



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27-50-152
August 1985

Invoking the Right to Counsel: The
Edwards Rule and
the Military Courts

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On May 18, 1981, the Supreme Court decided *Edwards v. Arizona*,¹ a case which interpreted *Miranda v. Arizona*² and created a *per se* rule for interrogations following invocation of the right to counsel. Since that decision, the area of request for counsel has seen continued major activity in the Supreme Court and other federal courts.³ The military courts have been no exception. Several decisions by courts of military review have interpreted *Edwards* and attempted to define its impact on military practice.⁴ The Court of Military Appeals has decided two major cases

¹ 451 U.S. 477 (1981).

² 384 U.S. 436 (1966).

³ See, e.g., *Solem v. Stumes*, 104 S. Ct. 1338 (1984) (retroactivity of *Edwards* rule (see also *Shea v. Louisiana*, 36 Crim. L. Rpt. (BNA) 3153 (U.S. Feb. 20, 1985)), discussed *infra* at notes 39-40 and accompanying text; *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (*Edwards* rule involves a two-step test, discussed *infra* at notes 90-110 and accompanying text); *United States v. Montgomery*, 714 F.2d 201 (1st Cir. 1983); *United States v. Scalf*, 708 F.2d 1540 (10th Cir. 1983).

⁴ See, e.g., *United States v. Reeves*, 17 M.J. 832 (A.C.M.R. 1984); *United States v. Alba*, 15 M.J. 573 (A.C.M.R. 1983); *United States v. Ray*, 12 M.J. 1033 (A.C.M.R. 1982).

on *Edwards*-related issues;⁵ one of those decisions has been remanded to the court after the Supreme Court granted a writ of certiorari and vacated the earlier judgment.⁶ In addition, the Court of Military Appeals has granted review of two other decisions of the Army Court of Review that interpreted the reach of *Edwards*.⁷ This article will discuss the *Edwards* decision and its impact on the military courts, and will assess how the *Edwards* rule has been applied and is likely to be applied in those courts.

I. *Miranda* and the Effect of Invoking Rights

Prior to 1966, the Supreme Court determined the admissibility of an accused's confession by evaluating the voluntariness of the statement.⁸

⁵ *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985) (discussing the applicability of *Edwards* to the military and the question of a "good faith exception, see *infra* notes 72-80 and notes 121-136 and accompanying text) and *United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984) (discussing when the right to counsel attaches, see *infra* notes 49-67 and accompanying text).

⁶ The Supreme Court granted Goodson's petition for certiorari and remanded the case to the Court of Military Appeals. 37 *Crim. L. Rpt.* (BNA) 4041 (U.S. May 1, 1985). See *infra* notes 56-67 and accompanying text.

⁷ *United States v. Reeves*, 17 M.J. 832 (A.C.M.R.), *petition granted*, 19 M.J. 53 (C.M.A. 1984); *United States v. Vidal*, 17 M.J. 1114 (A.C.M.R.) *petition granted*, 19 M.J. 35 (C.M.A. 1984).

⁸ *Hopt v. Utah*, 110 U.S. 574 (1884). This standard of "common law voluntariness" centered on the trustworthiness and reliability of confessions: those not induced by threats or physical brutality were admissible because they were considered trustworthy and reliable. See generally Kamisar, *What is an "Involuntary" Confession? Some Comments on Imbau*

The Court focused on conditions surrounding the confession and police treatment of the accused and allowed confessions that it determined to be the product of the free choice of the maker, based on the totality of the circumstances.⁹ Of necessity, this method required a case-by-case factual analysis by the Court because of the lack of precision in the terms "voluntariness" and "totality of the circumstances."

In *Miranda v. Arizona*, the Court recognized that custodial interrogation is inherently compelling and coercive, rendering the voluntariness standard ineffective for assessing the validity of confessions given at the police station.¹⁰ The Court imposed a specific procedure for police to follow before interrogating a suspect in custody:

[A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has

and *Reid's Criminal Interrogations and Confession*, 17 *Rutgers L. Rev.* 728 (1963); Stone, *The Miranda Doctrine in the Burger Court*, 1977 *Sup. Ct. Rev.* 99 (1977).

⁹ See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961) (confession given after four days of custodial police questioning of 33-year-old illiterate mental defective was involuntary); *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions obtained by brutality and violence violate due process and are inadmissible).

¹⁰ *Miranda*, 384 U.S. at 467-79. The Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

The Army Lawyer (ISSN 0364-1287) Editor

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as *The Army Lawyer*, [date], at [page number]. Second-class postage paid at Charlottesville, VA and additional mailing offices. POSTMASTER: Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.¹¹

This rights advisement was required in order for any incriminating statements made during custodial interrogation to be admissible at trial.¹² The Court believed that the warnings were necessary to protect the fifth amendment rights of the individual subjected to inherently compulsive custodial interrogation.¹³ Any statements taken in violation of these rules would be excluded at trial, and once the accused exercised the fifth amendment privilege of which he was advised, further statements would be presumed to be the product of coercion.¹⁴

The Court set out explicit guidelines for protecting an accused's rights, but the standards for determining when a suspect could waive a previously invoked right to silence or right to counsel were not as clear.¹⁵ A decision to remain silent or to request counsel triggers "second level" *Miranda* protections that place further restric-

¹¹ *Id.* at 479. The opportunity to exercise these rights must be afforded the suspect throughout the interrogation process. *Id.*

¹² *Miranda*, 384 U.S. at 444, 478-79.

¹³ *Id.* at 445, 448, 457-58. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of free choice." The Court has recently seemed to back away from the idea that custodial interrogation is *inherently* coercive. See *Oregon v. Elstad*, 36 Crim. L. Rpt. (BNA) 3167 (U.S. Dec. 10, 1984). See also Finnegan, *Criminal Law Note—Recent Supreme Court Decisions*, *The Army Lawyer*, May 1985, at 17, 20.

¹⁴ *Miranda*, 384 U.S. at 474.

¹⁵ *Id.* at 475. The Court declared that an express statement by a suspect that he wants to talk without an attorney could constitute a waiver. *Id.* The Court also placed a "heavy burden" on the government to show that the suspect had "knowingly and intelligently waived" his rights. One passage early in Chief Justice Warren's majority opinion illustrates that additional protections follow an invocation of rights:

If, however, [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45.

tions on police conduct.¹⁶ Is the invocation of rights irrevocable: has the accused cut off any possibility of further dialogue with the police? Under what conditions or circumstances may the police question the accused after this initial invoking of rights? Is there a different standard for the "right to cut off questioning" than for requesting counsel? These questions were not directly answered by the *Miranda* decision, but later Supreme Court decisions have clarified the procedures and attempted to set guidelines for "second-level" *Miranda* protections.

A. The Right to Remain Silent: *Michigan v. Mosley*

The Supreme Court in *Michigan v. Mosley*¹⁷ addressed the issue of when, if at all, interrogation may be resumed after the accused has asserted the right to remain silent. Mosley was arrested for armed robbery and, after being advised of his *Miranda* rights, stated that he did not want to answer any questions about the offenses.¹⁸ The police officer immediately ceased the interrogation and returned Mosley to a detention cell.¹⁹ Several hours later, another police officer took Mosley from the cell to question him about a murder charge unrelated to the armed robberies.²⁰ He fully advised Mosley of his *Miranda* rights, which he waived; Mosley later confessed to the murder.²¹ At trial and on appeal, Mosley argued that *Miranda* precluded the second police officer from questioning him after he had declined to speak.

The Court determined that the admissibility of statements obtained after a person in custody

¹⁶ The phrase "second level" *Miranda* protections originated in *People v. Grant*, 45 N.Y.2d 366, 372, 380 N.E.2d 257, 260, 408 N.Y.S.2d 429, 432 (1978). For a discussion of "second-level protections", see White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 *Am. Crim. L. Rev.* 53, 63 (1979).

¹⁷ 423 U.S. 96 (1975). For complete discussions of *Mosley*, see Note, *Michigan v. Mosley, A New Constitutional Procedure*, 54 *N.C.L. Rev.* 695 (1976); Comment, *Michigan v. Mosley: A Further Erosion of Miranda?*, 13 *San Diego L. Rev.* 861 (1976).

¹⁸ *Mosley*, 423 U.S. at 97.

¹⁹ *Id.*

²⁰ *Id.* at 97-98.

²¹ *Id.*

elects to remain silent depends on whether the police "scrupulously honored" the suspect's right to refuse to be questioned.²² The Court was concerned that the police did not use successive interrogations and repeated rights advisements to wear down the will of the accused.²³ In this case, however, the Court noted that as soon as Mosley invoked the right to silence, the police ceased questioning. No other police officer questioned him for more than two hours. At that point, he was questioned by another police officer about an unrelated offense, and was again fully advised of his rights, including the right to remain silent and the right to counsel. The Court found that the second interrogation did not undercut the initial invocation of the right to remain silent and that the police had "scrupulously honored" Mosley's request.²⁴ This test was the Court's

²² The *Mosley* Court noted that *Miranda* was silent concerning under what circumstances, if any, questioning could be resumed after an invocation of rights. *Id.* at 101-02. The Court observed that it could interpret *Miranda* to require either a *per se* rule against any subsequent custodial interrogation or only the immediate cessation of interrogation and a momentary respite. *Id.* at 102. The Court rejected both these extremes as "absurd and unintended." *Id.* The Court reasoned that barring further interrogation altogether would set up irrational obstacles to legitimate police activity and deprive suspects of the right to change their minds. *Id.* The majority opinion also rejected the idea of a brief respite and then continued interrogation as frustrating the purpose of *Miranda* "by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Id.* The Court then reached a middle ground to determine that the critical safeguard was the individual's "right to cut off questioning." *Id.* at 103 (quoting *Miranda*, 384 U.S. at 474). Thus, the test fashioned was whether, at all stages of the questioning, the police had "scrupulously honored" the right to refuse further questioning. *Id.* at 104.

²³ *Id.* at 102.

²⁴ In finding that the police in *Mosley* had passed the "scrupulously honored" test, the Court emphasized the initial prompt cessation of interrogation, the resumed interrogation only after a significant period of time had passed, the readvising of *Miranda* warnings prior to the second interrogation, and the restricting of the second interrogation to another crime. *Id.* at 106. The Court did not, however, suggest which, if any, of the factors were critical to the determination of whether the suspect's rights had been "scrupulously honored." Of necessity, the test must be considered on a case-by-case basis. Among the factors to be considered are police attitude toward the accused, the existence of manipulative police tactics, the treatment of the accused, and the use of any stratagems to induce the accused to withdraw the invocation of rights.

means for insuring that the police did not try to overcome a person's decision to cut off questioning either by continuing the interrogation or by persisting in repeated efforts to wear down his resistance and make him change his mind. Justice White's concurring opinion pointed out that this test did not set a *per se* rule that questioning must forever cease after an individual elects to remain silent and also stated that the facts and opinion did not address the situation of a person who has requested counsel rather than elected to remain silent.²⁵ In fact, Justice White suggested that a stronger standard might be applicable when an accused requests counsel, for that could indicate the accused's belief that he is only competent to deal with police authorities through counsel.²⁶

In the absence of clear direction from the Supreme Court, however, other courts used the "scrupulously honored" rationale to address the admissibility of statements after either the accused had declined to speak or the accused had requested counsel. In *United States v. Muldoon*,²⁷ the Court of Military Appeals declined to create a *per se* rule for interrogation following the invocation of the right to counsel and adopted *Mosley's* holding and rationale, even though *Muldoon* had requested counsel and interrogators had persisted in questioning him without providing for *Muldoon* to see a lawyer.²⁸

²⁵ *Mosley*, 423 U.S. at 109 (White, J., concurring). "The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case."

²⁶ *Id.* at 109-110. Justice White seemed to foreshadow the holding of *Edwards*:

It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism.

Id. at 110 n.2.

²⁷ 10 M.J. 254 (C.M.A. 1981).

²⁸ *Id.* at 255-58.

B. The Right to Counsel: Edwards v. Arizona

In *Edwards v. Arizona*,²⁹ the Supreme Court specifically addressed the effect of an accused's invocation of the right to counsel after advisement of *Miranda* rights. Edwards, suspected of robbery and murder, was arrested, advised of his *Miranda* rights, and questioned.³⁰ After some questioning, he stated that he wanted an attorney and the interrogation ceased, and Edwards was held overnight in jail. The next morning, two detectives requested to see him. Edwards, who had still not talked to a lawyer, stated that he did not wish to speak with them, but the jailer told him he had to talk to the detectives.³¹ They again advised him of his *Miranda* rights, confronted him with the taped statement of an accomplice, and obtained his confession.³²

The Supreme Court used this case to create a *per se* rule concerning questioning after the accused invokes his right to counsel. Justice White, whose opinion in *Mosley* recognized a distinction between invoking the right to silence and requesting an attorney,³³ wrote the majority opinion in *Edwards*. The Court said that once an accused requests counsel after being advised of *Miranda* rights, the government cannot show a valid waiver of that right only by showing that he had responded to further police-initiated custodial interrogation, even if he was readvised of his rights.³⁴ The Court set out the following *per*

se rule: once an accused or suspect in custody invokes the right to counsel, no further interrogation is permitted until counsel has been made available or unless the accused himself initiates further communication or conversation.³⁵ Clearly, this is a different and stricter rule than the "scrupulously honored" test of *Michigan v. Mosley*.³⁶ Based on the facts in *Edwards*, the government probably would have prevailed if *Mosley's* test had been used. Here, the interrogators waited overnight before resuming questioning, they were different police officers than had originally questioned Edwards, and they again fully advised him of his *Miranda* rights. The only factual difference from *Mosley*, besides the invocation of the right to counsel in *Edwards*, was that the *Edwards* police officers were questioning him about the same offense. Clearly, the Court made the distinction between invoking the right to silence and requesting counsel that Justice White had earlier identified.

The Court's language in *Edwards* was ambiguous enough to cause some doubt concerning whether it had actually established a *per se* rule. In fact, Justices Powell and Rehnquist concurred in the result but specifically stated that they felt that the standard for waiver of even the right to counsel had already been established by earlier cases and they did not intend to superimpose a new element of proof by creating a new *per se* rule.³⁷ In later cases interpreting certain facets

²⁹ 451 U.S. 477 (1981).

³⁰ *Id.* at 478-79. After the police told Edwards that another suspect in custody had already implicated him in the crime, Edwards tried to "make a deal" with the interrogating officer. The police officer told him that he wanted a statement but did not have the authority to make a deal. Edwards then requested counsel. *Id.*

³¹ *Id.* at 479. The fact that the jailer told Edwards he "had to" talk to the detectives figured in the Court's determination that his statement was inadmissible. *Id.* at 487.

³² *Id.* at 479.

³³ See *supra* notes 25-26 and accompanying text.

³⁴ *Edwards*, 451 U.S. at 484-85. The Court found that Edwards had asserted his right to counsel. *Id.* at 482. The Court then determined that Edwards did not validly waive his right to counsel before giving the incriminating statements because he did not knowingly and intelligently relinquish that right. This standard of waiver comes from *Johnson v. Zerbst*, 304 U.S. 458, 464(1983):

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

The Court has subsequently applied this standard for determining whether the waiver was "knowing and intelligent" under the "totality of the circumstances." See, e.g., *Tague v. Louisiana*, 444 U.S. 469 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); *North Carolina v. Butler*, 441 U.S. 369 (1979).

³⁵ *Edwards*, 451 U.S. at 484-85.

³⁶ 423 U.S. 96 (1975). See *supra* notes 17-28 and accompanying text.

³⁷ *Edwards*, 451 U.S. at 488 (Powell, J., concurring). Justice Powell believed that *Johnson v. Zerbst* (see *supra* note 34) set the proper standard and that "initiation" should be treated as only one of several relevant circumstances concerning whether the waiver of the right to counsel had been knowing and intelligent. *Id.* at 491.

of *Edwards*, Justice Powell continued to hold to the proposition that *Edwards* had created no *per se* rule.³⁸ The Court made it clear in *Solem v. Stumes*,³⁹ a case discussing the retroactive applicability of *Edwards* to *habeas corpus* proceedings, that it had indeed established a new standard, stating:

Edwards established a bright-line rule to safeguard pre-existing rights *Edwards* established a *new test* for when that waiver [of the right to counsel] would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication.

Edwards nonetheless did establish a *new rule*.⁴⁰

II. *Edwards* and the Military

A. *The First Step: When Does the Right to Counsel Apply?*

Miranda warnings, including the advisement of the right to counsel, are required upon custodial interrogation.⁴¹ Because *Edwards* concerns "second-level" *Miranda* protections, it also necessarily applies to events following custodial interrogations. The first question that frequently arises is whether the accused was in custody. Military Rule of Evidence 305(d)(1)(A)⁴² indicates that counsel warnings are required before interrogation when "the suspect is in custody, could

reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way."⁴³ The drafters' analysis to the rule indicates that this language was intended to adopt an objective test that complied with *Miranda's* intent by using the viewpoint of the suspect, but made it improbable that a suspect could claim a custodial status not recognized by the interrogator.⁴⁴

In *United States v. Schneider*,⁴⁵ the Court of Military Appeals held that not every interrogation at a military police station is custodial, and not every order to report to a certain location, including a police station, involved custody, even if the soldier might not be legally able to disregard the order.⁴⁶ The court recognized that soldiers

⁴³ Mil. R. Evid. 305(d)(1)(A).

⁴⁴ Analysis of 1980 Amendments to the Manual for Courts-Martial, MCM, Appendix 22, at A22-13. While the Military Rules of Evidence give some guidance on the limited issue of how to determine custody, they are of virtually no help on resolving *Edwards* issues. At the time the rules were drafted, *Edwards* had not yet been decided and the state of the law was uncertain. The drafters intentionally left the area vague:

[T]he Rule [Mil. R. Evid. 305(f)] expressly does not deal with the question of whether or when questioning may be resumed following an exercise of a suspect's rights and does not necessarily prohibit it. The Committee notes that both the Supreme Court [citations omitted] and the Court of Military Appeals [citations omitted] have yet to fully resolve this matter.

Appendix 22, MCM, at A22-14. That leaves resolution of the issue to "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." Mil. R. Evid. 101(b)(1).

⁴⁵ 14 M.J. 189 (C.M.A. 1982).

⁴⁶ The Court of Military Appeals was concerned with applying the doctrine of *Dunaway v. New York*, 442 U.S. 200 (1979), to the military. *Dunaway* held that police must have probable cause to "seize" an individual for questioning. If the police lack probable cause before custodial interrogation, the fourth amendment violation caused by the unlawful seizure normally results in the suppression of any confession. The Court of Military Appeals stated in *Schneider* that "obvious differences between the military and civilian practices" prevent "literal application of the *Dunaway* doctrine." The courts have had a difficult time deciding how the doctrine should be applied in the military, however. For cases applying the *Schneider* factors and wrestling with the distinctions between military and civilian practices, see *United States v. Horst*, 17 M.J. 796 (A.F.C.M.R. 1983); *United States v. Scott*, 17 M.J. 724 (N.M.C.M.R. 1983); *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983). See also *United States v. Varraso*, 15 M.J. 793 (A.C.M.R. 1983).

³⁸ See, e.g., *Oregon v. Bradshaw*, 462 U.S. 1039, 1047 (1983) (Powell, J., concurring in the judgement).

³⁹ 104 S. Ct. 1338 (1984). The Court held that the *Edwards* rule did not apply retroactively in collateral attacks by *habeas* petitions. *Id.* at 1342 n.4. In the 1984 Term, however, the Court held that *Edwards* did apply to cases pending on direct appeal at the time *Edwards* was decided. *Shea v. Louisiana*, 36 Crim. L. Rpt. (BNA) 4153 (U.S. Feb. 20, 1985).

⁴⁰ 104 S. Ct. at 1343 (emphasis added).

⁴¹ The *Miranda* Court was specifically concerned with the coercive nature of custodial interrogations, which they defined as "questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

⁴² Manual for Courts-Martial, United States, 1984, Part III, Military Rule of Evidence 305(d)(1)(A) [hereinafter the Rules will be referred to as Mil. R. Evid. while other provisions of the Manual will be referred to as UCM].

often have to give information or report somewhere as part of a valid military duty. The court suggested several factors to be considered when determining if custody exists, including whether the soldier reported voluntarily or was ordered to report, whether he was under guard or was free to leave, and whether he was a suspect or a witness.⁴⁷ In addition, the court has held that when a soldier is ordered to report to his commander, with no indication that the commander has law enforcement purposes in mind, the soldier's obedience of the order does not mean that the soldier is in custody.⁴⁸

A second question that must be asked, once custody is determined, is when does the right to counsel attach? Can an accused invoke the right to counsel prior to rights warnings? The Court of Military Appeals addressed this issue in *United States v. Goodson*.⁴⁹ The accused and eight others were arrested on drug possession charges. After the arrests, the suspects were brought to the military police station for processing and interrogation. The accused, shortly after arriving at the MP station, told one of the persons who had assisted in the apprehension that he requested a lawyer.⁵⁰ That person was not involved in the interrogation process. Two other times while the accused waited to see the agent who was conducting the investigation, he again requested to see a lawyer. Some nine or ten hours later, during which time the accused waited in the police station, he was brought in to the investigating agent, who fully advised him of his

⁴⁷ *Schneider*, 14 M.J. at 195.

⁴⁸ *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981). This is a peculiar result which looks to the soldier's subjective knowledge rather than the commander's objective intent. If the commander is summoning the soldier for law enforcement purposes, rather than for some other military duty, the fourth amendment and the *Dunaway* doctrine should logically apply, no matter why the soldier believes he is being summoned. Although valid reasons may exist to excuse the military from some civilian applications of the fourth amendment because of the unique nature of the military environment, the analysis falls short when the commander's intent is to investigate a violation of the law.

⁴⁹ 18 M.J. 243 (C.M.A. 1984). The Army Court of Military Review had affirmed the findings and sentence. 14 M.J. 542 (A.C.M.R. 1982).

⁵⁰ *Goodson*, 18 M.J. at 244.

rights.⁵¹ This was the first time that the accused had been formally advised of his rights: he waived them and confessed. He appealed on the basis that his right to counsel had been violated, but the court affirmed his conviction, holding that all requests for counsel were made *before* he was advised of his rights and while the case was still in the investigatory stage.⁵² The court concluded that under *Miranda* the right to appointed counsel does not arise until custodial interrogation has begun and that the accused's invocation of counsel rights prior to the reading of warnings was of no effect because counsel rights had not yet attached.⁵³

The majority and dissent disagreed over the applicability of *Edwards*. The majority acknowledged the *Edwards* rule but disagreed that it was applicable on the facts because the request for counsel did not come after the recitation of *Miranda* rights, concluding that the right to appointed counsel did not arise until in-custody interrogation had begun.⁵⁴ Chief Judge Everett dissented strongly, stating that once an accused has "expressed his desire to deal with the police only through counsel" the *Edwards* rationale should be applicable whether the request for counsel preceded interrogation or was made after interrogation commenced.⁵⁵ A petition for certiorari was granted by the Supreme Court, which later vacated the decision of the Court of Military Appeals and remanded the case for further reconsideration in light of *Smith v. Illinois*,⁵⁶ decided by the Supreme Court earlier in the 1984-85 Term.⁵⁷

⁵¹ *Id.*

⁵² *Id.* at 249.

⁵³ *Id.*

⁵⁴ *Id.* at 246-48.

⁵⁵ *Id.* at 252 (Everett, C.J., dissenting). The Chief Judge's dissent characterized the majority opinion as "an invitation to hairsplitting" and stated that it invited abuse by creating incentives for investigators to ignore repeated counsel requests and intentionally delay the reading of *Miranda* warnings, hoping to induce the suspect to believe it would be futile to request counsel. *Id.* at 253.

