963; Federal Parliament 1960–1963; decrees and edicts of military governments; acts and laws of Nation and State Legislatures 1979–1983; and decrees and edicts of military governments.

[8] Also called "Common Law Application Law" § 45(1) Cap. 89.

[9] The regions adopted the act as follows: North—High Court Law No. 8 of 1955; West—Law of England (Application) Law Cap. 60; and East—High Court Law No. 27 of 1955.

[10] Stealing under the Penal Code requires "an intent permanently to deprive"; theft under the Criminal Code requires only fraud, even if temporary.

[11] (1975).

appellant police officer Patrick Njovens, using a police vehicle for armed robbery, hit and killed a traffic warden at a post regarded as a boundary between Kwana State in the north and Oyo State in the south. At his trial for murder and conspiracy to commit armed robbery in Oyo State High Court, Njovens moved for dismissal for lack of territorial jurisdiction. Refusing the motion, the court held that rather than both border states courts lacking jurisdiction, they both had jurisdiction. The court also stated that the defendant could not use subtle tactics to pick and choose jurisdiction and punishment, or to avoid trial altogether by denying jurisdiction of both Oyo and Kwana states courts. The Federal Court of Appeals affirmed. In another interesting case, *Jos Native Authority,*[12] a businessman was sued in Lagos for adultery as a tort. Before disposal of the case, the plaintiff was transferred to Jos in the north, and decided to abandon the suit. On a later business trip to the north, the businessman was apprehended at a rendezvous with the same lady for another act of adultery in Jos. He was indicted, convicted, and imprisoned.

There are also differences between the trial procedures under the two codes. Both meet the fair trial requirements of the Constitution, however, and both are taught at the Nigerian Law School. The Nigerian Bar Association has been advocating unification for years and may soon succeed due to renewed vigor and blessing of the Law Review Commission.

It has been easier to pass uniform laws since the creation of states. This is clearly because the state governments' relations with the federal government are more cordial under military rule than they were between regional and federal governments.[13] Current laws relating to drugs and traffic offenses, offenses relating to public highways, waterways, and airports, as well as natural resources exploitation, are examples of uniform laws.

### *Permitted Local Customs (Customary Law)*

When the British came to Nigeria, they prohibited some of the local customs they found, under the doctrine of repugnancy. Such customs as traditional religious rites, trial by ordeal, and paternity by dowry were declared "repugnant to equity, good conscience, and natural justice."[14] Such customs as those relating to commerce and labor were modified and strictly regulated by English law. They were necessary for the survival of colonialism. The result was that commercial and labor laws have remained uniform throughout the country. Customs relating to property (under custom separate from land) ownership and transfer, land (under custom inalienable), succession, marriage, peers, and chieftaincy were left strictly alone. These are reflected in the appropriate laws of the various states. Islamic personal law falls under this category and is thus customary law. Customary and Islamic personal law cases are the domain of Customary Courts and Sharia Courts, respectively. Marriages under the Marriages Act do not fall within the jurisdiction of customary law, even if customarily celebrated. Christian marriages are mostly under the Act.

### *Other Sources*

Other sources of Nigerian law are similar to those in other Common Law countries. These include judicial interpretations of the superior courts, case law, writings of legal scholars, and treaties to which Nigeria is a member, if enacted by the National Assembly as domestic law.[15]

### *Nigerian Law Reform*

Updating the law in Nigeria has been a very slow process. For a decade after independence, it was clear that Nigerians were suspicious of attempts to update the law. Some felt that changes desired by a few might end up being forced on the majority as new law. Thus, over a decade after independence, Nigeria was still saddled with old laws that were entirely British in letter and in spirit. For instance, in a society where the custom allows polygamy, the law against adultery and illegitimate children remained in force until 1979. Due to either oversight or ineptitude, prohibitions against witchcraft still remain in the statute books. The progress of a Law Review Commission set up in 1978 has been unsatisfactory, but there is renewed vigor both to reconstitute the Commission and to review the law.

## The Judiciary

The judiciary in Nigeria, like elsewhere in the Common Law jurisdictions, is a non-partisan department, encased in an otherwise partisan set-up. The Minister for Justice, who is a political appointee, administers the judiciary, which must be impartial. Appointment of judicial officers may also be politically motivated. The conflict presented by this situation is always a test of the true independence of the judiciary.

The Nigerian judicial system follows the principle of stare decisis, so lower courts are bound to follow the decisions of the higher courts. The Constitution divides the courts into superior courts[16] and lower courts. It is, however, simpler to categorize the courts according to the level of government mandated to establish them, namely federal, state, or local. The characteristics will in any case remain the same. The highest courts have unlimited jurisdiction to hear and to determine cases and award remedies or punishments. Those below are limited in subject matter jurisdiction and the type of remedy or degree of punishment they can award. They are supervised by and subject to the appellate jurisdiction of those on top. Superior courts keep records and can punish for contempt in or out of court. Lower courts are not statutorily required to keep records; they can punish only contemptuous acts that occur in their presence.

### *Powers of the Judiciary*

The Constitution of Nigeria provides that the judicial powers of the federal government shall be exercised by the federal courts and those of the state governments by the

[12] (1956).

[13] Absence of partisan political wranglings and the military discipline allows more speedy consideration and passage of decrees and edicts.

[14] Ordeal, Witchcraft, and Juju Proclamation Act of 1903.

[15] § 12 Constitution of Nigeria. (Sections shown are that of the Constitution. Others are designated.)

[16] § 6(1).

state courts.[17] Those courts are specifically listed[18] and their establishment mandated while the states have the power to abolish any existing ones not deemed necessary.[19] The Constitution also declares that the judicial powers vested in the Nigerian courts "extend to all inherent powers and sanctions of a court of law," and, "extend to all matters between persons or between governments or authority and any person in Nigeria and to all actions and proceedings thereto for the determination of any questions as to the civil rights and obligations of that person." The superior courts can, therefore, carry out judicial review of the exercise of power by the executive[20] and the legislature.[21] An example of this is the case of *Federal Minister for Internal Affairs vs. Shugaba Daraman.*[22] In that case, the Speaker of Bornu State House of Assembly was ordered deported on an allegation that he was a Chadian. Affirming the judgment of the High Court, the Federal Court of Appeals held that by inpounding the Nigerian passport of the respondent without proof that he was a Chadian, the executive had infringed respondent's constitutional right of freedom of movement. The court also affirmed the punitive damages awarded against the government.

The constitutional limitation on legislative power through review by the courts is illustrated in the following two cases. In *Adesanya vs. President of the Federal Republic,*[23] the court held that the proof required to halt the passage of a proposed law by the National Assembly was that such law is unconstitutional. The only locus standi required was that plaintiff be a Nigerian citizen. He was not required to show how the law would affect him, or any other standing to challenge the law. The Supreme Court upheld the decision of the Federal Court of Appeal in the second case, *Senate of the National Assembly vs. Tony Momoh,*[24] that the proposed legislation subjecting states to federal legislation on a matter of exclusive jurisdiction of the state legislature was contrary to the principles of Nigeria's federalism and thus unconstitutional.

### *The Hierarchy of Nigerian Courts*[25]

The Supreme Court of Nigeria. Prior to independence, cases appealed from Nigeria went to the West African Court of Appeals, and from there to judicial Committee of the Privy Council of the British House of Lords. After independence, cases went to the Federal Supreme Court which, when Nigeria gained republican status, became the Supreme Court of Nigeria. The legal effect of this is that cases decided by foreign courts no longer have binding effect on the Supreme Court of on Nigerian lower courts. Commonwealth and United States cases are widely and freely cited as persuasive authorities, however.

The Supreme Court has original and exclusive jurisdiction of disputes between the states, and between the states and the federal government.[26] The Court does not have original jurisdiction in any other case. It is the final arbiter of whether any executive action, or any law passed or proposed to be passed by any legislature, is constitutional. In its appellate jurisdiction, it is the final court of law to determine criminal or civil cases from the Federal Court of Appeal. This includes the determination of whether a person has been validly elected to, or has ceased to be the holder of the office of the President, or federal or state legislative house.[27]

The Chief Justice of Nigeria heads the Supreme Court. The Constitution provides for no more than fifteen other justices of the court, three of whom must be learned in Islamic and Customary Law.[28] The Court is fully constituted when five justices are seated. Seven justices are required to sit, however, when the following cases are determined: a criminal case where the only or likely punishment is death; constitutional application or interpretation; validity of election to a legislative seat; or vacancy on occupancy of the presidency.[29] The procedure of the Supreme Court is regulated by the Rules of Procedure of the Supreme Court of Nigeria. This is similar to the "White Book" Rules of Procedure of the Judicial Committee of the Privy Council of the House of Lords.

The Chief Justice of Nigeria is appointed by the President at his discretion, subject to confirmation by a simple majority of the Senate. Justices of the Supreme Court are appointed by the President on the advice of the Federal Judicial Service Commission subject to approval by the Senate. Only practitioners of at least fifteen years standing are qualified to be appointed to the Supreme Court.[30]

The Federal Court of Appeals. To be qualified for appointment as a Justice of the Federal Court of Appeals, one must have at least twelve years of law practice in Nigeria. The President of the Federal Court of Appeals is appointed by the President of Nigeria on the advice of the Federal Judicial Service Commission subject to approval by a simple majority of the Senate.[31] The constitution requires the National Assembly to prescribe the number of justices, subject

[17] § 6(1)–(2).

[18] § 6(5)(a)–(f).

[19] § 6(4)(a)–(b).

[20] § 5.

[21] § 4(8).

[22] (1981) 2 NCLR 259.

[23] (1981) 2 NCLR 358.

[24] (1981) 1 NCLR 105.

[25] A hierarchial diagram of Nigerian courts is at Appendix A at end of article.

[26] § 212.

[27] § 212.

[28] § 210.

[29] § 212.

[30] § 211(1)–(2).

[31] § 218.

to a maximum of fifteen. Three judges must be learned in Islamic law and in Customary law.[32]

The Federal Court of Appeals has four chambers throughout the country. The Court is fully constituted when three justices are seated. If the issue in a case involves either Islamic personal law or Customary law, there must be three justices learned in the appropriate law seated. The court does not have original jurisdiction. As the second highest court in the hierarchy, it hears appeals from the Federal High Court, the States' High Courts, the States' Sharia Courts of Appeals, and the States' Customary Courts of Appeals.[33] It also hears appeals from the Code of Conduct Tribunal and from tribunals or other courts of law established by the National Assembly, including Courts-Martial.[34]

The Federal High Court and the States' High Courts. These are the lowest courts in the federal system. As the heading indicates, federal and state court systems interweave at this point. There is also an area of concurrent legislative jurisdiction. The concurrency of jurisdiction of the States' High Courts and the Federal High Court does not arise from concurrency in the legislatures, however.[35]

The Federal High Court consists of the Chief Judge and other judges as may be prescribed by the National Assembly. All the judges of the Federal High Court are appointed by the President on the recommendation of the Federal Judicial Service Commission. Ten years of practice at law is the minimum requirement for appointment as a judge of the Federal High Court.[36] The Federal High Court has jurisdiction over matters connected with or pertaining to the revenue of the federal government, as well as on such matters as may be prescribed by the National Assembly.[37] There are four chambers of the Federal High Court; two are located in the north and two are in the south. The territorial jurisdiction of any of the Chambers of the High Court is not restricted by its location. The Federal High Court has powers of a High Court of a State with respect to matters upon which the National Assembly has given it jurisdiction. A single judge constitutes a full court.

Judges of the States' High Courts are appointed by the state governors on the recommendation of the State Judicial Service Commission. For the appointment of the Chief Judge of a State High Court, the governor must have the approval of a simple majority of the House of Assembly of that state.[38] The qualification for appointment as judge of a State High Court is the same as that for a Federal High Court.[39] In practice, an appointee must have practiced as a government counsel, magistrate, or in private capacity for at least ten years. Composition of State's High Courts is the same as that of their federal counterpart.

States' High Courts have unlimited jurisdiction to hear and to determine any civil proceedings in which the existence or extent of legal right, power, duty, liability, privilege, interest, obligation, or claim is in issue. This jurisdiction extends to whether a person was elected to an office or any legislative house. In criminal matters, the jurisdiction includes proceedings involving or relating to any penalty, forfeiture, punishment, or other liability with respect to an offense committed by any person, including violation of laws made by the National Assembly. High Courts have supervisory and appellate jurisdiction on all courts below except Sharia or courts administering Islamic personal law.[40]

The Federal High Court and States High Courts have concurrent jurisdiction. Some have argued that this is not true, but these arguments are wrong. In *Shugaba's* case, the government argued that the issue of citizenship was an exclusive federal legislative matter that could be brought only to the Federal High Court and that the High Court of Borno State lacked jurisdiction. The Supreme Court upheld the ruling of the Borno State High Court that the High Courts have concurrent jurisdiction. The majority judgment read in part as follows:

> There is no justification why a citizen whose fundamental rights have been infringed by the Federal Government must be forced to file his action in a Federal High Court. He might prefer to go to a State High Court and justifiably prefer to go to a Federal High Court when he is a victim of state tyranny. This choice would appear to best protect his liberty which the Constitution has found it necessary to specially preserve and which it is the duty of the courts to preserve."

Professor B.O. Nwabueze[41] has argued, and I agree with his view, that section 42(2) of the Nigerian Constitution confers the power of enforcing fundamental rights of Nigerian citizens, including freedom of movement. Section 277(1), interpreting "High Court," includes "Federal High Court." There has been no contrary interpretation by the superior courts. The High Courts, therefore, have concurrent jurisdiction, with the exception that revenue matters are expressly assigned to the Federal High Court.

Courts-Martial. Courts-martial are an integral part of the federal judicial system. Under section 33 of the Constitution, a person can be tried only by a court of competent jurisdiction. Courts-martial are not listed under section 6 of the Constitution as superior courts. For this reason, some have argued that courts-martial are not courts of competent jurisdiction for the trial of criminal offenses, much less to award the death penalty. This view is misleading. Under the provisions of section 6(5)(g) of the Constitution, a court

[32] § 217.

[33] § 219.

[34] § 219; and Federal Court of Appeals Act of 1964.

[35] The concurrency of jurisdiction is conferred by the Constitution, independent of and without reference to the concurrent legislative nature of the issue.

[36] § 221.

[37] §§ 230–231.

[38] § 235(1)–(2).

[39] § 235(3).

[40] § 237.

[41] B.O. Nwabueze, The Presidential Constitution of Nigeria 298 (1982). Professor Nwabueze is a Professor of Law at the University of Lagos.

not expressly listed under section 6(5)(a)–(f) may nevertheless be "authorized by law to exercise jurisdiction in matters with respect to which the National Assembly may make laws." The Nigerian Army Act (NA Act) of 1960 authorizes courts-martial to exercise jurisdiction in matters relating to military discipline and to award the punishments provided by the Act.[42] Also, by virtue of the provisions of section 275 of the Constitution, all institutions, laws, authorities, courts, and powers that were existing before the coming into effect of the 1979 Constitution, except otherwise abrogated, are continued. They will continue to exist and function as if created by the 1979 Constitution. The provisions creating courts-martial under section 165 of the Republican Constitution of 1963 were therefore saved. For the foregoing reasons, courts-martial are courts of competent jurisdiction with respect to military disciplinary proceedings. In *Akpowevwe vs. State,*[43] the Federal High Court, following the decision of the Federal Court of Appeal in *Bello vs. State,*[44] held that courts-martial were tribunals authorized to be established under section 6(5)(g) to exercise jurisdiction over discipline of the military.

Courts-martial in the Nigerian Army are categorized as General, District, and Field General. The first two correspond to and are similar in composition and powers with the U.S. General Courts-Martial (GCM) and Special Courts-Martial. There is no Bad-Conduct Discharge Special Court-Martial in the Nigerian Army. The Field General Court-Martial is convened during combat[45] and has all the powers of a GCM.

Procedure in a Field GCM is simplified because of exigency of combat. By virtue of section 96 of the NA Act, rules of evidence applicable in Nigeria Superior Courts are applied in courts-martial. GCMs are, however, allowed discretion where the interest of justice requires to take notice of service matters not adduced in evidence. Accused persons are not to suffer injustice because of negligent or incompetent defense.[46]

States' Sharia Courts of Appeals and States' Customary Courts of Appeals. The Constitution has left the establishment of the Sharia Court of Appeals and Customary Courts of Appeals to the states that desire them.[47] Sharia courts were allowed at state level to satisfy the Muslims' demand for a court that would administer their personal law as required by Islam. They were, however, denied a separate federal level court to avoid the judicial confusion that would arise from having two courts of concurrent jurisdictions.[48] Sharia courts have jurisdiction over Islamic personal law cases, but only at the request of the litigants.[49] The Sharia Court of Appeals of a state is headed by a Grand Khadi, and has such other khadis as may be prescribed by the House of Assembly of that state. The Customary Court of Appeals of a state is headed by a President and may have such other judges as the House of Assembly of that state may prescribe. Grand Khadis and Customary Court Presidents are appointed in the same way as chief judges of the States High Courts. Khadis and Customary Courts judges are appointed in the same manner as the States' High Courts judges.[50] Candidates appointed as Sharia Courts Khadiate must be well learned in Islamic law. Those who are appointed as judges of the Customary Courts must be learned or experienced in Customary law. They need not be lawyers, however. In practice, they are retired senior administrative officers. Customary Courts were established as a non-Muslim alternative to Sharia courts. The customs of the various ethnic communities relating to marriages, bride price, succession, chieftaincy, land tenure,[51] and peers (age and social equals) as reflected in the laws of the states are the province of Customary Courts. Even the foundations of national politics are regulated by Customary law.

Customary Courts are official preservers of African Customary law. Under English law, criminal conversion would lead to imprisonment or a fine. But a Customary Court would order restoration in the manner satisfactory to the complaint. Supervision of execution is effected by chiefs, clan, and kindred heads and peers. In this way, the complainant suffers no loss, and there is no bitterness as the culprit does not go to jail—regarded as an institution of humiliation and foreign oppression. There is family resentment, and the culprit will be cautioned by peers and would lose peer grade (religated to a lower age and social group) on reoccurrence of a similar act. Family or kindred relations are thus preserved.

There is increasing public demand that the jurisdiction of Customary Courts be increased. Lawyers are not required in Customary Courts. Litigants present their cases personally in the traditional arbitration fashion. Culprits are openly taunted, warned, or cautioned. The results are generally more satisfying than cases in Magistrate or High Courts. High Courts procedures are officious, impersonal, filled with "hired liars," and unsatisfactory.[52] High Courts are increasingly allowing settlements out of court. Such settlements, however, lack the supervisory character of Customary Courts orders. It is likely that Customary Courts and High Courts may be fused and thus exercise jurisdiction now exercised by both Customary and High Courts.[53]

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[42] §§ 1, 84 NA Act 1960.

[43] (Unreported). Recorded at Federal High Court Jos Chambers on 10 Aug. 1983.

[44] 1984.

[45] It is more difficult to be elaborate during actual combat. Justice is not compromised, however.

[46] Military Courts (Special Powers) Decree 1984.

[47] § 240 for Sharia Courts of Appeals, and § 245 for Customary Courts of Appeals.

[48] The issue would be that of two Supreme Courts with possibility of opposing judgments on the same issue. The appointment of justices of the Supreme Court learned in Islamic law has solved this problem.

[49] § 242.

[50] § 243 for Sharia Courts, and § 246 for Customary Courts.

[51] This is developed or occupied community land. Other lands are covered by the Land Use Act, 1975.

[52] This is the Customary view of "sharp-practice."

[53] From a report of a committee set up by the Plateau State Government to study demands for Customary Courts Reforms in 1980.

Magistrate Courts. Magistrate Courts are established under the provisions of section 6(4)(a) of the Constitution. Area and Alkali Courts (area courts in Muslim localities) also fall under this provision.[54] Magistrate courts are the lowest state courts of record. In the northern states, Magistrate Courts have criminal jurisdiction only, and are limited to fines of one thousand Naira or ten years imprisonment or both. Magistrates have no jurisdiction to dispose of culpable homicide—murder—cases. When the facts of the case disclose homicide, it is immediately transferred to the High Court. In its appellate and supervisory jurisdiction, Magistrate Courts hear criminal appeals from Area Courts. Magistrates are appointed by the state governors on the recommendation of the State Judicial Service Commission.[55]

Area Courts. Area courts are State Courts but are administratively under the local governments. There are two categories, Area Courts and Upper Area Courts. They have both criminal and civil jurisdiction. In criminal offenses, these courts are limited to petty offenses and misdemeanors, conversion of small properties, and abduction. Criminal appeals go to Magistrate Courts, civil appeals to Customary Courts of Appeals. Area Court judges are non-lawyers and are appointed from suitably qualified middle grade civil servants.

### *Independence of the Judiciary*

The Constitution has made provisions to insulate the judiciary from legislative and executive political influences and to ensure impartial determination of cases. These provisions relate to the appointment, retirement, financing, and discipline of the judiciary. Judges cannot be removed once appointed, except for mental or physical disability, misconduct, or contravention of the Code of Conduct. Two-thirds majority approval of the Senate is required for the removal.[56] Judicial officers cannot be retired compulsorily. They retire voluntarily at sixty years of age, or statutorily at sixty-five. At that age, if they have served as judges for fifteen years, they are entitled to their full salary for life.[57] Salaries and allowances of judges are prescribed by law. These allowances and salaries, with the recurrent expenditure of the judiciary, are removed from the annual vote and placed as a permanent charge on the consolidated revenue fund of the federation or state. Salaries and allowances are protected from alteration after a judge has taken office.[58] General discipline of judicial officers including Magistrates is vested in the Judicial Service Commissions of the various states or of the Federation. Thus, in *Olawoyin vs. Governor of Bendel State,*[59] the state governor signed a letter purporting to terminate Olawoyin's appointment as a magistrate. The Bendal State High Court held that the governor could not exercise power that was not vested in him.

In spite of these constitutional provisions, occasionally a determined majority in a State or National Assembly has tried to remove judges. Also, the role of the president and state governors in the appointment of justices, judges, magistrates and khadis could be used to apply subtle political influences. The guarantees of salary, allowances, and judicial expenses are often offset by inflation, giving rise to possible legislative and executive influences on the judiciary.[60] It is still generally agreed, however, that the constitutional guarantees of independence of the judiciary are adequate. Their implementation must be left to human imperfections and vagaries.

## Legal Education in Nigeria

The first level of legal education in Nigeria is a university law degree. There are sixteen law faculties offering the Bachelor of Law (LL. B.) degrees in Nigeria. The academic staff of the law faculties must be approved by the Nigerian Universities Commission, while the curriculum staff and entry qualifications must be acceptable to the National Council of Legal Education. The curriculum is either three or four years in length. The entry qualifications are a Higher School Certificate or a General Certification of Education (GCE) Advanced Level for the three year legal program. For the four year legal program, the West African School Certificate or the GCE Ordinary Level is required. The curriculum includes Criminal Law, Contracts, Evidence, Torts, International Law, Constitutional and Administrative Law, Nigerian Land Law, and Commercial Law as core subjects. Family Law, Islamic Law, Wills and Successions, Banking, Insurance, Equity, Labor Law, Mineral Law, Industrial Law, Revenue Law, and Criminology are elective subjects. Subsidiary subjects include the Use of English, Nigerian Culture and Customs, and two social science subjects.[61] Success is determinated by passing examinations and obtaining forty-eight credits for the three year program or fifty-two credits for the four year program. Degrees are classified as LL. B. with Honors First Class, Second Class, or Third Class. Graduates apply to the Nigerian Law School and are accepted if adjudged fit and proper for admission.[62]

The Nigerian Law School is the next level of legal education. It has a three-term academic session, one of which is practical work in government or private law chambers. The Law School concentrates on Civil and Criminal Procedures, Procedural Evidence, Nigerian Land Law, and Contract Law. The course ends with the Bar Examination. Successful candidates apply for enrollment at the Supreme Court of Nigeria. If considered fit and proper by the Body of

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[54] The Constitution allows states to establish courts, not covered under § 6(5)(a)–(f), for further exercise of their judicial powers.

[55] In the southern states, magistrates also exercise Customary law jurisdiction.

[56] § 256(1).

[57] § 78.

[58] §§ 78, 116.

[59] (Unreported). Recorded as B/28/80 of 4 June 1980 at Benin Chambers of Bendel State High Court.

[60] Judges sometimes face the unsavory position of having to request funds from the executive. The alternatives are to resign or to work under unfavorable conditions.

[61] Brochure of the Nigerian Universities Commission—Annual Publication.

[62] "Fit and proper" has a wide interpretation, including prior convictions, role in student unionism, and academic standing.

Bencheres,[63] they are certified Barristers at Law (BL). They are then enrolled as Solicitors and Advocates of the Supreme Court of Nigeria. They can then appear in any court in Nigeria. For Supreme Court appearance, five years of practice is required. A practicing lawyer must belong to the Nigerian Bar Association (NBA) or to the Bar Association of the state where he or she is practicing, or both.[64] An advocate can take up practice in private or civil service anywhere in Nigeria. These are the men and women from whom members of the Nigerian judiciary are drawn.

## Conclusion

The Nigerian judiciary, like the judiciary in any other democracy, draws its mandate from the Nigerian Constitution. It checks and balances executive and legislative excesses, and resolves conflicts that would otherwise overload or inhibit the other organs of government. Within its hierarchy, the superior courts maintain balance by supervising and correcting the lower courts in the enforcement of justice. As a secondary social role, the judiciary has catered to all Nigerian customs, preserving African culture and maintaining social (families, kindred and ethnic) relations at the same time. The political and financial position of the judiciary, in relation to the legislature and the executive, tends to diminish the effectiveness of the constitutional provisions for independence of the judiciary. Like all human institutions, however, the success of the judiciary must be left to human strengths and weaknesses.

## Selected Bibliography

The following books may be of interest in further readings on the Nigerian Constitution and judicial system.


