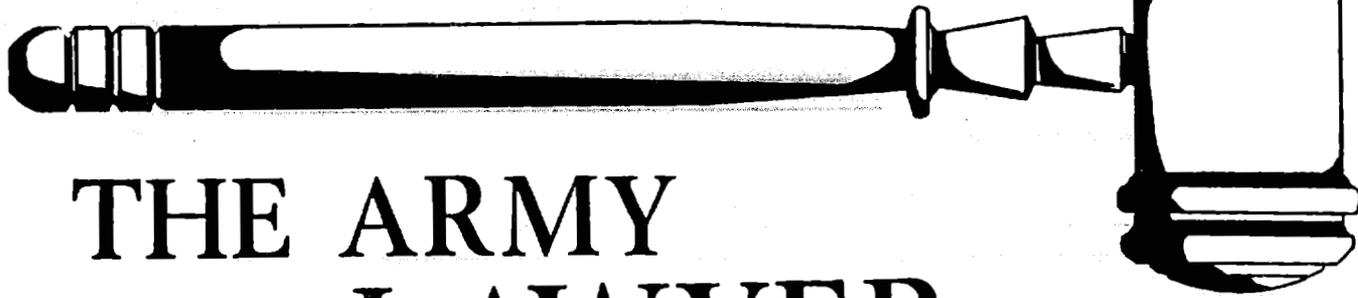


Cpt Mackenzie



# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-177

September 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-CL 1987/6313 (27-1a)

28 JUL 1987

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Liaison with Civilian Officials After Solorio - Policy Memo 87-5

1. The Supreme Court of the United States overruled O'Callahan v. Parker, 395 U.S. 258 (1969) in Solorio v. United States, \_\_\_ U.S. \_\_\_ (June 25, 1987). The Court held that the exercise of court-martial jurisdiction over an offense depends solely on the accused's status as a member of the Armed Forces, and not on the "service connection" of the offense charged. The Solorio decision dramatically enhances the disciplinary authority of commanders and will have an impact on investigative, law enforcement, and legal resources. Military jurisdiction over off-post offenses will, by necessity, require greater communication and coordination with civilian law enforcement agencies and prosecutors.

2. Staff and command judge advocates should review any Memorandum of Understanding (MOU) in effect with local, state, and federal prosecutors and law enforcement officials in light of Solorio. Regardless of the status of these MOUs or other informal arrangements, Solorio should be discussed with these officials as soon as possible and plans made for coordination on future cases. In addition, you should ensure that local Criminal Investigation Division (CID) and Military Police (MP) officials coordinate with their civilian counterparts on how to handle cases in view of Solorio.

3. In your discussions with these civilian officials you need to keep in mind the following policies:

a. The ultimate goal is a well disciplined fighting force. As stated in para. 4-2, AR 27-10,

A person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction.

DAJA-CL 1987/6313 (27-1a)

SUBJECT: Liaison with Civilian Officials After Solorio - Policy  
Memo 87-5

b. Prior cases in which the civilian authorities declined to exercise their jurisdiction and which were never subjected to military jurisdiction due to O'Callahan, may be disposed of under the UCMJ (with discretion) if within the statute of limitations.

c. Prior courts-martial in which the government lost subject matter jurisdiction over the offense due to O'Callahan and did not appeal, will not be revived as a matter of policy.

d. Cases currently underway at the trial level are controlled by Solorio; therefore, Alef factors in those specifications are mere surplusage.

e. Cases currently on direct or government appeal will be affected by Solorio. Government Appellate Division will cite Solorio where appropriate and allow the normal appellate process to proceed.

4. Finally, commanders and law enforcement officials need to understand that we must use the expanded jurisdiction under Solorio wisely. Abuses will invite corrective action by Congress as suggested in both the majority and dissenting opinions in Solorio. We must ensure that the exercise of UCMJ authority is prudent and consistent with good order and discipline.

*Hugh Overholt*

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

# Federal Criminal Prosecutions on Military Installations

## Part II: Practice Pointers for the Military Attorney

Captain David J. Fletcher\*

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This article is based in part on the experiences of Fort Hood prosecutors trying civilian felonies in federal court. Part I, published in the August 1987 issue of *The Army Lawyer*, dealt with establishing a felony prosecution program on an installation in the United States. Part II is designed to assist military Special Assistant United States Attorneys in federal criminal practice. It covers several specific areas, including federal arrest, initial appearance, pretrial detention hearings, preliminary examinations, the grand jury, arraignment, speedy trial requirements, voir dire, and sentencing. It is not intended to address all of the critical points of the federal criminal trial process, but rather to examine those areas that a military prosecutor may find most novel and troublesome in practice.

### Pretrial Issues

Federal arrests trigger the criminal process. Once a potential defendant is arrested, the federal prosecutor must immediately plunge into action. An arrest based upon an arrest warrant issued under Federal Rule of Criminal Procedure 4 is normally coordinated with the federal prosecutor by federal agents authorized to execute such a warrant.<sup>1</sup> Seldom does an arrest executed with a warrant cause problems in subsequent trial proceedings. On the other hand, a warrantless arrest often leads to litigation

problems. When a suspect is taken into custody, or otherwise has his or her liberty of movement restricted, he or she is usually under arrest.<sup>2</sup>

Federal officers are authorized to make warrantless arrests only where there is an affirmative statutory grant of such power by Congress.<sup>3</sup> The statutory grants of warrantless arrest power apply only to specified situations. Army Criminal Investigation Division agents, military police officers, and most installation game wardens do not have statutory warrantless arrest powers. They should only temporarily detain suspects for the limited period of time needed to coordinate with the appropriate federal agency. If military law enforcement officers apprehend a civilian suspected of a felony, they should immediately coordinate with the appropriate federal law enforcement agency exercising investigative jurisdiction over the offense. This will usually be the FBI.

Arrests without warrants are generally valid if supported by probable cause.<sup>4</sup> An arresting officer's mere suspicion or good faith will not constitute probable cause, although the standard does not rise to that degree of evidence needed to establish guilt.<sup>5</sup> The probable cause must exist at the time of the arrest.<sup>6</sup>

The most immediate implication of any federal arrest is that the defendant must be taken before a magistrate as soon as possible (without unnecessary delay).<sup>7</sup> If there is a period of unnecessary delay in taking an accused before a

\*Part II of this article was originally submitted as a research paper in partial satisfaction of the requirements of the 35th Judge Advocate Officer Graduate Course.

<sup>1</sup> Fed. R. Crim. P. 4. This rule authorizes the issuance of an arrest warrant based on a criminal complaint filed with or without an affidavit stating facts supporting the existence of probable cause that the defendant committed an offense against the United States. Warrants must be issued by magistrates as defined in Fed. R. Crim. P. 54. This includes a judge of the United States, a United States magistrate, and a state or local judicial officer as defined in 18 U.S.C. § 3041 (1982 & Supp. III 1985). Unless an emergency exists, petitions for warrants should be made to federal judicial officers.

<sup>2</sup> *United States v. Henry*, 361 U.S. 98, 103 (1959). In *Henry*, FBI agents who were investigating the theft of an interstate whiskey shipment observed cartons being loaded into a car. They subsequently stopped the car in which two suspects were riding. The agents searched the car while detaining the suspects. The search produced cartons of stolen radios. The suspects were then formally arrested. The Supreme Court held that the arrest was completed when the agents stopped the car and interrupted the suspects and restricted their liberty of movement. More than a restriction of liberty is required for arrest, and courts will consider the amount of force used in the detention. See also *Dunaway v. New York*, 442 U.S. 200 (1979) and *Terry v. Ohio*, 391 U.S. 1 (1968) (brief investigative stops do not necessarily constitute arrests); *Hayes v. Florida*, 470 U.S. 811 (1985) (effect of officers forcibly removing a person from his home and transporting him to a police station for fingerprinting); *United States v. Hammond*, 666 F.2d 435 (9th Cir. 1982); *Bailey v. United States*, 389 F.2d 305, 308 (D.C. Cir. 1967) (illustration of informal arrest without warrant); but see *United States v. Sayers*, 698 F.2d 1128 (11th Cir. 1983) (definition of arrest for speedy trial purposes is different). See generally *J. Cissell, Federal Criminal Trials 40-44* (1983); see also *United States v. Beck*, 598 F.2d 497, 500-02 (9th Cir. 1979).

<sup>3</sup> See *United States v. Moderacki*, 280 F. Supp. 633 (D. Del. 1968). Federal officers with statutory grants of warrantless arrest powers include directors, inspectors, and agents of the FBI under 18 U.S.C. § 3052 (1982), agents of the Secret Service under 18 U.S.C. § 3056 (1982), postal service inspectors under 18 U.S.C. § 3061 (1982), customs agents under 19 U.S.C. § 1589 (Supp. III 1985), Internal Revenue Service agents under 26 U.S.C. § 7608 (1982), Drug Enforcement Administration agents under 21 U.S.C. § 878 (1982), and United States Marshals under 18 U.S.C. § 3053 (1982). Some installation game wardens associated with the Forest Service of the United States have limited statutory arrest authority under 16 U.S.C. § 559 (1982).

<sup>4</sup> *Gerstein v. Pugh*, 420 U.S. 103, 113-15 (1975).

<sup>5</sup> See *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>6</sup> *United States v. Simon*, 409 F.2d 474, 475 (7th Cir.), cert. denied, 396 U.S. 829 (1969); *United States v. Rivera*, 321 F.2d 704, 708 (2d Cir. 1963).

<sup>7</sup> Fed. R. Crim. P. 5(a) (the purpose of the rule is to protect the rights of potential defendants from inappropriate pressures of law enforcement officers by having a judicial officer advise the suspect of his or her constitutional rights, thus avoiding unlawful detention by law enforcement officers). See also *United States v. Carignan*, 342 U.S. 36 (1951); *United States v. Manbeck*, 744 F.2d 360 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); *United States v. Smith*, 31 F.R.D. 553 (D.D.C. 1962).

magistrate for initial appearance, confessions or other evidence obtained during the period between arrest and initial appearance may be inadmissible at trial.<sup>8</sup> There are a number of specific factual situations where courts have considered the delay necessary.<sup>9</sup> By statute, if a voluntary confession is obtained through questioning an arrested or detained person within six hours of the arrest or detention, the confession will not be held invalid solely because of a delay in the initial appearance.<sup>10</sup> If law enforcement officers arrest an individual and question him or her prior to appearing before a magistrate, they should make a record of all that transpires, including the time used for all investigatory matters including booking,<sup>11</sup> identification, eliciting confessions,<sup>12</sup> and verifying confessions.

As a general rule, the defendant does not enter a plea at the initial appearance.<sup>13</sup> The magistrate must advise the defendant of the following points: that a complaint has been filed naming him as a defendant; that he has a right to counsel; that if he cannot afford counsel he has a right to request court-appointed counsel; the general circumstances under which he might secure pretrial release; that he is not required to make any statements and that if he does, such statement may be used against him; and that he has a right to a preliminary examination.<sup>14</sup> Counsel for the government should be present at the initial appearance whenever counsel or his or her superiors decide to hold the defendant in confinement until trial. This is recommended because the defendant is technically entitled to a pretrial detention hearing at his or her first appearance before a magistrate (*i.e.*, the initial appearance).<sup>15</sup> Under the Bail Reform Act of

1984, the detention hearing must be held immediately upon the defendant's first appearance before a judicial officer unless the judicial officer or the attorney for the government moves for a continuance.<sup>16</sup> If no pretrial detention hearing is conducted and there is no legitimate continuance, the defendant will be released prior to trial.<sup>17</sup>

At the pretrial detention hearing, the defendant has the right to be represented by counsel, to testify on his own behalf, to present his own witnesses, and to cross-examine witnesses for the government.<sup>18</sup> The rules of evidence do not apply at the hearing and the magistrate may base his or her ruling on hearsay.<sup>19</sup> Federal pretrial detention is designed to prevent the flight of defendants and to protect the community.<sup>20</sup> The government attorney can raise a rebuttable presumption "that no condition or combination of conditions [found in 18 U.S.C. § 3142(d)] will reasonably assure the safety of any other person and the community" by introducing evidence enabling the magistrate to find that the defendant has committed a drug offense punishable by imprisonment for ten years or more under title 21, United States Code, or has committed a crime using a firearm punishable pursuant to 18 U.S.C. § 924(c).<sup>21</sup> Grounds for a government motion to detain a defendant prior to trial are outlined in 18 U.S.C. § 3142(f)(1) and (2). These grounds include offenses involving crimes of violence, crimes punishable by death or life imprisonment, drug offenses for which imprisonment for ten years or more is possible, and habitual offenders. Factors the judicial officer should consider are stated in 18 U.S.C. § 3142(g). These include the nature and circumstances of the offense charged, whether

<sup>8</sup> See *Mallory v. United States*, 354 U.S. 449 (1957). See generally J. Cissell, *supra* note 2, at 102-03.

<sup>9</sup> For example, a 26 hour delay was not unnecessary where the time was spent as follows: 25 minutes to transport the defendant to the stationhouse; 35 minutes to identify the defendant; two and one-half hours in routine processing; two hours to transfer defendant to FBI office followed by two more hours of processing; overnight incarceration followed by one hour in transport to United States Attorney's office; and almost six more hours of particularizing the defendant's confession. *United States v. Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); Also defined as not being unnecessary delay are the following: time allowed for intoxicated accused to become sober, *United States v. Bear Killer*, 534 F.2d 1253 (8th Cir.), *cert. denied*, 429 U.S. 846 (1976); delay for purpose of giving defendant medical treatment, *United States v. Aman*, 624 F.2d 911 (9th Cir. 1980); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); and delay because of the unavailability of a magistrate under certain conditions, *United States v. Burgard*, 551 F.2d 190 (8th Cir. 1977); *United States v. Currie*, 354 F.2d 163 (2d Cir. 1965), *cert. denied*, 384 U.S. 933 (1966). See generally J. Cissell, *supra* note 2, at 102-06; 8 Federal Procedure, Lawyer's Edition 22:316 (1982 & Supp. 1985) [hereinafter *Federal Procedure*] (other examples of reasonable delay).

<sup>10</sup> 18 U.S.C. § 3501(c) (1982).

<sup>11</sup> See *Ginoza v. United States*, 279 F.2d 616, 620 (9th Cir. 1960).

<sup>12</sup> The Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), directly attacked the problems that were the basis for the unnecessary delay rule set out in *Mallory*. As a result, some courts have subsequently held that where defendants waive their *Miranda* rights, they also waive their right to be brought before a magistrate without delay. J. Cissell, *supra* note 2, at 107 (citing *United States v. Indian Boy X*, 565 F.2d 585 (9th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978)).

<sup>13</sup> A defendant may plead at an initial appearance before a United States magistrate if the magistrate has jurisdiction over the charged offense. See Fed. R. Crim. P. 5(b).

<sup>14</sup> Fed. R. Crim. P. 5(c). This rule does not apply to arrest warrants issued as a result of grand jury indictments. *Miller v. United States*, 396 F.2d 492 (8th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969). Likewise, it does not apply to parole violators or escapees from federal custody. *United States v. Harrison*, 461 F.2d 1127 (5th Cir.), *cert. denied*, 409 U.S. 884 (1972); *United States v. Reed*, 413 F.2d 338 (10th Cir. 1969), *cert. denied*, 397 U.S. 954 (1970).

<sup>15</sup> 18 U.S.C. § 3142 (Supp. III 1985).

<sup>16</sup> 18 U.S.C. § 3142(f) (Supp. III 1985). *United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *United States v. O'Shaughnessy*, 764 F.2d 1035 (5th Cir. 1985); *United States v. Payden*, 759 F.2d 202 (2d Cir. 1985). Both the Second and Fifth Circuits appear unwilling to make any deviation from the literal language of the statute. Thus, the attorney for the government must decide whether to appear at the initial appearance and move for a continuance of the pretrial detention hearing (three days is the maximum period on the government's motion) or to rely on the judicial officer to make such a motion at the initial appearance. The safe approach is obvious. See also *United States v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985) (case suggests a preferred course for the government).

<sup>17</sup> The government may still move for imposition of conditions for release under 18 U.S.C. § 3142(c) and if the defendant then fails to comply with those conditions, the prosecutor may move for revocation of release and detention under 18 U.S.C. § 3148 (1982). *O'Shaughnessy*, 764 F.2d at 1039.

<sup>18</sup> 18 U.S.C. § 3142(f)(2)(B) (Supp. III 1985).

<sup>19</sup> 18 U.S.C. § 3142(f) (Supp. III 1985); see *United States v. Hazzard*, 598 F. Supp. 1442 (N.D. Ill. 1984).

<sup>20</sup> *United States v. Botero*, 604 F. Supp. 1028 (S.D. Fla. 1985). The Supreme Court has recently upheld the provision of the Bail Reform Act that allows pretrial detention to protect the community. *United States v. Salerno*, 107 S. Ct. 2095 (1987).

<sup>21</sup> 18 U.S.C. § 3142(e) (Supp. III 1985); 21 U.S.C. §§ 841-851 (1982 & Supp. III 1985); 21 U.S.C. §§ 951-965 (1982 & Supp. III 1985); 18 U.S.C. § 924(c) (Supp. III 1985); 18 U.S.C. § 16 (Supp. III 1985).

the offense is a crime of violence (see 18 U.S.C. § 16) or involves a narcotic drug, the weight of the evidence against the defendant, and the defendant's history and character. Either a release order or a detention order, with findings supporting the order, must issue following the hearing.<sup>22</sup>

Magistrates often conduct pretrial detention hearings and cover the requirements of preliminary examinations at the same time. In cases where a defendant has been arrested and detained on a criminal complaint, the defendant is entitled to a preliminary examination within ten days following the initial appearance, unless an indictment or information is filed within that period.<sup>23</sup> The principal purpose of the preliminary examination is to determine whether probable cause exists to bind a defendant for action by a grand jury.<sup>24</sup> Should a grand jury return an indictment against the accused that is directed against the activity which resulted in the original criminal complaint, the accused has no right to a preliminary examination.<sup>25</sup> An accused may also waive his or her right to a preliminary examination.<sup>26</sup>

In most cases at Fort Hood, the sole government witness at a preliminary examination is the case agent. Because a finding of probable cause may be based on hearsay,<sup>27</sup> the testimony usually consists of a brief summary of pertinent evidence on each element of the crime as given by the case agent. The prosecutor may ask leading questions. Rules of evidence, with the exception of privileges, do not apply at preliminary examinations.<sup>28</sup> In the Western District of Texas, Waco Division, the government offers its evidence first and the defense then cross-examines and introduces evidence on its behalf.<sup>29</sup> If the judicial officer does not find probable cause, the complaint is dismissed. A subsequent prosecution may still be effected for the same offense, even if the magistrate dismisses the complaint.<sup>30</sup>

## The Grand Jury

The next critical pretrial phase to be discussed is the grand jury. A grand jury is a body of qualified persons assembled for the purpose of investigating the commission of crimes within the jurisdiction from which its members are selected, determining the probability of guilt, and returning indictments against supposed offenders.<sup>31</sup> A grand jury is assembled and selected by the court, often in association with the selection of potential petit jurors. The district court does not, however, control a grand jury's investigatory proceedings, even though it is an appendage of the court.<sup>32</sup> Likewise, the attorney for the government does not control the grand jury (although some might think that they do). Prosecutors presenting cases to grand juries have an obligation to preserve the fairness, impartiality, and lack of bias of the grand jury.<sup>33</sup> The prosecutor must always remember that his or her primary goal in the grand jury and trial process is to remain independent and unbiased; the concern for justice must transcend all other considerations.<sup>34</sup> The fifth amendment grants a defendant the right to have a fair and impartial grand jury consider whether to indict an individual for a capital or otherwise infamous crime.<sup>35</sup> The grand jury is designed to be a "fair method for instituting criminal proceedings"<sup>36</sup> and "to serve as a protector of citizens against arbitrary and oppressive governmental action."<sup>37</sup>

With the preceding thoughts in mind, the prosecutor prepares cases to present to grand juries. Always present in the mind of the prosecutor must be the thought of avoiding misconduct before the grand jury. As a general rule, the court's only remedy in cases of prosecutorial misconduct is to dismiss the indictment.<sup>38</sup> Furthermore, allegations of misconduct can ruin a prosecutor's credibility for the trial of an indicted offender and with the grand jury with which an attorney works. There are several areas of grand jury

<sup>22</sup> 18 U.S.C. § 3142(g) and (h) (Supp. III 1985).

<sup>23</sup> Fed. R. Crim. P. 5(c). Defendants arrested for petty offenses, as defined in 18 U.S.C. § 1(3) (Supp. III 1985), are not entitled to preliminary examinations. If a defendant is not detained after initial appearance, the time limit is 20 days. Extensions can only be made with the consent of the defendant or if granted by a judge of the United States with a showing of extraordinary circumstances and that delay is indispensable to the interests of justice.

<sup>24</sup> *United States v. Chase*, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907, 913 (1967); see *United States v. Kysar*, 459 F.2d 422 (10th Cir. 1972) (sole function of preliminary examination is to determine whether sufficient evidence exists to warrant detention). But see *United States v. Blue*, 342 F.2d 894 (D.C. Cir. 1964), cert. denied, 380 U.S. 944 (1965) (purpose of the hearing is to give the defendant an opportunity to show that there is no probable cause to continue his detention and to discover in advance of trial the foundations of the charge and evidence that the government will use at trial); *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194 (E.D.N.Y. 1967) (the preliminary examination is the most valuable discovery technique available to the defense). The D.C. Circuit has somewhat backed off from its position in *Blue*. See *Coleman v. Burnett*, 477 F.2d 1187 (D.C. Cir. 1983).

<sup>25</sup> Fed. R. Crim. P. 5(c). Likewise, filing an information will eliminate the need for a preliminary examination. Informations may only be used in misdemeanor cases or in situations where a defendant waives his right to indictment by grand jury in open court under Fed. R. Crim. P. 7(b).

<sup>26</sup> Fed. R. Crim. P. 5(c).

<sup>27</sup> J. Cissell, *supra* note 2, at 189.

<sup>28</sup> Fed. R. Evid. 1101(d)(3); J. Cissell, *supra* note 2, at 189.

<sup>29</sup> Fed. R. Crim. P. 5.1(a). Scope of the cross-examination is limited to the scope of the direct. *Coleman v. Burnett*, 477 F.2d 1187, 1201 (D.C. Cir. 1983).

<sup>30</sup> Fed. R. Crim. P. 5.1(b).

<sup>31</sup> *Beavers v. Henkel*, 194 U.S. 73 (1904). See generally 9 Federal Procedure, *supra* note 9 § 22:421.

<sup>32</sup> *Brown v. United States*, 359 U.S. 41 (1959), *rev'd on other grounds sub nom. Harris v. United States*, 382 U.S. 162 (1965); *Bursey v. United States*, 466 F.2d 1058 (9th Cir. 1972).

<sup>33</sup> *United States v. Gold*, 470 F. Supp. 1336, 1346 (N.D. Ill. 1979) (opinion contains an excellent discussion on the role of the grand jury and the role played by the prosecutor in presenting cases to federal grand juries).

<sup>34</sup> *United States v. Dondich*, 460 F. Supp. 849, 855 (N.D. Cal. 1978), *aff'd sub nom. United States v. Mayo*, 646 F.2d 369 (9th Cir. 1980).

<sup>35</sup> *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973); *United States v. Provenzano*, 440 F. Supp. 561, 564 (S.D.N.Y. 1977).

<sup>36</sup> *United States v. Gold*, 470 F. Supp. at 1345 (quoting *Costello v. United States*, 350 U.S. 359, 362 (1956)).

<sup>37</sup> *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974)).

<sup>38</sup> 1 United States Department of Justice, Criminal Division, Narcotic and Dangerous Drug Section, Manual for Federal Grand Jury Practice 163 (1983) [hereinafter Grand Jury Manual].

procedure that defense counsel have attacked in order to have indictments quashed based on prosecutorial misconduct. One involves the use of hearsay evidence. An indictment may be based totally on hearsay evidence,<sup>39</sup> although two circuits have created exceptions to this rule.<sup>40</sup> A second problem area is where the prosecutor fails to disclose "substantial evidence" that is known to be exculpatory.<sup>41</sup> Justice Department policy requires attorneys for the government to disclose exculpatory material to grand juries.<sup>42</sup> With the exception of illegally obtained wiretap evidence,<sup>43</sup> evidence that would be inadmissible at trial may be introduced at grand jury proceedings.<sup>44</sup> Evidence obtained in violation of an individual's fourth or fifth amendment rights may also be used.<sup>45</sup> Privileges assertable at trial may be asserted by witnesses at grand jury.<sup>46</sup> Violation of privileges generally should result only in suppression of the evidence at trial, not in dismissal of the indictment.<sup>47</sup> Improper statements by a prosecutor can be deadly. An indictment may be dismissed if the prosecutor offers personal opinions regarding witness credibility or sufficiency of the evidence.<sup>48</sup> The prosecutor who is participating in the presentation of a case cannot act as a witness in that case.<sup>49</sup> Prosecutors must not make comments that can be interpreted as factual or testimonial in nature. Any comments made by the prosecutor must be limited to legal advice. Witnesses should be recalled to answer questions of a factual nature. Government attorneys are not obligated to instruct grand jurors on the law;<sup>50</sup> however, they may explain elements of offenses.<sup>51</sup> In Western District of Texas, prosecutors generally instruct the grand jury on elements of crimes. Should a prosecutor improperly instruct the grand jury on the law, the indictment will probably be upheld on appellate review, absent evidence of flagrant conduct by the

prosecutor to the point where the grand jury's ability to exercise its independent judgment is significantly impaired.<sup>52</sup>

Defendants can raise and successfully litigate issues involving improper grand jury actions by requesting the court to disclose grand jury records to them in accordance with Federal Rule of Criminal Procedure (6)(e)(3)(C)(ii). To avoid prosecutorial misconduct accusations, the following measures are suggested. As a verbatim record is made of all grand jury proceedings, never go "off the record." Such situations do nothing but invite conjecture and give defense counsel an opportunity to attack the propriety of the prosecution role in the proceedings. Prosecutors must not disclose material or information that has been offered as evidence in a grand jury investigation to unauthorized persons or agencies.<sup>53</sup> Prosecutors should ensure that the grand jury understands when it is receiving hearsay evidence. The grand jury must also understand that hearsay evidence is a legitimate basis for establishing probable cause. Government attorneys must insist on getting exculpatory evidence from agents and then must disclose it to the grand jury.<sup>54</sup> If a prosecutor makes an honest mistake, that individual must try to correct it. Courts are very cautious when it comes to invalidating indictments for alleged grand jury misconduct by prosecutors.<sup>55</sup>

There is a certain amount of strategy and tactics involved in grand jury work. Realizing that there is little to be gained by the return of a true bill of indictment if a prosecutor cannot get a conviction at trial, the power of the grand jury should be used to legally gather as much evidence as is possible. For example, if a case has an important, but uncooperative witness, or a cooperative defendant who may turn out to be less cooperative in the future, the prosecutor may decide to put the witness in

<sup>39</sup> *Costello v. United States*, 350 U.S. at 361-63.

<sup>40</sup> The Second and Fifth Circuits may invalidate indictments based totally on hearsay in the following situations: where the grand jury is misled into believing that the proffered hearsay is first-hand, direct evidence; and where there is a high probability that the grand jury would not have returned a true bill of indictment had live witnesses testified. The remedy in such cases has been dismissal of the indictment. *United States v. Cruz*, 478 F.2d 408 (5th Cir.), cert. denied sub nom. *L & A Creative Arts Studio Inc. v. Redevelopment Authority of the City of Philadelphia*, 414 U.S. 910 (1973); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). See *Grand Jury Manual*, supra note 38, at 163.

<sup>41</sup> *United States v. Gold*, 470 F. Supp. at 1336; see also *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States v. De Marco*, 401 F. Supp. 505, 513 (C.D. Cal. 1975), aff'd 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

<sup>42</sup> *United States Attorney's Manual* § 9-11.334.

<sup>43</sup> 18 U.S.C. § 2515 (1982); *Gelbard v. United States*, 408 U.S. 41 (1972).

<sup>44</sup> *United States v. Blue*, 384 U.S. 251 (1966); *Fed. R. Evid.* 1101(d)(2).

<sup>45</sup> *United States v. Calandra*, 414 U.S. at 354; *Grand Jury Manual*, supra note 38, at 165 (the manual suggests that, as a matter of policy, this evidence should not be used in grand jury proceedings).

<sup>46</sup> *Kastigar v. United States*, 406 U.S. 441 (1972) (privilege against self-incrimination); *In Re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979) (attorney-client privilege); *Fed. R. Evid.* 501 and 1101(d).

<sup>47</sup> *Grand Jury Manual*, supra note 38, at 165; see *United States v. Colosurdo*, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); *United States v. Bonnell*, 483 F. Supp. 1070 (D. Minn. 1979).

<sup>48</sup> *Beatrice Foods Co. v. United States*, 312 F.2d 29, 39 (8th Cir.), cert. denied, 373 U.S. 904 (1963); *United States v. Samango*, 450 F. Supp. 1097 (D. Haw. 1978), aff'd, 607 F.2d 827 (9th Cir. 1979).

<sup>49</sup> *United States v. Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978), aff'd sub nom. *United States v. Mayo*, 646 F.2d 369 (9th Cir. 1980). The prosecutor must exercise caution to ensure that he or she does not testify (give evidence) when responding to grand juror questions.

<sup>50</sup> *United States v. Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981); *Grand Jury Manual*, supra note 38, at 166.

<sup>51</sup> *United States v. Singer*, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States v. International Paper Co.*, 457 F. Supp. 571, 576 (S.D. Tex. 1978).

<sup>52</sup> See *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982); *United States v. Linetsky*, 553 F.2d 192 (5th Cir. 1976).

<sup>53</sup> *Fed. R. Crim. P.* 6(e)(2) imposes an obligation upon certain individuals involved in grand jury proceedings to maintain secrecy regarding official grand jury matters. Personnel included are grand jurors, interpreters, stenographers, operators of recording devices, transcribers of recorded testimony, attorneys for the government, and personnel who assist attorneys for the government (e.g., case agents). The rule also specifies narrow exceptions to the secrecy requirement. *J. Cissell*, supra note 2, 162-63. The secrecy requirement does not extend to lay witnesses.

<sup>54</sup> *Grand Jury Manual*, supra note 38, at 169.

<sup>55</sup> *Beatrice Foods Co. v. United States*, 312 F.2d at 39.

front of the grand jury, under oath, to "lock in" that person's testimony for trial. If the credibility of a particular witness is crucial, such as a victim in a rape case, and if the witness' credibility is questionable, test the witness before the grand jury. It is far better to risk a "no bill" (no indictment) than to spend several days trying a case resulting in an acquittal. Prosecutors who know of potential defense witnesses should consider putting them in front of the grand jury. This accomplishes several things. First, the grand jury gets to hear "both sides of the story." Second, it provides the prosecutor with advance notice of the nature of the defense. Third, it "freezes" the testimony of the witness. If a witness changes his or her testimony prior to trial, the prosecutor can impeach the witness with grand jury transcripts. Prosecutors should be wary of generating unnecessary Jencks Act material because a transcript of each witness' grand jury testimony is discoverable after the witness testifies at trial.<sup>56</sup> The primary concern in this regard is with government witnesses, because the defense normally knows how its witnesses will testify.

The composition of the grand jury is as follows. A grand jury consists of sixteen to twenty-three grand jurors selected in accordance with federal law.<sup>57</sup> An indictment may be found only with the concurrence of twelve or more grand jurors.<sup>58</sup> The court appoints a foreman and a deputy foreman. The foreman has the power to administer oaths and signs all indictments. If the foreman is absent, the deputy foreman assumes the foreman's duties. The foreman, or a person appointed by him, keeps a record of the number of grand jurors concurring in an indictment and that record is filed with the clerk of the court.<sup>59</sup> The grand jury normally may serve no longer than eighteen months.

Fort Hood prosecutors present cases to the grand jury generally in accordance with procedures set out in the Justice Department manual on grand jury practice. The Waco Division grand jury is normally in session only one to three days a month. A prosecutor often begins a session with a summarized report to the grand jury that details progress on cases previously indicted. Then a prosecutor introduces a case by identifying a defendant and giving a brief summary of the offenses charged in the indictment. This is followed by an inquiry to determine whether any of the grand jurors know the defendant or have any prior knowledge of the facts of the offense based upon hearing the defendant's name and the nature of the charges. Next, the prosecutor reads the indictment, summarizes the statutes involved, and apprises the grand jury of the elements of the offenses. The grand jurors are then asked if they have any questions on the law. After legal questions are concluded,

the first witness is called. The first witness is normally the case agent. The foreman swears the witness and the prosecutor proceeds to question the witness, using leading questions whenever possible. Part of the prosecutor's job is to keep the witness on track, ensuring that the witness does not wander from essential facts and relevant testimony.

When the direct examination of a witness is complete, the witness is excused and the grand jurors are asked if they have questions for the witness. If the prosecutor determines that the questions are relevant and would assist the grand jury in its probable cause determination, the witness is recalled and the prosecutor asks the grand jurors' questions. Should a grand juror's question be irrelevant on the issue of probable cause, but not appear to be a question that could lead to any significant problem or misunderstanding, the question may be asked. If a question is irrelevant and improper to such a degree that the validity of the indictment could be placed in jeopardy, the prosecutor should discourage the question and explain the irrelevance of the question to the grand juror. Witnesses should not testify to matters about which they are unsure. Speculative testimony has no place in the grand jury room. Prosecutors should write down grand juror questions and comments for use at trial. Petit (trial) jurors often think along the same line as grand jurors.

After ensuring that all necessary evidence has been presented, the prosecutor gives the foreman the original indictment.<sup>60</sup> All persons other than the grand jurors then leave the room while the grand jury deliberates and votes. The prosecutor informs the foreman that if the grand jury has any questions during its deliberation, he or she will be available outside the deliberation room. If further questions do arise, the prosecutor must make certain that the recorder returns to the room and puts all statements, questions, and responses into the record. When voting is complete, the foreman informs the prosecutor of the result and then the next case is presented. When all cases for the day have been presented, the prosecutor ensures that he or she and the foreman have signed each indictment and then informs the judge or magistrate that the grand jury is prepared to return the indictments.<sup>61</sup>

As stated before, indictments are found only on the concurrence of twelve or more grand jurors. There must be a quorum of sixteen grand jurors at a session. The standard of proof needed to indict is that there is probable cause<sup>62</sup> or a reasonable probability<sup>63</sup> that the accused committed the crime. An indictment must allege every element of an offense charged.<sup>64</sup> In most cases, indictments that set forth

<sup>56</sup> Grand Jury Manual, *supra* note 38, at 12-13. The Jencks Act is found at 18 U.S.C. § 3500 (1982).

<sup>57</sup> 28 U.S.C. §§ 1861-1866 (1982); Fed. R. Crim. P. 6(a).

<sup>58</sup> Fed. R. Crim. P. 6(f).

<sup>59</sup> Fed. R. Crim. P. 6(c).

<sup>60</sup> The indictment must be signed by both the representative of the United States Attorney and the grand jury foreman. Assistant United States Attorneys should not sign the indictment for the United States Attorney until after the grand jury has deliberated and voted on the case. Presigning indictments has been viewed as improper by some courts; however, courts will seldom invalidate indictments on that basis alone. See *United States v. Levine*, 457 F.2d 1186 (8th Cir. 1972).

<sup>61</sup> See also Grand Jury Manual, *supra* note 38, at 12-14. Some United States Attorneys may not allow regular Assistant United States Attorneys to sign indictments for them. The choice is the United States Attorney's as a policy consideration. Special Assistant United States Attorneys, when duly appointed and sworn, may sign indictments. *Little v. United States*, 524 F.2d 335 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

<sup>62</sup> *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

<sup>63</sup> *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971).

<sup>64</sup> *Hamling v. United States*, 418 U.S. 87 (1974).

offenses using the precise wording of the statute itself, when the words describe all of the elements of the offense without ambiguity, are found to be legally sufficient.<sup>65</sup> The indictment must describe the defendant sufficiently to identify him and give the court in personam jurisdiction.<sup>66</sup> The indictment should state the official citation for each statute that the defendant is alleged to have violated in each count. Errors in citation will not result in reversal of conviction so long as the error does not prejudice the defendant.<sup>67</sup> Allegations in counts may be alleged in the conjunctive and proved in the disjunctive.<sup>68</sup> Indictments should not be multiplicitous<sup>69</sup> or duplicitous.<sup>70</sup> If errors in an indictment are discovered prior to trial, or if there is a need to add counts or substantially amend an indictment, the prosecutor should seek a superseding indictment (preferably from the same grand jury that returned the original indictment).<sup>71</sup>

Witnesses who are subpoenaed to testify before a grand jury must appear even if they expect to be asked incriminating questions.<sup>72</sup> No constitutional provision prohibits subpoenaing a potential defendant to appear before a grand jury.<sup>73</sup> Conversely, the government is not legally obligated to allow a potential defendant to testify, although Justice Department policy is to normally give potential defendants an opportunity to testify if they request the opportunity.<sup>74</sup> Potential defendants have no right to be advised that they

are under investigation by the grand jury,<sup>75</sup> no right to counsel in the grand jury room (although counsel can be waiting outside the room and the defendant must be given access to counsel if desired),<sup>76</sup> no right to offer rebuttal to the government's evidence,<sup>77</sup> and no right to *Miranda* warnings.<sup>78</sup>

### Arraignment

Arraignment is the next critical proceeding following indictment. Arraignment and rearraignment (guilty plea) proceedings are covered under Federal Rules of Criminal Procedure 10 and 11. Rule 10 requires that the arraignment be held in open court. It consists of reading the indictment (or information) to the defendant or stating the substance of the charge, and calling on the defendant to plead to the charge.<sup>79</sup> The defendant (or defense counsel) must be given a copy of the indictment or information before the defendant is required to enter a plea.<sup>80</sup> The defendant can waive arraignment and plea.<sup>81</sup> This often happens when the defense counsel and the defendant sign written waivers of personal appearance at arraignment and enter pleas of not guilty in absentia. Arraignment proceedings are usually conducted by magistrates rather than by district judges in the Western District of Texas; but that practice varies from district to district. The accused has a right to counsel,

<sup>65</sup> *Id.*, at 117-18. The indictment must fairly inform the defendant of the nature of the charged offense and enable him or her to plead an acquittal as a bar to future prosecution for the same offense.

<sup>66</sup> *Chow Bing Kew v. United States*, 248 F.2d 466 (9th Cir.), *cert. denied*, 355 U.S. 889 (1957). The important point to remember here is to put the name of the defendant in each count. Some minor errors in spelling and the insertion of an incorrect initial have been held not to be fatal in an indictment. *See Faust v. United States*, 163 U.S. 452 (1896); *Poffenbarger v. United States*, 20 F.2d 42 (8th Cir. 1927).

<sup>67</sup> Fed. R. Crim. P. 7(c)(3).

<sup>68</sup> *United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976), *cert. denied*, 431 U.S. 920 (1977).

<sup>69</sup> Multiplicity is the charging of a single offense in separate counts. *See United States v. Hairrel*, 521 F.2d 1264, 1266 (6th Cir.), *cert. denied*, 423 U.S. 1035 (1975); *J. Cissell*, *supra* note 2, at 280. The federal test for multiplicity is whether each count requires the proof of an additional fact that the other counts do not. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Papia*, 399 F. Supp. 1381, 1387 (E.D. Wis. 1975), *aff'd*, 560 F.2d 827 (7th Cir. 1977). Multiplicity is not a fatal defect, but on conviction only one punishment may be imposed for one offense. *See 9 Federal Procedure*, *supra* note 9, § 22:609.

<sup>70</sup> Duplicity is the joining of two or more offenses in one count. *United States v. Ramos*, 666 F.2d 469 (11th Cir. 1982). Duplicity is not necessarily fatal to a case, but some appellate courts have reversed guilty verdicts on duplicitous counts. Other courts of appeal have held that the government must choose the charge that it will prosecute at trial. *Thomas v. United States*, 418 F.2d 567, 568 (5th Cir. 1969); *Reno v. United States*, 317 F.2d 499, 502 (5th Cir.), *cert. denied*, 375 U.S. 828 (1963); *see J. Cissell*, *supra* note 2, at 280.

<sup>71</sup> *See United States v. Wilks*, 629 F.2d 669 (10th Cir. 1980) (a superseding indictment may be filed at any time prior to trial as long as the defendant is not prejudiced). The prosecutor should file the superseding indictment as far in advance of trial as possible and ensure that the defense counsel receives a copy of the superseding indictment as soon as it is returned.

<sup>72</sup> *Blair v. United States*, 250 U.S. 273 (1919); *Matter of Fula*, 672 F.2d 279 (2d Cir. 1982) (recalcitrant witness has no standing to take exception to grand jury's jurisdiction over subject matter of the investigation). Courts have held that witnesses may claim certain privileges available at trial. *Compare In Re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979) (attorney-client privilege is available at grand jury) with *Branzburg v. Hayes*, 408 U.S. 665 (1972) (the first amendment does not permit the press to refuse to testify before a grand jury).

<sup>73</sup> *United States v. Wong*, 431 U.S. 174 (1977); 9 *Federal Procedure*, *supra* note 9, § 22:437.

<sup>74</sup> *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *Grand Jury Manual*, *supra* note 38, at 54-55. The Manual suggests that if a target testifies, the record should reflect an explicit waiver of the fifth amendment privilege against self-incrimination, a waiver of counsel if not represented, and that the target has consented to appear voluntarily. The prosecutor should oppose any request by the target to submit a written statement to the jury. Never put a target in front of the grand jury if you know that he or she intends to invoke the fifth amendment. If the target testifies and invokes the fifth amendment, the prosecutor must instruct the grand jury that it cannot draw any implication of guilt from that action by the target.

<sup>75</sup> *United States v. Brumfield*, 85 F. Supp. 696, 705 (W.D. La. 1949).

<sup>76</sup> *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969).

<sup>77</sup> *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979).

<sup>78</sup> *Gollaher v. United States*, 419 F.2d 520 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

<sup>79</sup> Fed. R. Crim. P. 10.

<sup>80</sup> If the defendant, or his or her counsel, receives a copy of the indictment in sufficient time to prepare for trial, arraignment requirements will generally be considered satisfied, even if the judge or magistrate fails to personally read the charges or fails to verbally advise the defendant of the nature of the charges. *See, e.g., United States v. Romero*, 640 F.2d 1014 (9th Cir. 1981); *United States v. Coffman*, 567 F.2d 960 (10th Cir. 1977). A conviction will be vacated for lack of formal arraignment proceedings only where there is possible prejudice to the defendant. *Garland v. Washington*, 232 U.S. 642 (1914).

<sup>81</sup> *Garland v. Washington*, 232 U.S. at 646.

which can be waived, at arraignment.<sup>82</sup> A not guilty plea should be entered at arraignment for any defendant who refuses to enter a plea.<sup>83</sup>

Defendants may plead guilty to federal charges under Fed. R. Crim. P. 11(a)(1). Defendants may also enter conditional guilty pleas preserving issues for appeal under Fed. R. Crim. P. 11(a)(2), but several federal circuits have expressed strong disapproval of such pleas.<sup>84</sup> Pleas of *nolo contendere* are also allowed under Fed. R. Crim. P. 11(b), but courts and United States Attorneys have shown some reluctance in accepting them.<sup>85</sup>

The court must fully comply with procedures set out in Fed. R. Crim. P. 11 when taking a guilty plea. Fed. R. Crim. P. 11 requires that: the defendant be addressed personally; he or she be advised of the rights he or she will waive as a result of the guilty plea; the plea be voluntarily given; the defendant's plea be "knowing and intelligent" in that the defendant understands the nature of the charges against him or her and the consequences of the plea; there be a factual basis for the plea; and the plea agreement, if there is one, be on the record.<sup>86</sup> The hearing is conducted in open court. Factors that can indicate involuntariness of a guilty plea include threats against a defendant or persons close to him, improper promises or inducements, dissatisfaction with counsel, being under the influence of intoxicants or medication, mental incompetence (at the time the plea is given), or intimidation by a judge.<sup>87</sup> In determining whether the plea is being made voluntarily, the court will inquire whether the defendant has discussed the indictment and the possible defenses to the charges with defense counsel. In the Western District of Texas, the court will usually have the prosecutor read the indictment and then the court asks the defendant if he or she understands the charges against him or her as read by the prosecutor.

The defendant must understand the consequences of his or her plea. At least two circuits have held that the court

need not advise the defendant of every conceivable consequence of a guilty plea, but must advise on those aspects that "necessarily affect the maximum term of imprisonment."<sup>88</sup> The prosecutor should advise the court and defense counsel of these consequences prior to the hearing. In establishing a factual basis for the plea, the judge must again address the defendant personally and elicit facts that show that the defendant committed the charged offense(s).<sup>89</sup> The prosecutor can provide a summary of facts (factual basis statement) to aid the court in this process.<sup>90</sup> Facts elicited in open court must cover each element of each offense. This statement should be prepared in advance of the hearing and a copy sent to defense counsel for review and concurrence prior to the hearing. That way, government counsel can avoid having a recalcitrant defendant disagreeing with the government's proof summary in open court.

