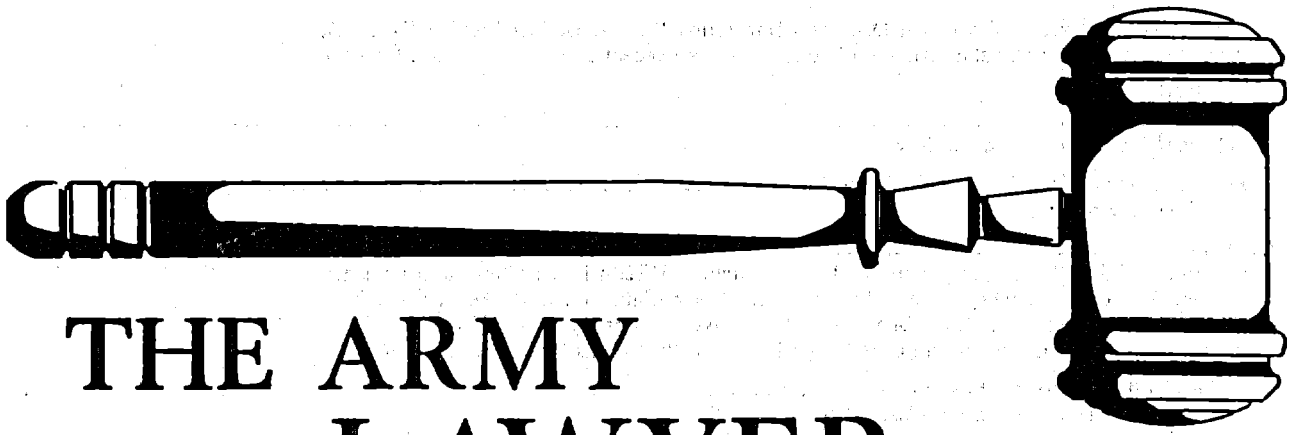

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Table of Contents

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Editor
Captain Matthew E. Winter

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF

JACS-PCA 12 JAN 1989

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Army Affirmative Claims Program - Policy Memorandum 89-1

1. The U.S. Army Claims Service (USARCS) has provided your office with a new automated data management program for your use in recording and tracking affirmative claims, beginning in FY89. The Army Affirmative Claims Program is a major part of our total Army Claims Program and contributes to the financial security of the Federal Government by recovering monies due for medical care and property damage.

2. To assure that we are fully accomplishing the affirmative claims mission, each staff and command judge advocate must--

a. Ensure proper liaison and procedures are established with all local medical treatment facilities and CHAMPUS/insurance representatives so that complete information concerning all potential medical care recovery cases is received by your office.

b. Ensure proper liaison and procedures are in place with installation activities (e.g., provost marshal traffic section, report of survey office and transportation motor pool) and units so that property damage by civilian tortfeasors is promptly reported to your office.

c. Ensure adequate staffing to review records of potential claims, make timely assertions and provide continuous follow-up.

d. Maintain good relations with the local members of the bar in order to obtain their assistance in pressing the Army's medical care claim in conjunction with the claim of the injured party.

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

3. These matters must have your personal attention and support if the Army Affirmative Claims Program is to realize its full recovery potential.

Hugh Overholt

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

ERRATA

The page numbers were inadvertently omitted from the Table of Contents in the February 1989 issue of *The Army Lawyer*. The complete Table of Contents is printed below.

Department of the Army Pamphlet 27-50-194

February 1989

Table of Contents

Recent Changes to the Qualitative Management Program

Major Tom G. Morgan, USAR
IMA, Administrative Law Division, Office of The Judge Advocate General

Introduction

The Army's qualitative management program (QMP) is designed to ensure the continued high quality of enlisted personnel serving on active duty. Department of the Army boards screen the records of all enlisted personnel in grade E-6 and higher and of those E-5's with more than eleven years of service to determine whether their entire record of service warrants their continued service. The objectives of the program are to: 1) enhance the quality of the career enlisted force; 2) selectively retain the best qualified soldiers for thirty years of active duty; 3) deny reenlistment to nonproductive soldiers and to soldiers who might not advance to higher grades; and 4) encourage soldiers to maintain their eligibility for further service.[1]

The provisions of the recently revised QMP are contained in chapter 10, AR 601-280, and work in two ways. The first, which is directly related to the QMP itself, is through the imposition of a bar to reenlistment. The second is a requirement for commanders to initiate involuntary separation proceedings in the case of soldiers who do not voluntarily elect to retire or to be separated, or whose appeals of the imposition of a bar to reenlistment are denied. The purpose of this article is to review why the changes to the QMP were made, and how the QMP will be implemented.

The Catalyst for Change

Following the adjournment of the 1987 Master Sergeant selection board, a review of the QMP was directed.[2] This study revealed that the average soldier selected for a bar to reenlistment under the QMP was an E-6, and had 5.97 years time in grade, 15.85 years in service, and 2.71 years remaining until ETS. Additionally, the study group found that an average of fifteen weeks elapsed between the date the board recommended that a soldier be barred from reenlistment and the date the notification letter was sent to the soldier. Because the regulation in force at that time did not require initiation of separation action until the first day of the nineteenth month following the day of the notification letter, marginal soldiers were being retained on active duty for an average of nearly twenty-two months before separation action was initiated. The review identified nine specific problems: 1) the notification to the soldiers was slow; 2) the notification letter was not informative; 3) the rationale for selection under the QMP was obscure; 4) the appeal process was confusing; 5) local bars and DA bars to reenlistment under the QMP were both treated as rehabilitative measures; 6) the appeal process was time consuming; 7) the appeal adjudication was unrelated to the criteria for selection under the QMP; 8) the assignment rules for QMP soldiers complicated appeal resolution and replacement of soldiers under the QMP; and 9) the separation process compounded delay and burdened commanders.[3]

As a result of the concerns raised by this study, the QMP was extensively revised. An explanation and analysis of the new QMP provisions follows.

Imposition of Bar to Reenlistment

Selection Board Review of Records

Soldiers' records are screened following the qualitative screening procedures established in paragraph 10-4, AR 601-280. For command sergeants major and sergeants major, the screening is done by the DA Command Sergeants Major/Sergeants Major Selection Board. For personnel in grades E-6 thru E-8, the screening is done by regularly scheduled promotion boards for the grade being screened. For E-5 personnel, the screening is done by regularly scheduled E-8 promotion boards. If a selection board recommends that a bar to reenlistment be imposed and the Deputy Chief of Staff for Personnel (DCSPER) approves that recommendation, the soldier will immediately be notified that the bar to reenlistment has been imposed. Notification will no longer be deferred pending release of the board results.[4]

The Commander, Total Army Personnel Command (PERSCOM), will forward the notification in a sealed envelope to the soldier's installation or overseas commander. Attached to the memorandum will be the performance portion of the soldier's OMPF (the "P" fiche), a document explaining the rationale behind the imposition of the bar, and a list of those documents that contributed most significantly to the board's recommendation to impose a bar to reenlistment.[5]

Command Review and Disposition

Upon receipt of the notification, the installation or overseas commander will forward it to the first O-5 or higher commander in the soldier's chain of command. That commander must first ensure that the soldier has not reenlisted or been promoted on or after the date of the notification memorandum. If the soldier has reenlisted, the enlistment is erroneous and should be pro-

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[1] Army Reg. 601-280, Total Army Retention Program, para. 10-2 (5 July 1984) [hereinafter AR 601-280].

[2] The findings and recommendations of the QMP review panel are contained in a 2 March 1988 memorandum from the Commander, U.S. Army Enlisted Records and Evaluation Center, to the Deputy Chief of Staff for Personnel.

[3] *Id.*

[4] AR 601-280, para. 10-5.

[5] *Id.* para. 10-5*a*.

cessed under the erroneous enlistment provisions of Army Regulation 635-200.[6] Similarly, any promotion occurring on or after the date of the notification memorandum is void and must be revoked pursuant to Army Regulation 600-200.[7] In so doing, the provisions providing for consideration of a soldier's *de facto* status are applicable.[8]

If the commander determines that the soldier is dead, separated, reassigned, or already has an approved retirement application, the notification memorandum will be returned to PERSCOM. When a soldier has been reassigned, the notification will be returned by certified mail to PERSCOM within seven days of receipt by the commander so that it may be forwarded to the soldier's new commander. In reassignment and retirement cases two copies of the soldier's reassignment order, retirement order, or retirement application must be sent along with the returned notification.[9]

Notification to Soldier

If the notification memorandum is not returned to PERSCOM, the commander is required to personally provide the memorandum to the soldier and conduct a counseling session about the significance of the imposition of the bar. The commander must complete a Department of the Army Form 4856-R, General Counseling Form, and forward a copy to PERSCOM. During this counseling session, the commander must tell the soldier the effective date of the bar; that he or she is in a non-promotable status; that his or her duty station is stabilized; and that, if the bar is not removed, separation action will be initiated. The soldier will also be advised that the separation action, unlike the DA bar, will be based on conduct during the current enlistment and that the existence of the bar does not, in and of itself, mean that the soldier will be separated involuntarily. The soldier will be advised of the option to appeal the bar to reenlistment.[10]

A soldier who is retirement eligible will be encouraged to retire, and must be counseled on the consequences of being discharged at ETS instead of retiring.[11] The soldier must submit the request for retirement within fourteen days following execution of the option form, with a requested retirement date no earlier than two months and no later than six months following the date of the retirement request.[12]

If the soldier is not eligible to retire, the commander should advise the soldier of the right to request discharge under the provisions of paragraph 16-5, AR 635-200. Soldiers who believe that they will be unable to overcome the bar to reenlistment may request discharge under this provision at any time after notification of the imposition of the bar or notification that an appeal of the bar has been denied.[13] If the soldier requests discharge, the discharge must be accomplished within six months of the date of the request, notwithstanding the length of time remaining in the soldier's enlistment. Overseas tours may be curtailed in order to permit early separation. Approved requests for discharge are irrevocable.[14]

Election of Options by Soldier and Commander

After the counseling session with the commander, the soldier must complete a Statement of Option Form (DA Form 4941-R). This form must be completed within seven days after the commander receives the notification of imposition of the QMP bar to reenlistment.[15] The soldier can do any of the following: 1) submit an appeal to the bar to reenlistment; 2) take no further action; 3) request discharge under paragraph 16-5, AR 635-200; or 4) request retirement, if eligible.[16] Additionally, the commander is required to exercise one of three options in completing the DA Form 4941-R. The commander may: 1) submit an appeal; 2) ask for additional time in which to complete his or her portion of the DA Form 4961-R when the soldier has been assigned to the command for less than 120 days; or 3) decline to submit an appeal.[17] As noted in the following section, the commander may appeal the bar to reenlistment, regardless of whether the soldier appeals.[18]

Appeals of Bar to Reenlistment Under QMP

As a result of the study group findings and recommendations, the period for submitting an appeal has been shortened significantly. Thus, the soldier no longer has up to twelve months to submit an appeal of the imposition to the bar and a commander who desires to appeal no longer has up to ninety days before a soldier's

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[6] Army Reg. 635-200, Enlisted Personnel, Chapter 7 (5 July 1984) [hereinafter AR 635-200].

[7] Army Reg. 600-200, Enlisted Personnel Management System, Chapter 7 (5 July 1984) [hereinafter AR 600-200].

[8] AR 601-280, para. 10-5*b*. *See* AR 600-200, para. 7-5.

[9] AR 601-280, para. 10-5*a*.

[10] *Id.* para. 10-6*a*.

[11] *Id.* para. 10-6*a*(1).

[12] Dep't of Army, Form 4941-R, Statement of Option, para. 3 (May 1988) [hereinafter DA Form 4941-R].

[13] AR 601-280 para. 10-6*c*; *Id.* para. 10-7*c*.

[14] AR 635-200, para. 16-5*a*(1).

[15] AR 601-280, para. 10-6*a*(2).

[16] DA Form 4941-R.

[17] *Id.*

[18] AR 601-280, para. 10-7*b*.

ETS to submit an appeal. In the revised regulation, both the soldier and the commander must appeal the bar within ninety days of the date of notification of the bar to reenlistment. The only exception to this rule is for a commander's appeal when the soldier has not been assigned to the command for at least 120 days.[19]

Under the previous QMP a soldier's appeal was based on the assertion that his or her performance during the current assignment and/or enlistment did not warrant imposition of the bar. The commander was permitted to appeal on the basis that the records considered by the selection board that recommended imposition of the bar were improperly constituted. Because the commander is the individual most likely to be objective concerning a soldier's performance, under the new QMP the commander may appeal the bar based on the soldier's performance during the current assignment.[20] Similarly, because the soldier is in the best position to know whether the records considered by the board were materially in error, the soldier is permitted to appeal based upon a material error in the records considered by the board.[21]

Soldier's Appeal

In deciding whether to appeal based upon a material error in the records that were considered by the board, the primary consideration is whether there is a reasonable chance that the soldier would not have been barred from reenlistment had the error not existed.[22] The regulation lists twelve examples of what normally constitutes material error.[23] Existence of one or more of the following in the soldier's performance fiche at the time it was considered by the board that selected the soldier for the QMP will normally constitute material error warranting referral of the case to a standby advisory board (STAB): 1) material error in an enlisted or academic evaluation report that was subsequently declared invalid; 2) an adverse document relating to another soldier that was cited as a basis for selection under the QMP; 3) a record of article 15 punishment imposed after 1 September 1979 that was cited as a basis for selection under the QMP and which should have been filed only in the MPRJ; 4) failure to file a record of setting aside an article 15 punishment imposed prior to 1 September 1979; 5) a record of an article 15 punishment imposed after 1 September 1979 that was set aside; 6) court-martial orders in which the finding was one of not guilty; 7) a document erroneously indicating that the soldier was AWOL or a deserter; 8) a low SQT score that was cited as a basis for selection under the QMP but which was subsequently recomputed resulting in a significant change in the SQT score; 9) an erroneous enlistment form or one belonging to another individual was filed, and the SQT score was significantly lower than a soldier's actual score; 10) a record of thirty semester hour credits from a regionally accredited college or university that was not in the soldier's file (assuming the board did not review the hard copy academic record); 11) the award of a decoration for valor, an Army Achievement Medal, or an award for meritorious service/achievement that the board did not review; or 12) an EER that was submitted in time for processing and filing before the convening of the board, but which was not reviewed by the board.[24]

In addition to advising the soldier what constitutes material error, the new QMP regulation also specifies what is not a material error and, consequently, what is normally not grounds for referral of a case to a STAB. There are eight such reasons. These are: 1) omission of congratulatory correspondence such as letters of commendation and appreciation; 2) non-derogatory comments filed in the wrong performance fiche; 3) absence of documents that may have been prepared following the convening of the board; 4) incorrect data on a personal qualification record that had been reviewed and confirmed by the soldier prior to the convening of the board; 5) absence of an official photograph or the presence of an outdated photograph; 6) absence of a record of the award of the Good Conduct Medal; 7) absence of the personal qualification record; or 8) absence of documents that are not eligible for filing in the performance fiche.[25]

The addition of these specific examples should significantly assist the soldier in deciding whether to appeal the imposition of a bar to reenlistment, and should minimize the number of appeals that have little chance of success.

Commander's Appeal

If a soldier's commander believes that the soldier's current manner of performance and potential warrant continued service, the commander, if an O-5 or higher, may appeal the bar to reenlistment under the QMP. In deciding whether to appeal, the commander must compare the soldier's current manner of performance with the information used by the screening board in imposing the bar to reenlistment. If, upon making this comparison, the commander decides that the soldier's current manner of performance warrants reinstatement, the commander may initiate the appeal.[26]

Appeal Processing

Once submitted, appeals are forwarded to the CG, PERSCOM. In the case of a soldier's appeal, PER-

[19] *Id.* para. 10-7*b*.

[20] *Id.* para. 10-9*a*.

[21] *Id.* para. 10-7*a*.

[22] *Id.* para. 10-8*a*.

[23] *Id.* para. 10-8*b*(2).

[24] *Id.*

[25] *Id.* para. 10-8*b*(3).

[26] *Id.* para. 10-9*a*.

SCOM will screen the appeal to determine if a material error has been properly alleged. If PERSCOM concludes that a material error did exist, the soldier's records are corrected and transmitted to the Secretariat for Enlisted Boards, United States Army Enlisted Records and Evaluation Center (USAEREC) for further processing.[27] If PERSCOM concludes that a material error did not exist, the appeal is denied and the soldier is notified.[28] In the case of a commander's appeal, the soldier's records, to include all matters pertaining to the original bar to reenlistment, are forwarded to USAEREC.[29] The appeals are held at the center until they may be considered by the next scheduled STAB, which is normally conducted in conjunction with centralized enlisted selection boards.[30]

In a soldier-initiated appeal in which PERSCOM has determined there was a material error, the soldier's corrected records are submitted to a STAB for a *de novo* determination whether the soldier should be barred from reenlistment.[31] The STAB will not be provided with any of the material pertaining to the imposition of the first bar to reenlistment (e.g., the first board's rationale for imposing the first bar to reenlistment). If the STAB determines that the soldier should not receive a bar to reenlistment, the matter is closed. If the STAB recommends that the soldier once again be barred from reenlistment, and that recommendation is approved, the soldier will be treated for all purposes as if the original QMP bar to reenlistment had never been removed.[32]

When an appeal is submitted by the commander based upon the soldier's manner of performance, the STAB receives all the material pertaining to the original bar, including the notification memorandum and enclosures.[33] This review is not *de novo*; the burden is on the commander to provide sufficient evidence to persuade the STAB that the soldier's current manner of performance and potential for future service warrants removal of the bar to reenlistment.[34]

Extensions

A soldier who has completed eighteen or more years of active federal service and received a QMP bar to reenlistment may be extended to reach retirement eligibility. A soldier who has an appeal pending at his or her scheduled ETS date may be extended until final action is taken on the appeal.[35]

Stabilization of Assignment

One of the problems identified by the review of the QMP concerned reassignment of soldiers with DA bars. To minimize the disruption occasioned by reassigning soldiers with DA bars prior to their ETS, both from the commander's and the soldier's standpoint, and to allow maximum command support for the soldier throughout the appeal and separation processes applicable under the QMP, the revised QMP provides that soldiers barred under the QMP will be stabilized at their current duty assignments until the QMP process is complete.[36] Under these stabilization provisions CONUS stationed soldiers will be retained at their current duty station until ETS, discharge, or until the bar to reenlistment is lifted by HQDA.[37] Soldiers stationed OCONUS, other than those in a short tour area, will be retained at their current station until their appeal has been processed, the bar to reenlistment has been lifted, or until separation processing has been completed. If the soldier elects not to appeal the bar to reenlistment or a separation board recommends retention, routine reassignment to CONUS upon DEROS will be accomplished only when the soldier has at least twelve months of service remaining in the period of enlistment. In any event, soldiers will not be involuntarily retained overseas beyond their existing DEROS unless retention is approved on a case-by-case basis by the CG, PERSCOM, or his designee (O-6 grade level or higher).[38]

Requirements for Separation Processing

In addition to barring the soldier from reenlistment, the QMP also requires that separation action be initiated against the soldier if the soldier fails to apply for retirement or voluntarily request discharge. One of the most significant aspects of the revision of the QMP is the acknowledgement that, unlike a local bar to reenlistment imposed under chapter 6, AR 601-280, a QMP bar to reenlistment is not intended to be a rehabilitative measure. Consistent with this approach, not only have the periods in which to submit an appeal been substantially reduced, but also the time frame for initiating separation action has been shortened from nineteen

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[27] *Id.* para. 10-8*b*(1).

[28] *Id.*

[29] *Id.* para. 10-9*b*.

[30] *Id.* para. 10-10*a*.

[31] *Id.* para. 10-10*c*.

[32] *Id.*

[33] *Id.* para. 10-10*b*.

[34] *Id.* para. 10-10*d*.

[35] *Id.* para. 10-11.

[36] *Id.* para. 10-13*b*.

[37] *Id.* para. 10-13*b*(1).

[38] *Id.* para. 10-13*b*(2).

months to sixty days after receipt of the notification of the imposition of the bar to reenlistment. In situations in which an appeal has been submitted, separation action must be initiated within sixty days after receipt of notification that the appeal has been denied.[39]

The requirement to initiate separation action remains the most troublesome aspect of QMP for both commanders and judge advocates. This stems from two factors. First, a QMP bar to reenlistment is based upon the soldier's entire military record as compared to that of his or her contemporaries. Thus, soldiers who have been performing satisfactorily during their current reenlistment may nevertheless receive bars to reenlistment for conduct that occurred during one or more prior enlistments. Because administrative separation actions must be based, for the most part, solely upon soldiers' performance and conduct during their current enlistment, commanders are sometimes faced with the anomaly of being required to initiate separation actions against soldiers whose current performance is satisfactory.[40] Secondly, there is a conflict between the philosophies underlying chapter 10, AR 600-200, and AR 635-200. As indicated earlier, the QMP is no longer viewed as a rehabilitative tool. On the other hand, AR 635-200, at least with respect to counseling and transfer requirements enumerated in paragraph 1-18*a*, requires that efforts be taken to rehabilitate a soldier prior to initiating certain separation actions. Because there is no specific basis in AR 635-200 for separating soldiers who have QMP bars to reenlistment, separation action must fall within one of the existing bases for separation. Frequently, the most appropriate basis for separation of a soldier with a QMP bar to reenlistment is either chapter 13 (unsatisfactory performance) or chapter 14 (paragraph 14-12*a*, minor disciplinary infractions, or paragraph 14-12*b*, pattern of misconduct). These separation grounds require that soldiers be counseled prior to separation, told what their performance/conduct deficiencies are, and advised that separation action will be initiated *if the behavior continues*. If a soldier's current performance is satisfactory, the commander is required under the provisions of AR 601-280 to initiate separation action, although separation is not warranted under any of the bases listed in AR 635-200.

To minimize this conflict, paragraph 1-49, AR 635-200 provides that a soldier with a QMP bar to reenlistment will be "processed for separation" and defines that term as requiring initiation and processing of the separation action to the separation authority for "appropriate action." The immediate and intermediate commanders are free to recommend retention if appropriate. Additionally, the separation authority has the option of stopping the separation process if the soldier does not meet the criteria for separation under AR 635-200. A decision by the separation authority to terminate the separation action, or a recommendation by a board to retain the soldier, does not require that the bar to reenlistment be removed.[41]

Conclusion

For judge advocates who must counsel commanders and soldiers concerning the new provisions of the QMP, the major points to be emphasized are that: 1) imposition of a bar to reenlistment under the QMP is no longer considered a rehabilitative measure; 2) the bases for the commander's and the soldier's appeals have been reversed; 3) the time frames for taking action following notification of the imposition of the bar have been shortened; and 4) although it is mandatory that separation action be initiated following imposition of the bar to reenlistment, separation cannot be based solely on the bar under the QMP but must be based on the character of the soldier's service under the soldier's current enlistment.

In general, the recent revisions to the Qualitative Management Program should significantly advance the program's objectives of ensuring a quality force by removing substandard soldiers from active duty sooner than they would have been under prior procedures. There may still be cases where soldiers with HQDA imposed QMP bars to reenlistment will be retained until the end of their enlistment periods because they do not apply for retirement or separation and are not separated under the mandatory separation procedures. The QMP revisions, particularly the provision that specifies that the bar to reenlistment is not rehabilitative in nature, should result in the removal of most soldiers from active duty shortly after imposition of the bar. In addition, because the imposition of the bar is no longer considered to be a rehabilitative measure, soldiers who might otherwise have elected to remain on active duty pending completion of separation action may now be more inclined to request separation because of the knowledge that, at best, they would be permitted to remain on active duty only until the end of their current enlistment. This should enhance the quality of the active force by removing soldiers who might otherwise be substandard performers, rather than having them remain on active duty until completion of their period of enlistment. All of these anticipated results should promote the basic QMP goal of maintaining a quality enlisted force.

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[39] *Id.* para. 10-14.

[40] Requirements for separation based solely on performance during a current enlistment are contained in Dep't of Defense Directive 1331.14, Enlisted Administrative Separations, Jan. 28, 1988. Any separation based solely on a soldier's DA bar to reenlistment would be improper to the extent that the imposition of the bar under the QMP was based upon conduct prior to the current enlistment (*see* DAJA-AL 1986/3115, 19 Dec. 1986).

[41] DAJA-AL 1986/1395, 4 Mar. 1986.

Involuntary Manslaughter and Drug Overdose Deaths: A Proposed Methodology

Major Eugene R. Milhizer
Instructor, Criminal Law Division, TJAGSA

Introduction

In *United States v. Henderson* [1] the Court of Military Appeals affirmed the accused's conviction of involuntary manslaughter for the cocaine overdose death of a fellow soldier. Unfortunately, the court's reasoning in that decision is imprecise, confuses distinct theories of criminal culpability, and is, in some respects, analytically untenable.

This article will analyze the court's decision in *Henderson* in light of these problems. Specifically, the article will review the development of homicide cases involving drug overdose deaths and the involuntary manslaughter cases that were decided subsequent to *Henderson*. Finally, this article will propose a methodology for addressing future cases involving drug overdose deaths.

The Development of Decisional Law for Homicide in Drug Overdose Cases

Article 119(b) of the Uniform Code of Military Justice [2] defines the offense of involuntary manslaughter for the military as follows:

> Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—
>
> (1) by culpable negligence; or
>
> (2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;
>
> is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.[3]

Several decisions by the military appellate courts have addressed whether the accused could be convicted of involuntary manslaughter for the drug overdose death of another. Although there are two distinct theories for establishing criminal liability in involuntary manslaughter—culpable negligence,[4] and perpetrating an offense directly affecting the person [5]—the appellate courts have used varied and often unclear arguments to sustain the convictions. Moreover, in one case the accused was convicted of negligent homicide,[6] a lesser included offense of involuntary manslaughter.[7]

The earliest reported military case involving a soldier convicted of homicide for a drug overdose death is *United States v. Thibeault*.[8] The accused in *Thibeault* administered two injections of epinephrine into the right arm of a fellow confinee.[9] Each injection was approximately one-quarter cubic centimeter (cc).[10] Although the accused had just been told that one-half cc of the drug would cause severe chest pains if given to anyone,[11] the accused gave the victim a second injection when the victim complained that the first had no effect on him.[12] A short time later the victim died as a result of the epinephrine.[13]

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[1] 23 M.J. 77 (C.M.A. 1986).

[2] Uniform Code of Military Justice art. 119, 10 U.S.C. § 919(b) (1982) [hereinafter UCMJ].

[3] Manual for Courts-Martial, United States, 1984, Part IV, para. 44a [hereinafter MCM, 1984]. The offenses named in clause (4) of article 118—burglary, sodomy, rape, robbery, and aggravated arson—can serve as a basis for conviction of felony murder. *See* UCMJ art. 118(4); *see also* MCM, 1984, Part IV, para. 43b(4)(d).

[4] The Manual defines "culpable negligence" as follows:
> Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducted target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

MCM, 1984, Part IV, para. 44c(2)(a)(i).

[5] The Manual defines "an offense directly affecting the person" as follows:
> An "offense directly affecting the person" means one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming.

Id., Part IV, para. 44c(2)(b).

[6] UCMJ art. 134; MCM, 1984, Part IV, para. 85. Negligent homicide requires that the victim's death be the result of the accused's simple negligence.

[7] MCM, 1984, Part IV, para. 44d(2)(b).

[8] 43 C.M.R. 704 (A.C.M.R.), *pet. denied*, 43 C.M.R. 413 (C.M.A. 1971).

[9] *Id.* at 707.

[10] *Id.*

[11] *Id.* at 706.

[12] *Id.* at 707.