⁵⁶ 36 Crim. L. Rpt. (BNA) 4126 (U.S. Dec. 12, 1984).

⁵⁷ This was the first time that the Supreme Court ever granted petition in a case directly appealed from the Court of Military Appeals. 37 Crim. L. Rpt. (BNA) 4041 (U.S. May 1, 1985).

In *Smith*, the accused was arrested for suspicion of armed robbery. During the reading of the rights warnings, the accused said that he would like to talk to the lawyer.⁵⁸ The police continued to read him rights warnings until they had fully advised him of his rights. They then asked him whether he was willing to talk without a lawyer being present. *Smith* agreed to waive his rights and confessed.⁵⁹ The Court held that there was

⁵⁸ *Smith's* responses were not exactly clear invocations of the right to counsel as the transcript of the interrogation session shows:

Q. Steve, I want to talk to you in reference to the armed robbery that took place at McDonald's restaurant on the morning of the 19th. Are you familiar with this?

A. Yeah. My cousin Greg was.

Q. Okay. But before I do that I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?

A. Uh. She told me to get my lawyer. She said you guys would railroad me.

Q. Do you understand that as I gave it to you, Steve?

A. Yeah.

Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?

A. Yeah.

Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?

A. Uh, yeah. I'd like to do that.

Q. Okay.

Smith, 36 Crim. L. Rpt. (BNA) at 4126 (quoting 102 Ill. 2d at 368-369, 466 N.E.2d at 238) (emphasis in opinion).

⁵⁹ Again, the transcript shows that the waiver was not a clear repudiation of the right to counsel:

Q. If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?

A. Okay.

Q. Do you wish to talk to me at this time without a lawyer being present?

A. Yeah and no, uh, I don't know what's what, really.

Q. Well. You either have to talk to me this time without a lawyer being present and if you do agree to talk

nothing ambiguous about the request for counsel and that the subsequent responses to questioning after the request for counsel could not be used to cast doubt on the clarity of his initial request.⁶⁰ The dissent suggested that it was significant that the request for counsel came *during* the administration of the rights warnings and contended that authorities need not stop their questioning because the "statements were not a request for counsel during interrogation. Indeed, interrogation had not begun."⁶¹ The Court held that "such reasoning is plainly wrong,"⁶² quoting *Miranda* by saying that a request for counsel coming "at *any* stage of the process' requires that questioning cease until counsel has been provided.⁶³ Thus, if the arrest and detention of Goodson in the police station can be considered "a stage of the process", *Miranda* rights had attached, even before the commencement of interrogation.

The question that the Court of Military Appeals must address on remand, then, is what constitutes a "stage of the process." If the arrest and detention of Goodson in the police station can be considered part of "the process," *Miranda* rights had attached when Goodson stated that he wanted a lawyer, even before the commencing of interrogation. A "stage of the process" could also be interpreted to mean the *interrogation* process however, meaning that the accused must request

with me without a lawyer being present you can stop at any time you wanted to.

A. All right. I'll talk to you then.

Smith, 36 Crim. L. Rpt. (BNA) at 4126 (quoting 102 Ill. 2d at 369, 466 N.E.2d at 238) (emphasis in opinion).

⁶⁰ *Id.* at 4127. The Court also took care to emphasize what it was not deciding in *Smith*: the effect of an equivocal or ambiguous request for counsel. Lower courts have split in the way to handle this problem: some require all interrogation to cease even if the request is equivocal, while others permit questioning at least designed to clarify the ambiguity. *Id.* at n.3 and cases cited therein. This issue was not decided in *Smith*, but it is another ramification of *Edwards* that the Court will eventually have to face.

⁶¹ *Smith*, 36 Crim. L. Rpt. (BNA) at 4128 (Rehnquist, J., dissenting). The quote is from the opinion of the Illinois Court of Appeals for the Fourth District, whose decision Rehnquist adopted in part. 113 Ill. App. 3d 305, 309-310, 447 N.E.2d 556, 558-59 (1983).

⁶² *Smith*, 36 Crim. L. Rpt. (BNA) at 4127 n.6.

⁶³ *Id.*, quoting *Miranda v. Arizona*, 384 U.S. at 444-45.

counsel at some unspecified time after detention but during the "interrogation process," including advisement of rights. That would be consistent with the holding in *Smith* but might not address Chief Judge Everett's concern in his *Goodson* dissent that the police might be able to take advantage of this decision by intentionally not beginning the interrogation process for an extended period of time after taking the accused into custody.⁶⁴

The composition of the court on remand will be greatly changed from the three judges who were involved in the initial decision. Judge Cook is no longer on the bench and, because it seems unlikely that the court will decide the first case remanded from the Supreme Court without a full complement of judges, Judge Fletcher's replacement may be sitting. That will leave only Chief Judge Everett, who vigorously dissented in the first *Goodson* decision. The court should be cautious about forming a rule that is overly broad by forbidding any reading of rights or inquiry into whether a suspect wants to make a statement if the suspect *at anytime* after arrest states that he wants to see an attorney. Such a rule would go far beyond what the Supreme Court has required and may unnecessarily handcuff military police. A better rule might be one used by some lower courts when a suspect makes an ambiguous request for an attorney.⁶⁵ The police are then limited to clarifying the request before they may in-

⁶⁴ This holding in *Smith* that counsel rights attach even if a suspect has not been fully advised of his *Miranda* rights seems to be at odds with another line of recent Supreme Court cases dealing with the use of the accused's silence to impeach. In those cases, the Court reasoned that the prosecutor may properly cross-examine and argue to the jury concerning the pretrial silence of the accused if the silence is arguably inconsistent with the defense raised at trial and the silence referred to is before the rights warnings are administered. See *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980). The Court's reasoning included the fact that it is the *Miranda* warnings themselves that are the government's promise that silence will not be used, and silence before the warnings is fair game for comment. This seems to imply that the right to silence does not attach until one is informed of the right, a different result from *Smith*.

⁶⁵ See, e.g., *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979); *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074 (App. 1983).

terrogate about any crime.⁶⁶ In *Goodson's* case, that rule would mean that the police interrogator, if he knew of *Goodson's* statements earlier in the police station,⁶⁷ would first have to question his specifically about those "requests," to determine if he indeed wished to see counsel now that his full array of rights had been explained to him. If *Goodson* persisted in his request for counsel, interrogation would have to cease. If he stated, after a full explanation of rights, that he did not want counsel and was willing to discuss the offense, the questioner could proceed.

B. Does the Per Se Rule Apply to the Military?

When the Court of Military Appeals declined to create a *per se* rule for the military in *United States v. Muldoon*,⁶⁸ discussed above, it noted that *Edwards v. Arizona* was pending decision before the Supreme Court. After the *Edwards* decision, several cases decided by the military courts of review applied the *per se* rule and excluded confessions where the police had interrogated the accused after he had requested counsel.⁶⁹

In *United States v. Goodson*,⁷⁰ discussed above, the majority and dissenters disagreed on whether the *Edwards* rule applied to that fact situation, but the court did not directly address whether the *per se* rule applied in military interrogations.⁷¹ In *United States v. Harris*,⁷² a

⁶⁶ See *supra* note 60 for other approaches to this issue.

⁶⁷ The rule should probably be expanded to include circumstances where the agent could have learned of the request through the exercise of due diligence (this does not allow the agent to hide behind the cloak of deliberate ignorance and adopts part of Judge Cox's "good-faith" test in *United States v. Harris*, 19 M.J. 331, 342 (C.M.A. 1985) (Cox, J., concurring)). See also *infra* notes 121-136 and accompanying text.

⁶⁸ 10 M.J. 254 (C.M.A. 1981). Noting that the "same issue has recently been argued before the United States Supreme Court", *id.* at 258 n.7, the court stated that it was "not yet willing to adopt a *per se* rule." *Id.* at 258.

⁶⁹ See, e.g., *United States v. Spencer*, 19 M.J. 677 (A.F.C.M.R. 1984); *United States v. Alba*, 15 M.J. 573 (A.C.M.R. 1983).

⁷⁰ 18 M.J. 243 (C.M.A. 1985). See also *supra* notes 49-67 and accompanying text.

⁷¹ *Goodson*, 18 M.J. at 246-48.

⁷² 19 M.J. 331 (C.M.A. 1985). See also *infra* notes 121-136 and accompanying text.

case discussed in more detail below, the court specifically addressed the question of the applicability of *Edwards* to the military.

The court acknowledged that it had previously ruled that *Miranda* applies to military interrogations.⁷³ Because the rights warnings requirements of Article 31, UCMJ, do not include the right to counsel, and because the event which triggers the need for *Miranda* warnings—custodial interrogation—is less stringent than that for Article 31, which requires warnings whenever a suspect or accused is questioned, it was not initially clear how the requirement of *Miranda* would fare in the military. In *United States v. Tempia*,⁷⁴ however, the Court of Military Appeals held that *Miranda* applied to military interrogations. Military Rule of Evidence 305 also incorporates *Miranda* requirements, with the additional provision that counsel are provided to military accused regardless of indigency.⁷⁵

Tempia and Military Rule of Evidence 305 did not end the court's analysis, however. The Supreme Court had stated in *Solem v. Stumes*⁷⁶ that *Edwards* added a new rule which went beyond the holding of *Miranda*. The Court of Military Appeals found no reason to exclude military personnel from the benefit of the additional right that the Supreme Court held in *Edwards* had been granted by the fifth amendment.⁷⁷ The court also recognized that it would be confusing to apply *Miranda* to the military and not apply *Edwards*, which is really a "second-level"

Miranda protection.⁷⁸ In addition, the court could find no military exigency that would require the waiver of the right to counsel provisions of Military Rule of Evidence 305(g) to be applied less favorably to a military accused than to a defendant in any federal court.⁷⁹ Following this discussion, the court decided that the *Edwards per se* rule does apply to military interrogations.⁸⁰

C. Overcoming the Per Se Rule

When the Court stated the *per se* rule in *Edwards* that would be applied to an accused's request for counsel during custodial interrogation, it left two loopholes for the government. If the government can show either that counsel was made available or that the accused initiated the conversation, the *per se* rule no longer applies.

1. Counsel made available. The Supreme Court has not addressed the meaning of this term. In the most favorable meaning to the accused, it would mean that questioning must cease until the accused has actually consulted with an attorney. It is not clear that the reading of that language must be so broad, however. In *United States v. Whitehouse*,⁸¹ the Army Court of Military Review interpreted that language in a different way. Whitehouse, suspected of inflicting a wound upon himself, was questioned by a Criminal Investigation Division (CID) agent and invoked his right to counsel. The CID agent ceased the interrogation and released Whitehouse back to his unit.⁸² Thirteen days later, Whitehouse was questioned by his company commander about the same incident. The company commander, unaware of the previous invocation of rights and questioning, fully advised Whitehouse of his Article 31 and *Miranda* rights. Whitehouse waived his rights and confessed to the self-inflicted wound.⁸³ At trial and on appeal, Whitehouse alleged that his rights under *Edwards* had been violated by the commander's interrogation after he

⁷³ *Harris*, 19 M.J. at 336.

⁷⁴ 16 C.M.A. 629, 37 C.M.R. 249 (1967). The Court of Military Appeals ruled that *Miranda* applied to military interrogations because service members enjoy the same constitutional rights as other citizens, in the absence of reasons why persons in the armed forces should not have those rights.

⁷⁵ Mil. R. Evid. 3055d)(2). The right to provided counsel applies "without regard to the person's indigency or lack thereof." *Id.* This codification rejected an interpretation of *Miranda* in which the Court of Military Appeals had held that the right to military counsel only applied if the accused was indigent. *United States v. Hofbauer*, 5 M.J. 409 (C.M.A. 1978).

⁷⁶ 104 S. Ct. 1338 (1984). See also *supra* notes 39-40 and accompanying text.

⁷⁷ *Harris*, 19 M.J. at 338.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 14 M.J. 643 (A.C.M.R. 1982).

⁸² *Id.* at 644.

⁸³ *Id.* at 645.

had invoked counsel rights. The court addressed the question of whether counsel had been "made available" to the accused.

Although certain references in *Miranda* and *Edwards* seem to indicate that once an accused requests counsel, he may never change his mind and decide to speak to the authorities until he has actually talked with a lawyer,⁸⁴ the Court recognized that the literal language is softened by other wording in the cases and further interpretations of its meaning. In fact, *Miranda* only requires that the accused have the "opportunity to confer with the attorney," and *Edwards* refers to the accused having "access" to counsel.⁸⁵ The Army Court of Military Review found that the interest of insuring that the waiver of the right to counsel was adequately protected by affording the accused the opportunity to seek counsel and exercise his prerogative as to whether he wishes to speak with the police.⁸⁶ In this case, Whitehouse had thirteen days in which he was free to seek out and consult with counsel. He was not confined during that time and for reasons of his own decided not to consult with an attorney. The court found that "counsel made available" simply meant a "reasonable opportunity" to consult with counsel.⁸⁷

This decision seems to be a correct interpretation of the requirements of *Edwards*. One point that the Supreme Court has made repeatedly is that an initial invocation of rights does not forever bind the accused.⁸⁸ With the availability of free defense counsel in the military, affording the accused a reasonable time period in which to talk to an attorney adequately fulfills the intent of *Edwards*, particularly when the accused is not in custody.

⁸⁴ The *Edwards* Court observed that *Miranda* required that once the accused asserted the right to counsel, interrogation must cease "until an attorney was present." *Edwards*, 451 U.S. at 485. Other language in *Miranda* states that, after an accused requests counsel, he must have "the opportunity to consult with counsel." *Miranda*, 384 U.S. at 474 (emphasis added).

⁸⁵ *Edwards*, 451 U.S. at 485 and 487.

⁸⁶ *Whitehouse*, 14 M.J. at 645.

⁸⁷ *Id.*

⁸⁸ *E.g.*, *Edwards*, 451 U.S. at 486 n.9; *Mosley*, 423 U.S. at 102.

2. Initiation by the accused. *Edwards* also allows the *per se* rule to be overcome if the accused initiates further communication or conversation. The problem, as foreseen by the concurring opinion of Justices Powell and Rehnquist in *Edwards*,⁸⁹ is that it is often difficult to determine who initiated a conversation and what level of initiation is sufficient for the police to resume interrogation. The Supreme Court found itself faced with exactly that dilemma in *Oregon v. Bradshaw*.⁹⁰

James Bradshaw was arrested by the Oregon State Police in connection with the death of a passenger in Bradshaw's pickup truck. After some initial questioning and denials by Bradshaw of any connection with the death, he told the police, "I do want an attorney before this goes much further." The officer immediately stopped the interrogation.⁹¹

Later that day, Bradshaw was transferred from the police station to a county jail. Either during or immediately prior to the move, he asked the police officer, "Well, what is going to happen to me now?"⁹² The officer responded to this question by telling Bradshaw that he did not have to talk and reminding him that he had requested an attorney.⁹³ They then discussed the charges and the officer suggested that Bradshaw should take a polygraph examination.⁹⁴ The next day, after again being advised of his *Miranda* rights, Bradshaw took the polygraph examination and confessed after the polygraph indicated he was not telling the truth.⁹⁵ At no time after

⁸⁹ *Edwards*, 451 U.S. at 490 (Powell, J., concurring).

⁹⁰ 462 U.S. 1039 (1983).

⁹¹ *Id.* at 1042.

⁹² *Id.*

⁹³ *Id.* The officer stated: "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." *Id.*

⁹⁴ *Id.* The Court did not address the issue of whether this might have been an attempt by the police officer to elicit an incriminating response.

⁹⁵ *Id.*

his initial request for an attorney did Bradshaw consult with a lawyer.⁹⁶

The Oregon Court of Appeals reversed Bradshaw's conviction as a violation of *Edwards*, holding that his question, "Well, what is going to happen to me now?," was not an initiation of further conversation and therefore did not constitute a valid waiver of his previously invoked right to counsel.⁹⁷ The Supreme Court reversed, holding that the Oregon Court of Appeals had misapplied *Edwards*.⁹⁸ The four member plurality disagreed initially about whether Bradshaw's question constituted initiation of further conversation. Justice Rehnquist's opinion stated that some inquiries are "so routine that they cannot be fairly said to represent a desire on the part of the accused to open up a more generalized discussion relating directly or indirectly to the investigation."⁹⁹ Such "routine" inquiries relating to the normal incidents of the custodial relationship will not generally "initiate" a conversation under *Edwards*. Although that rule seems clear—i.e., the inquiry must be one relating to a desire to discuss the subject matter of the criminal investigation—the application of that standard to the facts of *Bradshaw* is puzzling. It is difficult to comprehend a more routine inquiry than a suspect being moved from one jail to another to ask a police officer what is going to happen to him next.¹⁰⁰ It is just as difficult to see how that inquiry relates even indirectly to the subject of the criminal investigation. Nevertheless, the rule seems clear, even if this particular application of it is not.

The *Bradshaw* Court did not stop with the initiation question. It also addressed the Oregon Court of Appeals' belief that an "initiation of a conversation" was sufficient both to satisfy the *Edwards* rule and also to show a waiver of the previously asserted right to counsel.¹⁰¹ The

Court said that the two inquiries are separate and a two-step analysis was required.¹⁰² The *Bradshaw* Court had a four member plurality who believed that the question was "initiation," a four member dissent which disagreed that the question was initiation of further conversation under *Edwards*,¹⁰³ and Justice Powell, who sided with the plurality without specifically deciding the question of initiation.¹⁰⁴ The eight members of the plurality and dissent agreed that *Edwards* required a two-step analysis when concerned with initiation of further conversation with the police.¹⁰⁵ The first step, both the plurality and dissent agreed¹⁰⁶, was to decide if the accused did in fact initiate further conversation. They disagreed on the answer to the question on *Bradshaw's* facts. They also agreed that whenever initiation was found, that did not end the analysis because initiation by itself did not amount to a waiver of the previously invoked right to counsel.¹⁰⁷ Once the accused initiated conversation after invoking the right to counsel, the next inquiry was whether, under the totality of the circumstances, the accused had validly, intelligently, and knowingly waived his right to counsel.¹⁰⁸ After the first step, initiation, was satisfied, the Court then determined whether the subsequent waiver of the right to counsel was valid under the totality of the circumstances. Among the key factors that the Court focused on

¹⁰² The Court found that "initiation", once found, suffices to show a waiver of a previously asserted right to counsel. "The inquiries are separate, and clarity of application is not gained by melding them together." *Bradshaw*, 462 U.S. at 1045.

¹⁰³ *Id.* at 1051 (Marshall, J., dissenting). Justice Marshall's dissent was joined by Justices Brennan, Blackmun, and Stevens.

¹⁰⁴ *Id.* at 1047 (Powell, J., concurring).

¹⁰⁵ *Id.* at 1055 n.2 (Marshall, J., dissenting).

¹⁰⁶ If an accused has himself initiated further communication with the police it is still necessary to establish as a separate matter the existence of a knowing and voluntary waiver under *Johnson v. Zerbst*. . . . The only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for the purposes of the *Edwards per se* rule.

Id. (citation omitted) (emphasis in original).

¹⁰⁷ *Id.* at 1045 and 1055 n.2.

¹⁰⁸ *Id.* at 1045, quoting *Edwards*, 451 U.S. at 486 n.9.

⁹⁶ *Id.*

⁹⁷ *State v. Bradshaw*, 34 Or. App. 949, 636 P.2d 1011 (1981).

⁹⁸ *Bradshaw*, 462 U.S. at 1043.

⁹⁹ *Id.* at 1045.

¹⁰⁰ For an amusing analysis of some possible ramifications of this decision, see Fyfe, *Oregon v. Bradshaw—What's Happening Here?*, 20 *Crim. L. Bull.* 154 (Mar.-Apr. 84).

¹⁰¹ *Bradshaw*, 462 U.S. at 1045.

in *Bradshaw* to determine that the waiver was valid were the facts that the police had reminded him of his previous request for counsel and informed him that further discussion had to be the product of his own free will, and that the police had again fully advised him of his *Miranda* rights and obtained an express waiver.¹⁰⁹

The dissenters did not discuss the second step of the analysis—waiver by totality of the circumstances—because they believed that the facts showed that the first step—initiation—had not been met. Both opinions agreed that waiver should only be addressed once the first step—initiation by the accused—was satisfied.¹¹⁰

3. Applying the rule. Lower courts, including the military courts of review, have had difficulty applying the rule and defining the reach of its loopholes. For example, in *United States v. Appelwhite*,¹¹¹ the Army Court of Military Review decided a case in which the accused had invoked counsel but was later interrogated. Appelwhite had been apprehended for rape and gave a statement after proper rights warning and waiver.¹¹² About two weeks later, he was interviewed again about the same incident, with an additional warning concerning adultery. He invoked his right to counsel, but agreed to take a later polygraph examination.¹¹³ When Appelwhite reported for the polygraph examination five days later, he was again advised of his rights for the rape and for a separate rape and sodomy incident that had occurred two months earlier.¹¹⁴

¹⁰⁹ *Id.* at 1046-47.

¹¹⁰ *Id.* at 1044-45 and 1055 n.2. For a clear example of an accused initiating further conversation about the offense and then waiving his rights after being reminded of and questioned concerning his previous invocation of rights, see *United States v. Ray*, 12 M.J. 1033 (A.C.M.R. 1982).

¹¹¹ 20 M.J. 617 (A.C.M.R. 1985).

¹¹² *Id.* at 618.

¹¹³ *Id.*

¹¹⁴ *Id.* Whether the police can resume questioning about an unrelated crime after invocation of the right to counsel under *Edwards* is an undecided issue. Clearly, the police may resume questioning if the accused asserts a right to remain silent, so long as they "scrupulously honor" that request. *Michigan v. Mosley*, 423 U.S. 96 (1975); see also *supra* notes 17-28 and accompanying text. Questioning the accused about another offense after he has asserted the right to counsel is another matter, however, and the lower courts that have ad-

After the polygraph examination, he gave written confessions regarding both incidents.¹¹⁵ At trial and on appeal, Appelwhite alleged that *Edwards* had been violated and his confessions should have been suppressed.

The court found two bases for admitting the confessions. Because the accused had the opportunity to see counsel for the five days between the invocation of the right to counsel and the polygraph examination, but failed to do so, the government properly fit into the loophole of "counsel made available."¹¹⁶ This is an appropriate result under *Edwards* and continues to apply the holding of *United States v. Whitehouse*.¹¹⁷ On that basis, the court was correct and the confessions were properly admitted at trial. The other reason that the court stated that the confessions were admissible is suspect, however. Analogizing the case law concerning notification of counsel by an interrogator who knows the accused is represented by counsel,¹¹⁸ the court said that since these offenses were unrelated in time, place and victim, and a different interrogator was involved, Appelwhite's invocation of rights regarding one

addressed the issue have held that the police may not resume questioning, relying on the rationale that an accused who requests counsel is expressing his own incompetence to deal with the police except through an attorney. See, e.g., *State v. Routhier*, 33 Crim. L. Rpt. (BNA) 2367 (Ariz. Sup. Ct. July 6, 1983); *Drake v. State*, 34 Crim. L. Rpt. (BNA) 2145 (Fla. Sup. Ct. Oct. 27, 1983); *Radovsky v. State*, 464 A.2d 239 (Md. C.A. 1983).

¹¹⁵ *Appelwhite*, 20 M.J. at 618.

¹¹⁶ *Id.* at 619.

¹¹⁷ 14 M.J. 643 (A.C.M.R. 1982); see also *supra* notes 81-88 and accompanying text.

