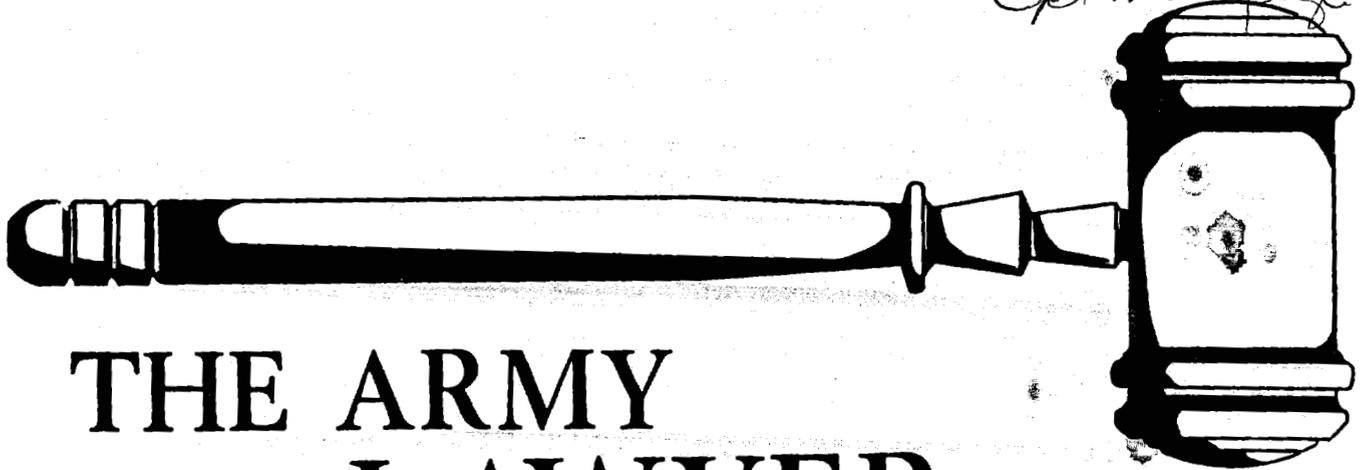


Cpt Mark Kepp



# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-173

May 1987

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**Editor**

**Captain David R. Getz**

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*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform*

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

REPLY TO  
ATTENTION OF

DAJA-PT

9 APR 1987

SUBJECT: 1987 JAGC Summer Intern Program

Staff Judge Advocates/OTJAG Field Operating Agencies/Division/  
Office Chiefs/Regional and Senior Defense Counsel

1. One hundred law students have been selected to work this summer as interns in our legal offices throughout CONUS and Germany. For many of those interns this experience will be their first contact with the military. I ask that you make every effort to ease their transition from the classroom into our offices.
2. The Summer Intern Program is one of the Corps' most effective recruiting tools. This year alone we have received applications for commissions from 26 of the 50 second-year student interns who participated in last summer's program. As law school enrollment and our applicant pool continue to decrease in numbers, this program takes on increasing significance. Our interns act as informal ambassadors for the Corps at their respective law schools, providing their fellow students an insight into our military legal practice.
3. You have a pivotal role in ensuring the success of our Summer Intern Program by developing assignments that will not only challenge the intern professionally, but will make him or her feel part of our JAGC family for the summer. Monitor the performance and development of your intern. Ensure that your student receives frequent feedback from his or her supervisor. An after-action report is required from you at the conclusion of the program. Should your intern apply for a JAGC commission, your personal assessment of his/her job performance and potential as an officer will assist us in evaluating that intern's file.
4. I hope that this year's summer interns will prove to be enthusiastic workers and professional members of your office. Please take this opportunity to showcase the best of what the Army and the JAG Corps has to offer.

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



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

REPLY TO  
ATTENTION OF

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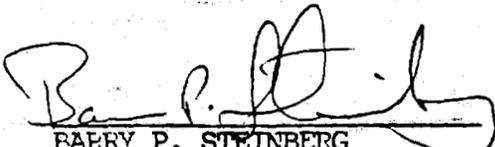
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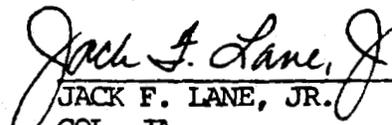
SUBJECT: Federal Tort Claims Act

STAFF AND COMMAND JUDGE ADVOCATES

1. Actions filed against the Army under the Federal Tort Claims Act are the dual responsibility of the U.S. Army Claims Service (USARCS) and Litigation Division, Office of The Judge Advocate General. USARCS is responsible for a tort claim from initial filing until institution of suit. Litigation Division assumes responsibility once a claim enters litigation.
2. The investigation and processing of FTCA claims is a team effort involving field judge advocates, USARCS, and OTJAG. It is imperative, however, that the Army speak with one voice when involved in discussions with outside agencies. This is particularly true regarding settlement. While the open discussion of settlement within the Army claims/litigation community is encouraged, communication of specific settlement offers to those outside the Army is inappropriate unless transmitted by the responsible agency.
3. During the administrative phase of a FTCA action, only USARCS is authorized to tender settlement offers on claims not falling within the monetary jurisdiction of a field claims office, that is, claims in which the demand is for more than \$15,000 individually or for all claims arising from a single incident.
4. Once a case enters litigation, Litigation Division is the exclusive agent for representing the Army's settlement position to plaintiffs, the U.S. Attorney, or the Department of Justice. That policy applies even when a case in litigation has been delegated to a field office.
5. With the exception of those identified above, all others will refrain from making either formal or informal settlement proposals without prior approval of the appropriate authority.

FOR THE JUDGE ADVOCATE GENERAL:

  
BARRY P. STEINBERG  
COL, JA  
Chief, Litigation Division

  
JACK F. LANE, JR.  
COL, JA  
Commander, USARCS

# The Confidentiality of Medical Quality Assurance Records

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Instructor, Administrative & Civil Law Division, TJAGSA

## Introduction

The Department of Defense (DOD) Authorization Act for fiscal year 1987<sup>1</sup> contains a provision that makes records created in a medical quality assurance (QA) program confidential and precludes participants in quality assurance activities from testifying about the records or about any of the findings, recommendations, evaluations, opinions, or actions taken by the QA activity.<sup>2</sup> The statutory privilege, which allows disclosure of QA information only in certain limited situations, is designed to improve the quality of medical care by encouraging a thorough and candid medical peer review process.<sup>3</sup> This article will briefly discuss the major provisions of the new law and how it will affect the Army's QA program.

The Army Medical Corps' Quality Assurance Program<sup>4</sup> is intended to assure the highest quality of medical care and treatment possible within the available resources. The program encompasses patient care assessment,<sup>5</sup> credentialing,<sup>6</sup> utilization review,<sup>7</sup> and risk management.<sup>8</sup> The heart of the program is the process of peer review. Peer review subjects the care and treatment rendered by a particular health care provider to the critical scrutiny of other professionals. The goal is to learn from one's own mistakes and the mistakes of others, and to develop procedures and processes that will minimize the chance of error. As doctors

and nurses, as well as other health care providers, improve their individual skills and patch "gaps" in the system, the result will be a continuing improvement in the quality of medical care delivered at the particular facility. The end result, the highest possible quality of medical care, benefits all the patients and potential patients serviced by the medical treatment facility.

As you might imagine, a system such as this produces many files, records, and other information that may be extremely critical of the care rendered in a particular case.<sup>9</sup> Disclosing that information to a patient or a patient's attorney seriously hinders the defense of any malpractice claim. To avoid disclosing damaging opinions and information about a colleague's practice of medicine, the participants in the peer review process may be reluctant to scrutinize the medical care as critically as is necessary to reach the laudable goal of the highest quality of care possible. Thus, the risk of public disclosure dilutes the efficacy of the peer review process and damages the public interest in quality medical care.<sup>10</sup>

Both courts and legislatures have recognized the reluctance among medical professionals to critically review each other's work and have created various privileges to preclude the discoverability and admissibility of information and opinions developed in the peer review process. Prior to

<sup>1</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. —(1986). [hereinafter Authorization Act].

<sup>2</sup> *Id.* § 705 (to be codified at 10 U.S.C. § 1102). References to specific provisions of the statute in this article will be made by citation to title 10 United States Code.

<sup>3</sup> See S. Rep. No. 331, 99th Cong., 2d Sess. 245-46 (1986).

<sup>4</sup> Dep't of Army, Reg. No. 40-66, Medical Services—Medical Record and Quality Assurance Administration, ch. 9 (31 Jan. 1985) [hereinafter AR 40-66].

<sup>5</sup> *Id.* para. 9-7. "Patient care assessment" is a systematic review of medical records and other hospital data sources designed to evaluate the quality of patient care as measured against written assessment criteria developed by the medical staff. The assessment may be performed by committees on a departmental basis or by committees formed according to certain tasks such as tissue review. The process is intended to identify problems or deficiencies in the delivery of health care, establish corrective measures, and monitor the corrective actions. As established by AR 40-66, patient care assessment will include, in addition to the problem identification and correction aspect: a review of medical records for accuracy, timeliness, completeness, clinical pertinence, and adequacy as medico-legal documents; a review of certain specified case outcomes such as hospital incurred trauma, complication, or infection, readmission within 30 days, return to the operating room in the same admission, return for emergency care within 48 hours after emergency or outpatient treatment; and all death cases. Other aspects of patient care assessment include surgical (tissue) review, anesthesia audit, autopsy review, blood utilization review, drug use review, and a review of hospital support services and special units such as emergency rooms, outpatient clinics, and home care programs.

<sup>6</sup> *Id.* para. 9-10. "Credentialing" involves the delineation of a given practitioner's privileges to practice medicine or dentistry at a particular facility. All health care providers who are given the authority to make independent decisions to initiate or alter a course of medical or dental treatment will be given individual clinical privileges based upon their training, experience, and the equipment and support available at the medical or dental facility. Residents, interns, and others in training programs are given categorical privileges depending upon their level within the training program. Once granted, individual clinical privileges must be reviewed annually. AR 40-66 contains procedures to summarily limit, suspend, or revoke clinical privileges when the practitioner's conduct requires such action to protect the health or safety of patients, employees, or others in the facility. In less drastic circumstances, privileges may be limited, suspended, or revoked after the practitioner has been given notice and an opportunity to be heard.

<sup>7</sup> *Id.* para. 9-8. "Utilization review" is resource management. The goal is cost containment. Factors such as the appropriateness of admission, services provided, length of stay, discharge planning and practice, and outpatient services are reviewed to assess the prudence with which the facility's resources were utilized. Section 701 of the Authorization Act requires the Secretary to establish by regulation diagnosis related groups (DRGs) as the primary criteria for allocating resources to military medical and dental facilities. DRGs have been used as a resource management tool and as the basis to determine payments under health insurance programs in the civilian sector for some time.

<sup>8</sup> AR 40-66, para. 9-9. The risk management program is concerned primarily with accident and injury prevention and the reduction of financial loss to the government after an untoward incident has occurred. Each medical facility is required to appoint a risk manager to direct the program. He or she will be an Army Medical Department (AMEDD) officer in the rank of major or above or the civilian equivalent, where possible. The risk manager is responsible for screening incidents that occur in the facility and determining whether they should be reviewed further for risk management purposes. The risk manager serves as the primary point of contact within the medical facility for the claims judge advocate investigating potential and actual claims against the government.

<sup>9</sup> Merely because a thorough retrospective analysis reveals a "better" or "different" method of handling a particular case does not necessarily mean that the physician deviated from the "standard of care" and committed malpractice.

<sup>10</sup> See S. Rep. No. 331, 99th Cong., 2d Sess. 245 (1986).

the passage of the DOD Authorization Act for fiscal year 1987, the protection from discovery of information generated by the Army's QA program was open to question. Attempts to protect the opinions and recommendations of peer review committees from disclosure were based upon a few federal cases as well as some state statutes.<sup>11</sup>

The leading case in the federal sector on the confidentiality of peer review information is *Bredice v. Doctor's Hospital*.<sup>12</sup> In *Bredice*, the plaintiff sought discovery of minutes and reports of any board, committee, or staff member of the defendant hospital concerning the death of plaintiff's decedent. The defendant refused to produce the information and the plaintiff moved the court to compel discovery. The court denied discovery of the requested material and found that the peer review function performed by the committees and staff was essential to improving the quality of medical care and treatment delivered. Furthermore, the court was convinced that "[c]andid and conscientious evaluation of clinical practices [was] a *sine qua non* of adequate hospital care" and that the public had an overwhelming interest in having the peer review process carried on in confidence so that "the full flow of ideas and advice can continue unimpeded."<sup>13</sup> The privilege from discovery of peer review materials established by *Bredice* is not absolute, however. The court noted that evidence of extraordinary circumstances could overcome the public's interest and establish sufficient cause to justify disclosure.<sup>14</sup>

Subsequent decisions have, more or less, followed *Bredice* and one can safely say that authority does exist to support the federal common law privilege for self-evaluative materials.<sup>15</sup> In applying the federal common law privilege, the test normally used by the courts to determine if information is subject to discovery entails balancing the public's interest in protecting the confidentiality of the peer review process against the needs of the particular party seeking discovery. If the need for truth outweighs the public's interest in the confidential nature of the relationship that produced the information, discovery is ordered.<sup>16</sup>

This "balancing act" presents a problem for the judge advocate called upon to advise a hospital commander concerning the confidentiality of QA information. The question the commander has is not whether there is a privilege, but whether particular documents reflecting the

recommendations and opinions of a particular peer review activity will be protected from disclosure. To ensure that the peer review process works and the incident at issue receives thorough and critical scrutiny, this question must be answered *before* the documents are created. As with any exercise involving the weighing of the public's interest against the interest of an individual litigant, it is difficult to predict, at the time the document or information is created, whether a particular document will withstand a challenge to the privilege. Thus, when the opinions and recommendations are being developed, usually well in advance of litigation, one cannot safely say that they will not be turned over to a plaintiff a year or two down the road. The new statutory privilege will remove some of this uncertainty.

Generally speaking, the new statute does four things. It establishes the confidential and privileged nature of QA information; it prohibits disclosure of the records and testimony concerning the records except in certain specified circumstances; it establishes penalties for unauthorized disclosure; and it provides immunity from civil liability for anyone who, in good faith, participates in or provides information to a person or body engaged in creating or reviewing medical quality assurance records. The legislative history is quite sparse; however, the statute is sufficiently detailed to allow some conclusions to be made concerning its application.

#### QA Information Is Confidential and Privileged

The heart of the statute is the broad declaration that "quality assurance records . . . are confidential and privileged . . . [and] . . . may not be disclosed to any person or entity, except as provided" by the specific exceptions within the statute.<sup>17</sup> Thus, the language of the statute not only creates the privilege but also establishes the extent of the privilege. The weighing of competing interests to determine the discoverability of documents under the federal common law privilege is no longer the test that determines the scope of the privilege. If the information in question falls within the definition of "quality assurance records" its releasability is determined by the statute, not by a court's notion of the relative weight of various competing interests. Furthermore, apparently not satisfied with the protection from

<sup>11</sup> Under Fed. R. Evid. 501, the privilege of a witness, person, government, or other entity, is determined by the principles of the common law as they may be interpreted by the federal courts in light of reason and experience. In civil cases, when state law provides the rule of decision, such as a diversity action, Rule 501 directs that state law provide the rule of privilege as well. *Scott v. McDonald*, 70 F.R.D. 568 (N.D. Ga. 1976). Cases brought against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982) look to state law to determine the liability of the government. In this instance, however, state law is adopted and becomes federal law for the purpose of Fed. R. Evid. 501 and the federal common law of privilege applies. See *Whitman v. United States*, 108 F.R.D. 5, 6 (D.N.H. 1985) (federal common law applied in an FTCA case); *Mewborn v. Heckler*, 101 F.R.D. 691, 693 (D.D.C. 1984) (federal common law applied in an FTCA case); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978) ("in non-diversity jurisdiction civil cases, federal privilege law will generally apply"). In interpreting the principles of the common law "in light of reason and experience" as required by Fed. R. Evid. 501, the federal courts will consider the state privilege rules and their underlying policies. The federal courts are not, however, required to apply the state rule. *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979).

<sup>12</sup> 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

<sup>13</sup> *Id.* at 250.

<sup>14</sup> *Id.* at 251.

<sup>15</sup> *Whitman v. United States*, 108 F.R.D. 5 (D.N.H. 1985); *Mewborn v. Heckler*, 101 F.R.D. 691 (D.D.C. 1984); *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971). See generally Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083 (1983); Comment, *Civil Procedure: Self-Evaluative Reports—A Qualified Privilege in Discovery?*, 57 Minn. L. Rev. 807 (1973).

<sup>16</sup> *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *Schafer v. Parkview Memorial Hosp., Inc.*, 593 F.Supp. 61 (N.D. Ind. 1984).

<sup>17</sup> 10 U.S.C. § 1102(a).

disclosure afforded by exemption b(5) of the Freedom of Information Act (FOIA),<sup>18</sup> Congress expressly declared that medical quality assurance records may not be disclosed under FOIA.<sup>19</sup>

At this point, it is probably safe to assume that much of the future litigation under the statute will center around whether the records or information at issue are "quality assurance records" within the meaning of the statute. A "medical quality assurance record" is defined as "the proceedings, records, minutes, and reports that emanate from quality assurance program activities."<sup>20</sup> A "medical quality assurance program" within the meaning of the statute is "any activity carried out . . . to assess the quality of medical care."<sup>21</sup> The statute specifically includes within the definition of quality assurance program any activity designed to assess the quality of medical care carried out or conducted by individuals, committees, or other review bodies responsible for credentialing, infection control, patient care assessment, medical records, health resources management review, and identification and prevention of medical or dental incidents and risks.<sup>22</sup>

To fully appreciate the breadth of the statute's coverage, one need only compare the new federal law with some of the state statutory schemes. As a general rule, the state privileges are rather narrowly drawn and do not extend to all quality assurance information and activities. The federal law, on the other hand, is quite comprehensive and encompasses all aspects of the Army's current Quality Assurance Program.

While virtually all statutes offer some degree of protection to the opinions and recommendations of a peer review committee, the actions taken after the peer review process is completed are not always afforded confidentiality. The Illinois statute is a good example.<sup>23</sup> In *Gleason v. St. Elizabeth Medical Center*,<sup>24</sup> the plaintiff alleged that the defendant hospital was negligent in allowing her physician operating privileges. To press her claim against the hospital, the plaintiff sought to discover what action the hospital took after information concerning the doctor's past medical practice came to light through depositions taken in several malpractice cases. In interpreting the Illinois statute, the court found that the peer review process was privileged but

that any action taken as a result of the process was outside the protection of the statute. More recently, the Illinois Supreme Court agreed with the *Gleason* analysis in upholding a civil contempt citation against a hospital that refused to answer interrogatories concerning the action it had taken to limit or suspend a physician's privileges.<sup>25</sup>

The federal statute, on the other hand, protects not only the "proceedings, records, minutes, and reports"<sup>26</sup> of a quality assurance program, but also precludes any individual who reviews or creates QA records or who participates in a proceeding that reviews or creates the records, from testifying "with respect to any finding, recommendation, evaluation, opinion, or action taken by such person or body."<sup>27</sup> The presence of the "action taken" language in the federal statute makes a compelling argument that the mantle of confidentiality created by Congress covers the corrective action as well as the peer review process itself.

Some state courts have interpreted their statutes as only protecting quality assurance activities when performed by regularly constituted committees of the hospital whose duty it is to review and evaluate the quality of care in question.<sup>28</sup> Under this view, protected QA activities are rather limited and formalized. Unless the documents, records, or information were either created by a formal committee or done at the specific request or direction of a committee, the privilege does not attach.<sup>29</sup> In enacting the federal statute, Congress apparently recognized the shortsightedness of this approach and extended confidentiality to QA "activities," not just QA committees. The statute specifically envisions QA activities being carried out by individuals apart from a committee arrangement.<sup>30</sup> This should allow the Surgeon General and hospital commanders some flexibility in accomplishing peer review. For example, a medical facility may only have one or two specialists in a particular discipline. In order to assess the quality of their care, a consultant from another facility can be called upon to review their cases. The fact that the consultant is an individual and not a "committee" of the facility involved will not remove the documents, information, and opinions from the protection of the statute.<sup>31</sup>

A document that can be extremely useful to a plaintiff, and one that may initiate the peer review process, is the

<sup>18</sup> 5 U.S.C. § 552 (1982). Exemption b(5) allows an agency to withhold documents requested under FOIA that would not ordinarily be available to a party in litigation with the agency. See, e.g., *United States v. Weber Aircraft Co.*, 465 U.S. 792 (1984).

<sup>19</sup> 10 U.S.C. § 1102(f). This provision invokes exemption b(3) of FOIA which exempts from mandatory disclosure records that are specifically exempted from release by statute. 5 U.S.C. § 552(b)(3) (1982).

<sup>20</sup> *Id.* § 1102(j)(2).

<sup>21</sup> *Id.* § 1102(j)(1).

<sup>22</sup> *Id.*

<sup>23</sup> Ill. Ann. Stat. ch. 110, paras. 8-2101; 8-2102; 8-2105 (Smith-Hurd 1984).

<sup>24</sup> 135 Ill. App. 3d 92, 481 N.E.2d 780 (1985).

<sup>25</sup> *Richter v. Diamond*, 108 Ill. 2d 265, 483 N.E.2d 1256 (1985); accord *Anderson v. Breda*, 103 Wash. 2d 901, 700 P.2d 737 (1985) (applying Washington law).

<sup>26</sup> 10 U.S.C. § 1102(j)(2).

<sup>27</sup> *Id.* § 1102(b)(2) (emphasis added).

<sup>28</sup> *Coburn v. Seda*, 101 Wash. 2d 270, 677 P.2d 173 (1984) (en banc).

<sup>29</sup> See, e.g., *Jordan v. Court of Appeals*, 701 S.W.2d 644 (Tex. 1985) (protected documents are those prepared by or at the direction of a committee for committee purposes).

<sup>30</sup> 10 U.S.C. § 1102(j)(1).

<sup>31</sup> See *Gutierrez v. United States*, No. EP-83-CA-116 (W.D. Tex. Discovery Order Apr. 11, 1984) (report prepared by Surgeon General's consultant containing review of Army doctor's medical practice not protected under either Texas statute or federal common law privilege because the consultant was not a "committee").

hospital incident report. Designed to bring an unusual occurrence or incident to the immediate attention of supervisory personnel, these reports are usually prepared by the nursing staff and forwarded through channels to the person responsible for taking corrective action. Because they are not prepared by "committees" they may fall outside the protection of a narrowly drawn statute. Most cases dealing with the discoverability of incident reports resolve the issue on either the attorney-client privilege or the work-product doctrine.<sup>32</sup> The short-comings of both of these theories are illustrated by the decision in *St. Louis Little Rock Hospital v. Gaertner*.<sup>33</sup> The underlying case was a medical malpractice action for the wrongful death of an alcoholic and chemically dependent patient who committed suicide by drinking a bottle of toilet bowl cleanser that was left in her hospital room. In support of their claims, plaintiffs sought to discover the hospital incident report prepared by a nurse as required by the hospital's safety manual. The hospital objected to the requested discovery and asserted both the work-product doctrine and the attorney-client privilege. The court found that the work-product doctrine was not available because the incident report was prepared as part of the hospital's program to prevent future incidents and losses and not in anticipation of litigation. The attorney-client privilege did not protect the document from discovery because the court found that the form was not prepared for the purpose of seeking professional legal advice, but was created in the ordinary course of business as a means of accident prevention.

Under the Army QA program, whenever an "incident"<sup>34</sup> occurs a report of unusual occurrence<sup>35</sup> must be prepared and forwarded to the head of the department within twenty-four hours of the incident and should reach the risk manager within forty-eight hours. Depending upon the nature of the incident, the claims judge advocate may or may not receive the report. Neither the attorney-client privilege nor the work product doctrine offers much hope of protecting the report from discovery. Because it is prepared at the time the incident is first discovered and well before any claim has been asserted, the report is not prepared "in anticipation of litigation or for trial" and does not qualify for work-product protection.<sup>36</sup>

To be protected under the attorney-client privilege, the document must be prepared for the purpose of obtaining legal advice. The DA Form 4106, however, is routed through

non-lawyer supervisors before it gets to an attorney and, in fact, may never be seen by an attorney at all. Under these circumstances, a court could easily find that the primary purpose for preparing the document was future accident prevention and not to obtain legal advice.<sup>37</sup> Absent this crucial element, the attorney-client privilege will not protect these reports from discovery.

The uncertainty surrounding the privileged status of the incident report is eliminated by the federal statute. Under the new law, a medical quality assurance program activity specifically includes activities carried out to *identify and prevent* medical or dental incidents and risks.<sup>38</sup> The DA Form 4106 serves just such a purpose and is a report "emanating from a quality assurance program activity" within the meaning of the statute.

Reports and documents prepared by infection control committees have been discoverable under some state laws, but are privileged under the DOD confidentiality statute. In *Davidson v. Light*,<sup>39</sup> the court allowed discovery of a report containing mixed factual and opinion information prepared by a hospital infection control committee. In distinguishing *Bredice*, the court said that the mixture of fact and opinion in the report indicated that the document was prepared as part of the patient's ongoing medical care and was not a retrospective review of treatment rendered in the past.

The same result was reached by the New Jersey Superior Court in *Young v. King*,<sup>40</sup> an action alleging that plaintiff's decedent died due to the defendant's failure to properly diagnose and treat a staph infection. Plaintiff, as well as four physician co-defendants, sought an order compelling the hospital to produce records of the Medical Record and Audit Committee, the Tissue Committee, the Medical Council, and the Infection Control Committee. In construing the New Jersey statute, the court found that the only committee that enjoyed an immunity from discovery was the Utilization Review Committee. The hospital's argument that the statute "inferentially" protected all peer review committees was rejected and discovery was ordered. Should a similar case arise out of a DOD medical treatment facility under the Federal Tort Claims Act, the statutory definition of quality assurance program in the new federal statute, which includes infection control committees, tissue committees, medical record review, and resources management review, would apply and protect the information.<sup>41</sup>

<sup>32</sup> Compare *Sierra Vista Hosp. v. Superior Court*, 248 Cal. App. 2d 359, 56 Cal. Rptr. 387 (Cal. Ct. App. 1967) (attorney-client privilege protected hospital incident report) with *Peters v. Gaggos*, 72 Mich. App. 138, 249 N.W.2d 327 (1977) (work-product privilege applied to statements prepared by hospital's investigator).

<sup>33</sup> 682 S.W.2d 146 (Mo. Ct. App. 1984).

<sup>34</sup> An "incident" is "any unintended or unexpected result that arises from human error or mechanical malfunction during patient care." AR 40-66, para. 9-9d.

<sup>35</sup> Dep't of Army, Form No. 4106, Report of Unusual Occurrence (June 1973) [hereinafter DA Form 4106].

<sup>36</sup> See Fed. R. Civ. P. 26(b)(3). Even if a document qualifies for protection under the work-product doctrine, it can still be discovered if the party seeking discovery can establish "a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

<sup>37</sup> The requirement to prepare a DA Form 4106 is part of the Risk Management Program. According to the regulation, "Risk Management . . . is concerned with accident and injury prevention and the lowering of financial losses after an incident has occurred; [i]t will identify problems or potential risk circumstances that must be eliminated or reduced to prevent accident and injury." AR 40-66, para. 9-9a.

<sup>38</sup> 10 U.S.C. § 1102(j)(1).

<sup>39</sup> 79 F.R.D. 137 (D. Colo. 1978).

<sup>40</sup> 136 N.J. Super. 127, 344 A.2d 792 (1975).

<sup>41</sup> 10 U.S.C. § 1102(j)(1).

Another significant difference between the new federal statute and the common law privilege and some state statutes is that the federal privilege is not qualified. In establishing the common law privilege, the *Bredice* court created only a qualified privilege and held that evidence of extraordinary circumstances would overcome the public's interest in confidential peer review.<sup>42</sup> The protection afforded peer review documents by several state statutes is also qualified and discovery is allowed under certain conditions.<sup>43</sup>

#### QA Information May Not Be Disclosed

The second major accomplishment of the statute is the express prohibition against disclosure of the records and the preclusion of testimony concerning the records or the findings, recommendations, evaluations, opinions, or actions taken by a QA activity by any person who reviews, creates, or participates in any proceeding that reviews or creates QA records, except as specified in the statute itself. Significantly, the statute does not just preclude a witness from compulsory testimony; it precludes even voluntary testimony. The statute provides that an individual "may not be permitted or required to testify in any judicial or administrative proceeding."<sup>44</sup> This language should preclude decisions like *Whitman v. United States*,<sup>45</sup> where the court held that the voluntary disclosure of certain information during a deposition waived the privilege. The *Whitman* plaintiff alleged that negligent surgery by Air Force physicians resulted in facial paralysis. During the pre-trial deposition of one of the Air Force physicians, testimony was elicited concerning the peer review committee meeting that reviewed the surgery in question. The doctor testified that the meeting was held about two months after the surgery, identified the individuals present, and disclosed that an outside specialist reviewed the information developed by the committee and concluded that he "didn't think the job was too good."<sup>46</sup> The plaintiff requested production of the record of the peer review committee and sought an order to compel discovery when the government asserted the self-evaluative privilege. The magistrate, relying on *Bredice*, denied the motion to compel. The district court found that the testimony of the doctor at his deposition constituted a waiver of the privilege and ordered the record disclosed.

The Supreme Court of California reached a similar result in ruling that under California law, a member of a peer review committee may waive the confidentiality afforded peer review activities and voluntarily reveal the substance of peer review proceedings. The case, *West Covina Hospital v. Superior Court*,<sup>47</sup> involved a malpractice action brought

against a hospital for negligently granting surgical privileges to the plaintiff's surgeon and for retaining him on the medical staff when they knew or should have known that he was incompetent. The plaintiff intended to call as a witness a member of the hospital committee that evaluated the surgeon's application for operating privileges. The trial court, over the objection of the hospital, ruled that the California statute providing that a hospital committee member may not be "required" to testify did not preclude the voluntary testimony of the committee member.<sup>48</sup> Upon the hospital's petition for an order to compel the trial court to reverse its ruling and exclude the testimony, the appellate court found that allowing voluntary testimony would "punch a judicially created and legislatively unintended hole in the crucial shield of confidentiality provided to medical staff committees in medical malpractice actions [and] . . . would directly contravene the vital policy underlying that immunity."<sup>49</sup> The California Supreme Court reversed. The statute in question, the court found, clearly precluded compulsory testimony but made no mention of voluntary testimony. The court concluded that if the legislature intended to prohibit voluntary testimony it would have done so specifically. Responding to the underlying public policy to encourage medical peer review by providing confidentiality, the court determined that by immunizing members of hospital committees from compulsory process for their committee work, it would be easier to attract doctors to serve on the committees, thereby fostering peer review.

The new federal statute, unlike the California law and the common law privilege, precludes any disclosure of QA records except as provided by the statute.<sup>50</sup> Records or information covered by the federal law can be disclosed only if one of the exceptions specified in the statute applies. Even if an adverse party in litigation obtains a copy of a QA record, the statute still prohibits its use in the case. The new law specifically provides that QA records may not be "subject to discovery or admitted into evidence" except as provided by the statute.<sup>51</sup> Thus, the concept of waiver that appears in some state provisions and in the federal common law rule has not been incorporated into the federal statute.

The circumstances under which either the records may be disclosed or a person may testify as to the records are rather limited by the new law. The statute allows disclosure to federal or private agencies performing licensing or accreditation functions regarding DOD facilities or conducting required monitoring of DOD health care facilities.<sup>52</sup> This will allow the Joint Commission on Accreditation of Hospitals (JCAH) access to the QA files of

<sup>42</sup> *Bredice v. Doctors Hospital* 50 F.R.D. 249, 251 (D.D.C. 1970).

<sup>43</sup> D.C. Code Ann. § 32-505 (1981) (discovery allowed upon a showing of "extraordinary necessity"); Me. Rev. Stat. Ann. tit. 32 § 3296 (1978) (discovery allowed upon a showing of "good cause"); Neb. Rev. Stat. §§ 71-2046 to -2048 (1981) (discovery allowed for "good cause arising from extraordinary circumstances"); Va. Code Ann. §§ 8.01-581.16 to -581.17 (1984) (discovery allowed for "good cause arising from extraordinary circumstances").

<sup>44</sup> 10 U.S.C. § 1102(b)(2) (emphasis added).

<sup>45</sup> 108 F.R.D. 5 (D.N.H. 1985).

<sup>46</sup> *Id.* at 8.

<sup>47</sup> 41 Cal. 3d 846, 718 P.2d 119 226 Cal. Rptr. 132 (1986).

<sup>48</sup> Cal. Evid. Code § 1157(b) (West Supp. 1987).

<sup>49</sup> *West Covina Hospital v. Superior Court*, 165 Cal. App. 3d 794, 211 Cal. Rptr. 677, 678 (Cal. Ct. App. 1985).

<sup>50</sup> 10 U.S.C. § 1102(a) & (b).

<sup>51</sup> *Id.* § 1102(b)(1) (emphasis added).

<sup>52</sup> *Id.* § 1102(c)(1)(A).

DOD hospitals that are undergoing accreditation inspection.

The statute also allows release of QA records to an administrative or judicial proceeding brought by a current or former DOD health care provider concerning the termination, limitation, or suspension of the health care provider's clinical privileges.<sup>53</sup> Basic fairness dictates that the affected practitioner have access to the information relied upon and the rationale for a decision to curtail or terminate his or her clinical privileges.

QA records may also be disclosed to governmental boards, agencies, or professional health care societies if needed to perform licensing, credentialing, or monitoring of the professional standards of any present or former member or employee of DOD.<sup>54</sup> Similarly, disclosure is permitted when the records or information are requested by another hospital or medical treatment facility and are needed to assess the professional qualifications of a current or former DOD health care provider.<sup>55</sup> These types of disclosures are consistent with the goal of providing quality health care. Certainly, professional societies charged with the responsibility of certifying a particular physician as a "specialist" in a given discipline should have access to peer review information concerning the physician's practice. By the same token, when a health care provider seeks staff privileges at a hospital, the hospital should be allowed to make a decision based upon all of the information available concerning the applicant, including his or her track record at other facilities. Indeed, the failure to make inquiry or consider such information can give rise to liability on the part of the health care facility.<sup>56</sup>

The federal statute also allows disclosure to officers, employees, and contractors of DOD who have need for QA information in the performance of their official duties.<sup>57</sup> Under this provision, claims officers, criminal investigators, the Inspector General, and others may gain access to QA information in the performance of their official duties. Access to QA information by criminal investigators is controversial within the medical profession and opponents of this particular use of QA information almost precluded the draft legislation from ever leaving the Pentagon. In view of the strong feelings about this issue, implementing regulations promulgated by the Secretary of Defense could establish procedures to review requests for information and remove the access decision from the discretion of the individual investigator. By placing the decision in the hands of

a senior commander, both the needs of the medical profession and the needs of the criminal investigator could be balanced in determining whether disclosure would serve the best interests of the agency.<sup>58</sup>

While DOD law enforcement personnel can gain access to QA information based upon a need to know in the performance of their official duties, civilian agencies charged with enforcement of criminal or civil laws may obtain QA records only if they are charged under "applicable law with the protection of the public health or safety, [and] if a qualified representative of . . . [the] agency makes a written request that such record or testimony be provided for a purpose authorized by law."<sup>59</sup> Similarly, disclosure may be made in an administrative or judicial proceeding brought by the civilian agency to protect the public health or safety.<sup>60</sup> Disclosure under this exception may arise in a state prosecution for the unauthorized or unlicensed practice of medicine or in an action to revoke a license to practice medicine issued by the state.

Once disclosure of privileged information occurs, the protection of the statute is not lost. The records of the QA activity or testimony given concerning the QA process remains confidential and further disclosure may be made only as specifically provided.<sup>61</sup> This prohibition against disclosure is not limited to participants in the peer review process, but extends to any "person or entity having possession of or access" to QA records or testimony.<sup>62</sup> Furthermore, the nature of the initial disclosure is irrelevant; the statute simply precludes disclosure "in any manner or for any purpose except as provided in this section."<sup>63</sup> Thus, if information is "leaked" or inadvertently disclosed, the recipient of the unauthorized disclosure is precluded from further disclosure.

#### Penalties for Unauthorized Disclosure

To underscore the seriousness with which Congress views the peer review function, the federal statute provides for penalties for unauthorized disclosures of QA information.<sup>64</sup> Penalties range from a \$3,000 fine for a first offense of willful disclosure of a QA record to a \$20,000 fine for subsequent violations.<sup>65</sup> The penalty provisions apply to "[a]ny person" and will reach not only the government employee who makes an unauthorized disclosure, but will also apply to recipients of authorized and unauthorized releases who make further disclosure of the privileged information.

An important task in implementing the new law will be to inform both medical and administrative personnel of the

<sup>53</sup> *Id.* § 1102(c)(1)(B).

<sup>54</sup> *Id.* § 1102(c)(1)(C).

<sup>55</sup> *Id.* § 1102(c)(1)(D).

<sup>56</sup> *See, e.g., Johnson v. Misericordia Community Hospital*, 301 N.W.2d 156 (Wis. 1981).

<sup>57</sup> 10 U.S.C. § 1102(c)(1)(E).

<sup>58</sup> While this approach reintroduces a degree of uncertainty inherent in any "balancing act" (*see supra* test accompanying notes 15-16), at least the weighing of the competing interests can be done by a senior military commander and not a civilian judge.

<sup>59</sup> 10 U.S.C. § 1102(c)(1)(F).

<sup>60</sup> *Id.* § 1102(c)(1)(G).

<sup>61</sup> *Id.* § 1102(e).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 1102(k).

<sup>65</sup> *Id.*

consequences of an unauthorized disclosure of QA information. Before a fine can be assessed for an unauthorized disclosure, the statute requires a willful disclosure with knowledge that the record is a QA record. The local judge advocate should make certain that every one who may even remotely come in contact with quality assurance information is aware of its confidential nature and the penalties for unauthorized disclosure. Lectures and briefings should be conducted and consideration should be given to labeling all QA documents as such. Included in any label should be a warning that unauthorized disclosure carries a \$3,000 fine. Prominently marking QA documents in this manner will not only establish the element of knowledge necessary to impose a fine, but also will serve as an ever-present reminder of the consequences of improper disclosure. This should foster an attitude of caution on the part of personnel charged with the creation and maintenance of QA files, records, and information. Perhaps this ounce of prevention will be better than several pounds of cure. Of course, labeling documents as QA records will also require the Army and the other services to make a conscious determination as to what is and what is not a QA record, an exercise that will require a careful view of the entire QA program. If implementing directives require all QA records to be labeled as such, we will be hard pressed to convince a court later on that a non-labeled document is really a QA record that we just overlooked.

#### Civil Immunity for Participants in QA Activities

The fourth major component of the federal statute is the grant of qualified immunity to participants in quality assurance activities. The statute provides one who participates in or provides information to a quality assurance activity immunity from civil liability "if the participation or provision of information was in good faith based on prevailing professional standards at the time the medical quality assurance program activity took place."<sup>66</sup> In view of other immunities available to military members and federal civilian employees for actions taken within the course and scope of their employment, this provision may not seem important.<sup>67</sup> It does, however, serve to immunize individuals who are not government employees, such as patients, civilian physicians, and others who might be asked to provide information to a peer review activity. As long as the information was provided in good faith, the individual will be immune from liability for defamation and other civil actions.

<sup>66</sup> *Id.* § 1102(g).

<sup>67</sup> See, e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983) (military commander immune from liability for constitutional torts brought by enlisted subordinates); *Bush v. Lucas*, 462 U.S. 367 (1983) (federal civilian employees may not maintain constitutional tort for adverse personnel action against their superiors); *Butz v. Economou*, 438 U.S. 486 (1978) (federal officials have qualified immunity from constitutional torts); *Barr v. Matteo*, 360 U.S. 564 (1959) (federal officials have absolute immunity from common law torts); see also *Kwoun v. Southeast Missouri Professional Standards Review Org.*, No. 85-2379 (8th Cir. Feb. 4, 1987) (federal officials in the U.S. Department of Health and Human Services (HHS) with oversight responsibility for the Medicare program and the private professional standards review organization under contract with HHS to investigate facilities and physicians suspected of Medicare abuses enjoy absolute immunity from constitutional torts).

<sup>68</sup> 10 U.S.C. § 1102(h).

<sup>69</sup> See *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>70</sup> Dep't of the Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedures for Investigating Officers and Boards of Officers, (24 Aug. 1977) (C1, 15 June 1981).

<sup>71</sup> Dep't of the Army Message 161200Z Oct 85, subject: Command Management and Reporting Requirements of Serious Incidents Resulting From Potentially Substandard Care, reprinted in Dep't of the Army Message 091715Z Jun 86, subject: Command Management and Reporting Requirements of Serious Incidents Resulting From Potentially Substandard Care.

<sup>72</sup> *Id.*

<sup>73</sup> 10 U.S.C. § 1102(h).

