

# THE ARMY LAWYER

Headquarters, Department of the Army

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**The Army Lawyer (ISSN 0364-1287)**

**Editor**  
**Captain Matthew E. Winter**

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*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, WordPerfect, MultiMate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (14th

ed. 1986) and *Military Citation* (TJAGSA, July 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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On December 21, 1988, the Secretary of the Army, John O. Marsh, Jr., directed that The Judge Advocate General establish a Center for Law and Military Operations at The Judge Advocate General's School. The purpose of the Center is outlined in the memorandum that follows. The first Center symposium, to be attended by military and civilian attorneys from the United States and allied and friendly countries, has been scheduled for April 1990.

The Center, currently co-located with the International Law Division of The Judge Advocate General's School, will be housed in the new addition to the School. The Director of the Center is LTC David E. Graham.



SECRETARY OF THE ARMY  
WASHINGTON

21 December 1988

MEMORANDUM FOR THE JUDGE ADVOCATE GENERAL

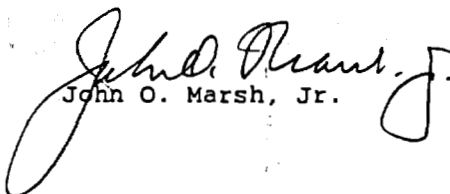
SUBJECT: Establishment of a Center for Law and Military Operations

To ensure a more effective and comprehensive examination of legal issues associated with military operations, you are directed to establish at The Judge Advocate General's School, Charlottesville, Virginia, a Center for Law and Military Operations.

The principal purpose of this Center will be the ongoing examination of legal issues associated with the preparation for, deployment to, and conduct of military operations. Toward this end, and as an integral part of its mission, the Center should periodically host working seminars and topical lectures for military judge advocates, civilian attorneys, and legal scholars from the United States and from allied and friendly countries around the world. In addition, the Center should publish appropriate articles, monographs, and papers.

It is my belief that the development of a close professional and working relationship between U. S. and allied attorneys in the area of operational law will prove to be valuable to the effective resolution of legal issues which arise in the overseas operational environment. The activities of the Center will contribute significantly to the achievement of this goal.

This Center should be established at the earliest possible time. Available personnel and funding support will be utilized to both effect and sustain the Center and its programs. Additional personnel and funding requirements will be identified as the Center develops.

  
John O. Marsh, Jr.



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



REPLY TO  
ATTENTION OF

17 FEB 1989

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Malpractice Protection for National Guard Personnel  
Providing Legal Services-Policy Memo 89-2

1. Recent visits with Army National Guard Judge Advocates have generated questions concerning the scope of the immunity protections provided by 10 U.S.C. 1054, the statute which provides DOD attorneys and legal staff members with personal legal malpractice protection similar to that accorded medical care providers under the Gonzales Act, 10 U.S.C. 1089. Particular concerns include whether Department of Justice representation would be provided when a malpractice suit arises out of the delivery of legal services by National Guard personnel serving in a title 32 status as members of the State units as opposed to duty under title 10 as members of the National Guard of the United States, i.e., in their federal status.

2. The scope of the protections provided by 10 U.S.C. 1054 is broad. The Federal Tort Claims Act as amended, 28 U.S.C. 2671, includes National Guard members engaged in title 32 training within the definition of "employee of the government." In matters outside the scope of the Federal Tort Claims Act, National Guard personnel serving in a title 32 capacity generally obtain representation from the attorney general of their state and not the United States. However, 10 U.S.C. 1054 expressly requires Department of Justice representation for National Guard personnel providing legal services in a title 32 or title 10 status and limits the application of the FTCA exceptions so that claimants could recover under the FTCA for legal malpractice. Accordingly, the "in scope" delivery of legal services by National Guard personnel whether based upon either title 32 or title 10 orders is protected by 10 U.S.C. 1054. This includes representation and removal to federal district court.

3. If National Guard legal services personnel are serving under other than title 10 or title 32 orders, they must look to the law of their state to address questions of both representation and immunity.

*William K. Suter*

WILLIAM K. SUTER  
Major General, USA  
Acting The Judge Advocate General



## Memorandum of Law: Status of Certain Medical Corps and Medical Service Corps Officers Under the Geneva Conventions

The International Affairs Division, OTJAG, recently forwarded the following memorandum to the Army's Director of Health Care Operations. It responds to a request to clarify the status, under the relevant Geneva Convention, of medical personnel not exclusively engaged in patient care. Because of the frequent questions received at TJAGSA regarding this subject, the memorandum is reprinted in its entirety. While it addresses employment of medical personnel under procedures unique to the Army, its legal rationale and conclusions apply equally to all services. As noted, the Judge Advocate Generals of the Navy and Air Force have concurred in the content and conclusions of the memorandum.

DAJA-1A

MEMORANDUM FOR: DIRECTOR, HEALTH CARE OPERATIONS (DASG-HCZ)

SUBJECT: Status of Certain Medical Corps and Medical Service Corps Officers Under the Geneva Conventions

1. Reference. DASG-HCZ memorandum dated 30 September 1988, same subject.

2. The reference requested clarification of the status, under the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (GWS), of certain U. S. Army medical personnel serving in positions not strictly related to patient care. Specific situations which have raised these questions are:

a. Medical Service Corps (MSC) officers now serve as commanders of fire support bases (FSBs) with responsibility for base/base cluster defense as well as command and control of medical and nonmedical units. MSC officers and Army Medical Department (AMEDD) noncommissioned officers are also serving as staff officers within the FSB with responsibility for planning and supervising the logistics support for a combat maneuver brigade as well as during the rear battle.

b. The medical company commander, a physician, and the executive officer, an MSC officer, by nature of their positions and grade, may be detailed as convoy march unit commanders. In this position they would be responsible for medical and nonmedical unit routes of march, convoy control, defense, and repulsing attacks.

c. MSC officers and other Army officers and warrant officers who are qualified helicopter pilots but who are not permanently assigned to a dedicated medical aviation unit devote (e.g.) one day or a portion thereof to flying medical evacuation helicopters, but fly helicopters not bearing Red Cross markings on standard combat missions on alternate days.

3. Article 24 of the GWS provides special protection for "[m]edical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff exclusively engaged in the administration of medical units and establishments . . . [emphasis supplied]." Article 25 provides limited protection for [m]embers of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick...if they are carrying out those duties at the time when they come into contact with the enemy or fall into his hands [emphasis supplied]."

4. There are two forms of protection, and they are separate and distinct. The first is protection from intentional attack if medical personnel are identifiable as such by an enemy in a combat environment. Normally this is facilitated by medical personnel wearing an arm band bearing the Distinctive Emblem of the Red Cross or Red Crescent, as provided for in articles 40 (article 24 personnel) and 41 (article 41 personnel), GWS, or by their employment in a medical unit, establishment, or vehicle (including medical aircraft and hospital ships) that displays the Distinctive Emblem, as prescribed in article 42, GWS, and articles 41-43 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Persons protected by article 25 may wear an arm band bearing a miniature Distinctive Emblem only while executing medical duties.

5. The second protection provided by the GWS pertains to medical personnel who fall into the hands of the enemy. Article 24 personnel are entitled to "retained person" status, as provided in article 28, GWS. They are not deemed to be prisoners of war, but otherwise benefit from the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). They are authorized to carry out medical duties only, and "shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require." (Article 28, GWS). Under article 29, GWS, article 25 personnel are prisoners of war, but shall be employed on their medical duties in so far as the need arises. They may be required to perform other duties or labor, and they may be held until a general repatriation of prisoners of war is accomplished upon the cessation of hostilities.

6. Some medical personnel may fall into each of the categories identified in articles 24 and 25, depending on their duties at the time. While only article 25 refers to nurses, the official commentary to the GWS prepared by the International Committee of the Red Cross makes it clear that nurses are article 24 personnel if they meet the "exclusively engaged" criteria of that article. Jean S. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, 1952), p. 218. In some armies, however, nurses serve as ammunition bearers until such time as it becomes necessary for them to carry out their medical duties. The latter do not meet the "exclusively engaged" criteria of article 24, but (by the terms of article 25) are entitled to protection from intentional attack if they are carrying out their medical duties at the time they come into contact with the enemy.

7. Until recently, medical services personnel in the armed services of the United States have been regarded as "staff exclusively engaged in the administration of medical units and establishments," entitled to the protection contained in articles 24 and 28, GWS. While the duties of some MSC officers, AMEDD noncommissioned officers, and other Medical Corps personnel have been amended as noted in paragraph 2 of this memorandum, MSC officers in the Navy and Air Force continue to serve exclusively in positions related to the administration of medical units, establishments, and vehicles. In fact, article 0845 of the U.S. Navy Regulations expressly permits medical personnel to execute medically-related duties only.

8. U.S. Army MSC officers, AMEDD noncommissioned officers, or other Medical Corps personnel serving in positions that do not meet the "exclusively engaged" criteria of article 24 are not entitled to its protections but, under article 25, are entitled to protection from intentional attack during those times in which they are performing medical support functions. This would include physicians who, while serving as medical company commanders, might be detailed to perform the duties specified in paragraph 2b. The principal distinction (other than wearing an arm band bearing the distinctive emblem, and the size of the Red Cross thereon [as prescribed in articles 40 and 41, GWS]) is that medical personnel who do not meet the "exclusively engaged" criteria of article 24, GWS, are not entitled to carry the medical personnel identification card authorized in article 40, GWS (in the U. S. armed services, DD Form 1934). Article 25 personnel (by that article) are entitled to carry a special identification card, provided it is not the same as that carried by article 24 personnel and that it specifies what special training they have received, the temporary medical duties in which they may be engaged, and their authority for wearing the arm band bearing the Red Cross (article 41, GWS). If no such special identification card is available, as is the case in the United States armed services, article 25 personnel must carry a standard military identification card (DD Form 2A). As article 25 status affords no special treatment upon capture, there is no practical justification for a special identification card.

9. The sole reason for possession of a medical identification card is to entitle article 24 personnel to "retained status" and its perquisites, as listed in paragraph 5. Although the provision regarding unconditional repatriation of retained personnel repeats a "matter of principle" (Pictet, *Commentary on the GWS*, p. 235) contained in the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (article 3), the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (article 12), and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (article 12), in practice it is one of the least-respected provisions of those treaties. The principle was "indifferently applied" during World War I, and honored on a minor scale only in World War II. Pictet, pp. 235-242. U.S. and allied medical personnel captured during the

Korean and Vietnam Wars not only were denied early, unconditional repatriation, but were denied their retained status. Moreover, even were an enemy to permit unconditional repatriation, a very good case could be made for denial of its application to U.S. Army medical personnel, inasmuch as under the U.S. Army's new policy those persons could return to combatant rather than medical duties. Hence the "retained status" relinquished by MSC officers, AMEDD noncommissioned officers, and other medical personnel who must surrender their DD Form 1934 medical identification card because they do not meet the "exclusively engaged" criteria of article 24 exists more in appearance than fact. However, in order to protect those medical personnel who do meet the stricter criteria of article 24, GWS, MSC officers, AMEDD noncommissioned officers, and other medical personnel not meeting the "exclusively engaged" criteria of article 24, GWS, must exchange their medical personnel identification card (DD Form 1934) for the standard DD Form 2A military identification card.

10. A question remains as to when a MSC officer, AMEDD noncommissioned officer, or other medical personnel shifts from the article 24 medical personnel status to that of article 25 personnel, and the duration of that change. The GWS and *Commentary* are silent on this matter. The description of duties contained in paragraph 2 of this memorandum suggests that certain billets have been identified as those in which MSC officers, AMEDD noncommissioned officers, and other medical personnel may be called upon to perform nonmedical duties. If they have not been identified, it is incumbent upon the Office of the Surgeon General to identify them and provide for the relinquishment of the DD Form 1934 by the officer or noncommissioned officer upon assumption of that position.

11. There exists no requirement for such relinquishment to be for the duration of a conflict. A nurse in a foreign army serving as an ammunition bearer (who, at best, would be entitled to article 25 protection) hypothetically could be reassigned to a field or rear area hospital, at which time he or she would meet the "exclusively engaged" criteria of article 24. The same is true for MSC officers, AMEDD noncommissioned officers, or other medical personnel. An officer or noncommissioned officer serving in a billet that might require him or her to perform nonmedical duties (who, at best, would be entitled to article 25 protection) could reassume full medical personnel status upon reassignment to a position in which he or she meets the "exclusively engaged" criteria of article 24, GWS.

12. With respect to a helicopter pilot who alternates flying medical evacuation missions and conventional combat missions, such an individual is not entitled to medical personnel status nor authorized to carry the DD Form 1934 medical identification card; he may not shift from carrying one identification card to another depending on the day's mission(s). The same is true with respect to reassignment, as discussed in the preceding paragraph. Reassignment must be in the common usage sense of the word, i.e., semipermanent, and not a revolving door through which an individual passes depending on his or her duties on a particular day. Either practice would be inconsistent with the "exclusively engaged" criteria of article 24, and could place legitimate medical personnel at undue risk.

13. *Conclusion.* It is recommended that those billets be identified in which MSC officers, AMEDD noncommissioned officers, or other medical personnel would not be "exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, for acting as staff exclusively engaged in the administration of medical units and establishments" so that individuals serving in such billets may exchange their DD Form 1934 identification card for the DD Form 2A card for the period in which they are so serving. This office is prepared to offer additional advice and assistance as required in accomplishment of this.

14. This memorandum has been coordinated with the International Law Offices of The Judge Advocates General of the Navy and Air Force, who concur with its contents and conclusion.