¹¹⁸ This is known as the *Mcomber* rule, named for the case in which the Court of Military Appeals originated the requirement, *United States v. Mcomber*, 1 M.J. 380 (C.M.A. 1976). The rule is codified in Military Rule of Evidence 305(g) and requires that once an investigator is on notice that an attorney represents an individual in a military criminal investigation, the investigator may not question the individual without affording that counsel notice and a reasonable opportunity to be present at the interrogation. Any statements taken in violation of the rule are considered involuntary even if the accused has been advised of and waives his rights. *Id.* The Court of Military Appeals has held that *Mcomber* is inapplicable to interrogations regarding unrelated offenses, even if the interrogator knows that the accused is represented by counsel for another crime. *United States v. Spencer*, 19 M.J. 184 (C.M.A. 1985); *United States v. McDonald*, 9 M.J. 81 (C.M.A. 1980).

incident did not properly relate to the other incident.¹¹⁹

This basis for the decision misses one major rationale for *Edwards* and the distinction that the Supreme Court has drawn for invoking the right to counsel. The analogy to the notification of counsel cases is not apt: those cases and the rule of evidence that stems from them are concerned with the obligation of the person doing the interrogation to contact a counsel who is already involved in representing the accused. This case, and all *Edwards* cases, concern the wish of the accused to seek legal counsel; the Supreme Court has determined that the invocation of the right to counsel is a qualitatively different right with specific protections. The major distinction that the Court has drawn between invoking the right to silence and invoking the right to counsel is based on the Court's belief that an accused who invokes the right to counsel is in effect saying, "I do not feel competent to deal with the police except through a lawyer."¹²⁰ The decision in *Appelwhite*, that a different offense may obviate the *Edwards* rule, fails to recognize that rationale. An accused who wants a lawyer to help him with the police should not be interrogated about another offense without that attorney, particularly where the offenses, though separate crimes, are related, similar offenses.

D. A "Good Faith" Exception?

Several lower federal courts have addressed the issue of whether the *Edwards* rule allows a

¹¹⁹ *Appelwhite*, 20 M.J. at 619.

¹²⁰ This rationale has its roots in Justice White's concurring opinion in *Mosley*. See *supra* notes 25-26 and accompanying text. The Fifth Circuit has applied the rationale in a unique fashion. An accused was arrested and interrogated, and he invoked his right to counsel. The police then asked him for consent to search, which the accused gave. The court suppressed the evidence found in the search, holding that the police should not have asked for consent after the accused had asserted the right to counsel. Although police are not required to give rights warnings before asking for consent to search (see, e.g., *United States v. Stoecker*, 17 M.J. 158 (C.M.A. 1984)), the court held that this accused had already indicated a feeling of incompetence in dealing with the police, and counsel should have been provided even before asking for consent. *United States v. McCraney*, 33 Crim. L. Rpt. (BNA) 2131 (5th Cir. Apr. 27, 1983).

"good faith" exception.¹²¹ That is, what happens when the accused invokes the right to counsel to one police officer, then is questioned subsequently by another police officer who has no knowledge of the previous invocation of rights?

Most of the federal courts that have addressed the issue have determined that *Edwards* is a bright line *per se* rule that does not permit a good faith exception.¹²² For example, in *United States v. Scalf*,¹²³ the defendant was arrested by state patrol officers for robbing a bank. After being read *Miranda* rights, he requested counsel. He was booked and turned over to FBI agents, who again advised him of his rights. Scalf waived his rights and confessed.¹²⁴ On appeal, the Tenth Circuit Court of Appeals held that the fact that the FBI agents who interrogated Scalf did not know of the earlier request for counsel was irrelevant and the fact that the rights advisement came from a member of a different police force was also irrelevant. The court concluded that "once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspects."¹²⁵ There are two probable reasons for such a rigid approach to *Edwards*: first, the courts are concerned about police perjury and the ease with which one set of police officers could aver that they had no prior knowledge of rights warnings; and second, one of the utilities of *Edwards* is that it is a bright-line rule that can be applied literally to reach certain results and eliminate litigation of issues such as good faith. The Supreme Court has not decided a case dealing with the issue of lack of knowledge of a prior invocation of rights and whether there can be a good-faith exception to *Edwards*.

The Court of Military Appeals attempted to decide the issue in *United States v. Harris*,¹²⁶

¹²¹ See, e.g., *United States v. Scalf*, 708 F.2d 1540 (10th Cir. 1983); *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982); *United States v. Downing*, 665 F.2d 404 (1st Cir. 1981).

¹²² *Id.*

¹²³ 708 F.2d. 1540 (10th Cir. 1983).

¹²⁴ *Id.* at 1542.

¹²⁵ *Id.* at 1544.

¹²⁶ 19 M.J. 331 (C.M.A. 1985). See also *supra* notes 72-80 and accompanying text.

but left the question of the underlying rule in the military unanswered. Harris was apprehended for possession of marijuana that was found in his wall locker during an inspection. The arresting military police officer advised Harris of his rights and Harris stated that he wanted a lawyer.¹²⁷ The arresting officer then transported the accused to the CID Office for processing but did not tell any of the CID agents on the Drug Suppression Team that Harris had requested an attorney. They advised Harris of his rights, which he waived.¹²⁸ In fact, at some point in the proceedings, Harris was asked if he had previously been read his rights and he answered that he had not.¹²⁹

The Army Court of Military Review affirmed the conviction, holding that it had been Harris' own act of lying to the investigators about the previous invocation of rights rather than any police overreaching that had caused the further interrogation.¹³⁰

The Court of Military Appeals, with only two judges sitting, did not reach any definitive answers concerning creation of a good faith exception. In fact, the court remanded the case for an evidentiary hearing concerning the exact role of the initial police officer who read Harris his rights upon apprehension and the actions of the other police officials after Harris was in their custody.¹³¹ The two opinions, however, gave some indication that the judges may well disagree on the ultimate question of whether a good faith exception to the *Edwards* rule should be applied in the military. Chief Judge Everett, writing the lead opinion, relied heavily on federal opinions that impute the knowledge of one police official to all others and spoke of the advantage of a bright-line rule that makes the guidelines clear for police and litigators.¹³² Judge Cox, concurring in the result of returning the case for an evi-

dentiary hearing, was not persuaded that a good faith exception of some sort should not be applied. He said that the federal court interpretations of *Edwards* are "rigid" and disagreed that they should be applied "at least within the military community."¹³³ He wrote that a reading of *Edwards* that makes the bright-line "so intense that if an accused makes a request for counsel to any government agent, anywhere or at anytime, then no other government agent can even talk to that accused unless the accused himself initiates the conversation" is too inflexible to be compatible with the realities of military life.¹³⁴ Judge Cox seemed to be persuaded in part by the fact that here the police officers at least did inquire of Harris whether he had been read rights previously: he found it "disquieting . . . that the interrogators here were not content to rest on their ignorance of the accused's request for counsel; instead they attempted to learn if a previous advisement of rights" and invocation of counsel rights had been made, but were thwarted by "the accused's own verbal acts."¹³⁵ He suggested the following rule: did the agent know, or by exercising due diligence could he have learned, that the accused had requested an attorney?¹³⁶ That is almost by definition a good faith exception to *Edwards*.

The Court of Military Appeals should not have as difficult a time in deciding *United States v. Reeves*,¹³⁷ another Army Court of Military Review decision on which it has granted a petition for review. There, the Army Court clearly

¹²⁷ *Harris*, 19 M.J. at 333. The Army Court of Military Review had affirmed Harris' conviction. *United States v. Harris*, 16 M.J. 562 (A.C.M.R. 1983).

¹²⁸ *Harris*, 19 M.J. at 334.

¹²⁹ *Id.*

¹³⁰ *Harris*, 16 M.J. at 564.

¹³¹ *Harris*, 19 M.J. at 340-41.

¹³² *Id.* at 338-340.

¹³³ *Id.* at 342 and 343 n.9 (Cox, J., concurring).

¹³⁴ *Id.* at 342 n.2.

¹³⁵ *Id.* at 343.

¹³⁶ *Id.* at 342 and 343 n.6. The debate over the use of a "good-faith exception" to *Edwards* hinges on the fact that *per se* rules, by their nature, are sometimes unfair to the government. In the search for a definitive "bright-line," criminals sometimes go free even when the constable has not erred, except to unknowingly violate a technical rule. Federal District Judge Dortch Warriner summed up the tension this way in *United States v. Renda*, 33 Crim. L. Rpt. (BNA) 2435 (E.D. Va. Jul 28, 1983): "This is the danger of *per se* rules. They may very well make sense in most cases but in a given case frustrate legitimate efforts, with no taint of government misbehavior, to bring criminals to book."

¹³⁷ 17 M.J. 832 (A.C.M.R.), *petition granted*, 19 M.J. 53 (C.M.A. 1984).

misapplied the law and seemed to come up with a good faith exception without discussing it. Reeves was arrested for drug trafficking and questioned by the CID. He invoked his counsel rights and was in continuous custody for several hours before being sent to the pretrial confinement facility.¹³⁸ While inprocessing at the pretrial confinement facility, Reeves was met by his company commander. The company commander used a rights warning card to read Reeves his rights, and took his confession.¹³⁹

It was clear that Reeves invoked his counsel rights to the CID and equally clear that the company commander, not Reeves, initiated the conversation at the stockade. Nevertheless, the Army Court of Military Review affirmed the admissibility of his confession and Reeves' conviction on the basis that, under the totality of the circumstances, the confession to the company commander had come about after a knowing, voluntary, and intelligent waiver of the right to counsel.¹⁴⁰ The court seemed to rely on the fact that the commander fully advised Reeves of his rights. The court either misapplied *Bradshaw*¹⁴¹ or misunderstood its rationale: before addressing the "totality of the circumstances," the first step of the analysis—initiation by the accused—must be met. Because Reeves did not initiate the conversation that led to his confession, the court should never even have addressed totality of the circumstances. The court seems *sub silentio* to be creating a good faith exception by assuming that the company commander would not be bound by the previous invocation of rights. Even applying a good faith rationale, however, it is difficult to see how this confession passes the test. Judge Cox's suggestion in *Harris*¹⁴²—did the agent know, or by exercising due diligence, could he have learned that the accused had requested counsel—dooms the company commander. If the

company commander did not *know* that a soldier in his unit being processed for pretrial confinement had been apprehended by the CID and questioned, it would have taken only one quick phone call, or even one preliminary question of the accused, to find out. The Court of Military Appeals should reverse without even having to reach the issue of whether a good faith exception should be applied.

Reeves does point out one problem of creating a good faith exception in the military. Soldiers who are suspects are likely to be questioned both by police agencies and by members of the chain of command. Because of that circumstance, the potential for overbearing a suspect's will is great if a commander questions and then the police question the soldier, or vice versa. If the Court of Military Appeals fashions a good faith exception of some kind, and it does not appear that the Supreme Court is ready to decide that specific question, trial courts and lower appellate courts should be careful when applying the "due diligence" standard to the second questioner. It may be that the only logical time for applying a good faith exception is where the accused, like *Harris*, affirmatively misleads the questioners who are trying to discover what has already happened.

E. Foreign Police and the Edwards Rule

The Army Court of Military Review, in *United States v. Vidal*,¹⁴³ a case involving the question of whether the *Edwards per se* rule should be applied to invocation of counsel rights to foreign police, determined that *Edwards* is inapplicable in those circumstances. The Court of Military Appeals has granted petition on the issue.

The accused was apprehended by German police for the rape of a German student. An American police officer, at the scene to assist the German police, advised the accused of his rights, but did not seek a waiver and did not ask any questions.¹⁴⁴ The accused did not request counsel or state a desire to remain silent. Vidal was then taken into German custody and questioned, and at one point was administered a blood-alcohol

¹³⁸ *Id.* at 834 and Assignment of Errors and Brief on Behalf of Appellant to the Army Court of Military Review at 5. [hereinafter cited as appellant's brief].

¹³⁹ Appellant's brief, *supra* note 138, at 5-6.

¹⁴⁰ *Reeves*, 17 M.J. at 834.

¹⁴¹ *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). See *supra* notes 90-109 and accompanying text.

¹⁴² *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985). See *supra* notes 126-136 and accompanying text.

¹⁴³ 17 M.J. 1114 (A.C.M.R.), *pet. granted*, 19 M.J. 35 (C.M.A. 1984).

¹⁴⁴ *Id.* at 1115.

test.¹⁴⁵ Prior to the blood-alcohol test, he was advised of his rights under German law with respect to the test and asserted a right to counsel by writing it on a form provided by the German police.¹⁴⁶ After the Germans processed him, Vidal was returned to American police custody. No German police officials told the American investigators that the accused had invoked a right to counsel nor did they give them the form the accused had signed.¹⁴⁷ When the accused was advised of his rights and questioned by the CID, he waived his rights and made a full confession.¹⁴⁸ He later contested the confession on the ground that his invocation of the right to counsel to the German police put *Edwards* into effect and that the actions and knowledge of the German police should be imputed to the Americans.

The Army Court of Military Review upheld the conviction, holding that foreign police are not subject to American constitutional standards and that *Edwards*, therefore, was inapplicable to Vidal's invocation of rights to the German police.¹⁴⁹ The court also found that the knowledge of the German police should not be imputed to the CID agent who questioned Vidal.¹⁵⁰

Based on past decisions of the Court of Military Appeals concerning the applicability of constitutional rules to foreign police,¹⁵¹ *Vidal* seems to be decided correctly. It is also clear from the facts that the CID agent did not know the previous invocation of rights, and nothing in *Edwards* suggests a duty for the agent to actively determine what the accused had done with the Ger-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1116.

¹⁴⁹ *Id.* The court was concerned that applying *Edwards* in these circumstances might induce the Germans to retain jurisdiction in future cases or could place an unnecessary burden on American police operating overseas. *Id.* at 1116-17.

¹⁵⁰ *Id.* at 1116-17. Actions are imputed to the American police when a United States official causes the foreign official to act in his stead. *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982).

¹⁵¹ See, e.g., *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982); *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976). See also Mil. R. Evid. 305(h)(2) (interrogations by foreign officials not subject to American warning requirements).

man police. This might be another area, however, where the court should examine the due diligence of the American investigator and set some standards for when, if ever, the American investigator should inquire about previous rights invocations. It does not seem an onerous burden for the American investigator to at least question the accused about previous rights invocations, and that method is consistent with several civilian decisions that limit the interrogator's initial questioning to clarification in circumstances where the accused has made an ambiguous statement that may be a request for counsel.¹⁵² As a minimum, American investigators should not be able to use deliberate ignorance to attempt to overcome what may have been the accused's attempt to invoke his rights.

III. Conclusion

Edwards v. Arizona sets a *per se* rule that forbids further interrogation once an accused subject to custodial interrogation has requested counsel. The rule does apply in the military courts and can only be overcome after the accused has invoked the right to counsel if counsel is made available or if the accused initiates further conversation or communication. Even if the accused initiates further conversation, courts must still look to the totality of the circumstances to determine if the waiver of counsel rights was valid. It is unclear whether a "good faith" exception applies when a second interrogator does not know of a previous invocation of rights, but the weight of authority is against it and the circumstances that permit such an exception would necessarily be limited. The *Edwards* rule does not apply to interrogations by foreign police where American investigators do not participate and do not know of the invocation of counsel rights to the foreign police, although the duty of American investigators to inquire into the circumstances is undecided. As the Supreme Court and the Court of Military Appeals continue to interpret and explain different facets of *Edwards*, the area of invocation of the right to counsel will remain prominent in the litigation of self-incrimination issues.

¹⁵² See *supra* notes 60 and 65 and cases cited therein.

Article 139: A Remedy for Victims of Soldier Misconduct

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I. Introduction: Recovering Money Owed a Client by a Service Member

When presented with the problem of recovering money owed a client by a service member, the legal assistance attorney has limited options. The availability of these options in a particular case depends on the status of the client-creditor and the circumstances which gave rise to the debt. If the client to whom financial support is due and owing is a dependent of the debtor, Army regulations provide for the imposition of an involuntary allotment against the debtor's military pay if there is a valid court order establishing the debt.¹ If the client is in the less favored position of having merely made a bad bargain with the service member, there is generally no vehicle for reaching the debtor's pay without his or her consent. In this latter case, the client must resort to the time-honored methods of appealing to the debtor's chain of command for help in persuading the debtor to honor his or her obligations, or suing in civil court and attempting to satisfy a favorable judgment through attachment of the debtor's property. Involuntary access to the service member-debtor's pay through garnishment or other means is generally not available under these circumstances.² An exception to this policy is Article 139 of the Uniform Code of Military Justice.³ Article 139, as implemented by chapter 9 of Army Regulation 27-20,⁴ provides one way a private creditor can gain ac-

cess to a service member's military pay without the latter's consent and without recourse to the courts.⁵ Although the class of claimants under Article 139 is virtually unlimited, its provisions are only available to persons who have suffered "willful damage" or a "wrongful taking" by a service member, and these terms are narrowly defined in AR 27-20.⁶ To better understand the meaning and scope of "willful damage" and "wrongful taking," it is useful to examine the history and purpose behind Article 139.

II. The History of Article 139

A. Antecedents

Article 139 descends from British army regulations whose purpose was to preserve discipline in the ranks, protect landlords and other civilians from mistreatment by soldiers, and compensate victims of such mistreatment for damages. Article XXI of the Articles of War of James II⁷ prescribed "severe punishment" for troops causing damage to or extorting civilian property, and death for damaging property which could serve to provision the army. The emphasis here appeared to be on preserving potential supplies for the army as much as protecting civilians or maintaining discipline. The direct ancestor of Article 139 was Article V of the British Articles of War of 1765.⁸ This article purported to protect civilians by punishing the officer who failed to discipline his troops who had caused damage "as if he himself had committed the crimes or disorders complained of." This article also prescribed reparation to civilians so wronged to be made from the offender's pay.

¹ Dep't of Army, Reg. No. 37-104-3, Military Pay and Allowances Procedures Joint Uniform Military Pay System, para. 70709 (C29, 17 Jan. 1984) [hereinafter cited as AR 37-104-3].

² This rule is based on the principle of sovereign immunity. The government cannot be sued without its consent, even as garnishee. See *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846). The government has given its permission to be charged as garnishee for the enforcement of legal obligations to provide child support or make alimony payments, but only when the money due is for remuneration for employment. 42 U.S.C. §659 (1982). See *Brockelman v. Brockelman*, 478 F. Supp. 141 (1979) and *Omega Accounts Servicing Corp. v. Koller*, 503 F. Supp. 149 (1980).

³ Uniform Code of Military Justice art. 139, 10 U.S.C. §939 (1982) [hereinafter cited as UCMJ].

⁴ Dep't of Army, Reg. No. 27-20, Claims, ch. 9 (C18, 15 June 1984) [hereinafter cited as AR 27-20].

⁵ The only other ways for a private creditor to obtain an involuntary collection from a service member-debtor's military pay are by means of a judicial support order or under the special provisions of para. 70705 for payment of rent for premises occupied by military dependents. Of course, federal government instrumentalities can establish liens against military pay for debts owed them by a service member. See *generally* AR 37-104-3, ch. 7.

⁶ AR 27-20, para. 9-4.

⁷ Articles of War of James II, art. XXI (1688) (reprinted in W. Winthrop, *Military Law and Precedents* 922-23 (2d ed. 1920)).

⁸ British Articles of War of 1765, § 9, art. V (reprinted in Winthrop, *supra* note 7, at 937).

The American Articles of War of 1775 contained a provision which closely tracked the 1765 British Article.⁹ The American Articles of War of 1776 reenacted this provision and added another making it obligatory for commanding officers of soldiers who had committed crimes to help apprehend the wrongdoers on pain of being "cashiered."¹⁰ Article of War 54¹¹ was almost identical. All the American provisions retained the essential features of the British articles: punishment of the commander for failing to insure that justice was done for depredations caused by troops under his command, and recourse to the wrongdoer's pay to compensate for damages. The American provisions were at first strictly construed to require garnishment of a wrongdoer's pay to redress physical injury to civilians caused by the personal violence of a soldier. Property damage incidentally caused by such violence could also be included in the reparations. Eventually, a more liberal interpretation allowed compensation for damage to or loss of civilian property even if unaccompanied by personal violence. The class of claimants was strictly limited to civilians.¹²

The immediate predecessor of Article 139, UCMJ, Article of War 105 of 1920 was extended by an opinion of the Attorney General to include Army officers within the eligible class of claimants.¹³ It was also held to apply to claims for willful damage to property, excluding damage caused by acts of simple negligence.¹⁴ Thus, a

guilty intent or an implication of guilty intent was required for recovery. Likewise, in claims for wrongful taking, the taking had to be caused by "depredation, willful misconduct, or such reckless disregard of property rights as to carry an implication of guilty intent."¹⁵ According to one theory, since claims for wrongful taking under Article of War 105 were not payable where there was no riotous, violent, or disorderly conduct, claims under Article 139, its successor, should be similarly limited.¹⁶

One of the premises of this article is that this reading of Article 139 is too restrictive because the language in AR 27-20 implementing Article 139 does not so limit recovery, there are no opinions or interpretations which do so,¹⁷ and the historical evolution of Article 139-type regulations has moved toward eliminating compensation for personal injury and expanding the circumstances under which recovery for property damage is possible. The requirement for violence under predecessor provisions appears to have been a vestige of the interpretations of the original American provisions, which emphasized compensation for physical injury caused by soldiers and allowed recovery for property damage only when it was incidental to such injury. This "violence requirement" is preserved in the willful damage

cer. . . . This extraordinary provision would be inexplicable if the article were deemed to include isolated acts of simple negligence committed by an individual. . . .

Dig. Ops. JAG 1912-1940 sec. 463(2) (5 Mar. 1928).

¹⁵ *Id.* Dep't of Army, Reg. No. 25-80, Claims Under the One Hundred Fifth Article of War, para 4f (3 July 1943) ("Claims arising from larceny, forgery, deceit, embezzlement, fraud, misappropriation, and misapplication, where the wrongful taking is accomplished under conditions of stealth, deception, trickery, or device, unaccompanied by riotous, violent, or disorderly conduct, are not payable under the provisions of these regulations.") [hereinafter cited as AR 25-80].

¹⁶ Berke *supra* note 12, at 4.

¹⁷ Embezzlement is a crime not formally associated with violence but often with deceit. Indeed, apparently recognizing this inherent contradiction (*i.e.*, between the language in AR 25-80 quoted, *supra* note 15, and the concept of embezzlement), The Judge Advocate General stated in a 1932 opinion that embezzlement did not constitute a "wrongful taking" under Article of War 105. Dig. Ops. JAG 1912-1940 sec. 463(3) (3 May 1932). Embezzlement is included in the term "wrongful taking" in AR 27-20 and there is no language in that regulation requiring that it be accompanied by violence or depredation.

⁹ Articles of War (United States) art. XII (1775).

¹⁰ Articles of War (United States) §IX, art. 1 and §X, art. 1 (1776).

¹¹ Articles of War (United States) art. 54 (1874).

¹² W. Winthrop, *Military Law and Precedents* 658, 661 (1920). See also J. Berke, *Article 139: Possibilities for Wider Utilization* 2 (Aug. 12, 1977) (available at U.S. Army Claims Service, Ft. Meade, Maryland) [hereinafter cited as Berke].

¹³ Dig. Ops. JAG 1912-1940 sec. 463(1) (18 May 1926). The term "Army officer" included all active duty military personnel, whether officer or enlisted. Dig. Ops. JAG 1912-1949 sec. 463(1) (3 Oct. 1934).

¹⁴ A.W. [Article of War] 105 is an unusual and extraordinary remedy, repugnant to the usual methods of establishing civil liability, authorizing the stoppage of a soldier's pay to satisfy a claim for civil damages, without right of appeal except to the soldier's commanding offi-

provision of Article 139. The wrongful taking provision, as implemented and explained by AR 27-20 and DA Pam 27-162,¹⁸ does not include it.

