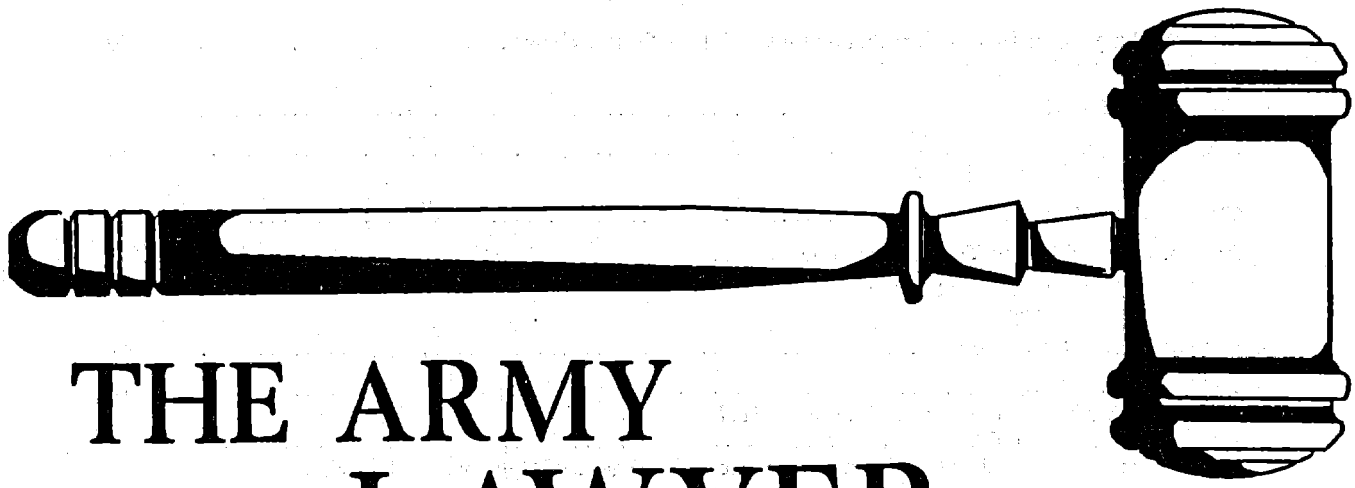

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-171

March 1987

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Editor
Captain David R. Getz

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

REPLY TO
ATTENTION OF

DAJA-LTG

7 January 1987

SUBJECT: Department of Justice Interface Program - Policy Letter 87-1

STAFF AND COMMAND JUDGE ADVOCATES

1. I am committed to enhanced support in civil litigation and criminal prosecutions arising out of Army operations. Our goal is to work with the Department of Justice (DOJ) and U.S. Attorneys to save Army funds and preserve the integrity of Army activities. We will achieve that goal by combating fraud and other criminal conduct and reducing monetary losses from civil judgments. We must continue to emphasize and expand our efforts in these areas.

2. DOJ is statutorily entrusted with the responsibility for representing the United States. However, the role of Army attorneys in civil litigation and prosecutions of misdemeanors and felonies occurring on Army installations is well established, professional and effective. Recently, Congress amended Article 6, UCMJ, recognizing the role we have come to play in representing the United States. (Statute and DOD implementation enclosed.)

3. Felony Prosecution Programs have been established at Fort Hood, Fort Bragg, Fort Stewart, Fort Drum and West Point. The programs provide for designation of Army attorneys as Special Assistant U.S. Attorneys empowered to prosecute felonies affecting Army activities in U.S. District Court. Prosecutors are trained and supervised by local U.S. Attorneys. The U.S. Attorney controls the efforts of our attorneys in these cases and retains full prosecutorial discretion.

4. To the extent personnel assets allow, a Felony Prosecution Program should be considered at each installation. The first step is staff judge advocate coordination with the local U.S. Attorney. Discussions must emphasize that only Army-related litigation can be supported, and that the Army assets may be withdrawn, if necessary, to meet other mission requirements. TJAG approval of new felony prosecution programs is required after local coordination. General Litigation Branch, Litigation Division (AUTOVON 227-3462), is the point of contact for obtaining OTJAG approval and is also available for advice and assistance.

Hugh Overholt

2 Encls

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

Sec. 807. DETAIL OF JUDGE ADVOCATES

(a) REPRESENTATION OF UNITED STATES INTERESTS--Section 806 (article 6) is amended by adding at the end the following new subsection:

"(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

"(2) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.".

(b) EFFECTIVE DATE--The amendment made by subsection (a)--

(1) shall take effect on the date of the enactment of this Act; and

(2) may not be construed to invalidate an action taken by a judge advocate, pursuant to an assignment or detail under section 973(b)(2)(B) of title 10, United States Code, before the date of the enactment of this Act.

SEC. 808. EFFECTIVE DATE

Except as provided in sections 802(b), 805(c), and 807(b), this title and the amendments made by this title shall take effect on the earlier of--

(1) the last day of the 120-day period beginning on the date of the enactment of this Act; or

(2) the date specified in an Executive order for such amendments to take effect.

CONFERENCE REPORT

Detail of judge advocates (sec. 807)

The House amendment contained a provision (sec. 707) that would clarify the circumstances under which judge advocates are detailed to assist, for example, the Department of Justice in litigation involving the Department of Defense.

The Senate bill included a similar provision (sec 807).

The House recedes with a technical amendment clarifying that judge advocates may assist another agency without reimbursement to the Department of Defense by the other agency in cases of interest to the Department of Defense.

THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

19 November 1986

MEMORANDUM FOR SECRETARY OF THE ARMY
SECRETARY OF THE NAVY
SECRETARY OF THE AIR FORCE

SUBJECT: Judge advocates representation of the United States in civil and criminal cases

You may assign or detail judge advocates to the Department of Justice under 10 U.S.C. §§ 806(d) and 973(b)(2)(B) with respect to cases of interest to the Department of Defense. In such cases, reimbursement is not required.

Any assignment or detail of a judge advocate involving matters other than cases of interest to the Department of Defense is governed by DoD Directive 1000.17. Reimbursement shall be obtained to the extent required with respect to the provision of similar services to another agency under the Economy Act (31 U.S.C. § 1535).

This memorandum shall be cancelled upon issuance by the General Counsel of an instruction incorporating the provisions of this memorandum and other appropriate guidance.

William H. Taft, IV
Deputy Secretary of Defense

SECRETARY OF THE ARMY
WASHINGTON

31 December 1986

MEMORANDUM FOR THE JUDGE ADVOCATE GENERAL

SUBJECT: Judge Advocate Representation of the United States in Civil and Criminal Cases

Recent legislation codified our authority to assign or detail judge advocates to the Department of Justice to represent the United States in cases of interest to the Department of Defense. 10 U.S.C. § 806(d). Deputy Secretary of Defense William H. Taft, IV, has issued instructions authorizing the Service Secretaries to assign or detail judge advocates in accordance with this legislation. In this regard, I recognize your authority within the Department of the Army to act in accordance with Article 6, Uniform Code of Military Justice, to assign or detail judge advocates, to include such assignment or detail to the Department of Justice for the purpose of representing the United States as authorized under 10 U.S.C. § 806(d).

Judge advocates have historically represented Army interests in federal courts with expertise and enthusiasm. I charge you to continue that tradition through the assignment and detail of our judge advocates to the Department of Justice.

John O. Marsh, Jr.

John O. Marsh, Jr.

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

REPLY TO
ATTENTION OF

JACS-PC

11 FEB 1987

SUBJECT: Army Personnel Claims Program - Policy Letter 87-2

STAFF AND COMMAND JUDGE ADVOCATES

1. Beginning 1 May 1987, our ability to recover money from common carriers that cause loss or damage to soldiers' property increases from 60 cents per pound, per article, to $1.25 per pound times the weight of the entire shipment. This gain for the soldier will place an added burden on claims offices. As the carrier industry will be more concerned over how fairly and reasonably we adjudicate personnel claims, we anticipate increased challenges to our adjudications.

2. To assure quality adjudication and effective management of claims personnel, each staff and command judge advocate must--

a. Adhere strictly to established adjudication procedures. Pre-existing damage must be properly evaluated and depreciation schedules applied accurately and interpreted fairly.

b. Train adjudicators to make detailed, accurate notes on both the DD Form 1844 and the claims chronology sheet to explain unusual circumstances and to rebut future carrier appeals.

c. Fund annual training at U.S. Army Claims Service (USARCS) workshops and seminars, with priority to new personnel who would benefit most.

d. Initiate regular communications with USARCS and request claims assistance visits as needed.

e. Dedicate sufficient resources to accomplish the above objectives and to process claims, particularly small claims, expeditiously and accurately.

f. Review the status of pending claims and recovery actions monthly with your claims judge advocate. Emphasize adequacy of inspections, assertions of carrier recovery claims, and use of small claims procedures.

3. These matters must have your personal attention and support if the Army Personnel Claims Program it to achieve its potential.

Hugh Overholt

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

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

REPLY TO
ATTENTION OF

DAJA-PT 5 February 1987

SUBJECT: Professional Training - Policy Letter 87-3

STAFF AND COMMAND JUDGE ADVOCATES

1. All members of the Judge Advocate General's Corps must achieve the highest level of professional proficiency. In addition to technical instruction at The Judge Advocate General's School and enlisted service schools, professional training encompasses many other skills required for a combat ready force.

2. The Army's only training goal is to develop a combat ready force which is physically and psychologically prepared to fight and win a global war. Officers and enlisted soldiers of the Judge Advocate General's Corps must maintain proficiency in common soldier tasks and combat survival skills. Examples are physical training, map reading, first aid, camouflage, weapons proficiency, NBC training, and use of field equipment.

3. Common soldier tasks and combat survival skills are emphasized at every installation. Officers and enlisted members of the Corps maintain proficiency in these tasks and skills by participating in unit-level training. Independent and collective training builds unit cohesion, esprit de corps, and combat effectiveness. Realistic field training reinforces these tasks and skills. I am convinced that common soldier tasks and combat survival skills enhance our professional training.

4. I expect you to assist all JAGC personnel assigned to and supported by your offices in meeting these requirements. Ensure that judges and defense counsel receive sufficient notice of training dates so that dockets and travel can be planned to permit maximum participation in the training.

Hugh Overholt

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

Update on Fourth Amendment Coverage Issues—*Katz* Revisited

Major Wayne E. Anderson
Instructor, Criminal Law Division, TJAGSA

Introduction

In addressing the lawfulness of a search or seizure, one should first ask whether the activity, conduct, or property that was the subject of the search or seizure was entitled to fourth amendment protection, sometimes referred to as "coverage." In *United States v. Katz*,[1] Justice Harlan articulated his analysis as to when privacy interests were entitled to fourth amendment protection or were "covered" by the fourth amendment: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[2]

In addition to establishing a two-tiered standard for determining whether fourth amendment interests were implicated, the Court also clarified its interpretation of what society would recognize as reasonable. In *Katz*, the Court was confronted with the question of whether a person's conversation on a public pay phone was the type of activity that the fourth amendment protected. In finding that there was fourth amendment coverage, the Court said:

> [T]he Fourth Amendment protects people, not places. What a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[3]

The courts continue to employ the two-tiered standard for determining whether fourth amendment protection exists. This article will examine how four recent cases have treated the subjective and objective tiers of the *Katz* coverage test.

Subjective Expectation of Privacy

Before one is entitled to fourth amendment protection in his or her effects, the person must have an actual or subjective expectation of privacy in the property or activity that is the subject of a governmental intrusion. Courts, however, have been somewhat willing to concede the existence of a subjective expectation of privacy and move straight to an analysis of whether there exists an objective expectation of privacy—one society is willing to recognize as reasonable. The temptation to move over the subjective expectation tier quickly is understandable; it is difficult to articulate a rebuttal to one's claim that he or she had a *subjective* expectation of privacy. Nevertheless, in some cases the facts make a suspect's claimed subjective expectation of privacy implausible.

In *United States v. Portt*,[4] the appellant, an Air Force security policeman, contested the search of his personal wall locker that was located in the security police guard-mount room. While cleaning the guard-mount room, two Airmen noticed that the padlock on the appellant's wall locker was not locked. They opened it and, based upon its condition, believed it to be a "junk" locker not assigned to anyone. They started to remove items from the locker when they discovered a soda can that had apparently been used as a smoking device for marijuana. They also discovered a shot record with the appellant's name. They replaced the suspected contraband and called the military police. The military police duplicated the search made by the Airmen and summoned Portt for questioning. The appellant made a confession, submitted to a urine test, and granted the authorities permission to search his room and automobile. In his confession the appellant said that he had not used the locker in six months. At trial and on appeal, the appellant contested the legality of the search of his wall locker.

The Court of Military Appeals viewed with skepticism the appellant's claimed subjective expectation of privacy in the wall locker. Portt had left the locker "unlocked in a common area where all the other lockers were routinely locked".[5] Moreover, he kept no valuables in it and, based on his own admission, had not gone near the locker in six months. However implausible the appellant's claimed subjective expectation of privacy seemed, the court moved past the issue after expressing its doubt that the appellant had an *actual* expectation of privacy, and ruled that there was no *objective* expectation of privacy.[6]

In *United States v. Ayala*,[7] the Army Court of Military Review expressed its reluctance to recognize a claimed expectation of privacy in government quarters from which the appellant had, for all intents and purposes, moved out. Sergeant First Class (SFC) Ayala was suspected of murdering his wife. At the same time, SFC Ayala's request for retirement had been accepted and he was in the final stages of processing his retirement. He had moved out of his government quarters into temporary government quarters. He had removed all of his personal belongings except for a few items he apparently intended to abandon and some items left for the commercial cleaning team. Ayala, however, had not "cleared" quarters through the government housing office, so technically he was the tenant and he was still responsible for them.

---

[1] 389 U.S. 347 (1967).

[2] *Id.* at 361 (Harlan, J., concurring).

[3] *Id.* at 351 (emphasis added).

[4] 21 M.J. 333 (C.M.A. 1986).

[5] *Id.* at 335.

[6] *Id.*

[7] 22 M.J. 777 (A.C.M.R. 1986).

Criminal Investigation Division agents obtained a search authorization for the quarters that was later found to be unsupported by probable cause. During a very thorough search of the quarters for forensic evidence, they found several blood stains on the walls, ceilings, and windows of the quarters even though it was apparent that someone, presumably SFC Ayala, had tried to wipe the blood away. Some of the blood stains were the same type as Ayala's deceased wife.

The Army court agreed with the trial court that the search authorization was not based on probable cause. It then turned to whether there was an expectation of privacy and whether the accused had standing to object.[8] Although the court focused its discussion on standing, it did conclude that SFC Ayala "could not reasonably have harbored a subjective expectation of privacy in these premises."[9] The factors relevant to the standing issue are of equal relevance to the issue of whether there was a subjective expectation of privacy. Those factors included the facts that Ayala was not making personal use of the quarters, he had no personal belongings or furniture in the quarters, he had taken up personal residence elsewhere, and he had given a key and permission to enter to a contract cleaner.

Upon analyzing the factors presented, it is clear that the accused had a possessory interest in the quarters to the extent that he was still the lawful tenant. Indeed, one could argue that delivering keys to a cleaning team is no more an expression of the lack of a subjective expectation of privacy than giving keys to a maid service. He certainly did not intend by this act to abandon his interest in the property and such an act did not signal the government or the public that they were free to wander in and out as they pleased.

On the other hand, the existence of a mere possessory interest does not presumptively establish a subjective expectation of privacy. Certainly SFC Ayala had an interest in protecting the property from damage or vandalism; a failure to do so could result in pecuniary liability. The fourth amendment, however, protects *privacy* interests. On these facts, the most persuasive argument is that SFC Ayala had no subjective expectation of privacy because he had removed all personal property that one normally considers intimate and private; he had physically moved out and he had opened the quarters to a cleaning team and, presumably, to government housing inspectors. Nothing in which SFC Ayala maintained a *privacy* interest remained behind.

In both *Portt* and *Ayala,* the courts chose not to base their decisions of the lack of a subjective expectation of privacy. In both cases, however, the facts probably would have supported findings that there was no *actual* expectation of privacy. This is not to suggest that the cases are "wrong" for failing to base their decisions on this issue; trial and appellate courts usually base their decisions on a single theory even though there are several available alternative grounds that support the same result. In any event, counsel should be aware of the factors relevant to the issue of whether there exists a subjective expectation of privacy, and should articulate those factors when arguing before trial and appellate courts.

Objective Expectation of Privacy—An Expectation Society Is Willing To Recognize

In *Katz,* the Supreme Court said that there was no objective, reasonable expectation of privacy in conduct, activities, and things that a person "knowingly" exposes to the public. This doctrine, also referred to as the "plain view" rule,[10] has several variations.[11] The variation of the plain view doctrine that will be discussed next occurs when law enforcement officials, while located in a public place they are lawfully entitled to be, make a visual intrusion into a place that is protected by the fourth amendment. In recent cases, the Supreme Court and military courts have arguably expanded this doctrine by approving somewhat unconventional methods of gaining visual access to constitutionally protected places in order to observe not only what one *knowingly* exposes to the public, but also what one unintentionally and unknowingly exposes to "public view."

---

[8] In the opinion of the author, the Army court confused the closely related concepts of fourth amendment coverage and "standing." The court should have resolved the issue solely on the basis of fourth amendment "coverage." Standing and coverage are closely related, but distinct issues. With both issues, the subject's "expectation of privacy" is usually the focus of attention. The difference, however, is that before the standing issue should even be addressed, one should normally first conclude that the search or seizure by the law enforcement officials violated *someone's* privacy rights. Once a violation of privacy rights has been found, the issue is whether the illegal search or seizure violated the accused's rights and not the rights of some third party. *See, e.g.,* Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Tileston v. Ullman, 318 U.S. 44 (1943). The tendency to confuse standing and coverage issues was also discussed by Professor LaFave:

> [T]he expectation-of-privacy analysis utilized with respect to so-called standing issues is also used for other purposes, most notably to determine whether any search for Fourth Amendment purposes has occurred. Yet, it is important to keep in mind that the question traditionally labelled as standing (did the police intrude upon *this defendant's* justified expectation of privacy?) is not identical to, for example, the question of whether any Fourth Amendment search has occurred (did the police intrude upon *anyone's* justified expectation of privacy?), and that therefore the particular issues discussed herein are still rather discreet and deserving of separate attention, no matter what label is put on them.

3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.3 (Supp. 1985). In the present case, if anyone had an expectation of privacy in the quarters, it was SFC Ayala. Other than Ayala, only the owner could have claimed an interest, and in this case the owner was the government. Hence, upon finding that SFC Ayala had no expectation of privacy, the court should have found that the search of the quarters by government agents implicated no fourth amendment privacy rights.

[9] 22 M.J. at 785.

[10] The plain view doctrine is triggered if: the item is in plain view; there is probable cause or reason to believe the item to be seized is contraband or evidence; and the law enforcement official who sees the contraband or evidence in plain view is in a place that he or she is lawfully entitled to be. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court stated that the viewing must also be inadvertent. The inadvertence requirement has been largely ignored, however, and in California v. Ciraolo, 106 S. Ct. 1809 (1986), the Court said that it made no difference whether police flew over the Ciraolo's property with the specific intention of looking for marijuana or whether it was a routine aerial patrol.

[11] The plain view doctrine may be broken down into at least three categories: (1) The item is in plain view and in a place that is not protected by the fourth amendment. Contraband dropped on a public sidewalk falls into this category; (2) The item is in plain view in a place protected by the fourth amendment and the police officer is also lawfully in the constitutionally protected area. An example of this variation of plain view is when a military officer observes contraband while conducting a lawful health and welfare inspection; (3) The item is in plain view in a place protected by the fourth amendment and the police officer is in a public place looking into the constitutionally protected place. An example of this is when a policeman standing on a public sidewalk sees a potted marijuana plant growing in someone's home or within the curtilage of the home.

In *United States v. Wisniewski,*[12] a Sergeant Keane was told by a mail courier that he suspected drugs were being distributed from the room of a Lance Corporal Lansing. Lansing's room was two doors down from Sergeant Keane's. The rooms had glass doors that led outside to a public walkway that was about three feet wide. The walkway also served as a patio. Sergeant Keane, who was off duty, went outside and, for the next few hours, lounged on the walkway. He saw 20 to 30 people go to Lansing's door and knock. Because Lansing was on duty, no one answered. Later in the afternoon, two more Marines went to Lansing's door and knocked. When they received no answer they went next door to the room of Lance Corporal Wisniewski. They asked Wisniewski to go with them to find Lansing. Lansing gave the accused a key to his room and wall locker and Wisniewski returned to the barracks to sell LSD to the two Marines. The door to Lansing's room locked itself after the accused and the other two Marines entered. The windows were already covered with venetian blinds. When Sergeant Keane saw Wisniewski and the other Marines go into Lansing's room, he walked down the walkway and peered into the room through a crack in the blinds that measured about ⅛" × ⅜" (a crack no larger than the abbreviation "LSD" as it appears in this text). There he saw Wisniewski transfer a powdery substance to one of the other Marines who consumed it on the spot.

With little discussion, the Navy-Marine Court of Review found that when Sergeant Keane peered through the crack in the venetian blinds, he conducted an unlawful "search" of Lance Corporal Lansing's room.[13] The next question and the focal point of the decision was whether Wisniewski had *standing* to object to this search of Lansing's room. Based on several factors, the court found that Wisniewski did have a supportable, subjective expectation of privacy in the room and found further that his expectation of privacy in the room was objectively reasonable.

The Judge Advocate General of the Navy certified the case to the Court of Military Appeals. The Court of Military Appeals did not decide the case based on Wisniewski's standing,[14] but, rather resolved the case on the coverage issue.

Wisniewski entertained and clearly manifested a subjective expectation of privacy as articulated in *Katz.* By locking the door and pulling the blind, he manifested his intent to withdraw from public view and shut out the probing eye of the government and the public. Notwithstanding the presence of a subjective expectation of privacy, the court held that there was no objectively reasonable expectation of privacy in this conduct because it was exposed to the public view; the court said that "Sergeant Keane . . . did nothing more than look through an opening available to any curious passerby."[15] The court emphasized that the walkway around the barracks was for the use of all occupants of the barracks as well as their guests. Quoting its decision in United States v. Lewis,[16] the court said occupants of the barracks have "no reasonable expectation of privacy with respect to passers-by—whether casual or official—who looked into the room through an opening available in the window."[17] Certainly, the court argued, Sergeant Keane was in a place where he was lawfully entitled to be. Once lawfully situated, "[h]e had no difficulty in gaining a view into the room by merely peering through the openings in the blinds."[18]

Wisniewski strains the outer limits of *Katz.* The court seems to seize on *Katz's* premise that there is no expectation of privacy in that which one exposes to public view. From there, the court seems to reason that if the public *could have* observed the activity or item, then, by definition, the individual's privacy interest in the activity or item is not one that society is willing to recognize as reasonable. The court's analysis is suspect on two grounds. First, it ignores the language in *Katz* that states: "What a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[19] Clearly, Lance Corporal Wisniewski did not *knowingly* expose his transaction to the public; in fact, he was trying to conceal

[12] 21 M.J. 370 (C.M.A. 1986).

[13] United States v. Wisniewski, 19 M.J. 811 (N.M.C.M.R. 1984).

[14] With respect to the standing issue, the court simply said, "It is clear 'that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusions into that place.'" 21 M.J. at 373 (quoting Rakas v. Illinois, 439 U.S. 128, 142 (1978)). There was no further discussion of Wisniewski's expectation of privacy in Lansing's room even though the lower court discussed the issue at some length. Of course, as the court found that no fourth amendment privacy interests were implicated, it was not necessary to reach the standing issue. Nevertheless, it is somewhat surprising that the court did not concede the coverage issue and get right to the standing issue in light of language in United States v. Lawless, 18 M.J. 255 (C.M.A. 1984). The facts in *Wisniewski* and *Lawless,* in certain important respects, are very similar. Both appellants moved to suppress evidence that was discovered during the search of another's dwelling. In *Lawless,* the dwelling was the government quarters of an Air Force couple. Lawless was inside the quarters as a guest when he was seen smoking and packaging marijuana through a crack in the drapes. In *Wisniewski,* the appellant was in the barracks room of a fellow Marine selling LSD when he was seen through a crack in the blinds. In *Lawless,* the court held that the evidence would have been inevitably discovered even if the alleged illegality had not occurred, but in a footnote expressed doubt over whether the appellant had standing:

> We have grave doubts whether appellant's rights under the fourth amendment were violated by the subsequent conduct of the police in this case. *See United States v. Salvucci,* 448 U.S. 83, 100 S. Ct. 2547 (1980). The military judge erred to the extent he relied on Mil. R. Evid. 311 for the proposition that appellant's possessory interest in the seized drugs was sufficient to permit him to challenge an illegal search of the Marx's house. *See* Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421 (1978); Analysis of Rule 311, Appendix 18, Manual for Courts-Martial, United States, 1969 (Revised edition).

18 M.J. at 258 n.3.

[15] 21 M.J. at 372.

[16] 11 M.J. 188 (C.M.A. 1981).

[17] *Wisniewski,* 21 M.J. at 373 (quoting *Lewis,* 11 M.J. at 191).

[18] *Id.*

[19] *Katz,* 397 U.S. at 351.

it.[20] Second, the court seems to misinterpret the *Katz* test by concluding that society is not willing to recognize a reasonable expectation of privacy in any conduct where one could envision a circumstance in which that conduct could have been exposed to the public. The problem with the court's analysis is that it makes an underlying assumption that society will not recognize a privacy interest in activity simply because it *could be* observed by a private person standing in a public place. To the contrary, the Supreme Court in *Katz* recognized that "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[21] Perhaps it is ironic that military courts have upheld convictions for similar intrusions based upon the violation of one's right to privacy. An Air Force board in *United States v. Clark*[22] said that "[w]indow peeping . . . is a violation of the [law] whereby the voyeurer [sic] infringes upon the right to privacy of the person observed and upon the protection of the public from being the involuntary subjects of the vouyerer's [sic] curiosity."[23] This is not to suggest that Sergeant Keane's peering through a ⅛" × ⅜" crack in the blinds was a crime, although that position could be argued.[24] The point is, it is incorrect to presume that society will not recognize as reasonabe an expectation of privacy in conduct just because a court can envision a scenario whereby a private person lawfully situated in a public place *could have* seen the conduct. It seems a quantum leap to hold on the one hand that peeking into one's home may be such an egregious violation of privacy that such conduct is criminally punishable and to hold on the other hand that peeking into one's home by *government officials* does not even amount to an intrusion of fourth amendment privacy interests that society is willing to recognize as reasonable because some "curious passer-by" could have done the same thing.[25]

The Supreme Court recently decided a case in which it addressed the same considerations raised by the Court of Military Appeals in *Wisniewski*. In *California v. Ciraolo*,[26] the Supreme Court granted certiorari to determine whether an aerial overflight of a fenced-in back yard was a search within the meaning of the fourth amendment. In *Ciraolo*, the Santa Barbara Police received an anonymous tip that Ciraolo was growing marijuana in his yard. When police officers followed up on the tip, they discovered that Ciraolo's yard was completely enclosed by a six foot outer fence and a ten foot inner fence. Undaunted, the police secured a private plane that afternoon and flew over Ciraolo's home at 1,000 feet. From that altitude, they were able to see plants that they recognized as marijuana plants. Based upon the affidavits of the police, a warrant was issued and the police seized seventy-three marijuana plants eight to ten feet in height. Ciraolo contended that the overflight constituted an unlawful "search" of a place in which he had an expectation of privacy, namely, the "curtilage" of his home.

The Court began its analysis with a recapitulation of the two-tiered analysis in *Katz*.[27] Concerning the subjective expectation of privacy, the Court said, "Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits."[28]

Addressing the objective tier of the analysis, the Court first acknowledged that the curtilage of one's home is "an area intimately linked to the home, both physically and psychologically, where privacy interests are most heightened."[29] Nevertheless, the Court, quoting *Katz*, reiterated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections."[30] The Court noted that the police were within public navigable airspace and "[a]ny member of the

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[20] This is not to suggest that one loses his privacy interest only when he *knowingly* exposes his property or activity to public view. Rather, it appears from the text of *Katz* that the Supreme Court used this example to emphasize its point that the fourth amendment protects persons, not places; the Court said that what one knowingly exposes to the public, even in his own *home* or *office*, is not protected by the Constitution. Just as it would be incorrect to say that a person must *knowingly* expose an activity or item to the public before it loses fourth amendment protection, it would seem equally incorrect to say that there is no reasonable expectation of privacy in conduct just because the public *might* be able to see it.

[21] 389 U.S. at 351, 352.

[22] 22 C.M.R. 888 (A.F.B.R. 1956).

[23] *Id.* at 890.

[24] To prove an offense under the Uniform Code of Military Justice 10 U.S.C. §§ 801–940 (1982), it is not necessary to show that the window peeper was motivated by a desire to satisfy sexual lusts or desires. Indeed, the gravamen of the offense appears to be the involuntary invasion of privacy. In United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978), the court said:

> [T]he act constitutes an invasion of the privacy of those observed and while constituting a form of sexual perversion, such an act *per se* is not directly related to exciting one's lust or depraving one's morals. . . . Accordingly, we view the appellant's act as a disorder to the prejudice of good order and discipline and under circumstances to bring discredit upon the military service.

Id. at 772. On the other hand, if Sergeant Keane had reasonable suspicion to make this intrusion, as he appears to have had, it would be extremely dubious that his conduct could, as a matter of law, constitute a "disorder prejudicial to good order and discipline."

[25] In the author's opinion, there was a clear invasion of a fourth amendment privacy interest by Sergeant Keane, but the intrusion could have been justified under the rationale of New Jersey v. *T.L.O.*, 469 U.S. 325 (1985). During the 1984–85 Term, the Supreme Court decided five cases, including *T.L.O.*, in which it addressed the constitutionality of minimal investigatory intrusions of constitutionally protected privacy interests based only on reasonable suspicion (as opposed to probable cause). In *T.L.O.*, the Supreme Court held that the search of a 14 year old schoolgirl's purse for cigarettes was reasonable under the fourth amendment where there was *reasonable suspicion* that the evidence would be discovered, the intrusion was *minimal*, and the search was necessary to protect important governmental interests, namely, *good order, security* and *discipline* on the school grounds. In the present case, the report of suspected drug dealing, coupled with the number of visitors to Lansing's room, certainly supported a reasonable suspicion that criminal activity was afoot. Sergeant Keane's investigation was minimally intrusive—he did not barge through a door, but simply peeked through a crack. His intrusion of Wisniewski's fourth amendment privacy interests was calculated to quickly confirm or dispel his suspicions with as slight a frustration of Wisniewski's privacy interests as reasonably possible. The court has recognized the recent "proliferation" of cases permitting warrantless searches based on "conclusions of reasonableness." United States v. Muniz, 23 M.J. 201, 207 n.7 (C.M.A. 1987).

[26] 106 S. Ct. 1809 (1986).

[27] *Id.* at 1811.

[28] *Id.*

[29] *Id.* at 1812.

[30] *Id.* (quoting *Katz*, 389 U.S. at 351).

public flying in this airspace who glanced down could have seen everything that these officers observed."[31] Based on the garden's exposure to the flying public, the Court found that there was no expectation of privacy in this horticultural venture that society was willing to recognize as "reasonable."