#### Information Developed Outside a QA Program is not Protected

Lest all of the emphasis or privilege and confidentiality obscure the obvious, in enacting the new law Congress specifically pointed out that "[n]othing in this section shall be construed as limiting access to the information in a record created and maintained outside a medical quality assurance program . . . on the grounds that the information was presented during meetings of a review body that are part of a medical quality assurance program."<sup>68</sup> This means information in the patient's medical record is not protected by the statute even though it may be presented to a peer review body and become incorporated into a QA record. \*

We can expect the courts to extend a sympathetic ear to requests for information developed apart from the established QA program. In keeping with the principle that privileges should be narrowly construed because they hinder the search for truth by preventing the discovery and admission of relevant evidence,<sup>69</sup> the courts will most likely apply the statutory privilege only to information clearly developed as part of the agency's announced QA program as set forth in its regulations. In other words, any doubts about whether a particular document is a QA record will most likely be resolved in favor of the party seeking disclosure. Investigations and information gathered under the provisions of other regulations, programs, or directives will not be afforded the statutory privilege. For example, the requirement to conduct an investigation under Army Regulation 15-6<sup>70</sup> "[w]henver there is substantial question that death or serious bodily injury may have resulted from substandard care or negligence"<sup>71</sup> was imposed by the Surgeon General by electronic message. A court may not consider it a part of the QA program established by AR 40-66. In fact, the message specifies that it does not change the "MTF commander's responsibility to take appropriate actions under AR 40-66" when a serious incident occurs, implying that the investigation is in addition to the requirements of the QA program and not a part of the program.<sup>72</sup> A court could easily determine that any investigation conducted under this directive is "outside a medical quality assurance program" and not entitled to the protection of the statute.<sup>73</sup> In order to derive full benefit from the confidentiality of QA records provided by the new law, the Surgeon General should give serious consideration to bringing such investigations under the purview of the QA program.

## Conclusion

Congress has provided military medicine with a comprehensive privilege for QA information to ensure that medical peer review can be carried out with maximum confidentiality. The statute fills holes in the common law privilege previously relied upon to protect QA information from disclosure and covers documents and information beyond the scope of many states' peer review privilege laws. To take full advantage of the statute, the services should conduct a detailed review of their entire QA operation and bring all

ancillary investigations and activities under the auspices of the established QA program. Having provided the shield of confidentiality, Congress will no doubt expect the military to carry out medical quality assurance programs thoroughly and aggressively. The candid peer review fostered by the new law will improve the quality of medical care by identifying and either training or eliminating the substandard practitioner and by correcting systemic errors. The ball is now in the doctor's court.

## Witnesses: The Ultimate Weapon

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### Introduction

Contested issues, whether occurring during the motions, findings, or sentencing stages of a court-martial, are usually won or lost based upon the witnesses who testify for each side. Good advocates generally litigate only close issues because those that are clear are usually resolved out-of-court through alternative disposition negotiations or pretrial agreements. No case can be stronger than the witnesses who support it, and no amount of skillful oratory can resurrect a case doomed by the weaknesses of its witnesses. This article is designed to help judge advocates prepare the defense or prosecution of a court-martial by focusing on the most critical players in that drama. The case itself is usually created by its facts and circumstances before the attorney ever hears of it. The trial lawyer then becomes its "producer, director, and narrator." One's skills as a "narrator" are shaped by innate abilities, courses in advocacy, and trial experiences themselves. This article will hone the trial lawyer's skill in "producing and directing" the performance of the "actors" by presenting a methodology for finding, preparing, and presenting these "stars" of the "play."

The techniques discussed here are only guidelines and, of course, are not applicable to every situation. Like all "rules," they are subject to exception based on unusual circumstances or one's unique style. Arguments of counsel are not evidence, and physical or documentary evidence rarely possesses the great power of persuasion that can be found on the face, heard in the voice, and seen in the eyes of a trial lawyer's ultimate weapon—the witness!

### The Search for Witnesses

The first place to look for witnesses is in the case file itself, which will list and usually include statements or summaries of statements from the witnesses that the command and the investigative agency consider to be material.

The best way to begin your search for other material witnesses is by interviewing your "client." Although it is obvious that a defense counsel's client is the accused,<sup>1</sup> it is helpful to realize that the trial counsel's "client" is technically the interest of justice,<sup>2</sup> which usually equates with the interests of the victim, be it human or an institution such as a command structure. Accuseds and victims are usually all in immediate need of your professional help. All have memories that not only will fade with time, but also will do so even more rapidly if they are left to feel that their cause is unimportant because they are neglected. Witnesses can forget, withdraw, hide, be transferred, and even die with alarming rapidity. Speed in reaching them and discovering exactly what they have to say is critical. Time becomes even more of the essence as the magnitude of the issues escalates because, as the stakes get higher, details often become more important.

Article 46 of the Uniform Code of Military Justice<sup>3</sup> guarantees to each side equal access to witnesses. The right to have testimony of witnesses at either the trial on the merits or the extenuation and mitigation portion of the court-martial extends only to witnesses whose testimony is material to an issue before the court.<sup>4</sup> There is no right to the personal attendance of even a material witness, however, if the testimony would be merely cumulative to that of others at trial.<sup>5</sup> Refusing to comply with a subpoena to appear as a witness before a court-martial is an offense that may be prosecuted in United States district court or in a court of original criminal jurisdiction; punishment may include a \$500 fine, imprisonment for not more than six months, or both.<sup>6</sup> Of course, witnesses in the military can simply be ordered to appear and testify before military tribunals anywhere. The accused's right to obtain a witness is not absolute; however, if the witness is actually unavailable or not amenable to the court's process, other methods of securing that testimony must be pursued, such as the taking

<sup>1</sup> Model Code of Professional Responsibility Canon 7 (1980).

<sup>2</sup> ABA Standards for Criminal Justice 1.1(c) (2d ed. 1980).

<sup>3</sup> Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1982) [hereinafter UCMJ].

<sup>4</sup> United States v. Combs, 20 M.J. 441 (C.M.A. 1985); United States v. Courts, 9 M.J. 285 (C.M.A. 1980).

<sup>5</sup> United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978); Mil. R. Evid. 403.

<sup>6</sup> UCMJ art. 47; see United States v. Hinton, 21 M.J. 267 (C.M.A. 1986).

of a deposition.<sup>7</sup> If a counsel delays in requesting a material witness for whatever reason, he or she assumes the risk that in the interval that witness may become unavailable to testify at trial.<sup>8</sup>

A thorough interview of an accused or victim includes questioning him or her concerning who else might be a material witness. The same matters should be inquired into with each person interviewed. Of course, it is rarely possible to run down every lead in a case, but you should at least ask each interviewed witness what that witness believes others could add to the matter about which you are interviewing him or her. Sometimes your search will be for any witness who can make a material point for your side; other times you have the luxury of being able to choose one of several witnesses to make the point for you in the courtroom. In the former instance, you work with whomever you can find, and in the latter you can pick the "actor" who will best convey the events to your audience. In either case the trial lawyer's goal is the same—presenting a credible and effective witness.

Whether you are choosing among witnesses or grooming only one witness, you should keep in mind that military court members and judges are most impressed by witnesses who are sincere, accurate, articulate, poised, unbiased, and of unblemished backgrounds. Simply explaining those qualities to the witness you have decided or are forced to use at trial will work wonders toward causing him or her to acquire the first four of these qualities. Another thing that helps is to explain to your witness the criticality of the role he or she is to play in the presentation of your case. Witnesses need to know that the side of the case for which they are testifying cannot win if they are viewed as incredible; they need to realize that for the truth as they know it to prevail, they must be viewed as being accurate. By the same token, when attacking any witness, it is critical to remember that he or she can be undone if he or she is shown to be insincere, inaccurate, biased, or of a background blemished with actions affecting his or her credibility. In this regard, when interviewing witnesses you eventually hope to discredit on cross-examination, it is often helpful to find out who else might be able to provide you with impeachment information. Roommates, friends, parents, lovers, and ex-spouses are often worthy candidates for such an interview, even if you only have time to do it telephonically.

### Interviewing Witnesses

The credibility of a witness may be attacked by any party, even the party calling the witness, because you are often forced to take material witnesses as they are, with no ability to substitute for them.<sup>9</sup> When interviewing important witnesses, you should ensure that what they say to you can be presented in court if they say something different on the stand. The best method for doing this is to have someone with you, such as a paralegal, criminal investigator, or other attorney. That person can take notes for you and, if necessary, testify as to what the witness told you. This luxury of manpower is not always available, so you may need

to resort to other less desirable methods, such as the use of a tape recorder. If you use a tape recorder, you should tell the witness at the beginning of the interview, and you should ensure that he or she does not object to your using the recorder. The problem with this technique, however, is that tape recorders cause a chilling effect in many people so that you are not likely to learn as much if you use one. Another method is simply to take good notes, then have the witness read them and sign them, preferably under oath. Each of these methods has additional problems associated with it: tape recordings have to be authenticated (although this should be done by stipulation so that counsel do not have to take the stand); and all statements by a witness, including tape recordings and your notes signed by him or her, are subject to disclosure and discovery rules in spite of the work product doctrine.<sup>10</sup> These minor problems usually pale in significance compared to the greater difficulty that exists when a critical witness deviates at trial from what you expected him or her to relate based on what he or she told you in your interview. To prevent being surprised at trial by this unexpected turn of events, it is wise to reinterview critical witnesses shortly before trial. This will serve as a further measure to help ensure that a witness does not change his or her story in an untruthful way. It will also give you an opportunity to learn how the witness may have legitimately deviated because of facts that have been brought to his or her attention and perhaps refreshed his or her recollection during trial preparation.

It is usually best to interview witnesses who are hostile to your side on your own territory, such as in your office. On the other hand, witnesses on your side of the case can often be most effectively interviewed on their own territory where they feel comfortable. The most important thing is to interview the witness at a time and place where he or she can concentrate on what you are there for. This usually requires coordinating with the witness and his or her superiors to make sure that your interview does not create a conflict situation. Of course, a surprise interview is sometimes necessary to catch a witness with no time to prepare, but make sure this sort of interview does not interfere with any military functions he or she is required to perform.

Each interview should be thought out beforehand so that you do not waste time, but always allow a few minutes to include a prolonged pause during which you keep quiet and just let the witness ramble. You will be surprised at the unexpected nuggets of information that can be found when you let a witness tell you what is on his or her mind as opposed to just answering questions about what is on yours. It is also often lucrative to make inquiry as to whether anyone (friend, victim, accused, opposing counsel, police agent, or commander) has put any pressure on the witness to say a particular thing. Even though you may well discover that such pressure, if any, is only a figment of the witness' imagination, that alone may be a critical point in your case. Where there has been actual pressure applied to make a witness say a particular thing, it may prove that an accused is obstructing justice or that he or she is being framed, depending upon who is imposing the pressure.

<sup>7</sup> Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 702, 1001(b)(4) [hereinafter R.C.M.]; Mil. R. Evid. 804(b)(1); see United States v. Bennett, 12 M.J. 463 (C.M.A. 1982).

<sup>8</sup> United States v. Cottle, 14 M.J. 260 (C.M.A. 1982).

<sup>9</sup> Mil. R. Evid. 607; see United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985).

<sup>10</sup> Jencks Act, 18 U.S.C. § 3500 (1982); see United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978).

## Interviewing the Witness for Your Side

Once you have located a witness and made arrangements to talk with him or her, your attention will turn to obtaining all the relevant information he or she has. There are points you hope he or she can make for you, and your questions about those will be thought out ahead of the interview, but the witness probably has more to contribute if you give him or her the chance. It is often best to begin your interview by simply asking the witness to tell you everything he or she knows about the case. Once the witness has finished, you should begin by asking him or her about those points that are important to you. After you have discovered everything you need, you should turn your attention to the weaknesses of the witness, for that is surely what your opposing counsel will do. Weaknesses can usually be categorized as either weaknesses in the witness' basis of knowledge<sup>11</sup> or weaknesses in the witness;<sup>12</sup> each should be explored thoroughly. You need to know about these weaknesses so that you can weigh whether they are so detrimental that you do not wish to call the witness to the stand. If the witness' probative value outweighs his or her weakness, you will want to turn your attention to minimizing the weaknesses. This can be done by finding a back-up witness to bolster his or her basis of knowledge, by drafting a closing argument that effectively downplays his or her character flaws, or by finding a witness who can support his or her character for truthfulness through opinion or reputation evidence if your witness' character for truthfulness is attacked.<sup>13</sup> You should seriously consider having your witness reveal during direct examination any weakness that you believe your opponent is likely to bring out; this will make both you and your witness seem very honest because you will not appear to be hiding anything.

After you have evaluated all the witnesses you can find for your side, it will be easy to choose the ones you will actually call to testify. In planning your presentation, you should keep in mind that your case will hopefully tell the story of your side. Because human memory records things in chronological order and then recalls them in that same order, it is easiest to present your case in the order in which it occurred. This will be easiest for you, and most importantly, it will be the best way for the fact finder to absorb what you are presenting. The same principle applies to your presentation of each individual witness. Have the witness tell his or her story in the order in which it unfolded. This will make it easy for the witness to remember and articulate everything he or she knows about the points you want him or her to convey. Dealing with a witness on direct examination is never easy because you need to avoid leading questions. Leading questions are appropriate only in cross-examination, except that they can be employed in direct examination when they are absolutely necessary to develop the testimony of the witness, where the witness is hostile, where the witness is identified with an adverse party,<sup>14</sup> or to develop preliminary background information. The easier it is for your witness to recall what he or she needs to say, the easier it is for you because no leading questions will be

necessary. Explaining to your witness what his or her role is in your presentation will also help the witness remember what he or she is there to say. As a further aid for the witness and for you, a key word outline written by you at the end of your first interview or at a subsequent interview, will be a reassuring mental crutch for him or her and a written direct examination guide for you. If the witness leaves out a critical point, all you have to do is ask a question containing the key words, which should trigger in the witness the recollection of the concept he or she seems to have forgotten. If that does not work, take a recess at some appropriate point before he or she finishes direct examination and remind him or her that this point needs to be made when the trial proceeds.

Another wonderful method of coaching your witness through direct examination involves the use of props. Having a witness use diagrams, maps, sketches, charts, or photographs to illustrate his or her testimony will remind him or her of the points he or she needs to convey, while making the testimony more interesting and understandable. The same holds true for your showing a witness the physical or demonstrative evidence from a case, especially if you have the witness demonstrate with it instead of having him or her just talk about it.

In telling the story of your case chronologically, you may often have to present a witness several times because he or she knows only bits and pieces of the story that are not united in time. Most trials take only a few days, and this can usually be done without much inconvenience to the witness' personal schedule. Counsel must be reasonable, however, in deciding whether to recall a witness or have him or her tell his disjointed story at one time. Fortunately, most witnesses will have a story than can and should be presented at one setting. But where this is not the situation, the orderly presentation of your case takes precedence over an individual witness' desire to get away from the courtroom. You will also find that if a witness is to be called more than once, the break in the testimony will give you a natural time to remind the witness of things his or her initial nervousness caused him or her to forget.

Nervousness about testifying is something any seasoned trial lawyer knows will occur with almost all witnesses. Because of our adversary system, they perceive themselves as being on trial with regard to their honesty and accuracy. In this regard they are right, and your awareness of this situation will facilitate your being able to coach them through it. Most witnesses are genuinely afraid of cross-examination, even if they have nothing to hide. Even those who are certain of the points they are making and who have unblemished characters are afraid of being belittled or being made to look incredible by the wizardry of the opposing lawyer. You should explain to all your witnesses that they cannot be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material and may tend to degrade them.<sup>15</sup> Furthermore, you should tell your witnesses that military law requires the judge to guard them against questions that

<sup>11</sup> Mil. R. Evid. 602.

<sup>12</sup> Mil. R. Evid. 608-609.

<sup>13</sup> Mil. R. Evid. 608(a); see *United States v. Woods*, 19 M.J. 349 (C.M.A. 1985).

<sup>14</sup> Mil. R. Evid. 611(c).

<sup>15</sup> Mil. R. Evid. 303.

would harass or unduly embarrass them.<sup>16</sup> In addition, the military judge will ensure that questions are not ambiguous or misleading, and your witnesses should be told not to be afraid to say "I don't understand," "I don't know," or "I don't remember," if that is in fact the situation.

If you have the time, and you ought to find it for your key witnesses at least, a few minutes of mock cross-examination in your office will work two wonders. First, it will remove much of the witness' fear. Second, you can use that session to teach the witness how to respond respectfully to the questions by making further points for your side. That will ensure a very short cross-examination! Cross-examination that not only fails to detract from the witness but in fact allows him or her to score further points for your side achieves the greatest effectiveness any "director" can hope for.

The physical appearance of a witness will tell the fact finder a great deal.<sup>17</sup> Witnesses who dress and groom themselves well give an initial impression of being people we can count on. Witnesses should have a proper haircut, wear their uniforms correctly with all awards and decorations, sit up straight, refrain from chewing gum or wearing sunglasses, and use good English. If the witness is not naturally this type of person, you ought to insist that he or she dress for and play appropriately the part he or she is to assume while on the stand—this is part of your job as a "director."

#### Witnesses for the Other Side

Except for the case in rebuttal and surrebuttal, the witnesses to be called by the other side are generally discoverable. The government is required to disclose to the defense its intended witnesses for the prosecution case-in-chief and any witnesses intended to rebut the raised defenses of alibi or lack of mental responsibility so that they can be interviewed ahead of time.<sup>18</sup> The defense usually will go through the government to have its witnesses brought to trial at government expense, and the defense is required to disclose the names and addresses of any alibi witnesses it intends to use.<sup>19</sup> Even if the defense initially contacts witnesses, such as experts, that it does not want the government to know about, there is no point in keeping those witnesses a secret until the time of trial because each side is entitled to a pretrial interview of witnesses and adequate time to prepare its case.<sup>20</sup> There is no trial by ambush in military practice, and any attempt to fashion one on the merits will bring upon the trial lawyer the wrath of the judiciary because of the waste of time that it will cause to everyone involved in the court-martial. Finding the witnesses for the other side will not be a problem; simply ask your opposing counsel in a written discovery motion to tell you who they are and where they can be contacted.

Interviewing opposing witnesses should be done much like the interview of your own witnesses. First, ask them to

tell you all they know about the case. Second, ask them what their understanding is about what your opposing counsel intends to have them testify. Then go over with them the things you will have them bring out on cross-examination. If the witness seems hostile to your side, as is often the case, you may wish to be subtle about which points you actually intend to have him or her present for you. It may be best to go over those points without ever telling the witness what you intend to have him or her say at trial.

As you interview opposing witnesses, keep a sharp lookout for evidence of bias, basic lack of knowledge, or lying. Explore their pasts with them and search for those skeletons in their closets that will discredit anything they have to say. An easy way to get into such things is to ask the witness if he or she has ever been in trouble; you will be surprised at the frankness with which most people answer. Although there can be no "fishing expedition" in court, you may "fish" all you like during your interviews. Specific instances of conduct of a witness may, in the discretion of the military judge, be inquired into on cross-examination for the purpose of attacking credibility if probative of untruthfulness concerning character of the witness for untruthfulness or character for untruthfulness of another witness about whose character the witness being cross-examined has testified.<sup>21</sup> In addition, the witness may, in the discretion of the military judge, be impeached by eliciting on cross-examination or establishing by public record that he or she was convicted during the last ten years, or possibly longer, of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, or a crime involving dishonesty or false statement, regardless of punishment.<sup>22</sup>

Every opposing witness should be viewed as a potential witness for your side, at least in part. If you can establish part of your case through your opponent's witnesses, the trial will appear less like a contested matter and you may be able to conclude your case by arguing that even your opponent's witnesses support your position.

#### Cross-Examination of Opposing Witnesses

If you have discovered things opposing witnesses can say that will help your side, begin with those. In some cases, that will be all you can do with the witness. If there are discrediting matters you intend to bring out, do so only after having made as much constructive use of the witness as possible. Begin your destruction by changing your approach and becoming more stern. You should attack his or her basis of knowledge and pursue the things that the witness has done that impeach credibility. When dealing with a witness who otherwise seems untouchable, you will hopefully have had time to interview him or her on several occasions for the purpose of discovering any inconsistencies he or she has told you, about which you can now examine him or

<sup>16</sup> Mil. R. Evid. 611(a).

<sup>17</sup> See Hahn, *Preparing Witnesses for Trial—A Methodology for New Judge Advocates*, *The Army Lawyer*, July 1982, at 1, 8.

<sup>18</sup> R.C.M. 701(a)(3).

<sup>19</sup> R.C.M. 701(b)(1).

<sup>20</sup> R.C.M. 701(e); see *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).

<sup>21</sup> Mil. R. Evid. 608(b); see *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985); Pence, *Military Rule of Evidence 608(b) and Contradictory Evidence: The Truth-Seeking Process*, *The Army Lawyer*, Feb. 1987, at 30.

<sup>22</sup> Mil. R. Evid. 609.

her. Whether written or oral, such statements need not be shown to the witness, but on request must be shown to opposing counsel.<sup>23</sup> Extrinsic evidence of the prior inconsistent statement itself, such as a writing or tape recording, is not admissible unless the witness is afforded an opportunity to explain or deny it and the opposing party is given an opportunity to interrogate him about it.<sup>24</sup>

There will be witnesses from whom you simply cannot get anything favorable and to whom you cannot do any damage. In these cases, the best cross-examination is none at all! You will know these witnesses ahead of trial because you will interview them. They must not be tackled by you; they must instead be attacked, if possible, by other witnesses you have sought out for that purpose—witnesses who will contradict them or who will tell the court of their bias<sup>25</sup> or untruthfulness.<sup>26</sup> Evidence of untruthful character can be by reputation or opinion evidence presented by one witness about another.

Except with respect to the admission into evidence of prior inconsistent statements, where the witness is required to be given an opportunity to explain, you should not give him or her the opportunity to explain anything. Make your point and move on, lest the witness explain it away. This is now possible in military practice even when examining a witness about a prior oral or written statement so that the witness will not have an opportunity to lie as he or she could if you were required first to lay a foundation.<sup>27</sup> Save your dwelling on it for argument, when the witness is no longer in a position to smooth out the wrinkles. Remember always that military court members and judges can and should take notes (ask jurors to do so in your opening statement) so there is no need to dwell on the matter with the witness. Formulate your questions so that you are in fact testifying with the witness reduced to giving the shortest possible answers before you move to your next question in a "machine gun" technique. Although your goal should be to have the witness reduced to giving "yes" or "no" answers, remember that no military judge will restrict a witness so that he or she cannot explain if he or she wants to. If you give a witness time, he or she will want to explain.

### The Expert Witness

Use of expert witnesses is becoming more prevalent in courts-martial as a reflection of our technological advancements as a society. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," witnesses qualified as experts by "knowledge, skill, experience, training, or education" may testify thereto.<sup>28</sup> Some cases depend entirely on scientific and circumstantial evidence, which necessitates the calling of experts. Judges and jurors are generally aware of the vast variety of scientific

expertise available, and every good trial lawyer will satisfy his or her audience by using experts wherever possible.

The military has its own experts in almost every field, and you will find them to be good not only at their science but also good as witnesses; they are trained for that and generally have a lot of experience in court. In addition, they are usually skilled teachers who can teach you all you need to know about presenting their testimony; often they provide you with fascinating props. Furthermore, if you work closely with them, they can help you to formulate an effective cross-examination of any expert opposing them. The easiest way to effectuate this plan is to reach an agreement with opposing counsel that each side has its experts observe the testimony of the opposing experts.<sup>29</sup> There is no harm in this because these witnesses are not going to be tainted in their testimony by what the other experts have said, which is the basis of the general rule that all witnesses be absent from the courtroom while other witnesses are testifying.<sup>30</sup> By listening to each other, the experts can focus on their differences and their reasons therefor, thus making it easier for the fact finder to decide which expert is most accurate. Using this methodology requires no substantive knowledge about the science itself on the part of the trial lawyer; all the lawyer has to do is pinpoint the differing contentions of the experts and ask them to clarify and support their own positions, and in rebuttal ask them to undermine what they heard their opponents say. Cross-examination can usually be done simply by asking the questions that your own expert advises you to ask in order to reveal the folly of the of the opposing expert.

### The Child Witness

Crimes against children are increasingly coming to the attention of prosecutors, who are properly bringing them to court. Consequently, judge advocates are dealing frequently with children as witnesses. Children under twelve years of age require different handling than other witnesses because of their youth. A methodology for dealing with youngsters is easy to formulate if you keep in mind some fundamental guidelines. First, youth alone is no impediment to calling the child as a witness, provided the child has the ability to distinguish between truth and falsehood and understands the moral importance of telling the truth.<sup>31</sup> Second, children are often shy and are usually reluctant to talk with adult strangers; therefore, it is imperative that the lawyer first become the child's friend. You should always go through the parents or guardians of a child in order to obtain an interview. You should ask the parents or guardians to vouch that you are friendly and to encourage the child to talk with you. It is best to interview the child initially with someone present whom the child likes and trusts, such as a parent or an older sibling. If you think the child may have been influenced by a parent, guardian, or relative to say

<sup>23</sup> Mil. R. Evid. 613(a); see *United States v. Callara*, 21 M.J. 259 (C.M.A. 1986).

<sup>24</sup> Mil. R. Evid. 613(b).

<sup>25</sup> Mil. R. Evid. 608(c).

<sup>26</sup> Mil. R. Evid. 608(a).

<sup>27</sup> Mil. R. Evid. 613(a).

<sup>28</sup> Mil. R. Evid. 702.

<sup>29</sup> *United States v. Croom*, 21 M.J. 845 (A.C.M.R. 1986).

<sup>30</sup> Mil. R. Evid. 615.

<sup>31</sup> Mil. R. Evid. 601, 603; see *United States v. Lemere*, 16 M.J. 682 (A.C.M.R. 1983), *aff'd*, 22 M.J. 61 (C.M.A. 1986).

something untrue, be certain to eventually obtain an interview without that person present. Children do not suffer a chilling effect from the use of tape recorders, so it is often advisable to use one for two reasons. First, children often say very different things about a subject on different occasions. Second, even if the story does not change in substance, the presentation may be silly enough in an interview to discredit the child later. Your approach in the presence of any child, whether your witness or your opponent's, should be gentle, calm, and soft in all respects. It is best to begin by talking about some neutral subject of interest to the child; for example, ask about a dog, cat, or other pet in order to get him or her talking. Overcome the shyness and reluctance to talk to you before you go into the subject that brought you there. Most children are not shy about any subjects; they are simply shy towards strangers. Once you are no longer a stranger, you can learn what the child knows.

The best place for the initial interview is the child's own room, for that is where he or she will feel most comfortable. There you will be surrounded by the child's things, so it will be easy for you to make initial conversation about them. Bringing a stuffed animal along with you as an "associate and helper" is a good way to make friends with a child. Additionally, you will find that many children would rather show you what they saw by demonstrating with a toy animal. Especially if the child is the victim, it will be far easier for him or her to show you what the accused did to the teddy bear than to tell you directly what the accused did to him or her. The same methodology can be employed in court, as with the use of two dolls to help a child explain accurately what happened in a sexual assault case.

Let the child do the talking about the case. If you do the talking by asking leading questions you are likely to get positive answers, but not necessarily accurate ones. Children want to please, and if they think you want them to say a particular thing, they usually will. This is the real problem with children, especially because this principle applies with their parents as well; a parent can easily get a child to say almost anything, whether intentionally or unintentionally. The problem is made greater by the fact that after a child has told a story, true or untrue, it is hard for the child to differentiate fact from fiction. The more a story is told by a child, the more the child will become convinced that it is true. Once that has happened with a child witness, he or she becomes nearly impossible to crack.

You must take great care to ensure that you do not unintentionally lead a child into saying things that are false. Great care must also be taken not to mentally harm a child further by making a "big deal" about the serious matter of his or her involvement in the case, particularly if the child is the victim. The use of a child psychiatrist or psychologist to help you ensure accuracy without harm to the child is a wonderful safety precaution. It not only protects the child, but it will also cause the fact finder to be far more likely to believe the final version the child presents to the court-martial.

It is best if a child psychiatrist evaluates the child's story early in the progress of the case before trial or defense

counsel are involved. These experts can often formulate conclusions as to whether or not the child is being truthful and they can advise you accordingly. Their opinions about a child's truthfulness and the actual things the child told them will not be admissible in court Military Rule of Evidence 803(4), however, unless the child saw the psychiatrist for purposes of medical diagnosis and treatment with the expectation of receiving medical benefit as opposed to seeing the psychiatrist to obtain the psychiatrist's testimony at trial.<sup>32</sup>

It is possible to present a child's testimony through closed circuit television projected into the courtroom so that the child is never traumatized by the court itself. Unfortunately, children often "ham it up" in front of a camera, so if you decide to employ this technique and if your military judge approves, it would be best to use a concealed camera.

If your job is to impeach a child, repeated interviews may help you because children tend to vary so much in their reports of things. Children often cannot differentiate between fantasy and reality, which you can probably bring out through their beliefs in many of the incredible things they see in today's television cartoons. Of course you cannot impeach a child because he or she believes in Santa Claus, the Easter Bunny, or the Tooth Fairy, but you may be able to impeach a child if he or she believes that people can fly, turn into animals, or do other superhuman feats. Another thing to keep in mind is that once you get a child talking, there is no telling what he or she will say. As you ask more questions and let the child meander, you may find details that are incredible enough to discount the story entirely.

### The Missing Witness

Occasionally, a witness not called will become the dispositive factor in a case. The failure of opposing counsel to properly prepare his or her case or a bad tactical decision on his or her part can lead to a critical missing witness. Many a court-martial has been won by the defense because the government did not prove its case beyond a reasonable doubt when it could have done so by calling an eyewitness or an expert who could tie up a loose end. The missing witness argument is proper for the defense but not for the government because it would undoubtedly amount to a comment on the defense's failure to do something they have no burden to do. Every defense counsel should be alert for an opportunity to use the missing witness argument, and every trial counsel should endeavor to make it impossible to use by calling that witness.

### The Rebuttal or Surrebuttal Witness

A credible rebuttal witness or surrebuttal witness can often win a case. Not only does this witness destroy part of the fabric of your opponent's case, but he or she also does it near the end of the trial so the testimony will be fresh in the mind of the fact finder during deliberations. Military judges generally are very liberal when it comes to allowing rebuttal evidence. For example, evidence of commission of acts by

<sup>32</sup> Mil. R. Evid. 803(4); see *United States v. Deland*, 22 M.J. 70 (C.M.A. 1986).

the accused similar to those charges<sup>33</sup> seems to be more liberally allowed into evidence if used in rebuttal.<sup>34</sup> Of course, the danger in saving evidence admissible in your case-in-chief for use in rebuttal is that the other side may not present anything for you to rebut. For example, the defense might simply rest its case if it knows that devastating evidence awaits presentation. Unlike the situation with the trial on the merits, however, the government need not disclose evidence in rebuttal. The defense remedy for this sort of surprise is usually only a short recess to interview the "torpedo" witness.

### Witnesses and the Law

The purpose of this article is not to create a hornbook on the law applicable to witnesses, but to discuss the art of preparation and presentation of witnesses. It would be incomplete, however, without setting forth where most of the military law concerning witnesses can be found. Section VI of the Military Rules of Evidence is entitled "Witnesses" and deals with most of the legal rules concerning them. The fifteen rules in that section include a drafter's analysis that traces the history and purpose of each rule. Those rules and their analysis should be read in conjunction with this article.

The latest case law concerning witnesses can be found most easily by reviewing the West Military Justice Key Numbers 1020 through 1152, a synopsis of which can be found in *West's Military Justice Digest*.

The Manual for Courts-Martial, United States, 1984, contains the following Rules for Courts-Martial that pertain particularly to the subject of witnesses: R.C.M. 405(g), R.C.M. 701, R.C.M. 702, R.C.M. 703, R.C.M. 807(d), R.C.M. 912(f)(1)(D), R.C.M. 902(b)(3), R.C.M. 905(b)(4), R.C.M. 906(b)(7), R.C.M. 914, and R.C.M. 1001(e).

<sup>33</sup> Mil. R. Evid. 404(b).

<sup>34</sup> United States v. Hunter, 21 M.J. 240 (C.M.A. 1986); United States v. Wirth, 18 M.J. 214 (C.M.A. 1984); United States v. Gaeta, 14 M.J. 383 (C.M.A. 1983).

<sup>35</sup> Rule 4 of the Proposed Army Rules of Professional Conduct covers the treatment of witnesses by counsel.

<sup>36</sup> Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 July 1984).

Canon 7 of the American Bar Association Model Code of Professional Responsibility, with its disciplinary rules and ethical considerations, is generally dedicated to the subject of witnesses and is applicable to all military counsel.<sup>35</sup> In addition, Army Regulation 27-10<sup>36</sup> makes the American Bar Association Standards for Criminal Justice, the Prosecution Function, and the Defense Function, applicable to Army judge advocates involved in courts-martial. Prosecution Function Parts III and IV and Defense Function Parts IV and VII are largely devoted to the subject of witnesses.

### Conclusion

The proper discovery, preparation, and presentation of witnesses are the most critical skills that must be mastered by the trial lawyer. Although everyone will eventually employ a unique style of accomplishing these tasks, this article will serve as a guideline in perfecting those skills. The principles presented here are the practical ones of actually interacting with witnesses in the application of the law concerning them as it is set out in the Rules for Courts-Martial, the Military Rules of Evidence, case law, and ethical standards. Approach and deal with your own witnesses as you would want to be dealt with if you were to be a witness in a court system totally unknown to you. Approach and deal with the witnesses on the other side with honesty and respect, with the goal of making some positive use of them before eventually discrediting them through cross-examination, through the use of your own witnesses, or through your arguments to the court. As a final thought, begin and end your case presentation with strong witnesses and hope that your opponent begins and ends his or her case with weak ones.

## The Rush Cases and the Class of 1887\*

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Now that the Judge Advocate General's Corps has joined the U.S. Army Regimental System, the lore of the Corps has gained new importance. This article describes one event in the history of two Corps: the Judge Advocate General's Corps and the Corps of Cadets at the United States Military Academy (USMA).

One hundred years ago this past August, the USMA Class of 1887 was involved in a spectacular collision with Academy authorities. The incident, known at the "Rush

Cases," received national attention, resulted in severe sanctions against the class leaders, and haunted the class for half a century. Surprisingly, few today know of this interesting event. The centennial of the Rush Cases of 1886 is an appropriate time to learn more about this episode of Academy history.

At that time, cadets were not authorized to depart the Academy for other than very short periods until the summer furlough for the class following their yearling (sophomore or third class) year. After about ten weeks

\*Reprinted with permission from *Assembly*, the West Point alumni magazine. *Assembly*, Dec. 1986, at 23.

away, the new second class (juniors) came back as a body to West Point in late August, just before the beginning of the fall term. For years, the returning class had been met at the edge of the Plain by the first class. Dressed in fancy caps and carrying canes, the furlough class looked dandy indeed. For a few moments, the two groups would eye each other. On some signal, the members of the first class (seniors) would "rush" the returning second class. The ensuing pandemonium may be imagined. Hats, jackets, and canes were tossed and crushed in the friendly melee. The evidence seems to be that the cadets loved it. The Academy's officers had, it seems, at least tolerated the annual class clash.

The superintendent, Colonel Wesley Merritt, Brevet Major General and Class of 1860, had watched this for several years and had had enough. On 27 August 1886, one day before the second class was to return, he prohibited the rush. Cadets were ordered "not to go beyond the limits of Camp W.S. (Winfield Scott) Hancock" on 28 August. Camp W.S. Hancock was the annual summer encampment west of Fort Clinton where cadet training similar to that now done at Camp Buckner was conducted.

General Merritt's order shocked the cadets. The superintendent was even more shocked when he learned—later—that the unhappy cadets had voted that night as to whether they should obey it! General Merritt was not mollified by the outcome of the ballot. The temerity of cadets to vote on whether to obey an order of a military superior was incomprehensible.

Imagine the excitement of the second class that last night of its furlough. Most were probably spending the evening and the last of their money under the bright lights of New York City. Many, if not all, gave some thought to the fun of the rush on the next day. It goes without saying that the ride up the Hudson to West Point on the next morning must have been filled with shouting, laughing, and excited cadets. The pleasant tension of anticipation must have built as the New York-Albany day boat, *C. Vibbard*, plied northward.

Back at the Academy, the night of 27 August was probably a dark contrast to the sparkling evening being enjoyed by the furlough class. The mood of the members of the first class must have been gloomy as the cadets mourned the passing of a tradition that they had looked forward to being a part of since perhaps as long as their arrival at West Point and certainly since they had been rushed the year before.

What happened at almost exactly noon on 28 August is told in several sources. The *Army and Navy Journal* had entries during the weeks following, and the 50th year reunion book of the Class of 1887 discusses the incident as if it had happened yesterday. Here is how the *New York World* newspaper described it:

On Saturday morning 60 merry fellow tumbled up the long incline, calculating upon getting the noisy welcome. They caught sight of the camp, and behind the sentry line they saw the reception committee of cadets, nearly three hundred strong. [author's note: The reunion book says that "only about half the Class participated as it was supposed that there was to be no rush and many were out of camp on First Class Privileges." Half the Class of 1887 was fewer than thirty-five. Of course some yearlings joined in and two were

caught.] The newcomers were not aware of the order of General Merritt, and therefore could not appreciate the strain under which their companions in camp were suffering. It was the time-honored duty of the first class men to do the proper thing at this point but there was the order of General Merritt, with all the penalties of disobedience, but before them on the plain, near the parked light battery, were their friends and companions, full of expectancy, with light hats and canes, waiting to be smashed.

It was more than human nature, even in uniform, could stand, and when Cadet Fackett [author's note: The reunion book of 1937 says that the cadet who shouted remained unidentified to that day. Furthermore, there is no cadet named Fackett or any similar name in the Classes of 1887 through 1890, but someone surely did.] sent up a shout like a Comanche and darted across the sentry-line to greet his particular chum, there was a general break, and soon there was a mixture of campers and comers engaged in a whirling dance of joy and welcome.

One of the members of the class of 1889 who probably observed the confusion was Walter A. Bethel. He and the other yearlings were marching to dance class! Major General Bethel was The Judge Advocate General from 1923 to 1924.

General Merritt was outraged and, in the words of the correspondent to the *Army and Navy Journal*, "The matter has stirred up the post as it has not been agitated for many a year." In less than a week, the six cadet officers involved had been tried by a general court-martial convened by the superintendent.

The charges and specifications were similar in each case. For instance, Cadet Lieutenant James G. Meyler was charged with having crossed a sentinel post for the purpose of meeting the furlough class at noon and having greeted the furlough class outside the line of sentinels with loud cheering and other noisy demonstrations. The second charge alleged that Cadet Meyler had failed to exercise his authority as a cadet officer to repress the incident but had instead "by his presence and example encouraged the said act of insubordination . . . , the cheering and other noisy demonstrations made in palpable approval of said disobedience of orders." Interestingly, the cadets were not charged with voting on the order itself. It may be that the authorities did not discover that part of the incident until the trials were underway.

As is often the case with adversity, the rush incident brought the Class of 1887 closer together. After raising \$500, the class asked the prominent lawyer Benjamin Butler to defend the accused. Butler, known as General "Beast" Butler for his actions as military commander of New Orleans during the Civil War, declined to come. In 1937, the writer of the Class of 1887 reunion book said it was because Butler "was not a graduate of West Point and did not grasp the situation." There may have been other reasons. There is evidence that Butler hated West Pointers. Whatever his motives (perhaps it was the feel), Butler refused.

The cadets, spurned by General Butler, turned to Lieutenant Colonel William Winthrop, newly-arrived Professor of Law. In fact, Winthrop volunteered. It is an irony of history that Winthrop's brother, Theodore, was serving as an aide to General Butler when he was killed at the battle at

Big Bethel in 1861. The cadets could scarcely have had a more learned lawyer and scholar as a defense attorney than Colonel Winthrop. Well educated, his brief but active trial experience was twenty-five years before the Rush Cases, but his experience as a judge advocate for twenty-three years, his contributions as the author and compiler of the Digest of Opinions of the Judge Advocate General, and, most recently, the publication, in March 1886, only five months before these cadet trials, of his two-volume treatise, *Military Law*, marked Colonel Winthrop as one of the greatest living experts on military law. In 1887, he would issue an abridgement of his treatise for use by cadets in the course of law. There was little time to prepare and the pressure was great as Winthrop decided on his best course. The evidence against the cadets was overwhelming and Winthrop knew it. He realized that this was no case in which to fight the facts. Instead, he apparently intended to count on the court attaching no criminal accountability to the acts even if they had been committed. If the cadets were found guilty, Winthrop hoped that the court would be lenient given the tradition of the rush and the spontaneity of the incident.

First Lieutenant George B. Davis, a cavalry officer, was then an Assistant Professor of Law serving under Colonel Winthrop. Davis rose to the rank of major general and served as Judge Advocate General from 1901 to 1911.

Probably quoting Winthrop, the *Army and Navy Journal* said of the defense case, "There will be no denial of the fact, but it will be shown in extenuation that there was no deliberate defiance of the order, but rather that under the habit of long usage the thirty odd were carried away on the spur of the moment and did that for which they are now heartily sorry."