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2. C.O. Okonkwo, Introduction to Nigerian Law (Sweet & Maxwell, London, 1980).
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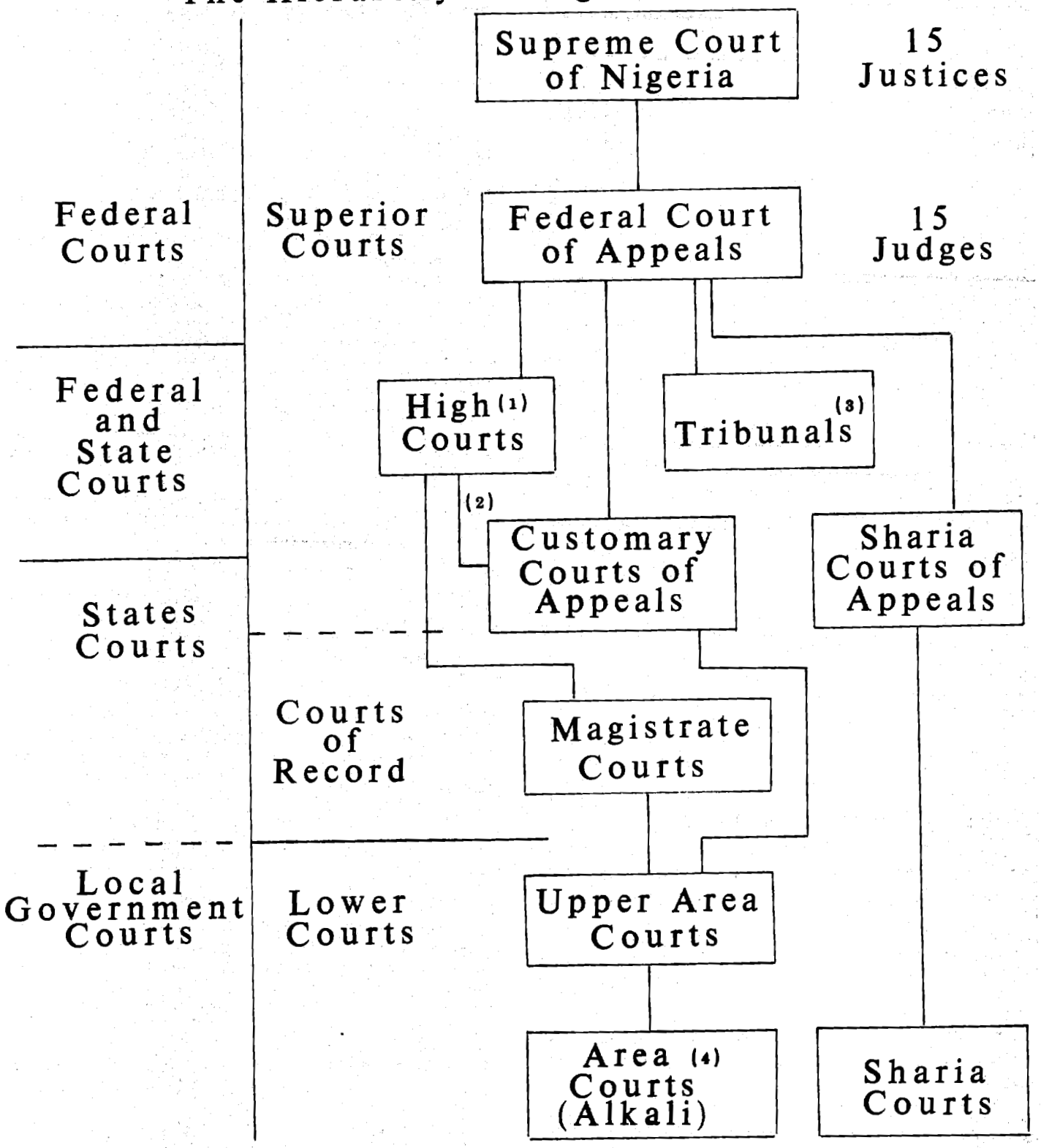
6. E.A. Keay & S.S. Richardson, Native and Customary Courts of Nigeria (Sweet & Maxwell, London, and African University Press, Lagos, 1966).
7. T.A. Aguda, Practice and Procedure of the Supreme Court, Court of Appeals, and High Courts of Nigeria (Sweet & Maxwell, London, 1980).
8. C.O. Madarikan & T.A. Aguda, Criminal Law and Procedure of the Southern States of Nigeria (Sweet & Maxwell, London, 1974).
9. A.P. Blaustein & G.H. Flanz, Constitutions of the Countries of the World, Vol. XI (Oceana Publications, Inc., New York, 1986).


[63] The Body of Benchers is composed of the Chief Justice of the Federation as the Chairman, and the Federal and States Attorneys General and Chief Judges of the States High Courts as members.

[64] NBA Regulations. Also Legal Practitioners Act, 1975.

# Appendix A
## The Hierarchy of Nigerian Courts




NOTES:
(1) Includes Federal High Court
(2) Cases involving constitutional issues
(3) Includes Courts-Martial
(4) In Muslim areas (minor offenses)

# USALSA Report

*United States Army Legal Services Agency*

## *The Advocate for Military Defense Counsel*

## Multiplicity Update

*Captain John J. Ryan*
*Defense Appellate Division*

Because appellate courts are restricting appellate defense counsel's ability to raise multiplicity issues on appeal, a greater burden is placed on trial defense counsel to ensure that their clients are not convicted of multiplicious offenses.[1] To assist counsel in recognizing and raising multiplicity issues,[2] this article will present an updated index of opinions and summary dispositions of the Court of Military Appeals and the courts of military review.[3] Cases are arranged topically, under one of the offenses charged, but not both.

Counsel are reminded that the Court of Military Appeals[4] has recently upheld the validity of the test for multiplicity set out in *United States v. Baker,*[5] and has rejected the more restrictive *Blockburger*[6] test.

This index covers opinions and summary dispositions of the Court of Military Appeals and published opinions from the courts of military review found in volumes 20, 21 and 22 of the West's Military Justice Reports, in their entirety, and also as much of volume 23 as was published by 10 March 1987.

### Adultery

1. Where accused convicted of adultery and rape, adultery must be set aside. *United States v. Hickson,* 22 M.J. 146 (C.M.A. 1986); *see also United States v. Stovall,* 23 M.J. 231 (C.M.A. 1986) (summary disposition); *United States v. Lopez,* 22 M.J. 360 (C.M.A. 1986) (summary disposition).

2. Carnal knowledge multiplicious for findings with adultery. *United States v. Allen,* 22 M.J. 352 (C.M.A. 1986) (summary disposition).

3. Adultery multiplicious for findings with indecent acts. *United States v. Thomas,* 22 M.J. 349 (C.M.A. 1986) (summary disposition).

### Arson

1. Damaging government property multiplicious for findings with arson to the extent that accused was charged with damaging government buildings and with setting fire to the buildings. This ruling did not extend to the property destroyed within the building. *United States v. Glenn,* 20 M.J. 172 (C.M.A. 1985).

2. Aggravated arson of inhabited building not multiplicious for findings with simple arson of the contents of building. *United States v. Grasha,* 20 M.J. 220 (C.M.A. 1985).

### Assaults

1. Communicating a threat multiplicious for findings with assaulting a non-commissioned officer while he was engaged in the execution of his office, where threat was part of incident constituting assault. *United States v. Weekes,* 20 M.J. 298 (C.M.A. 1985) (summary disposition).

2. Assault upon the victim by cutting her on the throat with a knife multiplicious for findings with charge of cutting a child under the age of sixteen years on the throat with a knife, as both charges constituted essentially the same act. *United States v. Wright,* 21 M.J. 163 (C.M.A. 1985) (summary disposition).

3. Assault multiplicious for findings with involuntary manslaughter. *United States v. Irvin,* 22 M.J. 559 (A.F.C.M.R. 1986).

4. Assault consummated by battery multiplicious for findings with robbery where battery was the force used to commit the robbery. *United States v. Henry,* 21 M.J. 172 (C.M.A. 1985) (summary disposition); *United States v. Boucher,* 20 M.J. 301 (C.M.A. 1985) (summary disposition).

5. Two indecent assault offenses on same victim were so united in time, circumstance, and impulse that they should

[1] United States v. Jones, 23 M.J. 301 (C.M.A. 1987) (appellate claim of multiplicity will fail unless multiplicity can be determined from the face of the challenged specifications). At a minimum, trial defense counsel must move that the challenged specifications be made more specific. *See also* United States v. Wheatcraft, 23 M.J. 687 (A.F.C.M.R. 1986) (multiplicity for sentencing waived on appeal if not raised at court-martial).

[2] Despite case law that has firmly established that certain offenses are multiplicious with one another, multiplicity cases involving these crimes are still finding their way to the Court of Military Appeals. These areas of concern are noted in the index.

[3] For a detailed listing of multiplicity cases decided by the Court of Military Appeals and the courts of military review prior to February 1985, see Raezer, *Trial Counsel's Guide to Multiplicity,* The Army Lawyer, April 1985, at 21.

[4] United States v. Jones, 23 M.J. at 303.

[5] 14 M.J. 361 (C.M.A. 1983).

[6] Blockburger v. United States, 284 U.S. 299 (1932).

be consolidated into a single offense. *United States v. Defibaugh*, 23 M.J. 180 (C.M.A. 1986).

6. Assault consummated by a battery not multiplicious for findings with breach of peace where second specification does not allege battery as means of breaching the peace. *United States v. McCullar*, 20 M.J. 218 (C.M.A. 1985).

### Absent Without Leave (AWOL)

Although *brief* AWOLS repeatedly have been found to be multiplicious for findings with breach of restriction (*see United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); *United States v. Doss*, 15 M.J. 409 (C.M.A. 1983)), this issue is still frequently being raised before the Court of Military Appeals (*e.g., United States v. Walker*, 22 M.J. 180 (C.M.A. 1986) (summary disposition) (two day AWOL multiplicious for findings with breaking restriction on first day); *United States v. Williams*, 21 M.J. 379 (C.M.A. 1985) (summary disposition) (less than three days AWOL multiplicious for findings with breaking restriction)).

### Communicating a Threat

1. Wrongfully trying to influence and intimidate a soldier by threatening her for purpose of preventing her from reporting accused to authorities multiplicious for findings with communicating a threat to injure. *United States v. Cantu*, 22 M.J. 819 (N.M.C.M.R. 1986).

2. Communicating a threat to kill multiplicious with forcible sodomy where it is the means by which the accused effected the act of forcible sodomy. *United States v. Watson*, 21 M.J. 96 (C.M.A. 1985) (summary disposition) (citing *United States v. Hollimon*, 16 M.J. 164, 167 (C.M.A. 1983); *United States v. McKinnie*, 15 M.J. 176 (C.M.A. 1983)).

3. Communication of threats are multiplicious for findings with obstruction of justice by communicating the threats. *United States v. Malanga*, 20 M.J. 377 (C.M.A. 1985) (summary disposition).

### Conduct Unbecoming an Officer

An officer cannot be convicted of both a substantive crime and of conduct unbecoming an officer for the same act. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984). Conduct unbecoming an officer duplicates rape. Congress never intended for findings of guilty to be affirmed under both Article 133[7] and specific punitive article. Specific punitive article dismissed. *United States v. Deland*, 22 M.J. 70 (C.M.A. 1986); *see also United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987) (false official statement, extortion, false swearing all in contravention of general article/conduct unbecoming); *United States v. Ramirez*, 21 M.J. 353 (C.M.A. 1986); (masturbating in front of minors/conduct unbecoming); *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986) (taking indecent liberties/conduct unbecoming); *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (conduct unbecoming an officer/adultery; conduct unbecoming an officer/fraternization, where fraternization specifications were based on same incidents forming basis for adultery specification); *United States v. Walker*, 21 M.J. 74 (C.M.A. 1985) (adultery with a married man/conduct unbecoming); *United States v. Leahy*, 20 M.J. 564 (N.M.C.M.R. 1985) (assault/conduct unbecoming); *United States v. Williams*, 20 M.J. 686 (A.C.M.R. 1985) (possession of cocaine, possession of marijuana/conduct unbecoming).

### Conspiracy

1. Solicitation of person to steal multiplicious for findings with conspiracy with that same person to steal. *United States v. Kauble*, 22 M.J. 179 (C.M.A. 1986) (summary disposition).

2. Three charges of conspiracy to commit robbery multiplicious where there was but one agreement to rob three Marines. *United States v. Thompson*, 21 M.J. 94 (C.M.A. 1985) (summary disposition).

### Dereliction of Duty

Accused cannot be convicted of dereliction of duty for failure to report drug abuse by others on those occasions when accused was charged as principal to drug abuse. *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986); *see also United States v. Templin*, 22 M.J. 105 (C.M.A. 1986) (summary disposition) (dereliction of duty for failing to turn in certain property/larceny of that property); *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986) (dereliction of duty by allowing a female to enter appellant's stateroom/fraternization); *United States v. Giusti*, 22 M.J. 733 (C.G.C.M.R. 1986) (dereliction of duty/use and possession of drugs).

### Disrespect

Disrespect to a non-commissioned officer multiplicious for findings with disobedience of non-commissioned officer. *United States v. Brunson*, 21 M.J. 162 (C.M.A. 1985) (summary disposition). *But see United States v. Rogers*, 20 M.J. 299 (C.M.A. 1985) (summary disposition) (disobedience of sergeant's order to empty duffel bag not multiplicious for findings with disrespect to same sergeant).

### Drugs

1. It has been well settled that possession and distribution of the same amount of drug on the same day is multiplicious for findings. *United States v. Zubko*, 18 M.J. 578 (C.M.A. 1984). This issue continues to come before the Court of Military Appeals. *See United States v. Herbert*, 22 M.J. 206 (C.M.A. 1986) (summary disposition); *United States v. Murphy*, 22 M.J. 113 (C.M.A. 1986) (summary disposition).

2. It has also been well established that possession of a substance with intent to distribute is multiplicious for findings with distribution of that substance. *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984). This also continues to come up at the Court of Military Appeals. *United States v. Montileone*, 23 M.J. 275 (C.M.A. 1986) (summary disposition); *United States v. Rottinghaus*, 23 M.J. 276 (C.M.A. 1986) (summary disposition).

3. Use of a substance and possession of that same substance is another area that the Court of Military Appeals has held multiplicious for findings. *United States v. Bullington*, 18 M.J. 164 (C.M.A. 1984). This also continues to come before the Court of Military Appeals before it is declared multiplicious for findings. *United States v. Brodock*,

[7] Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (1982).

22 M.J. 206 (C.M.A. 1986) (summary disposition); *United States v. Brown*, 22 M.J. 179 (C.M.A. 1986) (summary disposition).

4. Wrongful possession of a drug and wrongful introduction of that same drug is yet another area where it has been established that the offenses are multiplicious for findings. *United States v. Miles*, 15 M.J. 431 (C.M.A. 1983). Yet this issue also continues to come before the Court of Military Appeals. *See United States v. Copeland*, 20 M.J. 300 (C.M.A. 1985) (summary disposition); *United States v. Carl*, 20 M.J. 216 (C.M.A. 1985).

5. Possession of some amount of marijuana multiplicious for findings with possession of a larger amount on the same day. *United States v. Sebourn*, 23 M.J. 223 (C.M.A. 1986) (summary disposition). Simultaneous possession of different drugs should not be alleged in different specifications. *United States v. Williams*, 22 M.J. 953, 955 (A.C.M.R. 1986). Two specifications of wrongful possession of hashish multiplicious for findings purposes. *United States v. Mortimer*, 20 M.J. 964 (A.C.M.R. 1985).

6. Possession of drug abuse paraphernalia multiplicious for findings with use of drug abuse paraphernalia. *United States v. Gokee*, 20 M.J. 138 (C.M.A. 1985) (summary disposition).

7. Wrongful distribution of cocaine and marijuana, respectively, at the same time and place are multiplicious for findings. *United States v. Christmas*, CM 447468 (A.C.M.R. 24 Oct. 1985).

8. Possession of marijuana not multiplicious for findings with possession of drug abuse paraphernalia. *United States v. Cage*, 22 M.J. 204 (C.M.A. 1986) (summary disposition).

9. Wrongful introduction of a controlled substance with intent to distribute not multiplicious for findings with wrongful distribution of a controlled substance. *United States v. White*, 22 M.J. 631 (N.M.C.M.R. 1986).

10. Use of marijuana not multiplicious for findings with use of cocaine on same day as they were separate transactions. *United States v. Bostic*, 20 M.J. 562 (A.C.M.R. 1985).

11. Possession of cocaine on diverse occasions not multiplicious for findings with distribution on diverse occasions where times alleged in specifications were different. *United States v. Bowers*, 20 M.J. 1003 (A.F.C.M.R. 1985).

### False Writing

1. Signing false official writing multiplicious for findings with signing false official record where accused simultaneously signed two official records in which he falsely indicated the number of his dependents, while applying for base housing. *United States v. Burris*, 21 M.J. 82 (C.M.A. 1985).

2. Making a false check not multiplicious for findings with uttering same falsely made check; different places, separated by less than one month. *United States v. Mora*, 22 M.J. 719 (A.C.M.R. 1986).

### Forgery

Attempted larceny and larcenies multiplicious for findings with forgeries, where forgeries were means by which larcenies took place. *United States v. Mullins*, 20 M.J. 307 (C.M.A. 1985) (summary disposition); *see also United States v. Barger*, 21 M.J. 302 (C.M.A. 1985) (summary disposition) (forgery/larceny and attempted larceny); *United States v. Gracia*, 21 M.J. 162 (C.M.A. 1985) (summary disposition) (forgery/attempted larceny); *United States v. Jackson*, 20 M.J. 414 (C.M.A. 1985) (summary disposition) (forgery of a check/larceny by check); *United States v. Kinney*, 22 M.J. 872 (A.C.M.R. 1986) (forgery/larceny where amount stolen was amount of forged checks).

### Fraternization

1. Fraternization by committing sodomy multiplicious for findings with committing sodomy. *United States v. Baker*, 23 M.J. 226 (C.M.A. 1986) (summary disposition).

2. Fraternization multiplicious for findings with violation of order not to fraternize. *United States v. Cantu*, 22 M.J. 819 (N.M.C.M.R. 1986).

3. Fraternization not multiplicious for findings with adultery. *United States v. Caldwell*, 23 M.J. 748 (A.F.C.M.R. 1987).

### Homicide

1. Felony murder multiplicious for findings with premeditated murder. *United States v. Dodson*, 21 M.J. 237 (C.M.A. 1986).

2. Involuntary manslaughter not multiplicious for findings or sentencing with another charged involuntary manslaughter. Accused, while driving drunk, ran his vehicle into oncoming motorcycle, killing driver and passenger. *United States v. Sheffield*, 20 M.J. 957 (A.F.C.M.R. 1985).

### Impersonation

Wearing unauthorized decorations multiplicious for findings with impersonating non-commissioned officer. *United States v. Twitchell*, 21 M.J. 313 (C.M.A. 1985) (summary disposition).

### Indecent Exposure

Three specifications of indecent exposure consolidated in interest of judicial economy with three specifications of lewd and lascivious acts involving same girls. *United States v. Haston*, 21 M.J. 559 (A.C.M.R. 1985).

### Larceny

1. Larceny multiplicious for findings with another larceny specification, same time and place, different victims. *United States v. Campbell*, 22 M.J. 99 (C.M.A. 1986) (summary disposition). Improper to charge appellant with three different larcenies involving articles contemporaneously taken by him during course of single housebreaking. *United States v. Orr*, 20 M.J. 139 (C.M.A. 1985) (summary disposition); *see also United States v. Krauss*, 20 M.J. 741 (N.M.C.M.R. 1985) (specifications charging theft of checks stolen at one time multiplicious for findings). *But see United States v. Bankston*, 22 M.J. 896 (N.M.C.M.R. 1986) (larceny of targets not multiplicious for findings with larceny of M–16 magazines where ordered on separate dates and taken on separate dates).

2. Larceny of $30.00 multiplicious for findings with making false claim for $30.00. *United States v. Fullwood*, 21 M.J. 167 (C.M.A. 1985) (summary disposition); *see also*

*United States v. Gans*, 23 M.J. 540 (A.C.M.R. 1986) (false claim/larceny).

3. Larceny of government property not multiplicious for findings with wrongful disposition of government property. *United States v. Banks*, 20 M.J. 166 (C.M.A. 1985) (Judge Everett still maintained his position that these offenses were multiplicious for findings but stated that on the basis of stare decisis he would no longer register a dissent); *see also United States v. Morrison*, 22 M.J. 743 (N.M.C.M.R. 1986) (larceny of aviation fuel, wrongful sale of fuel, and falsification of fuel records not multiplicious for sentencing); *United States v. Lusk*, 21 M.J. 695 (A.C.M.R. 1985) (larceny of government property/sale of same property not multiplicious for findings).

4. Dishonorable failure to pay debt not multiplicious for findings and sentencing with larceny, where, at first, accused did not pay debt, and subsequently, he devised scheme to avoid liability for debt. *United States v. Mervine*, 23 M.J. 801 (N.M.C.M.R. 1986).

5. Wrongful possession of two fragmentation grenades at a particular date and place in violation of a general regulation not multiplicious for findings with larceny of same grenades at same place and same date. *United States v. Watts*, 22 M.J. 9 (C.M.A. 1986) (summary disposition).

6. Successive withdrawals of cash from different accounts by the use of ATM cards is not multiplicious for findings. *United States v. Aquino*, 20 M.J. 712 (A.C.M.R. 1985).

**Obstruction of Justice**

1. Communication of threats multiplicious for findings with obstruction of justice by communication of the threats. *United States v. Malanga*, 20 M.J. 337 (C.M.A. 1985) (summary disposition).

2. Altering public document multiplicious for findings with obstruction of justice. *United States v. Jackson*, 20 M.J. 300 (C.M.A. 1985) (summary disposition).

**Rape**

Rape not multiplicious for findings with second rape charge, where separated by time and impulse. *United States v. Graves*, 23 M.J. 245 (C.M.A. 1986) (summary disposition).

**Receiving Stolen Property**

Receiving stolen property multiplicious for findings with receiving different stolen property, where the different property was received by accused at same time and place. *United States v. Price*, 22 M.J. 10 (C.M.A. 1986) (summary disposition).

**Sodomy**

Indecent exposure multiplicious for findings with sodomy. *United States v. Flores*, 21 M.J. 160 (C.M.A. 1985) (summary disposition).

## DAD Notes

### Rehearings—Move 'em on Out

Prosecutors have not always been delighted to receive word from the Clerk of the Army Court of Military Review that they have been chosen to prosecute a rehearing against an accused. They are involved with other "real" cases that will run the normal course from preferral of charges to trial, a process with which they are intimately familiar. By contrast, a rehearing involves little-used and therefore unfamiliar procedures. For accused who are on excess leave, it means locating them and notifying them of the rehearing. Those factors, as well as the fact that the prosecutor was probably not previously involved in the case, result in a tendency for the rehearing case to settle toward the bottom of the "IN" box.

That tendency could be fatal after the recent Army Court of Military Review decision in *United States v. McFarlin*.[1] Private McFarlin, who was on excess leave when the rehearing was ordered, was retried 121 days after the convening authority had been notified of the Army court's decision. He was not confined at any time following his return to duty. After noting that the government conceded the applicability of Rule for Courts-Martial 707(a)[2] to McFarlin's case,[3] the Army court declined to adopt the government's argument that either the re-preferral of charges[4] or the date the accused was notified of the pendency of the rehearing should trigger the 120 day clock. Instead, the court chose the date that the convening authority was notified of the decision authorizing the rehearing. Because 121 days had elapsed between that date and the date of trial, and the government failed or was unable to justify an exclusion under R.C.M. 707(c), the court set aside the findings and sentence and dismissed the charge.

The court's decision is noteworthy in that it was the first decision to deal with the rehearing of an accused not in confinement pending the rehearing. The Court of Military Appeals had, in *United States v. Flint*,[5] addressed the applicability of the 90 day rule of *United States v. Burton*[6] to rehearings. That court concluded that *Burton* was indeed

[1] 24 M.J. 631 (A.C.M.R. 1987).

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(a) [hereinafter R.C.M.].

[3] 24 M.J. at 633.

[4] The court noted that because its order authorizing a rehearing did not dismiss the charges, the re-preferral of charges was not necessary and thus had no effect on the speedy trial issue. *Id.* at 634.

[5] 1 M.J. 428 (C.M.A. 1976).

[6] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

applicable, and that the trigger date was the date the convening authority was notified of the final decision authorizing a rehearing.[7] In *United States v. Spears,*[8] a case in which the accused was in pretrial confinement pending a rehearing, the Army court adopted the *Flint* holding as to the trigger date in its interpretation of R.C.M. 707(d), which establishes a 90 day speedy trial requirement for an accused in pretrial arrest or confinement. Thus, the decision in *McFarlin* is logically consistent with *Flint* and *Spears,* insofar as it adopts the same trigger date, and seems to complete the analytical development of speedy trial considerations in rehearings.[9]

Now that these cases clearly direct prosecutors and staff judge advocates to handle rehearing cases expeditiously, it is less likely that the government will permit itself to fall victim to the 120 day requirement. Nevertheless, defense counsel should monitor such cases carefully for appropriate relief on the basis of speedy trial. Past experience indicates that it will be to the defense counsel's advantage to count the days and avoid defense delay if at all possible. A complete dismissal of all charges and specifications is, after all, an extremely favorable result for your client. Captain Stephen W. Bross.

### *United States v. Reed*—More Than Just Another Providence Issue

In *United States v. Reed,*[10] the Court of Military Appeals wrestled with the issue of whether a Navy regulation[11] requiring a service member to report known offenses could be enforced by prosecution under Article 92, Uniform Code of Military Justice.[12] Appellant pleaded guilty to use of marijuana and to a violation of Article 92 by failing to report a transfer of marijuana by another service member that the accused had personally observed.[13] The second offense violated Article 1139, U.S. Navy Regulations.[14]

On appeal, Reed argued that the language of the regulation was unconstitutionally overbroad, that it violated the fifth amendment because it required members of the Navy to incriminate themselves either directly or indirectly, and that it infringed on his first amendment right to freedom of association.[15] Judge Sullivan, writing for the court, chose not to address these issues. The court relied instead on *United States v. Heyward,*[16] and held that the guilty plea to the Article 92 offense was improvident because the military judge failed to determine whether appellant's failure to report a drug offense was the result of his use of marijuana at that time or of his being an accessory or principal to the illegal activity he failed to report.

When an accused is charged with a violation of a lawful regulation or dereliction of duty under Article 92, UCMJ, for failing to report an offense in which he or she was also criminally involved, defense counsel should make a motion to dismiss the charge. If the charge is based on violation of a lawful regulation, defense counsel should investigate whether an argument can be made that the regulation's language is overly broad and vague. If the charge is dereliction of duty, defense counsel's motion can be predicated on the fifth amendment concerns raised in *Heyward.*[17] In either case, an argument can be made that such a charge infringes on the accused's first amendment right to freedom of association.

Support for a motion to dismiss also can be found in Chief Judge Everett's concurring opinion in *Reed.* He found that the conviction for violation of the Navy Regulation involved the fifth amendment privilege against self-incrimination, as well as due process and first amendment guarantees.[18] Chief Judge Everett concluded that the regulation's broad language did not adequately define the duty to report, so it did not provide the accused with the constitutionally required notice.[19] He also concluded that the regulation violated first amendment rights concerning freedom of association, because "even in the interests of military necessity, military authorities may not create a 'police state' within the military society, as Article 1139 purports to do."[20]

Defense counsel should be aware that although Judge Cox agreed with Chief Judge Everett that the Navy Regulation was overly broad and vague, he did not join in the Chief Judge's concurring opinion because Reed pleaded guilty and had not litigated the issue at trial.[21] This dissenting opinion further emphasizes the importance of raising a

[7] 1 M.J. at 429.

[8] CM 444757 (A.C.M.R. 16 Jun. 1986).

[9] Both Spears and McFarlin received full rehearings. Distinctions might arguably be drawn between full rehearings and new trials, other trials, and rehearings on sentence only (R.C.M. 810(a)). *See* United States v. Rivera-Berrios, SPCM 18240, (A.C.M.R. 19 May 1987) (applies *McFarlin* to a new trial ordered by The Judge Advocate General); United States v. Giles, 20 M.J. 937 (N.M.C.M.R.), *petition denied,* 21 M.J. 388 (C.M.A. 1985) (R.C.M. 707(a) not applicable to rehearings on sentence only).

[10] 24 M.J. 80 (C.M.A. 1987). The Court of Military Appeals recently granted a petition for review on a related issue in United States v. Schmidt, 24 M.J. 55 (C.M.A. 1987).

[11] U.S. Navy Regulations (1973), Article 1139, *as amended by* change 3 (1979).

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

[13] United States v. Reed, 24 M.J. at 80.

[14] Article 1139 provides that: "Persons in the Department of the Navy shall report to proper authority offenses committed by persons in the Department of the Navy which come under this observation."

[15] United States v. Reed, 24 M.J. at 81.

[16] 22 M.J. 35 (C.M.A. 1986). *Heyward* held that where, at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report, the privilege against self-incrimination may excuse his non-compliance.

[17] *Id.* at 37.

[18] United States v. Reed, 24 M.J. at 83.

[19] *Id.* at 84.

[20] *Id.* at 84–85.

[21] *Id.* at 86.

motion to dismiss even in guilty plea cases. Captain Stephanie C. Spahn.