Ciraolo is similar to *Wisniewski* because in both cases the suspects did not *knowingly* expose their criminal activity to the public eye; indeed, they took some rather elaborate measures to assure that the public or, more precisely, the government would not discover the activity. Furthermore, in both cases, the imaginary public had to engage in some rather unconventional machinations to gain visual access to the criminal activity.

Despite the similarities, the cases are distinguishable. The test contemplated by *Katz* is not as dependent on whether a member of the public *could have* viewed the individual's criminal venture; rather, it is ultimately dependent on whether the individual is engaged in an activity or is in a place where society is willing to recognize his or her right to privacy.[32] In *Wisniewski*, the subject was in a private barracks room; in *Ciraolo*, the activity was conducted in a back yard where one may hope for privacy, but, based on the likelihood of aerial overflights, is not guaranteed it. The Supreme Court made this very point: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[33]

It is not the possibility that the activity *could have* been seen by the public, but the likelihood that the activity would be viewed by the public during the course of normal, socially acceptable, activities. If it is likely that an activity or item would be seen by the public while the public was going about its normal business, then the criminal activity or item is not entitled to fourth amendment protection.

Conclusion

Any search or seizure issue raises the fundamental question whether the intrusion by the government "infringes upon the personal and societal values protected by the Fourth Amendment."[34] The intrusion must first be personal; if there is no subjective or actual expectation of privacy in the activity or item that was the subject of the intrusion, then no fourth amendment interests are infringed. Moreover, the government need not take an accused's word that he or she did, in fact, subjectively believe he or she had a right to privacy. Rather, this claim will be evaluated in light of the accused's actions. If those actions do not objectively support the claim, then the court may properly conclude that there were no real fourth amendment privacy interests at stake. If, on the other hand, a subjective expectation of privacy has been manifested, then the court should consider whether the claimed privacy interest is one society is willing to recognize as reasonable. In assessing society's tolerance of governmental intrusions, it is certainly relevant to consider whether the conduct or item was knowingly exposed to the public view or, because of the nature or place of the activity or item, was likely to be seen by the public notwithstanding the desires of the individual concerned. Nevertheless, the ultimate issue is whether the individual's expectation of privacy is the kind of privacy interest society is willing to recognize and defend. *Wisniewski* arguably goes beyond this standard by focusing undue attention on whether the activity could be viewed by a person in a public place without deciding whether the individual's illegal activity was conducted in a place or under circumstances that society would and should regard as private. *Ciraolo* can be construed to focus more on society's recognition that the number of private and commercial planes in the public airspace have diminished the individual's expectation of privacy in activities and items in one's own back yard.

Like it or not, what we do in our own back yards cannot be totally free from uninvited intrusions due to the reality of increased private, commercial, and governmental access to public airspace. On the other hand, it seems unlikely, absent probable cause or at least reasonable suspicion, that society would or should tolerate a visual intrusion—peeking—through a tiny crack in the blinds of one's home or barracks whether the act is done by a nosey neighbor or a law enforcement official.

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[31] *Id.* at 1813.

[32] *See generally* Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1 (1986).

[33] 106 S. Ct. at 1813.

[34] Oliver v. United States, 466 U.S. 170, 183 (1984).

Victim's Loss of Memory Deprives Accused of Confrontation Rights

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Introduction

The right to cross-examine adverse witnesses is guaranteed by the Military and Federal Rules of Evidence and the sixth amendment confrontation clause. An accused may be deprived of this right when the witness is present and cross-examined but memory loss prevents the witness from providing a basis for his or her testimony.[1] Cross-examination often reveals memory lapses and problems in perception and hence casts doubt on the reliability of the direct testimony.[2] The more perplexing issue, however, is whether a complete memory loss so frustrates cross-examination as to violate the sixth amendment confrontation right.[3] The court in *United States v. Owens*[4] addressed this issue and held that a victim's complete loss of memory deprived an accused of cross-examination rights under Federal Rule of Evidence 801(d)(1)(C) and the confrontation clause of the sixth amendment.[5]

After a crime has been committed and a suspect is apprehended, the police may hold a lineup or a showup at which the victim or an eyewitness identifies the accused. At the time of trial, the witness may be deceased or have a memory loss. In such a case, it is possible for the person witnessing the identification to testify as long as that person is subject to cross-examination. There may also be a situation where the victim initially identifies the accused, but at trial the victim testifies that he or she has no memory of seeing the accused at the time of the offense and has experienced a memory loss concerning the basis of the out-of-court identification. *Owens* presents this second situation where the victim had no memory of seeing the perpetrator at the time of the offense, and no memory of the basis of a prior out-of-court identification of the accused. This is not a situation where the victim's claimed memory loss is so incredible as not to be believable, *e.g.*, the victim is a friend of the accused or a co-conspirator.

The court in *Owens* found that the defendant's confrontation rights were violated when the trial judge admitted testimony of the victim's out-of-court identifications of the accused. Although the victim identified the accused as his assailant to a Federal Bureau of Investigation (FBI) agent after the assault, the victim was unable to identify the accused as his assailant at the time of trial. Additionally, the victim was unable due to a complete memory loss to answer questions on cross-examination concerning the basis of his out-of-court identifications. The court of appeals found that admissions of the victim's out of court identifications violated both Federal Rule of Evidence 801(d)(1)(C) and the confrontation clause of the sixth amendment.[6] The decision is instructive because of the court's interpretation of Rule 801(d)(1)(C), and the effect of a witness' actual and complete memory loss on an accused's sixth amendment right to confront that witness.

The Facts

On April 12, 1982, Correctional Officer John Foster was brutally assaulted while on duty at a federal prison. The evidence at trial established that Foster's attacker beat him repeatedly with a metal pipe. Foster sustained numerous injuries to his face, arms, hands, and head. As a result of these injuries, Foster lost his memory of most of the details concerning the assault. While in the hospital, Foster informed an FBI agent that his attacker was Owens and identified Owens from a photographic display. At trial, Foster could only remember feeling the impact on his head and seeing blood on the floor. Foster testified that he had no memory of seeing his assailant. The evidence also demonstrated that Foster was visited in the hospital by many people but his only memory was the visit of the FBI agent where he identified Owens as his assailant.[7] During cross-examination, Foster testified that he remembered identifying Owens as his assailant, but was unable to remember any fact or reason that caused him to identify Owens as his assailant.[8]

On appeal, the appellant challenged the trial judge's rulings admitting Foster's out-of-court identifications, claiming that Foster was not subject to cross-examination due to his memory loss, and therefore his testimony was inadmissible under Rules 602 and 801(d)(1)(C), and violative of the sixth amendment confrontation right.[9]

Rule 602

Rule 602 provides that a "witness may not testify to a matter unless evidence is introduced sufficiently to support a finding that he has personal knowledge of the subject matter."[10] There are two requirements of the rule.[11] First, the witness who is testifying about an out-of-court identification must have personal knowledge of the identification. Personal knowledge can be shown by a witness to the lineup or

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[1] *See* California v. Green, 399 U.S. 149 (1970).

[2] *See* Delaware v. Fensterer, 106 S. Ct. 292 (1985).

[3] This issue was explicitly left open by the Supreme Court in California v. Green, 399 U.S. at 169–70.

[4] 789 F.2d 750 (9th Cir. 1986).

[5] *Id.* at 763.

[6] *Id.* at 757, 763. The court in *Owens* considered Fed. R. Evid. 801(d)(1)(C), which is identical to Mil. R. Evid. 801(d)(1)(C).

[7] 789 F.2d at 752, 753.

[8] *Id.*

[9] *Id.* at 755.

[10] Fed. R. Evid. 602.

[11] *Owens*, 789 F.2d at 754.

showup, or the person making the identification at the lineup or showup.[12] Second, the declarant who made the out-of-court statement must have personal knowledge of the events that constitute the crime.[13] In this case, the second step was violated because Foster had no personal knowledge of the identity of the assailant. It is of no value that the police officer had personal knowledge of the statement made at the lineup or showup, if the victim of the crime had his or her back turned, was taken by surprise, or for any reason did not observe the assailant. The court could have easily rested its holding on this ground because Rule 602 applies to both in-court and out-of-court identifications. The court did not deem it necessary or advisable to decide the case based on Rule 602 because of the court's judgment concerning Rule 801 and the sixth amendment.[14]

Rule 801(d)(1)(C)

Rule 801(d)(1)(C) provides "A statement is not hearsay if [t]he declarant testifies at trial or a hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person."[15]

Owens first contended that Foster's initial statement was inadmissible because it was not an identification of a person made after perceiving him. Appellant argued that the perception required by Rule 801(d)(1)(C) was a perception occurring after the crime had taken place.[16] In other words, the accused argued that "after perceiving him" meant that the declarant must first view the subject before making an identification. In rejecting the appellant's argument, the court noted that Foster's identification of Owens complied with the literal wording of 801(d)(1)(C), as Foster had perceived Owens many times prior to the out-of-court identification.[17] The court also reasoned that the purpose of Rule 801(d)(1)(C) is to allow the introduction of identifications made when the witness' observations are still fresh in mind, and before the passage of time dims recollection, or the witness changes his mind.[18] The *Owens* court refused to read into Rule 801(d)(1)(C) a requirement that the witness first view the appellant before making an identification. The court reasoned that such a requirement would not further the purpose of the rule and could hinder the reliability of out-of-court identifications by subjecting witnesses to governmental suggestion.[19] Accordingly, the court imposed no requirement that Foster be afforded an additional opportunity to observe the accused after the crime before making an identification.

After analyzing the cross-examination requirement of Rule 801(d)(1)(C), the court concluded that an out-of-court statement may not be admitted unless the declarant is subject to cross-examination concerning the basis of his identifications.[20] The cross-examination requirement of this Rule is intended to permit the opposing party to explore the reliability of the out-of-court identifications.[21] Not only must the process of the identification be explored, but the opposing counsel must also be permitted to cross-examine the declarant on the facts and circumstances underlying the identifications.[22] Absent such an inquiry, there is a substantial danger of unreliable identification evidence coming before the fact finder. In *Owens*, the court concluded that because of Foster's complete memory loss, the appellant was unable to effectively explore the basis of the out-of-court identifications. Furthermore, the lack of cross-examination deprived the jury of a sufficient basis to evaluate the reliability of those identifications. As such, the court found that the right to cross-examination envisioned by Rule 801(d)(1)(C) includes the right to cross-examine into the basis of the out-of-court identifications.[23] Only by affording the accused an opportunity to inquire into the underlying basis of the identifications will the fact finder be assured of receiving reliable and trustworthy evidence. After the *Owens* decision, the absence of cross-examination into the basis of the out-of-court identifications should cause identification testimony to be treated as inadmissible hearsay.

The Confrontation Clause

In addition to holding that Foster's identification testimony was inadmissible hearsay violative of Rule 801(d)(1)(C), the court also held that Owens was deprived of his sixth amendment right of confrontation. The court found that Foster's complete memory loss precluded affective cross-examination.[24] The court recognized that the right of confrontation includes the right to effectively cross-examine adverse witness.[25] The Supreme Court has stated that the purpose of the confrontation clause is to assure that the trier of fact has a satisfactory basis to evaluate the truth.[26] This purpose is accomplished in the following three ways: by ensuring that the declarant testifies under oath; by forcing the declarant to submit to cross-examination; and

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[12] *See id.* at 754 n.2.

[13] *Id.* at 754.

[14] *Id.* at 755.

[15] Fed. R. Evid. 801(d)(1)(C).

[16] *Owens*, 789 F.2d at 755.

[17] *Id.*

[18] *Id.*

[19] *Id.* The court's opinion is in accord with the view of the commentators. The commentators have rejected any requirement that the witness making an out-of-court identification first view the suspect before making an identification. *Id.* at 755. *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 525 (3d ed. 1982).

[20] 789 F.2d at 756.

[21] *See also* J. Wigmore, *Evidence* § 1018 (3d ed. 1940).

[22] *Id.*; United States v. Elemy, 656 F.2d 507 (9th Cir. 1981).

[23] *Owens*, 789 F.2d at 752.

[24] *Id.*

[25] California v. Green, 399 U.S. 149, 158 (1970).

[26] Dutton v. Evans, 400 U.S. 74 (1970); *California v. Green.*

by permitting the fact finder to observe the declarant's demeanor.[27] Because Foster testified under oath, and the jury was afforded an opportunity to observe his demeanor, the issue presented to the *Owens* court was whether the accused at trial was afforded an opportunity for effective cross-examination.

Cross-examination is crucial in furthering the truth-seeking goal of the confrontation clause. Statements admitted without cross-examination are subject to misperception, memory failure, and faulty narration such that the fact finder has no basis to evaluate whether the statement is true.[28] The *Owens* court found that the cross-examination of Foster was so limited that it did not eliminate the dangers of misperception and faulty memory.[29] Because the memory loss was so complete, the fact finder was not afforded sufficient information to determine if Foster had perceived his attacker and whether his memory accurately reflected his perceptions. The court concluded that under the facts no one, including Foster, knew whether his perceptions were accurate and whether at the time of his out-of-court identifications he had any memory of having observed Owens at the time of the assault.[30] Accordingly, under the circumstances, cross-examination was so limited that it could not provide the requisite basis to the fact finder to evaluate the truth, thus frustrating the purpose of the confrontation clause.

Owens Is Consistent With Prior Precedent

At first blush it appears that the decision in *Owens* is inconsistent with the rule of *California v. Green.*[31] A closer examination, however, reveals that *Owens* follows the rationale of *Green.* Green was charged with providing marijuana to a minor. At the preliminary hearing, the minor testified that Green had supplied the marijuana, but at trial the minor was unable to recall how the marijuana was supplied. The Court found that the partial memory loss did not deprive the accused of effective cross-examination because the fact finder was provided a basis for evaluating the truth.[32] Furthermore, the Court in *Green* specifically left open the issue of whether a complete memory loss might affect cross-examination to the extent of violating an accused's confrontation rights.[33]

The *Owens* decision is also consistent with the Supreme Court's decision in *Delaware v. Fensterer,*[34] where the Court held that the accused's confrontation rights were not violated by the admission of testimony of an expert witness who could not remember the basis for his expert opinion. Like the witness in *Green,* the expert did not experience a complete loss of memory, and the defense was able to explore the basis of his expert opinion.[35] *Fensterer* made it clear that the right to cross-examination was the right to effective cross-examination, not effective cross-examination to the extent desired by the defense.[36] Finally, *Fensterer* is distinguishable from *Owens* primarily because the expert's memory loss occurred after he had reached his conclusions, while there was a distinct possibility that Foster's memory regarding the attack was impaired even prior to his identification of Owens.[37]

Conclusion

The full and effective cross-examination envisioned by the Supreme Court was not present in *Owens.* The victim's complete memory loss precluded the defense from engaging in cross-examination envisioned by Rule 801(d)(1)(C) and required by the sixth amendment. As a result of the denial of effective cross-examination, the fact finder was not able to determine if there was a legitimate basis for Foster's out-of-court identifications, and there was a fair risk that a conviction was based upon unreliable evidence. It is likely that the holding and rationale of *Owens* will be followed in future trials where testimony by a witness who has experienced a complete memory loss is offered into evidence.

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[27] *Green,* 399 U.S. at 158.

[28] *Owens,* 789 F.2d at 758.

[29] *Id.*

[30] *Id.* at 758. *Owens* should not be confused with the situation where the claimed memory loss is so incredible as not to be believable. In those situations the untruthful statements, or evasions as to the ability of a witness to remember, give rise to an inference of the truthfulness of the prior out-of-court statements thus satisfying Rule 801(d)(1)(C) and the confrontation clause.

[31] 399 U.S. 149 (1970).

[32] *See id.* at 168. The Court in *Green* noted that cross-examination would allow inquiry into the prior statement, and the reasons for it, at the preliminary hearing. If the witness admits the prior statement, there is no danger of faulty recollection. If the witness denies the prior statement after taking the oath at trial, the jury can decide which, if either, of the statements is true. The jury will thus be able to give appropriate weight to either or both of the statements. *Id.* at 159.

[33] *Id.* at 168, 169.

[34] 106 S. Ct. 292 (1985).

[35] *Id.* at 295. The trial record in *Fensterer* indicated that the expert witness was cross-examined extensively. In fact, the expert admitted that his opinion was based on one of two theories. The defense was able, by calling its own expert, to establish that one of the bases that could have been used was not reliable. The Court also noted that the jury could draw inferences regarding the reliability of the expert because of the loss of memory as to the basis of his opinion. *Id.*

[36] *Id.*

[37] *Owens,* 789 F.2d at 757 n.7.

Foreign Divorces and the Military: Traversing the "You're No Longer Mine" Field

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Introduction

The Legal Assistance Office, Office of The Judge Advocate General, recently issued an extensive preventive law message, one section of which addressed an advertisement that has been circulating around the country. The advertisement encourages United States citizens contemplating divorce to consider bringing the action in the Dominican Republic.[1]

The message points out that the advertisement claims that such divorces can be obtained quickly, cheaply, and easily. According to the message, those who pursue this action have two options. Under the first, the client sends a power of attorney to an attorney in the Dominican Republic, who then completes the divorce procedure without the physical presence of the client. Once completed, the attorney mails the divorce decree back to the client. The second option involves a vacation package. Through prearranged plans, the client goes to the Dominican Republic and the divorce is included as a part of the vacation package.

Legal assistance attorneys should be aware that the validity of such foreign divorces has been and continues to be the subject of litigation. They are also of doubtful validity for military purposes. This article generally reviews case law involving foreign divorces and highlights how the federal government, and more particularly, the military, administratively treat such divorces.

The Department of Defense Pay and Entitlements Manual provides that "[a]ny claim involving remarriage of a member following a foreign nation divorce and any claim by or on behalf of the spouse from whom the member has obtained a foreign nation divorce, are cases of doubtful relationship."[2] The import of this phrase, "cases of doubtful relationship," will be discussed later. The DOD Pay Manual directs military officials to consider a number of factors in determining the validity of a foreign nation divorce. These include the place of residence of the parties involved, whether they appeared in person to obtain the divorce, and applicable state laws.[3] Because the military looks to state law, it is appropriate to review how state courts have reacted when one party or the other attempts to assert the validity or invalidity of a foreign divorce within a particular forum.

State Law Developments

It is ironic that advertisements offering "quickie" foreign divorces apparently continue to attract customers, given the enmity with which state officials look upon such tactics. In fact, as early as 1972, a company that offered a package vacation/divorce tour was the subject of an injunctive action by the New Jersey Attorney General. In *Kugler v. Haitian Tours, Inc.*,[4] a company advertised a unilateral divorce package for $1125 and a bilateral divorce for $1275.[5] The fee included air fare, lodging, consultations, and document reproduction and legal and administrative fees.

Kugler reinforced what has been a longstanding principle of United States courts concerning foreign nation divorces: recognition of a foreign country decree by a United States court rests on the doctrine of comity, which in turn is controlled largely by each state's public policy.[6] In *Kugler*, the court examined Haitian law and opined that domicile of neither party was required, just a "fleeting transitory presence" of one of the parties.[7] This, the court concluded, was violative of New Jersey public policy even if both parties consented and the divorce was bilateral. In so ruling, the court followed the majority rule among United States jurisdictions, summarized in an excellent American Law Reports annotation:

> Regardless of its validity in the nation awarding it, the courts of this country will generally not recognize a judgment of divorce rendered by the courts of a foreign nation as valid to terminate the existence of the marriage unless, by the standards of the jurisdiction in which recognition is sought, at least one of the parties was a good-faith domiciliary in the foreign nation at the time the decree was rendered.[8]

The application of this general rule is best illustrated by the New Jersey case of *Warrender v. Warrender*,[9] which is not unlike fact situations that will be encountered by military legal assistance attorneys. In *Warrender*, both the husband and the wife executed a separation agreement in New Jersey. Mrs. Warrender flew to El Paso the following day and appeared personally in a Mexican court across the border. Her husband was represented by a Mexican attorney on the basis of a power of attorney he had executed. She obtained the divorce and flew back to New Jersey, but

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[1] Dep't of the Army Message 061000Z Jun 86, subject: Preventive Law Guidance.

[2] Dep't of Defense Pay and Entitlements Manual, para. 30233e (1 Jan. 1967) (C81, 21 Dec. 1984) [hereinafter DOD Pay Manual].

[3] *Id.*

[4] 120 N.J. Super. 260, 293 A.2d 706 (1972).

[5] A unilateral divorce is one in which only one party seeks and obtains a divorce. A bilateral divorce is one in which both parties consent to the action. *See* 45 Comp. Gen. 155, 156 (1965).

[6] 120 N.J. Super. at 265, 293 A.2d at 708–09.

[7] *Id.* at 265, 293 A.2d at 709.

[8] Annotation, *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicil for Jurisdiction of the Parties*, 13 A.L.R.3d 1419, 1425 (1967).

[9] 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd*, 42 N.J. 287, 200 A.2d 123 (1964).

changed her mind fifteen months later, and attacked the validity of the Mexican decree. Her husband argued that her conduct in procuring the divorce should estop her from asserting its invalidity. Citing considerations of public policy, the New Jersey court rejected the husband's arguments and found the Mexican divorce void. This can be contrasted with the result in New York in *Rosenstiel v. Rosenstiel,*[10] in which a New York court found that a Mexican divorce, obtained under almost identical circumstances, was valid. The result in *Rosenstiel,* that a foreign nation bilateral divorce obtained under questionable jurisdictional circumstances can be considered valid by a United States court, is clearly a minority view.[11] Arguably, even in New York, a unilateral divorce, like a divorce obtained solely through the mails, would be considered void.

Mrs. Warrender was permitted to attack the validity of the Mexican divorce fifteen months after its entry, notwithstanding her complicity. In fact, there have been cases in which parties have successfully attacked foreign divorce decrees up to ten years after they have been rendered.[12] But time has limits. *Bruneau v. Bruneau*[13] is factually similar with Warrender, except that nineteen years had passed between the entry of a Mexican decree and the attack on its validity. Mr. Bruneau appeared personally in the Mexican court and Mrs. Bruneau appeared through counsel. Nineteen years later, she asked a Connecticut court to rule the Mexican divorce void, contending that Mr. Bruneau (who remarried subsequent to the divorce) had failed to abide by certain financial obligations.

Employing a concept known as "practical recognition," the Connecticut court found that Mrs. Bruneau had waited an unreasonable length of time to maintain the action, that Mr. Bruneau had detrimentally relied on the divorce, and that she should not now be allowed to benefit from a fraud in which she had participated. The court recognized the general rule that a divorce decree rendered by a court in a foreign country in which neither spouse is domiciled is void in United States state courts. But the court noted that "practical recognition" should be accorded the Mexican decree in this case. After weighing all the equities involved, the court found that the facts mandated an exception to the general rule.[14]

Recognition of Dominican Republic Divorces

It is black letter law that the parties to the marital relationship are the husband, the wife and the state.[15] This is true whether the parties are marrying or divorcing. Where a foreign nation divorce is at issue, however, strange bedfellows attempt to become involved. Take the case of *Mayer v. Mayer,*[16] which involved a Dominican Republic divorce. Victor Mayer became enamored of the future Mrs. Mayer (Doris) while she was married to one Fred Crumpler, who was a lawyer by trade. Victor enticed Doris away and assisted her in obtaining a Dominican Republic divorce. It was evidently a unilateral divorce, because there is no evidence that Mr. Crumpler appeared in the Dominican Republic proceeding. After divorcing Mr. Crumpler, Doris married Victor, and in the words of the court, "gambled and lost." When the marriage failed, Victor attempted to assert the invalidity of Doris' Dominican Republic divorce from Mr. Crumpler to avoid paying alimony. The court held that although the Dominican Republic divorce was not valid and was unenforceable because Doris was domiciled in the United States, Victor was estopped from asserting its invalidity because of his active participation in its procurement.[17]

A more recent Dominican Republic divorce case, which is also enlightening on the general subject of the Latin American and Carribbean legal systems, is *Feinberg v. Feinberg.*[18] Mr. Feinberg was one of three owners of a New York wine and liquor distributing business. He negotiated a separation agreement with his wife in which she agreed to appear in an action he filed in the Dominican Republic for an uncontested divorce. In the agreement, she accepted $265 a week and title to a $70,000 home. Two weeks after the Dominican Republic divorce was entered, the Wall Street Journal carried an article that Mr. Feinberg and his two brothers had sold their wine and liquor importing business for $30 million. Mr. Feinberg's share was $10 million. The former Mrs. Feinberg was not amused. In a subsequent New York court action, she successfully set aside the Dominican Republic divorce. Mrs. Feinberg's attorney called Henry P. DeVries, a professor of law at Columbia University and Associate Director of the Parker School of Foreign and Comparative Law at Columbia, as an expert witness on the relative sophistication of the Dominican Republic legal system. This was to demonstrate that the variance between the Dominican Republic legal system and that of New York was so broad that to permit Dominican Republic law to prevail would offend all sense of justice and fair play. Mr. Feinberg argued that Mrs. Feinberg should pursue her legal remedies in the Dominican Republic, but Mrs. Feinberg established through Professor DeVries that the legal systems of both Haïti and the Dominican Republic were "at the bottom of the scale" and that she would have no effective remedy in appealing the divorce and the terms of the separation agreement in the Dominican Republic court system.[19]

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[10] 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied,* 384 U.S. 971 (1966).

[11] *See* Annotation, *supra* note 8, at 1424, 1439.

[12] *Id.* at 1457–59.

[13] 3 Conn. App. 453, 489 A.2d 1049 (Conn. App. Ct. 1985).

[14] *Id. See also* Baker v. Baker, 39 Conn. Supp. 66, 468 A.2d 944 (Conn. Super. Ct. 1983).

[15] J. Goldstein & J. Katz, Family and the Law 9 (1964).

[16] 66 N.C. App. 522, 311 S.E.2d 659 (N.C. Ct. App. 1984).

[17] *Id.* The case contains a wealth of citations for the proposition that a spouse who encourages the other to obtain a divorce from a prior spouse is estopped from questioning the validity of that divorce.

[18] Feinberg v. Feinberg, 96 Misc. 2d 443, 409 N.Y.S.2d 365 (N.Y. Sup. Ct. 1978), *aff'd,* 70 A.D.2d 612, 415 N.Y.S.2d 1018 (N.Y. App. Div. 1979). *See also* Mulligan, *Proving Foreign Divorce Law,* Fair$hare, June 1986, at 18.

[19] Mulligan, *supra* note 18, at 19.

Military Treatment of Foreign Divorces

In light of the suspicion with which United States state courts continue to view "quickie" foreign divorces obtained in Latin American and Carribbean locales, it should not come as a surprise that the federal government in general and the military in particular cast a similarly jaundiced eye at such decrees.

Questions concerning the validity of a foreign divorce arise in a variety of contexts. For example, a soldier may seek increased military benefits because of a remarriage following a foreign divorce, or an ex-wife may be denied benefits such as medical care because of a foreign divorce decree and she may complain to military authorities. Situations also arise where the soldier or retiree dies and the issue concerns who is entitled to benefits such as the Survivor Benefit Plan annuity, the six month death gratuity, or the Servicemen's Group Life Insurance proceeds.

As indicated earlier, where the soldier claims increased benefits based on a remarriage following a foreign divorce, or where the spouse from whom the member has obtained the foreign divorce complains, Department of Defense guidance is that a case of "doubtful relationship" exists.[20]

What this means for the soldier is that a request for determination of the validity of the divorce must be forwarded to the Commander, United States Army Finance and Accounting Center.[21] The actual determination is made by the Comptroller General of the United States. This action is required in all cases involving a request for increased Basic Allowance for Quarters (BAQ) where the claim is based on a common law marriage, or in any case that involves a divorce granted by a foreign country.[22] These cases generally arise where the soldier's official records indicate that he is married to one party (but in the typical case has not been receiving increased BAQ), and who then applies for BAQ, listing a second party on whom eligibility is based. When finance officials question the soldier and he produces a foreign divorce decree ending his marriage to the first party, the divorce must be determined valid by the Comptroller General before the increased BAQ and other benefits will be paid.

The logical follow-up question is that if the foreign divorce is determined invalid by the Comptroller General, does that not mean that the soldier is entitled to increased BAQ based on his apparently still valid marriage to the first party? The answer is no. Relying on a 1931 Court of Claims case, unless the soldier can provide evidence that he has supported the first party in the past and evidences an intent to provide support in the future, military officials will not authorize increased BAQ.[23] In *Robey v. United States,* a Navy officer argued that because a federal statute authorized increased allowances for those with dependents, he was authorized the increased allowances merely upon that showing and that it was immaterial whether or not he actually provided support. He contended all he needed to show was that he had a lawful wife. The Court of Claims noted that while Robey came within the letter of the statute, he did not come within its spirit or within the intent of its drafters. In denying his claim for increased allowances, the court noted that to allow any other construction of the statute would lead to a "result so grossly absurd as to 'shock the general moral or common sense.'"[24] *Robey* has been incorporated as policy in the DOD Pay Manual and its implementing service regulations.

The other side of the coin involves the soldier who has been receiving increased BAQ for a substantial period of time after remarrying based on a foreign divorce, and whose situation is discovered by finance officials. Finance officials will initiate recoupment action of the amount of increased BAQ the soldier has received based on the "purported marriage." In this case, however, a federal statute entitled "Validity of Allowance Payments Based on Purported Marriages,"[25] permits the soldier to request a determination from the Secretary of the Army that the purported marriage was entered into in good faith. If the marriage is determined to have been entered into in good faith, recoupment action will not be carried through. The Secretary has designated The Judge Advocate General to make such determination.[26] The soldier's request is submitted through finance channels to the Commander, United States Army Finance and Accounting Center, who transmits it to The Judge Advocate General.

A soldier who obtains a "quickie" foreign divorce without the knowledge or consent of his spouse and then subsequently remarries, will find it difficult to convince military officials that the second "purported" marriage was entered into in good faith. Where the foreign divorce was consenual with the other spouse, the soldier's lot in convincing military officials of his or her good faith will be easier. Realistically, the Army will frequently recommend that the soldier take some action to validly terminate the prior marriage, such as refiling for divorce in a United States court that would have jurisdiction, or seeking an annulment.[27]

Historically, the general rule for the Army, in fact for all the uniformed services and the Comptroller General, has been and apparently remains that until a foreign divorce has been recognized as valid by a court of competent jurisdiction in the United States, it will remain too doubtful to justify the payment of certain benefits and allowances. A 1975 decision by the Comptroller General on this point is illustrative.[28] This case involved a woman who obtained a Mexican divorce and later married a Coast Guard petty officer. When the petty officer died, she filed for the death

[20] *See supra* note 2.

[21] DOD Pay Manual, para. 30233f(3).

[22] Dep't of Army, Reg. No. 37-104-3, Financial Administration—Military Pay and Allowance Procedures, Joint Uniform Military Pay System (JUMPS-Army), para. 30216*g* (15 June 1973) (C34, 15 Sept. 1986) [hereinafter AR 37-104-3].

[23] Robey v. United States, 71 Ct. Cl. 561 (1931).

[24] *Id.* at 566.

[25] 37 U.S.C. § 423 (1982).

[26] AR 37-104-3, para. 30216*j*.

[27] *See* DAJA-AL 1982/3119, 13 Dec. 1982, and DAJA-AL 1983/1848, 13 Apr. 1983.