Plea agreements should be negotiated strictly between the attorney for the government and the defense. In federal court, the judge does not participate in the plea bargain process. Judges cannot make statements that encourage pleas.<sup>91</sup> The terms of the plea agreement must be read in open court and on the record (generally by the prosecutor).<sup>92</sup> The plea agreement should be negotiated, executed, and filed with the clerk prior to the hearing.

At no point does a defendant have an absolute right to withdraw his or her guilty plea.<sup>93</sup> The court has discretion to allow withdrawal of the guilty plea.<sup>94</sup> If the plea is withdrawn before sentencing, the standard for withdrawal is much lower than it is for a motion to withdraw a guilty plea after sentencing.<sup>95</sup> Withdrawal is usually permitted when objective evidence indicates that the defendant was justifiably confused about the plea agreement.<sup>96</sup> Where the plea agreement requires only that the government recommend a sentence, the defendant cannot withdraw a plea.<sup>97</sup>

<sup>82</sup> *United States v. Romero*, 640 F.2d at 1015; *Anderson v. United States*, 352 F.2d 945 (D.C. Cir. 1965).

<sup>83</sup> *Ruckle v. Warren Md. Penitentiary*, 335 F.2d 336 (4th Cir.), *cert. denied*, 379 U.S. 934 (1964).

<sup>84</sup> The Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have expressed disapproval of the use of conditional guilty pleas. The Eighth and D.C. Circuits have approved their use. See 9 Federal Procedure, *supra* note 9, § 22:529.

<sup>85</sup> *Nolo contendere* pleas are seldom used in the Western District of Texas. Prosecutors in the Fort Hood felony prosecution program have never accepted *nolo contendere* plea offers in felony cases. Fed. R. Crim. P. 11(b) specifies that *nolo contendere* pleas should only be accepted by courts after taking "due consideration." See *United States v. Faucette*, 223 F. Supp. 199 (S.D.N.Y. 1963).

<sup>86</sup> Fed. R. Crim. P. 11 codifies the Supreme Court's decision in *McCarthy v. United States*, 394 U.S. 459, 464-67 (1969); see also Attorney General's Advocacy Institute, Office of Legal Education, Department of Justice, Trial Advocacy Notebook 5 [hereinafter Trial Advocacy Notebook] (guilty plea section) (this section contains an excellent checklist for taking guilty pleas).

<sup>87</sup> Trial Advocacy Notebook, *supra* note 86, at 6 (guilty plea section).

<sup>88</sup> *United States v. Hamilton*, 568 F.2d 1302 (9th Cir.), *cert. denied*, 436 U.S. 944 (1978); *United States v. Myers*, 451 F.2d 402 (9th Cir. 1972); *United States v. Ferguson*, 513 F.2d 1011 (2d Cir. 1975). The *Myers* opinion indicates that the Fourth and Fifth Circuits take the same position on this issue. The editors of the Trial Advocacy Notebook, *supra* note 86, recommend that defendants be advised of the potential maximum penalty, the mandatory minimum, any special parole term, loss of state probation or parole, commencement date of federal imprisonment, ineligibility for parole (if that situation exists), and the potential for a more severe sentence because of a prior conviction.

<sup>89</sup> *McCarthy v. United States*, 394 U.S. at 463.

<sup>90</sup> *United States v. Ford*, 363 F.2d 375, 377 (4th Cir. 1966).

<sup>91</sup> See *United States v. Adams*, 634 F.2d 830 (5th Cir. 1981); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1970).

<sup>92</sup> *United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977), *aff'd*, 445 U.S. 552 (1980); *Jones v. United States*, 423 F.2d 252 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970).

<sup>93</sup> *United States v. Roberts*, 570 F.2d at 1008; *United States v. Arredondo*, 447 F.2d 976, 977 (5th Cir. 1971), *cert. denied*, 404 U.S. 1026 (1972).

<sup>94</sup> *United States v. Simmons*, 497 F.2d 177, 178 (5th Cir. 1974), *cert. denied*, 419 U.S. 1048 (1975).

<sup>95</sup> *United States v. Roberts*, 570 F.2d at 1008.

<sup>96</sup> *United States v. Roberts*, 570 F.2d at 1008-09; see also *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

<sup>97</sup> Fed. R. Crim. P. 11(e)(2).

The court always has the power to reject a plea agreement under Fed. R. Crim. P. 11(e)(4).

### Speedy Trial

Speedy trial time begins to run when an accused is arrested under federal charges based on a particular offense.<sup>98</sup> If an individual is arrested for a felony alleged in a criminal complaint, an indictment (or information if the defendant waives indictment by grand jury) must normally be filed within thirty days of arrest or the charges will be dismissed.<sup>99</sup> Once a defendant is indicted, or has an information filed against him or her, the case must go to trial within seventy days of the filing date of the information or indictment, subject to certain excludable time for specified reasons.<sup>100</sup> The most common areas of excludable time involve the resolution of pretrial motions and delay resulting from mental or physical examinations of the defendant.<sup>101</sup> Not only is the sanction of dismissal available to the court, but an attorney for the government may also be sanctioned by the court for certain actions committed in contravention of the purposes of the Speedy Trial Act.<sup>102</sup> Attorneys for the government should move that the court exclude periods covered either by the enumerated exceptions or by the general provisions of 18 U.S.C. § 3161(h)(8)(A). Dismissal on speedy trial grounds should only result from a defense motion; the statute does not direct the court to dismiss a case sua sponte.<sup>103</sup>

### Voir Dire

The purpose of federal voir dire is essentially the same as in court-martial proceedings. It is designed to provide the defendant and the government with a fair and impartial jury through the posing of questions that assist counsel in making intelligent challenges to the panel.<sup>104</sup> The district judge may exercise broad discretion in determining the manner in which voir dire examination is conducted according to the needs of a particular case; the district judge's actions will not be grounds for reversal unless there is substantial prejudice to the accused.<sup>105</sup> Thus, voir dire practices varies from one district to the next. In the Waco Division of the Western District of Texas, counsel are required to submit written requests for voir dire examination questions five days in advance of trial. The court

considers counsel's questions and then the court conducts the voir dire. Local district court rules should describe the prevailing practice in most districts. The trial court has discretion as to whether it will propound questions to the jury that are submitted by counsel and whether jurors will be questioned collectively or individually.<sup>106</sup> Counsel for the government should always ask the court's permission to question the jury personally, if such an option exists. Leading questions should not be asked as the idea is to get the jurors to talk so that they can be evaluated. Do not ask questions of individuals in a manner that could be construed as derogatory.<sup>107</sup> Questions about jurors' jobs, spouses, families, military experience, prior service as jurors, and outcomes of trials on which they sat as jurors are typically asked in federal court. Ask whether any of the jurors have ever been the victim of a crime. Ensure that they can decide the case solely on the evidence and totally accept and follow the judge's instructions. When deciding on peremptory challenges, follow this general rule: the less a juror looks like and has a background like the defendant, the better. It is important to observe a potential juror's dress and demeanor and to pay attention to the way the juror expresses himself or herself. Make eye contact with each potential juror and evaluate them. Are they bored or nervous? Do they have something else on their mind that might detract from their jury service? Remember that because of the unanimous verdict requirement in federal practice, the defense only has to be right *once* in jury selection; the government must be right on every single juror.<sup>108</sup>

### Sentencing

Federal sentencing procedures are fundamentally different from those employed in military practice. Federal sentencing is totally within the province of the court. Once a defendant is convicted, the court will order a United States Probation Officer to prepare a presentence investigative report unless the defendant waives such a report or if the court, in accordance with Fed. R. Crim. P. 32(c)(1), finds a sufficient factual basis within the record to exercise sentencing discretion in a meaningful manner.<sup>109</sup> Actually, this report may even be initiated and completed prior to

<sup>98</sup> United States v. Sanchez, 722 F.2d 1501 (11th Cir.), cert. denied sub nom. Gonzalez v. United States, 467 U.S. 1208 (1984); United States v. Sayers, 698 F.2d 1128 (11th Cir. 1983); 18 U.S.C. § 3161(a)(1) (1982). Detention by state officials or detention as a result of a different crime does not trigger the Speedy Trial Act. See 9 Federal Procedure, supra note 9, § 22:739.

<sup>99</sup> 18 U.S.C. §§ 3161(b), 3162(a)(1) (1982). The court may dismiss charges with or without prejudice. There is an extension provision in § 3161(b) that may be invoked if no grand jury is in session during the 30 day period.

<sup>100</sup> 18 U.S.C. § 3161(c)(1) (1982) (or 70 days from the date when the defendant first appeared before a judicial officer in the district where charges are pending, whichever occurs last). The filing date will usually control unless the defendant makes no appearance before a judicial officer until after the indictment is filed. Then first appearance will trigger the statute.

<sup>101</sup> 18 U.S.C. § 3161(h) (1982 & Supp. III 1985). Excludable time on pretrial motions runs from the date on which the defense files the motions until the date the court hears or otherwise promptly disposes of the motions. See United States v. Mastrangelo, 733 F.2d 793 (11th Cir. 1984); United States v. Brim, 630 F.2d 1307, 1311-13 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981).

<sup>102</sup> 18 U.S.C. § 3162(b) (1982).

<sup>103</sup> 18 U.S.C. § 3162(a)(2) (1982).

<sup>104</sup> United States v. Blount, 479 F.2d 650 (6th Cir. 1973).

<sup>105</sup> United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1975).

<sup>106</sup> Rosales-Lopez v. United States, 451 U.S. 182 (1981); United States v. Gerald, 624 F.2d 1291 (5th Cir. 1980) cert. denied, 450 U.S. 920 (1981).

<sup>107</sup> For example, do not ask "How long have you been a garbage man?" Instead, ask "How long have you been a city employee?" Trial Advocacy Notebook, supra note 86, at 2-3 (voir dire section).

<sup>108</sup> Id. at 3-4.

<sup>109</sup> See United States v. Latner, 702 F.2d 947 (11th Cir.), cert. denied, 464 U.S. 914 (1983); United States v. Long, 656 F.2d 1162 (5th Cir. 1981).

conviction, as long as the court does not review it or disclose it to anyone until after the defendant is convicted.<sup>110</sup> The primary purpose of preparing a presentence investigative report is to provide the district judge with objective and accurate background information pertaining to the defendant so that the judge may impose an appropriate sentence.<sup>111</sup>

There is almost no limit on the information that the probation officer may use in preparing the presentence report. Attorneys for the government may furnish investigation reports prepared by case agents, background reports containing past criminal histories of a defendant, and the arrest record of the defendant, even if the arrest did not result in a conviction.<sup>112</sup> The attorney for the government should not give the probation officer transcripts of any witness' grand jury testimony without first obtaining a release order from the district judge.<sup>113</sup>

The defense is no longer required to affirmatively request disclosure of the presentence investigative report prior to sentencing. A recent amendment to Fed. R. Crim. P. 32(c) requires the court to make the report available to the defendant and counsel at a reasonable time before imposing sentence.<sup>114</sup> The attorney for the government has access to the same information that is disclosed to the defense.<sup>115</sup> Neither party may have access to the probation officer's recommendations to the court.<sup>116</sup>

The court has several sentencing options for adult offenders. These options include imprisonment, residence in a Bureau of Prisons halfway house, fines, special assessment, probation, and restitution. The maximum term of imprisonment is usually set forth in the statute that defines the crime.<sup>117</sup> Some statutes defining criminal offenses do not set out maximum sentences. These offenses have sentence parameters established in accordance with a new federal code provision, 18 U.S.C. § 3559. Maximum fines have been set for offenses committed after December 31, 1984, in accordance with the Alternative Fines Act.<sup>118</sup> As of November 11, 1984, the court must impose a "special assessment" of \$50 on each convicted felon for each felony count on which

he or she is convicted.<sup>119</sup> Probation is available for defendants convicted of any offense not punishable by death or life imprisonment. Probation may also be combined with a fine. Probation is combined with imprisonment only in two situations. One is the "mixed sentence" situation. If a defendant is convicted on multiple counts, a district judge may impose imprisonment on one or more counts, followed by probation on the remainder. In a "split sentence" situation, there is a conviction on only one count. A "split sentence" cannot be imposed for offenses punishable by life imprisonment or death, and the offense's maximum penalty must include imprisonment for more than six months. Under 18 U.S.C. § 3651, for such an offense the court may sentence a defendant to confinement for six months or less, which then is followed by probation for the rest of the sentence.<sup>120</sup> Probation periods cannot exceed five years, and consecutive probation terms may not exceed a total of five years. Restitution to the victim or an aggrieved party may also be ordered under the authority of the Victim Witness Protection Act and the probation statute.<sup>121</sup>

Most of the sentencing hearing is conducted by the court, again while directly addressing the defendant. The prosecutor's role at the sentencing hearing is minimal. The prosecutor may address the court and make recommendation as to sentencing. The prosecutor must be prepared to inform the court on the amount of restitution, if any, that is due to the victim or other aggrieved parties. Before the court imposes sentence, it must give both the defendant and his or her attorney the opportunity to present evidence or testimony of mitigating factors (allocution).<sup>122</sup> The court has wide discretion in imposing sentence. Any sentence falling within the statutory limit for the offense will not be set aside on appeal unless there is arbitrary and capricious action amounting to a gross abuse of discretion.<sup>123</sup>

## Conclusion

Part II of this article is intended to introduce the relatively inexperienced military attorney to federal criminal practice. It highlights some of the areas to which military Special Assistant United States Attorneys must be alert

<sup>110</sup> Gregg v. United States, 394 U.S. 489 (1969); Stevens v. United States, 227 F.2d 483 (10th Cir. 1955).

<sup>111</sup> United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980).

<sup>112</sup> See Farrow v. United States, 580 F.2d 1339, 1358-60 (9th Cir. 1978).

<sup>113</sup> United States v. Hogan, 489 F. Supp. at 1038-39.

<sup>114</sup> Fed. R. Crim. P. 32(c)(3)(A); see United States v. Rone, 743 F.2d 1169 (7th Cir. 1984).

<sup>115</sup> Fed. R. Crim. P. 32(c)(3)(C).

<sup>116</sup> Fed. R. Crim. P. 32(c)(3)(A).

<sup>117</sup> A. Partridge, *The Sentencing Options of a Federal District Judge 3* (rev. ed. June 1985).

<sup>118</sup> 18 U.S.C. § 3623(a) (Supp. III 1985). Individuals convicted of federal offenses may be fined not more than the greatest of: the amount set forth in the statute defining the offense; in a case where the defendant derives pecuniary gain from the crime or if the crime causes pecuniary loss to a victim, the greater of twice the defendant's gain or twice the victim's loss; for felonies, \$250,000; for misdemeanors resulting in death, \$250,000; and for misdemeanors punishable by imprisonment over six months, \$100,000. Information as to the maximum potential fine is a required part of the judicial officer's advisement at arraignment and rearraignment.

<sup>119</sup> 18 U.S.C. § 3013 (Supp. III 1985). There is a similar requirement on misdemeanor convictions at the rate of \$25 per count.

<sup>120</sup> A. Partridge, *supra* note 117, at 7. The court may also impose conditions of probation enumerated in 18 U.S.C. § 3651 (1982 & Supp. III 1985). Note that 18 U.S.C. § 3651 is repealed effective November 1, 1987. Probation will subsequently be imposed consistent with 18 U.S.C. §§ 3561-3566 (Supp. III 1985).

<sup>121</sup> 18 U.S.C. §§ 3579-3580 (1982 & Supp. III 1985); 18 U.S.C. § 3651 (1982 & Supp. III 1985).

<sup>122</sup> United States v. Navarro-Flores, 628 F.2d 1178 (9th Cir. 1980). Denial of the right of allocution does not constitute a violation of constitutional rights and is usually not grounds for collateral attack. See United States v. Turner, 741 F.2d 696 (5th Cir. 1984); United States v. LaPaz, 698 F.2d 695 (5th Cir. 1983).

<sup>123</sup> United States v. Jones, 696 F.2d 479 (7th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); United States v. Hayes, 589 F.2d 811 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979).

when they practice in federal court. Detailed analyses of the different areas addressed in this article may be found in the sources cited herein. In the course of working in an assignment involving federal prosecutions, the military attorney will constantly encounter unfamiliar situations and challenges that are unique to civilian prosecution practices.

Hopefully, this article will help to avoid unnecessary problems and will provide assistance for successful prosecutions.

## Which Comes First, the Army or the Job?

### Federal Statutory Employment and Reemployment Protections for the Guard and the Reserve

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#### Introduction

##### *The Problem*

Each year, thousands of Army Guard and Reservists participate in military training either by serving on active duty or active duty for training tours, or as part-time soldiers who attend evening or weekend drills and two-week summer camps. Soldiers who are about to complete active duty tours are likely to be concerned with whether their civilian jobs will be available, and if available, what the pay and benefits will be when the tour ends. Part-time Guard or Reserve soldiers are likely to be concerned with whether they will be able to take time off from work to attend drills or summer camp and if so, how this will affect their jobs. In addition, prospective Guard or Reserve soldiers may be concerned with whether an employer can refuse to hire them because of a military commitment. The answers to these questions are likely to be favorable if the soldiers act with a sound knowledge of their federal employment and reemployment rights and know where to seek assistance in securing those rights.

This article will discuss employment and reemployment protections available to Guard and Reserve soldiers ("reservists") under federal law. Several states also have

statutes that provide employment and reemployment protections.<sup>1</sup>

Employment protections are available to soldiers under federal law in both mobilization and peacetime situations. Protected individuals include inductees, enlistees, and reservists performing active duty, active duty for training, and inactive duty training.<sup>2</sup> Under a recent statutory enactment, individuals may not be denied employment at a new employer because of membership in a Reserve Component of the Armed Forces.<sup>3</sup> Although the duration and frequency of their employment absences will differ, the employment rights of soldiers in these groups share a common statutory nexus. Today's volunteer Army enlistee is typically confronted with a single lengthy employment absence similar to the situation faced by inductees when the draft was in effect. The reservist, on the other hand, is customarily faced with a requirement for periodic absences of a few hours', days' or weeks' duration. Thus, there is a potential for the reservist to experience employment conflicts on a recurring basis. Because the Army National Guard and the United States Army Reserve (USAR) are a part of the Army's total force, it is important for commanders and judge advocates in both the Active and Reserve Components to be familiar with employment conflicts their soldiers

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<sup>1</sup> Rights available under state law are outside the scope of this article. See Sharp, *Reservists' Employment Rights*, 22 A.F. L. Rev., 374, app. (1980) for a list of states with employment rights legislation.

<sup>2</sup> Reservist training is accomplished through inactive duty training (IDT), annual training (AT), active duty for training (ADT), and initial active duty for training (IADT). IDT is performed by reservists who are assigned or attached to Troop Program Units (TPU) and is performed in four-hour segments, including roll call and rest periods, and during which time such personnel are not on active duty. See 10 U.S.C. § 270(a) (1982); Dep't of Army Reg. No. 140-1, Army Reserve—Mission, Organization and Training, para. 3-4 (1 Feb. 1985) [hereinafter AR 140-1]. A four-hour IDT period is known as a Unit Training Assembly (UTA). Two consecutive four-hour periods of IDT performed on the same day are known as Multiple Unit Training Assemblies (MUTA). A UTA is usually performed in the evening of a weeknight and is sometimes called a "weekly drill." A MUTA is usually performed on a weekend day and is known as a "weekend drill." AT is a yearly training period in which both TPU and control group personnel perform active duty for not less than 14 days during each training year. See 10 U.S.C. § 270(a) (1982), AR 140-1, para. 3-16. Although sometimes known as "summer camp," AT may be performed at any time of the year, in either a continuous or segmented basis. ADT is a period of one or more consecutive days where Reserve Component personnel perform active duty on an individual basis. See 10 U.S.C. § 672(d), AR 140-1, para. 3-29a. These are sometimes known as "man-days." IADT is the period of active duty required to qualify in the selected Military Occupational Specialty, and comprises a length of not less than 12 consecutive weeks. See Dep't of Army, Reg. No. 135-200, Army National Guard and Army Reserve, Active Duty for Training, Annual Training and Full-Time Training Duty for Individual Members, para. 6-3 (1 Aug. 1985).

<sup>3</sup> Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, § 331, 100 Stat. 3248, 3279 (to be codified at 38 U.S.C. § 2021(b)(3)).

may encounter and with their soldiers' employment rights. The following situations are illustrative:

**Case 1.** You are a National Guard company commander and it is one hour before an evening Unit Training Assembly is scheduled to begin. You receive a telephone message from Private Smith, a member of your unit, who advises that he will not be able to attend drill because his working shift had been unexpectedly extended into the evening. Leaving work early might jeopardize his civilian position. Although you are inclined to authorize rescheduled training,<sup>4</sup> you are somewhat troubled because you have experienced this same problem with Private Smith and his employer several times within the past three months.

**Case 2.** You are a USAR judge advocate officer. While having lunch on a weekend Multiple Unit Training Assembly with Second Lieutenant Allen, you learn that she was not hired for a promising job in a research laboratory. Although the prospective employer appeared to be interested in her employment candidacy during the first two interviews, the interest noticeably diminished when the extent of her reserve obligation was discussed with a senior company representative at the third interview. Lieutenant Allen thinks that she did not receive an offer because the company believed that her absences for drills and summer camp might be too disruptive of the office routine.

**Case 3.** You are a reserve judge advocate officer. While attending a weekend Multiple Unit Training Assembly, you are approached by Private Franklin for advice about a problem with her employer. Although her employer readily permits time off from work for attendance at evening and weekend drills, it has been unwilling to make adjustments to Private Franklin's work schedule to enable her to work a full forty-hour week during those weeks when scheduled drill conflicts with her working period. You learn that she works evenings and weekends on a rotating shift assignment. Her department usually runs two shifts on a six day-a-week basis. When there is a drill scheduled, she must report to work late or miss work entirely, and is thus unable to earn a full week's pay.

**Case 4.** You are a reserve battalion commander. You would like to assign one of your promising young officers to a position that requires completion of a twelve-week resident training course offered once each year. The officer has expressed interest in attending the course and being assigned to the position but because of production scheduling requirements unique to the industry, his employer will not permit him to attend. If he is away from his job for more than two consecutive weeks during the busy period, he will be replaced. The employer's annual peak production period occurs at the time the military training course is offered.

The employer does not want to hire temporary help because of the expense.

**Case 5.** You are an active duty company commander. Specialist Four Hall is a cook in your unit who was a worker in a restaurant prior to his enlistment. He is nearing the end of his four-year enlistment. He recently returned from leave at home where he learned that the restaurant had been sold to a new ownership group. He is worried because he was told that he will not be reinstated by the new owners. Another person has already been hired to fill his job. You learn that although the name of the restaurant and its culinary format have been changed, most of the former staff members have been retained. The restaurant's location and equipment remain the same.

These situations are typical of the concerns that Active Army and Reserve Component personnel serving an extended tour of active duty may have when contemplating a return to civilian life, and demonstrate the day-to-day conflicts that Army reservists are likely to experience with their civilian employers. Because of the periodic nature of their absences, reservists' conflicts have additional dimensions besides periodic absences from the workplace. The soldier may have a problem with pay, pension benefits, or other "incidents or advantages of employment." Potential employers may be reluctant to hire the reservist because the periodic obligation to attend training could disrupt production or the assignment of other personnel within the organization. A knowledge of employment rights is important to not only reservists who are assigned to Troop Program Units, but also to reservists assigned to the Individual Ready Reserve. Soldiers will frequently turn to their chain of command, or their servicing judge advocate, for advice on what to do when these situations arise.

In order to provide correct advice and assistance to reservists experiencing an actual or potential employment problem, commanders and judge advocates must have a working familiarity with the statutory and decisional law establishing employment rights, and should be aware of what actions to take when employment conflicts arise. Timely intervention, coupled with accurate advice and referral, can reduce the likelihood of an employment conflict causing damage to a reservist's civilian career and foster continued participation in the Army reserve program.

### Resources

The responsibility for advising reservists of their employment rights has been placed on commanders, who are responsible for periodically briefing members of their command.<sup>5</sup> The briefing is a useful tool in assisting soldiers to identify and resolve their own potential employment conflicts before serious problems arise. In the event that a

<sup>4</sup> Absences from Unit Training Assemblies and Multiple Unit Training Assemblies are governed by AR 140-1, and Dep't of Army, Reg. No. 135-91, Army National Guard and Army Reserve, Service Obligations, Methods of Fulfillment, Participation Requirements and Enforcement Procedures (1 Feb. 1984) [hereinafter AR 135-91]. Employment conflicts, which in the judgment of the unit commander do not clearly constitute a convenience to the member will justify rescheduled training authorization. See AR 140-1, para. 3-12d. But see AR 135-91, para. 4-7b, providing that employment conflicts, overtime, schooling, and loss of income are not normally considered valid reasons for absence from training. In cases of continued hardship, the unit commander will refer the case through channels to the approval authority for a decision on whether to retain or remove the member from the unit. While awaiting this decision, the member is required to participate in scheduled training.

<sup>5</sup> See Dep't of Army, Pam No. 135-2, Briefing on Reemployment Rights of Members of the Army National Guard and the U.S. Army Reserve (15 May 1982) [hereinafter DA Pam 135-2]. TPU commanders should brief their soldiers on reemployment rights as soon as possible after assignment to the unit and at least one month before Annual Training. DA Pam 135-2, para. 2b. Personnel attending other types of training and Control Group Personnel may receive information regarding reemployment rights from Commanding General, Army Reserve Personnel Center, with the training orders or at least one month prior to the AT reporting date. DA Pam 135-2, para. 2c, d.

reservist is unable to resolve a conflict, the commander may choose to intervene and speak directly with the employer regarding the employee's reserve obligations. The judge advocate also plays an important role in the process. Judge advocates should have a working knowledge of federal and state statutes that provide employment rights, together with applicable case law, so that they can accurately advise the commander and the soldier on the proper courses of action. If command intervention is unsuccessful, the reservist should be referred to outside assistance.

There are established civilian resources that can assist reservists in securing their rights under federal law. The National Committee for Employer Support of the Guard and Reserve is an activity of the Assistant Secretary of Defense for Manpower and Reserve Affairs. In addition to the National Committee, there are state committees comprised of employers and business leaders who are supportive of the Reserve Components. Contact with members of these committees should be made where reservists are experiencing difficulty in securing a leave of absence from employers to participate in scheduled military training or where there are other employment difficulties arising as a result of an obligation of reserve membership. The National Committee maintains an Ombudsman Program, the purpose of which is to obtain the support of employers for employee participation in the Guard and Reserve without harm to the employee's civilian career. The Program provides an informal mechanism to quickly resolve in a friendly way conflicts and disputes that arise among employers, employees, and commanders, without filing a formal complaint with the United States Department of Labor. The National Committee has a toll-free telephone number.<sup>6</sup>

If the conciliatory approach is not successful, the reservist should be referred to the local Department of Labor office responsible for veterans' reemployment rights.<sup>7</sup> Services provided by the Department range from an informal resolution to filing a lawsuit on the reservist's behalf in

federal court and representing the reservist without charge at the trial and through appeal.

The sources of reemployment rights under federal law begin with the statute, and include applicable legal concepts fashioned and interpreted by the courts. The statute, legal concepts, and rights protected under the law will be discussed in the following sections.

### The Statute

Federal reemployment rights are codified at 38 U.S.C. §§ 2021 to 2026. Legislation establishing reemployment rights for military personnel dates from September 1, 1940, with the passage of the Selective Training and Service Act,<sup>8</sup> which required the reinstatement of returning veterans to their civilian employment with their seniority, status, and pay undiminished. The Supreme Court noted that the veteran "who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job."<sup>9</sup> That statute and subsequent enactments<sup>10</sup> are now codified in the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (the Act).<sup>11</sup> An important policy of the Act is to prevent an obligation arising by reason of reserve membership from damaging the reservist's civilian career, and to provide reservists with the same on-the-job treatment as their co-workers without military obligations.<sup>12</sup> The Act, however, does not require preferential treatment of a reservist by an employer<sup>13</sup> or permit unreasonable conduct by an employee.<sup>14</sup>

Reemployment protection is provided for individuals who leave their jobs to enter<sup>15</sup> or to be physically examined for entry into the Armed Forces.<sup>16</sup> These protections apply to draftees and those who enlist. Guard and Reserve soldiers called to active duty, whether voluntarily or involuntarily, are also protected. Soldiers who leave their jobs to perform initial active duty for training for at least a three-

<sup>6</sup> See generally *Employer Support, Without It, You're Hurting*, Army Reserve Magazine, Summer 1980, at 15, for a listing of Employer Support State Committee Chairmen. Requests for assistance may be made by the employer, the employee, or a commander who may be experiencing problems with a particular employer. The toll-free number for the National Committee is (800) 336-4590. The address of the National Committee for Employer Support of the Guard and Reserves is: 1735 N. Lynn Street—Suite 206, Arlington, VA 22206.

<sup>7</sup> See DA Pam 135-2, app. C., for a nationwide listing of these offices.

<sup>8</sup> Pub. L. No. 783, 54 Stat. 885 (1940) (formerly codified at 50 U.S.C. App. § 308). For a brief survey of the statutory history of reservists' reemployment rights, see Comment, *Military Reservist-Employees' Rights under 38 U.S.C. 2021(b)(3)—What is an Incident or Advantage of Employment*, 19 San Diego L. Rev. 877 (1982).

<sup>9</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

<sup>10</sup> In 1951, the Universal Military Training and Service Act required employers to grant leaves of absence for active duty for training. Pub. L. No. 51, § 1(a), 65 Stat. 75, 86-87 (1951). In 1955, the Reserve Forces Act afforded reemployment protection to reservists serving on active duty for training in excess of 12 weeks. Pub. L. No. 305, § 262(f), 69 Stat. 598, 602 (1955). In 1960, Reserve and National Guard reemployment rights were equalized, and extended to reservists who trained for periods less than 90 days per year, protecting seniority, status, pay, and vacation. 38 U.S.C. § 2024(d) (1976). This provision was similar to a provision requiring the reinstatement of veterans returning from active duty. 38 U.S.C. § 2021(a) (1976). The law did not protect returning reservists from discharge, demotion, or other discriminatory conduct once reinstated, even though similar protections appeared in the related section dealing with full-time active duty returnees. This disparity was remedied with the passage in 1974 of what is now codified at 38 U.S.C. § 2021(b)(3) (1976), which provides that reservists shall not be denied retention in employment, promotion, or other incident or advantage of employment because of an obligation arising from membership in a reserve component.

<sup>11</sup> Pub. L. No. 93-508, 88 Stat. 1594 (1974) (codified as amended at 38 U.S.C. §§ 2021-2026 (1982)). The congressional rationale was that valuable precedent in the interpretation of the older statutes might have been lost if the existing statutes were replaced with new legislation. See, e.g., *Hanna v. American Motors Corp.*, 557 F.2d 118, 119 n.1 (7th Cir. 1977).

<sup>12</sup> *Fishgold*, 328 U.S. at 284.

<sup>13</sup> *Id.* at 285. The *Fishgold* plaintiff unsuccessfully contended that the one-year discharge protection afforded returning veterans should be construed as including protection against layoffs. The Court held that the statutory protection did not provide an increase in seniority over what an employee would have had if that employee never entered the armed services.

<sup>14</sup> *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981).

<sup>15</sup> 38 U.S.C. §§ 2021(a), 2024(b)(2) (1982).

<sup>16</sup> 38 U.S.C. § 2024(e) (1982).

month period,<sup>17</sup> or to perform weekly or monthly unit training assemblies,<sup>18</sup> two or more weeks of annual training,<sup>19</sup> or who attend service schools or special courses of instruction,<sup>20</sup> are covered by the statutory protections. Protections apply to employees of the United States, the District of Columbia,<sup>21</sup> state and local governments, and private employers.<sup>22</sup>

The following summarizes the pertinent provisions of the Act providing reemployment rights and other employment protections.

**38 U.S.C. § 2021.** This section furnishes reemployment protection for persons holding a nontemporary position who satisfactorily complete their military service. It provides that such persons must be restored to a position of like seniority, status, and pay. If the vacated position is no longer available, the employer must offer a comparable position. A successor employer is also responsible for providing reemployment rights. Protected individuals must apply for reemployment within ninety days after relief from active duty, and they enjoy protection from discharge without cause for one year after restoration.

Section 2021(b)(3) provides that protected individuals cannot be denied hiring, retention in employment, promotion, or an "incident or advantage of employment" because of any obligation as a member of a Reserve Component. This section was enacted "to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being discriminated against in their employment because of their Reserve membership."<sup>23</sup>

**38 U.S.C. § 2022.** This section establishes enforcement procedures for § 2021 and § 2024 by conferring jurisdiction upon United States district courts. Cases are to be given a preference on the court calendar. The U.S. Attorney or "comparable official" may appear and act as attorney for persons protected by the Act. No fees or court costs are to be taxed against the person seeking benefits under the Act. Suit may be instituted in any district where a private employer maintains a place of business or, if against a state or political subdivision thereof, where such entity "exercises its authority or carries out its functions." State statutes of limitation are expressly deemed inapplicable to proceedings under the Act. Possible remedies include reinstatement, back pay, and damages.<sup>24</sup>

<sup>17</sup> 38 U.S.C. § 2024(c) (1982).

<sup>18</sup> 38 U.S.C. § 2024(d) (1982).

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

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

<sup>21</sup> 38 U.S.C. § 2023 (1982).

<sup>22</sup> 38 U.S.C. § 2022 (1982).

<sup>23</sup> S. Rep. No. 1477, 90th Cong., 2d Sess., 1-2 (1968).

<sup>24</sup> See, e.g., *Bankston v. Stratton Baldwin Co.*, 441 F. Supp. 247 (S.D. Ala. 1977) (reservist wrongfully discharged because of two-week summer camp absence awarded damages equal to earnings and medical benefits he would have received if he had not been discharged and was held to be entitled to reinstatement).

<sup>25</sup> 38 U.S.C. § 2024(c) (1982); cf. 38 U.S.C. § 2021(b)(1) (1982) which protects inductees from discharge without cause for one year after return from military duty.

<sup>26</sup> In a case where a police officer's reserve training session was scheduled from 7:00 a.m. to 4:00 p.m., and his normal work shift for the day was from 3:30 p.m. to 11:30 p.m., the court noted that section 2024(d) required him to report for work at the start of the next regularly scheduled working period, which was the following day, rather than at 6:00 p.m. on the day in question, which was requested by his superior. See *Gellendin v. Village of Brown Deer*, 100 Lab. Cas. (CCH) ¶ 10,807 (E.D. Wis. 1983); see also *Sawyer v. Swift & Co.*, 610 F. Supp. 38 (D. Kan. 1985) (Statutory requirement allowing employee sufficient time to travel from place of training to worksite also included sufficient time to travel from the worksite to the place of training. Travel time held permissible where employee was required to leave work early on a Friday to travel to a distant training location for drill beginning on Saturday morning.).

**38 U.S.C. § 2023.** This section establishes reemployment rights for employees of the Federal Government and the District of Columbia and authorizes the Director of the Office of Personnel Management to direct other federal agencies to comply with the Act.

**38 U.S.C. § 2024.** This section provides to persons who enlist or who are called to active duty (whether or not voluntarily) the same reemployment rights as inductees, if the period of service does not exceed four years (five years if the additional year is at the request and for the convenience of the Government).

The section also protects reservists and Guardsmen ordered to initial active duty for training (IADT) for a period of not less than twelve consecutive weeks, if they apply for reemployment within thirty-one days after release from such training. The reservist returning from IADT is protected from discharge without cause for six months after restoration.<sup>25</sup>

Section 2024(d) establishes "leave-of-absence" rights for reservists. An employer must grant a leave of absence upon request to a member of the Guard or Reserve to perform active duty training (ADT) or inactive duty training (IDT) and must restore the individual to all seniority, status, pay, and vacation the person would have enjoyed if the military-related absence did not occur. The employee returning from ADT or IDT must report for work at the next regularly scheduled work period after travel from the place of military training to the place of employment.<sup>26</sup> Failure to timely report for work will subject the employee to the disciplinary rules of the employer with respect to absences from scheduled work. Soldiers completing a period of active duty have ninety days to apply for reemployment, while those performing AT, ADT, or IDT must report back to work upon completion of training. Although a lengthy period of ADT may be practically indistinguishable from active duty, the distinction should be observed. The wording of a soldier's orders is likely to control.

There is no discharge protection for employees performing ADT, AT, or IDT. Although the Act requires that satisfactory service be performed, an employee seeking reinstatement under section 2024(d) need not present a

certificate of discharge to the employer as a precondition to reinstatement.<sup>27</sup>

**38 U.S.C. § 2025.** This section establishes the enforcement scheme for the statute. It authorizes the Secretary of Labor to assist persons in securing their rights under the Act. The assistance is provided through the Office of Veterans' Reemployment Rights (OVRP). If the OVRP is unable to achieve a satisfactory resolution of the matter with the employer, it can refer the case to the United States Attorney in a judicial district where the employer does business. The U.S. Attorney may file suit if "reasonably satisfied that the person so applying is entitled to such benefits."<sup>28</sup>

**38 U.S.C. § 2026.** This section provides that where two or more persons are entitled to benefits under the Act and are entitled to reemployment in a particular position, the person who left the position first has the prior right.

### Requirements for Protection

#### Notice

If the performance of ADT or IDT will cause an absence from the workplace during a scheduled working period, the employee, to qualify for protection, must request a leave of absence from the employer.<sup>29</sup> Although the Act does not require that the request be in writing, it is to the reservist's advantage to make a written request.<sup>30</sup> The request for a leave of absence is primarily a notice requirement. The statute does not permit the employer to deny the request or to

require that the employee reschedule the training to a time more convenient for the employer. Although the statute also does not specify a minimum or maximum time for giving the notice, the employee should give it as far in advance as possible in order to minimize the impact of the absence on the employer's operations.

#### Duration/Frequency of Leave

The Act does not specify either how often an individual can request military leave for ADT or IDT, or the maximum allowable length of time for such leave. The courts have held that the duration and frequency of training leaves must be reasonable.<sup>31</sup> The Department of Labor briefly held to a policy that the statute afforded no reemployment protection to individuals whose training exceeded ninety days within any three calendar years. That policy was rescinded after an unfavorable congressional review. The current policy does not specify either the permissible length or frequency of training leaves, but rather is designed "to provide the flexibility for determining what is equitable and reasonable behavior between employer and reservist."<sup>32</sup> Reemployment protections apply to individuals performing active duty for periods up to four years, and for five years if an individual is requested to remain on active duty for the convenience of the government.<sup>33</sup> Individuals who are involuntarily retained on active duty or who are recalled pursuant to law will have reemployment rights without regard to the length of the absence.<sup>34</sup> Only service with an individual's current employer is relevant for determining

<sup>27</sup> See *Micalone v. Long Island R.R. Co.*, 582 F. Supp. 973 (S.D.N.Y. 1983). The court noted that section 2021(a)(1), which provides for the reinstatement of inductees and requires that the returning service member receive a certificate of satisfactory service, does not apply to the reservist seeking reinstatement under section 2024(d).

<sup>28</sup> 38 U.S.C. § 2022 (1982).

<sup>29</sup> 38 U.S.C. § 2024(d) (1982); *cf. id.* § 2024(c) which does not require reservists ordered to IADT to request a leave of absence for the training. A reservist who fails to request a leave of absence for other than IADT is not entitled to reinstatement. See *Blackmon v. Observer Transp. Co.*, 102 Lab. Cas. (CCH), ¶ 11,450 (W.D.N.C. 1982), *aff'd sub nom. Troy v. City of Hampton*, 756 F.2d 1000 (4th Cir. 1985).

<sup>30</sup> The Department of Defense and the Department of Labor have devised a request form that reservists can use to meet the statutory requirement. A sample format is provided in DA Pam 135-2, app. B.

<sup>31</sup> In *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), the court imposed a "rule of reason" requirement in § 2024(d) cases by holding that a municipal police officer who received an extension of his active duty for training from the military, while already on active duty and without consulting his employer, and who remained on active duty after his employer denied his request for an extension, acted unreasonably and could be terminated. The court noted that the individual voluntarily extended his training duty to suit his own convenience and placed an unreasonable burden on his employer. The court ruled that the length of time of the active duty leave, the circumstances surrounding its request, and the circumstances existing at the time the reservist returns from military duty must be reasonable under the circumstances. The court noted that § 2024(d) applied whether or not the training duty is required. See also *Anthony v. Basic American Foods*, 600 F. Supp. 352 (N.D. Cal. 1984) (leave request under § 2024(d) must be reasonable in light of the circumstances giving rise to its request and requirements of employer; presumption exists that leave is protected under the Act; 4½-month leave held reasonable even though it strained employer's operation where employee had "little choice" but to undergo training if he wanted to remain a commissioned officer); *Bottger v. Doss Aeronautical Services, Inc.*, 609 F. Supp. 583 (M.D. Ala. 1985) (26-day leave request for nonobligatory training made immediately after return from summer camp held reasonable where training was offered only once and would enhance the employee's reserve career); *Barber v. Gulf Publishing Co., Inc.*, 103 Lab. Cas. (CCH) ¶ 24,859 (S.D. Miss. 1986) (five-month leave to attend officer advanced course not unreasonable even though reservist could have taken a correspondence course in lieu of in-person training); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987) (one-year leave of absence to attend nursing school to become a licensed practical nurse and qualify for promotion to fill a military occupational speciality then under strength held reasonable where employee notified employer four months prior to the beginning of the requested leave). In *Ingram*, the court delineated the factors to consider in making the determination of whether the leave request was reasonable. The court noted that "any judicial inquiry into the reasonableness of leave requests must be limited and extremely deferential to the reservists' rights." *Id.* at 1469. The court went on to state that the voluntariness of the leave request and the burden that the leave places upon the employer should not defeat the leave request. The court focused on the presence of any "questionable conduct of the employee" and stated that in the absence of such conduct, "the reasonableness test will most likely be satisfied." *Id.* at 1470.

<sup>32</sup> See Memorandum of William C. Plowden, Jr., Assistant Secretary for Veterans' Employment: Operating Guidelines for Dealing with Reserve cases under § 2024(d), Title 38 U.S.C. (March 3, 1983). The Assistant Secretary for Veteran's Employment has expressed the view that *Lee* is not the Fifth Circuit's specific interpretation of the duration or frequency of military training leaves. The United States Department of Labor has taken the position that section 2024(d) cases are to be processed in accordance with the following criteria: the reservist must be in possession of orders before leaving the worksite; he or she must request a military leave of absence for training purposes; and the reservist must report back to work at the start of the next regularly scheduled shift after expiration of the last calendar day necessary for travel from training and sufficient rest. The reservist in compliance with the above criteria will generally be viewed as having established a prima facie case under § 2024(d). See also *Anthony v. Basic American Foods* (Congress did not intend that there be a three-month limit on training leaves pursuant to § 2024(d)); *Barber v. Gulf Publishing Co.* (protection not limited to 12 weeks).

<sup>33</sup> 38 U.S.C. § 2024(a) (1982).

<sup>34</sup> 38 U.S.C. §§ 2021(a), 2024(b)(2) (1982).

the applicable four- or five-year period. A person's reemployment rights begin anew with each new employer.<sup>35</sup> Leaves of absence for ADT or IDT do not count towards the four- or five-year limitation for active duty. Although there is no statutory limitation on the number or duration of ADT leaves, protected individuals would be wise to seek and obtain the express consent of their employer before going on a period of ADT in excess of ninety days. The right to obtain a leave of absence should not be abused and it is advisable that each military leave have a bona fide military justification.

#### *Nontemporary Position*

To be eligible for statutory reemployment protection, the reservist must be employed in a position that is "other than a temporary position."<sup>36</sup> The courts have construed the word "temporary" quite narrowly. A position will not be considered temporary if there is a reasonable expectation on the part of the employee that the employment relationship would be continuous and is to continue for a significant period or indefinitely. In cases where layoffs or other periodic interruptions are inherent in the nature of the job, preferential rights to be hired for the next working period can give rise to an expectation of reemployment and make the position nontemporary. Thus, a seasonal employee enjoying a reasonable expectation of reemployment in the future would have a right to reemployment on the same basis as prior to the military service.<sup>37</sup> Neither the fact that under state law, a position is probationary,<sup>38</sup> nor the possibility that the employment might not continue because of certain contingencies or variables (e.g., illness or failure to perform satisfactorily) renders a position temporary for purposes of the Act.<sup>39</sup>

The courts have fashioned a two-part test for determining whether an employee who must complete a training or probationary period before attaining permanent status and who enters on active duty prior to the completion of a

training or probationary period is in a "temporary position." An employee who has a probationary status prior to leaving for military service must show upon return that, as a matter of foresight, it was reasonably foreseeable prior to leaving that upon completion of the probationary period the employee would have received permanent status and, as a matter of hindsight, permanent status was awarded.<sup>40</sup> Although the employee need not complete a probationary or training period before acquiring any rights under the Act, he or she must successfully complete the training period upon return.<sup>41</sup> Upon successful completion of the probationary period, the employee is entitled to a seniority date reflecting the delay caused by military service. Where permanent status was automatic upon the completion of a probationary period not designed to increase skills or enhance proficiency, completion of that period will be excused where failure to complete the probationary period was due to a military absence.<sup>42</sup>

#### *Employment Before Military Service*

Reemployment protection under the Act are available only to individuals who are employed prior to performing a period of military training. Thus, an individual who attained a numerical position on an eligibility list for an apprenticeship program and who was not placed on a subsequent eligibility list during the course of his active duty was held not to be employed and was not entitled to reemployment rights under the Act. The court held that the employee was merely an applicant for the program, not an employee.<sup>43</sup>

An employee who resigns prior to beginning a period of active duty cannot claim the benefits of the Act upon return if the resignation was in fact a bona fide and legitimate severance of the employment relationship.<sup>44</sup> If the employee was required to resign by the employer in order to report for military duty, the statutory protections will apply,<sup>45</sup> and a resignation for the purpose of entering the military

<sup>35</sup> 38 U.S.C. § 2021(a) (1982).