B. Evolution

There are three themes common to all of the provisions from the British Articles of 1765 to Article 139: the desire to maintain discipline within the military in its contacts with the civilian community; the concern for protecting persons from the depredations of soldiers,¹⁹ and the principle that the wrongdoer's military pay should be tapped to make restitution for the damage caused. Article 139 represents the latest step in this lengthy evolution. The class of claimants has expanded from landowners, to all civilians, to "military officers," which, by interpretation, includes all service members.²⁰ Under Article 139, the class of claimants comprises all who have suffered damage or loss in the ways specified in AR 27-20 by service members. The types of injuries compensable have changed from personal injuries alone, to property damage accompanying personal violence, to all property damage due to depredation that did not necessarily include personal violence. Again, AR 27-20 has expanded the original provisions by allowing compensation, in my opinion, for the wrongful taking of property unaccompanied by riotous or violent conduct, and has eliminated recovery for death or personal injury altogether. Finally, the focus has changed from an emphasis on punishing commanding officers who are unresponsive to the complaints of victims of their soldiers' excesses to a concern with recovering money damages directly from the wrongdoer.

Examples of cases brought under predecessor statutes to Article 139 which were denied include a claim by a bank for money obtained by false pretenses, unaccompanied by force, violence, or

¹⁸ Dep't of Army, Pamphlet No. 27-162, Claims, ch. 8 (15 Dec. 1984) [hereinafter cited as DA Pam 27-162].

¹⁹ "When A.W. [Articles of War] 89 and 105 are considered together in their entirety, it seems clear that their combined function is 'to protect civilians from disorderly and riotous acts on the part of the military.'" Dig. Ops. JAG 1912-1940 sec. 463(2) (5 Mar. 1928). See also AR 25-80, para. 2.

²⁰ *Supra* note 13.

disorderly conduct,²¹ and claims of patients in a hospital for money lost through embezzlement.²² Examples of cases in which Article 139 has been applied include a claim paid for losses sustained when Army personnel raided an apple orchard,²³ and damages caused when trees and shrubbery were taken to decorate a battery area (the United States paid for damages to a nearby barn and battery members were held liable for the trees and shrubbery).²⁴

In summary, Article 139 represents the latest stage in a historical trend generally expanding the circumstances in which recovery may be made from a service member's pay for property damage and loss caused by him or her. Further, the historical *raison d'être* of Article 139 is the concern with discipline in the ranks and the maintenance of good relations with the civilian community. Finally, to fully understand Article 139, its language must be read in conjunction with applicable portions of AR 27-20 and DA Pam 27-162.²⁵

III. Types of Claims Payable

Recovery is possible under Article 139 only for willful damage to personal property or the wrongful taking of it. Paragraph 9-4a of AR 27-20 defines "willful damage" as "[d]amage which is inflicted intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from damage which is caused thoughtlessly, or inadvertently as in simple negligence." "Wrongful taking" is defined in paragraph 9-4b as "[a]ny unauthorized taking or withholding of property, not involving breach of contractual or fiduciary relationships, with intent to deprive the

²¹ Dig. Ops. JAG 1912-1940 sec. 463(3) (21 June 1920).

²² Dig. Ops. JAG 1912-1940 sec. 463(3) (3 May 1932).

²³ Dig. Ops. JAG 1912-1940 sec. 463(3) (3 June 1926).

²⁴ DA Pam 27-162, para. 8-4d(1)(b).

²⁵ Another relevant provision is UCMJ art. 109, which denounces the damaging of non-military property by service members and makes such conduct criminally punishable. Other claims provisions now allow recovery in some situations historically covered by Article 139 and its predecessors. AR 27-20, ch. 10 allows payment for claims submitted by foreign nationals for damage caused by the negligence or willful misconduct of U.S. service members committed overseas. Article 139 may still be used in many circumstances where chapter 10 might apply. AR 27-20, para 9-5c.

owner or person in lawful possession of his property temporarily, permanently, or for an indefinite period.”

A. Willful Damage

AR 27-20, paragraph 9-5a, further specifies claims for which recovery under Article 139 can be made as—

Those for damage to or loss or destruction of property caused by riotous, violent, or disorderly conduct, or acts of depredation, by a member or members of the Army showing such reckless and wanton disregard of the property rights of others that willful damage or destruction may reasonably be implied....

The language of the first provision dealing with willful damage, paragraph 9-4a, distinguishes between intentional and negligent acts. Damage caused by negligence is explicitly excluded from the coverage of Article 139. The Army has made the policy decision that simple negligence does not justify taking a soldier's pay without his or her consent.²⁶ This is in accord with the historical purpose of Article 139-type regulations: to deter marauding by soldiers and compensate the victims of such behavior.

Intentional behavior is clearly within the coverage of Article 139, but paragraph 9-5a, which further elaborates on “willful damage,” seems to include another type of activity which can trigger application of Article 139. In his historic treatise on torts, William L. Prosser describes intentional conduct as that which either involves an intent to do the specific harm which results, or in which the potential harm is known to the actor at the time he acts to be substantially certain.²⁷ Between negligence and intentional behavior, he identifies a third level of behavior: a “penumbra of what has been called ‘quasi intent.’” The words “willful,” “wanton,” and “reckless” are associated with this middle level of behavior which Prosser refers to as aggravated or “gross” negligence.²⁸ Is this type of conduct “willful,” as that word is used in AR 27-20, paragraph 9-5a.

²⁶ *Supra* note 14.

²⁷ W. Prosser, *Torts* §8, at 31-32 (4th ed. 1971).

²⁸ *Id.* §34, at 184-186.

The operative words of paragraph 9-5a are “conduct, or acts of depredation . . . showing such a reckless and wanton disregard of the property rights of others that willful damage or destruction may reasonably be implied.”²⁹ Compare this language with Prosser's description of gross negligence:

[A]n act of unreasonable character in disregard of a risk known to [the actor] or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow....³⁰

The issue can be framed as follows: is the conduct contemplated by paragraph 9-5a limited to Prosser's intentional conduct, which by definition includes that in which the potential harm is “substantially certain,” or does it also include gross negligence as defined by Prosser to include potential harm which is “highly probable”? Such a distinction might seem to have significance only for lawyers, but because it could be used to limit recovery under Article 139, it is useful to discuss it. In my opinion, the willful conduct referred to in Article 139 does include gross negligence as defined by Prosser, given the historical purposes of Article 139 and its predecessors. If the reasons for granting soldiers' pay are to deter unruly impulses and to compensate soldiers' victims for the consequences of their excesses, these ends can be accomplished best by garnishing for the certain, as well as the readily foreseeable, consequences of soldiers' behavior. For example, suppose there is a brawl in a multi-occupant barracks room in which there is personal property such as stereo equipment, exposed and unprotected, which results in damage to that equipment. The damage might not be specifically intended as the primary concern of the participants in this scenario would be the fight, and the damage might not be substantially certain, but only highly probable, depending on factors such as the size of the room and the location of the stereo equipment within

²⁹ AR 27-20, para. 9-5a.

³⁰ Prosser §34, at 185.

it. If the owner of the damaged stereo equipment were not an instigator of or participant in the fight, he or she could recover from the party or parties responsible for the damage under Article 139.³¹

Finally, as already mentioned, AR 27-20 establishes a violence requirement for recovery under the willful damage provision. Paragraph 9-5a states that the damage must be caused by "riotous, violent, or disorderly conduct, or acts of depredation." Damage caused by behavior which does not attain the requisite degree of turbulence, no matter how deliberate, does not qualify.

B. Wrongful Taking

As with willful damage, AR 27-20 further comments on "wrongful taking", complicating rather than simplifying the meaning of the term. After defining "wrongful taking" as a taking "not involving breach of contractual or fiduciary relationships" in paragraph 9-4b, the regulation enlarges on the concept in paragraph 9-5b: "A loss through larceny, forgery, embezzlement, fraud, misappropriation, and similar offense is compensable if a wrongful taking of property is involved." Apart from the confusion created by this circular definition, there is the potential conflict generated by excluding contractual and fiduciary relationships when embezzlement is included within the concept of wrongful taking. Embezzlement is the fraudulent appropriation of the property of another by a person already in legal possession of it.³² Further, the legal possession is quite often acquired through a contractual, quasi-contractual, or fiduciary relationship between the parties, such as agency or a bailment. Does AR 27-20 deny recovery to the victim of a loss by embezzlement when the legal possession was acquired as a result of such a relationship? Two examples illustrate this problem.

³¹ Although not explicitly stated in AR 27-20 chapter 9 (C-17), reason dictates that conduct on the part of the alleged victim which is a contributory cause of the damage could bar recovery under Article 139, just as contributory negligence or misconduct bars or mitigates civil liability in tort. This concept was in fact articulated in earlier versions of chapter 9.

³² W. LaFave & A. Scott, Jr., *Criminal Law* §89 (1972).

1. Service member A is about to be reassigned and makes an agreement with service member B whereby the latter, with a power of attorney, takes custody of the former's car to sell it and forward the proceeds of the sale to A at his new duty station. B, acting gratuitously, sells the car and absconds with the proceeds.

2. Service member A, just arrived at his new duty station and not yet aware of his fleecing at the hands of B, needs a car to get to work. Service member C is willing to sell A a car at a reasonable (although not suspiciously low) price. Unbeknownst to A, the car C is offering to him is rented (*i.e.*, not owned by C). To eliminate the possibility of negligence on A's part, which would preclude recovery under AR 27-20, let us assume that C is able to present credible evidence of ownership of the car of which A reasonably relies to make the purchase. Several days later, the rental agency repossesses its property. Ironically, A receives notice of B's treachery the same day. Can A recover under Article 139 for both losses? Either loss?

In answering these questions, first consider the policy motivations behind paragraphs 9-4b and 9-5b of AR 27-20. Clearly, the reason for excluding contractual situations from Article 139's coverage is that the Army is not a collection agency and will not protect creditors from bad bargains made with service members. If the Army puts the machinery of Article 139 at the disposal of every soldier's creditors, it would be thrust into the position of adjudicating questionable debts and countless personnel hours would be diverted from the defense mission to doing the jobs of the courts and collection agencies. Nevertheless, the mere existence of the "wrongful taking" provision shows that the Army has accepted responsibility for helping the victims of the more egregious deceptions perpetrated by its members. No doubt this is at least partly motivated by the Army's desire to maintain good relations with the civilian community. Another concern, as we have seen is discipline. With the expansion of the class of eligible claimants under Article 139 to include all service members, another policy consideration can be identified: maintaining morale within the ranks. The availability to service members of an inexpensive and time-saving alternative to civil suit to redress the more seri-

ous and obvious injustices inflicted upon them by their comrades can only enhance morale.

Each of the hypotheticals discussed above appears to be a situation in which the parties have made a contract which was later breached. Hypothetical 1 is a bailment because A gave B custody of his car in trust to sell and then to render an accounting back to A. Although B is acting without compensation and, therefore, all the benefit (and none of the detriment) appears to be flowing to A, it has long been recognized in such a situation that a bailor's detriment is the relinquishment of custody to the bailee, which fulfills the consideration requirement.³³ Whether one considers this situation a contractual or a fiduciary relationship, A would have no recourse under Article 139 to recover from B unless it could be shown that B intended to defraud A when the original agreement was made, thus vitiating the agreement itself. Although B has embezzled A's property, there was no "wrongful taking" because under paragraph 9-4b of AR 27-20, such a taking cannot involve a breach of contract or a fiduciary relationship.

A, however, may use Article 139 to recover from C in hypothetical 2. although C purported to contract to sell A the car, C knew that he never had title to the property and deliberately concealed that fact. Because there was fraud in the inducement, there never was a contract and the paragraph 9-4b restriction does not apply. As a practical matter, in any situation where a client's loss involves a breach of contract, the practitioner should look for fraud in the inducement as the most promising avenue for obtaining relief under Article 139.³⁴

³³ See 8 Am. Jur. 2d *Bailments* §57 (1980) and cases cited therein.

³⁴ One might conclude that, even in the absence of a violence requirement, recovery under Article 139 for a loss caused by embezzlement must be rare, since in many situations custody is transferred pursuant to a contractual arrangement and it is difficult to show a fraudulent intent. However, for example, custody may be transferred by loan. Another possibility is a fact pattern in which the contract transferring the original possession or custody of the property can be sufficiently separated from the embezzlement to show that the loss did not directly result from breach of contract. Thus, the potential for embezzlement cases cognizable under Article 139 is not as limited as might initially appear.

These results in the two hypotheticals are consistent with the policies underlying AR 27-20. In the case of A's bailment to B, the government will not save A from a bad bargain which he entered with his eyes open. Adjudication of the matter is properly left to the courts, which are equipped to decide the fine points of law and fact and to give the full panoply of due process rights to all parties. The answer to the question of whether the embezzlement victim can recover under Article 139 if possession of the lost property was acquired by contract is, theoretically, yes, but in most cases, no. If the contract transferring possession can be separated temporally and factually from the circumstances of the conversion (or if it can be shown to be void for some reason, i.e., there is no contract at all), Article 139 can be used. If, however, the loss is somehow connected with the breach of the original contract, Article 139 is unavailable.

IV. Procedural Considerations

A. Guidelines

For the legal assistance officer, the value of Article 139 is that the alleged debtor's chain of command is forced to get involved. The language of AR 27-20 mandates an investigation of the claim and satisfaction of a debt found to be valid from the debtor's pay.³⁵ When neither Article 139 nor a support order is available, the advocate representing the service member's creditor must rely on the energy and goodwill of the service member's immediate commander, who can do little more than exert moral pressure on the soldier to pay his or her debts or take action which may punish the soldier but leave the victim uncompensated. Situations where the Army may take direct action to make the creditor whole by taking a service member-debtor's pay are few. Understandably, many commanders, preoccupied with the mass of details inherent in their jobs and cognizant of their legal impotence in helping creditors, no matter how valid their claims, are hesitant to commit a great amount of time to debt counseling. Article 139, as implemented by

³⁵ "If the commanding officer receiving the complaint has authority to convene a special court-martial, he *will* appoint an investigating officer . . . to investigate the complaint." AR 27-20, para. 9-8c(1)(a) [emphasis added].

AR 27-20, not only supplies the authority to satisfy valid claims, but also makes available a mechanism to adjudicate claims which requires a minimum commitment of time by the chain of command.

The advocate's first question in deciding whether to advise the client to submit a claim under Article 139 should be do the facts fit the limited class of situations to which Article 139 applies? Willful damage and wrongful taking—limitations on the type of case cognizable—have already been discussed. Paragraph 9-6 of AR 27-20 identifies claims not cognizable under Article 139: claims for personal injury or death (as opposed to property damage or loss); claims for damage caused by the acts or omissions of service members while acting within the scope of their employment; and subrogated claims.³⁶ As should be clear from the discussions of willful damage and wrongful taking, damage or loss caused by simple negligence is not compensable. A clear, specific intent, whether actual or implied, is required. Further limitations on recovery are that no collections over \$5,000 will be made against the pay of any one offender without the approval of the Commander, U.S. Army Claims Service,³⁷ and no consequential or indirect damages will be paid.³⁸

The advocate's next consideration should be the time limitation established by AR 27-20. Unless a complaint is submitted within ninety days of the date of the incident which gave rise to the claim, the claim is barred. This limitation may be waived by the officer acting on the complaint "for good cause shown."³⁹

Once the decision is made to proceed with an Article 139 claim, the complaint itself must be submitted. The complaint may be oral or in writing initially, but must be reduced to writing and

³⁶ This paragraph specifies insurers as the subrogees who are barred from recovery under Article 139. However, the idea of the government recovering under that provision by subrogation (for example, the government compensates the victim of willful damage then attempts to recover against the wrongdoer) has also been considered and rejected. DAJA-AL 1976/3630, 15 Jan. 1976.

³⁷ AR 27-20, para. 9-7b.

³⁸ *Id.* para. 9-7c.

³⁹ *Id.* para. 9-7a.

submitted in triplicate before final action. It must be submitted to the "offending member's" unit or to the nearest military installation, and must recite a sum certain in damages.⁴⁰

Regardless of who in the chain of command receives the claim, it must be acted upon by the offender's special court-martial convening authority (SPCMCA).⁴¹ If there are several offenders who are members of different units, the SPCMCA whose headquarters is closest to the site of the incident is responsible for acting on the claim.⁴² Upon receipt of the claim, the SPCMCA must appoint an investigating officer or a board, using informal procedures, investigate it.⁴³ The board, acting under the informal procedure guidelines of chapter 4 of AR 15-6,⁴⁴ must make three findings: whether the claim is cognizable under Article 139 and chapter 9 of AR 27-20; the identity of the offender or offenders; and the amount of damages. If the claim is found to be cognizable, the board must submit a report, in triplicate, to the SPCMCA with findings and recommendations, including an assessment of damages against each offender if the claim is meritorious. If the claim is not found to be meritorious, the board may disapprove it.⁴⁵ If the board finds the claim cognizable and assesses damages, the SPCMCA must submit the report to the servicing staff judge advocate for a written review, including whether the claim is cognizable under Article 139, whether it is supported by the evidence, and whether there has been substantial compliance with the provisions of Article 139, AR 15-5, and AR 27-20.⁴⁶

When the report is determined to be legally sufficient, the SPCMCA will make a final determination that the claim is within Article 139 and that all procedural requirements have been met. If the claim is approved, the SPCMCA must per-

⁴⁰ *Id.* para. 9-8a.

⁴¹ *Id.* para. 9-8c.

⁴² *Id.* para. 9-8c(2).

⁴³ *Id.* para. 9-8c(1)(a).

⁴⁴ Dep't of Army, Reg. No. 15-6, Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) [hereinafter cited as AR 15-6].

⁴⁵ AR 27-20, para. 9-8d.

⁴⁶ *Id.* para. 9-8e(1)(b), (c).

sonally fix the amount to be assessed against each offender and direct the disbursing officer to withhold the amount assessed against each offender from that person's pay.⁴⁷ "Such action by the commanding [appointing] officer is not subject to appeal by the claimant or the offender, and is conclusive on any disbursing officer for payment by him to the claimant of the amount of the stoppage so ordered."⁴⁸ This amount, however, is subject to the limitations provided in other, appropriate Army regulations. If any of the offenders are members of units other than the SPCMCA's, the report will be forwarded to the appropriate commanders.⁴⁹

Although there is no appeal from the SPCMCA's decision, the SPCMCA may reconsider his action as long as he remains in command of the same unit he commanded when the decision was made. Upon leaving that command, he loses reconsideration authority over the case. Thereafter, his successor may only reconsider the decision on the basis of "newly discovered evidence, fraud, or obvious error of law, fact, or calculation appearing on the face of the record."⁵⁰ The remission of indebtedness provisions of 10 U.S.C. § 4837(d) do not apply to garnishments under Article 139.⁵¹

B. Practical Guidance for Advocates

Because recourse to Article 139 gets the debtor's chain of command involved with the creditor's claim, pressure is necessarily brought to bear on the debtor. The result will often be an offer of restitution from the debtor. AR 27-20 recognizes and encourages this as an alternative to its procedures.⁵² Thus, the advocate representing the creditor may need only prepare and file a complaint, then await an offer from the debtor.

The complaint should be a clear and concise statement of the facts upon which the claim is based, preferably in the form of an affidavit

⁴⁷ *Id.* para. 9-8e(1)(c).

⁴⁸ *Id.* para. 9-8e(1)(d).

⁴⁹ *Id.* para. 9-8e(2).

⁵⁰ *Id.* para 9-8f(2).

⁵¹ *Id.* para. 9-8g.

⁵² *Id.* para. 9-8b.

signed by the claimant. Since the recipient of the complaint will be a layperson, there is no point in using "legalese" or making fine legal points. The complaint should be accompanied by all the evidence available to support the claim, such as witness statements, police reports, promissory notes, *etc.*, because the file will be submitted directly to the AR 15-6 board by the SPCMCA. If possible, the advocate should personally deliver the file to the debtor's SPCMCA and should take the opportunity to inform that officer on the provisions of Article 139 and chapter 9 of AR 27-20, as many line officers are unaware of Article 139 and the authority it gives them. Copies of both (a total of five pages) might be attached to the file to provide the SPCMCA with a quick reference. Thereafter, the claim's progress should be monitored to insure that the file is neither lost nor given low priority.⁵³

When the claim is processed, the advocate should get copies of all actions: the record of the investigation, the SPCMCA's decision, the directive to finance to garnish, and finance's documentation showing compliance. If the claim is not cognizable under Article 139, or if recovery cannot be made for some other reason,⁵⁴ the advocate should examine the possibility of proceeding under another provision of AR 27-20 and refer the client to the local claims judge advocate to explore other possible options, if any.

V. Due Process and the Future of Article 139

A. Due Process in Article 139

Are the due process rights afforded the debtor in an Article 139 action (under the procedures of AR 27-20 and AR 15-6) adequate? What due

⁵³ AR 27-20 establishes no time limits for adjudicating an Article 139 claim.

⁵⁴ One situation in which a collection might not be possible even though a valid debt has been established under Article 139 is that in which the maximum allowable collections/ deductions are already chargeable against the debtor's pay. Generally speaking, the maximum portion of an enlisted person's pay which may be taken to satisfy debts to all entities, government or private, is two-thirds of basic pay and certain allowances. AR 37-103-3, para. 70702c, *e.* Debts to government entities, garnishment of child support, bankruptcy payments, and voluntary allotment are some of the deductions which take precedence over collections under Article 139. Department of Defense Pay Manual, ch. 9, Table 7-9-1 (C74, 30 May 1983).

process rights does the Constitution grant an individual facing attachment of pay? In *Sniadach v. Family Finance Corporation*,⁵⁶ The Supreme Court made it clear that wages are property, the attachment of which constitutes a deprivation requiring application of procedural due process standards. *Sniadach* further distinguished wages as "a specialized type of property presenting distinct problems in our economic system . . ." because "[t]he leverage of the creditor on the wage earner is enormous. . ."; even temporary deprivation of wages "may as a practical matter drive a wage-earning family to the wall."⁵⁶ Thus, the tentative wage garnishee has the right, at a minimum, to advance notice of the garnishment action and a hearing in which he may present any defenses to the suit itself or to the prejudgment garnishment of his or her wages.

An Article 139 claim is very different from the fact pattern in *Sniadach*. First, *Sniadach* dealt with a temporary, *i.e.*, prejudgment, freezing of the defendant's pay during the time between summons and trial on the issues, while the potential deprivation of pay in an Article 139 claim is permanent. The Article 139 claim is equivalent to the trial on the merits in *Sniadach*, so it would appear to require greater due process safeguards than those mandated by the Supreme Court for prejudgment garnishment.⁵⁷

Second, a claim under Article 139 can raise some technical issues. The shades of difference between embezzlement, larceny, and false pre-

⁵⁶ 395 U.S. 337 (1969).

⁵⁶ *Id.* at 341-342.