[28] In the Matter of a Petty Officer, U.S. Coast Guard, Deceased, 55 Comp. Gen. 533 (1975).

gratuity payment. Payment was refused because no United States court had recognized the validity of the foreign divorce. The Comptroller General found that her marital status was too doubtful to justify payment of the gratuity. Similarly, in a 1965 case, the Comptroller General denied an Army captain's request for increased BAQ based on his remarriage following a Mexican divorce.[29] In that case, the officer's wife obtained an ex parte divorce in Mexico. The officer was served with notice of the action but did not answer or appear. Although the Comptroller General acknowledged the *Rosentiel* decision, where a New York court recognized a Mexican divorce, the crucial fact was that *Rosentiel* involved a bilateral divorce while the divorce in the officer's case was unilateral. Prior opinions of the Comptroller General and The Judge Advocate General of the Army have reached similar results.[30]

Not every foreign divorce is suspect. Where the foreign court clearly had jurisdiction over one of the parties, the Comptroller General and military authorities will recognize the divorce and any subsequent remarriage. In fact, the most recent reported decision from the Comptroller General is a case on point. In 1981, the Comptroller General was asked to rule on the validity of the marriage Martha E. and Michael L. Laster to one another.[31] Both were active duty Navy enlisted personnel, and the couple applied for increased pay and benefits based on the marriage. Martha, however, had been previously married to another Navy enlisted man. While both were on permanent assignment in Bermuda, the marriage broke up. She sued for divorce in Bermuda and her then-husband consented to the action and chose not to defend. The divorce was granted in April 1980, and she married Michael several months later. The Comptroller General noted that while foreign divorces obtained while one or both parties remain in the foreign jurisdiction for a brief period of time are subject to great skepticism, where the divorcing parties have resided in the foreign country for an extended period, the subsequent remarriage of one of the parties is generally not subject to question by federal accounting officers.[32]

Conclusion

The case of the Lasters illustrates the elaborate administrative machinations that military personnel must go through to obtain benefits when there is a foreign divorce lurking somewhere in the background. Although the Lasters were successful because of Martha's protacted contact with the jurisdiction in which the divorce was obtained, there is no escaping that "quickie" foreign divorces are dangerous.[33] A soldier may be subject to recoupment of substantial sums of money paid based on a "purported" remarriage which has now been administratively determined invalid. Worse yet, many years later when the soldier or retiree dies, the family from that remarriage may be denied benefits such as government life insurance proceeds, the Survivor Benefit Plan annuity, death gratuity, or other benefits.

A seasoned civilian legal assistance practitioner in Europe, who has dealt with many a marriage and divorce case involving military personnel, is fond of noting that he has distilled his many long years of legal assistance practice in this area into three words. If he is consulted by a soldier who wants to get married, his advice is, "Don't do it." If he is consulted by a soldier who is contemplating divorce, his advice is, "Don't do it." If he is consulted by a divorced soldier considering remarriage, his advice is, "Don't do it."

While in the routine marriage and divorce case, that response is too simplistic, it is sage advice where the soldier is considering a "quickie" foreign divorce.

[29] 45 Comp. Gen. 155 (1965).

[30] *See* 47 Comp. Gen. 286 (1967), *as modified by* 39 Comp. Gen. 833 (1970); 25 Comp. Gen. 821 (1946); 10 Dig. Ops. 165 (1960); 6 Dig. Ops. 335 (1956).

[31] 61 Comp. Gen. 104 (1981).

[32] *Id.* at 106.

[33] One way for a legal assistance officer to assist an overseas military client in avoiding the danger of a foreign "quickie" divorce is to investigate the law of the state of the soldier's domicile. Many states permit individuals to initiate and conclude divorce actions by affidavit, without the need for a personal appearance. *See* Note, *Divorce American Style . . . Overseas,* The Army Lawyer, Oct. 1986, at 81.

Speech Recognition Technology

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Have you ever dictated briefs or correspondence, only to see them added to a backlog of typing, and not resurface for several days? Wouldn't it be great to be able to see the material as it is dictated, edit it by voice dictation, then tell the computer to print the text, all without using a typewriter?

This is now possible through the latest breakthrough in office automation, speech recognition. This technology employs techniques from the fields of linguistics, speech science, acoustic-phonetics, digital signal processing, advanced microelectronics, statistical pattern recognition, and artificial intelligence.[1] The use of speech-to-text automated

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[1] Speech Systems Incorporated, *The Technology, The Product, The Market, The Company.*

systems will allow executives and professionals to produce instant text of memoranda, letters, and other documents without the necessity of being trained typists.

Voice recognition, still in the developmental stage, has two potential uses. The first application is voice data entry, or voice commands to a computer. An example of voice data entry is a pilot using both hands on the controls and giving voice commands to a computer. The second application, which is more sophisticated, but with greater potential for legal offices in the Army, is speech-to-text capability. Speech-to-text voice recognition is a means of producing written text from the spoken word without the use of a typewriter. A computer, hearing the spoken word, translates the speech to written text.

Three companies are engaged in research and development of this new technology: Kurzweil Applied Intelligence, IBM, and Speech Systems Incorporated. Each company has independently devised a computer process that will recognize the spoken word.

Kurzweil Applied Intelligence is currently marketing a voice activated typewriter for office use that has a word capacity of 1,000 words. This very small vocabulary is not appropriate for general office use. In addition, they are developing a dictation-taking word processor with a vocabulary of 15,000 words, which currently has an accuracy rate of ninety-seven percent. Kurzweil's VoiceWriter is an isolated-word system, which requires the speaker to leave a slight pause between words. Each word must be enunciated independently with enough space between words so that the computer can recognize them as separate words. Kurzweil began supplying a developmental model to test sites in November 1986, and plans to market this system in 1987.

IBM is also involved in research and development of a voice recognition system that quickly and accurately recognizes spoken English sentences.[2] Their system is designed to be compatible with their IBM PC. The IBM research team anticipates that their system will have a recognition capability of 20,000 words by the latter part of this year, and they will begin testing their product at that time. IBM plans to market their system in the next few years. IBM's model is also based on an isolated-word concept.

While the isolated-word systems of Kurzweil and IBM will perform well for normal dictation, the requirement for a pause between words will make it inappropriate for preparation of records of trial by closed microphone court reporters. Courts-martial proceed at a rapid pace and do not allow time for a system of this type.

Speech Systems Incorporated has devised a system based upon Empirical Artificial Intelligence, which may overcome the shortcomings of the isolated-word systems. The system will initially accommodate a vocabulary of 5,000 words (upgradable to 10,000 words and above). The VoiceLine™ is an acoustic processor that breaks words down into phonetic sounds or "phonemes." A computer that translates the phonemes into words and phrases. No pauses are required between words; the speaker uses a normal speaking pace. It takes approximately twenty minutes to "train" the machine to the operator's voice. Speech Systems Incorporated will market the VoiceLine™ in 1987 to original equipment (computer) manufacturers; they will also market directly to the ultimate users. Speech Systems is designing their system for use by white-collar professional workers rather than clerical personnel in order to gain productivity for these "knowledge workers." In other words, they are designing the system to be used by the person dictating the material rather than a secretary or clerk.

The principal technical challenges remaining in the development of speech recognition are distortions caused by background noise and the problems associated with syntax. The computer must identify and work with a different speech pattern for each person using the system.

In addition to the benefits to be gained in time and productivity in standard dictation, this state-of-the-art technology has the potential for use by closed microphone reporters, who will access the acoustic processor through their Stenomasks. This will avoid the distortion problem. The computerized system will then begin production of the first draft of the record of trial while the reporter is still in the courtroom. The reporter will later edit and correct the transcript, and corrections may be accomplished by voice command or by keyboard. When this technology has been refined for use by court reporters, it will mean a great saving of time as reporters will no longer have to type every word of the transcript. Because reporters are trained to enunciate clearly, they should achieve optimum results from such a system.

The major benefit of voice recognition will be increased productivity. Voice recognition can make users three to ten times more productive in creating legal documents by allowing them to skip the actual writing of a document or data entry via keyboard.[3]

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[2] IBM Bulletin, Feb. 1985, at 6.

[3] *Breakthroughs Said to Be Ahead for Voice Recognition*, Government Computer News, Aug. 29, 1986.

United States v. Hines: An Examination of Waiver Under the Confrontation Clause

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Introduction

A common circumstance in the prosecution of child sex abuse cases, especially when the accused is either a natural or a step-parent, is the unavailability of the victim as a witness at trial. The victim's absence is frequently caused by the other parent who, fearing adverse economic consequences to the family if the accused is convicted, removes the child to a location unknown to the government. In other cases, however, though the victim is present in court, he or she may refuse to testify, despite admonitions from the military judge. The victim's refusal is usually premised upon the desire to prevent the accused's conviction and confinement and, ultimately, the hope that the family will be reunited—motivations that, in many instances, are reinforced by the other parent and social workers or family counselors. In the past, this circumstance usually operated to the accused's benefit because, of course, the victim's refusal to testify precluded the presentation of the corpus delicti of the offense. The adoption of the rules of evidence, specifically, residual hearsay exceptions,[1] changed this result, however. In the absence of the victim, prior statements have been offered as a substitute, and courts have readily accepted this form of evidence.[2] Recently we have been reminded that, while satisfying a particular hearsay rule, an even greater requirement is also present; namely, the accused's sixth amendment right of confrontation.[3]

When the accused uses the victim's concerns to circumvent a trial, the question of whether the accused's sixth amendment right of confrontation is necessarily paramount is vital and, further, raises the question of whether the accused by his or her actions has waived this right. Generally, the decisions finding waiver of the sixth amendment right of confrontation have relied on some overt misconduct by the accused that results in the witness' absence from trial. Such misconduct includes, for example, instances where the accused has intimidated[4] or controls[5] the witness or, having prior knowledge of a plan to murder the witness, fails to alert the authorities.[6] Recently, however, in *United States v. Hines,*[7] the Court of Military Appeals considered whether, in a child sex abuse case where the accused, the victim, and other material witness were members of the same family unit, factors other than subsequent misconduct by the accused could justify a finding of waiver. The purpose of this article is to examine the concept of waiver under the factual setting of *Hines,* and the application of the doctrine that was considered by the court in this case.

United States v. Hines

Staff Sergeant Hines was convicted of several sex offenses, consisting of two specifications of sodomy[8] and four specifications of indecent, lewd, and lascivious conduct,[9] involving his two step-daughters, ages fourteen and eighteen which had occurred over an extended period. The offenses were revealed after the victims' mother discovered the accused in the process of committing a lewd act with the older girl. During the days following the incident, Mrs. Hines and the victims gave oral statements to a law enforcement agent detailing the accused's misconduct. These statements were later reduced to writing and signed under oath by the witnesses. The accused also made both oral and written confessions that largely coincided with the allegations of the victims and Mrs. Hines. The witnesses' statements were further corroborated by Mrs. Hines' excited utterance upon discovering the one offense and by a statement made to a social worker by one of the girls. The

[1] Fed. R. Evid. 803(24) and Mil. R. Evid. 803(24) and 804(b) (5).

[2] *See* United States v. Rousseau, 21 M.J. 960 (A.C.M.R. 1986), petition granted, 23 M.J. 176 (C.M.A. 8 Oct. 1986); United States v. Hubbard, 18 M.J. 678 (A.C.M.R. 1984), *petition granted,* 19 M.J. 216 (C.M.A. 4 Dec. 1984); United States v. Ruffin, 12 M.J. 952 (A.F.C.M.R.), *petition denied,* 13 M.J. 494 (C.M.A. 1982).

[3] United States v. Cokeley, 22 M.J. 225 (C.M.A. 1986); United States v. Cordero, 22 M.J. 216 (C.M.A. 1986). For further discussion of the constitutional ramifications of the residual hearsay exceptions, see Thwing, *The Constitutional Parameters of Hearsay Evidence,* The Army Lawyer, Dec. 1986, at 24.

[4] *See* United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied,* 449 U.S. 84 (1980).

[5] *See* Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982), *cert. denied,* 460 U.S. 1053 (1983).

[6] *See* United States v. Mastrangelo, 662 F.2d 946 (2d Cir. 1981), *cert. denied,* 456 U.S. 973, *remanded,* 693 F.2d 269 (2d Cir. 1982), *on remand,* 561 F. Supp. 1114, *aff'd,* 722 F.2d 13 (2d Cir. 1983).

[7] 23 M.J. 125 (C.M.A. 1986).

[8] Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1982) [hereinafter UCMJ].

[9] *UCMJ* art. 134.

witnesses did, however, make inconsistent statements to a social worker.

At trial, each of the witnesses was present, pursuant to subpoena, but though sworn, refused to testify. Each based her refusal upon a reluctance to increase the likelihood of the accused's being convicted and punished. Despite efforts by the military judge to persuade the witnesses to testify, they persisted in their refusal. Eventually, he declared them unavailable within the meaning of Mil. R. Evid. 804(a)(2).[10] Following the government's proffer of the witnesses' out-of-court statements under Mil. R. Evid. 804(b)(5),[11] the military judge conducted an extensive evidentiary hearing into the circumstances surrounding the taking of the statements and the character of the witnesses. Over objection by defense counsel that the statements were deficient under the sixth amendment and the rules of evidence, the military judge ruled them admissible pursuant to Mil. R. Evid. 804(b)(5), and the accused was subsequently convicted. The conviction was affirmed by the Air Force Court of Military Review.[12] That court began with a painstaking analysis of applicable case law and the legislative history of the Federal counterpart to Rule 804(b)(5). Then, because no specific findings of fact had been made by the military judge, the court scrutinized the trial record to determine the circumstances under which the witnesses had rendered their statements. Moreover, the court concluded that each of the statements was supported by circumstantial guarantees of trustworthiness and had therefore been properly admitted under Mil. R. Evid. 804(b)(5) and the sixth amendment.

The Court of Military Appeals granted review to consider whether the military judge erred by admitting the statements in the absence of an opportunity by the defense to confront and cross-examine the witnesses.[13] The court agreed with the Air Force court that the statements bore indicia of reliability and circumstantial guarantees of trustworthiness. The court held, however, that the circumstances surrounding the taking of the out-of-court declarations did not comport with the substance of the sixth amendment protections. The statements were given ex parte to a law enforcement agent, and the court found no indication in the record that, in questioning the witnesses, he had acted equally to vindicate both defense concerns (*i.e.*, testing to explore all possibility of reasonable doubt as to guilt) and prosecution objectives (*i.e.*, establishing a prima facie case). Accordingly, the court ruled that the purposes of cross-examination had not been served. Nonetheless, the court ruled that this sixth amendment infirmity was largely cured by the accused's confession, which corroborated each offense alleged in the witnesses' statements except for one specification of sodomy. Therefore, the accused's conviction of the remaining offenses was affirmed.

For purposes of this discussion, however, the most instructive aspect of *Hines* is the court's resolution of the issue of whether the accused bore responsibility for the witnesses' failure to testify, thereby waiving his sixth amendment right to confrontation. The government did not raise this issue at trial or on appeal. Rather, it was identified by the Court of Military Appeals. The court noted several factors supporting waiver. First, in connection with a defense pretrial motion, the accused testified that within a week after his wife had witnessed his misconduct, she began calling him at the barracks where he was temporarily quartered. According to the accused, they became Christians and "made a commitment to get back together."[14] Also, despite the witnesses' refusal to testify pursuant to government subpoena, Mrs. Hines and the younger child testified on behalf of the accused on sentencing. Both stated their love for the accused and asked that he not be sentenced to confinement.

In addition, there was extensive testimony from various social workers and counselors who had attended the family regarding their progress toward reconciliation. A social worker from the City of Denver, the adjoining civilian community, testified during a hearing on a pretrial motion and again on sentencing about the family's earnest involvement in a program of extensive rehabilitation and described the "very good bonding" that had occurred.[15] A family counselor, whom the accused had employed, stated, during sentencing, that the accused had been permitted to move back in with his family prior to trial and that the re-unification seemed to be successful.[16]

A similar assessment of the family's progress was given by a military social worker, who testified that they had been "very cooperative in their intensive treatment program."[17] Finally, the accused's civilian pastor was called as a witness during sentencing, and he described a transformation the family had undergone and indicated that, even upon meeting the accused and Mrs. Hines, he had been impressed by their desire "to be a family."[18]

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[10] Mil. R. Evid. 804(a)(2) provides that a witness is unavailable if he or she "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order from the military judge to do so."

[11] Mil. R. Evid. 804(b)(5) provides:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

[12] 18 M.J. 729 (A.F.C.M.R. 1984).

[13] 19 M.J. 246 (C.M.A. 1984).

[14] *Hines*, 23 M.J. at 131.

[15] *Id.* at 132.

[16] *Id.*

[17] *Id.*

[18] *Id.*

According to the court, if this evidence had been available to the military judge during his consideration of the admissibility of the witnesses' pretrial statements, the "interesting question of whether such a total family effort waived or excused the absence of confrontation would have been squarely presented."[19] In the court's opinion, these facts demonstrated that "by the time of trial, the family was functioning as a unit to resist appellant's conviction and sentence."[20] The court also noted that the accused's invocation of his right to confront the witnesses was obviously disingenuous, because he himself produced them when it suited his purpose. Indeed, if the witnesses had testified to any extent, even to recant their previous statements, the accused's sixth amendment claim would have disappeared; therefore, the court observed, the accused definitely did not want to confront the witnesses. Thus, in the court's view, the accused was trying to use the confrontation clause "to prevent, rather than to secure confrontation."[21]

Ultimately, however, the court concluded that, while these facts came close, they were not sufficient to establish waiver. First, there was no evidence that the accused was controlling the witnesses. Therefore, even if he had really wanted them to testify, they still might have refused. Second, the court acknowledged an absence of precedent to support a finding of waiver under these circumstances.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] 98 U.S. 145, 158 (1878).

Conclusion

While the court in *Hines* was properly concerned about the accused's manipulation of his right of confrontation under the sixth amendment, its failure to apply waiver was quite correct. Waiver under the sixth amendment is a well settled principle. As the United States Supreme Court observed more than a century ago in *Reynolds v. United States:*

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away he cannot insist on his privilege.[22]

Thus, at a minimum, a finding of waiver would have been appropriate only if the evidence had shown that the accused had embarked upon this course of reconciliation with his family simply to secure their silence at trial. Absent such a showing, courts will decline to find waiver even if it is clear that the refusal to testify is part of a concerted plan of the accused's family.

The Advocate for Military Defense Counsel

A Review of Supreme Court Cases Decided During the October 1985 Term: Part II

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Introduction

This article completes the review of Supreme Court cases decided during the 1985–86 Term.[1] The decisions discussed herein cover as broad a realm of constitutional law as earlier decisions of the Term.

Search and Seizure

The expectation of privacy protected by the fourth amendment was further defined to accommodate modern technology in *California v. Ciraolo*[2] and *Dow Chemical Co. v. United States.*[3] Both were aerial search cases. The Supreme Court held there was no reasonable expectation of privacy in either instance.

In *Ciraolo,* the defendant's fenced-in backyard was deemed to be within the curtilage of a home, but his expectation of privacy was unreasonable when his marijuana

[1] *See* Lee, *A Review of Supreme Court Cases Decided During the October 1985 Term,* The Army Lawyer, July 1986, at 45, for a discussion of cases decided prior to 30 April 1986.

[2] U.S. 106 S. Ct. 1809 (1986).

[3] U.S. 106 S. Ct. 1819 (1986).

plants were visible to the naked eyes of law enforcement officers flying overhead at an altitude of 1000 feet.[4] The facts that the defendant took measures to restrict view by surrounding the garden with high double fences and the officers were trained to recognize marijuana were irrelevant to the reasonableness of defendant's privacy expectation.[5] The aerial inspection and photographing of defendant's marijuana garden did not constitute an improper search.

The industrial plant complex in *Dow* was not regarded by the Court as analogous to the curtilage of a dwelling for purposes of aerial surveillance.[6] Instead, the chemical manufacturing complex was more comparable to an open field with its diminished expectations of privacy.[7] The taking of photographs with a precision aerial mapping camera by agents of the Environmental Protection Agency (EPA) did not infringe upon any legitimate expectation of privacy from aerial inspections.[8] Furthermore, Dow's privacy interest in protecting trade secrets was not violated because the EPA was not an industrial competitor which could use the photographs to compete with Dow.[9]

Right to Confrontation

Accomplice's Confession

In a five-four decision, the Supreme Court in *Lee v. Illinois*[10] ruled that the trial court's reliance upon the codefendant's confession as substantive evidence against petitioner violated her rights under the confrontation clause of the sixth amendment. Accomplices' confessions are presumptively unreliable.[11] Unless this presumption is rebutted by a showing of particularized guarantees of trustworthiness to meet confrontation clause reliability standards, such confessions are inadmissible hearsay.[12]

The Court rejected the government's two assertions of reliability. First, the circumstances surrounding the confession did not rebut the presumption that the codefendant's statement was untrustworthy with respect to the defendant's participation in the murders.[13] Specifically, the confession was elicited only after the codefendant was told that the defendant had already implicated him and only after he was implored by the defendant to share "the rap."[14] The voluntariness of the confession given in response to custodial interrogation did not bear on the question of the codefendant's motive to mitigate his own culpability and possibly retaliate for the defendant's implication of him in the murders.[15] Second, the Court found unpersuasive the government's argument that because the defendant's and the codefendant's confessions "interlocked" on some points, the latter's confession should be deemed trustworthy in its entirety.[16] A confession is not reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement.[17] "[W]hen the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted."[18]

The factual discrepancies between the statements of the codefendant and the defendant went to the very issues in dispute at trial, *i.e.*, the roles they played in the killing and the question of premeditation.[19] These discrepancies could not be characterized as "irrelevant or trivial."[20] Therefore, the codefendant's confession was inherently unreliable and the convictions supported by that evidence violated the constitutional right of confrontation.[21]

The Court's response to the government's argument that the defendant was afforded an opportunity to cross-examine the codefendant during the suppression hearing is noteworthy.[22] As the purpose of that hearing was to determine the voluntariness of the confession, the truth or falsity of the confession was not relevant to the voluntariness inquiry and no testimony was given by the codefendant on the veracity of his confession.[23] Because of the limited inquiry of the suppression hearing and because it was a joint trial where neither defendant testified on the merits, there was no opportunity to cross-examine the codefendant on the reliability of his confession sufficient to satisfy the demands of the confrontation clause.[24] If there had been separate trials and the codefendant's trial preceded the defendant's trial, then there would not have been a confrontation issue as the codefendant could have been called by the defendant. *Lee* exemplifies perfectly the disadvantage of a joint trial to

[4] 106 S. Ct. at 1812–13.
[5] *Id.*
[6] 106 S. Ct. at 1827.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1823.
[10] 106 S. Ct. 2056 (1986).
[11] *Id.* at 2063.
[12] *Id.* at 2064.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 2065.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 2065 n.6.
[23] *Id.*
[24] *Id.*

the government where the case rests on a codefendant's confession and the codefendant is unavailable for confrontation purposes.

The real key to *Lee*, however, seems to lie in the later per curiam opinion in *New Mexico v. Earnest*.[25] In *Lee*, the Court did not close the door on the idea that "interlocking confessions" might be sufficient to overcome the confrontation clause problem that exists when a codefendant's confession is admitted without an opportunity for cross-examination. The Court held that, under the particular facts, the confessions of Lee and her accomplice did not "interlock" on key points. The significant discrepancies prevented the interlock theory from surmounting the confrontation clause problems, but the Court left open the possibility that, given the right facts, interlocking confessions could overcome the sixth amendment issue. The follow-on opinion in *Earnest*, issued just twenty days after *Lee*, shows what the Court meant. The Court had agreed to review this case, in which the admission of a nontestifying codefendant's statement had been held to have violated the defendant's right of confrontation because of the lack of an opportunity for cross-examination. The Court vacated the judgment in a one sentence order that remanded the case for further proceedings in light of *Lee*. Four Justices, in a concurring opinion to the remand, said that *Lee* made it clear that the confrontation clause did not *require* an opportunity for cross-examination as a condition for admission of a codefendant's out of court statement, if the statement actually did "interlock" with the defendant's statement on the key points.[26]

Defendant's Confession

In a unanimous opinion authored by Justice O'Connor, the Court held in *Crane v. Kentucky*[27] that the defendant had been denied his fundamental constitutional right to a fair opportunity to present a defense where evidence of the circumstances of his confession was excluded on the merits of the case. Even though the trial judge considered this evidence at the suppression motion based on voluntariness grounds, admission of the same evidence on the ultimate issue of guilt or innocence was not precluded.[28] The Court explained:

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.[29]

"[The] opportunity [to be heard] would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence."[30]

Crane's entire defense was based upon the lack of physical evidence linking him to the murder. To support that defense, which necessarily required the jury to disbelieve his confession, the petitioner "sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county."[31] The Court did not pass on the merits or strength of this defense, but it regarded the introduction of evidence of the physical circumstances yielding the confession as indispensable to the petitioner's defense.[32] The case was remanded to the state court to determine whether the error was harmless.[33]

Right to Counsel

In *Kuhlmann v. Wilson*,[34] the Court found no violation of the rule established in *Massiah v. United States*[35] and its progeny, which prohibit the use of secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. *Kuhlmann* limits the *Massiah* doctrine in jailhouse plant situations where the government informer acts as a "mere listening post." After his arraignment, defendant Wilson was placed in confinement.[36] Unknown to him, his cellmate was a police informant who had been instructed to listen to Wilson's conversations to determine the identities of his confederates.[37] The informant was specifically told not to ask any questions, but simply to "keep his ears open."[38] After several days, Wilson admitted to the informant that he and two other men had planned and carried out the robbery and committed the murder, which

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[25] 106 S. Ct. 2734 (1986).

[26] *Id.* at 2735 & n.* (Rehnquist, J., with whom Burger, C.J., Powell, and O'Connor, J.J., join, concurring).

[27] 106 S. Ct. 2142 (1986).

[28] *Id.* at 2145.

[29] *Id.* at 2146 (citation omitted).

[30] *Id.* at 2146–47.

[31] *Id.* at 2147.

[32] *Id.*

[33] *Id.*

[34] 106 S. Ct. 2616 (1986). *Cf.* Maine v. Moulton, 106 S. Ct. 477 (1985). *Moulton* is discussed in Lee, *supra* note 1, at 46.

[35] 377 U.S. 201 (1964).

[36] 106 S. Ct. at 2619.

[37] *Id.*

[38] *Id.*

the informant reported to the police.[39] Because the police and their informant took no action beyond mere listening, the Court concluded that no indirect and surreptitious interrogation had taken place.[40]

The active-passive distinction underscored in *Kuhlmann* is not without its practical difficulties. When two people share the same cell for days or even weeks, they *both* talk back and forth. A police informant has to exchange remarks with his cellmate if only to avoid alerting him that something is amiss. In fact, the informant in *Kuhlmann* did not remain mute. He stimulated conversation concerning Wilson's role by commenting that his exculpatory story did not "sound too good" and that he had better come up with a better one.[41] Obviously, these statements were not deemed sufficient to establish active interrogation on the part of the informant. At what point questions that elicit incriminating responses become active interrogation is not clear from *Kuhlmann.* Perhaps, as Professor Kamisar suggested at a constitutional law conference, the Court could have provided more guidance in the application of the *Massiah* doctrine by holding that the government is prohibited from approaching the defendant in the absence of counsel once the sixth amendment right to counsel has attached.[42]

Due Process Concerns

Racial Discrimination

In *Batson v. Kentucky,*[43] the Court disapproved the use of peremptory challenges on prospective black jurors as a violation of the black defendant's sixth amendment right to a fair trial and fourteenth amendment right to equal protection. The defendant must first make a prima facie showing that there was purposeful discrimination in the exercise of peremptory challenges.[44] To rebut the presumption of improper discrimination, the prosecutor must explain his or her peremptory challenges with neutral reasons based on something more than an assumption or intuition that the challenged jurors would be partial to the defendant merely because of their shared race.[45] *Batson* applies retroactively to all cases pending appellate review at the time of the decision.[46]

The Court found reversible error, in *Turner v. Murray*[47] when the trial judge denied the defendant's request to voir dire prospective jurors on possible racial bias. The black defendant was charged with capital murder for the shooting of a white victim in the course of a robbery.[48] The three bases for the holding included: the fact that the crime charged involved interracial violence; the broad discretion given the jury at the capital sentencing proceeding; and the special seriousness of the risk of improper sentencing in a capital case.[49]

Jury Instructions

The jury charge at issue in *Rose v. Clark*[50] was "if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously."[51] Agreeing with the lower court's determination that this instruction erroneously shifted the burden of proof to the defendant on the intent element,[52] the Court cited two factors for subjecting this type of error to harmless error analysis. First, the defendant was assisted by counsel and had a full opportunity to present his defense before a fairly selected, impartial jury; and second, besides giving the challenged instruction, the unbiased judge told the jury that the defendant had to be found guilty beyond a reasonable doubt with respect to every element of the crime.[53] The case was remanded to the lower court for a finding on harmlessness.[54]

Standards for Sentencing Factors

In *McMillan v. Pennsylvania,*[55] the Court reviewed a sentencing scheme that prescribed enhanced punishment where a preponderance of the evidence established that the defendant "visibly possessed a firearm" during the commission of certain felonies. The defendants argued that visible possession of a firearm was an element of the crime and thus must be proved beyond a reasonable doubt.[56] In rejecting this argument, the Court pointed out that the state legislature specifically made gun possession a sentencing factor rather than an element of the offense.[57] Thus, the statute in question did not exceed the state's power to prescribe penalties where there was no reallocation of the

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[39] *Id.* at 2619–20.

[40] *Id.* at 2630.

[41] *Id.* at 2619.

[42] Report, *Constitutional Law Conference Addresses Supreme Court's 1985–86 Term,* 40 Crim. L. Rep. (BNA) 2101, 2104 (Oct. 29, 1986).

[43] 106 S. Ct. 1712 (1986).

[44] *Id.* at 1722–23.

[45] *Id.* at 1723. *See* Cardillo, *Government Peremptory Challenges,* The Army Lawyer, Aug. 1986, at 63.

[46] *See* Griffith v. Kentucky, 55 U.S.L.W. 4089 (U.S. Jan 13, 1987).

[47] 106 S. Ct. 1683 (1986).

[48] *Id.* at 1684–85.

[49] *Id.* at 1688–89.

[50] 106 S. Ct. 3101 (1986).

[51] *Id.* at 3104.

[52] *Id.* at 3104–05.

[53] *Id.* at 3107.

[54] *Id.* at 3109.

[55] 106 S. Ct. 2411 (1986).

[56] *Id.* at 2415.