FOR THE JUDGE ADVOCATE GENERAL:

W. Hays Parks  
Special Assistant for Law of War  
Matters

## Letting Life Run Its Course: Do-Not-Resuscitate Orders and Withdrawal of Life-Sustaining Treatment

Lieutenant Colonel William A. Woodruff  
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### Introduction

As medical technology progressed to the point that a patient's vital signs could be sustained almost indefinitely, society began to question the value of these advancements. If the patient was permanently comatose, unable to interact with the environment, unable to communicate with others, unable to feel and appreciate the soft touch of a loved one's hand, and unable to function at even a basic cognitive level, what purpose was served by keeping the patient "alive"?

These questions and the apparent conflict between scientific advances and the essence of human life were brought into sharper focus on April 15, 1975, when an emergency rescue team was summoned to help Karen Ann Quinlan, a 20-year-old woman who had stopped breathing for two 15-minute periods. Upon arrival at the hospital, Karen had a temperature of 100 degrees, her pupils were unresponsive to light, and she was unresponsive

to painful stimuli. Over the next several weeks she developed a "sleep-wake" cycle and reacted to painful stimuli, but remained respirator dependent and in a coma. Her physicians characterized her condition as a "chronic persistent vegetative state" with no real hope of return to a cognitive condition.<sup>1</sup>

Several months later, after Karen's doctors refused to discontinue the respirator because they thought to do so would violate accepted standards of medical practice, Joseph Quinlan, Karen's father, petitioned the New Jersey Superior Court for appointment as Karen's guardian and asked the court for permission to disconnect the respirator. The Superior Court denied the petition.<sup>2</sup> In a landmark decision, the Supreme Court of New Jersey reversed and held that Karen Ann Quinlan's privacy rights under both the state and federal constitutions outweighed the state's interest in preserving life and, because she was incompetent, her father could exercise that right for her.<sup>3</sup> The court also held that once the

<sup>1</sup> *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom., *Garger v. New Jersey*, 429 U.S. 922 (1976).

<sup>2</sup> *In re Quinlan*, 137 N.J. Super. 227, 348 A.2d 801 (N.J. Super. Ct. Ch. Div. 1975).

<sup>3</sup> *In re Quinlan*, 70 N.J. at 41-42, 355 A.2d at 664.

treating physicians determined, and the hospital ethics committee agreed, that there was no reasonable hope of Karen emerging from her comatose condition to a cognitive state, the respirator could be withdrawn without fear of any criminal or civil liability.<sup>4</sup>

Subsequent to the *Quinlan* decision, thirty-nine states and the District of Columbia enacted "Living Will" statutes, "Death With Dignity" laws, "Natural Death" acts, or similar provisions in an attempt to remove the uncertainty that forced Joseph Quinlan into court.<sup>5</sup> Generally speaking, the statutes allow individuals to execute "living wills" or "advance directives" to inform

physicians of their desires should they be in a terminal condition and/or comatose and incompetent to decide what medical treatment to accept or reject.<sup>6</sup> In spite of the legislative activity, the courts have been increasingly involved in deciding when and under what circumstances life-prolonging treatment can be withheld or withdrawn.<sup>7</sup>

As the practice of writing "do-not-resuscitate" (DNR) orders and withdrawing life support from terminally ill patients became more accepted in the civilian community, questions arose concerning the policy in Army hospitals. In 1978 the Army Health Services Command

<sup>4</sup> *Id.* at 54-55, 355 A.2d at 671-72.

<sup>5</sup> Alabama Natural Death Act, Ala. Code §§ 22-8A-1 to -10 (1981); Alaska Rights of the Terminally Ill Act, Alaska Stat. §§ 18.12.010 to .100 (1986); Arizona Medical Treatment Decision Act, Ariz. Rev. Stat. Ann. §§ 36-3201 to -3210 (1985); Arkansas Death With Dignity Act, Ark. Stat. Ann. §§ 20-17-201 to -218 (1987); California Natural Death Act, Cal. Health & Safety Code §§ 7185-7195 (West Supp. 1988); Colorado Medical Treatment Decision Act, Colo. Rev. Stat. §§ 15-18-101 to -113 (1987); Connecticut Death With Dignity Act, Conn. Gen. Stat. §§ 19A-570 to -575 (West Supp. 1988); Delaware Death With Dignity Act, Del. Code Ann. tit. 16, §§ 2501-2508 (1983); District of Columbia Natural Death Act, D. C. Code Ann. §§ 6-2421 to -2430 (Michie Supp. 1988); Life-Prolonging Procedure Act of Florida, Fla. Stat. Ann. §§ 765.01-.15 (Harrison Supp. 1987); Georgia Living Wills Act, Ga. Code Ann. §§ 31-32-1 to -12 (1985 & Michie Supp. 1988); Hawaii Medical Treatment Decisions Act, Haw. Rev. Stat. §§ 327D-1 to -27 (1986 & Supp. 1987); Idaho Natural Death Act, Idaho Code §§ 39-4501 to -4508 (1985 & Michie Supp. 1988); Illinois Living Will Act, Ill. Ann. Stat. ch. 110 1/2, §§ 701-710 (West Supp. 1988); Indiana Living Wills and Life-Prolonging Procedures Act, Ind. Code Ann. §§ 16-8-11-1 to -22 (Michie Supp. 1988); Iowa Life-Sustaining Procedures Act, Iowa Code Ann. §§ 144A.1-.11 (West Supp. 1988); Kansas Natural Death Act, Kan. Stat. Ann. §§ 65-28,101 to -28,109 (1985); La. Rev. Stat. Ann. §§ 40:1299.58.1 to .10 (West Supp. 1988); Maine Living Wills Act, Me. Rev. Stat. Ann. tit. 22, §§ 2921-2931 (West Supp. 1987); Md. Health-Gen. Code Ann. §§ 5-601 to -614 (Michie Supp. 1988); Mississippi Withdrawal of Life-Saving Mechanisms, Miss. Code Ann. §§ 41-41-101 to -121 (Supp. 1987); Missouri Uniform Rights of the Terminally Ill Act, Mo. Ann. Stat. §§ 459.010-.055 (West Supp. 1988); Montana Living Will Act, Mont. Code Ann. §§ 50-9-101 to -111, 50-9-201 to -206 (1987); Nevada Withholding or Withdrawal of Life Sustaining Procedures Act, Nev. Rev. Stat. §§ 449.540-.690 (1986); New Hampshire Terminal Care Document, N. H. Rev. Stat. Ann. §§ 137-H:1 to :16 (Supp. 1987); New Mexico Right to Die Act, N.M. Stat. Ann. §§ 24-7-1 to -10 (1986); N.Y. Pub. Health Law §§ 2960-2978 (West 1988) (provides for do-not-resuscitate orders only); North Carolina Right to Natural Death Act, N. C. Gen. Stat. §§ 90-320 to -323 (1985); Oklahoma Natural Death Act, Okla. Stat. Ann. tit. 63, §§ 3101-3111 (West Supp. 1988); Oregon Rights With Respect to Terminal Illness Act, Or. Rev. Stat. §§ 97.050-.090 (1984); South Carolina Death With Dignity Act, S. C. Code Ann. §§ 44-77-10 to -160 (Law. Coop. Supp. 1987); Tennessee Right to Natural Death Act, Tenn. Code Ann. §§ 32-11-101 to -110 (Michie Supp. 1988); Texas Natural Death Act, Tex. Rev. Civ. Stat. Ann. art. 4590h, § 1-11 (West Supp. 1988); Utah Personal Choice and Living Will Act, Utah Code Ann. §§ 75-2-1101 to -1118 (Michie Supp. 1988); Vermont Terminal Care Document Act, Vt. Stat. Ann. tit. 18, §§ 5251-5262 (1987); Virginia Natural Death Act, Va. Code Ann. §§ 54-325.8:1 to :12 (Michie Supp. 1987); Washington Natural Death Act, Wash. Rev. Code Ann. §§ 70.122.010-.905 (West Supp. 1987); West Virginia Natural Death Act, W. Va. Code §§ 16-30-1 to -10 (1985); Wisconsin Natural Death Act, Wis. Stat. Ann. §§ 154.01-.15 (West Supp. 1987); Wyo. Stat. §§ 35-22-101 to -109 (1988).

<sup>6</sup> See Gelfand, *Living Will Statutes: The First Decade*, 5 Wis. L. Rev. 737 (1987).

<sup>7</sup> Seventeen states and three federal district courts have dealt with the issues of withdrawing or withholding life-prolonging treatment since *Quinlan* was decided. FEDERAL: *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); *Ross v. Hilltop Rehabilitation Hosp.*, 676 F. Supp. 1528 (D. Colo. 1987); *Tune v. Walter Reed Army Medical Center*, 602 F. Supp. 1452 (D.D.C. 1985); ARIZONA: *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); CALIFORNIA: *Childs v. Abramovic*, No. A037920 (Cal. Ct. App. Nov. 30, 1988) (WESTLAW 1988 WL 127111); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988); *Bouvia v. Superior Ct.*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); *Bartling v. Glendale Adventist Medical Center*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983); *Dority v. Superior Court*, 145 Cal. App. 3d 273, 193 Cal. Rptr. 288 (1983); COLORADO: *Lovato v. Dist. Court*, 198 Colo. 419, 601 P.2d 1072 (1979); CONNECTICUT: *Fqody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, 482 A.2d 713 (Conn. Super. Ct. 1984); DELAWARE: *In re Severns*, 425 A.2d 156 (Del. Ch. 1980); FLORIDA: *John F. Kennedy Memorial Hosp. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980); *Wons v. Public Health Trust*, 500 So. 2d 679 (Fla. Dist. Ct. App. 1987); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App.), *review denied*, 492 So. 2d 1331 (Fla. 1986); *In re Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); GEORGIA: *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984); IOWA: *Morgan v. Olds*, 417 N.W.2d 232 (Iowa Ct. App. 1987); LOUISIANA: *In re P.V.W.*, 424 So. 2d 1015 (La. 1982); MAINE: *In re Gardner*, 534 A.2d 947 (Me. 1987); MASSACHUSETTS: *Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601 (1982); *In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959, *review denied*, 392 Mass. 1102, 455 N.E.2d 261 (1984); *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); MISSOURI: *Cruzan v. Harmon*, Mo. Sup. Ct. No. 70813 (Nov. 16, 1988), 57 U.S.L.W. 2324, 1988 WL 122100; MINNESOTA: *In re Torres*, 357 N.W.2d 332 (Minn. 1986); NEW JERSEY: *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *Iafelice v. Zarafu*, 221 N.J. Super. 278, 534 A.2d 417 (N.J. Super. Ct. App. Div. 1985); *In re Requena*, 213 N.J. Super. 443, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986); *In re Visbeck*, 210 N.J. Super. 527, 510 A.2d 125 (N.J. Super. Ct. Ch. Div. 1986); *In re Clark*, 210 N.J. Super. 548, 510 A.2d 136 (N.J. Super. Ct. Ch. Div. 1986); NEW YORK: *In re O'Connor*, No. 312 (N.Y. Oct. 14, 1988), 57 U.S.L.W. 2241 (WESTLAW 1988 WL 107046); *Veteran's Admin. Medical Center v. Harvey U.*, 68 N.Y.2d 624, 505 N.Y.S.2d 70, 496 N.E.2d 229 (1986); *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987); *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980); *In re Beth Israel Medical Center*, 136 Misc. 2d 931, 519 N.Y.S.2d 511 (N.Y. Sup. Ct. 1987); *Workmen's Circle Home and Infirmary v. Fink*, 135 Misc. 2d 270, 514 N.Y.S.2d 893 (N.Y. Sup. Ct. 1987); *In re O'Brien*, 135 Misc. 2d 1076, 517 N.Y.S.2d 346 (N.Y. Sup. Ct. 1986); *Vogel v. Forman*, 134 Misc. 2d 395, 512 N.Y.S.2d 622 (N.Y. Sup. Ct. 1986); *Saunders v. State*, 129 Misc. 2d 45, 492 N.Y.S.2d 510 (N.Y. Sup. Ct. 1985); *Crouse Irving Memorial Hosp., Inc. v. Paddock*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985); *A.B. v. C.*, 124 Misc. 2d 672, 477 N.Y.S.2d 281 (N.Y. Sup. Ct. 1984); *In re Lydia E. Hall Hosp.*, 116 Misc. 2d 477, 455 N.Y.S.2d 706 (N.Y. Sup. Ct. 1982); OHIO: *In re Milton*, 29 Ohio St. 3d 20, 505 N.E.2d 255, *cert. denied*, 108 S. Ct. 79 (1987); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (Ohio Comm. Pleas 1980); PENNSYLVANIA: *In re Estate of Dorone*, 517 Pa. 3, 534 A.2d 452 (1987); WASHINGTON: *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1988); *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *In re Ingram*, 102 Wash. 2d 827, 689 P.2d 1363 (1984); *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

asked the Army Surgeon General if the Texas Natural Death Act applied to Army hospitals in Texas. The Surgeon General replied that the Act did not apply and that Army policy did not allow DNR or withdrawal of life support orders.<sup>8</sup>

As more courts, legislatures, and physicians recognized the benefits of allowing patients to make these fundamental choices, the Army Surgeon General made several attempts to revise the Army policy. Each time a proposed policy was staffed for legal review, The Judge Advocate General cautioned that it was at least possible that a physician withdrawing life support or failing to order resuscitation could face criminal prosecution in some circumstances. Apparently unwilling to subject Army physicians to this risk, the Surgeon General did not change the policy.