[13] *Id.*

The court affirmed the accused's conviction for involuntary manslaughter based on a culpable negligence theory.[14] The court emphasized that the accused was aware of the "drastic effects of epinephrine on the body"—especially in such a large dosage—but nonetheless injected the drug in "gross disregard of a fellow soldier's safety." [15] The court did not decide whether injecting a dangerous drug would constitute culpable negligence in *all* cases.[16]

The next reported case involving a drug overdose death is *United States v. Uno*.[17] The accused in *Uno* provided opium to the victim.[18] The accused "heated it up, mixed it . . . handed him [the victim] back the stuff" and then "kept watch for him" while "he shot up." [19] The victim died from opium overdose.[20] The court affirmed the accused's conviction for involuntary manslaughter without a detailed analysis, concluding simply that the "[d]eath was directly caused by the culpably negligent act of appellant in furnishing a dangerous drug to the deceased and participating in its injection into the deceased." [21] The court apparently concluded that providing the drug and helping the victim inject it constituted culpable negligence regardless of the amount of drug involved or the particular susceptibilities of the victim. Although not dispositive to the decision, *Uno* was the first case where the court seemed to recognize an aiding and abetting theory as a basis for establishing criminal liability under a culpable negligence standard.[22]

In *United States v. Monroe* [23] the accused was convicted of causing the death of another by heroin overdose. The accused provided the victim with a "dime bag" of heroin and the paraphernalia to inject it.[24] The accused admittedly knew that a "whole 'dime' bag of heroin would be too much" for the victim.[25]

The court affirmed the accused's conviction on the broad grounds that providing a dangerous drug and the means to inject it were sufficient to constitute culpable negligence.[26] Whether the accused personally assisted the victim in injecting the drug was deemed immaterial.[27] The excessive amount of the drug provided was apparently not important to the court's decision.

The Court of Military Appeals first addressed this type of case in *United States v. Romero*, [28] where the accused was convicted of negligent homicide for the death of a fellow soldier by an overdose of heroin. The victim had "cooked" a quantity of heroin and drew it into a syringe.[29] He then solicited the help of those present to inject the drug.[30] The others refused and advised the victim, in the presence of the accused, that the amount was dangerously excessive.[31] Frustrated in his attempts to invoke the aid of the others, the victim began pricking his upper arm, exploring for a vein suitable for injection.[32] The accused, observing the victim's failed attempts, helped the victim inject the heroin into a vein.[33]

The court affirmed the accused's conviction for negligent homicide, based in large part on the other soldiers' express warnings concerning the dangerous amount of heroin to be injected.[34] This, coupled with the accused's personal drug use experiences, clearly provided him notice of the danger involved in assisting the victim.[35]

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[14] *Id.* at 707–08.

[15] *Id.* at 708.

[16] *Id.*

[17] 47 C.M.R. 683 (A.C.M.R. 1973).

[18] *Id.* at 684.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 684–85.

[23] 50 C.M.R. 423 (N.C.M.R. 1975).

[24] *Id.* at 424.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] 1 M.J. 227 (C.M.A. 1975).

[29] *Id.* at 229.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

The Court of Military Appeals next addressed this issue in *United States v. Moglia*.[36] The accused was convicted of involuntary manslaughter for the heroin overdose death of a fellow soldier, under the theory that his act of transferring heroin to the victim constituted an offense directly affecting the person of another.[37] The court affirmed, finding that the accused's transfer of heroin was an inherently dangerous act that directly affected the person of the deceased.[38] Further action by the accused, such as assisting the victim to inject the drug, was unnecessary to sustain the conviction.[39]

In *United States v Mazur* [40] the accused was convicted of involuntary manslaughter by culpable negligence when he assisted the victim in intravenously injecting heroin. The victim was already under the influence of heroin and was unable to inject himself without the accused's assistance.[41] Citing *Moglia*,[42] Judge Cook noted that "furnishing . . . a restricted drug was an act inherently dangerous to human life." [43] Chief Judge Everett concurred, finding that even if the accused's responses during the providence inquiry established that he was guilty of involuntary manslaughter under the theory of an offense directly affecting the person, his conviction under a culpable negligence theory could nonetheless be affirmed.[44] Judge Fletcher dissented, being "unable to agree that the inherent dangerousness of drug transfer and use necessarily compels a finding of culpable negligence." [45]

The facts in *United States v. Dinkel* [46] are similar to those in *Mazur*.[47] In *Dinkel* the accused had already injected himself and another soldier with heroin when the victim entered the room.[48] The victim "snorted" some heroin but complained that he was not getting "high." [49] The accused then assisted the victim in injecting an additional dose of heroin.[50] As a consequence, the victim died.[51] A unanimous court affirmed the accused's conviction for involuntary manslaughter based on a culpable negligence theory.[52]

Finally, in *United States v. Sargent* [53] the Court of Military Appeals reversed the accused's conviction of involuntary manslaughter for the heroin overdose death of a fellow soldier. The accused's conviction was premised on the theory that his sale of heroin to the victim constituted an act directly affecting the person of another.[54] The court concluded that merely selling the drug does not constitute an offense directly affecting the person of the purchaser.[55] The court noted, however, that "when the seller has gone further and assisted the purchaser in injecting or ingesting the drug, the sale becomes one which does directly affect the person for purposes of Article 119(b)(2)." [56] In this regard, the court observed that such conduct would constitute aiding and abetting the use of the drug, and thus would satisfy the article 119(b)(2) requirement that the offense directly affect the person of another. The court remarked that even though a mere seller could not be prosecuted under an article 119(b)(2) theory, furnishing a dangerous drug provides at least some evidence of the culpable negligence that is required for a conviction under article 119(b)(1).[57]

United States v. Henderson

In *Henderson* the accused was convicted of involuntary manslaughter under a culpable negligence theory for

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[36] 3 M.J. 216 (C.M.A. 1977).

[37] *Id.* at 217.

[38] *Id.*

[39] *Id.* at 217-18.

[40] 13 M.J. 143 (C.M.A. 1982).

[41] *Id.* at 144.

[42] United States v. Moglia, 3 M.J. 216, 217 (C.M.A. 1977) (footnote omitted).

[43] *Mazur*, 13 M.J. at 144.

[44] *Id.* at 145-46 (Everett, C.J., concurring) (citing United States v. Felty, 12 M.J. 438 (C.M.A. 1982)).

[45] *Mazur*, 13 M.J. at 146 (Fletcher, J., dissenting).

[46] 13 M.J. 400 (C.M.A. 1982).

[47] United States v. Mazur, 13 M.J. 143 (C.M.A. 1982).

[48] *Dinkel*, 13 M.J. at 401.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] 18 M.J. 331 (C.M.A. 1984).

[54] *Id.* at 332.

[55] *Id.* at 338-39.

[56] *Id.* at 339.

[57] *Id.* at 339 n.6.

the victim's death by cocaine overdose. The accused had supplied cocaine to the victim prior to the fatal occasion.[58] The accused knew that the victim was severely depressed and suicidal.[59] The victim had "almost killed himself" before by overdosing on cocaine, [60] and on the night before the victim died, the accused commented that the victim "was in a back room shooting cocaine and saying that he was going to die." [61] In response to another's expression of concern, the accused replied that the victim "was a big boy." [62]

On the fatal evening, the accused "made available" [63] to the victim a large amount of cocaine knowing that it would be consumed.[64] Additionally, the accused encouraged the victim to "get fired up," permitted the victim to use his private room for injecting the cocaine, and was present while the victim consumed the fatal dosage.[65]

Judge Cox, writing for the majority, found that the designation of cocaine as a controlled substance, standing alone, was sufficient to establish that cocaine was potentially harmful, only available illicitly, and of uncontrolled quality.[66] Citing *Moglia* [67] and *Sargent*,[68] he noted that merely providing a controlled substance was an act inherently dangerous to human life.[69] Although the accused did not inject the victim with the drug, Judge Cox found that the accused's participation—providing a room, encouraging the use, and being present during the use—constituted aiding and abetting.[70] The majority also noted that the accused's knowledge of the victim's propensity to use cocaine excessively and recklessly made the accused's acts especially culpable.[71] Apparently based on all these reasons, the majority affirmed the accused's conviction.

Chief Judge Everett dissented, finding that although the evidence was probably sufficient to prove the simple negligence required for negligent homicide,[72] it was not sufficient to establish the culpable negligence required for involuntary manslaughter.[73] Specifically, Chief Judge Everett found that at the time of the charged offense, the victim's death as a result of an overdose of cocaine was not reasonably foreseeable.[74] The Chief Judge also concluded that no special circumstances existed that put the accused on notice that the victim's use of cocaine might be fatal.[75]

Involuntary Homicide Decisions After *Henderson*

Two child abuse cases have resulted in important decisions construing the scope of involuntary manslaughter based on a culpable negligence theory. They are illustrative of the court's seemingly inconsistent approach in assessing the vulnerability of the victim when applying the culpable negligence standard.

In *United States v. Baker* [76] the accused was convicted of involuntary manslaughter for the death of a thirteen-month-old child. The court concluded that the accused's act of violently throwing the child eight to ten inches to an unpadded floor constituted culpable negligence,[77] and the accused's conduct "directed towards a child of such tender age created a substantial and unjustifiable danger of death." [78]

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[58] *Henderson*, 23 M.J. at 78–79.

[59] *Id.* at 78.

[60] *Id.*

[61] *Id.* at 79.

[62] *Id.*

[63] The military judge announced his findings as follows:

> I could not find beyond a reasonable doubt that a sale of cocaine occurred between the accused and Myers W. Hickman [the victim] on or about 15 June. I did find beyond a question of a doubt, however, that the accused made available to Myers Hickman sufficient quantities of cocaine that once ingested caused the death of Myers Hickman.

Henderson, 23 M.J. at 79. The court concluded that the military judge's finding that the accused "made available" cocaine to the victim was equivalent under the facts to a finding that appellant "provided," "supplied," or "furnished" the illegal drug. *Id.*

[64] *Id.* at 80.

[65] *Id.*

[66] *Id.*

[67] *Moglia*, 3 M.J. at 217.

[68] *Sargent*, 18 M.J. at 339 n.6.

[69] *Henderson*, 23 M.J. at 80.

[70] *Id.*

[71] *Id.*

[72] *See supra* note 5.

[73] *Henderson*, 23 M.J. at 81 (Everett, C.J., dissenting).

[74] *Id.*

[75] *Id.* at 81–82.

[76] 24 M.J. 354 (C.M.A. 1987).

[77] *Id.* at 356.

[78] *Id.* at 357.

In the second case, *United States v. Brown*,[79] the accused was convicted of involuntary manslaughter for the death of his five-week-old son. The child died as a result of being violently shaken by the accused.[80] Relying on evidence showing the severity of the bodily injuries and the prior negligent conduct of the accused, the court concluded that a reasonable inference could be drawn that the accused's acts amounted to culpable negligence.[81] The court, however, did not explicitly state that the child's tender years established special circumstances that created a substantial and unjustified danger of death.

A Synthesis and Criticism of the Decisional Law

This review demonstrates that the development of the case law pertaining to homicide for drug overdose deaths has been, at best, sporadic and confusing. Distinct theories of criminal liability have sometimes been merged into an analytically untenable hybrid. Sound bases for affirming convictions have often been ignored or only implicitly relied upon. This imprecision has created a body of law that provides little principled guidance to trial practitioners faced with charging, prosecuting, or defending an accused soldier who has contributed to the drug overdose death of another.

A primary source of this confusion is that although accused soldiers have been charged under the two separate theories of involuntary manslaughter for the drug overdose deaths of others,[82] a single analytical formula has sometimes been used to review the sufficiency of all such convictions. For example, although the accused in *Moglia* was convicted on the theory of committing an offense directly affecting the person of another, the court focused on the inherent dangerousness of the accused's acts.[83] Although the dangerousness of the accused's conduct is logically related to the question of culpable negligence,[84] it does not bear on the issue of whether the accused's act directly affected the victim.[85]

Conversely, although the accused in *Uno* was convicted on a culpable negligence theory, the court focused on the accused's acts that aided and abetted the victim's drug use.[86] The court also relied on this "aiding and abetting" theory in *Henderson*, which likewise involved a conviction based on a culpable negligence theory.[87] Although the accused's assistance in administering the drug is logically related to the issue of whether the offense directly affected the person of the victim,[88] it does not necessarily address the issue of whether his conduct was culpably negligent.[89] The blending of these two distinct bases for criminal liability is both analytically unsound and confusing to trial practitioners.

Another source of confusion is the appellate courts' frequent failure to expressly rely on special circumstances relating to the criminality of the accused's conduct when sustaining convictions under the two theories of involuntary manslaughter. For example, in *Monroe* the accused's specific knowledge that the amount of heroin he provided to the victim was a dangerously large dosage was of no apparent import to the court in affirming his conviction.[90] Similarly, the lead opinion in *Mazur* apparently attached no significance to the victim's heightened vulnerability as a consequence of injecting heroin a few hours earlier.[91] This tendency to either ignore or implicitly rely on crucial facts compounds the confusion arising from these decisions.[92]

The problems identified here are merely symptomatic of the appellate courts' unwillingness to establish a sound and clear methodology for approaching the issues raised by drug overdose deaths. This absence of a broad and principled approach results in the imprecision and

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[79] 26 M.J. 148 (C.M.A. 1988).

[80] *Id.* at 150.

[81] *Id.*

[82] Several cases involve convictions for involuntary manslaughter by culpable negligence. *E.g.*, United States v. Henderson, 23 M.J. 77 (C.M.A. 1986); United States v. Dinkel, 13 M.J. 400 (C.M.A. 1982); United States v. Mazur, 13 M.J. 143 (C.M.A. 1982); United States v. Monroe, 50 C.M.R. 423 (N.C.M.R. 1975); United States v. Uno, 47 C.M.R. 683 (A.C.M.R. 1973); United States v. Thibeault, 43 C.M.R. 704 (A.C.M.R.), *pet. denied*, 43 C.M.R. 413 (C.M.A. 1971). Other cases involve convictions for involuntary manslaughter for perpetrating an offense directly affecting the person. *E.g.*, United States v. Sargent, 18 M.J. 331 (C.M.A. 1984); United States v. Moglia, 3 M.J. 216 (C.M.A. 1977).

[83] *Moglia*, 3 M.J. at 217.

[84] *See* MCM, 1984, Part IV, para. 44c(2)(a)(i).

[85] *See id.*, para. 44c(2)(b).

[86] *Uno*, 47 C.M.R. at 684-85.

[87] *Henderson*, 23 M.J. at 80.

[88] MCM, 1984, Part IV, para. 44c(2)(b).

[89] *Id.*, Part IV, para. 44c(2)(a)(i). Whether an accused can be found guilty of involuntary manslaughter on a theory of aiding and abetting a culpably negligent act was discussed in greater detail in United States v. Brown, 22 M.J. 448 (C.M.A. 1986).

[90] *Monroe*, 50 C.M.R. 423 (N.C.M.R. 1975).

[91] *Mazur*, 13 M.J. 143 (C.M.A. 1982). Chief Judge Everett specifically cited these special circumstances in his concurring opinion. *Id.* at 145 (Everett, C.J., concurring).

[92] Similarly, in United States v. Brown, 26 M.J. 148 (C.M.A. 1988), the court failed to mention the tender years of the victim as helping to establish the accused's culpable negligence by shaking the victim to death.

the failure to cite important facts noted above. It is against this backdrop that a methodology will now be proposed.

A Proposed Methodology

The proposed methodology for assessing the sufficiency of proof for involuntary manslaughter as a result of a drug overdose is simple and straightforward. It involves four steps: 1) determine the appropriate theory or theories for criminal liability; 2) based on the theory chosen, ascertain the legal requirements for establishing the offense; 3) consider only those facts that relate to the pertinent legal requirements; and 4) evaluate the adequacy of proof.

The starting point is to determine which of the two distinct theories for involuntary manslaughter should be applied. This determination is crucial as the two theories—culpable negligence and an offense directly affecting the person—are not logically coextensive. Thus, the theory utilized should both shape the presentation of the government's case and provide notice to the defense. If appropriate to the facts, both theories could conceivably be charged in the alternative for a single act.

Assuming the culpable negligence theory is used, the special legal requirements of proof would focus on whether the accused's conduct was sufficiently negligent; i.e., whether the conduct was accompanied by a culpable disregard of the foreseeable, dangerous consequences to the deceased.[93] The question of foreseeability is judged by an objective, reasonable person standard. As the Court of Military Appeals has noted, "The actor need not actually intend or foresee those consequences: it is only necessary that a reasonable person in such circumstances would have realized the substantial and unjustified danger created by his act." [94]

In all such cases, the contraband and controlled status of the substance involved would be some evidence of culpable negligence. Indeed, controlled substances by their nature have been determined to be harmful, are only available illicitly, and lack quality control.[95] Thus, the Court of Military Appeals has repeatedly found that merely providing a controlled substance is "an act inherently dangerous to human life." [96] Whether furnishing a controlled substance, without more, constitutes culpable negligence should be regarded as a question of fact.[97] The degree of dangerousness, and hence culpability, would turn in part on the nature of the drug provided and society's general awareness of its harmful effects.[98] One method of establishing the degree of dangerousness could be through the use of expert testimony.[99]

The degree of dangerousness might be enhanced or diminished depending on the particular facts of the case. For example, several of the cases previously reviewed involve an unreasonably large dosage of drugs provided to the victim by the accused. In *Thibeault* the accused injected the victim with what he knew to be an excessive amount of epinephrine.[100] Similarly, in *Monroe* the accused knowingly provided an excessive amount of heroin to the victim for his use.[101] In *Romero* the accused injected the victim with an excessive quantity of heroin despite his personal knowledge of the drug and contrary to warnings of others.[102] In each of these cases, the amount of the drug provided should have been considered in determining the extent of the accused's negligence.

The manifest vulnerability of the victim is likewise pertinent to the issue of the accused's culpability. In *Mazur*, for example, the accused helped the victim inject heroin because, as the accused was aware, the victim had injected himself with heroin only three hours earlier.[103] Whether the victim is under the influence of drugs and therefore more susceptible to the transferred drug's affects is clearly a relevant factor pertaining to the culpability of the accused.

These factors do not constitute an exhaustive list of what should be considered in assessing the accused's negligence. Examples of other relevant factors might include the accused's knowledge that the victim was

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[93] MCM, 1984, part IV, para. 44c(2)(a)(i); *accord* United States v. Brown, 26 M.J. 148 (C.M.A. 1988); United States v. Baker, 24 M.J. 354 (C.M.A. 1987); United States v. Brown, 22 M.J. 448 (C.M.A. 1986) (accused turned over operation of a car to a drunk); United States v. Cherry, 22 M.J. 284 (C.M.A. 1986) (accused failed to inspect his assigned vehicle, to follow unit safety instructions, and to pull over when the brakes failed).

[94] *Baker*, 24 M.J. at 356 (citing United States v. Henderson, 23 M.J. 77 (C.M.A. 1986), and United States v. Brown, 22 M.J. 448 (C.M.A. 1986)).

[95] *Henderson*, 23 M.J. at 80.

[96] *Id.*; *see Sargent*, 18 M.J. at 339 n.6; *Dinkel*, 13 M.J. at 401; *Moglia*, 3 M.J. at 216.

[97] Chief Judge Everett noted that providing dangerous drugs was "some evidence" of culpable negligence. *Sargent*, 18 M.J. at 339 n.6. The court in *Henderson* found it unnecessary to decide whether the sole act of furnishing a controlled substance to a person who uses it and dies as a result would constitute culpable negligence per se. 23 M.J. at 80 n.4.

[98] For example, a reasonable person in 1988 would perceive a substantially greater danger in furnishing "crack" to another as compared to furnishing cocaine in 1981. *See Henderson*, 23 M.J. at 83 (Everett, C.J., dissenting).

[99] *See id.* at 81 (Everett, C.J., dissenting) (expert witness testified regarding the frequency of cocaine-related deaths in the military); *cf.* United States v. Harper, 22 M.J. 157 (C.M.A. 1987) (expert testimony explaining laboratory results in urinalysis cases). If the government was only able to show simple rather than culpable negligence, the accused could be convicted of the lesser included offense of negligent homicide under article 134. *See Henderson*, 23 M.J. at 81 (Everett, C.J., dissenting); United States v. Romero, 1 M.J. 227 (C.M.A. 1975).

[100] 43 C.M.R. at 706.

[101] 50 C.M.R. at 424.

[102] 1 M.J. at 229.

[103] 13 M.J. at 144.

unusually vulnerable or that the drug was adulterated or especially potent. Conversely, facts that might diminish culpability might include the accused's knowledge that the drug was especially weak or that the victim was unusually tolerant.

Whether the accused aided or assisted the victim is not necessarily pertinent to the culpable negligence theory of involuntary manslaughter. The foreseeable danger involved in the accused providing an illegal drug for another's personal use is generally not aggravated if the accused helps the victim consume the substance. Regardless of whether the accused assists the victim consume the drug, when the substance is provided to the victim for the victim's use and is used by the victim, the danger to the victim remains unchanged. In fact, in some circumstances the danger to society may be increased where the accused fails to assist the victim to use the drug, as where a victim who has developed a tolerance for the drug later decides to transfer it to another who is especially vulnerable, such as a child.

The accused's assistance to the victim can be pertinent to the issue of culpable negligence where the victim is otherwise unable to consume the drug because of his or her vulnerable condition.[104] Criminal liability is therefore not premised on an aiding and abetting theory as is sometimes suggested,[105] but is instead based on the reasonably foreseeable dangerousness of providing the drug to an especially vulnerable victim who could not otherwise consume it.[106] In such cases, the accused's assistance would be simply another factor to consider on the issue of culpability, rather than a separate or per se basis for finding such culpability.

If the theory of an offense directly affecting the person of another is used, the accused's assistance then becomes crucial. The Court of Military Appeals has decided that merely selling or providing a drug to another, without more, does not constitute an offense directly affecting the person of another.[107] If the seller goes further and assists the purchaser in injecting or ingesting the drug, however, the sale becomes one that directly affects the person for purposes of article 119(b)(2).[108] The dangerousness of the drug involved, although potentially relevant to the issue of punishment, is thus not pertinent to the question of whether the offense directly affected the person of another. That issue is resolved solely by evaluating whether the accused's conduct directly affected some particular person (the victim), as distinguished from society in general.[109]

If the accused is charged under one theory but contests guilt, and the evidence establishes guilt only under another uncharged theory, a conviction should not be obtained under the uncharged theory—the variance would be too great.[110] If, on the other hand, the accused's answers during a providence inquiry establish guilt of involuntary manslaughter based on an uncharged theory, the plea need not be set aside on appeal.[111]

Henderson Revisited

Henderson was charged with involuntary manslaughter under a culpable negligence theory for the cocaine overdose death of another. Thus, the crucial issue was whether Henderson's conduct was such that a reasonable person would have appreciated a substantial and unjustified danger created by his actions. Given the then-prevailing view of society regarding the comparatively minimal dangers of cocaine, the absence of any reported cocaine related deaths in the military, and the fact that the celebrated "crack" deaths were years in the future, the mere furnishing of the drug, without more, would probably not have amounted to culpable negligence. Based solely on these facts, Henderson's misconduct would have constituted no more than simple negligence, and thus he would be guilty only of negligent homicide.

Special additional circumstances were present, however, which elevated Henderson's misconduct to culpable negligence. The victim was severely depressed, even suicidal, and Henderson was aware of this condition. Henderson also knew that the victim nearly died on an earlier occasion from a cocaine overdose. Nonetheless, Henderson made available a large quantity of cocaine to the victim for his use. Given these additional facts, Henderson's misconduct clearly amounted to culpable negligence.

Although Henderson's encouragement, presence in the room, and the fact that he made his room available to the victim may have helped establish causation, these facts add little to the assessment of whether he was culpably negligent. Hypothetically, if evidence had been presented that the victim was reluctant or unwilling to consume the drug absent Henderson's assistance, then his assistance might have been pertinent to evaluating the

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[104] *Id.*

[105] *See Henderson*, 23 M.J. at 80; *Uno*, 47 C.M.R. at 684-85. Indeed, the use of an aiding and abetting theory to establish guilt for a crime based upon culpable negligence is doubtful, as the accused must share the criminal purpose or design of the perpetrator. *See* MCM, 1984, Part IV, para. 1b(2)(b)(ii); *see generally Brown*, 22 M.J. at 451-52 (Everett, C.J., concurring).

[106] The accused's assistance could also be pertinent to the issue of causation. *See, e.g., Mazur*, 13 M.J. at 145.

[107] *Sargent*, 18 M.J. at 338-39; *accord Henderson*, 23 M.J. at 82 (Everett, C.J., dissenting).

[108] *Sargent*, 18 M.J. at 339.

[109] MCM, 1984, Part IV, para. 44c(2)(b); *accord Sargent*, 18 M.J. at 335-39; *see, e.g.*, United States v. Madison, 34 C.M.R. 435 (C.M.A. 1964) (death as the result of an assault).

[110] *See* United States v. Sargent, 18 M.J. 331 (C.M.A. 1984) (accused contested involuntary manslaughter charge under article 119(b)(2); court reversed the accused's conviction without testing its sufficiency under an article 119(b)(1) theory).

[111] United States v. Mazur, 13 M.J. at 146 (Everett, C. concurring) (citing United States v. Felty, 12 M.J. 438 (C.M.A. 1982)).

degree of his negligence. Where, as here, the victim was apparently anxious to use the cocaine provided to him, Henderson's assistance in helping the victim do what he would have done in any event is of no moment in determining whether Henderson was culpably negligent.

Finally, because Henderson contested his guilt as to the involuntary manslaughter offense charged, solely on the basis that he was culpably negligent, his conviction cannot be affirmed on appeal under the theory that his assistance constituted an offense directly affecting the person.

Conclusion

With the proliferation of dangerous new drugs, the incidence of death by drug overdose will certainly continue. Applying the proposed methodology should provide clear guidance to trial practitioners on how to charge, prosecute, and defend accused soldiers in such cases. It also should establish a principled analytical basis for reviewing convictions on appeal. Given the current national war on drugs and the strong emotions engendered by drug related offenses, the need to establish a fair and legally sound method for assigning criminal responsibility when death results from the use of drugs has attained special importance.

Department of Defense Inspector General Subpoena

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Introduction

Congress passed the Inspector General Act of 1978 to provide an Inspector General for many of the federal departments and agencies.[1] The enactment of the Inspector General Act reflected congressional concern that fraud, waste, and abuse in federal departments and agencies was "reaching epidemic proportions." [2] Under the provisions of the Inspector General Act, a department's audit and investigative functions are centralized under the Inspector General, thus improving investigative abilities and eliminating abuses. In 1982 Congress amended the Inspector General Act to provide an Inspector General for the Department of Defense.[3] The Department of Defense Inspector General's (DODIG) overall mission is to prevent and detect fraud, waste, and abuse within DOD.[4] The amendment to the Inspector General Act did not consolidate investigative and audit functions under the DODIG; rather, it required the DODIG to develop policy, evaluate performance, and provide guidance to the investigative arms of the military services (Naval Security and Investigative Command, U.S. Army Criminal Investigative Command, and the Air Force Office of Special Investigation) and to the Defense Criminal Investigative Service (DCIS). One of the tools that Congress gave to the DODIG to perform the mission was an administrative subpoena *duces tecum,* frequently referred to as a DODIG subpoena.[5] The purpose of this article is to outline the procedures used to obtain the subpoenas, and to explain their scope, use, and enforceability.

The DODIG Subpoena

The DODIG, through the use of the subpoena, may require "the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned." [6] No testimony may be compelled by the DODIG subpoena, although a request that the subpoenaed party provide a statement to authenticate the returned documents should be permissible. This authentication should be considered ancillary to the subpoena.[7] In the event that an authenticating statement is not obtained, either a certificate of compliance or a certificate of completeness and accuracy will often satisfy the authentication requirement.