⁵⁷ Strictly speaking, a claim under Article 139 is not a true garnishment. Rather than being a suit by a third party to force the debtor's employer to withhold the debtor's wages, the Article 139 procedure is a voluntary, administrative, "in-house" mechanism for the employer to evaluate claims against its employees, and, in certain situations, satisfy such claims by means of collections from the employee's pay. As already noted, Article 139 is primarily for the benefit of the employer—the U.S. Government—since its purposes are to maintain discipline (and sometimes enhance morale) within the organization, and to preserve good relations with the non-military community. Despite this fact, the effect of a collection under Article 139 is sufficiently similar to a garnishment to make *Sniadach* a good starting point to discuss due process as it relates to Article 139, and the Article 139 procedure will be analyzed as a garnishment-type action throughout this article.

tenses are capable of sending experienced lawyers into paroxysms of esoteric debate. Determining whether a set of facts can be categorized as "willful damage" or "wrongful taking," as those terms are defined in AR 27-20, can be trying for line officer and lawyer alike. There is no requirement that the AR 15-6 investigation be conducted by a person trained in the law. In fact, most AR 15-6 investigating officers are probably nonlawyers. Similarly, the SPCMCA, who finally decides the issue of liability, is unlikely to have extensive legal training. The investigating officer and the SPCMCA may be strongly influenced by the legal arguments of the advocate presenting the creditor, which could make a difference in a close case. Although the judge advocate review mandated in paragraph 9-8e(1) of AR 27-20 may offset this effect to a certain extent, the SPCMCA is not required to follow the staff judge advocate's recommendation. Given these circumstances, it is likely that the potential Article 139 garnishee will need legal advice and representation to protect his or her interests.⁵⁸

Finally, the remedy provided in the second paragraph of Article 139 creates formidable due process problems:

If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.⁵⁹

The remedy created here is extraordinary, involving as it does a governmental righting of private wrongs. The reason for it is apparently the government's desire to provide a remedy for the victims of soldiers' misbehavior in situations

⁵⁸ This is not to say that the investigating officer should be required to be a lawyer. I am not advocating such a proposition and probably could not convincingly do so under present law. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (parole boards are not required to be composed of lawyers if hearing officers are neutral and detached).

⁵⁹ UCMJ art. 139(b).

where no civil remedy against individuals may be available—when soldiers loot and pillage, they often do so in groups and in the heat of the moment, making it difficult to identify the responsible individuals. The rationale seems to be that because the government has brought the group of soldiers to the vicinity of the victim's property (as in the case of the raid on the apple orchard) and is ultimately responsible for their discipline, it will insure that the victim has a remedy for losses attributable to the group. This situation, however, is fraught with due process problems, both substantive and procedural. The provision could be used to justify imposing liability on a service member in the absence of any evidence of his or her individual guilt. The only criterion for imposing liability is the presence of a person at the scene where the damage occurred. Once the individual soldier is found to have been present, he or she could be forced to contribute to the general assessment with no opportunity to be heard individually on the merits. The remedy is extreme—especially in view of the *Sniadach* Court's comments regarding the sanctity of wages.⁶⁰

The Article 139 procedure does provide minimal due process: notice and a right to be heard. AR 27-20 directs that the informal procedures under AR 15-6 be followed when investigating an Article 139 claim.⁶¹ AR 15-6, in turn, provides for notice to the subject of an investigation when the investigation is complete. The subject must then be given the opportunity to respond in writing, and the SPCMCA must "review and evaluate" this response before making a decision.⁶² The SPCMCA is the final arbiter of the validity of the claim—there is no further appeal. Because of the factors discussed above, it is my opinion

⁶⁰ The argument might be made that, in view of the benefits available to military families, such as housing, medical care, Army Emergency Relief loans, etc., wages do not have the "special significance" attributed to them in the civilian context. However, one need only witness the hardship the family of an enlisted service member experiences as a result of a "short" paycheck to appreciate the significance of military wages.

⁶¹ AR 27-20, para. 9-8d.

⁶² AR 15-6, para. 1-4c(3). Paragraph 4-3 frankly states that the informal procedure is not intended to provide a hearing for persons with an interest in the litigation.

that the minimal due process rights afforded by the informal AR 15-6 procedure are inadequate for an Article 139 proceeding. The extraordinary nature of the remedy, the seriousness of the potential consequences to the subject of the action, and the technical intricacies involved make it necessary to provide greater due process protection to the prospective garnishee.⁶³

B. The Verdict: Is It Worth It?

After considering these due process problems, one might well be tempted to ask whether it would be better to consign Article 139 to the scrapheap of history. The need for such a provision has been filled to a certain extent by chapter 10 of AR 27-20, under which foreign nationals may claim compensation directly from the Army for damage caused by the negligence or intentional wrongdoings of soldiers committed overseas. However, there is no such comprehensive coverage for United States citizens. Article 139 has been criticized because of its due process problems and, largely due to them, has fallen into disuse by the Air Force and Navy, and rarely used in the Army.⁶⁴ Running counter to this trend, however, is the history of general expansion and liberalization of Article 139-type remedies noted earlier in this article.

Despite its current drawbacks, the Article 139 remedy should be preserved because of the public relations, morale, and discipline benefits of having such a remedy available. The value to civilian-military relations of having an expeditious way of redressing the wrongs done civilians by soldiers is obvious. Although this need is partially met by other claims provisions, Article 139 can be used to fill many of the gaps in coverage. Service members suffering losses due to their comrades' wrongdoings may also take advantage of this remedy; this enhances morale. Finally, Article 139's unique feature of forcing the wrongdoer to pay for the consequences of his or her acts is of great value in terms of discipline and deterrence. Unlike under chapter 10 of AR 27-20, for instance, the grossly careless, irre-

⁶³ For an example of the opposing view, finding due process under informal 15-6 procedures adequate, see DAJA-AL 1978/3094, 22 June 1978.

⁶⁴ Berke *supra* note 12 at 6.

sponsible, or malicious service member cannot shrug off the consequences of his or her behavior by relying on "Uncle Sugar" to satisfy the aggrieved claimant like an overindulgent parent.

If Article 139 is to be preserved, its due process inadequacies must be remedied. The positive effects of morale and discipline will be negated if Article 139 is used arbitrarily. Service members must be aware that, although they can be held personally responsible for the damage they cause, the decision to garnish will be made only after a full and fair consideration of the facts, and not as a "knee-jerk" response to every alleged claimant who exerts pressure on the chain of command. The mechanism for providing enhanced due process protection is already in place and need only be activated. The *formal* investigation procedures under AR 15-6 contain the minimal due process features—prior notice and a hearing—plus rights of confrontation and representation at an in-person hearing.⁶⁵

In *Mathews v. Eldridge*,⁶⁶ the Supreme Court considered whether an in-person evidentiary hearing was necessary before suspending disability benefits pending a final determination of eligibility at a full-blown, quasi-judicial hearing on the merits. The eligibility determination mechanism under review by the Court allows submission of medical and testimonial evidence by the benefit recipient, as well as a written presentation of his or her position, prior to a preliminary suspension or curtailment of benefits. Thereafter, the recipient was entitled to *de novo* consideration of the suspension by the state administering agency, an in-person evidentiary hearing before a Social Security Administration judge and, finally, judicial review by a federal court. *Eldridge* contended that the suspension of his benefits based solely on a "paper" presentation, without the opportunity to personally appear before the deciding authority, violated his due process rights.

The Court identified three factors to be considered in a review of the constitutional adequacy of procedures required prior to the deprivation of a given property interest:

⁶⁵ See generally AR 15-6, ch. 5.

⁶⁶ 424 U.S. 319 (1976).

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁶⁷

The Court noted that because "full retroactive relief" was available to *Eldridge* if he "ultimately prevail[ed]" in the disability adjudication scheme, his only interest was in uninterrupted receipt of benefits pending final determination of his right to them.⁶⁸ The Court further pointed out that of all the cases presenting the issue of whether due process required an evidentiary hearing prior to temporary deprivation of a property right similar to the one in *Eldridge*, only in *Goldberg v. Kelly*⁶⁹ had such a hearing been found necessary. *Goldberg* involved termination of welfare assistance, and a hearing was deemed necessary prior to suspension in that case because such assistance is often the sole means of survival for recipients. Further, since welfare recipients often lack the education necessary to write effectively and the resources to get assistance in drafting a statement, a written presentation was considered an inadequate substitute for oral presentation in communicating the recipient's case to the decision maker. The *Eldridge* Court distinguished the case before it on the basis that physical impairment rather than financial need is the criterion for the award of disability compensation. Thus, applying the three factors, the Court reasoned that because disability recipients are less likely than welfare recipients to be dependent solely on the benefits for survival, the deprivation in the former case is not as great. Second, given the detailed factual analysis required by the state agency in *Eldridge* prior to suspension of benefits, and the reliance of the agency on professional, objective medical evidence, both the

⁶⁷ *Id.* at 335.

⁶⁸ *Id.* at 340.

⁶⁹ 397 U.S. 254 (1970).

risk of erroneous deprivation and the value of an evidentiary hearing were found to be lower than in the *Goldberg* scenario. Finally, in view of the thoroughness and reliability of the presuspension procedure, and the cost of superimposing a judicial hearing on it, the governmental interest in fiscal economy was found to overcome Eldridge's interest in a pre-suspension hearing. The existing procedures were, therefore, found to be adequate.

In applying the *Eldridge* factors to Article 139(a),⁷⁰ one fact is immediately apparent: whereas the *Eldridge* and *Goldberg* decisions dealt with cases of temporary property deprivation pending a final adjudication, the procedure under Article 139 is the final adjudication. Thus, the respondent in an Article 139 action faces permanent deprivation of wages. Second, due to the technical nature of the issues in an Article 139 claim, the risk of erroneous deprivation resulting from lack of expertise on the part of the adjudicator is significant. Also, the creditability of the parties on both sides of the issue is often an important consideration in an Article 139 claim. In the words of the *Goldberg* Court:

[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.⁷¹

An in-person hearing under formal AR 15-6 procedures would go a long way toward remedying these problems. The respondent would have the benefit of the advice and appearance of counsel⁷² to help explain his or her side of esoteric issues. He or she would also have the opportunity to confront the claimant and opposing witnesses and to probe their credibility before the board.⁷³

⁷⁰ Putting aside, for the moment, Article 139(b), which is discussed separately below.

⁷¹ 397 U.S. at 269.

⁷² AR 15-6, para. 5-6.

⁷³ But *not*, it should be noted, before the decision maker (respondent's SPCMCA). It will be remembered that the investigation or informal board only *recommends* action it deems

Finally, the interest of the government in an Article 139 claim is not only budgetary, it is also concerned with morale and discipline. Giving Article 139 claims a full and fair airing would serve these government interests. Nor would incorporating formal investigation procedures into Article 139 actions present an undue financial burden—such procedures would be no more onerous or wasteful of Army resources than an elimination board. In summary, because it is contended that informal AR 15-6 procedures are constitutionally inadequate for investigating Article 139 claims, implementing formal AR 15-6 procedures would answer all due process objections and should be carried out.

Article 139(b) presents more serious due process problems. It is difficult to conceive of any procedural safeguards that would solve these problems. In the case of this provision, the danger that a soldier's substantive and procedural due process rights may be violated outweighs any interest the government may have in recovering from individuals to compensate victims of soldier misconduct. The difficulty is in the basic concept of the provision. Therefore, it is urged that it be eliminated. It is further suggested that some thought might be given to creating a new claims provision allowing victims in situations such as those contemplated in Article 139(b), but not covered by other claims provisions, to recover directly from the Army for their losses.

VI. Conclusion

Article 139 provides a unique means of compensating the victims of the intentional and reckless misbehavior of service members without recourse to civil courts through a forced allotment from the wrongdoers' pay. Although there are due process problems with the remedy in its present form, these can be resolved with minor changes to Article 139 and its implementing regulation, AR 27-20. The changes should be made, and the remedy preserved, because Article 139 has a positive effect on the image of the military in the civilian world and on morale and discipline within the ranks.

appropriate. However, there is no reason why the report of investigation at either counsel's request, could not contain findings regarding credibility of witnesses.

The Advocacy Section

TRIAL COUNSEL FORUM



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Introducing Documentary Evidence

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I. Introduction

To introduce documentary evidence at a court-martial, the trial counsel must establish that the document is relevant, fits within a hearsay exception, is properly authenticated, and complies with the best evidence rule. In addition to the Military Rules of Evidence, recent decisions have simplified and clarified the procedure for admitting various documents into evidence. This article will examine the current state of the law and provide trial counsel with guidelines for admitting documentary evidence. Rather than scrutinizing the variety of documents which trial counsel must introduce (*e.g.*, medical records, SIDPERS,¹ ration cards, laboratory reports, chains of custody, prior connections, checks, sworn statements, *etc.*), this article will focus on the two documents which seem to give trial counsel the most difficulty—Criminal Investigation Division (CID) laboratory reports of illegal drugs, and worthless checks in prosecutions un-

der Article 123a of the UCMJ.² If trial counsel can understand and master the fundamental principles behind the introduction of these documents, then he or she should have no problem applying them to the introduction of other documents.

II. Relevance

Trial counsel must first show that the document which is to be introduced is relevant to the case under Military Rules of Evidence 401 and 402.³ The definition of relevance under Rule 401

¹ Standard Installation/Division Personnel System (SIDPERS). The SIDPERS forms (DA Form 2475-2 and DA Form 4187) are the standard forms used to account for Army personnel and are admissible in evidence under the same general rules as morning reports.

² Uniform Code of Military Justice art. 123a, 10 U.S.C. § 923a [hereinafter cited as UCMJ]. This article does not address the more complex issues raised by the introduction of urinalysis laboratory reports emanating from certified DOD and civilian drug testing laboratories, or CID laboratory reports or other scientific reports representing subjective judgments and evaluations of experts such as handwriting analyses or sanity board reports. However, no distinction between these types of scientific reports is made by the Military Rules of Evidence and, therefore, these types of reports should be admissible in the same manner and to the same extent as the documents discussed in this article. The only distinction would be that the defense might be more readily able to compel the production of the expert for cross-examination.

³ Mil. R. Evid. 401 and 402 [hereinafter cited as Rule in the text].

is broad and "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁴ Rule 402 provides for the admission of all relevant evidence, except as otherwise provided, and states that all irrelevant evidence is inadmissible. Because the purpose of this rule is to favor the admission of evidence, trial counsel will have no problem in most cases showing the relevance of various documents. Indeed, their relevance will be self-evident. For example, where the accused is charged with absence without leave (AWOL) between certain dates, the SIDPERS document reflecting an accused's change of duty status from present for duty to AWOL would be relevant on its face. Likewise, in prosecuting worthless check cases, the accused's personal checks with his or her signature and the stamp of dishonor on the checks, all of which correspond to the charge, would be readily identifiable and relevant on their face. When introducing a forensic laboratory report showing the test results on fungible evidence such as illicit drugs, however, the relevance of the document will not be apparent because fungible evidence is not unique or readily identifiable.

To establish relevance in these types of cases, the trial counsel must prove to a "reasonable probability" that the drugs which were seized from the accused were the same drugs tested at the crime laboratory and presented in court.⁵ To prove this fact, trial counsel should introduce the DA Form 4137, Chain of Custody Document,⁶ into evidence by using the official record exception to the hearsay rule under Rule 803(8).⁷ The

⁴ Mil. R. Evid. 401.

⁵ *Gass v. United States*, 416 F.2d 767, 770 (D.C. Cir. 1969); *United States v. Courts*, 9 M.J. 285, 291 (C.M.A. 1980).

⁶ Dep't of Army, Reg. No. 195-5, Criminal Investigations-Evidence Procedures, paras. 2-1 and 2-3 (15 Oct. 1981) [hereafter cited as AR 195-5].

⁷ Mil. R. Evid. 803(8) provides as follows:

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made

chain of custody document also fits within Rule 803(6),⁸ the business record exception to the hearsay rule. Because of the greater difficulty in introducing documents under the business record exception, trial counsel should offer the chain of custody document as an official record. The procedure to introduce documents as business record exceptions will be examined later in this article.

Army Regulation 195-9⁹ provides for the immediate marking and sealing of fungible evidence when the chain of custody document is initiated. Trial counsel should request the military judge to

pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

⁸ Mil. R. Evid. 803(6) provides as follows:

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in the paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and roster of prisoners.

⁹ AR 195-5, paras. 2-1 and 2-3.

take judicial notice of these provisions.¹⁰ This regulation also requires the preparation of the chain of custody document as an official duty, and thereby lays the foundation for its admissibility under the official record exception to the hearsay rule.¹¹ The testimony of the military police officer (MP) or CID agent who initiated the chain of custody document can also be used to lay the foundation for its admissibility as an official record. It should be noted, however, that the admissibility of official records under Rule 803(8) requires no live witness testimony or foundation.¹² Moreover, official records are self-authenticating and require only an attesting certificate signed by the custodian of the record.¹³ The official record exception and its authentication will be discussed more fully later in this article.

Once the properly authenticated chain of custody document and the pertinent provisions of AR 195-5 are admitted into evidence, the government should have met its burden of proving a continuous chain of custody to a "reasonable probability."¹⁴ The official acts of public officials are presumed to be regular absent evidence to the contrary.¹⁵ Nevertheless, trial counsel must be concerned that his or her case is proven beyond a reasonable doubt and not just to the "reasonable probability" standard required for the admission of a laboratory report. Additionally, trial counsel might be faced with an irregularity on the face of the chain of custody document which would surely go to the weight of consideration given to it by the finder of fact and which

could even render the document inadmissible.¹⁶ As a result, the prudent trial counsel must also seek to prove the relevance of the laboratory report by showing that the seized fungible evidence is actually readily identifiable and unique.

To prove the uniqueness or ready identifiability of the evidence, the MP or CID agent who first seized or handled the fungible evidence should be called as a witness to identify his or her initials, time, and date on the bag used to seal the evidence as well as any other unique or general characteristics of the evidence. The agent should emphasize that the same assigned case number appear on the sealed evidence bag, chain of custody document, and the laboratory report. Ample military case law establishes that this identification procedure renders the seized evidence readily identifiable and the laboratory report relevant.¹⁷

The trial counsel should also show to a "reasonable probability" that the seized evidence has not been tampered with or changed in any important respect. Every possibility of tampering, however, need not be discounted.¹⁸ Thus, the testimony of the seizing MP or CID agent that the evidence was safeguarded and that it is in substantially the same condition, along with the presumption of regularity in the preparation of the chain of custody document, and the security procedures for handling evidence mandated in chapter 4, AR 195-5, should be sufficient to discount any tampering other than for laboratory testing.¹⁹ If evidence of tampering exists or there

¹⁰ Mil. R. Evid. 201(A)(a).

¹¹ Mil. R. Evid. 803(8).

¹² 4 J. Weinstein & M. Berger, Weinstein's Evidence para. 803(8)[01] (1984) [hereafter cited as Weinstein's Evidence].

¹³ Mil. R. Evid. 902(4a).

¹⁴ United States v. Mendel, 746 F.2d 155 (2d Cir. 1984) (chain of custody documents admissible as business record and they established authenticity of animal blood samples); United States v. Coleman, 631 F.2d 908 (D.C. Cir. 1980).

¹⁵ United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1979); United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951); United States v. Robinson, 12 M.J. 872 (N.M.C.M.R. 1982).

¹⁶ United States v. Arispe, 12 M.J. 516 (N.M.C.M.R. 1981); United States v. Anderson, 12 M.J. 527 (N.M.C.M.R. 1981); United States v. Kupchik, 6 M.J. 766 (A.C.M.R. 1978).

¹⁷ United States v. Madela, 12 M.J. 118 (C.M.A. 1981) (date, time, and initials on bag containing evidence was readily identifiable); United States v. Lewis, 11 M.J. 188 (C.M.A. 1981) (white heroin packet was readily identifiable by initials on packet); United States v. Parker, 10 M.J. 415 (C.M.A. 1981) (a bag seized with the initials "B.P." was readily identifiable); United States v. Fowler, 9 M.J. 149 (C.M.A. 1980) (brown camera bag with manicured marijuana was readily identifiable); United States v. Shy, 10 M.J. 582 (A.C.M.R. 1980) (marking of "X" on paper heroin packet sufficient to sustain identifiability).

¹⁸ United States v. Ettlison, 13 M.J. 348 (C.M.A. 1982); Courts, 9 M.J. at 291.

¹⁹ See *supra* note 14.

are significant breaks in the chain of custody, trial counsel should remember that nothing forecloses the presenting of live testimony, with or without the chain of custody document, to prove the chain of custody.

III. Hearsay and Confrontation

Once the relevance of a document is apparent or has been shown, trial counsel must then show that the document fits within an exception to the hearsay rule.²⁰ Although documentary evidence can fall within several hearsay exceptions,²¹ the two principal exceptions for documentary evidence are Rule 803(8) for official records and Rule 803(6) for business records. The admissibility of laboratory reports is expressly provided for under either hearsay exception. The preferred method of introducing a laboratory report would be under the official records exception because the presumption of their reliability is greater.²² Also, as previously mentioned, under the official records exception no live witness testimony or authentication is required to show that the laboratory report was made by a person with official duties to make the report.²³ The rationale is the inconvenience of taking public officials away from their duties when their testimony would add little to the trustworthiness and reliability of official records.²⁴ Another advantage, as will be discussed later, is that copies of official records are not subject to best evidence

²⁰ The written contents of some documents, however, might not be hearsay. For example, a written letter containing a threat to kill someone would not be offered for the truth of the matter stated, but rather to show it was said. Likewise, the forged writing on a check would not be hearsay in an Article 123 prosecution for check forgery.

²¹ For example, a document could be introduced under Mil. R. Evid. 803(5) as a past recollection recorded of a testifying witness or under Mil. R. Evid. 803(24) as residual hearsay. However, trial counsel should avoid over-reliance upon Rule 803(24), especially where the document fails to meet important criteria under Rule 803(6) and 803(8). *United States v. May*, 18 M.J. 839 (N.M.C.M.R. 1984).

²² 4 Weinstein's Evidence para. 803(8)[01]; McCormick on Evidence §315 (3d ed. 1984) [hereinafter cited as McCormick on Evidence].

²³ 4 Weinstein's Evidence para 803[01]; McCormick on Evidence § 315.

²⁴ *Id.*

rule objections.²⁵ After introducing the laboratory report, trial counsel should ask the judge to take judicial notice of the fact that Army crime laboratories are required by regulation to apply scientific methods to the identification of various substances.²⁶

Trial counsel must also be prepared to introduce the laboratory report under the business record exception where the report is not admissible as an official record.²⁷ To introduce a laboratory report under Rule 803(6) as a business record requires trial counsel to present live testimony to lay the proper foundation. This witness must testify that he is familiar with the activities conducted by the crime laboratory.²⁸ The witness must also state that the regular business of the crime laboratory is to examine various substances and record their findings on the laboratory report. Again, the military judge can take judicial notice of these facts.²⁹ The witness must further testify that the laboratory report was prepared by qualified technicians "at or near the time" of testing, or "from information transmitted, by a person with knowledge . . ." ³⁰ The agent who seized the evidence may be able to provide this testimony. If he cannot, trial counsel should call the evidence custodian from the local CID office where the evidence is secured. The evidence custodian can additionally testify that he or she mailed the evidence to the

²⁵ *Id.*; Mil. R. Evid. 1005.

²⁶ *United States v. Chong*, 8 M.J. 592 (A.C.M.R. 1979). Specifically, trial counsel should request judicial notice of Dept. of Army, Reg. No. 195-2, Criminal Investigations-Criminal Investigation Activities, para. 6-1 (6 May 1977) and U.S. Army Criminal Investigation Division Regulation No. 195-20. Criminal Investigation Laboratories, para. 3-6 (1 Apr. 1977).

²⁷ The laboratory report might not be admissible under Rule 803(8) where it was not made or maintained in accordance with regulation or where it does not have a proper authentication. See generally *United States v. Wetherbee*, 10 M.J. 304 (C.M.A. 1981); *United States v. Jaramillio*, 13 M.J. 782 (A.C.M.R. 1982); *United States v. Williams*, 12 M.J. 894 (A.C.M.R. 1982). See also *supra* note 15. These cases also stand for the proposition that the inadmissibility of a public record under Rule 803(8) does not generally foreclose its admissibility under Rule 803(6).

²⁸ *United States v. Porter*, 12 M.J. 129 (C.M.A. 1981); *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980).

²⁹ *Chong*, 8 M.J. at 594.