### The New Deal: Forfeitures of Rehearings or New Trials

In handling the numerous rehearings generated by the 3d Armored Division unlawful command influence cases, the military defense counsel often advised the client that all forfeitures collected as a result of the court-martial sentence that was set aside on appeal would be returned to the client. This benefit, characterized as a monetary windfall by the government, resulted from the operation of two rules: first, that a sentence to forfeitures of pay and allowances that also included an unsuspended discharge or confinement for one year or more could not be ordered executed until appellate review was complete;[22] and second, that property affected by an executed part of a court-martial sentence that is set aside must be restored unless the executed part is included in the sentence on rehearing or new trial.[23] Because forfeitures could not be ordered executed until completion of appellate review in those cases requiring such review, the forfeitures collected under the old sentence had to be restored and were not subject to be collected again by the government based on a subsequent sentence adjudged on rehearing or new trial. Any new forfeitures could be collected only from pay and allowances due on or after the date the convening authority action on the new sentence.[24]

Defense counsel handling rehearings or new trials that arise from cases originally tried after the effective dates of the 1983 Military Justice Act and the 1984 Manual for Courts-Martial should be aware that the rules regarding forfeitures have undergone a substantial change. The convening authority may now order forfeitures executed in his or her action even though the case is subject to appellate review.[25] Therefore, in cases returned for rehearing or new trial in which the convening authority has taken such action, forfeitures executed under the old sentence may be offset by the amount of any new sentence of forfeitures adjudged and approved on rehearing or new trial under UCMJ art. 75(a).[26]

This change, while possibly not specifically contemplated by the drafters of the new Manual for Courts-Martial, has several significant effects. When considering the practicability of conducting a rehearing or new trial, the convening authority may now consider the cost to the government of not obtaining a new sentence of forfeitures to offset the original forfeiture sentence. Further, defense counsel may no longer assure a client subject to a rehearing or new trial that regardless of the outcome of the new proceeding, there will be a nice government check in the mail for the amount of the forfeitures collected under the old court-martial sentence. Finally, the change makes forfeitures a subject of negotiation when attempting to develop a pretrial agreement on rehearing or new trial.

Defense counsel involved in a rehearing or new trial should be intimately familiar with the client's finance records. The amount of monies actually collected under the prior court-martial sentence to forfeitures is frequently different than the total amount of forfeitures adjudged, based on the date of the original convening authority action, length of confinement, the expiration term of service date of the client, and the date on which the client was placed on excess leave. The amount of pay and allowance actually collected on the original forfeiture sentence has always been a significant consideration for your client; it is now significant to the convening authority as well. Captain Keith W. Sickendick.

### Challenges for Cause: Closer Scrutiny on Appeal

In *United States v. Moyar*,[27] the Army Court of Military Review recently held that it would no longer give "special deference" on appellate review to the decisions of military judges denying challenges for cause against court members at trial. This step was necessary to encourage judges to more closely adhere to the mandate that challenges for cause must be liberally granted.

The opinion by Chief Judge O'Roark reflects the frustration felt at the appellate level with cases that must be reversed because the trial judge failed to apply a liberal standard in ruling on a defense challenge for cause. In *Moyar*, the accused pled guilty to committing indecent acts with his adopted daughter, both before and after she reached the age of sixteen. The defense challenged for a cause a court member whose sister had been molested in a similar way by their father twenty-six years previously. The member's sister was molested at approximately the same age as the victim in the case at bar. The challenge for cause was denied after the court member assured the military judge that he could nevertheless decide the case in an impartial manner.

In its opinion, the court reemphasized the well-established rule that challenges for cause must be liberally granted. It moreover recognized that "[n]otwithstanding this mandate and the fact that currently military exigency is seldom a factor in management of trials, some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members".[28] This blunt criticism served as justification for the court's announcement that it would no longer give "special deference" to the decisions of trial judges denying challenges for cause. Military judges must expect that their decisions regarding challenges will be very closely scrutinized in the future. Challenges for cause are thus in a separate class in terms of appellate review and will remain there so long as "some trial judges . . . continue to consider the rule to liberally grant challenges to be a

[22] UCMJ art. 71(c); Manual for Courts-Martial, United States, 1969 (Rev. ed), para. 88(d)(3).

[23] UCMJ art. 75(a).

[24] UCMJ art. 57(a).

[25] UCMJ art. 71(c); R.C.M. 1113(b).

[26] DAJA-CL 1985/6319, 5 Dec. 1985.

[27] 24 M.J. 635 (A.C.M.R. 1987).

[28] *Id.* at 638. The court found that the military judge's questioning of the challenged member in *Moyar* "consisted of mechanical rehabilitative questions which led to bare assertions by the member that he could impartially sit as a member. Under these circumstances we are compelled to conclude that the denial of the challenge for cause . . . was a clear abuse of discretion by the trial judge." *Id.* at 639.

form of moral suasion to take or leave."[29] The court concluded its analysis by recognizing that "[i]f trial judge decisions on challenges are to be given deference at the appellate level, those decisions must more closely adhere to the spirit and intent of the liberal grant mandate than is evident in some such rulings."[30]

While *Moyar* does not change the standard by which a trial judge must evaluate challenges for cause, it forcefully reemphasizes that challenges must be granted liberally. The impact at the trial level of this decision will be difficult to assess, but it may result in an even lower practical threshold for granting challenges as judges seek to avoid the intensified scrutiny of the appellate courts. This, of course, is a circumstance that may well benefit the defense. Captain Robert P. Morgan.

[29] *Id.*

[30] *Id.*

## *Trial Judiciary Note*

# Military Rule of Evidence 304(g)—The Corroboration Rule

*Lieutenant Colonel R. Wade Curtis*
*Military Judge, Fifth Judicial Circuit, Stuttgart, FRG*

A confession[1] is a very convincing piece of evidence. Once the accused has let the words slip past his lips, he faces a very difficult task of retracting them. A confession standing alone, however, is of no value. To be admissible, it must be corroborated. Thus, now and then, the defense will challenge the admissibility of a confession on the grounds of lack of sufficient corroboration.[2] This tactic has the element of surprise. If the trial counsel has not properly evaluated the confession and closely compared it with the other evidence in the case, what counsel may have thought to be an easy victory will turn into an agonizing defeat!

As straightforward as the rule requiring corroboration may appear, it was entangled by the Army Court of Military Review with its dicta in *United States v. Loewen.*[3] The court opined that Military Rule of Evidence 304(g) prescribes a specific method for corroborating a confession, that "can impose a greater burden on the prosecution in a particular case, because it extends the corroboration requirement to include the identity of the accused as the perpetrator, an element not required to be corroborated under the old corpus delicti rule."[4]

The court in *Loewen* based its interpretation of the corroboration rule on *Opper v. United States*[5] and *Smith v. United States.*[6] Since the inception of the government's right of appeal, two published decisions have overturned rulings suppressing confessions for lack of corroboration.[7] In each of those cases, the appellate court held the trial judge applied the wrong legal standard when considering

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> A confession is generally defined as an acknowledgment by accused in a criminal case of his guilt of the crime charged. A confession implies that the matter confessed constitutes a crime, and it is limited in its nature and in its precise scope and meaning to the criminal act itself . . . and it must be of such nature that no other inference than the guilt of the confessor may be drawn therefrom.

23 C.J.S. Criminal Law § 816a (1961) (footnotes omitted); *see* Mil R. Evid. 304(c)(1). Herein, the word "confession" includes "admissions," as defined in Mil. R. Evid. 304(c)(2).

Military Rule of Evidence 304(g) states the current corroboration rule. "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." This rule "is substantially the same as paragraph 140*a*(5) of the Manual for Courts-Martial, United States, 1969 (Revised edition). . . . [P]aragraph 140*a*(5) . . . was intended to incorporate the corroboration rule adopted by the Supreme Court in [*Opper* and *Smith*], in place of the previous Manual provision requiring proof of the corpus delicti." United States v. Loewen, 14 M.J. 784, 786 (A.C.M.R. 1982) (citations omitted).

[2] Prior to the government's right of appeal, a successful trial attack of this nature would usually result in an acquittal. Even on appeal, the accused has a chance for victory. In *Loewen*, the appellate court dismissed 26 specifications, each, of forgery and larceny, based on its determination that the confession was not corroborated. That case is unique, not because of the dismissal, but because the essential facts contained in the confession were contradicted by the government's independent evidence. Regarding the government's right of appeal, see Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (Supp. III 1985) [hereinafter UCMJ].

[3] 14 M.J. 784 (A.C.M.R. 1982). The problem created by the dicta is demonstrated in Note, *Corroboration of Confessions,* The Army Lawyer, June 1985, at 58. The case of United States v. Yates, 23 M.J. 575 (N.M.C.M.R. 1986), *aff'd*, 24 M.J. 114 (C.M.A. 1987) presents an example of a trial judge who may have been mislead by the dicta in *Loewen.*

[4] *Loewen*, 14 M.J. at 786–87 (citations omitted). It would be fair to speculate that, after reading the quoted statement, jurists would ask the rhetorical question: If the government can prove by substantial independent evidence that the accused was the person who committed the offense, why would it need the confession?

[5] 348 U.S. 84 (1954).

[6] 348 U.S. 147 (1954).

[7] *Yates*; United States v. Poduszczak, 20 M.J. 627 (A.C.M.R. 1985).

the issue of corroboration.[8] This discussion of the corroboration rule should assist counsel and trial judge in avoiding unnecessary appellate litigation regarding the admissibility of a confession.

This article will examine the Supreme Court cases that gave rise to the corroboration rule and will consider the application of the rule in courts-martial. Based on that analysis, it is this author's opinion that, although the result reached in *Loewen* was correct, the court incorrectly interpreted what the corroboration rule requires. To understand why, it will be necessary to examine the historical basis for the *Opper* decision and to examine the legal premise and factual basis for the *Opper* and *Smith* decisions, as well as the application of the rule in *United States v. Calderon.*[9]

### Why the Corroboration Rule?

Under the English common law, a conviction could be based on the uncorroborated extrajudicial confession of an accused.[10] Our system of justice, however, has an inherent distrust for the uncorroborated extrajudicial confession.[11] The Supreme Court noted in *Opper:* "In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession."[12]

In *Smith,* the Supreme Court outlined the following reasons for the corroboration requirement: "[c]onfessions may be unreliable because they are coerced or induced, and . . . the accused may be unable to establish the involuntary nature of his statements"; "[t]hough a statement may not be 'involuntary' . . . still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation;" [and] "the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made."[13]

Prior to the Supreme Court's decisions in *Opper* and *Smith,* the federal courts applied two different corroboration[14] rules. Some circuits required "that the corroboration must consist of substantial evidence, independent of the accused's extrajudicial statements, which tends to establish the whole of the corpus delicti."[15] The other circuits required proof of the trustworthiness of the confession, which required either: independent evidence that touches the corpus delicti and fortifies the truthfulness of the confession; or proof of corroborating circumstances that fortifies the truthfulness of the confession or establishes the facts embraced in the confession, without requiring proof of the corpus delicti.[16]

### The Corroboration Rule

The Supreme Court, realizing the reasons for requiring more than proof of the corpus delicti to corroborate a confession, granted certiorari in *Opper* "because of asserted variance or conflict between the legal conclusion reached in [the *Opper*] case—that an extrajudicial, exculpatory statement of an accused, subsequent to the alleged crime, needs no corroboration—and other cases to the contrary."[17]

Opper was a civilian subcontractor supplying parts to the U.S. Air Force. He was convicted of violating 18 U.S.C. §§ 2 and 281, by inducing Hollifield, a federal employee, to accept $1,750.00 in exchange for Hollifield recommending approval of Opper's previously rejected products.[18] There are two significant elements to the basic offense: the payment of money to the federal employee; and the rendering of services by the federal employee.[19] To prove the first element, the government relied on Opper's exculpatory statements to agents of the Federal Bureau of Investigation.

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[8] *Yates,* 23 M.J. at 579; *Poduszczak,* 20 M.J. at 631.

[9] 348 U.S. 160 (1954).

[10] *Opper,* 348 U.S. at 89. *See* 7J. Wigmore, Evidence § 2070(1) (Chadbourn rev. 1978).

[11] *Opper,* 348 U.S. at 89.

[12] *Id.* at 89–90.

[13] *Smith,* 348 U.S. at 153.

[14] *Opper,* 348 U.S. at 92–93.

[15] *Id.* at 93 (footnote omitted). This rule was applied in courts-martial. "A court may not consider the confession or admission of an accused . . . unless there is . . . other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone." Manual for Courts-Martial, United States, 1951, para. 140a; *see* United States v. Hise, 20 C.M.A. 3, 42 C.M.R. 195 (1970).

Wigmore explains the term corpus delicti in the following manner:

> The meaning of the phase *corpus delicti* has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first,* the *occurrence* of the specific kind of injury or loss . . .; *second,* somebody's criminality . . . as the source of the loss . . .; and *third,* the accused's *identity* as the doer of this crime.
>
> (1) Now, the term *corpus delicti* seems in its orthodox sense to signify merely the first of these elements, namely, the *fact of the specific loss or injury sustained.*
>
> . . . .
>
> (2) But by most judges the term is made to include the second element also, i.e., *somebody's criminality:*
>
> . . . .
>
> (3) A third view, too absurd indeed to be argued with, has occasionally been advanced, at least by counsel, namely, that the corpus delicti includes the third element also, i.e., the *accused's identity* . . . as the criminal. By this view, the term corpus delicti would by synonymous with the whole of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession, which would be absurd.

7 J. Wigmore, supra note 10, § 2072(3) (emphasis in original).

[16] *Opper,* 348 U.S. at 92.

[17] *Id.* at 86 (footnote omitted).

[18] *Id. at 85–86.*

[19] *Id.* at 94.

Those statements, in addition to Opper's rendition of the facts and his denial of having committed any offense, included an admission that he had loaned Hollifield $1,200.00.[20] The government proved the second element by independent evidence.[21]

After deciding Opper's exculpatory statements should be corroborated, the Supreme Court considered the extent of the corroboration of admissions necessary as a matter of law for a judgment of conviction.[22] The Court reasoned:

> [T]he corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[23]

The Court rejected the line of federal cases that required only proof of the corpus delicti, adopting the other line of cases that had trustworthiness as the primary consideration. That selection was in keeping with the Court's recitation of the reasons for our departure from the English common law.

The Court then examined the facts of the case and concluded that the government had presented sufficient independent evidence to corroborate Opper's statement that he had paid Hollifield money.[24] That corroborative evidence, by itself, was not sufficient to establish the corpus delicti of the offense. But because the government had established by independent evidence the rendering of services,[25] the government could use the corroborated confession to prove the payment of the money.

> This independent evidence of services and of facts within the admissions seems adequate to constitute corroboration of [Opper's] extrajudicial admissions and also establish the corpus delicti. The jury was free therefore to consider the admission in connection with all the other evidence in the case and to decide whether the guilt of [Opper] had been established beyond a reasonable doubt.[26]

### Application of the Corroboration Rule

The same day that the Supreme Court announced the basic principles of the corroboration rule, it considered, in *Smith* and *Calderon*, the application of those principles using a crime for which there was no tangible corpus delicti, tax fraud.

In *Smith*, the trial court admitted into evidence, over defense objection, Smith's statement to the Internal Revenue Service that contained tables and charts showing his assets for the years 1945 to 1949 and the changes in his net worth during that period.[27] The government wanted to compare the value of Smith's assets at the beginning of the computation period, as reflected in his statements, with his assets at the end of the period. Even though Smith intended the statement to be exculpatory, the $190,000 difference between the beginning and the ending values represented the income Smith should have reported, but did not. Smith argued that the government had to "corroborate the negative implications of his net worth statement, that he did not have at the end of 1945 any substantial assets—for example, cash on hand—which were not reflected in his or the government's net worth computation."[28] Hence, the issue presented by the case was "whether there [was] sufficient independent evidence to corroborate [Smith's] extrajudicial admission that he did not have sufficient assets at the starting point to account for the increases in the net worth attributed to him in the prosecution years."[29]

The Supreme Court recognized that "in a crime such as tax evasion there is no tangible injury which can be isolated as a corpus delicti. As to this crime, it cannot be shown that the crime has been committed without identifying the accused."[30] Because of the lack of a tangible corpus delicti, the Court was faced with the issue of "whether the requirement of corroboration may properly be applied to the crime of tax evasion." The Court "[chose] to apply the [requirement for corroboration] . . . to crimes in which there is no tangible corpus delicti, where the corroborative evidence

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[20] *Id.* at 88.

[21] *Id.* at 94.

[22] *Id.* at 92.

[23] *Id.* at 93 (citation omitted).

[24] *Id.* at 94 n.12.

[25] *Id.* at 94 n.13.

[26] *Id.* at 94. The Supreme Court's comment that "this independent evidence of services and of facts within the admissions," in addition to corroborating the admissions, "also [established] the corpus delicti," should be read as a reference to proof of a *prima facie* case. It does not retract their earlier ruling that "the corroborative evidence need not be sufficient, independent of the statement, to establish the corpus delicti."

[27] *Smith*, 348 U.S. at 150–51. It is interesting to note the Supreme Court found "the evidence is sufficient to cast doubt on the accuracy of [Smith's] admissions. The unreliability of the statement is illustrated by the great variance between its net worth calculation and the Government's computation. . . ." *Id.* at 155. Those inaccuracies, however, did not cause the Supreme Court to find the statement untrustworthy. The Supreme Court, in sustaining the conviction, stated:

> The circumstances leading up to [Smith's] statement, and the failure of the facts shown therein to mesh with the other evidence adduced by the Government, imposed on the trial judge and the reviewing courts a duty of careful scrutiny. Nevertheless, the independent evidence was strong enough, we believe, to overcome these indicia of unreliability. . . .

*Id.* at 159.

[28] *Id.* at 152.

[29] *Id.*

[30] *Id.* at 154.

must implicate the accused in order to show that a crime has been committed."[31]

Having decided that Smith's statement had to be corroborated, the Court stated:

> There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty.[32]

The Court then posed the following questions: "(1) whether corroboration is necessary for all elements of the offense established by admissions alone . . . and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged.[33] In answering both questions affirmatively, the Court explained: "All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[34]

That discussion, regarding the required "quantum of corroboration," refers both to the government's burden to corroborate the confession, as well as the government's ultimate burden regarding guilt and innocence. The corroborative evidence must establish the trustworthiness of the confession, as well as implicate the accused in the commission of the crime. Substantial evidence is all that is required to accomplish those purposes, however.

The application of the corroboration rule is illustrated in the Court's analysis of the evidence. The Court considered two different methods of corroborating Smith's admissions. Under the net worth method, "the Government may provide the necessary corroboration by introducing substantial evidence, apart from [Smith's] admissions, tending to show that [Smith] willfully understated his taxable income. This may be accomplished by substantiating the opening net worth directly."[35] With regard to this method, the government relied on the testimony of two government agents. The testimony of one agent, however, "was based solely on the extrajudicial statements of [Smith], and . . . must be corroborated by substantial independent evidence."[36] The Court held that Smith's "tax returns adequately [corroborated his] statements as to his financial history."[37] The combination of the tax returns and the agent's testimony corroborated the opening net worth.[38] It is that evidence that implicated Smith in the commission of a crime.

The Court then examined the second method for corroborating the admissions. This method focused on the "independent evidence concerning [Smith's] conduct during the prosecution period, which tends to establish the crime of tax evasion without resort to the net worth computations."[39] The Court listed the assets accumulated by Smith during the period of prosecution, and stated:

> These substantial expenditures, savings and investments might not, of themselves, suffice to support a conviction of tax evasion without evidence of a starting point indicating a lack of funds from which these payments might have come. But this conduct does corroborate the net worth statement by *tending* to show that [Smith] was understating his income during the prosecution years.[40]

The Court held that "under either of these two lines of proof sufficient corroboration was shown to permit the case to go to the jury."[41]

### Another Example of the Application of the Rule

The situation in *Calderon* was the same as in *Smith;* however, in *Calderon* there was insufficient evidence for the Court to use the net worth method. The Court had to "search for independent evidence which [would] tend to establish the crime directly, without resort to the net worth method."[42] Considering both the government's evidence and Calderon's own testimony at trial, the Court noted: "We have therefore examined the independent evidence with great care to insure that the accused will not be convicted on the basis of a false admission alone. Although the evidence was insufficient to corroborate the opening net worth directly, we find the independent proof of tax evasion entirely adequate."[43]

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[31] *Id.* at 153–54 (citations omitted). In Wong Sun v. United States, 371 U.S. 471, 489 (1963) (citations omitted) (excerpts from note 15 follows the quote in brackets), the Court noted:

> It is true that in [Smith] we held that although "corroboration is necessary for all elements of the offense established by admissions alone," extrinsic proof was sufficient which "merely fortifies the truth of the confession, without independently establishing the crime charged. . . ." 348 U.S. at 156. [But where the crime involves no tangible corpus delicti, we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed."]

[32] 348 U.S. at 156 (citations omitted).

[33] *Id.*

[34] *Id.* at 156 (citation omitted).

[35] *Id.* at 157.

[36] *Id.* (footnote omitted).

[37] *Id.* at 158.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 159.

[41] *Id.*

[42] *Calderon*, 348 U.S. at 165.

[43] *Id.* at 169.

If a tangible corpus delicti cannot be proved, the corroborative evidence, in addition to fortifying the trustworthiness of the confession, must implicate the accused in the commission of the crime. This requirement is not a return to the corpus delicti rule, but provides a safeguard, "so that the accused is not convicted on the basis of a false confession alone."[44] The corroboration rule was adopted to prevent this evil.

### Entanglement of the Corroboration Rule

*Loewen* would have been another straightforward application of the corroboration rule, but for one factor: the appellate court's apparent confusion regarding what to do when the government, in an attempt to corroborate a confession, proved facts contrary to the essential facts contained in the confession.[45] The court unnecessarily reasoned that "[t]he Supreme Court did not discard the corpus delicti rule in *Smith* and *Opper*, but instead provided an alternate method of corroboration which could be used in cases where there is no tangible corpus delicti."[46] But, Loewen was charged with forgery and larceny. Clearly, those offenses have tangible corpus delicti. In fact the court found that "a tangible corpus delicti, i.e. a forgery by someone, was established by independent evidence."[47]

The court failed to recognize that a strict application of the principles in *Opper* would allow it to reverse the conviction, not because the government failed to prove the corpus delicti, but because of the lack of truthfulness of the statement. Instead, the court reasoned that because Military Rule of Evidence 304(g) prescribed a specific method for corroborating confessions, the military courts could not use the corpus delicti method for corroborating a confession as followed in the federal courts. Thus, the court opined that Military Rule of Evidence 304(g) "can impose a greater burden on the prosecution in a particular case, because it extends the corroboration requirement to include the identity of the accused as the perpetrator" of the offense.[48] The court failed to properly apply the decisions in *Opper* and *Smith*, and it added to the corpus delicti rule a requirement to prove not only the "occurrence of the specific kind of injury or loss" and "somebody's criminality," but also the "accused's identity."[49]

Loewen had been apprehended after his wife presented two of twenty-six forged prescriptions and received the purported prescribed drug. He confessed to taking some of the prescription forms and to forging all or portions of some of them.[50] At trial, the government presented the laboratory report of a handwriting expert. The expert reach seven conclusions, none of which implicated Loewen. On the contrary, the expert concluded that, "[Loewen] 'did not make' the purported signatures of" one doctor " 'and probably did not make' the purported signatures of" the other doctor.[51] It is unclear from the opinion what other specific evidence the government presented at trial. It is clear that the trial judge applied the old corpus delicti rule without consideration of trustworthiness.

The appellate court broke Loewen's confession into seven essential facts[52] and compared each essential fact with the evidence in the case.[53] The court concluded that, except for Loewen's admitted addiction to Tylox, "none of the other essential facts [were] independently corroborated and some [were] contradicted by the [G]overnment's evidence."[54] Based on all of the evidence, the court held "[t]he independent evidence in [the] case not only fails to support an inference that the confession was reliable, it strongly indicates that it was false."[55]

The court's dismissal of the fifty-two offenses fits squarely with the decision in *Opper* and *Smith*, although the *Loewen* court reached that result applying an incorrect premise. Loewen's statement, like Smith's, was unreliable, but in *Loewen*, even though the corpus delicti of forgery had been established, there was no evidence of trustworthiness. Thus, the confession was not corroborated. Without the confession, there was no evidence to implicate Loewen in the commission of the offenses; hence, the charges were dismissed.

Although the corroboration rule does not require proof of the "accused's identity," the government could have prevailed in *Loewen* if it could have proved by independent

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[44] *Id.*

[45] *Loewen*, 14 M.J. at 785–88.

[46] *Id.* at 787; *see Yates*, 23 M.J. at 578. The court's conclusion was based on *Calderon* and *Wong Sun*. The conclusion ignored the fact that the Supreme Court in *Opper*, after considering the two lines of cases followed in the federal courts (*supra* notes 15 and 16), stated: "[W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti." *Opper*, 348 U.S. at 93. The Court required the government, instead, to prove the trustworthiness of the statement. The Court used the same approach in *Smith* and *Calderon*. In those cases, however, because there was no tangible corpus delicti and the admissions of the accused were self serving and unreliable, the Court required that the "corroborative evidence must implicate the accused in order to show that a crime has been committed." *Smith*, 348 U.S. at 154. The Court did not set up a two-pronged approach, but instead implemented trustworthiness as the key consideration. This is supported by the Court's decision in *Wong Sun*. There the Court again reaffirmed their distrust for confessions. *Wong Sun*, 371 U.S. at 489. The confusion arises from footnote 15 in *Wong Sun*. There the Court, in discussing crimes with tangible corpus delicti, referred to the government's ultimate burden of proof, and stated that the indicia of criminality would be provided by that evidence. Whereas, for cases with no tangible corpus delicti, the corroborative evidence must provide the necessary indicia of criminality.

[47] *Loewen*, 14 M.J. at 787.

[48] *Id.* at 786–87.

[49] *See supra* note 15.

[50] *Id.* at 785–86.

[51] *Id.* at 786.

[52] *Id.* at 787.

[53] *Id.* at 787–88.

[54] *Id.* at 787.

[55] *Id.* at 788.

evidence Loewen's "guilt either as a sole perpetrator or as a principal."[56]

### The Corroboration Rule is Untangled

With the government's right to appeal,[57] the impact of the Army Court of Military Review's statement regarding the prosecution's burden to independently corroborate the "accused's identity" came to light. An illustrative case is *United States v. Yates.*[58]

The trial judge, apparently applying the dicta in *Loewen,* suppressed Yates' confession on the grounds that the government had failed to present substantial independent evidence establishing Yates as the perpetrator of the offense.[59] The Navy-Marine Court of Military Review granted the government's appeal, reversing the trial judge.