<sup>36</sup> See, e.g., *Gulf States Paper Corp. v. Ingram* (dicta that there is a general presumption in favor of the reasonableness of the request, and that although a one-year request is not per se unreasonable, a greater length of time might reach that level).

<sup>37</sup> See, e.g., *Davis v. Halifax County School System*, 508 F. Supp. 966 (E.D.N.C. 1981) (teacher, serving in three-year probationary status prior to acquiring career status held not to hold a temporary position); *Stevens v. Tennessee Valley Authority*, 687 F.2d 158 (6th Cir. 1982) (all relevant characteristics of the position, and not simply the designation given to it by the employer or the employment contract must be considered; thus, short-term seasonal employee held to be permanent); see also *Bryan v. Griffin*, 166 F.2d 748 (6th Cir. 1948) (employment terminable at will but for an indefinite period is not temporary); cf. *Carr v. RCA Rubber Co.*, 609 F. Supp. 526 (N.D. Ohio, 1985) (employee hired to assist in winding down operations held to be a temporary employee).

<sup>38</sup> *Davis*.

<sup>39</sup> See *Tilton v. Missouri-Pacific Ry.*, 376 U.S. 169 (1964).

<sup>40</sup> See, e.g., *Brickner v. Johnson Motors*, 425 F.2d 75 (7th Cir. 1970) (collective bargaining agreement provided for automatic permanent status at the completion of a 90-day probationary period). Where a training program is involved, as opposed to a work period not designed to develop skills or increase proficiency, the employee must complete the training period. See *Tilton*.

<sup>41</sup> See, e.g., *Pomrening v. United Air Lines*, 448 F.2d 609 (7th Cir. 1971) (pilot entitled to flight officer seniority date similar to that of those in his training class whose training was not interrupted by military service).

<sup>42</sup> See *Hanna v. American Motors Corp.*, 577 F.2d 118 (7th Cir. 1977) (absence due to preinduction physical examination should be credited to employee probationary period not intended to develop job skills or increase proficiency).

<sup>43</sup> *Wilson v. Toledo Area Joint Apprenticeship Comm.*, 560 F.2d 222 (6th Cir. 1977). A recent statutory change now protects individuals from denial of hearing. See *supra* note 3. It is not clear to what extent the new legislation would have affected the outcome of *Wilson*.

<sup>44</sup> *Hilliard v. New Jersey Army Nat'l Guard*, 527 F. Supp. 465 (D.N.J. 1981) (letter of resignation while on active duty constituted a career choice); *Mowdy v. Ada Board of Educ.*, 440 F. Supp. 1184 (E.D. Okla. 1977) (letter of resignation indicated termination of employment rather than a request for a leave of absence).

<sup>45</sup> See, e.g., *Witter v. Pennsylvania Nat'l Guard*, 442 F. Supp. 299 (E.D. Pa. 1978) (employee directed by superior to file letter of resignation prior to entering active military service).

will not deprive the employee of the Act's protection.<sup>46</sup> Upon return from active duty, a soldier may pursue other employment options without jeopardizing the right to reemployment.<sup>47</sup> An employee discharged just prior to entering the military cannot claim the benefits of the Act;<sup>48</sup> one under suspension at the time of entry on entry on active duty, however, may claim the Act's benefits.<sup>49</sup>

### Legal Concepts

The courts have fashioned several legal concepts to resolve cases in which an absence for military service causes a conflict between the rights of the soldier and established employer practices.

#### *The Escalator Principle*

A person returning from a military absence does not step back on the seniority escalator at the point that he or she stepped off to perform active duty. The person steps back on at the point he or she would have occupied if the employee had been employed continuously without the break for military service. The employee is entitled to be restored to the position that he or she left with accumulated seniority.<sup>50</sup> The "escalator principle" applies to employment benefits such as automatic wage and salary increases, promotions, and work scheduling preferences that are based upon seniority. The doctrine does not apply to benefits based on managerial discretion or work performance.

#### *The Reasonable Certainty Test*

A benefit is protected under the Act if it is reasonably certain to result from continuous employment. This doctrine has been created by the courts to determine what benefits an employee would have enjoyed if there was no military absence and addresses the question of what would likely have happened if the employee had been continuously employed. Employer practices and any applicable collective bargaining agreement will be examined to analyze the question,<sup>51</sup> and to delineate the existing system of seniority credit that is due the employee. The employee will be given credit for military service even if the seniority system has not been reduced to writing.

The rule has been applied in cases where promotion is automatic<sup>52</sup> and where there is some uncertainty present. Thus, a returning veteran was entitled to a retroactive seniority date as railroad engineer where he was able to show that selection for the engineer training program accrued as a requisite of seniority and that he would have been selected for and would have completed that program at an earlier date had he not performed active duty.<sup>53</sup> Likewise, an employee returning from active duty was awarded retroactive seniority at a higher job classification by establishing that, but for his period of active duty, he would probably have completed his apprenticeship training at an earlier date and at a different location.<sup>54</sup>

The rule was not applied, however, where a part-time employee missed an opportunity to apply for a full-time position while on Reserve Training Duty. The court distinguished the right to apply for the position from the right to the position itself. Because advancement to a full-time position was based upon "fitness and ability" and not continued employment, the court held that it was not reasonably certain that but for his military leave, the employee would have advanced to a full-time position had he remained continuously employed.<sup>55</sup>

#### *Short-Term Compensation for Services Rendered*

This benefit is not protected or preserved by the Act. Regular pay is an example. Certain benefits can be considered as compensatory and not protected if there is a work requirement that must be completed before the benefit is available (as in cases where vacation is awarded on the number of weeks actually worked),<sup>56</sup> or if the employee's right to the benefit is subject to a significant contingency at the time military service begins.<sup>57</sup>

#### *A Reward for Longevity*

A reward for longevity with an employer is protected by the Act. Seniority and its perquisites such as order of layoff and recall, and work scheduling preferences are examples. It is the nature of the benefit rather than its characterization that is controlling. The Supreme Court has held a returning employee to be entitled to credit toward his pension under his employer's pension plan for a thirty-month

<sup>46</sup> See *Green v. Oktibbeha County Hosp.*, 526 F. Supp. 49 (N.D. Miss. 1981) (test was whether the employee was required to leave his employment to report for military duty; the fact that an employee resigned to do so is of no consequence); see also *Winders v. People Express Airlines*, 595 F. Supp. 1512 (D.N.J. 1984) (military leave of absence requested by employee).

<sup>47</sup> *Davis v. Halifax County School System*, 508 F. Supp. 966 (E.D.N.C. 1981).

<sup>48</sup> *Trulson v. Trane Co.*, 738 F.2d 770 (7th Cir. 1984) (enlistment two months after employee stopped working and was subject to discharge for absenteeism).

<sup>49</sup> *Gall v. United States Steel Co.*, 102 Lab. Cas. (CCH), ¶ 11,335 (W.D. Pa. 1984) (employee entering active duty while under suspension by employer was not discharged).

<sup>50</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).

<sup>51</sup> A soldier's reemployment rights take precedence over conflicting provisions in the collective bargaining agreement and employer practices. See *Fishgold*, 328 U.S. at 285.

<sup>52</sup> See *Brooks v. Missouri Pacific R.R. Co.*, 376 U.S. 182 (1964) ("in practice," transition from rank of apprentice to rank of mechanic was automatic).

<sup>53</sup> *Brandt v. Minneapolis, Northfield & Southern R.R.*, 714 F.2d 794 (8th Cir. 1983).

<sup>54</sup> *Brooks*.

<sup>55</sup> *Batayola v. Municipality of Metropolitan Seattle*, 798 F.2d 355 (9th Cir. 1986).

<sup>56</sup> *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) (vacation pay was a form of deferred short-term compensation for work actually performed and not a right of seniority protected by the Act).

<sup>57</sup> *Raypole v. Chemi-Trol Chemical Co.*, 754 F.2d 169 (6th Cir. 1985) (annual employer contributions to profit-sharing plan held compensatory where true nature was short-term compensation for work performed, and contributions were subject to significant contingencies: no contributions would be made unless profits occurred; the company board of directors in its absolute discretion decided whether to make additional contributions; and a participant was eligible for a contribution only if he actually earned compensation during the year for which the contribution was made).

break in employment covering the period of time he spent in the military, reasoning that the pension benefit was a right of seniority secured by the Act because it would have accrued with reasonable certainty (as opposed to being subject to a significant contingency) had the veteran been continuously employed.<sup>58</sup> The lengthy vesting period required by the pension plan was influential in the Courts conclusion that the true nature of the pension payments was to reward continuous employment with the same employer rather than short-term compensation for services rendered. The "reasonable certainty" requirement was met on the basis of the employee's satisfactory work history both before and after military service.<sup>59</sup>

### *Managerial Discretion*

When the exercise of managerial discretion is necessary for a promotion or advancement, as opposed to a system of automatic progression, the Act is inapplicable, and an employee will not obtain a promotion with seniority retroactive to a time when he or she might have been promoted.<sup>60</sup> Promotions or advancements that are based strictly on the passage of time are protected, however.<sup>61</sup>

### *Impossibility or Unreasonableness of Reinstatement*

Section 2021(a) of the Act affords the employer a limited defense to a reemployment claim in cases where changed circumstances render it "impossible or unreasonable" to reinstate the employee. This exception has been limited to cases where reinstatement would require creation of a useless job or where there has been a reduction in the work

force that reasonably could have included the employee.<sup>62</sup> It is not sufficient that another person has been hired, promoted, or transferred to fill the position vacated by the employee performing military duty or that no opening existed at the time of the employee's return.<sup>63</sup>

### *Successor*

The Act provides that an employer or its successor in interest must provide reemployment rights.<sup>64</sup> The employee is generally entitled to reinstatement in his or her position with a successor owner if the business is still functioning and engaging in essentially the same type of operations at a magnitude similar to preservice levels, and if it requires services generally the same as those supplied by the service member. The courts will not, however, impose an obligation upon an independent buyer of the assets of a business to rehire former employees of the seller.<sup>65</sup> If there is a complete break in the general continuity of the business as to its location, specific nature, public identity, and employees, there will be no reemployment rights.<sup>66</sup>

### *Waiver and Abandonment*

Rights of reemployment provided under the Act may be waived by the employee either expressly or by conduct. Waiver arises where an employee has clearly and unequivocally made a decision to change careers prior to entry on active duty, and thereafter claims reemployment rights with the former employer.<sup>67</sup> The courts will not find a waiver unless the employee's conduct is voluntary and consistent

<sup>58</sup> *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977). The Court construed § 2021(a) and (b) as it applied to "defined benefit plans" as defined by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(34) (1982). It did not rule on whether a "defined contribution plan" as defined in ERISA, 29 U.S.C. § 1002(35) should receive the same treatment. *Cf. Raypole*.

<sup>59</sup> *Alabama Power Co. v. Davis*, 431 U.S. at 591.

<sup>60</sup> See, e.g., *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265 (1958) (promotion not necessarily protected where collective bargaining agreement provided that assignment to superior position be based on "fitness and ability"); *Schilz v. City of Taylor*, 640 F. Supp. 160 (E.D. Mich. 1986) (no reasonable certainty of promotion from police cadet to patrolman where such advancement was based on employer's determination of fitness and ability).

<sup>61</sup> See *Brooks v. Missouri Pacific R.R. Co.*, 376 U.S. 182 (1964).

<sup>62</sup> See, e.g., *Goggin v. Lincoln St. Louis*, 702 F.2d 698 (8th Cir. 1983) (restoration required where employer forced to demote present employee to promote veteran); *Kay v. General Cable Corp.*, 144 F.2d 653 (3d Cir. 1944) (veteran was restored even though temporary replacement was more desirable to employer as a permanent employee); *Muscianese v. United States Steel Corp.*, 354 F. Supp. 1394 (E.D. Pa. 1973) (an employee had no vested rights to a position that violated veteran's rights under the Act).

<sup>63</sup> See *Witter v. Pennsylvania Nat'l Guard*, 442 F. Supp. 299 (E.D. Pa. 1978); *Monroe v. Standard Oil Co.*, 452 U.S. 547, 564-65 (1981) (employers must grant Guard and Reserve soldiers a leave of absence and then "find alternative means to get the necessary work done").

<sup>64</sup> 38 U.S.C. § 2021(a)(B) (1982).

<sup>65</sup> See *Wimberly v. Mission Broadcasting, Inc.*, 523 F.2d 1260 (10th Cir. 1975) (complex break in continuity of business as to its location, specific nature or format, public identity, and employees); *cf. Chaltry v. Ollie's Idea, Inc.*, 546 F. Supp. 44 (W.D. Mich. 1982), where two consecutive corporate successors in interest of a veteran's original employer were held jointly and severally liable for providing reemployment. The operation of the business had proceeded as before and the circumstances of the successors in interest of the original employer did not make it impossible or unreasonable to reinstate the veteran. The court analyzed the successorship question in the context of civil rights and labor cases, and identified nine factors relevant in determining whether to hold a successor company liable for the unlawful employment practices of its predecessor. The factors were:

- (1) whether the successor company had notice of a claim;
- (2) the ability of the predecessor to provide relief;
- (3) whether there has been a substantial continuity of business operations;
- (4) whether the new employer uses the same facilities;
- (5) whether he uses the same or substantially the same work force;
- (6) whether he uses the same or substantially the same supervisory personnel;
- (7) whether the same jobs exist under substantially the same working conditions;
- (8) whether he uses the same machinery, equipment and methods of production; and
- (9) whether he produces the same product.

*Chaltry*, 546 F. Supp. at 51 n.12 (citing *EEOC v. MacMillian Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974); see also *Carr v. RCA Rubber Co.*, 609 F. Supp. 526 (N.D. Ohio 1985) (succeeding employer that shared the same owner and upper level management as predecessor held to be successor); Annotation, *When Does Sale or Reorganization Exempt Business from Reemployment Requirements of Military Veteran's Reemployment Laws?* 63 A.L.R. Fed. 132 (1983).

<sup>66</sup> *Cox v. Feeders Supply Co.*, 344 F.2d 824 (6th Cir. 1965) (change of ownership defeats reemployment claim); *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352 (N.D. Cal. 1984) (sale of business with no ownership or management ties to seller defeats reemployment claim unless employee can show it was more likely than not he would have been hired by successor).

<sup>67</sup> See, e.g., *Hillard v. New Jersey Army Nat'l Guard*, 527 F. Supp. 465 (D.N.J. 1981).

with a knowledge of the applicable statutory rights and an intention to abandon those rights.<sup>68</sup>

### Laches

An employee can wait too long before instituting suit. In such a situation, the claim is barred by the defense of laches. The defense will be valid where it is shown that there has been inexcusable delay in asserting the claim and that the delay caused undue prejudice to the party against whom it is asserted.<sup>69</sup> State statutes of limitation are not applicable by the terms of the Act<sup>70</sup> and there is no federal statute of limitations with respect to claims of veterans for reemployment. Thus the sole limitation is laches. In a case where the employee asserted both a reinstatement and a pension-based claim in a suit filed within sixty days of retirement, the court held that the thirty-six-year-old reinstatement claim was barred by laches. The pension-based claim was held not to accrue until retirement even though it could have been asserted when the anticipatory breach occurred, some seven years earlier.<sup>71</sup> In appropriate factual situations, delay by the Government in investigating a reemployment claim can be charged to an employee and used in support of a laches defense.<sup>72</sup>

### Rights Protected by the Act

Retention in employment after a period of military service, promotion, hiring, and other incidents or advantages of employment are protected by the Act.<sup>73</sup> Included among these "incidents or advantages of employment" are an employee's seniority, status, pay, and vacation.<sup>74</sup> According to the Senate Report accompanying the legislation, the intent of the law was to protect reservists and Guardsmen not on active duty from being discriminated against in employment because of their reserve membership.<sup>75</sup> These protections are applicable to those with a preservice or current employment position. Until recently, the law extended no protection to members of the Guard and Reserve against

discrimination in initial employment because of their military status. Congress became aware of this situation and found that this and other factors were impediments to continued reserve membership.<sup>76</sup> The law was accordingly amended to prohibit discrimination in hiring because an individual is a member of a Reserve Component of the Armed Forces.<sup>77</sup>

The legislative history indicates that "the same principles that apply in discrimination cases involving already employed reservists and National Guardsmen . . . will apply in the new hire situation."<sup>78</sup> Once a prima facie case of discrimination has been established, the burden of proof will shift to the employer to prove that it would not have hired the Guard or Reserve member based on good cause without regard to the military obligation.<sup>79</sup> The legislative history made analogies to the National Labor Relations Act and Title VII of the Civil Rights Act of 1964.

The interrelationship of the statute with conflicting state laws, collective bargaining agreements, work rules, and practices is essential to an analysis of which particular aspects of the employment relationship receive statutory protection.

The following are illustrative of the particular incidents or advantages of employment that have qualified for statutory protection.

### Discrimination and Retention in Employment

The statute provides that employees shall not be denied hiring, retention in employment, or any promotion or incident or advantage of employment because of any obligation as a member of a Reserve Component of the Armed Forces of the United States.<sup>80</sup> Thus, an employer who demoted an employee after his return from initial active duty for training with the United States Army Reserve (because of his absence) was held to have violated the Act.<sup>81</sup>

<sup>68</sup> See *Omara v. Peterson Sand & Gravel Co.*, 498 F.2d 896 (7th Cir. 1974) (failure to specify position in application for reemployment and acceptance of another position field no waiver); *Loeb v. Kivo*, 169 F.2d 346 (2d Cir.), cert. denied, 335 U.S. 891 (1948) (where veteran was led to believe by employer that he had no reemployment rights, acceptance of employment contract held no waiver); *Walsh v. Chicago Bridge & Iron Co.*, 90 F. Supp. (N.D. Ill. 1949) (acceptance of a different position and remaining in it for three years without complaint held waiver).

<sup>69</sup> See, e.g., *Grzyb v. New River Company*, 793 F.2d 590 (4th Cir. 1986) (no waiver to pension right for failure of employee to correct erroneous discharge date for 31 years); *Lingenfelter v. Keystone Consolidated Industries*, 691 F.2d 339 (7th Cir. 1982) (suit barred where nine-year delay after action accrued and six-year delay after exhausting other courses of action); *Farriss v. Stanadyne/Chicago Div.*, 618 F. Supp. 1324 (N.D. Ind. 1985) (claim based on wrongful refusal to reinstate barred by laches where veteran waited almost nine years from date of discharge under other than honorable conditions and six years from date of upgrading before filing suit); *Blake v. City of Columbus*, 605 F. Supp. 567 (S.D. Ohio 1984) (unreasonable delay where plaintiff delayed five years without action and cause of action was 13 years old at time of suit; however, no laches as employer held not prejudiced by delay); *Letson v. Liberty Mut. Ins. Co.*, 523 F. Supp. 1221 (N.D. Ga. 1981) (no laches where claim filed within two years of retirement); *Dorris v. Alabama Power Co.*, 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir. 1976), cert. denied, 429 U.S. 1037 (1977) (claim may be made either upon anticipatory breach or upon failure of performance).

<sup>70</sup> 38 U.S.C. § 2022 (1982), as amended by Pub. L. No. 99-576, § 331, 100 Stat. 3248, 3279 (1986).

<sup>71</sup> *Troiani v. Bethlehem Steel Corp.*, 570 F. Supp. 1140 (E.D. Pa. 1983).

<sup>72</sup> See *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (8th Cir. 1979).

<sup>73</sup> 38 U.S.C. § 2021(b)(3) (1982).

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

<sup>75</sup> S. Rep. No. 1477, 90th Cong., 1, 2 (1968).

<sup>76</sup> 132 Cong. Rec. H9297 (daily ed. Oct. 7, 1986) [hereinafter Cong. Rec.].

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

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 38 U.S.C. § 2021 (1982).

<sup>81</sup> *Henry v. Anderson County, Tenn. Office of Sheriff* 522 F. Supp. 1112 (E.D. Tenn. 1981) (however, the employee's discharge for cause was upheld based upon misconduct not causally related to his reserve membership).

Frequently, an employer can allege several reasons for terminating an employee. In the "mixed motive" discharge situation, several courts have addressed the question of what standard should be used to determine whether a particular termination violated the Act. In *Monroe v. Standard Oil Co.*,<sup>82</sup> the Court observed: "Section 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discrimination like discharge and demotion, motivated solely by reserve status."<sup>83</sup>

This standard was criticized by Congress as being inconsistent with the "but for" or "same decision" analysis employed in cases involving the National Labor Relations Act of 1964.<sup>84</sup> Nevertheless, the "solely" test continues to be employed,<sup>85</sup> although not universally, in the lower courts.

#### *Layoff and Recall*

The returning employee is not protected from layoffs in cases where other individuals having the same seniority are laid off.<sup>86</sup> The employee is entitled to be reinstated in a lay-off status,<sup>87</sup> however, and will be eligible for recall when other employees with the same seniority are recalled.

#### *Discharge Protection*

Reservists returning from initial active duty for training are protected from discharge without cause for a period of six months,<sup>88</sup> while persons who enlist or who are called to active duty (and who normally serve for longer periods) are protected for a full year.<sup>89</sup>

#### *Day and Hours at Work; Shift Assignments*

The First Circuit has held that an assignment of a state trooper to a less desirable shift after his return from a six-week absence for active duty with the Air Force Reserve constituted a denial of an "incident or advantage of employment" under § 2021(b)(3) even though the transfer resulted in no loss of pay, seniority, or personnel benefits under the state personnel system.<sup>90</sup> The court found that

the transfer was for reasons casually related to the employee's reserve obligations. The position to which an employee is restored need not be identical to the previous position but must be of like seniority, status, and pay,<sup>91</sup> i.e., similar employment.

#### *Bidding on Jobs*

The right to bid on a job becoming available during an employee's military absence can be a prerequisite of seniority to which an employee is entitled upon return from the service.

In a case where the employee was covered by a collective bargaining agreement that provided that jobs would be filled through a bidding system based on seniority, the employee was held to have a contractual right to bid on positions becoming available during his absence on active duty and to assume the position upon return.<sup>92</sup> The employer was held to have a contractual duty to inform the employee of all positions becoming available during the military absence. The test was whether the employee would have obtained the status sought but for the military absence.

#### *Retirement and Pensions*

Pension benefits are protected as prerequisites of seniority if the benefit would have accrued with reasonable certainty had the employee been continuously employed but for the period of military service and if the benefit constitutes a reward for length of service. The benefit is not protected if it is in the nature of short-term compensation for services rendered.<sup>93</sup> A union trust fund was held to be an employer within the meaning of the Act for the purpose of crediting pension rights where the employer had delegated all of its rights and control over retirement benefits to the pension fund.<sup>94</sup> Pension eligibility credit under a pension plan was held to be a prerequisite of seniority because of the automatic nature of its accrual, and a reservist was held entitled to credit for a fifteen-month period of training and hospitalization while on active duty.<sup>95</sup>

<sup>82</sup> 452 U.S. 549 (1981).

<sup>83</sup> *Id.* at 559 (emphasis added).

<sup>84</sup> Cong. Rec., *supra* note 76.

<sup>85</sup> *Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172 (N.D. Minn. 1986); *cf. Chesna v. International Fueling Co.*, 102 Lab. Cas. (CCH) ¶ 11,230 (1st Cir. 1984) ("we do not feel it necessary to determine whether *Monroe* requires reserve status to be the sole reason for dismissal or simply a reason for which we read the District Court's decision to satisfy the more stringent standard"); *Cook v. 84 Lumber Co.*, 99 Lab. Cas. (CCH) ¶ 10,639 (N.D. Ohio 1983) ("casualty related to service" standard; no discussion of *Monroe*).

<sup>86</sup> *See Fishgold.*

<sup>87</sup> *See, e.g., Hanna v. American Motors Corp.*, 577 F.2d 118 (7th Cir. 1977).

<sup>88</sup> 38 U.S.C. § 2024(c) (1982).

<sup>89</sup> 38 U.S.C. § 2021 (1982).

<sup>90</sup> *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979) (change from an 8-to-5 weekday job to one with weekend work and shifts that could fall during any hour of the day or night was held to be discriminatory when plaintiff was compared to fellow employees not having a reserve commitment).

<sup>91</sup> *See e.g., McCormick v. Carnett-Partsnett Systems, Inc.*, 396 F. Supp. 251 (M.D. Fla. 1975) (Act not violated where restored position was equal in pay and seniority but with reduced responsibility and opportunity for advancement).

<sup>92</sup> *Alber v. Norfolk & Western R.R.*, 654 F.2d 1271 (8th Cir. 1981); *see also Cobb v. Prokop*, 557 F. Supp. 391 (W.D. Mass. 1983) (employer under affirmative duty to consider absent employee for vacancy).

<sup>93</sup> *Alabama Power Co. v. Davis*, 389 U.S. 323 (1967).

<sup>94</sup> *Bunnell v. New England Teamsters and Trucking Industry Pension Fund*, 655 F.2d 451 (1st Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

<sup>95</sup> *United States ex rel. Reilly v. New England Teamsters and Trucking Industry Pension Fund*, 737 F.2d 1274 (2d Cir. 1984). The court extended the *Alabama Power* rationale to include defined contribution plans within the protections afforded § 2024(d), and held that a prerequisite of seniority has the same meaning under §§ 2021(a), (b) and 2024(d).

## Supplementary Unemployment Benefits

In *Coffy v. Republic Steel Corp.*,<sup>96</sup> former service members were held entitled to maximum benefits under the steel industry's Supplementary Unemployment Benefits Plan based in part on time spent in the military service. The plan was created pursuant to a collective bargaining agreement. The benefits were held to be prerequisites of seniority guaranteed under the Act. The Court noted that the purpose of the plan was to provide economic security during periods of layoff to employees who had been in the service of the employer for a significant period. The benefits under the plan were viewed as a reward for length of service closely analogous to traditional forms of seniority, rather than as deferred short-term compensation for services actually rendered. The Court so held primarily because the collective bargaining agreement included credit for weeks in which the employee was paid but did not work, e.g., jury duty.

### Severance Pay

Where the amount of severance pay to each employee depended on the length of the employee's "compensated service" (defined to exclude military absences), the Court concluded that severance payments to tugboat firemen were not intended as a form of deferred compensation for work done in the past, but were a means of compensating employees for the use of rights and benefits accumulated over a long period of service, and thus protected by the Act.<sup>97</sup> Severance payments were considered a reward for longevity and a prerequisite of seniority similar to the more traditional benefits of work preference and order of layoff and recall.

### Wage Rate

A municipal police officer on National Guard duty during an illegal police work slowdown was held entitled to an increase as a prerequisite of seniority given to police officers who did not participate in the job action.<sup>98</sup> The court found that but for his absence on National Guard duty, the officer would have remained on duty during the slowdown, and that the raise was a reward for satisfactory completion of service during the strike. The court also found that the raise was "virtually automatic" and devoid of managerial discretion for those who remained on the job.

### Vacation and Holiday Pay

These benefits can qualify for statutory protection depending on the nature of the benefit conferred by the collective bargaining agreement or employer practice and whether the benefit is dependent on a work requirement.

The Act has been held to protect a vacation and holiday pay provision in a collective bargaining agreement that required that the employee be employed on the one-year anniversary date of starting work with the company and that he be on the payroll for the three months preceding each paid holiday.<sup>99</sup> Although the employer contended that the employee was not eligible for the benefits because he returned to work less than three months before the holiday, the court held that the employee was entitled to the benefits because he had met all the contractual work requirements and would have been eligible for the benefits if he had simply remained on the company payroll. A National Guardsman was held to be entitled to pay for a holiday occurring during his leave of absence for annual training even though the collective bargaining agreement required that employees work each day of the week in which the holiday fell in order to be eligible for holiday pay. The court noted that workers whose absence was involuntary (e.g., for illness, jury duty, or layoff) were eligible for holiday pay, and that military leave "shares the essential features of those exemptions designated for employees not in the reserve."<sup>100</sup>

In a case where the benefit was conditioned upon a work requirement that was not fulfilled, the Court held that the Act did not entitle the returning employee to full vacation benefits for the years spent in the military even though his failure to satisfy the substantial work requirement upon which the benefits were conditioned was due to his serving in the military for portions of those years.<sup>101</sup> The Court found that vacation benefits were intended as a form of short-term deferred compensation for work performed, and the right to benefits did not accrue automatically as a mere function of continued association with the employer. The vacation benefits were not a prerequisite of seniority but were benefits that had to be earned. Thus they were unavailable to one who had not satisfied the work requirement. Likewise, where an employee on leave of absence for any reason was entitled to vacation benefits only on a pro rata basis for time actually worked, vacation pay for the period of military leave was held not to be a prerequisite of seniority.<sup>102</sup>

### Promotions

An employee is entitled to any automatic promotion that he or she would have received had the employee remained continuously on the job rather than on active military service. The rule is not applicable to advancements based upon employer discretion.<sup>103</sup> Training programs must be completed before promotion takes place.<sup>104</sup> An employee in a training program can also be eligible for an automatic promotion without working the required number of days,

<sup>96</sup> 477 U.S. 191 (1980) (construing 38 U.S.C. § 2021(b)(1)).

<sup>97</sup> *Accardi v. Pennsylvania R.R.*, 383 U.S. 225 (1966). The Court noted that, notwithstanding the definition of "compensated service" (a month was defined as any month in which the employee worked one or more days), the true nature of the severance payments was compensation for loss of jobs. See also *Brown v. Consolidated Rail Corp.*, 605 F. Supp. 629 (N.D. Ohio 1985) (monthly displacement allowances available to railroad employees who either did not qualify for work with successor railroad or whose hours or positions would be curtailed held to be prerequisite of seniority and protected by the Act).

<sup>98</sup> *Greene v. City of Oak Ridge*, 102 Lab. Cas. (CCH) ¶ 11,336 (E.D. Tenn. 1984).

<sup>99</sup> *Eager v. Magma Copper Co.*, 389 U.S. 323 (1967).

<sup>100</sup> *Waltermayer v. Aluminum Co. of America*, 804 F.2d 821, 825 (3rd Cir. 1986).

<sup>101</sup> *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) (claim for vacation rights occurring during military absence rejected where vacation time was earned as a result of days worked rather than through seniority).

<sup>102</sup> *Aiello v. Detroit Free Press*, 570 F.2d 145 (6th Cir. 1978). The collective bargaining agreement was construed as imposing a work requirement because it correlated the magnitude of the vacation benefit with the amount of work actually performed, as opposed to mere continued status.

<sup>103</sup> *McKinney v. Missouri-Pacific R.R.*, 357 U.S. 265 (1958).

<sup>104</sup> See *Pomrening v. United Air Lines*, 448 F.2d 609 (7th Cir. 1971).

however, if the work experience in the program is not based on achievement of proficiency or employer discretion. Thus, in a case where there was no test measuring proficiency, and where the probationary period was free from any formalized instruction or training, and promotion to an advanced position was virtually automatic, returning railroad employees were entitled to have their seniority dates as journeymen retroactively fixed, even though they failed to complete the work requirement in a lower classification because of their military service.<sup>105</sup>

### Transfers

An employee who would have been given an opportunity to transfer to an upgraded position at a particular time if he had not been in the military service has been held entitled to that opportunity upon return, despite the employer's contention that its decision to canvass other employees in the serviceman's position to see who was interested in the transfer and to make a decision based thereon was an act of managerial discretion.<sup>106</sup> The court looked to what the serviceman's status would have been if he had been continuously employed, and held that there must only be a reasonable certainty (as opposed to strict foreseeability) that the employee would have elected to make the transfer to the status he claimed but for his military service.

### Stock Purchase Plan

The right to purchase stock in an employment restricted stock purchase plan has been held to be a perquisite of seniority.<sup>107</sup> Under the plan, the longer one was employed, the more shares of stock became freed from the restrictions on transferability, and the increased value of the stock to employees was held to be a benefit considered a reward for length of service.

### Full Work Week

In the leading case involving section 2021(b)(3), the Supreme Court held in *Monroe v. Standard Oil Co.*<sup>108</sup> that the Act did not require employers to provide to reservists special work scheduling preferences not available to nonreservist employees. The Act likewise did not include

within the protected "incidents and advantages of employment" the right to work a full work week when the time missed was due to military service, and did not require that the employer make "reasonable accommodation" in work scheduling for the reservist. The Court held that the employer's obligation was limited to granting a leave of absence for training time and reinstating the employee upon return. In situations where the employer routinely makes work scheduling accommodations to other employees, however, such scheduling accommodation should also be made available to the reservist. Although *Monroe* can be considered as narrowing the scope of what had been considered an incident or advantage of employment, the reservist may have prevailed if other employees on other types of leave were entitled to make up missed work or were guaranteed a forty-hour work week.

### Overtime

It has been held that an employer must grant an employee overtime work opportunities missed by reason of National Guard service.<sup>109</sup> Under the terms of the collective bargaining agreement, the right to work overtime was a right accorded by seniority. It is unclear, however, whether this rationale remains viable in light of the *Monroe* holding that no work scheduling preferences are required under the Act.

### Interdepartmental Transfer

An employer must reinstate a returning employee to a comparable position to which he or she was entitled had the employee not been disabled because of military service. If, under the applicable collective bargaining agreement or employer practice, an employee who transfers between departments loses departmental seniority, the employer must identify another position in another department comparable in status and pay to the former position, and offer that position to the returning employee.<sup>110</sup> The returning employee is not required to accept a position that does not approximate his or her previous position in pay, status, and seniority. An offer of employment that was only eighty percent of the pay that the employee would have received had

<sup>105</sup> *Cohn v. Union Pacific R.R.*, 427 F. Supp. 712 (D. Neb. 1977), *aff'd*, 572 F.2d 650 (8th Cir. 1978). The district court observed "[t]he seniority rights of veterans would be defeated if the courts allowed employers to make benefits contingent on work time rather than seniority without careful scrutiny of the facts to determine if the work requirement constitutes a bona fide effort to compensate for work actually performed." 427 F. Supp. at 723; see also *Spearmon v. Thompson*, 167 F.2d 626, 631 (8th Cir.), *cert. denied*, 335 U.S. 822 (1948) ("seniority advances with the calendar without necessary regard to the degree of proficiency").

<sup>106</sup> *Barrett v. Grand Trunk Western R.R.*, 581 F.2d 132 (7th Cir. 1978) (construing 38 U.S.C. § 2021(a)(2)(B)(i), which requires restoration to a position of "like seniority, status and pay") (restoration to switchman position held of not like status where absent employee would have been given an opportunity to transfer to fireman's position available during military absence).

<sup>107</sup> *Winders v. People Express Airlines*, 595 F. Supp. 1512 (D.N.J. 1984). The court observed that "[t]he essence of plaintiff's rights under the plan is the periodic release of his shares from the transfer restrictions so that he can acquire indefeasible ownership and sell if he deems it advantageous to do so." *Id.* at 1519.

<sup>108</sup> 452 U.S. 547 (1981). The *Monroe* implication that a violation of § 2021(b)(3) occurs only when the reserve obligation is the sole motive in the adverse action taken by the employer has been the subject of congressional criticism as allowing "an employer to escape liability by simply asserting a reason which, by itself, could not justify the adverse action, but would make the adverse action other than solely based on the military obligation." See Cong. Rec., *supra* note 76.

<sup>109</sup> *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (right to make up missed overtime opportunities protected by statute as "incident or advantage of employment" by § 2021(b)(3) rather than by collective bargaining agreement); see also *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980) (collective bargaining agreement provided 40 hours of work per week). The Third Circuit has observed "To the extent that the factual situations are similar, *Monroe* may have substantially weakened *West*." *Waltermayer*, 804 F.2d at 824.

<sup>110</sup> *Hembree v. Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1981) (collective bargaining provision requiring departmental seniority to be computed from date of assignment to department held to yield to the Act; seniority held to run from date of employment).

he continued in his prior job was held not to meet the employer's reinstatement obligations.<sup>111</sup>

### Conclusion

The hypothetical situations posed at the beginning of this article are each designed to illustrate a particular facet of the reemployment rights law. In actual cases where a commander or judge advocate is called upon to give advice or to intercede on behalf of a reservist, it is likely that the situation will not be "clear cut" and involve only a single factual issue. Additional information will likely determine whether the employer has violated the law. What follows are not the "school solutions" to the hypotheticals. Rather, they are initial approaches that may yield greater insight into the ultimate resolution of the situations.

**Case 1.** Where the employer repeatedly disregards a request to attend reserve training, Private Smith should try to resolve the problem with his immediate supervisor. If this fails, the unit commander should quickly become involved. The commander should communicate with the employer and stress the extent and the importance of the employee's reserve commitment. If this approach is not successful, a State Ombudsman whose name can be obtained from the National Committee for Employer Support of the Guard and Reserve should be contacted by either the employer or the employee in order to attempt an informal resolution of the problem. The contact can be made by telephone. If a resolution is not reached, the reservist should notify the local Office of Veteran's Reemployment Rights of the Department of Labor.

**Case 2.** The recent change in the law prohibits discrimination in hiring based on an obligation arising from membership in a Reserve Component. Although this is a new area, the courts are likely to follow earlier precedents in the discrimination cases. It remains to be seen whether the courts will ultimately apply the "solely" or "but for" standard.

**Case 3.** Where an employee is denied the opportunity of working a full forty-hour week, additional factual information should be elicited. Are other employees given the opportunity to work a forty-hour week even though they may be absent for nonmilitary-related matters? The *Monroe* decision suggests that if the reservist-employee is being denied a benefit or an opportunity available to other employees, the statutory protections will apply.

**Case 4.** In a situation where an employee is denied the opportunity of attending a lengthy training course, factors regarding both the employer's hardship and the need to attend the course should be elicited. In each case, the employee must act reasonably and make out a prima facie case under section 2024(d) by requesting leave (preferably in writing) and by having valid orders in his or her possession before leaving the worksite.

**Case 5.** Where a returning enlistee finds that the identity of his employer has changed, the question to be addressed is whether the new employer is a successor in interest to the old. Although a full spectrum of factors have been considered by the courts in these cases, if the second employer is legally a successor to the first, the soldier's reinstatement right is protected. The employee should promptly apply for reemployment and notify the Department of Labor if there is a problem.

In all cases involving employment conflicts, the employee-reservist has four important resources. In successive steps, the individual, the commander and/or judge advocate, an Ombudsman from the Committee for Employer Support, and the Department of Labor should become actively involved in the particular situation. Most importantly, employment conflicts can be prevented with proper planning and a knowledge of the law and where to turn for help before a problem arises.

Armed with such knowledge, when faced with the question of whether the Army or the job comes first, the answer should be "Both!"

<sup>111</sup> *Ryan v. City of Philadelphia*, 559 F. Supp. 783 (E.D. Pa. 1983), *aff'd mem.*, 732 F.2d 147 (3rd Cir. 1984). The court noted that the statute did not require identical pay, it only required like pay. The court suggested that a salary approximating 95.8% of preservice salary would have complied with the Act. 559 F. Supp. at 786.

## Permissible Law Enforcement Discretion in Administrative Searches

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### Introduction

Discretion may indeed be the better part of valor, but it has been scrutinized with great suspicion when placed in the hands of law enforcement officials conducting administrative inspections, inventories, and gate searches. In *United States v. Harris*,<sup>1</sup> decided in 1978, the Court of Military Appeals denounced the practice of placing discretion in the hands of a military policeman to decide who will be

searched when entering the main gate of the installation. Indeed, the court stated, "To insure the least possible intrusion into the constitutionally protected area, and thereby preserve freedom from unreasonable invasions of personal privacy, a procedure must be employed which completely removes the exercise of discretion from persons engaged in law enforcement activities."<sup>2</sup>

<sup>1</sup> 5 M.J. 44 (C.M.A. 1978).

<sup>2</sup> *Id.* at 65.

In recent decisions by the Supreme Court, the Court of Military Appeals, and the courts of military review,<sup>3</sup> the discretion issue has been revisited with quite a different result. This article will review several recent Supreme Court and Court of Military Appeals decisions addressing the discretion issue. The cases all involve administrative intrusions, that is, warrantless searches justified when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractical."<sup>4</sup> The cases discussed involve different types of administrative searches. They illustrate, however, that law enforcement officer discretion is an issue that must be resolved in all types of administrative searches. The cases also illustrate that the degree of discretion that may properly be left in the hands of law enforcement officials is affected by the type of administrative intrusion under consideration. Finally, the cases illustrate the courts' inclination to place confidence in law enforcement officers executing regulated administrative inspection schemes that vest discretion in law enforcement officials at various levels of authority.

### Court of Military Appeals Decisions

In *United States v. Johnston*,<sup>5</sup> the Court of Military Appeals approved a plan for conducting mandatory monthly urinalysis testing of Naval Brig and Correctional Confinement Unit staff members where a supervisory law enforcement official had discretion to pick the date of the testing. The defense contended that the law enforcement supervisor violated the administrative scheme that required him to "randomly" select days for testing. The defense contended that "randomness" meant "[l]eft to chance or hazard."<sup>6</sup> Judge Sullivan rejected that argument, finding instead that in context "randomness" means selection of a date that is not known and cannot be readily predicted. The next issue before the court was whether it was proper to vest in the supervising law enforcement officer the discretion to pick the dates for testing. The officer in this case did not have any discretion as to who would be tested or how the tests were conducted. Moreover, the regulatory scheme called for 100% testing each month. His only discretion was in scheduling, and his scheduling was based on other command operations, the availability of personnel to assist in the test, and the presence of the members to be tested. In upholding the inspection scheme, the court made it clear that there was no indication the officer used his scheduling discretion to order an inspection that was a subterfuge for a search.

*Johnston* was decided on July 20, 1987. A week later on July 27, the court took up the discretion issue again in *United States v. Jones*.<sup>7</sup> In *Jones*, the Court of Military Appeals approved a gate search in which a subordinate law

enforcement official was given the discretion to determine what system of randomness would be used to select incoming vehicles for inspection. He was given authority to select a random system and authority to modify the system based on traffic congestion.<sup>8</sup> The Court of Military Appeals upheld the gate search and overruled *Harris* to the extent that *Harris* forbade the exercise of any discretion.

Both Court of Military Appeals decisions are consistent with recent Supreme Court decisions analyzing the discretion issue.

### Supreme Court Decisions

In *Colorado v. Bertine*,<sup>9</sup> the Supreme Court had occasion to rule on the discretion issue as it pertained to an inventory procedure.<sup>10</sup> Steven Lee Bertine was arrested by Boulder, Colorado, police for driving under the influence of alcohol. Before the vehicle was impounded, an officer conducted a thorough inventory of the vehicle as well as a back pack behind the front seat. Cocaine, drug paraphernalia, and a large quantity of cash were found. One of Bertine's arguments before the Supreme Court was that the inventory procedure left too much discretion in the hands of law enforcement officials. The procedure gave law enforcement officers the option of either impounding the vehicle and conducting an inventory or simply parking and locking the vehicle near the scene of the arrest. The Court said that there was no prohibition against law enforcement officials exercising discretion "according to standard criteria and on the basis of something other than suspicion of evidence of a crime."<sup>11</sup> A strong caveat was added by a three Justice concurring opinion that it would be improper to grant law enforcement officials discretion with regard to the scope of the search. In short, the regulatory scheme could properly vest discretion in police to decide when an inventory, as opposed to a "park and lock," was appropriate, but any regulatory scheme that gave law enforcement officials discretion as to the thoroughness of the search would run afoul of the fourth amendment.

While the forgoing cases have, by example, provided helpful guidelines concerning permissible discretion, none of the cases explained what it is about too much discretion that makes an administrative inspection unconstitutional. In *New York v. Burger*,<sup>12</sup> the Supreme Court placed the discretion issue in a constitutional perspective. In *Burger*, New York police searched the automobile junk yard of the appellant pursuant to a state statute permitting warrantless searches of automobile junk yards. The Court found that

<sup>3</sup> See *United States v. Flowers*, 23 M.J. 647 (N.M.C.M.R. 1987).

<sup>4</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985), quoted in *Griffin v. Wisconsin*, 107 S. Ct. 3164, 3167 (1987).

<sup>5</sup> 24 M.J. 271 (C.M.A. 1987).

<sup>6</sup> *Id.* at 273.

<sup>7</sup> 24 M.J. 294 (C.M.A. 1987).

<sup>8</sup> See *United States v. Jones*, 20 M.J. 594, 597 (N.M.C.M.R. 1985).

<sup>9</sup> 107 S. Ct. 738 (1987).

<sup>10</sup> See Note, *Inventories—Colorado v. Bertine*, *The Army Lawyer*, Mar. 1987, at 49.

<sup>11</sup> *Bertine*, 107 S.Ct. at 743.