It was to no avail. The cadets were convicted of every charge and specification. Furthermore, all but one of the cadets was sentenced to dismissal. But President Grover Cleveland mitigated the sentences to reduction from the grade of cadet officer to that of cadet.

Whether General Merritt received the news of the President's action with consternation, resignation, or even pleasure is unknown. There was for many years an unspoken, officially condemned, but nonetheless pervasive practice of courts-martial imposing harsh sentences in every case in order to permit the officer who appointed the court to grant clemency. Furthermore, General Merritt was not humorless. During his superintendency, Mark Twain was his personal guest three times. This puzzled the cadets. They wondered how such a well-known pacifist and the warrior Merritt could get along. So, notwithstanding General Merritt's anger at what the cadets did, his desire for a court-martial, and his satisfaction at convictions and severe sentences, he may well have urged clemency and been pleased that it was granted.

Action on the Rush Cases, even the mitigation, did not end the matter. Instead, the incident cast a pall over the remainder of the year for the Class of 1887. The courts-martial were not the only disciplinary measures taken. The reunion book relates that:

The other members of the Class involved were condemned by executive order of the Superintendent to walk extra tours of guard duty every Saturday afternoon for a year and not to be allowed to graduate until August 28th, 1887. This date was ten weeks later than

the date of graduation of the Class and involved of course the loss of their class standing consequently loss . . . [of] their priority, as to assignment on graduation, to desirable branches.

From the incident on 28 August 1886 until 31 March 1887, the participants served their sentences or underwent the disciplinary punishments, were confined, and were not permitted any ordinary privileges of the first class. The reunion book tells us that:

[T]he remainder of the Class ceased all social activities of a general nature and remained in the barracks except when on some duty or engaged in physical exercise in the gymnasium or elsewhere. The cadet hops ceased for a while, but there was such a demand for these, by visitors, that the Class of 1888 eventually took over the conducting of these amusements and they were resumed, the first one occurring on New Year's Eve. Other general social activities were likewise resumed. Members of the Class of 1887 did not, however, participate in them.

For seven months the cloud hung over the Class of 1887 and the Academy. Winter was especially dreary and the year that should have been the most fun-filled for the graduating class was, instead, a time of gloom. There were diversions. The report to the *Army and Navy Journal* of 8 January 1887 noted that "The toboggan slide is now in complete running order, and has become the Mecca for the sightseers. Every afternoon a crowd is present to see the sport. The slide is 170 feet long and, after leaving it, the run is about 500 feet further out on the railroad flat. As the slide is quite steep, the speed attained is very great."

Then came the startling news that the ordeal was over. All unexecuted punishments were remitted on 1 April 1887. To everyone's surprise (and fear that the cadet adjutant was playing a cruel and dangerous joke) an order was read that announced lifting of the punishments. The reunion book said that upon discovery that the news was true, "there was great rejoicing not only among the members of the class but also among our visiting friends and other sympathizers in the Corps. This included most of the families of the Academic Staff and of the instructors."

Bitterness lingered in the Class of 1887. Whether they did better or worse than other USMA classes of the time is speculative. The 1937 reunion book reveals that many reached general officer ranks and many others served their country with honor in the Army or civilian life or both.

It is easy to sympathize with the cadets. From the vantage of a century later, but without the benefit of all the facts that hindsight normally brings, it may seem that General Merritt acted unwisely by banning the cadet-beloved rush. It is clear, however, that officers cannot vote to decide whether to obey an order. How could the long-time existence of a student custom possibly be deemed more vital than the plain and direct order of an undoubted military superior to drop that custom? These were prospective officers who had already been inculcated with the principle of obedience.

Whatever the merits of the superintendent's action or that of the cadets, the Rush Cases caused a furor that continued for years. But there is value in lessons, even sharp ones. Time, of course, heals the worst of wounds. Fifty years after the rush, the class historian commented on its

aftermath: "As we look back upon that ten months of turmoil and trouble we must confess that we were wrong and General Merritt was right."

As leaders, we have the duty to set, teach, and enforce standards of conduct for cadets and young officers. Let us

hope that we do so in such a way that it does not take fifty years for the lessons we teach to be learned.

## Enlisted Training Update

CW4 Calvin R. Haynes  
Correspondence Course Officer, TJAGSA

### Nonresident Instruction Program

The nonresident course program administered by The Judge Advocate General's School, Charlottesville, Virginia, includes three courses that are available for enlisted soldiers and civilian employees working in a military legal office. Course descriptions appear below:

#### *Law for Legal Specialists*

The Law for Legal Specialist Correspondence Course consists of basic material in legal research, criminal law, and organization of a staff judge advocate office.

**PURPOSE:** To provide Army legal specialists with substantive legal knowledge for performing duties as a lawyer's assistant and with a foundation for resident instruction in the Law for Legal Noncommissioned Officers Course.

**PREREQUISITES:** Enlisted soldiers in grade E-5 or below who have a primary MOS of 71D or 71E and military members of other services with equivalent specialties; or civilian employees in a military legal office.

**COURSE CONTENT:** Three subcourses, total credit hours: 18. Academic requirement is that student must complete entire course within one year from date of enrollment.

#### *Law for Legal Noncommissioned Officers*

The Law for Legal Noncommissioned Officers Correspondence Course covers basic and advanced material in legal research, military personnel law, claims, legal assistance, staff judge advocate operations, standards of conduct, professional responsibility, and selected military common skill subjects.

**PURPOSE:** To prepare soldiers to perform or to improve their technical skills in performing the duties of legal non-commissioned officers.

**PREREQUISITES:** Must be Active Army, USAR, or ARNGUS warrant officer (MOS 713A), or soldier in grade E-6 or above who has a primary MOS 71D or 71E. Soldiers in grade E-5 or below who have completed the Law for Legal Specialist Correspondence Course are eligible for enrollment. Military members of other services with equivalent specialties are eligible for enrollment. Civilian employees are not eligible for this course.

**COURSE CONTENT:** Fourteen subcourses, total credit hours: 90. Academic requirement is that student must complete entire course within one year from date of enrollment.

### *Army Legal Office Administration*

The Army Legal Office Administration Correspondence Course covers advanced material in civilian personnel law, law of federal employment, trial procedures (including pre-trial and post-trial), and technical common military subjects.

**PURPOSE:** To prepare Army members to perform or to improve their proficiency in performing the duties of Army Legal Office Administration.

**PREREQUISITES:** Warrant officers (MOS 713A), or enlisted soldiers in grade E-6 or above who have a primary MOS of 71D or 71E and who have completed the Law for Legal Noncommissioned Officers Correspondence Course. Members of other branches of service and civilian employees are not eligible for this course.

**COURSE CONTENT:** Seventeen subcourses, total credit hours: 184. Academic requirements are that student must complete 75 credit hours per enrollment year and the entire course within two years from date of enrollment.

### *Independent Instruction Program*

Independent enrollment is available in selected subcourses. An applicant who does not meet the eligibility requirements for enrollment in one of the judge advocate correspondence courses or who wishes only to take selected subcourses may enroll in specific subcourses provided the applicant's duties require the training that may be accomplished by means of such subcourses. Enrollment as an independent student requires that the student complete thirty credit hours per enrollment year or the individual subcourse, whichever is less. Selected subcourse titles appear below:

JA02	Standards of Conduct and Professional Responsibility
JA20	Introduction to Administrative and Civil Law, and Military Legal Bibliography
JA22	Military Personnel Law and Board of Officers
JA23	Civilian Personnel Law and Labor-Management Relations
JA25	Claims
JA26	Legal Assistance
JA30	Military Criminal Law for Paralegals
JA36	Fundamentals of Military Criminal Law and Procedures
JA58	Staff Judge Advocate Operations
JA125A	Law of Federal Employment

- JA127 Military Personnel Law
- JA128 Claims (FTCA, PC, FCA)
- JA129 Legal Assistance Programs, Administration and Selected Problems
- JA130 Nonjudicial Punishment
- JA133 Pretrial Procedures
- JA134 Trial Procedures
- JA135 Post Trial Procedures
- JA140 JA Operations Overseas

**Resident Instruction Program**

The resident program administered by The Judge Advocate General's School offers two courses for active duty and Reserve Component Army warrant officers (MOS 713A) and legal noncommissioned officers in grade E-5 and above with a primary MOS of either 71D or 71E. Starting in Academic Year 87-88, the resident Administration and Law for Legal Specialists Course will be deleted from resident instruction and replaced with a Law for Legal Noncommissioned Officers Course. Resident course descriptions appear below:

*Law for Legal Noncommissioned Officers*

The Law for Legal Noncommissioned Officers resident course focuses on Army legal practice, with emphasis on the client service aspects of administrative and criminal law. The course builds on the prerequisite foundation of field experience and correspondence course study. Course coverage includes legal research, administrative eliminations and board procedures, preparation of legal documents, claims, criminal law, military personnel law, victim/witness assistance program, management, interviewing and counseling, preventive law, and enlisted evaluation report appeals.

**PURPOSE:** To provide essential training for legal non-commissioned officers who work as professional assistants to Army judge advocates. The course is specifically designed to meet the needs of the Army legal noncommissioned officer, MOS 71D, for skill level three training.

**PREREQUISITES:** The course is open only to enlisted Active Army and Reserve Component soldiers in the grades E-5 thru E-6, MOS 71D or 71E, who are serving in an Army legal office, or whose immediate future assignment entails providing professional assistance to an Army attorney. Students must have served a minimum of one year in a

legal position and must have satisfactorily completed the Law for Legal Specialists Correspondence Course not less than sixty days before the starting date of the course.

*Law Office Management Course*

The Law Office Management resident course focuses on management theory and practice including leadership, leadership styles, motivation, and organizational design. Various law office management techniques are discussed, including management of military and civilian personnel, equipment, law library, office actions and procedures, budget management and control, and manpower. Warrant officers receive a separate track of instruction designed to improve their unique legal administrator management skills.

**PURPOSE:** To provide a working knowledge of the administrative operations of an Army staff judge advocate office and basic concepts of law office management to senior enlisted soldiers; and to provide enhancement of law office management skills to warrant officers.

**PREREQUISITES:** Active duty or Reserve Component Army warrant officers (MOS 713A) and senior noncommissioned officers in the grade of E-7 and above with an MOS of either 71D or 71E. Persons who have completed this course within the last three years are not eligible to attend. Persons who have completed this course more than three years ago are eligible to attend, but priority will be given to first-time students.

**Additional Information**

The TJAGSA Academic Year 87-88 Annual Bulletin will be available later this year.

Revised DA Pam. 351-20 (Army Correspondence Course Program) is at the publisher and will be available through normal distribution channels on or before 1 June 1987.

If you have any questions or need further information about correspondence course studies administered by The Judge Advocate General's School, call the TJAGSA Correspondence Course Office at (804) 972-6308; or AUTOVON 274-7110, extension 972-6308.

# USALSA Report

United States Army Legal Services Agency

## Trial Counsel Forum

Trial Counsel Assistance Program

### "Paper Wars": A Prosecutorial Discovery Initiative

Lieutenant Colonel James B. Thwing  
Trial Counsel Assistance Program

*"When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it."<sup>1</sup>*

When the 1984 Manual for Courts-Martial went into effect on 1 August 1984, one of the bright promises it held was that the matter of the government's responsibilities for, and the accused's rights to, discovery would be finally clarified. Indeed, Rule for Courts-Martial (R.C.M.) 701, which codifies the military procedure for discovery, seemed, on first review, to carefully succeed in this regard. Despite the analysis of R.C.M. 701, which shows that the intention of the rule is "to promote full discovery to the extent consistent with legitimate needs for nondisclosure . . . and [to] eliminate gamesmanship,"<sup>2</sup> many prosecutors today complain that this rule is not entirely helpful in guiding their efforts nor in preventing what they perceive to be "gamesmanship."<sup>3</sup> These complaints *do not* stem from the obvious requirements imposed upon the prosecution to provide full disclosure of evidence to be used by the prosecution in a criminal case as well as exculpatory evidence. Rather, they stem from the lack of specific guidance as to how to deal with generalized requests for discovery that in effect skirt the basic parameters of R.C.M. 701, asking the prosecution to produce evidence inimical to the prosecution's cause, to provide prosecutorial assistance in aiding the defendant's cause, and to perfect the accused's defense. Prosecutors, whether experienced or not, have discovered that rejection of generalized requests for discovery can be as tasking to their cases as full-fledged attempts to respond to them because of frequent litigation over these matters at trial. Some trial judge's have commented that discovery issues frequently end up as a "war of paper." Another vexing aspect to generalized requests for discovery is that they frequently subtly blend with other rights of the accused, such as the sixth amendment rights of confrontation and compulsory

process, so that failure to address these concerns may ultimately create serious appellate error in an otherwise well-conducted prosecution. A final note of concern in this area is that although the Court of Military Appeals and the Supreme Court have addressed issues that have arisen as a result of prosecutorial rejection of generalized requests for discovery and have provided direction for *appellate resolution* of the issues arising therein, they have failed to clearly provide prosecutors with procedural direction in properly resolving these matters with certainty before trial. The purpose of this article is to accomplish that task.

#### An Illustration of the Problem

In *Brady v. Maryland*,<sup>4</sup> the Supreme Court plainly established the government's obligation to turn over evidence in its possession that was both favorable to the accused and material to guilt or punishment. According to the Court, the constitutional significance of the evidence in those cases derived from the accused's fifth amendment right to "due Process of law."<sup>5</sup> Subsequently, in *United States v. Agurs*,<sup>6</sup> the Court established that nondisclosed evidence "favorable" to the defense was not in every instance of constitutional significance unless it was shown to be "material"—whether the defense generally or specifically requested it, or whether the defense failed to request such evidence at all.<sup>7</sup> *Agurs* specified that nondisclosed evidence, favorable to the defense, was only material where the findings were questionable and the addition of the evidence *might* have been sufficient to create a reasonable doubt.<sup>8</sup> Based on *Brady* and *Agurs*, R.C.M. 701(6) provides some specific guidance: evidence favorable to the defense is that which "reasonably tends to: (A) Negate the guilt of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment."

Because the Supreme Court determined in *Agurs* and subsequently (after promulgation of R.C.M. 701) in *United*

<sup>1</sup> Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985), *rev'd and remanded sub nom.* Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987).

<sup>2</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 analysis [hereinafter R.C.M.].

<sup>3</sup> Among requests for assistance from prosecutors received at the Trial Counsel Assistance Program office, a high percentage (15%) are questions concerning discovery requests.

<sup>4</sup> 373 U.S. 83 (1963).

<sup>5</sup> *Id.* at 87.

<sup>6</sup> 427 U.S. 97 (1976).

<sup>7</sup> *Id.* at 109.

<sup>8</sup> *Id.* at 112-13.

*States v. Bagley*,<sup>9</sup> that some potential evidence of impeachment was constitutionally significant evidence, however, it is obvious that a prosecutor *must* also be concerned about other forms of evidence beyond exculpatory evidence. *Bagley* illustrates the gravity of the issues that arise in this context.

Bagley was charged with fifteen charges of violating federal narcotics and firearms statutes. Nearly one month before his trial, he filed a discovery motion that, among other things, requested that the prosecution provide the names and addresses of witnesses that the government intended to call, as well as any agreements, promises, or inducements made to witnesses in exchange for their testimony. In response to this request, the prosecution provided affidavits sworn to by two key government witnesses, O'Connor and Mitchell, that recounted in detail the dealings they had with Bagley and closed with a statement that the respective affidavits were made freely and voluntarily without threats, rewards, or promises. At trial, both O'Connor and Mitchell testified and the prosecution did not disclose the existence of any inducements, promises, or other agreements made between these witnesses and the government. Furthermore, on cross-examination, O'Connor explicitly testified that he was not testifying in response to any pressure or threats from the government about his job. In view of the prosecution's silence as to the existence of any pretrial agreements with these witnesses, the defense did not pursue the issue of bias as to either of the them. Nevertheless, seven months prior to trial, O'Connor and Mitchell had signed agreements providing that they would be paid by the Bureau of Alcohol, Tobacco, and Firearms (BATF) for information they provided. After Bagley's trial, Agent Prins, who was employed with the BATF, recommended that both witnesses each be paid \$500. Ultimately, the Bureau reduced this amount to \$300. Subsequently, the accused's defense counsel discovered the existence of these agreements through use of a Freedom of Information Act request. Accordingly, the defense sought to vacate the accused's conviction. The federal district court denied the motion, holding that the evidence of the agreements providing for remuneration of the two witnesses would have had no effect upon its finding that the prosecution had proved beyond a reasonable doubt that the accused was guilty of the offenses for which he had been convicted.<sup>10</sup> The Court of Appeals for the Ninth Circuit strongly disagreed and, in reversing the district court, pinned its holding on the theory that the prosecution's failure to disclose the requested evidence deprived the defense of the opportunity to conduct an effective cross-examination. Indeed, the Ninth Circuit

determined that the prosecution's failure to disclose this "impeachment" evidence was "more egregious" than a failure to disclose exculpatory evidence.<sup>11</sup> The Supreme Court disagreed with this latter determination.

While the Supreme Court acknowledged that several of its precedents had recognized the constitutional significance of impeachment evidence,<sup>12</sup> it specifically determined that this form of evidence could not be treated as "constitutionally different from exculpatory evidence."<sup>13</sup> Furthermore, the Court observed that the circuit court had erred in viewing the Court's holding in *Davis v. Alaska*<sup>14</sup> as compelling the conclusion that the nondisclosure of the "impeachment" evidence was constitutional error because it restricted the defense from cross-examining O'Connor and Mitchell. Instead, the Supreme Court determined that, "[t]he constitutional error, if any . . . was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination."<sup>15</sup> Accordingly, in this context, the Court further determined that "[s]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial"<sup>16</sup> and that the only means by which that determination could be made was whether the suppressed evidence was "material in the sense that is suppression undermine[d] the confidence in the outcome of the trial."<sup>17</sup> Two Justices determined that the *Agurs* test for materiality of undisclosed evidence had been refined by its subsequent decision in *Strickland v. Washington*.<sup>18</sup> In turning to the *Strickland* holding, they stated that "a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"<sup>19</sup>

Then, in assessing whether the undisclosed evidence in *Bagley* was material evidence within the context of the "Strickland formulation," they found that it effectively covered the three main areas of prosecutorial nondisclosure of evidence favorable to the accused: first, where there is "no request"; second, "a general request"; and, third, "a specific request." Justice Blackmun observed that as to each of these situations that "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome."<sup>20</sup> In viewing how the "Strickland formulation" would then operate with regard to constitutionally significant nondisclosed evidence, he observed that

<sup>9</sup> 105 S. Ct. 3375 (1985).

<sup>10</sup> *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983).

<sup>11</sup> *Id.* at 1464.

<sup>12</sup> See, e.g., *Giglio v. Illinois*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

<sup>13</sup> *Bagley*, 105 S. Ct. at 3380.

<sup>14</sup> 415 U.S. 308 (1974).

<sup>15</sup> 105 S. Ct. at 3381.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 467 U.S. 1267 (1984).

<sup>19</sup> 105 S. Ct. at 3383 (emphasis added).

<sup>20</sup> *Id.* at 3384 (emphasis added).

[U]nder the Strickland formulation the reviewing court may consider directly *any* adverse effect that the prosecutor's failure to respond *might* have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the *totality of the circumstances* and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.<sup>21</sup>

In applying the foregoing analysis to the facts in *Bagley*, he stated that "there was a significant likelihood that the prosecutor's response to [the accused's] discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government."<sup>22</sup>

Ultimately, the Court remanded *Bagley's* case to the Ninth Circuit "for a determination whether there [was] a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different."<sup>23</sup>

While this opinion provides some direction for appellate court review, it is obvious that it creates grave problems for the prosecutor—especially with regard to generalized discovery requests. First, *Bagley* opens up a broad vista of "evidence favorable to the defense." Where this evidence may at one time have been limited to exculpatory evidence, the equating of impeachment evidence to exculpatory evidence presents a broad category of evidence (*i.e.*, character evidence, bias, interest, prior convictions, prior inconsistent statements) for which the defense may consider in every case properly discoverable if it cannot reasonably be obtained by the defense. Other categories of evidence may likewise be the subject of similar requests. The only apparent limitation as to the burden upon the prosecution to provide such evidence is that it be "material." But the standard of materiality outlined in *Bagley* places the prosecutor in the imperfect and awkward position of making judgments about such evidence with a hindsight view. Consequently, the potential for making constitutionally errant judgments in this regard, whether the prosecutor's motives are intentional, negligent, or unintentional, is manifold. Indeed, this consequence was directly addressed by Justice Marshall in his dissenting opinion in *Bagley*. There, among other things, Justice Marshall observed that

[T]he Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant—of which he presumably knows very little—and perform the impossible task of deciding whether a piece of information will have a significant impact on

the trial. . . . No prosecutor can know prior to trial whether such evidence will be of consequence at trial.<sup>24</sup>

### An Illustration of Further Dilemmas of Constitutional Magnitude

Most recently, in *Pennsylvania v. Ritchie*,<sup>25</sup> the Supreme Court confronted the issue whether an accused was denied his sixth amendment rights to confrontation and compulsory process where he sought to obtain records concerning his daughter from a state child protective agency in order to gather evidence for impeachment. A Pennsylvania state statute prohibited the disclosure of the files except under court order. The trial judge refused to order disclosure.

Ritchie was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor. The accused's thirteen-year-old daughter was the alleged victim of these crimes. During pretrial discovery, the accused served a child protective service agency with a subpoena seeking access to records concerning his daughter. In his quest for these records, the accused sought to obtain his daughter's file concerning the charges pending against him and records that he claimed were compiled by the same agency in 1978 when a separate report was filed against him alleging that he was abusing his children. The subpoena was rebuffed by the child protective service agency. The agency relied on a Pennsylvania statute that provided that such records were confidential subject to eleven exceptions, one of which provided that disclosure of the records could be ordered by a court of competent jurisdiction. At trial, the accused again requested the records, claiming that they might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. The trial judge, after reviewing some of the records, denied the accused's motion. Even so, the defense was allowed considerable latitude in cross-examining the accused's daughter when she testified. The accused was subsequently convicted of all charges.

On appeal, the Pennsylvania Supreme Court concluded that the denial of the accused's access to the records violated both the confrontation clause and the compulsory process clause of the sixth amendment. In its holding, the Pennsylvania Supreme Court determined that "Ritchie was unlawfully denied the opportunity to have the records reviewed by 'the eyes and the perspective of an advocate,' who may see relevance in places that a neutral judge would not."<sup>26</sup>

The Supreme Court granted certiorari. In addressing the sixth amendment issues, only a plurality of the Court<sup>27</sup> rejected the accused's contention that the failure to disclose the information he requested effectively undermined the confrontation clause's purpose of increasing the accuracy of the truth-finding process. Their response, however, is important. Justice Powell, the author of the plurality opinion, observed that the acceptance of the accused's confrontation

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at (Marshall, J., dissenting) (emphasis added).

<sup>25</sup> 107 S. Ct. 989 (1987).

<sup>26</sup> *Commonwealth v. Ritchie*, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985).

<sup>27</sup> Chief Justice Rehnquist and Justices Powell (the author of the opinion), White, and O'Connor.

clause argument, which was based upon the Court's decision in *Davis v. Alaska*,<sup>28</sup> would "transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery."<sup>29</sup> According to the plurality opinion, "[t]he ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."<sup>30</sup>

A majority of the Court agreed in rejecting the accused's claim that he had been denied compulsory process in violation of his sixth amendment rights. The accused argued that the trial court's ruling prevented him from learning the names of witnesses in his favor as well as other evidence that might be contained in the requested child protective services file. Noting that the Pennsylvania Supreme Court had apparently concluded that "the right of compulsory process include[d] the right to have the State's assistance in uncovering arguably useful information, without regard to the existence of a state-created restriction,"<sup>31</sup> the majority determined that the proper analysis for this claim was not through the compulsory process clause but, instead, that the proper approach should be "a due process analysis."<sup>32</sup> Writing for the majority, Justice Powell observed in this regard that "[a]lthough we conclude that compulsory process provides no greater protections in this area than those afforded by due process, we need not decide . . . whether and how the guarantees of the Compulsory Process Clause differ from [due process considerations]."<sup>33</sup>

Accordingly, utilizing the framework the Court had established in *Brady*, *Agurs*, and *Bagley* in assessing the impact of nondisclosed constitutionally significant evidence upon the verdict in *Ritchie*, the majority of the Court determined that the accused was entitled to have the child protective services file reviewed by the trial judge "to determine whether it containe[d] information that probably would have changed the outcome of his trial."<sup>34</sup> The majority also held that this assessment should be made *only* by the trial judge and not, in any event, by the defense. The Court's holding in this regard is extremely important. In prescribing this specific limitation over the assessment of the "materiality" of the evidence, the Court stated that:

[T]his Court has never held—even in the absence of statute restricting disclosure—that a defendant alone may make the determination as to the materiality of information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland* . . . it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld

and brings it to the court's attention, the prosecutor's decision on disclosure is final. *Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.*<sup>35</sup>

Still, prosecutors should note that *Ritchie* does not dispense with the ancillary issue of the accused's claim that his right to confrontation was denied at trial. Indeed, Justice Brennan's dissenting opinion probably correctly points out that it was wrong for the plurality to have rejected the Pennsylvania Supreme Court's holding and the accused's argument that *Davis v. Alaska* was crucial to the analysis of this issue.<sup>36</sup> In many respects, *Davis* is similar to *Ritchie*.

In *Davis*, the accused was prevented from cross-examining a key government witness regarding his juvenile record because of an Alaska state statute that made evidence of juvenile adjudications inadmissible in court. The juvenile record of the key government witness was important to the defense because it revealed that the witness was on probation for the same burglary for which Davis was charged. The defense sought to cross-examine the witness regarding this record because the possibility existed that the witness was biased or prejudiced against Davis, in that he was attempting to turn towards Davis the attention of the police that otherwise would have been directed against him. Davis' counsel was permitted to cross-examine the witness regarding his bias towards Davis, but was foreclosed from alluding to his juvenile conviction. In this context, the Court specifically observed that "[t]he jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness, or as the prosecutor's objection put it, a 'rehash' of prior cross-examination."<sup>37</sup>

Although Davis was not forbidden from obtaining the witness' juvenile record, Justice Brennan found that the effect of non-use of the record in *Davis* was not necessarily substantively distinct from the non-disclosure of the child protective services file in *Ritchie*. According to Justice Brennan, in either case, the effect upon the accused's confrontation rights was the same. "The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself."<sup>38</sup>

This is an excellent point and a strong clear reminder to prosecutors that the scope of analysis surrounding an accused's request for discovery is not limited solely to the due process analysis outlined by *Brady*, *Agurs*, or *Bagley*, but may also involve the much wider panorama of the sixth amendment and its subtle concerns.

<sup>28</sup> 415 U.S. 308 (1974).

<sup>29</sup> *Pennsylvania v. Ritchie*, 107 S. Ct. at 999.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1000.

<sup>32</sup> *Id.* at 1001.

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> *Id.* at 1002.

<sup>35</sup> *Id.* at 1003 (emphasis added).

<sup>36</sup> *Id.* at 1008-09 (Brennan, J., dissenting).

<sup>37</sup> *Davis*, 415 U.S. at 318.

<sup>38</sup> *Ritchie*, 107 S. Ct. at 1009 (Brennan, J., dissenting).

## The "Conundrum"

A generalized defense for discovery couched in such terms as "all *Brady* evidence," "any evidence of impeachment pertaining to government witnesses," or "any evidence of uncharged misconduct to be used by the prosecution or during rebuttal," provides the prosecution with some direction as to the relevance of such evidence. Rarely, however, are such requests solely confined to this form. Frequently, the defense will link these generalized requests to other equally general requests for other "favorable" evidence such as either documentary or testimonial evidence that "will be used to aid the accused in his defense" or "will be used on the merits to demonstrate the accused's innocence of the charges." Prosecutors frequently argue that such requests are a form of "gamesmanship" or a "fishing expedition"<sup>39</sup> designed primarily to distract the prosecution from preparing the case or to burden the prosecution into preparing a case for both the prosecution and the defense. As frequently, defense counsel counter such arguments with the assertion that they are only pursuing their right to obtain "equal access to the evidence."<sup>40</sup> What usually is at stake in such controversies is that the case for the defense, if any, is unknown. Indeed, it may be argued that in many instances where an issue of pretrial discovery has surfaced, it is the specific desire of the defense not to reveal its position regarding a criminal allegation particularly in matters relating to discovery.<sup>41</sup>

In commenting on the mechanisms for obtaining discovery of documentation and compulsory process then available for military accuseds, Arnold I. Melnick, then a major, observed:

It is true, of course, that once an accused has complied with the Manual and established that the witnesses he desires are material and necessary to his case, he is entitled to their personal presence, and he cannot be required to accept a deposition or stipulation as a substitute. *But this is a dearly purchased right, and it has been acquired at the price of revealing the accused's case and trial strategy to the Government.*<sup>42</sup>

A good illustration of how the defense may shadow its aims regarding a request for discovery with a claim for equal access to evidence is found in *United States v. Frederick*.<sup>43</sup> The defense sought to have the accused examined by a psychiatrist, a psychologist, and a neurologist of the defense's choosing and at government expense. This request was transmitted directly to the accused's convening authority urging that neither the identity of the witnesses nor their possible testimony be divulged to the prosecution. Additionally, the defense also moved for an *ex parte* proceeding

with the military judge so that the application for the witnesses could be made without disclosure to the prosecutor. Both these attempts to obtain the assistance of the requested witnesses were justified under Article 46. Ultimately, these attempts were rejected by the trial judge. On appeal, the accused complained, among other things, that the military judge's failure to grant him equal access to witnesses was a violation of the mandate of Article 46, and by disclosing his entire case in advance, the trial judge had substantially prejudiced his rights. In addressing this matter, the Navy court observed that:

We perceive [the] real objection to be that of discovery timing, i.e., providing the Government with information in advance of the necessity for so doing, in that appellant has to date failed to delineate with specificity wherein he has suffered the asserted prejudice. If relevant and material, the much sought defense evidence would have been subjected to prosecution scrutiny sooner or later. Judicial efficiency alone would have demanded disclosure to the Government sufficiently in advance of the exercise of its right of cross-examination so as to give that right meaningful effect. *Discovery in a criminal trial is not a one-way street.*<sup>44</sup>

The Rules for Courts-Martial regarding discovery and compulsory process<sup>45</sup> have, of course, changed since Major Melnick's article and also, of course, currently provide against the kind of approach utilized by the defense in *Frederick* in seeking to obtain "helpful" psychiatric evidence.<sup>46</sup> It is arguable, however, that the underlying "tactical" considerations surfaced by Melnick and the defense approach in *Frederick* have not evaporated and serve to explain why defense counsel continue to submit generalized requests for discovery. The conundrum currently existing both in the Rules for Courts-Martial and in the case law developed by the Supreme Court is that the Court rarely, if at all, takes into consideration that vague discovery requests are purposely tactical. As a result, a murky area has developed between its analysis of the accused's rights to confrontation and discovery, neither of which is entirely congruent, and which offers the prosecutor only the hindsight test of "materiality" with no concomitant pretrial burden upon the defense to demonstrate a specific justification for the requested evidence. That problem is clearly reached in *Ritchie*, where Justice Brennan rendered the following observation in his dissent:

In this case, the trial court properly viewed *Ritchie's* vague speculations that the agency file might contain something useful as an insufficient basis for permitting general access to the file. However, in denying access to the prior statements of the victim the court deprived

<sup>39</sup> See *United States v. Franchia*, 13 C.M.A. 315, 320 32 C.M.R. 315, 320 (1962).

<sup>40</sup> Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1982) [hereinafter UCMJ] generally provides that: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." (Emphasis added).

<sup>41</sup> A flavor of this approach is alluded to in Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 Mil. L. Rev. 1 (1965).

<sup>42</sup> *Id.* at 5 (emphasis added).

<sup>43</sup> 7 M.J. 791 (N.C.M.R. 1979).

<sup>44</sup> *Id.* at 805 (emphasis added).

<sup>45</sup> R.C.M. 703.

<sup>46</sup> Indeed, R.C.M. 701(b)(2) specifically requires that "if the defense intends to rely upon the defense of lack of mental responsibility . . . the defense shall, before the beginning of trial on the merits, notify the trial counsel of such intention."

Ritchie of material crucial to any effort to impeach the victim at trial. I view this deprivation as a violation of the Confrontation Clause.<sup>47</sup>

Later, in apparent justification of this view, Justice Brennan, relying on the Court's prior holding in *Jencks v. United States*,<sup>48</sup> went on to further observe that "a defendant is entitled to inspect material 'with a view to use on cross-examination' when that material '[is] shown to relate to the testimony of the witness.'" <sup>49</sup> This latter proposition is certainly true, especially in context with either of Justice Brennan's observations, but only when it is supposed that the defense has demonstrated *in advance of trial* that the evidence requested bears a material relationship to the accused's case.

#### A Prosecutor's Test for Materiality

Interestingly, the Supreme Court, in *Ake v. Oklahoma*,<sup>50</sup> has recently determined a more certain pretrial test for assessing the constitutional significance of a denial of an indigent accused's request for psychiatric assistance at trial. This holding has a direct bearing on the issue of pretrial discovery. In *Ake*, the Court, in determining whether the accused had been deprived of a significant due process right, found that there were three factors relevant to its analysis.

The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional safeguard or substitute procedural safeguards that are sought, and the risk of erroneous deprivation of the affected interest if those safeguards are not provided.<sup>51</sup>

The Supreme Court's resolution of the third factor of this inquiry provides a direct link to the consideration of an appropriate pretrial test for prosecutorial action on general requests for discovery. In discussing the parameters of this third factor, the Supreme Court observed that

without the assistance of a psychiatrist to conduct a professional examination on *issues relevant to the defense*, to help determine whether the defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an *inaccurate resolution* of sanity issues is extremely high.<sup>52</sup>

The Court also observed, however, that the need for psychiatric assistance had to be established by the defense. This observation was the crux of the Court's holding which, in sum, provided that "[w]hen a defendant demonstrates to

the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum assure the defendant access to a competent psychiatrist."<sup>53</sup>

Thus, according to the Court, the controlling factors that compel the government to affirmatively respond to a defense request for assistance are that the accused must demonstrate, first, what defense he is relying on, and, second, how the object of his request for assistance will *significantly* apply to that defense. Such a test when applied in the general field of "discovery" is no more onerous to the defense than the current "*Agurs-Bagley*" test and provides both the prosecutor and the trial judge with a competent means of assessing the veracity of general, as well as specific, defense requests for discovery.

The true failing of a rule requiring the defense to demonstrate the veracity of general requests for discovery and the utility of the "significant factor" test in clarifying the speculative nature of these requests is illustrated through an examination of *United States v. Eshalomi*,<sup>54</sup> a case recently decided by the Court of Military Appeals.

Eshalomi was charged with raping Mrs. Judy Clark on 10 August 1981. Prior to trial, the defense delivered a sweeping request for discovery to the prosecution. Similar requests for discovery continued throughout the Article 32 investigation. Although these requests reiterated much of the information now currently required to be delivered to the defense under R.C.M. 701, the defense also requested an opportunity to depose Mrs. Clark, indicating among reasons for so doing an intent to question Mrs. Clark concerning "The alleged suicide attempt by Judy Irene Clark on 16 August 1981,"<sup>55</sup> and "The psychiatric treatment of Mrs. Judy Irene Clark before and after 11 August 1981."<sup>56</sup> Subsequent to this request, the defense also requested that the prosecution release "all psychological and medical records of Mrs. Judy I. Clark in possession of the U.S. Government prior to Article 32 Investigation."<sup>57</sup> Later, the defense orally requested the assistant prosecutor to provide all statements made by Mrs. Clark or any of the other government witnesses and was assured by the assistant prosecutor that although the prosecution was not in possession of any additional statements made by Mrs. Clark at that time, that any additional statements made by Mrs. Clark would be provided to the defense. There is no indication in *Eshalomi* that the defense provided any substantive reason justifying the need for the requested information.

At trial, the accused maintained that he had engaged only in consensual sexual intercourse with Mrs. Clark. He testified that he had initially come into contact with Mrs. Clark when she attempted to sell Avon products to his wife. Thereafter, according to the accused, a relationship

<sup>47</sup> *Ritchie*, 107 S. Ct. at 1006 (Brennan, J., dissenting) (emphasis added).

<sup>48</sup> 353 U.S. 657 (1957).

<sup>49</sup> *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting).

<sup>50</sup> 470 U.S. 68 (1984).

<sup>51</sup> *Id.* at 77.

<sup>52</sup> *Id.* at 82 (emphasis added).

<sup>53</sup> *Id.* at 83 (emphasis added).

<sup>54</sup> 23 M.J. 12 (C.M.A. 1986).

<sup>55</sup> *Id.* at 17.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

developed between him and Mrs. Clark to the extent that when her husband was absent from their home, the two would meet at Mrs. Clark's residence and engage in sexual intercourse.

Mrs. Clark's testimony was to the contrary. She agreed that she first came into contact with the accused when she came to his quarters intending to sell Avon products to the accused's wife. Mrs. Clark maintained that, as the accused's wife was not home, she left her calling card with the accused. Then, according to Mrs. Clark, she subsequently received a call from the accused and after a 20 to 30 minute conversation was asked for a "date." Mrs. Clark further testified that, during a period when her husband was on temporary duty away from their home, she was overtaken one evening by two intruders. She testified that she was raped by the "shorter" of the two intruders while the taller intruder was looking through her cupboards and drawers. Mrs. Clark further related that while she was being raped the "shorter" man began talking to her and she recognized his voice as the accused's.

Additional evidence adduced at trial revealed that Mrs. Clark immediately reported the rape to a neighbor who came to her house and found it in disarray. While the neighbor wanted to contact the police, Mrs. Clark appeared reluctant. Eventually, however, the military police were contacted and Mrs. Clark was taken to a hospital where she underwent a medical examination. This examination ultimately showed that there was no semen in samples extracted from Mrs. Clark's vagina. Other laboratory tests conducted on a towel Mrs. Clark had maintained was used by the accused to wipe away semen he had ejaculated on her face similarly showed no presence of semen. In addition to this evidence, a physical examination of Mrs. Clark following the reported rape disclosed that she was neither bruised nor internally injured despite her report that she was forcibly raped.

Following her in-court testimony, and while the trial was in progress, Mrs. Clark rendered an additional statement to law enforcement authorities regarding the second individual she had previously described as entering her quarters with the accused. In this statement, Mrs. Clark admitted that she had "left some details out of [her] previous statements" because she was "very much afraid."<sup>58</sup> Mrs. Clark maintained in this additional statement that she had also been raped and sodomized by the second man and that he had ejaculated in her mouth. She stated further that the second man had threatened to harm her and her children if she told anyone. Mrs. Clark also recanted a portion of an earlier pretrial statement wherein she had related that she attempted to overdose on sleeping pills *because she had been raped*. In her recantation of that statement, Mrs. Clark related that she had taken an overdose of sleeping pills because she had seen the second man who raped her peering

in her window some days after the reported rape. Although the prosecution was aware of these inconsistent statements before the conclusion of the trial, no effort was made to inform the defense. Ultimately, the accused was convicted and sentenced to, among other things, thirty years confinement.

Some days after Eshalomi's conviction, the prosecution informed the defense of Mrs. Clark's additional statements. The prosecution was uncooperative in providing the defense with the text of these statements, however. The defense then personally contacted Mrs. Clark and she admitted that she had made post-trial statements inconsistent with her pretrial statements and in-court testimony and indicated that she "knew other things (about the evening of the reported rape) but . . . intentionally left those things out of [her] testimony."<sup>59</sup>

After discovering this new evidence, the defense moved for a new trial before the court of military review. During the submission of post-trial affidavits, the chief prosecutor maintained that he had not informed the defense of Mrs. Clark's statements made to law enforcement authorities following her in-court testimony because he believed "that the criminal discovery rules only required him to give the defense 'exculpatory' evidence"<sup>60</sup> which he believed was not revealed in Mrs. Clark's later statements. He admitted that he had not revealed to the defense a civilian medical record pertaining to Mrs. Clark which showed that she had a history of psychiatric counseling stemming from an incestuous relationship she had with her older brother when she was twelve years of age. The chief prosecutor maintained in his affidavit that he did not show the defense this medical record because Mrs. Clark "did not want anything brought out in court concerning her incestuous relationship with her brother . . . or the resulting psychiatric treatment."<sup>61</sup> Additionally, in this regard, the chief prosecutor maintained that by reason of Military Rule of Evidence 412(b)<sup>62</sup> he advised Mrs. Clark that, in conjunction with her Florida doctor-patient privilege, she did not have to reveal her "past sexual activities." In an unpublished opinion, the Navy-Marine Corps Court of Military Review denied the defense request for a new trial, observing that Mrs. Clark's statement made to law enforcement authorities following her in-court testimony "would not have probably produced a substantially more favorable result for [the accused]."<sup>63</sup>

On subsequent appeal before the Court of Military Appeals, the accused argued that the actions by the prosecution in deliberately withholding information concerning Mrs. Clark's medical and psychological history and her post-trial statement to law enforcement authorities concerning her second alleged assailant "greatly impeded the ability of the defense to impeach Mrs. Clark and probably affected the outcome of his trial."<sup>64</sup> The Court of Military Appeals strongly agreed.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 18.