Yates admitted that during July 1985 he had sexual relations, both conventionally and orally, with an unknown girl; and that "he may have accidentally transmitted gonorrhea to his infant stepdaughter, Carolyn, as he twice" committed indecent acts with her, "although he was not aware of ever having gonorrhea himself and could not offer a definitive explanation for how Carolyn contracted the disease."[60] He further admitted to engaging twice in oral sexual relations with Carolyn.[61]

At trial, Yates repudiated his confession. "[He] denied engaging in any sexual intimacies with Carolyn or with any persons . . . [or] ever contracting gonorrhea. He related that . . . he engaged in sexual relations with his wife and that both he and his wife tested negative for gonorrhea."[62] His wife confirmed those portions of his testimony relating to them and testified as to matters regarding their family life, which matters the government contradicted using rebuttal evidence.[63]

The government presented medical evidence that Carolyn was diagnosed as having gonorrhea, that she had a labial tear on her vulva, that Yates had been treated for pharyngitis, that pharyngitis could be diagnosed from symptoms found in a person who had contracted oral gonorrhea, and many other medical facts regarding gonorrhea and the transmittal of the disease.[64]

In arriving at its decision, the Navy-Marine Court of Military Review did not cite *Loewen.* It did consider the same Supreme Court cases considered by the *Loewen* court, and did not discuss any new Supreme Court cases.[65]

The *Yates* court agreed with the *Loewen* court that:

> [T]he Supreme Court has not abandoned the corpus delicti rule, but has provided a second approach where the corpus delicti could not be proven independently, and, in such cases, the trustworthiness of the confession can be supplied by independent evidence dovetailing with the admitted facts sufficiently to justify a jury inference of their truth, thereby proving the offense through the statements of the accused.[66]

The *Yates* court, however, did not feel the need to "answer the question of whether Mil. R. Evid. 304(g) was intended to adopt the two-pronged federal approach of (1) preserving the corpus delicti rule and (2) providing for a more flexible rule in accordance with the *Opper-Smith* rational where a corpus delicti cannot be established."[67] Nevertheless, the court opined "that the revised military rule is broad enough and was designed to emulate the more flexible federal rule, subject to the caveat that under either prong the linchpin consideration is whether the *independent evidence corroborates the essential facts admitted sufficiently to justify an inference of their truth.*"[68]

Considering the case as a whole, the court held that, "the evidence . . . goes far beyond establishing a corpus delicti and, if believed, fortifies the truth of the confession utilizing only the *Opper-Smith* second prong."[69] The court also held "that the trial judge erred as a matter of law in requiring the Government to prove through independent evidence alone the identity of the accused as the perpetrator of the offenses."[70]

The court gave the following guidance to trial judges:

> Ultimately, the trier of fact must determine whether the accused's guilt on the whole of the evidence, including his confession, is established beyond a reasonable doubt. The question, however, before the trial judge on the motion to suppress the accused's confession did not require consideration of the ultimate issue and the attendant burden of proof, but

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[56] *Id.*

[57] UCMJ art. 62.

[58] *Yates,* 23 M.J. 575 (N.M.C.M.R. 1986), *aff'd,* 24 M.J. 114 (C.M.A. 1987). [Editor's note. The Court of Military Appeals held that where there was tangible injury to the victim, there need not be independent evidence of the identity of the perpetrator to admit the confession. Query: What is the meaning of the language in Mil. R. Evid. 304(g): "If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence . . . only with respect to those essential facts . . . that are corroborated . . . ."?]

[59] 23 M.J. at 579.

[60] *Id.* at 575–76.

[61] *Id.* at 576.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 577–79.

[66] *Id.* at 578.

[67] *Id.*

[68] *Id.* at 579 (citation omitted) (emphasis in original).

[69] *Id.* at 578–79.

[70] *Id.* at 579.

whether the independent evidence raised an "inference of the truth of the essential facts admitted". . . .[71]

### Conclusion

Contrary to the opinion expressed in *Loewen* and *Yates*, the cases of *Opper, Smith,* and *Calderon* leave little doubt that the Supreme Court did discard the corpus delicti rule as the touchstone for corroborating a confession. In its place, the Court required a demonstration of trustworthiness supplemented by the requirement, in those case with no tangible corpus delicti, that the evidence also implicate the accused in the commission of the crime.

The government always has the burden of proving beyond reasonable doubt each element of the offense charged. To accomplish that, the government must show, by legal and competent evidence, that the accused committed each element of the offense. The accused's corroborated confession is just one item of evidence that the fact finder can use to prove guilt. The confession is admissible if there is independent evidence to justify sufficiently the jury inferring the truth of the essential facts admitted in the confession.

One method for corroborating the confession is to establish by independent evidence the elements of the offense embraced in the confession.[72] That evidence must also cast light on the trustworthiness of the confession. Another method of proof is to verify the existence of the essential facts embraced in the confession.[73] If this second method is used, the corroborative evidence, in addition to casting light on the trustworthiness of the confession, must implicate the accused in the commission of the crime.[74] This additional factor is necessary to ensure that the accused is not convicted based on a false confession.

Trial counsel should determine what essential facts are embraced in any statements of the accused and identify those facts needed to prove the accused's guilt. He or she should determine if there is independent evidence to justify sufficiently an inference of their truthfulness. The witnesses should be carefully interviewed and the other evidence in the case closely examined. After presenting the evidence at trial, the trial counsel should articulate the reasons why the specific evidence presented bolsters the trustworthiness of the statement and how the independent evidence implicates the accused in the commission of the crime.

The trial defense counsel should likewise be aware of the essential facts admitted in the statement and carefully evaluate the available testimony and evidence. He or she should pin each witness down to the exact facts, time, and place. This is especially true in the case of larceny. It is not just a matter of the property having been taken, but exactly where, when, and how the property was taken, and how that evidence compares with the essential facts in the accused's statement.

The trial judge should be careful not to confuse the government's ultimate burden of proving guilt with its burden of corroboration. A confession is corroborated if substantial evidence has been presented from which the jury could infer that the confession is truthful. The confession, thus corroborated, will establish the identity of the accused as the perpetrator of the offense. Otherwise, a motion for a finding of not guilty may be the next motion considered by the court.

[71] *Id.*

[72] This method was labeled by the *Yates* court as the corpus delicti prong followed in the federal courts. *Yates,* 23 M.J. at 578.

[73] This method was labeled by the *Yates* court as the second prong of the federal rule. *Yates,* 23 M.J. at 578.

[74] *Smith,* 348 U.S. at 154.

## *Government Appellate Division Notes*

# Execution of Additional Confinement for Failure to Pay a Fine

*Captain Carlton L. Jackson*
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### Introduction

Since 31 May 1951, all courts-martial have had the power to adjudge a fine in addition to confinement, and to provide that if the fine is not paid, further confinement may be executed.[1] It has also been Army policy at the United States Disciplinary Barracks (USDB) since 1 October 1978, that prior to the execution of additional confinement for failure to pay a fine, the prisoner's ability to pay the fine must be considered.[2]

On 24 May 1983, the Supreme Court reached a similar conclusion in the appeal of an individual whose probation was revoked for failure to pay an adjudged fine. In *Bearden*

[1] *See* Manual for Courts-Martial, United States, 1951, para. 126h(3); Manual for Courts-Martial, United States, 1969, (Rev. ed.), para. 126h(3); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(b)(3) [hereinafter M.C.M., 1984, and R.C.M., respectively].

[2] Dep't of Army, Reg. No. 190–47, Military Police—The United States Army Correctional System, para. 12–5*d* (1 Oct. 1978) [hereinafter AR 190–47]. *See also* Dep't of Defense Instruction No. 1325.4, Treatment of Military Prisoners and Administration of Military Correction Facilities, para. III. P.2.a. and b. (Oct. 7, 1968) (C2, Oct. 23, 1974) [hereinafter DOD Instr. 1325.4]; AR 190–47, paras. 6–14 and 12–23 (C1, 1 Nov. 1980).

*v. Georgia,*[3] the Supreme Court mandated that, before an individual could be confined for failure to pay a fine, the government must determine why the fine was not paid.[4] If the failure to pay the fine is willful, the government may confine the individual without further due process.[5] On the other hand, if the individual has used his or her best efforts to pay the fine, but cannot pay because of indigency, the government must consider alternatives to confinement.[6] If no reasonable alternative can be found to meet the government's interest in adequate punishment, then and only then can such confinement be executed.[7]

*Bearden's* mandate was extended to the military by R.C.M. 1113(d)(3) on 1 August 1984. In particular, R.C.M. 1113(d)(3) provides that no sentence to confinement may be executed for a failure to pay a fine,

> if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

In *United States v. Soriano,*[8] the Court of Military Appeals recognized that *Bearden* and R.C.M. 1113(d)(3) applied to the military, and reminded judge advocates in the field that failure to make such determinations prior to the execution of additional confinement for failure to pay a fine would be considered error.[9] Unfortunately, R.C.M. 1113(d)(3) is a statement of general policy that, when applied to specific cases, leaves many unanswered questions.[10] This article attempts to answer many of these questions and offer suggestions on how R.C.M. 1113(d)(3) should be implemented in the Army.

### When Is the Indigency Determination to Be Made?

The placement of R.C.M. 1113(d)(3) in Chapter XI of the MCM, 1984, Post-Trial Procedure, suggests that the determinations of the prisoner's alleged indigency and the government's interest in appropriate punishment are to be made before the order promulgating the convening authority's action is published pursuant to R.C.M. 1114. This interpretation is at odds with *Soriano*, however, because *Soriano* held that the R.C.M. 1113(d)(3) issue did not become ripe for appellate decision until the prisoner began to serve his or her additional confinement.[11] As the issue does not become critical until the prisoner begins serving the additional confinement, the approach taken in DOD Instr. 1325.4 and AR 190–47 not to make these determinations until the prisoner is considered for early release or parole on his or her basic sentence to confinement is correct, and R.C.M. 1113(d)(3) should be interpreted accordingly.[12]

### How Is the Indigency Determination Initiated?

Neither R.C.M. 1113(d)(3) nor DOD Instr. 1325.4 attempt to define how the indigency determination process is initiated in the military, although AR 190–47 defines how the process is initiated by Army prisoners at the USDB. Pursuant to AR 190–47, para 12–7, Army prisoners at the USDB initiate the process by executing a form[13] and submitting it to the Commandant of the USDB within ninety days of their eligibility date for parole. This process is similar to federal practice.

In the federal system, the inmate submits an application under oath to the U.S. magistrate. In the application, the inmate must demonstrate that he or she does not possess "any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt."[14]

Unfortunately, no provision is made in AR 190–47 for the initiation of an indigency review by Army prisoners confined outside the USDB. Accordingly, procedures similar to those used at the USDB should be extended to Army prisoners confined elsewhere.[15]

### Who Makes the Indigency Determination?

The Manual for Courts-Martial does not define the term "authority" as it is used in R.C.M. 1113(d)(3). It is apparent, however, that the authority who must make this determination must have the power to remit or mitigate the approved fine and/or additional confinement, should such action be appropriate. In the Army, these powers are reserved to convening authorities,[16] the Army Court of Military Review,[17] The Judge Advocate General,[18] and the

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[3] 461 U.S. 660 (1983).

[4] *See generally id* at 664–69.

[5] *Id.* at 672–73.

[6] *Id.*

[7] *Id.*

[8] 22 M.J. 453, 454 (C.M.A. 1986).

[9] In *Soriano*, the issue was not "ripe for appeal" because the appellant had not begun to serve additional confinement for his failure to pay his fine. 22 M.J. at 454.

[10] A review of Army policy in this area has been initiated and a change to AR 190–47 is anticipated in the near future. The proposed change would bring clemency procedures under AR 190–47, para. 6–14, into accord with parole procedures under paras. 12–7 thru 12–10 and 12–23 (C1, 1 Nov. 1980), R.C.M. 1113(d)(3), and *Bearden v. Georgia.*

[11] *Soriano*, 22 M.J. at 454. If, however, an accused is sentenced to pay a fine, but no confinement is adjudged except in the event the fine is not paid, it would be appropriate for the convening authority taking initial action to make the indigency determination before approving any part of the sentence or in a supplemental action. *See generally* R.C.M. 1105–1114.

[12] *See generally* R.C.M. 102; *accord United States v. Pagan*, 785 F.2d 378, 381–82 (2d. Cir.), *cert. denied*, 107 S. Ct. 667 (1986); 18 U.S.C. § 3569 (Supp. III 1985).

[13] Department of the Army (DA) Form 1704–R, Parole Statement (Feb. 1972).

[14] 18 U.S.C. § 3569 (Supp. III 1985); *see also* 28 C.F.R. §§ 571.50–.56 (1986).

[15] *See supra* note 10.

[16] Uniform Code of Military Justice art. 60(c)(1) and (2), 10 U.S.C. § 860(c)(1) and (2) (1982) [hereinafter UCMJ].

[17] UCMJ art. 66(c).

Secretary of the Army.[19] Given the respective duties of each of these authorities, it appears that the indigency determination should be made by the officer exercising general court-martial convening authority over prisoners confined outside of the USDB,[20] and by the Secretary of the Army (Army Clemency Board) for prisoners confined at the USDB.[21]

In reaching this conclusion, it should be noted that R.C.M. 1113(d)(3) was promulgated to avoid the constitutional problems discussed in *Bearden v. Georgia* by conforming military practice with that of the federal government.[22] At the time R.C.M. 1113(d)(3) was promulgated, federal practice allowed an inmate to request that a determination of indigency be made by his or her warden or by a U.S. magistrate.[23] On 12 October 1984, however, Congress removed the subsection in 18 U.S.C. § 3569 allowing a warden to make this determination for two reasons:[24] it appeared that U.S. magistrates received most of these requests; and the Federal Bureau of Prisons conceded that a neutral magistrate was in a better position to make an independent inquiry and determination than was a prison warden.[25]

In any event, to the extent that the federal system requires that a magistrate determine indigency, the uniqueness of the military justice system justifies a different approach.[26] As previously indicated, in the military a magistrate has no power to remit or mitigate an approved punishment. Accordingly, so long as the convening authority or the Army Clemency Board remains neutral and detached, no constitutional error should arise from their determination of indigency in these cases.

### How Is the Indigency Determination Made?

None of the military authorities heretofore cited give any indication of what guidelines the Army Clemency Board and convening authorities should apply when a prisoner alleges indigency, although the federal practice of using a financial disclosure and a pauper's oath could easily be adopted by the military.[27] This evidence could be considered along with the prisoner's finance records, and other evidence, to determine if the prisoner is in fact indigent. For example, if the prisoner's finance records reveal that he or she has accrued pay in excess of the amount of the fine, the prisoner should be found to have wilfully refused to pay the fine and denied early release or parole.[28] Likewise, if there are serious discrepancies between the prisoner's finance records and his or her financial disclosure that demonstrate that the prisoner is not being truthful about how he or she spent his pay and allowances since trial, the prisoner may be denied early release or parole.[29] If, however, examination of these documents reveal that the prisoner "has made good faith efforts to pay but cannot because of indigency," the prisoner should be deemed indigent, and alternative punishment should be considered.[30]

Initially, these determinations should be made by Army Correction System personnel at the facility where the prisoner is confined. Thereafter, pursuant to AR 190–47, paras. 6–14, or 12–5*d* thru 12–10 and 12–23 (C1, 1 Nov. 1980), the commander of the Army correctional facility or the USDB Disposition Board should make recommendations to the general court-martial convening authority or the Army Clemency Board, respectively, concerning alternatives to the approved additional confinement. Finally, after giving the prisoner notice of the recommendations of the confinement facility commander or the disposition board and an opportunity to be heard, the general court-martial convening authority or Army Clemency Board would decide if "there is no other punishment adequate to meet the Government's interest in appropriate punishment."[31]

### Conclusion

This area of military practice is not well defined at present, although a change to AR 190–47 is forthcoming. In the interim, staff judge advocates on installations having Army confinement facilities should be aware of the need for indigency reviews prior to the execution of additional confinement for failure to pay a fine, and should ensure that no prisoner is compelled to serve such confinement without a determination by the convening authority that the failure to pay the fine was wilful or "that there is no other punishment adequate to meet the Government's interest in appropriate punishment."[32]

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[18] UCMJ art. 69(a) and (b).

[19] UCMJ art. 74(a) and (b).

[20] AR 190–47, para. 6–14*b*, *c*, and *d*.

[21] AR 190–47, para. 6–14*e*, 12–7 thru 12–10 and 12–23 (C1, 1 Nov 1980).

[22] *See generally* R.C.M. 1113(d)(3) analysis, at A21–76.

[23] *See* 18 U.S.C. § 3569 (1982).

[24] The change was effective 31 December 1984 (*see* 18 U.S.C. § 3569 (Supp. III 1985).

[25] H.R. Rep. No. 906, 98th Cong. 2d. Sess. 11, *reprinted in* 1984 U.S. Code Cong. Admin. News 5433, 5443.

[26] *See generally* Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974).

[27] *Compare* 18 U.S.C. § 3569 (Supp. III 1985) *and* 28 C.F.R. §§ 571.50–.56 (1986) *with* AR 190–47, paras. 6–14, 12–5d thru 12–10 and 12–23 (C1. 1 Nov. 1980).

[28] *Cf. Bearden*, 461 U.S. at 672–73 (willful failure to pay a fine or make bona fide efforts to acquire funds to do so, may justify imprisonment).

[29] *Id.*

[30] *Bearden*, 461 U.S. at 672–73; R.C.M. 1113(d)(3).

[31] R.C.M. 1113(d)(3).

[32] *Id.*

# Thoughts From a GAD

*Captain Vito A. Clementi*
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Trial counsel in the field may think that the Defense Appellate Division works off a "hit list" of issues. This is not the case, although appellate defense counsel do make it a practice to follow recurring trends in the cases they review. Because they see recurring problems with which they form issues, we at the Government Appellate Division are often responding to the same types of problems occurring at trial. These are not "heavy duty" legal issues. Rather, they are things that, with a little forethought and planning, the trial counsel could avoid and ensure a better result at trial, as well as avoiding needless appellate litigation. Most of these problems are common sense, but they are the kinds of things we frequently see. What are the current gigs? For convenience, I will take them in chronological order:

## Pre-Trial

ALWAYS GET A WRITTEN DEFENSE DELAY IF DOCKETING A CASE OUTSIDE THE 90/120 DAY LIMITS. One more form is not going to kill anyone, so it is a good idea to prepare a blank "request for delay" and present it to the defense counsel (if need be) when discussing docketing. If the defense refuses to request a delay, ask the judge to set an Article 39(a) session.[1] Many speedy trial problems at trial and on appeal can be avoided if it is established early who is responsible for what time. To that end, trial counsel should keep a chronology. It need not be very detailed, but it should reflect when the parties held case-related conversations, and what decisions were reached.

## Trial

1. ALWAYS ACCOUNT "ON THE RECORD" FOR THE COURT MEMBERS. To avoid those jurisdictional problems, trial counsel must state the names of all members appointed on the convening order. In addition to accounting for those members present, trial counsel must also state which members are absent and why.

2. GUILTY PLEAS.

a. ALWAYS TRY TO GET A STIPULATION OF FACT. If the accused is going to plead in exchange for a deal, you can and should insist upon a stipulation to go up to the convening authority. In it, you should include as much as possible about the offense, and not just fulfill the elements of proof. We find that the better stipulations contain matters that specifically negate defenses. This should serve to prevent the situation arising at trial where the accused may become hesitant to fully admit guilt.

We have noticed a trend where defense counsel are stipulating to aggravating evidence, then at trial asking the judge to excise certain portions as irrelevant or uncharged misconduct. Although the Army Court of Military Review has supposedly blessed this defense tactic, trial counsel should argue that the contents of a stipulation are part and parcel of the negotiation process and should not be subject to editing by the military judge.[2]

b. ALWAYS HAVE A COPY OF JUDICIAL NOTICE MATERIAL AVAILABLE. The thing that probably annoys trial judges the most is when counsel asks the court to judicially note the existence of a certain lawful regulation without having a copy present. The judge often "gigs" the trial counsel on the record, followed by a recess in which the latter makes a mad dash to places unknown to procure the appropriate material.

More importantly, the material that counsel asks the court to judicially note is often critical during the providence inquiry. In a recent case, an accused pled guilty to a violation of a federal statute under the Assimilative Crimes Act.[3] The trial counsel did not have a copy of statute for the judge, who "winged it" from the language of the specifications. Although affirmed on appeal, appellate litigation could have been avoided had trial counsel provided the judge with a copy of the statute.

c. IF YOUR ACCUSED GOES JUDGE ALONE AS PART OF THE DEAL, MAKE SURE YOU HAVE THE JUDGE ESTABLISH A VOLUNTARY WAIVER OF A PANEL. We have been seeing this a lot lately. Appellate defense counsel are arguing that waivers of jury trials in exchange for a more favorable sentence are per se violative of public policy. To be on the safe side, make sure that the judge fully inquires as to the voluntariness of waivers.[4]

d. MAKE SURE THE JUDGE DEVELOPS THE ACCUSED'S PROVIDENCY MORE THAN THE "SHORT FORM" ELEMENTS, AND THAT THE JUDGE INQUIRES AS TO ANY POSSIBLE DEFENSES. Often a problem arises when the judge makes scant use of the "tell me in your own words" portion of the providence inquiry. Perhaps because people have a natural reluctance to admit guilt, an accused will "hem and haw" about his or her culpability. This occurs most often when the accused has to talk about his or her intent. For example, you ought to make sure the judge goes beyond asking the accused if he and his counsel "have discussed the defense of entrapment and are satisfied it does not apply."

3. ASSESS YOUR CASE, HAVE A THEORY, AND DISCARD ALL THAT IS NOT NEEDED.

a. USE AN ELEMENTS CHECKLIST WHEN PREPARING FOR TRIAL TO ENSURE ADEQUATE DEVELOPMENT OF EVIDENCE. An elements checklist is perhaps the most important aid from the beginning to the end of a case. On one side of the page, list the elements of

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

[2] *See* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986); Trial Counsel Assistance Program Memorandum No. 18 (20 Mar. 1987) [hereinafter TCAP Memo 18]. *But see* United States v. Glazier, 24 M.J. 550 (A.C.M.R. 1987).

[3] 18 U.S.C. § 13 (1982). Offenses under the Act are charged as violations of UCMJ art. 134.

[4] The Court of Military Appeals has specified review on this question. United States v. Santos, *petition granted*, 23 M.J. 289 (C.M.A. 1986).

the offense; on the opposite side, list the individual pieces of admissible evidence you will use to prove each element. This list can then be transferred to your notes used to prepare direct examination.

A "horror story" here can be found in that TCAP Memo 18. A trial counsel allowed a rape victim to testify that the accused forced her to the ground, removed her clothes, and "did what he had to do" to "have sex." The wily defense counsel did not pursue this further on cross-examination. The Army Court of Military Review did not find this rendition sufficient to establish an act of penetration, and only affirmed an assault with intent to commit rape.[5] Had the trial counsel used an elements checklist, he would have been reminded that the victim needed to state the accused had penetrated her.

b. DO NOT FIGHT OVER TRIVIAL MATTERS. After making the elements checklist described above, you should be able to assess what is needed for the case. If you have enough for a conviction, you should attempt to separate the "wheat from the chaff" in your evidence, and not waste the court's time with needless matters. Many counsel unfortunately lose their objectivity, and try to jam in every bit of damaging evidence they can muster under the rubric of Military Rules of Evidence 404(b) and 803(24). Not only is this a mistaken trial tactic, but it often results in needless litigation on appeal.

c. DO NOT NEEDLESSLY OPPOSE CHALLENGES FOR CAUSE. The appellate courts have addressed this issue often of late.[6] Do not be afraid to "let go" of a court member. In the majority of cases, if you have assessed your case correctly, one member leaving is not going to make that much of a difference.

4. FULLY LITIGATE ANY "RESTRICTION TANTAMOUNT TO CONFINEMENT" PROBLEMS; ESTABLISH CONDITIONS ON RECORD.[7] There seems to be a natural reluctance to pin down the conditions of restraint under which an accused is held. It is probably because by the time the issue comes up, a trial counsel is so relieved to have gotten to sentencing that counsel "lays down." Anyway, claims of restriction tantamount to confinement are *not* waived by failing to raise at trial. When the issue comes up on appeal, it is difficult to glean conditions from a cold record. Without the trial counsel notifying the court of any pre-trial restraint and litigating the conditions on the record, a big hole opens up on appeal for the accused to get additional credit.

### Post-Trial

ENSURE THAT ALL NECESSARY DOCUMENTS ARE INCLUDED WITH THE RECORD OF TRIAL. On occasion, we have seen records where the pre-trial advice, post-trial recommendation, orders, and defense counsel submissions have been omitted. It is a genuine hassle for both the field counsel and us to run around trying to "marry up" the missing papers with the record. Also, if your convening authority changes command after referral but before action, you have to insert a copy of the change of command orders in the allied papers.

Attorneys at the Trial Counsel Assistance Program (TCAP) and Government Appellate Division are always available to assist trial counsel. If we do not have an answer for you, we will get back to you.

[5] United States v. Salters, CM 448877 (A.C.M.R. 25 Feb. 1987).

[6] *See* United States v. Reynolds, 23 M.J. 292 (C.M.A. 1987).

[7] *See* United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985).

## *Trial Defense Service Note*

# Advocacy at Administrative Boards: A Primer

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Most trial attorneys probably fancy themselves as zealous advocates embroiled in courtroom drama, but Army defense counsel often spend a good deal of time practicing their craft in the less lofty forum of an administrative hearing. Army Regulation 15–6[1] carries the procedural burden of administrative hearings through a virtually infinite range of subjects; most commonly, administrative elimination proceedings under Army Regulation 635–200.[2] For defense counsel, these regulations have become like chapters of an administrative Manual for Courts-Martial.[3]

### Preparation

Although representation of respondents at formal AR 15–6 investigations and administrative elimination board

[1] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) [hereinafter AR 15–6].

[2] Dep't of Army, Reg. No. 635–200, Personnel Separations—Enlisted Personnel (5 July 1984).

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

hearings is a priority III duty for defense counsel,[4] the consequences of unfavorable findings and recommendations by a board can have devastating effects on a soldier. While it may not be so egregious as to be ineffective assistance of counsel, defense counsel acting as counsel for representation who do little more than assure the government "does it by the numbers" at an administrative proceeding do a disservice to their clients. This is not to say that you should not worry about notice requirements and valid appointment orders,[5] but proper preparation coupled with good advocacy can quite literally make the difference in saving your client's career.

Tactics and strategy for representation at an administrative hearing are dictated in large part by the nature of the proceeding. Frequently, elimination proceedings under chapter 14 of AR 635–200 for misconduct look, feel, and smell a lot like a court-martial without a lot of rules.[6] Clearly, a contest over the facts will proceed much like a trial on the merits, and the emphasis in AR 635–200 on board proceedings indicates that it will be a staple of practice for defense counsel, particularly in urinalysis cases.[7]

### Evidence

Although the rules of evidence do not apply to proceedings conducted under AR 15–6 and AR 635–200, the regulations do provide a certain number of evidentiary limitations and the standard by which evidence may be admitted.[8] Despite the protections available under paragraph 3–7 of AR 15–6 and paragraph 2–11 of AR 635–200, the most bothersome is the provision that virtually all evidence deemed relevant and material is admissible.[9] At first blush, that standard may appear to give the government representative carte blanche to conduct a wholesale muckraking of your client in order to convince the board that he or she is guilty of misconduct and should be discharged. Counsel for the respondent can even the scales somewhat by being familiar with the regulation and insisting that the board adhere strictly to its provisions.[10]

Before proceeding on the merits, counsel for representation should endeavor to take control of the proceedings immediately by conducting a thorough voir dire. Although the sole basis for challenging any member is lack of impartiality, paragraphs 3–1 and 5–7 of AR 15–6 and paragraph 2–7*b*(1) of AR 635–200 make it clear that members must be impartial and that counsel have a duty to make any challenge promptly or be subject to waiver.[11]

With properly planned questions on voir dire, board members can be remarkably candid and, based on your questions, may decide that they lack the proper judicial temperament to sit as a member. In fact, if any member does come to that conclusion, the member is compelled to reveal it immediately.[12]

If you have sensitized the members to the importance of impartiality, you may find that even though there was no sustainable challenge at the outset, as evidence unfolds and witnesses come forward, conscientious board members may excuse themselves if it becomes apparent to them they cannot judge the case impartially. At the least, the members will be more conscious of their prejudices or preconceptions.

### Proceeding on the Merits

When a judge advocate, particularly a trial counsel, is the recorder, you can anticipate an opening statement. Although the formal script for conducting the hearing indicates respondent's counsel will make an opening statement at the beginning of the respondent's case,[13] an advocate is often well-advised to temper the recorder's statement by requesting permission to offer a statement immediately after the recorder has finished.