The Surgeon General's reticence changed when the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research recommended that institutions develop policies to implement DNR orders in appropriate cases.<sup>9</sup> Relying upon the recommendations and reputation of the President's Commission, the Surgeon General decided to approach the DNR and withdrawal of life support policies as separate issues, and in 1985 promulgated a uniform policy governing DNR orders in Army hospitals.<sup>10</sup>

While the new DNR policy brought the Army in line with the civilian medical community's emerging practice standards concerning resuscitation decisions, the Army policy still did not allow withdrawal of life support.<sup>11</sup> The ink was hardly dry on the new DNR policy, however, when Mrs. Martha Tune, the 71-year-old widow of an Army officer, entered Walter Reed Army Medical Center on February 21, 1985, complaining of shortness of breath and chest pain.<sup>12</sup> Her physicians ordered mechanical ventilation to treat her respiratory problem. Subsequent diagnostic procedures revealed fluid collecting around the heart, and laboratory examination of the fluid indicated the presence of cancer.

Treatment with antibiotics and surgery restored normal heart function, but Mrs. Tune developed adult respiratory distress syndrome (ARDS) and became respirator dependent. Serial x-rays suggested the presence of tumors in her lungs.<sup>13</sup> The combination of ARDS and cancer made death a certainty, and the respirator was only prolonging the inevitable. Mrs. Tune asked the physicians to remove the respirator and allow her to die. Her doctors told her that if they had known the full extent of her illness they would not have ordered the respirator originally, but since she was already on the respirator, Army policy did not allow withdrawal of life-sustaining treatment.<sup>14</sup>

On February 27, 1985, Mrs. Tune's son filed a *pro se* action in the District Court for the District of Columbia seeking an order requiring Walter Reed to remove Mrs. Tune from the respirator. After appointing a guardian *ad litem* and satisfying himself that Mrs. Tune was competent, that she had a terminal illness, and that she understood the consequences of her request, the judge ordered the hospital officials to remove the respirator.<sup>15</sup>

The *Tune* case removed any latent doubts about the legality of withdrawing life support in federal facilities, and shortly thereafter the Army Surgeon General published a uniform policy allowing withdrawal of life-sustaining treatment under specified circumstances.<sup>16</sup> The remainder of this article will discuss the substance of the Army's DNR and withdrawal of life support policies and will highlight areas that merit special attention from judge advocates and members of the health care team.

#### Do-Not-Resuscitate Orders

A patient who suffers cardiac or respiratory arrest in an Army hospital will be resuscitated unless there is a written DNR order in the medical record.<sup>17</sup> In other words, initiating resuscitation is automatic and will only be suspended when there is a written order to the contrary. This prohibits "slow codes" and "notify MOD before coding" practices that developed to avoid the policy against DNR orders.<sup>18</sup>

<sup>8</sup> Letter, HQDA, DASG-PSA (13 Dec. 77) 1st Ind., 23 May 1978, subject: Texas Natural Death Act, reprinted in President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment: Ethical, Medical, and Legal Issues in Treatment Decisions 520-22 (1983).

<sup>9</sup> President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment: Ethical, Medical, and Legal Issues in Treatment Decisions 248-55 (1983) [hereinafter President's Commission].

<sup>10</sup> Army Reg. 40-3, Medical Services: Medical, Dental, and Veterinary Care, chap. 19 (15 Feb. 1985) [hereinafter AR 40-3].

<sup>11</sup> *Id.* para. 19-1b.

<sup>12</sup> *Tune v. Walter Reed Army Medical Center*, 602 F. Supp. 1452, 1453 (D.D.C. 1985).

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

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

<sup>15</sup> *Id.* at 1456.

<sup>16</sup> Letter, HQDA, DASG-PSQ, 30 Aug. 1985, subject: Withdrawal of Life-Sustaining Treatment [hereinafter Withdrawal of Life-Sustaining Treatment Letter].

<sup>17</sup> AR 40-3, para. 19-3a.

<sup>18</sup> "Slow codes" and "notify MOD [medical officer of the day] before coding" were informal agreements between the medical staff, patients, and patients' families to delay the initiation of cardiopulmonary resuscitation (CPR) in a terminally ill patient who arrested. By delaying the initiation of CPR, the patient died before he could be resuscitated and placed on life support apparatus. These practices were not limited to Army facilities, but were common wherever written DNR orders were thought to be violations of law, policy, or good medical practice. See generally Younger, *Do-Not-Resuscitate Orders: No Longer Secret, But Still a Problem*, 17 Hastings Center Rep. 24 (1987); Fried, *Terminating Life Support: Out of the Closet*, 295 New Eng. J. Med. 390 (1976).

Under the Army policy, a DNR order is appropriate when a patient "will not benefit from resuscitation."<sup>19</sup> According to the regulation, patients who will not benefit from resuscitation "include those who are irreversibly, terminally ill or those in a persistent chronic vegetative state."<sup>20</sup> Though the regulation may seem to allow a DNR order for patients who do not fit the definition of "irreversibly, terminally ill"<sup>21</sup> or who are not in a "persistent or chronic vegetative state,"<sup>22</sup> other provisions are more restrictive. For example, the regulation provides that the "voluntary choice of a competent and informed patient *who is irreversibly, terminally ill* will determine whether cardiopulmonary resuscitation will be undertaken."<sup>23</sup> Furthermore, before the order is written the prognosis must be determined by the patient's attending physician and the chief of the service or the deputy commander for clinical services or his or her delegee.<sup>24</sup> Thus, the regulation requires that even the competent patient fit the irreversibly, terminally ill prognosis before a DNR order is appropriate. While this is consistent with the Army policy governing withdrawal of life support,<sup>25</sup> it has the potential of infringing upon the patient's right to refuse medical treatment.<sup>26</sup> The regulation does recognize, however, that a "competent patient has the legal right to refuse medical treatment at any time, even if it is lifesaving."<sup>27</sup> In view of the contradictory provisions of the regulation, the "tough

case," i.e., a *non-terminal* patient requesting a DNR order or refusing other lifesaving treatment, should be resolved individually under the law of the state where the facility is located.<sup>28</sup> This usually involves balancing the government's interest in preserving life, protecting innocent third parties (especially children who are dependent upon the patient), preventing suicide, and preserving the integrity and ethics of the medical profession against the patient's right to privacy, self-determination, and, in appropriate cases, free exercise of religion.<sup>29</sup>

The DNR order is only an order to forego the otherwise automatic initiation of cardiopulmonary resuscitation; it does not alter other treatment decisions.<sup>30</sup> To avoid possible confusion, physicians should write orders for supportive care, the relief of pain, and other treatment separately.<sup>31</sup> Only credentialed physicians who are members of the medical staff may write DNR orders; residents and other doctors in graduate medical education programs may not write DNR orders.<sup>32</sup> Like any other aspect of medical care, the completion of the medical record is important. Army policy requires that the DNR be written on the order sheet, dated, and signed.<sup>33</sup> Furthermore, the physician must include in a progress note an explanation of the rationale behind the order.<sup>34</sup> The progress note must also disclose whether the patient is competent<sup>35</sup> and how the competency

<sup>19</sup> AR 40-3, para. 19-3b.

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

<sup>21</sup> An "irreversibly, terminally ill" patient is any patient with "a progressive disease or injury known to terminate in death and where no additional course of therapy offers any reasonable expectation of remission." *Id.* para. 19-2c.

<sup>22</sup> A "persistent or chronic vegetative state" is a "chronic state of diminished consciousness resulting from severe generalized brain injury in which there is no reasonable possibility of improvement to a cognitive state." *Id.* para. 19-2f.

<sup>23</sup> *Id.* para. 19-6a (emphasis added).

<sup>24</sup> *Id.* para. 19-2c.

<sup>25</sup> See *infra* note 57 and accompanying text.

<sup>26</sup> See, e.g., *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (hospital's refusal to remove feeding tube from non-terminal quadriplegic patient with a 15-year life expectancy violated the patient's right to refuse medical treatment).

<sup>27</sup> AR 40-3, para. 19-3f.

<sup>28</sup> *Cf. id.* para. 2-19f.

<sup>29</sup> See, e.g., *Wons v. Public Health Trust*, 500 So. 2d 679 (Fla. Dist. Ct. App. 1986); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985); *In re E.G.*, 161 Ill. App. 765, 515 N.E.2d 286 (1987), *appeal granted*, 118 Ill. 2d 543, 520 N.E.2d 385 (1988); *In re Brown*, 478 So.2d 1033 (Miss. 1985); *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987); *In re Milton*, 29 Ohio St. 3d 20, 505 N.E.2d 255 (Ohio 1987); and *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988), all holding that the patient's interests outweighed the state's interests. *But see Cruzan v. Harmon*, Mo. Sup. Ct. No. 70813 (Nov. 16, 1988), 57 U.S.L.W. 2324, 1988 WL 122100 (Mo. 1988) (state's interest in life outweighed privacy interests of incompetent patient in a persistent vegetative state whose guardian sought to withdraw artificial feeding from his ward); *In re A.C.*, 533 A.2d 611 (D.C. 1987), *reh'g granted and judgment vacated*, 539 A.2d 203 (D.C. 1988) (caesarean section performed over the objection of the mother to save the life of the fetus); *In re Estate of Dorone*, 517 Pa. 3, 534 A.2d 452 (1987) (in an emergency situation the court may temporarily appoint the hospital administrator as guardian to consent to blood transfusions for an unconscious Jehovah's Witness patient).

<sup>30</sup> AR 40-3, para. 19-3c.

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

<sup>32</sup> *Id.* para. 19-3d.

<sup>33</sup> *Id.* para. 19-4.

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

<sup>35</sup> A competent patient is an adult (18 years of age or over or emancipated as determined by state law) "who has the ability to communicate and understand information and the ability to reason and deliberate sufficiently well about the choices involved." *Id.* para. 19-2d. Minors below 14 years of age are deemed incompetent and active duty soldiers 17 years old are deemed emancipated. *Id.* An incompetent patient is a minor (17 years of age and under and not emancipated) or someone "who does not have the ability to reason and deliberate sufficiently well about the choices involved." *Id.* para. 19-2e.

determination was reached.<sup>36</sup> The doctor must summarize in the progress note discussions with the patient, family members, or legal guardian and document any review by the ethics panel.<sup>37</sup> The regulation specifically prohibits asking the patient to sign a release or consent form;<sup>38</sup> therefore, a complete and thorough progress note is critical in defending against any claim of lack of informed consent.

The voluntary choice of the competent and informed patient determines whether a DNR order will be written.<sup>39</sup> The Army policy encourages the medical staff to discuss the various options with the patient in appropriate cases.<sup>40</sup> The policy also recognizes that often a direct approach to such a sensitive and personal matter is inadvisable and recommends a "general discussion" of the patient's preferences.<sup>41</sup> If a "general discussion" leads to an informed and voluntary decision to request a DNR order, the order may be written. If neither the doctor nor the patient can address the issue directly, the order should not be written. In other words, the "general discussion" may be an appropriate way to raise the issue with a patient, but it is not a substitute for an informed and voluntary decision to forego cardiopulmonary resuscitation.

Once the competent patient elects to request a DNR order, he or she determines whether family members will be told of the decision.<sup>42</sup> If the patient does not want family members to know of the decision, a disinterested physician or nurse (one who is not a member of the treatment team) will enter the request for confidentiality in the medical record.<sup>43</sup> This procedure brings a neutral player with a different perspective into the equation and insulates the treatment team, to some degree, from the conflicting interests of the patient and his or her family. In any case, the decision of the competent patient will be respected.

Resuscitation decisions for incompetent patients are a bit more complicated. If an incompetent patient made "firm and explicit" verbal or written directives regarding resuscitation while still competent, the next of kin or legal guardian and the medical staff should honor the patient's directives "unless there is reason to believe the patient's choice has changed or would change."<sup>44</sup> Of

course, if there is reason to believe that the patient's choice has changed or would change, it places in question the "firmness" and "explicitness" of the original directives. Unfortunately, the regulation offers no guidance on what factors the medical staff and the next of kin or legal guardian should consider in determining whether the patient's choice has changed or would change.

Once the patient's incompetency has been established, the next of kin or legal guardian becomes the surrogate decisionmaker. If the attending staff and the surrogate decisionmaker agree that a DNR order is appropriate, the order may be entered in the medical record.<sup>45</sup> If the surrogate disagrees with the medical staff's recommendation for a DNR order, the case must be referred to the hospital ethics panel.<sup>46</sup> If the ethics panel resolves the disagreement and all parties concur in the appropriateness of the DNR order, the order will be written. If an agreement is not reached, the order will not be written and resuscitation will be initiated unless a court directs otherwise.<sup>47</sup>

If an incompetent patient has no next of kin, legal guardian, or other person authorized under state law to consent to medical treatment for the patient and the medical staff believes a DNR order is appropriate, they should refer the case to the ethics panel and the deputy commander for clinical services (DCCS).<sup>48</sup> The regulation does not, however, tell either the ethics panel or the DCCS what to do. Its silence on this issue may mean that they become the surrogate decisionmaker. Prudence dictates otherwise. If an incompetent patient does not have a next of kin, legal guardian, or other person authorized to consent to medical treatment under state law, the hospital should contact the local staff judge advocate and seek his or her assistance in having a guardian appointed. This, of course, applies to all treatment decisions, not just to DNR orders.

#### Withdrawal of Life-Sustaining Treatment

The Army policy on the withdrawal of life-sustaining treatment was, in large measure, influenced by *Tune v. Walter Reed Army Medical Center*<sup>49</sup> and the President's

<sup>36</sup> Incompetency must be verified by clinical assessment of mental and emotional status. *Id.* para. 19-2e.

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* para. 19-6a.