As an administrative subpoena, the DODIG subpoena does not require a showing of "probable cause." [8] The applicable standard for the issuance of an administrative subpoena has been described as "mere suspicion" or "official curiosity." [9] Under the provisions of the Inspector General Act, the DODIG may issue a subpoena for documents "necessary in the performance of the

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[1] 5 U.S.C.A. app. 3, § 2 (West Supp. 1988). Section 2(l) also lists the federal departments and agencies that have Inspectors General.

[2] S. Rep. No. 1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. and Admin. News 2676, 2679.

[3] 5 U.S.C.A. app. 3, § 2, 8, 9(a)(1)(C) and 11 (West Supp. 1988).

[4] 5 U.S.C.A. app. 3, § 8(c) (West Supp. 1988).

[5] *Id.* at § 6(a)(4).

[6] *Id.*

[7] *See generally* Curcio v. United States, 354 U.S. 118 (1957), concerning the authentication of documents returned after the use of a grand jury subpoena *duces tecum.*

[8] United States v. Westinghouse Electric Corp., 615 F. Supp. 1163, 1182 (W.D. Pa. 1985), *aff'd,* 788 F.2d 164 (3d Cir. 1986).

[9] United States v. Morton Salt Co., 338 U.S. 632, 642, 652 (1950).

functions assigned by this Act." [10] The broad functions of the DODIG include initiating, conducting, and supervising audits and investigations within the Department of Defense as the DODIG considers appropriate; investigating fraud, waste, and abuse uncovered by audits; and acting as the principal advisor to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse.[11] A DODIG subpoena seeking information reasonably relevant to the fulfillment of any one of the DODIG's functions will be proper.[12]

Uses of the DODIG Subpoena

In accomplishing this mission, the DODIG primarily uses audits and investigations. The investigative arms of the military service, DCIS, and the Defense Contract Audit Agency (DCAA) actually conduct the investigations and audits in most instances. An investigator who desires the production of documents must make a formal request to the DODIG to issue the subpoena. Although the DODIG has not imposed a requirement that an auditor or investigator first seek voluntary production of the requested documents from the subpoenaed party,[13] voluntary production from witnesses or third parties who are not subjects of criminal investigations is encouraged and preferred.[14]

DODIG subpoenas may be issued in support of criminal, civil, and administrative investigations or audits.[15] A DODIG subpoena may be issued even though the Department of Justice (DOJ) is conducting a parallel criminal investigation. For example, in *United States v. Aero Mayflower Transit Co. Inc.*[16] the court upheld the issuance of DODIG subpoenas notwithstanding DOJ collaboration. In *Aero* the DODIG issued the subpoenas as a result of a preliminary investigation of price fixing by moving and storage companies that contracted with DOD. The Federal Bureau of Investigation (FBI) and DOJ had asked the DODIG to join their investigation, which had already produced a number of criminal indictments. The DODIG subpoenas were to be used by the Department of Defense in pursuing civil remedies.[17] The target companies refused to comply with the DODIG subpoenas. The companies alleged that the DODIG improperly delegated his authority to issue the subpoenas to the DOJ. The *Aero* court found no restrictions in the Inspector General Act or in any regulation that prohibited the DODIG from cooperating with the FBI and DOJ. Additionally, the court found that the DODIG acted within his broad subpoena power to investigate fraud, waste, and abuse in DOD. Finding no bad faith in the issuance of the subpoena, the *Aero* court declared the subpoenas valid and enforceable. The *Aero* court also struck down the company's allegation that it was a violation of the Posse Comitatus Act [18] to force the companies to deliver the requested documents to military officers on a military installation.[19]

A DODIG subpoena may be used to require "the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence *necessary* in the performance of functions assigned" [20] to the DODIG. The United States Army Criminal Investigation Command has used the subpoenas to obtain checking account records of soldiers writing large numbers of worthless checks; frequent flyer records of Department of the Army civilian employees and soldiers who are allegedly violating Standard of Conduct prohibitions; [21] bank records and brokerage records of an officer who allegedly defrauded his fellow officers of hundreds of thousands of dollars in a "get-rich-quick" scheme; and various records of government contractors and their suppliers, banks, owners, and managers.[22] Whether the DODIG subpoena for the described records is proper depends upon the relevance of the records. If the DODIG subpoena does not seek relevant records, then the subpoenaed party may argue that the records are not "necessary" in the performance of the DODIG's funtions. For example, in *United States v. Westinghouse Electric Corporation* [23] the DODIG

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[10] 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1988).

[11] *Id.* at § 8(c).

[12] United States v. Westinghouse Electric Corp., 615 F. Supp. 1163 (W.D. Pa. 1985), *aff'd*, 788 F.2d 164 (3d Cir. 1986).

[13] Dep't of Defense, Inspector General Memorandum, Criminal Investigations Policy and Oversight, Subject: Inspector General Subpoena, 8 Oct. 86.

[14] *Id.* The memorandum does indicate one benefit of using the DODIG subpoena on the subject when it states that "furthermore, when dealing with subjects, a subpoena is useful in that production of records thereunder will create for prosecutors an evidentiary chain indicating the source of the documents. Such a chain may be more difficult to construct absent a subpoena." Additionally, if the potential target of the DODIG subpoena is a company engaged in fulfilling a negotiated government contract, the clause in the Federal Acquisition Regulation, Subpart 52.215-2, gives the contracting officer a right to examine and audit the contractor's files.

[15] *See Westinghouse Electric*, 615 F. Supp. 1163 (W.D. Pa. 1985). *See also* United States v. Art Metal-U.S.A., Inc., 484 F. Supp. 884 (D.N.J. 1980).

[16] 831 F.2d 1142 (D.C. Cir. 1987).

[17] 831 F.2d at 1146. *See also* Fed. R. Crim. P. 6(e).

[18] 18 U.S.C. § 1385 (1982).

[19] The Inspector General Act of 1978, as amended, contains a clause excepting audits and investigations conducted by the DODIG from the provisions of the Posse Comitatus Act. 5 U.S.C.A. app. 3, § 8(g) (West Supp. 1988).

[20] 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1988) (emphasis added).

[21] Army Reg. 600-50, Personnel-General, Standards of Conduct for Army Personnel, para. 2-2*c* (8) (28 Jan. 88).

[22] Personal experience of the author who served as the Region Judge Advocate, Sixth Region, USACIDC, from July 1986 to June 1988.

[23] 615 F. Supp. 1163 (W.D. Pa. 1985), *aff'd*, 788 F.2d 164 (3d Cir. 1986).

sought the production of Westinghouse's internal audit reports that were paid for, in the main part, through costs allocated to DOD contracts. Because of Westinghouse's audit structure and procedure, the DODIG subpoena also required the production of audit reports of sections that performed no DOD work. The Assistant DOD Inspector General for Audit Policy and Oversight testified that examination of the non-DOD related audit reports could reveal deficiencies in Westinghouse's internal controls, which would also be found in a division that does DOD work. The court upheld the enforcement of the DODIG subpoena, finding the subpoena to be within the DODIG's statutory authority and not unreasonably broad.[24]

Grand Jury Secrecy

Documents obtained by the DODIG subpoena may be used to support all civil, administrative, contractual, and criminal remedies available to the Federal Government in combating procurement fraud. Secrecy problems engendered by the use of grand jury subpoenas are avoided.[25] The grand jury rule of secrecy generally precludes the use of subpoenaed evidence in civil, administrative, and contractual remedies unless the subpoenaed evidence was first presented in a criminal trial. The DODIG, however, may properly subpoena records that have been subpoenaed for a grand jury investigation, notwithstanding that the criminal investigation has already been completed and prosecution declined. The inspection of the records will remain critical to the DODIG's investigation.[26]

As few cases culminate in a criminal trial, the grand jury rule of secrecy imposes severe limitations on the use of evidence subpoenaed by a grand jury. In *United States v. Sells Engineering, Inc.*[27] the Supreme Court held that DOJ Civil Division attorneys are not entitled to automatic disclosure of matters occurring before the grand jury for use in a civil suit. A district court disclosure order, based upon a showing of "particular need," must be obtained for an authorized disclosure. In *United States v. Baggott* [28] the Supreme Court limited disclosure of grand jury matters to judicial proceedings, and then only pursuant to a court order. Investigators seeking administrative and contractual remedies would not be able to use the grand jury matters. Thus, the use of grand jury matters to support administrative sanctions such as debarment or suspension is generally not permitted. Because of all these restrictions on the use of grand jury subpoenas, DODIG subpoenas are preferred.[29]

Limitations

There are limitations as to what documents may be obtained with a DODIG subpoena. The only statutory limitation states that "procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from federal agencies." [30] Other procedures allow the DODIG and the DODIG's subordinate investigative agencies to obtain records from federal agencies. For example, U.S. Army Criminal Investigation Command (CID) special agents have access to "all Army facilities and records when necessary for criminal investigations." [31] DODIG policy decisions also impose limitations on the use of DODIG subpoenas. There are restrictions on the issuance of DODIG subpoenas to attorneys and members of the news media to obtain documents obtained from other parties. The limitations, in essence, require adherence to DOJ guidelines.[32] DODIG will also not issue a DODIG subpoena for a trial counsel once a court-martial is convened. Trial counsel should use the procedures outlined in Rule for Courts-Martial 703[33] to obtain the necessary documents.[34]

Other laws also affect the use of the DODIG subpoena. For example, documents obtained by the use of the DODIG subpoena may be subject to disclosure under the provisions of the Freedom of Information Act.[35] Thus, if a company's trade secrets or other confidential information are subpoenaed by the DODIG, the company will be reluctant to comply, fearing release of its confidential information to competitors. If the documents are marked to indicate that they contain trade secrets or confidential information, the DODIG will seek to exempt the documents from disclosure under the Freedom of Information Act.[36] DODIG subpoenas is-

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[24] 788 F.2d at 171.

[25] *See generally* Fed. R. Crim. P. 6(e) (2) and (3) for the general rule of secrecy and its exceptions.

[26] *In re* Grand Jury Matter, 640 F. Supp. 63 (E.D. Pa. 1986).

[27] 463 U.S. 418 (1983).

[28] 463 U.S. 476 (1983).

[29] The DODIG encourages the use of DODIG subpoenas. Dep't of Defense, Inspector General Memorandum, Subject: Inspector General Subpoenas, 14 Nov. 85.

[30] 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1988).

[31] Army Reg. 195-2, Criminal Investigation-Criminal Investigation Activities, para. 3-15a (30 Oct. 85).

[32] Dep't of Defense, Inspector General Memorandum, Criminal Investigations Policy and Oversight, Subject: Inspector General, Subpoenas 1) to Attorneys for Information Relating to Representation of Clients and 2) Members of the Media, 12 Jan. 1987.

[33] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703 [hereinafter R.C.M.].

[34] Dep't of Defense, Inspector General Memorandum, Criminal Investigations Policy and Oversight, Subject: Request for Subpoenas (subjects names deleted by author), 17 Aug. 87.

[35] 5 U.S.C. § 552 (1982).

[36] Dep't of Defense, Inspector General Memorandum, Criminal Investigations Policy and Oversight, Subject: Inspector General, Subpoenas, 8 Oct. 1986. *See also* 18 U.S.C. § 1905 (1982), which makes it a criminal offense for a federal employee to disclose trade secrets and similar confidential data.

sued to a financial institution to obtain the records of an individual customer must comply with the Right to Financial Privacy Act of 1978 (RFPA).[37] The RFPA prohibits the release of a customer's records unless a proper access procedure is used; a DODIG subpoena is a proper access procedure.[38] The customer must be notified of the request to obtain the records and be provided with a statement of customer rights form and court documents to be used to contest the release of the records. Thereafter, the special agent seeking the records must furnish the financial institution the subpoena and a certificate of compliance.[39]

Enforceability of the DODIG Subpoena

The Inspector General Act provides that a DODIG subpoena "in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court." [40] Federal courts have established the following requirements for an administrative subpoena: 1) the subpoena must be within the statutory authority of the agency; 2) the information sought must be reasonably relevant to the inquiry; and 3) the demand must not be unreasonably broad or burdensome.[41] Additionally, the subpoena may not be issued for an improper purpose, such as harassment.[42] *United States v. Westinghouse Electric Corporation* [43] is currently the leading case on the enforceability of the DODIG subpoena. In *Westinghouse* the court upheld the "Petition for Enforcement of Administrative Subpoena" by the government. The court found that the DODIG met the general standards to permit the enforceability of the subpoena even though the DODIG issued the subpoena at the request of the DCAA. The DODIG issued the subpoena in furtherance of his stated authority to investigate and exercised independent judgment in deciding whether to issue the subpoena to obtain Westinghouse's internal audit reports. The court also concluded that the subpoena was not unreasonably broad.[44]

Procedures to Obtain a DODIG Subpoena

CID economic crime special agents often use DODIG subpoenas in criminal investigations of defense contractors. CID Regulation 195-1 [45] provides detailed guidance on the procedures to obtain a DODIG subpoena. The CID region judge advocate (RJA) provides legal advice and review to the special agent in the preparation of the request for a DODIG subpoena. Additionally, each installation and command procurement fraud advisor should be able to assist the CID special agent in drafting the DODIG subpoena.

The request for a DODIG subpoena contains four separate documents. The first document is a memorandum for the Inspector General. The memorandum should provide the following essential information for the DODIG's review:

1. *Background*: An understandable yet concise history of the case and a listing of all known investigatory agencies involved in the case.

2. *Justification*: A general description of the items sought by the subpoena and an explanation of why the items are sought.

3. *Description of Items*: A precise description of the items sought. The recipient of the subpoena (a corporate officer, a partner, a senior bank officer, or the head of a state agency) should also be identified.

4. *Time and Place for Return of Service*: A recommendation as to where and when the documents should be returned. The location should be within a reasonable distance of the records. In some instances, return by mail may be appropriate.

The second document in the request is the DODIG subpoena itself. Because the subpoena form contains only a few lines on which to list the documents subpoenaed, an "Appendix A" is often used. It is often difficult to list and describe the documents sought in Appendix A. In addition to a general appreciation of business terms and an understanding of the purpose behind the investigation, the drafter of Appendix A must be familiar with the organization of the target company. Thus, the CID economic crime special agent is advised to consult with the installation procurement fraud adviser for assistance in preparing Appendix A.

The final two documents in the request packet are a Privacy Act notice and a cover letter from the investigator to the recipient. Examples of all of the documents can be found in CIDR 195-1, figures 57 through 60.

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[37] 12 U.S.C. §§ 3401-3422 (1982). *See also* Army Reg. 190-6, Military Police—Obtaining Information from Financial Institutions (15 Feb. 1982) [hereinafter AR 190-6]. In United States v. Jackson, 25 M.J. 711 (A.C.M.R. 1987), the court ruled that although the government did not comply with the RFPA and AR 190-6, the bank records obtained to be used as evidence at a court martial were admissible and would not be excluded. The DODIG, however, will require compliance with the RFPA before a DODIG subpoena will be issued.

[38] 18 U.S.C. §§ 3402(2), 3405 (1982).

[39] *Id. See also* CID Regulation 195-1, Criminal Investigation—CID Operations, para. 5-35 and Figures 61 through 70 (1 Nov. 1986) [hereinafter CIDR 195-1], which contains detailed information and sample forms to assist the CID special agent in complying with the RFPA. *See also* United States v. Jackson, 25 M.J. 711 (A.C.M.R. 1987) (failure to comply with regulatory notice requirements does not require exclusion of evidence).

[40] 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1988). Contumacy is defined as "The refusal or intentional omission of a person who has been duly cited before a court to appear and defend the charge laid against him, or, if he is duly before the court, to obey some lawful order or direction made in the cause." Black's Law Dictionary 400 (4th ed. 1951).

[41] United States v. Westinghouse Electric Corp., 788 F.2d 164, 166-67 (3d Cir. 1986), and cases cited therein.

[42] *Id.*

[43] 615 F. Supp. 1163 (W.D. Pa. 1985), *aff'd*, 788 F.2d 164 (3d Cir. 1986).

[44] *Westinghouse*, 788 F.2d at 171.

[45] CIDR 195-1, para. 5-33d(3) and figures 57-60.

The CID special agent must forward the documents through their region headquarters and Headquarters, USACIDC for review. Thereafter, the documents go to the DODIG's office for a final review. If the DODIG decides to issue a subpoena, the DODIG will affix an approval memorandum to the request and sign the subpoena. The memorandum will indicate that the DODIG has reviewed the request; considered the request to be within the DODIG's statutory mandate to investigate fraud, waste, and abuse within DOD; found the documents requested to be relevant to the investigation; and, importantly, requested that the investigating agency continue the investigation, thereby indicating that DODIG will monitor the investigation. Thereafter, the CID special agent will serve a copy (not the original) of the subpoena upon the recipient, notify the DODIG of the service, and receive the requested documents. The CID special agent has some authority to extend the compliance date if the recipient indicates a problem with returning the documents on time.[46] If the recipient indicates that they will not comply, the CID special agent must immediately notify the DODIG so that enforcement action may be sought.

Conclusion

The DODIG subpoena is a useful tool in the investigation of fraud, waste, and abuse within DOD. It is fairly easy to obtain and can be used by auditors and investigators. The DODIG subpoena avoids the secrecy problems engendered by the use of the grand jury subpoena. Information and documents obtained pursuant to a DODIG subpoena can support all of the civil, administrative, contractual, and criminal remedies available to the federal government. Only a lack of familiarity with the DODIG subpoena has limited its full development into one of the most useful means to investigate fraud, waste, and abuse within DOD.

[46] Dep't of Defense, Inspector General Memorandum, Criminal Investigations Policy and Oversight, Subject: Clarification of Inspector General, Department of Defense, Guidance on Service of Subpoena Issues, 18 Feb. 87.

Joint Use of Military Justice Assets: A Test Case

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The Department of Defense Reorganization Act of 1986 [1] requires the military to reevaluate how the armed forces plan, train, and fight in a joint environment. One area that lends itself to joint cooperation is the administration of military justice. This article is intended to relate the procedures recently initiated on the island of Okinawa, Japan, between the Office of the Staff Judge Advocate, 10th Area Support Group, and the U.S. Marine Corps. The success of our program is not a harbinger of the "purple suiting" of all military justice operations, but it does provide a cost-effective procedure that can be used in situations where one service has a relatively small installation and the other service has a large troop concentration.

The island of Okinawa is a major land mass in the Ryukyu Islands chain, approximately 1,000 miles south of Tokyo. Until May 15, 1972, the islands were under the control of the Civil Administration of the Ryuku Islands (USCAR), under the direction of the High Commissioner, a three-star Army general who was also the commander of the U.S. Army Ryuku Islands (USARYIS)—the highest military command position on Okinawa.

Okinawa swelled with troops during the Vietnam war, housing Army, Air Force, Marine Corps, and Navy troop units destined for deployment to Vietnam. This small island was home to logistical commands left on the island to lend support to the combat forces in Vietnam. Since the end of the Vietnam conflict, however, the Army presence has declined, reaching its lowest level around 1983. The troop strength presently hovers at approximately 870. There are over 200 Department of the Army civilians and their family members on Okinawa, as well as 700 Master Labor Contract employees (Japanese employees who work for U.S. activities but who are not provided personal support). There is also a large community made up of U.S. Army retirees and many Japanese widows of Army deceased personnel. The total supported population is approximately 2,100.

The major U.S. Army command for Japan is U.S. Army, Japan/IX Corps (USARJ), headquartered at Camp Zama, Japan. One of USARJ's major subordinate commands is the 10th Area Support Group, located on Okinawa. The group, which has general court-martial convening authority, is presently commanded by an Army colonel. The units that make up the command include a signal battalion, special forces battalion, quartermaster battalion, military port activity (battalion equivalent), headquarters company, and various smaller maintenance and support detachments. All the U.S. Army units assigned to Okinawa are attached to the 10th Area Support Group for military justice purposes, including courts-martial and administrative separations.

Until the initiation of the new procedures discussed in this article, when a court-martial was convened the

[1] Pub. L. No. 99-433, 100 Stat. 992 (1986).

military judge, defense counsel,[2] court-reporter, and sometimes even the trial counsel [3] had to come from outside the command. This became quite cumbersome and required a great deal of logistical preparation, as well as the expenditure of substantial TDY funds. In addition, because of concerns about processing times, all post-trial documents were hand carried to and from Korea (where our legal support was located). This also resulted in a substantial expenditure of TDY funds.

Knowing that there were limited funds available in fiscal year 1989, we started to look around for alternative means of support. There are approximately forty U.S. Marine Corps attorneys on Okinawa, including those in the III Marine Expeditionary Force; the Marine Corps Base, Camp Smedly D. Butler; and the Keystone Judicial Circuit. Because of their substantial assets, the Marines were the obvious choice to provide our support. Although the U.S. Air Force has Kadena Air Base on Okinawa, a rather large facility, they did not have the assets to provide a great deal of support. The U.S. Navy has a smaller judge advocate office than the Army, so they were not considered. There were already limited inter-service support activities with the Air Force; the Air Force Area Defense Counsel and legal assistance officer saw Army article 15 and legal assistance clients when the Army judge advocates were away or had conflicts of interest. There were also inter-service support agreements covering the installation, logistical, and housing requirements of the Army. It seemed logical to create an inter-service support agreement to cover the Army's military justice needs. Although there did not appear to be any legal impediment to the cross-service use of legal assets, there was no legal precedent to support its use.

Because we were supported by only one military judge from Korea, trial judiciary support was the most pressing concern. Informal contact was made between the 10th Area Support Group's SJA office and the Chief Judge, Keystone Circuit of the Navy-Marine Corps Trial Judiciary. Initially, because of a heavy case load and judicial personnel shortages, the situation could not be addressed immediately. Once the situation improved, however, the Chief Judge reinitiated the dialogue concerning the use of Navy-Marine Corps trial judiciary personnel. Further research indicated that approval from the U.S. Army Trial Judiciary's Chief Judge was necessary for the use of another service's military judges.[4] Subsequently, discussions with the Navy/Marine Corps Judiciary indicated that similar approval was needed from their Chief Trial Judge before they could try a case from another service. Letters went out to both service's chief judges to obtain their impressions of the idea.

Soon after the letters went out, Major General William K. Suter, The Assistant Judge Advocate General of the U.S. Army, was performing an Article 6 visit to the Pacific. Because of time constraints, both staff judge advocates for the U.S. Army Japan general court-martial convening authorities (GCMCA) met at Camp Zama. At that time, Major General Suter was briefed on the initiative. He was enthusiastic about the idea and supported the logical extension of the plan—the use of the other service's defense counsel. With the support and assistance of Major General Suter, the effort began to pay off. The U.S. Army Chief Trial Judge initiated a discussion with his counterpart at the Navy/Marine Corps trial judiciary. They both agreed that the idea had certain merit and determined that, considering the situation in Okinawa, it was an excellent place to test the idea of "sharing" our limited judicial assets. Both chief judges approved the trial of U.S. Army cases by U.S. Navy/Marine Corps trial judges. Even if nothing further had occurred, this would have been a major logistical accomplishment. Because there was only one U.S. Army judge in the western Pacific and one in Hawaii, it had always been extremely difficult to schedule trials and hearings. This problem was now solved.

The next logical step was to obtain approval for the use of U.S. Marine Corps defense counsel. In the past, the Trial Defense Service (TDS) regional office in Korea had been generous about supporting our needs in Okinawa and had designated TDS counsel to fulfill the support requirements of Okinawa. Unfortunately, however, these counsel had their own cases in Korea to handle and had to schedule trips to Okinawa around their Korea case load. In addition, it was expensive to travel to Okinawa, with a per diem rate of about $188.00 a day. Because the 10th Area Support Group already had a legal assistance officer dual-hatted as a TDS representative, we requested an exception to policy to allow this officer to be detailed as a defense counsel. Although I did not have much hope of obtaining the waiver, I wanted to be able to assure the Marine Corps senior judge advocate on the island that I had exhausted all alternatives within my service channels. Explaining these service procedures to senior U.S. Marine Corps judge advocates was fairly easy because many of them had attended The Judge Advocate General's School Graduate Course and were familiar with Army programs and procedures.

Soon after I requested the waiver from TDS I received notification that it would not be granted, but that TDS would look favorably upon the use of Marine Corps defense counsel in Army cases. As this appeared to be the only possible relief available, I again began drafting letters explaining the idea, the past procedures, and the plan for the future. The senior Marine Corps judge advocate on the island was very enthusiastic and indicated that he would seek approval of the idea through Marine Corps channels. At the same time, I contacted the Chief of the U.S. Army Trial Defense Service to officially request the approval of this procedure. The Chief of the Trial Defense Service initiated discussions with the Chief of Defense at Headquarters, Marine

[2] The 10th Area Support Group has a trial defense representative who also serves as the legal assistance officer. In accordance with the U.S. Army Trial Defense Service Standing Operating Procedure dated 1 October 1985, that officer cannot be detailed as a defense counsel because he is not assigned to TDS.

[3] For example, the trial counsel may have a conflict of interest because of a previous attorney-client relationship.

[4] Army Reg. 27-10, Legal Services—Military Justice, para. 8-6e(1) (18 Mar. 1988).

Corps. One issue that arose was that, in the Marine Corps, the Chief of Defense provides guidance, policy, and training to defense counsel, but they are assigned and supported by the local staff judge advocate. Because initial contact with the senior Marine Corps judge advocate on the island had already been accomplished, this problem was easily overcome. When the first case arose where we required a Marine Corps defense counsel, it was handled as a form of individual military counsel request, and approval was sought from The Judge Advocate General of the Navy. This was in accordance with the Manual of the Judge Advocate General (JAGMAN).[5] After approval of the request, the counsel was detailed by the regional TDS chief in Korea. This was the procedure used until the completion of the inter-service support agreement (ISSA), at which time TJAG Navy gave blanket approval for the use of Marine Corps defense counsel on Okinawa to defend at Army trials. Therefore, we had approval to use Navy-Marine Corps trial judges and Marine Corps defense counsel. The only remaining support needed was the use of Marine Corps courtrooms and court reporters. This support was to be obtained at a later date.

One area that initially appeared to be a problem but actually turned out to have a simple solution was the final procedure for detailing trial judges and defense counsel under the Rules for Courts-Martial.[6] The method now used for both military judges and defense counsel is to have the Chief Judge of the Sixth Judicial Circuit and the Regional Defense Counsel in Korea detail the judge and defense counsel as if they were Army assets. The Staff Judge Advocate, 10th Area Support Group, notifies the Chief Judge, Keystone Circuit, Navy/Marine Corps Trial Judiciary, and the Chief Defense Counsel, LSSS, that we need a judge and defense counsel for an upcoming case. Each then selects the judge and defense counsel that will be assigned to the case. Their Army counterpart is contacted, and the Marine Corps judge and defense counsel is then detailed as the trial judge or trial defense counsel to the case. This procedure has worked well and will continue to be followed in the future.

The remaining military justice assets that were lacking were the court reporter, a magistrate for pretrial confinement hearings, and an appropriate courtroom. In the past, court reporters were brought TDY to Okinawa from Korea or mainland Japan. Because they could not remain on Okinawa until the record of trial was finalized, this always required another TDY trip to the court reporter's location to pick-up the record of trial and have it reviewed by the trial counsel. Once reviewed, the record of trial was then hand carried to Korea, with a copy delivered to the trial judge and the defense counsel (this was even more burdensome when the trial judge came from Hawaii). The authenticated record of trial was then returned to Okinawa where a post-trial review was drafted and sent out over the Defense Data Network (DDN) to the SJA office nearest the trial defense counsel. It would then have to be served on the defense counsel. The reverse of this system was generally followed for its return, depending on whether or not the DDN was operational. Otherwise, the response to the post-trial review was mailed to us. Ensuring the post-trial procedures were completed within the allocated time frame became quite difficult, time consuming, and expensive. The resolution to this problem was to negotiate court reporter support from the Marine Corps LSSS. It seemed natural that the court reporter should be someone accustomed to working with the Marine Corps military judge.