<sup>60</sup> *Id.* at 19.

<sup>61</sup> *Id.* at 20.

<sup>62</sup> Mil. R. Evid. 412(b) generally provides that evidence of a victim's past sexual behavior other than reputation or opinion evidence is not admissible in a case where an accused is charged with a nonconsensual sexual offense, unless such evidence specifically relates to past sexual behavior with the accused or relates to the source of semen or injury relating to the victim or is otherwise constitutionally required to be admitted.

<sup>63</sup> *United States v. Eshalomi*, 23 M.J. 12,20 (C.M.A. 1986).

<sup>64</sup> *Id.* at 21.

After tracing the developments of the law surrounding discovery issues through *Brady*, *Agurs*, and *Bagley*, and drawing attention to the current Rules for Courts-Martial, as well as its own decisions in this area, the Court of Military Appeals concluded that reversal of the accused's case was required. In justifying its holding, the court observed that both the statements made by Mrs. Clark following her in-court testimony and her medical records amounted to constitutionally significant evidence. The court found that the central issue in the accused's case that made both these aspects of evidence critical was Mrs. Clark's credibility. In addressing the nexus between the issue of Mrs. Clark's credibility and the accused's defense, the court found that Mrs. Clark's post-testimonial statements were critical evidence because the discrepancies between these statements, her pretrial statements, and her in-court testimony "could have aided the defense in showing that Mrs. Clark was unreliable."<sup>65</sup> The court also found significant a ruling made by the trial judge that caused the defense to abandon a fertile area of cross-examination. At one point in the trial, the defense sought to introduce evidence that Mrs. Clark had undergone hypnosis and that this procedure may have affected her knowledge regarding the charged offenses. At the same time, the prosecution argued that it should be allowed to introduce evidence explaining that the reason for Mrs. Clark's hypnotic session was that she had twice attempted suicide following the rape. The trial judge ruled that this latter evidence would not be admitted unless "her credibility is attacked."<sup>66</sup> In viewing this ruling and its relationship to the non-disclosed evidence, the Court of Military Appeals opined that:

In light of the defense's original intent to offer evidence that some of the detailed information supplied by Mrs. Clark had been elicited by hypnosis, it seems clear that this line of inquiry was abandoned, rather than risk the prosecution's introduction of evidence about the "suicide attempt." Obviously the defense options would have seemed quite different if the defense counsel had been aware that, according to Mrs. Clark's later statement, there had been *no* suicide attempt.<sup>67</sup>

Further, according to the court, Mrs. Clark's non-disclosed medical records achieved constitutional significance under either of two hypothetical settings. In the first setting, the court observed that

[I]f the defense had known of Mrs. Clark's history of rape by her brother, they might have conducted additional investigation prior to trial. For one thing, they might have sought to determine if there were elements of fantasy in her account of the rape by her brother and the extensive treatment therefor. If she fantasized as to this matter when providing a medical history to her own doctors, it would be difficult to give much credence to her account of being raped by [the accused].<sup>68</sup>

The court established the second setting as follows:

<sup>65</sup> *Id.* at 26.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 27.

<sup>69</sup> *Id.*

[I]f the childhood rape had occurred, the relevance to her credibility also is great. Appellate defense counsel have called to our attention psychiatric literature concerning the traumatic effects of childhood incest or rape. It is clear from this literature that in the view of many psychiatrists these childhood events might be very important in evaluating the reliability of a claim of rape later in life. Indeed, one obvious reason why doctors ask alleged victims of sexual assault about any prior attacks is to determine the reliability of the allegations.<sup>69</sup>

Each of these determinations seem logically supportable. They have been gained, however, at the expense of considerable hindsight. For example, it seems easy to criticize the prosecution's deliberate non-disclosure of Mrs. Clark's post-testimonial statement as its impeachment value is evident. The prosecution, however, did not have the *Bagley* decision with which to assess the constitutional significance of this impeachment evidence (although there is an equally strong argument that the prosecution was ethically bound to reveal its existence). Also, it is neither clear from the facts of the *Eshalomi* case nor from the court's opinion, how the prosecution could have made the same hypothetical assessments concerning the requested evidence as made by the court because, as it also seems clear, the defense *never* provided any indication to the prosecution why the evidence requested was critical to the accused's case. Viewing the panorama of the case before trial, its features consisted of numerous defense requests for discovery concerning all aspects of the case including statements from all witnesses, laboratory reports, rape kits, photographs, psychiatric examinations, and health records. Viewing these features against the background of the accused's choices in defending on any one of numerous theories including consent, non-intercourse, lack of identity, and alibi, without any indication by the defense of the significance of their discovery requests, gives little cause for criticizing the prosecution for failing to disclose Mrs. Clark's past psychiatric treatment for an alleged incestuous relationship with her brother. Indeed, in the author's opinion the prosecutor's errant belief that Military Rule of Evidence 412(b) protected her from examination in this regard seems understandable, if not justifiable, given the existing conditions of the case before trial, as opposed to the vantage point of five years after the fact.

Had the prosecution been provided notice by the defense that the evidence requested presented a significant factor in the accused's defense, then there would be no justification for the prosecution to have later deliberately failed to disclose the evidence. Similarly, had the defense provided notice to the trial judge at the outset of the trial that its intent in the case was to show that only consensual intercourse had taken place, that the accused's defense was consent, and that therefore the government may have evidence in its possession that was a significant factor in the accused's defense because it related to the critical issue of the victim's credibility, the likelihood that the trial judge's

ruling may have been more accurate and far more favorable to the defense seems evident. Indeed, the fact that the defense abandoned a course of action that was distinctly crucial to its case, i.e., the impeachment of Mrs. Clark, solely on the possibility that the prosecution may have been allowed to admit evidence of her suicide attempts, seems to indicate that either more evidence was adduced at trial than is revealed in the *Eshalomi* opinion or that the defense overestimated the damage to its case by the mere possibility of introduction of the suicide evidence and underestimated the critical need to impeach Mrs. Clark. In any event, the "significant factor" test unquestionably would have served to clarify the errors outlined in this case *before trial*. And, while the appellate courts seem to be satisfied with the "Agurs-Bagley" test in addressing the constitutional significance of undisclosed evidence, there is nothing prohibiting prosecutors from applying the "significant factor" test to all general requests for discovery. While the defense may rely on the current state of the law to deflect this "prosecutorial requirement," a reasonable argument at trial is that the underlying defense purpose for asserting a right to discovery under the auspices of general request is based more upon tactical concerns than due process expectations. Furthermore, the hastening of issues regarding discovery at this point of the trial may prevent later revelation of appellate error because the trial judge will have a better vantage point to assess the true materiality of defense requested evidence.

#### The Factor of Ethical Determinism

Although *Brady* makes it clear that a prosecutor's duty of disclosure is not measured by his or her moral culpability or willfulness,<sup>70</sup> it would be extremely dangerous for a prosecutor to assume that these factors are not critical to the process of determining harm to the accused's case before, during, and after trial. A prosecutor is a servant of the law whose primary duty is to aid the truth-finding process and ensure that the innocent do not suffer.<sup>71</sup> Consequently, as the Supreme Court has firmly recognized that decisions regarding discovery, whether the accused has generally, specifically, or has not requested evidence that is exculpatory, favorable, or helpful, are singularly vested in the prosecutor,<sup>72</sup> such responsibility is as much founded upon a prosecutor's ethical duties as it is by law or statute. Every prosecutor is at one time or another tempted to prevent the surfacing of evidence that is harmful to his or her case. This temptation is natural, given the expectations that surround most criminal cases. Even so, prosecutors who chose to quibble with evidence that is obviously important to the defense run the risk of not only placing a criminal case in jeopardy on appellate review if the undisclosed evidence is favorable to the accused, but, if such evidence is uncovered at trial, may be subjected to an allegation of prosecutorial misconduct. This latter action can be devastating in terms of the prosecutor's credibility, delays that may be encountered in examining the entire prosecutorial effort, and the potential for discrediting the entire system of justice in the eyes of the public.

<sup>70</sup> 373 U.S. at 87.

<sup>71</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>72</sup> See *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1003 (1987).

<sup>73</sup> 16 M.J. 258 (C.M.A. 1983).

<sup>74</sup> *Id.* at 260.

Case law reveals that within a prosecutor's framework for assessing the disclosure of evidence that is favorable to the accused lies the following additional principle: "Beware, your actions that fail your duty to disclose evidence favorable to the defense will eventually find you out." A clear illustration of this principle is revealed in *United States v. Brickey*.<sup>73</sup>

The accused was charged with several offenses alleging that he had wrongfully attempted to possess and sell methamphetamines and that he had on other separate occasions wrongfully possessed and sold the same substances. The principle witness against the accused was Private Timothy Brown. Brown had acted as a covert conduit between the accused and agents of the Army's Criminal Investigation Division (CID) in assisting the CID investigating the accused's suspected drug trafficking efforts. Prior to referral of the charges against the accused, Private Brown was routinely transferred to Fort Lewis, Washington. Sometime later, a request that Private Brown be subjected to a polygraph examination surfaced at the Fort Lewis CID office. Subsequently, it was discovered that Private Brown had been admitted to Madigan Army Hospital, Fort Lewis, for suffering from an apparent overdose of morphine and that following treatment was admitted to a psychiatric ward because he was suffering from delusions and extreme paranoia. These facts were transmitted by electronic message to the prosecutor in Korea. Eventually, Private Brown was released from Madigan Army Hospital and allowed to return to Korea to testify in the accused's case. Several delays in the accused's trial were encountered and eventually Private Brown was deposed. Subsequently, Private Brown was allowed to return to the United States and was discharged from the Army. At the accused's trial, Private Brown's deposed testimony was introduced into evidence without defense objection. This deposed testimony was central to the government's case and Private Brown's credibility became a key issue. The defense called six witnesses who testified that they would not believe Brown under oath and called witnesses who vouched for the accused's credibility. Even so, the accused was convicted.

After the trial, Brickey's defense counsel was reviewing the unauthenticated record of trial and chanced upon the message concerning the accused's overdose on morphine and his subsequent psychiatric treatment at Madigan Army Hospital. This evidence was a complete surprise to the defense counsel and it seemed to contradict Brown's deposed testimony. During the deposition, the defense counsel asked why Brown had gone to the police. Brown stated that he had, *prior to cooperating with the CID*, "a conversion experience: specifically, he had heard that a little girl he had known had overdosed 'because of the same thing' [use of methamphetamines] . . . and that as a result of the girl's overdose he had come clean at some point prior to [the accused's] offenses."<sup>74</sup>

On the basis of this newly discovered evidence, the accused's defense counsel requested the trial judge to reopen the case for the purpose of ordering "appropriate relief."

After reviewing the evidence, the trial judge ruled that the post-trial session requested by Brickey's defense counsel should not be held because it could not qualify as a revision proceeding or a rehearing. He recommended that defense counsel seek appropriate action through the accused's convening authority. This was done. The convening authority, however, in the face of his staff judge advocate's advice that the evidence was not sufficient to either cause doubt about the findings or create constitutional error, also refrained from taking any ameliorating action. Eventually, the entirety of this matter came before the Court of Military Appeals.

In reviewing this matter, the court focused on the prosecutor's affidavit wherein she indicated that she did not consider the information concerning Private Brown's drug overdose and psychiatric treatment as strictly subject to disclosure to Brickey's defense counsel because this evidence only affected Brown's credibility. The prosecutor also maintained, in this regard, that Brown's past involvement with illicit drugs was generally personally known by Brickey's counsel and that Brown was available for a considerable period of time for this counsel to question him. Even though the court at the time of this review did not have the benefit of the Supreme Court decision in *Bagley*, it completely dismissed the explanation offered by the prosecutor and determined that her decision to withhold the evidence concerning Brown's overdose on drugs amounted to clear constitutional error. In this regard, the court observed:

When the Government's conduct makes it impossible for an appellate court to gauge the impact of withheld information under the appropriate *Brady* standard, it is not the accused who must suffer the consequences. The defense counsel must be allowed to fulfill his responsibility, and trial counsel's failure here to disclose this information—so important to the fundamental fairness of the trial—thwarted the performance of that responsibility, and may have thwarted justice as well.<sup>75</sup>

Additionally, the court believed that the prosecutor should have recognized the impression generated by Brown's deposed testimony, and further believed that by failing to disclose evidence that overshadowed the altruistic message conveyed in Brown's testimony, the prosecutor allowed the court members to erroneously believe that Brown was a reformed drug dealer. The court made clear that "such tactics are clearly prohibited."<sup>76</sup> Ultimately, the court took the drastic action of not only reversing the accused's conviction as to the charges directly affected by Brown's testimony but, also, other of the charges that were only indirectly affected. This was necessary according to the

court because it was in the best interest of justice because "of the type of error involved."<sup>77</sup>

It is clear from *Brickey* that although the court drew into perspective the *Brady* and *Agurs* decisions in assessing the appropriate standard to apply to the nondisclosed evidence, it eventually drew upon the higher standard imposed by the prosecutor's ethical duty to ensure that justice is done. This is a factor that ultimately surfaces in any discovery issue and one that prosecutors must not lay aside in assessing whether to disclose evidence that is helpful to the accused.

#### A Framework For Applying The "Significant Factor" Test

Apart from the overriding principle that a prosecutor has an ethical duty to disclose constitutionally significant evidence whether requested generally, specifically, or not, the Supreme Court has never held that an accused has a general constitutional right to discovery in a criminal case.<sup>78</sup> Furthermore, despite frequent assertions by the Court of Military Appeals that "[m]ilitary law has long been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights,"<sup>79</sup> the true context of these assertions lies in the mechanisms made available by military law for an accused to obtain discovery rather any notion of elevated right in this regard. Furthermore, the Supreme Court has also made it clear that an accused does not have the unsupervised authority to search through the government's files to ascertain the existence of constitutionally significant evidence (*i.e.*, exculpatory or impeachment evidence).<sup>80</sup> Nor can the accused compel the prosecution to seek out evidence when the evidence is not known to military authorities.<sup>81</sup> Consequently, the responsibility for determining which information must be disclosed is solely that of the prosecutor's. This duty is *ongoing*—"information that may be deemed immaterial upon original examination may become important as the proceedings progress"<sup>82</sup> and it would be incumbent upon the prosecution at that time to release the information.

Information that must clearly be released is that which the courts have recognized as achieving constitutional significance. That is, information that is both favorable to the accused and material to the case. Evidence that is favorable to the accused has been recognized as evidence that has either exculpatory<sup>83</sup> or impeachment value.<sup>84</sup> Even so, this evidence has not been recognized as material unless "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."<sup>85</sup>

<sup>75</sup> *Id.* at 268 (emphasis added).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 269.

<sup>78</sup> *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

<sup>79</sup> See, e.g., *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980).

<sup>80</sup> *United States v. Bagley*, 105 S. Ct. 3375, 3380 (1985).

<sup>81</sup> R.C.M. 701 analysis, at A21-29.

<sup>82</sup> *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1003 (1987).

<sup>83</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>84</sup> *Giglio v. United States*, 405 U.S. 150, 154 (1972).

<sup>85</sup> *Bagley*, 105 S. Ct. at 3384.

As shown above, this test of "materiality" fails to provide prosecutors with a meaningful basis for determining whether to disclose constitutionally significant evidence before or during trial. This is so particularly when the defense generally requests that the prosecution either itself discover or disclose such information that *may* be available. Accordingly, prosecutors must be able to make such decisions on the basis of the totality of the circumstances existing either before or during trial. Such decisions, apart from the obvious nature of certain evidence (*i.e.*, known exculpatory evidence), can be accurately made only by understanding how the requested evidence relates to the case. This requires knowledge of two factors: what the accused's defense is; and, how does the requested information significantly relate to that defense.

In order to accomplish the task of determining the significant relationship between generally requested information and the issues of the case, it is necessary for the prosecution to seek the assistance of the defense. General requests for discovery, unless such requests inherently provide notice of how the information will relate to the case, should be returned to the defense counsel specifically requesting a response as to the proposed significance of the evidence sought. Additionally, prosecutors should not be blinded by requests for assistance by defense counsel which are set under the general heading of "discovery." Some requested evidence may require an entirely different analysis. For example, evidence requested by the defense may relate to its ability to confront witnesses and thereby require the prosecution to fully consider whether a failure to disclose the evidence may create sixth amendment confrontation issues at trial or on appeal. Moreover, in other respects, the defense may be requesting testimonial evidence, favorable to its case, where such requests more appropriately concern the accused's right to compulsory process. Here, the prosecution is aided by R.C.M. 703, which requires the defense to categorize witness(s) as either "merits" or "sentencing" witness(s).<sup>86</sup> The defense must accurately identify and locate the witness(s), and in the case of witnesses on the merits, provide a synopsis of expected testimony "sufficient to show its relevance and necessity."<sup>87</sup> In the case of sentencing witnesses, the defense must provide a synopsis of expected testimony that will give reasons why the personal appearance will be necessary and of *substantial significance* to the determination of an appropriate sentence.<sup>88</sup> Prosecutors should note that these requirements concerning the accused's right to compulsory process are not entirely distinct from the "significant factor" test outlined above. In fact, especially regarding the sentencing phase of the trial, they require more specific information from the defense.

Finally, in no case should a prosecutor fail to respond to all or any part of a defense request for discovery. In *Agurs*, the Supreme Court specifically noted that it was seldom excusable for a prosecutor to fail to respond to a specific and

relevant request for information,<sup>89</sup> and this point was reemphasized by the Court in its subsequent decision in *Bagley*.<sup>90</sup>

### Conclusions

In addressing the issues surrounding prosecutorial decision-making regarding defense requests for information in a criminal case, the Supreme Court has consistently, for nearly twenty-five years, refused to recognize that an accused has a broad constitutional right to peer into the government's case. Even though such a stance seems to benefit prosecutors, the practical result, given the Court's gradual development of the materiality test, which recognizes at least two broad exceptions to its steady position, coupled with the liberal *mechanisms* for military accused's to compel government disclosure of evidence, has not been beneficial to the military prosecutor. This is so particularly recently because prosecutors have become hostage to a barrage of requests for information, witnesses, and assistance without having a firm pretrial test with which to accurately assess whether they are bound to affirmatively respond to these requests. Additionally, trial judges are in no better a position to make totally adequate judgments in this same regard.

Interestingly, the Supreme Court's decision to determine its particularized course of action for assessing the materiality of nondisclosed evidence was not inadvertent. Indeed, in *Agurs*, the Court specifically noted why it had done so:

It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. . . . Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "*Brady* material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of notice given to the defendant by the State, and *it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.*<sup>91</sup>

Given the extensive *mechanisms* for discovery currently available to the military accused, this reasoning does not really assist the decision-making process of the military prosecutor.

If prosecutors were to begin utilizing the "significant factor" test, discussed above, it is evident that the discovery process in the military would take on a more secure and sure direction for all parties. The only possible complaint that could be registered would be that the defense may be compelled to prematurely reveal the tactical advantages it

<sup>86</sup> R.C.M. 703(c).

<sup>87</sup> R.C.M. 703(c)(2)(B)(i) (emphasis added).

<sup>88</sup> R.C.M. 703(c)(2)(B)(ii); R.C.M. 1001(e)(2)(A).

<sup>89</sup> 427 U.S. 97, 106 (1975).

<sup>90</sup> 105 S. Ct. at 3383.

<sup>91</sup> 427 U.S. at 112 n.20 (emphasis added).

holds in not revealing the thrust of its case. It is clearly arguable, however, that tactical advantages have nothing whatsoever to do with the truth-finding process. Furthermore, harboring such a view places the defense in the kind of position exemplified in *Eshalomi*, where the defense seemingly abandoned pursuing a critical issue in the case

apparently in favor of capturing this tactical advantage and then, on appeal, shouldered the heavy burden of proving how the nondisclosed evidence affected the outcome of the trial. These are consequences that surely do not need to be preserved for tactical reasons.

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## *The Advocate for Military Defense Counsel*

### **"Best Qualified" or Not? Challenging the Selection of Court-Martial Members.**

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#### **Introduction**

One of the most important questions faced by a defense counsel preparing for trial is whether the case should be decided by court members or by the military judge sitting alone.<sup>1</sup> This is not a hard choice in a simple quality-plea case where the judge's sentencing pattern is well known. The attorney must spend considerably more time analyzing the potential consequences of the decision in a complex case, however. Often, there are no good options.

The defense counsel's burden on this issue is rarely lightened by the convening authority. To the contrary, it frequently seems that court-martial panels selections strike fear in the hearts of accused soldiers and their lawyers. Those who have the authority to pick court members often appear to prefer senior rank to junior, commanders to staff officers, and first sergeants to personnel clerks.<sup>2</sup> Few things disturb the sleep of a defense counsel more than the thought of facing a new, tough-looking panel in a contested case where the client stands to spend a good portion of his or her adult life behind bars.

While the convening authority has broad discretion to choose only those considered "best qualified" for court-martial duty, this discretion has limits. The defense counsel must be familiar with those limitations and be prepared to challenge the manner in which court members were selected when necessary. The purpose of this article is to outline the law governing selection of court members and suggest ways in which counsel can ensure that the law is followed.

#### **Who Is "Best Qualified"? A View From the Top**

Consider a hypothetical division in which the general court-martial convening authority consistently selects high-ranking commanders and NCOs in leadership positions for

court-martial duty to the virtual exclusion of all others. Although a range of lower-ranking staff officers, warrant officers, and enlisted soldiers down to the grade of E-5 are routinely nominated, they are almost never selected. The convening authority is advised, before making his selection, of the proper criteria and considers his highest-ranking leaders (primarily the brigade and battalion commanders and their command sergeants major) "best qualified." The division commander strongly believes that the decisions reached by courts-martial have a direct impact on the state of discipline within the division and therefore wants his "top people" passing judgment. He trusts these men and women to do a good job because they are all familiar with him and his policies and because they have been promoted through the system to positions of great responsibility, which reflects on their judgment. While officers below the rank of major, warrant officers, and lower-ranking enlisted soldiers are routinely selected as alternate court members, they are never called for duty, even when primary members are excused. This is because the general has ordered that an excused member must be replaced by an alternate of the same rank.

#### **The Law Governing Selection of Court Members**

Courts-martial are not part of the judiciary of the United States within the meaning of Article III of the Constitution.<sup>3</sup> They derive their authority under Article I, pursuant to congressional power to make rules for the government of the land and naval forces.<sup>4</sup> Consequently, "the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial."<sup>5</sup>

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<sup>1</sup> Of course it is the accused, rather than the defense lawyer, who ultimately makes this decision. Because people facing a criminal trial tend to rely heavily on their counsel's judgement, however, it is really the lawyer who must wrestle with the dilemma.

<sup>2</sup> While the writer is aware of no empirical evidence that indicates that such officers and noncommissioned officers (NCOs) tend to be more conservative in their views, counsel often assume they are less tolerant of soldiers who violate the law because they are the men and women most directly responsible for the maintenance of discipline.

<sup>3</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>4</sup> *Relford v. Commandant*, 401 U.S. 355 (1966).

<sup>5</sup> *United States v. Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973).

Congress has designated the convening authority as the only person who may select court martial members.<sup>6</sup> The guiding principle for selection is found in Article 25 of the Code: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as in his opinion are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament."<sup>7</sup> Deviation from this standard requires reversal of a conviction because "an accused has an absolute right to trial before a properly constituted court with members."<sup>8</sup>

Despite the rather broad language of Article 25, the convening authority's discretion has been further limited by the decisions of the United States Court of Military Appeals and by the courts of military review. Thus, lower-ranking officers and enlisted soldiers may not be systematically excluded from court-martial duty because, "notwithstanding the reference to the selection of those 'best qualified,' Article 25 implies all ranks and grades are eligible for appointment."<sup>9</sup> Not only is actual improper exclusion prohibited, but the appearance that the convening authority has "packed" the court to favor the prosecution is also proscribed. As the Court of Military Appeals recently stated: "[T]his Court is especially concerned to avoid either the appearance or reality of improper selection."<sup>10</sup>

The Court of Military Appeals has long recognized that the criteria of Article 25 may be manipulated to convene courts-martial designed to favor the government. In *United States v. Hedges*,<sup>11</sup> seven of nine court members had duties involving some aspect of law enforcement. Hedges' conviction for premeditated murder was reversed in part because the panel appeared to be "hand picked" to aid the prosecution.<sup>12</sup> In a concurring opinion, Judge Latimer wrote: "The preponderance of officers who were . . . employed [in law enforcement] is so great that any reader of the record would say candidly that the law of probability did not dictate the choice."<sup>13</sup> Judge Latimer concluded that "when it

appears from the record that one class most likely to lean in favor of the prosecution is favored above all others, there is substantial doubt thrown on the fairness of the selection process."<sup>14</sup>

The court decided in *United States v. Greene*<sup>15</sup> that a court-martial had been improperly selected when its membership consisted of three colonels and six lieutenant colonels. The composition of Greene's court-martial, combined with other unusual factors surrounding the selection process, raised a reasonable doubt in the court's mind that the proper selection standard had been applied.<sup>16</sup>

In *United States v. Daigle*,<sup>17</sup> the court set aside the sentence when it found the "members were selected not because they actually possessed the qualities enumerated in Article 25(d)(2) but solely because they had the senior rank desirable for a particular court-martial."<sup>18</sup> This process led to the exclusion of lieutenants and warrant officers from service on either general or special courts-martial for almost a two-year period.<sup>19</sup> Holding that the selection process violated the Code, the court affirmed again that "all ranks are eligible to serve on a court-martial."<sup>20</sup>

The Army Court of Military Review has likewise prohibited the exclusion of certain ranks from consideration for court-martial membership. In practice, this seems to mean only actual exclusion from the nomination process rather than exclusion from participation in a court-martial.<sup>21</sup> In *United States v. Carman*,<sup>22</sup> the Army court applied a two-part test in evaluating the lawfulness of a selection process that produced a special court-martial panel composed of five lieutenant colonels and one major. The court first found that there was no systematic exclusion of certain ranks because the nominees ranged in grade from O-6 to E-5.<sup>23</sup> Secondly, the court considered whether, as in *Hedges*, the panel's composition gave the appearance that the convening authority "hand-picked" the members to favor the prosecution. It concluded it did not, and instead virtually endorsed

<sup>6</sup> Uniform Code of Military Justice arts. 22, 23, 24, 10 U.S.C. §§ 822-824 (1982) [hereinafter UCMJ].

<sup>7</sup> UCMJ art. 25(d)(2).

<sup>8</sup> *United States v. Greene*, 20 C.M.A. 232, 239, 43 C.M.R. 72, 79 (1970). When the accused enters a provident plea of guilty, only the sentence is reversed. *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986).

<sup>9</sup> *United States v. Crawford*, 15 C.M.A. 31, 36, 35 C.M.R. 3, 8 (1964).

<sup>10</sup> *United States v. McClain*, 22 M.J. 124, 132 (C.M.A. 1986).

<sup>11</sup> 11 C.M.A. 642, 29 C.M.R. 458 (1960).

<sup>12</sup> The court did not hold that a court-martial composed entirely of personnel engaged in law enforcement work itself gave the appearance of a packed court. It also considered several matters developed during voir dire that tended to show the court was deliberately packed against the accused. See *United States v. Greene*, 20 C.M.A. 232, 237, 43 C.M.R. 72, 77 (1970).

<sup>13</sup> 11 C.M.A. at 645, 29 C.M.R. at 461 (Latimer, J., concurring).

<sup>14</sup> *Id.*

<sup>15</sup> 20 C.M.A. 232, 43 C.M.R. 72 (1970).

<sup>16</sup> The other factors considered by the court included a memorandum prepared by the SJA advising the convening authority that "[r]eview of our courts and boards leads me to serious consideration of only lieutenant colonels and colonels as members. . . . Such people should possess the mature judgement which is needed in actions which play an important part in establishing the standards of the military community." *Id.* at 233-34, 43 C.M.R. at 73-74.

<sup>17</sup> 1 M.J. 139 (C.M.A. 1975).

<sup>18</sup> *Id.* at 140.

<sup>19</sup> *Id.* at 141.

<sup>20</sup> *Id.* at 140.

<sup>21</sup> See *United States v. Autrey*, 20 M.J. 912 (A.C.M.R. 1985) (selection process that excluded company grade officers impermissible); *United States v. Firmin*, 8 M.J. 595 (A.C.M.R. 1979) (nominating procedure that included only officers above the grade of O-2 and enlisted soldiers above the grade of E-6 condemned).

<sup>22</sup> 19 M.J. 932 (A.C.M.R. 1985).

<sup>23</sup> *Id.* at 935.

selection of officers on the basis of senior rank and responsibility for command.<sup>24</sup> In essence, the court held that it was lawful to select an officer because he or she was a commander because the leadership qualities necessary to be chosen for such a position "are totally compatible with the UCMJ's statutory requirements for selection as a court member."<sup>25</sup>

The most recent opinion on this issue is the Court of Military Appeals' decision in *United States v. McClain*.<sup>26</sup> There the court held that an enlisted panel was improperly selected when evidence showed that the staff judge advocate (SJA), and by implication the convening authority, preferred senior NCOs because they were considered less likely to adjudge light sentences. The SJA recommended that senior enlisted soldiers be selected based upon talks he had with past court members who blamed junior officers and NCOs for what the SJA considered "unusual" court-martial results. The trial judge found that by "unusual" the SJA meant "lenient," which served as the factual basis for the Court of Military Appeals' ruling. Chief Judge Everett recognized that "[a] convening authority has great discretion in selecting court members,"<sup>27</sup> but may not manipulate Article 25 to select a court-martial panel that will achieve a particular result. Such "purposeful conduct [is] inconsistent with the spirit of impartiality contemplated by Congress in enacting Article 25 of the Code and with the limitation on command influence contained in Article 37."<sup>28</sup> Selection of court members because they would be more likely to impose greater punishment was thus improper because the intended purpose was improper. The only legitimate goal is to select qualified men and women who will impartially decide the cases brought before them. In the words of Judge Cox, who wrote a concurring opinion, "the only concern . . . should have [been] fairness."<sup>29</sup>

*McClain* is important in three respects. First, it shows that the Court of Military Appeals is sensitive to any threat to the appearance of fairness in the selection process. Even though the trial judge found that the convening authority "adhered to the standards of Article 25 in making his selection,"<sup>30</sup> the appearance of unfairness caused by an SJA who wanted "heavier" sentences was enough to warrant reversal. Second, the opinion indicates that the court does not consider the lowest ranks ineligible for selection as court members. While the three lowest enlisted grades were excluded from nomination in *McClain*, this was permissible only because the accused was a private first class, not because their low rank embodied a lack of qualifications under Article 25(d)(2).<sup>31</sup> Third, the opinion is critical of a selection process designed to convene courts composed primarily of senior officers and enlisted soldiers. The exclusion of junior officers and enlisted members enhanced the appearance that the government sought to "pack" the court; it deprived less senior people of the opportunity to gain experience as court members; and "it indicated a lack of confidence by the convening authority . . . in the ability of junior officers and enlisted members to adjudge a sentence that would be fair to both the accused and the Government."<sup>32</sup>

### Challenging the Selection Process

A defense counsel who decides to challenge a selection process similar to the one presented in the hypothetical above has several hurdles to overcome. A presumption of regularity attaches to the actions of the convening authority and the burden is on the defense to show an improper selection.<sup>33</sup> The objective of the defense effort should be first to

<sup>24</sup> *Id.* at 936. In support of its finding that the panel "appeared" lawful, the Court stated:

The statutory qualifications for selection as a court-martial member are contained in Article 25(d)(2), UCMJ. In today's Army, senior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates. The military continuously commits substantial resources to achieve this. Additionally, those officers selected for highly competitive command positions in the Army have been chosen on the "best qualified" basis by virtue of many significant attributes, including integrity, emotional stability, mature judgement, attention to detail, a high level of competence, firm commitment to the concept of professional excellence, and the potential to lead soldiers, especially in combat. These leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member.

*Id.*

<sup>25</sup> *Id.* See *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979), in which the Court of Military Appeals recognized that low rank presumptively indicated lack of qualification for selection as a court member. See also *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985), in which the Army Court of Military Review held that a selection was lawful even when the convening authority testified that his "primary consideration" was to select commanders: "We hold that the preference for and the intentional inclusion of those in leadership positions as court members did not invalidate the selection process. The appellant has failed to show any systematic exclusion of qualified personnel." *Id.* at 587.

<sup>26</sup> 22 M.J. 124 (C.M.A. 1986).

<sup>27</sup> *Id.* at 132.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 133 (Cox, J. concurring) (emphasis in original).

<sup>30</sup> *Id.* at 127.

<sup>31</sup> In *McClain*, the court stated:

In the present case, the method of selection used by the convening authority resulted in the nomination of 54 enlisted persons—none of whom was below the grade of E-4. However, appellant was an E-3, so the exclusion of the lower three enlisted grades was permissible under Article 25(d)(1)—which directs that, "[w]hen it can be avoided," court members should not be "junior to . . . [the accused] in rank or grade."

*Id.* at 130. This calls into substantial question the continued validity of the court's holding in *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979), in which the court recognized that low rank (below E-3) presumptively indicated lack of qualification for selection as a court member.

<sup>32</sup> 22 M.J. at 131. In his concurring opinion, Judge Cox wrote:

I disagree with any language in the principal opinion which appears to *per se* prohibit the appointment of a court-martial panel consisting entirely of senior officers or enlisted service-members. . . . Based on the statutory selection criteria, the best qualified members in some cases may well be senior officers and enlisted personnel.

*Id.* at 133 (Cox J., concurring).

<sup>33</sup> *Cunningham*, 21 M.J. at 587. The defense burden is to present evidence sufficient to cause a reasonable doubt that the members were properly selected. If such a doubt is raised, it must be resolved in favor of the accused. *McClain*, 22 M.J. at 132; *Greene*, 20 C.M.A. at 238, 43 C.M.R. at 78.

obtain a panel with a wide range of ranks representing a variety of viewpoints and experience.<sup>34</sup> If this is unsuccessful, either by voluntary action of the convening authority or by order of the military judge, then the issue must be preserved for appeal.

It will, of course, be a rare case when the defense has direct evidence that the convening authority was motivated to select members who would give greater sentences or decrease the number of acquittals. Thus, the defense must delve into every aspect of the selection process to build a circumstantial case demonstrating either an improper motive on the part of the convening authority or an appearance of unfairness great enough to require alteration of the system.<sup>35</sup>

The defense counsel faced with this issue should first determine exactly how members are selected in his or her jurisdiction.<sup>36</sup> During pretrial discovery, counsel should routinely request all documents, memoranda, and directives related to the process. Counsel should find out how members are initially nominated, how the nominees are presented for selection to the convening authority, and how the convening authority is advised regarding the selection.

After becoming familiar with the nuts and bolts of the process, counsel must look for any suspicious circumstances surrounding the selection method at issue. In the hypothetical case above, for example, it is important to know whether the general's policy has been consistent throughout his tenure as division commander. If, instead, the general abruptly began selecting only senior officers and enlisted soldiers as court members sometime after assuming command, it may reflect displeasure with certain verdicts or sentences. It would thus be necessary to review the results of trial for the period prior to the start of the new policy to find evidence of cases that resulted in acquittals or lenient sentences.<sup>37</sup>

Counsel should next look at the range of nominees presented for selection. All the nominees should be sent to the convening authority; the list must not be "culled" by anyone in the prosecutorial arm.<sup>38</sup> *McClain* suggests that the convening authority must consider all eligible soldiers;

thus each rank should be represented. At least the list of nominees should include soldiers in every rank above that held by the accused.<sup>39</sup> Because the convening authority in the hypothetical only considered soldiers above the grade of E-5, a motion requesting a new selection may be appropriate.

The manner in which excused members are replaced should also be examined. The trial counsel or others associated with the prosecution may not exercise discretion in choosing a replacement for an excused member.<sup>40</sup> A fixed policy governing replacement may indicate, however, that the convening authority relied on an improper criteria when he made the original selection. While rank, for example, may be considered as it relates to the characteristics called for in Article 25, it may not in itself serve as a basis for selection or as a basis for systematically excluding other soldiers.<sup>41</sup> Thus, a standing order that excused members be replaced with alternates of the same rank, as presented in the hypothetical, is circumstantial evidence that rank was given undue weight in the initial selection. This is particularly true when the original panel is made up of only senior ranks and the clear effect of the policy is to exclude lower-ranking officer and enlisted soldiers on the alternate list from court membership. The alternate list containing a range of ranks then looks like a cosmetic device used to preserve the appearance that all eligible soldiers are considered for selection.<sup>42</sup>

In the absence of, or better still in conjunction with, direct evidence, suspicious circumstances, improper nominating procedures, or a questionable replacement policy, the defense should try to compile a statistical base showing the impact of the selection process over time. To do so will require obtaining the selection documents, memoranda requesting nominees, and convening orders for the entire period that the questioned selection policy has been in effect. The defense can then show the frequency with which various ranks are nominated and selected. A pattern showing exclusion on the basis of duty position or rank may then emerge. Other important statistics may be, for example, the frequency by which various grades are selected relative to their proportion within the military population,

<sup>34</sup> While such a panel does not, of course, ensure a better outcome for the defense it nonetheless has advantages. First, it may provide a diversity of opinion on the panel, which would encourage a fuller discussion of the evidence and thus more careful deliberation. Second, it lessens the likelihood that the members have personal contact with each other and with the convening authority, which may inhibit disagreement and which makes them more susceptible to command influence. Finally, such a panel looks more fair to the accused and to observers of the court-martial. When an accused feels he is being "railroaded" by a group of officers and enlisted soldiers close in the chain of command to the officer who referred the charges, his or her resentment at being treated unfairly may cause his or her behavior to become unpredictable and the relationship with his or her defense counsel may be strained. A similar perception by observers, moreover, does nothing to enhance the reputation of the military justice system among soldiers.

<sup>35</sup> The approach suggested below is not necessarily exhaustive in any sense. Because each case and each jurisdiction has its own unique characteristics, the approach required to uncover evidence of improper selection will vary and is limited only by the individual defense counsel's creativity and investigative abilities.

<sup>36</sup> A model selection process is described in Schwender, *One Potato, Two Potatoes . . . A Method to Select Court Members*, *The Army Lawyer*, May 1984, at 12.

<sup>37</sup> See *United States v. Greene*, 20 C.M.A. 232, 43 C.M.R. 72 (1970), in which a panel of high-ranking officers was held to be improperly selected based in part on a set of unusual circumstances surrounding the selection process.

<sup>38</sup> See *United States v. Cherry*, 14 M.J. 251 (C.M.A. 1982); *United States v. Crumb*, 10 M.J. 520 (A.C.M.R. 1980).

<sup>39</sup> See *supra* note 31.

<sup>40</sup> *United States v. Cherry*, 14 M.J. 251 (C.M.A. 1982).

<sup>41</sup> *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979); *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975); *United States v. Greene*, 20 C.M.A. 232, 43 C.M.R. 72 (1970).

<sup>42</sup> In *McClain*, the court recognized that "sometimes the probable impact of an act helps illuminate the intent of the act." 22 M.J. at 131 n.5. The emphasis in *McClain* on maintaining the appearance of integrity in the court member selection process makes such a replacement scheme seem at best questionable.

and the frequency by which commanders are selected versus staff officers.<sup>43</sup> It may also be appropriate to compare a group of officers with a high selection rate (for example, O-6s) with a group not selected (CW4s). By examining personnel files, one may demonstrate that the two groups are similar in respect to the characteristics called for in Article 25 and differ only in rank or the qualification to command. This indicates that the non-selected group was excluded because of a factor not found in Article 25.<sup>44</sup>

Statistical evidence can serve as a strong basis for arguing that an improper criteria such as senior rank was a determining factor, or that the convening authority was motivated by a purpose other than selecting an impartial fact finder. Such evidence may also establish the appearance of impropriety discussed in *McClain*. If the convening authority's proper concern is only to select members who will fairly and impartially hear the case, then the laws of probability indicate that over time a range of eligible soldiers of different ranks will be selected for court duty.<sup>45</sup> Regardless of whether a panel composed solely of senior officers and enlisted members may pass muster in some cases,<sup>46</sup> the consistent selection of such ranks over a long period of time appears improper. It appears at worst that the convening authority, by always appointing a select group of senior people who are relatively close to him in the chain of command, has sought to influence the results of trials in favor of the government. At best it appears only that the convening authority has ignored the criteria of Article 25 and substituted his own, more restrictive, standard.