<sup>12</sup> 107 S. Ct. 2636 (1987).

automobile junk yards were "pervasively regulated industries"<sup>13</sup> and upheld the search even though the object of the search was stolen property. The Court said that "a State can address a major social problem both by way of an administrative scheme and through penal sanctions."<sup>14</sup> More importantly, the Court explained the constitutional basis for warrantless administrative searches generally, and explained the constitutional significance of too much discretion. An inspection is reasonable if three criteria are met. First, there must be a substantial government interest toward which the administrative search procedure is directed. Second, "warrantless searches must be 'necessary to further [the] regulatory scheme.'"<sup>15</sup> In other words, if the regulatory scheme would be frustrated if government officials had to get a warrant every time they wanted to inspect, a warrantless administrative inspection procedure may be proper. Finally, the administrative inspection procedure must "provid[e] a constitutionally adequate substitute for a warrant."<sup>16</sup> A warrant serves two purposes: it places an individual on notice and *limits the discretion* of the law enforcement official. An administrative inspection scheme must do the same thing if it is to take the place of a warrant.

### Analysis and Conclusion

Based on these criteria, one can better explain the constitutional limitation on discretion. The discretion granted to a law enforcement official is too broad if it permits the official to choose between alternatives intended to discover evidence of a crime. On the other hand, if the choices left to the official's discretion only affect successful execution of the administrative scheme, discretion is properly limited and the search should be lawful. Several examples illustrate this point. In the case of an inventory, as in *Bertine*, it would seem appropriate to allow law enforcement officers to decide whether to impound and inventory, or to park and lock, based on the location of the vehicle, the likely length of detention, the time of the arrest, the value of the property, and the availability of friends or relatives to take responsibility for the vehicle. Indeed, where so many factors are present, it seems prudent to leave the decision to impound or park with the law enforcement official at the

scene. Because so many factors go into making such a decision, the Court has said that it would not "second guess" the decision of police even though, in hindsight, a less intrusive course of action was available.<sup>17</sup> On the other hand, allowing police to decide how thoroughly to conduct an inventory, once that course of action has been decided upon, would grant the police impermissible latitude to use an administrative search as a subterfuge for a search. Indeed, in reviewing the Court of Military Appeals cases discussed above, the discretion given to the government officials conducting the administrative searches was limited to decisions affecting the logistical success of the administrative scheme.

In *Jones*, the supervisor selected a system of inspection designed to facilitate the even flow of traffic while at the same time deterring individuals who may otherwise consider smuggling contraband or stolen property on or off the installation. Clearly, such deterrence is the goal of a random gate search and the supervisor's discretion had an impact only on that aspect of the search.

Similarly, in *Johnston*, the discretion given to the supervisory law enforcement official affected logistical execution of the urine testing procedure. The purpose of the monthly 100% testing was to ensure that staff members of the Naval Brig and Correctional Custody Unit were free of drugs. The officer was given discretion only in an area necessary to ensure success of the administrative scheme; 100% testing required the officer to pick a time when there were no conflicting on-going operations, and personnel to take and administer the test were present.

The degree of discretion permissible in any given situation must, of necessity, turn on a number of factors unique to that situation. Nevertheless, if the administrative inspection scheme permits law enforcement officials the discretion to make decisions designed to ensure the success of the administrative scheme, the warrantless search is probably constitutionally permissible. On the other hand, where, as in *Harris*, the law enforcement official's exercise of discretion permits the official to decide when or how to search for evidence of a crime, fourth amendment safeguards are not satisfied.

<sup>13</sup> See *Donovan v. Dewey*, 452 U.S. 594 (1982); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970).

<sup>14</sup> *Burger*, 107 S. Ct. at 2649. Compare *Burger* with *United States v. Jasper*, 20 M.J. 112 (C.M.A. 1985); *United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984); and *Mil. R. Evid.* 313. The forgoing military cases as well as the *Mil. R. Evid.* require the government to show that the "primary purpose" of the inspection or inventory was not to obtain evidence for use in a court-martial or other disciplinary proceeding. The "primary purpose" rubric is frustrating because it involves an after-the-fact examination of the multi-faceted mental processes. As the Supreme Court has said of such activities, "[s]ending . . . courts into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 436 U.S. 560, 565 (1968) (White, J., dissenting), quoted in *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). Upon careful examination of *Burger* as well as the recently decided case of *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987), it does not appear that the "primary purpose" test is constitutionally required. Too the contrary, if a regulatory scheme is clearly and properly established, and if government officials' searches are executed in compliance with that scheme, evidence discovered may be used in a criminal proceeding without the need of ascertaining government officials' subjective purposes.

<sup>15</sup> *Burger*, 107 S. Ct. at 2644 (quoting *Donovan v. Dewey*, 452 U.S. at 600).

<sup>16</sup> *Donovan v. Dewey*, 452 U.S. at 603, quoted in *Burger*, 107 S. Ct. at 2644.

<sup>17</sup> *Bertine*, 107 S. Ct. at 738; see also *Illinois v. LaFayette*, 462 U.S. 640 (1983).

# The Virginia Military Advisory Commission—A Unique Forum for Improved Relations Between the Commonwealth of Virginia and the Armed Forces

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On 16 July 1987, a group of attorneys representing the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, and Corps of Engineers within the Commonwealth of Virginia met in Richmond, Virginia, with the State's Attorney General, The Honorable Mary Sue Terry, and other representatives of the administration of the Virginia Governor Gerald L. Baliles. This meeting was the first work group session of the Governor's Legal Advisory Committee, a committee created by the Governor under the auspices of the Virginia Military Advisory Commission, also established by Governor Baliles to foster communication and mutual support between the Commonwealth and the uniformed services.

The attorneys at the advisory committee meeting discussed Virginia family law jurisdiction for the benefit of military personnel and their families; state juvenile and domestic relations jurisdiction for on-base matters involving juveniles; termination of leases and rental agreements for military personnel under the military clause of the Virginia Landlord-Tenant Act; cooperation and information sharing between state and local agencies and the federal government concerning child protective services; local vehicle license requirements for non-domiciliary military personnel and their family members; and compilation of jurisdictional maps for federal facilities situated in Virginia.

The work group session was the culmination of more than a year of continuous cooperative effort on the part of the military establishment within the Commonwealth of Virginia and Governor Baliles' administration. The session also constituted the beginning of an exciting initiative to improve communications between the state government and the military, as well as to increase the quality of life for our soldiers, sailors, marines, and airmen assigned within Virginia.

## Background

The Department of Defense contributes more than seven billion dollars to Virginia's economy, which includes creating over 200,000 jobs. In July 1986, the Governor of Virginia, being acutely aware of the continuing importance of the military presence in the Commonwealth, proposed the establishment of a Virginia Military Advisory Commission to address issues of mutual interest. This proposal had been one of Governor Baliles' goals since taking office more than a year earlier.

The Governor wanted the Commission to consider issues and advise him and other Virginia officials on all matters in

which the military services and the Commonwealth shared mutual interest and concern. Also, Governor Baliles considered it appropriate for the Commonwealth to use the Commission as a source for an ongoing assessment of the military's special needs in the Commonwealth.

With the support of the Service Secretaries and Department of Defense, the Commission was created with the commanders of the military installations located in Virginia among its members. The Commission membership represents each branch of the Armed Services, as well as the Reserve Components. It meets with the Governor twice each year, once at the capital in Richmond and once at one of the major military installations in Virginia. As it has developed, the Commission currently has eighteen members, including the Governor. Five of these members are the senior Army commanders in Virginia, four of whom are assigned to U.S. Army Training and Doctrine Command (TRADOC), representing Fort Belvoir, Fort Lee, Fort Eustis, and TRADOC headquarters. The other Army representative is the Commander, Military District of Washington.\*

## The TRADOC Initiative

As part of his proposal to establish a Virginia Military Advisory Commission, the Governor scheduled an inaugural meeting for October 1986. At this meeting, attended by the commission members, members of the Governor's staff, and all three Service Secretaries, plans were made to formulate a working agenda and to meet again in April of 1987. General Carl E. Vuono, then the Commanding General, TRADOC, viewed the Commission as an opportunity to accomplish tasks and solve problems. He hoped the Commission would improve the quality of life for service personnel and their family members within the Commonwealth and provide an opportunity to reduce impediments to mission accomplishment. From the beginning, General Vuono, as well as Secretary Marsh, recognized the Commission as an opportunity to obtain positive results from the regular contact between the various installation commanders and their staffs, and between the military and state government staffs.

As there were twelve active duty military officers from four uniformed services, representatives of the Reserve and National Guard Components, as well as four nonmilitary gubernatorial appointees on the Commission, there were a variety of perspectives on the problems that traditionally have affected the relationship between the military and the

\*It should be noted that the senior commanders who are also Commission members cannot function as "officers of the Commonwealth" because both state and federal law precludes such dual status. Rather, they serve as military representatives to the Commission. In that capacity, they do not execute an oath to the state and their service does not constitute the holding of office under the Constitution of Virginia. Thus, serving as Commission members is not inconsistent with their roles as commissioned officers within the Department of Defense.

state government. Further, there were few established lateral channels of communication among the senior military commanders in Virginia and even fewer between those commanders and the state. It was apparent that the value of the Governor's initiative in establishing the Commission, no matter how well intended, could have been lost through inaction or redundant effort if the actions of the various Commission members were not coordinated toward a common goal.

With the goal of making a lasting contribution to the relationship between the Commonwealth and its military population, General Vuono gave the TRADOC Staff Judge Advocate the mission of coordinating the development of the Army's role in the Commission. As there was no precedent on what procedures to follow in developing a working agenda, the TRADOC Office of the Staff Judge Advocate suggested a plan to include representatives of all Army members of the Commission in a work group for the cooperative development of proposed agenda topics for each succeeding meeting. If a valuable result were to be achieved for the Army, there had to be sufficient time to prepare thoughtful suggestions for discussion. Next, those suggestions had to be analyzed by the Army work group to perfect and further refine the issues, while at all times keeping the Army installations, regardless of command lines, informed as to the progress of the work group. A consolidated proposed Army agenda was prepared and submitted to the state for its comment. General Vuono's goal was to utilize his Staff Judge Advocate as a representative of all TRADOC installations in his communications with the state to the maximum extent feasible, while at all times remaining responsive to the local interests of his subordinate

commanders who were also full Commission members. The intracommand coordination effort functioned smoothly and resulted in a proposed Army agenda of nine topics, seven of which were eventually chosen by Governor Baliles for presentation to the Commission at the April 1987 plenary session.

### Conclusion

To our knowledge, the initiative of Governor Baliles to establish a Military Advisory Commission is unique. It has been apparent throughout our experience that similar commissions at the state, regional, or local level, created for the same purposes, will work to the mutual benefit of the U.S. Army and its state or local governmental partner. So long as it is contemplated that any actions recommended by the Commission do not automatically bind the Department of the Army or Department of Defense and that all recommendations must be processed through existing procedural channels to accomplish final results, a commission such as this can be a valuable adjunct to the less formal channels of communication that may exist between the uniformed services and the individual state.

If the Commission members maintain the momentum of this effort, the Virginia Military Advisory Commission, and the Governor's Legal Advisory Committee established under it, will surely remain a valuable aid in accomplishing the Army's mission in the Commonwealth. It is a forum readily available to both its federal and state members, within which topics of mutual interest may be discussed, irritants reduced, and cooperation increased.

# USALSA Report

United States Army Legal Services Agency

## The Advocate for Military Defense Counsel

### How Far Is the Military Courtroom Door Closing for Defense Expert Psychiatric Witnesses?

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Recent changes to the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial, adopting changes in federal practice, are clearly intended to close the courtroom door to defense psychiatric evidence. The changes narrow the insanity standard; shift to the accused the burden to prove his insanity; heighten the mental capacity standard; eliminate the use of psychiatric evidence relevant to mens rea elements of crimes; and provide for new voting procedures in the deliberation room. In spite of these changes, strategies and arguments still exist in the defense arsenal, the use of which may determine how widely ajar the courtroom door can be kept open for expert psychiatric witnesses.

#### The Changes

The passage of the Insanity Defense Reform Act on 12 October 1984 provided the impetus for the changes in military law.<sup>1</sup> The Act reflects a congressional policy to remove certain mentally deficient defendants from the insanity defense umbrella and to prohibit defenses based on psychiatric evidence. Only defendants with a cognitive mental deficiency, but not those with a volitional deficiency, may successfully maintain an insanity defense.<sup>2</sup> In addition, only those defendants suffering from a mental disease or defect may challenge their capacity to stand trial.<sup>3</sup> Congress' intent was to eliminate all "needlessly confusing psychiatric testimony" by prohibiting the experts from giving their opinions on the "ultimate issue."<sup>4</sup>

Significantly, the burden of persuasion has been shifted to the accused. The prosecution need no longer disprove beyond a reasonable doubt an insanity defense raised by an accused.<sup>5</sup> Rather, the accused must persuade the factfinder of his insanity by clear and convincing evidence.<sup>6</sup>

#### Narrower Insanity Standard

The American Law Institute's (ALI) Model Penal Code insanity test, including both a cognitive and a volitional prong, was the military test for insanity.<sup>7</sup> The volitional prong of that test, measuring the accused's capacity to "conform his conduct to the requirements of law," is now eliminated in military practice. The new test also amends the cognitive prong of the ALI standard. Under the former cognitive prong of the test, an accused lacked mental responsibility if he "lacked substantial capacity" to appreciate the criminality of his conduct. Now an accused must show that he was "unable" to appreciate the nature and quality or wrongfulness of his acts as a result of a mental disease or defect.<sup>8</sup> The new test requires that the mental disease or defect be severe, specifically excluding "minor disorders such as nonpsychotic behavior disorders and personality defects."<sup>9</sup> It also embraces the rule of *United States v. Cortes-Crespo*<sup>10</sup> that it is not enough if an accused's abnormality is manifested only by repeated criminal or otherwise anti-social conduct.<sup>11</sup>

Federal cases decided subsequent to the passage of the Insanity Defense Reform Act illustrate how the elimination of the volitional prong of the test will remove some defendants from the insanity defense umbrella. In *United States v.*

<sup>1</sup> 18 U.S.C. § 20 (Supp. III 1985). It was unclear whether the Act applied to prosecutions under the Uniform Code of Military Justice. Hence, it was necessary to reform military law in a separate statute.

<sup>2</sup> Uniform Code of Military Justice article 50a, 10 U.S.C.A. § 850a [hereinafter UCMJ art. 50a]; Exec. Order No. 12,586, 52 Fed. Reg. 7103 (March 3, 1987) [hereinafter Exec. Order No. 12,586] (amending Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(1) [hereinafter R.C.M. 916(k)(1)]. See Williams, *Not Guilty—Only by Reason of Lack of Mental Responsibility*, *The Army Lawyer*, Jan. 1987, at 12.

<sup>3</sup> R.C.M. 909(a). The President changed this standard in February 1986 pursuant to his authority under UCMJ art. 36. MCM, 1984, R.C.M. 909 analysis. Initial plans were to "reform" military law relating to insanity by the same method. Though extensive changes to MCM, 1984 were staffed at the same time as the change to the mental capacity standard, the decision was made to amend UCMJ art. 50 before amending MCM, 1984, in order to incorporate the provisions of the Insanity Reform Act of 1984.

<sup>4</sup> S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3413 [hereinafter Senate Report].

<sup>5</sup> R.C.M. 916(b).

<sup>6</sup> UCMJ art. 50a; Exec. Order No. 12,586 (amending R.C.M. 916(b)).

<sup>7</sup> *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977).

<sup>8</sup> UCMJ art. 50a; R.C.M. 916(k)(1).

<sup>9</sup> Exec. Order No. 12,586 (amending R.C.M. 706(c)(2)(A)).

<sup>10</sup> 13 M.J. 420 (C.M.A. 1982).

<sup>11</sup> R.C.M. 706(c)(2)(A).

Lackey,<sup>12</sup> for example, the defendant, a paranoid schizophrenic, was convicted of filing false claims for income tax refunds after filing forty-three such claims. It was established that she appreciated the wrongfulness of her acts, and was hence mentally responsible under the cognitive test. As a result of mental disease or defect, however, she could not conform her conduct to the law. Thus, under the two-prong test then in effect, Mrs. Lackey maintained a successful defense.

The ex post facto clause,<sup>13</sup> which prohibits the application of a new law to acts that occurred previous to its enactment, preserved the former test for Mrs. Lackey.<sup>14</sup> Likewise, the ex post facto clause will preserve the use of the volitional prong standard for some future courts-martial accused. The new military insanity standard applies to any offense committed on or after November 14, 1986, but not to any offense committed before that date and subsequently tried.<sup>15</sup>

For those accused to whom the volitional test will no longer be applicable, the narrower cognitive test may nevertheless suffice. First,

the test of knowledge of the difference between right and wrong can be taken in several different ways. For instance, an accused person may have known in some sense that it is wrong to kill another person; yet, if he strangles someone to death under the delusion that he was simply patting them on the neck, he would not be guilty of murder. . . .<sup>16</sup>

Second, regardless of the insanity standard court members are instructed to apply, the result may be inevitably the same. Empirical studies indicate that civilian jurors do not entirely understand insanity instructions, cannot remember them accurately in the deliberation room, and generally rely on their own notions of insanity when required to decide the issue.<sup>17</sup> If the findings made by these studies are equally valid with respect to court-martial members, the substantive changes in the test for insanity would apparently affect the outcome of the case in a judge alone trial more than in a trial with members. Trial defense counsel may therefore avoid some of the impact of the narrower standard by litigating an insanity defense before members rather than before a military judge.

Effective voir dire of the court members can result in triers of fact more receptive to an insanity defense. It provides

defense counsel an opportunity to speak of insanity in terms which the defense expert will use in his testimony. Members who have undergone psychotherapy or psychiatric care, or who know someone who has, often view psychiatric testimony favorably. Some experienced trial attorneys view jurors who have more than a passing interest in psychiatry as defense jurors. Jurors with religious beliefs that emphasize personal responsibility for actions are not receptive to the insanity defense.<sup>18</sup>

Defense counsel may continue to rely on expert psychiatric witnesses to introduce evidence regarding mental disease or defect. Although the new Federal Rule of Evidence 704 prohibits expert psychiatric testimony as to the ultimate issue,<sup>19</sup> Military Rule of Evidence 704 allows such testimony. A military accused may also present expert testimony without expert conclusions. Eliciting from the expert witness all the relevant information which led to his or her diagnoses is permissible even under the Federal rule. Such evidence does not embrace an ultimate issue. Psychiatric experts who testify at courts-martial should be encouraged to explain the basis of opinions and to testify in terms understandable to laymen.<sup>20</sup>

A military accused must now persuade courts not only that the mental disease or defect from which he suffers is severe, but also that it rendered him "unable" at the time of his alleged criminal acts to appreciate the nature and quality or wrongfulness of his acts. The additional and new requirement that the disease or defect be severe, by itself, adds little. Which mental conditions qualify as diseases or defects is often the more relevant inquiry.

Military law does not provide a clear definition of the terms "mental disease" or "mental defect." It has been established, however, that such terms do not include "an abnormality manifested only by repeated criminal or otherwise anti-social behavior." Nor do the concepts of mental disease or mental defect generally include character disorders or sexual deviation.<sup>21</sup>

Many cases, such as those involving post-traumatic stress disorder (PTSD), turn on the definition of these terms. Most psychiatrists will testify that a soldier suffering from a chronic case of PTSD engages in criminal behavior because of an inability to distinguish right from wrong as a result of experience in combat wherein the distinction between right

<sup>12</sup> 610 F. Supp. 210 (D.C. Tex. 1985).

<sup>13</sup> U.S. Const. art. I, § 9, cl. 3.

<sup>14</sup> Using the ALI test in effect at the time of the offense, the government was also unable to prove the sanity of another paranoid schizophrenic who wrote a threatening letter to President Reagan. *United States v. Samuels*, 801 F.2d 1052 (8th Cir. 1986).

<sup>15</sup> Exec. Order No. 12,586.

<sup>16</sup> R. Everett, *Military Justice in the Armed Forces of the United States* 238 (1st ed. 1956).

<sup>17</sup> T. Maeder, *Crime and Madness* 103-07 (1st ed. 1985).

<sup>18</sup> H.M. Goulett, *The Insanity Defense in Criminal Trials* § 118 (1965).

<sup>19</sup> The drafters of the rule intended for expert testimony to be limited to the presentation and exploration of diagnoses "such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." Senate Report *Supra* note 4, at 41-46, 52-53.

The new Federal Rule of Evidence 704 was adopted as part of the Insanity Defense Reform Act of 1984. It became applicable to military practice on April 10, 1985, through the President's failure to take action contrary to the amendment within 180 days of its enactment on October 12, 1984. See *Mil. R. Evid.* 1102. When it was determined that military insanity law would be reformed by way of amendment of UCMJ art. 50, the President took action to return to the old rule, which allows psychiatric experts to testify regarding the ultimate issue of insanity. Exec. Order No. 12,550, 51 Fed. Reg. 6497 (February 19, 1986).

<sup>20</sup> TM 8-240, *Psychiatry in Military Law*, paras. 4-6, 4-7 (25 Sept. 1981).

<sup>21</sup> *United States v. George*, 6 M.J. 880, 882 (A.C.M.R. 1979).

and wrong is blurred and often lost.<sup>22</sup> Such a soldier is nevertheless mentally responsible and therefore also criminally liable for his acts, unless the PTSD from which he suffered is classified as a severe mental disease or mental defect. He must survive the rule that "mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right with respect to the act charged."<sup>23</sup>

Such an accused may nevertheless have one advantage under the new standard. Whereas the ALI standard included an element of a lack of substantial capacity to appreciate the "criminality" of conduct, the new standard requires the accused to persuade the trier of fact that he was "unable" to appreciate the "wrongfulness" of his acts.<sup>24</sup> While the prosecution may choose to stress the higher standard of causal connection, i.e., an inability rather than a lack of substantial capacity to appreciate, the accused need persuade only that the severe mental disease or defect prevented an appreciation of "wrongfulness." He need not persuade that he could not appreciate "criminality." Thus, evidence of a diagnosis like PTSD may fare no less well under the new standard.

### Burden of Proof

Jurors in the John Hinckley case explained to Congress that they had acquitted Hinckley because the prosecution had not proved, as was its burden, that Hinckley was sane. This testimony has resulted in a shifting of the burden of persuasion with respect to the affirmative defense of insanity. No longer does the prosecution have the burden of proving the accused's sanity beyond a reasonable doubt. The accused has the burden of proving his lack of mental responsibility by clear and convincing evidence. This change in the burden of persuasion, like the changes in the substantive standard defining the defense of insanity, is effective for only those trials involving offenses committed on or after 14 November 1986.<sup>25</sup> Such a shifting of the burden of proof is constitutional.<sup>26</sup>

Military courts should be sensitive to the needs of an accused required to prove his own insanity in light of the recently recognized constitutional right to psychiatric assistance at trial<sup>27</sup> and the preferred status military law affords

to the insanity defense.<sup>28</sup> Due process considerations require that when an accused's insanity is likely to be a significant factor at trial, the accused must be provided with psychiatric assistance. The minimum requirement is "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."<sup>29</sup> It is not clear whether a defendant is entitled to an independent psychiatric evaluation or a defense consultant.<sup>30</sup> The assistance to which a defendant is entitled, however, is extensive:

[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity 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. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.<sup>31</sup>

The Rules for Court-Martial now provide that an accused's mental capacity or responsibility will be evaluated by a board of one or more persons, each of whom shall be either a physician or clinical psychologist.<sup>32</sup> Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist.<sup>33</sup> Should an accused wish to employ an additional expert witness at government expense, he must demonstrate that the expert witness is necessary.<sup>34</sup> The United States Court of Military Appeals, in dicta, has indicated the type of evidence that may justify a request for a defense expert: "A history of disturbances, former diagnoses, conflicts in military psychiatric opinions, or other circumstances may justify a defense need for the services of its own expert to examine the accused and to present testimony in his behalf at the trial."<sup>35</sup> The court has interpreted the rule narrowly.<sup>36</sup> This rule was imparted, however, before either the recognition of the constitutional right to the assistance of a psychiatrist or the shifting of the burden to the accused to prove his own insanity. These are perhaps "other circumstances" that may bolster a defense request for psychiatric assistance.

Furthermore, Congress has guaranteed military accused equal opportunity to obtain witnesses and evidence as a

<sup>22</sup> See *United States v. Correa*, 21 M.J. 719, 721 (A.C.M.R. 1985), *petition denied*, 22 M.J. 378 (C.M.A. 1986).

<sup>23</sup> *Manual for Courts-Martial, United States*, 1969 (Rev. ed.), para. 120b [hereinafter MCM, 1969].

<sup>24</sup> See Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183, 212-13 (1986).

<sup>25</sup> Exec. Order No. 12,586.

<sup>26</sup> *Rivera v. Delaware*, 429 U.S. 877 (1976); *Leland v. Oregon*, 343 U.S. 790 (1952).

<sup>27</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>28</sup> *United States v. Walker*, 20 C.M.A. 241, 43 C.M.R. 81 (1971); *United States v. Babbidge*, 18 C.M.A. 327, 40 C.M.R. 39 (1969).

<sup>29</sup> *Ake* 470 U.S. at 83. A defendant in a capital case has an additional entitlement to psychiatric examination on issues relevant to sentencing, to testimony of the psychiatrist, and to assistance in preparation of the sentencing phase of the trial. *Id.* at 84.

<sup>30</sup> *Id.* at 87, 92 (Rehnquist, J., dissenting).

<sup>31</sup> *Id.* at 82.

<sup>32</sup> Exec. Order No. 12,586 (amending R.C.M. 706(c)(1)).

<sup>33</sup> *Id.*

<sup>34</sup> R.C.M. 703(d).

<sup>35</sup> *United States v. Johnson*, 22 C.M.A. 424, 428, 47 C.M.R. 402, 406 (1973).

<sup>36</sup> *United States v. Mustafa*, 22 M.J. 165, 168-69 (C.M.A.), *cert. denied*, 107 S. Ct. 444 (1986) (no error in denial of request for either a forensic psychiatrist or forensic psychologist).

matter of military due process.<sup>37</sup> Military courts have accorded a preferred status to the defense of insanity, requiring a full and complete inquiry into the question of insanity.<sup>38</sup>

These considerations should aid the military accused whose burden has increased from production of some evidence in order to raise the defense to a burden of persuasion with clear and convincing evidence. Because the government now has no burden with respect to insanity, save rebuttal, its need for expert witnesses has been reduced. The accused must have access to those experts necessary to his inquiry into and presentation of an insanity defense. Accordingly, even though the new rules provide that normally the sanity board should include either a psychiatrist or a clinical psychologist, the defense should ask that the sanity board include both experts. Clinical psychologists often provide valuable insights to psychiatrists examining an accused<sup>39</sup> and to courts considering insanity. Even if the sanity board does not include both a psychiatrist and a clinical psychologist, however, the considerations discussed above, i.e., the shifting of the burden to the accused, the now-recognized constitutional right to psychiatric assistance, and the long-standing military tradition to inquire completely into sanity issues, indicate that requests for an additional expert witness at government expense should be more readily granted.

#### New Rules Regarding Capacity To Stand Trial

The test of *Dusky v. United States*<sup>40</sup> has been adopted in military practice for determining whether an accused has the capacity to stand trial. The test has two prongs. The inquiry is whether the accused is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in his own defense.<sup>41</sup> Establishment of either prong by a preponderance of the evidence<sup>42</sup> results in a finding that an accused lacks the requisite capacity.<sup>43</sup> The new Rule for Courts Martial 909(a) incorporates the *Dusky* test but adds additional criteria to it. Now an accused must also show that he is suffering from a mental disease or defect. The disease or defect must render the accused so mentally incompetent that he has no capacity within the meaning of *Dusky*.<sup>44</sup>

Again, the definition of "mental disease or defect" may be the critical factor. Under the simple *Dusky* test, any mental condition preventing an accused from understanding the proceedings or rationally-cooperating in his defense rendered him mentally incapable of standing trial. Now, an accused must establish a disease or defect as a threshold showing. Once again, an expert may express an opinion under Military Rule of Evidence 704 whether the accused suffers from a mental disease or defect.

New rules now also specifically provide for a determination of capacity at the time of the convening authority's action and during the appellate process.<sup>45</sup> Moreover, the death penalty may not be carried out if the accused lacks capacity to understand the punishment to be suffered or the reason for imposition of the death sentence.<sup>46</sup> Only the provision regarding the capacity for imposition of the death penalty specifically places the burden on the accused to prove his own lack of capacity. All other capacity provisions provide only that proceedings may continue unless lack of capacity is established. Thus, it may be argued that the burden to establish capacity in these instances remains with the government.

#### Psychiatric Evidence Relevant to an Element of an Offense

The statute defining the new federal insanity standard includes a final sentence that "[m]ental disease or defect does not otherwise constitute a defense."<sup>47</sup> Congress intended that sentence

to insure that the insanity defense is not improperly resurrected in the guise of showing *some other affirmative defense*, such as that the defendant had a "diminished responsibility" or some similarly asserted state of mind which would serve to excuse the offense and open the door once again, to needlessly confusing psychiatric testimony.<sup>48</sup>

The new Codal paragraph setting out the insanity standard adopts that final sentence verbatim.<sup>49</sup> The drafters of the Manual change implementing the new Codal provision have construed congressional intent to allow elimination of the defense of partial mental responsibility for which the

<sup>37</sup> UCMJ art. 46.

<sup>38</sup> Manual for Courts-Martial, United States, 1951, para. 122b ("the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused"); MCM, 1969, para. 121 (additional mental examinations as required); R.C.M. 706 (c)(4); *United States v. Walker*, 20 C.M.A. 241, 43 C.M.R. 81 (1971) (interests of justice require as complete a factual basis as possible); *United States v. Martin*, 19 M.J. 621 (A.C.M.R. 1984) (new evidence produced after trial may result in dismissal, new trial, or rehearing); *United States v. Brown*, 44 C.M.R. 308 (A.C.M.R. 1981) (post-trial psychiatric evaluation required further inquiry); *United States v. Frederick*, 7 M.J. 791, 795 (N.M.C.M.R. 1979) ("procedures have been promulgated to insure, in so far as is possible, that every underlying fact bearing upon the mental responsibility of any military accused will be uncovered for submission to the trier of fact"); *United States v. Cook*, 30 C.M.R. 805, 812 (A.F.B.R. 1960) ("the action of the court in denying the accused an opportunity to obtain more evidence on the question of his sanity denied him a substantial right, depriving him of military due process").

<sup>39</sup> See *Saul v. State*, 6 Md. App. 540, 252 A.2d 282, 286 (1969) ("without question tests by and observations of qualified psychologists are invaluable to the psychiatrist in reaching his opinion").

<sup>40</sup> 362 U.S. 402 (1960).

<sup>41</sup> R.C.M. 909(c)(2).

<sup>42</sup> This standard of proof was adopted in conformance with federal practice. R.C.M. 909 analysis.

<sup>43</sup> *United States v. Victor*, 36 C.M.R. 814 (C.G.B.R. 1966).

<sup>44</sup> R.C.M. 909(a).

<sup>45</sup> Exec. Order No. 12,586 (amending R.C.M. 1107(b)(5) and R.C.M. 1203(c)).

<sup>46</sup> *Id.* (amending R.C.M. 1113(d)(1)).

<sup>47</sup> 18 U.S.C. § 20 (Supp. III 1985).

<sup>48</sup> Senate Report, *Supra* note 4, at 229. See *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985).

<sup>49</sup> UCMJ art 50a.

Manual previously provided. The prior Manual provision created a defense if an accused suffered a mental condition not amounting to a general lack of mental responsibility but which resulted in the accused's inability to have the necessary mens rea when it was an element of his offense.<sup>50</sup> Actual knowledge, specific intent, and premeditation were elements mentioned in the provision.<sup>51</sup>

By entirely eliminating the use of evidence of mental condition relevant to "whether the accused entertained a state of mind necessary to be proven as an element for the offense,"<sup>52</sup> the new Manual provision goes too far. Congress and the President have stated that it is "mental disease or defect" which does not otherwise constitute a defense. The previous Manual provision, in providing for defenses based upon partial mental responsibility, did not require a showing that the mental condition was the result of mental disease or defect. The new rules, moreover, continue to recognize that voluntary intoxication may raise a reasonable doubt as to a mens rea element.<sup>53</sup> Certainly, other mental conditions not amounting to severe mental diseases or defects may be relevant to the accused's mens rea. For example, a combat veteran suddenly placed in a wartime environment or a combat-like training environment may claim that he could not have premeditated his killing of another because he suffered from a post-traumatic stress disorder. Such an accused soldier should be allowed to present evidence of the disorder to test the government's evidence of premeditation. While the accused in these circumstances is arguably not presenting evidence of a severe mental disease or defect, the evidence tends to show the accused did not premeditate and is therefore relevant.

Likewise, the drafters of the new Manual provision fail to acknowledge that Congress recognized the difference between an affirmative defense like insanity and evidence negating a *mens rea* element of a crime. A defense is affirmative only if the accused asserting it admits the elements of the offense but offers a justification or excuse, such as duress, mistake of fact, entrapment, or insanity.<sup>54</sup> Though the accused technically committed the crime, the law does not attach criminal liability because of an excuse or justification.<sup>55</sup> Congress has clearly indicated that it included the language "mental disease or defect does not otherwise constitute a defense" in order to prevent the assertion of some other affirmative defense or psychiatric evidence that would excuse the crime. An accused offering psychiatric evidence to contest a mens rea element does not offer an affirmative defense. Quite to the contrary, he seeks to refute rather than to admit an element of the crime. He does not seek to

offer an excuse or justification for his crime, but seeks to contest the government's evidence that he committed the crime at all. For instance, evidence of post-traumatic stress disorder, as well as evidence of intoxication, may persuade a trier of fact that the accused did not premeditate a killing; did not know it was an officer he was assaulting or being disrespectful toward; or that he did not know it was a contraband drug he was using.

It is in the most serious case of premeditated murder, mandating life imprisonment and authorizing the death penalty, that the use of psychiatric evidence can be most critical.<sup>56</sup> It is also this type of case where the assertion of diminished responsibility most often occurs.<sup>57</sup> Accordingly, courts have held that it is a due process violation to preclude relevant and competent expert medical testimony that negates the mens rea element in a case involving premeditated murder.<sup>58</sup> Whether found in the due process clause or in the compulsory process and confrontation clauses of the sixth amendment, the opportunity to present a complete defense is guaranteed by the Constitution.<sup>59</sup> The due process clause guarantees psychiatric assistance in the presentation of a defense. In cases of premeditated murder where life and significant liberty interests are at stake, fundamental fairness dictates the use of relevant psychiatric evidence to present a complete defense.

Nevertheless, the new Manual provision preventing the admission of mental condition evidence relevant to whether an accused premeditated a murder relies upon cases that hold that a state is not constitutionally compelled to recognize the doctrine of diminished capacity.<sup>60</sup> The Manual continues to recognize diminished capacity, however, in its provision providing that voluntary intoxication may reduce premeditated murder to unpremeditated murder, and may otherwise negate mens rea elements of crimes. Having recognized the doctrine, an issue arises whether the due process clause or its equal protection component<sup>61</sup> requires the admission of relevant expert testimony for all accused attempting to negate mens rea elements. As the Court of Military Appeals has poignantly observed:

[I]f an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation, intent, or knowledge due to voluntary intoxication condition largely within his own control, and disapproved by society and the law—we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or

<sup>50</sup> R.C.M. 916(k)(2). See *United States v. Kunak*, 5 C.M.A. 346, 17 C.M.R. 346 (1954).

<sup>51</sup> See *United States v. Oisten*, 13 C.M.A. 656, 33 C.M.R. 188 (1963) (knowledge); *United States v. Dunnahoe*, 6 C.M.A. 745, 21 C.M.R. 67 (1965) (premeditation).

<sup>52</sup> Exec. Order No. 12,586 (amending R.C.M. 916(k)(2)).

<sup>53</sup> R.C.M. 916(1)(2).

<sup>54</sup> R.C.M. 916(a).

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

<sup>56</sup> See, e.g., *United States v. Redmond*, 21 M.J. 319 (C.M.A.), cert. denied, 106 S. Ct. 1950 (1986).

<sup>57</sup> W. LaFave, *Modern Criminal Law* 357 (1978).

<sup>58</sup> *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981) (en banc); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976). See Annotation, *Expert Testimony-Criminal Intent*, 16 A.L.R. 4th 672-73 (1982).

<sup>59</sup> *Crane v. Kentucky*, 106 S. Ct. 2142, 2146 (1986).

<sup>60</sup> E.g., *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), cert. denied sub nom. *Worthing v. Israel*, 467 U.S. 1228 (1984).

<sup>61</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

might be wanting due to some mental derangement—usually without the accused's control.<sup>62</sup>

Accordingly, even though there is some federal authority that allowing evidence of intoxication but not other mental condition to negate mens rea does not violate due process or equal protection,<sup>63</sup> well-established military precedent is to the contrary. The new Manual provision too readily ignores this controlling precedent.

Thus, this issue may be resolved not only in light of constitutional demands, but also in accord with the other sources of military due process. It is appropriate to look first to the statutes of Congress to determine the process due military accused.<sup>64</sup> A literal application of the new Article 50a, UCMJ, eliminates only evidence of mental disease or defect as a defense other than an insanity defense. To the extent that the statute requires interpretation, the legislative history evidences no congressional intent to prevent the use of evidence relevant to an element of an offense.

Therefore, trial defense counsel should continue to offer expert testimony, or make offers of proof as to such testimony, involving mental conditions short of insanity, relevant to mens rea elements. Offers of proof can best be made through the sworn testimony of the expert or by way of stipulation.<sup>65</sup> A trial court must then decide whether to follow the rule apparently prohibiting such evidence. Defense counsel should put the military judge to the task of deciding whether the Manual rule is promulgated contrary to the provisions of Article 36, UCMJ, inasmuch as it is inconsistent with the plain meaning of Article 50a and its legislative history.<sup>66</sup> Counsel should rely on military

precedent allowing such evidence. Lastly, defense counsel should rely on the Constitution: the meaningful opportunity to present a complete defense; the demands of the due process clause including the entitlement to the assistance of a psychiatric expert; and the equal protection issue the allowance of voluntary intoxication evidence creates. All of these arguments are for naught, however, unless defense counsel cogently explains how the evidence is relevant, competent, and of assistance to the trier of fact.<sup>67</sup>

### Conclusion

Few defendants have ever been acquitted as a result of an insanity defense. The recent concern over the use of the defense and the limitation of defense psychiatric experts was the last in a long line of changes to insanity law resulting from the acquittal of notorious defendants.<sup>68</sup> Lawyers and courts should nevertheless litigate evidentiary matters in accord with established rules of law. The trend of the evidentiary rules is to expand the use of expert testimony.<sup>69</sup> Even in the area of psychiatric testimony, the government has expanded its use of experts. It is common for trial counsel to proffer the testimony of a psychiatric expert in an attempt to bolster the testimony of a victim witness. Rules governing the admissibility of such evidence have focused on the relevance of the proffered evidence to the disputed issues, the assistance such evidence will provide to the trier of fact, and the balancing of probative value and prejudicial effect.<sup>70</sup> There is no basis in reason or law to treat defense psychiatric expert evidence differently. Defense counsel should continue to offer any such evidence relevant to issues in dispute.

<sup>62</sup> United States v. Higgins, 4 C.M.A. 143, 148, 15 C.M.R. 143, 148 (1954). See also United States v. Dunnaheo, 6 C.M.A. at 754, 21, C.M.R. at 76 ("A fortiori, character disorders of a more permanent character [than voluntary intoxication], which render it unlikely that the accused deliberated in a given situation, should [raise a defense]."); United States v. Vaughn, 23 C.M.A. 343, 49 C.M.R. 747 (1975).

<sup>63</sup> E.g., Wahrlich v. Arizona, 479 F.2d 1137 (9th Cir.), cert. denied, 414 U.S. 1011 (1973). See Carroll, *supra* note 24, at 196-209.

<sup>64</sup> United States v. Clay, 1 C.M.R. 74, 77 (1951).

<sup>65</sup> United States v. Means, 24 M.J. 160 (C.M.A. 1987); United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987); United States v. Scott, 22 M.J. 297, 300 n.1 (C.M.A. 1986).

<sup>66</sup> The President may provide for application of "the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]." UCMJ, art. 36.

<sup>67</sup> Mil. R. Evid. 403, 702.

<sup>68</sup> See generally T. Maeder, *Crime and Madness* (1st ed. 1985).

<sup>69</sup> United States v. Snipes, 18 M.J. 172, 178 (C.M.A. 1984).

<sup>70</sup> United States v. Deland, 22 M.J. 70 (C.M.A. 1986); United States v. August 21 M.J. 363 (C.M.A. 1986); United States v. White, 20 M.J. 366 (C.M.A. 1985) (granted issues); United States v. Moore, 15 M.J. 354 (C.M.A. 1983); United States v. Carter, 22 M.J. 771 (A.C.M.R. 1986); *petition granted*, 23 M.J. 414 (C.M.A. 1987); United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985).

## DAD Notes

### Absolute Bar Against Polygraph Evidence Lifted: Frye Test Superseded

In *United States v. Gipson*,<sup>1</sup> the Court of Military Appeals made a significant change toward relaxing the rigid bar against the admission of polygraph evidence. The court

held that the results of a polygraph examination are *not* inadmissible per se in a court-martial, and the military judge abused his discretion in not allowing the defense an opportunity to lay a foundation for admission of the results of appellant's polygraph exam.<sup>2</sup> In fact, both the defense

<sup>1</sup> 24 M.J. 246 (C.M.A. 1987).

<sup>2</sup> *Id.* at 253.

and the prosecution requested admission of polygraph evidence.<sup>3</sup> The defense claimed that its polygraph result was "exculpatory" because it showed accused's truthfulness, while the prosecution proffered the deception-indicated results of the polygraph examination administered by the government.<sup>4</sup> The military judge permitted neither party to lay a foundation because in his view the field of polygraph testing was too controversial.<sup>5</sup>

*Gipson* not only relaxed the absolute bar against polygraph evidence, but also clarified an issue that has plagued the courts for some time as to the applicable standard for determining the admissibility of scientific evidence. For the past half-century, both federal and military courts have applied the test enunciated in *Frye v. United States*,<sup>6</sup> which required a showing that the proffered scientific evidence has received general acceptance by the scientific community.<sup>7</sup> One of the key factors that the *Gipson* court considered in reaching its decision was the recent relaxation of the rules of evidence, both federal and military, with respect to expert testimony.<sup>8</sup> With the enactment of the Federal Rules of Evidence and the Military Rules of Evidence, the viability of the *Frye* test has been the subject of much debate.<sup>9</sup> The court observed that "the thrust of the new rules is to make more expert testimony available to the fact-finders than previously."<sup>10</sup>

Because polygraph testing and results remained controversial, even in the scientific field, it has never met the requirements of *Frye*.<sup>11</sup> The former prohibition against polygraph evidence under the 1969 Manual<sup>12</sup> has been deleted under the 1984 Manual.<sup>13</sup> Although polygraph results are not "per se admissible," it is clear that the drafters intended to allow the admission of polygraph evidence in those cases where the proper foundation is laid.<sup>14</sup>

The *Gipson* decision is consistent with the drafters' intent. Furthermore, the court was careful to point out that the decision does not in any way suggest that all polygraph evidence be admitted, or even that the evidence in *Gipson* should have been admitted.<sup>15</sup> "Our holding here is only

that the appellant was entitled to attempt to lay that foundation."<sup>16</sup> The relaxation of the *Frye* test simply allows the military judge greater freedom in admitting testimony concerning polygraph results. As Chief Judge Everett noted in his concurring opinion, once this testimony is admitted, the opponent can, through cross-examination or extrinsic evidence, challenge the training, experience, or skill of the particular polygraph operator and bring to light any weakness in the expert's testimony.<sup>17</sup>

By rejecting the *Frye* test as the sole standard of determining admissibility, the court has unlocked some of the doors that have previously kept out certain scientific information. *Frye* has not been totally abandoned; it remains a factor for consideration: "[t]he point is, general acceptance is a factor that may or may not persuade; it is not the test."<sup>18</sup>

The *Gipson* decision opens new doors for the defense and the prosecution. Defense counsel now have the opportunity to use not only polygraph evidence, but also all other scientific evidence not previously admitted as long as a proper foundation is laid. If the prosecution proffers novel scientific evidence,<sup>19</sup> however, then it is suggested that the *Frye* standard of general acceptance be relied upon to argue for its exclusion, as the degree of acceptance by the scientific community of the new theory or technique is still a factor for determining reliability. Ultimately, the admission or exclusion of evidence is still the military judge's decision. *Gipson* simply allows the judge to consider a wider range of factors in making that decision. Melanie E. Fields, Legal Intern.

#### Hope Is Not Enough

Defense counsel who sit back and do not investigate their clients' cases in the hope that their clients will not actually face a court-martial or will end up pleading guilty to the pending charges may find themselves cited for ineffective assistance of counsel. In a recent opinion, *United States v. Scott*,<sup>20</sup> the Court of Military Appeals held that the civilian

<sup>3</sup> *Id.* at 247.

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

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

<sup>6</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>7</sup> *Gipson*, 24 M.J. at 250.

<sup>8</sup> *Id.* at 250-51.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 251.

<sup>11</sup> *Id.* 248-49.

<sup>12</sup> Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 142e.

<sup>13</sup> See Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 702 analysis, app. 22, at A22-45.