We had previously used either the 313th Air Division's courtroom or the Marine Corps courtroom. Court members had to wander from courtroom to courtroom over the six-month period they sat as members. Again, it made sense to use the courtroom adjacent to the judge's office and close to the court reporter section. We negotiated the use of that specific Marine Corps courtroom for all of our trials.

The final item we needed to resolve was that of magistrate support. Specially, a magistrate was needed for review of pretrial confinement. Again, the Marine Corps had been generous enough in the past to provide us with an Initial Review Officer (IRO)—the Marine Corps equivalent of a magistrate; however, this was handled on a case-by-case basis. We already had an ISSA with the Marine Corps for them to provide a confinement facility (the Joint Forces Brig) and a correctional custody facility (the Correctional Custody Unit),[7] both top quality facilities. We negotiated for the use of Marine Corps IRO's (magistrates). With this action completed, we had all the needed support to operate a complete military justice system without going off the island. The Army continued to provide the trial counsel for the cases. The method used to finalize all the arrangements was through the drafting and execution of an Inter-Service Support Agreement (ISSA), a contractual agreement between two services to receive support and/or to receive reimbursement, depending on the situation. Even if there is no financial reimbursement, the service providing the support can use the support rendered to request additional manpower and/or equipment. The ISSA is negotiated between the two services' logistical personnel with advice and assistance from the subject matter experts. In this case, we drafted a list of the basic support required, and the Army logistics people put the document in proper format. It was then sent to the Marine Corps' logistical people, who had a Marine Corps judge advocate translate our requirements into the appropriate Marine Corps language. Once the verbiage was adjusted, the ISSA was signed by the Commanding General, Marine Corps Base, Camp Smedley D. Butler, and the Commander, 10th Area Support Group, and was approved by USARJ/IX Corps. Because the chief judge of the Keystone Circuit is a commander, he was

[5] Manual of The Judge Advocate General (1977), § 0120.

[6] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 503 (b) and (c).

[7] The authority to impose correctional custody has been withdrawn by the Commander, U.S. Army Japan, in his supplement to AR 27-10, dated 23 October 1984. The ISSA was drafted to provide for the capability to impose correctional custody, should it be authorized at some time in the future.

provided with his own ISSA, which he reviewed and had the Commanding General, Marine Corps Base, Camp Smedley D. Butler, sign. The Officer In Charge, LSSS, 3rd FSSG, did the same. At that point, we had an in-place support agreement, whereby one service was provided all of its military justice support, minus the trial counsel, from another service. I believe that this was the first formalized use of such a system.

The first real test of the initiative was a trial of a sergeant major for serious criminal misconduct. It was a convoluted case with many issues, requiring substantial effort and expertise. A civilian defense counsel from Hawaii was hired by the defendant. The detailing of the military trial judge and defense counsel went without difficulty. The Marine Corps provided the defendant with the best counsel they had and allowed him all the time needed to prepare a superb case, to include providing most of his administrative support. The detailing procedures, article 39a sessions, and court proceedings went flawlessly. The military judge, in deference to Army tradition, donned robes, which he normally does not wear.

One concern that the Marine Corps raised was that they might not understand Army policies or procedures. To resolve this concern, the ISSA included a provision that the Army would provide their TDS representative to assist the Marine Corps defense counsel and provide any service-unique information. Additionally, coordination was effected to allow a Marine Corps defense counsel to attend all Army TDS conferences in Korea. To accomplish this, the Marine Corps will be provided with an Army fund cite to support the education. Under this system, the Marine Corps defense counsel will become more knowledgeable about Army procedures and develop points of contact within the Army Trial Defense Service.

The idea of cross-service support for military justice is a realistic alternative to bringing Army trial judges, defense counsel, and court reporters to isolated locations. Places such as Turkey, Puerto Rico, and isolated areas in CONUS may be excellent candidates for a system similar to the one used on Okinawa. In the alternative, in Europe, where there are small Marine and Navy operations, it may be suitable for the Army to provide the support. This program is certainly not the perfect solution; there are real advantages to having a completely Army court. But when that is impossible, the possibility of cross-servicing should be examined. It works in Okinawa!

Pilot Drug Asset Forfeiture Program

*Major Michael J. Wall**
XVIII Airborne Corps and Fort Bragg

The following Memorandum of Understanding (MOU) addresses the pilot program for drug asset forfeiture at Fort Bragg. The MOU was developed with the assistance of Fort Bragg law enforcement authorities, the U.S. Attorney's Office, the Drug Enforcement Administration, and the U.S. Marshal's Office.

The MOU outlines the authority and responsibility of each agency in the seizure of assets for administrative forfeiture in drug-related cases. Seizures had been made very infrequently in the past because the process for adopting vehicles for forfeiture proceedings appeared to be overly complicated. In this respect, the Fort Bragg experience was not unlike that of local and state law enforcement officials, who only recently have seen the simplicity of the process.

The MOU is an attempt to establish a "cradle to grave" procedure. Considerable effort was required to prepare a document that satisfied all parties. Even after a general understanding had been reached, the exact wording of the document required extensive coordination.

Further information about the MOU may be obtained by writing to the Chief of the Criminal Law Division, XVIII Airborne Corps and Fort Bragg, ATTN: AFZA-JA-C, Fort Bragg, North Carolina 28307-5000; or calling AUTOVON 236-1505 or (919) 396-1505.

DEPARTMENT OF THE ARMY
HEADQUARTERS, XVIII AIRBORNE CORPS
AND FORT BRAGG
FORT BRAGG, NORTH CAROLINA 28307-5000

MEMORANDUM OF UNDERSTANDING
BETWEEN
FORT BRAGG LAW ENFORCEMENT
AUTHORITIES AND THE U.S. ATTORNEY,
RALEIGH, NORTH CAROLINA,
THE DRUG ENFORCEMENT ADMINISTRATION,
WILMINGTON, NORTH CAROLINA AND THE
U.S. MARSHAL, RALEIGH, NORTH CAROLINA

SUBJECT: Seizure of Assets for Administrative Forfeiture in Drug-Related Cases

* Major Wall, the Chief of Criminal Law for the XVIII Airborne Corps at the time he wrote this note, died on December 5, 1988. Major Wall had been at Fort Bragg since July 1988. His prior assignments included Chief Legal Counsel, 3rd Region, USACIDC, Ft. Gillem, Georgia, 1985-1988; Officer-in-Charge, Pirmasens Legal Services Center, Federal Republic of Germany, 1984-1985; Officer-in-Charge, Rheinberg Law Center, Federal Republic of Germany, 1982-1984; Corpus Christi Army Depot, 1979-1982; Government Appellate Division, 1977-1979; XVIII Airborne Corps, Ft. Bragg, North Carolina, 1974-1977. Major Wall received his B.S. degree from the University of Maryland in 1970 and his J.D. from the University of Maryland in 1973.

1. Purpose. To facilitate seizure of assets for administrative forfeiture in drug-related cases handled by the military law enforcement authorities at Fort Bragg, North Carolina.

2. Reference. The Controlled Substances Act, 21 U.S.C. § 881.

3. Scope. This agreement covers seizures for administrative forfeiture of assets used in drug related offenses on or off post by Fort Bragg Law Enforcement Authorities.

4. Understanding. See attachment titled "Seizure of Assets Used in Drug Related Cases."

5. Effective date. October 1, 1988.

John R. Bozeman Colonel, U.S. Army Staff Judge Advocate	Margaret Person Currin U.S. Attorney, E.D.N.C. Raleigh, North Carolina
William E. Flanigan, Jr. Lieutenant Colonel, U.S. Army Commander, USACIDC Fort Bragg District Office	Emilio Garcia Resident Agent in Charge Drug Enforcement Administration Wilmington, North Carolina
Robert P. Walters, Sr. Colonel, U.S. Army Provost Marshal	William I. Berryhill U.S. Marshal Raleigh, North Carolina

Seizure of Assets Used in Drug Related Cases

1. *Authority:* The Controlled Substances Act, 21 U.S.C. § 881.

2. *Policy:* All conveyances, currency, and other personal property which are used, or are intended for use, to transport, sell, receive, possess, or conceal illegal drugs or drug paraphernalia, or in any way facilitate the foregoing, will be routinely seized for administrative forfeiture proceedings.

3. *Conveyance:* Any mobile object capable of transporting objects or people.

4. *Legal Title and Rights:* In a strict legal sense, title in the property vests in the U.S. at the moment the property seized is used in the illegal drug offense as defined in Title 21, U.S. Code, Section 881. A subsequent forfeiture proceeding merely confirms the vesting of title in the U.S., and resolves the question of forfeiture of the property to the U.S. Therefore, at the time of the seizure for forfeiture, the property is considered government property for all purposes including damage, mischief, or theft of such property.

5. *Exceptions to Routine Seizure:*

a. Common carriers will not be subject to routine seizure.

b. Seizure will not be implemented if it will interfere with a continuing investigation.

6. *Procedure:*

a. The law enforcement authority that discovers the illegal drugs, or evidence of illegal drug activity involving conveyances, currency, or other personal property, will make the seizure, inventory and photograph the property, and assure that it is securely stored with the XVIII Airborne Corps Provost Marshal. Conveyances will be stored in the impound lot.

b. Within two duty days the person who made the seizure will contact the Fort Bragg U.S. Army Criminal Investigation Command (USACIDC) Assistant Operations Officer, 396-5536, who is designated the Fort Bragg Point of Contact for asset seizure associated with illegal drug offenses in violation of Title 21, U.S. Code, Section 881 et al.

c. Within five duty days after notification, the Assistant Operations Officer will conduct a lienholder investigation, assure that all necessary military and Drug Enforcement Administration (DEA) forms and affidavits are prepared, and provide to the Chief of Criminal Law, Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, a recommendation for appropriate disposition of the asset.

d. If the Chief, Criminal Law Division, determines that the forfeiture is legal and economically feasible, he will telephonically contact the Resident Agent in Charge (RAC), or the Assistant RAC, for the Drug Enforcement Administration (DEA), 272 N. Front Street, Suite 11403, Wilmington, NC, 1-343-4513, and request adoption of the seizure for administrative forfeiture. The DEA will concur or nonconcur telephonically in adoption of the seizure for forfeiture. With the concurrence of the DEA, the Chief, Criminal Law Division, or the DEA, will contact the U.S. Attorney's Office, 310 New Bern Ave., Raleigh, NC, 1-856-4026, to obtain telephonic concurrence or nonconcurrence in the forfeiture.

e. If a decision is made to not pursue the forfeiture, the asset will be released to the appropriate entity. If the forfeiture is adopted by DEA, the Chief, Criminal Law Division, will inform the CID Assistant Operations Officer.

f. In cases in which the vehicle is no longer needed for evidentiary reasons, the CID Assistant Operations Officer will notify the U.S. Marshal's Service (USMS), 310 New Bern Ave., Raleigh, N.C., 1-856-4153. The U.S. Marshal will have the asset picked up from the Provost Marshal impound lot for storage within five days of notification, assuming that (a) the USMS has previously received the necessary DEA Form 453 (or FBI Form 635) regarding the asset, or (b) the necessary DEA Form 453 (or FBI Form 635) regarding the asset will be made available by CID when the USMS arrives to pick up the asset.

g. On adopted forfeitures, DEA will be responsible for accomplishing all administrative actions necessary for the ultimate disposition of the asset, upon receipt from Fort Bragg of the completed necessary DEA forms requesting adoption of the seizure for administrative forfeiture.

7. *Conveyance Inventory:* Upon seizing the conveyance, it must be thoroughly searched, including opening

all containers within the conveyance to inventory its contents. The inventory will be accomplished as soon after seizure as is practicable, but need not be contemporaneous with an arrest, and no search warrant is needed. All articles not part of the conveyance, not having evidentiary value, and not subject to separate forfeiture action, will be removed and returned to the owner without delay. A written, signed receipt will be obtained from the recipient of any returned property. Normal vehicle accessories, such as jacks and maintenance tools, are considered part of the conveyance.

8. *Equitable Sharing:* In determining the equitable share distribution for a participating federal, state, or local agency, the Chief, Criminal Law Division, will provide written input and recommendations to the appropriate authority (U.S. Attorney's Office or DEA).

9. *Non-routine Seizures:* If there is sufficient probable cause for an administrative forfeiture in instances which do not fall within the guidelines provided in paragraph 2, approval from the Chief of Criminal Law must be received prior to the seizure.

10. *Effects on Evidence:* This SOP is not intended to affect decisions to seize an asset for purposes of criminal evidence.

11. *Release Policy:* If a decision is made against pursuing the seizure, the asset should be released to the appropriate party within five duty days of the decision, upon execution of a "Hold Harmless" and "Indemnification" agreement.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

United States v. Williams

Recently, the Army Court of Military Review set aside all but one of the findings of guilty in *United States v. Williams*.[1] Despite Williams' plea of guilty to charges of distribution of marijuana, the Army court opined that the military judge's failure to explain the defense of entrapment to appellant and to ensure through direct conversation with appellant that the defense did not apply constituted reversible error. The court let stand, however, Williams' conviction for possessing marijuana at the time of his arrest.[2] That charge was unaffected by appellant's assertion that his former platoon sergeant, who was also an informant for a drug suppression team, had badgered him into making the distributions. Although the military judge realized that the issue of entrapment had been raised, he merely asked appellant and his counsel if they had discussed the defense and accepted their assurances that they had.[3] The court likened this case to that of *United States v. Brooks*,[4] in which the military judge failed to question the accused about the applicability of the entrapment defense because he thought to do so would abridge the accused's right to make an unsworn statement that was not subject to cross-examination.[5] As in *Brooks*, the averments of defense counsel were an unacceptable substitute. The accused alone may negate matters that are inconsistent with a plea of guilty.

A word to the wise is sufficient. *Williams* and *Brooks* should put defense counsel and military judges on notice that if at any time during the providence inquiry an accused raises matters inconsistent with the plea of guilty, the discrepancy should immediately be resolved on the record. Such a resolution necessarily involves explaining to the accused any affirmative or special defenses that may have been reasonably raised by the evidence [6] and ensuring that they do not apply. Unless the accused *personally* negates the validity of the defense, the guilty plea should not be accepted by the military judge. Captain Harry C. Wallace, Jr.

Post-Trial Responsibilities: What to Do About the Advocate on Terminal Leave

Occasionally, a trial defense attorney will begin terminal leave or complete active duty immediately after a trial and prior to action on the case by the convening

[1] 27 M.J. 671 (A.C.M.R. 1988).

[2] *Id.* at 676.

[3] *Id.* at 673.

[4] 26 M.J. 930 (A.C.M.R. 1988).

[5] *Id.* at 932.

[6] The court in *Williams* was unable to discern from the record the validity of appellate defense counsel's assertion that trial defense counsel may have erroneously advised appellant on the defense of duress rather than entrapment. *Williams*, 27 M.J. at 674 n.2. In order to eliminate the possibility of such a mistake, defense counsel should rely on Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982), or the Manual for Courts-Martial, United States, 1984, in explaining the elements of crimes and their defenses.

authority. Is that attorney expected to carry out post-trial duties while on terminal leave? Are the post-trial responsibilities so important as to require that the client be represented by a substitute detailed trial defense counsel? The recent case of *United States v. Polk* [7] addressed those issues. In *Polk* the Army Court of Military Review ruled that the trial defense counsel, who went on terminal leave one week after the end of the trial, denied his client effective post-trial representation by failing to present his client's concerns to the convening authority. This case is significant not because of the court's ruling, but because of the discussion of the post-trial duties of trial defense counsel and the court's recommendations concerning what the Army should do to ensure that those duties are carried out if the original trial defense counsel goes on terminal leave.

Private First Class (PFC) Polk was convicted, *inter alia*, of rape, on the theory that he aided and abetted his co-accused's rape of their kidnapped victim. PFC Polk, however, had left the room before the alleged rape occurred. The co-accused, in a subsequent trial, was found not guilty of the rape but guilty of the lesser included offense of assault consummated by battery for hitting and holding the victim while PFC Polk drove the co-accused's car to the scene of the alleged rape. More significantly, PFC Polk received a dishonorable discharge and twenty years confinement while the co-accused received no punitive discharge and only twelve months of confinement.

Prior to the action of the convening authority, the trial defense counsel received substitute service of PFC Polk's record of trial and the staff judge advocate's (SJA) recommendation. While he was no longer on active duty, the defense counsel signed and submitted a form that no comments, corrections, or rebuttal would be submitted. Evidently, the defense counsel did this without having first contacted or discussed it with PFC Polk. Following the recommendation of the SJA, the convening authority approved only five years of the confinement portion of PFC Polk's sentence. One day following the convening authority's action, PFC Polk wrote a long, detailed letter to the convening authority. In the letter, PFC Polk requested clemency, challenged the sufficiency of the evidence, pointed out the sentence disparity, and questioned the trial counsel's conduct.

The Army court ruled that these matters should have been presented by the trial defense counsel after consultation with his client. Based on the facts of this case, failure to provide this assistance constituted prejudicial error.

The Army court stopped short of holding that failure to appoint a substitute trial defense counsel to represent PFC Polk during the post-trial phase was per se ineffective assistance of counsel. The court clearly stated its belief, however, that a trial defense counsel who has already begun terminal leave is not likely to zealously represent the accused. The court held that in order to meet codal and regulatory requirements, "the Army should detail an available defense counsel to represent the accused when the trial defense counsel departs on terminal leave." [8]

After pointing out that post-trial duties include raising matters favorable to the accused before the convening authority, the court noted that those duties are significant "because the convening authority is the most likely source of clemency." [9] The court stated that Congress and the Army did not intend to rely on a presumption that a judge advocate would fully and zealously carry out those duties while on terminal leave.

For trial defense counsel on active duty, the *Polk* case is also a good reference source for post-trial responsibilities. The court, referring to articles 38(c) and 60 of the Uniform Code of Military Justice [10] and Rule for Courts-Martial 502(d)(6),[11] stated that defense counsel's post-trial duties include: 1) submitting matters (if any) to the convening authority to request favorable action on findings or sentence after discussing this right with the accused, and 2) examining the SJA's post-trial recommendation and replying promptly in writing, noting any errors or omissions. Accordingly, the defense counsel has a duty to present "pleas to the convening authority for modification or reduction of sentence if in his or his client's judgment such is appropriate or desirable." [12]
Captain Alan M. Boyd.

Rights Warnings by AAFES Detectives

Rights warnings [13] are required before interrogation by a person subject to the Code. Thus, individuals such as civilian store detectives have historically been excluded from the requirements of article 31(b).[14] The Court of Military Appeals has recently expanded the exclusionary rule of article 31(d) to include statements made to store detectives of the Army-Air Force Exchange Service (AAFES) that are taken without the requisite article 31(b) rights advisal.

In *United States v. Quillen* [15] a female store detective stopped Quillen outside the exchange, showed her badge, and escorted Quillen back to her office where he was

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[7] ACMR 8700966 (A.C.M.R. 16 Dec. 1988).

[8] *Polk*, slip op. at 6-7.

[9] *Id.* at 3.

[10] Uniform Code of Military Justice, 10 U.S.C. §§ 838(c), 860 (1982) [hereinafter UCMJ].

[11] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 502(d)(6).

[12] *Polk*, slip op. at 4 (citing United States v. Palenius, 2 M.J. 86, 93 (C.M.A. 1977)).

[13] *See* UCMJ art. 31(b).

[14] *See, e.g.*, United States v. Jones, 11 M.J. 829, 831 (A.F.C.M.R. 1981).

[15] 27 M.J. 312 (C.M.A. 1988).

questioned about exchange merchandise in his possession. The Court of Military Appeals, reversing the decision of the Army Court of Military Review, held that a civilian employee of AAFES was an instrument of the military with investigative and law enforcement powers. The court noted that the organization that employed and directed the detective was under the control of military authorities. As such, the position of an AAFES detective was "governmental in nature and military in purpose." [16] In support of this determination, the court noted that AAFES detectives operate under regulations and directives establishing that AAFES will report all criminal activities to military commanders and military police, and that the ultimate responsibility for the prosecution of crimes committed in exchanges rests with military authorities.[17] Thus, the court concluded that the detective "obviously was not engaged in a frolic of her own." [18] The court noted, however, that there would have been no constitutional or codal issue raised if the store detective merely had asked Quillen to produce store receipts for the merchandise in his basket at the time she approached him outside the exchange.[19]

This expansion of article 31(b) protections rights may prove to be an opening to develop a more extensive prohibition against unwarned interrogations. Trial defense counsel should become familiar with the *Quillen* case and consider applying its principles to interrogations by employees of Community Counseling Centers and Family Advocacy Case Management Team (FACMT) members. Captain William J. Kilgallin.

[16] *Id.* at 314.

[17] *Id.* at 315.

[18] *Id.*.

[19] *Id.*.

Clerk of Court Notes

Request for Final Action

Recently, after an ACMR decision had been served on the accused, the GCM jurisdiction mailed to the U.S. Court of Military Appeals a packet including the proof of service (DA Form 4916-R), a copy of the appellate advice given to the accused (DA Form 4917-R), the accused's request for final action (DA Form 4919-R), and a memorandum from the accused to the Court of Military Appeals stating his desire to waive review by that court. The accused had not filed a petition for grant of review with the court.

Can you spot the errors in this procedure?

The Certificate of Service/Attempted Service (DA Form 4916-R) and related papers must be sent to the Clerk of Court, USA Judiciary, not the Court of Military Appeals. See AR 27-10, paras. 13-9*e*, *g-h*.

When an accused has not filed a petition for grant of review, it scarcely is necessary for him to inform the Court of Military Appeals that he does not wish further review; it only is necessary that the accused continue to refrain from filing a petition. Perhaps, in this case, the accused was unsure or believed he or his appellate counsel had filed a petition (the Clerk's office can determine this by telephone). Had a petition been filed, the only correct action would be for the accused's appellate counsel to file a motion to withdraw the petition.

As for the accused's Request for Final Action, the GCM jurisdiction to which an accused is assigned or attached should comply with the request and issue the final supplementary CMO unless: a) the accused has in fact filed a petition for grant of review, or b) other charges against the accused are pending or undergoing review. In either of those circumstances, or in any other unusual situation, the Clerk of Court should be consulted before any final order is issued.

When finalizing a sentence pursuant to an accused's request for final action, do not overlook the requirement of R.C.M. 1113(c)(1) to the effect that, if more than six months have passed since a punitive discharge was approved, a convening authority may not execute that discharge without first receiving certain advice from the staff judge advocate.

Court-Martial Processing Times

The table below shows the Armywide average processing times for general courts-martial and bad-conduct discharge special courts-martial for the fourth quarter of Fiscal Year 1988. Previously published quarterly figures are shown for comparison.

General Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Clerk of Court	405	404	404	411
Days from charging or restraint to sentence	45	50	46	46
Days from sentence to action	48	50	46	54
Days from action to dispatch	5	4	4	5
Days from dispatch to receipt by the Clerk	9	8	7	9

BCD Special Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Clerk of Court	168	168	133	125
Days from charging or restraint to sentence	34	34	28	30
Days from sentence to action	52	44	46	50
Days from action to dispatch	5	4	4	4
Days from dispatch to receipt by the Clerk	10	7	7	9

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Fourth Quarter Fiscal Year 1988; July–September 1988

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.50	(2.02)	0.40	(1.61)	0.80	(3.22)	0.36	(1.46)	0.73	(2.90)
BCDSPCM	0.31	(1.26)	0.29	(1.16)	0.40	(1.58)	0.29	(1.17)	0.24	(0.97)
SPCM	0.04	(0.16)	0.04	(0.17)	0.04	(0.16)	0.02	(0.07)	0.06	(0.24)
SCM	0.41	(1.65)	0.38	(1.51)	0.49	(1.94)	0.55	(2.18)	0.42	(1.69)
NJP	28.74	(114.94)	30.25	(120.99)	27.55	(110.18)	29.60	(118.40)	36.63	(146.51)

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

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

AIDS Update

As of February 15, 1989, the military's appellate courts have addressed five cases involving AIDS [1]—related misconduct. These cases will be briefly reviewed in this note.

United States v. Morris

The first reported military case involving AIDS-related charges is *United States v. Morris*.[2] The case came before the Army Court of Military Review as an interlocutory appeal by the government pursuant to article 62.[3] The government sought to vacate a military judge's ruling that excluded from evidence the positive results of the accused's AIDS test.[4]

The accused in *Morris* was charged with offenses alleging that he engaged in sexual intercourse and sodomy knowing that he was infected with the AIDS virus and that the virus can be sexually transmitted.[5] At trial the government sought to introduce evidence of the accused's positive test results for the AIDS virus to show that the accused knew he was infected.[6] The military judge held that the test results were privileged and not

[1] AIDS is the acronym for acquired immunodeficiency syndrome. A person with AIDS has the human immunodeficiency virus (HIV), which damages the body's immune system. Each of us has innate or natural immunities. We also acquire immunities, some even before birth. A fundamental element of the immune system is the T-lymphocytes, which multiply to combat infections. T-lymphocytes are divided into two groups: T-helper cells and T-suppressor cells. T-helper cells assist mobilizing other T-lymphocytes and enhance the responsiveness of the immune system in fighting infections. T-suppressor cells become important after the infection has been fought off, as they inhibit the activity of the T-lymphocytes and terminate the immune system's response. In a person with AIDS, the HIV has infected and damaged the T-helper cells, rendering the person immunoincompetent and thus susceptible to a variety of opportunistic infections which can cause death. *See generally* Facts About AIDS, United States Public Health Service, Winter 1986 Public Information Release; Surgeon General's Report on Acquired Immune Deficiency Syndrome, United States Public Health Service, Oct. 1986.

[2] 25 M.J. 579 (A.C.M.R. 1987), *remanded*, 26 M.J. 46 (C.M.A. 1988).

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

[4] *Morris*, 25 M.J. at 579.

[5] *Id.*

[6] *Id.*

admissible based upon the Department of Army Policy Letter then in effect.[7]

The court of review disagreed, finding that

> [t]he purpose of the stated privilege is to preclude disciplinary or other adverse actions based solely upon a test result (indicating possible past misconduct) or information of past misconduct revealed during a post-test interview of an individual testing positive. As such, the privilege is a form of limited immunity granted for possible past criminal misconduct and does not prohibit use of the test results where they directly relate to future misconduct. Here the basis of the disciplinary action is not the mere presence of HIV antibodies but rather conduct alleged to have occurred after the test and with knowledge of HIV infection.[8]

The Court of Military Appeals initially granted review on the issue of whether the Army Court of Military Review erred in vacating the military judge's ruling.[9] The Court of Military Appeals later remanded the case to the convening authority to request specific written guidance from the Secretary of Defense and the Secretary of the Army "concerning permissibility of trial counsel's intended use of the test results in this case." [10] Guidance was obtained that the intended use was permissible; accordingly, the record was returned to the Court of Military Appeals. The court vacated its order granting review and returned the record to the military judge for further proceedings.[11]

Morris was tried on July 26 and 27, 1988. He was convicted of consensual sodomy [12] and engaging in unprotected sex after medical counseling about AIDS.[13] As Morris's sentence did not include a punitive discharge or confinement for one year or more, he was not entitled to automatic review by the Army Court of Military Review.[14] The appellate review of Morris's trial is thus apparently complete.[15]

United States v. Stewart

The second AIDS-related case to be decided by the military's appellate courts is *United States v. Stewart*.[16] Pursuant to his pleas, the accused in *Stewart* was convicted, *inter alia*, of assault with a means likely to produce death or grievous bodily harm by exposing his sexual partner to the AIDS virus.[17] Specifically, the accused had sexual intercourse with the victim on numerous occasions without barrier protection after he had twice tested positive for the presence of the AIDS virus and had been counseled regarding the dangers of AIDS, its transmission, and preventive health measures.[18] The victim later tested positive for the presence of the AIDS virus.[19]

The accused contended on appeal that his plea to the assault charge was improvident because expert testimony "established that the 'means' alleged was not likely to

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[7] *Id.*; *see* Department of Army Letter, 40-86-1, 1 Feb. 86, subject: Policy for Identification, Surveillance, and Disposition of Personnel Infected with Human T-Lymphotrophic Virus Type III (HTLV-III), para. 13:

d. Limitations on the Use of Information.