#### Preserving the Issue for Appeal

The defense is not required to choose a court with members to preserve the issue of improper selection for appeal. The Court of Military Appeals in *McClain* expressly rejected application of waiver to the issue when the defense stated for the record that its choice of forum would have been different if the members had been selected properly.<sup>47</sup>

Thus defense counsel must clarify on the record, upon denial of any motion challenging the selection process, which forum it would choose if the court had been properly appointed.<sup>48</sup>

It is equally important to preserve an adequate factual basis for the issue. All the relevant documents for the entire period the unfair selection process has been in effect should be introduced. The statistical information discussed above should also be in the record, either by stipulation with the government or by testimony of individuals who maintain the records from which the information is taken. The defense may also seek to have the SJA and the convening authority testify on the motion. Because on this type of issue it is unlikely that a single fact will, in itself, be determinative, all aspects of the challenged process must be thoroughly documented. This will admittedly place a significant burden on the defense. If the unfair selection process remains in effect in subsequent cases, however, it should be easier to raise the motion with the information compiled in the first case.

#### Conclusion

A literal reading of Article 25 gives the convening authority broad discretion with a concurrent potential for abuse. The law recognizes that all soldiers are eligible for court duty, however, and prohibits the convening authority from selecting members based only on their rank or duty position or to achieve a particular result. The selection method must also be free from the appearance that it was designed to favor the government. Given the unlikelihood of obtaining direct evidence of a convening authority's improper motive, the defense must build a circumstantial case by creatively exposing every facet of the selection process to scrutiny. Aggressive litigation of this issue could lead to success at trial or on appeal and may at least encourage the convening authority to adopt a more moderate court member selection policy.

<sup>43</sup> While statistics alone have never been held sufficient to demonstrate an improper selection, the Court of Military Appeals has considered such evidence. See *United States v. Crawford*, 15 C.M.A. 31, 35 C.M.R. 3 (1964).

<sup>44</sup> Warrant officers may never be selected, for example, simply because they are not normally commanders. While the Army Court of Military Review has held that the responsibility to command indicates qualification as a court member, see *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985); *United States v. Carman*, 19 M.J. 932 (A.C.M.R. 1985), this is not an Article 25 criteria and cannot be used to justify exclusion of a class of otherwise eligible officers. The Court of Military Appeals has clearly held that while criteria such as rank and duty position may be considered to the extent that they reflect that an individual possesses the characteristics called for in Article 25(d)(2), they may not in themselves serve to justify selection or non-selection. As the court said in *Greene*: "Not a single condition is inserted [in Article 25(d)(2)] with regard to . . . rank or position within the military community." 20 C.M.A. at 238, 43 C.M.R. at 78. See also *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975).

<sup>45</sup> See *Hedges*, 29 C.M.R. at 461 (Latimer, J., concurring) ("any reader of the record would say that the law of probability did not dictate the choice").

<sup>46</sup> See *McClain*, 22 M.J. at 133 (Cox, J., concurring) ("Based on the statutory selection criteria, the best qualified members in some cases may well be senior officers and enlisted members.") (emphasis added).

<sup>47</sup> *Id.* at 126-28.

<sup>48</sup> In *McClain*, the defense counsel stated:

Solely because of your ruling, your Honor, we would elect to change to an officer panel. The accused would like to state specifically, for the record, that he would prefer a fair and properly selected enlisted panel, but in as much as that has not been provided; would at this time request an officer panel.

*Id.* at 127.

### Multiplicity: The Headache Continues

Trial defense counsel are urged to litigate the issue of multiplicity, as the appellate courts have recently begun restricting appellate defense counsel's ability to do so. The Air Force Court of Military Review in *United States v. Wheatcraft*<sup>1</sup> held that the issue of multiplicity for sentencing is waived on appeal if not raised at court-martial. The court relied on Rule for Courts-Martial 1005(f),<sup>2</sup> although that rule specifically addresses sentencing instructions and not multiplicity.

In another case, *United States v. Jones*,<sup>3</sup> the Court of Military Appeals, relying on *United States v. Holt*,<sup>4</sup> held that no appellate claim of multiplicity for findings will succeed unless it can be determined from the face of the challenged specifications whether they are multiplicitous. *Jones* requires, as a minimum, that trial defense counsel move to have the challenged specifications be made more specific.

The moral of these two cases is that it has become increasingly important, indeed dispositive, that multiplicity for findings and sentencing be litigated at the trial level.<sup>5</sup> Failure to do so may deny your client relief to which he or she is entitled. The good news is that, based on *Jones*, in arguing for multiplicity, defense counsel can rely on the *Baker*<sup>6</sup> test rather than the more restrictive *Blockburger*<sup>7</sup> test.<sup>8</sup> Captain John J. Ryan.

### The Military Instruction Course

When its name changed from the United States Army Retraining Brigade (USARB) to the United States Army Correctional Activity (USACA) in December 1982, the primary mission emphasis changed from retraining for return to duty to confinement. The USACA Commander has not allowed the concept of retraining for return to duty to die. The concept is alive and well at USACA and is currently referred to as the Military Instruction Course (M.I.C.).<sup>9</sup>

Army prisoners with sentences to confinement of four months to two years are confined at USACA. All are screened as potential "return to duty"<sup>10</sup> or "restoration to duty"<sup>11</sup> candidates through the USACA Return to Duty Program. The program consists of three phases of evaluation. Phase I is conducted while the prisoner is confined in

medium custody. It includes a comprehensive records review, evaluation by social workers, and a meeting with the USACA Assignment Board,<sup>12</sup> all of which generally occur during a prisoner's first ten weeks of confinement. The Assignment Board makes an initial determination of a prisoner's potential for return to duty. The performance of prisoners initially considered to have good potential for return to duty is closely monitored and evaluated by USACA cadre using various evaluation tools developed at USACA. Although a prisoner may fail to be targeted as a return to duty candidate at the Assignment Board stage, the prisoner may subsequently convince the USACA cadre of his or her potential and then be integrated into the Return to Duty Program.

Phase II evaluation is conducted while the prisoner is in minimum custody and generally requires a minimum of ninety days for completion. Prisoners who have completed confinement but served less than ninety days in minimum custody may voluntarily be assigned to the USACA holding platoon to permit completion of the evaluation process.

Minimum custody at USACA does not involve physical restraint, *i.e.*, there are no bars, wires, or guards, and evaluation focuses on a prisoner's ability to perform in a less restrictive environment. Favorable chain-of-command recommendations are required during Phase II for a prisoner to progress to Phase III. In the absence of favorable command recommendations and personal selection for participation in Phase III by the USACA Commander, the prisoner is ultimately processed for excess leave, discharged pursuant to court-martial sentence, or administratively separated on completion of the sentence to confinement.

If a prisoner's court-martial conviction becomes final, *i.e.*, appellate review is completed before the return to duty evaluation process is completed, the USACA Commander specifically considers whether return to duty or execution of the punitive discharge is appropriate when taking action pursuant to R.C.M. 1113(c)(1). If return to duty is considered appropriate, the commander may delay execution of the punitive discharge until completion of Phase III or he may direct execution of the punitive discharge and subsequently recommend restoration to duty by the Secretary of the Army. Restoration to duty is also possible if, after execution of a punitive discharge, a prisoner not previously

<sup>1</sup> 23 M.J. 687 (A.F.C.M.R. 1986).

<sup>2</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1005(f) [hereinafter R.C.M.].

<sup>3</sup> 23 M.J. 301 (C.M.A. 1987).

<sup>4</sup> 16 M.J. 393 (C.M.A. 1983).

<sup>5</sup> For a listing of multiplicity cases see Raezer, *Trial Counsel's Guide to Multiplicity*, The Army Lawyer, Apr. 1985, at 21.

<sup>6</sup> *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983).

<sup>7</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>8</sup> This refutes prior government claims to the contrary. See Cunningham, *The Blockburger Rule: A Trial by Battel*, The Army Lawyer, Jul. 1986, at 57.

<sup>9</sup> United States Army Correctional Activity, Policy Number ZX-10-86, USACA Restoration and Return to Duty (RTD) Procedures, 16 April 1986.

<sup>10</sup> Dep't of Army, Reg. No. 190-47, Military Police—United States Army Correctional System, para. 6-15, App. A (1 Oct. 1978) (C1, 1 Nov. 1980) (status resulting from suspension or remission of an approved punitive discharge or the absence of an adjudged and/or approved punitive discharge and no administrative discharge) [hereinafter AR 190-47].

<sup>11</sup> AR 190-47, para. 6-16, (Secretarial authorization for enlistment after completion of appellate review and execution of an affirmed punitive discharge).

<sup>12</sup> AR 190-47, para 6-4d (C1, 1980).

considered a return to duty candidate is favorably recommended by the chain-of-command.

The USACA Commander personally selects the return to duty candidates who will participate in the M.I.C., or Phase III of the program. Prisoners not selected undergo further evaluation until they are released on excess leave or are discharged. The sentence to confinement and forfeitures of a prisoner selected for M.I.C. is suspended and the former prisoner is then assigned to M.I.C. Currently, no one participates in M.I.C. while in a prisoner status.

The M.I.C. is a four week course of instruction administered by drill sergeants. The focus is on basic military skills and exacting discipline. The USACA Commander personally approves all candidates for graduation from M.I.C. If a candidate is approved for graduation, his or her punitive discharge and remaining unexecuted sentence are remitted. For those candidates previously restored to duty, action is taken to remit any unexecuted portion of the sentence. All M.I.C. graduates are immediately reassigned to regular units away from USACA. Choice of assignment is not accorded to graduates.

This program is unique to USACA. No such program exists at the United States Disciplinary Barracks (USDB) and USDB prisoners currently do not participate in the USACA program. The USACA program is highly selective and during fiscal year (FY) 1986 only five percent of all USACA prisoners were selected for participation in M.I.C. In FY 1986, however, only three candidates failed to graduate from the program. Therefore, a prisoner's chance for graduation, substantive sentence relief, and return to duty is great, once selected for the program.

Trial defense counsel should advise their clients bound for USACA of the existence of the M.I.C. program and its basic operation.<sup>13</sup> It is important that prisoners demonstrate on arrival at USACA that they are committed to returning to duty and that they make their commitment known to the USACA cadre. Therefore, it is essential that prisoners be properly counseled so they may make an informed decision considering both their own best interest and the fact that the odds against selection for the program are great. Captain Keith W. Sickendick.

#### SJA Delegation of Signature Authority

The Army Court of Military Review has recently decided a case strictly enforcing the staff judge advocate's duty to personally provide a written post-trial recommendation to the convening authority before action is taken on the record

of trial. In *United States v. Secor*,<sup>14</sup> the court determined that a post-trial recommendation signed by an individual other than, but "for" the staff judge advocate, was legally insufficient. Accordingly, a new review and action was ordered.

The *Secor* decision noted that nothing in the record indicated that the staff judge advocate was either absent or disqualified, or that the individual who signed the post-trial recommendation was serving or acting as the staff judge advocate. Article 60(d) of the Uniform Code of Military Justice requires the convening authority to obtain the written recommendation of the staff judge advocate.<sup>15</sup> Based on the individual's apparent lack of official authority, the Army court held that the post-trial recommendation did not meet the requirements of Article 60(d).<sup>16</sup>

For the trial defense counsel, the decision in *United States v. Secor* may have other applications. Before the convening authority can refer a case to a general court-martial, he or she must receive a written pretrial advice from the staff judge advocate.<sup>17</sup> Because the requirement for the staff judge advocate's personal written advice is the same under Article 34 (pretrial advice) as Article 60 (post-trial recommendation), the *Secor* holding is equally applicable when an individual uses the "for" signature block on behalf of the staff judge advocate on a pre-trial advice.<sup>18</sup> Captain William J. Kilgallin.

#### Synchronize Watches: Manual, Not Local, Time

Local rules that burden counsel in a manner not authorized by the Manual for Courts-Martial may be invalid. In a recent opinion, *United States v. Williams*,<sup>19</sup> the Court of Military Appeals reviewed a Rule of Court promulgated by the U.S. Army Trial Judiciary, Fifth Judicial Circuit, Europe. The court found that the Rule, which required written notice of motions served on opposing counsel at least five working days before trial, was in conflict with Mil. R. Evid 304(d)(2), which provides that motions to suppress evidence "shall be made by the defense prior to submission of a plea."<sup>20</sup> As the local rule carved out a period of time in which the Manual otherwise allowed defense to act, the court held the rule invalid.<sup>21</sup>

In *Williams*, appellant was charged with attempted robbery. He entered a plea of guilty to the lesser included offense of assault and battery. Prior to entering his plea, however, defense counsel moved in limine to suppress evidence of certain pretrial statements made by appellant. The military judge inquired whether trial defense counsel was aware of the five day notice requirement of the local Rules

<sup>13</sup> *United States v. Hannan*, 17 M.J. 115 (C.M.A. 1984).

<sup>14</sup> ACMR 8600240 (A.C.M.R. 30 Jan. 1987).

<sup>15</sup> Uniform Code of Military Justice art. 60(d), 10 U.S.C. § 860(d) (1982), [hereinafter UCMJ] states: "Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority . . . shall obtain and consider the written recommendation of the staff judge advocate or legal officer" (emphasis added).

<sup>16</sup> Delegation of signature authority to subordinates must not be prohibited by Army regulations or federal statutes. Dep't of Army, Reg. No. 340-15, Office Management—Preparing and Managing Correspondence, para. 9-1a (1 Mar. 1985).

<sup>17</sup> Article 34, UCMJ, states: Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate. . . . The convening authority may not refer a specification under a charge to a general court-martial unless he has been advised in writing by the staff judge advocate." (emphasis added). See *United States v. Murray*, 22 M.J. 700 (A.C.M.R. 1986) (pretrial advice required).

<sup>18</sup> R.C.M. 601(d)(2)(B) reinforces the language of Article 34, but also provides that the pretrial advice may be waived.

<sup>19</sup> 23 M.J. 362 (C.M.A. 1987).

<sup>20</sup> *Id.* at 366 (emphasis added).

<sup>21</sup> *Id.*

of Court.<sup>22</sup> The judge further inquired if trial defense counsel had "any good cause to show why . . . an exception [to the local Rules should be granted]."<sup>23</sup> Defense counsel restated his substantive motion,<sup>24</sup> but did not address the timeliness issue. He also did not articulate any reliance on the predominance of Manual provisions over locally promulgated rules. The motion was denied based on non-compliance with timeliness requirements of local rules.<sup>25</sup>

The issue presented in *Williams* was previously considered by the court in *United States v. Kelsen*.<sup>26</sup> The *Kelsen* court dealt with the validity of a Rule of Practice before Army Courts-Martial, which had been promulgated by the Secretary of the Army. The Rule reviewed was similar to that in the instant case. It required written notice of motion or other pleading to the trial counsel and the trial judge "as soon as practicable after service of charges."<sup>27</sup> While not a "bright line" like the instant five day requirement, the court nevertheless found that the Rule fettered the defense beyond the extent intended by the Manual.<sup>28</sup> Therefore, the Rule was held invalid.<sup>29</sup>

<sup>22</sup> *Id.* at 363.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The military judge also styled the defense counsel's noncompliance with local rules as a waiver. *Id.* at 365. *Cf.* Mil. R. Evid. 304(d)(2), which states that failure to move prior to plea constitutes a waiver of the objection.

<sup>26</sup> 3 M.J. 139 (C.M.A. 1977).

<sup>27</sup> *Id.* at 140.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 141. Counsel may also be interested in watching for *United States v. Webster*, petition granted, 23 M.J. 49 (C.M.A. 1986). In *Webster*, the trial judge denied a request for trial by military judge alone. R.C.M. 903(b) states that the accused may "defer requesting trial by military judge alone until any time prior to assembly." Accused made the request prior to assembly, although at a previous docketing call he had expressed a desire to be tried by members. The request was denied, apparently on a notion of untimeliness in that the forum change would inconvenience the already-notified members.

<sup>30</sup> The *Williams* holding does not mean that all local rules are invalid. *Williams*, 23 M.J. at 366.

<sup>31</sup> "However laudable [the objectives of local rules] may be, they do not permit overriding Rules prescribed by the President in the Manual for Courts-Martial." *Id.*

## Trial Judiciary Note

### Larceny, Forgery, and Multiplicity

Colonel Herbert Green

Military Judge, First Judicial Circuit, Fort Knox, Kentucky

In *United States v. Baker*,<sup>1</sup> the Court of Military Appeals attempted to bring some order to the chaos that was the law relating to multiplicity.<sup>2</sup> In doing so, it set out several rules for determining whether offenses were multiplicitous for findings. First, one must determine whether the charged offenses are based on one transaction, that is "a series of occurrences or an aggregate of acts which are

As all officers of the court, counsel have an obligation to effect the orderly administration of justice. Local rules of court often assist in this process by standardizing practice and providing guidance to counsel.<sup>30</sup> Trial defense and trial counsel alike must make every effort to comply with such rules. In fact, failure to comply may subject counsel to enforcement measures. At a minimum, repeated violations almost certainly will diminish a counsel's overall effectiveness. Trial defense counsel, however, must continue to keep one thing paramount: the effective representation of the accused. If faced with a situation that constitutes a local rule violation, but that is within the bounds of Manual provisions, counsel should press for application of the Manual provision, and should fully develop for the record the surrounding facts and circumstances. In particular, if local "time" is faster than Manual "time," counsel should not permit the more restrictive provision to operate to an accused's detriment.<sup>31</sup> Captain Melissa Wells-Petry.

logically related to a single course of criminal conduct."<sup>3</sup> Next, one must decide if the charges based on a single transaction constitute a multiplication of charges. A multiplication of charges occurs if: the charged offenses stand in the relationship of greater or lesser offenses; the charges are part of an indivisible crime; or the offenses "are different aspects of a continuous course of conduct prohibited by one

<sup>1</sup> 14 M.J. 361 (C.M.A. 1983).

<sup>2</sup> 14 M.J. at 372 (Cook, J. dissenting); see *id.* at 370-71 (Everett, C.J., concurring). Although Judge Cook was referring to problems concerning multiplicity for sentencing, his description could also apply to the findings stage of the trial. Apparently, Judge Cox is not as pessimistic as are his fellow judges. See *United States v. Mullins*, 20 M.J. 307, 308 (C.M.A. 1985).

<sup>3</sup> 14 M.J. at 366.

statutory provision."<sup>4</sup> A charged offense is a lesser included offense of another if the offense contains only elements of, but not all the elements of, another offense or where the offense, although containing elements different from those of another offense, is "fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial."<sup>5</sup> For sentencing purposes the court took an expansive view of multiplicity and determined that offenses may be multiplicitous even though they contain different elements.<sup>6</sup>

Even though it appears that *Baker* was intended to be the Court of Military Appeals' basic framework upon which to decide multiplicity issues, less than six months after it was decided, the court deemed that more guidance was necessary. In *United States v. Doss*,<sup>7</sup> the court opined that exigencies of proof will permit multiplicitous pleading. Once the exigencies are resolved, however, the multiplicitous charges must be removed from the case.<sup>8</sup> Thus, multiplicitous charges must be dismissed where they are based on inconsistent findings of fact or when the charges are identical. The court reiterated its holding in *Baker* that multiplicity for sentencing is viewed with leniency on behalf of the accused.<sup>9</sup>

As a result of *Baker and Doss*, it appears for findings purposes that the court is willing to permit the government to have substantial leeway in the charging process. Thus, unless charges are clearly multiplicitous under the guidelines set out by the court, the government likely will be permitted to have the charges it desires reach findings. With respect to sentencing, the rules are different. The liberality given the government on findings in effect shifts to the defense and there is an inclination to hold that charges are multiplicitous unless there is good reason that they should not be.<sup>10</sup>

Within this framework, the Court of Military Appeals has decided several larceny/forgery multiplicity cases since

*Baker and Doss*. In *United States v. Ward*,<sup>11</sup> the accused was charged, inter alia, with thirteen specifications of uttering worthless checks to the Fort Gordon Exchange and thirteen specifications of larceny from the Army and Air Force Exchange Service at Fort Gordon at the same time as the uttering of the checks. The Court stated that it "appears that each utterance was treated as the false pretense by which money or property was obtained"<sup>12</sup> from the exchange. Accordingly it held the charges were multiplicitous for findings purposes.<sup>13</sup> The court made no distinction between whether the appearance came from the specifications or from the evidence.<sup>14</sup> The significance of this distinction would subsequently become apparent.

*United States v. Holt*,<sup>15</sup> the accused was charged with several larcenies and the wrongful use of a false military identification card. The evidence established that the identification card was used to deceive cashiers at several post exchanges, thereby enabling the accused to accomplish the larcenies. The larceny specifications did not indicate that these offenses were accomplished by the use of the false identification card. On appeal, the accused claimed that the larceny and false identification card offenses were multiplicitous for findings. The court rejected this claim and held that "in testing for multiplicitousness we need not go beyond the language of the specifications on which the case is tried."<sup>16</sup> The proper remedy for the accused was to move at the trial to make the larceny specifications more definite so that they would "fairly embrace" the false identification card charges.<sup>17</sup> Because no motion had been made, relief at the appellate level was not granted.

In *United States v. Allen*,<sup>18</sup> decided the same day as *Holt*, demonstrates what the court means by the term "fairly embraced." Allen was charged with two specifications of larceny of Eastern Airline tickets and two worthless check offenses. The latter specifications indicated that the checks were written on the same dates as the larcenies, in the

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 368.

<sup>6</sup> The Manual for Courts-Martial adopts the different elements test as the determinant of sentencing multiplicity. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(c)(1)(C) [hereinafter R.C.M.]. The Court of Military Appeals has rejected this test. *United States v. Jones*, 23 M.J. 301 (C.M.A. 1987).

<sup>7</sup> 15 M.J. 409 (C.M.A. 1983).

<sup>8</sup> The exigencies may be removed in a number of ways. The accused may plead guilty to some of the charges, thereby obviating the need for multiple charges. Also, at the close of evidence the government may elect to proceed on charges based on one theory or the judge may compel the government to elect. A third method may be to instruct the members that they may not find guilt based on inconsistent findings of fact. Thus where the accused is charged with larceny and receiving stolen property, the members may be instructed that if they find the accused guilty of one offense they must acquit on the other. A fourth approach occurs when the judge sets aside a finding of guilty and dismisses the charge after the findings are announced. See, e.g., *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986); *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986).

<sup>9</sup> 15 M.J. at 413.

<sup>10</sup> In a general court-martial, a sentence to the maximum punishment or anything remotely approaching the maximum punishment is a rarity. This is the case even when there is great liberality in determining that offenses are multiplicitous for sentencing. Therefore, it is only the rare case where the determination of the maximum punishment has any effect on the trial. Accordingly, for practical reasons in most cases it makes little sense for the trial counsel to oppose defense requests that charges be held multiplicitous for sentencing purposes.

<sup>11</sup> 15 M.J. 377 (C.M.A. 1983).

<sup>12</sup> *Id.* (emphasis added). The military judge treated the offenses as multiplicitous for sentencing purposes.

<sup>13</sup> Interestingly, the court cited *United States v. Littlepage*, 10 C.M.A. 245, 27 C.M.R. 319 (1959) as its authority. In *Littlepage*, the accused was found guilty of larceny by check of \$30.00 and the dishonorable failure to maintain sufficient funds in his bank account to honor the check. The court held that the offenses were multiplicitous only for sentencing.

<sup>14</sup> The opinion is also silent on the nature of the plea.

<sup>15</sup> 16 M.J. 393 (C.M.A. 1983).

<sup>16</sup> *Id.* at 394.

<sup>17</sup> In determining whether to grant the motion, the trial judge considers the evidence. See *United States v. Baker*, 14 M.J. 361, 368 (C.M.A. 1983).

<sup>18</sup> 16 M.J. 395 (C.M.A. 1983).

same amounts, and for Eastern Airline tickets.<sup>19</sup> The court held that the specifications demonstrated that the larcenies were accomplished by the uttering of the worthless checks. Accordingly, the offenses were multiplicitious for findings.<sup>20</sup>

*United States v. Mullins*<sup>21</sup> reemphasized the holdings in *Holt* and *Allen* that the language of the specifications governs whether larceny and forgery specifications will be held multiplicitious for findings. In *Mullins*, forgery by uttering specifications referred to the same victim, date, and amount of money alleged in each companion larceny and attempted larceny specification. Accordingly, the specifications were multiplicitious.

*United States v. Jones*<sup>22</sup> is the court's most recent larceny forgery multiplicity decision. The accused was charged with conspiracy to commit larceny, larceny, and forgery by uttering a check. The larceny and forgery were alleged to have occurred at the same place and date.<sup>23</sup> Moreover, the conspiracy specification indicated a relationship between the larceny and forgery charges. Nevertheless, the court held that the language of the larceny and forgery specifications did not fairly embrace each other. Therefore, the defense claim that the offenses were multiplicitious was rejected. The court, citing *Holt*, stated that the proper defense course would have been a trial motion to make the larceny specifications more specific by showing that the larceny and forgery offenses were one.<sup>24</sup> Absent such a motion, the court would not grant relief.

Four years have passed since *Baker* launched the Court's most recent odyssey into multiplicity. With respect to larceny and forgery, several rules have emerged. First, it is the

language of the specifications claimed to be multiplicitious that determines if one offense is fairly embraced in another.<sup>25</sup> Second, the fact that a third specification indicates that the larceny and forgery specifications are fairly embraced within each other is immaterial.<sup>26</sup> Third, an appellate court will not look behind larceny and forgery specifications to the evidence to determine multiplicity.<sup>27</sup> Fourth, it is incumbent on the trial defense counsel to move either for dismissal of specifications based on multiplicity or for an amendment to a specification to establish that one offense is fairly embraced in another.<sup>28</sup>

The first three rules are essentially for appellate courts and as a whole they provide only minimal guidance to the trial participants.<sup>29</sup> Some matters are clear, however. At trial, the defense counsel should first make a motion to dismiss based on multiplicity. If that fails, he or she should move to amend the specifications to demonstrate that one offense is fairly embraced in the specification of another. In litigating these motions, the trial judge must consider all the facts and circumstances of the case. Thus, while an appellate court looks to the specifications to determine whether one is fairly embraced in another, the trial judge looks to the evidence. This is a significant difference and must be appreciated by the trial participants.

At least one matter remains unresolved. When a forgery by making occurs significantly earlier than the uttering of the document and the uttering is committed in order to accomplish a larceny, it is unclear whether the forgery by

<sup>19</sup> The military judge determined that the offenses were multiplicitious for sentencing.

<sup>20</sup> *Accord* *United States v. Kinney*, 22 M.J. 872 (A.C.M.R. 1986); *United States v. Gudel*, 17 M.J. 1075 (A.F.C.M.R. 1984). *But see* *United States v. Wood*, 19 M.J. 542 (A.C.M.R. 1984), *petition denied*, 21 M.J. 168 (C.M.A. 1985). For a very narrow interpretation of the term "fairly embraced," see *United States v. Caldwell*, 23 M.J. 748 (A.F.C.M.R. 1987).

<sup>21</sup> 20 M.J. 307 (C.M.A. 1985).

<sup>22</sup> 23 M.J. 301 (C.M.A. 1987).

<sup>23</sup> The opinion is not particularly well written and it is difficult to discern if any other significant similarities exist in the specifications. For example, the opinion purports to set out verbatim both the larceny and forgery specifications, but omits to set out the check and merely states that a photo copy of the check was set out in the forgery specifications. Therefore, the reader cannot tell if the amount of the check was the amount alleged in the larceny specification, nor can the reader determine if the accused was the payee of the check. The opinion also refers to the forgery as a bad check offense, a term more commonly applied to violations of Article 123a rather than Article 123. Uniform Code of Military Justice arts. 123, 123a, 10 U.S.C. §§ 823, 823a, (1982) [hereinafter UCMJ]. The court, however, reaffirmed *Baker*, notwithstanding the language in R.C.M. 1003(c)(1)(C).

<sup>24</sup> 23 M.J. at 303.

<sup>25</sup> *United States v. Jones*, 23 M.J. 301, 303 (C.M.A. 1987); *United States v. Allen*, 16 M.J. 395, 396 (C.M.A. 1983); *United States v. Holt*, 16 M.J. 393, 394 (C.M.A. 1983).

<sup>26</sup> *United States v. Jones*, 23 M.J. 301 (C.M.A. 1987).

<sup>27</sup> *Id.*; *United States v. Holt*, 16 M.J. 393 (C.M.A. 1983). This may not be the rule in cases involving offenses other than larceny and forgery. In *United States v. Burris*, 21 M.J. 82 (C.M.A. 1985), the court went behind the language of the specifications and looked at the evidence to determine that two documents alleged in separate specifications were falsely completed at the same time. Accordingly, it held that there had been an unreasonable multiplication of charges and consolidated the specifications. In *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984), the court also went behind the language of the specifications and determined from the evidence that the acts alleged in separate specifications of assault were in fact indivisible parts of the same incident. Accordingly the court consolidated the specifications. *See also* *United States v. Bostic*, 20 M.J. 562 (A.C.M.R. 1985).

In *United States v. Glover*, 16 M.J. 397 (C.M.A. 1983), however, the court held that even though the evidence established that the victim was held at knife point while she was raped and sodomized, the failure of the specifications to allege that the rape was committed by aggravated force required a holding that the rape and aggravated assault specifications were not multiplicitious.

In *Burris*, the alleged offenses were both violations of Article 107, UCMJ, and in *Morris*, both specifications alleged violations of Article 128. In *Glover* and in the larceny/forgery cases, the specifications alleged violations of different punitive articles. Therefore, the rule may be that when several violations of the same punitive article are alleged, it is proper to look at the evidence to determine multiplicity. When violations of different punitive articles are alleged, however, it is the wording of the specifications that determines multiplicity.

If this is the court's rationale, it has not been clearly articulated. Nor has the court explained why it should be significant in determining multiplicity. Until the court defines why in some cases the multiplicity decision is based on the evidence and in others it is based on the wording of the specifications, the multiplicity issue will continue to bedevil trial participants.

<sup>28</sup> *United States v. Jones*, 23 M.J. 301 (C.M.A. 1986); *United States v. Holt*, 16 M.J. 393 (C.M.A. 1983); *see, e.g., United States v. Gans*, 23 M.J. 540, 542 (A.C.M.R. 1986). *But see* *United States v. Burris*, 21 M.J. 82 (C.M.A. 1985); *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984), where it appears that motions to dismiss or consolidate were not made at the trial.

<sup>29</sup> For significant guidance, the trial judge must look to the rules set out in *Baker*, *Doss*, and the Manual for Courts-Martial (R.C.M. 307(c)(4)).

making and the larceny/uttering are multiplicitious.<sup>30</sup> In *Allen*, the specifications alleged making rather than uttering the checks. The court found this distinction to be meaningless. Because the checks were alleged to have been made on the same day as the larceny, there was no significant difference between making and uttering. When the interval is greater, a different result may be warranted.

The Army Court of Military Review has recently held that forgery by making a check and forgery by uttering the check that were separated in time by more than one month are not multiplicitious.<sup>31</sup> The decision is reasonable. If the offenses were multiplicitious, there would be little incentive for the accused to abandon his or her criminal conduct once the initial forgery was accomplished. Thus where the accused commits one forgery by making a document, has a

significant period of time to contemplate his or her misconduct, and then proceeds to utter the forged document, the accused has in fact committed discrete offenses for which a finding of multiplicity for findings or sentence is not warranted.

The issue of multiplicity in larceny and forgery cases is not simple. It is not that difficult, however, if all trial participants pay attention to some basic rules. The defense counsel must make motions to dismiss or to amend. The prosecution must use common sense in pleading to make the accused answer for what it is believed he or she has done instead of drafting pleadings that demonstrate an encyclopedic knowledge of military law. The trial judge must base his or her rulings on the evidence in light of the principles set out in *Baker* and *Doss*.

<sup>30</sup> The contemporaneous making and uttering are multiplicitious for findings. *United States v. Allen*, 16 M.J. 395 (C.M.A. 1983); *United States v. Lauderdale*, 19 M.J. 582 (N.M.C.M.R. 1984).

<sup>31</sup> *United States v. Mora*, 22 M.J. 719 (A.C.M.R. 1986).

## Government Appellate Division Note

### *United States v. Tipton: A Mare's Nest of Marital Communication Privilege*

Colonel Norman G. Cooper  
Chief, Government Appellate Division

*United States v. Tipton*<sup>1</sup> is an interesting and revealing opinion of the United States Court of Military Appeals. It adopts a narrow construction of Military Rule of Evidence 504(b) by holding that admission of letters from an accused showing him to be less a model spouse than he claimed in his unsworn statement resulted in reversible error.

Chief Judge Everett's opinion rigidly applies Military Rule of Evidence 504(b),<sup>2</sup> dealing with the marital communication privilege, to presentencing. *Tipton* requires that a military judge limit any inquiry as to the application of the privilege to whether there is a legally recognized separation at the time of the communication, and not otherwise be concerned with the true state of the marriage. Thus, no matter how disharmonious or nonexistent a marital relationship may be when one spouse privately communicates with the other, that communication is protected providing it occurs in the absence of any de jure—as opposed to de facto—separation. The rationale for such an unbending approach to the admission of evidence even when an accused puts forth a belief that he was a "legally single person"<sup>3</sup> at the time of the communication, rests in establishing "certainty and stability" for military justice, a criminal law

system involving numbers of non-lawyers in its administrative process.<sup>4</sup> To understand how a rule of evidence designed to preserve the institution of marriage was applied to a spouse who believed no marriage existed at the time of his communication, it is necessary to examine the full circumstances of *Tipton*.

Machinist's Mate Second Class Tipton was convicted by a Navy general court-martial of sundry offenses based upon his claims for dependency benefits deriving from a purported marriage to one Shirley Heckard. During its case, the government called Lani Mae Tipton to testify that she and sailor Tipton had married in 1977 and never divorced, in spite of Tipton's providing divorce documents to the Navy in connection with his claims of marriage to Shirley Heckard. (It appears that Tipton used an altered 1976 divorce decree involving his first wife, Mary Julita Tipton, to establish the bona fides of his divorce of Lani Mae in 1978.<sup>5</sup>) The government then offered, without success, handwritten letters from Tipton to Lani Mae, sent to her in 1982, a considerable time after their supposed divorce. The case went to findings with no evidence presented by the defense, and Tipton was convicted.

<sup>1</sup> 23 M.J. 338 (C.M.A. 1987).

<sup>2</sup> Military Rule of Evidence 504(b) provides:

- (1) *General rule of privilege.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.
- (2) *Definition.* A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

<sup>3</sup> *Tipton*, 23 M.J. at 340.

<sup>4</sup> *Id.* at 343.

<sup>5</sup> *Id.* at 339-40.

Prior to sentencing, Tipton made an unsworn statement in which he asserted that he had received a copy of a divorce decree in 1979 and therefore believed himself available to pursue marriage with Shirley Heckard, thereby creating dependency status for her and her three children. He further advised the general court-martial that he was in the process of obtaining a "genuine" divorce that would allow him to "remarry" his present family.<sup>6</sup> The government reoffered Tipton's letters, asserting waiver of any marital communications privilege based upon his unsworn statement. Over defense objection, the military judge ruled that the public policy behind the privilege had been undermined and Tipton's unsworn statement constituted a waiver of that privilege. The Navy-Marine Corps Court of Military Review sustained this ruling, but the Court of Military Appeals found otherwise, holding that the military judge erred to Tipton's prejudice in admitting the letters.

Recognizing that there is some support in federal cases for not applying the marital privilege for confidential communication in the absence of a real marital relationship,<sup>7</sup> Chief Judge Everett drew a distinction between an appellate court applying the Federal Rules of Evidence and one addressing the Military Rules of Evidence. The Federal Rules, of course, are the genesis of the Military Rules and the latter largely parallel their provisions.<sup>8</sup> Because the Federal Rules do not codify with specificity the privilege, however, they are interpreted with a view to common law policies behind the privilege and whether its invocation makes sense. The Military Rules, on the other hand, have specific language and, in the case of Military Rule of Evidence 504, the language speaks to a marital relationship wherein a confidential communication is made when the spouses are not legally separated. Thus, Chief Judge Everett concluded that so long as a couple is not legally separated, confidential communications are forever protected under the privilege.<sup>9</sup>

Chief Judge Everett also addressed the fact that Tipton's letters were offered during presentencing procedures, but did not find that any relaxation of rules of evidence regarding rebuttal evidence then<sup>10</sup> affects the availability of the privilege. Finally, he took up the proposition that Tipton's belief as to his marital status, namely that he was divorced

from Lani Mae at the time of his letters to her, belies any expectation of confidentiality in them. The Chief Judge pointed out that there was no exception under Military Rule of Evidence 504(c) that recognizes such,<sup>11</sup> and further that the privilege would apparently apply to a common law marriage even if a party to that arrangement was unaware of the existence of such a relationship.<sup>12</sup> To nail down the exclusion of the Lani Mae letters as presentencing rebuttal evidence, Chief Judge Everett observed first that the government was inconsistent in convicting Tipton based on his marriage to her, then claiming he was not entitled to a marital privilege of confidentiality. The Chief Judge then drove his last nail by finding that the letters did not really rebut Tipton, in that excerpts support the latter's belief that he was, in fact, divorced from Lani Mae.<sup>13</sup> Thus, in spite of the value of the letters in demonstrating that sailor Tipton was not a model of marital fidelity in his relationship with Shirley Heckard, the letters did not conform to the prosecution's purpose in rebutting Tipton's unsworn statement as to a good-faith belief in the validity of his legal marriage to Shirley Heckard. Query, if trial counsel had offered the letters specifically to show that Tipton was not the good husband and moral example he claimed,<sup>14</sup> but rather a wayward lothario seeking to rekindle a sexual relationship with Lani Mae while he lived with Shirley Heckard, would a different result obtain?

It is difficult to quarrel with Chief Judge Everett's conclusion that the military judge abused his discretion in admitting Tipton's correspondence with Lani Mae, because the letters were not true rebuttal of Tipton's assertion that he believed he was, in fact, divorced from her. Nonetheless, it would seem that at presentencing the letters would have been helpful in evaluating Tipton's true character in light of his self-serving unsworn statement. Indeed, Chief Judge Everett observed that an accused "is not entitled to immunity from the Government's introduction of unflattering evidence—especially during sentencing."<sup>15</sup> Nevertheless, the Chief Judge found Tipton's letters inadmissible under the rebuttal theory for which they were offered. Having denied the Navy an evidentiary billet for Tipton's billets-doux,

<sup>6</sup> *Id.* at 340-41.

<sup>7</sup> Chief Judge Everett quotes extensively from *United States v. Byrd*, 750 F.2d 585 (7th Cir. 1984), a case which examines the purpose of the marital communications privilege. That case refused to apply the privilege to permanently separated couples. Chief Judge Everett attempts to distinguish Tipton's letters as reflecting a reconciliatory situation. Perhaps a more realistic view would be that Tipton was reluctant to relinquish a sexual as opposed to marital relationship, inasmuch as he suggested the exchange of nude pictures and, even in Chief Judge Everett's eyes, "appeared preoccupied with resuming sexual relations with Lani Mae." *Tipton*, 23 M.J. at 345 (The letters themselves are not appended to the opinion, hence those seeking insights into the essence of Tipton's marital communications must rely upon Chief Judge Everett's ecdysiastic observations as to their contents.)

<sup>8</sup> See Chief Judge Everett's Foreword to S. Saltzberg, L. Schinasi & D. Schueter, *Military Rules of Evidence Manual* vii (2d ed. 1986). Chief Judge Everett observes that the Military Rules go further than the Federal Rules in having specific provisions pertaining to husband-wife and other privileges.

<sup>9</sup> *Tipton*, 23 M.J. at 344.

<sup>10</sup> *United States v. Strong*, 17 M.J. 263 (C.M.A. 1984) holds that a military judge has discretion to permit questions about an accused's misconduct in rebuttal of the latter's presentation of good conduct even when the document upon which the misconduct is recorded is inadmissible (It should be noted that Chief Judge Everett dissented in *Strong*, finding that the accused had not opened the door to this specific evidence of misconduct, namely nonjudicial punishment.)

<sup>11</sup> In *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985), the Army Court of Military Review found that joint criminal venture marital communications were not specified as exceptions under Military Rule of Evidence 504(c)(2), but federal cases adopted a common law exception, and applied a joint participant exception to the spousal privilege of Rule 504(b). This contrasts sharply with Chief Judge Everett's approach in looking at the literal language of Rule 504 as both the beginning and end of the inquiry.

<sup>12</sup> *Tipton*, 23 M.J. at 344.

<sup>13</sup> *Id.* at 345.

<sup>14</sup> In his unsworn statement, sailor Tipton not only portrayed himself as a loving husband but also as one teaching children "the proper codes of life and honesty through example. For this reason, I have tried to the best of my ability to live a life as honest and responsible as I would want them to." *Id.* at 340.

<sup>15</sup> *Id.* at 345.

Chief Judge Everett hammers home his message by directing reassessment of a sentence<sup>16</sup> he characterizes as not "harsh."<sup>17</sup> Regardless of the result, one can only admire

the Chief Judge's legal legerdemain in getting there; however, *apices juris non sunt jura*.<sup>18</sup>

<sup>16</sup> Sailor Tipton received a bad conduct discharge, confinement for one year, total forfeitures, and reduction to the grade of E-1 for false official statement, larceny, a false claim and nineteen instances of falsely obtaining various dependency benefits. *Id.* at 339.