[57] *Id.* at 2416.

burden of proof with respect to the elements of the offense.[58] The claim that sentencing factors must be proved by "clear and convincing" evidence was also rejected.[59]

Sodomy Statute Upheld

A Georgia statute criminalizing private, consensual sodomy withstood constitutional attack in *Bowers v. Hardwick*.[60] A five-four majority of the Court refused to recognize a privacy interest under the due process clause for homosexual activity between consenting adults in the privacy of their homes.[61] Such activity was regarded by the Court as neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition" so as to warrant the recognition that it was a fundamental right imbedded in the due process clause.[62] The fact that the statute was based on a moral judgment did not render the law constitutionally infirm.[63]

Death Penalty Issues

Double Jeopardy

Poland v. Arizona[64] held that the double jeopardy clause did not bar the imposition of the death penalty after a successful appeal of the first death sentence even though different aggravating circumstances were relied upon. The defendants were convicted of felony murder in the course of a bank robbery.[65] At the first sentencing hearing, the trial judge found that the murders were "especially heinous" under Arizona law based on the fact that the killings were committed by dropping the victims into a lake inside sacks weighed down with rocks.[66] The judge excluded the aggravating circumstance of commission of the murders for "pecuniary gain" based on the mistaken conclusion that this circumstance was limited to contract killings.[67] The Arizona Supreme Court reversed, holding that the record did not support a finding of "especially heinous circumstances" and further suggested that the "pecuniary gain" circumstance could be applied.[68] On remand, the defendants were again sentenced to death based on findings of "pecuniary gain" *and* "especially heinous" circumstances.[69]

In affirming, the Supreme Court determined that the failure to find a particular aggravating circumstance at the initial sentencing proceedings did not always constitute an "acquittal" of that circumstance for double jeopardy purposes.[70] The key is the *factual* findings of the trial court. The Court distinguished the earlier case of *Arizona v. Rumsey*.[71] There, as in *Poland*, the trial judge misconstrued the "pecuniary gain" circumstance to be applicable only to contract killings.[72] Unlike *Poland*, however, he did not find an alternate aggravating circumstance and thus could only sentence the defendant to life imprisonment rather than death.[73] When Rumsey's appeal resulted in a remand, the trial court imposed the death penalty.[74] The Supreme Court reversed based on a violation of the double jeopardy clause.[75]

In *Poland*, the trial judge found pecuniary gain but did not base his death sentence on that ground. But for his misconstruction of the law, he could have properly sentenced the defendants to death based on that circumstance. Therefore, at the second sentencing proceeding, the imposition of death on that same basis was not barred. The Court explained:

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice between the alternative verdicts of death and life imprisonment." Because these circumstances are only standards, finding their existence does not in and of itself convict (*i.e.*, require the death penalty) or acquit (*i.e.*, preclude the death penalty) the defendant.[76]

The Court further stated "[t]here is no cause to shield . . . a defendant [sentenced to death] from further litigation; further litigation is the only hope he has."[77] Though there is a general policy that the government should not be allowed to use its superior resources to wear down a criminal defendant with further litigation after a successful appeal of

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[58] *Id.* at 2417.

[59] *Id.* at 2420.

[60] 106 S. Ct. 2841 (1986).

[61] *Id.* at 2844.

[62] *Id.*

[63] *Id.* at 2846.

[64] 106 S. Ct. 1749 (1986).

[65] *Id.* at 1750.

[66] *Id.* at 1752.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] 106 S. Ct. at 1755.

[71] 467 U.S. 203 (1984).

[72] *Id.* at 207.

[73] *Id.* at 205–06.

[74] *Id.* at 208.

[75] *Id.* at 205, 211.

[76] 106 S. Ct. at 1755.

[77] *Id.* at 1756.

the death sentence, this rule does not apply where, as in *Poland*, the factual determinations made at the initial trial was not to the defendant's favor.[78]

Jury Challenges

In *Lockhart v. McCree*,[79] prospective jurors at the guilt phase of a bifurcated capital trial were removed for cause after they stated during voir dire that they could not under any circumstances vote for the imposition of the death penalty.[80] The Court upheld their removal and rejected the claim that exclusion of such jurors infringed fair trial rights by systematically leading to the selection of unusually guilt-prone juries.[81] Unlike women and members of racial and ethnic groups, individuals who oppose the death penalty do not constitute a distinctive group for "fair cross-section purposes."[82] Therefore, their exclusion did not contravene a defendant's right to be tried and sentenced by a fair cross-section of society.[83] Exclusion of such jurors is no different than the removal of jurors who express the view that they could not follow the law in a particular case.[84]

The standard to test a prospective juror's views on capital punishment, as set forth in *Wainwright v. Witt*,[85] is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[86] A functional equivalent of this standard was held to be adequate in *Darden v. Wainwright*.[87] There, the trial judge asked a prospective juror, who was subsequently removed, "Do you have any moral or religious, conscientious, moral or religious [sic] principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"[88] While this question did not compel the conclusion that the juror could not under any circumstance recommend the death penalty, the Supreme Court found no defect in light of the fact that the juror was present throughout a series of questions posed to other jurors that made the purpose and meaning of the *Witt* inquiry absolutely clear.[89]

Sentencing Matters

The petitioner in *Skipper v. South Carolina*[90] appealed his death sentence on the claim that he was denied his right to place all relevant evidence in mitigation of punishment before the sentencing jury. The Court agreed. The excluded evidence was testimony of two jailors and one "regular visitor" to the jail to the effect that petitioner had "made a good adjustment" during his seven-month confinement between arrest and trial.[91] Stating that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing," the Court concluded that "evidence that the defendant would not pose a danger if spared [the death penalty] (but incarcerated) must be considered potentially mitigating."[92] A defendant's disposition to adjust peacefully and in a disciplined manner to incarceration is an aspect of his character that is relevant to the sentencing determination.[93]

Execution of the Insane

A majority of the Court, in *Ford v. Wainwright*,[94] struck down Florida's statutory procedure for determining whether an allegedly incompetent condemned prisoner is sane enough to be executed. Under the statute, the governor made an ex parte, unreviewable decision based upon the reports of a commission of psychiatrists he appointed.[95] The Court found this procedure to be constitutionally inadequate. At a minimum, the inmate should have been granted an opportunity to be heard on the issue of his sanity.[96]

Conclusion

It is clear from *Batson v. Kentucky* and *Turner v. Murray* that the Supreme Court has continued to strike at racism in the criminal justice system. In other areas, the Court has not ruled in favor of the criminal defendant. For instance, in search and seizure and some right to counsel cases, governmental interests usually outweigh individual rights. The Court continues to manifest a disinclination to apply a per se reversal rule and instead looks for whether an error is harmless. On the plus side for the criminal defendant, the rights to confrontation and to present a defense were strongly protected.

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[78] *Id.*

[79] 106 S. Ct. 1758 (1986).

[80] *See* McShane, Lockhart v. McCree *and the Death-Qualified Jury*, The Army Lawyer, Aug. 1986, at 72, for an extended analysis of issues raised.

[81] 106 S. Ct. at 1764.

[82] *Id.* at 1765.

[83] *Id.* at 1766.

[84] *Id.*

[85] 469 U.S. 412 (1985).

[86] 469 U.S. at 424 (footnote omitted).

[87] 106 S. Ct. 2464 (1986).

[88] *Id.* at 2469.

[89] *Id.* at 2470–71

[90] 106 S. Ct. 1669 (1986).

[91] *Id.* at 1670.

[92] *Id.* at 1671 (footnote omitted).

[93] *Id.* at 1672.

[94] 106 S. Ct. 2595 (1986).

[95] *Id.* at 2599.

[96] *Id.* at 2606.

It is too speculative to predict the direction that the Court will take under Chief Justice William Rehnquist with the addition of Justice Anthony Scalia, but with the Supreme Court's grant of certiorari in the Coast Guard case of *United States v. Solorio*,[97] it behooves military defense counsel to keep abreast of developments in the Supreme Court's application of constitutional law.

[97] 21 M.J. 251 (C.M.A. 1986), *cert. granted*, 106 S. Ct. 2914 (1986).

The Right to Silence, the Right to Counsel, and the Unrelated Offense

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A suspect is under custodial interrogation for an offense and he exercises his rights under Article 31[1] and *Miranda*.[2] He is then subsequently questioned on another offense, unrelated to the first. Should the statement regarding the second offense be suppressed? What *Miranda* right was exercised? And what is the test to be applied? This article will discuss the impact of the exercise of the right to silence and the right to counsel on questioning on unrelated offenses, including a discussion of the recent United States Court of Military Appeals decision in *United States v. Applewhite*.[3]

The Right to Silence

The seminal case on subsequent interrogation after the exercise of the right to remain silent is *Michigan v. Mosley*.[4] Richard Mosley was arrested by a detective from the Armed Robbery Section of the Detroit Police Department and advised of his rights. Mosley stated that he did not want to answer any questions about the alleged robberies and the interrogation ceased. More than two hours later another police detective, this time from the Homicide Bureau, re-advised Mosley of his rights. Mosley waived his rights and was questioned about an unrelated homicide to which he eventually confessed.

In determining that Mosley's confession to the homicide was admissible, the Supreme Court tested to see if Mosley's right to cut off questioning was "scrupulously honored" and held, under the circumstances, that it was.[5] The circumstances the Court deemed determinative were, first, that the detective on the robbery charge "immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position."[6] Second, after a lengthy interval of two hours, Mosley was questioned by a different police officer at another location about an unrelated charge.[7] Third, Mosley was given a full rights warning prior to the second interrogation.[8] Finally, the second detective did not resume interrogation about the robberies but "focused exclusively" on the homicide, "a crime different in nature and in time and place of occurrence."[9]

Many courts have subsequently grappled with what constitutes "scrupulously honoring" the right to silence.[10] One recurring scenario is when the police continue questioning for reasons other than interrogation for the crime, *e.g.*, clarifying an ambiguous request[11] or "processing" an accused.[12] These are legitimate reasons for continuing to talk to an accused and do not trigger suppression.[13] Another not unusual situation occurs when the accused invokes his right to silence and the authorities then speculate or comment on the crime in front of the accused.[14] The Supreme Court in *Rhode Island v. Innis* defined interrogation to include not only express questioning, but also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

[1] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

[2] Miranda v. Arizona, 384 U.S. 436 (1966); *see also* United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[3] M.J. 196 (C.M.A. 1987).

[4] 423 U.S. 96 (1975).

[5] *Id.* at 104.

[6] *Id.* at 105.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 106.

[10] For a discussion of some of these cases, see Anderson v. Smith, 751 F.2d 96, 101–05 (2d. Cir. 1984). This is a very active area of the law and no short summary will approach completeness. Further, many of the cases discussing *Mosley*, including those *infra* notes 11–19, do not necessarily involve unrelated offenses but look to the overall standard of "scrupulously honored." They are, however, still illustrative of *Mosley* at it is applied.

[11] *E.g.*, Martin v. Wainwright, 770 F.2d 918, 924 (11th Cir. 1985), *modified and reh'g denied*, 781 F.2d 185 (11th Cir. 1986) (police questioning went beyond limited scope of clarification).

[12] *E.g.*, Hawkins v. United States, 461 A.2d 1025 (D.C. 1983), *cert. denied*, 464 U.S. 1052 (1984) (police advised accused of crime as part of "processing," *i.e.*, preparing necessary forms; accused volunteered "to get it off his chest."); *see also* Rhode Island v. Innis, 446 U.S. 291 (1980).

[13] *Miranda* itself seems to approve clarifying questions in its discussion of the procedures followed by the Federal Bureau of Investigation when the right to counsel is invoked. 384 U.S. at 485.

[14] *See, e.g.*, Langton v. Florida, 448 So. 2d 534 (Fla. Dist. Ct. App. 1984).

should know are reasonably likely to elicit an incriminating response from the suspect."[15] Thus, if the police conduct is the "functional equivalent" of interrogation, a violation of *Miranda* exists.[16]

Clearly there is no *Miranda* violation when an accused invokes his right to silence and questioning ceases, and is resumed only after the accused volunteers to speak.[17] At the opposite end of the spectrum is the case where the officers continue to question the accused after he has invoked his rights.[18] Where on the spectrum the fine line between "scrupulously honored" and a *Miranda* violation is crossed will depend on the facts of a given case.[19]

But the *Mosley* test is clear: resumption of interrogation on an unrelated offense is not prohibited so long as the accused's initial exercise of his right to silence was scrupulously honored.

The Right to Counsel

What happens if the accused exercises his right to counsel? The Supreme Court in *Edwards v. Arizona*[20] discussed the invocation of the right to counsel. Edwards was arrested for robbery, burglary, and first-degree murder. He was advised of his rights and stated he understood and was willing to be questioned. In the process of interrogation, Edwards sought to make a deal, adding that "I want an attorney before making a deal." Interrogation ceased at that point but the next day, after two different detectives readvised Edwards of his *Miranda* rights, he consented to interrogation and eventually rendered an inculpatory statement. The Supreme Court ruled that the use of the inculpatory statement was a violation of the fifth amendment and *Miranda*.[21] The Court held that, when an accused invokes his right to counsel, a waiver of that right cannot be established by showing that he responded to further police-initiated interrogation, even if a rights advisement was given.[22] The Court established a "bright-line"[23] rule that an accused who has expressed his desire to deal with police only through counsel is not subject to further interrogation until counsel has been made available or the accused initiates further communication with the police."[24]

The issue then becomes what is the proper approach to take when an accused exercises his right to counsel and is questioned on an unrelated offense: *Mosley's* "scrupulously honored" or *Edward's* "bright-line."

In *Miranda*, Chief Justice Warren, writing for the Court, laid out what could be read to be two different procedures:

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.[25]

In *Michigan v. Mosley*, Justice Stewart, writing for the Court, specifically noted that *Mosley* "does not involve the procedures to be followed if the person in custody asks to consult with a lawyer,"[26] recognizing that *Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney."[27] Justice White in his separate concurrence made his own special note:

> The question of the proper procedure following expression by an individual of his desire to consult with counsel is not presented in this case. 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. . . . [T]he 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.[28]

A number of courts have looked at this issue and have concluded that the *Edwards* "bright-line" test applies to

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[15] 446 U.S. at 301

[16] *See, e.g.*, Derrington v. United States, 488 A.2d 1314 (D.C. 1985). The term "functional equivalent" to interrogation is the Supreme Court's. Rhode Island v. Innis, 446 U.S. at 300.

[17] *E.g.*, State v. Phillips, 444 So. 2d 1196 (La. 1984).

[18] *See, e.g.*, Pruitt v. State, 683 S.W.2d 537 (Tex. Ct. App. 1984). For an analysis of a case's facts under the *Mosley* factors, *see* State v. Hartwig, 123 Wis. 2d 278, 366 N.W.2d 866 (1985).

[19] For example, one issue could be how much time must elapse before questioning can constitutionally be resumed. One *Mosley* factor was that a two-hour interval elasped between interrogations. *Compare* United States v. Udey, 748 F.2d 1231 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3477 (1985) (interval of six hours between questionings) *and* Jackson v. Wyrick, 730 F.2d 1177 (8th Cir.), *cert. denied*, 105 S. Ct. 167 (1984) (24 hour interval) *with* Shaffer v. Clusen, 518 F. Supp. 963 (E.D. Wis. 1981) (four minute interval). For a case that shows how fine the line can be and how much lies in the eye of the beholder, see the majority opinion in State v. Rogers, 686 S.W.2d 472 (Mo. Ct. App. 1984) and Judge Nugent's dissent.

[20] 451 U.S. 477 (1981). For a detailed discussion of *Edwards*, to include a discussion of *Mosley*, see Finnegan, *Invoking The Right to Counsel: The* Edwards *Rule and the Military Courts*, The Army Lawyer, Aug. 1985, at 1.

[21] *Edwards*, 451 U.S. at 480.

[22] *Id.* at 484.

[23] The "bright-line" designation of the *Edwards* rule was applied by the Supreme Court in Solem v. Stumes, 465 U.S. 638 (1981) which held that *Edwards* did not apply retroactively. *Cf.* Fare v. Michael C., 442 U.S. 707, 719 (1979) ("rigid" per se *Miranda* rule when right to attorney invoked).

[24] *Edwards*, 451 U.S. at 484–85. Subsequent cases involving the application of *Edwards* have looked carefully at whether the accused has met this "initiation" exception. *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039 (1983) (plurality); Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam).

[25] *Miranda*, 384 U.S. at 474.

[26] *Mosley*, 423 U.S. at 101 n.7.

[27] *Id.* at 104 n.10.

[28] *Id.* at 110 n.2 (White, J., concurring).

questioning even as to unrelated offenses.[29] As the Supreme Court of Arizona, sitting en banc, declared:

> The language of *Edwards* is unequivocal; an accused who has asserted his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him." 451 U.S. at 485, 101 S. Ct. at 1885. . . . Nowhere in *Edwards* does the majority indicate that reinterrogation of the accused is permissible if the authorities merely shift the line of questioning to other matters or unrelated offenses. Such a rule would render the *Edwards* opinion meaningless and invite the ingenious officer to invent new schemes to produce colorable waivers of the fifth amendment rights.[30]

This conclusion is not universally accepted, however.[31] One problem in obtaining a definitive answer to the issue of the application of *Edwards* has been the problem of retroactivity. In *Solem v. Stumes*,[32] the Supreme Court held that *Edwards* was not retroactive and many of the cases that discuss the application of *Edwards* to unrelated offenses deal with confessions made before the May 18, 1981 ruling in that case.[33] Thus, for example, the Seventh Circuit, in a much travelled case, first admitted a statement, then suppressed it under *Edwards*, then admitted it under *Solem v. Stumes*.[34] Certainly the rationale for suppression is the same irrespective of retroactivity, but until a statement is post-*Edwards*, much of the discussion on its application is dicta.

The Court of Military Appeals was squarely faced with the issue in *United States v. Appelwhite*[35] The accused was advised of his rights and questioned on 12 April 1984 for rape and adultery. He rendered a statement admitting to consensual sex only. On 25 April, Applewhite was called back to the Criminal Investigation Division (CID) office and advised of his rights as to adultery only. Appelwhite responded that he wanted a lawyer and was released. The CID agent asked Applewhite to return to take a polygraph exam on the incident, however, and Applewhite consented.[36] On 30 April, Applewhite returned to the CID office where he was readvised on his rights, both as to the first incident and as to a new offense based on a second incident involving rape and sodomy, which he was not suspected of on 25 April. He waived his rights and made inculpatory statements on both incidents. The military judge suppressed the 30 April statements on the first incident but admitted the statements on the second incident.[37] The Army Court of Military Review affirmed, holding that *Edwards* did not apply, first, because the two incidents were unrelated and investigated by different CID agents,[38] and second, because Applewhite had an opportunity to consult with counsel and did not do so.[39] The Court of Military Appeals reversed, finding that the "bright-line" test of *Edwards* was applicable in the case[40] and that Applewhite had not had counsel made available to him as required.[41] The Court of Military Appeals recognized a critical point in the case not discussed by the Army court. When the military judge suppressed the 30 April statement on the first incident, he found a violation:

> In *Whitehouse*, the Court of Military Review determined that the *Edwards* requirement "that counsel be 'made available' " upon request is met by giving an accused "a 'reasonable opportunity' to consult with counsel." [14 M.J.] at 645. This rationale, of course, would be equally applicable to all statements obtained on April 30. The military judge heard evidence on the operation of the local Trial Defense Service and found that resumption of interrogation "three working days" after invocation of the right to counsel was violative of appellant's rights. We agree. The polygraph interview was initiated solely by the CID agent in blatant disregard of *Miranda* and *Edwards*. Appellant's acquiescence in that interview was already a *fait accompli* when appellant left the CID office. Thus, it cannot be said that appellant's failure to contact a lawyer during the 5 days between interrogations was

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[29] *See, e.g.*, United States *ex rel.* Kimes v. Greer, 527 F. Supp. 307 (N.D. Ill. 1981), *motion to reconsider denied*, 541 F. Supp 632 (N.D. Ill. 1982); State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983) (en banc), *cert. denied sub nom.* Arizona v. Routhier, 464 U.S. 1073 (1984); Luman v. State, 447 So. 2d. 428 (Fla. Dist. Ct. App. 1984); People v. Hammock, 121 Ill. App. 3d 874, 881, 460 N.E.2d 378, 383 (1984), *cert. denied*, 470 U.S. 1003 (1985); Radovsky v. State, 296 Md. 386, 401 n.7, 464 A.2d 239, 247 n.7 (1983); Offutt v. State, 56 Md. App. 147, 467 A.2d 194 (1983).

[30] *Routhier*, 137 Ariz. at 97, 669 P.2d at 75.

[31] United States v. Scalf, 708 F.2d 1540 (10th Cir. 1983); State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); McFadden v. Commonwealth, 225 Va. 103, 300 S.E.2d 924 (Va. 1983).

[32] 465 U.S. 638 (1981).

[33] *See, e.g.*, United States *ex rel* Karr v. Wolff, 556 F. Supp. 760 (E.D.N.Y. 1983), *vacated and remanded*, 732 F.2d 615 (7th Cir. 1984); *see also Scalf*, 708 F.2d at 1543 (conviction on April 24, 1981); *Dampier*, 314 N.C. at 294, 333 S.E. 2d at 232 (interrogation on February 13, 1977); and *McFadden*, 225 Va. at 107, 300 S.E. 2d at 926 (questioning on May 1 and 6, 1981).

[34] White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979), *vacated and remanded*, 451 U.S. 1013 (1981) (for reconsideration in light of *Edwards*), *on remand*, 687 F.2d 885 (7th Cir. 1982), *vacated and remanded sub nom.* Fairman v. White, 465 U.S. 1075 (1984) (for reconsideration in light of *Solem v. Stumes*), *on remand*, 753 F.2d 540 (7th Cir. 1985).

[35] 23 M.J. 196 (C.M.A. 1987).

[36] *Id.* at 197.

[37] *Id.*

[38] United States v. Applewhite, 20 M.J. 617 (A.C.M.R. 1985).

[39] *Id.* at 619. The Army court held that, in the five days between 25 and 30 April, Applewhite had an opportunity to consult with counsel sufficient to constitute "counsel made available" under United States v. Whitehouse, 14 M.J. 643 (A.C.M.R. 1982). Indeed, the Army Court's opinion had been considered as precedent for this proposition. *See, e.g.*, Finnegan, *supra* note 20, at 13; Wilkens, *The Right to Counsel: What Does It Mean to the Military Suspect?*, The Army Lawyer, Nov. 1986, at 41, 42 n.24; *see also* the criticism of that analysis in United States v. Goodson, 22 M.J. 947, 950 (A.C.M.R. 1986).

[40] *Applewhite*, 23 M.J. at 198.

[41] *Id.* at 199.

unreasonable or indicative of a voluntary decision to forego the right to counsel previously invoked.[42]

Conclusion

Undoubtedly, one of the key factors in *Applewhite* was that the interrogation on both offenses, the first as to which the right to counsel had already invoked, and the second, unrelated offense as to which no rights were invoked, occurred contemporaneously. Indeed, Judge Cox writing for the court in *Applewhite* specifically noted that fact.[43] Certainly the issue of *Mosley* versus *Edwards* will be seen again, in different factual settings, and undoubtedly a case will arise where the interrogations are well and truly separate. What the definitive answer will be in such a case remains to be seen, but the precedent is in place that the test to be applied is triggered by what right was invoked during the initial interrogation. If an accused exercises his or her right to silence, further interrogation on another offense is permissible if his or her invocation was scrupulously honored. If an accused exercises his or her right to counsel, then questioning must cease until counsel is made available, or unless the accused initiates further conversations.

[42] *Id.*

[43] *Id.* Judge Cox noted this fact in his discussion of the *Mosley* "scrupulously honored" test. In fact, the court found that the interrogation failed under *Mosley* and *Edwards*, although the court also noted that "[b]ecause of the different considerations flowing from these rights [to silence and to counsel], we are not convinced that *Mosley* is applicable when the right to counsel is invoked." *Id.* at 199 n.3.

DAD Notes

Burton Lives

An issue that has been lurking in the shadows of the 1984 Manual[1] is whether Rule for Courts-Martial 707[2] has replaced the time limits set by the Court of Military Appeals in *United States v. Burton.*[3] In a recent memorandum opinion on a Navy Article 62[4] appeal, *United States v. Harvey,*[5] the Court of Military Appeals addressed the issue.

In *Harvey,* the accused, who was in confinement, requested trial without delay under the "second prong" of *Burton.*[6] The military judge found the delay in proceeding to trial to be inadequately explained and so dismissed the charges. The government appealed the dismissal and the Navy-Marine Corps Court of Military Review held that R.C.M. 707 sets the standard for determining speedy trial violations and that the military judge erred in finding a speedy trial violation based on the second prong of *Burton,* which was not adopted by R.C.M. 707.[7]

The Court of Military Appeals reversed the Court of Military Review's holding and reinstated the military judge's findings, ruling that there has been no explicit intent shown that R.C.M. 707 was to displace *Burton.*[8] Thus the second prong of *Burton* did apply to *Harvey* and the Court ruled that "in light of the principles announced in *Burton,* the military judge properly dismissed the charges."[9] The moral of the story is: do not give up your demands for a speedy trial, even if your case involves less than ninety days of confinement because *Burton* apparently lives, at least as to the demand prong. Captain Annamary Sullivan.

Disqualify Those Aggravation Witnesses!

In *United States v. Smith,*[10] the Army Court of Military Review recently held that a *Horner* error[11] is waived if no objection is made at trial. The court based that waiver on a finding that such an error does not constitute "plain error."[12] Moreover, even in *Horner* appellant received no relief, because the Court of Military Appeals found that appellant was not prejudiced as he was tried by a military judge alone who placed the testimony in proper perspective.[13]

[1] Manual for Courts-Martial, United States, 1984.

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

[3] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[4] Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (1982).

[5] 23 M.J. 280 (C.M.A. 1986) (summary disposition).

[6] *Burton,* 21 C.M.A. at 118, 44 C.M.R. at 172, which states: "[W]hen the defense requests a speedy disposition of the charges, the Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond . . . may justify extraordinary relief."

[7] United States v. Harvey, 22 M.J. 904, 905 (N.M.C.M.R. 1986).

[8] *Harvey,* 23 M.J. at 280.

[9] *Id.*

[10] 23 M.J. 714 (A.C.M.R. 1986).

[11] United States v. Horner, 22 M.J. 294, 296 (C.M.A. 1986) (testimony of witnesses during sentencing based solely on the severity of the offenses and not upon any assessment of accused's character and potential is improper).

[12] *Smith,* 23 M.J. at 716.

[13] *Horner,* 22 M.J. at 296.

Although the effectiveness of the principles set forth in *Horner* appear to be very limited on appeal,[14] the use of those principles by defense counsel during the sentencing phase of trial could effectively disqualify a number of aggravation witnesses. It is not unusual to have the accused's entire chain of command testify on aggravation that the accused lacks rehabilitative potential or should be confined based solely upon the severity of the crimes of which he or she has been convicted. In fact, many times this testimony follows the witness' description of the accused's outstanding duty performance.[15] On occasion, the government counsel will even mask this testimony with long winded questions such as: "Based upon your observation of the performance by the accused of his duties, his military bearing, what you have heard from others in his chain of command, and the charges of which the accused has been convicted of today, do you feel that the accused has any rehabilitative potential?" A defense counsel can eliminate much of this testimony through the implementation of the *Horner* principles.

First, cross-examine the witness to determine the basis of his or her opinion. The goal of the defense counsel is to lead the witness into admitting that his or her opinion is based solely on the severity of the offenses, and, if possible, that the witness' opinion would differ had the accused not been convicted of those offenses. Beware, however, of opening the door to uncharged misconduct by asking open-ended questions that require explanation by the witness. Note, too, that this strategy will only work if the accused has a reasonably good military record. A failure to cross-examine the witness may allow a determination by the military judge that the witness' testimony is based upon other factors and observations beyond the severity of the offenses.

Next, after establishing the basis of the witness' testimony, ask the court to either disqualify the witness or strike that portion of the testimony that is improper. If the military judge fails to do so, the issue is not only preserved for appeal,[16] but there will also be substantive proof on the record that the military judge failed to place the evidence in its proper perspective.[17] If the military judge does grant the motion, you have effectively eliminated a substantial portion of the aggravation evidence, and have placed the government counsel on notice that such tactics will not be tolerated. Captain David C. Hoffman.

"But I Tell You, I Ain't Lying!"

In *United States v. Wilhite*,[18] the Navy-Marine Court of Military Review upheld a military judge's decision not to allow the accused to lay a foundation for the admission of an exculpatory polygraph examination. Wilhite was convicted of three specifications of indecent assault. The government's evidence at trial consisted solely of the testimony of the alleged victims. Wilhite testified that he did not commit the offenses but was rather the victim of a conspiracy on the part of the prosecutrices. Wilhite's credibility was vigorously attacked by the trial counsel during cross-examination. The trial defense counsel then sought admission of an exculpatory polygraph examination to repair Wilhite's damaged credibility.[19]

The military judge recognized that the Military Rules of Evidence no longer contain a per se prohibition against admission of polygraph reports,[20] but rather their admission is analyzed in the same fashion as testimony of expert witnesses.[21] The military judge agreed with the Army Court of Military Review's decision in *United States v. Bothwell*[22] that an evidentiary hearing was required to determine if the polygraph results should be admitted.[23] He nevertheless refused to allow the trial defense counsel to attempt to lay a foundation for the admission of the evidence, relying on a case from the central district of California[24] for the proposition that such an evidentiary hearing would be too time-consuming. The Navy-Marine Court of Military Review endorsed the military judge's reliance on the decision of the California district court and his reliance upon the offers of proof as set out in trial briefs as opposed to an evidentiary hearing.[25]

When, as in *Wilhite*, the case turns on the credibility of the accused in denying the offense, an exculpatory polygraph report should be admissible, assuming the polygraph examiner can be qualified as a witness.[26] In any event, it is an abuse of discretion for a military judge to refuse to allow an accused to place evidence before the court from which a determination of admissibility can be made.[27]

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[14] Based upon *Smith* and *Horner*, it appears that relief will only be granted when the error is committed before members and is not corrected after a timely objection by defense counsel.

[15] For one example, see the facts set forth in *Smith*, 23 M.J. at 715–16.

[16] *Id.* at 716.

[17] *Horner*, 22 M.J. at 296.

[18] NMCM 86 1565 (N.M.C.M.R. 31 Dec. 1986) (unpub.).

[19] *Id.*, slip op. at 1–2.

[20] *Id.*, slip op. at 3.

[21] *Id.*, slip op. at 4.

[22] 17 M.J. 684 (A.C.M.R. 1983).

[23] *Wilhite*, slip op. at 3.

[24] United States v. Urquidez, 356 F. Supp. 1363 (C.D. Cal. 1973).

[25] *Wilhite*, slip op. at 8. *See* United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987) (the military judge's reliance in *Wilhite* on trial briefs for the facts upon which his ruling was based are of the same variety as that roundly criticized by the Court of Military Appeals). *See also* United States v. Scott, 22 M.J. 297, 300 n.1 (C.M.A. 1986).

[26] For an excellent analysis of the admissibility of exculpatory polygraph examinations, see Maizel, *An Innocent Man: The Accused Who Passes the Polygraph*, The Army Lawyer, June 1985, at 66, and cases cited therein. Of particular note is Captain Maizel's consideration of the constitutional considerations and the standard for admission under Military Rules of Evidence 402, 404, 608, 702 and 704.

[27] *Bothwell*, 17 M.J. at 687–88.

When trial defense counsel are faced with a credibility contest and have an exculpatory polygraph examination, the issue should be strongly pressed. Despite the Navy court's decision in *Wilhite*, the exculpatory polygraph presents a continuing issue of great interest to appellate authorities.[28] Captain Floyd T. Curry.

[28] The Court of Military Appeals has granted review in cases involving a military judge's denial of an opportunity to lay a foundation for the admission of an exculpatory polygraph, United States v. Johnson, 23 M.J. 445 (C.M.A. 1986); United States v. Gipson, 17 M.J. 343 (C.M.A. 1984), and on the issue of a denial of a defense request to have a polygraph examiner who conducted a polygraph examination of the appellant to testify on his behalf, United States v. Kirk, 19 M.J. 236 (C.M.A. 1984).