³⁰ Mil. R. Evid. 803(6).

crime laboratory and received it back from the laboratory accompanied by the laboratory report.³¹ Thus the government can rely on the reply mail doctrine which presumes that the sample sent off is the sample that was returned. This testimony will not only serve to lay the foundation for admissibility under the business record exception, but will also effectively authenticate the laboratory report under Rule 901. There is no requirement to call anyone from the crime laboratory either to authenticate it or to lay a foundation for the laboratory report as a business record.³² It should also be noted that the admissibility of the chain of custody document will dispense with the requirement to use the reply mail doctrine.

As noted earlier, a check's relevance to the prosecution of a worthless check case under Article 123a, UCMJ, is apparent. Unlike laboratory reports, however, checks do not fit within the definition of official records.³³ Accordingly, trial counsel must rely on the business record exception of Rule 803(6). Many trial counsel, therefore, believe that they must present the live testimony of the custodian of the drawee bank where the check was dishonored to prove the meaning of "insufficient funds" or similar bank stamps on the reverse side of the returned check. This belief rests upon the wording of Rule 803(6) which provides that the foundation for the admission of a document as a business record should be "shown by the testimony of the custodian or other qualified witness."³⁴ This belief can create a serious witness problem, especially when the case is tried overseas and the drawee bank is located in the United States. Fortunately, trial counsel

³¹ 5 Weinstein's Evidence, para. 901(b)(4)[05]; see generally *Vietor*, 10 M.J. at 71; *United States v. Cauley*, 9 M.J. 791 (A.C.M.R. 1980); *United States v. McDonald*, 32 C.M.R. 689 (N.B.R. 1962).

³² *United States v. Porter*, 12 M.J. at 132.

³³ A check does not qualify as a record made by "public office or agencies" and does not reflect "matters observed pursuant to a duty imposed by law..." Mil. R. Evid. 803(8).

³⁴ See *supra* note 8. Many courts are increasingly recognizing that the evidentiary foundation for a business record may be provided by other documentary evidence, affidavits, admissions, or circumstantial evidence and that a live qualified witness or custodian is not always required. See 4 Weinstein's Evidence para. 803(6)[03] and cases cited therein.

need not call the custodian from the bank to admit the check.

Many of the bad checks will have been either cashed or given to buy something of value at the local PX or club. In the regular course of business, they will be returned to one of these local facilities with the appropriate stamp of dishonor. The custodian from the local facility can then be called as a witness to testify that in the regular course of business as custodian of their local facility, the check was received back unpaid from the drawee bank through the mail or through regular banking channels. After this foundation is laid, trial counsel must then read Rule 803(6) in conjunction with Rule 902(9) governing the self-authentication of commercial paper. Rule 902(9) allows self-authentication for "[c]ommercial paper, signatures thereon, the documents relating thereto to the extent provided by general commercial law."³⁵ The applicable section of the Uniform Commercial Code provides:

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

* * * *

(b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor.³⁶

Trial counsel should then ask the military judge to take judicial notice of section 3-510(b) and that the drawee bank was located in a state where this law applied. Trial counsel can now invoke Rule 902(9). The trial procedure outlined above was sanctioned and recommended by the Air Force Court of Military Review in *United States v. Dean*,³⁷ which held:

[T]he checks, together with the notation thereon, are admissible under Military Rules of Evidence 803(6) as records of a regularly conducted activity. A bank is a business activity. Documents such as checks are self-authenticating under Mili-

³⁵ Mil. R. Evid. 902(9).

³⁶ U.C.C. § 3-510(b) (1977).

³⁷ 13 M.J. 676 (A.F.C.M.R. 1982).

tary Rule of Evidence 902(9) as commercial paper. Uniform Commercial Code, Section 3-510(b) makes admissible evidence of dishonor and notice of dishonor. The checks were properly before the court.³⁸

To bolster this foundation, trial counsel can obtain an affidavit from the drawee bank custodian, who should certify that he or she is the custodian of the bank record, that the attached copy of the check is a true copy of the original check, that the check was presented for payment in the regular course of the bank's business, that it was returned unpaid due to insufficient funds in the accused's account, and that the lack of funds was so noted on the check by the stamp "Insf." This type of affidavit was held admissible by the Court of Military Appeals in *United States v. Gladwin*.³⁹

³⁸ *Id.* at 679. Trial counsel should note that U.C.C. § 3-510 cannot be used to show that payment was refused because the checks were stolen. *United States v. Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982).

³⁹ 34 C.M.R. 298 (C.M.A. 1964). Trial counsel have forgotten the useful rules under the old Manual for Court-Martial, *United States*, 1969 (Rev. ed.), paras. 143b(3) and 144c, [hereinafter cited as MCM, 1969] which specifically provided for the authentication and admissibility of bank entries. Moreover, there is nothing in Mil. R. Evid. 803, or the commentary thereto, to suggest that the present rules of evidence were intended to change the practice of admitting affidavits from bank custodians. Indeed, these earlier rules can be carried over into present practice per the authority of Mil. R. Evid. 101(b)(2), and the commentary thereto. Since many trial counsel have long discarded their old Manual, the pertinent sections are set out here.

Authentication of banking entries. A business entry, or copy thereof, of a business regularly but not necessarily exclusively engaged in public banking activities may, if the entry relates to these activities, be authenticated by a certificate or statement, signed under oath before a notary public by the person in charge of the business entry or his assistant, which in any form indicates that the writing to which the certificate or statement refers is the entry itself or a true copy thereof (or an accurate "translation" of a machine, electronic, or coded entry), as the case may be, that the entry was made as a memorandum or record in the regular course of the business and relates to its public banking activities, and that the signer is the person in charge of the entry or his assistant, accompanied by a statement signed by the notary, under the seal of his office, which indicates that the certificate or statement was signed under oath before him. A certificate or statement that

The admission of the above-described laboratory reports and worthless checks do not violate the accused's sixth amendment right to confront and cross-examine the accusers. The military courts have consistently held that the accused must demonstrate how cross-examination would be beneficial to his or her case before the government can be compelled to produce the out-of-court declarant.⁴⁰ As a result, the trial counsel

after diligent search no record or entry of a specified tenor was found to exist in certain entries of this kind (see 143a(2) (h)) also may be authenticated by an accompanying statement signed by a notary public, under the seal of his office, which indicates that the certificate or statement was signed under oath before him. When a certificate or statement of either of these two types is notarized as provided above, it may be inferred that a person who has signed it as the person in charge of the business entry or entries referred to therein, or as his assistant, in fact occupies that status.

MCM; 1969, para 143b(3).

Also, it is not necessary that a business entry be authenticated by the person who made it or that an authenticating witness have personal knowledge that the entry was correct. Thus, if the holder of a check, draft, or other order for the payment of money upon a bank or other depository, or a person or organization acting on behalf of the holder, presents the instrument through regular banking channels for payment, collection, or deposit and the instrument is returned to the holder or his agent purportedly through regular banking channels with a notation in the form of a stamp, ticket, or other writing either on the instrument itself or accompanying it, purportedly made by the drawee or presenting bank or other depository or clearinghouse, indicating the payment of the instrument has been refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control or for other reasons, proof of the above facts will support an inference of the authenticity of the notation as having been made as a memorandum or record in the regular course of a banking business. The notation if thus authenticated, is admissible under the business entry exception to the hearsay rule as evidence that payment of the instrument was refused by the drawee for the reasons indicated in the notation, and this is so whether or not a similar notation also made as a memorandum or record was kept in the drawee or presenting bank or other depository or clearinghouse. *See also* 143b(3) regarding the authentication of banking entries.

MCM 1969, para 144c. *See also* *United States v. Baugh*, 33 C.M.R. 913, 921 (A.F.B.R. 1963).

⁴⁰ Concerning the right to cross-examine the lab chemist, *see* *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Davis*, 14 M.J. 847 (A.C.M.R. 1982); *United States v. Foust*, 14 M.J. 830 (A.C.M.R. 1982), *aff'd on other*

does not have the burden of demonstrating unavailability or that defense cross-examination would be pointless and frivolous.⁴¹ This approach is consistent with federal⁴² and state⁴³ court practice and the Supreme Court's decision in *Ohio v. Roberts*.⁴⁴ For these reasons, trial counsel should be able to avoid the expense of

grounds, 17 M.J. 85 (C.M.A. 1983). Concerning the right to cross-examine the bank custodian. See *United States v. States v. Gladwin*, 34 C.M.R. at 214.

⁴¹ *Id.*

⁴² *United States v. Parker* 749 F.2d 628 (11th Cir. 1984); *United States v. Mendel* 746 F.2d 155 (2d Cir. 1984); *United States v. Coleman*, 631 F.2d 908 (D.C. Cir. 1980); *United States v. King*, 613 F.2d 670, 673 (6th Cir. 1980); *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979); *United States v. Frattini*, 501 F.2d 1234 (2d Cir. 1974); *but cf.* *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (case distinguishable as not being decided under the confrontation clause, but rather as being decided under Fed. R. Evid. 803(8)(B) and 803(8)(C), which, unlike the Mil. R. Evids., make no express provision for admissibility of lab reports).

⁴³ *Howard v. United States*, 473 A.2d 835 (D.C. 1984); *Nep-tune v. State* 679 S.W.2d. 168 (Tex. Crim. App. 1984); *State v. Groom*, 359 N.W. 2d 901 (S.D. 1984); *State v. Hinz*, 360 N. W.2d 56 (Wis. Ct. App. 1984); *but cf.* *Moon v. State*, 478 A.2d 695 (Md 1984); *Llewellyn v. State*, 630 S.W. 2d 555 (Ark. Ct. App. 1982). The latter two state court decisions can be distinguished in that the laboratory technician did not have to be brought any great distance, whereas this is not generally so in the military. In *Moon* the chemist was actually in the courtroom but the defense was not allowed cross-examination and the laboratory report contained discrepancies. In *Llewellyn*, the case was decided upon state evidentiary rules modeled after the federal rules.

⁴⁴ 448 U.S. 56 (1980). Although the Court held that when a hearsay declarant is not present the confrontation clause normally requires a dual showing of unavailability and adequate "indicia of reliability," the Court did make an exception to the unavailability requirement in footnote 7 by stating, "A demonstration of unavailability, however, is not always required. In *Dutton v. Evans*, 400 U.S. 74 (1970) . . . for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." 448 U.S. at 65 n.7 (citation omitted). The Court also noted that reliability of hearsay can be "inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66. Clearly, the business record and the official record exceptions are two of the most firmly rooted and reliable hearsay exceptions. See generally *McCormick on Evidence* §§ 305, 315 (1984). Moreover, both Mil. R. Evid. 803(6) and (8) seem to protect the accused's confrontation rights by providing that the record should be excluded when "sources of information or other circumstances indicate lack of trustworthiness."

bringing distant bank custodians and lab chemists to the court-martial.⁴⁵

IV. Authentication and the Best Evidence Rule

As noted earlier, an advantage of introducing a laboratory report as an official record is that, unlike a business record, no live witness testimony is required for authentication. Indeed, authentication under Rule 901 usually does require live testimony to show that the matter in question is what its proponent claims. Rule 902(4a) provides that extrinsic evidence of authenticity is not required for official records as long as the record is accompanied by an "attesting certificate" signed by the official custodian.⁴⁶ The analysis to Rule 902(4a) defines an attesting certificate as:

[A] certificate or statement, signed by the custodian of the record or the deputy or assistant of the custodian, which in any form indicates that the writing to which the certificate or statement refers is a true copy of the record or an accurate 'translation' . . . , and the signer of the certificate or statement is acting in an official capacity as the person having custody of the record or as the deputy or assistant thereof.⁴⁷

Based upon this definition of an attesting certificate, trial counsel must ensure that the person signing the certificate is actually the custodian, as identified on the certificate. For example, in *United States v. Jaramillio*,⁴⁸ an attesting certificate to a personnel record contained the signature block of a captain who was identified in the certificate as the official custodian. This attesting certificate, however, was signed by a warrant officer for the captain. The court held the record inadmissible because there was no showing of the warrant officer's identity or the capacity in which he signed.

⁴⁵ Trial counsel should be aware that the showing necessary to compel production of the hearsay declarant appears to be slight. See *United States v. Davis*, 14 M.J. 847(A.C.M.R. 1982).

⁴⁶ Mil. R. Evid. 902(4a).

⁴⁷ *Manual For Courts-Martial, United States, 1984* [hereinafter cited as *MCM, 1984*], Mil. R. Evid. 902 analysis, at A22-49.

⁴⁸ 13 M.J. 782 (A.C.M.R. 1982).

Nonetheless, once the attesting certificate is signed by the properly identified custodian, his signature is presumed genuine absent evidence to the contrary.⁴⁹ In the attesting certificate, the custodian must then certify that he is the official custodian of the attached record, that he maintains custody of its in accordance with Army regulation, and that the attached record is a true and exact copy of the one in his custody.

Under Rule 1005, the copy of the laboratory report is admissible as an official record without regard to the best evidence rule. On the other hand, copies of checks offered as business records are susceptible to defense objection under Rules 1002, 1003 and 1004. However, a best evidence rule objection should pose no problem for trial counsel because "a duplicate is admissible to the same extent as an original. . . ."⁵⁰ Regarding the authenticity of checks, as discussed earlier in this article, Rule 902(9) provides for the self-authentication of commercial paper. As to the authentication of other types of documents, Rule 901 provides several methods of authentication for situations where a document is not self-authenticating under Rule 902. Finally, concerning these other types of documents, the best evidence rule will be a problem only when trial counsel try to prove their contents without the original or duplicate. For these rare situations, trial counsel can still introduce the document if one of the various requirements of Rule 1004 or Rule 1005 can be met.

V. Trial Counsel Checklists⁵¹

To introduce a laboratory report of illegal drugs, trial counsel must call the person who seized the drugs. Assuming this person can also testify about the matters listed below, trial counsel may not need additional witnesses to prove either the chain of custody or the identity of the drug seized.

1. An explanation of the facts and circumstances surrounding the seizure of the

⁴⁹ Mem, 1984, Mil. R. Evid. 902 analysis, at A22-49.

⁵⁰ Mil. R. Evid. 1003.

⁵¹ For outstanding practical guides for converting these principles into concrete questions see E. Imwinkelreid, *Evidentiary Foundations* (1980); Dep't of Army, Pamphlet No. 27-10, *Military Justice Handbook*, paras. 4-25 thru 4-33 (Oct. 1982).

drugs (trial counsel must be prepared to argue that any search or seizure was lawful).

2. An identification of the accused as the source of the seized drug.
3. An explanation of the procedures under AR 195-5 for marking and sealing the suspected drugs and the fact that these procedures were followed.
4. An explanation of the procedures required under AR 195-5 for preparing laboratory requests and that these procedures were followed.
5. An explanation of how the physical evidence is required to be stored and safeguarded.
6. An explanation of how the evidence and laboratory request were sent to and returned from the laboratory accompanied by the laboratory report.
7. An explanation of his or her familiarity with the crime laboratory and of its official mission in identifying suspected drugs through scientific methods (the judge will also take judicial notice of this fact).
8. Proof of relevance of laboratory report through
 - (a) chain of custody by,
 - (i) an explanation of the procedures under AR 195-5 for initiating the chain of custody document and the fact that these procedures were followed in this case, and
 - (ii) an identification of the chain of custody document through the signature of the witness, and
 - (iii) a matching of the numbers on the chain of custody document with the numbers on the physical evidence, and
 - (iv) an identification of the laboratory report through the matching of numbers from the physical evidence and the chain of custody document, or
 - (b) through the readily identifiable nature of the drug by
 - (i) the identification of the time, date, and initials of the seizing agent on the

sealed evidence bag plus any other unique or general characteristics of the evidence, and

(ii) the matching of the numbers on the physical evidence with the laboratory report, and

(iii) the same appearance of the evidence in court as when it was seized except for laboratory testing, or

(c) both (a) and (b).

If the witness who seized the evidence cannot testify to all these facts, trial counsel must call other witnesses who can. Once these facts are shown, the military judge should take judicial notice of all pertinent regulations and admit the chain of custody document and the laboratory reports as properly authenticated official records. In offering the chain of custody document, the accused's signature as the source of the drug may have to be masked from the document as a violation of Article 31, UCMJ.⁵² Other adverse information may have to be masked as well.⁵³

In following this checklist, trial counsel should not forget other methods to prove the identity of a suspected drug. Field tests, recognition by sight or smell of an experienced person, and admissions of the accused, may be sufficient evidence to prove identity even without the laboratory report.⁵⁴

To introduce a worthless check in a prosecution under Article 123a, UCMJ, trial counsel should call as a witness the person to whom the check was personally presented and/or the custodian of the local PX, club, or bank where

⁵² United States v. Jones, 46 C.M.R. 469 (A.C.M.R. 1972); United States v. Mathews, 44 C.M.R. 492 (A.C.M.R. 1971).

⁵³ Hearsay within hearsay is admissible under Rule 805 if each hearsay statement is admissible. However, inadmissible hearsay is not admissible merely because it is contained on a business or official record. United States v. McKinley, 15 M.J. 731 (N.M.C.M.R. 1982). For example, a medical record containing a description of an assault victim's injuries would be admissible, but a statement by the victim that the accused was the one who assaulted him would not be admissible to the extent that it was not necessary for treatment. See State v. Mason, 644 P.2d 710 (Wash. Ct. App. 1982) (statement of the source of venereal disease contained in medical record not necessary for treatment).

⁵⁴ United States v. Tyler, 17 M.J. 381 (C.M.A. 1984).

the check was cashed, given to buy something of value, or given to pay a debt. As an example, the following points should be made in the common situation where the accused cashes his own personal check at a local post banking facility and the check is returned from a distant drawee bank due to insufficient funds in the accused's account:

1. Identify the witness as the person who cashed the worthless check.

a. "I was a bank teller at the American Express bank located on post on the day in question," and

b. "I recognize Prosecution Exhibit #1 for identification (worthless check) because my bank teller stamp appears on the exhibit and indicates that I was the one who cashed the check"

2. Identify the accused as the person who cashed the worthless check.

a. The person who cashed the check may identify the accused as the one to whom the money was given, and/or

b. The trial counsel may present lay or expert handwriting testimony or reports identifying the accused's signature on the front and back of the check as being genuine.

3. Explain how, in the regular course of the banking business and in its regular practice, the bank sent the check through regular banking channels to the drawee bank for payment.

4. Explain how, in the regular course of the banking business, the check was received back from the drawee bank unpaid.

5. Request that the judge take judicial notice of U.C.C. section 3-510, and that this section is the controlling law in the state where the drawee bank is located. This judicial notice will now permit the invocation of the self-authentication provisions of Rule 902(a) for commercial paper.

6. Introduce the accused's checks and bank statements by notarized affidavits from the drawee bank custodian certifying:

a. that he or she is the custodian of the attached check and/or bank statement;

b. that the attached check and/or bank statement is a true and exact copy of the original maintained by the bank; and

c. that

(i) in the regular course of the banking business the attached check was presented for payment and dishonored due to lack of sufficient funds in the account, and the check was returned to the holder through regular banking channels with the annotation "Insf," and that all of the above represented the regular practice of the bank; or

(ii) in the regular course of the banking business the attached statements reflecting the status of the accused's account were made and maintained by the bank and that it was the regular practice of the bank to make and maintain these statements.

7. Offer into evidence the checks, bank statements, and affidavits from the drawee bank custodian.

In prosecuting a bad check case under Article 123a, trial counsel must remember to prove that the accused knew at the time of the cashing of the check that there would not be sufficient funds available to pay upon presentment. Trial counsel can prove this knowledge and intent to defraud through the introduction of evidence that the accused was given written or oral notice of dishonor due to insufficient funds and failed to pay the holder of the check within five days. Once this is proven, a statutory presumption arises that the accused had the requisite intent to defraud or deceive,⁵⁵ and the Government will have presented a prima facie case.

VI. Conclusion

Trial counsel's effective use of the Military Rules of Evidence in introducing documentary evidence can save the Government much time and expense in prosecuting many types of routine cases involving drugs, bad checks, and unauthorized absences.

⁵⁵ MCM, 1984, Part IV, para. 49c(17).

Reader Note

[NOTE: Chief Warrant Officer Larry K. Nelson is an Examiner of Questioned Documents and Division Chief of the Questioned Document Division, U.S. Army Criminal Investigation Laboratory—Europe, Frankfurt, West Germany. He holds a Bachelor of Science Degree and is a graduate of the U.S. Army Criminal Investigation Command's two year course of instruction in questioned document examination. CW3 Nelson is affiliated with the American Academy of Forensic Sciences and the Southwestern Association of Forensic Document Examiners and has testified as an expert witness in the field of document examination in courts of all the U.S. military services, the Canadian forces, and in United States district courts. He provides the following letter to trial counsel advising them how to more effectively use the expert testimony of questioned document examiners.]

Over the last several years I have had the pleasure of dealing with a number of trial counsel, of all the United States military services, in preparation for presenting testimony in court.

With very few exceptions I have found that they are not experienced in handling examiners of questioned documents as expert witnesses. In most cases they have provided this information "up front" and have asked for advice in preparing for the presentation of my testimony. As a result of our skull sessions I have concluded that we, the Army's document examiners, have been remiss in providing the Army's trial and defense attorneys with sufficient information concerning the potential value of our testimony and the laboratory report that is the written product of our work.

The first problem the attorney encounters in dealing with a document examiner is the examiner's report. All too often counsel finds it clouded with phrases like "probably wrote" and "limited indications did not write." Contrary to popular belief, these phrases are not posted on a dart board in a back room of the laboratory and selected by the accuracy of the throw. They have fairly standard definitions within the Army crime laboratories that afford them sometimes critical

value as evidence in court. The key is to understand what they mean. Allow me to offer some definitions, in order, on a scale from positive identification to positive elimination.

"Smith wrote the questioned . . ." is a positive identification. In the opinion of the examiner there is no possible way the questioned writing could have been produced by anyone in the world but Smith.

"Smith probably wrote the questioned . . ." is a phrase used when the agreement between the writing of Smith and the questioned writing is so great that the examiner is virtually certain Smith is the writer, but there are one or more technical problems that prevent the examiner from ruling out, at least as academic possibility, that somewhere in the world there is another person skillful enough to have produced the questioned writing.

"There are strong indications Smith wrote . . ." is phraseology used when there is considerable agreement between the questioned writing and the known writing of Smith. The agreement is such that there is only a remote possibility these similarities are coincidental or contrived by someone other than Smith.

"There are limited indications Smith wrote . . ." means the similarities between the questioned writing and the known writing of Smith are greater than would normally be expected to occur as a mere coincidence.

"Smith can neither be identified nor eliminated as the author of . . ." means simply that the examiner has no real conclusion. He's saying "I don't know" in formal language.

"There are limited indications Smith did not write . . ." is used when there are no significant similarities between the questioned and known writings and there are some significant differences that make it unlikely Smith wrote the questioned entries.

"There are strong indications Smith did not write . . ." is used when the differences between the questioned and known writings are such that there is only a remote possibility Smith could have altered his handwriting to such an extent as to enable him to produce the questioned writing.

"Smith probably did not write . . ." means it is virtually certain Smith did not write the questioned entries, but there are one or more technical problems that prevent the examiner from concluding there is no possible way Smith could have been the writer.

"Smith did not write . . ." is a positive elimination.

Less than positive conclusions in questioned document laboratory reports are the subject of considerable debate among investigators and attorneys. They are used because the examiner cannot always be positive. The success of a handwriting comparison can be affected by a wide variety of factors. First, there is natural variation in handwriting. No person can write any entry *exactly* the same way twice. Not all questioned writing contains enough individual characteristics to allow for a positive identification. A person's initials are a good example of this. The quality of the writing, and thus its reliability for comparison purposes, may be affected by emotional stress, fear, illness, the writing conditions, attempts by the writer to alter his writing to avoid identification, or attempts to trace or simulate someone else's writing.