As the board proceedings begin and evidence is offered, be mindful of the standards for admissibility and the government's requirement to disclose material matters to the respondent.[14] You may very well demand discovery if it has not been forthcoming and you may do so without incurring the reciprocal discovery obligations you would under the Manual.[15]

Unless you have to depend on the government to obtain respondent's witnesses or other evidence, there is no tactical advantage in showing your hand by volunteering the names of your witnesses or what sort of evidence you hope to present.

With the busy schedules most prosecutors have, it is understandable that the administrative proceeding carries

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[4] Standing Operating Procedures, U.S. Army Trial Defense Service (1 Oct. 1985).

[5] Although paragraph 1–21 of AR 635–200 clearly says that a general court-martial convening authority shall convene boards of officers, frequently this task is relegated to an administrative designee such as the chief of personnel actions at the local Adjutant General activity. Such delegation is not authorized. Because this delegation is comparable to a jurisdictional error, counsel may consider it a tactical decision to raise it before or after the proceedings. If things do not go your way, you may argue the board was a nullity because of improper referral.

[6] For example, the Military Rules of Evidence do not apply to administrative boards.

[7] Paragraph 14–12(d) of AR 635–200 requires that soldiers who are alleged to have abused illegal drugs be processed for separation, which in many cases, entitles the soldier to have the case heard by a board of officers. Compared to previous editions of AR 635–200, the sheer volume of the current version of chapter 2 devoted to board proceedings reflects increased activity in this area.

[8] Paragraph 3–7 of AR 15–6 and paragraph 2–11 of AR 635–200 state that, while the rules of evidence do not apply to these proceedings, reasonable restrictions regarding relevancy and competency of the evidence will be applied.

[9] AR 15–6, para. 3–7. This paragraph further delineates limitations on the use of privileged communications, polygraph tests, self-incrimination, and searches and other matters.

[10] *See supra* notes 8 and 9.

[11] AR 15–6, paras. 5–7*b* and 5–11.

[12] AR 15–6, para. 1–3 clearly states that a board member has a duty to act impartially. In consonance with that, paragraph 5–7 establishes the right of the respondent to impartial members.

[13] AR 15–6, appendix B, Suggested Procedure for Boards of Officers with Respondents, at B–5.

[14] *See* AR 15–6, paras. 5–4 and 5–8.

[15] MCM, 1984, Rule for Courts-Martial 701(b) [hereinafter R.C.M.].

little of the import it has for you and your client. As a consequence, you may well have the upper hand regarding knowledge of the case and preparation, and can capitalize on it.

### Standard of Proof

In some cases, the government will elect to proceed at an administrative hearing when it might have proof problems at trial. The most common example probably is the Chapter 14 proceedings for elimination based on a positive urinalysis.[16] Although the laboratories doing drug testing have tightened up procedures markedly since a few years ago,[17] very often prosecutors are faced with chain of custody or other problems that may make it difficult to overcome the reasonable doubt standard at trial.

Unlike a court of law, the standard of proof at an administrative proceeding conducted under the provisions of AR 15–6 is only a preponderance of the evidence; the more-likely-than-not standard.[18] Coupled with the broad standard for admissible evidence,[19] counsel for representation are compelled to convince the board members that, despite the definition of the standard of proof, this is no trifling matter. For example, some recorders have been known to use the comparison of winning the World Series 4–3 as a preponderance and winning 4–0 as beyond a reasonable doubt. The obvious retort to that analogy is that the hearing is no game and your client's career is on the line.

Although the government can argue that the relaxed evidentiary rules and lower standards of proof are proper because the respondent faces no legal jeopardy, you can easily demonstrate the economic impact on you client and his or her family, and your client's very real concern about the future.[20] If the board appreciates the position of the respondent, the board president may exclude unsworn statements and other arguably unreliable evidence that is otherwise admissible. Excluding this type of evidence is even more important at a flying evaluation board[21] where your pilot client faces the possibility of being grounded and losing flight pay. Should a pilot also face the prospect of leaving the service, the outcome of such an administrative proceeding may have a severe impact on his or her employment in civil aviation as well. In other investigations conducted under the guidance of AR 15–6, your client may have other very special interests at stake, such as military occupational skill (MOS) reclassification or removal from a special program.[22]

As with a trial involving technical subjects like aviation or the urinalysis program, you cannot effectively represent your client unless you "go to school" on the subject litigated at a board. If you do not know a helicopter's cyclic from its collective or how to pronounce radioimmunoassay, you may be far less effective than you would like. It can be a lonely feeling to be the only person involved in an investigative hearing who is not an expert on the subject being investigated.

### Separation Boards and Discharges

If your advocacy fails to convince the board to vote in favor of your client on the issues of misconduct, you may still be able to persuade the board that your client deserves something better than an Other than Honorable Discharge.[23] If the proceedings were initiated to determine if the respondent has committed misconduct, such as the use of illegal drugs under AR 635–200, paragraph 14–12*c*, it is often tactically advantageous to get the proceedings bifurcated, with the evidence on the merits heard first, and matters as to characterization of service heard only if the board finds against the respondent. Although the regulation states that only that findings and recommendations will be made to the separation authority,[24] you can make a good equity and common-sense argument for proceeding in two phases. Your aim should be to limit the evidence to proof of misconduct, particularly where your client does not have a good record. Of course, if your client has a good record, you probably want to include that "on the merits."

Whether you have been able to bifurcate the proceedings or not, the objective of advocacy on the issue of a discharge, like advocacy on sentencing, is to personalize the client to the members and put forward any available extenuation and mitigation evidence. Your efforts must be directed at broadening the board's focus on discharge considerations.[25] An excellent exhibit for the respondent in many cases is a

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[16] The Uniform Code of Military Justice article 51(c)(4), 10 U.S.C. § 851(c)(4) (1982) and R.C.M. 918 (c) define the standard of proof at courts-martial as beyond a reasonable doubt. The Court of Military Appeals in United States v. Murphy, 23 M.J. 310 (C.M.A. 1987), held that a urinalysis laboratory report was insufficient to satisfy the burden of proof for use of marijuana. (Ironically, the court had warned prosecutors in United States v. Harper, 22 M.J. 157 (C.M.A. 1986), that a "paper case" was probably insufficient.) The description of the standard of proof in AR 15–6, para. 3–10*b*, is most often described as the preponderance of the evidence or the more-likely-than-not standard. Routinely, government representatives will produce no more than a laboratory report in elimination cases to effectively prove drug use by the respondent.

[17] A Blue Ribbon Panel of the Army Surgeon General that reviewed Army and Air Force drug testing laboratories reported its findings on 24 October 1983 in what has become known as the Einsel Commission Report. The report identified a number of quality control problems. As a result, thousands of service members who had adverse actions taken against them had the actions rescinded. To establish uniform testing procedures, Dep't of Defense Directive No. 1010.1, Drug Abuse Testing Program (December 28, 1984), was created to regulate urine testing from the unit level to the laboratory. A follow-up inspection by the Blue Ribbon Panel in May and June 1984 found that improved standards had been effective in making the laboratory results scientifically and legally supportable.

[18] AR 15–6, para. 3–10*b*.

[19] *Supra* note 8.

[20] In addition to his sudden loss of income upon discharge, the client also may be ineligible to ship household goods or be paid for transporting family members. *See* Joint Federal Travel Regulation, paras. U7500–U7506 (1 Jan. 1987).

[21] Dep't of Army, Reg. No. 600–105, Personnel—General—Aviation Service of Rated Army Officers, para. 3–10*a* (1 Dec. 1983).

[22] *See generally* Dep't of Army, Reg. No. 600–200, Personnel—General—Enlisted Personnel Management System, ch. 2 (5 July 1984).

[23] *See* AR 635–200, paras. 3–7 and 3–8.

[24] *Id.* para 2–12.

[25] *Id.* para. 3–7*c*. The way this section is worded, it seems that any soldier who commits misconduct ought to be issued an Other Than Honorable Discharge. Counsel must be certain the board also reviews paragraph 3–8 as well as any other favorable factors.

copy of an official discharge benefits chart.[26] The chart clearly indicates what will happen if an Other than Honorable Discharge is issued. If the client has a family, it is important to point out to the board that not only may the soldier be reduced to E–1 upon discharge,[27] but also that the government may not pay to send the family home or ship household goods.[28]

**Conclusion**

Although your success at board proceedings will be dictated in large part by the facts of the case and your client's record, good preparation and effective advocacy can make a dramatic difference for your client. As a case in point, one Region I counsel in the past year has achieved retention of respondents in 11 out of 12 separation boards. Other counsel have done similarly well. Dumb luck? No, hard work.

[26] Dep't of Army, Poster No. 350–3, Benefits—Discharges (1 Aug. 1985).

[27] AR 635–200, para. 1–14 directs the separation authority to order reduction to E–1 when a soldier is discharged under other than honorable conditions.

[28] *See supra* note 20.

## *Clerk of Court Notes*

### Convening Authority Actions Crediting Pretrial Confinement

The requirement that the convening authority's action approving a sentence to confinement specify the number of days administratively to be credited against the sentence by reason of ordinary pretrial confinement was rescinded in February 1984. The Manual for Courts-Martial (MCM), which became effective in August 1984, requires only that the convening authority's action address any additional credit ordered by the military judge pursuant to Rule for Courts-Martial (R.C.M.) 305(k) (MCM, 1984, R.C.M. 1107(f)(4)(F) and app. 16, form 4). By decisional law, this includes credit ordered by the military judge because of a pretrial restriction judicially found equivalent to physical confinement (*see United States v. Gregory*, 23 M.J. 246 (C.M.A. 1986) (summary disposition); *United States v. Ecoffey*, 23 M.J. 629 ((A.C.M.R. 1986)).

Nevertheless, the Army Court of Military Review continues to encounter, and modify, convening authority actions specifying credit for ordinary pretrial confinement.

The problem with specifying administrative pretrial confinement credit in the action is that confinement officials may interpret this as additional credit ordered by the military judge. The vehicle for informing confinement officials of the amount of pretrial confinement to be credited administratively is the Report of Result of Trial (Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice para. 5–26). That is because the credit is due when the accused's status changes from detained to adjudged and should not be delayed awaiting the convening authority's action. Therefore, because administrative credit for pretrial confinement already is indicated by the Report of Result of Trial that accompanies the soldier to the confinement facility, its further mention in the convening authority action might erroneously be construed as judicial credit to be awarded in addition to that indicated by the Report of Result of Trial.

### Convening Authority Action Suspending Part of Sentence

How many errors can you find in the following convening authority action? Can you find four?

> In the case of . . ., only so much of the sentence as provides for confinement for 3 months, reduction to the grade of E1, forfeiture of $426.00 pay per month for 6 months, and a bad conduct discharge is approved and, except for that part of the sentence extending to a bad conduct discharge, will be executed. However, the execution of that part of the punishment that is in excess of reduction to the grade of E1, forfeiture of $426.00 pay per month for 3 months, and confinement for three months is suspended until 10 April 1987, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action.

Two mistakes combine to make it difficult to determine whether the convening authority intended to suspend the bad-conduct discharge. Assuming that he did intend to suspend the discharge (this was the intent in this actual case from which the above action is quoted), the first mistake was stating that the sentence was to be executed "except for that part . . . extending to a bad-conduct discharge." When the punitive discharge or dismissal is to be suspended, its execution will be stayed by the suspension clause and it is not necessary to separately except it as was done in this case. (See instructions following form 10, appendix 16, MCM, 1984.)

The second mistake was in couching the suspension clause so as to suspend that part of a sentence "in excess of" stated limits. Such wording may be suitable for a pretrial agreement, but it is a poor choice in the convening authority's action. In the first place, careful reading is required merely to determine that the confinement and reduction and monthly amount of forfeitures were in no way involved, only the term of forfeitures. More importantly here, the wording fails to dispel the uncertainty concerning suspension of the discharge. In this case, the material portion of the action should have read "is approved and will be executed, but the execution of that part of the sentence extending to a bad-conduct discharge and forfeiture in excess of $426.00 pay per month for three months is suspended until. . . ." (See forms 6, 26, 27, Appendix 16, MCM, 1984.)

On the other hand, had this convening authority not wished to suspend the punitive discharge, the action should have read "is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be

executed, but the execution of that part of the sentence extending to forfeiture of pay in excess of $426.00 pay per month for three months is suspended until. . . ."

The remaining two errors are comparatively minor mistakes of style. The term "bad-conduct discharge" is hyphenated, as shown here, in the UCMJ and generally throughout the MCM. That is consistent with rule 6.15 of the GPO Manual. Finally, numerals less than 10 usually are spelled out, but, in any event, consistency should be maintained throughout the action. Here, the action uses both "3" and "three."

Finally, although not necessarily an error here, periods of suspension customarily are stated as a number of months or years rather than until a specific date.

## *Contract Appeals Division Trial Notes*

# *Greg Pelland* Reconsidered—Small Business Certifications in the Shadow of a Joint Venturer's Bad Faith

*Major Daniel R. Allemeier*
*Contract Appeals Division*

The *Greg Pelland* case[1] involves a small contractor who entered into a joint venture arrangement with a large contractor. The joint venture arrangement had Greg Pelland bidding on small business set aside contracts, ostensibly for himself but actually for the large business. The Armed Services Board of Contract Appeals (ASBCA) in its original decision in this case treated the award of a particular contract to Greg Pelland as illegal because, contrary to Greg Pelland's certification, Greg Pelland was not a small business.

The significant points of the original decision were: a contractor claiming small business status must ensure that its status is correct before it certifies itself to be small; and if a contractor is wrong about its certified status, and it is clear that it is wrong, then declaring a contract void is a proper remedy. The ASBCA has since reconsidered its original decision and modified it.[2] While the original two points remain unchanged, a new significant point was added.

### The ASBCA's Analysis on Reconsideration

The additional point is this: Where an otherwise small business contractor is controlled by a large business concern acting in bad faith, award of a contract to the ostensible small business is illegal and sufficiently taints the contract to permit voiding it, even where the contract is fully executed. This is true, the ASBCA said, even where the small contractor's actions were not based on bad faith.[3]

The original decision did not expressly decide whether either Greg Pelland, the small business, or CSS Corporation, the large business joint venturer, acted in good faith when the small business certification was made. On reconsideration, the ASBCA was asked to address the good faith of Greg Pelland, the individual. In reconsidering, the ASBCA specifically found "no bad faith in [Greg Pelland's] personal conduct."

Greg Pelland, the individual, was not awarded the contract, however. Greg Pelland/CSS, the joint venture, was awarded the contract and, thus, the joint venture was the beneficiary of the small business certification.[4] Consequently, the ASBCA also determined that "Pelland's personal good faith is insufficient in light of the bad faith of his joint venture partner, CSS."[5]

This is an expansion of the original decision. Initially, the ASBCA appeared to focus on the conduct and knowledge of Greg Pelland, generally, without analyzing the specific conduct of the parties to the joint venture. On reconsideration, the ASBCA stated: "The award of the contract, ostensibly for Appellant, alone, was in effect an award to the joint venture of CSS/Pelland. The bad faith of CSS in securing the contract for itself and Pelland fatally tainted the award."[6]

### Even a High Level of Good Faith of Other Members of a Joint Venture Will Not Negate the Bad Faith of One Joint Venturer

The ASBCA in its decision on reconsideration did not discuss the level of good faith required in the context of a small business certification. The standard to be applied is found in the following text: "The test of good faith in the context of self certification by a small business of its size

[1] Greg Pelland Construction, ASBCA No. 31128, 86-3 B.C.A. (CCH) ¶ 19,298. *See* Allemeier, *Small Business Set-Aside Contract Voided Because Contractor Wrongfully Certified Himself as Small,* The Army Lawyer, Feb. 1987, at 49.

[2] Greg Pelland Construction, ASBCA No. 31128 (14 Jan. 1987).

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

[4] *Id.* The benefit to the joint venture is having had to compete in an atmosphere of diminished competition.

[5] *Id.*

[6] *Id.*

status is one of a high degree of prudence and care. See 51 Comp. Gen. 595 (1972)."[7]

From the foregoing, it would appear that the level of "good faith" in common commercial transactions would not satisfy the good faith requirement for small business certifications. Thus, the good faith required of a nonmerchant in a commercial transaction is not high enough[8] nor is the even higher level required of a merchant engaged in the sale of goods.[9] Rather, the duty of care required of a trustee[10] or a fiduciary[11] is more analogous to the level of good faith required.

Whether Greg Pelland, the individual, certified his status with a high degree of prudence and care, was not articulated by the ASBCA. Given its conclusion—that Greg Pelland, the individual, did not act in bad faith—a reasonable inference is that Greg Pelland did exercise a high degree of prudence and care.[12] Given the obvious bad faith of CSS Corporation, however, whether or not Greg Pelland, the individual, acted at the high level of good faith required was not a necessary consideration. The ASBCA could assume that Greg Pelland acted at the higher level of good faith without changing its analysis because CSS's bad faith was sufficient to taint the contract.

### Conclusion

The expansion of the original decision is significant because it places the burden of certifying the small business status squarely where it belongs—on the *party* making the certification. Where a large contractor controls a small business concern, it must be prepared to demonstrate its good faith because its control of the small business may create an affiliation with the small business. When dealing with a small business, a large contractor cannot hide behind the apparent good faith of a unsuspecting or unsophisticated small business concern. If questions of size status arise, not only will the ostensible small contractor's good faith be scrutinized, but the large contractor's good faith may also be evaluated.

Given the criteria of independence and that sense of control expressed in the Small Business Act[13] and its implementing regulations,[14] the primary focus ought rightly be on the conduct of every member on the joint venture rather than on just one of its members. The certifying small business member of the joint venture is not acting independently, but is acting in concert with other members of the venture. The ASBCA in its decision on reconsideration in *Greg Pelland* evaluates just that concerted action to determine that a contract is void.

[7] Comp. Gen. Dec. B-182926, (2 Jan. 1976), 76-1 CPD ¶ 1.

[8] U.C.C. § 1-201(a); *see also* Restatement (Second) of Contracts, § 205 and comments (1979).

[9] U.C.C. § 2-103(b).

[10] *See generally* Restatement (Second) of Trusts, §§ 169-185 (1959).

[11] *See generally* Restatement (Second) of Agency, chap. 13, Introductory Note (1957); Black's Law Dictionary 563, 564 (5th ed. 1979) ("Fiduciary" and "Fiduciary Relation").

[12] This is not a necessary inference. Not acting in bad faith is not the same as acting with a high degree of prudence and care.

[13] 15 U.S.C. § 632(a) (1982).

[14] 13 C.F.R. § 121.3 (1986).

## Hindsight—Litigation That Might Be Avoided

*Major Edward J. Kinberg*
*Contract Appeals Division*

This is the first of a series of articles. The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

### Problem #1

You have been advising the procuring contracting officer (PCO) on a troublesome contract for several months. The PCO clearly has grounds to terminate the contract for default. She has just walked into your office and told you she is sick and tired of dealing with the contractor and that she is going to terminate the contract for default. What do you tell her?

### The Solution

Until recently you could have safely told the PCO to go ahead and terminate the contract. In the past, the Armed Services Board of Contract Appeals (ASBCA) has not considered the motivation of the contracting officer in determining if a default termination was proper. While the ASBCA would consider allegations of bad faith, an appellant would have to meet an extremely high standard of proof (well-nigh irrefragable proof). Consequently, a default termination would not have been set aside by the ASBCA simply because the contracting officer was tired of dealing with the appellant.

The recent case of *Darwin Construction Co., Inc. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987), decided by the Court of Appeals for the Federal Circuit on 12 February 1987, appears to change the rules set out above. In *Darwin*, the ASBCA found that the contracting officer's termination for default was arbitrary and capricious, yet it sustained the termination because the appellant had failed to prove the contracting officer had acted in bad faith. In reversing the ASBCA's decision, the court stated:

However, Darwin contends that the Board erred as a matter of law in holding that it could not inquire into the motives or judgment of the contracting officer in electing to terminate the contract for default, once the Government determined that the contractor was in technical default. We agree that this rule of administrative restraint is legally erroneous and contrary to long established judicial precedent.

The ruling in *Darwin* clearly establishes a basis for the ASBCA to review the motivation of contracting officers in the future. Therefore, it is particularly important to ensure that a contracting officer's decision to terminate for default cannot be construed as being arbitrary or capricious in any manner. In *Darwin*, the court specifically quoted the language in the ASPR directives (this appeal has been around for a long time) that set out the procedures to follow in case of default. A similar directive is found at Federal Acquisition Regulation § 49.402–3(f). When you discuss a default termination with a contracting officer, you should specifically review each element of this directive, as well as the appropriate section of the Army FAR Supplement (§ 49.402–3(90)) and ensure that the contracting officer has made appropriate findings.

# TJAGSA Practice Notes

*Instructors, The Judge Advocate General's School*

## Criminal Law Note

### *O'Callahan v. Parker* Overruled

On 25 June 1987, the United States Supreme Court, in the case of *United States v. Solorio*, abandoned the service connection requirement of *O'Callahan v. Parker*. In a 5–4 decision written by Chief Justice Rehnquist, the Supreme Court held that court-martial jurisdiction depends only on the accused's status as a member of the Armed Forces and not on the "service-connection" of the offense charged. Thus, the sole test in the exercise of court-martial jurisdiction is whether the accused was in the military at the time of the offense.

## Contract Law Note

### Timeliness—*Pathman* Revisited

A recent article in *The Army Lawyer*[1] noted that the United States Claims Court surprisingly ruled in *Pathman Construction Co. v. United States*[2] that the Contract Disputes Act[3] requires contractors to timely appeal not only actual final decisions of contracting officers but also those claims "deemed denied" by a refusal or failure by the contracting officer to issue a final decision within sixty days. At odds with four earlier decisions of the same court, the *Pathman* court held that once a plaintiff elects to initiate the Contract Disputes Act process by filing a certified claim with the contracting officer, the plaintiff is obligated "to move ahead by timely suit or appeal, or to protect itself by petitioning the contract appeals board to set a date for decision."[4] As the plaintiff in *Pathman* did not initiate suit for well over twelve months after its claim was "deemed denied",[5] the suit was dismissed as untimely.

While *Pathman* was pending appeal at the Court of Appeals for the Federal Circuit, criticism of its rationale emerged from diverse sources. Ronald Kienlen, Deputy Chief Trial Attorney, Contract Appeals Division, prophetically concluded that the *Pathman* rationale should not be argued before the Armed Services Board of Contract Appeals until accepted by the Federal Circuit because

> it overlooks the fact that the CDA not only requires that a decision be issued by the contracting officer, but also that the decision be mailed or otherwise be given to the contractor, state the reasons for the decision, and inform the contractor of its appeal rights. . . . [T]hese elements are in fact missing from a deemed final decision.[6]

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[1] Kennerly, McCann, Pedersen & Post, *Recent Developments in Contract Law—1986 in Review*, The Army Lawyer, Feb. 1987, at 3, 7.

[2] 10 Cl. Ct. 142 (1986).

[3] 41 U.S.C. §§ 601–609 (1982).

[4] 10 Cl. Ct. at 150. In Pathman Const. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987), the Federal Circuit noted that the Claims Court decision in *Pathman* "stands in juristic solitude. Five other decisions of that court, both before and after the decision in this case, have reached a contrary result. . . . Three different boards of contract appeals also have come out the other way." (citations omitted).

[5] Section 605(c) of the Contract Disputes Act provides in pertinent part:

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—
(A) issue a decision; or
(B) notify the contractor of the time within which a decision will be issued.
(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time. . . .
(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim.

In *Pathman*, a written request for a final decision that included the certification required by the Contract Disputes Act for claims exceeding $50,000 was submitted on May 6, 1983. After several unsuccessful attempts to negotiate a settlement. Pathman invoked the "deemed denial" provision of the Contract Disputes Act on March 11, 1985 and commenced an action in the Claims Court.

[6] Kienlen, *Pathman—Jurisdictional Oddity*, The Army Lawyer, Nov. 1986, at 63, 64.

Then, in *Malissa Co., Inc. v. United States,*[7] Chief Judge Smith of the Claims Court held that the failure of a contracting officer to issue a decision within sixty days after submission of a claim did not trigger the twelve month statute of limitations governing appeals to the Claims Court. In disagreeing with the *Pathman* decision, Judge Smith wrote that such an interpretation of the statute of limitations may well serve to encourage litigation, contrary to the intent of Congress.

The ramifications of increased litigation were enormous. Given the relatively short statute of limitations (ninety days) observed by boards of contract appeals, contractors could not afford to wait to negotiate claims but would need to commence an action before the board almost immediately. As most claims are litigated before boards of contract appeals, the increased caseload would have overwhelmed the individual boards.

Not unexpectedly, the Federal Circuit decisively reversed the *Pathman* decision on May 4, 1987, disagreeing with the Claims Court's analysis of the statutory language and legislative history.[8] The principal issue in the appeal was when the time within which a contractor must file an action in the Claims Court challenging a decision of a contracting officer begins to run. The Federal Circuit held that the period did not begin to run until the contracting officer renders an actual (written) decision on the contractor's claim.

The Federal Circuit analyzed the pertinent language of the Contract Disputes Act and stated that the "deemed denied" provision of the Act (section 605(c)) merely authorized or permitted the contractor to file a direct access suit in the Claims Court when the contracting officer failed to issue a decision on the contract claim. The provision did not require the contractor to file suit.

The decision emphasized that the critical event that starts the running of the limitations period is receipt of the contracting officer's final decision.[9] Moreover, that decision must properly advise the contractor-plaintiff of the appeal rights provided by the Contract Disputes Act.[10]

The decision of the Federal Circuit binds the Claims Court and the boards of contract appeals. Accordingly, contracting officers and their legal advisors should understand the court's reasoning. The court is encouraging the negotiation and settlement of claims, in consonance with the intent of Congress as stated in the Contract Disputes Act. Government personnel should be aware that the Contract Disputes Act requires contracting officers to render timely final decisions on contract claims. In the event the government does not live up to this obligation, the contractor is permitted but not required to file an action in the Claims Court. Similarly, contracting officers can always start the running of the limitations period by issuing a final decision. Captain Munns.

## 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, Army, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

### Consumer Law Notes

*Automobile Repairs*

Notwithstanding aggressive efforts by legal assistance officers and civilian consumer protection agencies, some automobile mechanics continue to make "unneccessary" repairs. Missouri Attorney General William L. Webster has received a temporary restraining order against Car Care Center resulting from complaints from six consumers. After an in-depth investigation, General Webster alleged that the Center was in violation of the Merchandising Practices Act by making unnecessary auto repairs, representing to customers that they were necessary. He further alleged that the Center made advertising representations that particular services would be available at a specific price, when in fact such services were not available at that price.

In the investigation, the investigators visited the Car Care Center seeking repairs to a 1984 Oldsmobile. The car had been certified by an Oldsmobile dealership as being in good working condition prior to the visit. Employees at the Center estimated the repair cost to be $802.09. Incidents such as this should again remind consumers to verify the necessity of car repairs suggested by auto repair centers, and legal assistance attorneys should note this advice in preventive law briefings. Miss Lynn Blasingame, Legal Intern.

*Debt Collection Fraud*

After an investigation, Pennsylvania Attorney General LeRoy S. Zimmerman alleged that Bernard Richard Miller, President of B. Richard Miller, Inc., violated the Pennsylvania unfair trade practices and consumer protection laws through the operation of his debt collection agency. According to the complaint, Miller mailed letters that indicated that the addressees owed debts and that unless these debts were paid in full they would be turned over to the legal department. There was, in fact, no legal department in existence. Further, Zimmerman alleged that Miller had made calls to their places of employment about the alleged debts without attempting to contact them through any other means during the preceding thirty-day period as required by state law.

Zimmerman has accepted an assurance of voluntary compliance from Miller. Under the terms of the assurance, Miller has agreed to stop threatening or representing, expressly or impliedly, that nonpayment of debts will result in

[7] 11 Cl. Ct. 389 (1986).