<sup>40</sup> *Id.* para. 19-6b.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* para. 19-6d.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* para. 19-7a.

<sup>45</sup> *Id.* para. 19-7d.

<sup>46</sup> The ethics panel is composed of at least two physicians, a nurse, a chaplain, and a representative of the local staff judge advocate. *Id.* para. 19-2g.

<sup>47</sup> *Id.* para. 19-7d.

<sup>48</sup> *Id.* para. 19-7b.

<sup>49</sup> 602 F. Supp. 1452 (D.D.C. 1985).



Commission.<sup>50</sup> The policy allows competent patients in a "terminal condition"<sup>51</sup> or a "persistent or chronic vegetative state"<sup>52</sup> to decline life-sustaining treatment.<sup>53</sup> It also allows the next of kin or legal guardian to decide whether treatment should be withdrawn if the patient is incompetent.<sup>54</sup>

The basic philosophy underlying the Army's policy for withdrawal of life support is to support and sustain life when it is reasonable:

The Army Medical Department is committed to the principle of supporting and sustaining life when it is reasonable to do so. Life-supporting techniques and the application of medical technology may not cure a patient's disease or disability or reverse a patient's course. Some patients who suffer from a terminal illness and are incurable may reach a point where continued or additional treatment is not only unwanted by the patient but medically unsound. In such cases, medical treatment does not prevent death but merely defers the moment of its occurrence. The attending physician must decide whether continued efforts constitute a reasonable attempt at prolonging life or whether the patient's illness has reached such a point that further intensive, or extensive, care is in fact merely postponing the moment of death which is otherwise imminent.<sup>55</sup>

Thus, under the Army policy, when medical intervention or treatment will only artificially delay the death of a patient in a persistent or chronic vegetative state or afflicted with a terminal condition, sustaining life is no longer reasonable and withdrawal of life-sustaining treatment is appropriate.

The Army policy allows only "qualified patients," i.e., those who have a terminal condition or are in a persistent or chronic vegetative state, to request withdrawal of life-sustaining treatment. The diagnosis and

prognosis must be made and certified in writing by two physicians, one of whom must be the attending physician.<sup>56</sup> As with the DNR policy, allowing only certain patients the right to refuse treatment denies other patients their right to decide what medical treatment to accept or reject.<sup>57</sup>

The policy for withdrawal of life support, like the DNR policy, recognizes the competent patient<sup>58</sup> as the decisionmaker.<sup>59</sup> The next of kin or legal guardian, along with the attending physician, determines whether to withdraw life support from an incompetent patient.<sup>60</sup> The policy directs a surrogate decisionmaker to determine whether the withdrawal of life-sustaining treatment will be in the "patient's best interest."<sup>61</sup> In determining the patient's best interests, the Army policy directs the surrogate to consider: "(1) relief of suffering, (2) quality as well as extent of life sustained, and (3) 'substituted judgment doctrine': What the patient would have wanted if competent."<sup>62</sup>

Army policy requires that the hospital ethics panel review the case: 1) where there is doubt about the propriety of withdrawing life support; 2) where there is disagreement among the treating physicians, among members of the family, or between the treating physician and family members; or 3) where an incompetent patient has no next of kin or legal guardian.<sup>63</sup> The ethics panel is an *ad hoc* "advisory committee" that draws members from administration, medicine, nursing, pastoral care, social work, and the community. A representative of the staff judge advocate must be a member.<sup>64</sup>

The Army policy defines "life-sustaining" treatment as "any medical procedure or intervention which serves only to artificially prolong dying . . . . Intravenous therapies and lavage [sic] feeding are medical interventions."<sup>65</sup> Treatment and procedures designed to alleviate pain are not considered life-sustaining

<sup>50</sup> President's Commission, *supra* note 9.

<sup>51</sup> A "terminal condition" is an "incurable condition resulting from injury or disease in which imminent death is predictable with reasonable medical certainty." Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 2b.

<sup>52</sup> A "persistent or chronic vegetative state" is a "chronic state of diminished consciousness resulting from severe generalized brain injury in which there is no reasonable possibility of improvement to a cognitive state." *Id.* para. 2c.

<sup>53</sup> *Id.* para. 4a.

<sup>54</sup> *Id.* para. 3b.

<sup>55</sup> *Id.* para. 3a.

<sup>56</sup> *Id.* para. 2g.

<sup>57</sup> See *supra* notes 26-28 and accompanying text.

<sup>58</sup> The definitions of "competent" and "incompetent" are the same for withdrawal of life-sustaining treatment as they are for do-not-resuscitate orders. See *supra* note 35.

<sup>59</sup> Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 4a.

<sup>60</sup> *Id.* para. 4b.

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

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

<sup>63</sup> *Id.* para. 2i.

<sup>64</sup> *Id.* Note that the membership of an ethics panel considering withdrawal of life support differs from that of a panel considering a DNR order. See *supra* note 46.

<sup>65</sup> *Id.* para. 2a.

treatment.<sup>66</sup> Thus, artificial feeding as well as mechanical ventilation can be discontinued in appropriate circumstances.<sup>67</sup>

Once a decision to withdraw life-sustaining treatment has been made, the order must be documented in the patient's medical records. The attending physician must enter the order, the date and time of the order, and his or her legible signature on the order sheet. The progress notes must include:

- (1) A description of the patient's medical condition corroborating the prognosis, including reference to any consultations relevant to the decision to terminate.
- (2) A summary of discussions with the patient, NOK or guardian concerning the medical prognosis and the withdrawal of life-sustaining treatment.
- (3) The competency status of the patient and the basis for a finding of incompetency.
- (4) The authority upon which the final decision is based (e.g., competent patient's informed consent, Ethics Panel, court, etc.).<sup>68</sup>

### Potential Problems

In an area so filled with legal, medical, emotional, ethical, spiritual, and philosophical aspects, crafting a policy to satisfy all competing interests is virtually impossible. Thus, the Army DNR and withdrawal of life-sustaining treatment policies are not perfect. Careful and caring implementation of the policies, with an awareness of potential problem areas, will, however, accommodate most concerns.

### The Ethics Panel

Both the DNR and the withdrawal of life-sustaining treatment policies require ethics panels to become involved in certain cases. Both policies limit the involvement of the panel to those cases where there is an incompetent patient and some doubt or disagreement as to the propriety of a DNR order or withdrawal of life support. Furthermore, the membership on the panels established by the respective policy directives is not consistent, and neither policy gives any real guidance as to the role or function of the panel. Equally troubling is the fact that over eighteen months after ethics panels

were required in certain circumstances, thirty-three percent of the Army hospitals responding to a survey had not established them.<sup>69</sup>

The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research identified four general functions that an ethics committee can serve:

They can review the case to confirm the responsible physician's diagnosis and prognosis of a patient's medical condition.

They can provide a forum for discussing broader social and ethical concerns raised by a particular case; such bodies may also have an education role, especially by teaching all professional staff how to identify, frame, and resolve ethical problems.

They can be a means for formulating policy and guidelines regarding such decisions.

Finally, they can review decisions made by others (such as physicians and surrogates) about the treatment of specific patients or make such decisions themselves.<sup>70</sup>

By limiting the involvement of ethics committees to situations where there is disagreement over the propriety of a DNR order or withdrawal of life support for an incompetent patient, or where there is no surrogate decisionmaker for an incompetent patient, the Army policies offer little guidance on the function of the ethics committee. Arguably, it exists as a decisionmaking body in the case of a patient without a surrogate.<sup>71</sup> When there is a dispute over the propriety of a DNR or withdrawal of life support order, the panel's role impliedly is that of a forum for discussion that may lead to agreement. Because the membership consists of other than physicians, its role must extend beyond merely confirming the diagnosis and prognosis. The vast majority of respondents to a recent survey on ethics committees in Army hospitals thought the best use of the committee was in an advisory or consulting role in dealing with treatment decisions for the terminally ill.<sup>72</sup> Those responding also identified education, case review, and policy interpretation as useful ethics committee functions.<sup>73</sup>

The experience of Madigan Army Medical Center's ethics committee illustrates the education, bioethical policymaking and interpreting, and case review and consultation functions.<sup>74</sup> The Madigan committee per-

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

<sup>67</sup> The Army policy includes "lavage feeding" as life-sustaining treatment. "Lavage" means to irrigate or wash out an organ, Dorland's Illustrated Medical Dictionary 716 (26th ed. 1981), and is not generally thought of as a way to provide nutrition. The policy probably intends to include "gavage" feeding as life-sustaining treatment. "Gavage" means "forced feeding especially through a tube passed into the stomach." *Id.* at 544.

<sup>68</sup> Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 5a.

<sup>69</sup> Carter, *Medical Ethics Committee - A Survey of Army Hospitals*, 153 Mil. Med. 426, 427 (1988).

<sup>70</sup> President's Commission, *supra* note 9, at 160-61.

<sup>71</sup> One of the documentation requirements for a withdrawal of life support order is indicating "the authority upon which the final decision is based (e.g., competent patient's informed consent, Ethics Panel, court, etc.)." Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 5a(4) (emphasis added).

<sup>72</sup> Carter, *supra* note 69, at 428.

<sup>73</sup> *Id.*

<sup>74</sup> Madden, Reeder, Cragun, and Browne, *Evolution of Military Ethics Committees*, 152 Mil. Med. 613 (1987).



forms its educational role by sponsoring formal and informal presentations on bioethical issues. Formal presentations range from workshops on particular issues to "ethics rounds" that use case studies to illustrate ethical problems that arise in the hospital setting. Informal teaching involves collecting and sharing ethics literature with the staff and engaging in informal discussions about hypothetical cases or actual dilemmas.<sup>75</sup> The ethical ramifications of developing and implementing institutional policies dealing with the treatment of AIDS patients, organ harvesting, and the allocation of limited hospital resources are uniquely suited to ethics committee review.<sup>76</sup> Consultation and case review provides members of the staff, patients, or patients' families a forum to discuss the difficult issues and decisions that modern technology places upon us. The committee does not decide for the patient, but merely provides the opportunity to discuss the issue and, if possible, reach a consensus. Even though the committee does not decide the question, the recommended or consensus solution can have a strong psychological impact upon those who must decide.<sup>77</sup>

To perform any of these roles, however, ethics committees must be formally established, their existence publicized, and their members trained. Unfortunately, the limited involvement of the committees envisioned by the current policies hardly provides the experience necessary for the members to perform any of their functions well. Hospital commanders who require the ethics committee to review all DNR and withdrawal of life support decisions will help the committee acquire valuable experience so that when the difficult situations arise, e.g., a disagreement over the propriety of writing a DNR order or withdrawing life support, the committee will be able to provide real assistance to the professional staff, the patient, and the patient's family. The current policies almost guarantee that the ethics committee will have less experience in dealing with these issues than the professional staff and will be of little help with the difficult cases. With the experience gained from greater involvement in a larger number of cases, the committee can perform the educational and policy formulation roles more effectively.<sup>78</sup>

### Selecting the Surrogate

The "next of kin" or the patient's legal guardian is the surrogate decisionmaker under both the DNR and withdrawal of life support policies. Determining the

identity of the legal guardian is not difficult; the individual appointed by the appropriate court with authority to act for the patient is the one to whom the medical staff should look for health care decisions. The "next of kin" is a bit more elusive. Neither Army Regulation 40-3 nor the withdrawal of life support policy letter defines "next of kin." Intuitively, the spouse or other close family member qualifies and is generally looked to by the medical community to make decisions for incompetent patients.<sup>79</sup> But in selecting a surrogate decisionmaker the question should not be: "Who is the next of kin?" Rather, we should ask: "Who best knows the patient's goals, desires, and preferences, and who is most concerned about the patient's welfare?" In most instances this person will be the spouse or other close family member. The President's Commission strongly favors family members as surrogate decisionmakers because:

- (1) The family is generally most concerned about the good of the patient.
- (2) The family will also usually be most knowledgeable about the patient's goals, preferences, and values.
- (3) The family deserves recognition as an important social unit that ought to be treated, within limits, as a responsible decisionmaker in matters that intimately affect its members.
- (4) Especially in a society in which many other traditional forms of community have eroded, participation in a family is often an important dimension of personal fulfillment.
- (5) Since a protected sphere of privacy and autonomy is required for the flourishing of this interpersonal union, institutions and the state should be reluctant to intrude, particularly regarding matters that are personal and on which there is a wide range of opinion in society.<sup>80</sup>

Perhaps the best surrogate decisionmaker, and one not mentioned in the Army policy, is an individual designated by the patient in a durable power of attorney, or similar document, to make health care decisions in the event of the patient's incompetency.<sup>81</sup> Looking to such an individual gives full deference to the patient's autonomy and relieves the medical staff of the burden of selecting the surrogate. Furthermore, an individual with the foresight to appoint a decisionmaker has probably

<sup>75</sup> *Id.* at 614.

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

<sup>77</sup> *Id.* at 615 (citing Cranford, Hester, and Ashley, *Institutional Ethics Committees: Issues of Confidentiality and Immunity*, 13 *Law, Med. & Health Care* 52 (1985)).

<sup>78</sup> This does not mean that reviewing cases is the only, or even the best way for an ethics committee to develop expertise. In fact, education of the committee is required before they can assist in case review or perform any of their other functions. See Madden, Reeder, Cragun, Krug, and Browne, *supra* note 74, at 613. ("Committee members must be educated in basic philosophical concepts, current bioethical problems, and the mechanics of committee functioning.")

<sup>79</sup> See Deardorff, *Informed Consent, Termination of Medical Treatment, and the Federal Tort Claims Act - A New Proposal for the Military Health Care System*, 115 *Mil. L. Rev.* 1, 40-43 (1987).