Because of all the variables involved, there are times when it is just not possible to be positive. The theory behind less than positive conclusions is that it is better to assess the probabilities and offer a conclusion based on that assessment than to limit the lab reports to "wrote," "did not write," and "can neither be identified nor eliminated."

Nobody should be convicted solely on the basis of a laboratory report that says there are indications he wrote something, but evidence of this nature can be of critical importance when used in conjunction with other direct or circumstantial evidence. Army document examiners probably testify more often to less than positive conclusions than they do to positive ones. There are methods of using this evidence that are more effective than others.

One of the advantages of document examination is that the evidence is "visible." We all examine handwriting in our daily lives. Document examiners are just more systematic and thor-

ough and bring an extensive background to the examination process.

Effective testimony allows the examiner to explain the examination process, educate the court members in some aspects of the act of writing, and actually show the members the characteristics of the writing in evidence that led to the conclusions rendered. This last step is the most important phase of the testimony. It is best handled using charts, slides or some other enlarged reproduction that allows the witness to point out and comment on similarities, differences, and other aspects of the writings involved. Based on the testimony, and their own eyes and common sense, the members can then arrive at their own conclusions regarding the evidence.

The preparation of charts and slides is normally done by the examiner in the laboratory and requires that the evidence be returned to the laboratory with sufficient time for preparation prior to trial. It is this time constraint that sometimes results in the presentation of testimony without these aids.

Under ideal conditions, the trial attorney should contact the examiner by telephone in the earliest stages of trial preparation. Arrangement for the return of the evidence to the laboratory can be made at that time. In addition, the attorney may find out other useful bits of information. First, he or she should ask for the examiner's definition of the phraseology used in the report. The answer will be essentially the same as those you have already read, but the definition will be in the words the examiner will use as a witness. The attorney may also find that the examiner recalls a certain problem with the particular case that may have been overcome had then case investigator done something more or something different. Information of this type is routinely communicated to the investigator by phone or in informal notes returned with the lab report. The investigator may not have actually received the note or he may have considered the information irrelevant at the time. Since the examiner rarely knows all the circumstances of a given case, there is some hesitation to clutter up a laboratory report with information that may serve no purpose except to confuse the reader.

The attorney may also find that problems encountered by the examiner in his analysis are themselves of indirect value. Depending on the circumstances, the examiner's report may have mentioned "unnaturalness," "distortion," or "characteristics frequently associated with disguised writings" that were observed in the handwriting exemplars provided to the investigator by the accused. Identification of handwriting depends a great deal on the naturalness of the writings compared. The willingness of the accused to provide natural writing for comparison has become a hot issue in more than a few trials.

Document examiners generally try to answer the questions posed on the laboratory examination request submitted by the investigator. Sometimes it turns out that there should have been more examinations requested or that the issues have changed so that the questions posed should have been different. By discussing the case with the examiner the attorney may find there is more potential evidence waiting to be discovered. It can be disheartening to find at the beginning of the trial that a seemingly insignificant document is a critical issue in the case and has not been linked to the accused or examined to establish the nature of its spuriousness.

Examiners of questioned documents are also capable of performing a wide variety of "non-handwriting" examinations. A discussion of the nature of the documentary evidence with the examiner may reveal other examinations that could be performed to establish or refute facts or circumstances put forth in the statements of the accused or witness. For example, microscopic examinations of a questioned document may clearly establish that the signature on one side of the document was written before, or after, other entries were written or typed on the other side. Examination of an altered, or even obliterated, entry by video spectral analysis may conclusively establish its original text.

Most Army document examiners have testified a number of times. They all have lists of questions to facilitate their acceptance by the court as an expert witness. Usually they will also prepare a list of questions for direct examination to ensure the development of background information for the court and complete coverage of pertinent technical issues.

Pretrial conferences with defense counsel are also important. Laboratory examiners go to great lengths to maintain a position as an impartial technician. An important part of this effort is a candid pretrial interview with the opposing counsel. Sometimes both sides of an issue can gain something from the examiner's testimony. The court is best informed when all aspects of the examiner's findings are presented and explained. These pretrial conferences often lead to

stipulations and agreements that simplify and shorten the trial.

The presentation of thorough and effective expert testimony is of no less importance to the examiner than the examination itself. Thorough preparation by the examiner and the opposing attorney is the key to ensuring that the court has a complete understanding of the technical evidence and is best prepared to arrive at an informed opinion of its value and relevance.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Assumable Real Estate Loans

Legal assistance officers may be asked whether, and under what circumstances, a due-on-sale clause in a mortgage may be enforced. The following information answers that question and was extracted from a thesis by Captain Jack McGehee entitled, "*Due-on-Sale Clause, A Public Policy Necessity.*"

Lenders of real estate loans prevent loan assumptions by including a due-on-sale clause in mortgages. A typical clause reads: "In the event borrower sells, transfers, or otherwise encumbers the mortgaged premises without first obtaining consent of the lender, lender shall have the option to declare the entire indebtedness hereby secured due and payable." The clause has a tremendous financial impact on homeowners, and has often been activated by lenders under situations not anticipated by homeowners.

While individual home buyers and sellers usually favor assumability, lenders generally try to trigger due-on-sale clauses to rid their portfolio of below market-rate loans. In some cases their tactics have been unfair. For example, in addition to a "sale" situation, the due-on-sale clause language supports calling loans due whenever a homeowner finances a swimming pool, buys an oven using a chargecard (giving a purchase-money-security interest in the oven, which soon becomes a fixture encumbering the property), transfers the home to a spouse after death or divorce, or transfers the home to a tenant after converting the property into a rental unit.

Until recently, these events were used by lenders to trigger the due-on-sale clause. Home-

owners responded by arguing principles such as restraint on alienation and unconscionability of contracts to preserve assumability of their loans. States differ in whether they disallowed the clause in its entirety, allowed automatic enforcement under the clause, or required the lender to first show impairment to security or lack of credit-worthiness of the transferee.

The Garn-St. Germain Depository Institution Act of 1982, 12 U.S.C. §1701j-3 (1982), will resolve most due-on-sale issues. First, the Act preempts states from prohibiting the enforcement of due-on-sale clauses used in connection with real property loans made after 15 October 1982, and in prior loans except for loans made during a window period. The Act encourages lenders to permit assumptions of real property loans at the existing contract rate or at a rate which is at or below the average between the contract and market rates. Although due-on-sale clauses will generally be enforceable in the future, the Act does provide some protection for homeowners. Lenders may not use the events described above (*i.e.*, purchase money security interest, death, divorce, lease agreements) to trigger enforcement of the clause.

A window period was established making this law inapplicable until 15 October 1985 to pre-15 October 1982 loans if two conditions are met. First, the contract must have been made at a time when state law prohibited due-on-sale clauses. Second, the contract must have been made prior to 15 October 1982. If these conditions are met, state law may permissibly preclude enforcement of due-on-sale clauses, unless the transferee fails to meet customary credit

standards. But lenders in window-period states may freely enforce the clause after 15 October 1985 and earlier if their state law changes permitting enforcement earlier. As previously stated, due-on-sale clauses in loans made after 15 October 1982 will *always* be enforceable under the Act.

Since the Garn Act, the important issue concerning pre-15 October 1982 loans is whether a certain state is included in the window period exception. If not, due-on-sale issues are fairly straight-forward. But because state case law is sometimes difficult to interpret, window period states are likewise difficult to identify. In the final analysis, each state's highest court must determine whether it falls within the window period. A listing of the states believed to be included in the window period may be obtained by writing the Legal Assistance Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

Unless one of the narrow exceptions applies, after 15 October 1985, homeowners will no longer have an enforceable right to assume loans containing due-on-sale clauses. As the Supreme Court noted in *Fidelity Federal Savings & Loan Ass'n. v. De La Questa*, 458 U.S. 141, 146 (1982) (quoting 41 Fed. Reg. 6283, 6285 (1976)), allowing states to prohibit the free enforcement of the due-on-sale clause would "benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers."

Tax News

Terrorist or Military Action

Legal assistance officers who frequently are called upon to counsel survivors of deceased service members should be aware of I.R.C. § 692(c) which forgives income tax liability of service members and civilian employees of the United States who die as a result of wounds or injuries received outside the United States in a terrorist or military action. The following is a reprint of the text of a letter of understanding signed by the Internal Revenue Service and Department of Defense which implements this section of the Code:

LETTER OF UNDERSTANDING

SUBJECT:

Letter of Understanding between the Department of State, the Department of Defense, and the Internal Revenue Service Dealing with Both Civilian Employees and Military Members of the United States Who Die as a Result of a Terroristic or Military Action against the United States

Purpose: This Letter of Understanding outlines the necessary actions required by the Department of State, the Department of Defense, and the Internal Revenue Service for the proper processing of tax returns for civilian employees and military members of the United States who die as a result of a terroristic or military action against the United States.

Background: The Tax Reform Act of 1984 added section 692(c) to Public Law 98-259 Internal Revenue Code, Section 692(c) provides special Federal Income Tax rules in the case of a military member or civilian employee of the United States who dies as a result of wounds or injuries received outside the United States in a terroristic or military action. In these cases, no income tax will apply with respect to such individuals for the year of death or for an earlier year beginning with the last taxable year ending before the taxable year in which the wounds or injuries were incurred. These provisions apply to all taxable years of individuals dying after November 17, 1978, as a result of wounds or injuries incurred after that date.

Taxpayer Responsibilities: The individual must have been a civilian employee or military member both at the time of the injury and at the time of death. A tax return should be filed by the beneficiary or the estate of the deceased individual for the year of the death. For joint returns for which the surviving spouse has taxable income, an allocation of tax between the spouses must be made. If the surviving spouse or other person filing the joint return is unable to determine the proper allocation, a statement of all income and deductions allocable to each spouse should be attached to the tax return. The Internal Revenue Service will make the proper allocation. All returns must be accompanied by Forms W-2, Wage and Tax Statement.

In the case of any civilian employee or military member for whom a United States individual income tax return has already been filed (for example, in the case of a year for which a return was filed before enactment of the Act), claims for refunds should be made by filing Form 1040X, Amended U.S. Individual Income Tax Return, with the Internal Revenue Service. Separate Forms 1040X should be filed for each year in question. Returns and claims for refunds should be identified by writing *KITA* on the top of page one of the return or claim for refund and should be filed at the Internal Revenue Service Center, P.O. Box 267, Covington, Kentucky 41019.

The Internal Revenue Service has designated representatives in its district offices who will answer tax questions and assist in preparing original and amended returns for individuals covered by the new law.

All returns and claims for refunds must be accompanied by the following documents: (1) IRS Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer; and (2) a certification from the Department of Defense or the Department of State that the death was a result of a terroristic or military action outside the United States.

Certification Needs: The Department of Defense will provide certification for military members or DoD civilian employees on DoD-Form 1300. In the case of civilian employees of all other agencies, certification must be made in the form of a letter signed by the Director General of the Foreign Service, U.S. Department of State, or his/her delegate. In either case, the certification must include the name and social security number of the individual, the date of the injury, the date of death, and a statement that the individual died as a result of a military or terroristic action outside the United States and was an employee at the date of injury and at the date of death to enable the Internal Revenue Service to curtail Collection and Examination actions against the decedents. The Department of Defense and the Department of State should notify the Internal Revenue Service as soon as a determination has been made that a decedent died as a result of a terroristic or military action against the United States. This notification should be made to the Internal Revenue Service, National Office, Tax-

payer Service Division, KITA Coordinator, Washington, D.C. phone (202) 566-4550.

Dependency Exemption

The Tax Reform Act of 1984 modified I.R.C. § 152(e) to grant the dependency exemption for a child of divorced or separated parents in all cases to the custodial spouse unless that spouse specifically waives the right to the exemption in writing. The IRS has now developed Form 8332 on which such a waiver may be made. The form, entitled "Release of Claim to Exemption for Child of Divorced or Separated Parent," is to be attached to the income tax return of the non-custodial spouse when he or she is claiming the dependency exemption. The waiver can be made permanently or annually. Legal assistance offices may obtain copies of the form from District IRS offices. Legal assistance officers representing the noncustodial spouse should consider having this form executed with the separation agreement in cases where the custodial spouse agrees to make a permanent waiver, and expressly providing for such waivers in the separation agreement.

Interest Rates

The elation by home sellers and the stock market over recent drops in interest rates will be shared by those who are delinquent in their federal taxes. The interest rate charged on underpayment of federal income tax dropped from 13% to 11% on 1 July 1985.

New Consumer Protection Regulation on Advertising of Warranties and Guarantees

The Federal Trade Commissioner (FTC) recently adopted revised Guides Against Deceptive Advertising of Guarantees, effective May 1, 1985, which give consumers pre-sale access to warranty documents of advertised products. These are commonly referred to as "Pre-sale Availability Rules." See 50 Fed. Reg. 18462 (May 1, 1985).

The old Guides, adopted in 1976 pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, called for disclosure of warranty/guarantee terms where a remedy is promised in advertising in the event of a product malfunction or defect. This full and complete warranty information was required to be maintained in a note-

book or in some other fashion at the location where the products were offered for sale, as well as in the "fine print" of advertisements concerning any warranty or guarantee. The FTC found that these requirements were often viewed as burdensome to advertisers and ineffective as an aid to consumers.

Under the revised regulation, advertisements need not contain detailed warranty information. The revised Guides require a simple, brief disclosure in the advertisement that the actual warranty document is available for consumers to read prior to buying an advertised product.

The newly issued Guides substantially amend the old Guides and Trade Practices Rules, 16 C.F.R. § 239 and are summarized below:

Former section 239.1 required any guarantee on a product contained in an advertisement to disclose the exact nature and extent of the guarantee, the manner in which the guarantor will perform, and the identity of the guarantor. Revised section 239.1 eliminates this language and states that the new Guides are based upon FTC cases and experiences under the Magnuson-Moss Act, and although general, are not meant to anticipate all possible unfair or deceptive acts or practices in advertising warranties or guarantees. Rather, the FTC specifically reserves the right to initiate action under the Federal Trade Commission Act against any advertiser who misrepresents warranties or guarantees.

Former section 239.2 dealt with pro-rata adjustment of guarantees. That is, if a consumer purchased a tire upon which a guarantee of replacement was offered, the consumer would have to be advised if the guarantee was for full replacement or replacement less an allowance for tread wear or usage, *etc.* It also applied to any product upon which a guarantee was offered. The revised section 239.2 is titled "Disclosures in Warranty or Guarantee Advertising," and applies only to consumer products within the meaning of the Magnuson-Moss Act. This means a product with a sale price in excess of \$15 normally used for personal, family or house-hold purposes. The revised section 239.2 specifies that any advertisement mentioning a warranty or guarantee should tell consumers that they can consult the written warranty or guarantee for

complete details of warranty coverage and should tell consumers that they can obtain complete details of the written warranty or guarantee free from any seller of the product, upon making a specific written request.

Former section 239.3 was titled "Satisfaction or Your Money Back Representations." It is now titled "Satisfaction Guarantees and Similar Representations." The revised provisions are substantially similar to the former requirements. They specify that the terms "satisfaction guarantee" or "money back guarantee" or similar representations in advertising should be employed only where the seller provides a full refund of the purchase price upon the purchaser's request. Any material limitations or conditions applicable should be clearly and prominently disclosed so that the average prospective purchaser understands them and is put on notice.

Revised section 239.4 deals with "lifetime" guarantees and is substantially similar to the former section. It specifies that advertisements using "lifetime" or "life" or similar representations must disclose duration of a warranty or guarantee with clarity prominence so the average prospective purchaser is put on notice.

The revised section 239.5 is a general restatement of former section 239.6. Former sections 239.5 (savings guarantees), 239.6 (guarantees under which the guarantor does not or cannot perform) and 239.7 (when a guarantee constitutes misrepresentation) have been rescinded and replaced by a revised section 239.5 entitled "Performance of Warranties or Guarantees".

The FTC indicated that it repealed section 239.5 on savings guarantees ("guaranteed lowest price in town") because it did not relate to "defect" type warranties or guarantees as did the other sections, and that such problems could best be handled on a case-by-case basis. The FTC stated that section 239.7 was rescinded in its entirety out of fear that it would have a chilling effect on manufacturers who would otherwise offer warranties. The FTC explained that it may have been possible to infer from former section 239.7 that a violation of the FTC Act had occurred simply because a substantial number of warranted products failed in use, notwithstanding that the warrantor fully performed all warranty obliga-

tions. Such an inference, the FTC found, could discourage advertising of warranties, contrary to the FTC's purposes in revising the Guides.

These revisions result in less stringent requirements than were formerly placed on manufacturers who offered guarantees or warranties, and legal assistance officers may want to publicize these changes in preventive law articles in installation newspapers or in preventive law classes.

Early Termination of Rental Leases by Military Personnel

Legal assistance attorneys are often consulted on matters pertaining to the early termination of rental leases due to permanent change of station orders or other military reasons. A problem arises with the standard military clause which usually states that the tenant may terminate the lease by providing the landlord with thirty days advance notice of termination, and that the notice must be accompanied by a copy of the official orders and by any liquidated damages due. Frequently, however, the military tenant cannot furnish a copy of the official orders in time to comply with the thirty day advance notice requirement.

Legal assistance officers should advise their clients to give advance written notice to their landlord. This letter must both fairly communicate the service member's intention to terminate the lease early and give sufficient advance warning to the landlord. Service members should be instructed to include:

- (1) Notice to the landlord of termination of the lease due to matters connected with military service;
- (2) The specific date of departure from the premises; and
- (3) A statement indicating that written confirmation of official orders will follow no later than the service member's departure from the premises.

To avoid this problem in the future, every servicemember signing a lease should include appropriate provisions permitting termination of the lease upon thirty days notice for reasons connected with military service. Legal assistance officers may want to provide a sample of an accept-

able clause for service members to have inserted in their leases. The following military clause is recommended for use:

Lease Addendum

If the tenant is a member of the Armed Forces of the United States and:

1. Has been advised of permanent change of station orders to depart twenty miles or more from the leased premises; or
2. Is discharged or relieved from active duty with the Armed Forces; or
3. Leases the property prior to arrival in the area and his or her orders are changed to a different area prior to occupancy of the property; or
4. Is required to occupy on-post housing, the tenant may terminate this lease by both:
 1. Serving the landlord with thirty days advance written notice of termination; and
 2. Providing the landlord with a copy of permanent change of station or other appropriate orders, but if such copy is unavailable, written certification that the tenant has been alerted of the transfer. The permanent change of station or other appropriate orders shall be furnished to the landlord before departure from the premises, or, in the case of (3) above, within a reasonable time.

Delaware Federal Court Decides Overseas Military Parental Kidnapping Case

In a case involving an Air Force enlisted member who retained custody of his daughter at Clark Air Force Base in the Phillipines in violation of a court order issued by a Delaware state court, the federal district court for the District of Delaware decided on May 1, 1985, that the overseas military base was not subject to provisions of the Federal Parental Kidnapping Act (FPKA) of 1980 (codified at 28 U.S.C. § 1738A).

In *Dare v. Secretary of the Air Force*, No. 84-658-JLL (D. Del. May 1, 1985) (memorandum decision), the mother of a six-year-old girl sought a writ of mandamus from the federal court to

force her estranged husband to comply with orders from a Delaware state family court, and a finding that the Air Force and the commander of Clark Air Force base were required to comply with provisions of the FPKA.

The court found that the couple had separated in 1980, and since that time a state family court had exercised jurisdiction over the family. When Sergeant Francis Dare was transferred to Clark Air Force Base in the summer of 1983, he took his daughter with him. At the time of his transfer, Dare had apparent legal custody of his daughter and did not take her in violation of an existing court order. However, in January 1984 Mrs. Dare petitioned the Delaware court to arrange visitation rights, and sought the appearance of Dare and their daughter before the Delaware court.

Sergeant Dare failed to appear at the hearing on the visitation request which was held in February 1984, and he was held in contempt. Mrs. Dare's subsequent attempts to obtain cooperation from Sergeant Dare's military superiors were unsuccessful, even though she enlisted the aid of her congressional representative.

As a result, she brought suit in federal court under the FPKA, arguing that the act requires "appropriate authorities" in each "state" to comply with the provisions of existing child custody determinations made by another state.

Mrs. Dare argued that this provision "imposes on commanders of overseas United States military installations which have no resident civil courts a duty to enforce qualifying child custody determinations against members of their commands." The court, agreeing with the Air Force that the FPKA did not apply to this case, ruled against Mrs. Dare. First, the court found that Clark Air Force Base was not a "state" within the meaning of the federal statute. Mrs. Dare argued that the definition of the term "state" within the act applied to U.S. "possessions." The court found that neither the Phillipines nor Clark Air Force Base was a "possession" within the meaning of the statute. Second, the court found that military commanders are not "appropriate authorities" within the meaning of the statute. Citing *Parker v. Levy*, 417 U.S. 733, 743 (1974), the court found that the military constitutes a

specialized society separate from civilian society and that the court systems of federal and state governments should not be inserted into the command of armed service personnel by ordering them when and where to appear or how to deal with their dependents. The court found that without specific intent or guidance in this area from Congress, it should not intrude.

The court acknowledged that family strife cuts across geographical boundries and that there should be a mechanism to deal with situations such as those involving the Dares. But the court determined that it would be up to Congress or the President to resolve this and "other complaints connected with life in the military."

Army legal assistance attorneys should be aware that Army Regulation 608-99 is under revision and will be retitled to include child custody proceedings. The new regulation will be titled "Family Support, Child Custody and Paternity Claims." It will specifically require that service members comply fully with child custody orders and punitive sanctions have been proposed for those who fail to comply.

It should be noted that the *Dare* case did not technically involve a service member in violation of a custody order. Rather, Sergeant Dare failed to comply with the Delaware court's appearance order and was subsequently found in contempt.

Fraudulent Subscription Solicitations Enjoined In Alabama

The Alabama Attorney General's Office has obtained an injunction and a default judgment for \$350,000 against the publisher of *Better Living* magazine for engaging in what are described as unfair and deceptive practices.

According to the Attorney General's Office, the company sends prospective customers a notice informing them that they have "won" a free lifetime subscription to *Better Living* magazine for only \$4.95. The consumer is advised that the magazine is a leading home and garden magazine. In fact, according to the Attorney General, the magazine is actually a tabloid-type publication featuring sexually-oriented material and pornographic photographs. These facts are not disclosed in the promotional literature the consumer receives about the publication.

After receiving a few issues, the consumer then allegedly receives a post card telling the consumer that if he wants to continue the subscription, he must return the post card to the company. Most consumers, disgusted and disappointed with the magazine, do not return the post card and the company keeps the \$4.95.

The publisher, Avant-Garde Media, Inc., never responded to any process and in April 1985, a default judgment was obtained against the New York firm. The firm has continued to do business in Alabama and the Attorney General recently obtained an injunction against further solicitation. The Consumer Protection Division of the Alabama Attorney General's Office has initiated action in New York to enforce the Alabama order against Avente-Garde Media. If a recovery is obtained, a fund will be established against which aggrieved Alabama consumers may submit claims.

Although only Alabama residents will be entitled to submit claims against the fund, legal assistance attorneys in other jurisdictions may encounter clients with similar complaints. If so, legal assistance officers may want to consider initiating action before the Armed Forces Disciplinary Control Board to place the firm off limits and making a complaint to the state Attorney General's consumer protection office.

Military attorneys interested in further information may contact Mike Bounds, Consumer Protection Attorney, Office of the Attorney General, Consumer Protection Division, 560 S. McDonough Street, Montgomery, Alabama 36104.