[8] 817 F.2d 1573 (Fed. Cir. 1987).

[9] 41 U.S.C. § 605(a) (1982).

[10] *See* Institute of Modern Proc. Inc., 83–2 B.C.A. (CCH) ¶ 16,649 (DOT CAB 1983); Oregon Landworks, Inc., 83–2 B.C.A. (CCH) ¶ 16,638 (AGBCA 1983).

any legal action unless such a representation is made lawfully and there is an intention to follow through with legal action. Zimmerman was also assured that Miller would make no more attempts to reach the debtors at work unless, consistent with state law, he was unable to contact them during the preceding thirty-day period or unless he did not know and had no reason to know that the debtors' employers prohibited such contact.

*Fair Credit Reporting Act Requires Adequate Reinvestigation of Credit Information*

In *Pinner v. Schmidt,* 805 F.2d 1258 (5th Cir. 1986), the Fifth Circuit Court of Appeals held that the failure of a consumer reporting agency (CRA) adequately to reexamine credit information about a complaining customer's alleged debts violates the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1982).

While Pinner was employed at a Sherwin-Williams paint store, he established credit that allowed him to purchase personal items from the store. Upon leaving the job, his account showed a debit balance of $171.11, which he disputed. Upon receiving notification of this debt from Sherwin-Williams, a CRA distributed the information to soliciting creditors. Pinner was unable to make credit purchases as a result of the report.

When Pinner informed the CRA that the debt was in dispute and requested an investigation, the agency contacted the manager at Sherwin-Williams for verification. The manager indicated that the balance remained unpaid, and the credit report continued to reflect the delinquency.

According to the Fair Credit Reporting Act, CRAs must "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," 15 U.S.C. § 1681e(b), and must reinvestigate and correct information upon discovery that it is inaccurate. Pinner filed suit against the CRA alleging a violation of this statutory protection. Holding that the defendant had violated the Act, the court found that the CRA's failure to exert greater effort to verify the delinquency than merely contacting the Sherwin-Williams manager violated the purpose of the Act, which is to prevent inaccurate reports with regard to customers' credit records. The court noted that the CRA should have made efforts to contact a neutral source and, if that alternative was not feasible, should have deleted the information completely. According to the Fifth Circuit, failure to do so denied Pinner the "maximum possible accuracy" guaranteed in the Fair Credit Reporting Act. Miss Lynn Blasingame, Legal Intern.

*Health Clubs*

As noted frequently in this column, it is very important to investigate health clubs thoroughly prior to purchasing memberships. The problem of health club fraud continues to grow rapidly. In Illinois, the Attorney General has filed a lawsuit alleging fraud against a club that sold membership cards to over 100 consumers and closed down shortly thereafter. Additionally, it is alleged that those consumers were falsely informed that they could use their membership cards to enter over 2,000 other clubs around the country.

This fraudulent activity on the part of the health club violated the Illinois Physical Fitness Services Act because the club knew at the time of the membership drive that they would soon be going out of business. The Illinois Attorney General is seeking a $50,000 fine against the club as well as damages for participating consumers. Miss Lynn Blasingame, Legal Intern.

*Abusive Debt Collection Phone Calls*

According to a North Carolina federal court jury, which returned a verdict awarding $8,407.80 in actual damages and $75,000 in punitive damages to a consumer, debtors should not be subjected to threatening and abusive phone calls from a debt collection agency. The court based its finding of tort liability on two theories: intentional infliction of emotional distress; and violation of the state debt collection statute.

The creditor, Capitol Debt Corporation, apparently made numerous phone calls to an indebted couple using abusive language, yelling, threatening night visits and jail, degrading the couple, and making no attempt to work out an effective repayment plan. This caused the couple several problems ranging from fear and depression to difficulty functioning properly at work. In addition, several witnesses who had experienced similar or worse treatment by the corporation offered corroborating testimony at trial. Decisions such as this should serve as a significant deterrent to harsh debt collection practices. Miss Lynn Blasingame, Legal Intern.

*Deceptive Travel Packages*

The tempting low-cost travel packages advertised on television and in newspapers may not be as great a bargain as they appear. Tourist Promotions Unlimited of Washington advertised travel packages for $299.00 that included vouchers for four days and three nights in Mexico. According to the Washington State Attorney General, nearly all customers who purchased these vouchers were unable to take the trip because none of the dates for which these people had bought tickets were available. In addition, participants were required to pay a service charge about which they knew nothing when they purchased these packages.

According to the Attorney General, these packages, which violate the Washington consumer protection law, have resulted in well over 1300 complaints in the past year. As part of an out-of-court agreement, 100 of the customers who paid for the low-cost trips to Mexico will receive refunds. While the Attorney General is attempting to work out settlements with other travel voucher companies in order to prevent further problems of this sort, preventive law programs can greatly assist in the education effort necessary to protect consumers from participating in such programs. Miss Lynn Blasingame, Legal Intern.

*Bradlees: Merchandise Availability*

New Jersey Attorney General Edwards has been investigating Bradlees discount department stores. After receiving several customer complaints about the lack of availability of merchandise and the failure of the store to honor rainchecks, the consumer protection division investigated and verified the accuracy of these complaints. Based upon the investigation results, the Attorney General and Bradlees signed an agreement pursuant to which Bradlees promised to adequately stock the store with the advertised sales items

and to honor any rainchecks issued for unavailable items within sixty days. Miss Lynn Blasingame, Legal Intern.

*Home Improvement Fraud*

As discussed previously in this column, home improvement scams continue to cost consumers money. According to the Texas Attorney General, several elderly widows have been cheated by home remodeling companies soliciting sales by offering to do free inspections. After these inspections, the women were told that they had serious problems needing immediate repair. In each case, the company representative required a down payment prior to beginning work on the repairs. The total cost came to roughly 200 percent of what the average contractor would have charged. In response to complaints resulting from this practice, the Attorney General has filed suit asking the court to enjoin the company from such activity, to order the company to pay civil penalties of $2,000 per violation, and to award actual damages. Miss Lynn Blasingame, Legal Intern.

**Malpractice—Improper Will Execution**

A claim for legal malpractice concerning improper will execution has been asserted concerning a will allegedly drafted at the legal assistance office at Fort Bliss, Texas. The claim alleged that the will was prepared by the legal assistance office but was released to the client prior to execution, and was subsequently improperly executed at a local credit union. The will was neither signed nor witnessed, though the self-proving clause was. The will was allegedly released prior to execution because there was no notary public available in the legal assistance office. The testator died and the will was denied probate.

This claim is currently being processed and demonstrates the dangers of releasing a will that has not been executed. It also reemphasizes the importance of the execution process and of ensuring that complete legal assistance is rendered. Current Army policy concerning will preparation procedures requires that an attorney supervise will executions to ensure that the process is conducted in accordance with legal requirements. Additionally, the attorney is required to review the will after execution to check compliance with will formalities. These procedures would have precluded this unfortunate occurrence. Major Mulliken.

**Domicile**

Legal assistance officers are frequently asked to counsel clients concerning how to establish a new domicile. Once the advice is given, the client generally takes the steps recommended, and that is often the last the legal assistance officer hears of the client. Reprinted below is the text of a letter from the State of Alabama that may be representative of state reactions to efforts to terminate domicile. Major Mulliken.

> We are in receipt of notification from the United States Air Force of your change in state of legal residence from Alabama to Florida effective September 1, 1986. Please be advised that the State of Alabama cannot at this time accept your change in state of legal residence as it does not appear that you have abandoned your Alabama residency and established residency in the new state.
>
> Intent to abandon Alabama as the state of legal residence must be clearly indicated. First and most importantly, a person wishing to change domicile must be physically present and living in the State intended as the new domicile. Further actions which would indicate intent to make the new state one's permanent home would be:
>
> (1) Registering to vote in the new state.
> (2) Purchasing residential property or an unimproved residential lot in the new state.
> (3) Titling and registering any automobiles owned in the new state.
> (4) Notifying the previous state of legal residence of the change in state of legal residence.
> (5) Preparing a last will and testament which indicates the new state of legal residence.
>
> Persons changing their domicile must also comply with any applicable tax law of the new state of legal residence. It should be noted that not all of the above items are necessary to establish a new domicile, but two or three of the above conditions should be met along with being physically present and living in the new state. Finally, when the new state is claimed as change in domicile, specific action must be taken to abandon Alabama as the former domicile.
>
> Since the State of Alabama cannot at this time accept your change in state of legal residence, you are requested to notify your disbursing officer of this so that Alabama income tax will continue being withheld from your military pay. If we may be of any further assistance to you in this matter, please contact the Alabama Department of Revenue, Income Tax Division, Montgomery, Alabama 36130.

**Alternative Disputes Resolution**

*The following is an example consumer arbitration program that was distributed by Major General Suter to all legal assistance offices. A reprint of the letter that forwarded this program is at page 3 of this issue. This program is a revision of a program that was originally developed by the Air Force at Ramstein Air Force Base. The program has proven extremely successful, and could be adapted by offices for local use.*

*SMALL CLAIMS DISPUTES RESOLUTION CONCEPT*

In the U.S., small claims court procedures were devised to process lawsuits involving minor legal issues and relatively small amounts of money without incurring attorney's fees and filing fees associated with full-fledged court cases. In most states, attorneys are not even allowed to enter a small claims court. The parties to the action usually prepare the case themselves, present evidence, and bring their own witnesses. This is done in an informal hearing in which the rules of evidence are relaxed.

Often in the military there is no effective forum in which to resolve minor disputes because small claims courts are not always available. Furthermore, inevitable time delays and expenses can make successful litigation of a case difficult.

Arbitration is a desirable alternative for resolving these disputes without resorting to a court. Unlike many legal procedures, arbitration is purely voluntary. The arbitrator is appointed and has jurisdiction over the case only with the

agreement of the parties. While an arbitrator need not be an attorney, attorneys often function in that capacity.

In order to take advantage of an arbitration system, both parties to the dispute must be willing to submit the controversy to an arbitrator for resolution. SJA offices can prepare the documents necessary to submit the controversy to the arbitrator. Once the matter has been submitted to the arbitrator, the parties are bound by the arbitrator's decision. Neither party may be represented by an attorney at the hearing. Prior to the hearing, however, each party may consult an attorney about their legal rights and the mechanics of the arbitration system. A ceiling on disputes can be set. Parties may be reimbursed for their actual dollar loss, with no award for such intangibles as pain and suffering or loss of use of damaged property. The nature of the dispute may be any civil action that does not involve a criminal matter or a military or governmental agency. Examples include but are not limited to loans, sales, failure to pay a debt, and auto accidents involving property damage.

After the arbitrator has heard the evidence and reached a conclusion, a document describing the arbitrator's decision should be prepared and given to both parties. All decisions should be handed down expeditiously, usually no longer than five working days after the conclusion of the hearing. Each party that has agreed to the process is bound by the decision. A civil court will generally accept the decision of the arbitrator, unless it finds there was a defect in the conduct of the arbitrator during the dispute resolution process.

### *RULES FOR SMALL CLAIMS DISPUTES RESOLUTION*

1. Q. WHAT IS SMALL CLAIMS DISPUTES RESOLUTION?

A. It is a voluntary program that seeks to settle differences without going to a court, by having matters heard by a person who is trained in the resolution of disputes. The program is quicker than going to court, and is available without charge.

2. Q. WHO MAY USE SMALL CLAIMS DISPUTE RESOLUTION PROCEDURES?

A. Any military person, family member, or other individual eligible for legal assistance who agrees to have the claim(s) heard by an arbitrator. A party may only file his or her own claim. Furthermore, a party cannot file more than one complaint in the same suit.

3. Q. WHAT KIND OF DISPUTES CAN BE RESOLVED BY ARBITRATION?

A. Almost any type of claim or controversy that does not involve military or governmental agencies or any criminal matters. Loans, sales, failure to pay a debt, and auto accidents involving property damage are examples, as long as both or all parties agree to use the procedure, and the amount in controversy does not exceed $_____.

4. Q. CAN I FORCE THE OTHER PARTY TO HAVE THE DISPUTE CONSIDERED BY THIS PROCESS, OR CAN SOMEONE FORCE ME TO USE THIS PROCESS?

A. No. This program is voluntary. Unless all parties agree to submit the dispute to arbitration, the matter cannot be resolved through this process.

5. Q. WHO DECIDES THE DISPUTE?

A. A neutral person called an "arbitrator" will be appointed to decide the dispute.

6. Q. WHO SERVES AS AN ARBITRATOR?

A. The arbitrator will generally be an attorney with considerable experience in civil law matters.

7. Q. IS THERE A LIMIT TO THE AMOUNT OF THE AWARD?

A. Yes, the maximum that the arbitrator can award will be $_____. If you believe your claim is higher, but are willing to limit your claim to $_____, you may do so. If you do not wish to limit your claim to $_____, then this program will not be able to determine your case for you.

8. Q. IF THE OTHER PARTY BELIEVES THAT I OWE THEM MONEY, CAN THEY FILE A CLAIM AGAINST ME TO BE HEARD AT THE SAME HEARING?

A. Yes, they can if they are asking for no more than $_____ and agree to have it heard.

9. Q. WHAT IF INSTEAD OF SEEKING MONEY, I AM SEEKING THE RETURN OF PROPERTY, OR SOME RESULT OTHER THAN AN AWARD OF MONEY?

A. If all parties agree to the matter being decided by the arbitrator, then it can be decided. Those claimants receiving monetary awards are restricted to awards for actual dollar loss. No pain and suffering damages will be awarded.

10. Q. WILL I HAVE A CHANCE TO EXPLAIN MY SIDE OF THE CASE?

A. Yes, the parties are scheduled to meet together with the arbitrator for a hearing. Each person will have an opportunity to tell his or her side of the story and also present other evidence to the arbitrator as well as ask relevant questions of any witness. You should bring with you copies of important documents and photographs, as well as witnesses whom you believe will help support your case. Witnesses may, however, only testify about what they know, not about their opinions.

11. Q. DO I HAVE TO APPEAR IN PERSON AT THE HEARING?

A. No, you may submit your case to the arbitrator in writing and not appear, but you are warned that the other party can still appear in person at the hearing, even if you decline to appear. The ruling made by the arbitrator will be as binding as if you had appeared.

12. Q. CAN I GET TIME OFF TO PREPARE AND PRESENT MY CASE?

A. The program is a voluntary personal matter for which time off must be arranged with your supervisor.

13. Q. HOW QUICKLY CAN THE MATTER BE HEARD?

A. After all parties have agreed to have the matter resolved by the dispute resolution process, a hearing on the claim(s) will usually be held approximately 10 days following notice to all parties.

14. Q. HOW QUICKLY WILL THE DECISION BE MADE?

A. The arbitrator is required to decide the case within 5 working days after the conclusion of the hearing. In most cases, the decision will be handed down within 24 hours of the hearing.

15. Q. IS THE AWARD A DECISION OF THE ARMY?

A. No. The award is only the decision of the individual arbitrator.

16. Q. AM I BOUND, AND ARE THE OTHER PARTIES BOUND, BY THE ARBITRATOR'S DECISION?

A. Yes. Each of you will have agreed to abide by the decision if you have agreed to submit the matter to this process. A court will generally accept the decision of the arbitrator, unless it finds that there was a defect in the conduct of the arbitrator during the dispute resolution process.

17. Q. HOW MUCH WILL IT COST ME TO USE THIS SYSTEM?

A. There is no charge for this service.

18. Q. MAY I USE A LAWYER TO PRESENT MY CASE?

A. No. A legal assistance officer may assist you in explaining the process, or telling you what kind of evidence and approach will be helpful in your preparation for your presentation prior to the hearing, but may not be present with you at the hearing.

19. Q. IF I WIN AN AWARD, HOW CAN I COLLECT OR ENFORCE THE AWARD?

A. Losing parties are expected to honor the award. If they fail to do so you can then apply for enforcement through the courts who may treat the arbitrator's award as the decision of the court. A failure to comply may also be reported to the appropriate commander, if that person is in the Army.

20. Q. WHAT ALTERNATIVES CAN BE USED INSTEAD OF THESE PROCEDURES?

A. The parties may seek to settle the matters voluntarily or the matter may be taken to the proper court and fully litigated.

21. Q. IS IT POSSIBLE FOR THE PARTIES TO A CONTRACT TO REQUIRE, AS PART OF THE TERMS OF THE CONTRACT, THE USE OF THE ARBITRATION SYSTEM IN THE EVENT A DISPUTE ARISES?

A. Yes, when entering into a written contract or other written agreement, the parties can, by inserting a properly worded clause, agree to settle any future dispute arising out of that agreement through arbitration.

*MODEL REGULATION: SMALL CLAIMS DISPUTES RESOLUTION*

This regulation rules for the voluntary resolution of civil disputes among military personnel and other eligible personnel by a neutral arbitrator. These rules are applicable to disputes that arise from private transactions not involving the United States, the Army, or its agencies. These rules are limited to disputes involving no more than $_____. These rules do not apply to criminal or disciplinary matters, or matters of official business.

1. Policy. To encourage the settlement of civil disputes among eligible personnel. Personnel are encouraged to act reasonably and negotiate disputes privately if possible. If these attempts at private settlement are unsuccessful, the parties are invited to submit the dispute for resolution.

2. Rules Not Compulsory; Binding Effect of Award. Submission of civil disputes to these procedures is voluntary. Individuals may elect to seek resolution in a civilian court. However, if a dispute is submitted for resolution, the arbitrator's decision is *binding*, except when:

a. The award was obtained by corruption, fraud or other undue means.

b. The rights of a party were substantially prejudiced by misconduct of the arbitrator.

3. Definitions.

a. "Arbitration" means a nonjudicial determination of a disputed matter by a neutral person.

b. An "Arbitrator" means a neutral person to whom a disputed matter is submitted for arbitration.

c. "Award" means the decision of the arbitrator after consideration of the evidence presented by the parties.

d. "Dispute" means any question concerning legal obligations arising between the parties. These shall include, but are not limited to, the following: contracts for services or the sale of property, torts involving property damage, obligations under lease or sublease of real property, and loans of money or property.

e. "Party" means a soldier or other person authorized legal assistance under Army Regulation 27–3 who seeks and/or agrees to resolution of a dispute arising from a transaction or occurrence between him or her and another soldier or other person authorized legal assistance. The United States and its agencies, officers, or employees, in their official capacity, cannot be a "party" under these rules.

4. Administration. Arbitration proceedings are supervised by the Staff Judge Advocate.

5. Dispute Resolution Agreement. Parties may agree to resolve disputes:

a. *Before* a dispute by the inclusion of a disputes resolution clause in an agreement, or

b. *After* a dispute has arisen by agreement, in writing, to submit the matter to the resolution procedures.

6. Form of Agreement for Future Disputes Involving Contracts.

Standard Arbitration Clause. "Any controversy or claim arising out of or relating to this agreement, or the breach of this agreement, shall be submitted to arbitration upon request of either party, and judgment upon the award rendered by an arbitrator may be entered in any court having jurisdiction."

7. Form of Agreement for Existing Disputes. See Appendix A of this regulation.

"We, the undersigned parties, hereby agree to submit to arbitration, the dispute described above, under the rules set forth in _____. We agree the dispute may be submitted to an arbitrator selected by the Staff Judge Advocate. We further agree that we will abide by and perform any award rendered by the arbitrator and that a judgment of the court having jurisdiction may be entered upon the award."

8. Panel. The panel of available arbitrators consists of attorneys appointed by the Staff Judge Advocate.

9. No Conflict of Interest.

a. No panel member may serve as arbitrator if he or she has prior knowledge of the facts of the dispute, or any personal interest that might prejudice the decision.
b. A party may challenge the appointment of an arbitrator by demonstrating that the selectee has prior knowledge of the parties or the facts that would tend to prejudice the decision.

10. Rule of Law to be Used. [If in overseas commands: The general principles of American tort, contract, and equity law shall be applied by the arbitrator.] [If in the United States: The laws of the State of _____ shall be applied by the arbitrator.]

## INITIATION OF ARBITRATION PROCEEDINGS

11. Application. Arbitration is initiated by submitting a written application to the Office of the Staff Judge Advocate. Both parties must sign the application in front of a notary public or before a person authorized to administer oaths under the provisions of Article 136, UCMJ.

a. The application form is prepared and available at the Staff Judge Advocate Office.
b. In the case of a pre-existing agreement to arbitrate, the application must include the agreement showing the signature of each party.
c. In the case of a dispute without a pre-existing agreement to arbitrate, all parties must sign the application.

12. Notice: Assignment of Hearing Date.

a. All parties to the arbitration will receive notice of the proceedings. When an application is submitted, a hearing date will be set.
b. A copy of the application, bearing the time and date of the hearing and the arbitrator, must be served personally, or by first class mail, upon all other parties to the dispute who have agreed to arbitrate.
c. The service or mailing of the application must provide each party with at least ten days notice of the hearing. This notice requirement may be waived upon the written agreement of all parties to the dispute. If a hearing date is not set while the parties are present to submit their application, notice will be mailed to the respective parties.

13. Procedure.

a. The arbitrator will preside over the hearing, and rule on the admission and exclusion of evidence and questions of hearing procedure.
b. The parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing. Strict rules of evidence and rules of judicial procedure ordinarily will not be observed. The testimony of witnesses shall be under oath. Basic standards of decorum will be recognized and the arbitrator will instruct on procedure at the time of the hearing.
c. Oral hearing may be waived by any or all parties and the matter submitted to the arbitrator on written statements, under oath, and any other documentary evidence.
d. Arbitration may proceed in the absence of a party, who, after notice and agreement to submit the dispute, fails to appear. Those parties who, are subsequently appraised of a conflict with the hearing date are under an obligation to notify the Office of the Staff Judge Advocate.
e. The standard of proof to be used by the arbitrator will be one of the preponderance (or greater weight) of the evidence.

## THE AWARD

14. Time. The arbitrator must render the award promptly and, unless otherwise agreed by the parties, no later than five working days from the date of the close of the hearing, or if oral hearing has been waived, from the date of submission of final statements and evidence to the arbitrator.

15. Form. The form for the arbitration award is at Appendix B.

16. Scope. The arbitrator may grant any remedy or relief that is deemed just and equitable and within the scope of the arbitration agreement of the parties.

17. Settlement. If the parties settle their dispute during the course of the arbitration, the arbitrator may enter any award agreed upon by the parties at the time of the hearing.

18. Delivery of the Award. The placing of a copy of the award in the mail addressed to each of the parties at their last known address, or personal delivery at the time of the hearing or thereafter constitutes legal delivery of the award.

# Appendix A

Docket No. _____

## Small Claims Disputes Resolution

*Application for Arbitration*

1. Names of parties, mailing addresses, organizations, and phone numbers:

a. _____

b. _____

c. _____

d. _____

2. Brief description of dispute by each party including dates of events:

a. _____

_____

_____
(Signature)

b. _____

_____

_____
(Signature)

(For other parties or additional description use plain paper)

3. Is this application based on a previous written agreement to submit to arbitration? Yes ____ No ____. If yes, attach a copy of the agreement showing the signature of parties. If no, all parties must sign this form.

4. We, the undersigned parties, hereby agree to submit to arbitration, the dispute described above, under the rules set forth in _____. We agree the dispute may be submitted to an arbitrator selected by the Staff Judge Advocate. We further agree that we will abide by and perform any award rendered by the arbitrator and that a judgment of the court having jurisdiction may be entered upon the award.

5. I have read this application and fully understand all provisions therein.

(Signature, current mailing address, phone number, and date signed.)

a. _____

_____

b. _____

_____

c. _____

_____

d. _____

Subscribed and sworn to before me this ____ day of _____, 19____

_____
(Signature)

6. Hearing Date: _____
Time: _____
Building No. _____ Room No. _____

(Do not fill out the hearing date and time. You will be notified of this by the Office of the Staff Judge Advocate when you return the application.)

# Appendix B

Docket No. _____

## Arbitration Award

1. Names of parties, mailing addresses, organizations, and phone numbers:

   a. _____

   b. _____

   c. _____

   d. _____

2. Application made on: _____

3. Hearing:

   Held on _____ All Parties Appeared _____

   Waived _____ Did Not Appear _____

   Submitted Written Statements _____

4. Upon consideration of the oral and written statements of the parties, and the evidence presented, I find as follows:

_____

_____

_____

_____

_____

_____

_____

5. Based on the above findings the undersigned, duly appointed, qualified and acting arbitrator of a dispute existing between the above parties pursuant to an arbitration agreement dated _____, having received evidence of the parties, heard testimony presented, and duly considered the respective allegations of the parties, do hereby make the following award:

_____

_____

_____

_____

_____

_____

_____

_____ _____

Arbitrator Date

Subscribed and sworn to before me this ____ day of _____, 19 ____

_____

(Signature)

# Claims Report

*United States Army Claims Service*

## Planning for Foreign Claims Operations During Overseas Deployment of Military Forces

*Lieutenant Colonel Ronald Warner*
*Tort Claims Division*

*As noted in the article on page 9 of this issue of* The Army Lawyer, *the JAG Corps is placing increasing emphasis on the evolving military legal discipline of operational law (OPLAW). The following article addresses practical considerations concerning preparation for adjudication of claims in accordance with the Foreign Claims Act during overseas deployments. The resolution of claims that arise within the context of overseas missions is an important aspect of OPLAW. This article should thus prove to be of substantial benefit to judge advocates who deal with these types of claims issues.*

### Introduction

The C–130 eased to a stop in front of the flight operations hut on a dusty airstrip. The judge advocate assigned to Task Force Zulu climbed off the plane prepared to answer criminal law questions and to write wills and powers of attorney. Within hours, however, he was up to his armpits in problems that he had not anticipated. The task force commander wanted immediate input upon which to base a response to an urgent call from the Military Attache, American Embassy. The call concerned medical treatment for a local ten-year-old boy who had been struck by a task force tank. Then flight operations called. The local population was angry because their municipal soccer field was damaged by a fuel spill during refueling operations. The city mayor, backed by local armed militia, wanted all aircraft off the field unless and until someone came forward with money for cleanup and repairs. Finally, the S–5 wanted an answer concerning a petition presented by forty-eight farmers complaining that their crops had been damaged by the task force support group, which had set up its base camp on cultivated land and was denying the farmers access to their fields. The S–5 felt that he could quiet the farmers if he had some money with which to pay for the damages. The task force judge advocate realized that he had planned for the wrong problems.

This example is intended to portray the situation that could face a judge advocate assigned to a ready reaction force inserted into a foreign country. Recent involvement in Grenada, Honduras, and El Salvador prove the potential for claims arising from limited purpose military operations in foreign lands. The legal advisor in such operations, whether with the lead element or in a later echelon, will face unusual legal issues. Few of these questions will deal with legal issues common to an installation staff judge advocate (SJA) office. The questions that are most likely to cause the greatest initial concern to the deploying command involve international law and foreign claims. This article highlights areas of foreign claims concern and consideration for the OPLAW planner.

### Legal Basis for Foreign Claims Operations

When outlining the legal basis supporting foreign claims operations, it is necessary first to distinguish between two types of overseas claims environments. The first, which will not be discussed in this article, is comprised of operations in countries covered by the claims provisions of a status of forces agreement (SOFA) or other overriding treaty provisions. For the most part, U.S. military claims matters in these countries (*i.e.*, NATO countries, Japan, and Korea) are managed by command claims services under a system of single-service claims responsibility established by Department of Defense Directive 5515.8.[1] Units deployed to such a country may legitimately expect and plan for technical assistance from the servicing command claims service, and should coordinate with that service prior to deployment.

The second type of foreign claims situation is presented when U.S. military forces deploy to a country with which the U.S. does not have a formalized claims agreement covering the receipt, investigation, processing, and payment of claims filed by local inhabitants as a result of the activities of the "visiting" military force. In such cases, the implementation of the foreign claims program is a responsibility of the commander of the deploying units. It is this situation that must be of concern to the OPLAW planner.