(1) Results obtained from laboratory tests for HTLV-III performed under this policy and information concerning personal drug use or consensual sexual activity disclosed by a soldier as part of an epidemiological assessment under this policy may not be used against the service member in actions under the Uniform Code of Military Justice, in a line of duty determination, or on the issue of characterization in separation proceedings. Such information may not be used as the basis for separation of the service member except for (a) separation based upon physical disability, (b) separation for the convenience of the government after a hearing before a board of officers and approval by the Secretary or an Assistant Secretary of the Army, or (c) in accordance with reference h. (Note: Information divulged by soldiers concerning matters other than personal drug use or consensual sexual activities is not limited by this policy.)

(2) The limitations in paragraph d(1) above do not apply to:

(a) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) has been first introduced by the service member;

(b) Disciplinary or other action based on independently derived evidence.

[8] *Morris*, 25 M.J. at 580.

[9] United States v. Morris, 25 M.J. 441 (C.M.A. 1987). The granted issue was stated as follows:

Whether the Army Court of Military Review erred by granting the appeal of the United States and by vacating the ruling of the military judge suppressing the results of appellant's seropositive blood test for the human immunodeficiency virus (HIV), where controlling Department of Defense and Department of the Army policies provide clearly and unambiguously that such evidence is not admissible in court-martial proceedings.

Id.

[10] United States v. Morris, 26 M.J. 46 (C.M.A. 1988) (summary disposition). The government's motion for clarification and the accused's petition for reconsideration were subsequently denied. United States v. Morris, 26 M.J. 73 (C.M.A. 1988).

[11] United States v. Morris, 26 M.J. 219 (C.M.A. 1988) (summary disposition).

[12] A violation of UCMJ art. 125. *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 51 [hereinafter MCM, 1984].

[13] A violation of UCMJ art. 134, under a reckless endangerment theory.

[14] UCMJ art. 66(b)(1).

[15] *See* UCMJ art. 69.

[16] ACMR 8702932 (A.C.M.R. 9 Sept. 1988) (unpub.).

[17] *Id.* slip op. at 1.

[18] *Id.*

[19] *Id.*

produce death or grievous bodily harm." [20] The accused argued that the thirty to fifty percent probability of the victim developing AIDS, as predicted by the expert witness, did not amount to a "natural and probable consequence" of infecting the victim with the AIDS virus.[21] The Army Court of Military Review disagreed, concluding without explanation that, "[g]iven the totality of [the expert witness's] testimony and the other evidence of record, we find that appellant's plea was provident." [22]

United States v. Womack

The next AIDS-related case decided by the military's appellate courts is *United States v. Womack*.[23] The accused in *Womack* conditionally pled guilty to willful disobedience of a superior commissioned officer.[24] The order at issue—the so-called "safe sex" order [25]—was given to the accused by his commander after the accused was diagnosed as being positive for the presence of the AIDS virus.[26] Several weeks after the order was given the accused performed fellatio upon an airman who had fallen asleep in the accused's dormitory room.[27]

The Air Force Court of Military Review, sitting en banc, affirmed the accused's conviction. The court found that the "safe-sex" order—to inform partners and wear a condom—constituted a lawful exercise of a superior commander's authority when given to service members infected with the AIDS virus.[28] In particular, the court found that the order requiring the accused to protect his sexual partners from any contact with his bodily fluids and excretions, including his saliva, was lawful.[29] The court also held, in a related matter, that the order prohibiting a service member infected with the AIDS virus from engaging in consensual sodomy or homosexuality did not interfere with any constitutionally protected activities.[30]

United States v. Woods

The fourth military case involving AIDS-related misconduct discussed by the appellate courts is *United States v. Woods*.[31] The accused in *Woods* was charged with reckless endangerment [32] by engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus and counseled regarding infecting others.[33] The military judge dismissed the charge and specification for failure to state an offense; specifically, because it did not allege that the accused failed to inform his partner that he was infected with the AIDS virus.[34] The government appealed pursuant to article 62, urging the Navy-Marine Corps Court of Military Review to reverse the dismissal by the military judge.

The court of review reversed. The court found that the specification was sufficient to allege a violation of article 134. The court held that where an individual is alleged to have " 'unprotected' sexual intercourse with another Navy service member, the allegation, on its face, describes conduct that we conclude has both a direct and adverse impact upon relations between military personnel, and which substantially derogates from the health,

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[20] *Id.* slip op. at 2. An expert witness testified in aggravation that between thirty and fifty percent of the people infected with the AIDS virus would later develop AIDS. He also stated that researchers at Walter Reed Army Medical Center currently believe that up to ninety percent of the infected population would develop AIDS. *Id.* slip op. at 1-2.

[21] *Id.* slip op. at 2; *see* MCM, 1984, Part IV, para. 54c(4)(a)(ii).

[22] *Stewart*, slip op. at 2. The accused has not yet filed a petition for review with the Court of Military Appeals. Because of a delay in serving the Army court's decision on the accused, he still has time to file his petition. *See generally* UCMJ art. 67(c).

[23] 27 M.J. 630 (A.F.C.M.R. 1988) (en banc).

[24] A violation of UCMJ art. 90. *See* MCM, 1984, Part IV, para. 14.

[25] *See generally* Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, The Army Lawyer, Dec. 1988, at 4. The "safe-sex" order requires that a person infected with the AIDS virus warn any potential sexual partner of their diagnosed condition before engaging in intimate sexual contact, and to wear a condom when engaging in sexual intercourse. *Id.* The order in *Womack* contained a third component—that the accused was to refrain from acts of sodomy or homosexuality. *Womack*, 27 M.J. at 632.

[26] *Womack*, 27 M.J. at 631-32.

[27] *Id.* at 632.

[28] *Id.* at 633-34.

[29] *Id.*

[30] *Id.* at 632 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[31] NMCM No. 883617M (N.M.C.M.R. 16 Nov. 1988).

[32] A violation of UCMJ art. 134.

[33] *Woods*, slip op. at 1. The charge and specification at issue were as follows:
Charge: Violation of the UCMJ, Article 134.
Specification: In that Hospitalman Robert A. Woods, U.S. Navy, Naval Medical Clinic, Norfolk, Virginia, on active duty, in or around Virginia Beach, Virginia, sometime between 14-28 November 1987, then knowing that his seminal fluid contained a deadly virus (Human T-cell Lymphotropic Virus 3) capable of being transmitted sexually, and having been counseled regarding infecting others, an act that he knew was inherently dangerous to others, and that death or great bodily harm was a probable consequence of the act, and that was an act showing wanton disregard of human life, did engage in unprotected (without the utilization of a condom or other device to protect the partner from contamination) sexual intercourse with Seaman C _____ , U.S. Navy, such conduct being prejudicial to the good order and discipline in the Armed Forces.
Id.

[34] *Id.* slip op. at 1-2.

welfare, and discipline of the military command." [35] The court found that the "privacy interest appellant may have in private sexual intercourse is surely outweighed by the risk of infection and the calamitous results that befall the individual afflicted with AIDS, and society's interest in stemming the spread of this pernicious disease." [36]

The court also addressed whether the specification stated an offense, even though it did not allege that the accused failed to inform his partner that he was infected with the AIDS virus.[37] Although the court concluded that failure to provide notice of the AIDS infection need not be alleged as an element of the offense, it did not decide whether consent would constitute a valid defense to the charge as alleged.[38]

United States v. Johnson

The latest military case involving AIDS to be decided by the military's appellate courts is *United States v. Johnson*.[39] The accused in *Johnson* was convicted, *inter alia*, of assault with a means likely to produce death or grievous bodily harm.[40] The charge was based on the accused's failed attempt to engage in unprotected and unwarned anal intercourse after being diagnosed as having the AIDS virus and counseled as to its methods of transmission.[41]

The Air Force Court of Military Review affirmed the accused's conviction for aggravated assault. The court found that the accused used a means likely to produce death or grievous harm, i.e., placing his penis near the victim's anus intending to deposit therein semen carrying the AIDS virus.[42] The court emphasized that the accused had knowledge that he was infected and of the danger of transmitting the virus by engaging in unprotected sex.[43] The court finally concluded that the accused's acts constituted overt acts beyond mere preparation [44] and that the victim's purported consent was not a valid defense.[45]

The court also addressed the accused's argument that because he was never informed that failing to follow the AIDS counseling might lead to disciplinary action, his conviction for aggravated assault was void for vagueness and violated due process.[46] The court rejected this contention, noting that an "argument based on due process and fair notice, simply stated, is inapplicable to the offense of assault." [47] The court found that "[t]here is no vagueness as to assault; the accused knew he carried the AIDS virus and that unprotected sex could harm his partner." [48] Major Milhizer.

Larceny of Administrative Costs:

United States v. Dunn

In *United States v. Dunn* [49] the Air Force Court of Military Review held that administrative costs incurred by the Army-Air Force Exchange Service as a result of the accused's scheme to wrongfully appropriate goods from the exchange and then return them for a cash refund was not the proper subject of a larceny

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[35] *Id.* slip op. at 3-4.

[36] *Id.* slip op. at 4. The court observed that the better practice would have been to employ traditional words of criminality in the allegation, such as "wrongfully" or "unlawfully." *Id.* Such words, however, are not dispositive. *Id.* (citing United States v. Laskin, 31 C.M.R. 5 (C.M.A. 1961)).

[37] *Id.* slip op. at 4-7 (citing 1 Wharton's Criminal Law 46 (C. Torcia 14th ed. 1978) and R. Perkins & R. Boyce, Criminal Law 1074-75 (3d ed. 1982)).

[38] *Woods*, slip op. at 7.

[39] ACM 26812 (A.F.C.M.R. 22 Dec. 1988).

[40] A violation of UCMJ art. 128. *See* MCM, 1984, Part IV, para. 54b(4)(a). The specification stated:
In that SERGEANT NATHANIEL JOHNSON, JR., 62d Field Maintenance Squadron, McChord Air Force Base, Washington, did at McChord Air Force Base, Washington, on or about 13 December 1987, commit an assault upon [J.P.H.] . . . by attempting to penetrate his, the said [J.P.H.'s] anus with the said Sergeant Nathaniel Johnson, Jr's. penis, with a means likely to produce death or grievous bodily harm, to wit: the Human Immunodeficiency Virus, in that before on or about 13 December 1987, the said Sergeant Nathaniel Johnson, Jr. was infected with the Human Immunodeficiency Virus and knew he was so infected.
See Johnson, slip op. at 3.

[41] *Johnson*, slip op. at 2. The victim testified that had he known the accused had the AIDS virus, he would have avoided the accused. *Id.* slip op. at 3.

[42] *Id.* slip op. at 4. Interestingly, the assault charged in *Johnson* was an "attempt-type" assault and thus requires specific intent. *Id.* slip op. at 5; *see* MCM, 1984, Part IV, para. 54c(1)(b)(i). The court found the specific intent requirement was satisfied because the accused intended to "gain sexual gratification by releasing semen." *Johnson*, slip op. at 5. Whether this intent is sufficient for the intent required for the aggravated assault as charged is not clear.

[43] *Johnson*, slip op. at 6.

[44] *See* MCM, 1984, Part IV, para. 54c(1)(c)(i); *see also* United States v. Byrd, 24 M.J. 286 (C.M.A. 1987).

[45] Specifically, the court first found that "the victim's 'consent' was uninformed; he did not know his partner was infected." *Johnson*, slip op. at 6. In any event, the court held that "consent by the victim is not a valid defense when the conduct is of a nature to be injurious to the public as well as the party assaulted." *Id.*

[46] *Id.* slip op. at 7.

[47] *Id.*

[48] *Id.* In connection with this conclusion, the court stated that it "accept[s] without reservation the proposition that the Air Force may impose reasonable regulation on sexual relations of service members infected with AIDS." *Id.*

[49] 27 M.J. 624 (A.F.C.M.R. 1988).

offense. [50] *Dunn* is thus the second case in the past few months that limits the scope of larceny under article 121 when applied to intangibles.

About two weeks prior to the decision in *Dunn*, the Court of Military Appeals held in *United States v. Mervine* [51] that a debt or the amount thereof is not the proper subject of a larceny. [52] The court found that although an account receivable "states the amount of a debt in monetary terms, it is simply not the equivalent of money for purposes of Article 121." [53]

In *Dunn* the Air Force Court of Military Review reached a similar conclusion with respect to the administrative costs incurred as a result of a theft.[54] The court found that the administrative costs were not "taken, obtained, or withheld" from the possession of the owner. [55] Indeed, the court stated that these costs could not be stolen because they were an inherent intangible interest of the owner of the property.[56]

Dunn, along with *Mervine*, should sound a note of caution for military trial practitioners when considering the scope of larceny under article 121. Although the substantial breadth of larceny under article 121 has long been recognized, [57] the courts have held that Congress "did not [intend to] create any offense under the statute not previously recognized by common law as larceny, false pretenses, or embezzlement." [58]

The administrative costs associated with the accused's theft could, however, properly come before the trier of fact during presentencing. The Manual provides that "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." [59] Such evidence can include financial impact or cost evidence.[60] Major Milhizer.

The Sixth Amendment Requires a Cautious Reading of *Lingle*

On December 9, 1988, the United States Air Force Court of Military Review decided *United States v. Lingle*,[61] a case in which the trial court admitted several out-of-court statements made by a child victim of assault. The basis for the court's opinion is probably found in the last sentence of its decision: "Finally, we are convinced beyond a reasonable doubt that Tiffany Pankow was physically abused in the manner alleged, and that the appellant was the source of that abuse." [62] Sad and tragic facts have resulted in a decision that does not have a firm basis in sixth amendment case law or analysis. The court ignored Lingle's sixth amendment confrontation rights in the following ways: 1) "unavailability" of the victim was not established; 2) the concept of "firmly-rooted hearsay exception" was improperly expanded; and 3) the requirements of *United States v. Quick* [63] were not met when a witness, who was apparently available, did not testify.

Technical Sergeant Charles K. Lingle was convicted of assaulting three-and-one-half-year-old Tiffany by breaking her arm; beating her on the face, buttocks, and genitalia; and hitting her in her stomach with his fist, breaking a blood vessel in the first section of her small intestine (duodenum). He was sentenced to a bad-conduct discharge, confinement for one year, total forfeitures, and reduction to airman basic.

Lingle lived with Tiffany's mother from November 1, 1986 until May 19, 1987. During that time, Tiffany's

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[50] A violation of UCMJ art. 121.

[51] 26 M.J. 482 (C.M.A. 1988).

[52] *See generally* TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29.

[53] *Mervine*, 26 M.J. at 484.

[54] The accused in *Dunn* was charged, *inter alia*, with stealing "money, in the amount of about $2,000.00, the property of the Army-Air Force Exchange Service." *Dunn*, 27 M.J. at 624-25. Of this total, $105.05 represented the administrative costs incurred by the exchange as a result of the thefts. *Id.* at 625. The court of review found the accused's plea of guilty improvident as to the $105.05 of administrative costs, but affirmed his conviction for larceny of the remaining amount, $1,899.95. *Id.*

[55] *Id.*; *see* MCM, 1984, Part IV, para. 46b(1)(a).

[56] *Dunn*, 27 M.J. at 625; *see generally* R. Perkins & R. Boyce, Criminal Law 295-96 (3d ed. 1982). In this regard, the court observed that these administrative costs

> were created as an interest of the owner when the thefts were committed. No administrative costs such as the ones charged in this case exist until a criminal act occurs. Once the act has taken place, the costs exist, but they remain with the owner as an expense and potential for recovery.

Dunn, 27 M.J. at 625.

[57] The Court of Military Appeals has observed that article 121 "proscribes larceny in its various forms, including obtaining property by false pretenses and embezzlement, and provides a simplified pleading form to cover the different theories of theft." *Mervine*, 26 M.J. at 483 (citing *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 815, 1232 (1949); *see also* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953).

[58] *Mervine*, 26 M.J. at 483 (citing United States v. Buck, 12 C.M.R. 97, 99 (C.M.A. 1953)). Obtaining services under false pretenses is a violation of UCMJ art. 134. *See* MCM, 1984, Part IV, para. 78. An accused would be subject to the same punishment as if his act had been larceny. *Compare* MCM, 1984, Part IV, para. 78e(1) and (2) *with* MCM, 1984, Part IV, para. 46e(1)(a) and (b).

[59] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.].

[60] R.C.M. 1001(b)(4) discussion; *see* United States v. Schwarz, 24 M.J. 825 (A.C.M.R. 1987).

[61] 27 M.J. 704 (A.F.C.M.R. 1988).

[62] *Lingle*, 27 M.J. at 709.

[63] 26 M.J. 460 (C.M.A. 1988).

babysitters, day care providers, and neighbors noticed welts and bruises all over her body. In response to questioning by one of her babysitters, Tiffany said that Chuck (Lingle) had spanked her.[64] As each month passed, the physical abuse of Tiffany worsened. In December and January she was seen with black eyes and a bruised and swollen face. In March 1987 Tiffany was treated at the hospital for a spiral fracture of her upper arm (humerus), "not a common childhood injury." [65] Finally, in May 1987 Tiffany was hospitalized for vomiting, and tests revealed that she had a hematoma in her small intestine, which is usually the result of a "blunt abdominal trauma." [66] The doctor asked Tiffany what happened to her "tummy," and Tiffany replied that "Chuck hit me." [67]

Tiffany did not testify at Lingle's court-martial. The military judge admitted, over defense objection, three statements that Tiffany made to babysitters and one statement to a child welfare worker. In all of the statements, Tiffany identified Lingle as the person who hit or hurt her.[68]

In upholding the admission of Tiffany's out-of-court statements to her babysitters and welfare worker, the court in *Lingle* intermingled sixth amendment analysis and hearsay requirements in a confusing opinion. First the court correctly stated: "The majority of cases in this area involve the relationship between the Confrontation Clause of the Sixth Amendment and the evidentiary rules regarding the admissibility of hearsay statements." [69] After that statement, however, the court's analysis became convoluted. The court cited *Ohio v. Roberts* [70] for the proposition that hearsay statements must have sufficient "indicia of reliability" to be admissible under the sixth amendment, but the court ignored the second prong of the *Roberts* holding that requires a finding that the witness is "unavailable." In order to avoid the unavailability requirement, the court attempted to apply the *Roberts* exception of a "firmly-rooted" hearsay exception.[71]

The court decided that Tiffany's statements were admissible under Military Rule of Evidence 803 (3),[72] which was a "firmly-rooted" hearsay exception. The court's reasoning demands further review and a word of caution to counsel. First, the court apparently extended this exception to include most responses made by young children to questions asked by adults whom they trust.[73] Second, the court recognized a "firmly-rooted" hearsay exception under the sixth amendment that has not been commonly recognized by other courts. Third, the court expanded this exception to include "a fact remembered or believed" (Lingle's identity), which is not permitted by the language of this exception. Even when a hearsay exception may have been "firmly rooted," an extension or modification of its traditional application, such as admission of a fact remembered or believed under Military Rule of Evidence 803 (3), is outside the scope of the "firm rooting." [74]

Finally, the court has cited *Quick* for the holding that the government did not have to call Tiffany even if she was available.[75] The court in *Quick*, however, recommended that the military judge establish on the record that the government offered to call the witness.[76] The court in *Lingle* ignored that recommendation and held, without further discussion, that the government was not required to call Tiffany, but that the defense could have called her as a hostile witness.[77]

Counsel are advised to apply *Lingle* cautiously. Recognize that under sixth amendment analysis a witness must be "unavailable" before a hearsay statement can be

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[64] *Lingle*, 27 M.J. at 705.

[65] *Id.*

[66] *Id.* at 706.

[67] *Id.*

[68] The military judge also admitted Tiffany's statement to the medical doctor who treated her. The Air Force Court of Military Review upheld the admission of that statement, citing United States v. Brown, 25 M.J. 867, 869 (A.C.M.R. 1988). It is still subject to debate as to whether the identity of the abuser is required by a medical doctor treating physical injuries, as compared to a psychiatrist or psychologist. The court in *Lingle* agreed with *Brown* that child abuse cases require such an interpretation of Mil. R. Evid. 803 (4).

[69] *Lingle*, 27 M.J. at 708.

[70] 448 U.S. 56 (1984).

[71] *See also* United States v. Hines, 23 M.J. 125 (C.M.A. 1986). Following *Roberts*, the court in *Hines* recognized that unavailability does not have to be established, and indicia of reliability is presumed, if a hearsay exception is "firmly-rooted." A co-conspirator's statement and an excited utterance are examples of "firmly-rooted" hearsay exceptions. *See* United States v. Inadi, 475 U.S. 387 (1986); Bourjaily v. United States, 107 S. Ct. 2775 (1987); United States v. Arnold, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 1015 (1988).

[72] Mil. R. Evid. 803 (3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[73] "The fact that caring adults asked 'what happened?' does not disqualify an utterance that is otherwise voluntary and spontaneous." *Lingle*, 27 M.J. at 708.

[74] *See* United States v. Groves, 23 M.J. 374 (C.M.A. 1987); United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987).

[75] Like the situation in *Quick*, trial defense counsel did not raise a sixth amendment objection; however, the courts in *Quick* and *Lingle* still reviewed the admission of hearsay statements for possible sixth amendment violations.

[76] 26 M.J. at 462 n.2.

[77] *Lingle*, 27 M.J. at 709.

admitted at trial. Even if the witness is unavailable, the hearsay statement must have sufficient "indicia of reliability." [78] The exceptions are few. "Firmly-rooted" hearsay exceptions do not require the unavailability and indicia of reliability review. Courts are conservative, however, in recognizing "firmly rooted" hearsay exceptions.[79] The government should follow *Quick* and state on the record its willingness to call a witness. Major Merck.

Legal Assistance Items

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

Office Administration Notes

Preventive Law Programs

Although legal assistance instruction and resource materials emphasize the value of preventive law programs, attorneys sometimes find it difficult to discern the benefits of such programs or to envision how such programs can be implemented. Kay Krewer, an attorney in the U.S. Army Armament, Munitions, and Chemical Command's Office of Counsel, obviously had no such difficulties. Ms. Krewer recently earned the U.S. Army Materiel Command's Preventive Law Award for initiating and administering a workshop for small businesses that was designed to explain the rules of government procurement to the operators of local small business firms and a luncheon program through which representatives from various procurement offices meet to discuss contracting and procurement law topics. Both programs have helped attorneys identify potential legal problems in their early stages and have raised awareness of the assistance available through the participating offices. Ms. Krewer's successes affirm the benefits of exercising imagination and initiative in the effort to identify and solve problems before their resolutions become time-consuming or impossible.

Reserve Component Contributions to Legal Assistance

With summer just around the corner, Reserve component judge advocates soon will arrive at most installations for two weeks of active duty. In accordance with Army Regulation 27-4, Legal Services: Judge Advocate General Service Organizations: Organization, Training, Employment, and Administration (1 Jan. 1981), they will be assigned duties that relate to their areas of responsibility. This means that some will work in legal assistance offices, where they will see clients for the duration of the tour. Legal assistance attorneys may have their daily workloads reduced slightly for a brief period, but the Reserve attorneys' service will have no lasting impact on the quality of help that clients receive or on the installation legal assistance program. It does not have to be this way, however.

Reserve component attorneys are an important resource, and the challenge is to use this resource in the most effective manner. Using them to counsel individual clients makes poor use of their strengths, which include contacts with local attorneys who practice in a wide variety of areas that pertain to the legal assistance function, a working knowledge of state law and procedures, and the ability to research state law efficiently.

A better approach would be to have these experienced practitioners prepare materials to educate legal assistance attorneys on local law in the areas of consumer protection, trust provisions, estate administration, divorce, child custody, family support enforcement, and the multitude of additional issues that arise on a daily basis in legal assistance. In this way, the Reserve attorneys' summer tours benefit the office and clients throughout the year by helping legal assistance attorneys work more efficiently and provide better advice.

How do you set up such a program? The starting point is the Reserve component SJA or other supervisor; through prior coordination, attorneys with appropriate experience can be identified and assigned the training mission even before they arrive at the installation. Alternatively, Individual Mobilization Augmentees (IMA) can be contacted before they arrive to discuss this aspect of their upcoming tour. What if none of the attorneys who will be at your installation have experience that is germane to legal assistance? They can draw on professional contacts and conduct research to educate themselves on specific questions such as obtaining temporary restraining orders in response to domestic violence, securing support and temporary child custody orders, avoiding pitfalls in filling out pro se dissolution petitions, and requesting or supplying support consistent with state child support guidelines. They may even be able to arrange for local experts to present classes on pertinent topics; these classes could be videotaped for the benefit of absent and future members of the legal assistance office and for distribution to other legal assistance offices within the state.

Once a plan for this program is established and the Reserve attorneys arrive, the next step is to articulate specific expectations on officer evaluation report support forms. The assignment could include preparing legal memoranda or discussion papers (perhaps of a minimum specified length and including relevant telephone numbers and points of contact), sample forms and pleadings, fact sheets for clients, and preventive law articles for post publications. Reservists could also present classes for the legal assistance attorneys.

The benefits of this approach obviously are more long-lasting for the legal assistance office than having Reserve attorneys do nothing more than counsel clients. Equally important, the Reserve attorneys complete their tours with a sense of having made a valuable contribution to the legal assistance program. A management

[78] *See* United States v. Hines, 23 M.J. 125 (C.M.A. 1986).

[79] *See* United States v. Arnold, 25 M.J. 129 (C.M.A. 1987).

program that leaves everybody happy is certainly worth exploring. MAJ Guilford.

Texas Occupational Tax

The November issue of *The Army Lawyer* included a footnote on page 53 that discussed Texas's occupational tax on all attorneys who are licensed to practice law in that state. The note also briefly addressed the possibility of federal attorneys obtaining an exemption. Mr. J. W. Scanlon, U.S. Army Garrison, Fort Sam Houston, and Colonel O'Brien, Contract Law Division, OTJAG, have provided further guidance on this matter. A memorandum from Colonel O'Brien included the following advice:

> Federal attorneys, civilian or military, who would like to seek exemption from the Texas Attorney Occupation Tax for 1988 and 1989 must make a written request to the Comptroller of Public Accounts, ATTN: Charles C. Johnstone, Executive Assistant, LBJ State Office Building, Austin, Texas 78444. This request must include an affidavit from the requesting individual's SJA which specifies the command over which the SJA exercises legal responsibility, and provides that the person requesting exemption works under his or her "authority and supervision", and was in such a position on 1 June 1988. Further, the affidavit must state that the requesting person is not engaged in the private practice of law and that it is the SJA's strict policy to prohibit the private practice of law by attorneys under his or her authority or supervision.
>
> Initially the Comptroller of Public Accounts took the position that the affidavit must be executed by The Judge Advocate General in order to serve as the basis for exemption. However, Captain Demetrius Bivens, USAG Fort Sam Houston, engaged in successful negotiations, ultimately gaining approval for the local SJA's to author the affidavit.
>
> . . . POC for this matter is Major Vince Faggioli, AV 223-4071.

Memorandum, DAJA-KL, from Colonel Maurice J. O'Brien, Chief, Contract Law Division, Office of The Judge Advocate General, to Captain Matthew E. Winter, Editor, *The Army Lawyer*, subject: Texas Attorney Occupation Tax, 11 Jan. 1989. MAJ Guilford.