Trial Judiciary Note

Recent Developments in Instructions

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The United States Court of Military Appeals and the courts of military review have recently decided a wide range of instructional cases, deciding issues from preliminary matters through sentencing. This article is a review of some of these cases.

Preliminary Matters

In *United States v. Waggoner*,[1] the Court of Military Appeals recommended that military judges give preliminary instructions to members in all cases.[2] These instructions generally include the duties of the various parties, including those of the members, and may refer to the trial's procedural aspects.[3] In *United States v. Ryan*,[4] the military judge went beyond general preliminary instructions and gave specific instructions on reasonable doubt and credibility of witnesses. On appeal, the accused claimed that by giving the credibility instruction at the beginning of the trial and again during general instructions, the military judge emphasized the credibility issue to the accused's prejudice. The Army court rejected this argument and acknowledged that giving preliminary instructions was the preferred practice. In doing so, it upheld the trial judge's opinion that repeating the general instructions "assisted the members."[5] The court's opinion reaffirms the general rule that the scope of preliminary instructions rests within the sound discretion of the trial judge.

Offenses

United States v. Dyer[6] involved placing obscene pictures in the mail in Hawaii. At the original trial, the judge instructed that the determination of obscenity should be made by applying the contemporary community standards of the island of Oahu. Because of an unrelated matter, a rehearing was ordered and was held at Fort Leavenworth, Kansas. There the members were instructed to apply the standard of "the military community." No further description of the community was given. On appeal, the accused claimed error and asserted that the correct community standard was that of Oahu. For practical reasons the court held that the term "military community standard" as used in the instruction was proper. The court suggested, however, that the particular community be identified.[7]

The Benchbook does not yet incorporate this suggestion.[8] As a practical matter, there should be little or no difference among the standards in most military communities. The general military population, including family members, is essentially homogenous and transitory. Most large military communities have the same basic population demography and probably have the same general standards. Nevertheless, it appears best to instruct that the members must apply the local military community standard.[9]

In *United States v. Joyce*,[10] the accused placed government property in his hold baggage in Turkey. The property

[1] 6 M.J. 77 (C.M.A. 1978).

[2] *Id.* at 79.

[3] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 913(a) discussion [hereinafter M.C.M., 1984, and R.C.M. respectively]; Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook, para, 2-24 (1 May 1982) (C2, 15 Oct. 1986) [hereinafter Benchbook].

[4] 21 M.J. 627 (A.C.M.R. 1985).

[5] *Id.* at 632. In instructing, a judge may not distort the evidence *or* "must not emphasize, in summing up the evidence, portions in favor of one party and minimize those in favor of the other." United States v. Andis 2 C.M.A. 364, 367, 8 C.M.R. 164, 167 (1953); *see also* United States v. Nickoson, 15 C.M.A. 340, 35 C.M.R. 312 (1965); United States v. Harris, 6 C.M.A. 736, 21 C.M.R. 58 (1956); R.C.M. 920(e) discussion.

[6] 22 M.J. 578 (A.C.M.R. 1986).

[7] *Id.* at 583 n.3.

[8] Benchbook, para 3-162.

[9] *Dyer* also identified a once fatally defective instruction that did not describe solicitation under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (1982) as a specific intent crime. That defect has been corrected. Benchbook, para. 3-178.

[10] 22 M.J. 942 (A.F.C.M.R. 1986).

was discovered upon its arrival in the United States and the accused was charged, inter alia, with wrongful disposition of government property. The judge did not instruct on the meaning of the term "dispose" but did instruct that if the accused caused the property to be placed in his hold baggage for shipment to the Continental United States (CONUS), then as a matter of law he wrongfully disposed of the property. The Air Force court found two errors. The first was the failure to define the word "dispose." Under the facts of the case the court should have been instructed that dispose meant "relinquish, part with or get rid of."[11] The second error and crucial one was the instruction that the accused's acts amounted to a wrongful disposition of property. This, the court held, was "tantamount to a directed verdict of guilty—a practice not permitted in military law."[12] The trial judge should have instructed on the elements, defined the term "dispose," and then let the members decide whether the accused's acts amounted to a wrongful disposition of property.

In *United States v. Rodwell*,[13] the Court of Military Appeals reviewed the law with regard to when instructions on lesser included offenses were required. The court reaffirmed its long standing rule that whenever some evidence is presented raising a lesser included offense, that offense must be instructed on regardless of the judge's view of the credibility of the witnesses or the weight of the evidence.[14] Credibility and weight are for the members to decide and are not considerations in determining whether the evidence raises a lesser included offense.[15] *Rodwell* presented a variation of the usual lesser included offense issue. The trial judge agreed that the lesser included offense was raised by the evidence, but refused to instruct on it. He opined that in this case assault by intentionally inflicting grievous bodily harm was not a lesser included offense of the charged offense of assault with intent to commit murder by repeated stabbings because the specification did not allege grievous bodily harm. The Court of Military Appeals properly rejected this view and held that the allegation of repeated stabbing adequately alleged grievous bodily harm for purposes of raising the lesser included offense.

United States v. Jefferson[16] is the Court of Military Appeals' exposition of the felony murder doctrine. During the trial, the judge instructed on the theory of aiding and abetting, but failed to clarify whether the vicarious liability extended from aiding or abetting the underlying felony (robbery), or from aiding or abetting the murder itself. The court found the judge's failure to instruct to be non-prejudicial, because guilt could be established under either theory. The court cautioned[17] military judges to be more careful in giving this instruction, however.[18]

Defenses

United States v. Stafford[19] involved shifting the burden of proof.[20] The military judge instructed that if the court was convinced beyond reasonable doubt that the accused was where he claimed to be at the time of the offenses, the defense of alibi existed. This instruction placed the burden on the accused to prove that at the time alleged he was at a place other than the scene of the offense. This was erroneous because to defeat an alibi defense, the government has the burden of proving that the accused was present at the time and place alleged. Because the burden of proof was improperly shifted to the defense, the applicable findings were set aside.

In *United States v. Vanzandt*,[21] the Court of Military Appeals identified several rules that govern the military law of entrapment. These rules are: the defense is not raised until the accused's commission of the alleged criminal act is proven beyond reasonable doubt and there is evidence that the suggestion or inducement for the act originated with the government; once the defense is raised, the government must prove that the accused was predisposed to commit it; the existence of reasonable suspicion by the police as to the accused's latent predisposition to commit the offense is immaterial; and "except for that unique, peculiar situation where the conduct of the government agent reaches the point of shocking the judicial conscience,"[22] the issue must be resolved by the fact finder.[23]

In *United States v. Eason*,[24] a case which may have been tried prior to the publication of *Vanzandt*, the military judge instructed that there was no entrapment if the government agents had reasonable grounds to believe or suspect that the accused was involved or about to be involved in similar criminal conduct. In light of *Vanzandt*, the instruction was erroneous.[25] Because no evidence suggested the government agents suspected the accused, however, the instruction was non-prejudicial.

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[11] *Id.* 943. The Benchbook, para. 3–66 does not define the term and should be appropriately annotated. The MCM, 1984, Part IV, para. 32, is similarly devoid of a definition.

[12] 22 M.J. at 943.

[13] 20 M.J. 264 (C.M.A. 1985).

[14] United States v. Staten, 6 M.J. 275 (C.M.A. 1979); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979); *see* R.C.M. 920(e) discussion.

[15] Stevenson v. United States, 162 U.S. 313 (1896); United States v. Moore, 16 C.M.A. 375, 36 C.M.R. 531 (1966).

[16] 22 M.J. 315 (C.M.A. 1986).

[17] "Hopefully in future trials for felony-murder the members will receive a clearer explanation of the basis for any vicarious liability to be imposed." *Id.* at 328 n.20.

[18] The need for exceptionally careful vicarious liability instructions is also apparent when the prosecution theory extends to the liability of co-conspirators. *See* United States v. Gaeta, 14 M.J. 383 (C.M.A. 1983); Benchbook, para. 7–1*b*.

[19] 22 M.J. 825 (N.M.C.M.R. 1986).

[20] *See* United States v. Holmes, CM 439512 (A.C.M.R. 2 Feb. 1981); R.C.M. 916(b); *see generally* United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).

[21] 14 M.J. 332 (C.M.A. 1982).

[22] *Id.* at 342.

[23] *Id.* at 343–44.

[24] 21 M.J. 79 (C.M.A. 1985).

[25] *See also* United States v. Johnson, 18 M.J. 76 (C.M.A. 1984).

Unlike *Eason*, prejudicially erroneous entrapment instructions were given in *United States v. O'Donnell*.[26] The judge instructed that if the accused entered the criminal enterprise for profit, he was not entrapped because it was the profit motive and not government inducement that caused the accused's criminal conduct. The court was also instructed that entrapment would be a defense if the conduct of the government agents "was so outrageous as to violate fundamental fairness and be shocking to the universal sense of justice."[27]

Because *Vanzandt* clearly stated that the latter issue is for the judge and not for the members, the due process instruction was improper. The profit motive instruction was also improper. The Air Force court found, as an Army court had already opined,[28] that profit motive is but one factor to be weighed in deciding whether entrapment exists. It is not a per se disqualifying factor and any instruction so stating is error.

Evidence

The results of a polygraph are inadmissible on the issue of guilt or innocence.[29] The proper use of such evidence and the trial judge's instructional responsibility was decided in *United States v. Gaines*.[30] The defense elected to present evidence as to the voluntariness of the accused's admission in the case before the members.[31] The government responded by calling the polygraph examiner to explain the factual context of the admission. This testimony included evidence that the accused had been informed that he had failed the polygraph examination. The military judge instructed that: the members could not consider evidence regarding the polygraph on the issue of guilt or innocence; the actual results of the examination were not admissible for any purpose; the fact the accused was told he failed could only be considered for the proposition of what he was told and the members may not speculate as to the actual results; and the polygraph evidence could only be considered on the issue of the voluntariness of the admission.[32] The Air Force court found the instruction to be appropriate and affirmed.[33]

The court recognized that it was essential for the court members to know all the relevant facts surrounding the admission. To inform the members that the accused first encountered the polygraph examiner (identified as a criminal investigator) at a certain time and then did not make a statement until several hours later would be misleading and leave the members speculating as to what occurred in the interim. Thus, it was necessary to inform the members as to what occurred in order for them to make an intelligent judgment. This is one situation when it is better to rely upon the good sense of properly instructed court members rather than upon uninformed members who have had significant evidence kept from them.

United States v. Swoape,[34] is a case involving the "missing witness." The accused was charged with the larceny and willful damage of an automobile found in his possession. He claimed that he had borrowed the automobile from an individual who was aboard a ship and offered evidence of his efforts to locate the individual. Because no evidence was presented to show that the missing witness was peculiarly available to the defense, the military judge rejected the evidence as premature. Moreover, the military judge gave no instruction concerning the witness. The court recognized that the members might infer that the failure of the defense to call a witness whom the accused said would substantiate his innocence was an indication that the accused was not innocent. Because the witness was not peculiarly available to the defense, the members could not properly draw such an inference. Accordingly, the members should have been instructed "that they were not legally free to draw such an inference."[35]

The defense did not request that a missing witness instruction be given for the failure of the government to call the shipboard witness. Nor did the defense specifically request an instruction to disregard an adverse inference based on its inability to secure the witness. The Court of Military Appeals, however, found that the defense offer of evidence was a request for a neutralizing instruction that would reduce the danger of the drawing of an improper inference.[36]

The court did not state that giving an instruction in a case such as this was a sua sponte duty of the military judge. It denominated the failure to do so as plain error,[37] however, and it strains the English language to interpret an offer of proof as a request for an instruction. Therefore, it would be wise for judges in similar cases to consider a neutralizing instruction as a sua sponte responsibility.

The opinion suggested that where a party fails to call a witness who is peculiarly within its power to produce, the fact finder may properly infer that the testimony of the witness would be unfavorable to that party. Upon request, the military judge should instruct on this issue.[38]

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[26] 22 M.J. 911 (A.F.C.M.R. 1986).

[27] *Id.* at 912.

[28] United States v. Meyers, 21 M.J. 1007 (A.C.M.R. 1986).

[29] *See* United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981).

[30] 20 M.J. 668 (A.F.C.M.R. 1985).

[31] *See* Mil. R. Evid. 304(e)(2).

[32] 20 M.J. at 669.

[33] In addition to the limiting instruction on the use of polygraph evidence, an instruction on the weight to be accorded the admission must also be given. Mil. R. Evid. 304(e)(2). *See* Benchbook, para. 4–2.

[34] 21 M.J. 414 (C.M.A. 1986).

[35] *Id.* at 416.

[36] *Id.* at 416 n.4.

[37] *Id.* at 417.

[38] A sample instruction is provided at 21 M.J. 416 n.2.

United States v. Carter[39] and *United States v. Deland*[40] involved required instructions in sex-offense cases. In *Carter*, an expert witness testified regarding rape trauma syndrome. The military judge gave a limiting instruction in which he stated that the expert did not testify that the victim had been raped, but only that her symptoms were consistent with rape trauma syndrome. The court approved the instruction stating "the importance of a proper limiting instruction concerning the testimony of an expert witness is paramount."[41]

The importance of limiting instructions was also emphasized in *Deland*. There statements made to a child psychiatrist by a seven-year-old sex-offense victim were admitted into evidence as a exception to the hearsay rule.[42] In permitting the testimony of the psychiatrist as to the statements, the Court of Military Appeals cautioned that in trials with members the military judge must instruct that the members may not draw any inference that the expert witness had any belief as to the truth or falsity of the statements. "By instructions to court members or otherwise, the military judge should make clear that the doctor is only describing the statement rather than evaluating its credibility."[43]

Ordinarily, the accomplice testimony instruction[44] need be given only upon request.[45] If the testimony of an accomplice—that is, one who is culpably involved in an offense with the accused[46]—is virtually the entire case[47] or is of vital[48] or pivotal[49] importance to the prosecution, however, the instruction must be given sua sponte. Military judges did not fulfill this duty in two recent cases.

In *United States v. Adams*,[50] the accused was charged with fraternization with a trainee in violation of a regulation. The female trainee with whom he allegedly fraternized was the main witness against him, and her testimony was uncorroborated. Accordingly, her testimony was of pivotal importance to the prosecution. Because the regulation prohibited trainees, as well as cadre, from engaging in the alleged acts, the trainee also violated the regulation. As such, she was culpably involved in the criminal activity and therefore an accomplice. Under these circumstances, the Army court found prejudicial error for the failure to give the accomplice testimony instruction even though it was not requested.

In *United States v. Oxford*,[51] the entire government case centered on the testimony of the accused's co-conspirator. The failure to give the accomplice testimony instruction sua sponte was held to be prejudicial error.[52]

In one of its less enlightened periods, the Court of Military Appeals decided *United States v. Grunden*.[53] There, the court proclaimed that whenever uncharged misconduct was in evidence, "nothing short of instruction would suffice."[54] Eventually, through a series of cases[55] culminating with *United States v. Thomas*,[56] the court rejected the pronouncement of *Grunden*. The court held that when the uncharged misconduct is inextricably related to the time and place of the offense, there is no sua sponte obligation to give a limiting instruction. When the uncharged misconduct is not so inextricably related and there is no defense request to the contrary, however, a limiting instruction is required. Although this latter holding is contrary to Mil. R. Evid. 105, which requires that a limiting instruction be requested, it represents a significant improvement over the law announced in *Grunden*.

United States v. Pearce[57] is a recent example of the necessity for sua sponte instructions limiting uncharged misconduct. In *Pearce*, the misconduct was presented by questions. A defense character witness during cross-examination was asked "have you heard" questions about uncharged misconduct of the accused.[58] The military judge instructed that the questions could be considered only to test the basis of opinion of the witness. The Army court approved the instruction and emphasized that such a limiting instruction is mandatory.[59]

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[39] 22 M.J. 771 (A.C.M.R. 1986).

[40] 22 M.J. 70 (C.M.A. 1986).

[41] 22 M.J. at 776.

[42] Mil. R. Evid. 803(4) (statements for purposes of medical diagnosis or treatment).

[43] 22 M.J. at 75.

[44] Benchbook, para. 7–10.

[45] United States v. Lell, 16 C.M.A. 161, 36 C.M.R. 317 (1966); United States v. Stephen, 15 C.M.A. 314, 35 C.M.R. 286 (1965); United States v. Schreiber, 5 C.M.A. 602, 18 C.M.R. 226 (1955).

[46] United States v. Garcia, 46 C.M.R. 8 (C.M.A. 1972).

[47] *Stephen*, 15 C.M.A. at 316, 35 C.M.R. at 288.

[48] *Lell*, 16 C.M.A. at 166, 36 C.M.R. at 322.

[49] United States v. Gilliam, 48 C.M.R. 260, 262 (C.M.A. 1974); United States v. Young, 11 M.J. 634, 636 (A.F.C.M.R. 1981).

[50] 19 M.J. 996 (A.C.M.R. 1985).

[51] 21 M.J. 983 (N.M.C.M.R. 1986).

[52] The court opined that the accused may affirmatively waive the instruction, *Id.* at 986 n.1.

[53] 2 M.J. 116 (C.M.A. 1977).

[54] *Id.* at 119; *see also* United States v. Deford, 5 M.J. 104 (C.M.A. 1978) (Cook, J., concurring); United States v. Bryant, 3 M.J. 9 (C.M.A. 1977).

[55] United States v. Thomas, 11 M.J. 388 (C.M.A. 1981); United States v. Wray, 9 M.J. 361 (C.M.A. 1980); United States v. Fowler, 9 M.J. 149 (C.M.A. 1980).

[56] 11 M.J. 388 (C.M.A. 1981).

[57] 21 M.J. 991 (A.C.M.R. 1986).

[58] *See generally* United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982).

[59] 21 M.J. at 994.

In *United States v. McLaurin,*[60] the crucial issue was the identity of the accused as the perpetrator of the crime. The defense presented no evidence, but sought to raise doubts about the identification of the accused. No specific instruction was requested and none was given regarding eyewitness identification. The Court of Military Appeals found there was no sua sponte duty to give such an instruction, but if requested it should be given. The court set out the factors that should be included in such an instruction and provided a sample instruction.[61]

Sentencing

The military judge's responsibility to police counsel's arguments was examined in *United States v. Williams.*[62] The prosecution's presentencing argument in this rape case "was clearly aimed at inciting the passion of the members by inviting the members to place 'their daughters' as appellant's next victim."[63] The Army court found this to be an "improper inflammatory argument." The defense neither objected nor sought a limiting instruction or a mistrial. Nevertheless, the court held that the military judge had a duty to interrupt the argument to give corrective instructions. His failure to do so constituted reversible error. In so finding, the court emphasized that the military judge is more than a mere referee and reaffirmed a prior holding that the "military judge has [a] *sua sponte* obligation to act when there is a 'fair risk' that an improper argument will have an appreciable effect upon [the court] members."[64]

United States v. Gude[65] is an unfortunate example of a judge departing from his impartial role. The defense offered a document signed by twenty-six of the fifty-nine occupants of the barracks that stated that the signatories trusted the accused and, despite his barracks larceny, were willing to have him back. The military judge proposed to instruct the members that they could but were not required to infer that the thirty-three non-signatories did not share the opinion of the others. The proposed instruction was clearly unnecessary, not impartial and in fact, an expression of the low regard in which the judge held the proffered defense evidence.

United States v. Soriano[66] involved modifications to the instructions regarding the effects of a punitive discharge. At the trial counsel's request, the military judge instructed that a punitive discharge *may* affect the employment opportunities, legal rights, and the social acceptability of the accused.[67] As given, the instruction differed from the instruction contained in the Military Judge's Guide[68] that stated that a punitive discharge *will* have an adverse affect. The court found that the instruction was incorrectly modified but that no prejudice occurred.

The court referred to the instruction contained in the Military Judge's Guide as the standard instruction. If the Court of Military Appeals used the term "standard" to mean "as written," then no significant questions arise from this opinion. If the court meant that this instruction is required, however, problems will arise.

The Military Judge's Guide referred to this instruction as supplemental and not required to be given. Moreover, the present Benchbook does not contain this instruction. The Court of Military Appeals also cited no case that requires that the instruction be given. Therefore, it may be presumed that the instruction has not been given in many recent cases. If *Soriano* means the instruction is required, much appellate litigation over the absence of the instruction can be expected.

No published military case since *Soriano* has discussed the mandatory nature of this punitive discharge instruction. Therefore, it may be assumed that *Soriano* is limited to its facts and means merely that if any instruction, required or discretionary, is given it must be given correctly.

United States v. Allen[69] and *United States v. Fisher*[70] examined the military judge's responsibility to give clear and appropriate sentencing instructions. In *Allen,* the judge instructed that voting would be on each sentence in its entirety, but in response to a member's question he indicated that the members could vote on portions of the sentence.[71] The court found the instructions confusing enough to constitute error but deemed it harmless.

In *Fisher,* the judge failed to instruct on the mitigating effects of a guilty plea and failed to instruct that voting must begin with the lightest proposed sentence. The Court of Military Appeals held that in the absence of a request for an instruction, the failure to give the effect of a guilty plea instruction was not reversible error.

The failure to properly instruct on the order of balloting, however, was deemed to be prejudicial error requiring reassessment of the sentence. In future cases, the failure to instruct that voting must begin with the lightest proposed sentence will no longer be considered plain error per se. Nevertheless, the court declared that such failure is always error and stressed that military judges have "a *sua sponte*

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[60] 22 M.J. 310 (C.M.A. 1986).

[61] The court also provided a sample instruction to be used when inter-racial identification was in issue. *Id.* at 312 n.2.

[62] 23 M.J. 525 (A.C.M.R. 1986).

[63] *Id.* at 526.

[64] *Id.* at 527 (citing United States v. Smart, 17 M.J. 972, 973 (A.C.M.R. 1984)); *see* United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980) ("Also of concern to us is the failure of the military judge to interrupt the trial counsel in the midst of his improper argument and to instruct the court on the spot to disregard it."); United States v. Young, 8 M.J. 676, 678 (A.C.M.R. 1980) (The argument of the "trial counsel was sufficiently inflammatory to require a *sua sponte* instruction by the judge, cautioning the members to disregard the trial counsel's remarks."); United States v. Mills, 7 M.J. 664 (A.C.M.R. 1979).

[65] 21 M.J. 789 (A.C.M.R. 1986).

[66] 20 M.J. 337 (C.M.A. 1985).

[67] The text of the instruction is set out in the opinion. *Id.* at 341.

[68] Dep't of Army, Pam. No. 27-9, Military Judge's Guide, para. 8-4*a*(1) (19 May 1969).

[69] 21 M.J. 924 (A.C.M.R. 1986).

[70] 21 M.J. 327 (C.M.A. 1986).

[71] 21 M.J. at 925-26. R.C.M. 1006(d) requires that voting shall be "on each proposed sentence in its entirety."

duty to instruct the members on the proper procedures for voting on sentence."[72]

United States v. Noonan[73] involved the often-encountered question of the collateral consequences of a particular sentence. *Noonan* was a rehearing and the members were instructed that the accused would receive administrative credit for the confinement already served. The defense claimed that the instruction caused the court to increase an otherwise appropriate sentence. The Air Force court rejected the defense claim and held that this was proper information to bring to the attention of the members.

The court went on to state that the more information that can be brought to the attention of the members, the more appropriate the sentence will be. Certainly the trend in military law is to give more sentencing information to the members.[74] The holding in *Noonan* is consistent with that trend and is reasonable. When instructions regarding purely collateral consequences of a particular sentence are requested, however, the *Noonan* approach of "the more the better" should not be taken literally. These requests, such as the income tax consequences of a fine as opposed to a forfeiture,[75] or which specific benefits are lost as a result of a bad-conduct discharge,[76] are outside legitimate sentencing information. Similar information such as parole eligibility, good time credit, or "how much time will he actually serve" also should not be given to court members.[77]

The military judge's role on this issue is not an easy one. He or she must balance legitimate relevant information against the purely collateral. Therefore, the *Noonan* dicta without a good deal of leavening is not a helpful standard.

Conclusion

Instructions remain a crucial phase of the trial process. The area of instructions, however, is not relegated solely to the trial judge. Counsel must ensure that desired instructions are requested, as fewer instructions are required to be given sua sponte. Counsel should also pay heed to the final portion of R.C.M. 920 and 1005 on findings and sentencing instructions. Both rules contain the following language: "Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error."[78]

[72] 21 M.J. at 329 n.2.

[73] 21 M.J. 763 (A.F.C.M.R. 1986).

[74] *See, e.g.*, United States v. Vickers, 13 M.J. 403 (C.M.A. 1982); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985); United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[75] *See* United States v. Brown, 1 M.J. 465 (C.M.A. 1976).

[76] United States v. Quesinberry, 12 C.M.A. 609, 31 C.M.R. 195 (1962); United States v. Givens, 11 M.J. 694 (N.M.C.M.R. 1981).

[77] *See* United States v. Ellis, 15 C.M.A. 8, 34 C.M.R. 454 (1964); United States v. Wheeler, 18 M.J. 823 (A.C.M.R. 1984).

[78] R.C.M. 920(f); R.C.M. 1005(f).

Government Appellate Division Note

Establishing Court-Martial Jurisdiction Over Off-Post Drug Offenses

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Recent Decisions

The military's jurisdiction over off-post drug offenses has been increasingly challenged since the recent case of *United States v. Barideaux.*[1] Barideaux was on terminal leave from the Army in a trailer park in a community some distance away from any military installation when he delivered marijuana to an undercover Criminal Investigation Division (CID) agent. Barideaux "had no reason to believe" the CID agent was a soldier. The agent told Barideaux that she planned to use the marijuana in a nearby recreation area. The Court of Military Appeals found no court-martial jurisdiction over the offense.

At first blush, *Barideaux* appears to be a departure from the broad language in *United States v. Trottier,*[2] that "almost every involvement of service personnel with the commerce in drugs is 'service connected.' " Footnote 28 in *Trottier,* however, which was cited in *Barideaux,* foreshadowed the decision in *Barideaux.* In footnote 28, the *Trottier* court noted two exceptions to military jurisdiction of off-post drug offenses: use of marijuana by a service member on a lengthy period of leave away from the military community; and sale of a small amount of a contraband substance by a military person to a civilian for the latter's personal use. The facts of *Barideaux* fit somewhere between these two examples. Thus, *Barideaux* is consistent with *Trottier* and does not represent a departure from *Trottier's* broad application.

[1] 22 M.J. 60 (C.M.A. 1986).

[2] 9 M.J. 337, 350 (C.M.A. 1980).

Nevertheless, *Barideaux* illustrates the importance of three factors in the jurisdiction decision:[3] the location of the offense in relation to the military installation; the accused's objective knowledge or lack thereof of the purchaser's status as a soldier; and the use to which the accused objectively believes the drugs are going to be put.

The proximity of the situs of the offense to the military installation was considered a "significant fact suggesting service-connection" in *United States v. Abell,*[4] which concerned jurisdiction over off-post sex offenses. In *United States v. Hairston,*[5] the proximity between the situs of the offense and the military installation coupled with the drug purchaser's status as a soldier were enough to confer court-martial jurisdiction. Recently, in *United States v. Walker,*[6] one factor the court used in finding subject matter jurisdiction was that the off-post drug distribution took place in a city contiguous to the military installation. The Army court also took judicial notice of the "well-established military fact" that Fort Benning is the location of the United States Army Infantry Center and School.[7]

An objective basis for knowledge of the drug purchaser's status as a soldier was noted by the court in determining court-martial jurisdiction in *United States v. Fane.*[8] The military judge in *Fane* specifically found that Fane was not told of the drug purchaser's status as a soldier. The military judge, however, made other factual findings which, in the view of the Army court, established "ample reason to believe that the purchaser was, or might be, a service-member."[9] These facts were that the purchaser told Fane he was sent by a person whom Fane knew to be a soldier and that the transaction occurred two miles from the military installation.

Similarly, in *Walker,* the Army Court of Military Review specifically found that Walker was not aware of the drug purchaser's status as a soldier. In determining that subject matter jurisdiction existed, however, the court noted that the drug purchaser was introduced to Walker by someone Walker knew to be a soldier. Thus, the objective belief of the accused, once again, was an important factor in the jurisdiction decision.

The use to which the purchased drugs could be put was also a factor in determining court-martial jurisdiction in *Fane* and *Walker.* In *Walker,* the drug purchaser told Walker's cohort that he was obtaining the drugs for his personal use. Nevertheless, the Army court found that the amount of cocaine purchased could have been resold to one or two other people. Thus, the court was inferring that appellant should have been aware of the possible further distribution of the cocaine, despite the contrary declaration of the purchaser.

Similarly, in *Fane,* the military judge found that Fane knew that an ounce of marijuana could be broken down into thirteen "dime-bags" or twenty "nickel-bags." Thus, Fane could objectively foresee subsequent distribution of the marijuana to other soldiers. In contrast, Barideaux was told by the drug purchaser that the marijuana was for her personal use and the amount purchased, 3.66 grams of marijuana, was consistent with personal use only.[10]

Some Appellate Counsel Suggestions to Trial Counsel to Protect the Record

Trial counsel should keep in mind that jurisdictional issues can be raised for the first time on appeal.[11] While appellate courts will entertain affidavits on this issue, the courts do not favor affidavits.[12] Thus, it is preferable to establish the jurisdictional facts in the record of trial.

A guilty plea does not waive jurisdiction.[13] In guilty plea cases, the trial counsel should seek to include the necessary jurisdictional facts in a stipulation of fact.

In other cases, trial counsel should establish the jurisdictional facts through witnesses or documents. This should be done in all off-post drug offenses whether or not the jurisdictional issue is raised at trial. If scant jurisdictional facts are in the record, the issue will be raised on appeal.

The location of the offense in relation to the military installation should be established via a witness, an area map, or a stipulation of fact. The military judge may also take judicial notice of the location of a well known area. If the sale occurred in an area of town in which a large number of soldiers reside or otherwise frequent, that fact should be established in the record.

If the installation is home to a military training center or school, a large concentration of combat units, or has other specialized or technical missions which may be adversely affected by drug abuse, request the military judge to take judicial notice of that fact. This establishes a heightened military interest in the installation and its surrounding areas.[14]

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[3] Barideaux's status as a soldier on terminal leave undercut the military's interest in the crime and thus was also a factor negating subject matter jurisdiction. For purposes of in personam jurisdiction, the military's interest in the crime must be manifested prior to the discharge of an accused or in personam jurisdiction is lost. The time of discharge is liberally construed in favor of the accused. Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986); United States v. Howard, 20 M.J. 353 (C.M.A. 1985).

[4] 23 M.J. 99, 103 (C.M.A. 1986).

[5] 15 M.J. 892 (A.C.M.R. 1983), *petition denied,* 17 M.J. 279 (C.M.A. 1984).

[6] SPCM 22229 (A.C.M.R. 9 Jan. 1987).

[7] *Id.*, slip op. at 5 n.2.

[8] SPCM 22230 (A.C.M.R. 30 Oct. 1986).

[9] *Id.*, slip op. at 3.

[10] Although the amount of marijuana purchased is not reflected in the *Barideaux* opinion, the record of trial reveals that the amount purchased was 3.66 grams (Prosecution Exhibit 2, lab report).