<sup>80</sup> See President's Commission, *supra* note 9, at 128.

<sup>81</sup> See, e.g., *Cal. Civil Code* §§ 2430-2500 (West Supp. 1987); *Nev. Rev. Stat.* §§ 449.800-449.860 (Michie Supp. 1987); *Unif. Prob. Code* § 5-501.

made clear his or her desires regarding the types of treatment to accept or reject. This bit of planning eases the burden on both the doctor and the decisionmaker and ensures that the patient's desires will be paramount.

There are some circumstances when the medical staff must select another surrogate. This may occur when: 1) the apparent surrogate evidences interests that conflict with those of the patient; or 2) there are indications that the surrogate does not have the patient's welfare and wishes at heart, or is not aware of or intends to disregard the patient's values, desires, or expressed wishes.<sup>82</sup> Although it is the medical staff that selects the surrogate,<sup>83</sup> the judge advocate must be available to assist in identifying disqualifications in the presumed surrogate and in designating an appropriate surrogate. This assistance may take the form of advising the physician to continue supportive care until a court appoints a guardian to act for the patient. If the apparent surrogate is the legal guardian or is designated through a power of attorney, court action may be required to appoint a new surrogate.

Both the DNR and withdrawal of life support policies require consultation with the ethics panel if an incompetent patient has no legal guardian or next of kin and the attending physician thinks a DNR or withdrawal of support order is appropriate.<sup>84</sup> While neither policy specifically dictates that the ethics panel becomes the decisionmaker in these cases, it can certainly be inferred. The President's Commission noted the difficult and cumbersome process of obtaining judicial appointment of a guardian and recommended that health care institutions develop policies to designate surrogates for patients without close family.<sup>85</sup> In spite of this fact, however, in the absence of legislation or a specific policy that clearly and unequivocally sets out the standard to follow, DNR and withdrawal of life support orders should not be written for incompetent patients who do not have an appropriate surrogate decisionmaker. In light of the seriousness of the decision at stake, it is unjustified to infer from the ambiguities in the current policy that the ethics panel becomes the surrogate decisionmaker in these cases. The better course is to continue medical treatment and seek judicial appointment of a guardian.<sup>86</sup> Judge advocates must know the applicable law and procedure in their respective jurisdictions and be prepared to advise and assist in obtaining appropriate judicial action.

<sup>82</sup> See President's Commission, *supra* note 9, at 128-29.

<sup>83</sup> See *id.* at 127.

<sup>84</sup> AR 40-3, para. 19-7b; Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 4b(3).

<sup>85</sup> President's Commission, *supra* note 9, at 131-32.

<sup>86</sup> See, e.g., *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984).

<sup>87</sup> Both the DNR and withdrawal of life support policy designate the "next of kin" (or legal guardian if one has been appointed) as the surrogate decisionmaker. See AR 40-3, paras. 19-3b and 19-7d; Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 4b.

<sup>88</sup> AR 40-3, para. 19-7a.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* para. 19-7d.

<sup>91</sup> Withdrawal of Life-Sustaining Treatment Letter, Encl., *supra* note 16, para. 4b.

<sup>92</sup> *Id.*

<sup>93</sup> See generally, President's Commission, *supra* note 9, at 132-33.

## Deciding for the Incompetent

There can be no greater responsibility than making a life or death decision for another. The surrogate decisionmaker, who by definition shares a close bond with the patient,<sup>87</sup> must make decisions while under tremendous emotional strain. Because of the seriousness of the decision and the emotional involvement of the decisionmaker, the law should provide a decisional framework. Unfortunately, the Army policy does little to aid the surrogate decisionmaker.

The Army DNR policy specifically directs surrogate decisionmakers to follow explicit verbal or written directives made by the patient while competent unless there is reason to believe that the patient's choice has changed.<sup>88</sup> Thus, living wills executed under state law will serve as evidence of the patient's wishes. This approach gives full deference to the patient's rights of self-determination and privacy and lightens the burden on the decisionmaker. But where the patient has not made "firm and explicit . . . directives,"<sup>89</sup> the policy leaves the surrogate scant guidance. In this instance, the regulation merely provides that "[a]fter assessment of the benefits" a DNR order may be entered if there is agreement between the next of kin and the patient's physicians.<sup>90</sup>

The policy for withdrawal of life support, on the other hand, does not mention the effect of a prior verbal or written expression and directs the surrogate to make a decision based upon the patient's "best interest."<sup>91</sup> In determining the patient's "best interest," the surrogate should consider the: "(1) relief of suffering; (2) quality as well as extent of life sustained, and; (3) 'substituted judgment doctrine': What the patient would have wanted if competent."<sup>92</sup> Not only does this offer little real guidance to the decisionmaker, it confuses two separate decisionmaking models, the "best interest of the patient" model and the "substituted judgment" model.

The "substituted judgment" standard requires the decisionmaker to do what the patient would have done. It gives maximum deference to the patient's right of self-determination even if that decision is not objectively in the patient's best interest. In other words, it is the *patient's* definition of "best interest" that is respected, rather than some objective standard.<sup>93</sup> As explained by one court, the substituted judgment represents a shift in emphasis

away from a paternalistic view of what is "best" for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved, whether that person be competent or incompetent. As to the latter type of person, we concluded that the doctrine of substituted judgment, while not without its shortcomings, best served to emphasize the importance of honoring the privacy and dignity of the individual.<sup>94</sup>

Of course, in order to apply the "substituted judgment" model, there must be some evidence of what the patient would have decided. Prior oral or written directives are the best evidence of the patient's desires and should be given effect.<sup>95</sup>

The "best interest" model generally requires the surrogate to consider such factors as the relief of suffering, the preservation or restoration of function, and the quality and extent of the life sustained as viewed by the patient.<sup>96</sup> The "quality of life" component tries to determine the value of the patient's life to the patient and does not measure the value of life by the extent of the patient's ability to contribute or produce in society.<sup>97</sup>

The confusion in the Army policies is manifest. The DNR policy, while deferring to the patient's desires if they are evidenced by oral or written directives, imposes a vague "assessment of the benefits" standard when "firm and explicit" directives are absent. The policy for withdrawal of life support purports to impose an objective "best interest" test but includes the subjective "substituted judgment" doctrine as only one factor to consider. Both policies denigrate the patient's right of self-determination and leave surrogate decisionmakers with conflicting guidance. Because the issue in both the DNR and withdrawal of life support situations is the same, the decisionmaking standards should be uniform and give maximum deference to patient autonomy.

The approach adopted by the New Jersey Supreme Court in *In re Conroy*<sup>98</sup> for making termination of artificial feeding decisions for incompetent nursing home patients with serious and irreversible mental and physical impairments and a limited life expectancy provides a

useful model. The court created a decisionmaking hierarchy that deferred to the patient's desires as much as possible and resorted to objective criteria only when evidence of the patient's wishes was untrustworthy or lacking completely.

The first level of decisionmaking is a pure subjective test. Under this standard the decisionmaker will make the same decision the patient would have made if competent. The court noted that written directives in the form of living wills or powers of attorney and oral statements or directives were probative of what the patient would decide if competent.<sup>99</sup> Reactions by the patient to medical treatment administered to others, the religious beliefs of the patient, and his or her decisions regarding other aspects of medical care were also considered by the court to give insight into the patient's decision.<sup>100</sup> Against this evidence, the decisionmaker must consider the remoteness, consistency, thoughtfulness, and specificity of the patient's prior statements and conduct in order to accurately assess their probative value.

[A]n offhand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health would not in itself constitute clear proof twenty years later that he would want life-sustaining treatment withheld under those circumstances. In contrast, a carefully considered position, especially if written, that a person had maintained over a number of years or that he had acted upon in comparable circumstances might be clear evidence of his intent.<sup>101</sup>

For those patients for whom the evidence of subjective intent is remote or unclear, the *Conroy* court allowed removal of life-sustaining treatment if either of two "best interest" tests were met. The first test, a "limited-objective test," allows withdrawal of life-sustaining treatment "when there is some trustworthy evidence that the patient would have refused the treatment, and the decisionmaker is satisfied that it is clear that the burdens of the patient's continued life with the treatment outweigh the benefits of that life for him."<sup>102</sup> The test requires some trustworthy evidence of what the patient

<sup>94</sup> Brophy v. New England Sinai Hosp., 398 Mass. 417, 431, 497 N.E.2d 626, 633 (1986).

<sup>95</sup> If the patient has executed a living will or a durable power of attorney that spells out the patient's wishes in the particular circumstances, the surrogate really has no decision to make. The patient has already decided the issue and the surrogate and the medical treatment team need only to implement the patient's decision. Even though courts refer to this as "substituted judgment," it is not a substitute for the patient's judgment at all. The term should be reserved for those situations where the patient has not clearly decided the issue and the surrogate must consider all available evidence to determine what the patient would have decided if he or she were competent. See *infra* notes 107-08 and accompanying text.

<sup>96</sup> President's Commission, *supra* note 9, at 134-35.

<sup>97</sup> See, e.g., *In re Conroy*, 98 N.J. 321, 486 A.2d 1209, 1232-33 (1985) ("We expressly decline to authorize decision-making based on assessments of the personal worth or social utility of another's life, or the value of that life to others. . . . To do so would create an intolerable risk for socially isolated and defenseless people suffering from physical or mental handicaps.").

<sup>98</sup> 98 N.J. 321, 486 A.2d 1209 (1985).

<sup>99</sup> *Id.* at 1229-30.

<sup>100</sup> *Id.* at 1230.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1232. The Army withdrawal of life support "best interest" standard, which has both an objective and a subjective component, is essentially the same as the *Conroy* "limited-objective" test. Unlike the *Conroy* test, the Army policy does not set out the benefits and burdens that should be balanced.

would have decided, even though that evidence, standing alone, is insufficient to satisfy the pure subjective standard. Furthermore, the decisionmaker must also find that the treatment in question would "merely prolong the patient's suffering and not provide him with any net benefit."<sup>103</sup> Determining whether the treatment provides a "net benefit" requires an evaluation of the degree, expected duration, and constancy of pain and suffering with and without the life-sustaining treatment, and the possibility that the pain and suffering could be reduced or controlled by drugs or means other than terminating life support.<sup>104</sup>

For those situations where there is no trustworthy evidence of what the patient would have decided, the *Conroy* court devised yet a third test. Under this "pure-objective" standard, life-sustaining treatment may be withdrawn when,

as under the limited-objective test, the net burdens of the patient's life with the treatment . . . clearly and markedly outweigh the benefits that the patient derives from life. Further, the recurring, unavoidable and severe pain of the patient's life with the treatment should be such that the effect of administering life-sustaining treatment would be inhumane.<sup>105</sup>

The only court to consider the Army policy held that the substituted judgment standard applied. In *Newman v. United States*<sup>106</sup> Mary Ellen Newman was a comatose patient in an Army medical center. She had suffered severe and irreversible brain damage as a result of two massive heart attacks several months earlier. There was virtually no hope for her recovery and the only medical care she was receiving consisted of comfort measures, a Foley catheter, and the administration of nutrition and hydration through a naso-gastric tube. Her doctors notified her husband that she was a long term domiciliary patient and that he would have to transfer her from the Army medical facility to a private nursing home. At that point, Mr. Newman asked the Army doctors to remove the naso-gastric tube and allow his wife to die. While the physicians agreed that there was little or nothing they could do to reverse Mrs. Newman's condi-

tion, they objected to allowing her to die of dehydration. Mrs. Newman still had a swallow reflex and could swallow food that was placed in her mouth. The tube feeding was merely more convenient and safer than trying to feed her with a spoon. When the Army doctors refused to withdraw the naso-gastric tube, Mr. Newman filed suit in federal district court asking the judge to order the Army to stop feeding his wife artificially. The court held that the substituted judgment doctrine was the proper standard to apply and that plaintiff's testimony of his wife's desires as she expressed them to him some years before in casual conversation was insufficient to meet the burden of proof in light of the objections by the medical staff.

Until the Army policy is amended to clarify the applicable decisionmaking standards, the ambiguities in the current policy should be resolved in favor of the patient's right to self-determination. Accordingly, surrogate decisionmakers should first determine if the patient has already made the decision. Living wills or other formal expression of desires relieves the surrogate of any "decision." The medical treatment team and the surrogate need only implement the patient's decision. If the patient has not made a firm or formal declaration of his or her wishes, the surrogate must try to determine what the patient would have decided if competent. The surrogate should consider prior oral and written statements that reflect the patient's views even though these statements do not directly address the precise issue at hand. The patient's reactions to prior medical treatment given to others as well as previous decisions the patient made about personal medical care will be probative. The patient's religious beliefs and practices will give insight into the patient's views on how he or she might decide the issue. If the patient were competent and making the decision, he or she would evaluate all of the medical evidence available. Accordingly, the surrogate should consider the prognosis, the degree of suffering with and without the treatment, the risks of various treatment options, and the level of mental and physical functioning of the patient.<sup>107</sup> If there is absolutely no evidence of the patient's subjective intent, the *Conroy* "pure-objective" standard provides a workable decisionmaking model.<sup>108</sup>

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* In a subsequent decision, the New Jersey Supreme Court acknowledged that "pain and suffering" consisted of more than just physical anguish; it included the humiliation and indignities of being kept alive by machines. *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987).

<sup>105</sup> 98 N.J. at 366, 486 A.2d at 1232. The Army DNR decisionmaking standard seems to adopt a "subjective" test initially and leap to a "pure-objective" test if "firm and explicit" directives were not made by the patient.