Consumer Law Notes

Fair Credit Reporting Act Developments

The Fair Credit Reporting Act (FCRA) [80] was passed by Congress in 1970 to ensure that consumer reporting agencies (CRA's) [81] investigate, evaluate, and report credit worthiness and "other information on consumers" with "fairness, impartiality, and a respect for the consumer's right to privacy." [82] Congress believed this goal would be accomplished if CRA's were required to adopt "reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." [83]

Among other measures, Congress protected the consumer's interests by specifying the circumstances under which consumer reports could be furnished,[84] by limiting the age of the information included in these reports,[85] by permitting the consumer to obtain a summary of the report and the identities of those who have received the report,[86] by compelling one who bases a denial of credit, insurance, or employment on such a report to advise the consumer of the name and address of the agency providing the report,[87] by requiring the CRA to investigate contents disputed by the consumer and correct inaccurate statements,[88] and by allowing the consumer to file a statement rebutting a contested assertion.[89] The CRA must note in future reports that the entry is disputed and must include the consumer's statement when sending out future reports.[90] The CRA must also furnish the statement to those individuals *specifically identified* by the consumer who received the consumer's credit report within the past two years for employment

[80] 15 U.S.C. §§ 1681-82 (1982).

[81] A "consumer reporting agency" is a business that "regularly engage[s] in . . . the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f) (1982).

[82] 15 U.S.C. § 1681(a)(2), (4) (1982).

[83] 15 U.S.C. § 1681(b) (1982).

[84] CRA's may furnish consumer credit reports only in response to court orders, with the consumer's consent, to those who intend to use the information in connection with a consumer's attempt to obtain credit, employment, insurance, or a license or other government benefit, or when the requestor has "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b (1982).

[85] Except when the consumer is seeking credit of more than $50,000, life insurance of more than $50,000, or employment carrying an annual salary of more than $20,000, a CRA may not include in a consumer report judgments, paid tax liens, accounts placed for collection or identified as uncollectible, arrests, convictions, or other adverse information that antedates the credit report by more than seven years or bankruptcy adjudications that antedate the credit report by more than ten years. 15 U.S.C. § 1681c (1982).

[86] 15 U.S.C. § 1681g (1982). Consumers can obtain the identities of those who have received the report within the past two years for employment purposes and those who have received the report within the past six months for other purposes.

[87] 15 U.S.C. § 1681m(a) (1982).

[88] 15 U.S.C. § 1681i(a) (1982).

[89] 15 U.S.C. § 1681i(b) (1982). If a consumer disputes an entry following the CRA's investigation, the consumer may file a rebuttal statement of up to 100 words.

[90] 15 U.S.C. § 1681i(c) (1982).

purposes and within the past six months for other purposes.[91]

While the Act does not specify time limits within which the investigation and corrections must be accomplished, it does state that the investigation must be done "within a reasonable period of time" and that unverifiable or inaccurate information should be deleted "promptly." [92] The Federal Trade Commission (FTC), enforcement agency for FCRA compliance,[93] has stated: "While the term 'reasonable period of time' is not specific, it would be appropriate for the agency to reinvestigate the matter immediately unless there is some good reason for delay. Further, the reinvestigation must be pursued conscientiously and completed within a reasonable time." [94]

In *Lowry v. Credit Bureau, Inc., of Georgia* [95] the court refused to hold that a forty-nine-day delay in investigating a disputed credit report was per se unreasonable, denying the consumer's motion for summary judgment on this basis, notwithstanding the credit bureau's failure to explain the delay. In a 1983 consent agreement between the FTC and MIB, Inc.,[96] the FTC indicated that thirty days is presumed to be a reasonable period of time to conduct an investigation absent "unusual circumstances" or the need for more information from the consumer. Consumers who have requested investigations should be alerted both to the possibility of delay and to the fact that the CRA is not required to inform the consumer when the investigation is completed; the consumer is expected to contact the agency and inquire as to the investigation's result.

If a CRA fails to investigate an allegedly erroneous entry or fails to correct the entry notwithstanding evidence of its inaccuracy, the consumer may bring action against the CRA "within two years from the date on which the liability arises." [97] The Fifth Circuit recently held that each transmission of a credit report containing inaccurate adverse information constitutes a separate and distinct violation of the FCRA subject to a separate statute of limitations.[98]

In *Hyde v. Hibernia National Bank* [99] a consumer named Hyde had told a CRA in 1983 that the information in its report regarding a loan default was incorrect, but Hyde failed to lodge a written request that the questioned entry be investigated and adjusted even though the CRA suggested that he do so. When Hyde applied for and was refused a Diner's Club credit card in 1986, he wrote to the CRA for the first time, disputing the loan entry and requesting a copy of his credit report. The credit report, which Hyde received from the CRA in December 1986, contained exactly the same credit information that had been reported to Hyde in 1983.

When Hyde sued the CRA in July 1987, alleging violation of the FCRA, the CRA moved for summary judgment on the basis that the statute of limitations barred assertion of the federal claim. On appeal from the trial court's summary judgment, the Fifth Circuit noted that, because the CRA's release of erroneous information in 1986 resulted in denial of a line of credit distinct from any harm caused by release of the same erroneous report in 1983, the 1986 release inflicted a new injury on the consumer. This new injury, the court found, began the running of a new two-year limitations period.

Family Law Notes

Family Law Resources

The dynamism of family law sometimes makes it seem impossible to stay abreast of current developments. Legal assistance attorneys have an especially daunting task in this regard because of their need to know about major changes in the laws of all the states, not just one jurisdiction. The Bureau of National Affairs' *Family Law Reporter* helps meet this need, and it is provided to most offices through the Army Law Library Service. Two other valuable topical resources are available, however, and legal assistance offices with a heavy family law practice should consider subscriptions to either or both of them.

The *Equitable Distribution Journal* is a monthly publication that provides synopses of a wide range of issues that affect property division. A typical issue may examine recent decisions on antenuptial agreements, treatment of disability pay as marital property, and marital fault as a factor in property division. Each issue is a succinct twelve pages of clear discussion of matters that arise on a daily basis, and previous editions have included accurate and timely notes on Uniformed Services Former Spouses' Protection Act (USFSPA) cases. The *Journal* is published by the National Legal Research Group, Inc., and sample copies as well as further information may be obtained by contacting this organization at Post Office Box 7187, Charlottesville, Virginia 22906, phone (804) 977-5690.

Fair$hare, the Matrimonial Law Monthly is another helpful publication. It focuses on issues pertaining to property division, but there are also articles on other family law issues; for example, the January 1989 edition

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[91] 15 U.S.C. § 1681i(d) (1982).

[92] 15 U.S.C. § 1681i(a) (1982).

[93] 15 U.S.C. § 1607(c) (1982).

[94] Federal Trade Commission, *Compliance With The Fair Credit Reporting Act* 32 (rev. 2d ed. 1977).

[95] 444 F. Supp. 541 (N.D. Ga. 1978).

[96] 101 F.T.C. 415, 423 (1983) (consent order).

[97] 15 U.S.C. § 1681p (1982).

[98] Hyde v. Hibernia National Bank, 861 F.2d 446 (5th Cir. 1988).

[99] *Id.*

has an eighteen-page symposium on presenting and defending against allegations of child sexual abuse. Each issue of *Fair$hare* also includes sample separation agreement provisions covering such topics as child custody, life insurance, and division of real property interests. Like the *Journal*, this publication succinctly packs a lot of practical information into a few pages that can be quickly read and easily understood. Also like the *Journal*, *Fair$hare* has published a number of articles and notes regarding USFSPA cases. The normal subscription rate is $125 for twelve issues, and additional information can be obtained by contacting Prentice Hall Law & Business, 855 Valley Road, Clifton, New Jersey 07013, phone (201) 472-7400. MAJ Guilford.

Benefits for Former Spouses

Headquarters, Department of the Army, has issued a message providing guidance on benefits for former spouses.[100] This message supersedes previous messages on this topic and pertinent provisions of Army Regulation 640-3, Personnel Records and Identification of Individuals: Identification Cards, Tags, and Badges (17 Aug. 1984) [hereinafter AR 640-3]. The new directive is particularly important because it removes earlier limitations on commissary, theater, and exchange (C/T/E) benefits for unmarried 20/20/20 [101] former spouses.

Under AR 640-3, 20/20/20 former spouses who remarried after divorcing a member or retiree lost their C/T/E benefits for all time; these privileges were not revived even if the subsequent marriage was terminated due to divorce or death of the second spouse. Now, however, the former spouse regains these benefits if the second marriage ends.

The change does not apply to medical care benefits. Under statutory language in the Uniformed Services Former Spouses' Protection Act, only unremarried former spouses are entitled to military health care, and any subsequent marriage terminates the benefit forever. Thus, there are now three categories of 20/20/20 former spouses: 1) unremarried (i.e, those who have never remarried since divorcing the member or retiree, and they are entitled to all benefits); 2) remarried (i.e., those who currently are married to a subsequent spouse, and they are not entitled to any benefits that are based on their prior marriage to the member or retiree); and 3) unmarried (i.e., those whose subsequent marriages have terminated, and they are entitled to C/T/E benefits but are not entitled to military health care).[102] MAJ Guilford.

International Parental Kidnapping

Parental kidnapping has received a surprising degree of congressional attention. In addition to creating the Parental Kidnapping Prevention Act of 1980,[103] Congress recently directed the Department of Defense to develop a uniform policy for responding to arrest warrants arising from illegal parental kidnapping perpetrated by members of the Armed Forces. Even more significantly, last year Congress enacted the International Child Abduction Remedies Act,[104] which implements the Convention on the Civil Aspects of International Child Abduction.[105] So far, this multilateral treaty has been ratified by ten of the twenty-nine signatory nations: Australia, Canada (all provinces except the Northwest Territory), France, Hungary, Luxembourg, Portugal, Spain, Switzerland, the United Kingdom, and the United States. This note briefly discusses the Convention, which is now federal law.

Legal assistance attorneys need answers to four questions that arise under the Convention. First, who is covered by the protections and procedures it creates? Second, what types of wrongdoing are addressed? Third, what remedies are available? And, finally, how can the treaty be invoked?

Who Is Covered? The Convention's ultimate beneficiaries are children who have been wrongfully abducted or retained or who have been denied the opportunity to visit with a noncustodial spouse. Nevertheless, the protections are invoked by parents or other custodians and not by the children themselves. Thus, it is fair to say that the Convention protects people (or institutions) who legally exercise custody over children. "Custody" means the right to make decisions relating to the care of the child, especially the right to determine the child's place of residence. The fundamental prerequisites for invoking the Convention are the legal right to custody and the actual exercise of that right (or a showing that custody would have been exercised but for the child's wrongful abduction).

Because custody is the key, it is important to note that custody can exist even if the child is not living with the custodian. For example, suppose a custodial parent allows a child to live with grandparents for a brief period; in this case, the parent has exercised the right to determine the child's place of residence, and that is the essence of custody under the Convention.

The Convention applies to children under the age of sixteen who were habitually resident in a Contracting

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[100] Message, HQ, Dep't of Army, TAPC-PDO-IP, 131200Z Jan 89, subject: Unremarried Former Spouses. Points of contact regarding this message are Ms. Copeland and Mrs. Butler, AV 221-9590 or (202) 325-9590. If your office has not received this message, you may be able to obtain it from a facility that issues military identification cards.

[101] "20/20/20" former spouses are those who were married to military members for 20 or more years where the military spouse served 20 or more years on active duty and there were 20 or more years of overlap between these two periods.

[102] The cited message explains military health care eligibility for various categories of 20/20/15 former spouses (those who were married to military members for 20 or more years where the military spouse served 20 or more years on active duty and there were 15 or more years of overlap between these two periods).

[103] 28 U.S.C. § 1728A (1982).

[104] Pub. L. 100-300, 102 Stat. 437 (1988) [hereinafter the Act].

[105] October 25, 1980, The Hague, *text reprinted at* 51 Fed. Reg. 10498 (1986).

State (i.e., one that has ratified the Convention) at the time of the wrongful abduction or retention. Once a child reaches his or her sixteenth birthday, the Convention no longer applies, even if the child is in an abducted status at that time. The Convention is designed to supplement other relevant laws rather than supersede them, however, and an aggrieved custodian may seek the return of such a child under the Uniform Child Custody Jurisdiction Act (UCCJA) [106] or similar domestic law of the jurisdiction where the child is found, even when the Convention is no longer applicable.

The Convention also addresses wrongful denial of access rights, and "access" is defined as the right to take a child for a limited period of time to a place other than the child's habitual residence. Thus, the Convention seeks to protect visitation rights in addition to custody rights, but the enforcement mechanism for access essentially is hortative. The primary focus is returning wrongfully abducted or retained children to custodians.

What Constitutes A Wrongful Act? An abduction (or "removal") or retention of a child is wrongful under the Convention if it is a

> breach of custody rights attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; . . . the rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.[107]

There are several important aspects to this definition of an actionable wrong. The first point is that the three listed sources of custody rights are not exclusive; *any* legal custody right is protected. Moreover, the Convention can apply despite the absence of a judicial determination of custody rights. The law of the jurisdiction where the child was habitually resident will determine whether his or her removal violates another party's right of custody, and this right of custody may exist by operation of law even before the issue is adjudicated. The U.S. Department of State analyzed the Convention in this regard [108] and arrived at the following conclusion.

In the United States, both parents generally have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other's custodial rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. Thus, a parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry of a decree, absent an agreement between the parties, the question of wrongfulness would be resolved by looking to the law of the child's country of habitual residence.[109]

The third important point raised by the preceding quote is that the Convention recognizes *joint* custody rights and may be used to enforce one parent's joint right against the other parent. As has already been noted, the Convention addresses visitation rights as well as custody rights. The source of these rights is not mentioned, but, as a practical matter, one presumably would look to a court decree or an agreement between the parties for a definition of visitation rights. Theoretically, the law of the jurisdiction where the child is habitually resident may create noncustodial parents' access rights in the absence of a decree or agreement, but it is not likely that many countries have laws addressing this question. Thus, the threshold problem in access denial cases is establishing a right of access; once this is done, it should be an easy matter to determine whether the custodial parent has denied this right to the noncustodial parent.

What Remedies Are Available? The Convention's remedy for a wrongful abduction or retention is to arrange for the child's voluntary return or the issuance of a court or administrative order that directs the child's return to the person or institution entitled to custody. Thus, the purpose behind this treaty is simply to return the child to the *status quo ante* the abduction or retention; it does not address what court should have jurisdiction over custody matters, choice of law issues in an international custody dispute, the merits of a custody dispute, or other remedies such as tort damages for abductions. Also, as the Convention's name makes clear, it only deals with civil aspects of international child abduction; there is no provision for extradition or criminal prosecution of abductors.

Before the Convention can be invoked, the person or institution seeking the child's return must establish the following threshold facts: the requester must be entitled to custody under the law of the child's habitual residence; the requester must have been exercising custody over the child at the time of the removal or retention; and the child's removal or retention must be wrongful under the law of the child's habitual residence.

Assuming these foundational facts are established, article 12 of the Convention provides that when proceedings for the return of the child are commenced within one year of the wrongful removal or retention, the judicial or administrative authority of the Contracting State where the child is located "shall order the return of the child forthwith." [110] If more than one year has elapsed, then the judicial or administrative authority

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[106] 9 U.L.A. 115-331 (1988).

[107] Convention art. 3.

[108] 51 Fed. Reg. 10503 (1986).

[109] *Id.*

[110] Convention art. 12.

"shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." [111]

Of course, there are exceptions to the mandatory nature of article 12. Thus, a court or administrative authority of the Contracting State where the child is located may refuse to order the child's return to the custodian where: 1) the custodian had consented to or subsequently acquiesced in the removal or retention; 2) there is a grave risk that the child's return would subject him or her to physical or psychological harm or otherwise place the child in an intolerable situation; 3) the child objects to being returned and has attained an age and degree of maturity so that it is appropriate to take the child's views into account; or 4) to do so would violate the country's fundamental principles relating to the protection of human rights and fundamental freedoms.[112] In deciding how to apply these exceptions, the judicial and administrative authorities "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." [113]

It is also important to note what is *not* a defense to a request for an order for the child's return. Specifically, the bare fact that the removing or retaining person has obtained a custody order in the Contracting State where the child is located, or elsewhere, is not in itself a valid reason for refusing to order the child's return. Nonetheless, "the judicial or administrative authorities of the requested state [i.e., the state where the child currently is located] may take account of the reasons for the [custody] decision in applying [the] Convention." [114] It is unclear whether the "reasons for the [custody] decision" can become an independent basis for refusing to order the child's return or whether these reasons must relate to the defenses that are recognized in articles 13 and 20, noted above, before they can constitute grounds for the refusal.

In addition to actions designed to secure the child's return, the Convention requires Contracting States to assist in locating the child, to undertake cooperative efforts to prevent harm or abuse from befalling the child, and to arrange for the child's safety during his or her return. Technically, however, there is no obligation to actually place the child on an airplane to effect the return. Just how far courts will go to achieve the Convention's purposes will depend on the facts of each case, the legal authority created by local law, the availability of child protective services, and the personalities involved.

There is one final point to be made about remedies for international child abduction. The Convention is not the exclusive means of obtaining a child's return to the person entitled to custody. All American states have enacted the UCCJA, which provides for ordering parties to comply with custody orders already in existence. It also permits courts to decline to exercise jurisdiction in child custody disputes where the plaintiff has engaged in reprehensible conduct, which may include unilaterally removing a child from a family home. Under UCCJA section 23, these provisions may be invoked in international cases, and several reported U.S. decisions have in fact applied the UCCJA to international situations. Foreign nations may have similar domestic laws that afford better protection in certain cases than the Convention or that apply in cases where the Convention does not.

Invoking the Convention's Protections. Each Contracting State is required to establish a Central Authority to serve as a point of contact on matters relating to custody and access rights, and the U.S. Central Authority is the State Department's Office of Citizens Consular Affairs. A victim of a wrongful abduction or retention, or of a denial of access, who resides in a Contracting State can request assistance through his own country's Central Authority or he can initiate a direct contact with the Central Authority where the child is located. Theoretically, a person entitled to custody may even be able to bypass both Central Authorities and simply initiate a legal proceeding before a court of the jurisdiction where the child is located. This would be inadvisable, however, because a Central Authority can help in a number of ways, including negotiating the child's voluntary return and obtaining a determination whether the removal or retention is wrongful under the laws of the child's habitual residence.

If a voluntary return cannot be obtained, litigation will ensue. The victim will be entitled to free legal representation in some countries where the child is found, but that will not be the case in the United States. Thus, the person seeking the child's return from a location in the U.S. will have to retain an attorney (the U.S. Central Authority, in conjunction with state and local child welfare officials, will attempt to help in locating suitable counsel).

Additional information about the Convention and the Act can be obtained from the Office of Citizens Consular Affairs, Department of State, Washington, D.C. 20520, (202) 647-3666. Interim regulations for the U.S. Central Authority were published as 22 C.F.R. Part 94 in 53 Fed. Reg. 23,608 (1988), and the best compilation of materials on the Convention and the Act is in BNA's *Family Law Reporter*, 14 Fam. L. Rptr. 2057 (1988). This reference includes the text of the Act, the Convention, the Interim Regulations, and the State Department's Analysis of the Convention. MAJ Guilford.

Tax Notes

Entitlement to the Earned Income Credit

Few areas of the Internal Revenue Code present as many problems for soldiers as the earned income credit.

[111] *Id.*

[112] Convention arts. 13, 20.

[113] Convention art. 13.

[114] Convention art. 17.

I.R.C. § 32(d) (West Supp. 1988). The general concept of the earned income credit is relatively straightforward. A tax credit of up to fourteen percent is available to benefit all soldiers in lower pay grades. The maximum credit of $874 for 1988 begins to phase out if earned income exceeds $9,850 and is unavailable to all taxpayers earning more than $18,576. The earned income credit will be paid to a soldier even if the amount of the credit exceeds tax liability. I.R.C. § 6401(b) (West Supp. 1988).

Although the basic nature of the credit is fairly simple, two requirements have presented problems to legal assistance attorneys involved in tax preparation. A recurring issue is exactly what pay and allowances must be included in computing earned income. A common misconception is that earned income is the same as taxable income or adjusted gross income. The code provides, however, that all sources of income, whether taxable or not, must be included in earned income for purposes of computing the earned income credit. I.R.C. § 32(c)(2)(A) (West Supp. 1988). Accordingly, tax-free allowances such the basic quarters allowance and the subsistence allowance should be added to wages to determine the amount of earned income. *See* I.R.S. Publication 678-M, Volunteer Assistor's Guide—Military Module (Rev. 10-88).

A more difficult issue is whether the rental value of government-provided quarters should be considered in computing earned income. The regulations provide that earned income includes compensation excluded from gross income such as the rental value of a parsonage. Treas. Reg. § 1.43-2(c)(2). By analogy, therefore, earned income includes the rental value of quarters provided to soldiers. The "safest" way to compute the rental value of government quarters would be to merely add the basic allowance for quarters and the applicable variable housing allowance (VHA). Although an argument could be made that the variable housing allowance is intended to defray expenses in addition to housing costs, Joint Fed. Travel Reg., § U800, Vol. 1 (1 Jan. 1989), VHA is a form of compensation that soldiers residing off-post must include in determining earned income. Accordingly, the IRS would likely take the position that "fair rental value" of government quarters includes both VHA and basic allowance for quarters even though there is no specific guidance on the issue.

Another earned income credit issue faces soldiers serving overseas. The second basic requirement for entitlement to the credit is that the taxpayer furnish over one-half of the cost of maintaining a home for a child in the United States. Treas. Reg. § 1.43-2(c)(1). Accordingly, a soldier who maintains only a home for a child or children overseas is not entitled to claim the earned income credit.

All soldiers serving overseas are not necessarily ineligible for the credit. A soldier stationed outside the United States may still claim the credit if he or she pays over one-half the cost to maintain a home for a child in the United States for the entire taxable year. Treas Reg. § 1.43-2(c)(1)(iii). Thus, for example, a soldier stationed in Korea is eligible for the earned income credit if he or she maintains a home in the United States for the spouse and child or children for the tax year and earns less than $18,576. To be eligible under this theory, the soldier must anticipate returning to the household being maintained in the United States and file a joint return with the spouse.

The Internal Revenue Service computes entitlement to the earned income credit based on the facts reported to them on the taxpayer's return. Thus, it is quite possible that the IRS will incorrectly determine that a soldier is entitled to the earned income credit if the soldier reports less than $18,576 of taxable income but yet receives tax-free allowances that raise earned income over this amount or claims a dependent child on the return but has not maintained a home for the child in the United States. Soldiers in either of these two circumstances should inform the IRS that they do not qualify for the credit simply by writing "No" on line 23b of Form 1040A or on line 56 of Form 1040.

The Fort Leonard Wood Legal Assistance Office has devised a two-page form to help tax preparers determine the amount of earned income credit a soldier should be claiming. This form will be included in a legal assistance mail-out. MAJ Ingold.

Tax Court Disallows Interesting Way To Deduct Interest Expense

The Tax Court recently held that a taxpayer may not lower tax liability by netting interest expenses against interest income, because their total itemized deductions did not exceed their zero bracket amount. *Martha P. Murphy*, 92 T.C. 2 (1989). The court also held that the taxpayers could not rely on this novel way of deducting interest simply because the IRS had previously allowed them to net their interest expenses against income.

In the late 1970's, Landry and Martha Murphy purchased a four-year, $30,000 savings certificate earning seven and one half percent interest. After interest rates rose in late 1979, the Murphys took out a $27,000 share loan against the savings certificate. The Murphys used the loan proceeds to purchase a money market certificate. The renewable money market certificate consistently earned a higher rate of interest than the four-year certificate.

The Murphys presumably did not have enough expenses to itemize deductions on their 1982 income tax return. Instead, they deducted their interest expense on the share loan as a penalty for early withdrawal of savings. The IRS disallowed the deduction on the basis that the law required them to report the full amount of interest income and take any interest expense as an itemized deduction.

After reviewing the basic structure of the code, the Tax Court agreed with the IRS position. The court could find no statutory authority permitting a taxpayer to net interest expenses against interest income. Rather, the code clearly requires taxpayers to include interest received in gross income and to deduct interest paid or accrued on indebtedness as an itemized deduction. I.R.C. §§ 61 and 163 (West Supp. 1988). The taxpayers were simply out of luck if they did not have sufficient itemized deductions to claim the interest expense.

The Tax Court also rejected the Murphys' contention that because the IRS allowed them to net interest

expenses against interest income in a previous year, they were required to do so again in 1982. According to the Tax Court, taxpayers may not rely on erroneous determinations made by the IRS in the past. Furthermore, each tax year gives rise to new liability and a settlement reached in one year is not controlling in subsequent years. MAJ Ingold.

Probate Notes

New Legislation

Alaska has adopted a statutory form power of attorney. 1988 Alaska Sess. Laws 184. The basic form may be copied directly from the statute. Although the form grants a broad general power of attorney, any power listed on the form may be eliminated by crossing through it and initialing a box beside it. The standard form also contains space for listing more specific powers.

Oklahoma joins a growing number of states enacting the Uniform Durable Power of Attorney Act. 1988 Okla. Sess. Law Serv. 1766 (West). The Uniform Act allows a principal to give his or her attorney authority to act notwithstanding any subsequent disability or incapacity of the principal. Any words conveying the intent of the principal to confer this authority are sufficient. The Act allows the principal to grant extensive powers including asset management and health care decision-making to the attorney appointed in the instrument.

Oklahoma also substantially modified state law concerning guardians and wards by enacting the Oklahoma Guardianship Act. 1988 Okla. Sess. Law Serv. 1453 (West). The basic purpose of the new Act is to protect minors and incapacitated persons and to allow them to participate in decisions regarding their circumstances to the greatest extent possible. The Act specifies the court's powers in considering petitions for guardianship and delineates the court's authority in determining how the estate of the guardian should be managed.

Maine recently followed the trend established by several other states in repealing the Uniform Gift to Minors Act (UGMA) and enacting the Uniform Transfer to Minors Act (UTMA). 1988 Me. Legis. Serv. 402. Unlike UGMA, the UTMA places no limitation on the types of property transferable to minors. Moreover, UTMA custodians have all the power over custodial property that unmarried adult owners have over their own property. Under the Maine version of the Act, property must be distributed to a minor upon reaching the age of eighteen unless the transferor specifies another age up to age twenty-one. MAJ Ingold.

Real Property Notes

Recent Developments in Mortgage Foreclosures

Two federal courts have arrived at different results in determining whether government agencies guaranteeing home loans must comply with state law during foreclosure proceedings. In *Whitehead v. Turnage*, No. C87-779 (W.D. Wash. July 21, 1988), the district court permanently enjoined the Veterans Administration (VA) from attempting to collect deficiency judgments against veterans if their mortgages were nonjudicially foreclosed under Washington state law.

In *Whitehead* a group of veterans filed a class action against the VA asserting that Washington state law precludes collection of deficiencies in nonjudicial foreclosure actions brought within the state. The plaintiffs relied on a recent case, *United States v. Vallejo*, 660 F. Supp. 535 (W.D. Wash. 1987), which held that the Washington state antideficiency judgment statute applied to preclude the VA from pursuing a nonjudicial foreclosure proceeding. The district court reaffirmed *Vallejo* by noting that the VA's rights as guarantor are coextensive with the rights of a lender. Accordingly, the VA may not collect nonjudicial deficiency judgments against veterans in Washington because lenders would be precluded from doing so. The district court further ruled that the *Vallejo* principle should be applied retroactively, stating that the equities favored the veterans who had not received prior warning that they could be liable for deficiency judgments to the VA but not to their lenders. The court ruled that the veteran's claims accrued when the deficiency judgments were entered and limited the class to those veterans whose claims arose within six years from the date of the action. The court ordered the VA to modify its collection efforts and granted reimbursement to the plaintiff class members from whom the VA had collected deficiencies in violation of the rule set forth in *Vallejo*.