[11] United States v. Sands, 6 M.J. 666 (A.C.M.R.), *petition dismissed,* 6 M.J. 302 (C.M.A. 1978).

[12] *Id.* at 667.

[13] United States v. Joseph, 11 M.J. 333 (C.M.A. 1981).

[14] *See Walker,* slip op. at 5 n.2.

Any facts that would establish an accused's objective knowledge of the drug purchaser's status as a soldier or his or her intent to distribute the drugs to other soldiers should likewise be established on the record. Thus, if the purchaser was wearing a military uniform, had a military haircut, or mentioned other military members or places while communicating with the accused, this should establish an objective belief in the purchaser's status as a soldier.

Evidence of a declination to prosecute by the civilian authorities is most beneficial if it can be shown that the "refusal to exercise jurisdiction is extensive and affects a whole class of offenses." [15] For example, if the civilian prosecutor refuses to prosecute marijuana offenses, this fact should be included in the record. Even where the civilian prosecutor does prosecute military members for drug offenses, a persuasive argument can be made that the military's interest cannot be adequately vindicated by a civilian court. [16]

Finally, any evidence that would illustrate the impact of the offense on the military community, such as a loss of morale among the soldiers in the accused's unit, should be included. [17]

Trial counsel should coordinate with the local drug suppression team chief to ensure that the agents establish a military connection during their undercover operations. Further, as soon as a jurisdictional issue is evident, trial counsel may seek assistance from the Trial Counsel Assistance Program.

Conclusion

Despite the broad language of *Trottier*, trial counsel should establish the jurisdictional facts in the record of trial regardless of whether the issue is raised. The above discussion is a framework for accomplishing that task.

[15] *Trottier*, 9 M.J. at 352.

[16] *See Walker*, slip op. at 6 n.4.

[17] *See* United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983).

Trial Defense Service Note

Recruiter Reliefs

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Recruiters are often the Army's only representatives in the community; this subjects them to unique stress and public scrutiny. Because of the demands of recruiting duty, the Army closely monitors the image a recruiter presents. To protect the individual recruiter, and the Army's status in the community, the U.S. Army Recruiting Command (USAREC) has created a rather complex system governing involuntary removal from recruiting duties. This system can be confusing for a judge advocate trying to help a recruiter-client facing a relief action. The chart below provides a thumbnail sketch of the types of relief that may be proposed. The paragraphs referenced in the chart are sections of Army Regulation 601-1. [1]

While AR 601-1 deals with enlisted personnel, portions of it may also be applied to officers assigned to USAREC if they are highly visible in the community (for example, a recruiting company commander). Officers, as a rule, do not have a production quota; however, they may be relieved and reassigned due to loss of qualifications or unsuitability.

An allegation of an improper recruiting practice (IRP) must be reported to Headquarters, USAREC, and an investigation under Army Regulation 15-6 [2] will usually be conducted. [3] USAREC Reg. 601-45 defines the term "improper recruiting practices" and is punitive. When the investigating officer (IO) interviews a recruiter who has been accused of IRP, the IO must advise the recruiter of his or her Article 31 [4] rights. Because of the AR 15-6 investigation, it is not unusual for sixty or more days to pass between the date of the first report of an IRP, and the date of final action. In other cases, there is no requirement for an AR 15-6 investigation; they tend to be processed more rapidly.

Regardless of the nature of the proposed relief, the recruiter will be given a written notification that relief is being considered, and why the initiating commander believes relief is appropriate. If the relief is for unsuitability, the recruiter typically will be suspended from recruiting duties; a recruiter pending relief for ineffectiveness or loss of qualifications usually will not be suspended.

[1] Dep't of Army, Reg. No. 601-1, Personnel Procurement—Assignment of Enlisted Personnel to the U.S. Army Recruiting Command (22 July 1985) [hereinafter AR 601-1].

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

[3] *See* USAREC, Reg. No. 601-45, Procedure for the Reporting, Investigation, and Disposition of Allegations of Improper Recruiting Practices (1 Apr. 1985) [hereinafter USAREC Reg. 601-45].

[4] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

Upon receipt of notification, the recruiter has ten days to submit a written rebuttal; an extension may be granted for good cause. He or she will usually be given the chance to consult with a judge advocate concerning the rebuttal. The recruiter's unit will provide clerical support for the rebuttal, if requested by the recruiter.

The recruiter's rebuttal, together with the letter of notification and any supporting documentation, is forwarded through command channels to the commanding general (CG), USAREC. The CG is the approval authority for all relief actions. The recruiting battalion and brigade commanders prepare endorsements when the packet reaches them. The recruiter does not have the right to a formal hearing in the relief process; however, he or she may ask for an open door meeting with the commander at each level, including the CG. Ordinarily, the request for an open-door meeting is granted.

As a rule, only outstanding soldiers are selected for recruiting duty. Thus it is unlikely that a good soldier defense, standing alone, will defeat a relief for unsuitability. A recruiter may be able to argue that his or her track record as a soldier or recruiter outweighs the problem that generated the relief action.

The relief packet must be reviewed twice for legal sufficiency. The first review is done by the brigade judge advocate; the second review is performed by the Command Legal Counsel, Headquarters, USAREC.

Recruiter reliefs are quite different from the typical relief for cause. The aiding judge advocate needs to be aware of these differences when advising his or her client. An erroneous assumption about the nature of the proposed relief, or a misunderstanding about the proper focus of the recruiter's rebuttal, may destroy the client's attempts to combat the relief.

Relief from Recruiting Duties

References are to AR 601-1

Type of Relief	Reason for Relief	Type of Enlisted Evaluation Report (EER)	Eligible to Return to Recruiting
Unqualified. Paragraph 5-4.	Physical or medical limitation, financial hardship, or unfavorable incidents involving a family member.	Change of Duty.	Yes, with approval of CG, USAREC and CG, MILPERCEN.
Ineffective *new* recruiter. Paragraph 5-5*b*.	Must be in first nine months on recruiting duties, and have demonstrated a lack of attributes of a successful recruiter, or failed to progress in Transitional Training and Evaluation (TTE) Program. Typically must have been on recruiting duty for six months.	Change of Duty.	No.
Ineffective recruiter. Paragraph 5-5*a*.	Failure to attain or sustain assigned production levels; failure to respond to training and counselling, including Ineffective Recruiter Program training; failure to maintain knowledge of regulations, programs, policies and procedures.	Relief for Cause.	No.
Unsuitable recruiter. Paragraph 5-6.	Commission of improper recruiting practices; failure to meet or maintain acceptable standards of conduct; failure to maintain personal appearance standards; mismanagement of personal income.	Relief for Cause.	No.

Petitions for Extraordinary Relief

Petitions for extraordinary relief filed with the U.S. Army Court of Military Review by trial defense counsel seldom are in proper form. The required contents of a petition are set forth in Rule 20(a) of the Courts of Military Review Rules of Practice and Procedure (Army Reg. 27-13 or 22 M.J. at CXXVII). Petitions that do not meet those requirements risk not being accepted by the Clerk for filing.

Petition format is prescribed by Rule 20(b). Although the joint CMR rules do not include an example, an excellent example is in Court of Military Appeals Rule 28(a) (15 M.J. at page CXL). In petitions filed by electronic message (address CUSAJUDICIARY FALLS CHURCH VA// JALS-CCR//) material shown centered in CMA Rule 28(a) should begin at the left margin in standard message format. For example, paragraph 1 should begin "THIS IS A PETITION TO USACMR FOR EXTRAORDINARY RELIEF IN THE NATURE OF. . . . THE PETITIONER IS [GRADE, NAME, SSN]. . . . THE RESPONDENTS ARE [GRADE, NAME, POSITION WITH RESPECT TO THE CASE] . . . AND THE UNITED STATES OF AMERICA." The section titles shown centered in CMA Rule 28(a) should be used to begin new paragraphs at the left margin.

A petition for extraordinary relief and its accompanying brief on behalf of the petitioner must be filed in an original and two copies. When the petition and brief are filed by electronic message, they will be reproduced at the Clerk's office, but the required number of typescript copies must be sent immediately by mail.

Do not overlook the requirement that a copy of the petition also must be delivered, mailed, or transmitted to each respondent. In almost all cases, the government ("the United States of America") is named a respondent. That copy must be served on the Chief, Government Appellate Division, U.S. Army Legal Services Agency, 5611 Columbia Pike, Falls Church, VA 22041-5013 (message address CDRUSALSA FALLS CHURCH VA//JALS-GA//).

When a petition is filed on behalf of an accused by military trial defense counsel, the Clerk of Court always designates the Chief, Defense Appellate Division, to represent the petitioner in the appellate court. If it is filed by civilian trial defense counsel, military appellate counsel are not assigned unless requested by the petitioner. Counsel filing the petition should always include the address and telephone number at which he or she may be contacted by appellate counsel.

Patents, Copyrights, and Trademarks Note

The Army Patent Licensing Program

John H. Raubitschek
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Many people are surprised to learn that the Army has a large patent portfolio. It is second only to the Navy in the number of patents owned by a Federal agency. At the end of Fiscal Year (FY) 1976, Army held 5,551 unexpired[1] patents in comparison to Navy's 9,521.[2] Together, the Army and the Navy had over half of the government's 28,021 patents. It is expected that the size of the government's patent portfolio will decrease dramatically over time as the patents expire because the agencies have become more selective in their filing and those patents on which maintenance fees are required will probably be allowed to lapse if they are not licensed.[3]

The large number of patents in DOD was accumulated for defensive purposes; that is, by patenting its technology, DOD sought to lessen the risk of being sued for patent infringement by others. This policy started to change in 1971 when President Nixon issued a statement to encourage federal agencies to license its patents.[4] This initiative was delayed when a suit was filed in 1973 alleging that the government-wide licensing regulations[5] were unconstitutional.

[1] Under 35 U.S.C. § 154 (1982), the patent term is 17 years, but this may be extended for a short period of time under section 155 because of regulatory review by an agency such as the Food and Drug Administration.

[2] 1973-1976 Annual Report of the Federal Council of Science and Technology (FCST) 440 [hereinafter 1973-76 FCST Annual Report].

[3] In FY 1976, the agencies filed 1,587 patent applications according to the 1973-76 FCST Annual Report, *supra* note 2, at 417. It is now estimated that the number is less than 1,000. In a recent draft Government Accounting Office (GAO) report (GAO/RCED-87-44) entitled Patent Policy: Recent Changes in Federal Law Considered Beneficial, the Department of Defense (DOD) and the Department of Energy (DOE) were reported in Table 3.1 on page 39 to have filed 883 patent applications in FY 1986. This does not include any data from the National Aeronautic and Space Administration (NASA), the only other agency having significant patent activity. NASA's total is 115.

[4] 36 Fed. Reg. 16,887 (1971).

[5] Issued by General Services Administration on 6 August 1982, 47 Fed. Reg. 34,148, 34,151 as 41 C.F.R. Part 101-4, and reissued by the Department of Commerce on 12 March 1985, 50 Fed. Reg. 9801, 9804 as 37 C.F.R. Chapter IV. The Department of Commerce was assigned regulatory responsibility under Pub. L. No. 98-620, which was codified in 35 U.S.C. § 208 (Supp. II 1984).

Although the government won on appeal, there was still a cloud over its licensing program because the court ruled that the plaintiff lacked standing and so never addressed the issue of constitutionality.[6] This concern was disposed of when Congress in 1980 gave all agencies the express authority to license their inventions.[7] Accordingly, the Army's licensing program should be considered rather new.[8]

The purpose of the government's licensing program is to promote the utilization of government-funded technology.[9] In the Army, exclusive patent licenses have been signed by the Secretary but are now executed by the Assistant Secretary, Research, Development and Acquisition (SARDA).[10] Non-exclusive licenses are signed by the Chief, Patents, Copyrights and Trademarks Division, USALSA, who has the responsibility for negotiating all licenses.[11] The handling of patent licenses within the Army is expected to change in view of the Federal Technology Transfer Act of 1986, which explicitly authorized laboratory directors to negotiate patent licenses.[12]

The Army publicizes its inventions through the National Technical Information Service (NTIS), an agency of the Department of Commerce, which does this for all agencies without charge. NTIS provides information on these inventions in a number of its publications, including the weekly Government Inventions for Licensing Abstract Newsletter, the annual Catalog of Government Patents, and the Tech Note service. This information is also on the NTIS computer data base which is accessed by various commercial services. For agencies such as the Army and the Air Force, which have a memorandum of understanding (MOU) with NTIS, their applications and patents are published in the Federal Register as being available for licensing.

The inventions are sent to NTIS in the form of patents and patent applications without the claims by the particular legal office filing the application. Claims are not provided because the patent application may become involved in an interference proceeding before the Patent and Trademark Office in which two or more different inventive entities are claiming the same invention. Not all the Army applications or patents are sent to NTIS but only those considered by the legal office to have significant commercial potential and, of course, owned by the Army. Copies of these patents and applications are sold to the public by NTIS for $1 and $6, respectively. It is not clear how effective this method of publicizing the Army's inventions is because many of the licenses granted seem to have been based on a particular company's familiarity with the inventor or the laboratory's research through scientific publications and conferences. In fact, on several occasions we have been contacted by a company about a license even before a patent application has been filed. Nevertheless, agencies are required to publish in the Federal Register their inventions which are available for licensing at least three months prior to granting an exclusive license unless the agency determines that expeditious granting of such a license will best serve the interest of the Federal government and the public.[13] Interested parties, who may include the inventor, are required to submit an application for either a exclusive or non-exclusive license.[14]

As part of the application, there must be a detailed description of the plan for development and/or marketing the invention, which includes how much money is required to bring the invention to the point of practical application and a statement as to the applicant's capability and intention to fulfill the plan. The plan does not have to be performed directly by the licensee but could be another party, which would usually be a sublicensee. This is generally the situation when the licensee has no manufacturing capability, such as a university. In addition, the application must include some other items.

The plan is reviewed by the Patents, Copyrights and Trademarks Division, USALSA, in consultation with the inventor and his or her laboratory. If the plan is considered acceptable, negotiation of the terms is initiated. It is not unusual for questions to be asked about the plan and occasionally changes are required. The plan is exempt from release under the Freedom of Information Act.[15]

A notice providing the public the opportunity to file written objections to the grant of the license must be published in the Federal Register at least sixty days before execution of any exclusive license,[16] with a copy being sent to the Attorney General.[17] Accordingly, we generally publish our intent to enter into a license with a specific company before the negotiation is completed. After expiration of this period and consideration of any written objections, the exclusive agreement is finalized and sent to SARDA for execution. To date, we have received no comments from the Attorney General and only one formal objection from the public on an exclusive license. In that instance, the license was granted over the objection, but the period of exclusivity in the

[6] Public Citizen, Inc. v. Sampson, 180 U.S.P.Q. 497 (D.D.C. 1974), *rev'd*, 515 F.2d 1018 (D.C. Cir. 1975).

[7] Pub. L. No. 96–517, 35 U.S.C. § 207(a)(2) (1982). Prior to this time, only NASA and DOE had such authority in their individual enabling statutes.

[8] Chapter 10 was added to Dep't of Army, Reg. No. 27–60, Legal Services—Patents, Inventions, and Copyrights (15 May 1974) [hereinafter AR 27–60] on 24 June 1976 by Change No. 2 and revised by Interim Change No. I01 on 22 January 1984. Although the interim change has expired, it is still being followed. Dep't of Defense Directive No. 5535.3, Licensing of Government-Owned Inventions by the Department of Defense (Nov. 2 1973) provides general guidance.

[9] 37 C.F.R. § 404.2 (1986).

[10] General Orders No. 15, HQ, Dep't of Army, para. no. 8(c)(5) (16 Dec. 1980) gave SARDA the authority to approve exclusive patent licenses. This was not changed when the General Orders was revised on 12 June 1985.

[11] Delegation of signature authority was made in memoranda signed by the Secretary of Army on 26 June 1956 and 1 September 1965. The 1956 delegation was limited to royalty-free nonexclusive licenses.

[12] Section 2 of Pub. L. No. 99–502.

[13] 37 C.F.R. § 404.7(a)(1) (1986).

[14] 37 C.F.R. § 404.8 (1986).

[15] 35 U.S.C. § 209 (1982); 37 C.F.R. § 404.14 (1986).

[16] 37 C.F.R. § 404.7(a)(1)(i) (1986).

[17] 37 C.F.R. § 404.9 (1986).

license was limited to two years. Any decision not to grant a license or to dismiss an objection to a grant is appealable.[18] The deciding official in the Army is the Assistant Judge Advocate General for Civil Law.[19]

Before the grant of any exclusive license, all agencies are required to make four specific determinations.[20] These are made in the Army by the Chief, Patents, Copyrights and Trademarks Division prior to submission of the license to SARDA for signature. There is generally no problem in making the determinations, with perhaps the exception of the one that the desired application has not been nor is likely expeditiously to be achieved under any nonexclusive license that has been or may be granted. It is assumed that the applicant's unwillingness to accept a nonexclusive license and the lack of any request for such a license from another permits the agency to make this determination. Also, if the agency is aware of any unlicensed use, it will be difficult for it to determine that an exclusive license is necessary to call forth risk capital to bring the invention to practical application.

Finally, the agency has to be sensitive to the potential impact the license may have on competition. The law does not permit an agency to grant an exclusive license if it determines that such a grant will tend to substantially lessen competition or result in undue concentration in any line of commerce to which the invention pertains.[21] The failure of the Assistant Attorney General, Antitrust Division, to object when we send him a copy of the Federal Register notice of our intent to grant an exclusive license is generally regarded as clearance from antitrust concerns.

The terms of Army licenses differ because the value of the technology as perceived by a licensee vary. There are a number of required clauses and restrictions, however.[22] The specific terms that usually involve the most negotiation are royalties and period of exclusivity. These are arrived at considering the licensee's investment and the estimate of how long it will take to get the invention to the market place. The rates range from 5 to 10% for exclusive licenses to less for nonexclusive licenses, most of which are royalty free. Prior to Public Law 96–517, agencies did not charge for nonexclusive licenses. Royalties are usually based on commercial sales, although there may be annual minimum payments and an execution fee. The period of exclusivity may be from two years to the life of the patent, which is somewhat unusual. At one time, the Army limited the term to five years.

Government agencies are also authorized to license foreign patents.[23] This is of limited significance for the Army, however, as it does not have a foreign filing program. Because some of the Army's inventions may be worth protecting abroad, in 1982 we entered into an MOU with NTIS, which would not only file foreign patent applications but also license them for the Army. Under the MOU, NTIS would select those inventions for foreign protection and keep the royalties in excess of the fifteen percent awarded to the inventor. Statutory basis for the MOU was provided by Public Law 96–517, which permits one agency to transfer custody of its inventions to another.[24] Although we have transferred custody of several inventions, NTIS has foreign filed on only one Army invention jointly made with the National Institute of Health (NIH) for the treatment of malaria, which it also licensed to a U.S. drug company.

As indicated in the table below, the number of licenses and amount of royalty income generated by the Army's program has been rather modest although comparable with the other services.[25] In addition, the Army's income does not reflect actual commercialization because all except $1010 came from a 1977 nonexclusive foreign license with Canada on a military invention. We extended Canada's royalty free license under our informal reciprocal filing arrangement to a world-wide royalty bearing license. Thus, whenever Canada sells the invention outside of Canada, the Army receives a royalty.

The reciprocal filing arrangement involves the Army and Canada sending their patent applications to each other and permitting the receiving country to file a patent application in its country at its expense in exchange for a royalty free license. Although this could interfere with our licensing program if Canada elects to file a patent application on an Army invention by limiting the foreign rights available, it has not because very few Army inventions are patented abroad.

Royalty Income (Licenses Granted)

	Fiscal Year				
	82	83	84	85	86
Army	$31K(4)	$24K(5)	$10K(5)	$5K(0)	$8K(1)
Navy	$58K(15)	$28K(9)	$15K(11)	$8K(5)	$6K(0)
AF	–0– (0)	–0– (0)	–0– (1)	$6K(2)	$7K(0)
Total	$89K(19)	$52K(14)	$25K(17)	$19K(7)	$21K(1)

These figures for DOD are not very impressive, especially when compared with those reported by NTIS.[26] For example, NTIS' royalties were $868K for FY 84, $1.5M for FY 85, and estimated at $4M for FY 86. Most of this income is attributable to medical inventions from NIH. We expect that the Army's licenses and income will increase because of the Federal Technology Transfer Act of 1986 which allows the agencies to keep the royalty income and share up to $100,000 a year with its inventors.

[18] 37 C.F.R. § 404.11(a) and (c) (1986).

[19] AR 27–60, para. 10–16*a*.

[20] 35 U.S.C. § 209(c)(1)(A)–(D) (1982); 37 C.F.R. § 404.7(a)(1)(ii)(A)–(D) (1986).

[21] 35 U.S.C. § 209(c)(2) (1982).

[22] 35 U.S.C. § 209(b) and (f) (1982); 37 C.F.R. § 404.5 and § 404.7(a)(2) (1986). One of these requirements, that the licensee must manufacture the invention substantially in the United States, severely limits the agencies in licensing foreign corporations in the United States. Because the statute and the regulation uses the word "normally," an agency could waive this requirement. To date, however, this has not been done.

[23] 35 U.S.C. § 209(d) (1982).

[24] 35 U.S.C. § 207(a)(4) (1982).

[25] GAO Report, GAO/RCED–85–94, Aug. 29, 1985, at 9 and 10. The FY 1985–6 statistics were added by the author, who contacted the other services.

[26] NTIS report, Comparative Survey of Selected Private Sector Technology Transfer & Patent Management Organizations, June 1986, PB 86–227519, at 1 and 2.

If a licensee does not adhere to the marketing or development plan, the license may be terminated if the licensee cannot otherwise demonstrate that it has taken or can be expected to take within a reasonable time effective steps to achieve practical application of the invention.[27] The plan is important because it is part of the consideration for the government granting a license. To date, we have terminated a number of nonexclusive licenses but no exclusives. A decision to terminate is appealable to the Assistant Judge Advocate General for Civil Law.[28] There have been no appeals because the only terminations have been when the licensee lost interest and gave up.

During a license, things may become very complicated if there is or may be infringement by an unlicensed party. Although the Army usually retains the right to file suit, the exclusive licensee may if suit is not filed within a specified period of time. Because the Army cannot sue on its own, it requests the Department of Justice to take appropriate action. We have had only one serious question of infringement that was not referred to the Department of Justice because after we visited the potential infringer's plant in Texas, we were not convinced that there was infringement. We had to persuade the licensee, which was very concerned about the matter, however. We note that the Department of Justice has filed an infringement suit on only one occasion and this action is still pending.[29]

Another approach to address an infringement problem was taken by the Department of Agriculture which requested the International Trade Commission to launch an investigation under section 337 of the Tarriff Act of 1930, as amended,[30] to keep out of the country some devices that were believed to infringe its licensed patent. The investigation was terminated because the patent was being reexamined in the U.S. Patent and Trademark Office.[31] Any reluctance on the part of either the government or the licensee to enforce Government-owned patents will make it difficult for the government to have a successful licensing program.

Regulatory Law Office Note

The Tax Reform Act of 1986 reduces, as of July 1, 1987, the corporate federal income tax rate from 46 percent to 34 percent. I.R.C. § 11(b) (1986). This results in a "blended" 40 percent rate for calendar year 1987. I.R.C. § 15. Because income tax expense is a recoverable operating expense for public utilities, the revenue requirement of these utilities should decrease as a result of the lower corporate tax rate. This should translate generally into lower rates for utility ratepayers, including most Army facilities, provided such utilities' other expenses do not increase enough to offset any tax savings. The regulatory commissions will eventually make these determinations.

There also will be favorable consequences flowing from the so-called reserve for federal income taxes. Deferred tax reserves result when a utility takes advantage of accelerated depreciation for tax return purposes, but is allowed to use straight-line depreciation for ratemaking purposes. The difference between the amount of taxes paid under accelerated depreciation and that which would be paid under straight-line depreciation is placed in a reserve account. As the amount of a utility's annual depreciation deduction decreases over a period of years, it gets closer to, and eventually falls below, the amount allowable under the straight-line method. When the amount of this deduction falls below the straight-line amount, the utility draws upon the reserve account to make up the difference between its tax liability to the government and the amount of funds it has collected from the ratepayers. Most utilities have accumulated reserves to comply with the 46 percent corporate rate but will only have to pay taxes at the 34 percent rate.

This excess will not be returned to the ratepayers immediately. The Tax Reform Act requires that the excess be normalized over the depreciable asset's straight-line life if the utility is to continue to use the accelerated depreciation method. I.R.C. § 168(i)(9). State utility commissions are not likely to require utilities to flow this excess through to ratepayers in a shorter time frame because the benefits of accelerated depreciation would then be lost. This will have a long-term downward effect on rates on the average, which will tend to benefit Army installations.

While the utilities and ultimately the ratepayers should benefit from the reduction of the federal corporate income tax rate, the Tax Reform Act also eliminates a major benefit of the prior law. Under prior law, a utility could gain a tax credit for a portion of its investment in certain tangible personal property. I.R.C. § 46. The Tax Reform Act eliminates the investment tax credit for property placed in service after December 31, 1985. I.R.C. § 49. The loss of the investment tax credit is detrimental because most utilities are capital intensive. When balanced against the reduction in the corporate tax rate, however, the loss of the investment tax credit should not increase many utilities' net tax liability.

There are other changes in the Internal Revenue Code that are too numerous to discuss in this short note. The important point is that most regulated utilities' total tax liability will decrease as a result of the Tax Reform Act of 1986. The incidence of federal income tax is passed on to the ratepayers; consequently, the benefits of the Tax Reform Act should exert downward pressure on utility rates.

Army installations should benefit from the Tax Reform Act because they are major users of regulated utility services. The Regulatory Law Office will file comments and intervene in regulatory proceedings implementing the effects of the Tax Reform Act, as is necessary to protect the consumer interest of the Army. Judge advocates and legal advisors should become aware of any orders by, or proceedings of, state utility commissions implementing the effects of the Tax Reform Act for utilities that serve their installations. Notice of any such orders or proceedings should be directly forwarded to the Regulatory Law Office.

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[27] 35 U.S.C. § 209(f)(2) (1982).

[28] AR 27-60, para. 10-16*a*. The procedure for termination is described in Section VI.

[29] United States v. Telectronic Proprietary, Ltd., 607 F. Supp. 1052, 224 U.S.P.Q. 869 (D. Colo. 1983). This suit was filed on behalf of the Navy which had exclusively licensed the patent.

[30] 19 U.S.C. § 1337 (1982).

[31] Block v. United States International Trade Commission, 228 U.S.P.Q. 37 (Fed. Cir. 1985).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Notes

Confidentiality of Medical Quality Assurance Records

Section 705 of the Department of Defense Authorization Act[1] created a statutory privilege for medical quality assurance records and established penalties for a willful unauthorized disclosure of protected materials. The new law, to be codified as 10 U.S.C. § 1102, prohibits the release, with certain specified exceptions, of quality assurance records, defined as "the proceedings, records, minutes, and reports that emanate from quality assurance program activities."[2] The privilege precludes the release of records through the discovery process in civil litigation, prevents their admissibility in evidence, and exempts quality assurance records from release under the Freedom of Information Act.[3] The statute also prevents individuals who have created, reviewed, or participated in proceedings that created or reviewed quality assurance records, or who have possession of or access to such records, from testifying as to the contents of the records. Authorized disclosures include release to an officer, employee, or contractor of DOD who has need for the information in the performance of his or her official duties, to accrediting and licensing agencies involved in the accreditation or monitoring of health care facilities or individual practitioners, to other medical care facilities if needed to assess the qualifications of a present or former DOD health care provider, and to criminal and civil law enforcement agencies when an authorized representative of the agency makes a request in writing that the information be provided for a purpose authorized by law. The statute also permits release to an administrative or judicial proceeding brought by a health care provider concerning the termination, suspension, or limitations of the individuals clinical privileges. Major Wooduff.

Digests of Opinions of The Judge Advocate General

DAJA-AL 1986/1767, 27 May 1986. AR 15-6 Cannot Be Used in Lieu of the Provisions of AR 40-66 for Decredentialing Actions.

Dept. of Army, Reg. No. 40-66, Medical Services—Medical Record and Quality Assurance Administration, para. 9-17 (31 Jan. 1985) [hereinafter AR 40-66], provides that a hearing committee called to determine whether a practitioner's clinical privileges to practice medicine should be limited, suspended, or revoked, will be composed of at least three physicians, one of whom will be a member of the practitioner's medical specialty. The use of a single officer as a board of officers under Dept. of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers, (31 Oct. 1977) (C1, 15 Jun. 1981) [hereinafter AR 15-6], will not suffice as a substitute for the provisions of AR 40-66 in the face of a timely request for a hearing committee by the practitioner.

The issue presented arose after Dr. C., a general medical officer (GMO) at a small overseas Army medical clinic, admitted a pregnant patient with vaginal bleeding to the clinic for observation. Dr. C. then left the clinic and failed to write orders for the medics to follow in monitoring the patient during the night. The patient continued to hemorrhage and by morning her hematocrit had fallen from her prenatal normal of 39% to the dangerously low level of 24%. She was immediately evacuated to the nearest military hospital where prompt administration of blood and other emergency measures averted a tragedy.

Due to questions concerning Dr. C's. handling of the patient, decredentialing action was initiated. Dr. C., however, was the chairman of the credentials committee. Furthermore, there were no other physicians at the small clinic who were not involved at some point in the patient's care available to constitute the hearing committee required by AR 40-66. In an effort to provide Dr. C. with the procedural right to a hearing, the MEDDAC commander, after coordination with the commander of the regional medical center, appointed a physician specializing in emergency medicine at the regional medical center as a board of officers under AR 15-6. This physician was directed to conduct a formal investigation, and to make findings concerning Dr. C's. treatment of the patient and recommendations concerning his clinical privileges. A legal advisor was appointed and Dr. C. was provided counsel for representation. The letter of appointment specifically stated that the Board of Officers was to be in lieu of proceedings under AR 40-66, para. 9-17.

The board found that Dr. C's. treatment was substandard and recommended that his clinical privileges to practice in the emergency room be suspended indefinitely and that the records of other patients seen by him be reviewed by another physician for six months. The commander approved the findings and recommendations of the board and Dr. C. appealed.

In reviewing the appeal at the request of The Surgeon General, The Judge Advocate General determined that decredentialing is a significant adverse action as it can lead to elimination proceedings. Furthermore, the provisions of AR 40-66 that require a hearing committee composed of at least three physicians, one of whom must be a member of the practitioner's specialty, provide substantive benefits to the individual. On the facts presented there were no "overriding mission constraints, critical physician shortages in the theater, or any other exigency of the service" that justified a departure from the established procedure. A formal board of officers composed of only one physician, who was not a GMO, was not an appropriate substitute for the hearing committee provided for in AR 40-66, even though the AR 15-6 procedure offered additional benefits not provided for in AR 40-66, *i.e.*, counsel for representation. Accordingly, the appeal was returned to The Surgeon General with a recommendation that it be granted and with the advice

[1] Pub. L. No. 99-661, signed 14 Nov. 1986.

[2] *Id.* § 705(j)(2)

[3] 28 U.S.C. §§ 1346(b); 2671-2680 (1982).

that nothing precluded a new decredentialing action by a properly constituted committee.