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

<sup>15</sup> *Gipson*, 24 M.J. at 253.

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

<sup>17</sup> *Id.* at 254 (Everett, C.J., concurring).

<sup>18</sup> *Id.* at 252.

<sup>19</sup> See Sullivan, *Novel Scientific Evidence's Admissibility at Courts-Martial*, Oct. 1986, at 24.

<sup>20</sup> 24 M.J. 186 (C.M.A. 1987). Corporal Scott, a member of the United States Marine Corps, was convicted by general court-martial of attempted murder, rape, forcible sodomy, and kidnapping. The United States-Navy Marine Corps Court of Military Review returned the case to the convening authority for an evidentiary hearing on the issue of ineffective assistance of counsel. 18 M.J. 629 (N.M.C.M.R. 1984). On further review, the court of review affirmed the findings and sentence. 21 M.J. 889 (N.M.C.M.R. 1986). The Court of Military Appeals set aside the findings and sentence. The record of trial was returned to the Judge Advocate of the Navy who may order a rehearing. 24 M.J. at 193.

defense counsel's failure to promptly and adequately investigate and present Corporal Scott's alibi defense prejudiced the defense.<sup>21</sup>

On 20 April 1983, the victim, the wife of a Marine, was abducted, forcibly sodomized, raped, and her throat slashed. On 21 April 1983, Corporal Scott became a suspect. Shortly thereafter, he retained a civilian attorney from the surrounding community. At their first meeting, Scott told his lawyer the facts supporting an alibi defense. He alleged that during the time frame of the incident he was patronizing a pharmacy, a department store, and drive-in (eatery).<sup>22</sup> Scott's attorney never investigated his alibi, however, or interviewed any witnesses from the establishments where he claimed to be during the time frame in question.

At the post-trial evidentiary hearing, the civilian lawyer testified that he believed Scott "was innocent" and that "he did not promptly investigate, seek, or interview potential alibi witnesses, or pursue any alibi evidence because he believed that the case would never come to trial."<sup>23</sup> The lawyer further testified that he did not prepare the alibi witnesses for trial because he "expected them to tell the truth."<sup>24</sup> The lawyer claimed that he had relied on a volunteer investigator to develop testimony of potential alibi witnesses.<sup>25</sup>

The Court of Military Appeals applied the test for reviewing claims of ineffective assistance of counsel that was set out by the Supreme Court in *Strickland v. Washington*<sup>26</sup> and *United States v. Cronin*.<sup>27</sup> In accordance with these opinions, a counsel will be considered ineffective if the appellant establishes that the counsel's performance was deficient and that the deficient performance prejudiced the defense.<sup>28</sup> When reviewing a claim for ineffective assistance of counsel, the court must take into consideration that a

counsel's duty is "to make the adversarial testing process work in the particular case"<sup>29</sup> and that "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."<sup>30</sup> In *Scott*, the Court of Military Appeals found that Corporal Scott's lawyer's performance was deficient.<sup>31</sup> Thus, the counsel's deficient performance cast doubt on the reliability of the adversarial testing process at appellant's court-martial.<sup>32</sup>

Trial defense counsel should take note that the failure to timely investigate and prepare a defense may result in their being cited for ineffective assistance of counsel. The performance of the defense counsel in *United States v. Scott* serves as an example of judicially found professional dereliction. Failure to adequately prepare witnesses in the hope that the case will not go to trial or will result in a guilty plea or an administrative discharge does not satisfy counsel's responsibilities to zealously represent a client. Defense counsel should be sensitive to the fact that as time passes so do the memory and recollection of witnesses who may be vital to their clients' defense.<sup>33</sup> Thus counsel should not wait to find out whether their clients' cases will "fall out" before they begin to investigate the charges and prepare a defense.<sup>34</sup> Prompt investigation of a defense will solidify witnesses' testimony and may result in a favorable disposition of the charges. If defense counsel fail to promptly and adequately investigate and prepare their clients' cases for trial, hope will not be enough to shield counsel from allegations of ineffectiveness before the appellate courts. Captain Donna L. Wilkins.

#### ***United States v. Newak: Conflict of Interest***

In *United States v. Newak*,<sup>35</sup> the Court of Military Appeals held that appellant, a second lieutenant in the Air Force, was denied effective assistance of counsel because of

<sup>21</sup> 24 M.J. at 193. Corporal Scott was represented at trial by a civilian lawyer personally retained by him and his detailed military counsel. The civilian attorney was considered to be the lead counsel, with the military attorney acting as associate counsel. *Id.* at 187.

<sup>22</sup> *Id.* at 189.

<sup>23</sup> *Id.* at 191.

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

<sup>25</sup> *Id.* Corporal Scott had unilaterally sought the assistance of an individual who was neither trained or licensed as an investigator. The "investigator" was simply a volunteer who traced Scott's steps in order to find someone who could identify him. In each case, the "investigator" informed the prospective witnesses that Scott's civilian lawyer would be contacting them. *Id.* at 189-90.

<sup>26</sup> 466 U.S. 668 (1984).

<sup>27</sup> 466 U.S. 648 (1984).

<sup>28</sup> 24 M.J. at 188 (citation omitted). "The test for prejudice when a conviction is challenged on the basis of actual ineffectiveness of counsel 'is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" 24 M.J. at 189 (quoting *Stickland v. Washington*, 466 U.S. at 695).

<sup>29</sup> 24 M.J. at 188 (quoting *Stickland v. Washington*, 466 U.S. at 690).

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

<sup>31</sup> The court only addressed the performance of Scott's civilian counsel. The court apparently considered that the civilian lawyer, as lead counsel, was in charge of investigating and preparing Scott's defense at trial. Detailed military counsel, who are acting as "associate" counsel because a civilian lawyer has been retained, should not rely on Scott as a shield against claims of ineffective assistance of counsel, however. Detailed military counsel, whether they are lead counsel or associate counsel, are obligated to zealously represent their clients at all times.

<sup>32</sup> 24 M.J. at 193.

<sup>33</sup> Prompt investigation of potential witnesses can be crucial to a client's case. Corporal Scott's alibi witnesses had not had any previous contact with him before the night in question and then for only a few moments. Also, there had not been any significant circumstances surrounding Scott's contact with these witnesses. Thus, as more time passed, the witnesses' recollection of him on the night in question became less certain.

<sup>34</sup> Corporal Scott was suspected of the charged offenses on 21 April 1983; the convening authority referred the charges to a general court-martial on 10 August 1983; in mid-September 1983 the volunteer investigator began retracing Scott's steps and interviewing alibi witnesses; and trial commenced on 3 October 1983. 24 M.J. at 189-90. Five months had elapsed by the time anyone representing Scott had sought out and interviewed alibi witnesses. Corporal Scott's civilian lawyer did not contact these witnesses before trial. One of the alibi witnesses was not asked to testify at trial and the other two witnesses were unaware that they would be called as witnesses until immediately before trial. *Id.* at 192.

<sup>35</sup> 24 M.J. 283 (C.M.A. 1987)

her attorney's pre-trial representation of both her and the co-accused. Newak was convicted of use, possession, and distribution of marijuana, attempted distribution and use of amphetamines, and sodomy with an enlisted woman. The court reversed and remanded the case because of the conflict of interest that arose from the military defense counsel's representation of both Newak and the enlisted woman, Airman Lynne Peelman.

Both Newak and Peelman were informally assigned to Captain John Powers as a result of a criminal investigation implicating them in homosexual and drug activities. After an attorney-client relationship was established with each accused, Captain Powers was transferred to another duty station and the cases were assigned to Captain Raymond Smith, who then formed an attorney-client relationship with both Newak and Peelman. Captain Smith was later informed by the base staff judge advocate that the government planned to grant testimonial immunity to Peelman in return for her testimony against Newak. Captain Smith later testified that he was working in the interests of Peelman when negotiating the terms of the immunity, and advised Peelman to cooperate with the government. Smith even admitted that his advice to Peelman may have been subconsciously affected by information provided to him by

Newak.<sup>36</sup> In Newak's court-martial, Peelman was given immunity and was the main witness for the prosecution.

Although the Court of Military Appeals has recognized that representation of two or more accused by a single defense attorney is not a per se violation of "constitutional guarantees of effective assistance of counsel"<sup>37</sup> or necessarily a conflict of interest, a defense counsel must be alert to all possible conflicts inherent in multiple representation. The court stated that the defense counsel should have paid close attention to the defense function standards established by the American Bar Association, which provide, in part, that a lawyer should only represent more than one co-defendant when clearly "no conflict is likely to develop."<sup>38</sup>

In *Newak*, the court reasoned that if Captain Smith was performing his job as Peelman's attorney in a professional manner, then his position as Newak's attorney must have been compromised. Likewise, adequate representation of Newak would impair Peelman's case. Multiple representation of the type present in *Newak* should be strictly avoided. If faced with possible representation of more than one co-accused, defense counsel should immediately seek the advice of the regional or senior defense counsel. Captain Kevin G. Sugg.

### Clerk of Court Notes

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

Second Quarter Fiscal Year 1987; January-March 1987

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.42	(1.66)	0.34	(1.36)	0.59	(2.37)	0.53	(2.13)	0.39	(1.56)
BCDSPCM	0.36	(1.44)	0.36	(1.45)	0.37	(1.48)	0.44	(1.76)	0.26	(1.04)
SPCM	0.07	(0.30)	0.09	(0.34)	0.07	(0.27)	0.02	(0.07)	0.00	(0.00)
SCM	0.46	(1.82)	0.40	(1.62)	0.66	(2.64)	0.28	(1.10)	0.06	(0.26)
NJP	31.58	(126.30)	32.20	(128.80)	32.66	(130.64)	33.18	(132.71)	31.06	(124.25)

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

#### Speedy Retrials Revisited

Our Clerk of Court Note in the August issue of *The Army Lawyer* noted the recent cases of *United States v. McFarlin*, 24 M.J. 631 (A.C.M.R. 1987), and *United States v. Rivera-Berrios*, 24 M.J. 679 (A.C.M.R. 1987), holding that the 120-day rule of R.C.M. 707(a) applies to rehearings and new trials. The note observed that the same rule probably applied to "other trials" (R.C.M. 810(e)). Thereafter, in *United States v. Moreno*, 24 M.J. 752 (A.C.M.R. 1987), the Army Court of Military Review so held.

#### Some Overlooked Fundamentals of Record-Making

Most records of trial received by the Clerk of Court are excellently prepared, arranged, and packed. Our quality inspection for the Army Court of Military Review takes very little time and the original record is soon on its way for statistical coding while the defense copy is being delivered to assigned counsel. A few records, however, do not merit

such praise. We are sorely tempted to return them for repairs (we believe the warranty lasts for the life of the GCM jurisdiction), but we usually make the corrections ourselves to save time.

Only rarely does our appeal initiator find that the original record contains a copy, rather than the required original, of some critical document such as the charge sheet, Article 32, advice, referral, authentication, recommendation, or action. Slightly more often she finds a material variance between the convening authority's action as reflected in the promulgating order and the action actually signed. These variances remain critical even though the action set forth in the promulgating order no longer need be verbatim. That is to say, the new and more relaxed promulgating order must not become a substitute for proceedings in revision (such as by adding "per month" to the partial forfeiture if the sentencing authority inadvertently failed to announce it).

<sup>36</sup> *Id.* at 240.

<sup>37</sup> See *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).

<sup>38</sup> See ABA Standards, *The Defense Function*, Standard 4-3.5(b) (2d ed. 1979).

Our more common problem is the staff judge advocate's failure to include eight copies of the promulgating order in the original record immediately following the Court-Martial Data Sheet (DD Form 494). Waiting in line at the one Nassif Building copying room to reproduce your order is time that could be spent in processing other records. Another fundamental being overlooked is the prescribed order of contents of the record. This is carefully delineated on the Inside Back Cover of DD Form 490. Your court reporter or legal specialist will find this not only a handy guide to the order of contents, but an excellent inventory as well. We should not have to remind you that the defense and government counsel copies must be arranged in the proper order, too.

Although the time we must spend copying orders sent in insufficient copies, or rearranging misarranged (or should we say unarranged?) records is an annoyance and slows the appellate process, another problem poses greater danger to the judicial process. That is the labeling of items that cannot be bound with the record; videotapes, for example. Each container and the tape inside should contain the name of the case (U.S. v. Casename), the exhibit designation if any (Prosecution Exhibit 3), a sequence number in the case of multiple tapes (Tape 1 of 12), and the approximate running time (36 min.).

We appreciate the fact that the occasional lapses in the quality of your records sometimes are due to the problems of "summer help." However, summer is over.

#### Fiscal Year 1986 Statistics: Nonjudicial Punishment

As we shall occasionally apologetically point out, converting to our new data base (ACMIS) in July and August 1986 operated in a variety of ways to delay our production of statistics for that fiscal year. Here, at last, are nonjudicial punishment statistics for FY 1986.

Nonjudicial punishment was imposed in 111,758 cases, of which 21,660 (19.4%) involved drug offenses. In an additional 855 instances, trial was demanded (.76% of the

total). Appeals were taken from 7.1% of the punishments imposed and some relief was granted in 14.1% of the appeals. The nonjudicial punishment was imposed formally in 79.8% of cases (conversely, summarized punishment in 20.2%). These percentages seem fairly stable in light of the information for Fiscal Years 1983 through 1985 we published in *The Army Lawyer* for March 1986 at page 49.

The FY 1986 nonjudicial punishment rate per thousand soldiers was 142.67. This is based on an average quarterly strength of 783,343, including Reserve Component soldiers in initial active duty for training.

#### Election as to Appellate Representation: A Problem Substantially Solved

Anyone reviewing a complete set of *The Army Lawyer*, its partial predecessor the *Judge Advocate Legal Service*, and probably its predecessors the *Chronicle Letter* and the *JAG Chronicle*, would find a steady drumbeat of notes from the Clerk of Court or the OTJAG Criminal Law Division (or its predecessor, the Military Justice Division) urging staff judge advocates to include the accused's required election as to appellate counsel with each record sent for Article 66 review or Article 69 examination (in case the latter is referred to the Army Court of Military Review).

We are pleased—on your behalf—to report that only rarely do we now receive a record that does not include the accused's election or waiver of counsel. A major share of the credit for this significant improvement must go to the U.S. Army Trial Defense Service, whose staff and counsel have devoted considerable effort to alleviating the problem. However, the clerk's staff, and probably the judge advocate staffs at the Disciplinary Barracks and the Correctional Activity as well, also owe thanks to staff judge advocates for helping to reduce the occasions on which the accused must be located, readvised, and an election obtained.

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## Army Court of Military Review Note

### Insanity on Appeal

Captain Annamary Sullivan  
Commissioner, U.S. Army Court of Military Review

#### Introduction

When the issue of an accused's mental status arises, it can be in one of two areas: mental capacity or mental responsibility. Mental capacity is the question of whether the accused is capable of assisting in his or her defense, either at trial or on appeal. Mental responsibility, on the other

hand, is the issue of the defendant's sanity at the time he or she committed the charged offense. The treatment given to an issue of mental status on appeal will depend on whether it is lack of capacity or lack of responsibility, i.e., insanity, that is being alleged.<sup>1</sup> This article will discuss the standards of appellate review for allegations of lack of mental responsibility made for the first time on appeal.<sup>2</sup>

<sup>1</sup> See *United States v. Roberts*, 18 M.J. 192, 195 (C.M.A. 1984) (Everett, C.J., concurring).

<sup>2</sup> See *Manual for Courts-Martial, United States*, 1984, Rule for Courts-Martial 1203(c)(5) for rules governing raising mental capacity during appellate review [hereinafter R.C.M.].

## Mental Responsibility Litigated at Trial

If the question of mental responsibility is raised by evidence produced at trial, instructions must be given to guide the fact-finders.<sup>3</sup> The test is whether there is some evidence tending reasonably to place an accused's lack of mental responsibility in issue.<sup>4</sup> If the issue is raised at trial and properly instructed upon, that factual finding is reviewed on appeal.<sup>5</sup> Once the issue has been fully and fairly litigated at trial, the trial court's determination is generally accorded the same treatment on review as are other issues, in the absence of unusual circumstances.<sup>6</sup> The appellate courts have also considered post-trial information on mental responsibility in addition to that already considered at trial to determine whether the new information "raises" again the issue already litigated.<sup>7</sup> The test for whether a rehearing is required under these circumstances is whether "a different verdict might reasonably result if the issue was again presented to a court-martial."<sup>8</sup>

## Mental Responsibility Raised On Appeal

The focus changes, however, when the issue was not litigated at trial. In such a case, the appellate courts are faced with a determination as to whether the new information raises the issue of mental responsibility—not again, but for the first time.<sup>9</sup> The most recent pronouncement in this area from the Court of Military Appeals is *United States v. Roberts*.<sup>10</sup> *Roberts* is a difficult case to look to for clear guidance because all three judges wrote separate opinions: Fletcher for the court, Everett concurring in the result, and Cook concurring and dissenting. All three judges do agree, however, on certain aspects. In *Roberts*, the issues of mental responsibility and mental capacity were alleged post-trial. The Navy-Marine Corps Court of Military Review ordered a sanity board and a *DuBay*<sup>11</sup> hearing. The question before the judge at the *DuBay* hearing was whether the issues were actually raised; he went beyond that limited charter and made findings on the issue of whether capacity and responsibility actually existed.<sup>12</sup> The Navy-Marine Corps Court of Military Review also decided those ultimate questions.<sup>13</sup>

Writing for the Court of Military Appeals, Judge Fletcher indicated that the question to be resolved by the *DuBay* hearing and the Navy-Marine Corps Court of Military Review was the narrow issue of whether sufficient evidence had been introduced to raise the issues, not to decide them: "[t]he precise issue before the lower appellate court was whether appellant was entitled to a rehearing on the question of his mental capacity to stand trial and his mental responsibility at the time of the offense."<sup>14</sup> The Fletcher opinion expressly noted the different approach of de novo review under Article 66(c)<sup>15</sup> when the issue was raised at trial, fully litigated, and ruled on by the trial judge.<sup>16</sup> Chief Judge Everett opined that the lower appellate court could make the final determination as to capacity but that it "is not free to decide the issue of mental responsibility. . . . It may only determine whether the 'new information' obtained after trial 'raises an issue concerning mental responsibility'; and if that issue is raised, then that court must direct either dismissal of the charges or a 'new trial or rehearing.'"<sup>17</sup> Together, Fletcher and Everett agreed that *Roberts'* case needed to go back to the lower appellate court to decide the narrow issue of whether the question of mental responsibility was raised, while Senior Judge Cook opined that on the record it was clear that the question was raised and so a rehearing or dismissal was appropriate.<sup>18</sup>

The next question is what is the test for whether mental responsibility is raised when alleged for the first time on appeal. The preeminent case in this area is *United States v. Triplett*.<sup>19</sup> Although the issue was litigated at trial in *Triplett*, the standard enunciated for appellate review has been applied in cases, discussed below, where the issue was not litigated at trial.

*Triplett* establishes three categories for the appellate review of the insanity issue: where there is a reasonable doubt that the accused is mentally responsible, in which case the appellate court should dismiss; where there is no doubt that the accused is mentally responsible, in which case the court should affirm; and finally, the "gray" area, "where reasonable minds might differ as to the meaning and weight of the

<sup>3</sup> E.g., *United States v. Smedley*, 15 C.M.A. 174, 35 C.M.R. 146 (1964).

<sup>4</sup> *United States v. Lewis*, 14 C.M.A. 79, 33 C.M.R. 291 (1963); see also Dep't of Army, Pam No. 27-9, Military Judges' Benchbook, para. 6-3 (1 May 1982) (C2 15 Oct. 1986) ("some evidence . . . which tends to show insanity").

<sup>5</sup> E.g., *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985); *United States v. Cortes-Crespo*, 9 M.J. 717 (A.C.M.R. 1980), *aff'd*, 13 M.J. 420 (C.M.A. 1982).

<sup>6</sup> See *United States v. Schick*, 6 C.M.A. 493, 20 C.M.R. 209 (1955).

<sup>7</sup> E.g., *United States v. Triplett*, 21 C.M.A. 497, 45 C.M.R. 271 (1972); see also *United States v. McCray*, 18 M.J. 760 (A.C.M.R. 1984).

<sup>8</sup> *Triplett*, 21 C.M.A. at 503, 45 C.M.R. at 277.

<sup>9</sup> See, e.g., *United States v. Correa*, 21 M.J. 719 (A.C.M.R. 1985), *United States v. Martin*, 19 M.J. 621 (A.C.M.R. 1984), *petition granted*, 21 M.J. 293 (C.M.A. 1985).

<sup>10</sup> 18 M.J. 192 (C.M.A. 1984).

<sup>11</sup> *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967)

<sup>12</sup> *Roberts*, 18 M.J. at 193.

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

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

<sup>15</sup> Uniform Code of Military Justice, 10 U.S.C. § 866(c) (1982) [hereinafter UCMJ].

<sup>16</sup> *Roberts*, 18 M.J. at 194.

<sup>17</sup> *Id.* at 195 (Everett, C.J., concurring) (quoting Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 124 [hereinafter 1969 Manual or MCM, 1969]).

<sup>18</sup> *Roberts*, 18 M.J. at 196-97 (Cook, S.J., concurring and dissenting).

<sup>19</sup> 21 C.M.A. 497, 45 C.M.R. 271 (1972).

new and old matter.”<sup>20</sup> In this gray area, the “mere existence of conflicting opinion does not necessarily require a rehearing.”<sup>21</sup> If “considering all the matter on the issue, a different verdict might reasonably result if the issue was again presented to a court-martial,” then a rehearing is required.<sup>22</sup> Judge Duncan in his dissent in *Triplett* phrased the majority’s formulation as whether the new information is of such content and weight that, considering all the matter on the issue, a different verdict might reasonably result.<sup>23</sup> This summary was the phrasing given by the Fletcher opinion in *Roberts*.<sup>24</sup> Neither Chief Judge Everett nor Senior Judge Cook in *Roberts* discussed the standard for determining whether mental responsibility is raised.

In the fifteen years since it was decided, *Triplett* has been applied in about a dozen published cases besides *Roberts* in which the issue of mental responsibility was not litigated at trial but rather was raised for the first time post-trial. The cases can generally be divided into three groups: where no appellate action is required; where a sanity or *DuBay* hearing is ordered; or where a rehearing is necessary.

In *United States v. Mulhern*,<sup>25</sup> after trial, the Court of Military Review was presented with three items, two reports by a psychiatrist who based his opinion that the accused was not responsible on statements made by the accused in the evaluative process, which were contradicted by the accused’s own statements at trial, and a sanity board that opined that the accused was free from major mental illness that would prevent him from knowing right from wrong and adhering to the right.<sup>26</sup> In view of the substantially lessened weight given to the psychiatrist’s report, based as it was on contradicted statements by the accused, the Court of Military Appeals ruled that the lower appellate court did not err when it found the new matter did not raise the issue of mental responsibility.<sup>27</sup> In *United States v. Correa*,<sup>28</sup> the accused was evaluated post-trial as suffering from post-traumatic stress disorder (PTSD). None of the three evaluations, however, labelled PTSD a mental disease or defect and none indicated that, as a result of PTSD, the appellant lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the

requirements of the law.<sup>29</sup> Considering all matters submitted, and in light of the entire record which showed a long (twelve year) period of successful and incident-free service even though suffering from PTSD according to the post-trial evaluations, and lucid responses at trial, the court found that the evidence was insufficient to raise the issue.<sup>30</sup> The Army court in *United States v. Martin*<sup>31</sup> also found that the issue was not raised by a post-trial (twenty-two months after the offense) psychiatric report that diagnosed mental irresponsibility, in light of the accused’s lucid responses at trial and in light of a pre-trial psychiatric examination that found the accused sane: “the post-trial report is entitled to little weight when compared with the original report, at least in the absence of any evidence that these factors [limited nature of post-trial examination and length of time between commission of offense and examination] should be discounted in the assessment of its probative value.”<sup>32</sup> In *United States v. Brazil*,<sup>33</sup> a pre-trial sanity board found the appellant sane. A post-trial psychiatric examination by two doctors also found him sane.<sup>34</sup> Subsequently, one psychiatrist opined that, while there was “some room for interpretation and some doubt” as to his status at the time of the crime, the accused lacked capacity at time of court-martial.<sup>35</sup> The court ordered a sanity board which again found that the appellant was not mentally ill.<sup>36</sup> On the basis of the entire record, the court found that the accused was a manipulative individual who pretended to act crazy in order to obtain release from confinement and, in total, the evidence was not sufficient to raise the issue of sanity.<sup>37</sup> In *United States v. Sudler*,<sup>38</sup> the court ordered a sanity board based on statements by appellate defense counsel of difficulties with communicating with the accused and a statement by a psychiatric social worker who opined that the accused had a personality and character disorder. The accused refused to cooperate with the sanity board whose efforts to examine him were thus “completely thwarted.”<sup>39</sup> The Army court reviewed the record and found the appellant’s behavior consistent with his desire not to have his psychiatric condition examined or to raise an insanity defense, and further found that he appeared to be a normal

<sup>20</sup> *Id.* at 503, 45 C.M.R. at 277

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

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

<sup>23</sup> *Id.* at 505, 45 C.M.R. at 279 (Duncan, J., dissenting).

<sup>24</sup> 18 M.J. at 194.

<sup>25</sup> 21 C.M.A. 507, 45 C.M.R. 281 (1972).

<sup>26</sup> *Id.* at 509-10, 45 C.M.R. at 283-84.

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

<sup>28</sup> 21 M.J. 719 (A.C.M.R. 1985)

<sup>29</sup> *Id.* at 721.

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

<sup>31</sup> 19 M.J. 621 (A.C.M.R. 1984).

<sup>32</sup> *Id.* at 623.

<sup>33</sup> 4 M.J. 668 (A.C.M.R. 1977)

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

<sup>35</sup> *Id.* at 669.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 669.

<sup>38</sup> 2 M.J. 558 (A.C.M.R. 1976), *aff’d on other grounds*, 6 M.J. 82 (C.M.A. 1978).

<sup>39</sup> *Id.* at 561.

rational person.<sup>40</sup> Accordingly, there was no issue. An older Army case, *United States v. Locklin*,<sup>41</sup> surely went the farthest of any court in refusing to order any action. A pre-trial psychiatric evaluation found the accused sane. Two post-trial sanity boards, in reports approved by the Surgeon General, opined that the accused was legally insane at the time of the crime.<sup>42</sup> The court noted that the accused had mental capacity at time of trial and elected not to litigate sanity, that his responses at trial were lucid, and that the first psychiatric evaluation was near the time of the offense while his questionable behavior appeared after his incarceration.<sup>43</sup> Finally, in *United States v. Gay*,<sup>44</sup> the Air Force Court of Military Review ruled that no further inquiry was necessary where a pretrial sanity board had determined that the accused was sane while a psychiatric consultation was obtained post-trial that included neurological examination, electroencephalogram, and encephalogram.<sup>45</sup> No evidence was found of psychiatric disorder or organic brain syndrome.<sup>46</sup> "Nothing in the record, we believe, suggests that yet another inquiry into the accused's mental responsibility is warranted."<sup>47</sup>

The second category of cases is that in which a *DuBay* or sanity hearing is ordered. The Air Force court ordered a sanity inquiry in *United States v. Williams*<sup>48</sup> when presented with a medical report that related that, prior to his enlistment, the accused underwent ten days of psychiatric hospitalization, and that since the offense he acted bizarrely and was psychotic. In *United States v. Braye*,<sup>49</sup> a limited hearing was ordered on whether the accused's guilty pleas were provident. Interestingly, the post-trial information tended to negate the defense of insanity, but there were pretrial psychiatric reports that left the court with a question as to the accused's responsibility at the time of the offense.<sup>50</sup> Those pretrial reports consisted of a psychiatric report and a sanity board that opined that the accused was sane and a psychiatric report and a sanity board that made findings of mental irresponsibility.<sup>51</sup>

In the third category fall cases in which findings have been set aside and a rehearing authorized. A recent Army case, *United States v. King*,<sup>52</sup> illustrates this category. In *King*, a post-trial sanity board found that the accused was not mentally responsible at the time of the offenses. The reviewing specialist at the Office of the Surgeon General challenged the board's findings.<sup>53</sup> At *DuBay* hearing was held at the order of the Army Court of Military Review.<sup>54</sup> Extensive evidence was presented at the *DuBay* hearing, including the testimony of the accused's attorneys on his behavior during their preparation for his trial and a variety of psychiatrists and psychologists who testified as to the accused's bizarre behavior although their conclusion was that he was sane.<sup>55</sup> The military judge at the *DuBay* hearing found, *inter alia*, that there was insufficient post-trial evidence concerning sanity to warrant a rehearing and that a different verdict would not reasonably result if the issue were retried.<sup>56</sup> The Army court noted that the military judge's findings and conclusions were instructive but not controlling and decided that the issue of insanity was raised and that a different verdict might reasonably result.<sup>57</sup> Accordingly, the findings and sentence were set aside and a rehearing authorized.<sup>58</sup> Another illustrative case is *United States v. Chambers*.<sup>59</sup> In *Chambers*, a post-trial sanity board found that the accused was probably not so far free from defect as to be able to distinguish right from wrong and to be able to adhere to the right.<sup>60</sup> The Surgeon General's Office, in summarizing the report, stated that the accused had a mental disease or defect but, although not likely that he was incapable of distinguishing right from wrong, nevertheless the accused's capacity to adhere to the right was somewhat interfered with.<sup>61</sup> On the basis of this information, the court felt that this case fell into *Triplett's* gray area "wherein 'reasonable minds might differ as to the meaning and weight' to be given the new matter, and in which 'the disputed facts and opinions can better be tested in the crucible of examination at trial.'" <sup>62</sup>

<sup>40</sup> *Id.*

<sup>41</sup> 47 C.M.R. 101 (A.C.M.R.), *petition denied*, 48 C.M.R. 1000 (C.M.A. 1973).

<sup>42</sup> *Id.* at 103-04.

<sup>43</sup> It seems clear that *Locklin* is an aberration: the court in *Locklin* applied as its standard whether it had a reasonable doubt as to the mental responsibility of the accused at the time of the offense. *Id.* at 104. This is not the standard under *Triplett*. See *supra* notes 20-24 and accompanying text.

<sup>44</sup> 16 M.J. 586 (A.F.C.M.R. 1983), *aff'd on other grounds*, 18 M.J. 104 (C.M.A. 1984).

<sup>45</sup> 16 M.J. at 603-04.

<sup>46</sup> *Id.* at 604.

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

<sup>48</sup> 18 M.J. 533 (A.F.C.M.R. 1984).

<sup>49</sup> 47 C.M.R. 949 (A.C.M.R. 1973).

<sup>50</sup> *Id.* at 950.

<sup>51</sup> *Id.* at 950-51. Clearly, *Braye* is an aberration in this category because the *DuBay* hearing was ordered based on information known prior to trial, but the court declined to apply waiver.

<sup>52</sup> 24 M.J. 774 (A.C.M.R. 1987).

<sup>53</sup> *Id.* at 776.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 778.

<sup>56</sup> *Id.* at 776.

<sup>57</sup> *Id.* at 778.

<sup>58</sup> *Id.* at 779.

<sup>59</sup> 47 C.M.R. 469 (A.F.C.M.R. 1973)

<sup>60</sup> *Id.* at 470.

<sup>61</sup> *Id.* at 470.

<sup>62</sup> *Id.* at 472.

No single theme can be drawn from these cases, but some general observations can be made. First, *Mulhern* and *Brazil* teach that the issue of mental responsibility is not raised if it is clear that the post-trial determination of insanity results from the accused's manipulation of the evaluative process. Neither, in light of *Mulhern*, *Martin* and *Locklin*, is the issue raised if there is merely a conflict between differing psychiatric evaluations. *Correa* and *Gay* indicate that the issue is not raised by psychiatric evaluations that do not themselves raise an insanity defense, especially, as in *Correa*, where no link between the condition diagnosed and insanity is made by the record. A *DuBay* hearing or other inquiry is ordered when there is a good, as in *Williams*, although not, as *Braye* teaches, necessarily rebutted, reason to question sanity but the link between the question of sanity and the offense is not established. Finally, rehearing appears to be the remedy when there is unrebutted medical evidence, as in *Chambers*, that the accused lacked mental responsibility or even, as in *King*, where there is extensive, albeit contradictory, evidence of insanity.

### Whither Insanity Now?

The foregoing was a summary of what the rules have been for issues of mental responsibility. The future rules will be different at trial in light of the major changes.<sup>63</sup> to the insanity defense, in both what the standard is and on whom the burden of proof will fall.<sup>64</sup> The interesting question arises—will the rules be different when the issue is first raised on appeal and, if so, how?

First, of course, is the standard itself. The new insanity standard will be a significantly higher one than the previous standard: it will require a "severe mental disease or defect" rather than merely a "mental disease or defect."<sup>65</sup> It will require complete impairment rather than merely "substantial" or "great" impairment.<sup>66</sup> Finally the new standard eliminates as a consideration the accused's ability to control his behavior; only if the accused lacks capacity to appreciate the wrongfulness of his conduct will the defense lie.<sup>67</sup> Procedurally, the new insanity defense allocates the burden of proof to the accused, who must prove his insanity by clear and convincing evidence.<sup>68</sup>

The changes to the substantive standard should significantly narrow an appellate court's focus on when the issue is "raised." In view of how much more must be demonstrated for the possibility of a defense, it seems certain that the question of mental responsibility will be found to have been raised in the rarest of cases. Further, the procedural change also would seem to impact greatly on an appellate court's consideration of a newly raised question of insanity. A look at *Triplett's* three categories reveals a Pandora's box of unanswered questions.

The easiest to assess is the second *Triplett* category, i.e., where there is no question of the accused's mental responsibility. Under both old and new insanity rules, it is appropriate for the appellate court to affirm.

The first *Triplett* category would, however, seem to be significantly affected. The old insanity procedure required the government to prove mental responsibility beyond a reasonable doubt. Thus, *Triplett's* first category, i.e., where there is a reasonable doubt, looked to a government failure to meet its proof requirement, similar to its requirement to prove the elements of its case. Under the new procedure, it would appear that, if there is a "reasonable doubt" as to an accused's sanity, then it is the defense that will have failed to meet its burden and so dismissal, the remedy for government failure of proof, seems to be no longer as appropriate as formerly. In fact, the first *Triplett* category will narrow to cases in which the appellate court finds that the accused has proven "clearly and convincingly" that he lacked mental responsibility. When the issue is first raised on appeal, in view of the proof allocation, unless the government concedes the issue, it is very difficult to envision that an appellate court would dismiss without giving the government an opportunity to contest the issue in a *DuBay* hearing or at a new trial. All this, of course, assumes that dismissal is even a remedy any longer. In fact, a final question with respect to this category is whether dismissal will ever be appropriate. Under the new bifurcated voting procedures, first the accused is found guilty and then the sanity issue is decided.<sup>69</sup> With this approach taken at trial, the corollary on appeal would be that, should the appellate court find that the accused has successfully proven his or her lack of mental responsibility, the remedy would be not dismissal but a finding of not guilty only by reason of lack of mental responsibility.

In view of the new standard and procedure, then, it would seem likely that most of what would have fallen into *Triplett's* first category will now fall into the third, i.e., where reasonable persons might differ as to the meaning and weight of the evidence. Here the test, whether a different verdict might result, should be the same but its application should take into account the changed burden. Hence it would seem that, in the future, a defense showing that a different verdict might reasonably result would be more difficult than heretofore: now the defense must show the possibility, not that the government might fail to prove mental responsibility beyond a reasonable doubt, but that the defense can show clearly and convincingly that the accused lacked the necessary mental responsibility.

Another point to note, unrelated to the new rules for the insanity defense, is that there may be an open question as to whether an appellate court has to ever return a case for trial on the question of mental responsibility. As noted earlier, there is a distinction between mental capacity, which can be decided on appeal, and mental responsibility, which must be determined at trial. The clearest exposition of this dual

<sup>63</sup> UCMJ art. 50a.

<sup>64</sup> See *Williams, Not Guilty—Only by Reason of Lack of Mental Responsibility*, *The Army Lawyer*, Jan. 1987, at 12.

<sup>65</sup> *Id.* at 12-13. See R.C.M. 916(k).

<sup>66</sup> *Williams, supra* note 64, at 13.

<sup>67</sup> *Id.* at 13.

<sup>68</sup> *Id.* at 13-14; see R.C.M. 916(b).

<sup>69</sup> See *Williams, supra* note 64, at 14.

approach was the concurring opinion of Chief Judge Everett in *Roberts*.<sup>70</sup> The Everett concurrence was based on paragraph 124 of the 1969 Manual which provided that, as to mental responsibility, reviewing authorities may direct a new trial or rehearing as appropriate, while no such provision existed for mental capacity. On that basis, Chief Judge Everett concluded that the appellate courts could determine mental capacity but not mental responsibility. In the Rules for Courts-Martial in the 1984 Manual, however, there is no language comparable to that relied upon by the Everett concurrence in *Roberts*. Certainly the concept that mental responsibility is one to be decided by the fact-finder in the case is embodied in Article 51(b), UCMJ, as is recognized by the 1984 Manual.<sup>71</sup> Nevertheless, in the absence of the Manual guidance relied upon by the Everett concurrence, the appellate courts might feel it appropriate to re-examine whether the issue if raised needs to be decided at trial.

One further point is whether the *Triplett* analysis in this article has any validity at all for the future. Military law has in the past accorded special status to an insanity defense.<sup>72</sup> For appellate purposes, this has meant that the accused must meet the *Triplett* standard, as discussed in this article, and not the heavy burden usually required for one who seeks a new trial based on newly discovered evidence.<sup>73</sup> This preferred status was based on language in earlier editions of the Manual, language that has not been

incorporated into the 1984 Manual.<sup>74</sup> Further, under the new insanity rules, lack of mental responsibility is no longer accorded the same treatment as other affirmative defenses, such as self-defense or entrapment, which the government must still prove beyond a reasonable doubt.<sup>75</sup> Thus the continued existence of a preferred status for insanity is questionable. If insanity is now treated as just another appellate issue, then an accused who argues for a new trial based on new evidence of insanity may be required to meet new trial standards, *i.e.*, show that the evidence was discovered after trial, could not have been discovered earlier in the exercise of due diligence, and would probably produce a substantially more favorable result for the accused. The first two prongs have not been required under *Triplett* for a new trial based on newly discovered evidence of insanity and the third prong, "would probably" produce a more favorable result, appears on its face to be higher than the standard under *Triplett's* third category, a different verdict "might reasonably" result. Thus a *Triplett* analysis may be meaningless in future cases.

If there is one thing that is clear about the question of mental responsibility, it is that there is nothing clear about its appellate treatment in the future. It will be some time before the issues are faced for the first time, but it certainly appears that the topic is one that will not be amenable to any easy answers.

<sup>70</sup> See *supra* note 17 and accompanying text.

<sup>71</sup> See R.C.M. 916(k) analysis at A21-58 ("The import of Article 51(b) is that the issue of mental responsibility may not be removed from the factfinder.").

<sup>72</sup> *Triplett*, 45 C.M.R. at 276-77; *United States v. Martin*, 19 M.J. 621, 622 (A.C.M.R. 1984), *petition granted*, 21 M.J. 293 (C.M.A. 1985).

<sup>73</sup> R.C.M. 1210(f).

<sup>74</sup> Compare MCM, 1969, para. 124 with R.C.M. 706.

<sup>75</sup> See R.C.M. 916.

## Government Appellate Division Note

### Much Ado About Nothing

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On 16 March 1987, the Court of Military Appeals in *United States v. Williams*<sup>1</sup> held invalid the five day notice of motions requirement in a local circuit rule of practice. Despite rumblings of nay-sayers, local circuit rules of court remain alive and well, in effect in all military circuits. This article will examine the *Williams* and related opinions to determine how rules of court can be enforced without running afoul of the Court of Military Appeals. Several permissible tactics to ensure continued compliance with the notice requirements of local rules of court will be proposed.

*Williams* involved a defense counsel who moved, prior to the plea, to suppress statements his client had made to the arresting military police. The motion was based on the policeman's alleged failure to give the accused the required Article 31(b), Uniform Code of Military Justice<sup>2</sup> rights warning prior to the statements. The military judge reminded the defense counsel of the Fifth Judicial Circuit Rules of Practice, which required that notice of motions be served on opposing counsel at least five working days before the

<sup>1</sup> 23 M.J. 362 (C.M.A. 1987).

<sup>2</sup> Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) (1982) [hereinafter UCMJ].

trial.<sup>3</sup> He ascertained that no notice was given and that the defense counsel had known of the statements at least since the Article 32, UCMJ, investigation. Reminding the counsel of the purpose of the rules, to "promote the orderly, expeditious, and just disposition of court-martial cases,"<sup>4</sup> the military judge refused to hear the motion. The accused pled guilty to assault consummated by a battery and not guilty to attempted robbery. To negate the element of specific intent of the robbery charge, he presented the defense of voluntary intoxication. The military policeman testified for the defense on direct to the accused's apparent drunkenness, and on cross-examination, to certain exculpatory statements indicating the accused's sober and rational thought process. The members were warned to consider these statements not for their content, but only for their tendency to support or rebut the accused's claim of intoxication. They convicted appellant of attempted robbery.

On appeal, the government contended first, that the military judge correctly refused to hear the motion, and second, that if heard, the motion would have been unsuccessful, because the statements were a physical act, not requiring a warning. The Army Court of Military Review affirmed, but the Court of Military Appeals held that "the military judge erred in refusing to consider the merits of defense objections"<sup>5</sup> and that under the circumstances, the statements did require a warning. The court remanded the case, *inter alia*, to permit further proceedings to determine the admissibility of the statements, as some warnings were given.

In holding that the failure to hear the motion for lack of notice was error, the court relied on *United States v. Kelson*,<sup>6</sup> which had held invalid a similar refusal to hear a motion for violation of a local circuit notice requirement. The *Kelson* rule, however, contained a provision that motions not contained in the pretrial motions checklist would "not be entertained at a preliminary hearing or—during the trial proper except for good cause shown."<sup>7</sup> The *Williams*

rule no longer contained this provision, but the military judge's ruling purported to impose the same result.

The Court of Military Appeals has clearly indicated in *Williams* that the requirements in the Manual for Courts-Martial<sup>8</sup> to raise a motion before a plea is entered will govern the rights of an accused to present a motion at trial, and not the earlier notice deadlines of any local rules of practice. The language of the opinion stresses the court's concern with a waiver remedy that would impose on the accused a requirement greater than that in the present MCM 1984. The court did find the concept of local rules with the objective of minimizing or eliminating delays and continuances "laudable."<sup>9</sup> Thus, it seems the court is more concerned that the attempted punishment, and not the rule itself, was improper. So long as the means used to enforce a rule of court do not impose greater requirements or sanctions on the accused than those mandated by the President in the MCM, 1984, the rule would arguably be acceptable.<sup>10</sup> An acceptable rule would not restrict a military judge from seeking sanctions against a noncompliant counsel, who, as an officer of the court, is bound to obey its rules.<sup>11</sup> These sanctions would be essential to enable the military judge to fulfill his or her duties, which include maintaining an orderly trial calendar, making efficient use of available time, and expeditiously handling court-martial cases.<sup>12</sup>

*Williams* thus establishes by judicial decree the legislated rule in federal courts: Federal Rule of Criminal Procedure 57 allows each district court to "make and amend rules governing its practice not inconsistent with these rules."

The rules presently in effect in the various military circuits have been promulgated and drafted with regard for *Kelson*, and would also seem to meet the requirements of *Williams*. The *Kelson* court reviewed the Army regulations promulgated by the Secretary of the Army, on which the

<sup>3</sup> U.S. Army Trial Judiciary, Fifth Judicial Circuit, Rules of Practice before Army Courts-Martial (15 Dec. 1981). Rule of Court I.3.a. provided:

In accordance with Paragraph 2-28, Army Regulation 27-10, and Rule 34, Uniform Rules of Practice before Army Courts-Martial, Appendix H, Military Judges' Guide, DA Pam 27-9, moving counsel will present to opposing counsel and the judge notice of any motions or other pleadings prior to an Article 39(a) hearing. Motions and Hearings Checklist, Figure H-1, page H-6, DA Pam 27-9, will be utilized for this purpose. The Motions notice will be in writing and a statement of the substance of the motions issues and the points of law and authorities on which counsel rely provided to the trial judge. Motions will be served on opposing counsel at least 5 working days before trial, any reply briefs will be filed as soon as possible thereafter. Counsel should be prepared to dispose of all motions at one preliminary Article 39(a) session in conjunction with the trial or prior thereto. Briefs should be submitted by both parties on complex motions. Special Defenses such as alibi and insanity are covered by the foregoing.

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

<sup>5</sup> 23 M.J. at 366.

<sup>6</sup> 3 M.J. 139 (C.M.A. 1977).

<sup>7</sup> 3 M.J. at 140.

<sup>8</sup> Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

<sup>9</sup> 23 M.J. at 366.

<sup>10</sup> This interpretation is consistent with the court's comments in *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987), where the court held improper a military judge's denial for untimeliness of a request for trial by judge alone:

Apparently, the judge was seeking to discipline counsel so that in the future there would be better communication. While this result may have been good for the efficiency of military justice, it clearly penalizes Webster for sins that were not of his making. He lost the benefit of a statutory option provided by Article 16(1)(B) of the Uniform Code of Military Justice, 10 U.S.C. § 816(1)(B), in order that the lawyers appearing before this judge will communicate better in the future. Such a justification does not, in our view, accord with congressional intent.