New Jersey Expands Lemon Law

The New Jersey legislature has expanded coverage of the state's "lemon" law to include motorcycles. The prior law, enacted in 1983 and codified at N.J. Rev. Stat. § 56:1219 did not include motorcycles within the definition of motor vehicles. The law was amended, effective September 4, 1984, to require a manufacturer of a new motorcycle to repair all defects covered by a written warranty if the consumer reports the defect to the manufacturer during the warranty term or within one year, whichever is earlier.

If the manufacturer is unable to repair a defect which substantially impairs the motorcycle's use, value or safety after a "reasonable number of attempts," the manufacturer must either replace the motorcycle or refund the full purchase price and collateral charges, such as taxes and preparation fees, less an allowance for the consumer's use. Additionally, if the manufacturer has established an informal dispute resolution procedure that fully complies with Federal Trade Commission regulations, the lemon law places an obligation on the consumer to attempt first to settle through the manufacturer's settlement procedure before the replacement/refund provisions apply.

Resident Status for Military Personnel and Dependents Seeking Lower Tuition at State Schools

Lieutenant Colonel Charles B. Smith of the 184th JAG Detachment and a member of the Reserve-Guard Legal Assistance Advisory committee, has advised the Legal Assistance Branch of a change in Pennsylvania law which grants residency status to military personnel and their dependents for purposes of in-state tuition rates. Military personnel or their dependents who are assigned to an active duty station in Pennsylvania and reside in Pennsylvania under military orders, are to be assessed tuition at the lower "in-state resident" rates by state-owned institutions pursuant to 24 Pa. Stat. § 2509. The statute confers this limited residency status on military personnel and their dependents for tuition purposes, apparently without subjecting those personnel to residency status for other purposes, such as state income tax.

Military personnel frequently encounter situations where they have resided in a particular state for a sufficient period of time to qualify for resident tuition, but when they or their dependents enroll at state institutions, they are charged nonresident rates based on their state of domicile. Obtaining resident status for purposes of obtaining in-state rates may carry with it an obligation to pay state income tax. Legal assistance attorneys who are aware of state statutes, case law, or Attorney General opinions similar to the Pennsylvania statute are encouraged to advise the Legal Assistance Branch.

Mobile Homes Not Permanently Affixed To Land Treated As Personality

The tax implications for mobile home owners may be significantly different depending on whether the mobile units are treated as personality and thus subject to personal property tax, or real estate, and thus subject to real estate tax. Legal assistance attorneys may find a recent Washington Supreme Court decision helpful in advising clients who own such mobile units.

To resolve a condemnation question where the government sought to acquire fee title to a mobile home park near the Grand Coulee Dam, the court held that although the land was subject to acquisition, the trailers themselves were not part of the realty and thus the condemnor was precluded from acquiring them as well. See *United States v. 19.7 Acres of Land, More or Less, in the County of Okanogan*, 692 P.2d 809 (Wash. 1984).

The court adopted the rationale of a 1975 appellate court decision on a non-condemnation issue in *Clevenger v. Peterson Construction Co.*, 14 Wash. App. 424, 542 P.2d 470 (1975). In that case, the court of appeals identified several criteria for determining whether the mobile unit retains its identity as a vehicle and thus classification as personality. Persuasive features include:

- 1) axles remaining affixed to the mobile units though the wheels and hitches may be removed;
- 2) mobile units placed on blocks, not permanent foundations;
- 3) easily removable utility connections, rather than fixed pipes.

Absent any other similar characteristics, units not displaying these features are likely to be treated as real estate.

Homeowner's Insurance Policy Theft Coverage Includes Embezzlement

Legal assistance officers are occasionally asked for assistance from service members in situations where they have suffered property losses from thefts or larcenies. In a 1984 case, the Washington Court of Appeals held that the terms "theft" or "larceny" in a homeowners insurance policy was sufficiently broad enough to include any wrongful deprivation of property, including embezzlement.

In *Crunk v. State Farm Fire & Casualty Co.*, 686 P.2d. 1132 (Wash. App. 1984), the Crunks hired an individual to perform extensive remodeling on their residence. As a downpayment, they tendered a check for \$36,000. The individual performed no work and absconded with the proceeds. He was subsequently apprehended and tried and convicted in a criminal proceeding. Faced with the loss of their \$36,000, they filed a claim with State Farm under their homeowner's policy. State Farm denied coverage and the Crunks sued to recover on the claim. Although State Farm's request for summary judgment was granted by the trial court, the court of appeals held that the language of the policy had to be construed as the average policyholder would understand it, and that because the policy definition of theft was ambiguous, the ambiguity should be construed against the insurance company.

Revision of AR 27-3

Army Regulation 27-3, Legal Assistance, has been in effect since 1 April 1984, and legal assistance officers have had over one year of experience operating under the new regulation. The Legal Assistance Office, Office of The Judge Advocate General, is now considering changes to the regulation. Legal assistance officers are encouraged to send any suggested changes, additions, or deletions to Department of the Army, Office of The Judge Advocate General, ATTN: DAJA-LA, Washington, D.C. 20310-2215.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

**Reserve Component Technical
(On-Site) Training**

The following schedule sets forth the training sites, dates, subjects, instructors and local action officers for the Reserve Component Technical (On-Site) Training program for Academic Year (AY) 1986. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to Judge Advocate General Service Organizations (JAGSO's), or to judge advocate sections of USAR and ARNG troop program units, attend the training in their geographical area (AR 135-316). All other judge advocates (active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site Program features instructors from The Judge Advocate General's School and has been approved for continuing legal education credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units assigned judge advocates in their geographical area. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Members of the IRR earn retirement point credit for attendance IAW AR 140-185. These actions provide maximum opportunity for interested JAGC officers to take

advantage of this training.

Whenever possible, action officers will arrange enlisted legal clerk and court reporter training to run concurrently with On-Site training. In past years enlisted training programs have featured Reserve Component JAGC officers and noncommissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison.

JAGSO detachment commanders will insure that unit training schedules reflect the scheduled technical training. Staff Judge Advocates of other Reserve Component troop program units should insure that the unit training schedule reflects judge advocate attendance at technical training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. Many units providing mutual support to active army forces installations may have to notify the installation SJA that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems which cannot be resolved by the action officer or the unit commander should be directed to Captain Craig P. Wittman, Chief, Unit Training and Liaison Office, Judge Advocate Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (telephones 804-293-6121; Autovon 274-7110, extension 293-6121; or FTS 938-1301).

Reserve Component Technical (On-Site) Training Program, AY 86

<u>Date</u>	<u>City, Host Unit and Training Site</u>	<u>Subjects/Instructors</u>	<u>Action Officer</u>
5, 6 Oct 85	Boston, MA 94th ARCOM Hanscom AFB Bedford, MA	Admin & Civil Law MAJ Woodruff Criminal Law MAJ Wittmayer	COL L.R. Shuckra HQ, 94th ARCOM AFRC, Bldg 1607 Hanscom AFB, MA 01731-5290 (617) 593-4767

<u>Date</u>	<u>City, Host Unit and Training Site</u>	<u>Subjects/Instructors</u>		<u>Action Officer</u>
12, 13 Oct 85	St. Louis, MO 102d ARCOM	Contract Law Criminal Law	MAJ Pedersen MAJ Warren	COL C.W. McElwee Suite 200 1049 S. Brentwood St. Louis, MO 63117 (314) 721-1900
19, 20 Oct 85	Minneapolis, MN 214th MLC Thunderbird Motel 2201 E. 78th Street Bloomington, MN 55420	Admin & Civil Law International Law	MAJ Brown MAJ McAtamney	MAJ Ed Zimmerman 6750 France Ave. S. Edina, MN 55435 (612) 925-2500
26, 27 Oct 85	Philadelphia, PA 79th ARCOM Willow Grove NAS Willow Grove, PA	Contract Law International Law	MAJ Post LTC Taylor	MAJ Robert C. Gerhard, Jr. District Attorney's Office 4th Floor Court House Norristown, PA 19404 (215) 278-3123
16 Nov 85	Detroit, MI 123d ARCOM 26402 West 11 Mile Rd Southfield, MI	Criminal Law Contract Law	MAJ Mason MAJ Pedersen	LTC Michael L. Updike 6061 Venice Drive Union Lake, MI 48085 (313) 851-9500
17 Nov 85	Indianapolis, IN 123d ARCOM	Criminal Law Contract Law	MAJ Mason MAJ Pedersen	MAJ Richard A. Gole 7351 Shadeland Station Suite 200 Indianapolis, IN 46246 (317) 849-2668
14, 15 Dec 85	New York, NY 77th ARCOM World Trade Center New York, NY	Admin & Civil Law Criminal Law	MAJ Hemingway MAJ Capofari	COL Frederick W. Engel P.O. Box 448 Madison, NJ 07940 (201) 377-0666
11, 12 Jan 86	Los Angeles, CA 78th MLC Armed Forces Reserve Center Los Alamitos, CA	Contract Law International Law	LTC Graves MAJ Romig	LTC John C. Spence 1535 Bellwood Road San Marino, CA 91108 (213) 974-3763
18, 19 Jan 86	Seattle, WA 124th ARCOM 6th MLC University of Washington School of Law Seattle, WA	International Law Contract Law	MAJ McAtamney MAJ Kennerly	MAJ Robert Burke 4505 36th Avenue W. Seattle, WA 98199 (206) 623-3427
1, 2 Feb 86	Birmingham, AL 121st ARCOM Cumberland Law School Birmingham, AL	International Law Admin & Civil Law	MAJ McAtamney MAJ Hockley	LTC Fred Wood 2121 Highland Avenue Birmingham, AL 35205 (205) 939-0033
4, 5 Feb 86	San Juan, PR 7581st USAG Fort Buchanan, PR	International Law Admin & Civil Law	MAJ McAtamney MAJ Hockley	LTC Salvador Perez-Mayol P.O. Box 3867 San Juan, PR 00904 (809) 724-3131, Ext. 253

<u>Date</u>	<u>City, Host Unit and Training Site</u>	<u>Subjects/Instructors</u>	<u>Action Officer</u>
22, 23 Feb 86	Salt Lake City, UT 96th ARCOM TBA	Admin & Civil Law Criminal Law	MAJ Gruchala MAJ Anderson MAJ Samuel F. Chamberlain P.O. Box 899 Salt Lake City, UT (801) 535-4972
1, 2 Mar 86	San Antonio, TX 90th ARCOM HQS, 90th ARCOM 1920 Harry Wurzbach Highway San Antonio, TX	International Law Criminal Law	MAJ Romig LTC Gordon MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 349-3761
1, 2 Mar 86	Columbia, SC 120th ARCOM University of South Carolina School of Law Columbia, SC	International Law Contract Law	MAJ Hall MAJ Kennerly LTC Costa M. Pleicones 3018 Monroe Street Columbia, SC 29205 (803) 771-8000
15, 16 Mar 86	Kansas City, MO 113th MLC Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law International Law	LTC Kullman MAJ Wittmayer MAJ Romig COL David W. Kolenda 8990 West Dodge Road Suite 335 Omaha, NE 68114 (402) 393-3227
15, 16 Mar 86	San Francisco, CA 5th MLC HQ 6th US Army Presidio of San Francisco, CA	International Law Contract Law	LTC Taylor MAJ Cornelius MAJ William P. Lynch, Jr. 5th JAG MLC Bldg 1230 Presidio of San Francisco, CA 94129 (415) 454-9541
18, 19 Mar 86	Honolulu, HI IX Corps (AUG) Kalani Center Fort DeRussey, HI	International Law Contract Law	LTC Taylor MAJ Cornelius MAJ Coral C. Pietsch OSJA HQ IX Corps (AUG) Fort DeRussey, HI 96815-1997 (808) 548-6733
5, 6 Apr 86	Washington, DC 10th MLC HQ, 1st US Army Fort Meade, MD	Admin & Civil Law Criminal Law	MAJ Phelps MAJ McShane MAJ Gary Tidwell 2301 South Jefferson Davis Highway Arlington, VA 22202 (703) 685-7813
12, 13 Apr 86	New Orleans, LA 2d JAG Detachment Sheraton Hotel New Orleans, LA	Admin & Civil Law International Law	MAJ Mulliken MAJ Hall CPT Clem Donelon 1120 Oaklawn Metairie, LA 70005 (504) 885-9183
19, 20 Apr 86	St. Augustine, FL Florida Army National Guard	Admin & Civil Law Criminal Law	MAJ Kennerly MAJ Gaydos LTC Marcus Cornelius Office of The Adjutant General 190 San Marco Avenue St. Augustine, FL 32084 (904) 824-8461, Ext 115 AVN 860-7115

<u>Date</u>	<u>City, Host Unit and Training Site</u>	<u>Subjects/Instructors</u>	<u>Action Officer</u>
26, 27 Apr 86	Chicago, IL 86th ARCOM USAREC Conf. Room Fort Sheridan, IL	Admin & Civil Law Criminal Law MAJ Rosen MAJ Clevenger	LTC Gary L. Vanderhoof SJA Office 7402 W. Roosevelt Road Forest Park, IL 60130 (312) 886-6994
17, 18 May 86	Columbus, OH 83d ARCOM Defense Construction Supply Center (DCSC) Columbus, OH	International Law Contract Law MAJ Hall MAJ Cornelius	LTC Dennis A. Schulze 18606 Boerger Road Marysville, OH 43040 (513) 644-1355

Enlisted Update

Sergeant Major Walt Cybart



Training

Women in the Corps

I am often asked how women can succeed in the JAG Corps and what they need to do differently than their male counterparts. Women in today's Army have the same chance for promotion and career progression as do men. This is exemplified by the last E7 promotion board statistics: women accounted for 28% (15 out of 53) of the 71Ds selected for promotion to grade E7 although only 53 of the 237 (22%) of the 71Ds in the zone of consideration were women.

If you are still skeptical about women's career opportunities in the JAG Corps, consider the case of MSG B. Karla Towns. MSG Towns, Chief Legal NCO at Fort Rucker, Alabama, joined the Army on 1 April 1974 as a PFC in the stripes-for-skills program and was promoted to MSG on 31 March 1984; ten years from E3 to E8. This example shows that success can be achieved through hard work and determination.

The following courses for enlisted personnel will be available during FY 86:

a. 2d Admin Law for Legal NCOs, 512-71D/20/30, 17-21 Mar 86 at TJAGSA.

b. 6th TJAG Refresher Course for 71D/71E/20/30, 16-21 Mar 86 at Monterey, CA. For quotas, Chief Legal NCOs should contact MSG Gonzales, OSJA, 7th ID and Fort Ord, directly for information.

c. 6th TJAG Chief Legal NCO/Court Reporter Course, 10-13 June 86 at TJAGSA. This course is by invitation only; do not request quotas.

d. Claims Training Seminar, 7-11 July 86 at TJAGSA. Quotas for this course are controlled by CDR, USA Claims Service, Fort Meade, MD.

e. 15th Law Office Management Course, 7A-713A, 7-11 July 86 at TJAGSA.

f. ANCOG and BTC will be announced at a later date; both courses will be by DA selection/notification.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota alloca-

tions are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPENCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard per-

sonnel 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, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

September 9-13: 15th Criminal Trial Advocacy Course (5F-F32).

September 9-13: 31st Law of War Workshop (5F-F42).

September 16-27: 105th Contract Attorneys Course (5F-F10).

September 23-27: 7th Legal Aspects of Terrorism Course (5F-F43).

October 8-11: 1985 Worldwide JAG Conference.

October 15-20 December 1985: 108th Basic Course (5-27-C20).

October 21-25: 4th Advanced Federal Litigation Course (5F-F29).

October 28-1 November 1985: 17th Legal Assistance Course (5F-F23).

November 4-8: 81st Senior Officers Legal Orientation Course (5F-F1).

November 12-15: 21st Fiscal Law Course (5F-F12).

November 18-22: 7th Claims Course (5F-F26).

December 2-13: 1st Advanced Acquisition Course (5F-F17).

December 16-20: 28th Federal Labor Relations Course (5F-F22).

January 13-17: 1986 Government Contract Law Symposium (5F-F11).

January 21-28 March 1986: 109th Basic Course (5-27-C20).

January 27-31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 7-11: 15th Law Office Management Course (7A-713A).

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workshop (5F-F42).

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28–8 August 1986: 108th Contract Attorneys Course (5F–F10).

August 4–22 May 1987: 35th Graduate Course (5–27–C22).

August 11–15: 10th Criminal Law New Developments Course (5F–F35).

September 8–12: 85th Senior Officers Legal Orientation Course (5F–F1).

3. Civilian Sponsored CLE Courses

November 1985

1–2: NCDA, Regional Short Course, Charlotte, NC

4–6: FPI, Proving Construction Contract Damages, Monterey, CA.

4–8: FPI, Concentrated Course in Government Contracts, Washington, DC.

6: BLI, Legal Aspects of Data Processing Contracts, Dallas, TX.

7–8: PLI, Communications Law 1985, New York, NY.

8: GICLE, Recent Developments, Amelia Island, FL.

8–9: NCLE, Evidence, Lincoln, NB.

10–14: NCDA, Prosecution of Violent Crime, San Francisco, CA.

10–15: NJC, Administrative Law Procedure—Graduate, Reno, NV.

10–15: NJC, Search & Seizure—Specialty, Reno, NV.

10–22: NJC, Administrative Law—General, Reno, NV.

11–12: FPI, Commercial Contracting, Denver, CO.

11–13: FPI, Government Contracting for Engineers and Project Managers, Dallas, TX.

13–15: FPI, Changes in Government Contracts, San Diego, CA

13–15: ABA, Civil Rights, Boston, MA.

13–15: FPI, Cost Estimating for Government Contracts, Washington, DC.

14–15: FPI, Commercial Contracting, Washington, DC.

15: GICLE, Recent Developments, Atlanta, GA.

15–16: NCLE, Domestic Relations, Lincoln, NB.

17–22: NJC, Court Management/Managing Delay—Specialty, Reno, NV.

17–22: NJC, Equal Justice in the Courts—Specialty, Reno, NV.

18–21: FPI, Fundamentals of Government Contracting, Atlanta, GA.

20–22: SBT, Litigation, Houston, TX.

22–23: GICLE, Commercial Real Estate, Atlanta, GA.

22–23: GICLE, Workers' Compensation Law Institute (video replay), Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the July 1985 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Requirement

Seventeen states currently have a mandatory continuing legal education (MCLE) requirement. The most recent states to adopt MCLE are Vermont, whose program was effective on 1 June 1985, and Kansas, whose program was effective on 1 July 1985.

In these seventeen MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (October 1984) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by all of these MCLE jurisdictions with the exception of Kansas, which had not given approval as of 8 July 1985.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of

the requirement, the address of the local official, and the reporting date:

State	Local Official	Program Description
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 832-3693	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually
Georgia	Executive Director State Bar of Georgia 84 Peachtree Street Atlanta, GA 30303 (404) 522-6255	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281-3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Kansas	Continuing Legal Education Commission 301 West 10th Street Topeka, KS 66612 (913) 296-3807	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually
Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
Minnesota	Executive Secretary	—Active attorneys must complete 45 hours of

State	Local Official	Program Description
	Minnesota State Board of Continuing Legal Education 875 Summitt Ave. St. Paul, MN 55105 (612) 227-5430	approved continuing legal education every three years. —Reporting date: 1 March every third year.
Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442-7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826-0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255-1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828-3279	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.

State	Local Official	Program Description
	Seattle, WA 98104 (206) 622-6021	
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110E Main Street Madison, WI 53703 (608) 266-9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632-9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National

Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

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.)

AD NUMBER	TITLE
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/JAGS-ADC-84-2 (100 pgs).

AD NUMBER	TITLE	AD NUMBER	TITLE
AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-84-3 (80 pgs).		Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-84-4 (180 pgs).	AD B087848	Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
AD B086937	Criminal Law, Evidence/JAGS-ADC-84-5 (90 pgs).	AD B087774	Government Information Practices/JAGS-ADA-84-8 (301 pgs).
AD B086936	Criminal Law, Constitutional Evidence/JAGS-ADC-84-6 (200 pgs).	AD B087746	Law of Military Installations/JAGS-ADA-84-9 (268 pgs).
AD B086935	Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).	AD B087850	Defensive Federal Litigation/JAGS-ADA-84-10 (252 pgs).
AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-85-1 (200 pgs).	AD B087845	Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-85-2 (175 pgs).	AD B087846	Law of Federal Labor-Management Relations JAGS-ADA-84-12 (321 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).	AD B087745	Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).	AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1 (379 pgs).	AD B090989	Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
AD B089093	LAO Federal Income Tax Supplement/JAGS-ADA-85-1 (129 pgs).	AD B092128	USAREUR Legal Assistance Handbook (315 pgs)
AD B077738	All States Will Guide/JAGS-ADA-83-2 (202 pgs).	AD B086999	Operational Law Handbook/GS-DD-84-1 (55 pgs).
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).	AD B088204	Uniform System of Military Citation, A/JAGS-DD-84-2 (38 pgs).
AD B089092	All-States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).		
AD B087847	Claims Programmed Text/JAGS-ADA-84-4 (119 pgs).		
AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).		
AD B087849	AR 15-6 Investigations:		

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.

2. Regulations & Pamphlets

Number	Title	Change	Date
AR 20-1	Inspector General Activities and Procedures		6 Jun 85
AR 37-20	Administrative Control of Appropriated Funds		1 Aug 80
AR 140-145	Individual Mobilization Augmentation Program	1	20 Jun 85
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program	109	9 May 85
AR 635-40	Physical Evaluation for Retention, Retirement, or Separation	905	7 Jun 85
DA Pam 310-1	Consolidated Index of Army Publications and Blank Forms		1 Jun 85

3. Articles

- Appel, *The Inevitable Discovery Exception to the Exclusionary Rule*, 21 Crim. L. Bull. 101 (1985).
- Brown, *Hospital Medical Staff: An Entity in Need of Counsel*, 3 Preventive L. Rep. 116 (1985).
- Diamond, *The Rights and Benefits of Former Military Spouses*, 18 Clearinghouse Rev. 1402 (1985).
- Frolik, *Personal Injury Compensation as a Tax Preference*, 37 Me. L. Rev. 1 (1985).
- Geraghty & Raphael, *Reporter's Privilege and Juvenile Anonymity: Two Confidentiality Policies on a Collision Course*, 16 Loy. U.L.J. 43 (1984).
- Goldberg, *Escobedo and Miranda Revisited*, 18 Akron L. Rev. 177 (1984).
- Graham, *Evidence and Trial Advocacy Workshop: Prior Inconsistent Statements-Requirements for Impeachment*, 21 Crim. L. Bull. 156 (1985).
- Haynsworth, *How to Draft Clear and Concise Legal Documents*, 31 Prac. Law 41 (1985).
- Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W.Va. L. Rev. 295 (1984-85).
- Joost, *A Corps of Federal Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 New Eng. L. Rev. 733 (1983-1984).
- Kraut, *Domestic Relations Advocacy—Is There a Better Alternative?*, 29 Vill. L. Rev. 1379 (1984).
- La Grone & Combs, *Alternatives to the Insanity Defense*, J. Psychiatry & L., Spring 1984 at 93.
- Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985).
- Robinson, *Causing the Conditions of One's Own Defense: A study in the Limits of Theory in Criminal Law Doctrine*, 71 Va. L. Rev. 1 (1985).
- Rubin, *Nuclear Weapons and International Law*, 8 Fletcher F. 45 (1984).
- Salzberg & Zibelman, *Good Cause Evictions*, 21 Willamette L. Rev. 61 (1985).
- Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 Cath. Law. 1 (1984).
- Comment, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell Int'l Corp.*, 37 Baylor L. Rev. 181 (1985).
- Note, *United States v. Welden: The Constitutionality of the Victim and Witness Protection Act*, 79 Nw. U.L. Rev. 566 (1984).

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
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