DAJA–AL 1986/1922, 3 Jun 86. TJAG Reaffirms Dual Compensation Act's Bar Prohibiting Moonlighting Physicians From Accepting Payment For Treating Medicare, Medicaid, or CHAMPUS Beneficiaries.

The commander of an Army community hospital sought guidance from The Judge Advocate General concerning the propriety of off-duty Army physicians accepting payment for treating patients entitled to federally funded health care benefits. The local civilian hospital, due to its rather remote location, depended heavily upon moonlighting Army physicians in order to render appropriate care to its patient population. Department of Defense Directive No. 60235.7, Off-Duty Employment By DoD Health Care Providers (Oct. 21, 1985), specifically precludes off-duty physicians from soliciting or accepting compensation, either directly or indirectly, from patients entitled to treatment in DOD medical facilities. Because a large number of the patients in the civilian community were Medicare/Medicaid recipients, rather than CHAMPUS beneficiaries, the question posed was whether the DOD Directive, or any other rule, precluded Army physicians from treating these patients in the course of their off-duty employment.

The Judge Advocate General opined the Dual Compensation Act, 5 U.S.C. § 5536 (1982), as well as Comptroller General precedent and previous TJAG opinions, barred the activity in question. The same issue was addressed in DAJA–AL 1984/1056, 27 Feb. 1984. In that opinion, The Judge Advocate General ruled that the receipt of Medicare/Medicaid funds by off-duty Army physicians was precluded by the provisions of the Dual Compensation Act. Thus, absent a statutory change, military physicians may not accept payment for treating Medicare/Medicaid or CHAMPUS beneficiaries in the course of their off-duty employment.

Criminal Law Notes

Inventories—*Colorado v. Bertine*

On January 14, 1987, the Supreme Court announced its most recent decision on administrative inventories in *Colorado v. Bertine.*[4] In *Bertine,* a police officer in Boulder, Colorado, arrested Steven Bertine for driving under the influence of alcohol. A tow truck was called to impound the automobile (a van), but before the tow truck arrived, the contents of the van were inventoried by a back-up police officer. Behind the front seat of the van, the officer discovered a backpack. In the backpack was a nylon bag containing several metal canisters. The officer opened the canisters and discovered cocaine, methaqualone tablets, paraphernalia, and $700 in cash. He also found an envelope containing $210 in a zipped pouch of the backpack. The Colorado Supreme Court, relying on *Arkansas v. Saunders*[5] and *United States v. Chadwick,*[6] held that the search of the backpack, like the search of closed trunks and suitcases, violated the fourth amendment. The Supreme Court reversed. The Court noted that inventory searches are now a well-defined exception to the warrant requirement of the fourth amendment. The inventory in this case was prescribed by the Boulder Revised Code which required a "detailed inventory involving the opening of containers and the listing of [their] parts."[7] Unlike *Chadwick* and *Sanders,* the policeman in *Bertine* was not conducting a search "solely for the purpose of investigating criminal conduct."[8]

The Supreme Court recognized the inventory exception to the warrant requirement in *South Dakota v. Opperman.*[9] In *Opperman,* the Court upheld the inventory of a vehicle that had been impounded after receiving several parking citations. During the inventory, police opened the unlocked glove compartment of the vehicle and discovered marijuana. In upholding the inventory, the Supreme Court noted that inventories serve three important governmental interests: first, they safeguard and protect the personal property of the owner; second, they protect the government against false claims for lost or stolen property; and, third, they protect the authorities in custody of the property from dangerous items that may be contained in the property.

Seven years later, in *Illinois v. Lafayette,*[10] the Supreme Court again considered the inventory issue. In *Lafayette,* the suspect was arrested for disturbing the peace. When he arrived at the police station, he was carrying a shoulder bag. The contents of the shoulder bag were inventoried pursuant to established police procedures. The Supreme Court ruled that a pre-incarceration inventory of personal effects did not violate the fourth amendment. Again the Court discussed the important governmental interests that were protected by the inventory. Of greatest significance was the threat to guards and other prisoners posed by dangerous items that could be carried on the confinee's person. In *Lafayette,* the defense argued that the important governmental interests articulated in *Opperman* could be served without the necessity of a search. Specifically, the defense argued, and the police who conducted the inventory agreed, that the shoulder bag could simply have been sealed in a plastic container and retained in an evidence safe until Lafayette was released. In other words, the defense contended that when less intrusive means were available, they should be employed. The Supreme Court declined to impose on police the burden of making "fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."[11] To the contrary, the Supreme Court concluded that when police followed established, reasonable police regulations relating to inventories, the fourth amendment was not violated even when a less intrusive

[4] 55 U.S.L.W. 4105 (U.S. Jan. 14, 1987).

[5] 442 U.S. 753 (1979).

[6] 433 U.S. 1 (1977).

[7] 55 U.S.L.W. at 4106 (quoting the record of trial).

[8] *Id.*

[9] 428 U.S. 364 (1976).

[10] 462 U.S. 640 (1983).

[11] *Id.* at 648, *quoted in Bertine,* 55 U.S.L.W. at 4107.

means of protecting important governmental interests was available.

Bertine goes further than either *Opperman* or *Lafayette*, as an examination of the dissenting opinion reveals.[12] First, the search in *Bertine* involved the search of Bertine's backpack, a container in which personal and private property is often carried. The expectation of privacy in a backpack is much greater than one's expectation of privacy in the glove compartment of an automobile. While the expectation of privacy in *Bertine* was greater than in *Opperman*, the existence of important governmental interests was lesser. Bertine's van was impounded in a lighted, private storage lot surrounded by a locked six-foot fence. The lot was patrolled by private security officers and police and nothing had ever been stolen from a vehicle in the lot. In *Opperman*, the car was impounded in a lot that was in an old county highway yard. It had a partial wood fence and a dilapidated wire fence around it. The dissent in *Bertine* argued that protection of the owner's property was amply ensured by the impound facility and, upon balancing the privacy rights sacrificed by the inventory against the minimally additional protection afforded by the inventory, the inventory was in violation of the fourth amendment.

The dissent in *Bertine* also contended that the inventory procedure was unconstitutional because it left too much discretion with the law enforcement officials who conducted the inventory. Specifically, it appears from the record that the police officer could have "parked and locked" the car or impounded it as he did in this case. When an automobile is "parked and locked," it is not inventoried. Bertine was not told that the "park and lock" alternative was available or he would have requested it. The dissent suggested that a "park and lock" would have been more appropriate in this case because several public parking places were available and, because of the nature of the arrest, Bertine would probable be free to secure the automobile in a few hours. Nevertheless, the dissent's primary contention was that the law enforcement officer was given too much discretion in deciding which procedure to follow.

Chief Justice Rehnquist, writing for the majority of the Court, concluded that "reasonable police regulations relating to inventory procedure administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[13] In this case, the inventory procedures were designed to protect the governmental interests as articulated in *Opperman*, and the fact that the interests could have been protected through some other means was not controlling. Moreover, the Court declined to rule that the police officer who conducts the inventory could have no discretion at all. "Nothing in *Opperman* or *Lafayette* prohibits the exercise of discretion so long as that discretion is exercised according to standardized criteria and on the basis of something other than suspicion of evidence of criminal activity."[14]

In summary, law enforcement regulations concerning inventories that are designed to protect important governmental interests satisfy the fourth amendment. It is apparent from language in the decision that the Court will not tolerate bad faith resort to inventory procedures to conduct a criminal investigation. The key is standardization of procedure. Indeed, three Justices joined in a concurring opinion to "underscore the importance of having such inventories conducted only pursuant to standardized police procedures. The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the *scope* of the search."[15] Major Anderson.

The Risk of Shouting "Mistrial" (in a Crowded Courtroom)

A mistrial is a drastic judicial remedy seldom invoked under normal conditions.[16] Military judges have scrupulously applied this remedy when "manifestly necessary"[17] in the interests of justice, but the act or omission complained of must be such as to cast "substantial doubt" upon the fundamental fairness of the proceedings.[18] For good reason, then, military judges routinely deny requests of counsel for a declaration of mistrial, and because the standard of review on appeal is abuse of discretion, military appellate courts have been reluctant to disturb these trial decisions. Not surprisingly, the number of reported military cases in this area is relatively small.

Recently, in *Burtt v. Schick*,[19] the Court of Military Appeals utilized an extraordinary writ petition to review a military judge's order granting a mistrial requested by the government over defense objection. The Court of Military Appeals' opinion in the case, granting the requested relief, addressed three principal questions: first, was there a mistrial?; second, did the military judge abuse his discretion in ordering a mistrial?; and third, what effect, if any did the

[12] 55 U.S.L.W. at 4108 (Marshall J., joined by Brennan, J., dissenting).

[13] *Id.* at 4107.

[14] *Id.*

[15] *Id.* (Blackmun, J., joined by Powell and O'Connor, JJ., concurring in the result) (emphasis added). Chief Justice Rehnquist would allow the police some discretion in deciding whether an automobile should be impounded and inventoried. Police discretion in deciding whether to impound the vehicle or to park and lock, however, is not unfettered. In *Bertine*, the discretion "was exercised in light of standardized criteria related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it." *Id.* The concurring Justices apparently recognized the right of police to exercise limited discretion in deciding whether an impound and inventory should be conducted, but emphasized that the *scope* of the inventory should never be left to police discretion.

[16] United States v. Pastor, 8 M.J. 280 (C.M.A. 1980); Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 915(a) [hereinafter R.C.M.] R.C.M. 915(a) says in part: "The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." *See* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 56e(2).

[17] R.C.M. 915(a); *see* United States v. Jeanbapiste, 5 M.J. 374 (C.M.A. 1978) (receipt of improper evidence can be cured by remedies short of mistrial); United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976) (mistrial appropriate when trial counsel's argument improperly inflamed passions of court members).

[18] United States v. Brice, 19 M.J. 170 (C.M.A. 1985); *Jeanbaptiste;* United States v. Thompson, 5 M.J. 28 (C.M.A. 1978).

[19] 23 M.J. 140 (C.M.A. 1986).

mistrial have on subsequent proceedings? This note will examine the court's answers, and discuss the lessons *Burtt v. Schick* teaches.

The accused, Matthew S. Burtt, a builder constructionman, U.S. Navy, was tried by general court-martial, before a panel of officers and enlisted members, on charges of conspiracy and rape.[20] The prosecution called the accused's accomplice to testify against him. On cross-examination, the witness admitted he had been tried and convicted for his part in the incident. The defense counsel then asked him: "And you received a year and a bad conduct discharge for what you did?"[21]

Trial counsel immediately objected, and an out-of-court session was held during which the military judge "chastised" the defense counsel for asking about the witness' sentence. After a brief recess, the trial counsel moved for a mistrial, stating that defense counsel's question was improper and tainted the court members as to an appropriate sentence in the accused's case. Over defense objection, the military judge granted the government's motion, ruling that no curative instructive could repair the damage already caused by the question.[22]

Subsequently, a new Article 32[23] investigation was held on the original conspiracy and rape charges and on an additional charge of indecent assault. All three charges were referred to a general court-martial. The defense then filed a petition for extraordinary relief, alleging that the military judge erred in declaring a mistrial, and that former jeopardy barred any subsequent proceeding. Because of the accused's continued pretrial confinement, and in the interests of judicial economy, the court exercised its writ jurisdiction.[24]

The court granted appellant's petition, holding that the military judge abused his discretion in granting the government's motion for a mistrial over defense objection. The court assumed, without deciding, that the question posed by the defense counsel was improper.[25] Even so, the opinion by Judge Cox stated that the military judge could have employed less drastic measures to remedy the problem. The court noted that the question was never answered, a curative instruction was never given, and the disqualification of the members, if any, went only to sentencing and not to findings. Therefore the grant of mistrial was premature, overbroad, and unnecessary, and former jeopardy barred any new trial.[26]

The court took the opportunity to briefly explain the often-overlooked relationship between former jeopardy[27] and mistrial. An accused has a basic right, the court noted, to have a particular tribunal decide his or her case. A military judge should not normally declare a mistrial over defense objection. "When trial is terminated over defense objections, as was done here, the Government has a heavy burden of showing 'manifest necessity' for the mistrial in order to remove the double-jeopardy bar to a second trial."[28] Although R.C.M. 915 states that declaration of mistrial will not bar retrial unless the grant was *both* an abuse of discretion *and* was made over defense objection,[29] it appears, from this case at least, that the second element outweighs the first. When the defense objects to a grant of mistrial, that fact may actually predispose appellate courts to decide that the trial judge's ruling was an abuse of discretion.[30] If the defense chooses to proceed with the trial, despite the risk of prejudice, that choice too will be accorded great weight. The military judge in this situation must articulate an overwhelming reason why, in the interests of justice, the accused cannot have his day in court. This standard obviously favors the accused.

Several points raised in *Burtt v. Schick*, deserve emphasis. First, trial counsel should be extremely reluctant to move for mistrial in the first place.[31] The government's right to a fair trial is seldom in doubt; the military judge can apply other remedies short of mistrial to protect the government's legitimate interests. Second, when the defense moves for a mistrial it waives, in effect, any objection to retrial on grounds of former jeopardy if its motion is granted; if the motion is denied, appellate courts will rarely find that the military judge abused his or her discretion. Therefore, the defense should carefully consider whether a request for mistrial is appropriate. Lastly, *Burtt v. Schick* reminds us all that the concept of mistrial is alive and well, and that we ought to be careful what we ask for, because we might just get it. Major McShane.

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[20] *Id.* at 141.

[21] *Id.*

[22] *Id.*

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

[24] *Id.* at 142 (citations omitted). Burtt was originally placed in pretrial confinement on June 16, 1986. Trial commenced on August 8, 1986. The second Article 32 investigation was held on August 12, 1986. *Id.* at 141. Trial was ordered stayed on September 19, 1986. 23 M.J. 65 (C.M.A. 1986). On October 31, 1986, the Court of Military Appeals ordered the accused released from pretrial confinement. 23 M.J. at 141 n.1.

[25] 23 M.J. at 142. *See supra* note 15. The length of the accomplice's sentence may show or help to explain bias, and thus may be relevant. Trial counsel should consider whether it might not be better in such a case to have the accomplice testify before, rather than after, his or her own trial.

[26] 23 M.J. at 142. The government conceded, and the court agreed, that the additional charge was also barred by former jeopardy. *Id.* at 143.

[27] UCMJ art 44. Jeopardy attaches to a court-martial when evidence on the merits is presented to the trier of fact.

[28] 23 M.J. at 142 (citations omitted); *see* United States v. Rex, 3 M.J. 604 (N.C.M.R. 1977).

[29] R.C.M. 915(c)(2)(A). *See* R.C.M. 915 analysis.

[30] 23 M.J. at 142; *see* United States v. Ghent, 21 M.J. 546, 552 (A.F.C.M.R. 1985): "However, the Supreme Court has specifically and unequivocally prescribed a much higher standard in cases where an accused's right to verdict in one trial is interrupted by the declaration of mistrial over his objection."

[31] Of course, any government misconduct calculated to cause a mistrial will result in a bar to retrial on jeopardy grounds if jeopardy has attached. R.C.M. 915(c)(2)(B).

Legal Assistance Items

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

Consumer Law Notes

Credit Card Interest Campaign

Six national consumer organizations have launched a coalition campaign urging consumers to "Fight and Switch" for lower credit card interest rates. The coalition kicked off the nationwide campaign on January 8, 1987, calling on consumers to fight excessive credit card costs by switching to credit cards with lower rates, refinancing the debt on high interest rate cards with cash advances on lower rate cards or with low-interest consumer loans, and writing to state and federal representatives urging them to support legislation to cap credit card rates and to require improved disclosure of rates and other terms in all credit card advertising. The groups, which include Bankcard Holders of America, Consumer Federation of America, Consumers Union, National Consumers League, Public Citizen, and the U.S. Public Interest Research Group, argued that, while all other loan interest rates have dropped over the past five years, credit card interest rates have increased, with the national average credit card interest rate at over 18%.

Do You Own the Phone?

The sale of Design Line and Decorator Telephones by AT&T and Bell Telephone subsidiaries during the late 1970s and early 1980s is currently under investigation. Although in some cases the consumer intended to buy the entire phone, only the outer plastic housing of the telephone was actually purchased, while Bell Telephone retained ownership of the inner electrical components. The consumer was then charged a monthly fee to lease the electrical components. When AT&T took over the billing for the leased components in 1984, consumers began receiving bills that broke down the charges and discovered that they had been leasing the electrical equipment. Consumers subject to this practice should contact the state attorney general's office.

Automobiles

Advertised prices. Consumers should be alert to auto dealerships that advertise that there are "no additional add-ons to the sticker price" of their cars but then include a preprinted $100 charge for undercoating that is listed neither in the advertisement nor on the vehicle's sticker. A Pennsylvania dealership accused of doing so has agreed to pay a $4,000 civil penalty and has promised that it will not use "false or misleading" statements in its future advertisements.

Supplemental Sticker Prices. Car dealerships have also been accused of stating, in a supplemental sticker, that a "dealer handling charge" was specified by law and reflected the dealership's cost for flooring, inventory maintenance, local advertising, and dealer preparation. Such stickers are allegedly deceptive because they are easily confused with the factory sticker and because the law does not require such dealer handling charges.

Pursuant to a California consent agreement, one dealer using supplemental stickers has agreed to conspicuously disclose that the supplemental sticker contains the dealer's asking price and not the manufacturer's suggested retail price and to list separately the cost of each item and service not included in the manufacturer's suggested retail price. In addition, if the supplemental pricing label does not include any extra items, the dealer must indicate that it is "added profit."

The consumer law section of the California attorney general's office believes that many dealers use supplemental sticker prices to inflate the price of vehicles for negotiating purposes. Consumers who inquire as to the nature of unknown charges may be surprised to discover that the "ADP" or "AMP" added to the factory price is "additional dealer profit" or "adjusted market price." The California investigation has revealed that some dealers increase the asking price of their vehicles up to $2,000 over the manufacturer's suggested retail price to make customers think they are receiving substantial savings when the price is discounted from the supplemental sticker price, even though they are paying substantially more than the manufacturer's own recommended price.

Credit Card Procurement

A temporary restraining order has been issued against a bank credit card procurement business for alleged violations of the Oregon Unlawful Trade Practices Act. These violations include false and misleading representations to consumers concerning their chances of obtaining bank credit cards, which indicate that applicants can obtain VISA and Mastercard credit cards for service charges of $35 for one or $50 for both.

The procurement company allegedly told applicants, many of whom were regarded as poor credit risks, that they had a better than ninety percent chance of having their applications approved, that the applications would go through "bank action agents," that applications would be processed in four to eight weeks, and that the applicant would receive a full refund if the application were not approved. The lawsuit alleges that these representations were not accurate and that the company also failed to disclose to the applicants that they must: complete an additional financial application to a bank; pay a $50 processing fee to the bank; and deposit with the bank, for one year, a sum equalling the credit card's limit plus $100.

Home Study Courses

Pursuant to a refund agreement, the Beckley Group of Fairfield, Iowa, will refund over $2.4 million to more than 8,000 consumers who purchased home study real estate and credit card courses from that company. These home programs, entitled, "No Down Payment Real Estate Seminar" and "Credit Card Millionaire System" (which promoted procurement of large numbers of credit cards in order to use the cash advances from those cards for investment purposes), have been marketed both in seminars held in Iowa and on cable television networks. Captain Hayn.

Estate Planning Note

Will Executions

The importance of proper conduct of will executions has been emphasized in past letters and items in *The Army Lawyer.* An attorney is required to supervise the will execution process. The following script for use in executing wills was provided by Captain Maria Fernandez of the Legal Assistance Office at Headquarters, U.S. Army Europe and Seventh Army.

Instructions for Will Signing

Preparation: Separate the original from the copies of the will.

1. Only schedule one person or couple at a time.

2. Allow twenty minutes between signings.

3. When the client arrives, gather three witnesses.

4. In the presence of the witnesses, ask the client the following:

a. "Please identify yourself for the witnesses by stating your name and producing your ID card."

b. "Have you read this document that is presently before you and do you understand all of its provisions?" (Encourage client to ask questions in the presence of the witnesses).

c. "Do you declare this to be your last will and testament?"

d. "Do you understand that this means that upon your death, your property will be distributed in accordance with the provisions of this will?"

e. "Is your execution of this will your free and voluntary act?"

f. "Are you over eighteen years of age?"

g. "Are you presently experiencing any medical, psychological, or psychiatric condition that impairs your ability to remember important facts about your property, your family, and your friends; or which affects your ability to make sound judgments in personal matters?"

h. "Do you specifically request the people gathered here to witness the signing of your will?"

5. Ask the witnesses:

"Are you satisfied that this is [*Name of Client(s)*] and that he/she is of sound and disposing mind and memory; and that he/she is proposing to execute his/her will as a free and voluntary act?"

6. Have the client(s) sign at the bottom of all pages of the will preceding the page where the signature line is, then sign the signature line and DATE the preceding paragraph. Have the client(s) sign in the presence of all the witnesses.

7. Have the witnesses sign in the presence of each other and of the client(s).

8. Explain to client(s) the purpose of the self-proving clause. Administer oath to client(s) and witnesses. The following oath is suggested:

"Do you swear or affirm that the information provided to me in the answers provided to the questions I have previously posed is true to the best of your knowledge?"

9. Once the self-proving clause is signed, type in the date and names, and type or stamp attorney's name block, affix seal, and assemble the will in the cover.

10. Check the will to ensure that:

a. The client has signed bottom of all pages preceding the signature page.

b. All dates have been filled in re: the signature page, witness page, and self-proving clause.

c. All client, witness, and notary signatures are present.

d. All pages are present and in numerical order.

11. Provide a short briefing to the client(s) including the following:

a. The client(s) should review the will periodically to assure that it accurately represents his/her wishes and desires at any given time. The will should be revised to reflect changing circumstances resulting from births, deaths, divorces, marriages, changes of domicile, etc.

b. Advice that a will cannot be amended by crossing off, lining out, and writing in new provisions. Emphasize that to change a will, the client(s) must see an attorney.

c. The client should be advised that the will should be kept in a safe place. Various alternatives should be discussed with the client. The client should be advised not to have the will in his/her possession while traveling nor to transport it with household goods or hold baggage. In the event that the client is due to PCS, the client may choose to mail the will to the executor by registered mail, return receipt requested, sometime prior to departing for the new duty station. In the event that the client is traveling with a spouse who has been named the executor/executrix of the will, the client can mail the will to the alternate executor or executrix for safekeeping until arrival at the new duty station.

d. Once a client arrives at a new duty station or settles in a state other than where the will was executed, the client should consult with the local legal assistance office or a local attorney about the advisability of having a new will made.

e. Discuss other issues that may be relevant to the client's specific situation.

Tax Note

The Tax Reform Act of 1986 makes major changes in the tax law and is undoubtedly creating numerous questions for legal assistance officers. The new law is extremely comprehensive and complex, and there is a need for more information about the new law. Fortunately, the Army Law Library Service obtained funding to purchase a helpful treatise on the Tax Reform Act of 1986. Research Institute of America has published an excellent reference entitled *The RIA Complete Analysis of the 86 Reform Act.* Legal assistance offices will receive it through a mailout once it is received at TJAGSA.

Claims Report

United States Army Claims Service

Vehicle Damage on Post: A Primer on the Incident to Service Loss and Unusual Occurrence Rules

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It is Monday morning at Camp Swampy, and Private Jones comes out of the barracks to find that his car's bumper has had its shape altered by a not particularly considerate hit-and-run driver. Sergeant Smith, parked next to him, finds numerous long key scratches down the sides of his car and four flattened tires, courtesy of some passing vandal, perhaps a soldier in his unit.

Both Smith and Jones have heard that the Army pays for losses occurring on post, so they set out together to find the SJA claims office. Several hours later, Sergeant Smith is awaiting the issuance of a check. At the same time, Private Jones is trying to figure out why his claim is not a loss "incident to service" and mentally drafting a letter to his Congressman. After all, it happened on post.

Private Jones' letter provides a good starting point. The Army's claims program derives from congressional enactments. Title 31, United States Code, section 3721 (1982) [hereinafter the Act], implemented by chapter 11, Army Regulation 27-20,[1] authorizes the Army to pay for personal property belonging to soldiers and civilian employees of the Army and the Department of Defense that is lost or damaged incident to military service or employment. The Act is a gratuitous payment statute; it is not intended to be a government insurance policy, although the implementing regulation authorizes compensation for many losses that an insurance policy would cover. The Act's basic purpose is to provide a limited substitute for hazard insurance and to relieve hardships that arise when personnel are exposed to unusual risks of loss because of their service.[2] It only authorizes compensation for personal property that is reasonable or useful to use or possess under the attendant circumstances. Incidental expenses and consequential damages related to a loss, such as car rental, loss of use, attorney fees, inconvenience, and time spent in the preparation of a claim, are not payable.[3] A loss caused wholly or partly by the soldier's negligence is not compensable,[4] nor is any loss payable to the extent that it is covered by private insurance.[5]

The key concept is "incident to service." Private Jones is not alone in his confusion over the meaning of the term; there are senior officers who have the same problem. Army claims judge advocates and claims attorneys must understand the concept and dispel the myths and confusion that surround it.

The Act does not define incident to service.[6] The armed services have not, however, applied the term to cover only those losses that arise directly from the actual performance of duty. They have instead defined it in a broader sense to encompass the peculiar circumstances of military living; frequent household moves to remote or overseas locations; the assignment of quarters in unfamiliar communities; and extensive traveling.[7] Generally mirroring positions taken by the Air Force and the Navy, AR 27-20 deliniates those specific categories of losses deemed to be incident to service,[8] and provides the specific regulatory authority for paying for loss of or damage to a vehicle parked on the installation.[9]

A soldier's vehicle that is properly on the installation is presumed to be parked there incident to service, as is a civilian employee's vehicle during normal duty hours, unless

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[1] Dep't of Army, Reg. No. 27-20, Legal Services—Claims, chap. 11 (18 Sept. 1970) [hereinafter AR 27-20].

[2] *See, e.g.*, Dep't of Army, Pam. No. 27-162, Legal Services—Claims, paras. 2-5 and 2-7a (15 Dec. 1984) [hereinafter DA Pam. 27-162].

[3] 31 U.S.C. § 3721(b)(1982); AR 27-20, paras. 11-2*e* and 11-5. Although the statute only allows compensation for the loss of or damage to personal property, the cost of nonreimburseable estimate fees and drayage is considered payable; *but see* AR 27-20, para. 11-15*d*(3).

[4] AR 27-20, para. 11-6*a*.

[5] AR 27-20, para. 11-13*f*. *See generally* AR 27-20, para. 11-13 for a detailed list of the findings required preliminary to the allowance of compensation.

[6] It is clear, however, that "incident to service" as used in the Act has a very different meaning than in the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982) [hereinafter FTCA].

[7] *See* DA Pam. 27-162, para. 2-7.

[8] AR 27-20, para. 11-4 provides that the Commander, U.S. Army Claims Service may authorize payment for losses that do not fit into the categories of paragraph 11-4, but that have sufficient connection to military service or employment to be deemed incident to service.

[9] Automobiles, motorcycles, mopeds, utility trailers, camping trailers, trucks with mounted camper bodies, motor houses, boats, boat trailers, bicycles, and aircraft are all considered "vehicles" for the purposes of AR 27-20, paragraph 11-4*f*. The rules governing the treatment of vehicle losses on the installation generally under paragraph 11-4*f*(4) also apply to vehicle losses at government quarters or government authorized quarters overseas under AR 27-20, paragraph 11-4*f*(3). Different rules govern loss of or damage to privately owned vehicles used in the performance of military duty, however. In general, losses that are not due to a mechanical or structural defect in the vehicle are covered. *See* AR 27-20, para. 11-4*f*(1).

the application of such a presumption would be unreasonable under the particular circumstances.[10] This particular rule was adopted in 1980, expanding on previous practice without attempting to eliminate the requirement that the loss bear some substantial relationship to the claimant's military service or employment.[11] Except in areas designated by a commander as high-risk areas, such as recreational vehicle lots,[12] loss of or damage to vehicles or their contents is cognizable if caused by "fire, flood, hurricane, or other unusual occurrence or by theft, or vandalism."[13] These "hazard losses" fall into three broad categories: losses due to abnormal climatic conditions; losses due to the condition of the installation; and losses due to the intentional torts of vandalism and theft.[14] Because the terms "fire," "flood," "hurricane," "theft," and "vandalism" have specific meanings,[15] controversy generally centers on what constitutes "an unusual occurrence." Although field claims approval and settlement authorities have broad discretion to determine what is unusual in particular areas, some general rules apply.

An unusual occurrence is one that is "beyond the risks of damage or destruction associated with day-to-day living and working."[16] It is a single discrete incident, not a gradual deterioration as with damage to the paint and exterior trim of a vehicle caused by blown sand at various installations in the western United States.[17] An unusual occurrence is something unusual in the normal sense of the word; it is a hazard either of a nature or of a severity that the soldier would not expect to encounter.

During winter months in colder areas, for example, it is not abnormal for snow and ice to accumulate on and sometimes fall from buildings onto vehicles parked below. Such occurrences are relatively frequent; they are not of an unusual nature. At Fort Shafter, Hawaii, such a climatic condition would be abnormal, and an occurrence would be highly unusual. Hail is not an unusual occurrence. Hail that makes baseball-sized dents is and, because of the severity, should be considered unusual even in those areas normally subject to frequent hailstorms.

Occurrences attributable to the condition of the installation should be considered similarly. For example, it is not unusual for a branch to fall from a tree and land on a car. It is unusual if a large tree falls over and lands on a car. Regardless of whether the facilities engineer was negligent in maintaining the trees on the installation, the latter can be considered for payment as a loss incident to service. It is not unusual for power to go out, particularly in areas subject to electrical storms, and damage to a video tape recorder that is alleged to be caused by the power outage would not be the result of an unusual occurrence. If the facilities engineer was unable to restore power for four days, however, causing food to spoil, the spoilage would be considered the result of an unusual occurrence.[18]

There is no strong relationship between a soldier's military service and the mere presence of his or her vehicle on the installation as there is between a soldier's military service and his or her use of his or her vehicle to perform military duty for the convenience of the government. Consequently, paragraph 11–4*f*(4) only protects the soldier from those types of extraordinary hazards that other soldiers and civilians do not face to the same degree, and for the intentional torts of vandalism and theft that may or may not have a strong connection to a particular soldier's military service.[19] Granting this, there is no compelling reason to extend the coverage of the Act to compensate the soldier if someone else negligently damages his vehicle presumably while not acting within the scope of government employment. To Private Jones' dismay, a hit-and-run incident or other collision is not uncommon on or off a military installation and is not considered an unusual occurrence.[20] It should be noted that the insurance industry also distinguishes hit-and-run incidents from hazard losses by considering the former under collision coverage and the latter under comprehensive coverage.