It seems somewhat incongruous that an affirmative decision must be made to discontinue treatment that is by all accounts "inhumane." One would think that the legal, ethical, and medical problems would be with *continuing* such "treatment," not withdrawing it. The problem, however, is one of degree. Physicians do not initiate a course of treatment to hurt their patients. The difficulty arises in determining when the treatment has ceased being beneficial and begun being a burden. Some commentators have suggested that these decisions be made on an "anti-cruelty" basis. Under this approach, applied only to incompetent patients for whom there is no evidence of what their decision would be if competent, the decisionmaker balances the benefits of the diagnostic or therapeutic procedure against the harm it will inflict upon the patient. Thus, it applies the principles of beneficence and nonmaleficence. See Braithwaite and Thomas, *New Guidelines on Foregoing Life-Sustaining Treatment in Incompetent Patients: An Anti-Cruelty Policy*, 104 *Annals Internal Med.* 711 (1986).

<sup>106</sup> No. EP-86-CA-276 (W.D. Tex., filed Aug. 21, 1986).

<sup>107</sup> Though the *Conroy* court called this the best interest "limited-objective" standard, because it seeks to determine what the patient's decision would be under the circumstances, it is really the "substituted judgment" standard. The surrogate is deciding for the patient from the patient's perspective.

<sup>108</sup> Because the surrogate decisionmaker should be one who is aware of the patient's goals, desires, preferences, activities, lifestyle, philosophy, and interests, it is difficult to imagine a situation where no evidence of the patient's subjective intent is available. Thus, the surrogate decisionmakers that must decide for patients in Army facilities should not have to resort to a "pure objective" best interest standard. The situation may arise, however, when the patient does not have a family member or close friend to act as a surrogate and a guardian must be appointed. Under these circumstances the decision of the guardian should be subject to judicial review and supervision.

## Withdrawing Nutrition and Hydration

Withdrawing or withholding nutrition and hydration in appropriate situations have been sustained by the courts<sup>109</sup> and endorsed by the American Medical Association<sup>110</sup>. The issue is not without controversy, however.<sup>111</sup> Courts and medical ethicists who approve of the cessation of artificial feeding usually find no difference between sustaining a patient with oxygen from a mechanical respirator and providing nourishment through a naso-gastric tube, intravenous line, or other method.<sup>112</sup> Both artificial respiration and artificial nourishment, so the argument goes, merely prolong the inevitable moment of death and neither offers any hope of curing the illness involved. Others see a distinction that requires a different approach:

Should the provision of food and drink be regarded as medical care? It seems, rather, to be the sort of care that all human beings owe each other. All living beings need food and water in order to live, but such nourishment does not itself heal or cure disease. When we stop feeding the permanently unconscious patient, we are not withdrawing from the battle against any illness or disease; we are withholding the nourishment that sustains life.<sup>113</sup>

As important as the philosophical debate over the withdrawal of nutrition is the practical matter of ensuring that the patient or the patient's surrogate understands what support will be withdrawn. If the patient or the surrogate consents to "withdrawal of life-sustaining treatment" but does not realize that life-sustaining treatment includes food and water, can they be said to have given informed consent? The layman may think that life-sustaining treatment means the respirator but

may never stop to consider that food and water are included as well.

There is no indication in the Army policy that withdrawal of life-sustaining treatment is an "all or nothing" proposition. A patient or surrogate may, therefore, request termination of the respirator, chemotherapy, hemodialysis, or other therapeutic measures but retain nourishment.<sup>114</sup> Physicians recommending termination of treatment should explain in detail what treatment is "life-sustaining" and should clearly explain the various options.<sup>115</sup> The time spent in explanation can avoid tragic misunderstandings and prevent tremendous emotional turmoil.

## Documenting the Decision, its Basis, and the Competency Determination

Both the DNR policy and the policy for withdrawal of life-sustaining treatment require documentation in the patient's medical records.<sup>116</sup> The order itself must be entered in the doctors orders. The progress notes must include a discussion of the rationale for the order, including a description of the patient's condition, the mental status of the patient and the basis of any finding of incompetency, the results of discussions with the patient and family members, and any review by the ethics panel. The importance of this requirement cannot be overstated. Should the actions of the medical staff ever be questioned, the best evidence of what was done and why it was done will be the medical record. Short cuts or incomplete recording will seriously hamper the physicians' ability to justify their actions. On the other hand, complete and accurate medical record entries will demonstrate the good faith efforts of the medical staff in following the prescribed policy. Judge advocates must

<sup>109</sup> See, e.g., *Childs v. Abramovice*, No. A037920 (Nov. 30, 1988, Cal. Ct. App. 1988) (WESTLAW 1988 WL 127111); *In re Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. App. 1986); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Brophy v. New England Sinai Hosp. Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987); *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987).

<sup>110</sup> *Withholding or Withdrawing Life-Prolonging Medical Treatment*, Current Opinions of the Ethical and Judicial Affairs of the American Medical Association (1986), reprinted in 53 *The Citation* 51 (1986).

<sup>111</sup> Of the jurisdictions with legislation dealing with the withdrawal of life-sustaining treatment, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Missouri, New Hampshire, Oregon, South Carolina, Utah, Wisconsin, and Wyoming all exclude nutrition, fluids, nourishment, or sustenance from the definition of life-sustaining or life-prolonging medical treatment. See *supra* note 5.

<sup>112</sup> See, e.g., *Gray v. Romeo*, 697 F. Supp. 580, 587 (D.R.I. 1988) ("Although an emotional symbolism attaches itself to artificial feeding, there is no legal difference between a mechanical device that allows a person to breathe artificially and a mechanical device that artificially allows a person nourishment."); *In re Conroy*, 98 N.J. 321, 373, 486 A.2d 1209, 1236 (1985) ("Analytically, artificial feeding by means of a nasogastric tube or intravenous infusion can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own."); See also, Steinbrook and Lo, *Artificial Feeding - Solid Ground, Not A Slippery Slope*, 318 *New Eng. J. Med.* 286 (1988).

<sup>113</sup> Meilaender, *On Removing Food and Water: Against the Stream*, 14 *Hastings Center Rep.* 11 (1984), quoted in D. Meyers, *Medico-Legal Implications of Death and Dying* § 12.27 (Supp. 1988). See *In re Gardner*, 534 A.2d 947, 958 (Me. 1987) (Clifford, J. dissenting) ("where food and water are being provided in a non-invasive, pain-free manner to a non-terminally ill patient, the withdrawal of such a feeding tube for the purpose of causing [the patient's] . . . death ignores the legitimate and longstanding interest of the state in preserving life and preventing suicide, exposes many member of our society to potential abuse, and should not be sanctioned"); *In re Peter*, 108 N.J. 365, 529 A.2d 419, 432 (1987) (O'Hern, J. dissenting) ("Any decision allowing one group of people to withhold food and water from another human being evokes a response deep beneath the abstractions of legal reasoning."); Alexander, *Death by Directive*, 28 *Santa Clara L. Rev.* 67, 83 (1988) ("Although it is true that artificial feeding differs from normal eating, providing food and liquids is so psychologically bound to a level of expected non-medical care that physicians, not to mention lay people, have difficulty in equating its removal with the removal of respirators and other less commonly provided forms of help."). See also Correspondence, 318 *New Eng. J. Med.* 1754-59 (1988); Correspondence, 319 *New Eng. J. Med.* 306 (1988).

<sup>114</sup> *In re Peter*, 108 N.J. 365, 382 n. 11, 529 A.2d 419, 428 n.11 (1987) ("If a patient subjectively distinguishes among various forms of life support, of course, that distinction will be respected.").

<sup>115</sup> See Ruark and Raffin, *Initiating and Withdrawing Life Support: Principles and Practice in Adult Medicine*, 318 *New Eng. J. Med.* 25 (1986).

<sup>116</sup> AR 40-3, para. 19-4; *Withdrawal of Life-Sustaining Treatment Letter*, Encl., *supra* note 16, para. 5.

impress upon the medical community the importance of both following the published policy and documenting their actions in patients' medical records.

### Conclusion

The Army policies concerning DNR orders and the withdrawal of life-sustaining treatment are reasonable attempts to balance competing interests. The interests at stake, however, are profound, and no policy can satisfy every interest in all circumstances. Physicians, nurses, lawyers, clergy, and family members all have a role to play. The issues are not only medical or only legal; they

are medical, legal, ethical, spiritual, and philosophical. Judge advocates, as members of the ethics committees and as legal advisors to hospital commanders and their staffs, must be prepared to accept their responsibilities. They must, in cooperation with other interested parties, ensure that patients' rights of self-determination and privacy in medical treatment decisions are recognized and respected. At the same time, they must weigh in the balance society's interest in human life and medical ethics. Only through concern, compassion, and competency can the Army lawyer fulfill his or her responsibility in this difficult and sensitive area.

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## Source Selection—Litigation Issues During 1988

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### Introduction

Few areas of contract formation cause as much consternation as the source selection procedures in competitive negotiated acquisitions. Unfortunately, the hundreds of protests filed each year indicate that offerors and government source selection officials do not fully understand the procedures to be used. This article will focus on the jurisdictional and substantive developments in the source selection process during 1988. This area of government contract law remains dynamic and troublesome.

FAR Subpart 15.6 prescribes the policies and procedures for the selection of a source or sources in competitive negotiated acquisitions. As stated therein, source selection procedures are designed to—

- i. Maximize competition;
- ii. Minimize the complexity of the solicitation, evaluation, and the selection decision;
- iii. Ensure impartial and comprehensive evaluation of offerors' proposals; and
- iv. Ensure selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated Government requirements.<sup>1</sup>

Formal implementation of source selection policies and procedures is the responsibility of agency heads or their designees.<sup>2</sup> Regardless how that implementation

occurs, however, the role of the government contract attorney in the source selection process is extensive and pervasive.<sup>3</sup> The government contract attorney should be an active participant in all stages of source selection, to include: 1) the review and even the drafting of the solicitation and its evaluation criteria; 2) negotiations or discussions with offerors; 3) business and legal advice on the award decision; and 4) the defense of the source selection when protests arise.

### Preparing the Request for Proposals

The Competition in Contracting Act of 1984 (CICA)<sup>4</sup> requires that competitive proposals be evaluated solely on the factors specified in the solicitation.<sup>5</sup> While various contracting agencies follow different practices, each recognizes the need for detailed proposal evaluation systems so that the source selection official can make a sound decision.<sup>6</sup> Thus, a primary purpose of the Request for Proposals (RFP) is to provide the potential offerors with an understanding of the way the source selection decision will be made. Fairness requires that the basis for the source selection decision be stated in the solicitation and that the decision be made in accordance with those announced "rules of the game."<sup>7</sup>

### Describing the Evaluation Factors

In meeting this purpose, the various bid protest forums have given agencies broad discretion in describing the source selection process to be used in an acquisition. But while the evaluation factors that apply

<sup>1</sup> Federal Acquisition Regulation 15.603 [hereinafter FAR].

<sup>2</sup> FAR 15.604(a).

<sup>3</sup> See Army Material Command Pam 713-1, Source Selection Procedures (July 1987) [hereinafter AMC Pam 713-1].

<sup>4</sup> Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at 10 U.S.C. §§ 2301-2356, 31 U.S.C. §§ 3551-3556, 40 U.S.C. § 759, and 41 U.S.C. §§ 252-254 (Supp. IV 1986)).

<sup>5</sup> FAR 15.608(a).

<sup>6</sup> See, e.g., Air Force Reg. 70-30, Streamlined Selection Procedures (31 Dec. 1986).

<sup>7</sup> FAR 15.605(e).



to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials, price or cost to the government *must* be included as an evaluation factor in every procurement.<sup>8</sup> Furthermore, quality must also be addressed in every source selection.<sup>9</sup> As an evaluation factor, quality may be expressed in terms of technical excellence, management capability, personnel qualifications, prior experience, past performance, and schedule compliance.<sup>10</sup> Any other relevant factor may also be included as an evaluation criteria in the solicitation.<sup>11</sup>

One problem in the source selection process, which precipitated several protests during 1988, was the failure to exercise due care in describing the evaluation factors and their relative importance in the solicitation. Some of these decisions illustrate the importance of using RFP language that adequately describes the "rules of the game," yet gives the source selection official broad discretion in selecting the source.

In *University of Dayton Research Institute*<sup>12</sup> the RFP stated that technical factors were more important than cost or price. The subsequent award to the offeror with the best technical proposal at a price of \$552,520 was upheld by the Comptroller General against a protester whose price was substantially lower (\$424,685), but had a lower rated technical proposal. The Comptroller General said that, in a negotiated procurement, the government is not required to make an award to the firm offering the lowest cost unless the RFP specified that cost would be the determinative factor.

In *Compuline International, Inc.*<sup>13</sup> the General Services Board of Contract Appeals (GSBCA) upheld an award of a contract for automatic data processing equipment to a higher priced and technically superior offer. The protester claimed that if its proposal had been properly evaluated it would have received the award. The issue before the board was whether in the tradeoff between price and quality the agency should have selected the protester's proposal as the most advantageous to the government. Evaluation factors were cost and technical, which were of equal importance to the agency. The agency reserved the right in the RFP to make the award to a proposal that was not the lowest priced. The board held that the evaluation of the proposals by the agency resulted in an award to the offeror whose proposal was most advantageous to the government, and therefore it refused to overturn it.

<sup>8</sup> FAR 15.605(b).

<sup>9</sup> FAR 15.605(b).

<sup>10</sup> FAR 15.605(b).

<sup>11</sup> FAR 15.605(b).

<sup>12</sup> Comp. Gen. Dec. B-227115 (19 Aug. 1987), 87-2 CPD ¶ 178.