[T]he remedy lay elsewhere than in depriving an accused of the opportunity for trial by judge alone. Poor communication between counsel can be corrected without the imposition of requirements that are inconsistent with the Uniform Code and a provision of the Manual for Courts-Martial. 24 M.J. at 99-100.

<sup>11</sup> Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 July 1984) [hereinafter AR 27-10]; see *infra* n. 16.

<sup>12</sup> AR 27-10, para. 8-4d(1) and (3).

rule was based. It concluded that the rule was not promulgated by proper authority, as neither Article 140, UCMJ,<sup>13</sup> nor any applicable provision of the 1969 Manual for Courts-Martial authorized supplementation by the Secretary of the Army of the general requirement to simply present motions before entering a plea.<sup>14</sup> The present rules, on the other hand, are promulgated by a Presidential delegation of authority under Rule for Courts-Martial 108<sup>15</sup> expressly permitting the Judge Advocate General to make rules of court. This authority was further subdelegated by The Judge Advocate General, U.S. Army, to the local chief circuit judges in AR 27-10, para. 8-8. All circuits have adopted local rules of court adapted to the geographical and communications problems each faces. All circuit rules of practice presently require that *counsel*, as officers of the court, give prior notice of motions, all but one circuit at least five days prior to either trial or a pretrial hearing. None purport to or are intended to impose to the *accused's* detriment a waiver for failure to comply, however. Several remind counsel of their obligation to comply with the rules of a court under Disciplinary Rule 7-106(A) and (C)(7).<sup>16</sup>

This five day notice requirement echoes the federal rules: Federal Rule of Criminal Procedure 45(d) requires that written notice of a motion with supporting affidavits be served not later than five days before the hearing date. The presence of the five day notice provision in the general, and not local federal rules, would seem to dictate waiver of the motion as the proper remedy for failure to comply. A federal judge, however, whether confronting a violation of a general or more stringent local rule, is faced with the same dilemma as a military judge. Failure to hear a possibly outcome-determinative motion for untimeliness may result in reversal on the grounds of improper application of the rule or incompetence of counsel. The better, albeit, less convenient policy is the same for both courts, to seek sanctions against the counsel rather than imposing them against the client.

The Chief Trial Judge, Trial Judiciary, has averred that military judges expect to continue to enforce the notice provision,<sup>17</sup> and there are many logical reasons to expect both trial and defense counsel to comply with local rules of practice in the future. The Trial Defense Service's recent Training Memorandum 87-1, dated 26 May 1987, urged all defense counsel to continue to comply with the rules. Indeed, compliance is in an accused's best interest: the more notice a military judge has, the more careful consideration the judge can give to a motion, including reading cases and performing research on innovative points of law. Counsel must give notice if assistance is needed to procure witnesses for any motion. Also, while the *Williams* opinion will not

allow an accused at trial to be directly punished for his or her counsel's lack of notice by a refusal to hear the motion, the accused may nevertheless be indirectly punished: the members, who may suspect the reasons, may grow impatient with the delay; and the defense witnesses, especially sentencing witnesses who may have already been somewhat reluctant to appear, may likewise resent the further imposition on their time and the trouble the accused has caused them. All these impediments to an orderly trial are exacerbated when, as in many circuits, the military judge has traveled long distances or must preside over a tightly-scheduled "trial term."

The defense counsel's future clients may similarly be indirectly punished. A military judge may not be as likely to use his or her discretionary power to rule in favor of a counsel whose behavior shows he or she cannot be respected as an officer of the court. Proposed pretrial agreements must be forwarded for recommendations through the same trial counsel and staff judge advocate to the same convening authority. The defense counsel will be working with the same Criminal Investigation Division (CID) agents who may have just been called from their duties to testify with no notice. He or she will often be asking the same panel members to believe the defense presentation and find for an accused. The counsel will be trying to persuade an accused's supervisors to testify favorably on sentencing when the supervisors will have heard that any participation in a case involves unexpectedly long delays and absences from duty. In short, every person adversely affected by a defense counsel's non-compliance may be less co-operative, and hinder the counsel's smooth and efficient trial practice in the future.

A trial counsel is faced with the same inherent disadvantages from non-compliance with rules of practice. Offers to plead guilty will not be as forthcoming to a counsel with a reputation for incomplete disclosure or last-minute motions in limine. A military judge will not be able to fully deliberate on a motion. Finally, CID agents and commanders will be much less cooperative with a counsel who needlessly occupies their time, and who represents their command interests in a court while attempting to disregard its rules. Pressure from supervisors, the dishonor of a public record outlining their disobedience, and the benefits to their clients will ensure that both trial and defense counsel continue to comply with the local circuit rules of practice.

It is inevitable that on occasion a counsel will willfully or negligently fail to comply with a notice requirement. There are several steps a trial counsel can take when faced with such an eleventh-hour motion. During an Article 39(a),

<sup>13</sup> Article 140 states that "[t]he President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority."

<sup>14</sup> Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 66b.

<sup>15</sup> MCM, 1984, Rule for Courts-Martial 108 [hereinafter R.C.M.]

<sup>16</sup> Model Code of Professional Responsibility DR 7-106 (1980).

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

<sup>17</sup> Interview with Colonel Wayne R. Iskra, Chief Trial Judge, Trial Judiciary (May 4, 1987).

UCMJ, session, a copy of any pertinent disclosure forms, showing the date served on the defense, should be made part of the record. The counsel may ask the military judge to take judicial notice<sup>18</sup> of the notice requirements under the local rules of practice. He or she should ask for a brief recess to ascertain witness availability and estimate preparation time. In requesting a continuance, if needed, a trial counsel should demand that any delay be attributed to the defense under R.C.M. 707(c)(3),<sup>19</sup> (c)(4),<sup>20</sup> (c)(5)(B),<sup>21</sup> or (c)(9).<sup>22</sup> After trial, the incident should be reported to the appropriate superiors.

A military judge likewise has several options to directly and indirectly compel a noncompliant counsel to heed the local rules of court. At trial, the motion inquiry should ascertain on the record whether disclosure was properly made and whether there is any good cause for the lack of notice. The judge may verify that the counsel is aware that the government and defense services mandate compliance with the rules, and question the counsel about any justification for willfully disregarding the rules. Any delay granted to allow the opposing counsel to prepare or the military judge to deliberate on the motion should be attributed to the noncompliant counsel as well. In this way, the counsel has lost any tactical advantage the surprise was intended to gain. It is unlikely the military judge would suffer a repeat performance.

Outside the courtroom, a military judge should meet with the counsel's supervisor to discuss the disruptive effect of noncompliance with the rules. This conference can cover the need for orderly progression of courts-martial and the impossibility of careful consideration of complex legal issues without adequate time for research and preparation. If necessary, it is possible for supervisors to give a counsel a direct order under Article 90, UCMJ, to obey the local rules of court.

In the unlikely event that all the above subtle and not-so-subtle enforcement measures do not succeed in coercing compliance, a military judge might contemplate the powers granted under R.C.M. 809. The discussion to R.C.M. 809(a) indicates that a military judge may "issue orders when appropriate to ensure the orderly progress of the trial. Violation of such orders is not punishable under Article 48, but may be prosecuted as a violation of Article 90 or 92." A military judge could, for example, convene an Article 39(a),

UCMJ, session immediately after referral of charges and, on the record, order a persistently recalcitrant counsel to comply with the notice provisions of the local rules of court in order to ensure the orderly progress of a court-martial.

As a very last resort, the possibility of citing a counsel for contempt under R.C.M. 809 and Article 48<sup>23</sup> should not be overlooked. Arguably, failure to give notice of a motion and the ensuing logistical inconvenience at trial may rise to the level of disturbing proceedings "by any riot or disorder."<sup>24</sup> The case of *United States v. Burnett*,<sup>25</sup> presently before the Court of Military Appeals, involves precisely this question: the granted issues include the proper definition of "contempt," whether the civilian defense counsel's conduct constituted contempt, and finally, whether an Article I military judge has the same inherent power to summarily punish contempts as an Article III federal district judge.<sup>26</sup> The defense has urged a strict interpretation of the Article 48, UCMJ, language, and argued that a military judge, presiding over a legislative court, is limited in his contempt powers. The government cited military and federal case law broadening the definition of contemptuous actions, and presented precedent for the proposition that contempt powers are vested in all federal judges, constitutional or legislative, including military judges. The federal contempt statute<sup>27</sup> includes misbehavior of any of the court's officers in their official transactions and disobedience of any lawful order, rule, decree, or command. The invalidity of an order is no defense to a contempt proceeding alleging disobedience of the order.<sup>28</sup> The *Burnett* opinion should provide some interesting developments and, ideally, guidance on the definition of contempt and on a military judge's powers to find counsel in contempt for violating orders or rules.

### Conclusion

The *Williams* opinion has only solidified what has generally been military practice: the remedy for failure to comply with the notice requirement of local rules of court is not, and may not be, a refusal to hear the accused's motion. This would impose a requirement inconsistent with the Rules for Courts-Martial. Military judges must look instead to the counsel's supervisors and to the safeguards within the Rules for Courts-Martial to enforce the rules. *Williams* presents no bar to the use of the notice requirement as a continuing key to efficient and orderly courts-martial.

<sup>18</sup> Mil. R. Evid. 201.

<sup>19</sup> R.C.M. 707(c)(3): "Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense."

<sup>20</sup> R.C.M. 707(c)(4): "Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by the Manual." Arguably, this would include failure to provide notice required by a rule promulgated under R.C.M. 108.

<sup>21</sup> R.C.M. 707(c)(5)(B): "The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case."

<sup>22</sup> R.C.M. 707(c)(9): "Any other period of delay for good cause, including unusual operational requirements and military exigencies."

<sup>23</sup> UCMJ art. 48 provides:

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$100, or both.

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

<sup>25</sup> CM 444568 (A.C.M.R. 30 Apr. 1985), *petition granted*, 21 M.J. 410 (C.M.A. 1986).

<sup>26</sup> See Fed. R. Crim. P. 42.

<sup>27</sup> 18 U.S.C. § 401 (1982).

<sup>28</sup> See *Walker v. Birmingham*, 388 U.S. 307 (1967); *United States v. Stine*, 646 F.2d 839 (3d Cir. 1981); *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 552 F.2d 498 (3d Cir.), *cert. denied*, 434 U.S. 822 (1977); *Bowman v. Wilson*, 514 F. Supp. 403 (E.D. Pa. 1981).

## The Client as Advocate in Nonjudicial and Administrative Proceedings

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### Introduction

In his book, *How to Avoid Lawyers*,<sup>1</sup> Don Biggs teaches the public-at-large the art of self-advocacy for dealing with civil and criminal legal problems. The benefits of advocacy skills inure to military clients as well, particularly those facing nonjudicial punishment<sup>2</sup> (NJP) or administrative separation actions processed under the notification procedure.<sup>3</sup> While these clients have the right to consult with a military attorney, they must, in the end, proceed with their cases pro se.<sup>4</sup>

As lawyers, we are the recognized advocacy experts. If, when advising clients facing Article 15 and administrative separation, counsel will moderate the traditional "evaluation of alternatives" approach<sup>5</sup> to advice and utilize an approach that emphasizes self-advocacy, the results of the proceedings will be more favorable to clients, in both short-term disposition and long-term effects.

### The A,B,C's of Article 15

A client arriving for Article 15 counseling at a Trial Defense Service office typically views the TJAGSA film, "Article 15 Counselling,"<sup>6</sup> and/or reviews a handout that outlines the mechanics of Article 15 procedures. These devices apprise the client of most of the procedural aspects of NJP, which therefore need not be repeated by the attorney during the brief consultation.

The most important aspect of Article 15, however—that of the standard of proof required to find a soldier guilty of an offense—is not mentioned in the film. The apparent reason for this is that the applicable standard of proof is a facially ethereal concept. It is not enunciated in the Manual for Courts-Martial or in Army Regulation 27-10. The legislative history<sup>7</sup> pertaining to Article 15 and the scant military case law on point are devoid of any discussion about the standard of proof for guilt determination.

It is not easy to ascertain what standard of proof is applicable in Article 15 proceedings. Regulatory and case law heighten, rather than abate, the confusion. Dicta in military case law labels NJP as an administrative proceeding.<sup>8</sup> The descriptive language in AR 27-10 supports that assertion.<sup>9</sup> If, in fact, NPJ were a purely administrative proceeding, then the applicable standard would be "preponderance of the evidence."<sup>10</sup> NJP, however, is both administrative and criminal in nature.

NJP is, in fact, more akin to a criminal proceeding than an administrative one. Many of the basic procedural and substantive due process guarantees applicable to judicial criminal proceedings apply to Article 15 proceedings.<sup>11</sup> Many major offenses, ranging from assault to drug abuse and drunken driving, are routinely disposed of under Article 15. Additionally, the adverse career consequences of an

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<sup>1</sup> D. Biggs, *How to Avoid Lawyers, A Step-by-Step Guide to Being your Own Lawyer in Almost Every Situation* (1985).

<sup>2</sup> See generally Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982) [hereinafter UCMJ]; Manual for Courts-Martial, United States, 1984, Part V [hereinafter MCM, 1984]; Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, ch. 3 (1 July 1984) (C4 10 Aug. 1987) [hereinafter AR 27-10].

<sup>3</sup> See Dep't of Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 2, sect. II (5 July 1984) (C9, 2 Mar. 1987) [hereinafter AR 635-200].

<sup>4</sup> See AR 27-10, para. 3-18c. Defense counsel may only represent soldiers at Article 15 hearings with the specific approval of the Chief, U.S. Army Trial Defense Service, or, in Europe, the Senior Regional Defense Counsel. Standard Operating Procedures, U.S. Army Trial Defense Service, para. 1-5d(2)(b). See also AR 635-200, para. 2-2a, b & d. Enlisted soldiers facing administrative separation under the notification procedure have only the right to submit a statement on their behalf to the separation authority, after consultation with an attorney, unless they have more than six years of military service at the time that the separation would be accomplished. *Id.*

<sup>5</sup> See *United States v. Mack*, 9 M.J. 300, 312 (C.M.A. 1980) ("the role of such counsel seems generally to be involved with advising the accused of the options available to him and their legal consequences"). See also TJAGSA Programmed Instruction, Criminal Law: NonJudicial Punishment, Oct. 1987, at 17.

<sup>6</sup> A0106-85-0136 (30 Sept. 1985).

<sup>7</sup> See generally Index and Legislative History to the Uniform Code of Military Justice, 1950, vols. 1-3 1330 *passim* (1985).

<sup>8</sup> See, e.g., *Middendorf v. Henry*, 425 U.S. 25 (1976); *United States v. Covington*, 10 M.J. 64, 66 (C.M.A. 1980); *United States v. Penn*, 4 M.J. 879, 882 (N.C.M.R. 1978).

<sup>9</sup> See, e.g., AR 27-10, para. 3-18g(2), which states in pertinent part, "Article 15 proceedings are not adversary in nature." Cf. MCM, 1984, Part V, para. 1b ("Nature: Nonjudicial punishment is a disciplinary measure more serious than . . . administrative corrective measures . . . but less serious than trial by court-martial.").

<sup>10</sup> See Dep't of Army, Pam. No. 27-21, Legal Services—Military Administrative Law, para. 6-21e. Cf. Dep't of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers, para. 3-10b (24 Aug. 1977).

<sup>11</sup> See generally MCM, 1984, Part V, paras.: If (double, multiple and increased punishment prohibited, statute of limitations); 3 (right to demand trial); 4c (Article 31(b) rights, personal appearance, spokesman, examination of evidence, right to present a defense, right to witnesses including adverse witnesses, right to public hearing); 7 (right to appeal).

Article 15, both short and long-term, can be equally as devastating as those of a court-martial conviction in which a soldier is not punitively discharged.<sup>12</sup>

In many ways, clients and the general public are encouraged to view NJP as a part of the criminal justice process. For example, official references to Article 15 in the media, be it the aforementioned TJAGSA film or Professor Arthur Miller's AFRTS television spot<sup>13</sup> extolling the fairness of NJP, take place in a courtroom.

The nature of NJP proceedings, then, seems to require, as with judicial criminal proceedings,<sup>14</sup> proof of guilt beyond a reasonable doubt. That is, in fact, the standard required under Army law. It is so stated in paragraph 2 of Department of the Army Forms 2627 and 2627-1.<sup>15</sup> Samples of completed DA Forms 2627 and 2627-1 appear in AR 27-10.<sup>16</sup> The rights listed in paragraph 2, including the reasonable doubt standard of proof for guilt determination, are referenced throughout the regulation,<sup>17</sup> thereby incorporating the reasonable doubt standard of proof as a legal requirement.<sup>18</sup> Additionally, because Army commanders have employed this standard for so many years,<sup>19</sup> the standard has acquired the force of law by custom.<sup>20</sup>

Knowing what the reasonable doubt standard means, and that it applies at Article 15 proceedings, clients are more willing to have their cases decided at that level. Also, they are more optimistic about pleading not guilty at an Article 15 proceeding.

The attorney's job then becomes one of reviewing the evidence, advising clients of their rights and the various options available to them, advising clients whether to plead guilty or not guilty, and adopting a findings and/or sentencing strategy to obtain the most favorable result for clients. Where appropriate, clients should be counseled as to how to present witnesses and other favorable evidence

and how to argue their cases before the commander. Sentencing advocacy should always be stressed, because it is universally beneficial to Article 15 clients, regardless of plea.

Because of time constraints upon counsel in this field of office, and in light of clients' frequent inability to carry away with them all of the details of how best to advocate a case, the author has devised a handout entitled "The A,B,C's of Article 15,"<sup>21</sup> which every client receives. Clients who believe they are not guilty are usually urged to resolve their cases at the Article 15 level rather than demanding a court-martial. The facts that the consequences of a guilty finding at Article 15 are less severe than at court-martial, and that favorable evidence may be heard at an Article 15 proceeding that would be excluded at court-martial,<sup>22</sup> are primary factors weighing in favor of recommending resolution at the Article 15 level. Additionally, each client is told about the required standard of proof and that counsel is convinced that their commanders employ that standard when deciding Article 15 cases.<sup>23</sup>

Each client receives an individualized plan for advocating his or her case. Clients are encouraged to take notes in the margins of the handout. Counsel highlights areas on the handout particularly applicable to a given client. Clients are instructed to begin their cases by informing the commander that they are pleading not guilty (where applicable) and are handling their cases at the Article 15 level because they trust that the commander will find them guilty only if the commander is convinced of guilt beyond a reasonable doubt. Many soldiers paraphrase or state verbatim advocacy language from the handout during their hearings, and seem to feel confident and comfortable that they have a crutch to rely on after they leave the Trial Defense Service office.

<sup>12</sup> For example, soldiers in 46 of the 383 enlisted military occupational specialties (MOS) (including, among others, avionics mechanic (35K), legal specialist (71D), finance specialist (73C), pharmacy specialist (91Q), and military policeman (95B)) are subject to Department of the Army-mandated MOS reclassification actions if identified as drug users. Soldiers in a few MOS, such as legal specialist, court reporter (71E) and military policeman, are subject to disqualification for any Article 15 in their records. See Dep't of Army, Reg. No. 611-201, Personnel Selection and Classification—Enlisted Career Management Fields and Military Occupational Specialties, ch. 2, (29 Apr. 1987).

<sup>13</sup> *Legal Affairs/Article 15, "Choice is Yours"*, CT 01683. In the 58-second spot, Professor Miller says, "Article 15 is based on the fundamental beliefs of American justice, beliefs designed to achieve a fair result."

<sup>14</sup> See *Taylor v. Kentucky*, 436 U.S. 478 (1978).

<sup>15</sup> Dep't of Army, Form No. 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984); Dep't of Army, Form No. 2627-1, Summarized Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

<sup>16</sup> AR 27-10, figures 3-1 and 3-2.

<sup>17</sup> *Id.* See also AR 27-10, para. 3-18; app. B, Suggested Guide for the Conduct of Nonjudicial Punishment Proceedings, sect. I, Notification ("item 2 [DA Form 2627] lists the rights you have in the proceedings").

<sup>18</sup> Article 15 formats utilized by Departments of the Air Force and Navy do not list proof of guilt beyond a reasonable doubt as a regulatory right. See AF Form 3070 and NAVMC 10132. It is an open question, however, as to whether the other services are constitutionally required to employ the reasonable doubt standard of proof, based on the argument that all military service members are similarly situated and should therefore receive equal protection under the law. See *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>19</sup> The reasonable doubt standard of proof language has appeared in item 2, DA Form 2627, since at least 1 November 1973.

<sup>20</sup> See *United States v. Johanns*, 17 M.J. 862, 868 (A.F.C.M.R. 1983) ("Customs of the service can . . . help define the standard expected. In order to qualify as such, a custom must be uniform, a known practice of long standing, certain and reasonable, and not in conflict with existing statutes or constitutional provisions." (citing *W. Winthrop, Military Law and Precedents* 42 (1920))). See also MCM, 1984, Part IV, para. 60c(2)(b) ("Custom arises out of long established practices which by common usage have attained the force of law in the military.").

<sup>21</sup> The form is reprinted at Appendix A. The author is most grateful for the assistance of Ms. Karen K. Korowicki, 1986 summer legal intern, who collaborated in the development of this form. The form is designed to be readable at the ninth grade level, and the syntax is designed to be devoid of legalese.

<sup>22</sup> See AR 27-10, para. 3-18j.

<sup>23</sup> Counsel routinely and repeatedly advise commanders administering Article 15 proceedings, both in commander calls and on a one-on-one basis, of the procedural and substantive requirements of the required regulatory standard of proof.

A survey of users of the A,B,C advocacy approach who pled not guilty demonstrates that such clients fared significantly better than did soldiers at courts-martial.<sup>24</sup> It is therefore recommended that defense counsel experiment with this approach to Article 15 advice. The time spent advising a client using an advocacy-oriented approach is no greater than that spent per client under the traditional evaluation of alternatives method of advice.

### Self-Advocacy in Notification Procedure Administrative Separations

Soldiers facing administrative separation under the notification procedure normally exercise their right to consult with a military attorney prior to signing the election of rights form.<sup>25</sup> These clients, who cannot receive an other-than-honorable conditions discharge and who have no right to an administrative board, have an important right that is seldom exercised to their advantage. They may submit a statement to the separation authority<sup>26</sup> requesting retention on active duty, suspension of a recommended discharge, or discharge with an honorable discharge.<sup>27</sup> In addition, they may submit supporting statements and other favorable documents. The purpose of this section of the article is to convince counsel that this right should always be exercised by clients.

All too frequently, clients accentuate the negative aspects of an administrative separation, as evidenced by their questions, e.g., "What benefits do I lose?" or "How much will a general discharge hurt my chances for a good job?" Counsel have the opportunity to alter their clients' mindset and to focus on two equally important goals: how to minimize the damage in the near-term; and how to upgrade the characterization of a general discharge sometime in the future.

The personal statement, with supporting documentation, if available, is the instrument that best achieves these goals. A carefully worded statement written by the client may temper a posture of retribution in the command. It will also provide a summary of a client's attitude to the Army Discharge Review Board (ADRB),<sup>28</sup> should the client later apply to have his or her discharge upgraded.<sup>29</sup>

The technique for convincing a client, who usually comes to the interview with a chip on his or her shoulder, that the client should prepare the personal statement is a matter of individual attorney style. Most clients, however, understand the adage about state lotteries, "You can't win if you don't play," and can relate that truism to their pending elimination.

If a soldier expends the effort to write a good letter to the separation authority, it certainly weighs in favor of a more favorable disposition in that soldier's case. By requesting, for example, suspension of execution of a discharge, the soldier may demonstrate the very rehabilitation potential that the separation authority is charged by regulation to consider.<sup>30</sup>

Asking for retention or an honorable discharge at least plants additional choices into the decisionmaker's mix of options—ones that might not otherwise have been contemplated had the client not asked for them. Such a request also has strong potential for inducing favorable action by the ADRB, as will be discussed below.

In the letter,<sup>31</sup> the soldier should also highlight the positive aspects of his or her career to date. Almost every soldier enjoys some achievements, and by briefly highlighting them, the soldier demonstrates maturity and that he or she cares about his or her career. Additionally, this may be the only positive evidence to counterbalance negative counseling statements, Article 15s, etc., in the separation packet.

The letter should include factors in extenuation and mitigation. Additionally, the client should discuss the offense(s) that led to the separation action and apologize for past mistakes, if appropriate. Prior to submitting the letter, it should be reviewed by the attorney and its language carefully and individually tailored.

The author uses a form letter<sup>32</sup> that instructs clients how to prepare their statements. When used in conjunction with the sample rebuttal letter printed on the reverse side of the

<sup>24</sup> From 1 October 1986 through 31 March 1987, the author conducted 275 Article 15 consultations. Of that total, 45 soldiers elected to plead not guilty at Article 15 proceedings. Twenty-six of these soldiers (58%) were found not guilty by their commanders (20 had plenary findings of not guilty and 6 had partial not guilty findings). Offenses dismissed included marijuana use, larceny, aggravated assault, and adultery.

By comparison, in Fiscal Year 1986, there were 3,150 Army special and general courts-martial. In 35% of these, soldiers pled not guilty, with acquittals resulting in only 6% of the cases. Official statistics, U.S. Army Trial Judiciary (19 Nov. 1986).

Soldiers in this blind study fared well in sentencing also. Of the 19 soldiers whose cases required sentencing self-advocacy, the number of adverse results that ensued were as follows:

<i>Unsuspended Reduction</i>		<i>Performance Fiche Filing</i>	
<i>Partial NG Finding</i>	<i>G Plea Findings</i>	<i>Partial NG Finding</i>	<i>G Plea Finding</i>
2(10%)	1(5%)	2(10%)	5(26%)

No soldier in the study was represented at Article 15 either by a military or civilian attorney-spokesperson.

<sup>25</sup> See AR 635-200, para. 2-2a and fig. 2-5.

<sup>26</sup> AR 635-200, para. 2-2b.

<sup>27</sup> *Id.*, para. 2-3b.

<sup>28</sup> See Dep't of Army, Reg. No. 15-180, Boards, Commissions, and Committees—Army Discharge Review Board (15 Oct. 1984) & appendix (the appendix reprints Dep't of Defense Directive No. 1332.28, Discharge Review Board (DRB) Procedures and Standards (Aug. 11, 1982) [hereinafter DOD Dir. 1332.28].

<sup>29</sup> DOD Dir. 1332.28, Discharge Review Procedures, para. A3

<sup>30</sup> See AR 635-200, para. 1-17b ("Unless separation is mandatory, the potential for rehabilitation and further useful military service will be considered by the separation authority. . . . If separation is warranted despite the potential for rehabilitation, consider suspending the separation, if authorized.")

<sup>31</sup> Clients are encouraged to limit their letter to one page. By analogy, personnel directors insist that prospective employees limit resumes to a maximum of one page. See A. Lewis, *How to Write Better Resumes* 20 (1983).

<sup>32</sup> Reprinted at Appendix B.

instructions,<sup>33</sup> soldiers effectively exercise self-advocacy in fashioning their own personal statements with little expenditure of the attorney's time. For many young soldiers, this is the first time that they really take responsibility for and charge of their own destinies. (Incidentally, this helps to foster a healthy attitude toward transition to civilian life.)

Clients should be encouraged to garner as many supporting statements and other positive documentations of service as possible, including certificates of military training, and to save them (along with a copy of the personal statement) for use in connection with their petition to the ADRB.<sup>34</sup> Supervisors who might decline to write supporting letters for presentation to the separation authority may be more inclined to write letters of recommendation for prospective civilian employers. These can be helpful as evidence before the ADRB as well.

In addition to generating a strong personal statement, a client should be briefed, preferably by the Trial Defense Service attorney, on the process of discharge upgrading.<sup>35</sup>

Clients should know the time limits for applying to the ADRB for corrective action, and should be advised on how best to time the submission of their application.<sup>36</sup> They should be shown what the application form<sup>37</sup> looks like, and where to go to seek low- or no-cost legal assistance for processing their cases.<sup>38</sup> Clients should be advised that the ADRB examines two areas relating to discharges, propriety and equity,<sup>39</sup> and directs changes based on a showing of lack of either.

Counsel need to explain some of the factors that the board considers, including: age and educational level at the

time of military service;<sup>40</sup> family and personal problems;<sup>41</sup> level of responsibility at which the applicant served;<sup>42</sup> favorable service history,<sup>43</sup> including acts not formally recognized by awards;<sup>44</sup> prior honorable discharges, if any;<sup>45</sup> and any other relevant mitigating factors<sup>46</sup> presented by the applicant. "Other factors" include alcohol or drug-related impairment, remorse over terminating military service prematurely,<sup>47</sup> postservice civilian employment and conduct,<sup>48</sup> and pre- and post-discharge familial support responsibilities. The personal statement can and should include all positive factors favoring upgrading. It will serve as bolstering evidence for an applicant claiming the existence of these mitigating factors before an ADRB hearing.<sup>49</sup>

Recent statistics regarding the number of cases heard (see table below) and the number of favorable changes effected are not encouraging. Counsel may be able to improve the picture by providing additional knowledge about the discharge review process and encouraging self-advocacy on the part of the client.

Cases Heard Calendar Years (CY) 82-86				
82	83	84	85	86
14,202	6,228	4,151	4,205	3,334
Cases Heard CY 1986: 3,334				
Type of Discharge	Action			
Undesirable/OTH (1727)	No Change			1664
	To General			46
	To Honorable			16
	Change Characterization			1
Bad Conduct (108)	No Change			107

<sup>33</sup> Reprinted at Appendix C.

<sup>34</sup> Statements and supporting documents are easier to accumulate while the soldier is still in the immediate geographic area and can solicit the statements in person. It becomes nearly impossible to gather complete supporting documentation months or even years after the fact. Additionally, although soldiers should be able to retrieve complete copies of their military records from the National Personnel Records Center (NPRC) (see DOD Dir. 1332.28, Discharge Review Procedures, para. B9), they cannot always count on obtaining the records. For instance, a fire at NPRC destroyed 16.5 million records in 1973. See National Veterans' Legal Services Project, The Veterans Self-Help Guide to Discharge Upgrading (1983) [hereinafter Self-Help Guide].

<sup>35</sup> In addition to the aforementioned regulatory references, and the Self-Help Guide, *supra* note 34, counsel should review *Project: The Administrative Consequences of Courts-Martial*, 14 The Advocate 215, 218-28 (1982) [hereinafter *Project*], and D. Addlestone, Military Discharge Upgrading (1982) [hereinafter *Upgrading*].

<sup>36</sup> An applicant must request review within 15 years of the date of discharge. DOD Dir. 1332.28, Discharge Review Procedures, para. A2. When it is most advantageous to apply to the ADRB is an open question and one that is probably best answered by legal counsel who represent applicants before the ADRB. If a dischargee is faring well in the civilian sector despite a less-than-honorable discharge, however, it appears advantageous to wait at least one year to apply, so that the applicant can gather more favorable post-discharge documentation to present to the board, and so that the board does not decline to take favorable action based on a perception that it is too soon to second-guess the applicant's military commanders.

<sup>37</sup> Dep't of Defense, Form No. 293, Application for the Review of Discharge or Dismissal From the Armed Forces of the United States (Mar. 1985).

<sup>38</sup> See *Self-Help Guide*, *supra* note 34, at 2; *Project*, *supra* note 35, at 249-51.

<sup>39</sup> DOD Dir. 1332.28, Discharge Review Standards, para. A4.

<sup>40</sup> *Id.*, para. C3b (1).

<sup>41</sup> *Id.*, para. C3b (2).

<sup>42</sup> *Id.*, para. C3a (7).

<sup>43</sup> *Id.*, para. C3a (1).

<sup>44</sup> *Id.*, para. C3a (8).

<sup>45</sup> *Id.*, para. C3a (10).

<sup>46</sup> "A discharge should be deemed equitable unless . . . it is determined that relief is warranted based upon consideration of . . . other evidence presented to the DRB . . . even though the discharge was determined to have been otherwise equitable and proper at the time of issuance." *Id.*, sec. C3.

<sup>47</sup> Aggravating factors are not specifically enumerated in ADRB rules and regulations, although they are cited generally as a countervailing consideration to mitigating factors. See DOD Dir. 1332.28, Discharge Review Procedures, para. E6b(4). A recognized factor in aggravation is, however, a soldier's desire to terminate military service prematurely, for reasons other than legitimate personal or professional problems. The ADRB also considers as aggravating evidence a waiver of rights under administrative separation procedures. See *Upgrading*, *supra* note 35, para. 22.6.

<sup>48</sup> DOD Dir. 1332.28, Discharge Review Standards, para. C3a(10).

<sup>49</sup> An applicant may present his or her case to the ADRB wholly in writing, or may appear before a hearing panel in Washington, D.C. or before a traveling panel in a major U.S. city. *Id.*, sec. B3.

	To General	1
General (1428)	No Change	1226
	To Honorable	192
	Change Characterization	10
Honorable (125)	No Change	117
	Change Characterization	8
Early Separation (31)	No Change	31
Records Unavailable (4)	No Change	3
	To Honorable	1

	Change Characterization	5
Honorable	No Change	52
	Change Characterization	6
Early Separation (22)	No Change	22
Records unavailable (1)	No Change	1

Official Statistics, ADRB.

**Cases Heard 1 Jan.-22 Apr. 87: 1,138**

Type of Discharge	Action	
Undesirable/OTH (513)	No Change	499
	To General	4
	To Honorable	4
	Change Characterization	6
Bad Conduct (28)	No Change	28
General (516)	No Change	458
	To Honorable	53

**Conclusion**

Clients can improve their chances substantially in Article 15 proceedings and administrative separation actions, if they are properly advised by counsel of their rights and of effective techniques for exercising them. This article introduces an approach to advising these clients that relies primarily on self-advocacy by the client. Utilization of this or a similar approach by attorneys will create a more positive attitude in clients and permit them to achieve more favorable results, largely through their own efforts.



## Appendix B

### Instructions, Soldier's Rebuttal Letter

DEPARTMENT OF THE ARMY  
(your military address)

(your office symbol)

(date)

SUBJECT: Chapter \_\_\_\_ Proceedings, Rebuttal Letter

MEMORANDUM FOR: Commander (When the notification procedure is used, the addressee is normally your battalion commander for chapter 13 proceedings, or your brigade commander for chapter 14 proceedings.)

1. The first paragraph is the introductory paragraph. In it, you should state that you are pending separation and give the reason for the proposed separation. You should tell the separation authority why you are writing this letter, i.e., either to ask for retention on active duty or to request that you be separated with an honorable discharge, if the separation authority finds that separation is required. [The separation authority can grant a request for retention on active duty either by disapproving the recommendation(s) for separation or by suspending execution of the separation.]

2. In the next paragraph, you should justify your request. Start by stating your MOS and job specialty. Tell the separation authority how long you have been on active duty and briefly highlight some of your achievements and awards, if applicable. Describe your goals and aspirations. Mention any awards documentation and/or letters of support that you will attach to this letter as enclosures. [Letters of support from coworkers and supervisors are vital for any later attempt to upgrade a discharge as a civilian. Save your support letters !]

3. This next area is optional. It concerns the basis for your pending separation. Although you have the constitutional right not to discuss any offense for which you might face criminal charges, you may, after consultation with your attorney, find it helpful to apologize for any offense you may have committed and briefly highlight any factors that lessen the severity of the offense(s). If what you did that led to your being considered for separation was a one-time mistake, say that in this paragraph of your letter. You may want to state that the misconduct (or unsatisfactory performance) will not be repeated (or continue).

4. In the last paragraph, repeat your request for a second chance if your're seeking retention. If retention is not possible, ask for an honorable discharge, based on your whole record, if appropriate. Tell the separation authority that you do not want to have the stigma of a less than honorable discharge when seeking civilian employment.

\_\_\_\_ Encl

YOUR NAME  
Rank, U.S. Army

## Appendix C

### Sample Rebuttal Letter

DEPARTMENT OF THE ARMY  
ATMCT Rhein Main Air Base  
APO New York 09057

AEUTR-MCA-39-RM

07 MAY 1987

MEMORANDUM FOR: Commander, 18th Military Police Brigade, APO NY 09757

SUBJECT: Chapter 14 Proceedings, Rebuttal Letter

1. Sir, I am pending elimination from service for the one-time use of drugs. I am writing this letter to request that you either disapprove separation or suspend execution of my separation, so that I may remain on active duty.
2. My MOS is 71L, administrative specialist. I have been on active duty for nearly three years. I took basic training at Fort Leonard Wood, Missouri; AIT at Fort Benjamin Harrison, Indiana; and have been here in Germany since completing AIT. My two goals regarding my Army career have always been to do the very best job professionally that I can and to gain as much education as is possible, so that I will be a more productive soldier and citizen. I proudly served with my unit in Wintex, 85 and Caravan Guard, 86. I recently received an oral commendation from inspectors during a battalion IG. My score on the latest PT test was 289, a score I worked hard to achieve. I am currently attending City College of Chicago part-time, and am working toward an associate degree in Fire Science. I am enclosing two support letters from coworkers and one certificate of appreciation as documentary evidence of my achievements.
3. I am sorry for the incident that led to my being chaptered. I take full responsibility for it, as a soldier must do. In extenuation and mitigation, however, I was under a lot of personal stress at the time, related to my wife's recent hospitalization. I realize that what I did was a serious mistake, and I promise you that it will not happen again. I have successfully undergone Track I Rehabilitation.
4. Please give me a second chance, sir, and allow me to remain on active duty in the Army that I love. If, however, retention is not possible, please let me leave with an honorable discharge, so that I will not have the stigma of a general discharge when seeking civilian employment.

REGINALD P. HAUSENFUS  
SP4, U. S. Army

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## Regulatory Law Office Note

### Gas Utility Service

Changes in utility regulations continue to offer facilities engineers greater flexibility in procuring reasonably priced gas service for military installations. Engineers, judge advocates, and procurement officers are faced with substantial challenges as the forces of the marketplace play a larger role in gas service procurement. An article in *The Army Lawyer*, November 1986, at 61, discussed the background of changes in gas rate regulation.

At the federal and state level, an emphasis has been placed on allowing interstate pipelines and local distribution companies (LDC) to act both in a traditional role as a utility with "merchant" and "carrier" functions combined, and solely as a carrier. With falling well-head prices for

natural gas, the pipelines and LDC have been better able to compete with fuel oil and other alternate energy sources as "common carriers" to prevent loss of load. In cases in which LDC rates for industrial and other large users were far in excess of actual costs of service, these regulatory changes have presented "by-pass" of the LDC as an additional alternative to unreasonable LDC rates in some cases. Regulatory commissions continue to receive and promote innovative ratemaking initiatives.

Interstate gas service and pipelines are regulated by the Federal Energy Regulatory Commission (FERC). One FERC initiative that has drawn a remand from the courts

is popularly called Order No. 436. See *Regulation of Natural Gas Pipelines After Partial Well-head Decontrol Order No. 436*, FERC Docket No. RM 85-1 (Oct. 9, 1985). Recently, the United States Court of Appeals for the District of Columbia issued its decision in *Associated Gas Distributors v. FERC*, No. 85-1812 (D.C. Cir. June 23, 1987). In vacating and remanding Order No. 436, the court made it clear that it would affirm most of the substantive aspects of that FERC rulemaking decision. The court has required FERC to resolve several issues in further proceedings that were not adequately addressed in Order No. 436. The majority opinion, in which Judge Stephen Williams was joined by Judge Robert Bork, states:

#### VIII CONCLUSION

As a general matter we uphold the substance of Order No. 436 and the procedures the Commission employed in adopting it. However, we have found problems in a few of the Order's components and must REMAND the matter to FERC for further proceeding. We summarize these defeats briefly. . . .

The court was highly critical of FERC's lack of direct action in Order No. 436 to address the problem of certain costly "take or pay" gas purchase contracts of some pipelines. Other provisions of Order No. 436 may tend to exacerbate the problem of high priced gas under "take or pay" contracts. On remand, the Commission is to determine the extent to which its inaction on the "take or pay" issue is justified. The court made clear that FERC need not reach any particular conclusion, but only that its conclusion be reached by "reasoned decision-making."

The court rejected arguments that the "open access" commitment of any pipeline that secures a "blanket certification" to provide gas transportation under Order No. 436 was the imposition of a common carrier requirement upon the pipeline. The court attached great weight to the statutory authority in section 311(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3371, rather than the arguments related to the legislative history of the Natural Gas Act of 1938, 15 U.S.C. § 717. The court noted that section 4 of the Natural Gas Act, 15 U.S.C. § 717c(b), prohibits undue preferences and unreasonable differences in rates, charges, service or facilities. The court also observed that section 5 of that Act, 15 U.S.C. § 717d(a), requires the Commission to take corrective measures when it finds a rate, regulation, practice, or contract to be unjust or unduly discriminatory. The court was of the view that "open access" requirement of pipelines electing "blanket certification" to perform gas transportation was, therefore, within the Commission's statutory discretion.

At the other end of the pipeline, the court found that FERC had erred in arguing that section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), was an appropriate legal basis for affording LDC customers of a pipeline options to convert or reduce their contract demand (CD) under existing contracts. Order No. 436 had provided such relief to LDC customers seeking to take advantage of transportation services of a pipeline electing "open access." The court ruled against the use of CD charges to pay for transportation services. This mechanism appeared to conflict with the court's prior interpretation of the statute in *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135-36 (1979). On remand, FERC is to hold further proceedings to resolve whether the CD adjustment which the Commission

has identified as essential in remedying problems derived from the pipelines's market power suffers from independent vulnerabilities.

The court upheld the general concept of "first come, first served" as a capacity allocation method for gas transportation services as within the discretion of the Commission. Several parties in the appeal had argued it was an arbitrary and capricious methodology. The court noted that in the gas transportation industry, it may become difficult to determine who "comes first"; however, the matter is unripe for review as to specifics at the time. The court gave the Commission some thoughtful questions it might wish to reflect upon in further proceedings held on this methodology.

Under Order No. 436, pipelines have some flexibility in pricing transportation service. The court upheld the Commission's authorization of "selective" rather than "uniform" rate discounts. The court stated, however, that FERC must exact consistency in the application of such latitude in ratemaking by pipelines to be in conformity with sections 4 and 5 of the Natural Gas Act. The majority opinion noted that in applying the anti-discrimination provisions of the Interstate Commerce Act, 49 U.S.C. § 10741, differentials in rates had long been justified exclusively by price competition.

Lastly, the court was dissatisfied with the Commission's approach to the "grandfathering" of existing transportation arrangements under both U.S.C. § 717f and 15 U.S.C. § 3371. FERC had provided for a variety of expiration dates for different arrangements extending from October 1987 through the mid-1990s. The court was unable to "discern the path" by which the Commission reconciled such grandfathering to FERC'S acknowledged mandate to stamp out discrimination. Again, the matter was remanded for more "reasoned decision-making."

The court affirmed one portion of Order No. 436 that is important to large users of gas utility service. The majority rejected the argument that the optional expedited certification (OEC) procedure authorized in Order No. 436 intruded upon the regulatory jurisdiction of the states. The court upheld the Commission's OEC Procedure designed to shortcut the traditional cumbersome process for pipelines seeking to provide new service (or to construct or acquire facilities for doing so) provided that the pipeline assumes the full economic risk of the venture. Under Order No. 436, certain conditions were prescribed assuring the assumption of full economic risk, which, if accepted by a pipeline, entitled the applicant to a "rebuttable presumption" that the facility or service met the statutory prerequisites of certification. The OEC Procedure was attacked by the LDC's, Maryland People's Counsel, and state commission intervenors expressing concerns of potential pipeline "by-pass" of the LDC. In his dissent, Judge Abner Mikva cited *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333 (1951), and indicated that FERC regulation had not pre-empted state regulation of essentially local problems such as "by-pass." He questioned the majority's view affirming this aspect of Order No. 436.

Conflicts involving "by-pass" of the LDC have been decided in other forums. Cases tried before state regulatory commissions have produced sharply divided opinions. *South Jersey Gas Company v. Sun Olin Chemical Co.*, 82 Pub. Util. Rep. 4th (PUR) 59, 62 (1987), but see *Re Transportation of Natural Gas*, 82 Pub. Util. Rep. 4th (PUR) 121,

129 (1987); *Re Dome Pipeline Corp.*, 78 Pub. Util. Rep. 4th 1, 14 (1986); *Mobile Gas Service Corp. v. Coastal States Transmission Corp.*, 77 Pub. Util. Rep. 4th (PUR) 109 (1986).

On the other hand, state regulatory commissions have made efforts to address the new challenges of the market for gas utility service. Several state commissions have authorized transportation rates, interruptible rates, and innovative tracking price mechanisms in response to pressure of fuel oil competition, "by-pass," and alternate energy supplies facing the LDC and large users of gas utility service. Most of the tariff innovations are being handled on a case by case basis for each LDC before the state regulatory commission.