Sergeant Smith's happiness may be limited. The Act only allows compensation for property that is deemed to be reasonable or useful. Although the Act fails to define the term, the three services have jointly adopted a Table of Maximum Allowances that lists the maximum payments considered reasonable for specific categories of property. The maximum payment for the loss of or damage to a vehicle and its contents other than in shipment is $1,000.[21]

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[10] *See* AR 27–20, para. 11–4*f*(6). The following examples illustrate situations where application of the presumption is unreasonable: the claimant fails to register or insure his or her vehicle in accordance with post regulations or applicable state law; an emancipated family member or friend drives the vehicle onto the installation for reasons unconnected with the claimant's service; the claimant abandons the vehicle on the installation; the claimant leaves the vehicle parked in a remote location for an unreasonable amount of time for no particular reason connected with the claimant's service; and the claimant drives his or her vehicle onto an installation not his or her own while on leave or for reasons unconnected with the claimant's military service.

[11] AR 27–20, para. 11–4*f*(6) (C16, 15 Sept. 1980); U.S. Army Claims Service Claims Bulletin 2–80, para. 2f (April 1980).

[12] *See generally* AR 27–20, para. 11–4*f*(4)(a) through (c).

[13] AR 27–20, para. 11–4*f*(4).

[14] *See generally* DA Pam. 27–162, para. 2–7*a*(1).

[15] For example, "fire" is used in the sense of "wildfire." A fire resulting from a malfunction in the operation of the vehicle, such as an engine fire, would not give rise to a claim payable under paragraph 11–4*f*(4).

[16] AR 27–20, para. 11–4*g*.

[17] *See* U.S. Army Claims Service Claims Manual, Personnel Claims Bulletin 95 (15 Oct. 1986); *cf.* DA Pam 27–162, para. 2–7*a*(1).

[18] Airborne emissions claims (claims for the etching or discoloration of vehicles allegedly caused by the discharge of chemicals by Army activities), however, are not considered to be claims caused by the condition of the installation. Unless the damage is attributable to unusual atmospheric conditions, such claims are only considered under the FTCA and the Military Claims Act, 10 U.S.C. § 2733 (1982).

[19] For example, some instances of theft and vandalism are perpetrated by disgruntled subordinates and fellow soldiers as a direct result of duty relationships.

[20] AR 27–20, para. 11–4*f*(5); U.S. Army Claims Service Claims Manual, Personnel Claims Bulletin 77 (22 July 1985). In August 1983, the Air Force experimented with paying for hit-and-run damage when there was clear and convincing evidence that the incident occurred on the installation. The Air Force was not satisfied with the result and terminated the experiment in October 1984. It should be noted that it is often almost as difficult for claimants as it is for claims offices to determine when and where vehicles were damaged by hit-and-run drivers.

[21] AR 27–20, table 11–2, Allowance List/Depreciation Guide, item no. 5.

The policy these rules reflect is that the Act simply is not a substitute for ordinary collision or comprehensive coverage.[22] The maximum payment covers any reasonable insurance deductable and still reflects the reality that it is not economical to maintain comprehensive insurance coverage on older vehicles whose value is slight. Conversely, the maximum is low enough that no soldier can see in it a substitute for necessary insurance coverage.

If Private Jones and Sergeant Smith are disgruntled, it is because the reality of the limited protection provided by the Act is not commensurate with their expectations. Yet no private corporation pays employees merely because their vehicles happen to be damaged in the company parking lot. It is important that soldiers understand what benefits the Act does—and does not—provide them before they ever suffer a loss. Finding effective methods to inform soldiers of their rights under the Act is a continuing responsibility of the U.S. Army Claims Service and field claims offices.

[22] DA Pam. 27-162, para. 2-7*f*.

Size Is Vital

Phyllis Schultz
Attorney Advisor, Recovery Branch

After a claimant is paid for damage to or loss of his or her shipment, the Army pursues recovery against the carrier who caused the problem. Because liability is predicated on the specific size or description of an item, as indicated in the Military-Industry Table of Weights (U.S. Army Claims Service Manual, Chapter II, Appendix G), it is imperative the correct size and description be given for all items. Failure to do so can cause a significant loss of money to the Army.

When a claim is submitted, the claimant must list the exact size and specific description on the Schedule of Property (DD Form 1844) and also be informed that the same information must be reflected on the estimate of repair and on the Government Inspection Report (DD Form 1841). It is important that all descriptions be consistent on all documents. If a carrier notes that an item is described differently on the estimate of repair than on DD Form 1844, it will invariably offer liability based on the lesser weight.

Correct descriptions are particularly important for the following items:

Schranks. Carrier liability for a schrank is $150 based on an average 5-foot size. Many schranks are larger and the government can collect greater liability; a 12-foot schrank may bring in $360. Failure to list the correct size could mean a loss of more than $200 on this one inventory item. Some claimants mistakenly describe schranks as "wall units" or "bookcases"; if an item is a schrank, it must be described as one. Liability for bookcases and wall units is much lower than schranks.

Carpets and Padding. Because carpet sizes vary greatly and liability is based on size, exact measurements are mandatory. A small 3-foot by 5-foot carpet brings in approximately $4 as carrier liability, while one that is 15 feet by 20 feet is worth approximately $80. Similar differences apply to carpet padding.

Refrigerators or Freezers. Liability for a small item (under 10 cubic feet) is only $60 while liability for a larger item (over 20 cubic feet) is a maximum of $180.

Tables. The Military-Industry Table of Weights describes 36 different kinds of tables, ranging from card tables to dining room tables to ping pong tables. Depending on description, liability ranges from $3 to $78. Pool tables are in another category, depending on size and composition, with liability ranging from $90 to $300.

Desks. The Military-Industry Table of Weights list four different kinds of desks ranging from the small Winthrop desk with a weight liability of $42, to the large office size desk with a liability of $90.

Chairs. Twenty-seven different kinds of chairs are listed. While liability for a kitchen chair is $6, liability for a dining room chair is $12, and liability for a reclining chair is $54. The exact description is necessary for full recovery.

Televisions. Carrier liability may be as low as $12 for a black and white 12-inch set or as high as $108 for a 25-inch color set.

Dressers. Four categories are listed: child; regular; double; and triple.

Beds (Mattresses, Boxsprings and Headboards). Beds are items that vary greatly in size and description. A cot is worth $6 in carrier liability, a waterbed is worth $126, and a king size bed with mattress, boxspring, and headboard is worth $174.

Cabinets. Twelve different categories of cabinets are noted. Liability for a 20-pound record cabinet is $12, while liability for a 75-pound trophy cabinet is $45, and liability for a 90-pound corner cabinet is $54.

The items discussed above are only some of the articles in which correct size and description are vital to achieving maximum recovery. Other items in which size makes a difference are sofas, chests, stoves, stands, tents, and even doghouses. Proper size and description will not only help the Army obtain greater recovery and have more money available to pay claims, but it should also have the salutary effect of encouraging more care and attention on the part of the carrier industry as it is faced with greater liability costs.

Personnel Claims Note

This note is designed to be published in local command information publications as part of a command preventative law program.

This note concerns filing a claim for damaged household goods. Often, the claims process appears so complex, with so many forms, that the potential claimant gives up or puts off filing the claim until the two-year statute of limitations has run. Don't throw in the towel; it's quite easy if you take the following steps:

1. Before you move, consult your transportation office and follow their advice closely. Keep a file of purchase receipts for major items, take pictures of your household goods, and keep all documents pertaining to the move. Watch the movers, and don't be afraid to intervene if they are doing their work poorly.

2. When you arrive, again consult the transportation office without delay. Watch the movers unpack and take exceptions on the inventory. If damage is discovered later, complete the DD Form 1840.

3. Consult the claims office nearest you. They will answer all your questions. That's what they are there for. Most importantly, carefully read the pamphlet "Instructions to Claimant." It contains everything you need to know.

Once a claimant has presented a fair and properly completed claim, the claims office will endeavor to pay the claim promptly.

Automation Notes

Information Management Office, OTJAG

JAGC Automation—Leading The Way

With its long range commitment to providing each attorney with an individual, personal computer (PC) workstation, the JAG Corps is in the forefront of legal automation. JAG attorneys who have experienced dramatic productivity gains through automation are dispelling the pernicious myth than an attorney using a computer is nothing but an expensive secretary. While such statements are not unusual among some attorneys with little automation experience, it is nearly impossible to find this attitude among attorneys who have become even minimally computer proficient. Rather, one hears PC users talk about quicker turnarounds, more thorough research, less time spent on administrative chores, and more time spent on the "real" work.

As JAG attorneys continue to set the pace, there is an understandable proliferation of approaches to and resolutions of problems common to all JAG offices. For example, every office needs a system to track suspense dates, but it should not be necessary for every office to spend time developing its own system. Hardware and software standards have been established now for over a year. *See* Letter, DAJA-IM, Office of The Judge Advocate General, U.S. Army, to Staff and Command Judge Advocates, subject: JAGC Automation Standards, 11 Apr. 1986, *reprinted in* The Army Lawyer, June 1986, at 3. Within these standards, good automation ideas have been developed, but often they are communicated only by word of mouth, if at all. Sometimes even attorneys in the same office devise completely different, yet each completely acceptable solutions to a common problem. This reinvention of the wheel is unnecessary.

To find and share common solutions, send your ideas to the OTJAG IMO. Tell us how your productivity tripled once you got your forms on the word processor, describe the precipitous drop in processing times for your claims practice. The OTJAG IMO is here to serve as a clearinghouse for computer and automation ideas and applications written using the Enable software package. Send those ideas, requests, and floppy disks to: HQDA, ATTN: DAJA-IM (CPT David Carrier), Washington, D.C. 20310-2216. Captain David L. Carrier.

Safeguard Your Data!

Your personal computer is a relatively rugged and dependable machine. Unfortunately, this very dependability lulls some users into a false sense of security. Nothing will snap you out of that delusion quicker than permanently losing data because you "accidently" kicked your computer and "hadn't had the time" to make backups.

Your computer's hard and floppy disks are perhaps its most vulnerable areas. These disks contain the software programs that make it run and the information you create. Without properly functioning disks, your computer has a terminal case of amnesia. Disk drives work like a tape recorder by magnetizing tiny areas on the disk surface to "write" data and by sensing these areas to "read" data. Compared to your portable cassette recorder, however, your disk drives, especially your hard disk, are quite delicate.

To record your data and run your programs, the computer must read and write with extraordinary precision. To the computer, your fingerprint on a floppy is like Crisco on a record album; that friendly pat you gave your computer when it didn't do what you wanted is like an earthquake to its hard drive. Simply moving the machine without first "parking" the hard drive is enough to disable it. Your user manual is full of tips on the proper care and feeding of your computer equipment—read it.

As some unfortunate souls have discovered to their dismay, once the disk is damaged, all your hard work is down the tubes; your chance at glory is "kaput," and your career is a shambles. Even if you are very careful, using all the surge suppressors, antistatic mats, and other safety items on the market, there is still the chance that your hard or floppy disk will finally "go south." Your only consolation will be that it was not your fault.

All need not be lost, however. You can back up (save) your precious data. It will take time and will not be much fun. When the day comes that you call up your brief and the computer responds with what looks like a comic strip swear word (e.g., @#$%*&!) you will be able to restore your data. Your fate will be unlike that of the unfortunate young clerk in OTJAG whose PC burped two nights ago and digested several weeks' worth of attorneys' work. Her desperate travail is the inspiration for this piece, and should be an inspiration for you!

Remember: Blessed are the Pessimists, for They Shall Make Backups. Captain David L. Carrier.

LAAWS Legal Assistance Module: Archiving Legal Assistance Record Cards

If you use the "legal assistance cards" option of the Legal Automation Army-Wide System (LAAWS) legal assistance module's office management system, you may want to archive the records created to date and start a new file for the current year. The office management system stores all client "cards" in a file named LACARD.DBF. You can copy the current LACARD.DBF to a different subdirectory and replace it with an empty LACARD.DBF file. This can reduce the time it takes to retrieve a record from your database and enable you to maintain annual records. Note that all client cards currently in the system will be archived and that you will be starting from scratch.

The following instructions tell you how to archive your current client cards and create a new file for future client cards. DO NOT attempt this procedure unless you have a good grasp of the database operating system (DOS) file management commands—it is easy to get lost. If you do not have this expertise yourself and it is not available locally, call the OTJAG IMO at AUTOVON 227-8655 and we will talk you through it.

The instructions below tell you what to do, in English. Beneath the English explanation is the DOS command that should be entered at the DOS prompt. Your DOS prompt should look something like this: "C:>." DOS commands are written in all capital letters. Blank spaces are indicated by an underline character: "_."

1. Select the legal assistance module from the LAAWS master menu, so that the Legal Assistance Resource Menu is displayed. The DOS prompt (C:>) should appear below the menu.

2. Using the BACKUP command, make a copy of all your database (*.DBF) files to a floppy—just in case! [This should already be a part of your weekly routine—if it is not, you are courting disaster!]

BACKUP_C:*.DBF_A:

[Did you remember that the underline character "_" means leave a blank space?]

3. At the DOS prompt, check the directory to be sure that the LACARD.DBF file is there. The DOS list directory (DIR) command will display a list of the files in the LAWLA subdirectory. The "/W" will display the files across the screen, rather than in a single file list.

DIR/W

4. If LACARD.DBF is not present, start over again from Step 2. If you still cannot find LACARD.DBF, GO NO FURTHER, give us a call. If you see LACARD.DBF, proceed to Step 5.

5. Using the DOS make directory (MKDIR) command, create a new subdirectory named YEAR86:

MKDIR_\YEAR86

6. Copy LACARD.DBF to this new subdirectory:

COPY_LACARD.DBF_\YEAR86

7. The LAAWS legal assistance module was distributed on two floppy disks, numbered 1 and 2. Place the #1 disk in the floppy disk drive. If you have two floppy drives, place it in the "A" drive.

8. Change to the "A" drive:

A:

9. Enter the LAWLAX directory, using the DOS change directory (CHDIR) command:

CHDIR_LAWLAX

10. Copy the empty LACARD.DBF file to your legal assistance directory:

COPY_LACARD.DBF_C:\LAWLA

11. Return to the "C" drive:

C:

12. Return to the legal assistance resource menu:

LAWLA

13. You are now ready to resume use of your LAAWS office management system.

To retrieve your historical data, you must save your current data by copying it into another subdirectory and recopying the archived data to the LAWLA subdirectory. A procedure to accomplish this will be implemented in the next release of the LAAWS legal assistance module. Captain David L. Carrier.

Bicentennial of the Constitution

Announcement of the 1987 Army Theme

On 15 January 1987, the Honorable John O. Marsh, Jr., Secretary of the Army, and General John A. Wickham, Jr., Chief of Staff, United States Army, announced the 1987 Army Theme. The text of their announcement follows:

The Constitution will be the Army theme for 1987. We are proud of the progress made in the past year to strengthen values, the theme for 1986, throughout the total Army. Previous themes have developed into a solid flow of ideas and programs, each building on the preceding ones. As a result, we have strengthened the Army's winning spirit, physical fitness, excellence, families, leadership and values.

Those of us in the total Army who take an oath of service have sworn to "support and defend the Constitution of the United States." By doing so, we stand shoulder to shoulder with the framers of the Constitution who mutually pledged their lives, their fortunes and their sacred honor. We do this freely because it is the Constitution which gives the Army its very purpose for being. It is the Constitution which guarantees all citizens the rights and obligations which are the essence of being an American. And it is the Constitution that our comrades have, in other times and in other places, sacrificed to preserve.

The history of the Army is intertwined with the history of our Constitution. Before our young nation could even be in a position to draft a Constitution, her freedom had to be won. It was won with the courage and blood of the first American soldiers. Once our liberty was secured, these same soldiers became the citizens upon whose commitment and hard work a great nation would be built. The majority of the original signers of the Constitution had served as soldiers in the War of Independence. Throughout our nation's history, American citizens have always rallied to serve their nation when needed.

The preamble to the Constitution, that famous introduction which proudly begins, "We, the people . . . ", gives six statements of purpose under the Constitution. All our laws and bills and every appropriation of public money must be linked directly to one or more of those duty statements. The Army is most directly charged with responsibility for one of those duties: to provide for the common defense. Those of us in, or associated with, the Army speak of loyalty to the nation as well as loyalty to units and other members of the Army team. We also speak of duty, integrity and sacrifices. These concepts are hollow, however, if they are not viewed within the context of meaning provided by the Constitution. To be effective citizens and members of the total Army family, we must understand the concepts of the Constitution.

This year marks the 200th anniversary of the signing of the United States Constitution. Our entire nation will be celebrating the bicentennial as we focus on stimulating an appreciation and understanding of our national heritage. We urge each of you to become a better citizen this year by reading the Constitution and by finding ways to rededicate yourselves, your families, and your fellow professionals to the spirit of that document.

Constitutional Bibliography

During the observance of the Bicentennial of the Constitution, many judge advocates will be asked to teach classes, give speeches, or write articles about the Constitution and its meaning to Americans today.

This bibliography is an addition to the resource packet already made available to staff judge advocates (see *The Army Lawyer*, Dec. 1986, at 66). The bibliography is an introduction to the vast amount of literature that has been written about the history and operation of the United States Constitution. Book titles include the publisher and year of printing.

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Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

JAGC Reserve Professional Qualifications Database

In the event of full mobilization, over half of the Army's Judge Advocate General's Corps (JAGC) will consist of Reserve judge advocates. Indeed, the reason for the existence of the Reserve JAGC is to merge with the active JAGC upon mobilization to perform the JAGC mission for the mobilized Army. The peacetime mission of Reserve JAGC officers is to train for duties in the positions they will occupy upon mobilization.

Training is of paramount importance. Fortunately, mission requirements in the active JAGC provide opportunities for training. The Army benefits when the Reserve JAGC receives good mobilization training and, at the same time, assists the active JAGC in performing "real world" missions. Moreover, it is not unusual to find expertise within the Reserve JAGC that is not matched in the active Army. This is especially true when the many different jurisdictions are considered. These Reserve JAGC experts increase the total legal service capability of the Army.

Traditionally, two obstacles have impeded extensive use of the Reserve JAGC resources. The first has been the inability to quickly identify officers' specialties and qualifications. The second, and perhaps more formidable hurdle, is the need for creativity and imagination in accommodating the time or employment constraints of Reserve JAGC officers while remaining consistent with required training guidelines set forth in AR 140–1 and other directives. Advice may be sought from the Guard and Reserve Affairs Department (GRA), TJAGSA. It may also be necessary to coordinate with the officer's Reserve unit.

During the past year, the first inhibiter has been reduced significantly. GRA, TJAGSA, has established a professional qualifications database. Included is information on bar admissions, nature of civilian employment (*e.g.*, private practice, house counsel, government service, professor, etc.), professional experience (including percentage of time currently engaged in each area of practice), publications authored, foreign language ability, and current military assignment. This automated information has been obtained on approximately 1400 officers. It will not only assist The Judge Advocate General to measure the quality of the Reserve JAGC force and to make assignment decisions, but it will also enable him to identify the expertise available "on reserve." And, it will do it quickly.

Finding suitable arrangements to obtain use of the Reserve JAGC expertise consistent with training rules constitutes a significant challenge. Creativity by both active and Reserve JAGC officers will be essential. Some examples follow:

Example 1. A court-martial involving unusually complex patent law issues presented a need for a high degree of expertise. At the time of the court-martial, an eminent patent attorney was assigned to an individual mobilization augmentee (IMA) patent law position. Because the court-martial involved the subject matter of his IMA position, his assistance to the trial counsel did not conflict with mobilization training requirement guidelines. The patent attorney's IMA organization supervisor agreed to permit the officer to do his IMA annual training (AT) with the agency conducting the court-martial in lieu of his regular AT. The regular two-week AT coupled with a tour to another organization will not be common, but it is feasible when consistent with training needs and with urgent requirements.

Example 2. An active Army staff judge advocate had a terminally ill senior military client with a difficult estate tax dilemma. GRA, using the automated database, identified a Reserve JAGC officer in the same jurisdiction with a specialty in estate taxes. The Reserve officer was not placed on active duty in this case, but acted as a consultant. Had he devoted sufficent time to provide the assistance, however, he could have earned valuable retirement point credit. When retirement point credit is not needed, it is common to find Reserve JAGC officers acting as consultants without any compensation.

Example 3. A Continental United States Army (CONUSA) staff judge advocate needed JAGC officer involvement with an unusually complex report of survey in a remote area. A Reserve JAGC officer in the area of the survey agreed to assist in return for retirement points.

Example 4. Active component staff judge advocates have sometimes arranged to have Reserve JAGC officers who reside in the vicinity of their installation attached to their command to perform projects for them on a retirement point basis only. Attachment for points may be in addition to assignment to other IMA organizations or Reserve units (See AR 140–10).

There will not always be Reserve JAGC expertise available at the exact time or location needed. The new database will make a search for it much more feasible, however. Identification through the database is only a stepping stone to successful arrangements between the active and Reserve JAGC. For this type of use to grow and to be of on-going mutual benefit, the active and Reserve must devise arrangements beneficial to both. To request use of the database, contact Lieutenant Colonel Bill Gentry at GRA, TJAGSA, 800–654–5914 ext. 380, or (804) 972–6380.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 972–6307; commercial phone: (804) 972–6307).

2. TJAGSA CLE Course Schedule

April 6–10: 2d Advanced Acquisition Course (5F–F17).

April 13–17: 88th Senior Officers Legal Orientation Course (5F–F1).

April 20–24: 17th Staff Judge Advocate Course (5F–F52).

April 20–24: 3d SJA Spouses' Course.

April 27–May 8: 111th Contract Attorneys Course (5F–F10).

May 4–8: 3d Administration and Law for Legal Specialists (512–71D/20/30).

May 11–15: 31st Federal Labor Relations Course (5F–F22).

May 18–22: 24th Fiscal Law Course (5F–F12).
May 26–June 12: 30th Military Judge Course (5F–F33).
June 1–5: 89th Senior Officers Legal Orientation Course (5F–F1).
June 9–12: Chief Legal NCO Workshop (512–71D/71E/40/50).
June 8–12: 5th Contract Claims, Litigation, and Remedies Course, (5F–F13).
June 15–26: JATT Team Training.
June 15–26: JAOAC (Phase IV).
July 6–10: US Army Claims Service Training Seminar.
July 13–17: Professional Recruiting Training Seminar.
July 13–17: 16th Law Office Management Course (7A–713A).
July 20–31: 112th Contract Attorneys Course (5F–F10).
July 20–September 25: 113th Basic Course (5–27–C20).
August 3–May 21, 1988: 36th Graduate Course (5–27–C22).
August 10–14: 36th Law of War Workshop (5F–F42).
August 17–21: 11th Criminal Law New Developments Course (5F–F35).
August 24–28: 90th Senior Officers Legal Orientation Course (5F–F1).

3. West Virginia Begins MCLE

West Virginia has begun mandatory continuing legal education. All attorneys must complete six hours of MCLE between July 1, 1986 and June 30, 1987 and six hours between July 1, 1987 and June 30, 1988. Beginning on July 1, 1988, attorneys must complete twenty-four hours every two years, including three hours on ethics. TJAGSA resident CLE courses are approved by the state. For further information, contact the West Virginia Mandatory Continuing Legal Education Commission, E–400 State Capitol, Charleston, West Virginia 25305.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 December annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1987 issue of The Army Lawyer.

5. Civilian Sponsored CLE Courses

June 1987

1–2: FPI, Rights in Technical Data & Patents, Washington, D.C.
2–5: FPI, Procurement for Secretaries and Administrators: Government Contracts, Washington, D.C.
4: NYSTLA, Basics of Trying a Case, New York, NY.
4–5: PLI, Hazardous Waste Litigation, Chicago, IL.
4–5: PLI, Lending Transactions and the Bankruptcy Act, New York, NY.
4–5: PLI, The Closely Held Business: Financial Planning for Owners, Chicago, IL.
4–5: PLI, Commercial Real Estate Leases, Chicago, IL.
5: ULSL, Preparation of a Civil Case for Jury Trial, Louisville, KY.
6–12: NITA, Mid Atlantic Regional Trial Advocacy Program, Philadelphia, PA.
6–13: ATLA, Tort Litigation: New Theories, New Tactics, Maui, HI.
7–12: NJC, Judicial Writing-Graduate, Middlebury, VT.
7–12: NJC, Dispute Resolution, Middlebury, VT.
8–9: FPI, Financing Government Contracts, Washington, D.C.
8–9: FPI, Working with the F.A.R., Washington, D.C.
8–10: FPI, Changes in Government Contracts, San Diego, CA.
8–10: FPI, Construction Delay and Disruption, Washington, D.C.
10: NYSTLA, How to Read Medical Records, New York, NY.
10–12: FPI, Practical Negotiation of Government Contracts, Las Vegas, NV.
10–20: NITA, Southern Region Trial Advocacy, Dallas, TX.
11: MNCLE, Evidence Update, Minneapolis, MN.
11–12: FPI, Rights in Technical Data & Patents, Las Vegas, NV.
11–12: PLI, Construction Contracts, Los Angeles, CA.
11–13: ATLA, Medical Legal Seminar, Boston, MA.
11–26: NCDA, Career Prosecutor Course, Houston, TX.
15–19: FPI, Government Construction Contracting, San Diego, CA.
15–26: AAJE, Non-Attorney Judges' Trial Skills Program, Denver, CO.
16–18: FPI, Construction Delay and Disruption, Marina del Rey, CA.
18–19: PLI, Commercial Real Estate Leases, Los Angeles, CA.
18–19: FPI, Working with the F.A.R., Lake Tahoe, NV.
18–28: NITA, Northwest Regional Trial Advocacy Program, Seattle, WA.
19: ULSL, Workers' Compensation (Intermediate), Bowling Green, KY.
19–20: UKCL, Corporate Organization & Business Planning, Lexington, KY.
21–26: AAJE, Handling Objections to Evidence, Boulder, CO.

21–7/3: NJC, Administrative Law: Fair Hearing, Reno, NV.

22–23: FPI, Financing Government Contracts, Marina del Rey, CA.

22–24: FPI, Contracting for Services, Las Vegas, NV.

22–24: FPI, Hazardous Waste Litigation, Denver, CO.

24–26: FPI, Pricing of Claims: Government Contracts, Las Vegas, NV.

25–26: PLI, Lending Transactions and the Bankruptcy Act, San Francisco, CA.

25–26: PLI, Hazardous Waste Litigation, New York, NY.

26: ULSL, Appellate Practice, Louisville, KY.

28–7/3: NJC, Administrative Law: High Volume Proceedings, Reno, NV.

28–7/3: NITA, Advanced Trial Advocacy, Boulder, CO.

28–7/3: AAJE, Constitutional Criminal Procedure, Cambridge, MA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1987 issue of *The Army Lawyer.*

Current Material of Interest

1. New Constructive Credit Rules for Nonresident C&GSC

The U.S. Army Command and General Staff College (C&GSC) at Fort Leavenworth has announced new rules applicable to constructive credit for the correspondence course option, or nonresident C&GSC.

Previously, constructive credit for several subcourses was granted to officers who had attended CAS3 within three years prior to applying for the C&GSC correspondence course. Effective 1 October 1986, all constructive credit for CAS3 graduates enrolling in the correspondence option was eliminated. This credit was eliminated entirely and not just for JAGC officers.

Graduates of the Judge Advocate Officer Graduate Course still can receive constructive credit for subcourses in staff communication, military law, and leadership, but they must apply for nonresident C&GSC *within three years* of completion of the Graduate Course. The time requirement was added effective 1 October 1986. These changes make JAGC officers who have completed the Graduate Course the *only* individuals of *any* branch who receive any constructive credit for nonresident C&GSC.

2. TJAGSA Publications Available Through DITC

The following TJAGSA publications are available through the Defense Technical Information Center (DTIC). The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All-States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).

Claims

AD B087847	Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).

AD B087850	Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B100756	Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs).

Criminal Law

AD B107951	Criminal Law: Evidence I/ JAGS–ADC–87–1 (228 pgs).
AD B100239	Criminal Law: Evidence II/ JAGS–ADC–87–2 (144 pgs).
AD B100240	Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–87–3 (211 pgs).
AD B100241	Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS–ADC–87–4 (313 pgs).
AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 37–104–1	Payment of Retired Pay to Members and Former Members of the Army		15 Jan 87
AR 145–1	Senior Reserves Officer Training Corps Program: Organization, Administration, and Training		21 Jan 87
AR 190–30	Military Police	2	21 Nov 86
AR 360–61	Community Relations		15 Jan 87
AR 380–65	Security Classification Guidelines for Emerging Technologies		30 Nov 86
AR 601–210	Regular Army and Army Reserve Enlistment Program		2 Jan 87
AR 710–9	Guided Missile and Large Rocket Ammunition Issues, Receipt, and Expenditures Report		9 Jan 87
AR 870–20	Museums and Historical Artifacts		9 Jan 87
UPDATE 10	Unit Supply Update		24 Nov 86

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Barry & Kelly, *Avoidance of Post-Employment Conflicts of Interest for the Federal Employee,* 33 Fed. B. News & J. 410 (1986).

Beyer, *Drafting Wills for Foreign-Domiciled Clients,* Prac. Law., Dec. 1986, at 61.

Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment,* 24 Am. Bus. L.J. 309 (1986).

Britton, *Dealing with Professional Degrees in Divorce Cases,* Prac. Law., Dec. 1986, at 35.

Children, Divorce & the Legal System: The Direction for Reform, 19 Colum. J.L. & Sock Probs. 393 (1986).

Clevenger, *Federal Court-Martial Jurisdiction Over Reserve Component Personnel,* 33 Fed. B. News. & J. 418 (1986).

Feldman & Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity,* 3 Alaska L. Rev. 229 (1986).

Garrett, *Jurisdiction of Tennessee Courts to Modify the Child Custody Decrees and Visitation Orders of Sister States,* 16 Mem. St. U.L. Rev. 255 (1986).

Gosner, *The Lawyer's Guide to Automation,* A.B.A. J., Feb. 1987, at 75.

Hemingway & Collins, *Enforcement of Support Obligations Against Military and Federal Employees,* 33 Fed. B. News & J. 433 (1986) (pt. 2).

Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel,* 13 Hastings Const. L.Q. 625 (1986).

Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine,* 50 Alb. L. Rev. 263 (1986).

Mass Torts After Agent Orange, 52 Brooklyn L. Rev. 329 (1986).

Nimmer & Krauthaus, *Copyright and Software Technology Infringement: Defining Third Party Development Rights,* 62 Ind. L. Rev. 13 (1986–1987).

Prahinski, *Trade Secret Injunctions and Similar Actions Delaying the Obtaining of Military Equipment by the Government,* 33 Fed. B. News & J. 423 (1986).

Rogers, *Apportionment in Kentucky After Comparative Negligence,* 75 KY. L.J. 103 (1986–87).

Rogers, Seman & Clark, *Assessment of Criminal Responsibility: Initial Validation of the R–CRAS with the M'Naghten and GBMI Standards,* 9 Int'l J.L. & Psychiatry 67 (1986).

Smith, *Military Rule of Evidence 404(a)(1): An Unsuccessful Attempt to Limit the Introduction of Character Evidence on the Merits,* 33 Fed. B. News & J. 429 (1986).

Sturm, *The New Fair Debt Collection Practices Act,* A.B.A. J., Feb. 1987, at 60.

Teitell, *How to Deduct Your Property Donations*, A.B.A. J., Feb. 1987, at 100.
Zaritsky, *How the New Law Affects Income Taxation of Trusts and Children Under Age Fourteen*, Est. Plan., Jan/Feb. 1987, at 2.
Zollers, *Rethinking the Government Contract Defense*, 24 Am. Bus. L.J. 405 (1986).

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