The Third Circuit reached quite a different result in a case involving the Farmers Home Administration (FHA). In *United States v. Spears*, 859 F.2d 284 (3d Cir. 1988), the court held that the FHA need not comply with two Pennsylvania statutes setting forth procedural rights for mortgagors. One of the statutes requires that mortgagors be notified before foreclosure proceedings begin and a second statute requires thirty days' notice before accelerating the maturity of a residential mortgage or commencing foreclosure actions.

In reaching this conclusion, the Third Circuit distinguished a Supreme Court case, *United States v. Kimbell Foods*, 440 U.S. 715 (1979), which counsels the application of state law under similar circumstances. The court gave great weight to the fact that the FHA mortgage documents did not state that the FHA "must" or "will" utilize state foreclosure procedures. Rather, the mortgage documents permitted the FHA either to proceed in state court or to use a federal forum.

After determining that the contract signed by the parties did not dictate the applicable choice of law, the court considered whether judicial policy required application of state law. The court concluded that factors counseling the application of state law in *Kimbell Foods*, such as a threat to commercial relationships founded upon the expectations of the parties, were not present in this case.

Moreover, the Third Circuit believed that the FHA regulations provided adequate notice and opportunity for hearing, and therefore due process did not dictate application of state procedural law. The court could find no overriding benefit for the mortgagors by insisting on the application of state law. MAJ Ingold.

Claims Report

United States Army Claims Service

A Pocket History of the Personnel Claims Act

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Title 31, United States Code, Section 3721 ("Personnel Claims Act"), is a gratuitous payment statute intended to maintain morale by compensating service members and other federal employees for personal property lost, damaged, or destroyed incident to service. In the Department of Defense alone, over 179,000 personnel claims were settled in fiscal year 1988, for a total of $93,541,000.[1]

The current personnel claims system began its existence in a series of acts that were designed to compensate soldiers, and its history has mirrored the evolution of the United States Army and the way Americans have viewed that Army.

In this nation's first years, the Regular Army of the United States was minuscule. Inheriting English Whig attitudes, many Americans viewed a Regular Army with suspicion. They considered the Army to be a group of foreign-born hirelings who could easily be used as an internal instrument of oppression.[2] In time of war the nation's military strength would consist of the general militia of the several states and specially-raised units of volunteers, despite well-founded doubts over the efficacy of this procedure.[3]

The general or "common" militia theoretically consisted of every able-bodied man from 16 to 60. Each militiaman was expected to provide his own weapons, ammunition, and clothing, although state and local authorities maintained small reserve stocks.[4] Men enlisting in volunteer units were also expected to provide their own weapons, and men enlisting in mounted volunteer formations were expected to furnish their own horses.

The War of 1812 was the first major war fought by the United States after the Revolution. As many as 450,000 volunteers and militia were called out during the course of the war.[5] Many of them lost privately-owned horses, arms, and equipment. Following the end of the war, Congress found itself deluged with requests for private legislative bills to reimburse these soldiers. Congress responded by passing the first personnel claims statute, the Act of April 9, 1816.[6]

This statute was a temporary enactment. A commissioner was appointed to oversee payment of claims. Claimants were given two years from the date of the act to present the claims. The statute provided compensation for hired or impressed property that was lost or destroyed, and for houses and other buildings occupied by the military forces or destroyed by the enemy.[7]

Additionally, the statute provided for the payment of claims for the loss of personal arms and equipment, and for horses that were either killed in battle, dying of wounds, or lost through the government's failure to provide forage.[8] This portion of the enactment was the first concrete recognition by the new nation that it had a duty to compensate its soldiers for personal property lost in service to the nation. Indeed, the provision that provided compensation for a soldier's horse did not differ significantly from medieval reimbursement ordi-

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[1] In fiscal year 1988 the Army settled 86,793 personnel claims for an expenditure of $48,748,000; the Air Force settled 58,225 claims for an expenditure of $29,421,000; the Navy settled 29,517 claims for an expenditure of $12,106,000; and the Marine Corps settled 4,512 claims for an expenditure of $3,276,000. A portion of these expenditures is offset by monies recovered by the Services from carriers, warehouse firms, and other third parties.

[2] Opposition to a standing army was particularly virulent during the first two decades of this country's history. In 1789 the authorized strength of the Regular Army was only 840 men. Five years later the Army's actual strength was only 3,578 men out of 6,000 authorized, and "[e]ven this small force was denounced by the Republicans as a step toward military despotism." J. Bassett, The Federalist System: 1789–1801, at 114 (1968). For the first sixty years of American history the regular soldier was regarded as a doubtful necessity, and as an idle and possibly sinister figure not fully "American." M. Cunliffe, Soldiers and Civilians: The Martial Spirit in American 1775–1865, at 101 *passim* (1968). England itself maintained the fiction that it did not have a permanent standing army by passing annual Mutiny Acts to keep it in being, and it was not until 1755 that the first of a continuous series of army lists was published. C. Barnett, Britain and Her Army: 1509–1970, at 166 (1970).

[3] George Washington was well aware of the limitations of the general militia. For this reason, his administration made a strong, if unsuccessful, effort to obtain a well-drilled select militia. M. Cunliffe, *supra* note 2, at 180–86.

[4] The age of persons eligible for militia service under colonial militia ordinances differed slightly from state to state. The ideal that militia would provide their own arms and equipment, although not always realized, remained constant. *See, e.g.*, R. Weigley, History of the United States Army 4–5, 94 (1984).

[5] M. Mastoff, Army Historical Series: American Military History 124 (1969). Many men in this total were counted more than once.

[6] Act of April 9, 1816, ch. 40, 3 Stat. 361. The act was amended by the Act of March 3, 1817, ch. 110, 3 Stat. 397, to allow claims for losses during wars with Indian tribes from the end of the War of 1812 until September 1, 1815.

[7] Act of April 9, 1816, ch. 40, 3 Stat. 361, §§ 3, 6, 9.

[8] Act of April 9, 1816, ch. 40, 3 Stat. 361, §§ 1, 2, 4.

nances to the same effect.[9] A foundation was laid that would change as America altered its view of the Army.

Following the War of 1812, the United States embarked on what has been called the "Thirty Years Peace," interrupted only by the Seminole Wars and the Blackhawk War.[10] During these years of peace, the concept of a personnel claims act fell into disuse as the general militia declined in importance.[11]

The Mexican-American War revived the need for a personnel claims act. Although the Regular Army played a prominent role in that conflict, a large proportion of the men who fought belonged to volunteer units formed specifically for the war and to permanently organized state volunteer units that evolved into the National Guard.[12] These volunteers were required to furnish their own uniforms, and men in mounted units were required to furnish their own horses.[13] In the Act of March 3, 1849, Congress substantially reenacted the provisions of the previous law and authorized payment for loss of personal horses, arms, and equipment.[14]

This new law was radically different from its predecessor in one respect, however, in that it was a permanent enactment made retroactive to June 18, 1812, with payments made by the Department of the Treasury rather than by a commission.[15] As a permanent enactment rather than a temporary expedient, the law served its intended purpose until soon after the Civil War.

The Civil War altered many things. It was the last major American war fought by volunteer soldiers using their own equipment and horses. Although the first armies raised were formed from volunteer units raised by the several states and some of these volunteers still furnished their horses and weapons,[16] conscription of mass armies and changes in military technology destroyed this concept of the Army. Henceforth, the United States would provide the arms and equipment with which its wars would be fought, and the need for a personnel claims act to compensate volunteers for loss of personal arms and horses would disappear.

In the decades following the war, even as the Regular Army's budget and authorized strength were being slashed, changes were made in the Army's structure that would turn it into a modern, professional fighting force.[17] Increasingly, the Regular Army was seen as the principal military force of the nation. This change reflected the way the Civil War had fundamentally altered both the role of the Regular Army and the relationship between the several States and the Federal Government.

In 1885 Congress enacted a new and substantially different personnel claims statute intended to compensate officers and enlisted men of the Regular Army, as well as volunteers, for the loss of personal property under certain very limited circumstances that were considered incident to their service.[18] This enactment, the Act of March 3, 1885, is the direct ancestor of the present Personnel Claims Act, and many of its features have been incorporated into the present law essentially unchanged. The statute required claims to be presented within two years and provided that administrative action taken on a claim under its authority was final. It disallowed claims for losses that occurred through the fault or negligence of the claimant, and it directed the Secretary of War, in his discretion, to allow compensation for all types of personal property so long as he

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[9] In the Middle Ages, reimbursement for warhorses killed or injured on a campaign was called *mendum* in Italy and *restor* or *restaur* in France. The Latin term used was *restaurum* or *restauratio*. The expense account for the first crusade of Saint Louis, King of France, mentions payment of 6,789 *livres tournois* for 264 warhorses, while the expense account for the "*voye d'Aragon*" of Philip III the Bold in 1285 shows payment of 34,681 *livres tournois* in compensation. In the Italian city-state of Perugia, compensation ranged from L15 to L100, less an amount deducted for the salvage value of the animal's skin. In the city-state of Florence, compensation was determined by a commission headed by the city's marshal and was automatically awarded if the loss was reported within three days. P. Contamine, War in the Middle Ages 97 (M. Jones trans. 1984).

[10] *See* M. Mastoff, *supra* note 5, at 148–62.

[11] For the decline of the general militia, see M. Cunliffe, *supra* note 2, at 205–12.

[12] In anticipation of war, Major General Zachary Taylor assembled 3,922 officers and men of the Regular Army along the Rio Grande by mid-October 1845. This represented approximately half of the Regular Army's strength at that time. When war broke out, President Polk immediately called for 50,000 volunteers. Out of approximately 116,000 men who served during the war, over 73,000 served in volunteer units, although some men reenlisting after their terms of service expired were almost certainly counted more than once in this total. *See* K. Jack Bauer, The Mexican War: 1846–1848, at 33, 67, 397 (1974); *see also* R. Weigley, *supra* note 4, at 182–83.

[13] K. Jack Bauer, *supra* note 12, at 69.

[14] *Compare* Act of April 9, 1816, ch. 40, 3 Stat. 361, §§ 1, 2, 4, *with* Act of March 3, 1849, ch. 129, 9 Stat. 414, §§ 1, 6.

[15] *Compare* Act of April 9, 1816, ch. 40, 3 Stat. 361, §§ 11–15, *with* Act of March 3, 1849, ch. 129, 9 Stat. 414, §§ 1, 3, 4.

[16] At the time of the Civil War, American society had changed from the rural, agricultural society of the first fifty years of this nation's history. Many Americans owned neither a horse nor a rifle. A number of men who fought in the Civil War did furnish their own horses and weapons, however. At the Battle of Wilson's Creek in August 1861, virtually the entire Confederate fighting force was armed with privately-owned shotguns, flintlocks, and fowling pieces. *Cf.* 1 S. Foote, The Civil War, A Narrative: Fort Sumter to Perryville 91–92 (1986); *see also* A. Castel, General Stirling Price and the Civil War in the West 28 (1967). In 1863 Colonel John T. Wilder, an Indiana industrialist commanding a brigade in Rosecrans' Union Army of the Cumberland, entered into a interesting contract with his men to buy them Spencer rifles, the best breech-loading infantry weapon available, and have the purchase price stopped from their pay, pending reimbursement by the government. As mounted infantry, Wilder's "Lightning Brigade" compiled an enviable war record fighting in the West. *See* 3 S. Starr, The Union Cavalry in the Civil War: The War in the West 1861–1865, at 211–13 (1985); *see also* 2 S. Foote, The Civil War, A Narrative: Fredericksburg to Meridian 668–69 (1986). In 1985 the Army received a claim from the great-grandson of a member of the 5th Kansas Cavalry requesting reimbursement for loss of his ancestor's personal equipment and horse—plus 122 years accumulated interest. It was denied.

[17] *See* M. Mastoff, *supra* note 5, at 287–92.

[18] Act of March 3, 1885, ch. 335, 23 Stat. 350.

determined that the articles in question were "reasonable, useful, necessary, and proper for the officer or soldier while in quarters, engaged in the public service, in the line of duty." [19]

Only a few types of claims were considered losses incident to service, however. The enactment authorized payment for private property lost or destroyed when shipped on board an unseaworthy vessel pursuant to orders, and personal property lost or destroyed while saving property belonging to the United States. It did not apply during time of war or hostilities with Indians, and it required personal action on claims by the Secretary of War, with payment by the Department of Treasury.[20]

The provision for losses on board an unseaworthy vessel was probably a long-delayed response to the drowning of hundreds of Confederate prisoners of war, guards, and freed Union prisoners of war when the boilers of the overloaded transport "Sultana" blew up in April 1865 on the Mississippi River.[21] It was secondary to the provision for payment of claims for property lost while the claimant was saving life or government property. This particular provision was harsh in that the claimant had to "earn" the right to compensation. Nevertheless, the statute as a whole would provide a framework for subsequent expansion.

Expansion came in 1918, during the First World War, when coverage was extended to two other types of loss or damage.[22] Compensation was allowed for loss or damage to baggage "transferred by a common carrier" during travel under orders to the extent that this loss or damage exceeded the amount recoverable from the carrier. Compensation was also allowed for personal property destroyed or captured by the enemy or abandoned in the field. Interestingly, the statute also added "members of the Nurse Corps (female)" as proper claimants.[23]

The amendment allowing payment for loss or damage to baggage "transferred by a common carrier" is significant in that it represents the first movement by Congress to use a personnel claims act to ameliorate the financial hardships that transient assignments and frequent transfers impose on military life. As soldiers began owning more in the decades that followed—sharing in the increasing affluence of the nation as a whole—and as the Army took on greater responsibility for the shipment of personal property, claims for loss and damage in commercial shipment would assume greater prominence. At present, over eighty percent of the personnel claims presented yearly are for loss and damage in government-sponsored commercial shipment, and this trend shows every sign of continuing.[24]

In 1921 Congress made a few minor changes, shifting actual payment authority from the Department of Treasury to the Secretary of War.[25] In 1943, as the Army was growing toward an eventual wartime strength of over eight million men, Congress authorized the Secretary of War to delegate payment authority and added civilian employees of the Army to the category of proper claimants.[26] Major changes in the conception of the Personnel Claims Act finally occurred near the end of the Second World War.

In May 1945 Congress repealed existing legislation and substituted a comprehensive personnel claims act entitled "The Military Personnel Claims Act of 1945." [27] The Act recognized the injustice involved in narrowly limiting coverage to certain specified types of incidents and allowed the Secretary of War to promulgate regulations prescribing what losses would be considered incident to service.[28] The only limitations placed on the Secretary's discretion to determine types of losses considered incident to service were provisions that disallowed claims for loss or damage in non-government quarters within the continental United States and claims resulting from any negligent or wrongful act on the part of the claimant, his agent, or employee. An attempt to make the law a temporary, rather than a permanent, enactment was defeated.[29] Although this statute has been amended many times to extend coverage to other federal personnel

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[19] *Compare* Act of March 3, 1885, ch. 335, 23 Stat. 350, § 3, *with* 31 U.S.C. § 3721 (1982).

[20] Act of March 3, 1885, ch. 335, 23 Stat. 350, § 3.

[21] Accounts of the "Sultana" disaster differ. At least 500 men lost their lives. *See* Historical Times Illustrated History of the Civil War 731-32 (P. Faust ed. 1986). For a stirring, if less accurate account, see A. A. Hoehling, They Sailed Into Oblivion 37-52 (1959).

[22] Act of July 9, 1918, ch. 143, 40 Stat. 880.

[23] Act of July 9, 1918, ch. 143, 40 Stat. 880, § 1.

[24] Shipment of personnel property pursuant to orders was originally a private matter arranged between the soldier and the carrier. Even after the government took over the process of contracting with carriers to assure itself the most favorable rate, soldiers were still required to first settle their claims with the common carrier. In 1969, responding to excessive delays by common carriers in settling claims and recognizing the inherently unequal bargaining position of an individual service member dealing with a carrier contracted by the government, the military claims services altered their regulations to allow military personnel to file shipment claims directly with the government.

[25] Act of March 4, 1921, Pub. L. No. 66-391, 41 Stat. 1436.

[26] Act of July 3, 1943, Pub. L. No. 78-111, 57 Stat. 372.

[27] The Military Personnel Claims Act, Pub. L. No. 79-67, 59 Stat. 135 (1945).

[28] *See* H.R. Rep. No. 237, 79th Cong., 1st Sess. 1, *reprinted in* 1945 U.S. Code Cong. Service 715.

[29] *See id.* at 2, *reprinted in* 1945 U.S. Code Cong. Service at 716.

and to increase the maximum payment authorized,[30] it has passed into present law without substantive change.[31]

The recent legislative history of the Personnel Claims Act emphasizes the fact that payment is "ex gratia," but it also recognizes the fact that payment is based upon a moral obligation. [32] Congress explicitly stated that the Act was designed to ameliorate the hardships of military life by providing prompt and fair recompense for certain types of property losses.[33] Although the Personnel Claims Act is not insurance and limitations have always been placed upon the benefit provided,[34] Congress recognizes the fact that payment of claims for losses incident to service benefits the government by improving morale. The regulations and settlement experience of the military departments were used as guidelines for the extension of coverage to the other federal agencies.[35]

The present Army Regulation 27-20, Legal Services: Claims, embodies the present spirit of the Personnel Claims Act, stating that "[t]he prompt, fair disposition of claims of soldiers and civilians, consistent with protection of the interests of the Government, is necessary to maintain morale and to prevent financial hardship." [36] "Incident to service" losses include not only losses directly related to performance of military duty and transportation of property at government expense, but also hazard losses connected with the broader circumstances of modern military living and working such as assignment to quarters, extensive traveling, and overseas assignments.[37] As the nature of the Army has changed, the implementation of the Personnel Claims Act has changed. It will continue to do so.

Claims Notes

Personnel Claims Notes

Shipment Of Boats

Beginning in August 1988, soldiers and civilian employees were permitted to ship boats along with household goods, without regard to size. Rules governing shipment of boats have not yet been formalized. Based on information provided by the Military Traffic Management Command, it appears that craft under fourteen feet in length such as canoes, kayaks, skiffs, light rowboats, and small sailboats will be shipped in normal household goods shipments, and that larger craft will be shipped separately on boat trailers using one-time-only solicitations. Although soldiers will be required to pay assessorial charges, and soldiers shipping larger craft will be required to assume a weight additive, field claims offices can expect to see claims for loss and damage to boats.

The maximum allowance applicable to boats is $1,000 per claim, as reflected in item 24 of the Allowance List—Depreciation Guide. The Claims Service has considered the matter in conjunction with the Air Force and the Navy. Presently, there are no plans to increase this maximum allowance. The services will revisit the issue if experience suggests that the $1,000 maximum is inadequate. Soldiers whose loss exceeds the maximum allowance may wish to request waivers from USARCS.

The Claims Service strongly encourages soldiers shipping boats, particularly large ones, to obtain private insurance. Claims judge advocates are requested to coordinate with their local Installation Transportation Offices to ensure that transportation personnel are aware of the maximum limitation, and that soldiers shipping boats are advised of the maximum allowance during transportation counseling. To ensure full knowledge of the risks, claims judge advocates should also disseminate this policy as a preventive claims note in local publications. Mr. Frezza.

Matching Discontinued China and Crystal (3)

Pieces of china and crystal from discontinued patterns are often broken in shipment. To avoid replacing an entire set, claimants should be directed to firms which can replace such pieces, as stated in our July 1988 Personnel Claims Note. China Trace, P.O. Box 5297, Ocala, FL 32678, specializes in replacing Mikasa and

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[30] When the Department of Defense was formed, coverage was extended to all DOD personnel by the Act of July 3, 1952, Pub. L. No. 82-439, 66 Stat. 548. It was later extended to employees of all federal agencies by the Military Personnel and Civilian Employees Claims Act of 1964, Pub. L. No. 88-558, 78 Stat. 767 (1964). The maximum payment per claim originally authorized in 1945 was $2,500. This was increased to $6,500 by the Act of June 7, 1956, Pub. L. No. 84-571, 70 Stat. 376; to $10,000 by the Act of September 15, 1965, Pub. L. No. 89-185, 79 Stat. 789; to $15,000 by the Act of October 18, 1974, Pub. L. No. 93-455, 88 Stat. 1381; and to $25,000 by the Act of July 28, 1982, Pub. L. No. 97-226, 96 Stat. 245. In response to the Iranian evacuation, a special provision was enacted authorizing payment of up to $40,000 for evacuation and hostile act claims, Act of December 12, 1980, Pub. L. 96-519, 94 Stat. 3031. Legislation was passed in 1988 increasing the maximum payment to $40,000 for all claims accruing on or after October 31, 1988, by the Act of October 31, 1988, Pub. L. No. 100-565.

[31] *Compare* Military Personnel Claims Act of 1945, Pub. L. 79-67, 59 Stat. 135 *with* 31 U.S.C. § 3721 (1982). Present limitations on payment embodied in paragraph f of 31 U.S.C. § 3721 include the requirement that a claim may only be allowed if it is substantiated, if the agency determines that possession of the property was reasonable or useful, and if no part of the loss was caused by any negligent or wrongful act of the claimant. Also note that the Personnel Claims Act only provides payment for loss, damage, or destruction of personal property. It does not apply to claims for damage to real property or for other expenses.

[32] *See* S. Rep. No. 655, 89th Cong., 1st Sess. 9-13, *reprinted in* 1965 U.S. Code Cong. & Admin. News 3122, 3131-34.

[33] *See* S. Rep. No. 1423, 88th Cong. 2d Sess. 7, *reprinted in* 1964 U.S. Code Cong. & Admin. News 3407, 3413.

[34] The military services have implemented the congressional mandate by placing restrictions on what may be paid, such as those extracted in S. Rep. No. 1691, 82d Cong., 2d Sess. 3-5, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1873, 1875-77. The "reasonable and useful" limitation, for example, has been interpreted as requiring the military services to limit the maximum amount payable on various categories of property, with the approval of Congress. *See* S. Rep. No. 655, *supra* note 32, at 13.

[35] *See* Senate Report No. 1423, *supra* note 33, at 7.

[36] Army Reg. 27-20, Legal Services: Claims, para. 11-9a (10 July 1987).

[37] *See* Dep't of Army, Pam. 27-162, Legal Services: Claims, para. 2-7 (15 Dec. 1984).

Royal Jackson china. The telephone number is 904-622-4077. Ms. Zink.

Personnel Claims Recovery Note

When Carriers Deny Liability for Packed Items

Carriers frequently deny claims for damage to packed items from cartons that were picked up from nontemporary storage. They insist that they should not be held liable because they did not perform the packing. The following is a suggested response that can be used in letters rebutting these carrier denials:

> We cannot accept your contention that you are not liable for damage to packed items because you did not pack the shipment and the cartons did not show outside damage. When a carrier accepts a shipment in apparent good order, the carrier is responsible for damage to packed items unless that carrier can establish that the packing was improper, and that this was the sole cause of the damage. Nothing in the file indicates that the packing was improper or that this was the sole cause of the damage to the items in question. Ms. Schultz.

Tort Claims Note

Recent FTCA Denials

Claim for Payment of Civilian Medical Bills

A claim was filed for civilian medical bills incurred by a soldier after his discharge based on his allegation he was so ill he should have been treated prior to his discharge. The claim was referred to the Army Board for Correction of Military Records because the incident-to-service doctrine barred payment under the Federal Tort Claims Act.

Contractor Employee Injured While Working on a Military Installation

An electrician employed by an Army contractor filed a claim for severe burns incurred while repairing Army-owned electrical equipment located on a Army post. The claim was denied because the United States was considered a statutory employer under Georgia law and is immune from a claim for personal injuries incurred by an employee. *Wright v. M.D. Hodges Enterprises, Inc.*, 359 S.E.2d 700 (Ga. App. 1987).

Medical Malpractice/Statute of Limitations

A dependent spouse filed a claim for personal injuries allegedly caused by an Army physician's failure to promptly diagnose her cervical cancer. The cancer was diagnosed less than two months after she was first seen. The personal injury claim was filed a year and a half after the diagnosis; the patient died three months after filing the claim. No death claim was filed. Under Georgia law, the personal injury claim cannot be construed as constituting a claim for wrongful death and a new claim must be filed within the two year limitations period. Mr. Rouse.

Affirmative Claims Note

CHAMPUS Fiscal Intermediaries

The Affirmative Claims Note in the January 1989 issue of *The Army Lawyer* listed the incorrect telephone numbers for Blue Cross and Blue Shield of South Carolina and The Associated Group. The correct numbers are:

Blue Cross and Blue Shield of South Carolina	Suzanne Williams 803-665-7822, ext 6117
The Associated Group	Kathy Coonce 812-379-5112

Management Notes

Change 1, AR 27-20

Change 1 to AR 27-20, Claims, was recently published in the update format with an effective date of 15 February 1989. This change updates the applicable law on damages and the appellate procedures for claims filed under the Military Claims Act (chapter 3); designates responsibility for the article 139 claims program (chapter 9); provides uniform reduction procedures for a claimant's failure, absent good cause, to provide timely notice to the household goods carrier for loss or damage (chapter 11); and establishes rules on nonappropriated fund claims to be handled by commercial insurance instead of under a claims statute (chapter 12). Mr. Mounts.

Claims Manual Change 10

In late December 1988 USARCS mailed Change 10 to the Claims Manual to all Claims Manual holders of record. Change 10 contains the following items:

Chapter 1, Personnel Claims, Bulletins # 64 and # 82 are revised. Bulletins # 106 (Claims Preparation Services) and # 107 (Computing Payments When Private Insurance Is Involved) are added.

Chapter 2, Household Goods Recovery, Bulletin # 13 (Documents Included in Demand Packets) is added.

For a listing of all previous Manual changes, see the following editions of *The Army Lawyer*: Jan. 1989, at 60 (change 9); Aug. 1988, at 52 (change 8); Feb. 1988, at 67 (change 7); Oct. 1987, at 61 (change 6); Aug. 1987, at 67 (change 5); June 1987, at 49 (change 1-4). LTC Wagner.

Labor and Civilian Personnel Law Notes

Labor and Civilian Personnel Law Office, OTJAG
and Administrative and Civil Law Division, TJAGSA

Equal Employment Opportunity

Advising on Affirmative Action

Army Regulation 690–12 requires aggressive affirmative action programs (AAP) to meet locally established goals and objectives. AAP's "work toward achievement of a work force, at all grade levels and occupational categories, that are representative of the appropriate civilian labor force." Because of the controversial and complex nature of affirmative action, labor counselors should be more involved in helping design local AAP plans.

Recurring issues include how to define the civilian labor force (CLF) against which installation goals and objectives are measured, and how to reach these goals once they are set. Labor counselors should help managers understand the complex relationships among Army affirmative action goals, EEOC rules, merit system principles, and the prohibition in DOD Directive 1440.1 against preferential treatment based *inter alia* on race or sex. Affirmative action must not only respect regulatory constraints, but must also survive scrutiny under Title VII and the United States Constitution.

Richmond v. J.A. Croson Company, 1989 WL 3054 (U.S. 1989), demonstrates that there are significant obstacles in the way of race-conscious governmental action. The city of Richmond failed to show a compelling governmental interest for its minority contract set-aside program because it did not offer adequate evidence of past discrimination in city contracting. Justice O'Connor garnered more support for the position she took in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), in which a plurality of the Court required a history of past discrimination to support affirmative action that favors some employees at the expense of others.

A more ambiguous application of an affirmative action plan occurred in *Eccleston v. Secretary of the Navy*, 700 F. Supp. 67 (D.D.C. 1988), where the court concluded that a black supervisor had discriminated against a black employee by promoting a white employee. The supervisor justified his selection by a "gut feeling." Given the Navy's affirmative action plan to ensure "full consideration" of minority candidates, Judge Gesell found incredible the selecting official's testimony that he was unaware that the Navy "had an interest in promoting highly qualified blacks." Consequently, while "Title VII does not obligate an employer to accord a preference to equally qualified minority applicants . . . [the] failure to do so under these circumstances is evidence of intentional discrimination. . . ." Although Judge Gesell considered the Navy's failure to follow the affirmative action plan as an indication of the selecting official's intent, he does not suggest that there is authority to discriminate *in favor of* a black candidate based on race.