In some instances, state regulatory commissions have held generic rulemaking investigations to attempt to restructure gas utility regulation. Three recent California decisions on this topic are: *Rate Design for Unbundled Gas Utility Services*, 82 Pub. Util. Rep. 4th (PUR) 1 (1987), updating 79 Pub. Util. Rep. 4th (PUR) 93 (1986) and *New Regulatory Framework for Gas Utilities*, 79 Pub. Util. Rep. 4th (PUR) 1 (1986). Other state decisions of significance include *Intrastate Natural Gas Transportation and Service*, 79 Pub. Util. Rep. 4th (PUR) 1224 (1986) (Pennsylvania); *Natural Gas Industrial Rates and Transportation Policies*, 78 Pub. Util. Rep. 4th (PUR) 57 (1986) (Virginia); *Gas Cost Tracking Procedures*, 75 Pub. Util. Rep. 4th (PUR) 262 (1986) (Indiana); *Natural Gas Transportation Policies*, 81 Pub. Util. Rep. 4th (PUR) 1 (1987) (West Virginia); *Incentive Rates for Natural Gas Customers and Electric Utility Customers*, 77 Pub. Util. Rep. 4th (PUR) 381 (1986) (Iowa); interim guidelines for *Transportation of Natural Gas*, 78 Pub. Util. Rep. 4th (PUR) 72 (1986) and 82 Pub. Util. Rep. 4th (PUR) 121, 129 (1987) (Missouri); and *Interstate Sale*

*and Transportation of Gas*, 80 Pub. Util. Rep. 4th (PUR) 1 (1986) (Maryland). In the latter case, the Regulatory Law Office received funding to sponsor an expert witness on natural gas rate-making.

If the trend toward the unbundling of the "merchant" and "common carrier" functions of both the LDC and the interstate pipeline continues, the number of gas transportation rate cases may increase substantially. The major areas of gas supply are located in a few geologic basins. To reach military installations in many localities around the nation, gas will be transported over one or more pipelines and perhaps an LDC prior to delivery. In the past, the cost of gas transportation was "rolled-in" to the cost of gas purchased by the LDC, and passed through in rates. The new regulatory environment will make these transportation costs, and the level of transportation rates of pipelines and any involved LDC, contested issues in state and federal regulatory commissions. Variations in the transportation rate, or changes in other tariff provisions such as "ratchets," will have a great effect on the level of billings to the military installation. In the near term, the loss of customers by an LDC due to "by-pass" may engender increases in the frequency of requested increases in the level of base rates brought by the LDCs before state regulatory commissions.

In summary, the judge advocate should work with the facility engineer to keep abreast of developments that may present potential savings in the cost of gas utility service for the installation. Likewise, the judge advocate should not hesitate to consult with attorneys at the Regulatory Law Office on these matters, as necessary, and should report any notice of a filing of utility rate proceedings in accordance with Dep't of Army, Reg. No. 27-40, Legal Services—Litigation, para. 2-1c(3) (4 Dec. 1985).

## TJAGSA Practice Notes

*Instructors, The Judge Advocate General's School*

### Administrative and Civil Law Note

#### Digest of Opinion of The Judge Advocate General

DAJA-AL 1987/1366, 31 March 1987. *Interpretation of AR 635-200, Paragraph 1-17d(6)(d), Adverse Matter From A Prior Enlistment Can Be Considered In Involuntary Separation Actions.*

The Judge Advocate General was asked whether conduct occurring during a prior enlistment that does not constitute a pattern of misconduct may be considered on the issue of retention or separation for a soldier processed for separation UP AR 635-200, chapter 14, Separation for Misconduct. The misconduct in issue occurred during a prior enlistment but was not discovered until the soldier had reenlisted. The following general guidelines were provided in response:

a. Subject to the limitations below, adverse materials from a prior enlistment that have a "strong and probative value in determining whether separation is appropriate" and that are not "isolated incidents and events . . . remote

in time" may be considered on the issue of retention or separation from the Army (see DOD Directive 1332.14 Enclosure 3, Part 2, sections A.2.d.(6)(b)1 and A.2.d.(6)(b)2 (Jan 28, 1982), and AR 635-200, para. 1-17d(6)(d) and (e) (5 July 1984) (as changed)).

b. The general standard in "a." above is limited by the guidance that "[t]he use of such records *ordinarily* shall be limited to those cases involving patterns of conduct manifested over an extended period of time" (emphasis added). Thus, where a soldier's current enlistment conduct is a continuation of his or her conduct during a prior enlistment, that prior enlistment conduct can be properly considered on the issue of retention or separation.

c. In unusual situations, conduct from a prior enlistment that does not constitute a pattern of conduct manifested over an extended period of time may be considered in determining whether retention or separation is warranted. An example is where a single incident of misconduct occurring in the prior period of service, by itself, warrants separation and the officials in the soldier's chain of command neither knew, nor reasonably should have known, of the conduct at

the time the soldier reenlisted. Other unusual situations would exist where the reenlistment was the result of malfeasance on the part of the government officials who reenlisted the soldier or where retention in the Army would constitute a manifest injustice. Where such exists, it could also warrant separation based upon a single incident occurring during a prior enlistment. Each case that is believed to fall into this "unusual" category should be considered on a case by case basis with prior coordination between the unit concerned and the Enlisted Appeals and Separations Branch, MILPERCEN.

With respect to an inquiry as to whether prior service conduct could be considered on the issue of characterization of service, refer to AR 635-200, paragraph 3-8b(2), which provides that "[t]o the extent that [prior service activities] are considered on the issue of retention or separation, the record of proceedings will reflect the express direction that such information will not be considered on the issue of characterization" of service (emphasis added).

### Criminal Law Notes

#### *Edwards* and *McOmber* Held Not to Apply to Consent to Search

In a split decision in *United States v. Roa*,<sup>1</sup> the Court of Military Appeals recently held that a request to a suspect for consent to search does not implicate the request for counsel rule of *Edwards v. Arizona*<sup>2</sup> or the *McOmber* notice to counsel rule.<sup>3</sup> The court distinguished fourth amendment privacy interests from the compulsion and reliability concerns of the fifth amendment and concluded that "a request for consent to search . . . is not questioning in the sense of 'interrogation,' and consent obtained is not a 'statement.'"<sup>4</sup> Judge Cox's lead opinion also stated that the sixth amendment right to counsel had not attached as that right "becomes applicable only when the government's role shifts from investigation to accusation."<sup>5</sup>

The issues in the case arose from the investigation by an Air Force Office of Special Investigations (OSI) agent of several burglaries. In March 1984, Senior Airman Roa was arrested by Tucson, Arizona police as he fled the scene of a

burglary.<sup>6</sup> Two days later, an OSI agent called Roa's commander and asked that Roa report to the OSI office. Roa reported and was advised of his rights. In response, he asked to speak to his civilian lawyer.<sup>7</sup> Upon his request for counsel, Roa was allowed to leave, but the agent asked him to return to the OSI office after seeing his lawyer.<sup>8</sup>

Later that morning, a Tucson policeman briefed the OSI agent that the manager of a self-storage rental business had read of Roa's arrest in the newspaper and called police to say he had rented a space to Roa. That afternoon, when Roa had not returned to OSI, his commander was again asked to have Roa report. Roa arrived shortly thereafter and was asked if he had talked to his lawyer. He replied that he had and was "advised . . . not to discuss the investigation." The agent then asked Roa for consent to search the self-storage rental space. Roa answered that he would consent, but wanted to talk to his lawyer before signing a consent form. For 25 to 30 minutes Roa tried to telephone his lawyer, but could not reach him. He then signed the consent form and said he would tell his lawyer later.<sup>9</sup>

The issues raised by these facts resulted in separate opinions from each of the three judges of the Court of Military Appeals. In the lead opinion, Judge Cox drew a bright line between the protections of the fourth and fifth amendments and applied a separate analysis to each. "The Fourth Amendment," Cox wrote, "protects one's privacy. . . . Unlike the *per se* rules applicable to admissibility of a statement . . . consent to search . . . hinges on whether the consent was voluntary under the totality of the circumstances. No one factor is dispositive."<sup>10</sup> "The prophylactic rule of *Edwards v. Arizona*"<sup>11</sup> and the *McOmber* notice to counsel rule, Cox concluded, are "inapplicable to a request for consent to search."<sup>12</sup> Roa's conviction was affirmed.

Chief Judge Everett, concurring in the result, agreed with Judge Cox's analysis separating the fifth amendment concerns of *Edwards* and the *McOmber* rule from the fourth amendment issue at hand.<sup>13</sup> Judge Everett, however, found *Edwards* violated as, in his view, Roa was asked not only to consent to search, but also to show which rental space was his. This testimonial act was within the protection of the fifth amendment *Edwards* rule.<sup>14</sup> The error did not require

<sup>1</sup> 24 M.J. 297 (C.M.A. 1987).

<sup>2</sup> 451 U.S. 477 (1981) ("[W]hen an accused has invoked his right to . . . counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

<sup>3</sup> *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976) ("when an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary"); Mil. R. Evid. 305(e) ("When a person . . . intends to question an accused or person suspected of an offense and knows or reasonably should know [the suspect has counsel] . . . with respect to that offense, the counsel must be notified . . . and given a reasonable time in which to attend. . . .").

<sup>4</sup> 24 M.J. at 300.

<sup>5</sup> *Id.* at 299.

<sup>6</sup> *Id.* at 297.

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

<sup>8</sup> *Id.* at 298.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citations omitted).

<sup>11</sup> *Id.* at 299.

<sup>12</sup> *Id.* at 300.

<sup>13</sup> *Id.* at 301 (Everett, C.J., concurring in the result).

<sup>14</sup> *Id.* at 301-02.

reversal, Everett concluded, as identification of Roa's rental space "could have been determined . . . quite readily" and, thus, "a variant of the doctrine of inevitable discovery" could be applied.<sup>15</sup> Judge Everett, however, raised a caution flag:

Even though here we have a basis for affirming, this case demonstrates the problems that may arise if, despite a request for counsel, an investigator asks a suspect for consent to search his property. In the first place, the absence of counsel may tend to make the voluntariness of the consent more questionable. Even more importantly, it may be difficult to obtain consent without eliciting some incriminating admissions—especially in the form of authentication or identification of evidence. Thus, after a request for counsel, the safest course is for the investigator to deal with the suspect's attorney, rather than to rely on the distinction between consent and communication.<sup>16</sup>

Also concurring in the result, Judge Sullivan disagreed with the separation of fourth and fifth amendment analysis. Because Roa had asserted his right to counsel, Sullivan reasoned, to ask for consent to search was a violation of the bright-line request for counsel rule of *Edwards v. Arizona*.<sup>17</sup> He concluded, however, that the exclusionary rule did not apply as the evidence found in the rental space would inevitably have been discovered.<sup>18</sup>

The courts's opinions in *Roa* address interesting questions on the relationship between fourth and fifth amendment interests. The compartmentalizing of fourth amendment and fifth amendment issues by Judges Cox and Everett is the established approach.<sup>19</sup> The voluntariness of a consent to search is viewed as not implicating fifth amendment concerns.<sup>20</sup> Aside from this line-drawing, however, the rationale underlying the *Edwards* rule makes the point arguable. As Judge Cox noted in a recent opinion applying the *Edwards* rule, a request for an attorney indicates the suspect's "own view that he is not competent to deal with the authorities without legal advice."<sup>21</sup> This rationale could also be applied to bar a request for consent to search after the right to counsel is invoked. One's view on the soundness of the *Edwards* decision would likely affect any possible extension to the consent issue.

Judge Everett's concluding caution flag also raises important points. While his warning against improperly obtaining incriminating authentication or identification of evidence

along with the consent to search is an important concern, identifying the property to be searched is often not an issue. His caution to investigators to deal with suspect's attorney, rather than relying on the "distinction between consent and communication,"<sup>22</sup> will likely not be heeded. Dealing with the attorney will undercut the likelihood of consent. Perhaps the best analytical approach is a balanced application of the test of voluntariness for consent to search. But the possible illogic of "voluntarily" consenting to a search where evidence will be found make the issue a tough one. Major Wittmayer.

### Voluntary Abandonment—A New Defense?

In *United States v. Byrd*<sup>23</sup> the Court of Military Appeals has opened the door for the application of voluntary abandonment as a new special defense. Although Rule for Courts-Martial 916<sup>24</sup> does not list voluntary abandonment as a special defense, Chief Judge Everett stated in *Byrd* that voluntary abandonment must be recognized as a special defense in military practice for charges of attempted crimes.<sup>25</sup>

Pursuant to his plea, Private Byrd was convicted of attempted distribution of marijuana. During the providence hearing, Byrd admitted receiving \$10.00 from another soldier and consenting to take the money off a military installation to purchase marijuana. The accused also stated that he purchased a bottle of liquor with the money because he was afraid he would get caught if he tried to bring marijuana back on post.<sup>26</sup> The trial judge accepted the guilty plea to attempted distribution. The judge found that when the accused took the money and left the installation in a cab to buy drugs, he was taking a direct step toward the commission of the crime of distribution.<sup>27</sup> This direct step constituted the overt act necessary to convict for an attempt under Article 80.<sup>28</sup> Based on these facts, the Court of Military Appeals first addressed the providence of the accused's plea and then considered the propriety of applying the defense of voluntary abandonment to military practice.

### Guilty Plea Improvident—No Overt Act

The Court of Military Appeals concluded that the accused's conviction for attempted distribution of marijuana was improper.<sup>29</sup> The court first reviewed the guidance provided by Article 80 and the Manual. To constitute an attempt, there must be proof beyond a reasonable doubt that the accused had the specific intent to commit a specific

<sup>15</sup> *Id.* at 302.

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

<sup>17</sup> *Id.* at 302-03 (Sullivan, J., concurring in the result).

<sup>18</sup> *Id.* at 303.

<sup>19</sup> *United States v. Stoecker*, 17 M.J. 158 (C.M.A. 1984) (Everett: "No warning of rights under Art. 31(b) is required for a valid consent to search. . . . [I]t is merely one factor to be considered in determining whether the consent was voluntary in light of the totality of the circumstances.")

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

<sup>21</sup> *United States v. Applewhite*, 23 M.J. 196, 199 n.3 (C.M.A. 1987) (quoting Justice White's concurring opinion in *Michigan v. Mosley*, 423 U.S. 96 (1975)).

<sup>22</sup> *Roa*, 24 M.J. at 302.

<sup>23</sup> 24 M.J. 286 (C.M.A. 1987).

<sup>24</sup> Manual for Courts-Martial, United States, Rule for Courts-Martial 916 [hereinafter MCM, 1984, and R.C.M., respectively].

<sup>25</sup> 24 M.J. at 292-93.

<sup>26</sup> *Id.* at 287.

<sup>27</sup> *Id.* at 288.

<sup>28</sup> Uniform Code of Military Justice art. 80, 10 U.S.C. § 880 (1982) [hereinafter UCMJ].

<sup>29</sup> 24 M.J. at 290.

offense. This intent must be accompanied by an overt act that directly tends to accomplish the unlawful purpose.<sup>30</sup> Furthermore, the required act must be more than mere preparation and must be a direct movement towards the commission of the offense.<sup>31</sup>

The major concern of the court in *Byrd* was whether the accused's actions of taking a friend's money off post to buy drugs was mere preparation or an overt act. The court recognized that the legislative history of Article 80, U.C.M.J. and the Manual for Courts-Martial provided only general guidance in discerning when an act is preparation or an overt act.<sup>32</sup> Accordingly, the court looked to case decisions for guidance. These decisions teach that to be guilty of an attempt, the accused must have engaged in conduct that constitutes "a substantial step toward the commission of the crime" and that this step must be "strongly corroborative of the firmness of the accused's criminal intent."<sup>33</sup> Applying this test, the court concluded that the accused's conduct did not establish an attempt. The taking of a friend's \$10.00 and getting into a cab was merely preparation, and riding to the liquor store where the drugs were to be purchased was not strongly corroborative of the firmness of the accused's intent to distribute marijuana. The act was simply too ambiguous, and too many other steps remained before distribution could be consummated.<sup>34</sup>

#### The Defense

Although R.C.M. 916 does not include voluntary abandonment as a special defense, the defense has been recognized by the commentators,<sup>35</sup> The Model Penal Code,<sup>36</sup> and various decisions of both state and federal courts.<sup>37</sup> The defense provides that when an accused's conduct would otherwise constitute an attempt, it is a defense that the accused abandoned his effort to commit the crime under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.<sup>38</sup> As such, the defense has only been valid when an accused abandons his

intended crime because of a change of heart.<sup>39</sup> The defense has not been available when abandonment was the result of fear of immediate detection, where abandonment was due to a decision to await a better opportunity for success, or because of inability to complete the crime.<sup>40</sup>

In applying this doctrine to the facts of *Byrd*, Judge Everett concluded that although the defense must be recognized in the military, the defense was not raised.<sup>41</sup> The reason that the accused desisted from the venture was not because of a change of heart but because of a fear of apprehension.<sup>42</sup>

#### Limitations

While the lead opinion in *Byrd* indicates that the defense of voluntary abandonment must be applied in military practice, the defense is limited. The defense is available only to charges of attempted crimes.<sup>43</sup> Additionally, the requirement that the abandonment be caused by a change of heart will limit application of the defense under most fact scenarios. Finally, the opinion in *Byrd* is of questionable precedential value. The case was decided when the court concluded that the accused's acts did not constitute an overt act. Chief Judge Everett, however, went on and developed the defense and made it applicable to military practice. Although Judge Cox agreed with Chief Judge Everett that there was no overt act, he did not join the Chief Judge's opinion in adoption of the defense because of his reservations about making substantive law on a guilty plea record.<sup>44</sup> Because Judge Sullivan did not participate in the decision, no clear majority view is espoused by the court. Because of the strength and logic of the lead opinion, however, practitioners should recognize the defense, and trial judges should provide appropriate instructions should the facts raise the defense. Major Mason.

<sup>30</sup> MCM, 1984, Part IV, para.4c(1).

<sup>31</sup> MCM, 1984, Part IV, para.4c(2).

<sup>32</sup> 24 M.J. at 289.

<sup>33</sup> 24 M.J. at 290; *United States v. Jackson*, 560 F.2d 112 (2d. Cir.), cert. denied, 434 U.S. 941 (1977).

<sup>34</sup> 24 M.J. at 290.

<sup>35</sup> See R. Perkins & R. Boyce, *Criminal Law* 654 (3d ed. 1982).

<sup>36</sup> See Model Penal Code § 5.01(4) (1962); Model Penal Code and Commentaries 296-97 (1985).

<sup>37</sup> See cases and statutes cited 24 M.J. at 291 n.1, 292 n.2

<sup>38</sup> See *id.* at 291.

<sup>39</sup> *Id.* at 292.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 293.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 291-92.

<sup>44</sup> *Id.*

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

**Servicemen's Group Life Insurance**

The Legal Assistance Branch, OTJAG, recently sent an important message to the field regarding a problem that arose with a deceased soldier's Servicemen's Group Life Insurance beneficiary designation form. The message's date/time group is 271500Z Jul 87, from DA Washington DC, DAJA-LA, and it is reprinted below in its entirety.

Pass to all judge advocate/legal assistance offices.

Subject: SGLI and DD Form 93 designations

1. All judge advocates are reminded of their responsibility to ensure that they coordinate with their MILPO personnel concerning appropriate Servicemen's Group Life Insurance (SGLI) and Record of Emergency Data (DD Form 93) designations and the legal implications arising from improper designations.

2. A recent case illustrates the potential problems which can occur in this area. A soldier wished to prevent his estranged wife from receiving any benefits provided by the government, in the event of his death. He changed his SGLI beneficiary by annotating the election by stating: "See Will, see CPT. X, JAGC." The clerk preparing the form did not question the improper designation. The soldier then made a new will in which he disinherited his estranged wife. He forgot to tell the JAG officer about the SGLI designation. The soldier was killed before the error was detected.

3. As a matter of good legal practice, all JAs must be sensitive to any unusual distribution requests and ensure the client is counseled about making proper elections on the SGLI and DD 93 forms.

4. Although the JA was not directly responsible, the case serves as an important reminder for us to maintain a close working relationship with our local MILPO personnel. In light of the Gander tragedy, we must do all we can to prevent unintended consequences for the soldiers and family members we serve.

As for "unintended consequences," it should be noted that the soldier's invalid SGLI beneficiary designation resulted in a "by law" payment of SGLI benefits—to his wife.

*IRS Issues Proposed Regulations on IRA and Qualified Plan Distributions*

The Internal Revenue Service recently issued proposed regulations concerning required distributions from Individual Retirement Accounts (IRAs), annuity contracts, and qualified plans.<sup>45</sup> The proposed regulations would be effective for calendar years after 1984. Taxpayers may rely on the proposed regulations until the final regulations are released.<sup>46</sup>

The rules under the proposed regulations generally apply to both qualified plans and IRAs. A distribution must be made from an IRA in the year in which the owner reaches the age of 70½ and then for each year thereafter. The minimum distribution for each year is determined by dividing the account balance by the lesser of the "applicable life expectancy" or the "applicable divisor."

The calculations necessary to determine the "applicable life expectancy" are based on the type of ownership and the number of beneficiaries, and on whether the beneficiary is a spouse of the owner. The "applicable divisor" is a factor computed by referring to a table included in the proposals. Use of the "applicable divisor" is not mandatory until calendar years after 1988; current rules may be applied for tax years prior to 1989.

The minimum distribution must be made by April 1 of the year following the year in which owner reaches 70½. For each year thereafter, distribution must be made by December 31.

Generally, the account balance used to calculate the minimum distribution is determined by referring to the account balance as of the close of business on the last day of the previous calendar year. The base for determining the minimum distribution is slightly different for qualified plans; the employee's benefit under the qualified plan is used instead of the account balance on December 31 of the preceding year. The employee's benefit is valued as of the last valuation date in the prior calendar year and is adjusted for contributions, forfeitures, and distributions made after that date.<sup>47</sup>

The minimum distribution rules under the proposed regulation will apply to all taxpayers who reach the age of 70½ after 1987.<sup>48</sup> The proposed regulations also provide special guidance for determining the amount of minimum distributions to be made by December 31, 1987 for calendar years 1985, 1986, and 1987. Captain Ingold.

*Electronic Filing of Tax Returns*

The following information was submitted by Chief Warrant Officer Three Gary A. Durr and Chief Warrant Officer Two Charles R. Poulton, Legal Administrators, XVIII Airborne Corps & Fort Bragg.

In April 1987, The XVIII Airborne Corps Office of the Staff Judge Advocate became the first non-commercial electronic tax preparer in the United States. This participation

<sup>45</sup> Prop. Treas. Reg. §§ 1.401(a)(9)-1 and 1.408-8 (1987).

<sup>46</sup> Preamble to Prop. Treas. Reg. (1987).

<sup>47</sup> Prop. Treas. Reg. § 1.401(a)(9)-1, Q & A F-1 through F-7 (1987); Prop. Treas. Reg. § 1.408-8, Q & A A-1 (1987).

<sup>48</sup> Prop. Treas. Reg. § 1.401(a)(9)-1, Q & A B-2 (1987).

in the Internal Revenue Service's (IRS) electronic filing program marks the beginning of a new era in automation for the Judge Advocate General's Corps.

The primary benefit of electronic tax filing is that it reduces the time required to issue a refund check by about two to three weeks. Another major advantage is that it allows tax return preparers to serve clients more efficiently. Most of the commonly prepared forms, including Form 1040 and Schedules A, B, C, D, E, R, and SE, can be filed electronically.

Electronic returns can be accepted from preparers in ten states and six districts. The ten states included in the program are Alabama, North Carolina, Indiana, Kentucky, Wisconsin, Nebraska, Arizona, Virginia, Utah, and Washington. The districts included in the program are Albany and Buffalo, New York; Cincinnati, Ohio; Dallas, Texas; and Sacramento and San Jose, California. In all districts and states included in the program, taxpayers will be permitted to have refund checks deposited directly into savings or checking accounts.

Installation SJA offices located in one of the states or districts may apply to participate in the program. Applicants must meet several qualifications to be accepted into the program. The office must intend to file at least 100 1987 tax returns in 1988, comply with applicable Revenue Procedures, and have a computer hardware and software package capable of making electronic transmissions in the proper format. Several configurations may be used by electronic preparation filers. Detailed specifications for those offices interested in participating in the program may be obtained by contacting the Electronic Filing Coordinator in the local IRS District Office.

An information packet describing the XVIII Airborne Corp's program and hardware and software configuration is available to SJA offices by contacting CW2 Poulton, Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, NC 28307-5000, telephone (919) 396-5506/5306 or AUTOVON 236-5506/5306. General information on the electronic filing program is also available from the Internal Revenue Service by calling 1-800-423-1040.

### Consumer Law Notes

#### *Chagall or Charlatan?*

For the past two years, a local Honolulu newspaper has run periodic stories about a thriving market in "fake" prints, wall sculptures, and lithographs which are advertised to have been crafted or supervised by the famed artists Marc Chagall and Salvador Dali. The works, valued from \$10 to \$100, have sold for \$1,500 to \$9,500. Center Art Galleries—Hawaii, Inc., has sold 1,200 copies of a purported Chagall print for \$1,500 each. According to the late Chagall's wife, Valentine, this print is "definitely a fake," because her husband did not authorize or participate in its production. Chagall's long-time printer and numerous appraisers, critics, and collectors agree.

While the issue has received publicity primarily in Hawaii, the suspect works have been sold worldwide and have been popular with military members who are told that the works are a good investment. Numerous buyers have discovered too late that the value of the works is minimal and

that a high degree of sophistication is required to understand the art market. Although the potential for consumer abuse may be significantly curtailed by the results of a federal grand jury that met this past summer in Honolulu, those buying products whose origin is a dominant factor in determining value are again reminded of the potential for consumer fraud. Major Hayn.

### *Binding Arbitration Agreements Upheld*

The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), mandates that arbitration agreements be given full effect, prohibiting parties from raising their claims before a court when they have agreed to submit such claims to binding arbitration instead. Although binding arbitration agreements may not be enforced when there is a federal statute that explicitly restricts the effectiveness of an arbitration agreement in the particular case or when the agreement results from fraud or excessive economic power that would provide grounds for the revocation of any contract, the United States Supreme Court has paid extreme deference to such agreements in several recent cases. See, e.g., *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter, Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

While such arbitration agreements may benefit creditors and sellers by limiting their liability where such parties would otherwise be required to pay attorneys' fees, court costs, and multiple or statutory damages under federal law or state consumer protection statutes, these agreements can also work to the consumer's advantage by simplifying the process of asserting claims and defenses against the creditor and avoiding the creditor's use of the courts as a "collection mill."

Notwithstanding the recent judicial approval of arbitration agreements, however, a party who wishes to avoid enforcement of such agreements still may be successful on several bases. If, for example, the agreement provides for arbitration of all controversies "arising under the contract," the party may argue that claims alleging unfair or deceptive acts are outside the scope of the agreement, while an arbitration clause applying to controversies "relating to" the contract would require arbitration of such claims. Second, agreements that bind only the consumer to the arbitrator's decision may not constitute "an agreement in writing to submit to arbitration," as described in the Federal Arbitration Act, 9 U.S.C. § 2 (1982), and may therefore not be subject to the Act's enforcement provisions. Third, courts are likely to find that provisions that require binding arbitration of consumer warranty disputes are specifically precluded by federal statute, as the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), requires that the findings of mandatory arbitration mechanisms be nonbinding on the consumer. Fourth, a creditor who sues on a contract that contains a binding arbitration clause waives enforcement of that clause, permitting the consumer either to seek enforcement of the clause and return the dispute to arbitration or to raise counterclaims in court. Finally, as with any other contract provision, if the arbitration clause is the result of fraud, duress, minority, unconscionability, or a contract of adhesion, it may be unenforceable under general contract law.

Judicial deference to arbitration clauses mandates careful scrutiny by consumers and their legal assistance attorneys when contemplating the initial contract and when considering enforcement options. Major Hayn.

#### *Weight Loss While You Sleep? Dream On!*

The need for a special column in *The Army Lawyer* entitled "Weight Loss Notes" is becoming obvious, as another magic cure for spare tires and other unsightly bulges is found ineffective. Pursuant to an investigation by the Minnesota attorney general which revealed that products were falsely advertised by "Advanced Dream Away" as providing effortless, while-you-sleep weight loss, NutriMarketing has agreed to stop marketing their "Advanced Dream Away" and similar pills in that state.

Consumers (in the "caloric" sense) will be disappointed to learn that Dream Away's advertised results of clinical studies involving rodents, the amino acids L-Lyside and L-Arginine, and effortless weight loss, have not been proven accurate. Maybe if everybody stayed and watched the commercial instead of going to the refrigerator. . . .

#### *Inventors Win One*

Design and Funding, Inc., sold "invention development services" throughout the United States from 1977 until November 1982, when it declared bankruptcy. Pursuant to complaints from consumers in Maryland, Pennsylvania, Virginia, New Jersey, California, and Washington, D.C., the Maryland Consumer Protection Division filed suit against the firm in 1983 alleging that it deceived potential clients by grossly exaggerating its achievements and claiming that it could help inventors market their ideas and products.

In the largest single refund made under the Maryland Consumer Protection Act, Design and Funding agreed to pay nearly one-half million dollars in restitution to Maryland consumers. The firm's former clients who will receive portions of the settlement include inventors of such devices as an improved baseball pitcher's mound, a dipstick wiping device, a leather-bound cremation urn designed to resemble a book, and a toothbrush that automatically supplies its own toothpaste.

#### *Civil Service Exam Preparation Ads Found Deceptive*

The Achievement Center of Manchester, New Hampshire, has agreed to stop implying in advertisements for postal exam workshops that postal service jobs or exams are about to be announced. Pursuant to the agreement, consumers must be told before paying for the workshops, which are offered to prepare people to take civil service exams, that the U.S. Postal Service has not advertised any examinations or any clerk-carrier job openings. Potential registrants for adult education and other courses are reminded to inquire carefully about job placement opportunities and the credentials of instructors before enrolling.

#### *Pyramid Schemes Offer Variety, But Little Investment Return*

Pyramid schemes involving an "Airplane Game" centered in New York, a health-fraud scam involving a substance known as "Germanium" and advertised as a cure

for AIDS centered in Utah, a multi-level mail order program called "Gold Rush of the 1980s" centered in Missouri, long-distance telephone services centered in Nevada and Texas, and shopping clubs through which participants can purchase various products and services at a discount centered in Illinois, have all been the subject of recent investigations or consent agreements. Such schemes typically promise that no capital investment will be required, that the schemes are legal, and that a high level of return will be achieved within a very short time. Consumers who are considering participation in such allegedly "low risk," "low investment," "fool-proof" schemes should first consult local Better Business Bureaus and consumer protection agencies.

#### **Family Law Notes**

Earlier this year, the Florida Bar held a Legal Assistance Symposium for civilian and military attorneys. Mr. John S. Morse, of Tampa, Florida, presented a class on recent developments in Florida family law that should be of interest to legal assistance attorneys. In addition to his private practice, Mr. Morse is a JAG lieutenant colonel in the Air Force Reserve. The following notes are from his Family Law Update materials.

#### *Retired Pay*

In *Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986) the Florida Supreme Court on June 26, 1986, rendered its landmark decision concerning the trial court's right to distribute retirement funds. In that cause of action, the parties had been married for more than thirty years. Mrs. Diffenderfer worked as a part-time nurse and gave birth to two children. The husband worked throughout the marriage and had acquired retirement benefits the value of which when reduced to present value equaled approximately \$300,000.00. The trial court considered this asset when equitably distributing the property acquired by the parties during the course of their marriage. On appeal, the 1st District Court of Appeals (DCA), in reversing the trial court, rejected the wife's claim that retirement plan should have been recognized as a marital asset and the appellate court asserted that it could only be considered a source from which to pay maintenance and support obligations.

The supreme court reversed and remanded the cause of action, holding "that a spouse's entitlement to pension or retirement benefits *must* be considered a marital asset for the purposes of equitably distributing marital property." "While reduction to present value might best place the benefits in proper prospective for such purposes, we decline to impose any rigid rules and leave the doing of equity to the trial court. The trial court's scheme of distribution, of course, remains subject to appellate review under the 'reasonableness' standard set forth in *Canakaris*." (382 So. 2d 1197 (Fla. 1980)).

As a consequence of this decision, it is now clear that Florida courts may award retirement funds as property to be equitably divided *or* as a source from which to pay periodic, permanent alimony.

In *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986), the supreme court was confronted with the issue of the treatment of a husband's military retirement pension. In that case, the parties had been married for approximately twenty years. The husband was an active duty colonel in the United

States Air Force and the wife had remained unemployed during the course of the marriage, "in order to fulfill the duties of a military wife and accommodate her husband's career moves." The trial court awarded as property, not alimony, one-half of the husband's future military retirement benefits. The Supreme Court affirmed the trial court's method of distribution of future military retirement benefits.

Since entry of the *Diffenderfer* and *Pastore* decisions, Florida's appellate courts have published several decisions relative to distribution of retirement funds. They are of considerable importance in dealing with this issue:

In *Howerton v. Howerton*, 491 So. 2d 614 (Fla. Dist. Ct. App. 1986), 5th DCA reversed a trial court's award of fifty percent of the husband's pension which had been acquired during the period of time that he was employed at Southern Bell. The award and decision indicated that the spouse would be entitled to fifty percent at such time as the husband retired from the company including fifty percent of any lump sum benefits. The appellate court's reversal of this decision is found in the fact that the court made no evaluation of the pension, but stated that the wife would be entitled to one-half interest at whatever time the husband retired. If the husband continued to work, then the benefit would increase and the wife would be sharing benefits which accrued after the dissolution of the marriage. The DCA found this to be an improper award.

In *Summers v. Summers*, 491 So. 2d 1270 (Fla. Dist. Ct. App. 1986), the 2nd DCA in reviewing an equitable distribution of property reversed an award of lump sum alimony in the sum of \$20,000.00. In this instance, the wife's pension plan was being acquired from the United States Postal Service where she had been employed for twelve years. The husband also had a pension plan; however, because of the disparity of the value of the plans, the trial court made the award of lump sum alimony. The 2nd DCA reversed and remanded the decision because there was no evidence to determine whether the wife's pension plan was vested. The court said, "if the plan is not vested its value should not have been so considered because the plan would not have been established as security for the future. In that event any entitlement to payments from the plan might be lost. If for example there was a change of employment."

In *Reyher v. Reyher*, 495 So. 2d 797 (Fla. Dist. Ct. App. 1986), the 2nd DCA had the issue of the value of a retirement plan where the parties had been married for twenty-six years; in this instance, however, the plan had received contributions for nine years prior to the marriage. The 2nd DCA held that premarital contributions when proven must be excluded from an equitable distribution of the plan.

#### Marital Misconduct

In 1986, the supreme court addressed the issue of the effect of marital misconduct in proceedings for dissolution of marriage. This landmark decision is *Noah v. Noah*, 491 So. 2d 1124 (Fla. 1986).

From a statutory standpoint, Florida law retained a vestige of fault only in provisions relating to payment of alimony. In that regard, Fla. Stat. § 61.08(1) states as follows: "the Court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony will be awarded to such spouse and the amount of alimony, if any, to be awarded."

The most recent comprehensive review by the Florida Supreme Court of the issue of marital misconduct came in 1979 in the case of *Williamson v. Williamson*, 367 So. 2d 1016 (Fla. 1979). The court awarded alimony in part because the husband abandoned his wife and took a considerable portion of the family fortune. In that instance, the court said:

Under such circumstances, we conclude that it is entirely proper as a matter of equity to base an alimony award partially on a finding that one spouse is more responsible than the other for the difficult economic circumstances facing both parties. This is not an assignment of fault but rather of economic reality.

The 1st DCA in *Noah v. Noah*, 467 So. 2d 426 (Fla. Dist. Ct. App. 1985) reversed a trial court's decision which awarded virtually all of the parties' property to the wife because of the issue of marital misconduct. In reversing the decision, the 1st DCA certified the following question to the supreme court of great public importance:

Does the *Williamson* decision permit a trial judge to make distribution of virtually all of the assets to a faithful wife in part because her husband has been unfaithful?

The supreme court answered this question in the negative. Further, it outlined in some detail the use of evidence of marital misconduct. In doing so, the court ratified three appellate court decisions. In *Claughton v. Claughton*, 344 So. 2d 944 (Fla. 3rd Dist. Ct. App. 1977), the 3rd DCA held that a trial court must consider the other spouses' conduct in mitigating or in defense of the conduct of the alimony seeking spouse. In *Escobar v. Escobar*, 300 So. 2d 702 (3rd Dist. Ct. App. 1974), the court held that the trial court could refuse to consider adultery of a non-alimony seeking spouse when it was offered by an alimony seeking spouse solely to obtain an increase in an award of alimony. In *Langer v. Langer*, 463 So. 2d 265 (3rd Dist. Ct. App. 1984), the court stated that adultery and drug abuse, if proven, may have contributed to the depletion of the financial resources of the family and it may be admissible as to that issue.

Despite the fact that there may be appropriate instances for the use of evidence relating to marital misconduct, the supreme court clearly indicated that the mandate of the trial court is to secure equitable distribution of property and assets, and not to punish one party.

#### Florida Legislative Update

In 1986, the Florida Legislature enacted numerous changes in a variety of statutes dealing with paternity, dissolution of marriage, and support enforcement. The text of the legislative changes is located in chapter 86-220 of volume 8 of *West Session Law Service*.

#### Claims of paternity chapter 742:

1. The authority for paternity issues to be tried by jury is abolished.
2. Statutory Authority for the requirement of HLA blood testing is established and a system for securing summary judgment on determination of paternity in cases where HLA testing is ninety-five percent or higher is created. Likewise, there is a summary judgment procedure available

if there is, after HLA testing, no basis for a determination of paternity.

3. The statute of limitations in paternity claims has been clarified such that under Fla. Stat § 95.11 the statute now runs for a period of four years after the date of the majority of the child.

Dissolution of Marriage, Fla. Stat. § 61:

1. The residency requirement has been clarified such that parties may obtain a dissolution of marriage if one of the parties to the dissolution of marriage has been a resident in the state for six months before filing the petition.

2. The legislature created the Study Commission on Child Support Enforcement. The Commission is to provide

guidelines by not later than October 1, 1987 on support awards in paternity, dissolution, separation, or modification of support hearings or any other proceeding in which child support is an issue.

Support Enforcement:

1. Provisions were enacted in regard to enforcement of support obligations through an immediate income deduction order.

2. Legislative changes were enacted that require that governmental depositories must accept personal checks in satisfaction of support obligations.

## Claims Report

*United States Army Claims Service*

### The Army Claims System Gets a Facelift

*Colonel Jack F. Lane, Jr.  
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*NOTE: This article is based on a letter sent to CONUS claims settlement and approval authorities and the command claims services.*

Two events in the claims arena will cause the Army Claims System to change in its complexion over the next year. The first is the publication of a complete revision of Army Regulation (AR) 27-20, Claims (10 July 1987) (effective 10 Aug. 1987). The major changes wrought by this revision were discussed in the Claims Report in the May 1987 issue of *The Army Lawyer* at page 62. The second is the implementation of an automated claims data management system that will cause the demise of the DA Form 3 and ADP printouts from the U.S. Army Claims Service (USARCS), and provide field claims offices with the in-house capability to manage its own claims data and provide truly informative input to USARCS.

The revised AR 27-20 creates a more formal claims organization that modifies the current relationships between all types of claims offices, including both USARCS and the command claims services. Terminology has been revised to preclude the current overuse of the term "authority" and to standardize field office labels world-wide. Underlying this change is the delegation of more authority to field offices, especially in chapter 4 (Federal Tort Claims Act). This new relationship is also factored into the new automated Claims Data Management Programs that assign new "command and office codes" to each settlement and approval authority.

Basic to this new claims organization is the elimination of the chapter-by-chapter "laundry lists" of settlement and approval authorities. To a certain degree it was meaningless, as only commands with an assigned command and office code had funding for the payment of claims. Under the revised AR 27-20, with certain exceptions, area claims

offices (the new term for "area claims authority") are designated by USARCS in the Continental United States (CONUS) and by command claims service outside CONUS; the legal offices of engineer districts are, by regulation, area claims offices. Area claims offices designate most claims processing offices. As USARCS still maintains sole control of funding codes, the creation of any new office with payment authority requires USARCS approval. To meet a variety of needs, the AR authorizes the creation of four types of claims processing offices. These are claims processing offices, claims processing offices with approval authority, medical claims processing offices (designated by USARCS only), and special claims processing offices. These functions were formerly performed by "claims processing authorities," "maneuver claims services," "disaster claims officers," and "claims teams." Three of these offices are of a permanent nature and one, the special claims processing office, is intended as a temporary, event-specific extension of the area claims office. The roles to be played by these offices are covered in paragraph 1-8c of the revised AR 27-20.

Area claims offices in CONUS continue to have an assigned geographic area of responsibility. Under the revised AR 27-20, other claims offices within each geographic area (offices with approval authority or investigative responsibility only) are claims processing offices under the jurisdiction of the area claims office. Overseas, the area claims offices operate along command lines; for example, in Europe the main division SJA office will be the area claims office and the branch offices of that division will be claims processing offices thereunder. Each CONUS claims settlement and approval authority and the command claims services have been provided a listing of area claims offices and claims processing offices with approval authority (listed under their supervising area claims office) and, for CONUS area

claims offices, their geographic area of responsibility. In accordance with paragraph 1-8b(2) of the revised AR 27-20, area claims offices can have other military installations, e.g., a supply depot, in their area investigate claims caused by their personnel or occurring within a selected portion of the area. These installations can be designated as claims processing offices (AR 27-20, para. 1-8c(1)). Only offices having a judge advocate or civilian claims attorney can be given approval authority upon receiving a command and office code.

Under the new automated claims data management programs to be fielded soon, claims offices will use a new three digit command and office code (e.g., "441") in lieu of the current four digit code (e.g., "05-02"). The theory of the automation codes is quite simple. CONUS area claims offices have codes that show their area and that they are the "No. 1" office in that area (e.g., the area claims office for area 34 is coded "341"). The claims processing offices in the area are coded with the area number and a subsequent office number (e.g., if there are two such offices in area 34, they would be "342" and "343"). All Corps of Engineer claims offices have a beginning designation of "N" followed by a two digit office number. In Europe, all offices have a beginning designation of "E"; the other overseas designations are K (Korea), P (U.S. Army Pacific), and S (U.S. Army South). The respective command claims service is further designated "01." In Europe, single offices reporting directly to USACSEUR are designated "02" through "09." Major units with branch or other subordinate offices have their own distinct second digit and consecutive third digits, beginning with the area claims office as "0." All foreign claims commissions have "9" as the second digit and either a number or letter as the third digit. Finally, SETAF offices are designated as "ES" for "Europe/SETAF." Similar coding schemes are followed in the other overseas theaters. Thus, it will be possible to retrieve a specific set of records by area, command, theater, or commission with a simple computer command.

In CONUS, it is important to maintain effective liaison with the state National Guard, even more so now that many of their activities are covered by the Federal Tort Claims Act. Accordingly, CONUS area claims offices have been designated as the *primary* liaison offices for National

Guard matters. These offices were generally selected based on the location of the Guard headquarters in their assigned geographic areas. Other claims offices whose area covers part of the state must provide assistance to National Guard personnel and units involved in incidents within their area of responsibility, but do not need to maintain a constant liaison with the Guard headquarters.

To ensure the best possible claims program for the Army, Active Army area claims offices should provide technical assistance to engineer claims offices located in their geographic areas, especially in the area of personnel (chapter 11) claims. CONUS area claims offices are also urged to make use of reserve judge advocates located in their areas for investigations and/or legal research. These activities can be assigned as projects for which the reservist can be awarded retirement points. USARCS can assist in identifying reservists who have claims experience.

A recent management study of USARCS conducted by a team headed by Brigadier General O'Roark has resulted in a reorganization of USARCS. Under this reorganization, Affirmative Claims has been made a part of the Personnel Claims and Recovery Division, and the General Claims and Foreign and Maritime Claims Divisions have been merged into a Tort Claims Division. The Management and Budget Division has been restructured as a Budget/Information Management Office and a Support Services Office, both under the supervision of an Executive. The day-to-day assistance in tort claims for CONUS offices will be provided by the CONUS Torts Branch of the Tort Claims Division, whose seven action attorneys have designated geographic regions to overseas. Assistance on personnel claims can be obtained from the Personnel Claims Branch (formerly the Adjudications and Congressional Correspondence Branch).

The efficient operation of the Army Claims System depends on all claims offices assuming their responsibilities and exercising their authority professionally and with dedication. This has been clearly enunciated in several policy letters issued by The Judge Advocate General. USARCS cannot do it all; the system depends on teamwork to be successful. We at USARCS pledge our continuing support to field claims offices in accomplishing this vital legal service for the Army and its soldiers.

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## Rental Car Insurance

James D. Wilson  
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You have just arrived at National Airport on your way to Charlottesville to learn the latest on how to practice law the Army way. You get in your rental car and head toward the Beltway. Suddenly your reverie about returning to the JAG Corps regimental home ends with a bang as the car in front of you stops and you do not. You get out of the car and the driver of the car in front of you says "whiplash."

This simple scenario has several significant claims issues. Who pays the \$2,500 deductible to your rental car company? Who pays the driver for his whiplash? Who pays for

your camera which slid off the front seat at impact and broke?

### Collision Damage Waiver

When a government traveler, or anyone else, rents a car, the rental car company customarily offers several insurance

coverages and waivers for which the traveler may pay.<sup>1</sup> Most significant is the Collision Damage Waiver (CDW). The rental car companies consider it to be a waiver of the deductible on their collision insurance coverage. The deductible is usually between \$1,500 and \$2,500.