<sup>17</sup> *Id.* at 345.

<sup>18</sup> "Legal principles must not be carried to their extreme consequences, without regard for equity and good sense." Black's Law Dictionary 87 (5th ed. 1979).

## **Trial Defense Service Note**

### **Will the Suspect Please Speak Into the Microphone?**

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Many court-martial convictions are based in large part upon confessions or admissions obtained by the military police or the Criminal Investigation Division (CID). These confessions or admissions appear in court, at best, as written statements explained by the recollections of the participants, and at worst, as simply recollections. These recollections often create inaccurate, incomplete, and conflicting accounts, which in turn lead to disputes regarding rights warnings, waiver, voluntariness, and the contents of the interview.<sup>2</sup> These disputes can, in large part, be eliminated by the objective record of a tape recording of the entire interview, including rights warnings. More importantly, a tape recording will provide the court-martial with a much better opportunity to determine the truth. Consistent with our search for the truth, the following rule is proposed:

#### **Rule. Tape Recording Suspect Interviews.**

(a) All interviews of suspects by members of the military police or the Criminal Investigation Division,<sup>3</sup> including rights advisement and waiver of rights, shall be tape recorded, unless there exist exigent circumstances which would prevent recording. Such recordings will be preserved for trial.

(b) If an accused makes a timely motion to suppress or an objection based upon a violation of (a) above, and

the accused presents a plausible version of what happened during the interview which would, if true, entitle him to suppression of the statement, the entire statement shall be suppressed.

(c) If an accused makes a timely motion to suppress or an objection based upon a violation of (a) above, and the accused disputes the factual content of particular statements made during the interview, those statements shall be suppressed.

(d) When a statement obtained in violation of (a) above is considered for any purpose, the court shall give weight to the accused's version in any factual dispute.

(e) When the government demonstrates that the failure to tape record a suspect interview was in good faith,<sup>4</sup> the sanctions of (b), (c) and (d) above will not apply.

(f) This rule does not prohibit the use of the statement, or any part thereof, to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

The proposed rule will aid the courts in accurately determining whether there has been compliance with the

<sup>1</sup> The authors extend thanks to Captain Peter M. Cardillo, Defense Appellate Division, for his research assistance.

<sup>2</sup> From 1979 to 1984, the Courts of Military Review and the Court of Military Appeals decided at least forty reported cases regarding the issue of voluntariness of confessions. West's *Military Justice Digest* (Jan. 1985), key No. 1116. "In most confession cases that have reached the United States Supreme Court, the actual events that occurred in the interrogation room have been disputed. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 898 n.192 (1979)." *Stephan v. State*, 711 P.2d 1156, 1161 n.15 (Alaska 1985).

<sup>3</sup> The proposed rule is limited to military police and CID personnel because the authors believe it is impractical to require other military personnel to record interviews.

<sup>4</sup> Once there is a rule requiring tape recording, lack of knowledge of a duty to tape record should not be considered good faith.

warning and waiver requirements of Article 31<sup>5</sup> and *Miranda v. Arizona*;<sup>6</sup> aid the courts in accurately determining the contents of an admission or confession;<sup>7</sup> save the government time, effort, and expense;<sup>8</sup> allow statements to be redacted prior to trial so as not to prejudice the members;<sup>9</sup> and aid in effective interviewing of suspects.<sup>10</sup>

The first two advantages are by far the most important.<sup>11</sup> They demonstrate that tape recording creates truth where there was uncertainty by replacing the uncertain medium of biased<sup>12</sup> human perception with the objective record of a tape recorder. All evidence regarding rights warnings, waiver, subsequent invocation or lack thereof, coercion, promises, contents of statements, etc., will be accurately recorded, thus providing a court with a complete record for

dispute resolution. Without question, the reliability and credibility of a confession or admission are better judged by listening to a tape than by listening to the recollections of participants.<sup>13</sup> This accuracy is especially important in the case of a suspect interview because an objective electronic recording best protects a suspect's constitutional and statutory rights. Clearly, a tape recording is a substantial advantage in a court's search for truth.<sup>14</sup>

As with any rule, a rule requiring suspect interviews to be tape recorded has potential disadvantages. For example, such a rule could, arguably: "frighten the suspect and chill

<sup>5</sup> Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ]. Article 31 provides:

- (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
- (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
- (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
- (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial

<sup>6</sup> 348 U.S. 436 (1966). See *Stephan*, 711 P.2d at 1161; *In re S.B.*, 614 P.2d 786, 790 n.9 (Alaska 1980) ("It will be a great aid to the trial courts' determinations and our own review of the record if an electronic record of the police interview with a defendant is available from which the circumstances of a confession or other waiver of *Miranda* rights may be ascertained."); Unif. R. Crim. P. 243, commentary at 57-58 (1974) ("This [rule] will aid the courts in accurately determining whether there has been compliance with the warning and waiver requirements and to accurately determine the contents of an admission or confession. Sound recordings appear to be the most effective way for the prosecution to meet the 'heavy burden' of demonstrating a knowing and intelligent waiver imposed upon it by *Miranda* . . ."), quoted in *State v. Harris*, 678 P.2d 397, 410 (Alaska Ct. App. 1984) (Singleton, J., concurring and dissenting), rev'd, 711 P.2d 1156 (Alaska 1985).

<sup>7</sup> Kamisar, *Forward: Brewer v. Williams—A Hard Look at a Discomfitting Record*, 66 Geo. L.J. 209, 233-43 (1977).

<sup>8</sup> Tape recording will eliminate most disputes concerning the failure to read rights, the assertion of rights and the contents of a statement. See Kamisar, *supra* note 7, at 238 ("In all likelihood the use of a recording device, a tiny administrative and financial burden, would have spared the state the need to contest the admissibility of Williams' disclosures in five courts for eight years."); *Stephan*, 711 P.2d at 1162 (With a complete tape recording "less time, money and resources would have been consumed in resolving the disputes that arose over the events that occurred during the interrogations.")

<sup>9</sup> Thorne, *Video Tapes and the Law—An Update*, *The Army Lawyer*, Mar. 1977, at 7, 10.

10

C.E. O'Hara, *Fundamentals of Criminal Investigation* 154 (4th ed. 1976) recommends that "the room set apart for interrogations or for interviews in the offices of the law enforcement agency should be equipped with a permanent recording installation," pointing out that there may be several purposes in recording an interrogation other than offering it in evidence: if a suspect contradicts himself or falls into inconsistencies, by playing the interrogation back to him "he may be brought to appreciate the futility of deception," *id.* at 155; if a suspect implicates associates or accomplices, "the record can later be played for the associates for the purposes of inducing them to confess," *id.* at 156; if the interrogator is unable to spot weaknesses in the suspect's story or if the interrogation is interrupted, the officer can listen to the tape, "analyze it for consistency and credibility," and, "after determining the weak points, he can then plan the strategy and tactics to be employed in the next interrogation session." *Id.*

Kamisar, *supra* note 7, at 238 n.124.

<sup>11</sup> The Supreme Court has employed tape recordings to determine voluntariness. See, e.g., *California v. Prysock*, 453 U.S. 355 (1981).

12

It is not because a police officer is more dishonest than the rest of us that we should demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be "a judge of his own cause."

Kamisar, *Supra* note 7, at 242-43 (footnote omitted).

<sup>13</sup> See *id.* at 237 (quoting Solicitor General Archibald Cox from his Brief for the United States at 8, *Massiah v. United States*, 377 U.S. 201 (1964), which argued for the admissibility of a tape recording) ("[the recording of such conversations] safeguards defendants from distorted testimony and aids the administration of justice. . . . Even slight nuances in describing a conversation may be of crucial importance. . . . Surely, it is preferable that these crucial facts be established by a recording of the conversation itself.") and at 239 (quoting C.E. O'Hara, *Fundamentals of Criminal Investigation* 154 (4th ed. 1976), "Obviously, the best evidence of an interview is the recorded voice. The words themselves are there; the tones and inflection provide the true meaning. . . .")

<sup>14</sup> If the advantage of accuracy is not clearly substantial based on one's own experiences in court or in life, a reading of Kamisar's article would be worthwhile. Briefly, Kamisar reviewed the records and briefs in *Brewer v. Williams*, 430 U.S. 387 (1977). In *Williams*, the Supreme Court reversed a conviction and based its holding on the contents of a conversation between a police officer and Williams in a police car (the "Christian Burial Speech"). After reading Kamisar's article, one is convinced that the Supreme Court, as well as the other courts that heard the *Williams* case, had a perception of the conversation that may indeed have been far from reality. Therefore, one also concurs in Kamisar's critiques that "the various opinions in *Williams* totter on an incomplete, contradictory, and recalcitrant record," that the "Supreme Court—and all our courts—deserve better and should demand more," and that "any trial of the issue of waiver, no less than that of coercion—waged by the crude, clumsy method of examination, cross-examination, and redirect—is almost bound to be unsatisfactory." Kamisar, *supra* note 7, at 233 and 234-35 (footnotes omitted). More significantly, none of these critiques would be applicable had there been a tape recording of the conversation. In other words, had there been a tape recording, *Williams* would have dealt with truth, not speculation.

any willingness he might have to confess;<sup>15</sup> be too expensive;<sup>16</sup> and require qualified operators and chain-of-custody procedures so as to ensure the accuracy and reliability of the tape.<sup>17</sup> The only potential disadvantage that needs comment is the first.

The fear that a suspect may not be willing to talk does not override the substantial advantages to tape recording. First, there will be no such effect if the suspect is not informed that the interview will be recorded. Along this line, there is no constitutional duty to inform a suspect that his or her statements are being recorded (although the Army has imposed such a duty by regulation).<sup>18</sup> Second, even if

the suspect is informed, the chilling effect would probably be minor.<sup>19</sup> In any case, the issue of whether to put a suspect on notice that the interview is being tape recorded is secondary to the necessity to tape interviews. The interest in tape recording suspect interviews clearly outweighs both the speculative interest in notice<sup>20</sup> and any potential loss of confessions if notice is required.<sup>21</sup> The advantages of tape recording cited above thus outweigh any arguable disadvantages.

Requiring suspect interviews to be tape recorded is neither novel nor unsupported.<sup>22</sup> It is required by the National Conference of Commissioners on Uniform State

<sup>15</sup> *Harris*, 678 P.2d at 412 (Singleton, J., concurring and dissenting); see also *Kamisar*, *supra* note 7, at 237 n.122.

<sup>16</sup> Most military police stations and CID offices probably already have tape recording capability. See *Harris*, 678 P.2d at 412 (Singleton, J., concurring and dissenting) (The police contend that a requirement that confessions be recorded "would require wasting cassettes since it is never clear when interviewing a witness that he will confess. I do not think this argument requires rebuttal. See Model Code of Pre-Arrest Procedure § 130.4 commentary at 342-43.").

<sup>17</sup> Present procedures regarding other tangible evidence can easily be adopted. CID Pam. No. 195-6, Criminal Investigation Evidence Procedures (9 June 1979); see *Kamisar*, *supra* note 7, at 240:

True, a recording can be tampered with, but "it is doubtful that many officers would dare tamper with [such] physical evidence [and in any event] it could be required that the record be [promptly] deposited with the court under seal." Of course, the defendant would have the right to cross-examine the officer testifying to its authenticity. "The fact that it is conceivable that an agent may perjure himself no more makes a recording inherently unreliable and inadmissible than any other evidence which likewise may be fabricated." (footnotes omitted.)

<sup>18</sup> See *Kamisar*, *supra* note 7, at 237 n.122 (quoting the Model Code of Pre-Arrest Procedure § 130.4(2), commentary at 349 (1975)); see also *United States v. Williams*, 737 F.2d 594, 606 (7th Cir. 1984) (citing *Lopez v. United States*, 373 U.S. 427 (1963)); *United States v. Miriani*, 422 F.2d 150, 154 (6th Cir. 1970); *Stephen*, 711 P.2d at 1162 nn.20-21. It should be noted that existing Military Police and CID regulations authorize sound recordings of suspect interviews provided the investigator gives notice to the suspect that the interview is being taped. Dep't of Army, Reg. No. 190-30, Military Police—Military Police Investigations, para. 3-24 (1 June 1978); Dep't of Army, Reg. No. 190-53, Military Police—Interception of Wire and Oral Communications for Law Enforcement Purposes, para. 1-2c(9) (1 Nov. 1978) [hereinafter AR 190-53]; CID Reg. No. 195-1, Criminal Investigations—CID Operations, para. 5-7d(2) (1 Nov. 1986). The absence of an authorization to tape without "notice" suggests that investigators would have to follow the tortuous procedures outlined for interception of oral communications, if no notice is given. See AR 190-53, chapter 2. Present regulations, by requiring notice and by making it extremely difficult to tape without notice, may currently discourage investigators from tape recording.

<sup>19</sup> *Videotaping of Defendants Saves Time, Money*, Justice Assistance News, Aug. 1983, at 8, col. 2 (At least one study indicates "only 10 of 3,000 people have refused to be taped while making a statement.") Taken from Captain R. Bursell, *Videotape Evidence: Seeing is Believing* (April 1984) (paper presented to TJAGSA).

<sup>20</sup> See *Kamisar*, *supra* note 7, at 238 n.122 ("If the price for a system requiring sound recordings of the warnings, and waivers of other responses, and any subsequent conversation is that the suspect need not be told that a sound recording is being made, I would be quite willing to pay it.")

<sup>21</sup> The choice between a confession or tape recording seems to be a choice between a confession or the complete truth. With this in mind, the choice is clear. "Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . The United States wins its point whenever justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (footnote omitted); see also *Stephen*, 711 P.2d at 1162 ("Given the fact that an accused has a constitutional right to remain silent, under both state and federal constitutions, and that he must be clearly warned of that right prior to any custodial interrogation, [the argument that the rule might have a chilling effect] is not persuasive." (footnote omitted)).

<sup>22</sup> See *Kamisar*, *supra* note 7, at 233-43, 238 n.122 (After analyzing the records and briefs in *Williams*, *Kamisar* concluded that "wherever feasible all conversation between the police and a person in custody [should] be tape recorded."), and authorities cited therein; 29 Am. Jur. 2d *Evidence* § 534 (1967) ("[I]t has been said that a sound recording of a confession is of more value to the court than one in writing, especially where an issue has been raised as to whether it was voluntary."); *Stephan*, 711 P.2d at 1158 n. 2 ("Ragan v. State, 642 S.W.2d 489, 490 (Tex. Crim. App. 1982) (Tex. Code Crim. Proc. Ann. art. 38.22 § 3 (Vernon 1979) requiring that oral statements of the accused during custodial interrogations must be recorded in order to be admissible"); *Hendricks v. Swenson*, 456 F.2d 503, 506-07 (8th Cir. 1972) (In deciding that admission of a video taped confession did not violate an accused's constitutional rights, the court recommended its use in all confessions stating: "For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth."). Video taping suspect interviews would obviously be preferable, but in the interest of economy and immediate practicality, sound recordings, at least, should be required.

Laws,<sup>23</sup> the American Law Institute,<sup>24</sup> and the Alaska Supreme Court.<sup>25</sup> Moreover, it is consistent with liberal military discovery practice<sup>26</sup> and the apparent policy behind Military Rule of Evidence 1002 (Best Evidence Rule, requiring an original writing or recording), Rule 304(h)(2) (allowing an accused to introduce the remaining portion of a confession or statement), and Rule 106 (allowing an adverse party to require the proponent of a statement to introduce other parts of the statement that should be considered with it). Significantly, the authors have found no authority that advises against a requirement to record suspect interviews.

An argument can even be made that tape recording of suspect interviews is required by the due process clause of the United States Constitution.<sup>27</sup> This argument would be based on extending the government's duty to disclose information to the defense to a duty to take affirmative steps to preserve evidence on behalf of an accused.<sup>28</sup> In light of the unanimous Supreme Court decision in *California v. Trombetta*,<sup>29</sup> however, it seems unlikely that the Supreme Court would find that the failure to tape record violates the due process clause.<sup>30</sup> In *Trombetta*, the Supreme Court held that the due process clause does not require that law enforcement agencies take affirmative steps to preserve

breath samples of suspected drunk drivers for testing by the defense in order for the results of breath analysis (Intoxilyzer) tests to be admissible. Specifically, the Supreme Court said:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet the standard of constitutional materiality . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.<sup>31</sup>

The Court found that neither of these conditions was met by finding "that the chances were extremely low that preserved samples would have been exculpatory" and that the defendant had alternate means of testing the reliability of the Intoxilyzer result.<sup>32</sup> Similarly, the Court might not find a due process violation in a failure to tape record because an accused will, arguably, have a comparable means to test reliability (e.g., cross-examination).<sup>33</sup>

The failure to preserve breath samples in *Trombetta* is, however, distinguishable from the failure to tape record a

<sup>23</sup> Uniform Rule of Criminal Procedure 243 (1974) states in part: "The information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device whenever feasible and in any case where questioning occurs at a place of detention" quoted in *Harris*, 678 P.2d at 403. n.4.

<sup>24</sup> The Model Code of Pre-Arrest Procedure, § 130.4 at 37 (1975) states in part:

(1) [L]aw enforcement agencies shall make the full . . . sound records required by Subsection . . . (3) . . .

(3) *Sound Recordings.* The regulations relating to sound recordings shall establish procedures to provide a sound recording of

(a) the warning to arrested persons pursuant to Subsection 130.1(2);

(b) the warning required by, and any waiver of the right to counsel pursuant to, Section 140.8; and

(c) any questioning of the arrested person and any statement he makes in response thereto.

Such recording shall include an indication of the time of the beginning and ending thereof. The arrested person shall be informed that the sound recording required hereby is being made and the statement so informing him shall be included in the sound recording. The station officer shall be responsible for insuring that such a sound recording is made.

Quoted in *Harris*, 678 P.2d at 403 n.4.

<sup>25</sup> *Stephan*, 711 P.2d at 1162-63:

[C]ustodial interrogations in a place of detention, including the giving of the accused's *Miranda* rights, must be electronically recorded. To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview. Thus, explanations should be given at the beginning, the end and before and after any interruptions in the recording, so that courts are not left to speculate about what took place. . . . The failure to electronically record an entire custodial interrogation will, therefore, be considered a violation of the rule, and subject to exclusion, *only if the failure is unexcused*. Acceptable excuses might include an unavoidable power or equipment failure, or a situation where the suspect refused to answer any questions if the conservation is being recorded. . . . Any time a full recording is not made, however, the state must persuade the trial court by a preponderance of the evidence, that recording was not feasible under the circumstances, and in such cases the failure to record should be viewed with distrust. (footnotes omitted).

<sup>26</sup> See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 analysis at A21-29 (Broad discovery "leads to better informed judgments about the merits of the case and . . . contributes substantially to the truth finding process. . . .").

<sup>27</sup> See *Harris*, 617 P.2d at 413 (Singleton J., concurring and dissenting) ("[T]he Alaska Supreme Court . . . adopted Uniform Rule of Criminal Procedure 243 [see *supra* note 23] as a rule of decision in this state, based upon an interpretation of the due process clause of the state and federal constitutions." But see *Stephan*, 711 P.2d at 1160 (Alaska Supreme Court's tape recording requirement is based entirely on the Alaska Constitution).

<sup>28</sup> See *California v. Trombetta*, 467 U.S. 479 (1984); See also, *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975) (FBI has a duty to preserve witness interview notes); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971) (government has an affirmative duty to preserve tape recordings of alleged drug transaction involving the defendant).

<sup>29</sup> 467 U.S. 479 (1984).

<sup>30</sup> *Stephan*, 711 P.2d at 1160 ("We accept the state's argument that custodial interrogations need not be recorded to satisfy the due process requirements of the United States Constitution, because a recording does not meet the standard of constitutional materiality recently enunciated by the United States Supreme Court in *California v. Trombetta*. . . .").

<sup>31</sup> *Trombett*, 467 U.S. at 488-89. (footnote and citation omitted).

<sup>32</sup> *Id.* at 489-90.

<sup>33</sup> Given the fact that the police officer is usually believed, it is questionable whether cross-examination of the police officer would yield evidence comparable to that of a tape recorder. See *Kamisar*, *supra* note 7, at 234 n.103 ("*In re Groban*, 352 U.S. 330, 340 (1957) (Black, J., dissenting) (one who has been privately interrogated has little hope of challenging the testimony of the interrogator as to what was said and done)."); *Stephan*, 711 P.2d at 1158 n.6 ("*In Harris v. State*, 678 P.2d 397 (Alaska App. 1984), Judge Singleton stated: 'The importance of . . . a tape recording [in cases such as this] lies in the fact that the trial courts and appellate courts tend to trust police officers' recollections of what occurred at the expense of the criminal defendant's account. Thus, in the absence of a tape recording, the prosecuting authorities invariably win the swearing contest.' 678 P.2d at 414 (Singleton, J., concurring and dissenting). While Judge Singleton's observation may be an overstatement in absolute terms, it is probably generally valid.").

suspect interview. First, the circumstances surrounding a suspect interview "might be expected to play a significant role in the suspect's defense."<sup>34</sup> Second, the results of an Intoxilyzer are far more reliable than are biased human recollections. This is significant because the Supreme Court appears to have relied heavily on the reliability of the Intoxilyzer.<sup>35</sup> Third, while the defendant in *Trombetta* could not explain the exculpatory nature of the lost evidence, in the case of a failure to tape record, the accused will be able to do so.<sup>36</sup> Fourth, while breath samples themselves have no evidentiary value and merely provide "raw data to the Intoxilyzer,"<sup>37</sup> all statements by a suspect during an interview, arguably, have evidentiary value and are not merely raw data for a final written or oral confession or admission. Finally, independent constitutional rights are at issue in the case of a suspect interview (e.g., right to counsel and right against self-incrimination).

While these factors may not be sufficient to establish a constitutional due process violation,<sup>38</sup> an argument can be made that tape recording of suspect interviews is required by military due process or Article 46, UCMJ.<sup>39</sup> "Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory."<sup>40</sup> Arguably, the only method to ensure the defense equal access to all information regarding a suspect interview would be to tape record the entire interview. The Court of Military Appeals has, however, in a discussion of Article 46, stated that the "rule announced in *Trombetta* satisfies both constitutional and military standards of due process."<sup>41</sup> Even so, in the two recent cases involving a failure to preserve evidence, the Court of Military Appeals admonished government agents to preserve evidence or at least to provide the defense with access to such evidence before it is consumed or lost.<sup>42</sup> Moreover, in *United States v. Garries*,

the Court of Military Appeals indicated that a higher standard may be applicable where military agents are involved. There, blood samples were unavailable for examination by the defense because they had been consumed by State of Colorado authorities during testing and the defense was not given notice and an opportunity to be present at this testing. While the Court of Military Appeals held that, under *Trombetta*, there was no due process violation, it did state "[i]f the testing had been done by the military or at its request, a different result might be required. In that situation, it would be difficult to excuse the failure to provide notice to the defense."<sup>43</sup> Thus, room exists to argue that the military does and should have a higher standard than is announced in *Trombetta* and that tape recording is required by military due process.

Whether or not the failure to record violates constitutional or military due process, requiring suspect interviews to be tape recorded seems consistent with the prevailing notions of fundamental fairness on which the due process clause is based.<sup>44</sup> Therefore, tape recording of suspect interviews should be required.

Upon acceptance and implementation of a rule requiring tape recording, the question arises as to the proper remedy for failure to tape record. The Alaska Supreme Court considered this issue in *Stephan v. State*.<sup>45</sup> In *Stephan*, law enforcement officers obtained inculpatory statements from two defendants without tape recording the entire interviews. During suppression hearings, both defendants claimed that their statements were obtained in an unconstitutional manner. Their versions of what happened during the interview, of course, conflicted with that of the officers. The trial court believed the officers and the statements were received into evidence. The Alaska Supreme Court found that the failure to record the entire interview was in clear

<sup>34</sup> *Trombetta*, 467 U.S. at 488.

<sup>35</sup> *Id.* at 489.

<sup>36</sup> See also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982) (The Court, in holding that the due process clause was not violated by deportation of two eyewitnesses to the offense, stated that:

[A] "violation of the [the due process clause] requires some showing that the evidence lost would be both material and favorable to the defense. . . .

Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses, [and] will be warranted . . . only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. . . .

[R]espondent made no effort to explain what material, favorable evidence the deported passengers would have provided for his defense.

Here, unlike *Valenzuela-Bernal*, the accused may indeed provide an explanation of the exculpatory nature of the evidence.

<sup>37</sup> *Trombetta*, 467 U.S. at 487-88.

<sup>38</sup> In a footnote, the *Trombetta* Court said: "The capacity to preserve breath samples is equivalent to the actual possession of samples." *id.* at 488 n.7. This assertion suggests that the Court might equate the capacity to tape record with actual possession of a tape recording. In other words, the Court might view the failure to record as a failure to preserve an actual recording. If this is true, an argument that the failure to tape record an interview is a due process violation is much stronger.

<sup>39</sup> Article 46 provides:

The trial counsel, the defense counsel, and the court martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

<sup>40</sup> *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986).

<sup>41</sup> *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986).

<sup>42</sup> *Garries*, 22 M.J. at 293 (In a case where blood samples were consumed during testing and the defense was not present during the testing, the court stated that "the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present."); *Kern*, 22 M.J. at 52-53 (In a case where the government allowed stolen property to be returned to the unit supply system and thereby to be lost, the court stated: "Careful prosecutors will notify the defense of the intention to return stolen property, thereby allowing the defense to conduct an independent examination of the property and placing on the defense the onus of requesting that property be retained for use as evidence at trial."). Significantly, in both *Garries* and *Kern*, no prejudice was found on appeal and none could be articulated by the defense.

<sup>43</sup> 22 M.J. at 293 n.6.

<sup>44</sup> See *Trombetta*, 467 U.S. at 485; *Garries*, 22 M.J. at 293.

<sup>45</sup> 711 P.2d 1156 (Alaska 1985).

disregard of its prior admonition that all suspect interviews be tape recorded and held that the statements should be suppressed. The Alaska Supreme Court based its ruling on the due process clause of the Alaska Constitution.<sup>46</sup>

The Alaska Supreme Court felt that suppression was necessary for three reasons. First, suppression was the only remedy sufficient to ensure compliance with the rule.<sup>47</sup> Second, the exclusionary rule avoids "any suggestion that the court is biased in favor of either party," by avoiding the situation where the court accepts one participant's version over the other's.<sup>48</sup> Finally, "an exclusionary rule furthers the protection of individual constitutional rights."<sup>49</sup> After noting that a "confession is generally . . . conclusive evidence of guilt" the court said:

Exclusion is warranted [when a tape recording is not made of the entire interview] because the arbitrary failure to preserve the entire conversation directly affects a defendant's ability to present his defense at trial or at a suppression hearing. Moreover, exclusion of the defendant's statement is the only remedy which will correct the wrong that has been done and "place the defendant in the same position he or she would have been in had the evidence been preserved and turned over in time for use at trial."<sup>50</sup>

The Alaska Supreme Court did note the following exceptions to its exclusionary rule:

Where recording ceases for some impermissible reason, properly recorded statements made prior to the time recording stops may be admitted, even when the failure to record the balance of the interrogation is unexcused, since such prior statements could not be tainted by anything that occurred thereafter. Also, failure to record part of an interrogation does not bar the introduction of a defendant's recorded statements, if the unrecorded portion of the interrogation is, by all accounts, innocuous. In such cases, there is no reason to exclude the defendant's recorded statements, because no claim of material misconduct will be presented. . . . For the same reason, a defendant's unrecorded statement may be admitted if no testimony is

presented that the statement is inaccurate or was obtained improperly, apart from [a failure to record].<sup>51</sup>

Consistent with the Alaska Supreme Court's decision, the proper remedy for failure to tape record a suspect interview is suppression of the entire interview where an accused presents a plausible<sup>52</sup> version of what happened which, if true, would entitle the accused to suppression.<sup>53</sup> If the accused's version is merely factually inconsistent with that of the police officer, only the inconsistent portion of the statement should be suppressed. Finally, if an unrecorded statement is used in any part of a court proceeding and the police officer's and accused's version are inconsistent, the court should be directed to give weight to an accused's account.<sup>54</sup> These remedies should not be available if the government proves that the failure to tape record was in good faith.

The proposed rule is designed to offer the court a complete look at the circumstances and statements made in a suspect interview, the crucial evidence upon which many convictions are based. It is not designed to allow an accused the opportunity to lie on the witness stand. Therefore, consistent with Military Rule of Evidence 304(b)(1), the rule would permit a statement to be used to impeach by contradiction the in-court testimony of the accused and in a later prosecution against the accused for perjury, false swearing, or for making a false official statement.

With modern technology available to tape record all suspect interviews, there appears no strong argument against, and many for, adoption of a rule requiring such recording. As a necessary corollary to this rule, where a statement is not recorded in its entirety, the statement should, under the circumstances expressed in the proposed rule, be suppressed. To fail to adopt this rule is to choose uncertainty over certainty, to choose possible injustice over justice. "For any time an officer unimpeded by an objective record distorts, misinterprets, or overlooks one or more critical events, the temple may fall. For it will be a house built upon sand."<sup>55</sup>

<sup>46</sup> *Id.* at 1160.

<sup>47</sup> *Id.* at 1163.

<sup>48</sup> *Id.* at 1164.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (footnote and citation omitted).

<sup>51</sup> *Id.* at 1165 (citation omitted) (emphasis added).

<sup>52</sup> See *supra* note 36.

<sup>53</sup> See Model Code of Pre-Arrest Procedure § 150.3(5) (1975) (where there has been a failure to record, the state must prove compliance with *Miranda* by clear and convincing evidence) cited in *Harris*, 678 P.2d at 414 n.3 (Singleton, J., concurring and dissenting); Kamisar, *supra* note 7, at 241-42 ("At the very least, no claim that a waiver has been obtained should be accepted unless all proceedings subsequent to the initiation of judicial proceedings have been tape recorded.").

<sup>54</sup> The Model Code of Pre-Arrest Procedure § 130.4, commentary at 343 (1975), "directs the court to give weight to the defendant's account in any factual dispute if it finds that the police department has not set up procedures [full written records and sound recordings] to insure compliance with the Code or has not diligently and in good faith sought to comply with the record-keeping provisions." Quoted in *Harris*, 678 P.2d at 414 n.3 (Singleton, J., concurring and dissenting).

<sup>55</sup> Kamisar, *supra* note 7, at 243.

**Court-Martial and Nonjudicial Punishment Rates Per Thousand**

Fourth Quarter Fiscal Year 1986; July-September 1986

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.45	(1.80)	0.40	(1.59)	0.62	(2.50)	0.36	(1.45)	0.52	(2.09)
BCDSPCM	0.37	(1.49)	0.38	(1.54)	0.43	(1.74)	0.15	(0.61)	0.65	(2.61)
SPCM	0.08	(0.34)	0.09	(0.37)	0.07	(0.27)	0.10	(0.38)	0.20	(0.78)
SCM	0.49	(1.95)	0.50	(2.00)	0.60	(2.39)	0.08	(0.30)	0.52	(2.09)
NJP	34.31	(137.24)	35.65	(142.61)	34.69	(138.75)	33.16	(132.62)	33.03	(132.12)

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

**Regulatory Law Office Note**

**Cleaning Up Hazardous Waste Sites Under the Comprehensive Environmental Response, Compensation and Liability Act: Maxey Flats Nuclear Waste Disposal Site**

Since 1980, the Army has been liable as any other party for sharing in the expenses of cleaning up hazardous waste sites off-post. Section 107(g) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(g) (1982) (CERCLA), stated:

Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

This language is currently contained in section 120 of the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613, signed by the President on October 17, 1986.

The Army is occasionally named as a Potentially Responsible Party (PRP) at an off-post site. Potentially responsible parties under CERCLA/SARA include current and former owners and operators of the disposal site, persons and entities who generated or produced the disposed-of hazardous substances, and persons and entities who were involved in the transport, treatment, storage, or disposal of hazardous substances at the site. Under CERCLA/SARA, and possibly other laws, PRPs may be liable for costs incurred by the government (the Environmental Protection Agency (EPA) or other entities) in taking corrective actions at the site necessary to stop or prevent the release of hazardous substances. Such costs may include, but are not limited to, engineering studies and expenditures for clean-up of the site and enforcement activities. PRPs are given the option, however, of proposing to conduct their own study and clean-up, with EPA oversight. Once EPA notifies the PRPs, the clock starts ticking, and the PRPs have ninety days to organize themselves and reach some agreement on how to conduct the Remedial Investigation and Feasibility Study (RI/FS) to clean up the site.

In order to encourage PRPs to clean up the sites with minimum EPA involvement, EPA sometimes uses a 300% markup; that is, if EPA has to conduct the RI/FS, etc., it

retains the option to bill the PRPs for the costs involved, plus another 200% over cost. This inducement has led to a proliferation of PRP committees around the country, as more and more sites are identified for clean-up (engineering, accounting, and law firms that specialize in assisting these PRP committees are also proliferating).

When the Army is identified as a PRP, the practice has been to determine the facts as quickly as possible, and to seek a means to pay the Army's fair share of the clean-up. In order to determine the facts, it is essential that the knowledgeable installations and major Army commands (MACOMs) assist this office, when requested, in determining how much waste was shipped to the particular waste site and by whom.

One recent off-post clean-up site that has required the assistance of numerous installations is the Maxey Flats Nuclear Disposal Site in Morehead (Fleming County), Kentucky. This site involves 832 potentially responsible parties, including several dozen Department of Defense (DOD) facilities. Approximately half of the volume at the site was contributed by federal agencies, with about three percent being contributed by Army, according to the documents prepared by the EPA.

Maxey Flats was opened in 1963 by the Commonwealth of Kentucky, pursuant to Atomic Energy Commission licensing agreement, for the management of low-level radioactive materials. An estimated 4.75 million cubic feet of waste were deposited at Maxey Flats between 1963 and the end of disposal activities in 1977. About 2.4 million curies of atomic by-product material, over 240,000 kilograms of atomic source material, and 430 kilograms of special nuclear material were placed in trenches, pits, and hot wells in the active disposal area, which consists of twenty-five acres. Specific low level radioactive waste disposed of at Maxey Flats include items such as contaminated paper, trash, clothing, laboratory glassware, plastic tubing, filters, ion-exchange resins, and evaporation sludges. Organic materials placed in Maxey Flats included animal tissue, paper, cardboard, wood, plastics, and organic chemicals. EPA

estimates that the clean-up will cost at least thirty million dollars.

It should be emphasized that at all times during its active operation, Maxey Flats was a licensed facility, and all Army contributions to the site were in accordance with all applicable laws and regulations. The clean-up at Maxey Flats is necessitated by events subsequent to closure: radionuclides have leaked and spilled into the environment due to overflow of the disposal trenches. EPA has concluded that the "bathtub" overflow has resulted in potential and actual off-site migration of contaminated leakage and radionuclides, which may pose a threat to local surface waters, groundwater, wells, and landowners. It should also be noted that the Commonwealth of Kentucky owns this property, and by virtue of this ownership, it could be liable under section 104(c)(3) of CERCLA (42 U.S.C. § 9604(c)(3) (1982)) for fifty percent of the clean-up of the site. Kentucky disputes any suggestion of liability and is preparing its legal memorandum in opposition thereto.

The Department of Defense has taken an active lead in the Maxey Flats clean-up and has designated Navy as the lead military department. A threshold question that must be addressed is whether CERCLA/SARA applies to low level radioactive waste disposal. Many of the other PRP counsel believe that such wastes are excluded from coverage under both CERCLA/SARA and the clean-up provisions of the Resource Conservation and Recovery Act (42 U.S.C. § 6901 (1982)). It now appears that this "threshold question" may be the subject of early litigation initiated by the de minimis PRPs (that is, those generators, etc., who contributed very small amounts of waste to the site). It may be appropriate for the federal agencies to advance a broad interpretation of the law in order to effectuate its purpose—the clean-up of waste sites—without undue emphasis on the admittedly ambiguous language used in the law.

The next question that must be answered at Maxey Flats is the simple factual question of who contributed what to

the site, and when was it contributed. The EPA has written hundreds of letters to PRPs, stating that, based upon "radioactive shipping records" (by which the EPA means records of shipments of radioactive materials), EPA has determined that there may be 832 PRPs, including numerous Army facilities listed in an appendix to their letter. Based upon the shipping records, EPA has established volumetric contributions accurate to the ten-thousandth part of a cubic foot.

Using the EPA letter as a starting point, this office has advised all named Army installation PRPs to conduct a records audit to confirm the EPA allegations as to identity and quantity of hazardous substances shipped to Maxey Flats. As this data is being compiled, it is clear that there is some disagreement with the EPA allegations. In some cases, the Army's records conflict with EPA's records, while in other cases the Army's records fail to show any contributions to Maxey Flats. This could be the result of a simple failure on the part of the installation to maintain the records showing the shipment, or it could be that the shipment never took place. It is expected that DOD will cooperate with EPA to determine the appropriate level of contribution to the ultimate clean-up at Maxey Flats.

The Army is committed to cleaning up hazardous waste sites on-post. We are also committed to cooperating with the EPA to pay our fair share toward cleaning up off-post sites where an Army element is named as a Potentially Responsible Party. This office should be notified by the post or staff judge advocate as soon as the installation is identified by the EPA or other entity as a Potentially Responsible Party at a hazardous waste site. Any Army element that has received a letter from EPA naming it as a PRP for Maxey Flats, but has not received a letter from this office should contact this office immediately.

## TJAGSA Practice Notes

*Instructors, The Judge Advocate General's School*

### Contract Law Note

#### Amendments to the NATO Mutual Support Act

In the February issue of *The Army Lawyer*, we included in our report of recent developments in contract law a number of statutory changes expected to have broad impact.<sup>1</sup> Another change, not mentioned in the article but that may ultimately have a major effect on how we do business, was contained in the 1987 Department of Defense Authorization Act.<sup>2</sup> In § 1104 of that act, Congress amended the

North Atlantic Treaty Organization (NATO) Mutual Support Act of 1979.<sup>3</sup> NMSA was first enacted to ease problems encountered in the acquisition of logistical support, supplies, and services for U.S. military forces stationed or deployed in Europe and adjacent waters.<sup>4</sup> NMSA authorizes acquisitions from NATO countries and NATO subsidiary bodies<sup>5</sup> and also authorizes the Department of Defense (DOD) to enter into reciprocal cross

<sup>1</sup> Kennerly, McCann, Pedersen & Post, *Recent Developments in Contract Law—1986 in Review* *The Army Lawyer*, Feb. 1987, at 3.

<sup>2</sup> Pub. L. No. 99-661, 100 Stat. — (1986) [hereinafter P.L. 99-661].

<sup>3</sup> 10 U.S.C. §§ 2341-2350 (Supp. III 1985) [hereinafter NMSA].

<sup>4</sup> 1980 U.S. Code Cong. & Admin. News 2420.

<sup>5</sup> 10 U.S.C. § 2341 (Supp. III 1985).

servicing agreements.<sup>6</sup> In addition, NMSA waives certain statutory contract clauses with respect to such acquisitions and cross servicing agreements.<sup>7</sup>

The amendments contained in P.L. 99-661 broadly expand the authority of NMSA. Now DOD is authorized to acquire from and enter into cross servicing agreements with non-NATO countries as well.<sup>8</sup> This expanded authority applies to countries that: have a defense alliance with the United States; permit the stationing of U.S. forces or homeporting of U.S. naval vessels; allow the prepositioning of U.S. assets; or serve as host for U.S. forces in exercises or permit U.S. military operations in their countries.<sup>9</sup>

The provision authorizing cross servicing agreements contains a requirement that the Secretary of Defense consult with the Secretary of State before designating a country for such an agreement.<sup>10</sup> Also, the Secretary of Defense must notify the committees on Armed Services and Foreign Relations of the Senate and the committees on Armed Services and Foreign Affairs of the House of Representatives thirty days before designating a country.<sup>11</sup>

The ultimate scope of such agreements is potentially very broad. For Fiscal Year 1987, however, there is an understanding that this authority will be extended to acquisition and cross servicing agreements only with Egypt, Israel, Japan, and the Republic of Korea.<sup>12</sup> Even with this limited scope, many of us will be affected. You should be on the lookout for implementing instructions and be prepared to participate in the negotiation of the implementing arrangements. Major Post.

### 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

#### *Trends in Consumer Legislation*

Legal assistance officers should follow the local news and state bar publications to keep abreast of current state legislative initiatives. A national survey of Better Business Bureaus has revealed that the main focus of consumer legislation and regulatory activity in the states is automobile lemon laws. Typically, these laws call for refund of the purchase price, replacement, or repair of cars found to be defective based upon a number of repair attempts and/or days in the shop.

<sup>6</sup> 10 U.S.C. § 2342 (Supp. III 1985).

<sup>7</sup> 10 U.S.C. § 2343(b) (Supp. III 1985) waives sections 2207, 2304(a), 2306(a), 2306(b), 2306(e), 2306(f), and 2313 of title 10; 41 U.S.C. § 22; and 50 U.S.C. app. § 2168.

<sup>8</sup> P.L. 99-661, § 1104.