As with all things governmental, public monies cannot be expended to satisfy claims without statutory authority. The Foreign Claims Act (FCA)[2] is the statutory vehicle for the receipt and payment of claims made by inhabitants of foreign countries for death, personal injuries, or property damage caused by U.S. military forces overseas, other than those resulting from combat.[3] The statute provides the framework for the appointment of foreign claims commissions (FCCs) "to settle and pay" specified claims. The Act lists three types of compensable claims:

(1) Claims for damage to or loss of real property owned by the host foreign country or a political subdivision or inhabitant thereof. Specifically included are claims for damage or loss incident to use and/or occupancy of real property.

(2) Claims for damage to or loss of personal property, either owned by the foreign country or by an inhabitant thereof.

[1] Dep't of Defense Directive No. 5515.8, Single Service Assignment of Responsibility for Processing of Claims (Nov. 14, 1974).

[2] 10 U.S.C. § 2734 (1982).

[3] For a thorough and interesting history of the Foreign Claims Act, see Dep't of Army, Pam. No. 27–162, Legal Services—Claims, para 4–1 (15 Dec. 1984).

(3) Claims for personal injury or death of an inhabitant of a foreign country.[4]

In order to be compensable, the death, injury, or property loss must have been caused by or otherwise incident to the non-combat activities of U.S. armed forces, or have been caused by a member or civilian employee of those armed forces. It is not necessary that the claim be predicated upon official acts or conduct within the scope of duties or employment; damage or injury resulting from off-duty criminal conduct by U.S. soldiers or civilian employees often are properly compensable under the FCA. The absence of a requirement for a nexus between the tortious conduct and the scope of employment of the U.S. tortfeasor makes the FCA extremely useful in solving problems often encountered by U.S. forces during a rapid deployment to a foreign land.

The authority to pay claims under the FCA, of course, is not without limits. There are monetary limits imposed by the Act and further limits imposed by chapter 10, Army Regulation 27–20, the implementing regulation.[5] The FCCs, which can be either single-member or three-member, must be appointed by proper authority. Under AR 27–20, a single-member FCC may pay claims where settlement can be reached in an amount not to exceed $5,000. A three-member FCC may approve payment up to $25,000 on its own authority; up to $50,000 with the approval of the FCC appointing authority; or up to $100,000 with the approval of The Judge Advocate General or The Assistant Judge Advocate General. Claims meritorious in an amount in excess of $100,000 must be processed for approval by the Secretary of the Army or his designee. The regulation also lists several categories of losses that are expressly not compensable. A judge advocate serving as a member of an FCC should, of course, become familiar with the procedures and limitations set forth in AR 27–20.

## Predeployment Planning Considerations

The variety of possible deployment scenarios makes detailed planning for foreign claims operations impracticable. The FCA is sufficiently flexible, however, to allow prompt application of a very general plan of operation to a specific deployment situation. Effective predeployment planning should focus upon those elements of foreign claims operations requiring support from outside the military legal apparatus. While an FCC may be appointed telephonically or electronically from anywhere in the world, thereby vesting the officer(s) on the ground with the legal authority to pay foreign claims, the same is not true for the logistical, finance, and interpreter support necessary to get the job done quickly and effectively. A legal annex to a deployment operation plan (OPLAN) that is limited to the responsibilities of the SJA may miss the opportunity to identify other staff elements whose cooperation is necessary to assure an effective foreign claims program.

### *Logistical Support*

The deployment OPLAN should specifically charge the senior Army commander in any deployment with responsibility for effective foreign claims operations, inasmuch as the foreign claims mission is a function of command. The commander should be responsible for identifying an appropriately staffed and equipped headquarters element to provide logistical support for the FCCs. Possibly the most important item of support is transportation. A claims officer or a claims investigator who is immobile within the area of operation is of no real help in a deployment involving far ranging field operations. As noted before, the real benefit to the tactical command of an effective FCC is the commission's ability to move quickly to and solve problems with the local populace.

### *Translation/interpreter support*

An obvious necessity when deploying to a non-English-speaking country is the ability to communicate with the local population. The planner should consider a variety of ways to satisfy this need. It may be possible to use bilingual Army personnel. Shared use of such personnel with other elements, such as the G/S–5 or the military police, may be satisfactory for small force deployments, but the planner must not underestimate the need for this resource. This factor can be a consideration when selecting personnel for participation in the deployment. On-the-spot hiring of indigenous personnel may be an option if funding is preplanned. Other potential sources of support may be the local armed forces (assuming they are not the enemy) or the American Embassy/mission/consulate. The planner should consider that the reliability, loyalty, or honesty of local hires may be less than satisfactory.

### *Clerical Support*

Clerical requirements for field FCCs are not extensive. Nothing prohibits handwritten memoranda of decision or hand-prepared finance vouchers. Foreign claims operations do require basic record keeping and preparation of automated data input documents. For very short term deployments, the clerical "niceties" can be deferred until return to home base.

### *Finance Support*

Effective foreign claims operations require the ability to pay the claims. Close coordination should be maintained between the FCC and the servicing finance officer. Arrangements should be made to convert payment vouchers to cash in the local currency so that claims or finance personnel may personally deliver payments when necessary. Bureaucratic delay in getting compensation to the claimant is counterproductive. The OPLAN should address the appointment of Class A agents as necessary. It should also address the appointment of FCCs as precertifying officers and the execution of signature cards. It is critical that the finance apparatus be made a part of the overall foreign claims effort rather than becoming a roadblock to effectiveness.

## Publicity

If the FCCs are to accomplish the purpose of the FCA, to "promote and maintain friendly relations," it is obvious that local inhabitants who are injured or who suffer damage or loss must be made aware of the availability of the remedy and the location of the FCC. The manner and degree of

[4] 10 U.S.C. § 2834(a) (1982).

[5] Dep't of Army, Reg. No. 27–20, Legal Services—Claims, chap. 10 (10 July 1987) [hereinafter AR 27–20].

publicity will depend upon the size and type of military operation, and the popular and political environment. It is essential, however, that coordination and liaison with the American Embassy/mission/consulate be achieved at the earliest practicable time following deployment. These agencies are the natural recipients of complaints and claims and will probably be able to obtain local media support. Because these agencies may be unfamiliar with the remedy provided by the FCC, they should be advised of FCC operations and procedures in order to avoid dissemination of misinformation and misdirection. This channel should also be used to educate the local government concerning FCC operations, objectives, and limitations.

### Appointment of FCCs

The number and size of the FCCs appropriate for a given deployment will depend on the size and type of force being deployed and the deployment mission. While the payment authority of a single-member FCC is limited to $5,000, one member of a three-member FCC may investigate and prepare a large claim for consideration by the whole FCC at a later time. Detailed instructions regarding the implementation of the FCA are beyond the scope of this article; however, procedures for the appointment of FCCs are clearly stated in AR 27-20. The planner should include in the OPLAN the steps necessary to effect the appointments for foreign claims operations. Application to the U.S. Army Claims Service (USARCS) for appointment of FCCs will also initiate action to allocate funds for use by the FCCs.[6]

### Predeployment Training

Extensive training of potential foreign claims commissioners and claims investigators is not necessary as long as a cache of reference material is kept on hand for use during the deployment. Investigation of the relevant facts needed for disposition of foreign claims is much the same as any investigative requirement of a judge advocate. As noted earlier in this article, the standard of proof necessary to support a foreign claim is liberal in order to fulfill the intent of the FCA. For example, if the evidence supports the conclusion that a particular loss was caused by a U.S. soldier, it is not necessary that the specific soldier or even the U.S. military unit be identified with certainty. Although the claimant has the initial burden to establish a prima facie case of damage or injury and causation, the local inhabitant claimant should not be required to meet an unreasonable burden of proof regarding identity of the tortfeasor. Where there is demonstrable loss and probable U.S. military causation, the FCC should consider equity and fairness before constructing technical defenses upon which to deny compensation.

### Conclusion

Congress has provided the armed forces with a powerful and flexible tool, in the form of the FCA, for use during military deployments to foreign lands. The power of the FCA lies in the discretion it bestows upon the FCCs. The authority to compensate for injury or damage resulting from the presence of U.S. military forces on foreign soil should be used with good judgment but also with confidence and decisiveness. It provides the judge advocate a unique opportunity to quickly and effectively assist the tactical commander with problems that could otherwise unduly divert attention from the military mission at hand. Contingency planning by the operational lawyer should include a full measure of thought toward the effective implementation of this statutory tool.

[6] USARCS does not normally permit the appointment of stand-by or contingency FCCs in the absence of actual deployment because of the difficulty in budget management.

## Claims Judge Advocate Communication With Medical Treatment Facilities

*Roger E. Honomichl*
*Chief Investigator, Tort Claims Division*

In recent years, I have been fortunate to be able to represent the U.S. Army Claims Service (USARCS) at the semi-annual Health Services Command course for prospective hospital commanders. As my job entails the investigation of medical malpractice claims on a worldwide basis, the relationships formed have been invaluable. A frequent topic raised by the attendees is the need for better communication at the installation level.

The Pre-Command Course lasts for two weeks, and covers a variety of subjects relating to the daily operation of a military medical treatment facility. The major method of instruction is the case method, that is, by utilizing actual occurrences. These examples illustrate how adherence to protocols, SOPs, regulations, and the principles of adequate staffing, among other basic tenets of good care, could preclude an injury or death. Even where a bad result occurs regardless of the quality of care, such adherence may minimize or negate the basis for a tort claim. Any suit against the United States necessarily encompasses all of the health care personnel involved, as well as the facility itself; it is not a process of singling out any one practitioner for blame. On occasion, the entire military medical system must be defended.

In my presentation, I engage in a free and open question and answer session. A consistent area of concern raised by the attendees is the need for more feedback from Army claims personnel, both at USARCS and the installation level, regarding lessons learned from the investigation, processing, and settlement of medical malpractice claims. After-action reports on paid claims enable medical commanders to instruct their medical staff and other health care personnel on how to avoid substandard care. Many of

the attendees would like a monthly briefing from their local claims judge advocate concerning pending medical malpractice claims and suits. In return, they have expressed a willingness to assist in all aspects of claims investigations and processing, to include standard of care. The attendees have stated that they would encourage the chiefs of various hospital departments and services to also assist in claims processing. Overall, the hope has been expressed that there can be better and freer communication, as such close coordination is clearly in the best interest of both the Army medical and legal services and ultimately in the best interest of Army patients.

Claims judge advocates are encouraged to utilize the best offices of their staff judge advocates to meet with the local hospital commander and develop an ongoing program of cooperation and support with a view to making maximum use of local resources in the resolution of medical malpractice claims. Such a mutual arrangement, along with early reporting of potentially compensable events to USARCS in accordance with Dep't of Army, Reg. No. 40–66, Medical Services—Medical Record and Quality Assurance Administration, chap. 9 (15 Feb. 1985), and obtaining input from the Department of Legal Medicine, Armed Forces Institute of Pathology, will be a vital part of any successful risk management program.

## Developments in the Processing of Medical Malpractice Claims

Two developments in the processing of medical malpractice claims within the Army are expected to have an impact upon those field claims offices having responsibility for claims generated by local military medical treatment facilities. Although these developments are largely procedural, they are designed to reduce the fragmentation that currently exists in the Army's administration of medical malpractice claims.

The first development involves the processing of medical malpractice claims in Germany. By letter dated 16 March 1987, U.S. Army Claims Service, Europe (USACSEUR) announced the establishment of new processing procedures to involve the newly created medico-legal advisor position within the Office of the Command Judge Advocate (OCJA), 7th Medical Command. This advisor is charged with monitoring and coordinating the investigation of malpractice claims in Germany, assisting in the training of local claims personnel in the nuances of medical claims investigation, and preparing the opinion and recommendation portions of completed investigation reports. The procedures call for field claims offices to report the receipt of all medical malpractice claims to the OCJA, 7th Medical Command. Technical assistance in the conduct of the investigation will be available upon request. Centralizing this function within 7th Medical Command headquarters is expected to enhance the integration of medical consultation into the investigative process and will establish a formal link between the medical and legal communities in the response to medical malpractice claims.

The second development is the impending reorganization within the U.S. Army Claims Service (USARCS) of the apparatus for administration of tort claims along subject matter lines. Heretofore, claims alleging negligent medical care within CONUS (thus cognizable under the Federal Tort Claims Act) were the responsibility of the General Claims Division, USARCS, while similar claims arising within the Army's claims jurisdiction overseas (cognizable under the Military Claims Act) fell within the province of the Foreign and Maritime Claims Division, USARCS. Upon reorganization this summer, a Medical Malpractice Branch within a newly-formed Tort Claims Division will process a major portion of Army malpractice claims arising both in CONUS and overseas. This plan is intended to foster consistency in the handling of medical malpractice claims and to concentrate the expertise in this specialty.

Taken together, these two developments should strengthen the ability of the Army claims apparatus, especially that in Germany, to respond to the growing medical malpractice mission. By concentrating the focus of medical malpractice within USARCS, we should be better able to access and document the staffing needs for this high visibility mission and to expand the highly successful Medical Claims Judge Advocate/Medical Claims Investigator program.

## Personnel Claims Note

### Timely Notice and Deductions for Lost Potential Carrier Recovery on Household Goods and Holdbaggage Claims (Personnel Claims Bulletin 96)

1. When a soldier's household goods or holdbaggage is lost or damaged in shipment, the soldier is required to annotate the DD Form 1840 for loss or damage noted at delivery, and to annotate the DD Form 1840R and take it to a military claims office within seventy days for any loss or damage later discovered. The claims office must sign and dispatch the DD Form 1840R to the carrier involved on or before the seventy-fifth day after delivery (except as provided in paragraph 6 below), and retain a signed copy for the claim file. The carrier is entitled to deny liability for any item for which it does not receive timely notice on one or the other of these documents. Millions of dollars are collected from carriers annually, and although the underlying purpose of the statute is to improve morale by compensating personnel for losses incurred incident to service, the government must be in a position to enforce carrier liability.

2. When recovery from a carrier will be lost because the claimant has failed to provide timely notice, the claims office *must* contact the claimant, preferably in writing, to determine the claimant's reasons for failing to comply. The approving authority must then analyze the claimant's reasons and determine whether to deduct lost potential carrier recovery. Deducting lost potential carrier recovery lightly or mechanically does not further the purposes underlying the payment of personnel claims.

3. For shipment claims involving carrier released valuation of sixty cents per pound per article or warehouse released valuation of fifty dollars per line item, when the claimant fails to provide timely notice and good cause (see paragraph 5 below) is not shown, the approving authority will deduct the amount of potential carrier recovery lost on an item by item basis.

4. For shipment claims involving basic increased carrier released valuation of $1.25 times the weight of the shipment under the new domestic tender of service [this became effective on domestic intrastate household goods shipments on 1

April 1987 and on domestic interstate household goods shipments on 1 May 1987], or for claims involving increased valuation coverage or full replacement cost protection purchased by the claimant from the carrier through the transporation office, when the claimant fails to provide timely notice and good cause (see paragraph 5 below) is not shown, the approving authority will deduct fifty percent of the lost potential carrier recovery from the amount otherwise payable, computed on an item by item basis. This position is based on a joint policy decision of the claims services. The "lost potential recovery" on claims involving extra increased released valuation or full replacement protection is computed as if the $1.25 basic increased released valuation were applicable rather than any higher valuation.

5. Approving or settlement authorities may find "good cause" and waive deduction of potential carrier recovery *only* when one of the following circumstances directly contributes to a claimant's failure to give timely notice: officially recognized absence (*e.g.*, temporary duty (TDY), off-post training exercises, etc.) resulting in the claimant's absence from official duty station for a significant portion of the notice period; hospitalization of the claimant for a significant portion of the notice period; or substantiated misinformation concerning notice requirements given to the claimant by government personnel.

6. When the claimant's failure to submit is due to a good cause such as official absence or hospitalization, the DD Form 1840R *may be* dispatched after the seventy-fifth day, as outlined in the Military-Industry Memorandum of Understanding. In all such cases, the carrier *must* be provided with an explanatory memorandum. It must be attached to the 1840R and a copy included in the claims file. When a settlement authority believes that there was good cause for a claimant's failure to give timely notice under circumstances other than those listed above, the claim will be forwarded to USARCS or USARCSEUR with a seven paragraph memorandum of opinion for a determination.

# Criminal Law Note

*Criminal Law Division, OTJAG*

### Article 15 Filing

The current system of filing records of Article 15, Uniform Code of Military Justice (UCMJ), punishment allows the commanders who impose punishment the discretion to file the records of punishment in either the performance fiche or the restricted fiche of the Official Military Personnel File (OMPF). The current option is serving Army needs by providing commanders with a prompt means of correcting minor disorders, while preserving rehabilitation potential in appropriate cases.

The performance fiche is routinely used by career managers and selection boards for assignment, promotion, and schooling selection. The restricted fiche contains information not available to career managers or selection boards without specific approval of the Commander, Military Personnel Center.

In making filing decisions, commanders are expected to follow carefully the guidance in paragraph 3–6, Army Regulation 27–10 (1 July 1984) (C3, 25 Sept. 1986), and to balance the interests of the soldier and the local command along with the general interest of the Army in producing and advancing only the most qualified soldiers for positions of leadership, trust, and responsibility.

Recent reviews of Article 15 filing decisions demonstrate that most commanders are following regulatory guidelines in their filing decisions. In a number of cases, however, filing decisions appear to depart from the current regulatory guidance. Inappropriate filing decisions are a matter of concern. While each filing decision must be considered on its own merits, commanders must evaluate the character traits underlying the misconduct and consider whether the traits are compatible with leadership in today's Army of Excellence. Improper restricted fiche filing undermines the Army's ability to ensure that only the most qualified soldiers hold positions of leadership, trust, and responsibility. Performance fiche filing is appropriate for offenses demonstrating moral turpitude, lack of integrity, serious character deficiencies, substantial breaches of military discipline, and patterns of misconduct.

A recently-approved change to file in local files only all Article 15 records for enlisted soldiers in grades E–4 and below, with less than three years service, will ensure that early Article 15s for minor misconduct do not appear in the OMPFs of soldiers who can overcome an early mistake and prove their worth as good soldiers who have the desire and potential for an Army career.

# Automation Note

*Information Management Office, OTJAG*

### Getting Started

So you want to automate your law office but you are not sure what tools to use or where to start? Well, here are some tips on how to get it done. First, there is no need to reinvent the wheel. Other offices have blazed a trail to automation that you can follow. You do not have to be like the courageous soul who advertised an intent to solicit bids for personal computers (PCs) and was deluged with over 200 responses.

Getting PCs to the users who do the work is a top automation priority. As stated in the JAGC external Information Management Plan (IMP) Initiative No. JA86001, "[i]nitial concentration of resources will be at the user level (Tier 3) where intelligent terminals [PCs] will be placed in the hands of attorneys and support personnel."

Annex I to the Department of Army Information Management Planning Guidance, dated 14 January 1987, is even more specific in its statement of the basic thrust of the Legal Automation Army-Wide System (LAAWS): "Initial emphasis [will be] placed on full configuration (PC-to-user ratio of 1:1) at the user level (Tier 3)." The annex also provides that "PC workstations will be IBM PC compatible with 640K RAM, color monitor, and at least one 5¼" floppy disk drive and one 20mb (or larger) hard disk drive. Printers, plotters, OCRs and other peripherals will be acquired IAW the needs of each JAGC office. Enable and DisplayWrite 3 Software will be acquired for each PC workstation."

To facilitate acquisition and insure compatibility with the Army automation architecture, IMP Initiative No. JA86001 also provides that hardware will be acquired using standard Army or Joint Service contracts whenever possible. So, if you have the money, you should consider buying PCs from the Joint Microcomputer Contract, number F19630-86-D-002, or the Army Minicomputer contract, number DAEA 26-86-D-0004. Both contracts were fully competed and are available for use by all Army activities. The actual ordering process is not too difficult, but like anything else, there are a few hoops to jump through. The ordering instructions for use with the minicomputer contract are provided in the US Army Guide for US Air Force Contract F19630-86-D-002, Revision 3, May 6, 1987. A similar guide is available for users of the minicomputer contract.

Copies of the Ordering Guide should be available from your Director of Information Management and/or contracting officer. If not, contact the General Purpose Computer Support Center at AUTOVON 364-5101/5102 or 1LT Pang at the Information Systems Engineering Command, AUTOVON 992-7917. If you need a copy of the LAAWS IMP Initiative or Annex I, HQDA, IMP Guidance, give us a call at AUTOVON 227-8655.

As we complete acquisition of PCs, we will provide additional guidance on networking PCs around local area networks, departmental minicomputers, or installation mainframes. Please share your "lessons learned" in the networking process with us in the OTJAG IMO. Captain David L. Carrier.

# Bicentennial of the Constitution

## Bicentennial Update: The Constitutional Convention—August 1787

*This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January, April, May, and June issues of* The Army Lawyer.

Because of the debate over congressional representation, the Constitutional Convention had spent relatively little time discussing the other two branches of government. The major problem the delegates saw was protecting the executive and the judiciary from legislative encroachment. Just before the Convention recessed on July 26, it decided to have a single executive, appointed to a single seven-year term (The Convention rejected calls for a plural executive, or a joint executive-judicial Council of Revision). After making this decision, the convention appointed a Committee of Detail, consisting of Edmund Randolph of Virginia, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut, John Rutledge of South Carolina, and Nathaniel Gorham of Massachusetts. The Committee was responsible for consolidating into a single document all the resolutions the Convention had passed.

The Convention reconvened on August 6. By this time the delegates had spent more than two months in Philadelphia, and they were eager to move to a conclusion. Nevertheless, several major debates arose. In the Committee report, the powers of the president were limited; he would serve as commander-in-chief of the armed forces and see that the laws were "duly and faithfully" executed. The Senate would retain the power to make treaties and to appoint ambassadors and justices of the Supreme Court. The delegates had been reluctant to provide this authority to the President; it smacked too much of the royal prerogatives that the British monarchy had exercised.

The Convention began to reconsider its position, however. Several delegates from the large states voiced concern that the Senate, where the small states would have relatively greater influence, had too much authority over foreign affairs. Delegates spoke of the president as the "guardian of

the national interest," who would rise above the factional squabbles expected in the Senate. On August 31, the issue once again went to a Committee on Unresolved Parts. There are few records of the Committee debates, but in its September 4 report, the presidency was transformed: the President, with the "advice and consent" of the Senate, would appoint ambassadors and other officials, including judges, and make treaties. An electoral college would select the President, which would keep him politically independent of the legislature. He would have a four-year term and could run for reelection.

In August, the Convention also returned to another divisive issue—slavery. The "Three-fifths Clause"—which stated that every five slaves would count as three free men in population counts to determine representation in the house—had set the stage for the Connecticut Compromise and the makeup of the legislature. The Committee of Detail report, however, upset this compromise. It proposed several measures that would weaken the national government, including a ban on export taxes and a provision that forbade the national government from regulating the slave trade. This precipitated a wide-ranging debate over the national government's authority over the state's commercial interests. Southern states objected to a proposal to give Congress the authority to regulate commerce with foreign nations, among the states, and with the Indian tribes. Southern delegates feared that it would lead to an entrenched New England monopoly over the trade in staple goods needed in the South. Other delegations insisted that Congress have a wide authority over trade matters in general, and the slave trade in particular; they feared the "Three-fifths Clause" would be seen as a constitutional sanction of the slave trade; moreover, unlimited slave imports could permit the Southern states to increase their representation in the legislature. These delegations wanted Congress to have the authority to "prevent the increase of slavery." Yet another compromise bridged this gap.

Governor William Livingston of New Jersey proposed that the national power to regulate commerce not extend to prohibiting the importation of slaves until 1800. Charles Cotesworth Pinckney of South Carolina moved to substitute the year 1808, which carried on an eight to four vote. In addition, there would be a ban on export taxes. Thus satisfied, the Southern states waived their objections to the commerce clause and to taxes on imports.

August also saw the Convention adopt the supremacy clause. On August 23, the delegates passed a provision to make the Constitution the "supreme Law of the Land." Four days later, the Convention extended the federal judicial power to "all cases arising under the Constitution." These provisions laid the foundation for national sovereignty.

Finally, on August 31, the delegates decided how to ratify the Constitution. They approved a motion to submit the Constitution to state ratifying conventions that were to be established "as speedily as circumstances permit." The Constitution would be effective after ratification by nine states. (The Convention's September proceedings will appear in the August issue of *The Army Lawyer*.)

## Guard and Reserve Affairs Item

*Judge Advocate Guard & Reserve Affairs Department, TJAGSA*

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

The following schedule sets forth the training sites, dates, subjects, and local actions officers for The Judge Advocate General's School Continuing Legal Education (On-Site) Training program for Academic Year (AY) 1988. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to The Judge Advocate General Service Organizations (JAGSOs) or to judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135–316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site program features instructors from The Judge Advocate General's School, U.S. Army (TJAGSA), and has been approved for continuing legal education (CLE) credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Limited funding from ARPERCEN is available, on a case by case basis, for IRR members to attend On-Sites in an ADT status. Applications for ADT should be submitted 8 to 10 weeks prior to the scheduled On-Site to Commander, ARPERCEN, ATTN: DARP–OPS–JA (MAJ Kellum), 9700 Page Boulevard, St. Louis, MO 63132–5260. Members of the IRR may also attend for retirement point credit pursuant to AR 140–185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists/NCO and court reporter training to run concurrently with On-Site training. In the past, enlisted training programs have featured Reserve Component JAGC officers and non-commissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison. A model training plan for enlisted soldier On-Sites has been distributed to assist in planning and conducting this training.

JAGSO detachment commanders and SJAs of other Reserve Component troop program units will ensure that unit training schedules reflect the scheduled On-Site training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Captain Mike Chiaparas, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781 (telephone (804) 972–6380; toll-free 1–800–654–5914, ext. 380).