The Joint Federal Travel Regulations (JFTR), paragraph U3415-C2b (for military) and the Joint Travel Regulations (JTR) paragraph C2101-2d2 (for civilians), provide that the government will not reimburse a traveler for the purchase of CDW in the United States, Puerto Rico, and U.S. possessions and territories. Instead, the JFTR and JTR allow the finance office to pay the deductible in the event of damage to the vehicle incurred in the performance of "official business." The payment is made in one of two ways. If the traveler pays the deductible, it should be added to the temporary duty (TDY) voucher that the traveler submits at the end of the trip. The preferred method is to provide a copy of the travel orders to the rental company, along with the address of the servicing Finance & Accounting Office. The company may then file its claim directly. Periodic notices in the daily bulletin advising travelers not to purchase the CDW and how to pay for the damage have been helpful in the past in educating the traveler.<sup>2</sup> They may prevent the situation where a rental company refuses to allow a traveler to turn in a damaged vehicle without paying the deductible amount.

All too often, however, the rental company files its claims with a claims office. The claims judge advocate should find the traveler, investigate the accident, and obtain the fund cite used for the travel. The claim should then be forwarded to the servicing Finance & Accounting Office for payment. The claims judge advocate should cite the appropriate JFTR or JTR paragraph to aid the Finance & Accounting Office in paying the claim.

Effective 1 November 1986, all Army members and employees on temporary duty who rent a vehicle are provided extra collision insurance by the leasing company and its insurer.<sup>3</sup> There is no fee for the CDW and the company and its insurer assume responsibility for all collision damages to

its vehicle, provided the member or employee driving the vehicle did not cause the damages through willful and wanton negligence. A claim covered by this insurance should be denied.<sup>4</sup> Where there is no coverage due to willful or wanton negligence and the driver is within the scope of employment, the claim for the collision damage deductible should be processed under the JFTR or JTR as above.<sup>5</sup>

Regardless of whether the damage or loss occurred before or after 1 November 1986, there are several areas of concern with CDW, such as the government employee using the vehicle outside the scope of official business.<sup>6</sup> For example, after three days in Charlottesville, you decide to go to Monticello. On the way, you have an accident. Neither the JFTR nor the JTR allows payment of the CDW deductible because the accident was outside the scope of employment. The traveler is individually liable for the amount. Fortunately, many automobile insurers, including USAA, State Farm, Allstate, and GEICO, offer coverage of this risk under their policies. The language of the agreement governing claims accruing on or after 1 November 1986 is unclear as to whether the driver's being outside the scope of employment exculpates the company or its insurer; however, the language used to describe their responsibility is broad.<sup>7</sup>

The claims judge advocate should assist the Finance & Accounting Office in determining any scope of employment issues. Be aware that the typical CDW under the agreement effective before 1 November 1986 had a number of exceptions that would require the traveler or the government to pay the entire cost of repair, not just the deductible amount. A common example is a driver who drives from his hotel at the TDY site to the nearest restaurant where he has a glass of wine with dinner. As he is returning to the hotel he is rear-ended while stopped at a stoplight. The police cite the other driver, but note "HBD" (had been drinking) for the government driver. The rental company, under the CDW, is entitled to the full cost of repairs. The full amount is payable from travel funds as this use of the vehicle is within the scope of employment. The same would be true for damage by an unknown cause (e.g., while the

<sup>1</sup> One of the coverages is a first party medical expense coverage and personal coverage. Military travelers do not need medical coverage as the right to free medical care, even in civilian facilities, travels with them. Civilian travelers will be covered by Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (1982). The other coverage is for damage to personal property in the vehicle. This type of damage is covered by Dep't of Army, Reg. No. 27-20 Legal Services—Claims, chap. 11 (10 July 1987) [hereinafter AR 27-20], and will be discussed later in this article.

<sup>2</sup> A sample daily bulletin notice is as follows:

*Rental Cars.* TDY travelers authorized to obtain a rental car should be aware that the government will not reimburse them for the additional insurance coverage offered for a fee by the rental car company. If the rental vehicle is damaged, the traveler should inform the company of the circumstances surrounding the accident and provide a copy of the travel orders and the address of the servicing Finance & Accounting Office so the rental car company can seek reimbursement for the accident. If the rental car company insists that the traveler pay for the damage, the traveler should do so and file for reimbursement as a "reimbursable expense" on the travel voucher. The traveler should also inform the Claims Office at (phone number) of the accident.

<sup>3</sup> This is pursuant to an agreement between the Military Traffic Management Command (MTMC) and participating rental car companies. As the listing of rental car companies will probably change over time, the best local source for claims judge advocates to consult is the *Federal Travel Directory*, published jointly by MTMC and the General Services Administration, and available at transportation offices.

<sup>4</sup> See AR 27-20, para. 13-7h(1).

<sup>5</sup> See AR 27-20, para. 13-7h(2).

<sup>6</sup> Such use is permissible under the JFTR and the JTR as long as the traveler reimburses the government for additional costs incurred.

<sup>7</sup> In paragraph 5 of the agreement, entitled "Insurance," the following language applies:

a. *Insurance.* Government travelers on official business will not be subject to any fee for Collision Damage Waiver, and in the event of an accident, will not be subject to any collision damage responsibility. Personal Accident Insurance or Personal Effects Coverage may be offered to the Government employee but are not a prerequisite for renting a vehicle.

b. *Loss of or Damage to Vehicles.* Notwithstanding the provisions of any vehicle Rental Agreement executed by (Name of Company) and the Government or its employees, (Name of Company) hereby assumes and shall bear the entire risk of direct loss of or damage to the vehicles (including towing, loss of use, substitutes and replacements) rented from any and every cause whatsoever, including without limitation, casualty, collision, upset, malicious mischief, vandalism, falling objects, overhead damage, glass breakage, strike, civil commotion, theft, and mysterious disappearance, except where the loss or damage is caused by the willful and wanton negligence of the government employee. When damage and loss is due to such negligence, (Name of Company) will submit its bills for such loss and damage directly to the employee's agency, rather than to the employee.

rental vehicle is parked overnight), or by a United States vehicle.

Therefore, the provisions of the JFTR and the JTR should be applied to claims accruing prior to 1 November 1986 (assuming the extra collision coverage was not purchased), and to claims accruing on or after 1 November 1986 where excepted conduct by the lessee is involved. If the coverage is purchased, the government may be considered an insured, and copies of the rental contract and insurance policy should be obtained.

### The United States as a Third-Party Beneficiary of the Rental Company's Insurance

In cases where the "in scope" government driver is at fault in damaging a third party, the United States should assert its right to be defended as a third-party beneficiary of the rental company's liability policy. As long as the driver was within the scope of employment, he or she cannot be held individually liable because of the Drivers Act.<sup>8</sup> The driver is an insured under the rental company's liability policy, which is the primary policy for the accident. The United States may also be considered an additional named insured under the policy,<sup>9</sup> and thus have standing as a third-party beneficiary of the policy, and an excess carrier. Under the agreement between MTMC and many of the rental car companies, the required liability coverage, which is not insignificant, is considered to be the primary coverage.<sup>10</sup>

The claims judge advocate must be very aggressive in urging the insurance company to assume its duty to defend. As soon as the claims judge advocate becomes aware of the accident, he or she should contact the insurance company and also begin coordination with the local United States Attorney. The United States Attorney's support can be important in getting the insurance company involved. The rental car company should be formally notified of any third party injury or damage claim and proffered the defense thereof.

The claims judge advocate cannot just sit back once the insurance company becomes involved. The rental companies often carried only the minimum liability coverage under their agreements with MTMC prior to 1 November 1986, so it is entirely possible for the damages to exceed the policy limits. Also, the rental companies can be self-insured. The claims judge advocate must be in touch with the insurance company or the rental car company so that it does not settle without including the United States as a party. The claims judge advocate should also coordinate the

case with the USARCS Tort Claims Division Action Officer, as it will be the government's best interest to settle at the same time as the insurance company.

It is still important that the claimant file a claim within the statute of limitations. It is particularly important where the local state practice would be for the claimant to sue the driver in state court to get the insurance company's attention. The United States, of course, will move to substitute the United States for the driver, remove to federal court, and move to dismiss for failure to file an administrative claim. The plaintiff should be advised of the need to file a claim; otherwise, the statute of limitations may run. Filing the state court action does not substitute for filing an administrative claim.

If the state court action has been dismissed, the claims office and United States Attorney must continue their efforts in keeping the insurance company involved. The insurer may have to be reminded that the United States may be able to bring an action for the company's "bad faith" in failing to defend.

The claims judge advocate should also assist the United States driver who is outside the scope of employment in proffering defenses to the rental company's insurer. This is beneficial as legal assistance and to attempt to preclude a claim against the United States. Where a government vehicle is at fault in causing damage and personal injury to a rental car and its government driver, the CDW should be covered under the provisions of the JFTR (unless there is a question of scope of employment) and the old MTMC agreement, or under the collision coverage provided by the rental company and its insurer under the new agreement. Personal injuries very likely will be barred by the *Feres*<sup>11</sup> doctrine or the exclusivity provisions of the Federal Employees' Compensation Act.

Finally, in cases where the rental vehicle is damaged by an employee of the United States (other than the renter), the United States and the driver should enjoy the status of third-party beneficiaries regardless whether the loss would fall under the CDW or the extended coverage required by the new MTMC agreement.

### Damage To Personal Property in a Rental Car

The rental companies now offer first party insurance for traveler's property in the vehicle. TDY travelers whose personal property is damaged in an accident while in a rental car may instead file a claim<sup>12</sup> and, as long as the traveler was not negligent, the claim may be paid. If, however, the

<sup>8</sup> 28 U.S.C. § 2679 (1982).

<sup>9</sup> See cases cited in *Federal Tort Claims Handbook*, ¶ IID8, United States Army Claims Service (USARCS) Claims Manual.

<sup>10</sup> Paragraph 5 of the MTMC agreement also provides:

a. (*Name of Company*) shall maintain in force, at its sole cost, insurance coverage for the United States Government, its employees, and any additional operators authorized under the terms of the Rental Agreement against liability for bodily injury, including death and property damage arising from the use of the vehicle as permitted by this Agreement with limits of at least \$100,000 for each person for each accident or event and, subject to the foregoing limitation, \$300,000 for all persons in each such accident or event, and property damage liability limits of \$25,000 for each such occurrence arising out of the use, maintenance condition or operation of any vehicle. The conditions, restrictions and exclusions of the applicable insurance for any rental shall not be less favorable to the Government or its employees than the coverage afforded in the United States under a standard automobile liability policy. In the event that the insurance provided in any country where a rental is made is more favorable in any respect than provided under a standard policy in the United States, then the more favorable provisions shall in all events control. Standard coverage includes mandatory No-Fault benefits as required by law. (*Name of Company*) warrants that, to the extent permitted by law, the liability and property damage coverage provided are primary in all respects to any other insurance available to the Government, Renter or any additional authorized operator.

<sup>11</sup> *Feres v. United States*, 340 U.S. 135 (1950).

<sup>12</sup> AR 27-20, chap. 11

traveler was negligent, the claim will be denied under paragraph 11-5a. Contributory negligence in personnel claims is an absolute bar to payment so, even if another party was more negligent, the claim is not payable.

### Conclusion

Claims involving rental cars are not difficult as long as the claims judge advocate keeps a few simple rules in mind:

1. Presuming no scope of employment issues, CDW deductibles are paid from the travel funds under the agreement effective before 1 November 1986. On or after that date, the loss is borne by the rental company and its insurer except where there is willful and wanton negligence.
2. Defense of the accident when there is third party loss should be proffered to the rental car company's insurer.
3. Rental car company claims for government employees other than the renter should be processed under the rental agreement.
4. Claims by government travelers for damage to their personal property are compensable under chapter 11, AR 27-20.

### Tort Claims Note

#### Recent FTCA Denials

**Flood and Flood Waters.** Claims for water damage to property caused by flooding as a result of alleged negligent design and control of local drainage systems constructed and operated as a flood control project by the U.S. Army Corps of Engineers are not payable by virtue of the exculpatory language in 33 U.S.C. § 702(c), even though the statute was enacted prior to the passage of the Federal Tort Claims Act (*National Manufacturing Company v. United States*, 210 F.2d 263 (8th Cir.) cert. denied, 347 U.S. 967 (1954); *James v. United States*, 106 S. Ct. 3116 (1986)).

**On Post Robbery.** A claim for property loss suffered by a civilian while visiting a military installation is not payable when the loss results from a robbery or burglary by an unknown person. If the perpetrator is identified as a soldier, appropriate action may be taken under Article 139, UCMJ.

**Car Damage at Baseball Game.** A claim for a windshield broken by a baseball hit by a player is not payable when the car is parked by a participant or spectator at a place chosen by the claimant or his or her agent.

**Car Damaged by Propelled Rock.** A claim for a windshield broken by a rock propelled by the tire of an Army

vehicle operated in the opposite direction at a speed commensurate with the surface condition of the road is not payable. Where mud flaps are required by local law and the rock flies into the windshield of a following vehicle, the claim is payable if properly proven, e.g., fresh complaint or identification of the Army vehicle.

**Recreational Users.** A claim for injuries caused by falling on an improperly designed and poorly maintained stairway in an Army recreational area is not payable under applicable state law that requires warning to users only when the actions of the landowner, i.e., the United States, are deliberate, willful, or malicious. As applied here, the United States is not liable unless it is or should be aware of a hidden danger and fails to warn of same.

**Car Damage by Pothole.** A claim for damage to a car as a result of striking a pothole 14 × 12 inches and six inches deep on an unlighted street on a military installation is not payable, even though the pothole had been in existence for five days, as severe weather conditions that continued during the entire period had only permitted temporary filling earlier in the day of the incident. It is noted that the claimant was a daily user of the road.

**Murder of Spouse.** A claim by the parents of a deceased female soldier is not payable where the decedent was murdered by her husband, also a soldier, in their offpost residence. The denial is based on the assault exception to the FTCA (28 U.S.C. § 2680(h); *Shearer v. United States*, 105 S. Ct. 3034 (1985)) and the incident to service bar (*Feres v. United States*, 340 U.S. 135 (1950)). This rule also applies to derivative claims (*Mattos v. United States*, 274 F. Supp. 38 (E.D. Cal.), aff'd, 412 F.2d 793 (8th Cir. 1969); *Van Sickel v. United States*, 285 F.2d 87 (9th Cir. 1960)).

**Unlawful Arrest.** A personal injury claim by an Army civilian employee is not payable where the injury arose from a detention based on an investigation by military police of offenses arising from the performance of official duties. The exclusive remedy is the Federal Employees' Compensation Act (5 U.S.C. § 8116(c); *Johansen v. United States*, 343 U.S. 427 (1952)).

**Loss of Educational Benefits.** A claim by an Army applicant for the loss of educational benefits to which he was mistakenly informed he was entitled by an Army recruiter is not payable as there is no loss of or damage to tangible property as required by the Federal Tort Claims Act (*Oregon v. United States*, 308 F.2d 568 (9th Cir.), cert. denied, 372 U.S. 941 (1963); *California v. United States*, 307 F.2d 941 (9th Cir.), cert. denied, 372 U.S. 941 (1963); *Idaho ex rel. Trombley v. Department of Army*, 666 F.2d 444 (9th Cir. 1982)) and the claim is based on a misrepresentation which is an exception to FTCA coverage (28 U.S.C. § 2680(h); *United States v. Neustadt*, 366 U.S. 696 (1961); *Reamer v. United States*, 459 F.2d 709 (4th Cir. 1972)).

## Personnel Claims Recovery Note

At a recent meeting of the Military-Industry Personal Property Claims Symposium, the following memorandum of understanding was agreed upon:

### Joint Military-Industry Agreement

In an effort to reduce administrative costs, both to the Industry and the Government, in settling claims against carriers for loss or damage to household goods, wherein the claim by the Government or the request for a reimbursement by an industry member is for \$25 or less, it is hereby agreed as follows:

The Military Services will not pursue a claim against a carrier for loss or damage to household goods, for \$25 or less; nor will a carrier request reimbursement for such claims from Military Services for an amount of \$25 or less.

This agreement is effective as of 1 May 1987, and shall apply to all actions taken on and after that date.

The original of this Memorandum of Understanding shall be retained by the American Movers Conference,

which shall provide conformed copies to all signatories and other interested parties.

Therefore, effective immediately, it will not be necessary to prepare "demands" where the amount owed is \$25 or less, or to send refunds for \$25 or less. This new standard applies to carriers, warehouse facilities, and all other contractors. Files forwarded to the U.S. Army Claims Service that were formerly marked "under \$25" will now be marked "closed."

### Errata

In the May issue of *The Army Lawyer*, at 64, the Claims Report announced the establishment of a "Certificate of Appreciation" which could be awarded to deserving claims office civilians and enlisted personnel meeting certain minimum criteria. The certificate is in fact a "Certificate of Achievement" and nominations should refer to it by that title.

## Automation Notes

Information Management Office, OTJAG

### Bulletin Board Blues

Downloading (i.e., copying over the telephone line) software from a local bulletin board system (BBS) can be a quick, easy, and free way to get useful utility software. It can also be a shortcut to disaster. Innocent-looking programs may disguise booby traps that can do real damage to your personal computer (PC) and your expensive DisplayWrite 3 and Enable programs. Some of these traps merely erase the other data on your hard disk (like that brief you spent all weekend writing). Erasures may occur suddenly, a full screen one moment, blank the next, or sneakily, with your data deleted byte by byte. Other software demons take over your hard disk and cause it to wildly access various sectors so it vibrates itself to pieces. The types of malicious mischief caused by these programs is limited only by the author's imagination.

The three most common species of destructive software are named for their mode of operation. They are the Trojan Horse type, the worm type, and the virus type.

Trojan Horses seem to be useful programs, but as they run, they perform the despicable deeds described above. Because Trojan Horses ruin as they run, you can probably figure out which program contains the bad code and at least evict the evil doer.

Worms are an insidious type of Trojan Horse because they work their wickedness independently of the carrier program. Worms may lie dormant for long periods of time, waiting for a preset trigger, such as a date or random number. Then the worm slinks into action, perhaps nibbling at

your data or transposing numbers in your reports, so the effects may go unnoticed until severe damage has been done. Worms may also have the other effects described above.

Viruses are the worst of the lot. Not only do they act like the Trojan Horses and worms, they also copy themselves onto your other files, infecting them with bad code. Thus, it will do no good to erase suspicious files when things go awry. Worse, the virus can spread to the other PCs in your office as your share word-processing documents or other computer files.

Prevention, of course, is the best cure—be careful if you download software from BBSs. If you download software, use only a reputable BBS, copy the programs to a floppy disk, not your hard drive, and operate the software from that floppy. If you run into trouble, get rid of that free software pronto.

Information Systems Command-Pentagon has provided the following list of known baddies (some of which have legitimate versions):

ARC513.EXE and ARC514.COM;

BACKTALK;

DANCERS.BAS (the bad version will scramble your File Allocation Table (FAT));

DISKSCAN.EXE (bad version creates bad disk sectors);

DMASTER, DPROTECT;

DOSKNOWS.EXE (may be good if 5376 bytes long);

EGABTR (deletes whatever files it finds);

EMMCACHE (scrambles as it caches files);  
FILER.EXE;  
FINANCE4.ARC, FUTURE.BAS;  
MAP;  
NOTROJ.COM (destroys files when disk is more than half full);  
PACKDIR;  
PC-Write Version 2.71 (if it is 98,274 bytes long);  
QUIKRBBBS.COM, QUIKREF;  
RCKVIDEO;  
SIDEWAYS.COM;  
STARS.EXE and STRIPES.COM;  
TIRED, TOPDOS;  
TSRMAP (erases boot sector on drive C); and  
VDIR.COM.

You can get good and useful software from bulletin boards, but remember, you are picking daisies in a minefield.

#### **Don't Touch That Dial!**

Did your folks always hound you to turn off the lights when you left the room? If so, do not apply this lesson to the use of your PC. The shock of powering up is the most traumatic experience your PC knows (unless you abuse it). When you flip that switch, a surge of current flows into the PC's power supply and thence to the capacitors and finally to the electronic chips, like a wave crashing on the shore. The point is, turn it on in the morning and off when you go home. Your system will like you and last longer.

Long periods of inactivity, however, may cause another problem: screen burn-in. When the same image is projected on the screen for a long period of time, the coating behind the glass wears away and the image is burned into the screen. Avoid this by darkening your screen with the brightness knob when you leave your PC on but do not intend to use it. Screen saver utilities, which darken the screen after a two or three minute period of keyboard inactivity, are handy and probably available from your local Director of Information Management (DOIM) shop.

#### **And Away We Go!**

Staff judge advocate offices should give serious consideration to the procurement of portable PCs to support off-site computing requirements. Portable PCs make it possible to take your legal assistance program to the people, perform litigation support tasks in court, and do your late night and weekend work at home. A recently-announced Army policy gives supervisors the flexibility they need to fully realize the potential of the personal computer (PC). HQDA Letter 25-87-2, 3 Apr. 1987, Subject: Policy on the Use of Employee and Government-Owned Personal Computers (PCs) for Off Site Processing, declared "[i]t is the policy of the U.S. Army to permit employees to use employee and government-owned PCs when voluntarily processing work off site, subject to controls over records and property."

Several common sense conditions apply to this policy. Classified or sensitive information relating to national security, procurement, or privacy act issues may not be processed off site. Regardless of the ownership of the computer or supplies, government related work is U.S. Government property. When government related work is being processed off site, the PC must be configured as a stand-alone. Licensed copyrights must be strictly observed. Payroll, supply, travel voucher, and other sorts of asset handling programs may not be processed on employee-owned PCs or off site without the program originator's approval. Finally, proprietary information will not be processed on employee-owned PCs; government-owned computers may be used if safeguards are employed.

If you have been dying to use your Apple or Commodore computer at the office, the bad news is that use of employee-owned computers at the work site is discouraged. On the bright side, your commander or agency head can grant a waiver.

The policy letter contains specific assignments of responsibility that should be considered in formulating a local off-site processing policy. It also prescribes a locally reproducible form, DA Form 5632-R, Request and Approval for Off-Site Processing. Your local DOIM should have a copy of the policy and the form on file. If it does not, give us a call.

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## **Bicentennial of the Constitution**

### **Bicentennial Update: Events of October 1787**

*This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January, April, May, June, July, and August issues of The Army Lawyer.*

Once the Continental Congress passed the resolution submitting the Constitution to special state ratifying conventions, the real battle began. At first, the Federalists—

the Constitution's supporters—held the initiative. Antifederalist legislators boycotted the Pennsylvania Assembly, denying it the quorum needed to authorize a convention. A Federalist mob descended on the homes of two absent members on September 29 and returned them to the State House. A quorum was thus secured, and the Assembly voted to call a convention. In October 1787, the state legislatures of Connecticut, Massachusetts, and New Jersey called for state ratifying conventions.

Supporters and opponents of the new government took quill pens in hand in their correspondence to one another.

Richard Henry Lee wrote that the plan in Congress was to push the Constitution to adoption before it had stood the test of reflection and due examination. George Mason wrote to Elbridge Gerry of Massachusetts that the supporters of the Constitution were pushing for ratification too quickly and without proper examination. In a letter to George Washington, Gouverneur Morris explained that some Pennsylvanians felt that the new Constitution would deny them "the power and profit of State government." On the other hand, Washington wrote that "The Constitution that is submitted, is not free from imperfections—but there are as few radical defects in it as would well be expected . . . considering the heterogeneous wars . . . and the diversity of interests." James Madison wrote to Washington, noting that the initial reaction to the Constitution was "rather favorable . . . but its adversaries will naturally be latest in showing themselves." One Walter Minto wrote to the Earl of Buchan about the great probability of ratification without bloodshed, an accomplishment that he felt would be "singular in the history of mankind."

The press was an important factor in the ratification process. Again, the Federalists had the early advantage.

Five hundred copies of the Constitution were printed for the official signing ceremony on September 17. The *Pennsylvania Gazette* reported the zeal of Pennsylvania to show her attachment to a vigorous, free, and wise frame of national government. The Constitution was printed in the *Connecticut Journal* on September 26. The *South Carolina Weekly Chronicle* published the first commentary on the Constitution in South Carolina on October 9. Several days later, the Constitution was printed in the *Savannah Gazette of the State of Georgia* and the *Georgia State Gazette*. On October 27, the first of *The Federalist Papers* was published in the *Independent Journal*, a New York newspaper. It explained and defended the proposed Constitution. The second essay appeared on October 31, advocating a union bound by the new Constitution, and rejecting the suggestion that several confederacies of states be established. During the next six months, a total of eighty-five essays were published. James Madison and Alexander Hamilton wrote most of the essays, and John Jay authored five. When published in book form as *The Federalist* in 1788, they were hailed by Thomas Jefferson as "the best commentary on the principles of government which ever was written."

## Guard and Reserve Affairs Items

*Judge Advocate Guard & Reserve Affairs Department, TJAGSA*

### 1988 JAOAC Training Dates

The Judge Advocate Officer Advanced Course (JAOAC), Phase VI, is scheduled at TJAGSA from 13–24 June 1988. Inprocessing will take place on Sunday, 12 June 1988. Attendance is limited to those officers who are eligible to enroll in the Advanced Course. Course quotas are available through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground, for ARNG personnel, and through channels from the JAGC Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN) (800-325-4916) for USAR personnel. Requests for quotas must be received at ARNG OAC or ARPERCEN by 15 Apr 1988. International law/claims detachment and contract law detachment officers who wish to attend JAOAC instead of JATT must obtain a JAOAC quota. No transfers between courses will be permitted after arrival at TJAGSA. Personnel who report to Charlottesville without a quota from ARNG OAC or ARPERCEN will be sent home.

All personnel are reminded that students must comply with Army height/weight and Army Physical Readiness Test (APRT) standards while at TJAGSA. Point of contact at TJAGSA for this course is Captain Chiapas or Mrs. Lee Park, Guard and Reserve Affairs Department, telephone (804) 972-6380 or AUTOVON 274-7110, ext. 972-6380.

### 1988 JATT Training Dates

Judge Advocate Triennial Training (JATT) for international law/claims detachments and contract law detachments will be conducted at The Judge Advocate

General's School Army (TJAGSA) from 13–24 Jun 1988. Inprocessing will take place on Sunday, 12 Jun 1988. Attendance is limited to commissioned officers only; alternate AT should be scheduled for warrant officers and enlisted members. The 2072d U.S. Army Reserve Forces School (USARFS), Philadelphia, PA, will host the training; orders will reflect assignment to the 2072d USARFS with duty station at TJAGSA.

JATT is mandatory for all international law/claims detachments and contract law detachments. Individuals belonging to these units may be excused only by their CONUSA Staff Judge Advocate with the concurrence of the Director, Guard and Reserve Affairs Department, TJAGSA.

Units should forward a tentative list of members attending AT at TJAGSA to the School, ATTN: JAGS-GRA (Mrs. Park), no later than 30 October 1987. Final lists of attendees must be furnished no later than 15 March 1988. Units are responsible for ensuring attendance of unit personnel. "No-show" will be reported to respective ARCOM Commanders for appropriate action. Military law centers and legal service team members who do not appear on the final list of attendees submitted by the unit should not be issued orders. Personnel who report to Charlottesville who have not been previously enrolled in JATT will be sent home.

Commanders are encouraged to visit their units during the training; these visits, however, must be coordinated in advance with either Mrs. Park or Captain Chiapas of the Guard and Reserve Affairs Department at the telephone numbers listed below.

ARNG judge advocates are invited to attend this training and may obtain course quotas through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground. Point of

contact at TJAGSA for this course is Captain Chiapas or Mrs. Lee Park, Guard & Reserve Affairs Department, telephone (804) 972-6380 or Autovon 274-7110, ext. 972-6380.

## CLE News

### 1. Changes in Mandatory Continuing Legal Education

Several new mandatory continuing legal education (MCLE) requirements take effect on 1 January 1988. *Missouri* has suspended implementation of its MCLE rules until 1 January.

In *Wisconsin*, the new Rules of Professional Conduct will take effect. In order to become familiar with the new rules, the Wisconsin Supreme Court requires each lawyer licensed to practice in Wisconsin and who is an active member of the State Bar to complete three hours of CLE on the new rules within the next two years. For further information, contact the Supreme Court of Wisconsin Board of Attorneys Professional Competence, 119 Martin Luther King, Jr. Boulevard, Madison, WI 53703-3355, telephone (608) 266-9760.

*Florida* will begin MCLE on 1 January. All active members of the Bar must complete 30 hours of approved CLE every three years, two hours of which must be in the area of legal ethics. Active duty military are exempt, but they must file a report establishing their status during their reporting period. Those so exempt may not engage in the delivery of legal services within the State of Florida or give advice on matters of Florida law except as required by their military duties. Those exempted under this provision must complete the 30 hours of required education in order to become active practitioners in Florida. For purposes of implementing the program, the Bar will divide its membership into three groups, with phased-in reporting deadlines of 1 January 1989, 1990, and 1991, reporting completion of 10, 20, and 30 hours of MCLE respectively. Thereafter, all members will report every three years by the end of a deadline month assigned by the Bar. For details, contact The Florida Bar, Tallahassee, FL 32301-8226, telephone (904) 222-5286, or toll-free out-of-state (800) 874-0005.

Finally, *Louisiana* has announced that it will begin MCLE on 1 January. All active attorneys must complete 15 hours of approved CLE every year. The reporting date is 1 January beginning in 1989. Active duty military are exempt, but must claim the exemption on a special form. For further information, contact the Louisiana Continuing Legal Education Committee, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112, telephone (504) 566-1600.

### 2. 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).

### 3. TJAGSA CLE Course Schedule

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 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Delaware	on or before 30 July annually
Florida	assigned monthly deadlines, every three years beginning in 1989
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	30 days following completion of course
Louisiana	1 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually

Washington 31 January annually

West Virginia 30 June annually

Wisconsin 1 March annually

Wyoming 31 December in even or odd years depending on admission

For addresses and detailed information, see the July 1987 issue of *The Army Lawyer*.

#### 5. Civilian Sponsored CLE Courses

December 1987

2: PBI, Tax Aspect of Separation and Divorce (Video), State College, PA.

2: MBC, Bankruptcy Litigation, St. Louis, MO.

3-4: ABA, Dynamics of Corporate Control, New York, NY.

3-4: PLI, Broker-Dealer Institute, New York, NY.

3-4: PLI, Litigating Toxic Chemical Cases, San Francisco, CA.

3-4: PLI, Advanced Antitrust: Mergers and Acquisitions, New York, NY.

3-4: PLI, Bankruptcy and Reorganization 1987: Substantive Basics, Chicago, IL.

3-4: NELI, Employment Law Conference, Dallas, TX.

3-4: ABA, Take or Pay Litigation, Denver, CO.

3-4: PLI, Premises Liability, New York, NY.

3-5: ALIABA, Fundamentals of Bankruptcy Law, Santa Fe, NM.

4: SBNM, Tax Considerations in Estate Planning, Albuquerque, NM.

4-5: MBC, Current Trends in the Field of Civil Law, St. Louis, MO.

4-5: MBC, Mastering the Craft of Trial Advocacy, Kansas City, MO.

7-8: FPI, Working with the F.A.R., Las Vegas, NV.

7-9: GCP, Patents, Technical Data and Computer Software, Los Angeles, CA.

7-11: FPI, The Masters Institute in Government Contracting, Washington, DC.

8-9: PLI, The Jury: Techniques for the Trial Lawyer, New York, NY.

8-11: SLF, Securities Regulation Short Course, Dallas, TX.

10-11: PLI, Telecommunications, Washington, DC.

10-11: PLI, Bankruptcy and Reorganization 1987: Substantive Basics, San Francisco, CA.

10-11: NELI, Employment Law Conference, Washington, DC.

10-12: ALIABA, Business Reorganization Under the Bankruptcy Code, Beverly Hills, CA.

11-12: NCLE, Banking Law, Omaha, NE.

12: UMKC, Recent Developments in Federal Taxes, Kansas City, MO.

14-15: PLI, Managing the Medium Law Firm, San Francisco, CA.

14-15: PLI, Managing the Small Law Firm, San Francisco, CA.

14-15: PLI, Managing the Corporate Law Department, San Francisco, CA.

14-15: PLI, Impact of Environmental Regulations on Business, New York, NY.

14-16: FPI, Cost Estimating for Government Contracts, Marina del Rey, CA.

15-18: FPI, Procurement for Secretaries and Administrators: Government Contracts, Washington, DC.

29: PBI, Workers' Compensation Practice (Video), Reading, PA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1987 issue of *The Army Lawyer*.

### 6. Army-Sponsored Continuing Legal Education Calendar (1 October 1987-30 September 1988)

The following is a schedule of Army-sponsored continuing legal education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department (804) 972-6380; Trial Judiciary (703) 756-1795; Trial Counsel Assistance Program (TCAP) (202) 756-1804; U.S. Army Trial Defense Service (TDS) (202) 756-1390; U.S. Army Claims Service (301) 677-7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Butler, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA (804) 972-6342.

Training	Location	Date
TJAGSA On-Site	Honolulu, HI	3 Oct 87
PACOM CLE	Fort DeRussy, HI	6 Oct 87
TJAGSA On-Site	Minneapolis, MN	3-4 Oct 87
TJAGSA On-Site	St. Louis, MO	10-11 Oct 87
USAREUR	Garmisch, Germany	11-24 Oct 87
Criminal Law Workshops and Advocacy Course		
USAREUR Trial Observer's Workshop	Heidelberg, Germany	21-22 Oct 87
TJAGSA On-Site	Boston, MA	24-25 Oct 87
TDS Workshop (Region III & VI)	Fort Leavenworth, KS	26-30 Oct 87
TCAP Seminar	Seattle, WA	October 1987
TDS Workshop (Region II)	Fort Jackson, S.C.	4-6 Nov 87
TJAGSA On-Site	Philadelphia, PA	7-8 Nov 87
TJAGSA On-Site	Detroit, MI	14 Nov 87
TJAGSA On-Site	Indianapolis, IN	15 Nov 87
TCAP Seminar	Korea	Nov 87
Pacific Area Claims Conference	Seoul, Korea	17-19 Nov 87
TDS Workshop (Region V)	Presidio, San Francisco	17-19 Nov 87
USAREUR JA Workshop	Berchtesgaden, Germany	23-25 Nov 87
TDS Workshop (Region I)	Fort Meade, MD	November 1987
1st/2d Circuit Judicial Conference	TBA	30 Nov-2 Dec 87
TJAGSA On-Site	New York, NY	5-6 Dec 87
TCAP Seminar	San Antonio, TX	Dec 87

USAREUR International Affairs Workshop	TBA	Dec 87
TDS Workshop (Region VIII)	Stuttgart, Germany	December 1987
USAREUR Legal Assistance/Tax Seminar	TBA	11-15 Jan 88
USAREUR Administrative Law Seminar	TBA	25-29 Jan 88
TCAP Seminar	Philadelphia, PA	January 1988
TJAGSA Onsite	Los Angeles, CA	16-17 Jan 88
TJAGSA Onsite	Seattle, WA	23-24 Jan 88
TDS Workshop (Region VII)	Germany	Feb 88
TDS Workshop (Region VIII)	Germany	Feb 88
3d/4th Judicial Circuit Conference	Denver, CO	Feb 88
TCAP Seminar	Fort Bragg, NC	Feb 88
TJAGSA Onsite	San Antonio, TX	5-6 March 1988
TJAGSA Onsite	Columbia, SC	5-6 March 1988
TJAGSA Onsite	Nashville, TN	12-13 March 1988
TJAGSA Onsite	Kansas City, MO	12-13 March 1988
TJAGSA Onsite	San Francisco, CA	19-20 March 1988
TJAGSA Onsite	Washington, DC	26-27 March 1988
TDS Workshop (Region IX)	Germany	March 1988
TCAP Seminar	Denver, CO	March 1988
Western Regional Claims Workshop	TBA	March 1988
USAREUR Contract Law Seminar	TBA	March 1988
TJAGSA Onsite	Miami, FL	9-10 April 1988
TJAGSA Onsite	San Juan, PR	16-17 April 1988
TJAGSA Onsite	Oxford, MS	16-17 April 1988
TJAGSA Onsite	New Orleans, LA	23-24 April 1988
TJAGSA Onsite	Chicago, IL	23-24 April 1988
TDS Workshop (Region I)	Fort Knox, KY	April 1988
TDS Workshop (Region III)	Fort Leavenworth, KS	25-29 April 1988
TCAP Seminar	San Diego, CA	April 1988
USAREUR Judge Advocate Update	Heidelberg, Germany	21-22 April 1988
USAREUR Legal Administrator's Workshop	TBA	28-29 April 1988
TDS Workshop (Region VI)	Korea	April 1988
TDS Workshop (Region II)	Fort Stewart, GA	May 1988
TDS Workshop (Region V)	Fort Lewis, WA	24-26 May 1988
TJAGSA Onsite	Columbus, OH	14-15 May 1988
TJAGSA Onsite	Park City, UT	14-15 May 1988
TCAP Seminar	Germany	May 1988
USAREUR German/American Law Symposium	TBA	May 1988
USAREUR Operational Law Workshop	TBA	May 1988

Eastern Regional Claims Workshop	TBA	May 1988	TCAP Seminar	Fort Hood, TX	June 1988
USAREUR Trial Observer's Workshop	TBA	May 1988	TCAP Seminar	Fort Monroe, VA	July 1988
TDS Workshop (Region IV)	Austin, TX	June 1988	TDS Workshop (Region IX)	Europe	August 1988
			TCAP Seminar	Atlanta, GA	August 1988
			TDS Workshop (Region VI)	Yongsan, Korea	September 1988
			TCAP Seminar	Kansas City, MO	September 1988

## Current Material of Interest

### 1. Videocassettes of General Court-Martial Guilty Plea Trial Available

Videocassettes of a practice general court-martial guilty plea trial are now available for use in the field. This 45-minute videotape shows a simple, but complete, general court-martial guilty plea trial and is useful for familiarizing the viewer with a guilty plea court-martial. The tape may be stopped and explanations or questions addressed during the tape, or discussion can be held at the end of the program. An instructor's guide is provided to assist in explaining portions of the trial. If you are interested in obtaining a copy of the tape, please send a blank  $\frac{3}{4}$ " or VHS  $\frac{1}{2}$ " (standard speed) videocassette to: The Judge Advocate General's School, U.S. Army, ATTN: Media Services Office (JAGS-ADN-T), Charlottesville, Virginia 22903-1781.

### 2. TJAGSA Publications Available Through Defense Technical Information Center (DTIC)

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD A181445 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs).
- AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

#### Legal Assistance

- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD A174509 All States Consumer Law Guide/JAGS-ADA-86-11 (451 pgs).
- AD B100236 Federal Income Tax Supplement/JAGS-ADA-86-8 (183 pgs).
- AD B100233 Model Tax Assistance Program/JAGS-ADA-86-7 (65 pgs).
- AD B100252 All States Will Guide/JAGS-ADA-86-3 (276 pgs).

- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-85-7 (355 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-85-8 (329 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs.)
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs.)
- AD B110134 Preventive Law Series/JAGS-ADA-87-4 (196 pgs.)

#### Claims

- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

#### Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

#### Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

## Developments, Doctrine & Literature

- AD B086999 Operational Law Handbook/  
JAGS-DD-84-1 (55 pgs).  
AD B088204 Uniform System of Military Citation/  
JAGS-DD-84-2 (38 pgs).

### Criminal Law

- AD B095869 Criminal Law: Nonjudicial Punishment,  
Confinement & Corrections, Crimes &  
Defenses/JAGS-ADC-85-3 (216 pgs).  
AD B100212 Reserve Component Criminal Law PEs/  
JAGS-ADC-86-1 (88 pgs.)

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal  
Investigations, Violation of the USC in  
Economic Crime Investigations (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 15-13	Boards, Commissions and Committees Subsistence Review Committees	101	15 Jun 87
AR 27-10	Military Justice		10 Jul 87
AR 27-20	Claims		10 Jul 87
AR 30-18	Food Programs Army Troop Issue Subsistence Activity Operating Procedure	101	15 Jun 87
AR 37-103	Financial Administration, Finance and Accounting for Installation Disbursing Operations	101	15 Jun 87
AR 37-111	Financial Administration Working Capital Funds	101	15 Jun 87
AR 40-501	Standards of Medical Fitness		1 Jul 87
AR 72-20	Incentive Awards	102	8 Jul 87
AR 210-50	Installations, Family Housing Management	101	15 Jun 87
AR 310-2	Military Publications	102	16 Jul 87
AR 420-10	Management of Installation Directorates of Engineering and Housing		2 Jul 87
AR 680-5	Direct Exchange of Personnel Data Between the MILPERCEN and the SIDPERS (MINIMIZE) (RCSMILPC -27)		1 Jul 87
AR 702-3	Product Assurance	101	15 Jun 87
CIR 11-87-2	Internal Control Review Checklists		3 Jul 87
CIR 612-87-1	Xmas New Year Holiday FY 1988		10 July 87
DA Pam 27-22	Military Criminal Law Evidence		15 Jul 87
DA Pam 350-38	Standards in Weapons Training		1 Jul 87
DA Pam 570-5	Army Functional Dictionary—Manpower		24 Jul 87
DA Pam 600-8-1	Unit Level Procedures		17 Jul 87
DOD	Military Pay and Allowances Entitlements Manual		9 Mar 87

JFTR	Joint Federal Travel Regulation, Volume 1	8	1 Aug 87
JFTR	Joint Federal Travel Regulation, Volume 2	262	1 Aug 87
UPDATE 8	Finance		30 Jul 87
UPDATE 19	Reserve Components Personnel		1 Jul 87

### 4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

- Braswell & Scheb, *Conservative Pragmatism Versus Liberal Principles: Warren E. Burger on the Suppression of Evidence, 1965-86*, 20 Creighton L. Rev. 789 (1986-1987).  
Eble, *Case Preparation in Federal Court: Formal Discovery, Case & Com.*, July-Aug. 1987, at 30.  
George, *United States Supreme Court 1985-86 Term: Criminal Law Decisions*, 31 N.Y.L. Sch. L. Rev. 427 (1986).  
Graham, *Evidence and Trial Advocacy Workshop: Admissions of a Party-Opponent—An Overview*, 23 Crim. L. Bull. 275 (1987).  
Harty, *Military Search of Civilians: A Commander's Power*, 22 Trial 48 (1986).  
Howe, *Ethical Problems in Treating Military Patients With Human Immunodeficiency Virus Diseases*, 3 J. Contemp. Health L. & Pol'y 111 (1987).  
Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 Yale J. Int'l L. 294 (1987).  
Kinlock, *The Military Affidavit: A State Key to Federal Door*, 60 Conn. B.J. 348 (1986).  
Laurence, *At Home With the Bankruptcy Code: Residential Leases, Installment Real Estate Contracts and Home Mortgages*, 61 Am. Bankr. L.J. 125 (1987).  
McDonald & Bivins, *Alternative Dispute Resolution and the Court*, 42 Arb. J. 58 (1987).  
McFadden, *You're in the Army Now: Tozer v. LTV Corp. [792 F.2d 403] and the Government Contractor Defense*, 22 Tort & Ins. L.J. 467 (1987).  
Moore, *The Durable Power of Attorney as an Alternative to the Improper Use of Conservatorship for Health-Care Decisionmaking*, 60 St. John's L. Rev. 631 (1986).  
Myers, *The Testimonial Competence of Children*, 25 J. Fam. L. 287 (1986-87).  
Neubau, *Defense of Paternity Cases*, Case & Com., July-Aug. 1987, at 38.  
Overly, *Government Contractors, Beware: Civil and Criminal Penalties Abound for Defective Pricing*, 20 Loy. L.A.L. Rev. 597 (1987).  
Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. Ky. L. Rev. 409 (1987).  
Sweig, *Guidelines For Consumer Debt Collection By Attorneys Under the 1986 Amendment to the Fair Debt Collection Practices Act*, 21 New Eng. L. Rev. 697 (1985-1986).  
*Tenth Anniversary of the Protocols Additional to the Geneva Conventions (1977-1987)*, 258 Int'l Rev. Red Cross 243 (1987).  
Weisbard, *Informed Consent: The Law's Uneasy Compromise with Ethical Theory*, 36 Def. L.J. 363 (1987).  
Comment, *Tortious Interference with Visitation Rights: A New and Important Remedy for Non-Custodial Parents*, 20 J. Marshall L. Rev. 307 (1986).

Comment, *You Want Me to Do What? Where? Urinalysis Drug Testing in the Eighth Circuit*, 20 Creighton L. Rev. 961 (1986-1987).

Commentary, *Social Host's Criminal Liability for DUI Guest's Manslaughter of Another: What Will Oklahoma Think of Next?*, 39 Okla. L. Rev. 689 (1986).

Note, *Extraterritorial Jurisdiction over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599 (1987).

Note, *If I Had a Hammer—United States v. Kabat—Sabotage and Nuclear Protestors*, 20 Creighton L. Rev. 1167 (1986-1987).

Note, *Justified Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence*, 21 New Eng. L. Rev. 725 (1985-1986).

Note, *Warrant Requirement for Searches of Computerized Information*, 67 B.U.L. Rev. 179 (1987).

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