<sup>9</sup> P.L. 99-661, § 1104(a) (to be codified at 10 U.S.C. § 2341).

<sup>10</sup> P.L. 99-661 § 1104(a) (to be codified at 10 U.S.C. § 2342(b)).

<sup>11</sup> *Id.*

<sup>12</sup> H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 520 (1986).

The second most intense area of activity is in the financial field, where caps on credit card interest rates, oversight of financial planners, and regulation of "credit repair" services are receiving attention. Advertising is the third most active area, including emphasis on comparative pricing practices, the use of the term "wholesale," and "percentage off" claims. Also coming under scrutiny are: adherence to truth-in-lending requirements in loan and credit card advertising; charitable solicitations; health frauds; used car warranties; and computerized telemarketing practices.

The Better Business Bureaus also report that budget cuts have forced the consolidation or closing of numerous local consumer protection agencies, with many of their functions being passed to states' attorneys general. Currently, the push for enhanced consumer protection is originating from these attorneys general and from within state legislatures. Major Hayn.

### *Odometer Tampering Violates Federal law*

President Reagan has signed Public Law 99-579, the Truth in Mileage Act, which raises civil and criminal penalties for odometer tampering. Odometer tampering, often called "clocking," is the practice of lowering the mileage on a used car's odometer to increase the sale price of the car. Odometer-rollback fraud costs consumers and franchised car and truck dealers an estimated \$2 billion a year. The Truth in Mileage Act will help end such fraud by requiring states to create uniform reporting requirements for the sale and transfer of used motor vehicles, including provision of a space for the odometer reading on all motor vehicle titles to create a "paper trail" of a vehicle's mileage in its titling and registration history.

### *Kentucky Passes Transient Merchant Law*

Kentucky's new Transient Merchant Law, which became effective on 15 July 1986, requires those temporarily conducting business in one locality for less than six months or those traveling from place to place in Kentucky for the purpose of selling merchandise to obtain a transient merchant permit. These permits may be obtained by applying with the clerk in the county in which the business is to be conducted. In addition, each transient merchant must have a registered agent that is a resident of Kentucky to receive any process or notice to be served upon the transient merchant, and merchants selling merchandise having a total market value of \$1,500 or more must post a cash or surety bond with the Kentucky attorney general's office.

### *Coin Collectors' Caution*

The Federal Trade Commission (FTC) has recently charged two related companies, Rare Coin Galleries of America, Inc., and Rare Coin Galleries of Florida, Inc.,

with misrepresenting the grade and investment value of coins that the companies sell through general circulation newspapers and magazines and through direct mail and telephone solicitations.

The value of a coin depends not only on its rarity, but also on its condition or grade. "Mint State 65" (MS 65) is generally the highest grade available for an uncirculated coin, describing a coin in near-perfect condition. According to the FTC staff, the companies described most coins they sold as MS 65, even though the coins they sold were of a grade significantly inferior to that represented.

In response to the FTC's complaint, the U.S. District Court for the District of Massachusetts has granted an asset freeze and a temporary restraining order that prohibits the defendants from selling any coins unless they have been graded and valued accurately and in accordance with generally accepted industry standards.

#### *South African Eyeglasses—Problems With Performance and Importation*

The Institute for Vision Improvement, P.O. Box 7840, Johannesburg, South Africa, has been soliciting the sale of eyeglasses marketed as "Lax-Optic Lensless Spectacles," notwithstanding a 1984 U.S. Customs and Postal Service prohibition on the importation of this product. The Arkansas Attorney General, in cooperation with the Food and Drug Administration, has issued a consumer alert warning that claims regarding the eyeglasses cannot be substantiated by professionals in the eye-care field.

The eyeglasses, which are promoted as a substitute for prescription eyeglasses by restoring eyesight and blurred vision so that glasses are not needed, have a plastic opaque material with seven rows of pin holes of specific size and spacing rather than ordinary lenses. The offer indicates that the glasses are valuable both to those who presently wear glasses and to those who want to prevent the need for glasses in the future because the glasses reduce eye strain by reducing sensitivity to sunlight glare and brilliant lights, preventing deterioration of vision.

The material sent from South Africa carries several testimonials from users living throughout the United States. One of these endorsements was written by a man identified as living in Arkansas. Upon inquiry, the Arkansas attorney general's office learned that the man wrote the testimonial at least nine years ago and died over five years ago.

In addition to the eyeglasses, which sell for \$27.00 for one pair or \$47.00 for two pairs, the company also advertises a device called the Intensive Ciliary Exercise Oscillator, which purportedly reduces any eye strain caused by exercising the eye muscles through wearing the glasses. Major Hayn.

#### *Travel Problems Plague Consumers*

Complaints involving travel plans have increased dramatically in the past year. A majority of these problems are caused by low cost travel voucher or coupon sales advertised in newspapers, through the mail, and by phone, which are often given as bonuses for listening to time share sales presentations.

Typically, these trips (which are often to Hawaii or Mexico) must be arranged through the firm that issues the

voucher or coupon, and the firm will disclose the conditions and restrictions applicable to the trip only after the consumer has paid a large deposit. The restrictions usually render the trip far more expensive than advertised, limiting travel times, requiring service charges to take advantage of inexpensive hotels, or requiring the purchase of one high-priced airline ticket to take advantage of free accommodations. In addition, after paying for the trip, some consumers are told that they do not qualify for the trip because they are too old, they are required to travel with a spouse, they have an insufficient income, or for some other reason.

Consumers who cannot meet the qualification criteria are often unable to obtain refunds of their deposits. Obtaining refund of the deposit poses particular problems when the consumer has paid the deposit by credit card and the travel company waits more than sixty days before disclosing the conditions of the trip, making it difficult for the consumer to dispute the deposit charge on the credit card bill. Major Hayn.

#### **Tax News**

##### *Panama Canal Zone Income*

Many people are still confused about the tax status of income earned in the Panama Canal Zone. For some time, there was an issue as to whether the Panama Canal Treaty exempted income earned by military and civilian employees of the Panama Canal Commission from federal income taxation. There was a legitimate argument that the income was exempt from tax, but that argument was mooted by the Supreme Court in *O'Connor v. United States*, 107 S. Ct. 347 (1986). That case determined that the Panama Canal Treaty did not exempt income of employees of the Panama Canal Commission from taxation by the United States. The issue was also addressed by the Tax Reform Act of 1986. Section 1232 of the Act makes it clear that no such exemption exists. Additionally, the Act made this provision retroactive, applying to any tax year still open by the statute of limitations. Major Mulliken.

##### *State Taxes May Take a Bigger Bite*

The Soldiers' and Sailors' Civil Relief Act prohibits states from taxing the military income of nonresident soldiers living in the state pursuant to military orders (50 U.S.C. app. § 574 (1982)). The effect of this provision has been to protect the soldier's military income, which is subject to state income taxation by the soldier's state of domicile, from additional taxation by the soldier's state of station.

Notwithstanding the statutory prohibition against taxation of the soldier's income by the soldier's duty state, Kansas has implemented a taxation scheme that bases the soldier's spouse's tax rate on the combined income of the soldier and the spouse, applying this artificially high tax rate to the spouse's income to determine the income tax owed by the soldier's spouse.

Although this arguably amounts to an indirect tax on the soldier's military income in violation of 50 U.S.C. app. § 574, other states may implement similar taxation schemes in light of *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), *aff'g* 580 F. Supp. 512 (D. Kan. 1984), in which the court approved Kansas' income taxation scheme. The Army is seeking appeal of this decision to the United States Supreme Court. Major Hayn.

## Life Insurance—Military Service Exclusions

Legal assistance officers frequently advise clients concerning the need for life insurance as part of the will drafting and estate planning process. When giving advice, legal assistance officers should caution clients contemplating purchase of insurance that some policies exclude from coverage deaths occurring during war. The exclusion clauses vary considerably and can be as broad as to exclude from coverage any death which is connected with military service. Obviously, soldiers should not purchase policies that would not pay benefits if the soldier died during battle or as a result of a training accident.

The decision to buy life insurance can arise in many different contexts, and the potential problem with clauses excluding coverage of service-connected deaths exists in all of these circumstances. For example, a Fort Campbell soldier, when purchasing and financing a car, took out a life insurance policy suggested by the lender to guarantee repayment of the loan. The policy contained a clause excluding coverage for death connected with military service. The soldier died in the Gander, Newfoundland, crash, and the insurance company refused to pay.

Legal assistance officers should educate soldiers about this danger as part of their preventive law program. Additionally, to the extent life insurance policies are being sold on the installation, the problem can and should be controlled through coordination and cooperation with the commercial activities office at the installation. The sale of life insurance on-post is governed by Army Regulation 210-7, Installations—Commercial Solicitation on Army Installations. Paragraph 3-4b of AR 210-7 requires that any restrictions on the policy because of military service or military occupational skill (MOS) be clearly indicated on the face of the policy. Additionally, if the company increases premiums because of the insured's military status, that fact must be plainly indicated. The commercial activities offices should be screening applications from life insurance sales people to ensure that these requirements are being met. Additionally, commanders could publish lists of policies being offered that contain restrictions based on military status.

The death of a soldier is always a tragedy. The tragedy, however, is compounded when the soldier's survivors do not receive life insurance money they had planned on because the policy contained a restriction based on military service. Legal assistance officers should mount an information campaign to preclude such an unfortunate occurrence in the future. Major Mulliken.

## Family Law Note

### *What is "Divisible"—Gross or Net Retired Pay?*

The Uniform Services Former Spouses' Protection Act (the Act) provides that states may treat "disposable retired pay" either as income of the retiree or as marital property belonging to both the retiree and his or her former spouse. See 10 U.S.C. § 1408(c)(1) (Supp III 1985). The significance of this language is that it explicitly overrules at least a part of *McCarty v. McCarty's* holding that states are preempted from dividing military retired pay as marital property. See 453 U.S. 210 (1981).

The Act defines the term "disposable retired pay" as gross retired or retainer pay minus certain sums required to

be withheld from the gross pay in calculating the amount due the retiree each month. These deductions include, for example, amounts owed to the government, premiums for Survivor's Benefit Plan (SBP) participation, and, most significantly, federal income tax withholdings. See 10 U.S.C. § 1408(a)(4) (Supp. III 1985). Based on the plain language of section 1408(c)(1), then, it would seem that the Act confers upon states the authority to treat as marital property only that portion of the retiree's pay that remains after federal taxes have been withheld.

Let's look at an example. Suppose a male retiree's gross retirement pay is \$2,000 per month and the only deduction is for federal income tax, at a withholding rate of 28% (because the retiree has other post-retirement income). His disposable retired pay would be \$2,000 minus 28%, or \$1,440, and states clearly can divide this sum in accordance with state law. Further assuming that under state law all the retired pay constitutes marital property and that the former spouse is entitled to 50% of the marital property, she should receive \$720. The retiree receives \$720, plus he also receives credit for the \$560 in withholding that is paid to the IRS. If he actually pays 28% in taxes on his full retirement income, his net cash position is no better than that of his former spouse, assuming she does not have to pay tax on her share.

Of course, it never works out quite so equitably. With tax deductions and adjustments, most retirees would not pay a full 28% in tax, which means he will receive a refund at the end of the year. Assume the refund works out to \$100 per month; then his one-half the retirement pay will be greater than his former spouse's one-half as his net monthly amount works out to \$820 compared to her \$720. Clearly, too, there is an inequity if the former spouse's share is taxable to her, as her \$720 would be further reduced.

Inequity can arise in another way. Suppose the former spouse has no other taxable income. Her share of the retired pay would be taxed at the lowest rate—not more than 15% and actually the effective rate of tax would be much less after personal exemptions and the standard deduction are factored in. If she received 50% of the gross retired pay (\$1,000) and then had withholding deducted at the rate applicable to her, she would receive more than \$720. Further, if her actual tax rate is around 10%, her net after-tax monthly amount would average \$900, not \$720.

Not surprisingly, state courts chafe at these inequities. Their statutory schemes provide an answer by entitling the former spouse to 50% of the gross retired pay amount, and this approach solves some problems. Moreover, awarding the former spouse one-half the total retired pay is mandated by law in many states, especially those with community property regimes. The hitch is that the Act creates state authority to treat only disposable retired pay as marital property. Any attempt to circumvent this language runs into *McCarty's* language about preemption—i.e., beyond the Act, states may have no power to divide retired pay at all.

At first glance there appears to be a ready solution. If the military finance centers would treat the retired pay as taxable to the recipient, as determined by the property division order, and withhold accordingly, then little violence would be done to the statutory language and equity would be achieved. Each party would receive one-half the gross, and the monthly amount paid to each would be reduced only by his or her actual tax withholding. Alas, however, it will not

work for two reasons. First, the former spouse's share of the retired pay is not always taxable to her. In fact, all the retired pay will be taxable to the retiree unless a portion goes to the former spouse as alimony payments qualifying for the special income-shifting rules, or unless by state law the former spouse receives her share of the retired pay as a property right, vested upon the issuance of the decree. See, e.g., the Private Letter Ruling synopsis at 12 Fam. L. Rep. (BNA) 1186 (1986).

The second reason the solution is untenable is that, notwithstanding state laws defining the nature of the former spouse's interest in retired pay and the time this interest "vests," by federal law all of it is retired pay due the retiree. The finance centers therefore are required by the Internal Revenue Code to withhold income tax based on payment of the complete sum solely to the retiree. Note, however, that if state law gives the former spouse a property interest that is taxable to her, she may be entitled to credit for an aliquot portion of the amount withheld. See the Private Letter Ruling discussion at 12 Fam. L. Rep. (BNA) 1195 (1986); Internal Revenue Code § 31(a)(1); Treasury Reg. 1.31-1a; *Gilmore v. United States*, 290 F.2d 942 (Ct.Cl. 1961).

Given this state of affairs, what options are open to counsel representing soon-to-be former spouses to ensure their clients receive the share of retired pay they are entitled to pursuant to state law? The good news is that many states have not been hindered in applying their statutory schemes despite the ostensibly limited grant of authority provided by the Act. That is, they divide gross retired pay, basically ignoring the language about "disposable retired pay" or rationalizing that the definition of the term really applies only to the direct payment provisions of the Act, found at 10 U.S.C. § 1408(d). States that follow this approach include California (*Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33 (1986)), Minnesota (*Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984)), North Carolina (*Lewis v. Lewis*, 83 N.C. App. 438, 350 S.E.2d 587 (1986)), and North Dakota (*Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984)).

On the other hand, one court in Texas has held that it has no authority to divide anything other than disposable retired pay as it is technically defined at 10 U.S.C. § 1408(a)(4). *Grier v. Grier*, 713 S.W.2d 213 (Tex. Ct. App. 1986). *Grier* cited with approval earlier California precedent that was subsequently overruled by *Casas*, however. Thus its vitality may be open to question.

Even if a state undertakes to divide gross retired pay as marital property, however, the tax consequences may be unclear. A Minnesota court confronted this issue in *Deliduka*, but it could not decide how the IRS would treat the situation. Thus, it allowed the retiree to clarify the tax assumptions that undergirded the decree and explicitly gave him leave to reopen the matter if the IRS employed a different analysis. Such an adjustment would be appropriate, for example, if the court assumed that the former spouse's share would be taxable to her but the IRS instead ruled that it all must be included in the retiree's income for tax purposes. Similarly, any separation agreement incorporating provisions for the division of gross retired pay should also include a statement of the parties' intent regarding liability for taxes and an explication of the operative assumptions regarding tax treatment. Equally important,

the agreement should provide for the right to seek readjustment of the scheme for division if the IRS rules contrary to the assumptions and the parties' intent is thwarted.

If the goal is to achieve an equal division of retired pay, the parties' intent might be that the former spouse is to receive one-half the gross pay, reduced by the appropriate amount of tax applicable to her specific income situation and also minus those adjustments to gross income found in 10 U.S.C. § 1408(a)(4) that the parties agree the wife should share the cost of (e.g., in cases where the former spouse is also the beneficiary of SBP protection, her portion of retired pay might also be reduced by one-half the cost of the SBP annuity). In this regard, note that § 1408(a)(4) was recently amended. See the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, § 643 (1986). The assumptions would be that the former spouse will receive on a monthly basis a cash amount equal to one-half the gross (minus her share of the SBP cost and other adjustments, as appropriate), that each party will be liable for taxes on one-half the gross amount, and that the amounts withheld for tax purposes by the finance center will be credited entirely to the retiree.

All the foregoing assumes that the retired pay will be split equally between the parties, and this usually would occur only if the period of coverture included the entire period of military service. The analysis is equally applicable to situations where the former spouse is entitled to less than one-half. For example, the assumptions would simply be modified to state that the former spouse should receive on a monthly basis a cash amount equal to 37% of the gross retired pay (minus her share of the SBP and other costs as appropriate).

One other problem arises from the award of gross retired pay. The Act clearly states that direct payments of retired pay to the former spouse will be limited to 50% of the disposable retired pay, and this is a firm limitation applied by military finance centers. Thus, although a court may award the former spouse one-half the gross pay, she will not be able to obtain the full amount as a direct payment. To ensure that the decree will be accepted by finance for direct payment, it is probably best to state that the former spouse is entitled to a direct payment of 50% of the disposable retired pay, and that the retiree is responsible for supplemental payments on a monthly basis that equal the difference between the direct payment amount and one-half the gross retired pay. Unfortunately, enforcement of these supplemental payment provisions can be difficult. One of the most effective enforcement mechanisms clearly is not available—there can be no garnishment of federal pay for the collection of property settlement provisions.

Are there any protections for spouses when the decree will issue from a court that divides only disposable retired pay? First, the spouse should consider using a separation agreement, or requesting a decree, that provides an interest in each retirement payment as it is received by the retiree. This would serve to decrease the possibility that her (already diminished) share will be considered income taxable to her.

Secondly, it is obviously in her best interest for the retiree's pay to be subject to minimal withholding. Thus, a separation agreement might include provisions regarding the withholding claims the retiree will assert; e.g., it might

provide that he must request withholding based on his actual marital status and the maximum number of dependents he can lawfully claim. It might further provide that all, or a portion of, the withholding adjustments available to him (e.g., additional withholding due to mortgage interest) must be used to reduce withholding from the retired pay. Any failure to comply with such an agreement then could be remedied through an action for breach of his contractual obligation, and violations of a decree could be remedied through an action for contempt or perhaps a compensating modification of the award to the former spouse.

In summary, two of the most significant issues regarding the division of retired pay are the determination of what

will be divided—gross or disposable pay,—and the tax treatment of the money received by the former spouse. Regarding the first issue, states have shown a surprising willingness to disregard the plain language of the Act and to follow instead their state statutory schemes in providing the former spouse with a share of the gross retired pay. As for tax treatments, the law is unclear, resting as it does largely on the specifics of state law. Careful drafting of separation agreements, however, can overcome most of the uncertainties and unfairness, ensuring that the parties' expectations will be realized. Major Guilford.

## Claims Report

*United States Army Claims Service*

### **Atkinson and the Application of the Feres Doctrine in Wrongful Birth, Wrongful Life, and Wrongful Pregnancy Cases**

*Joseph H. Rouse*  
Chief, General Claims Division

In 1950, the Supreme Court ruled, in *Feres v. United States*,<sup>1</sup> that claims under the Federal Tort Claims Act (FTCA)<sup>2</sup> by active duty members of the Armed Forces were barred if such claims arose incident to service. This rule has become known as the "incident to service" or "Feres" doctrine. Uniformly, this doctrine has been applied to bar claims arising out of medical treatment of such members, until the recent decision by the Court of Appeals for the Ninth Circuit in *Atkinson v. United States*.<sup>3</sup> This decision is not only directly contrary to a long line of cases concerning the Feres doctrine, but it will also cause more uncertainty in an area of law already brimming with considerable confusion. The decision employs language from the recent Supreme Court decision of *Shearer v. United States*,<sup>4</sup> which stated that each claim by a military member must be scrutinized individually to determine whether it arose incident to service, as the rationale for the departure from prior contrary opinions. In view of the cited language in *Shearer*, the trend of scrutinizing incident to service cases individually is likely to continue in areas previously well settled. Thus, the reversal of the *Atkinson* decision that is being sought is not likely to end the close scrutiny of cases in which there is an injury to a fetus being carried by a mother who is an active duty soldier. Its direct impact would probably be the greatest in claims for wrongful birth, wrongful life, and wrongful pregnancy, and the type of damages recoverable under FTCA. These cases are frequent and involve considerable sums. This article will explore the

problems inherent in claims for injuries to soldiers, particularly those involving prenatal treatment of mothers who are active duty soldiers, and address methods for minimizing the application or expansion of cases similar to *Atkinson*.

#### **Definition of Wrongful Birth, Wrongful Life, and Wrongful Pregnancy**

There is always a certain amount of confusion in any rapidly developing field of law and medical malpractice is no exception, especially in the areas of wrongful birth, wrongful life, and wrongful pregnancy. Even the definitions of these terms have been the subject of controversy and they are still not entirely uniform or well understood. For the purposes of this article, "wrongful birth" is defined as the claims of the parents and child for damages emanating from injuries to a fetus due to negligent delivery or prenatal care rendered to the mother and fetus. Wrongful birth claims by the parents only are also permitted in situations where the real cause of action is "wrongful life" but the local law does not recognize that cause of action.

"Wrongful life" is defined as the claim of a child for injuries resulting from the breach of a duty to warn the parents of certain genetic situations, which, if known, allegedly would have resulted in a decision either not to conceive or to terminate a pregnancy. Common examples are the discovery of Tay Sachs disease or Down's Syndrome or of an insult to the mother during early pregnancy, like Rubella. In the few jurisdictions permitting wrongful life claims, the

<sup>1</sup> 340 U.S. 135 (1950).

<sup>2</sup> 28 U.S.C. §§ 1346, 2671-2680 (1982).

<sup>3</sup> 804 F.2d 561 (9th Cir. 1986).

<sup>4</sup> 473 U.S. 52 (1985).

claim of the child has been limited to special damages. General damages have been denied as impossible to assess or determine.<sup>5</sup> In other words, is life in a damaged condition worse than not being born at all? In fact, it is for this reason that most jurisdictions have denied wrongful life claims.<sup>6</sup> Nonetheless, there is no such reluctance on the part of the courts to award pain and suffering or general damages in a wrongful birth case to a child injured in utero or at birth by negligent prenatal care.<sup>7</sup> Such awards are apparently based on the theory that the quality of life has been diminished as a result of the injury and not on any actual perception of pain or suffering in the usual sense. Not all courts are in accord with this naked assumption.<sup>8</sup> It is also noted that if the child in a wrongful life case does not have a cause of action, the extraordinary expenses of living during adulthood are probably not recoverable as the parents' claims for extraordinary expenses are normally limited to the minority years. None of the wrongful life cases have permitted any recovery for lost earning potential.<sup>9</sup>

The third category, "wrongful pregnancy" claims, are defined as claims by the parents for the birth of a normal but unwanted child following a failed sterilization, such as a vasectomy or tubal ligation. Here again, damages are the principal issue. Most courts deny recovery of the costs of raising a child as against public policy.<sup>10</sup> Some courts permit the costs of raising the child to be balanced against the benefits of having the child.<sup>11</sup> Damages are generally limited to lost earnings of the mother, medical specials, and the pain and suffering of pregnancy, labor, and delivery.

#### Application of the *Feres* Doctrine

What damages are recoverable when at least one parent is an active duty military member depends first on whether

the father, the mother, or both is the active duty soldier, and then on whether the parent's claim is derivative or separate, that is, a direct injury to the claimant. Thus, if the jurisdiction in question does not permit a wrongful life claim and the parents are both in active military service when the injury occurred, all claims would be *Feres* barred. This is exemplified by *Scales v. United States*,<sup>12</sup> where the mother was in U.S. Air Force Basic Training and pregnant when she received rubella vaccine. The father was also a member of the U.S. Air Force. All claims were denied when the child was born with rubella syndrome as the negligent treatment was only to the mother. According to the court in *Utley v. United States*,<sup>13</sup> however, where the negligent treatment was to both mother and fetus, the child's claim was valid even if both parents are active duty.

Whether the claim is derivative or the injury is to the spouse or child in their own right is not always clear. *Utley* relied on the original circuit court decision in *West v. United States*<sup>14</sup> in which "children were born with birth defects attributable to incompatible RH factor not discovered as their father was not yet typed after having been mismatched during a preinduction physical." *West* did not discuss whether the claims were separate or derivative but relied on the circuit court decision in *Shearer v. United States*,<sup>15</sup> which involved an off-post, off-duty murder of one soldier by another soldier from the same organization. The fact that there had been previous animosity between them was known and, in effect, condoned by their superiors. Both decisions were overruled, however. In *West*, the en banc circuit court reversed the panel decision and reimposed the incident to service bar as decided by the district court. The circuit court in *Shearer* later was overruled by the Supreme Court, which stated that, as the gravamen of the case rested

<sup>5</sup> Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1984) (permitted wrongful life claim by child born deaf to parents who had already produced one genetically deaf child; suit based on failure to warn); Procanik v. Procanik, 97 N.J. 339, 478 A.2d 755 (1984) (permitted wrongful life claim by child born with rubella syndrome; failure to warn of the danger to fetus upon rubella exposure in first trimester usual basis for suit); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983) (twin fetuses injured by negligent administration of dilantin to pregnant dependent wife who was known epileptic; both wrongful birth and wrongful life claims recognized, the latter for first time in Washington).

<sup>6</sup> Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law in a rubella syndrome case); Phillips v. United States, 575 F. Supp. 1309 (D.S.C. 1983) (Down's Syndrome); Glidiner v. Thomas Jefferson University Hosp., 451 F. Supp. 692 (E.D. Pa. 1958); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981) (Larsen's Syndrome); Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986) (rubella syndrome); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (Down's Syndrome); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 107 S. Ct. 131 (1986) (Down's Syndrome); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (rubella syndrome).

<sup>7</sup> Trevino v. United States, 804 F.2d 1512 (9th Cir. 1986) (\$2,000,000 reduced to \$1,000,000 on appeal); Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984) (\$5,000,000 reduced to \$1,000,000 on appeal).

<sup>8</sup> Nemmers v. United States, 612 F. Supp. 928 (C.D. Ill. 1985); see also Flannery v. United States, 718 F.2d 108 (4th Cir. 1983); Corrigan v. United States, 609 F. Supp. 720 (E.D. Va. 1985).

<sup>9</sup> See cases cited *supra* note 5.

<sup>10</sup> McNeal v. United States, 689 F.2d 1200 (4th Cir. 1982) (Virginia); White v. United States, 510 F. Supp. 146 (D. Kan. 1981) (applying Ga. law); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Flowers v. District of Columbia, 478 A.2d 1073 (D.C. 1984); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Fulton-DeKalb Hosp. v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984); Cockram v. Baumgardner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Nankje v. Napier, 346 N.W.2d 520 (Iowa 1984); Shark v. Huber, 648 S.W.2d 861 (Ky. 1983); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); Delaney v. Krafte, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984); Weintraub v. Brown, 98 A.D.2d 339, 470 N.Y.S.2d 634 (1983); Mason v. Western Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); Hickman v. Myers, 632 S.W.2d 869 (Tex. App. 1982); Sutkin v. Beck, 629 S.W.2d 131 (Tex. App. 1982); Beardsley v. Wierdsmal, 650 P.2d 288 (Wyo. 1982).

<sup>11</sup> University of Ariz. Health Sciences Center v. Superior Ct., 136 Ariz. 579, 667 P.2d 1294 (1983); Morris v. Frudenberg, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1983); Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984); Clapham v. Yanga, 102 Mich. App. 47, 300 N.W.2d 727 (1981).

<sup>12</sup> 685 F.2d 970 (5th Cir.), cert. denied, 459 U.S. 845 (1983); see also Heath v. United States, 633 F. Supp. 1340 (E.D. Cal. 1986) (Bendectin administered for nausea during pregnancy alleged to have caused severe birth defects; as both parents were active duty the child's claim held to be derivative and all claims were barred).

<sup>13</sup> 624 F. Supp. 641 (S.D. Ind. 1985) (premature birth of child whose parents both were active duty U.S. Air Force). The distinction between *Scales* and *Heath* on the one hand and *Utley* on the other must be based on the fact that in neither *Scales* nor *Heath* was the fetus considered to be the individual being treated.

<sup>14</sup> 729 F.2d 1120 (7th Cir.), rev'd en banc, 744 F.2d 1317 (7th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

<sup>15</sup> 723 F.2d 1102 (3d Cir. 1983), rev'd, 473 U.S. 52 (1985).

on negligent supervision, it arose incident to service. Whether it also fell under the assault or battery exception contained in 28 U.S.C. § 2680(h) was subject to a split vote of four to four. Other courts have held that even where the injury to the non-military member plaintiff is direct and not derivative, the claim is nonetheless barred by the *Feres* doctrine.<sup>16</sup>

All of the foregoing rests on the central proposition that the negligent or improper furnishing of medical care to an active duty soldier at a military facility, thereby causing an injury, results in a claim arising incident to service that is thus barred. The incident to service doctrine has not required that the soldier be in the actual performance of duty, *i.e.*, performing military tasks. In a survey made several years ago of Ninth Circuit cases, only 14 of 33 involved the actual performance of duty (see Appendix A). In another survey of 147 cases in all circuits, forty-seven *Feres*-barred claims involved the use of medical privileges.<sup>17</sup> Even where the care was elective in nature, the claim was nevertheless *Feres*-barred.<sup>18</sup> The doctrine has been applied to military care for injuries received on leave<sup>19</sup> and where the care is provided to an active duty soldier in a non-military Federal facility.<sup>20</sup>

### The *Atkinson* Decision

*Atkinson* involved the failure to treat preeclampsia (toxemia of pregnancy) in an active duty mother at Tripler Army Medical Center, Hawaii, which resulted in the delivery of a stillborn child. Claims were filed for the injury to the mother and the death of the fetus. The death claim was settled administratively for \$75,000 prior to suit being filed. The death claim was settled because the incident to service doctrine was unquestionably not applicable, but it was necessary to permit the mother's injury claim to go to suit as part of the settlement. The injury claim was considered *Feres*-barred as it involved direct injury to a soldier and was not derivative. The suit for injury to the mother was dismissed by the district court in Hawaii. The appeal was granted by the Ninth Circuit as there was considered "to be no relevant relationship between the service member's behavior and the military interests."<sup>21</sup> This approach was derived from the *Shearer* opinion which, according to the *Atkinson* opinion, required each case to be scrutinized as to the effect of the suit on military discipline. Because of this requirement of *Shearer*, the *Atkinson* court took the position that past contrary decisions of the Ninth Circuit could

be cast aside. The court said that Specialist Four (SP4) Atkinson was not subject in any real way to military discipline when she sought treatment for her pregnancy.

An examination of the plaintiff-appellant's brief indicates that this was the very argument advanced. It stated that Atkinson could have sought care from a civilian source and there was no compulsion at all to seek military care. What is startling is that the government's brief concurred in this proposition. It is obvious that the government conceded a vital point that was not based on fact. A pregnant soldier is not free to seek prenatal care anywhere she chooses. The only exceptions in regulations pertaining to pregnancies apply to postpartum or prepartum leave.<sup>22</sup> Prior to delivery, SP4 Atkinson was so much subject to military discipline and control as anyone injured or sick while in a peacetime stateside military setting. As a result, reversal is being sought either by an en banc hearing or by appeal.

### Prenatal Treatment Cases in Light of *Atkinson*

The *Atkinson* decision permits a claim for direct injury to a service member being treated in an Army hospital. Under the *Atkinson* rationale, cases based on improper genetic counseling would not be barred even where the mother is the active duty parent. Similar reasoning would be applicable to a Down's Syndrome case where the mother is on active duty. More uncertain would be a case like *Scales* involving undiagnosed rubella during pregnancy; it could be argued that failing to warn an active duty mother concerning the need for an abortion, which is the essence of such a claim, is not service connected.

The reversal of *Atkinson* and the imposition of the incident to service bar would leave the parents and child in a wrongful birth case without any remedy, as occurred in *Scales*. If a wrongful life claim by a child is not permitted, the service family faces a special dilemma. Even where a wrongful life claim by the damaged child is permitted, the damages are limited to extraordinary costs, and general damages would still be expressly excluded. Where both parents are on active duty, there would be no remedy. Where only one parent is on active duty, a wrongful birth claim would be permissible. The inequity in this situation is even greater when it is realized that the impact of the incident to service bar is on the injured child and not on the parent. Because FTCA cases are decided under state law, a Federal court cannot carve out a remedy except by redefining the *Feres* bar. Thus, it may be predicted that the reversal of

<sup>16</sup> DeFont v. United States, 453 F.2d 1239 (1st Cir. 1972) (wife's mental anguish is a separate claim under Puerto Rican law); Harrison v. United States, 479 F. Supp. 529 (D. Conn. 1979), *aff'd mem.*, 622 F.2d 573, *cert. denied*, 449 U.S. 828 (1980) (loss of consortium is a separate claim under Michigan law). Both cases cite Van Sickle v. United States, 285 F.2d 87 (9th Cir. 1964).

<sup>17</sup> Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489, 538 (1982).

<sup>18</sup> Harten v. Coons, 502 F.2d 1363 (10 Cir. 1974) (failed vasectomy in New Mexico); Hall v. United States, 451 F.2d 353 (1st Cir. 1971) (rejected argument that no military discipline is involved in medical care); Lowe v. United States, 440 F.2d 452 (5th Cir. 1971) (elective surgery in Louisiana); Luce v. United States, 538 F. Supp. 637 (E.D. Wis. 1982) (voluntary circumcision at Great Lakes Naval Training Station).

<sup>19</sup> Veillette v. United States, 615 F.2d 505 (9th Cir. 1980); Stansberry v. United States, 567 F.2d 617 (4th Cir. 1978); Shults v. United States, 421 F.2d 170 (5th Cir. 1969); Buér v. United States, 241 F.2d 3 (7th Cir. 1956), *cert. denied*, 353 U.S. 974 (1957).

<sup>20</sup> Lindeman v. United States (9th Cir. 1975) (unreported); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973); Eisenhart v. United States (E.D. Mich. 1982) (unreported).

<sup>21</sup> 804 F.2d 561, 563 (9th Cir. 1986) (quoting Johnson v. United States, 704 F.2d 1431, 1440 (9th Cir. 1983) (involved off duty death of active duty member in car wrecked by another off duty active duty member, both of whom were bartenders in a noncommissioned officers (NCO) club and had gotten drunk after hours in the NCO club kitchen)).

<sup>22</sup> Dep't of Army, Reg. No. 40-3, Medical Services—Medical, Dental, and Veterinary Care, para. 2-35 (15 Feb. 1985); Dep't of Army, Reg. No. 630-5, Personnel Absences—Leaves and Passes, paras. 9-5 to 9-8 (1 July 1984); see also Dep't of Army Reg. No. 600-20, Personnel—General—Army Command Policy and Procedures, paras. 5-29 to 5-31 (20 Aug. 1986); Dep't of Army, Reg. No. 635-100, Personnel Separations—Officer Personnel, paras. 3-100 to 3-103.3 (19 Feb. 1969); Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel, chap. 8 (5 July 1984).

*Atkinson* will not resolve the problem and courts will continue to try to fashion new remedies.

Not only does the incident to service doctrine create special problems as to whether any claim at all is permissible, but it also creates special problems as to the type of damages payable in cases of improper prenatal care. There is no particular problem where the parent, active duty or not, is claiming special damages for medical or rehabilitation costs, special caretaker costs, or the like. If the *Atkinson* child has been born alive but damaged, as often occurs in preeclampsia cases, *Feres* would not have barred the claim for special damages. General or non-economic damages to the injured child can cause problems, however, as previously mentioned in wrongful life cases. The major problem lies when the claim is for non-economic damages to the parent if the claiming parent is a soldier and the claim is for the injury to that parent, for example, for witnessing the injury to the child or having to live with the results of the injury to the child on a daily basis in the home. If such an injury is a direct injury and the claim is not derivative, it can be argued that recovery is barred by the incident to service doctrine. If the claim is for loss of consortium between parent and child and thus derivative of the injury to the child, it would not be so barred.

Emotional or mental anguish to the parents from witnessing the birth, and the damaged parent-child relationship from raising a damaged or deformed child, resulted in a judgment of \$400,000 by the trial court in *Trevino v. United States*.<sup>23</sup> There was no discussion as to whether the claim of the active duty father for such damages was *Feres*-barred. In a more dubious category would be an argument that extraordinary costs of raising the child would be *Feres*-barred where the parents were on active duty. There are various decisions that hold that either the child or the parents can recover such damages.<sup>24</sup>

#### Use of the *Feres* Bar in Light of *Atkinson*

Routine dismissals by Federal courts of traditionally *Feres*-barred cases are obviously but a memory. No longer can the government take the position that the use of a military benefit in and of itself provides a sufficient basis for the denial of administrative claims. Rather, the direct effect on military discipline must be shown. SP4 *Atkinson* could not have ordered herself into quarters without a military physician's consent. If she had had her child in a civilian hospital, she would have had to have been on properly authorized leave, or, if she had used up her leave, she would have been considered absent without leave. This line of reasoning was not developed and argued by the United States in *Atkinson*; it is essential to ensure better preparation of *Feres*-type cases.

The foregoing is applicable not only as to prenatal treatment case but generally as well. *Parker v. United States*<sup>25</sup>

involved a military member who was injured in an on-post accident while he was proceeding to his off-post quarters to move to another dwelling place off-post. He had been given several days off for that purpose. In other words, he was on pass or in the same status as any soldier while off duty on a workday or weekend. At trial, it was conceded that he was on leave or furlough. Because he was deemed to be free of military control while on leave, the *Feres* bar was not applied. In a subsequent decision, the Fifth Circuit held that a pass did not divest the military of control and *Feres* applied.<sup>26</sup> It is easy to pass over the *Parker* case as it involved a seemingly minor distinction between a pass and a furlough. The decision has spawned numerous claims involving on-post collisions, however, and much seemingly needless litigation in an area in which the law was once relatively well settled.

Another example is a recent Eleventh Circuit case now on appeal to the Supreme Court. In *Johnson v. United States*,<sup>27</sup> a Coast Guard pilot died on a search and rescue mission when he crashed due to improper weather information from the Federal Aviation Agency (FAA). The circuit court opinion centered on the fact that *Feres* did not apply as there was no military relationship between the Coast Guard and the FAA, a civilian agency. Following this rationale, a military pilot could be said to be free to decide whether to fly a mission based upon his assessment of weather information supplied by the FAA. Obviously, his commander would take a different view. But *Feres* has been applied in other cases where the negligence was that of a civilian working for the military or that of a non-military Federal agency.<sup>28</sup> In these cases, the test has been whether the service member was in fact under military control or performing his or her duties; judge advocates must leave no regulation or custom of the service unexamined in fashioning arguments to support a finding of military control and thus a *Feres* bar. What has been considered obvious by members of the armed forces in the past must now be substantiated and made clear to judges.

Claims based on circumstances similar to those in *Atkinson* should continue to be denied administratively. The guidance provided by the Ninth Circuit in incident to service cases is sparse to say the least. In *Bon v. United States*,<sup>29</sup> a claim by an active duty sailor for injuries received in a collision between two boats rented from Navy morale services was considered *Feres*-barred in a decision handed down by the Ninth Circuit at about the same time as *Atkinson*. Because the decision states that it was not clear whether the collision was in waters on or off base, the decision must rest on the use of a military benefit. Nevertheless, the same court reached the opposite result in *Atkinson* even though SP4 *Atkinson* was also using a military benefit. It is more important in the trial workup of *Feres* cases to emphasize the effect on the military relationship and military discipline and to insist that such

<sup>23</sup> 504 F.2d 1512 (9th Cir. 1986) (reduced to \$100,000 on appeal).

<sup>24</sup> *Corrigan v. United States*, 609 F. Supp. 720 (E.D. Va. 1985); *McNeil v. United States*, 519 F. Supp. 283 (D.S.C. 1983). In *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E.2d 567 (1984), the court allowed not only extraordinary costs but also all costs of raising the child.

<sup>25</sup> 611 F.2d 1007 (5th Cir. 1980).

<sup>26</sup> *Warner v. United States*, 720 F.2d 837 (5th Cir. 1983).

<sup>27</sup> 749 F.2d 1530 (11th Cir.), *reh'g denied*, 758 F.2d 660 (11th Cir.), *opinion vacated*, 760 F.2d 244 (11th Cir. 1985), *opinion reinstated*, 779 F.2d 1492 (11th Cir.), *cert. granted*, 107 S. Ct. 59 (1986).

<sup>28</sup> See cases cited *supra* notes 17 and 20.

<sup>29</sup> 802 F.2d 1092 (9th Cir. 1986).

arguments be included in trial and appellate briefs. Where this is not done, a senior judge advocate should be brought into the picture and appropriate departmental level authorities informed.