<sup>13</sup> GSBCA No. 9203-P, 88-1 BCA ¶ 20417.

<sup>14</sup> Anacom/Datagraphix, GSBCA No. 9714-P, 89-1 BCA ¶ \_\_\_\_\_ (Dec. 14, 1988).

<sup>15</sup> 693 F. Supp. 1232 (D.D.C. 1988).

<sup>16</sup> FAR 15.605(c).

<sup>17</sup> Comp. Gen. Dec. B-228468 (3 Feb. 1988), 88-1 CPD ¶ 105.

<sup>18</sup> Comp. Gen. Dec. B-231108 (12 Aug. 1988), 88-2 CPD ¶ 144.

In another case, however, the GSBCA sustained the protest because the agency, for evaluation purposes, used the awardee's non-commercial price list submitted with the proposal instead of the awardee's GSA price schedule as required by the evaluation criteria in the RFP.<sup>14</sup>

In *BMY, A Division of HARSCO Corp.*<sup>15</sup> the District Court sustained the Army Tank Automotive Command's award to a higher priced offeror even though the RFP stated that "cost [is] of primary importance and is worth significantly more than technical, and somewhat more than technical, logistics/MANPRINT, and production capability combined." The court held that the RFP did not make all criteria except cost irrelevant. Instead, the source selection official was charged with making an award to that offeror whose proposal was "most advantageous and offers the greatest value." In this case the source selection official had the discretion to select a significantly better forklift truck for a slightly higher price, and had a rational basis for his decision.

While the lowest price or lowest total cost to the government is properly the deciding factor in many source selections, the above cases illustrate how the government may select a source whose proposal offers the greatest value to the government in terms of performance and other factors.<sup>16</sup>

#### Award Based On Initial Proposals

The Comptroller General has stated that the Competition in Contracting Act prohibits an agency from awarding on the basis of initial proposals to anyone other than the lowest overall cost offeror, unless discussions are held. In *Meridian Corporation*<sup>17</sup> GAO sustained the protest because there was at least one lower priced and technically acceptable proposal in the competitive range.

An award based on initial proposals must also be for the item specified in the solicitation. In *Circon Acme*<sup>18</sup> GAO sustained the protest because the Defense Logistics Agency accepted an initial proposal for pediatric cystourethroscopy kits that did not conform to the solicitation requirements. The solicitation required the kits to contain three different scopes for the examination of certain internal body organs, but the awardee's proposal offered a kit with only two scopes. After the protest, the awardee offered to supply conforming kits at the same contract price, but this was held to be improper because the offer was made outside the competitive process.

Revised proposals may also be considered to be initial proposals for the purposes of this rule if discussions are not held and there is no opportunity to cure technical deficiencies. In *United Telecontrol Electronics, Inc.*<sup>19</sup> the Navy issued a solicitation amendment requesting revised proposals and then made an award without discussions based on the revised proposals. GAO sustained the protest because the revised proposals were nothing more than new initial proposals, and award went to a proposal that was not the lowest priced technically acceptable offer.

When the agency knows or is on notice that it may be possible to realize a significant cost savings by conducting discussions, the agency *must* conduct discussions and must not accept an initial proposal. In *Hartridge Equipment Corporation*<sup>20</sup> and *Hartridge-Request for Reconsideration*<sup>21</sup> GAO sustained the protest because the Army Materiel Command was reasonably placed on notice by the circumstances that award on the basis of initial proposals might not result in the lowest overall cost to the government. The solicitation for Fuel Injection Test Stand units permitted offerors to propose unit prices with or without first article approval. The protestor, a well-established manufacturer, proposed a unit price without first article approval of \$51,000, which compared favorably to the awardee's (the next low) offer without first article approval of \$60,600. The awardee proposed a \$200 per unit price increase for the first article requirement, while the protestor submitted no bid with first article approval. The Comptroller General stated that it should have been evident from this pattern of pricing that the initial proposal it accepted did not necessarily represent the lowest overall cost to the government.

#### Agency Source Selection Discretion

The agency's source selection official is expected to and does exercise broad discretion in selecting the competitor whose proposal offers the best overall value for the government.<sup>22</sup> In *Scheduled Airlines Traffic Offices, Inc.*<sup>23</sup> the Under Secretary of the Army reviewed and vacated a subordinate Source Selection Authority's (SSA) selection, pursuant to formal source selection procedures, of the protestor for official and unofficial travel services for the Fifth Army Region, Fort Sam Houston, Texas. He then selected a different proposal whose technical superiority outweighed the "small advantage in concession fee rebates offered by

SATO [the protestor]." In denying the protest, the Comptroller General found that the Under Secretary was properly designated, pursuant to 10 U.S.C. § 3014(c)(2), as the Army's Acquisition Executive, and has the inherent authority to review, vacate, or make source selection decisions pursuant to 10 U.S.C. § 2305(b). Moreover, the Under Secretary's source selection decision was reasonable and in accordance with the evaluation criteria in the solicitation.

#### Cost or Price Evaluation

The contracting officer uses cost or price analysis<sup>24</sup> to evaluate proposal cost estimates not only to determine whether they are reasonable, but also to determine whether the offerors understand the work and have the ability to perform the contract.<sup>25</sup>

The head of an agency must evaluate competitive proposals, including cost or price, based solely on the factors specified in the Request for Proposals. In *PAI, Inc.*<sup>26</sup> GAO sustained the protest because the Navy did not evaluate proposals in accordance with the Evaluation and Award section of the solicitation. In addressing the issue of uncompensated overtime, the solicitation advised offerors not to use deflated hourly rates (rates based on an individual working more than 2080 hours per year). Although the contractor that was selected for award proposed labor rates for its professional and technical staff which indicated that it was using uncompensated overtime, the Navy failed to adjust upwardly the proposal's labor rates in the cost realism analysis.

The source selection decision should be based on the determination of the greatest value to the agency after comparing price versus quality.<sup>27</sup> An agency may use virtually any evaluation system that it desires. One system gives numerical scores to all evaluation factors, including cost or price. Another system provides raw data on cost or price, and narrative analyses of quality factors such as technical merit and management ability. The latter system is used by the Army Materiel Command.<sup>28</sup>

While it may seem that almost anything will be upheld in this area, an agency's evaluation of a proposal must still be reasonable. In *International Consulting Engineers, Inc.*<sup>29</sup> the Navy was procuring architectural and engineering services and had selected the protestor for price negotiations when it discovered that the protestor knew that it had the highest evaluated proposal. Because

<sup>19</sup> Comp. Gen. Dec. B-230246, B-230246.2 (21 June 1988), 88-1 CPD ¶ 590.

<sup>20</sup> Comp. Gen. Dec. B-228303 (15 Jan. 1988), 88-1 CPD ¶ 39.

<sup>21</sup> Comp. Gen. Dec. B-228303.2 (24 May 1988), 88-1 CPD ¶ 491.

<sup>22</sup> 1 Nash & Cibinic Rep. 118 (1987); FAR 15.605(b); SARDA Guidance For Solicitation Source Selection Language (January 1988).

<sup>23</sup> Comp. Gen. Dec. B-229883 (29 Mar. 1988), 88-1 CPD ¶ 317.

<sup>24</sup> See FAR Subpart 15.8.

<sup>25</sup> FAR 15.608(a)(1).

<sup>26</sup> Comp. Gen. Dec. B-230610 (12 July 1988), 88-2 CPD ¶ 36.

<sup>27</sup> FAR 15.605(b) and (c).

<sup>28</sup> AMC Pam 713-1.

<sup>29</sup> Comp. Gen. Dec. B-230305.2 (24 Aug. 1988), 88-2 CPD ¶ 175.



it had improperly disclosed procurement information to the protestor, the Navy set aside the initial decision and re-evaluated the proposals, but with different results. The Comptroller General agreed with the Navy's decision to re-evaluate, but sustained the protest because it was unclear whether the second evaluation of the protestor's proposal was reasonable. The protestor's ranking was significantly lower after the second selection process, when it went from first to last place.

### Technical Evaluation

Award to someone other than the lowest-priced, technically acceptable offeror is permitted when that is consistent with the evaluation section of the solicitation. In *PECO Enterprises, Inc.*<sup>30</sup> the Defense Supply Service requested proposals for technical support services and analytical studies to assist the Army in its cost analysis of major weapons programs. The solicitation contemplated a cost-plus-fixed-fee requirements contract and advised that award would be made to the proposal evaluated as the most superior technically with a realistic estimated cost. The incumbent offered the most superior technical proposal, and was selected for award at an estimated cost of \$11,497,659. The protestor was technically acceptable and offered the lowest cost at \$7,650,362. GAO upheld the award because the agency determination that the technical superiority of the selected proposal justified a \$3.8 million higher price tag was reasonable and consistent with the established evaluation criteria. Furthermore, the agency was not required to equalize this acquisition by considering the competitive advantage of the incumbent offeror, as the protestor had argued.<sup>31</sup>

### Cost Realism Analysis

There is no requirement that cost-reimbursement contracts be awarded on the basis of the lowest proposed cost, the lowest proposed fee, or the lowest total proposed cost plus fee. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the government, as determined by an evaluation of the proposals in accordance with the established evaluation criteria.<sup>32</sup> When awarding a cost reimbursement contract, the agency should not automatically assume that the offeror's estimated costs of performance are realistic, because they may not be valid indications of the actual costs that the government

will pay.<sup>33</sup> In other words, an agency's evaluation of the estimated costs should determine the extent to which the offeror's estimates represent what the contract *should cost*. GAO's review of an agency's cost realism analysis remains limited to a determination of whether the evaluation was reasonably based.

In *Bendix Field Engineering Corporation*<sup>34</sup> the Comptroller General reviewed the FAR guidance on cost realism analysis, and restated its scope of review when faced with a protest that an analysis was improper. The protestor argued that the Navy's cost realism analysis was improper. GAO denied the protest because the Navy's approach of not escalating personnel costs subject to Department of Labor determinations under the Service Contract Act was not arbitrary or unreasonable, even though it had the effect of differentially adjusting the proposed costs of the offerors.

In *Sterling Services, Inc.*<sup>35</sup> GAO determined the agency's cost realism analysis to be reasonable and denied the protest. The awardee's estimated costs were evaluated based on the work to be performed, and were compared with the independent government cost estimate and the other proposals submitted.

In *Jonathan Corporation*<sup>36</sup> the Navy acted reasonably in using the protestor's recently negotiated labor rates contained in a forward pricing agreement to adjust the protestor's proposed costs upward during a cost realism analysis. In *Fairchild Weston Systems, Inc.*<sup>37</sup> GAO decided that an agency is not required to conduct an in-depth analysis or to verify each and every item in conducting its cost realism analysis. The evaluation of competing proposals requires the exercise of informed judgment by the contracting agency involved.

### Determining the Competitive Range

The contracting officer determines which proposals are in the competitive range for the purpose of conducting written or oral discussions.<sup>38</sup> The competitive range is determined solely on the basis of cost or price and the other evaluation factors that are stated in the solicitation and should include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal should be included in the competitive range, the proposal should be included.<sup>39</sup>

The Comptroller General's long-standing position on review of bid protests alleging improper competitive

<sup>30</sup> Comp. Gen. Dec. B-232307 (27 Oct. 1988), 88-2 CPD ¶ 398.

<sup>31</sup> For another case where award to other than the lowest-priced technically acceptable offeror was upheld, see *DWS, Inc.*, Comp. Gen. Dec. B-229963 (17 Mar. 1988), 88-1 CPD ¶ 283.

<sup>32</sup> FAR 15.605(d).

<sup>33</sup> FAR 15.605 (d).

<sup>34</sup> Comp. Gen. Dec. B-230076 (4 May 1988), 88-1 CPD ¶ 437.

<sup>35</sup> Comp. Gen. Dec. B-229926.5, B-229926.6 (3 Oct. 1988), 88-2 CPD ¶ 306.

<sup>36</sup> Comp. Gen. Dec. B-230971 (11 Aug. 1988), 88-2 CPD ¶ 133.

<sup>37</sup> Comp. Gen. Dec. B-229568.2 (22 Apr. 1988), 88-1 CPD ¶ 394.

<sup>38</sup> FAR 15.609(a); FAR 15.610(b).

<sup>39</sup> FAR 15.609(a).

range determinations remained intact during 1988. The Comptroller General will accord the agency broad discretion in making the determination and will review the source selection action only for reasonableness and for violation of applicable laws and regulations.<sup>40</sup>

An agency may not exclude from the initial or subsequent competitive ranges a technically acceptable proposal without considering price. In *Federal Services, Inc.*<sup>41</sup> the solicitation advised that award of a fixed price contract for custodial services would go to the offeror whose proposal had the highest overall price and technical point score. The Department of Interior evaluated only the technical proposals in determining the initial competitive range. After discussions were held with those in the competitive range, all five were given the opportunity to submit revised price and technical proposals. Only the revised technical proposals were evaluated in determining the new competitive range, which excluded the protestor. The protest was sustained.

A technically unacceptable proposal need not be included in the competitive range, regardless of its low price, where the proposal cannot be made acceptable without major revisions. In *S. T. Research Corporation*<sup>42</sup> the Navy properly excluded a proposal from the competitive range because the solicitation called for a overhaul of the existing equipment, while the protestor offered new and redesigned equipment.