**The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 88**

| Date | City, Host Unit, and Training Site | Subjects | Action Officer |
|---|---|---|---|
| 3, 4 Oct 87 | Minneapolis, MN<br>214th MLC<br>Thunderbird Motel<br>2201 E. 78th Street<br>Bloomington, MN 55420 | Admin & Civil Law<br>International Law | MAJ Robert Blum<br>617 10th Street<br>Albert Lea, MN<br>(507) 373–7600 |
| 3 Oct 87 | Honolulu, HI<br>IX Corps (Aug)<br>Kolani Center<br>Fort DeRussey, HI | Admin & Civil Law<br>Criminal Law | MAJ Douglas Silva<br>WESTCOM<br>Claims Service<br>Fort Shafter, HI 96858–5100<br>(808) 433–9953 |
| 10, 11 Oct 87 | St. Louis, MO<br>102d ARCOM<br>St. Louis Sheraton<br>St. Louis, MO | Criminal Law<br>Contract Law | CPT William E. Kumpe<br>4139 Weskan Lane<br>Bridgton, MO 63044<br>(314) 263–7908 |
| 24, 25 Oct 87 | Boston, MA<br>94th ARCOM<br>Hanscom AFB<br>Bedford, MA | Criminal Law<br>Admin & Civil Law | COL Paul L. Cummings<br>HQ, 94th ARCOM<br>AFRC, Bldg 1607<br>Hanscom AFB, MA 01731–5290<br>(617) 277–1991 |
| 7, 8 Nov 87 | Philadelphia, PA<br>79th ARCOM<br>Willow Grove NAS<br>Willow Grove, PA | Contract Law<br>International Law | LTC Donald M. Moser<br>153d JAG Det (MLC)<br>USARC, Naval Air Station<br>Willow Grove, PA 19090–5110<br>(215) 925–5800 |
| 14 Nov 87 | Detroit, MI<br>123d ARCOM<br>26402 West 11 Mile Rd<br>Southfield, MI | Criminal Law<br>Contract Law | LTC Michael L. Updike<br>6061 Venice Drive<br>Union Lake, MI 48085<br>(313) 851–9500, Ext. 477 |
| 15 Nov 87 | Indianapolis, IN<br>123d ARCOM<br>Bldg 400<br>Ft. Benjamin Harrison, IN | Criminal Law<br>Contract Law | MAJ John Joyce<br>10404 Stormhaven Way<br>Indianapolis, IN 46256<br>(317) 637–5353 |
| 5, 6 Dec 87 | New York, NY<br>77th ARCOM<br>World Trade Center<br>New York, NY | Admin & Civil Law<br>Criminal Law | LTC(P) Francis D. Terrell<br>OSJA, 77th USARCOM<br>Fort Totten<br>Flushing, NY 11359<br>(212) 220–6497 |
| 16, 17 Jan 88 | Los Angeles, CA<br>78th MLC<br>Marina Del Rey Marriot<br>Marina Del Rey, CA | Contract Law<br>International Law | LTC Charles W. Jeglikowski<br>4256 Ellenita Avenue<br>Tarzana, CA 91356<br>(213) 894–4636 |
| 23, 24 Jan 88 | Seattle, WA<br>124th ARCOM<br>6th MLC<br>University of Washington<br>School of Law<br>Seattle, WA | Contract Law<br>International Law | LTC Robert Burke<br>33d Floor<br>Columbia Seafirst Center<br>701 Fifth Avenue<br>Seattle, WA 98104<br>(206) 623–3427 |

| Date | City, Host Unit, and Training Site | Subjects | Action Officer |
|---|---|---|---|
| 5, 6 Mar 88 | San Antonio, TX<br>90th ARCOM<br>HQS, 90th ARCOM<br>1920 Harry Wurzbach Highway<br>San Antonio, TX | International Law<br>Criminal Law | MAJ Michael D. Bowles<br>7303 Blanco Road<br>San Antonio, TX 78216<br>(512) 349–3761 |
| 5, 6 Mar 88 | Columbia, SC<br>120th ARCOM<br>University of South Carolina<br>School of Law<br>Columbia, SC | International Law<br>Contract Law | MAJ James R. Hill, Jr.<br>Commander, 120th USARCOM<br>ATTN: AFKD–ACG–JA<br>Fort Jackson, SC 29207–6070<br>(803) 737–6458 |
| 12, 13 Mar 88 | Nashville, TN<br>125th ARCOM<br>Opryland Hotel<br>Nashville, TN | Criminal Law<br>Contract Law | MAJ Douglas A. Brace<br>300 Noel Place<br>200 4th Avenue N.<br>Nashville, TN 37219<br>(615) 256–9999 |
| 12, 13 Mar 88 | Kansas City, MO<br>89th ARCOM<br>Marriott Hotel<br>KCI Airport<br>Kansas City, MO | Admin & Civil Law<br>Criminal Law<br>International Law | LTC Daniel Duffy<br>615 Fairacres Road<br>Omaha, NE 68132<br>(402) 390–0300 |
| 19, 20 Mar 88 | San Francisco, CA<br>5th MLC<br>6th Army Conference Room<br>Presidio of San Francisco | International Law<br>Contract Law | MAJ William Lynch<br>#675<br>1000 Fourth Street<br>San Rafael, CA 94903<br>(415) 454–9541 |
| 26, 27 Mar 88 | Washington, DC<br>10th MLC<br>TBA | Criminal Law<br>Admin & Civil Law | CPT David W. LaCroix<br>113 Grantham Court<br>Walkersville, MD 21793<br>(202) 282–2524 |
| 9, 10 Apr 88 | Miami, FL<br>174th MLC<br>TBD | Admin & Civil Law<br>Criminal Law | CPT John Copelan<br>8020 Northwest 100 Terrace<br>Tamarac, FL 33321<br>(305) 722–6470<br>(305) 579–6700 |
| 16, 17 Apr 88 | San Juan, PR<br>PR ARNG<br>TBD | Admin & Civil Law<br>Criminal Law | LTC Salvador Perez-Mayol<br>HQ PR ARNG<br>P.O. Box 3786<br>San Juan, PR 00904–3786<br>(809) 721–3131 Ext. 298/299 |
| 16, 17 Apr 88 | Oxford, MS<br>11th MLC<br>University of Mississippi<br>School of Law<br>Oxford, MS | Admin & Civil Law<br>International Law | MAJ Charles L. Clark<br>University of Mississippi<br>Division of Continuing Education<br>ATTN: Mr. Rusty Cooper<br>University, MS 38677<br>(601) 982–6590 |
| 23, 24 Apr 88 | New Orleans, LA<br>LA ARNG<br>TBD | International Law<br>Admin & Civil Law | COL Arthur Abercrombie, Jr.<br>P.O. Box 2471<br>Baton Rouge, LA 70821<br>(504) 387–3221 |
| 23, 24 Apr 88 | Chicago, IL<br>86th ARCOM<br>USAREC Conference Room<br>Fort Sheridan, IL | Criminal Law<br>Admin & Civil Law | COL Gary L. Vanderhoof<br>SJA, 86th ARCOM<br>7402 W. Roosevelt Road<br>Forest Park, IL 60130<br>(312) 353–3862 |

| Date | City, Host Unit, and Training Site | Subjects | Action Officer |
|---|---|---|---|
| 14, 15 May 88 | Columbus, OH<br>83d ARCOM<br>Defense Construction Supply Center (DCSC)<br>Columbus, OH | International Law<br>Contract Law | MAJ Dana McCue<br>Building 150<br>DCSC<br>Columbus, OH 43216–5004<br>(614) 238–3702 |
| 14, 15 May 88 | Park City, UT<br>UT ARNG<br>TBA | Criminal Law<br>Admin & Civil Law | LTC Barrie A. Vernon<br>P. O. Box 8000<br>Salt Lake City, UT 84108–0900<br>(801) 524–3682 |

# 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 non-unit 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

The 6th Contract Claims, Litigation, and Remedies Course, originally scheduled for September 19–23, 1988, has been rescheduled for September 12–16. Other TJAGSA courses are as follows:

August 3–May 21, 1988: 36th Graduate Course (5–27–C22).

August 10–14: 36th Law of War Workshop (5F–F42).

August 17–21: 11th Criminal Law New Developments Course (5F–F35).

August 24–28: 90th Senior Officers Legal Orientation Course (5F–F1).

September 14–25: 113th Contract Attorneys Course (5F–F10).

September 21–25: 9th Legal Aspects of Terrorism Course (5F–F43).

October 6–9: 1987 JAG Conference.

October 19–23: 7th Commercial Activities Program Course (5F–F16).

October 19–23: 6th Federal Litigation Course (5F–F29).

October 19–December 18: 114th Basic Course (5–27–C20).

October 26–30: 19th Criminal Trial Advocacy Course (5F–F32).

November 2–6: 91st Senior Officers Legal Orientation Course (5F–F1).

November 16–20: 37th Law of War Workshop (5F–F42).

November 16–20: 21st Legal Assistance Course (5F–F23).

November 30–December 4: 25th Fiscal Law Course (5F–F12).

December 7–11: 3d Judge Advocate and Military Operations Seminar (5F–F47).

December 14–18: 32d Federal Labor Relations Course (5F–F22).

*1988*

January 11–15: 1988 Government Contract Law Symposium (5F–F11).

January 19–March 25: 115th Basic Course (5–27–C20).

January 25–29: 92nd Senior Officers Legal Orientation Course (5F–F1).

February 1–5: 1st Program Managers' Attorneys Course (5F–F19).

February 8–12: 20th Criminal Trial Advocacy Course (5F–F32).

February 16–19: 2nd Alternate Dispute Resolution Course (5F–F25).

February 22–March 4: 114th Contracts Attorneys Course (5F–F10).

March 7–11: 12th Administrative Law for Military Installations Course (5F–F24).

March 14–18: 38th Law of War Workshop (5F–F42).

March 21–25: 22nd Legal Assistance Course (5F–F23).

March 28–April 1: 93rd Senior Officers Legal Orientation Course (5F–F1).

April 4–8: 3rd Advanced Acquisition Course (5F–F17).

April 12–15: JA Reserve Component Workshop.

April 18–22: Law for Legal Noncommissioned Officers (512–71D/20/30).

April 18–22: 26th Fiscal Law Course (5F–F12).

April 25–29: 4th SJA Spouses' Course.

April 25–29: 18th Staff Judge Advocate Course (5F–F52).

May 2–13: 115th Contract Attorneys Course (5F–F10).

May 16–20: 33rd Federal Labor Relations Course (5F–F22).

May 23–27: 1st Advanced Installation Contracting Course (5F–F18).

May 23–June 10: 31st Military Judge Course (5F–F33).

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: Legal Administrators Workshop (512-71D/71E/40/50).

July 18–29: 116th Contract Attorneys Course (5F–F10).

July 18–22: 17th Law Office Management Course (7A–713A).

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. Civilian Sponsored CLE Courses**

*October 1987*

1–2: UDCL, Advanced Estate Planning Symposium, Denver, CO.

1–2: SBN, Federal Practice Seminar, Reno, NV.

2: UMC, Real Estate Litigation, Columbia, MO.

2–3: LSU, Louisiana Evidence, Baton Rouge, LA.

4–6: AAJE, Search & Seizure & Recent U.S. Supreme Court Criminal Proc. Cases, Durham, NH.

4–9: NJC, Administrative Law: Advanced, Reno, NV.

4–9: NITA, Advanced Trial Advocacy, Washington, D.C.

5–7: FPI, Construction Contract Litigation, Carmel, CA.

5–7: FPI, Construction Course for Owners, San Francisco, CA.

5–7: FPI, Cost Accounting Standards, Washington, D.C.

5–9: GCP, Contracting with the Government, Washington, D.C.

5–9: FPI, Government Construction Contracting, Washington, D.C.

5–9: SLF, Antitrust Law Short Course, Dallas, TX.

7–9: AAJE, Handling Hearsay Objections, Durham, NH.

8–9: ABA, Construction Law & Practice, Los Angeles, CA.

8–9: SBN, Federal Practice Seminar, Las Vegas, NV.

8–9: ABA, The Contested Merger: Negotiating with the FTC, Washington, D.C.

8–9: ABA, National Institute on Antitrust, Washington, D.C.

8–10: ALIABA, Pension, Profit-Sharing and other Deferred Compensation Plans, Washington, D.C.

8-10: PLI, Product Liability of Manufacturers, New York, NY.

8–10: ALIABA, Trial Evidence, Civil Practice & Litigation in Federal and State Courts, Charleston, SC.

8-10: PLI, Computer Law Institute, New York, NY.

9: UMC, Family Law Institute, Columbia, MO.

9–10: LSU, Recent Developments in Legislation & Jurisprudence, New Orleans, LA.

12–15: FPI, Pension Law Today, Las Vegas, NV.

14–16: FPI, Government Contract Claims, Dallas, TX.

14–16: FPI, Practical Negotiation of Government Contracts, Washington, D.C.

15–16: SLF, Labor Law Institute, Dallas, TX.

15-16: ALIABA, The Role of Corporate Counsel in Litigation, Washington, D.C.

15–17: ALIABA, Creative Tax Planning for Real Estate Transactions, Chicago, IL.

16–17: PLI, Deposition Skills Training, New York, NY.

16–17: LSU, Divorce Law Practice for the Louisiana Attorney, Baton Rouge, LA.

19–20: FPI, The Competition in Contracting Act, San Diego, CA.

19–21: FPI, Understanding Overhead in Government Contracts, Washington, D.C.

19–21: FPI, Claims and the Construction Owner, Denver, CO.

19-21: FPI, Pricing of Claims: Government Contracts, Washington, D.C.

19–21: FPI, Changes in Government Contracts, Washington, D.C

19–21: FPI, Practical Construction Law, Boston, MA.

19–21: FPI, Subcontracting, Marina del Rey, CA.

19–23: GCP, Administration of Government Contracts, Washington, D.C.

22–23: BNA, Western Government Contracts, San Francisco, CA.

22–23: PLI, Securities Litigation, New York, NY.

22–24: ABA, Appellate Advocacy, Boston, MA.

23: UMC, Trial Techniques, Columbia, MO.

25-30: NJC, Conducting the Civil Trial, Orlando, FL.

25–30: NJC, Administrative Law: Management Problems of Chief Judges and Boards, Orlando, FL.

26–27: PLI, Secured Creditors & Lessors Under Bankruptcy Reform Act, New York, NY.

26–27: FPI, Rights in Technical Data & Patents, Washington, D.C.

26–28: FPI, Proving Construction Contract Damages, San Francisco, CA.

26-28: FPI, Government Contract Costs, San Diego, CA.

26–30: FPI, The Skills of Contract Administration, Washington, D.C.

27: PLI, Title Insurance, New York, NY.

28–30: FPI, Pricing of Claims: Government Contractor, Las Vegas, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1987 issue of *The Army Lawyer*, at 66.

**4. Mandatory Continuing Legal Education Requirement**

Twenty-six states currently have a mandatory continuing legal education (MCLE) requirement. The latest addition is Delaware.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct. 1986) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from

jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

| State | Local Official | Program Description |
|---|---|---|
| *Alabama | MCLE Commission<br>Alabama State Bar<br>P.O. Box 671<br>Montgomery, AL 36101<br>(205) 269–1515 | —Active attorneys must complete 12 hours of approved continuing legal education per year.<br>—Active duty military attorneys are exempt but must declare exemption annually.<br>—Reporting date: on or before 31 December annually. |
| *Colorado | Colorado Supreme Court<br>Board of Continuing Legal Education<br>Dominion Plaza Building<br>600 17th St.<br>Suite 520–S<br>Denver, CO 80202<br>(303) 893–8094 | —Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years.<br>—Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years.<br>—Reporting date: 31 January annually. |
| Delaware | Commission of Continuing Legal Education<br>706 Market Street<br>Wilmington, DE 19801<br>(302) 658–5856 | —Active attorneys must complete 30 hours of approved continuing legal education per year.<br>—Reporting date: on or before 31 July every other year. |
| *Georgia | Executive Director<br>Georgia Commission on Continuing Lawyer Competency<br>800 The Hurt Building<br>50 Hurt Plaza<br>Atlanta, GA 30303<br>(404) 527–8710 | —Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics.<br>—Reporting date: 31 January annually. |
| *Idaho | Idaho State Bar<br>P.O. Box 895<br>204 W. State Street<br>Boise, ID 83701<br>(208) 342–8959 | —Active attorneys must complete 30 hours of approved continuing legal education every three years.<br>—Reporting date: 1 March every third anniversary following admission to practice. |
| *Indiana | Clerk of the Supreme Court<br>Continuing Legal Education Program<br>State of Indiana<br>Room 217, State House<br>Indianapolis, IN 46204 | —Attorneys must complete 36 hours of approved continuing legal education within a three-year period.<br>—At least 6 hours must be completed each year.<br>—Reporting date: 1 October annually. |
| *Iowa | Executive Secretary<br>Iowa Commission of Continuing Legal Education<br>State Capitol<br>Des Moines, IA 50319<br>(515) 281–3718 | —Active attorneys must complete 15 hours of approved continuing legal education each year.<br>—Reporting date: 1 March annually. |
| *Kansas | Continuing Legal Education Commission<br>Kansas Judicial Center<br>301 West 10th Street<br>Room 23–S<br>Topeka, KS 66612–1507<br>(913) 357–6510 | —Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years.<br>—Reporting date: 1 July annually. |
| *Kentucky | Continuing Legal Education Commission<br>Kentucky Bar Association<br>W. Main at Kentucky River<br>Frankfort, Kentucky 40601<br>(502) 564–3793 | —Active attorneys must complete 15 hours of approved continuing legal education each year.<br>—Reporting date: 30 days following completion of course. |

| State | Local Official | Program Description |
|---|---|---|
| *Minnesota | Executive Secretary<br>Minnesota State Board of Continuing Legal Education<br>200 So. Robert Street<br>Suite 310<br>St. Paul, MN 55107<br>(612) 297–1800 | —Active attorneys must complete 45 hours of approved continuing legal education every three years.<br>—Reporting date: 30 June every third year. |
| *Mississippi | Commission of CLE<br>Mississippi State Bar<br>PO Box 2168<br>Jackson, MS 39225–2168<br>(601) 948–4471 | —Attorneys must complete 12 hours of approved continuing legal education each calendar year.<br>—Active duty military attorneys are exempt, but must declare exemption.<br>—Reporting date: 31 December annually. |
| Missouri | The Missouri Bar<br>The Missouri Bar Center<br>326 Monroe Street<br>P.O. Box 119<br>Jefferson City, MO 65102<br>(314) 635–4128 | —Active attorneys must complete 15 hours of approved continuing legal education per year.<br>—Effective 1 July 1987<br>—Reporting date: 30 June annually beginning in 1988. |
| *Montana | Director<br>Montana Board of Continuing Legal Education<br>P.O. Box 4669<br>Helena, MT 59604<br>(406) 442–7660 | —Active attorneys must complete 15 hours of approved continuing legal education each year.<br>—Reporting date: 1 April annually. |
| *Nevada | Executive Director<br>Board of Continuing Legal Education<br>State of Nevada<br>P.O. Box 12446<br>Reno, NV 89510<br>(702) 826–0273 | —Active attorneys must complete 10 hours of approved continuing legal education each year.<br>—Reporting date: 15 January annually. |
| New Mexico | State Bar of New Mexico<br>Continuing Legal Education Commission<br>1117 Stanford Ave., N.E.<br>Albuquerque, NM 87125 | —Active attorneys must complete 15 hours of approved continuing legal education per year.<br>—Reporting date: 1 January 1988 or first full report year after date of admission to Bar. |
| *North Dakota | Executive Director<br>State Bar of North Dakota<br>P.O. Box 2136<br>Bismark, ND 58501<br>(701) 255–1404 | —Active attorneys must complete 45 hours of approved continuing legal education every three years.<br>—Reporting date: 1 February submitted in three year intervals. |
| *Oklahoma | Oklahoma Bar Association<br>Director of Continuing Legal Education<br>1901 No. Lincoln Blvd.<br>P.O. Box 53036<br>Oklahoma City, OK 73153<br>(405) 524-2365 | —Active attorneys must complete 12 hours of approved legal education per year.<br>—Active duty military are exempt, but must declare exemption.<br>—Reporting date: 1 April annually, beginning in 1987. |
| *South Carolina | State Bar of South Carolina<br>P.O. Box 2138<br>Columbia, SC 29202<br>(803) 799–5578 | —Active attorneys must complete 12 hours of approved continuing legal education per year.<br>—Active duty military are exempt, but must declare exemption.<br>—Reporting date: 10 January annually. |
| Tennessee | Commission on Continuing Legal Education<br>Supreme Court of Tennessee<br>3622–A West End Avenue<br>Nashville, TN 37205<br>(615) 385–2543 | —Active attorneys must complete 12 hours of approved continuing legal education per year.<br>—Active duty military attorneys are exempt.<br>—Reporting date: 31 January. |
| *Texas | Texas State Bar<br>Attention: Membership/CLE<br>P.O. Box 12487<br>Capital Station<br>Austin, TX 78711<br>(512) 463–1382 | —Active attorneys must complete 15 hours of approved continuing legal education per year.<br>—Reporting date: Depends on birth month. |

| State | Local Official | Program Description |
|---|---|---|
| *Vermont | Vermont Supreme Court<br>Committee of Continuing Legal Education<br>111 State Street<br>Montpelier, VT 05602<br>(802) 828–3279 | —Active attorneys must complete 10 hours of approved legal education per year.<br>—Reporting date: 30 days following completion of course.<br>—Attorneys must report total hours every 2 years. |
| *Virginia | Virginia Continuing Legal Education Board<br>Virginia State Bar<br>801 East Main Street<br>Suite 1000<br>Richmond, VA 23219<br>(804) 786–2061 | —Active attorneys must complete 8 hours of approved continuing legal education per year.<br>—Reporting date: 30 June annually beginning in 1987. |
| *Washington | Director of Continuing Legal Education<br>Washington State Bar Association<br>500 Westin Building<br>2001 Sixth Avenue<br>Seattle, WA 98121–2599<br>(206) 448–0433 | —Active attorneys must complete 15 hours of approved continuing legal education per year.<br>—Reporting date: 31 January annually. |
| West Virginia | West Virginia Mandatory Continuing Legal Education Commission<br>E–400 State Capitol<br>Charleston, WV 25305<br>(304) 346–8414 | —Attorneys must complete 6 hours of approved continuing legal education between 1 July 1986 and 30 June 1987; 6 hours between 1 July 1987 and 30 June 1988; and 24 hours every two years beginning 1 July 1988.<br>—Reporting date: 30 June annually. |
| *Wisconsin | Supreme Court of Wisconsin Board of Attorneys Professional Competence<br>119 Martin Luther King, Jr. Boulevard<br>Madison, WI 53703–3355<br>(608) 266–9760 | —Active attorneys must complete 30 hours of approved continuing legal education every two years.<br>—Reporting date: 31 December of even or odd years depending on the year of admission. |
| *Wyoming | Wyoming State Bar<br>P.O. Box 109<br>Cheyenne, WY 82003<br>(307) 632–9061 | —Active attorneys must complete 15 hours of approved continuing legal education per year.<br>—Reporting date: 1 March annually. |

# Current Material of Interest

## 1. Article 137, UCMJ, Training Videotapes

Information on the procedure to obtain Article 137, UCMJ training videotapes may be found in *The Army Lawyer*, April 1987, at 49. The videotapes, entitled "The Uniform Code of Military Justice, Part I, The Punitive Articles" (SAVPIN No. 701608DA) and "The Uniform Code of Military Justice, Part II, The UCMJ in Action" (SAVPIN No. 701609DA), may be obtained through Training and Audiovisual Support Centers (TASC). If your office needs its own copy of these materials, submit a request for the videotapes to Commandant, TJAGSA, ATTN: JAGS-ADN-T, Charlottesville, VA 22903-1781. Include the name, phone number, and address of the person who will sign a hand receipt for the tapes, and state whether ½ or ¾ inch tape format is desired. The videotapes will be provided to your office on an extended loan basis by the U.S. Army Audiovisual Center, Tobyhanna Army Depot, PA.

A twenty minute videotape on Reserve Component jurisdiction is being prepared by the Criminal Law Division of The Judge Advocate General's School. This tape, which will be available shortly, discusses the implementation of the recent Reserve Component jurisdiction legislation. You may obtain a copy of the videotape by sending a blank videotape cassette to Commandant, TJAGSA, ATTN: JAGS-ADN-T, Charlottesville, VA 22903-1781. Either commercial ½ inch VHS or ¾ inch tape format blank cassettes are acceptable.

## 2. TJAGSA Publications Available Through Defense Technical Information Center (DTIC)

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 B090375 | Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-85-1 (200 pgs). |
| AD B090376 | Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-85-2 (175 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 A174509 | All States Consumer Law Guide/JAGS-ADA-86-11 (451 pgs). |
| AD B100236 | Federal Income Tax Supplement/JAGS-ADA-86-8 (183 pgs). |
| AD B100233 | Model Tax Assistance Program/JAGS-ADA-86-7 (65 pgs). |
| AD B100252 | All States Will Guide/JAGS-ADA-86-3 (276 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-85-7 (355 pgs). |
| AD B094235 | All States Law Summary, Vol II/JAGS-ADA-85-8 (329 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 B110134 | Preventive Law Series/JAGS-ADA-87-4 (196 pgs). |

### Claims

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|---|---|
| AD B108054 | Claims Programmed Text/JAGS-ADA-87-2 (119 pgs). |

### Administrative and Civil Law

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|---|---|
| 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 B107951 | Criminal Law: Evidence I/JAGS–ADC–87–1 (228 pgs). |
| AD B107975 | Criminal Law: Evidence II/JAGS–ADC–87–2 (144 pgs). |
| AD B107976 | Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–87–3 (211 pgs). |
| AD B107977 | Criminal Law: Evidence IV (Fifth and Sixth Amendments/JAGS–ADC–87–4 (313 pgs). |
| 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:

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|---|---|
| AD A145966 | USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 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 1–15 | Civilian Aides to the Secretary of the Army | | 8 May 87 |
| AR 37–47 | Contingency Funds of the Secretary of the Army | | 15 May 87 |
| AR 37–107 | Accounts Payable | | 3 Apr 87 |
| AR 340–15 | Preparing & Managing Correspondence | | 17 Nov 86 |
| AR 385–64 | Ammunition and Explosives Safety Standards | | 22 May 87 |
| AR 570–2 | Manpower Requirements Criteria (MARC)—Tables of Organization and Equipment | | 22 May 87 |
| AR 600–37 | ERRATA—Unfavorable Information | | |
| AR 608–99 | Family Support, Child Custody, and Paternity | | 22 May 87 |
| AR 611–201 | Enlisted Career Management Fields & Military Occupational Specialities | | 29 Apr 87 |
| AR 670–1 | Wear and Appearance of Army Uniforms and Insignia | | 20 May 87 |
| AR 702–5 | Missile Firing Data Reports (RCSAMC–224) | | 26 May 87 |
| CIR 11–87–1 | Internal Control Review Checklists | | 5 May 87 |
| DA Pam 40–15 | Your Diabetic Diet | | Oct 86 |
| DA Pam 700–26 | Acquisition Management Milestone System | | 22 May 87 |
| DA Pam 700–30 | Logistic Control Activity (LCA) Information and Procedures | | 11 May 87 |
| UPDATE 9 | Message Address Directory | | 30 Apr 87 |

### 4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Boyle, *Determining U.S. Responsibility for Contra Operations Under International Law*, 81 Am. J. Int'l L. 86 (1987).

Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 Ind. L.J. 273 (1986–1987).

*The Deceptive Trade Practices—Consumer Protection Act Symposium*, 18 Tex. Tech L. Rev. 1 (1987).

Goodman, Golding, Helgeson, Haith & Michelli, *When a Child Takes the Stand: Jurors' Perceptions of Children's Eyewitness Testimony*, 11 Law & Hum. Behav. 27 (1987).

Mann, *International Law and the Child Soldier*, 36 Int'l & Comp. L.Q. 32 (1987).

Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348 (1987).

Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723 (1987).

Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. Crim. L. & Criminology 277 (1986).

Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 Pac. L.J. 801 (1987).

Myers, *Hearsay Statements by the Child Abuse Victim*, 38 Baylor L. Rev. 775 (1986).

Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1 (1987).

Paust, *The President Is Bound by International Law*, 81 Am. J. Int'l L. 377 (1987).

Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1 (1987).

Rehnquist, *The Legal Profession Today*, 62 Ind. L.J. 151 (1986–1987).

Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 Emory L.J. 853 (1986).

Scantlebury, *The Government Contract Defense: Alive and Well in the Fourth Circuit*, 22 Torts & Ins. L.J. 268 (1987).

*State Legislation on Child Support and Paternity*, 20 Clearinghouse Rev. 1408 (1987).

Whitman, *Government Responsibility for Constitutional Torts*, 85 Mich. L. Rev. 225 (1986).

Comment, *Chemical Warfare Agent Research Regulation: The Conflict Between Federal and Local Control*, 15 B.C. Envtl. Aff. L. Rev. 131 (1987).

Comment, *In Defense of the Government Contractor Defense*, 36 Cath. U.L. Rev. 219 (1986).

Comment, *The Fourth Amendment and Drug-Detecting Dogs*, 48 Mont. L. Rev. 101 (1987).

Note, *Impeachment With an Unsworn Prior Inconsistent Statement as Subterfuge*, 28 Wm. & Mary L. Rev. 295 (1987).

Brickner, Book Review, 16 Cap. U.L. Rev. 147 (1986) (reviewing Great American Law Reviews (R. Berring ed. 1984)).