## Appendix A

### Duty Status of Soldier/Claimant in Incident to Service Cases

#### For Plaintiff

1. *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983) (*Feres* does not bar Swine Flu Act suit by active duty (AD) member).
2. *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983) (AD member injured in off-post collision by AD member—bartender who participated in after hours party in NCO club).
3. *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1980) (AD member in nuclear test—continuing duty to warn to avoid genetic damage).
4. *Trogliia v. United States*, 602 F.2d 1334 (9th Cir. 1979) (Haw.) (off-base collision while off duty).
5. *Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (Cal.) (off-base collision while on furlough).
6. *Targatt v. United States*, 551 F. Supp. 1231 (N.D. Calif. 1982) (same as *Broudy* (both now controlled by Supreme Court denials of certiorari in *Jaffee* and *Laswell v. Brown*)).

#### For United States

##### a. While using military benefits

###### (1) Medical care in military hospital

1. *Veillete v. United States*, 615 F.2d 505 (9th Cir. 1980) (Guam) (AD member injured in off-post accident).
2. *Henninger v. United States*, 473 F.2d 814 (9th Cir. 1973) (Cal.) (AD member).
3. *Tirrill v. McNamara*, 451 F.2d 579 (9th Cir. 1971) (Oregon) (AD member).
4. *Bailey v. Van Burkirk*, 345 F.2d 298 (9th Cir. 1965) (Cal.) (AD member).
5. *Van Sickel v. United States*, 285 F.2d 87 (9th Cir. 1960) (Cal.) (derivation death claim—AD member).
6. *Franz v. United States*, 414 F. Supp. 57 (D. Ariz. 1976) (retired member—negligent act while on AD).

###### (2) Other

7. *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1978) (Cal.) (AD member on leave traveling Space A).
  8. *Archer v. United States*, 217 F.2d 545 (9th Cir. 1957) (West Point cadet on leave traveling Space A).
  9. *Preferred Ins. Co. v. United States*, 222 F.2d 942 (9th Cir. 1955) (Cal.) (property damage, aircraft in on-base trailer court).
  10. *Fidelity-Phoenix Fire Ins. v. United States*, 111 F. Supp. 899 (N.D. Cal. 1953) (on post quarters blown up).
- b. While in actual performance of duties

11. *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983) (AD member in aircrash—permits contractor to use “government contractor” defense and *Feres* bar).

12. *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981) (AD member exposed in nuclear test—genetic damage claim).

13. *Charland v. United States*, 615 F.2d 508 (9th Cir. 1980) (AD member on leave voluntarily in Navy exercise).

14. *Calhoun v. United States*, 604 F.2d 647 (9th Cir. 1978) (Cal.) (AD member killing in pugilstick training).

15. *Daberkow v. United States*, 501 F.2d 785 (9th Cir. 1978) (Ariz.) (FRG AD member in United States plane).

16. *Adams v. General Dynamics*, 935 F.2d 409 (9th Cir. 1976) (Cal.) (AD member testing contractor plane).

17. *Mattos v. United States*, 412 F.2d 783 (9th Cir. 1969) (Cal.) (weekend reservist riding in Army truck).

18. *Gerardi v. United States*, 408 F.2d 492 (9th Cir. 1969) (Cal.) (wrongful induction in 1943).

19. *United States v. Lee*, 400 F.2d 550 (9th Cir. 1968) (Cal.) (AD member riding in Air Force plane).

20. *United Airline v. Weiner*, 335 F.2d 379 (9th Cir. 1964) (Cal.) (AD member on temporary duty riding in civilian plane).

21. *Knoch v. United States*, 316 F.2d 532 (9th Cir. 1963) (Reservist undergoing AD physical).

22. *Callaway v. Garber*, 289 F.2d 171 (9th Cir. 1961) (Mont.) (AD member riding in military truck).

##### c. Intentional Tort

23. *Chappell v. Wallace*, 462 U.S. 296 (1983) (AD member—constitutional tort).

24. *Mallow v. Carlton*, 716 F.2d 627 (9th Cir. 1983) (former USAF officer alleged conspiracy of superiors).

25. *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982) (negligent infliction of emotional stress caused by commander referring unfounded charges to trial).

26. *Lewis v. United States*, 663 F.2d 889 (9th Cir. 1981) (AD member intentional tort).

27. *Dexheimer v. United States*, 608 F.2d 765 (9th Cir. 1979) (Kan.) (AD military physically and sexually abused).

28. *Grant v. Pitchford*, 564 F. Supp. 430 (S.D. Cal. 1983) (same as *Chappell*).

29. *Schmid v. Rumsfeld*, 481 F. Supp. 19 (N.D. Cal. 1979) (AD member who was beaten by unknown assailants was not protected by U.S. despite promises).

30. *Hungerford v. United States*, 192 F. Supp. 81 (N.D. Cal. 1961) (Korean war veteran injured in Korea—misrepresentation exception applied as war injury not diagnosed while AD).

##### d. Unreported

31. *Sudawinski v. United States*, No. 77 Civ. 3077 (9th Cir. 1980) (Reservist treated for training duty injury).

32. *Lindeman v. United States* (9th Cir. 1975) (unreported) (AD member treated in Virginia hospital while on leave).

33. *Thoming v. United States*, No. 79 Civ. 849 (D. Ore. 1980) (West Point cadet).

## Army Regulation 27-20 (Claims) Has a Metamorphosis

James A. Mounts, Jr.  
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Army Regulation (AR) 27-20, the bible for claims within the U.S. Army, has undergone eighteen changes since it was first published in September 1970. It is finally time for a complete revision, which will be in the UPDATE format. This format will facilitate more timely changes to the regulation and result in more current guidance being available to field claims offices. The proposed publication date for the revision is July 1987.

One of the major changes found in the revised AR 27-20 will give a greater role to the area claims authorities, to be called “area claims offices,” by giving them responsibility for claims arising in their geographic regions. Claims processing offices must forward claims to the area claims offices for action unless otherwise directed by the United States Army Claims Service (USARCS), Area claims offices will

therefore exercise more control over claims offices within their region.

In addition, area claims offices will be delegated authority to approve, disapprove, or compromise tort claims for \$15,000 or less. The claimant may submit a written request for reconsideration to USARCS when his or her claim has been denied or a final offer issued. Granting area claims offices authority to disapprove claims presented for \$15,000 or less is a new concept and is in harmony with the power-down emphasis within the U.S. Army. This is an appropriate enlargement of the installation staff judge advocate's authority in the claims arena.

Numerous other changes have been made in the revision. The number of pages and figures have been drastically reduced. The revision now contains only regulatory requirements with the "how to do it" information reserved for the Claims Manual. A comparison of the other more significant changes made by the revision, on a chapter basis, is as follows:

### Chapter 1. The Army Claims System

#### Current AR 27-20

Claims processing authorities.

Claims authorities listed in various chapters.

Health Services Command not mentioned.

#### Revised AR 27-20

Creates claims processing offices with and without approving authority and allows for creating special claims processing offices (a new technical supervision change).

Simplifies designation of claims authorities.

Gives recognition to Health Services Command's responsibility for medical claims JAs.

### Chapter 2. Investigating and Processing of Claims

#### Current AR 27-20

Detailed investigation procedures/techniques.

Detailed guidance on liability and quantum issues, with citations.

#### Revised AR 27-20

Eliminated much detailed guidance on investigation of specific types of claims as more appropriate for Claims Manual.

Revised to give general principles with detailed guidance reserved for Claims Manual. Established two new paragraphs dealing with property damages appraisers and independent examinations.

### Chapter 3. Military Claims Act

#### Current AR 27-20

Applies law of the foreign country to issues of comparative/contributory fault of the claimant.

Provides for use of general principles of American law for the assessment of damages in all types of overseas personal injury and death claims.

#### Revised AR 27-20

Clarifies the policy and procedures to be followed in claims having potential remedies under both the Military Claims Act (Chapter 3) and the Federal Tort Claims Act (Chapter 4).

Applies general principles of comparative negligence to issues of comparative fault of the claimant.

Establishes the Death on the High Seas Act, 46 U.S.C. § 761, as interpreted by federal courts, as guidance for assessment of damages for overseas wrongful death claims.

Provides guidance for the use of structured settlements and mandates use in specified types of claims.

Expressly provides that no form of hearing is authorized upon appeal of a claim to the Secretary of the Army.

Clarifies the use of Chapter 3 for implementation of the statutory hold harmless provision in cases where medical or legal personnel are successfully sued in their individual capacity for malpractice occurring overseas.

### Chapter 6. National Guard Claims Act

#### Current AR 27-20

Settlement and approval monetary authorities used pursuant to prior legislation.

Contains generally same wording as Chapter 3 (Military Claims Act). Both statutes similar in content.

#### Revised AR 27-20

Changes in settlement and approval monetary authorities reflect recent congressional action, Pub. L. No. 98-564 (October 30, 1984).

Chapter 6 has been greatly reduced in size by cross-referencing to parallel wording in Chapter 3, where applicable.

### Chapter 8. Maritime Claims

#### Current AR 27-20

Division and District Engineers are delegated authority to approve and pay claims regardless of amount which are meritorious and settleable in an amount not exceeding \$5,000. This excludes authority to disapprove claims.

#### Revised AR 27-20

Engineer area claims offices are delegated authority to approve and pay claims (but not disapprove) meritorious and settleable in an amount not exceeding \$10,000.

### Chapter 9. Claims Under Article 139, UCMJ

#### Current AR 27-20

No suspenses are imposed on processing Article 139 claims, and field claims offices are given no special authority to monitor the processing of such claims.

Pay is withheld immediately following the approval of an Article 139 claim, limiting the effectiveness of action on reconsideration.

#### Revised AR 27-20

Specific suspenses are imposed on the processing of Article 139 claims, and field claims offices are directed to monitor the processing of such claims.

Except when this would create an injustice, withholding of pay is delayed for fifteen days following the approval of an Article 139 claim to permit the soldier to request reconsideration.

### Chapter 11. Personnel Claims and Recovery

#### Current AR 27-20

All reconsiderations in personnel claims acted on by USARCS.

Destroyed items with salvage value must be turned in before payment is made.

Rounding of sums is not permitted.

To make an emergency partial payment, an approving authority who does not have the authority to settle a claim must forward the file to the next higher settlement authority.

Offices not otherwise designated in paragraph 11-45 have approval authority of \$5,000 and in CONUS they forward claims they cannot settle directly to USARCS.

#### Revised AR 27-20

All reconsiderations in personnel claims acted on by USARCS, except USACSEUR acts on those from offices in USAREUR.

Claims approving authority permit alternate disposition for items with a value of \$25.00 or less.

Rounding of sums to the nearest whole dollar is required.

The next higher settlement authority may authorize an emergency partial payment by telephone.

Claims processing offices with approval authority have approval authority of \$10,000 and forward claims they cannot settle to their area claims authority.

## Chapter 14. Affirmative Claims

### Current AR 27-20

No regular report of property damage assertions or collections of claims under property section is required.

Information concerning the number and dollar amount of demands made and claims collected under medical care recovery will be reported annually.

Authority to compromise or waive:

For property loss, damage, destruction,

SJA may compromise claims and terminate collection action for claims that do not exceed \$20,000 up to \$5,000.

### For Medical Care Recovery,

SJA may compromise claims, asserted in an amount up to \$40,000, so long as the claim is not reduced by more than \$10,000.

## Chapter 15. Claims Office Administration

### Current AR 27-20

At end of Chapter 2 (Where often overlooked)

Gave specific instructions on preparation of DA3.

### Revised AR 27-20

Semi-annual report required for CY.

Semi-annual report required for CY.

Area claims offices have the authority to accept full payment of a claim and to approve a compromise not exceeding \$10,000 in claims not exceeding \$20,000.

Redelegation of compromise authority in an amount not to exceed \$5,000 is permitted to any claims processing office with approval authority.

Area claims offices have the authority to compromise or waive in whole or in part, claims not in excess of \$40,000, provided that the claim is not reduced by more than \$15,000.

Redelegation in an amount not to exceed \$5,000 compromise authority to any claims processing office with approval authority is permitted.

### Revised AR 27-20

Made separate Chapter to highlight administrative matters.

Add guidance on affirmative claims and investigative files/logs.

All DA3 instructions are in Claims Manual.

Gives specific instructions for preparation and disposition of Affirmative Claims Report.

## Certificates of Appreciation

The Judge Advocate General has approved the issuance of U.S. Army Claims Service (USARCS) Certificates of Appreciation for selected claims personnel serving in judge

advocate offices worldwide. The purpose of the certificate is to provide special recognition to civilian and enlisted claims personnel who have made significant contributions to the success of the Army Claims Program within their assigned commands.

The criteria for the issuance of a certificate is as follows:

a. the recipient must be a civilian employee or enlisted soldier currently serving in a judge advocate claims office;

b. the recipient must have worked in claims for a minimum of five years (this time may be figured on a cumulative basis and relate to different assignments or claims positions);

c. the recipient must be nominated by the staff or command judge advocate, detailing the contributions of the individual that makes him or her worthy of this recognition; and

d. only one person in an office may be nominated for a certificate in any one calendar year (waivable in exceptional cases at the request of the nominating official to allow two individuals in a single office to receive the certificate in one calendar year).

Nominations should be addressed to the Commander, USARCS, who is the approving official for the award of the certificate. Upon approval, the certificate, signed by the Commander, USARCS, will be forwarded to the nominating official for presentation at an appropriate ceremony.

## Personnel Claims Note

*This note is designed to be published in local command information publications as part of a command preventative law program.*

This month's note concerns domestic household goods shipments. In May 1987, the Military Traffic Management Command is scheduled to start a new system that will force carriers to pay a lot more for any damage they cause in transporting a soldier's property.

A number of carriers have responded by emphasizing that they have competent, professional repair services in place that can repair items damaged in shipment, particularly furniture. The carriers will now have a financial inducement to offer such services to the soldier on most domestic shipments initiated after May 1987.

Soldiers who want to spare themselves the time and trouble of filing a claim and obtain estimates of repair are encouraged to look into these services.

# Automation Notes

Information Management Office, OTJAG

## JAGC Defense Data Network Directory

This is the first printing of the JAGC Defense Data Network (DDN) Directory. It lists electronic addresses for JA offices and JA personnel having the ability to communicate using the DDN. As more locations gain identities on the network, their addresses will be added to the directory. Eventually, the DDN addresses will be included in the JAGC Personnel and Activity Directory. Corrections to information contained in this directory should be sent to: Office of The Judge Advocate General, Headquarters, Department of the Army, ATTN: DAJA-IM, The Pentagon, Washington, D.C. 20310-2216.

The directory is current as of April 15, 1987. Users change frequently, so this list may not be exhaustive. For example, on the OPTIMIS host computer, an account is frozen if it is not used for two months or if the user's password is not changed on a regular basis. Users should check with their host computer management office for similar rules.

For those with no prior knowledge of DDN, it is a worldwide network designed to meet the data communication requirements of the Department of Defense and to satisfy the performance needs of computer system users who require data communication services. As users of a DDN host computer, offices with DDN addresses have the ability to send electronic mail (E-mail) to all other users on the DDN.

Instructions on how to use E-mail can be obtained from your DDN host computer management office. Normally, mail sent thru the DDN is addressed in the following manner: To: mailer! <addressee's username@computer host name>. Examples are:

For OTJAG IMO: mailer! <drothlisb@optimis.arpa >

For OJA, HQ USAREUR: mailer! <ja@usareur-em.ARPA >

SJA, HQ USA Japan: mailer! <ajja@zama-em.h.arpa >

Addresses on the same DDN host computer, e.g., OPTIMIS, need only use the username.

E-mail has been used to send a variety of materials including briefs, letters, and statistical reports. E-mail is delivered instantly to those on the same DDN host. It is delivered every twenty minutes to those hosted by a different DDN host computer. As E-mail and electronic bulletin boards become more available, JA offices should be ready to take advantage of this increased communication capability. All it takes is a PC, a modem, and a DDN address.

### Office of The Judge Advocate General

Office of The Judge Advocate General  
HQDA, The Pentagon  
Washington, D.C. 20310-2200

Office DDN Address: DROTHLISB@OPTIMIS.ARPA

Individual DDN Addresses: The Following Individuals Have Addresses on the OPTIMIS DDN Host Computer. E-mail to Them Should Be Addressed in the Following Manner:

MAILER! <USERNAME@OPTIMIS.ARPA >

or

MAILER! <USERNAME@OPTIMIS-PENT.ARPA >

(E-Mail Between OPTIMIS Users Need Only Address the USERNAME.)

#### Owner

BAKER, MS BARBARA  
BLACK, CPT SCOTT  
BOZEMAN, COL JOHN  
CARLSON, MAJ LOUIS  
CARRIER, CPT DAVID  
EGOZCUE, CW3 JOSEPH  
FAGGIOLI, MAJ VINCENT  
GRAY, MS JACKIE  
HOLDEN, MAJ PHILIP  
ISAACSON MAJ SCOTT  
KEARNS MS THELMA  
LECLAIR, MAJ THOMAS  
MACKEY, LTC PATRICK  
MANUELE, MAJ GARY  
MARCHAND, LTC MICHAEL  
MCFETRIDGE, MAJ ROBERT  
MCGEHEE, MAJ JACK  
MURDOCH, CPT JULIE  
POPESCU, MAJ JOHN  
PYRZ, MAJ THOMAS  
ROTHLISBERGER, LTC D  
RUMMEL, MR EDGAR  
SCHWARZ, MAJ PAUL  
STAMETS, MR ERIC  
STRASSBURG, COL TOM  
WALTERS, MS KATHEY  
WHITE, CPT RONALD  
WOODLING, CPT DALE

#### Username

BBAKER  
BLACK  
BOZEMAN  
LCARLSON  
CARRIER  
EGOZCUE  
FAGGIOLI  
GRAY  
HOLDEN  
ISAACSON  
KEARNS  
TLECLAIR  
PMACKEY  
GMANUELE  
MARCHAND  
MCFETRIDG  
MCGEHEE  
MURDOCH  
POPESCU  
PYRZ  
DROTHLISB  
RUMMEL  
SCHWARZ  
STAMETS  
STRASSBUR  
WALTERS  
RWHITE  
WOODLING

### U.S. Army Legal Services Agency

U.S. Army Legal Services Agency  
Nassif Building  
5611 Columbia Pike  
Falls Church, VA 22041-5013

Office DDN Address: BRUNSON@OPTIMIS.ARPA

Individual DDN Addresses: The Following Individuals Have Addresses on The OPTIMIS Host Computer.

*Owner*

BRIDGES, MS DOROTHY  
BRUNSON, MAJ GIL  
CROW, MAJ PATRICK  
FULTON, MR WILLIAM S  
HARDERS, MAJ R T  
HUGHES, MAJ JAMES  
KAPANKE, MAJ CARL  
KINBERG, MAJ EDWARD  
MILLER, JOL HAROLD L  
NIXON, MR STEVE  
PRESCOTT, ILT JODY  
RAMSEY, LTC WILLIAM  
ROLLINS, MR JOHN  
SPOSATO, CPT MARK  
STOKES, CPT WILLIAM

*Username*

DBRIDGES  
BRUNSON  
CROW  
FULTON  
HARDERS  
JAHUGHES  
KAPANKE  
KINBERG  
HMILLER  
SNIXON  
JPRESOTT  
WRAMSEY  
ROLLINS  
SPOSATO  
WSTOKES

**U.S. Army Training & Doctrine Command**

Office of the Staff Judge Advocate  
HQ, U.S. Army Signal Center & Ft. Gordon  
Fort Gordon, GA 30905-5280

DDN Address: MLANOUE@OPTIMIS.ARPA

Office of the Staff Judge Advocate  
HQ, U.S. Army Air Defense Artillery Center & Fort Bliss  
Fort Bliss, TX 79916-5000

Office DDN Address: HOLMES@OPTIMIS.ARPA  
Individual DDN Addresses: The Following Individuals have addresses on the OPTIMIS Host Computer.

*Owner*

TUDOR, CPT RONNIE B.  
HOLMES, MSG RAY

*Username*

TUDOR  
HOLMES

**The Judge Advocate General's School**

The Judge Advocate General's School  
Charlottesville, VA 22903-1781

Office DDN Address: DODSON@OPTIMIS.ARPA  
Individual DDN Addresses: The Following Individuals Have Addresses on the OPTIMIS Host Computer.

*Owner*

BILLINGSLEY, SFC GLENN  
BUNTON, SFC LARRY  
CAYCE, CPT LYLE  
DODSON, CPT DENNIS  
FLETCHER, MAJ DOUG  
GETZ, CPT DAVID  
OLDAKER, MS HAZEL  
POINTER, CPT DAVE  
SCHOFFMAN, MAJ R  
HAYNES, MAJ TOMMIE  
ZUCKER, LTC DAVID

*Username*

BILLINGS  
BUNTON  
CAYCE  
DODSON  
FLETCHER  
GETZ  
OLDAKER  
POINTER  
SCHOFFMAN  
THAYNES  
ZUCKER

**U.S. Army Forces Command**

Staff Judge Advocate  
HQ, 7th Infantry Division & Ft. Ord  
ATTN: AFZW-JA  
Fort Ord, CA 93941

DDN Address: BOUGLANER@OPTIMIS-PENT.ARPA

**U.S. Army Europe & Seventh Army**

Office of the Judge Advocate  
U.S. Army Europe & Seventh Army  
APO New York 09403-0109

DDN Address: JA@USAREUR-EM.ARPA

**U.S. Army Claims Service**

U.S. Army Claims Service  
Building 4411  
Fort Meade, MD 20755

Office DDN Address: SLUSHER@OPTIMIS.ARPA

**U.S. Army Japan**

Office of the Staff Judge Advocate  
HQ, U.S. Army Japan  
Camp Zama Japan  
APO SF 96343

DDN Address: AJJA@ZAMA-EMH.ARPA

**U.S. Army Recruiting Command**

Command Legal Counsel, Bldg. 48A  
U.S. Army Recruiting Command  
Fort Sheridan, IL 60037-6000

DDN Address: USAREC@DDN2.ARPA

**U.S. Army Korea & Eighth Army**

Office of the Judge Advocate  
HQ, Eighth U.S. Army  
APO SF 96301

DDN Address: USFK-JAJ@WALKER-EMH.ARPA

**U.S. Army Strategic Defense Command**

U.S. Army Strategic Defense Command  
1941 Jefferson Davis Highway  
PO Box 15280  
Arlington, VA 22215-0150

DDN Address: DGRAY@OPTIMIS.ARPA

**U.S. Army Materiel Command**

Commander  
Anniston Army Depot  
Legal and Claims Office  
Anniston, AL 36201-5005

DDN Address: IMASON@ANAD.ARPA

Office of the Staff Judge Advocate  
HQ, U.S. Army Aviation Systems Command  
4300 Goodfellow Blvd.  
St. Louis, MO 63120-1798

Office DDN Address: AMSAVJL@USAREC-4.ARPA  
Individual DDN Addresses: The Following Individuals Have Addresses  
on the OPTIMIS DDN Host Computer.

Owner	Username
COL ROGER G. DARLEY	RDARLEY@USAREC-4.ARPA

Commander  
U.S. Army Dugway Proving Ground  
ATTN: STEDP-JA  
Dugway, UT 84022-5000

DDN Address: STANGLER@DPG-1.ARPA

Office of the Chief Counsel/SJA  
HQ, U.S. Army Test and Evaluation Command  
ATTN: AMSTE-JA  
Aberdeen Proving Ground, MD 21005-5055

DDN Address: AMSTELO@APG-4.ARPA

Office of the Command Judge Advocate  
U.S. Army Yuma Proving Ground  
ATTN: STEYP-JA  
Yuma, AR 85365-9102

DDN Address: YPGJAG@YUMA.ARPA

### U.S. Army Military Traffic Management Command

Staff Judge Advocate  
HQ, Western Area, MTMC  
Oakland Army Base  
Oakland, CA 94626-5000

DDN Address: AABWRM@NARDACVA.ARPA

### No Substitute For Subdirectories

The twenty megabyte hard disks that are standard on LAAWS attorney workstations can hold 10,000 pages of programs, briefs, and other files. Without effective organization, trying to find the file you want can be nearly impossible. You could browse through endless screens of file lists, never finding the file that you "know" is there. Disorganization on the hard disk can also slow down your computer's operation by making it search for your data and programs throughout one huge directory.

The Disk Operating System (DOS) that manages your computer's operations offers an easy way to organize files

on your hard disk. It has a built-in, "tree-structured" file directory system. The main directory is called the "root" directory and is symbolized by the backslash character (\). Subdirectories are branches off the root directory. Each subdirectory may contain further subdirectories, and so on. Like a tree, there is a central trunk and many branches and offshoots.

Each application program should have two subdirectories; one for the programs themselves; and one for the data (documents, graphics, etc.) you produce using the programs. Naming the subdirectory to reflect the application software and its data (e.g., \ENABLE and \EDATA) will help you quickly access the proper subdirectory. Then, when you list the subdirectory (using the DIR command), only the relevant files will appear. To take full advantage of the names you give the subdirectories, the DOS command "PROMPT \$PSG" should be included in your computer's AUTOEXEC.BAT file (see your automation coordinator for more detailed instructions). With this command activated, the prompt at the left-hand side of the screen will reflect the current subdirectory level (e.g. C:\ENABLE\EDATA >) and you will never get lost (well, hardly ever).

The subdirectory approach also makes the all-important backup procedures easier. For example, the Enable software program alone occupies about seven floppy disks when you do a backup. But there is no need to waste time and floppies backing up the Enable or other application programs, as this software can always be reinstalled from the original floppy disks. What you really want (and need) to do is save your new work product. When you store your data in separate subdirectories, these are the only ones that need to be backed up. Thus, rather than issuing a global BACKUP command, e.g., C:\ > BACKUP \*.\* a:/s, which will backup each and every file on the disk, you can change to the data subdirectory (CHDIR or CD) and backup only the files in that particular subdirectory. If you have invoked the PROMPT \$PSG command and your Enable files are stored in a subdirectory you have named EDATA, the backup sequence might look like this:

```
C:\ > CHDIR \Enable\EDATA
< RETURN >
C:\ENABLE\EDATA > BACKUP *.* A:
< RETURN >
```

It is old news that backing up data on your hard disk is extremely important to long life and happiness. Judicious use of subdirectories will let you make your backups more quickly and easily and put the good life within your grasp. Captain David L. Carrier.

## Bicentennial of the Constitution

### Bicentennial Update: The Constitutional Convention—June 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 and April, 1987, issues of The Army Lawyer.*

At its opening session on May 25, 1787, the Convention adopted a set of procedural rules, gave each state delegation an equal vote, and passed a rule of secrecy. On May 29, serious discussion began with the Virginia Plan, which became the agenda of the Convention.

James Madison had arrived in Philadelphia eleven days early, with other Virginians, to draft the Virginia Plan. Madison believed that the experience under the Articles of The Confederation proved that the state legislatures were unwilling to respect the national interest, the interests of other states, or the rights of individuals. He saw no future for a national Congress that relied, as did the Continental Congress under the Articles of Confederation, on the good will of the states to carry out national policies. The new government would need the power to enact laws and levy taxes directly on the population, and enforce the laws through a national executive and judiciary.

For strategic reasons, Virginia governor Edmund Randolph, rather than Madison, introduced the Virginia Plan to the Convention. He introduced the Plan with the recommendation that the Articles of Confederation be "corrected and enlarged." While Randolph's introduction fit within the limited role the Continental Congress envisioned for the Convention, the Plan itself completely dismantled the Articles. It called for a bicameral legislature, with the lower house elected by popular vote and the upper house selected by the lower from candidates nominated by the state legislatures. The legislature would have the power to make laws in areas where "the separate states are incompetent"; if necessary it could call forth the armed forces of the union against a state to enforce these laws. The legislature would also elect people to serve in the executive and judicial branches of the government. A national executive would exercise the executive powers that the Articles of Confederation had given to the Continental Congress; a combined executive judicial Council of Revision would enjoy a limited veto power over acts of Congress. The Council of Revision, in conjunction with one or both houses of the legislature would also have the power to overturn state laws contrary to the Constitution. Finally, the Plan also established a federal court system.

Surprisingly, the proposal for a greatly strengthened national government encountered little opposition. The Convention immediately formed a committee of the whole and adopted, by a vote of six to one, a motion calling for adoption of a national government "consisting of a supreme Legislative, Executive, and Judiciary." With this vote, the Convention rejected the Articles of Confederation and committed itself to a more powerful central government.

The Convention nearly foundered on another issue, however—representation in the legislature. The Plan called for each state to have representation in the Congress proportional to its population. Madison and his Virginia colleagues were adamant that the Convention replace the "one-state, one-vote" rule that prevailed in the Continental Congress. In this they were joined by delegates from Massachusetts and Pennsylvania, the other two largest states in the Confederation. All agreed that the Convention had to solve the representation problem first.

The smaller states were equally adamant against proportional representation. They foresaw a government dominated by the large states, ignoring the small states' interests in favor of Virginia, Massachusetts, and Pennsylvania. The fight over representation lasted for seven exhausting weeks. In the two weeks after Randolph introduced the Virginia Plan, the large states managed to gain an endorsement in principle of proportional representation. Their success came to a halt, however, on June 14, when delegate William Paterson, the New Jersey attorney general, introduced the New Jersey Plan, backed by the smaller states. The New Jersey Plan would have continued the important features of the Articles of Confederation. The unicameral legislature would remain, with each state keeping an equal voice. The plan established a plural executive, elected by the legislature. Like the Virginia plan, however, the New Jersey Plan granted the national government the power to lay taxes directly on the populace (in states that failed to meet the contribution quotas established by Congress) and the national government could call on the armed forces to enforce the national laws.

On June 19, the New Jersey plan was voted down, seven to three, after heavy criticism by Alexander Hamilton and Madison. The delegates continued to discuss a central government of the kind proposed by the Virginia plan, but the large and the small states remained at odds. The large states threatened to dissolve the Union and confederate separately if their demands were not met. In response, the smaller states indicated that they might seek alliances with the European powers, in order to "find some foreign ally of more honor and good faith."

To break the deadlock, Oliver Ellsworth of Connecticut proposed the Connecticut Compromise: he submitted a motion to give each state an equal representation in the Senate. The debate over the Compromise ended dramatically on July 2, when the states divided, five states to five (the Georgia delegation was itself divided and lost its vote) on Ellsworth's motion. With the Convention on the verge of breaking up over the issue, it appointed a committee, with one member from each state, and charged it with finding an acceptable solution. The committee considered the issue for three days, over the Fourth of July holiday, and submitted its report on July 5. (The Convention's July proceedings will appear in the next issue of *The Army Lawyer*).

## Bicentennial Communities

The National Commission on the Bicentennial of the United States Constitution has established a program to certify qualifying communities as Designated Bicentennial Communities. Military installations are eligible for certification. Recognition as a Designated Bicentennial Community indicates that the installation has an ongoing program to celebrate the Bicentennial and increase awareness of the Constitution. Designated Bicentennial Communities are authorized to use the commission logo and to approve use of the logo by non-profit organizations sponsoring projects

officially recognized by the installation's bicentennial committee. The Judge Advocate General's School received its designation on March 9, 1987.

Army installations should submit applications to the Chief of Public Affairs, ATTN: SAPA-CR, Washington, DC 20310-1508. An announcement of the program and sample application forms appear in the *Army Public Affairs Update \* Speech File Service*, 1 April 1987, at 4. Copies of the announcement and forms are now included with The Judge Advocate General's School Bicentennial Packet. See *The Army Lawyer*, Dec., 1986, at 66

## 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

June 1-5: 89th Senior Officers Legal Orientation Course (5F-F1).

June 9-12: Chief Legal NCO Workshop (512-71D/71E/40/50).

June 8-12: 5th Contract Claims, Litigation, and Remedies Course, (5F-F13).

June 15-26: JATT Team Training.

June 15-26: JAOAC (Phase IV).

July 6-10: US Army Claims Service Training Seminar.

July 13-17: Professional Recruiting Training Seminar.

July 13-17: 16th Law Office Management Course (7A-713A).

July 20-31: 112th Contract Attorneys Course (5F-F10).

July 20-September 25: 113th Basic Course (5-27-C20).

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 Contract 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 19-23: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

### 3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually

Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 December annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1987 issue of *The Army Lawyer*.

### 4. Civilian Sponsored CLE Courses

August 1987

- 2-7: NJC, Judicial Writing, Reno, NV.
- 2-7: NJC, Constitutional Criminal Procedure, Reno, NV.
- 2-7: ATLA, Basic Course in Trial Advocacy, Boston, MA.
- 2-14: NJC, Special Court: Non-Law Trained Judge, Athens, GA.
- 6-16: NITA, Northeast Regional Trial Advocacy Program, Hempstead, NY.
- 13-14: PLI, Lawyer Writing Course, Los Angeles, CA.
- 16-21: AAJE, Trial Skills Workshop, Palo Alto, CA.
- 17-21: FPI, The Skills of Contract Administration, Sun Valley, CA.
- 20-21: PLI, Creative Real Estate Financing, San Francisco, CA.
- 21: NCLE, Agricultural Law, Kearney, NE.
- 23-28: ATLA, Advanced Courses in Trial Advocacy, Vail, CO.
- 27-29: PLI, Product Liability of Manufacturers, Los Angeles, CA.
- 30-4: AAJE, Trial Judges, Boulder, CO.
- 30-4: AAJE, Appellate Opinions—Advanced, Boulder, CO.
- 30-4: AAJE, Appellate Opinions—General, Boulder, CO.

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*.

## Current Material of Interest

### 1. Proper Wear of Distinctive Unit Insignia

The Judge Advocate General's Corps regimental distinctive unit insignia (regimental crest) will soon be available for wear by active duty and Reserve Component judge advocates, legal administrators, legal specialists and NCOs, and court reporters. See Army Regulation 600-82 for details on the regimental affiliation policy.

Distribution procedures for regimental crests are being developed by Office of the Deputy Chief of Staff for Logistics and will be announced when determined. The following guidelines for wear of regimental crests are provided:

Regimental crests are authorized for wear on the Army green, white, and blue uniforms, and the Army white and blue mess uniforms.

On the Army green, white, and blue uniforms, men wear the regimental crest centered and 1/8 inch above the top right breast pocket seam or 1/2 inch above unit and foreign awards, if worn. Women center the regimental crest 1/2 inch above the nameplate or 1/2 inch above any unit awards or foreign awards, if worn.

On the Army white and blue mess uniforms, regimental crests will be worn on the right lapel. On the blue mess uniform, it is worn centered on the satin facing and 1/2 inch below the notch in the lapel. On the white mess uniform, it is worn 1/2 inch below the notch and centered on the lapel. The vertical axis of the insignia will be perpendicular to the ground.

Military personnel assigned to the Office of The Judge Advocate General and the US Army Claims Service, in addition to wearing the regimental crest as prescribed above, will wear it on the black pullover sweater, centered from left to right, top to bottom, above the nameplate.

Army Regulation 670-1 contains figures demonstrating the proper wear of distinctive unit insignia.

## 2. TJAGSA Publications Available Through the Defense Technical Information Center

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

### Contract Law

- AD 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).

### Claims

- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

### Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

### Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

### Developments, Doctrine & Literature

- AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).
- AD B088204 Uniform System of Military Citation/JAGS-DD-84-2 (38 pgs).

### Criminal Law

- AD 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:

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 1-29	Telephone and Intercommunications Services in the National Capital Region		15 Mar 87
AR 15-110	Board of Directors, Army and Air Force Exchange Service (AAFES)		1 Mar 87
AR 27-20	Legal Services-Claims	102	4 Mar 87
AR 37-107	Accounts Payable		3 Apr 87
AR 40-35	Preventive Dentistry		1 Mar 87
AR 40-66	Medical Record and Quality Assurance Administration		1 Apr 87
AR 40-501	Standards of Medical Fitness	35	9 Feb 87
AR 135-32	Retention In An Active Status After Qualification For Retired Pay		15 Apr 87
AR 190-57	Civilian Internee-Administration, and Compensation		4 Mar 87
AR 195-3	Acceptance, Accreditation, and Release of U.S. Army Criminal Investigation Command Personnel		22 Apr 87
AR 380-380	Automation Security	1	15 Mar 87
AR 381-26	Army Foreign Materiel Exploitation Program		6 Mar 87
AR 385-40	Accident Reporting and Records		1 Apr 87
AR 385-55	Prevention of Motor Vehicle Accidents		12 Mar 87
AR 700-45	Logistics Support of Artic and Adjacent Remote Areas		20 Feb 87
AR 725-50	Requisitioning Receipt and Issue System		1 Apr 87
AR 735-11-2	Reporting of Item and Packaging Discrepancies		1 Oct 86
AR 870-15	Army Art Collection Program		4 Mar 87
CIR 40-87-330	FY 87 Medical, Dental, and Veterinary Care Rates; Rates for Subsistence; and Crediting FY 87 Appropriation Reimbursement Accounts		15 Mar 87
CIR 310-86-2	12 Series Forms	3	30 Nov 86
DA Pam 165-15	Moral Leadership/Values: Responsibility and Loyalty		15 Dec 86
DA Pam 350-100	Extension Training Materials Consolidated MOS Catalog		13 Mar 87
DA Pam 600-41	Military Personnel Manager's Mobilization Handbook		1 Jan 87
UPDATE 4	Personnel Evaluations		1 Apr 87
UPDATE 18	Reserve Components Personnel		20 Feb 87

### 4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

- Bazylar, *Capturing Terrorists in the 'Wild Blue Yonder': International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 Whittier L. Rev. 683 (1986).
- Bogdanos, *Search and Seizure: A Reasoned Approach*, 6 Pace L. Rev. 543 (1986).
- Boyle, *Preserving the Rule of Law in the War Against International Terrorism*, 8 Whittier L. Rev. 735 (1986).
- Developments in Tort Law and Tort Reform*, 18 St. Mary's L.J. 669 (1987).
- Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. Int'l L. & Pol. 1 (1986).
- Franckx, *The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters*, 18 J. Mar. L. & Com. 33 (1987).
- Hermann, *Amnesia and the Criminal Law*, 22 Idaho L. Rev. 257 (1985-1986).
- Joost, *Simplifying Federal Criminal Laws*, 14 Pepperdine L. Rev. 1 (1986).
- Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239 (1987).
- Klein, *From the Bench: A Dozen Ways to Anger a Judge*, Litigation, Winter 1987, at 5.
- Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act With Limitations of Liability in Common Law Negligence*, 60 St. John's L. Rev. 221 (1986).
- Langstraat, *The Individual Retirement Account: Retirement Help for the Masses, or Another Tax Break for the Wealthy?*, 60 St. John's L. Rev. 437 (1986).
- Larson, *Naval Weaponry and the Law of the Sea*, 18 Ocean Dev. & Int'l L. 125 (1987).
- Lepow, *Nobody Gets Married for the First Time Anymore—A Primer on the Tax Implications of Support Payments in Divorce*, 25 Duq. L. Rev. 43 (1986).
- Levitt, *International Law and the U.S. Government's Response to Terrorism*, 8 Whittier L. Rev. 755 (1986).
- Marsh, *Living Will Legislation in Colorado: An Analysis of the Colorado Medical Treatment Decision Act in Relation to Similar Developments in Other Jurisdictions*, 64 Den. U.L. Rev. 5 (1987).
- Morgan, *Pharmacist Liability*, 33 Med. Trial Tech. Q. 315 (1987).
- Nanovic, *Comparative Negligence and Dram Shop Laws: Does Buckley v. Pirolo Sound Last Call for Holding New Jersey Liquor Vendors Liable for the Torts of Intoxicated Persons?*, 62 Notre Dame L. Rev. 238 (1987).
- Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 Buffalo L. Rev. 177 (1986).
- Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 Whittier L. Rev. 711 (1986).
- Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence*, 80 Nw. U.L. Rev. 956 (1986).
- Sheerin, *Structured Settlements—Some Brief Comments*, 30 Trial Law. Guide 425 (1987).
- Rosenthal, *Countering International Terrorism: Building a Public Consensus*, 8 Whittier L. Rev. 747 (1986).

Solf, *A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 Akron L. Rev. 261 (1986).

*A Symposium on International Terrorism*, 13 Ohio N.U.L. Rev. 1 (1986) (introduction by Judge Robinson O. Everett).

Trail & Maney, *Jurisdiction, Venue, and Choice of Law in Medical Malpractice Litigation*, 7 J. Legal Med. 403 (1986).

Comment, *The Feres Doctrine and the Department of Defense Quality Assurance Plan: The Road to High Quality Care in Military Medicine*, 7 J. Legal Med. 521 (1986).

Comment, *First Amendment Rights in the Military Context: What Deference is Due?—Goldman v. Weinberger*, 20 Creighton L. Rev. 85 (1986–1987).

Note, *The Disposition of Father-Daughter Incestuous Assault Cases: An Overview*, 21 New Eng. L. Rev. 399 (1985–1986).

Note, *Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866.

Note, *The Jurisprudence of the Foreign Claims Settlement Commission: Vietnam Claims*, 27 Va. J. Int'l L. 99 (1986).

Note, *Sentence Reform and the Federal Rules of Criminal Procedure: A Prospective Analysis*, 35 Drake L. Rev. 405 (1985–1986).

Note, *The Ten Dollar Attorney Fee Limitation and Preclusion of Judicial Review in the Veterans Administration*, 14 Hastings Const. L.Q. 141 (1986).

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