EEO Relief May Require Replacing Innocent Employee Who Encumbers Job

Displacement of an incumbent employee may be necessary for complete relief in some EEO cases. *Lander v. Hodel*, 1988 WL 122580 (D.D.C. 1988), offers an example of court-ordered "bumping" of the incumbent in the plaintiff's original position when less relief would have been "unjustly inadequate." *See also Brewer v. Muscle Shoals Board of Education*, 790 F.2d 1515 (11th Cir. 1988). Displacement obviously should be avoided in favor of early settlement in meritorious cases.

Personnel Law Developments

Whistleblower Bill Introduced

Representatives Schroeder and Horton introduced HR 25 on January 3, 1989. The new bill is identical to the legislation that President Reagan vetoed last year. The Reagan administration sent a different proposal to Congress the same day, but whether the Bush administration will adopt it is unclear.

Protection for HIV Disclosures

A commander was sued after he disclosed the HIV-positive test results of an employee who had been tested during medical treatment. In *Plowman v. Department of the Army*, 698 F. Supp. 627 (E.D. Va. 1988), the court granted the commander qualified immunity from constitutional tort suits. Consistent with *Anderson v. Creighton*, 107 S. Ct. 3034 (1987), the court concluded that immunity is appropriate when, as here, the fourth amendment did not offer clear constitutional standards to guide the employee. The court also found that disclosure of the results to other personnel with a need to know was not an invasion of privacy.

Remember that there is no authority to conduct AIDS testing of civilian employees in any circumstance except when a host nation requires it. Note also that *Plowman* is relevant to possible challenges to drug testing, another area presently lacking clear constitutional standards.

Labor Law Developments

Courts Split on Labor Issues

In *DODDS v. FLRA*, 1988 WL 135721 (D.C. Cir. 1988), for the second time, the D.C. Circuit held that wages (in this case, premium pay for overseas teachers) are not "conditions of employment" under 5 U.S.C. § 7102. The case highlights the conflict between the D.C. and Third Circuits, which have held that wages are not negotiable; and the Second, Fourth, and Eleventh Circuits, which have determined wages to be negotiable. The FLRA is considering seeking a rehearing (the Army has already requested a rehearing in the Eleventh Circuit case—*Fort Stewart Schools v. FLRA*). Another D.C. case, *IRS v. FLRA*, 862 F.2d 880 (D.C. Cir. 1988), holds that a proposal to subject contracting-out decisions to grievance and arbitration procedures is negotiable.

This holding puts the court at odds with the Fourth and Ninth Circuits, which have held that grievance and arbitration cannot be the administrative review procedure discussed in OMB Circular A-76.

Management No Longer Required to Negotiate Over Workhour Changes

Scott AFB and NAGE, 33 FLRA 73 (1988), clarifies the bargaining obligations with respect to changes in employees' work hours. The Authority eliminated the distinction between: 1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and 2) changes which permit "a modicum of flexibility" within the range of starting and quitting times for an existing tour of duties. The Authority found both to be negotiable at the election of the agency instead of *only* the former (5 U.S.C. § 7106 (b)(1)). The Authority did not, however, eliminate the requirement for impact and implementation bargaining. (Remember, the Federal Employees Flexible and Compressed Work Schedules Act of 1982 requires negotiations when establishing alternative work schedules.)

Union Entitlement to Home Addresses

In *Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), the union's right under 5 U.S.C. § 7114 to have access to employees' home addresses was affirmed, with an exception made for employees who request nondisclosure. In *Riverside National Cemetery & AFGE, Local 3854*, 33 FLRA No. 39 (1988), the FLRA ordered the release of home addresses without making an exception for employees who wanted their addresses kept confidential. The Army position should continue to be that addresses of these employees are not releasable.

Proposals Affecting Non-Bargaining Unit Employees Are Negotiable

Some union proposals affect employees outside the bargaining unit. For example, a proposal defining the competitive area for reductions in force will affect non-bargaining unit employees. In this factual context, the FLRA has now reversed an earlier case with prodding by the courts, holding in *AFGE Local 32 and OPM*, 33 FLRA No. 41 (1988), that it will apply the private sector test as set out in *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), to determine if a proposal affecting non-unit employees is bargainable. The Authority held that if the proposal vitally affects working conditions of unit employees and is consistent with applicable law and regulations, it is negotiable. Given the protracted litigation of this issue, meeting the test in future cases may prove difficult.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Checklist for Processing UCMJ Actions Involving Reservists

Introduction

The following checklist for processing UCMJ actions involving Reserve component soldiers was prepared by the Staff Judge Advocate of the 2122d United States Army Garrison with assistance from the Criminal Law Division at TJAGSA and was distributed by the Staff Judge Advocate of the 97th United States Army Reserve Command. Because of the distances between Reserve component commanders and their judge advocates, checklists such as the one below can be very beneficial to commanders. The Guard and Reserve Affairs Department encourages more efforts of this sort by Reserve component judge advocates in all command groups.

Checklist

STEP 1—*Make a Preliminary Inquiry to Gather the Facts.*

1. Reference: R.C.M. 303; AR 27-10, para. 3-14.

2. Rights warning must be given to suspects. *See* UCMJ, article 31b.

3. Obtain sworn statements. Reserve JA's, adjutants, and assistant adjutants are now authorized to administer oaths and act as notaries during IDT.

4. If searches or seizures are necessary, see Appendix 1.

5. Certain offenses require immediate reporting to the CID or other authorities.

6. Consultation with a JAG before or during the preliminary inquiry may be necessary and should be done as soon as the commander contemplates the exercise of UCMJ jurisdiction.

STEP 2—*Decide Whether the UCMJ is Applicable.*

STEP 2A—*Decide Whether the Soldier Was Subject to UCMJ Jurisdiction at the Time the Incident Occurred.*

1. Soldiers are subject to UCMJ jurisdiction whenever they are training. AR 27-10, para. 21-2.

2. IDT includes, but is not necessarily limited to, UTA's, ET's, RST's, ATA's, RMA's, and training in nonpay status. *See* AR 27-10, para. 21-2. Status of administrative drills is unclear.

3. Failure to report to drill (AWOL)—Soldier is subject to action under the UCMJ.

4. Traveling to and from drill—Soldier may be subject to action under the UCMJ.

STEP 2B—*Decide Whether the Offense is Covered by the UCMJ.*

1. Substantive offenses are listed in the punitive articles of the UCMJ, articles 77 to 134 (MCM, Part IV). Note that federal and state criminal offenses not specifically listed in the UCMJ can be punished under article 134.

2. Offenses no longer have to be "service-connected," i.e., offenses committed off-post or away from the Reserve center can be punished as long as the soldier was in a training status.

STEP 3—*Decide Whether the UCMJ is the Best Choice.*

1. Administrative measures are to be used to the maximum extent possible. *See* para. 3-2, AR 27-10.

2. Certain cases may best be handled by civil authorities (local, state, federal).

3. Certain actions can be taken under the UCMJ that can't be accomplished under administrative procedures. For example, under article 15, soldiers can be required to forfeit money, and soldiers in grade E-5 can be reduced without board action.

STEP 4—*If the Soldier Is on Active Duty at the Time the Offense Occurs, Decide Whether the Soldier Should Be Extended On Active Duty.*

1. Authority to extend exists so long as action with a view toward prosecution is taken before the end of the AD period. AR 27-10, para. 21-4.

2. Extension should be requested only in exceptional cases. There are, however, certain advantages to it. In extension cases a sentence with confinement can be imposed without Secretary of the Army approval of involuntary activation. Additionally, the AD site may be the better place for trial because of witness availability, etc.

3. Procedures for extending personnel on AD are contained in First Army Regulation 140-8. If you are considering requesting extension of a soldier's AD, contact the 2122d USAG SJA, who will make the necessary SJA contacts. Extension orders are ordinarily cut by 97th ARCOM if the request for extension is approved by First Army.

4. Remember that jurisdiction continues even if the individual is not extended.

STEP 5—*Decide Whether the Matter Should Be Handled Under Article 15 or by Court-Martial.*

1. As a general rule, offenses that are suitable for disposition under article 15 are minor offenses. These are offenses that, if tried by court-martial, could not result in a dishonorable discharge or confinement at hard labor for more than one year. Para. 3d(1), Part V, MCM; AR 27-10, para. 3-2.

2. Tables of maximum punishment are in the MCM, Appendix 12.

STEP 6—*If an Article 15 Is to Be Given—*

STEP 6A—*Decide Who Should Give It.*

1. Any commander can ordinarily administer an article 15, unless the authority has been withheld by a superior commander. "Commander" is defined in AR 27-10, para. 3-7.

2. Article 15's should ordinarily be administered at the lowest command level. AR 27-10, para. 3-5a. This is the policy in the 2122d USAG. However—

a. Commanders must have received UCMJ training as required by FORSCOM Cir. 27-87-2, para. 6b.

b. Certain cases may appropriately be referred to a field grade officer in the chain of command for administration of a "field grade article 15." These are cases "where the commander's authority under Article 15 is insufficient to impose a proper punishment." *See* para. 3-5b., AR 27-10. Compare the maximum punishments for company grade and field grade article 15's.

c. A superior commander may withhold authority to administer article 15 punishment for particular categories of personnel or offenses, or for individual cases. AR 27-10, para. 3-7c. Units subordinate to the 2122d will be notified of any such withholding by the CDR, 2122d, or a superior commander.

d. Article 15 punishment can be administered to Reserve *officers* only by a GCMCA or commanding general in the Reserve chain of command. AR 27-10, para. 21-3c.

3. In some instances, active duty commanders will also have authority to administer article 15 punishment to reservists; e.g., when a reservist is attached to an AD command for administration of military justice during AT or ADT.

4. Jurisdiction to administer article 15 punishment to AGR's remains solely with active duty commanders.

5. Commanders generally cannot delegate their article 15 authority. AR 27-10, para. 3-7b.

STEP 6B—*If You Are Going to Recommend That a Superior Officer Consider Article 15 Punishment in a Particular Case—*

Forward the case through command channels, if appropriate, using DA Form 5109-R, Request to Superior to Exercise Article 15, UCMJ, Jurisdiction. The form appears at the end of AR 27-10.

STEP 6C—*If You Are Going to Administer the Article 15, Ensure That You and the Soldier Are in the Proper Status.*

1. Commanders must be in Title 10 duty status (ADT, AT, IDT) for most actions taken under article 15, including offering and imposing article 15 punishment. AR 27-10, para. 21-2c. Note, however, that the commander may designate a subordinate in rank E-7 or above to deliver the article 15 form (DA 2627) and inform the soldier of his or her rights. AR 27-10, para. 3-18a.

2. Similarly, the soldier must be in Title 10 status. IDT may not be scheduled for the soldier solely for the purpose of UCMJ action. AR 27-10, para. 21-5b.

STEP 6D—*Decide Whether the Procedure Will be Formal or Summarized.*

Maximum punishment imposed under summarized procedures cannot exceed extra duty for fourteen days, restriction for fourteen days, oral admonition or reprimand, or any combination thereof (no forfeiture of pay, reduction, or correctional custody).

STEP 7—*Administer the Article 15.*

STEP 7A—*If You Are Going to Follow the Summarized Article 15 Procedure—*

See Appendix 2 and use DA Form 2627-1.

STEP 7B—*If You Are Going to Follow a Formal Article 15 Procedure—*

1. *See* Appendix 3 and use DA Form 2627.

2. Note that "normally, 48 hours is a reasonable decision period," but that the exact decision period is not prescribed. AR 27-10, para. 3-18f(1).

3. Counsel for consultation will be provided by the 2122d SJA. Counsel may be consulted by telephone, at the soldier's option.

4. Procedure for calculating forfeitures is at Appendix 4.

STEP 8—*If You Are Going to Recommend Court-Martial—*

1. Before preferring charges, you are required to consult with the SJA, 2122d, who in turn will consult with the 97th ARCOM SJA prior to referral to the AC GCMCA SJA (at Ft. Meade) or the designated trial counsel. Defense counsel is provided by Trial Defense Service (TDS), Fort Meade.

2. Prefer charges using DD Form 458.

3. Forward charges, in memorandum form, addressed to or through Commander, 2122d USAG.

4. Caution:

a. Before being placed in pretrial confinement, the Reserve component soldier must be involuntarily activated, which requires approval of the Secretary of the Army.

b. Charges must be forwarded immediately upon preferral, because notice of preferral starts the speedy trial clock. While up to sixty days processing time within the Reserve component system is excluded from the speedy trial limit, the exclusion period does not begin until the date of the initial request for involuntary active duty. In addition, even if charges have not been preferred, once the soldier has been brought on active duty the exclusion period ends and the speedy trial clock begins to run. *See* R.C.M. 204 and 707 (a)(3).

Appendix 1

Search and Seizure for Commanders

The Fourth Amendment Provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the person or things to be seized.

The Exclusionary Rule

Evidence obtained as a result of a violation of constitutional rights is subject to exclusion in judicial proceedings.

I. *The Fourth Amendment and the Situations to Which it Applies.*

The fourth amendment prohibits *unreasonable* searches and seizures of places where a service member has a *reasonable* expectation of privacy. This includes the service member's wall locker, foot locker, room, automobile, and items provided for the storage of personal effects. It does not generally apply to common areas or to items issued for purely military reasons, such as a military vehicle.

II. *Types of Lawful Searches.*

A. *Searches Pursuant to a Warrant.*

1. Must be issued by a military judge, a magistrate, or a neutral commander with proper jurisdiction.

2. Must be based upon *probable cause*—a reasonable belief that property or evidence is located at the place to be searched. *This determination must be made by the issuing officer, not by the applicant.*

3. Basis—written affidavit (DA Form 3744) or oral communication.

4. Execution of the warrant. The items seized must be embraced by the warrant.

B. *Searches Based Upon Exigent Circumstances.*

1. Must be based upon probable cause.

2. Insufficient time to get authorization because the delay would result in the removal, destruction, or concealment of evidence.

C. *Automobile searches.*

1. An operable vehicle may be searched without a warrant if there is probable cause to believe that it contains contraband or evidence.

2. The search may encompass any container or package capable of concealing the contraband.

D. *Consent Searches.*

1. A person may always consent to a search even if there is no underlying lawful basis for the search.

2. But the consent must be voluntary. The government must be able to prove by clear and convincing evidence that the consent was freely given.

E. *Searches Incident to Apprehension.*

1. Contemporaneously with taking a person into custody, the official may search the suspect's person and the area within the suspect's immediate control (arm's reach) for weapons and evidence.

2. When a person is apprehended in an automobile, the official may search the entire passenger compartment, including the glovebox and containers, but not the trunk.

II. *Inspections and Inventories.*

A. *Purpose.* An examination of a military unit to assure readiness. The commander has the inherent power to determine the health, safety, welfare, and readiness of the unit.

B. *Requirements* (Military Rule of Evidence 313).

1. Primary purpose. The primary purpose of the inspection must be administrative (unit security, fitness, order, and discipline) and not criminal (to obtain evidence against a specific person).

2. The subterfuge rule. If an examination is ordered immediately following the report of a crime, specific persons are targeted, or some persons are subjected to substantially different intrusions, then the government must prove by clear and convincing evidence that the primary purpose of the examination was administrative and not criminal.

C. *Gate or Threshold Inspections* (Military Rule of Evidence 314). Commanders may authorize inspections of persons and vehicles entering or exiting a military installation.

Appendix 2

Procedures for Summarized Proceedings, Nonjudicial Punishment

(a) Inquiry: Probable cause to believe accused committed an offense, and lesser means of disposition are not appropriate based on the offense(s) and record of the accused.

(b) Initiation: Use DA Form 2627-1—handwritten is sufficient.

(c) Notification: By the commander, a designated officer, or NCO in grade of E7 or above. Accused is notified of the following:

(1) Offense charged.

(2) Right to remain silent.

(3) Summarized article 15 and its maximum punishments.

(4) Witnesses reasonably available.

(5) Right to demand trial and refuse NJP.

(6) No right to consult with or be represented by an attorney.

(d) Decision: Accused may accept NJP or demand court-martial. If NJP accepted, accused is not necessarily entering plea of guilty, but only agreeing to NJP proceeding. Accused will have twenty-four hours to decide and gather matters in defense, extenuation and mitigation (E&M).

(e) Hearing: The commander will hear and consider the evidence and determine guilt or innocence. If accused found guilty by standard of *beyond a reasonable doubt*, commander will impose punishment and explain right of appeal.

(f) Maximum punishments: Fourteen days of extra duty, fourteen days of restriction, oral reprimand or admonition, or any combination of these. Each Unit Training Assembly (UTA) is considered one day.

(g) Appeal: Accused may appeal within a reasonable time, but can be required to undergo punishment pending the appeal. If the appeal is not acted upon within three days, punishments involving deprivation of liberty must be stayed pending appellate decision, if accused so requests.

(h) Filing: Filed locally in nonjudicial punishment files only, and destroyed after two years or upon transfer of the soldier, whichever comes first.

Appendix 3

Formal Proceedings, Nonjudicial Punishment

1. Procedures

(a) Inquiry: Same as summarized proceedings.

(b) Initiation: Use DA Form 2627, typewritten.

(c) Notification: Same as summarized proceedings, except different maximum punishments and right to *consult* with counsel, but not to be represented by counsel.

(d) Decision: Same as summarized proceedings, except accused has *forty-eight* hours to decide and gather matters in defense, extenuation, and mitigation.

(e) Hearing: Same as summarized proceedings, where commander will conduct hearing and determine whether accused has been proven guilty by evidence *beyond a reasonable doubt.*

(1) Accused may call witnesses, if witnesses are reasonably available, as determined by the imposing commander. As in summarized proceedings, no witness or travel fees or pay authorized.

(2) Accused may have a spokesperson to speak on his or her behalf. The spokesperson is a volunteer, not a lawyer. Accused has right to consult with defense counsel, but no right to be represented by defense counsel at the hearing.

(f) Maximum punishments: *See* MCM, Section V, for complete range of punishments, but company grade and field grade punishments include reduction in grade, deprivation of liberty, deprivation of pay (note that detention of pay is no longer allowable), and admonition or reprimand. Each Unit Training Assembly (UTA) is considered one day. An example for calculating forfeitures for Reserve component personnel is at Appendix 4.

(g) Appeal: Same as summarized proceedings, except appeal must be acted upon within five days, or punish-

ments involving deprivation of liberty must be stayed if accused so requests.

(h) Filing: For soldiers in the Army less than three years who are E-4's or below, the original is filed locally in unit nonjudicial punishment files and is destroyed after two years. Copy 1 is destroyed, and copies go to MILPO only if needed to support reductions or forfeitures, but are not kept permanently in the MPRJ. For all other soldiers, the original goes in the OMPF, with commander deciding whether filed in *restricted* fiche or *performance* fiche. If original in performance fiche, one copy filed in permanent section of MPRJ; if original in restricted fiche, one copy filed in unit personnel files, to be destroyed after two years or upon transfer from the unit, whichever comes first.

2. Appellate Review

(a) Appellate authority: Normally the next superior commander in the chain of command.

(b) Grounds for appeal: Accused not guilty on the merits, punishments imposed were excessive, or for any other reason alleged by the soldier.

(c) Commander's options: The appellate commander may do any of the following:

(1) *Approve* the subordinate commander's action.

(2) *Suspend* the action for a maximum of six months (but an executed punishment of reduction or forfeiture may be suspended only within a period of four months after the date imposed. AR 27-10, para. 3-24).

(3) *Mitigate* or lessen the severity of the punishment imposed. AR 27-10, para. 3-26.

(4) *Remit or cancel* portions of the unexecuted punishment imposed. AR 27-10, para. 3-27.

(5) *Set aside* the action, but must be done within four months of date of imposition. AR 27-10, para. 3-28.

(6) *Note* that the appellate commander does *not* have the authority to change the record filing decision of the imposing commander unless the decision is set aside.

3. Execution of Punishment

(a) Punishment may be served while the soldier is in IDT status, as well as AD, ADT or AT status, but if in IDT status the punishment must be served during normal IDT time. Any remaining punishment will be carried forward to each following normally scheduled IDT until completed. IDT may *not* be scheduled solely for purposes of UCMJ action.

(b) No sentence of restrictions on liberty can be imposed during other than normal IDT or AD or ADT without approval of the Secretary of the Army.

Appendix 4

Article 15 Forfeitures for Reserve Component Personnel

UCMJ Limit	7 days pay (company grade art. 15)
MCM limits	1. Base pay only
	2. In whole dollar amount, rounded down
EXAMPLE: SPC over 2 years	ASSUME: $860 base pay per month or $28.67 per day

Reservists are paid by the drill period or Unit Training Assembly (UTA) at the rate of 1/30th of the base pay for the active component (AC) soldier of equal grade (37 U.S.C. § 206). However, UTA's are usually only two to four hours long and typically there are multiple UTA's (MUTA's) in one calendar day. Therefore, a SPC reservist with over two years service will earn $57.34 on a typical Saturday for a MUTA 2. If a Reserve component commander focuses on drill pay rather than the UCMJ, the maximum forfeiture may be calculated incorrectly.

The *WRONG* Method:

$57.34 compensation per calendar day
× 7 days
$401.38 or forfeiture of $401

The *CORRECT* Method:

$28.67 = one day's base pay for a SPC over 2 years in the AC
× 7 days
$200.69 or forfeiture of *$200*

Although a reservist may lose almost all drill pay for two months to satisfy a maximum $200 forfeiture (200 = MUTA 7), it must be remembered that drill pay is compensation over and above the reservist's civilian livelihood, and that the commander may always impose a forfeiture less than the $200 maximum in this example.

New Reserve Component Commissary Entitlement

On January 1, 1989, a new Reserve component commissary entitlement policy went into effect. Under the new policy, there are two methods for Reserve component members and their dependents to gain access to the commissary.

The first method applies during periods of Active Duty Training or Annual Training. A member or authorized family member will be allowed access to the commissary during these training periods simply by showing a copy of valid orders covering the dates of the training and a valid Reserve component photo ID card.

The second method of gaining access to the commissary applies during the rest of the training year. Members of the Reserve components in good standing will be issued a new U.S. Armed Forces Commissary Privilege Card (DD Form 2529). This privilege card, and the appropriate photo ID Card, will authorize the member or dependent access to commissary benefits twelve days each year at the member or dependents' discretion. These new privilege cards will be distributed to the Reserve components between January and March 1989, and they will become effective on July 1, 1989. These cards will be made available through normal forms channels.

An interim procedure for gaining access to commissaries was established for the period between January 1,

1989 and July 1, 1989. During this transition period, there are no limits on the number of days a Reserve component member or dependent may use the commissary provided they show the appropriate photo ID card and a copy of orders establishing that the member was ordered to ADT or AT during either calendar year 1988 or 1989.

Address Changes

The note in this section of the January 1989 issue of *The Army Lawyer* pertaining to address changes indicated that USAR officers who desire to correct or update an address should send a letter to the JAGC Personnel Management officer at ARPERCEN. That procedure will work for USAR officers assigned to one of the control groups, e.g., IMA and IRR. For officers assigned to Troop Program units, however, the ARPERCEN database is overlaid with data from the SIDPERS database. If the SIDPERS database is incorrect, the ARPERCEN database will also be erroneous. Reservists in that situation will still not receive *The Army Lawyer* and the *Military Law Review* from The Judge Advocate General's School. Troop unit officers who have had a recent address change must verify with their unit administration that their mailing address is correct in the SIDPERS database system.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses 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 MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM's 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

1989

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24-August 4: 119th Contract Attorneys Course (5F-F10).

July 24-September 27: 119th Basic Course (5-27-C20).

July 31-May 18, 1990: 38th Graduate Course (5-27-C22).

August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

August 14-18: 13th Criminal Law New Developments Course, (5F-F35).

September 11-15: 7th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

June 1989

1: FB, Criminal Trial Practice, Miami, FL.

1: FB, Florida Law, Tampa, FL.

1: IICLE, Pre-Trial Motions: Arrest, Search and Seizure, Chicago, IL.

1-2: GULC, Construction Contracts, Washington, D.C.

1-2: PLI, Hazardous Waste Litigation, New York, NY.

1-2: ALIABA, Minimizing Liability for Hazardous Waste Management, Washington, D.C.

1-2: PLI, Securities Enforcement Institute, New York, NY.

1-2: ALIABA, Securities Regulation of Thrifts, Washington, D.C.

1-3: VACLE, Virginia Conference on Federal Taxation, Richmond, VA.

2: FB, Basic Probate Practice, West Palm Beach, FL.

2: FB, Criminal Trial Practice, Tampa, FL.

2: NKU, Family Law, Highland Heights, KY.

2: FB, Florida Law, Miami, FL.

2-3: MCLE, Accounting for Lawyers, Boston, MA.

2-3: MCLE, Disposition Skills Workshop, Boston, MA.

2-3: MLI, The TMJ Injury and Dental Malpractice, Las Vegas, NV.

3-4: MLI, Ob/Gyn and Pediatric Injuries, Las Vegas, NV.

5: MCLE, Advanced Reading Skills for Lawyers, Boston, MA.

7: MCLE, Negotiation Workshop, Boston, MA.

8: MCLE, Effective Time Management for Lawyers, Boston, MA.

8-9: IICLE, Estate Administration, Chicago, IL.

8-9: GULC, Trade Laws, Washington, D.C.

9: MCLE, Recent Developments in Federal and Massachusetts Law, Boston, MA.

9: MCLE, Writing for Lawyers, Boston, MA.

10-11: MLI, Litigating Psychological Injuries, Chicago, IL.

12-13: PLI, Construction Contracts and Litigation, San Francisco, CA.

13-16: ESI, Contracting for Services, Washington, D.C.

15-16: IICLE, Landlord Tenant, Chicago, IL.

15-30: NCDA, Career Prosecutor Course, Houston, TX.

16: PLI, Advanced Brief Writing, Los Angeles, CA.

18-23: NJC, Advanced Evidence, Reno, NV.

19-23: ALIABA, Estate Planning in Depth, Madison, WI.

22: FB, Diagnostic Tests in Worker Compensation Cases, Tallahassee, FL.

22-23: PLI, How to Handle Basic Copyright and Trademark Questions, New York, NY.

23: NKU, Insurance No-Fault, Highland Heights, KY.

23: IICLE, Proof of Damages, Chicago, IL.

23-24: UKCL, Law Practice Management, Lexington, KY.

23-25: MLI, Orthopedic Injury and Disability, Orlando, FL.

24-25: MLI, Anatomy for Attorneys (Part I), Boston, MA.

25-30: NJC, Conducting the Trial, Reno, NV.

26-30: ALIABA, Environmental Litigation, Boulder, CO.

30: IICLE, Federal Tax Practice, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1989 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar
North Carolina	Annually
North Dakota	1 February in three-year intervals
Ohio	Last name A-L—initial report January 31, 1990; thereafter each even-numbered year. Last name M-Z—initial report January 31, 1991; thereafter each odd-numbered year.
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1989 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

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

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

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2. Regulations & Pamphlets

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Number	Title	Change	Date
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AR 25-50	Preparing and Managing Correspondence		21 Nov 88
AR 27-10	Military Justice		16 Jan 89
AR 601-210	Regular Army and Army Reserve Enlistment Program		1 Dec 88
CIR 37-88-1	The Army Sure-Pay Program		9 Dec 88
Pam 25-30	Index of Army Pubs and Blank Forms		30 Sep 88
Pam 360-544	You and the Law Overseas		1989

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