Inclusion of a proposal in the competitive range does not always mean that the proposal is technically acceptable. An agency may properly include in the competitive range proposals that may become acceptable through discussions. But in *Mark Dunning Enterprises*<sup>43</sup> the Air Force determined that the protestor was technically unacceptable because the protestor's best and final offer did not cure a deficiency pointed out during discussions. The Comptroller General denied the protest, stating that it will only review an agency determination of unacceptability for reasonableness.<sup>44</sup>

It is possible to have a competitive range of one. In *Everpure, Inc.*<sup>45</sup> the awardee's technical proposal was superior to the protestor's and was forty-three percent lower in cost. Although the proposal submitted by the protestor was evaluated as acceptable, the agency properly concluded that there was no reasonable chance that the protestor would be selected for award, and therefore excluded it from the competitive range.

It is an offeror's responsibility to furnish all of the information required by the solicitation, and an agency may properly exclude from the competitive range an offer with significant informational deficiencies. In *Sterling Services, Inc.*<sup>46</sup> the protestor was excluded from the competitive range because of forty-seven technical deficiencies and omissions in its proposal. The Comptroller General also held the exclusion from the competitive range proper in *Kaiser Electronics*<sup>47</sup> where the proposal was unacceptable because of deficiencies judged to be the result of a poor and risky design. Finally, in a decision that emphasized the "reasonable chance" rule, the Comptroller General stated that the Navy improperly excluded a protestor from the competitive range because the protestor demonstrated that the deficiencies could be corrected through discussions.<sup>48</sup>

#### Conducting Discussions

The contracting officer conducts written or oral discussions with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition. The FAR advises the contracting officer to—

- i. Control all discussions;
- ii. Advise each offeror of the deficiencies in its proposal so that the offeror is given an opportunity to satisfy the government's requirements;
- iii. Attempt to resolve any uncertainties concerning each technical proposal and the other terms and conditions of the proposals;
- iv. Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible, but without disclosing information concerning other offerors' proposals or the evaluation process; and
- v. Provide each offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal.<sup>49</sup>

The Comptroller General has stated that the discussions must be meaningful, so that each offeror is advised of all of the deficiencies in its proposal. The content and extent of discussions in each case are matters of judgment primarily for determination by the agency and are not subject to review unless the agency's judgment is clearly arbitrary or unreasonable.<sup>50</sup>

<sup>40</sup> Mark Dunning Enterprises, Comp. Gen. Dec. B-230058 (13 Apr. 1988), 88-2 CPD ¶ 364.

<sup>41</sup> Comp. Gen. Dec. B-231372.2 (6 Sept. 1988), 88-2 CPD ¶ 215.

<sup>42</sup> Comp. Gen. Dec. B-232264 (3 Nov. 1988), 88-2 CPD ¶ 435.

<sup>43</sup> Comp. Gen. Dec. B-230058 (13 Apr. 1988), 88-1 CPD ¶ 364.

<sup>44</sup> See also Comp. Gen. Dec. B-228168.2 (28 Jan. 1988), 88-1 CPD ¶ 85.

<sup>45</sup> Comp. Gen. Dec. B-226395.2; B-226395.3 (20 Sept. 1988), 88-2 CPD ¶ 264.

<sup>46</sup> Comp. Gen. Dec. B-232093 (11 Oct. 1988), 88-2 CPD ¶ 337.

<sup>47</sup> Comp. Gen. Dec. B-232175 (7 Nov. 1988), 88-2 CPD ¶ 448.

<sup>48</sup> Loral EOS/STS, Inc., Comp. Gen. Dec. B-230013 (18 May 1988), 88-1 CPD ¶ 467.

<sup>49</sup> FAR 15.610(c).

<sup>50</sup> Martin Advertising Agency, Inc., Comp. Gen. Dec. B-225347 (13 Mar. 1987), 87-1 CPD ¶ 285.

In *Price Waterhouse*<sup>51</sup> the agency did not conduct meaningful discussions because it did not advise the protestor that it had grossly overestimated the level of effort required. Thus, the offered price exceeded what the agency considered reasonable.

The Comptroller General has stated that the agency should do more than just tell the offeror that certain areas in its proposal require clarification, amplification, or improvement. The agency is required to lead the offeror into the areas of his proposal that are deficient.<sup>52</sup>

In *Automation Management Consultants, Inc.*<sup>53</sup> the requirement for meaningful discussions did not obligate the Army to identify every aspect of a technically acceptable proposal that received less than a maximum score. The decision distinguished weaknesses in a proposal from defects and stated that agencies must advise those offerors in the competitive range of deficiencies in their proposals. The decision also indicated that agencies must give the offerors an opportunity to satisfy the agency requirements by submitting a revised proposal. On the other hand, if the proposal is acceptable despite the weaknesses, then the agency need not tell the offeror anything.

In a later decision involving the same protestor<sup>54</sup> the protestor contended that the Nuclear Regulatory Agency did not conduct meaningful discussions because it failed to advise the protestor of deficiencies that resulted in the rejection of its proposal as technically unacceptable. GAO denied the protest because the agency led the protestor into the areas of its proposal that needed amplification and is not required to conduct all-encompassing negotiations or provide the preferred approach.<sup>55</sup>

The dividing line between discussions and clarifications is often too difficult to walk. In *McManus Security Systems*<sup>56</sup> the protestor argued that the rejection of its proposal as technically unacceptable was improper because the Naval Research Laboratory (NRL) did not hold meaningful discussions or allow it to submit a best and final offer. The agency contended that the protestor's initial proposal was susceptible to being made acceptable and that the letter sent to the protestor concerning its technical proposal amounted to clarifications, not discussions. The Comptroller General found that NRL's contacts with the protestor clearly constituted discussions. Citing FAR 15.601, the Comptroller

General stated that discussions occur when an offeror is given an opportunity to revise or modify its proposal or, as here, when information requested from and provided by an offeror is essential to determining the acceptability of its proposal.

In *E.D.S. Federal Corp.*<sup>57</sup> the board decided that a request for supporting documentation explaining an offeror's price reduction in its best and final offer is not discussions requiring another round of best and final offers. The board called the contact with the offeror a clarification and therefore denied the protest.

#### Prohibited Discussion Practices

The FAR<sup>58</sup> also admonishes the contracting officer and other government personnel involved in discussions to not engage in—

i. *Technical leveling* (helping an offeror to bring its proposal up to the level of other proposals by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal);

ii. *Technical transfusion* (government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

iii. *Auction techniques*, such as—

(a) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(b) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the government to be too high or unrealistic); and

(c) Otherwise furnishing information about offerors' prices.<sup>59</sup>

In *Unidyne Corporation*<sup>60</sup> the Comptroller General denied a protest alleging technical leveling. During successive rounds of discussions the Navy did not inform the awardee of deficiencies remaining in its proposal and therefore did not help raise the awardee's proposal to the level of the protestor's proposal. The Comptroller General stated that the Navy raised technical deficiencies only during the first round of discussions, and the awardee did not submit a revised technical proposal after submitting its initial proposal.

<sup>51</sup> Comp. Gen. Dec. B-220049 (16 Jan. 1986), 86-1 CPD ¶ 54.

<sup>52</sup> Sperry Corporation, Comp. Gen. Dec. B-220521 (13 Jan. 1986), 86-1 CPD ¶ 28; see *Compere, Inc.*, Comp. Gen. Dec. B-227832 (15 Sept. 1987), 87-2 CPD ¶ 254.

<sup>53</sup> Comp. Gen. Dec. B-231540 (12 Aug. 1988), 88-2 CPD ¶ 145.

<sup>54</sup> Comp. Gen. Dec. B-231978 (8 Nov. 1988), 88-2 CPD ¶ 456.

<sup>55</sup> See also Comp. Gen. Dec. B-231840 (7 Nov. 1988), 88-2 CPD ¶ 446.

<sup>56</sup> Comp. Gen. Dec. B-231105 (21 July 1988), 88-2 CPD ¶ 68.

<sup>57</sup> GSCBA No. 9600-P, 89-1 BCA ¶ \_\_\_\_\_, 88-3 BPD ¶ 234.

<sup>58</sup> FAR 15.610(d).

<sup>59</sup> FAR 15.610.

<sup>60</sup> Comp. Gen. Dec. B-232124 (20 Oct. 1988), 88-2 CPD ¶ 378.

When there has been an improper disclosure of proprietary pricing information, the remedy of excluding the recipient from the competition is not always required. In *Computer Services Corp.*<sup>61</sup> the Navy acted reasonably in concluding that the inadvertent disclosure of proprietary financial information relating to the protestor's development contract did not create an actual conflict of interest requiring the exclusion of the recipient from the competition. The decision not to exclude the recipient was reasonable because the disclosure was inadvertent, the recipient did not use the disclosed information in preparing its initial proposal, and exclusion would have a significant impact on the degree of competition.

In *Aydin, Inc.*<sup>62</sup> GAO considered a protest stemming from the Operation "Ill Wind" investigation. In this case sensitive information allegedly had been leaked outside Navy procurement channels to a consultant, who in turn sold the information to another consultant. The protestor contended that because it was not known whether either of the two awardees in this procurement had improperly received this information, the Navy should either re-compete the procurement or allow the protestor to compete on the follow-on production contract. GAO denied the protest, determining that the only possible recipient of the information was another unsuccessful offeror.

#### Best and Final Offers

Upon completion of discussions, the contracting officer issues to all offerors still within the competitive range a request for best and final offers. The FAR<sup>63</sup> requires the request to include—

- i. Notice that discussions are concluded;
- ii. Notice that this is the opportunity to submit a best and final offer;
- iii. A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers; and
- iv. Notice that if any modification is submitted, it must be received by the date and time specified and

is subject to the Late Submissions, Modifications, and Withdrawals of Proposals or Quotations provision of the solicitation.<sup>64</sup>

After receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the government's interest to do so.<sup>65</sup> Second or subsequent requests for best and final offers should be avoided because they precipitate auction problems and because sensitive source selection data may be released. Changes in requirements or funding or other compelling reasons are valid reasons for a second or subsequent request for best and final offers. In 1988 DOD issued a new rule regarding multiple rounds of best and final offers. Effective August 10, 1988, each request for second or subsequent best and final offers must be approved, before the request is issued, as follows:

- i. For competitive negotiated acquisitions under formal source selection procedures<sup>66</sup> by the Source Selection Authority (SSA) and the Service Acquisition Executive (SAE). The SAE may delegate this authority to a level no lower than the Head of the Contracting Activity (HCA).
- ii. For all other competitive negotiated acquisitions, by the HCA. The HCA may delegate this authority to a level no lower than the chief of the contracting office.<sup>67</sup>

The primary purpose of the rule change is to address procurement fraud allegations of transfer of inside information by DOD officials to defense contractor consultants.

#### Conclusion

This article is intended to summarize the significant cases that were decided in 1988 that impact on the source selection process. Although there have not been many significant changes in this area, it is clear from the sheer number of cases that there are still problems with the way the government selects its sources in competitive acquisitions. In order to prevent the wheels of the government acquisition process from grinding to a halt, attorneys must pay close attention to the established rules and to the cases interpreting them.

<sup>61</sup> Comp. Gen. Dec. B-231165 (29 Aug. 1988), 88-2 CPD ¶ 188.

<sup>62</sup> Comp. Gen. Dec. B-232003 (25 Nov. 1988), 88-2 CPD ¶ 517; see also Comp. Gen. Dec. B-232017 (25 Nov. 1988), 88-2 CPD ¶ 518.

<sup>63</sup> FAR 15.611.

<sup>64</sup> See FAR 15.412.

<sup>65</sup> FAR 15.611(c).

<sup>66</sup> See FAR 15.612(a).

<sup>67</sup> DFARS 215.611(c); Defense Acquisition Circular 88-1 (1 Nov. 1988).

# Evaluating Past Performance

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## Introduction

Past performance evaluations in federal acquisitions are neither commonplace nor consistent. Some activities hesitate to consider past performance for fear of injecting bias into the evaluation process. Others hesitate due to a general uncertainty about the law. Many activities see the obvious value in past performance evaluations but are unsure of the procedure. Those activities that do evaluate past performance rely almost exclusively upon data supplied by the contractor rather than upon independent data otherwise available to the government.

The entire subject of past performance evaluations is undergoing renewed emphasis. Plans are currently underway within the Army to evaluate more aggressively past performance by utilizing government-generated data during the source selection process. This article summarizes some of the key legal issues surrounding this subject.

## Distinguishing Past Performance From Responsibility Determinations

At the outset, one should distinguish past performance evaluations from preaward surveys. Although similar, each serves a different purpose. Preaward surveys are conducted to determine whether a contractor is responsible—that is, *can* he do the job? Past performance evaluations are conducted as part of the source selection process in negotiated procurements to determine whether a contractor is acceptable—that is, *will* he do the job successfully?

Responsibility is a broad concept that asks whether an offeror has the *capability* to perform a particular contract. It encompasses many areas, including financial resources, integrity, operational controls, technical skills, production control procedures, quality assurance measures, property control system, technical equipment, facilities, and past performance information. The procuring contracting officer makes the responsibility determination based upon information and recommendations received from several sources, the most important of which is the Defense Logistics Agency (DLA) preaward survey. The preaward survey is performed by the administrative contracting office based upon information on hand, received from another agency, or obtained by on-site inspection.

The past performance evaluation is a very specific endeavor that seeks to identify the *degree of risk* associated with each offeror. It deals solely with each offeror's track record on previous contractual efforts. The procuring contracting officer receives a performance

risk assessment from his or her own team of evaluators that is based upon past performance information received from a variety of sources, including offeror proposals and agency data banks. While responsibility determinations are typically go-no-go decisions, risk assessments are expressions of relative confidence levels by the contracting activity's own experts.

While DLA could perform a performance risk assessment during a preaward survey, it would not be quite the same as one performed by the contracting officer's own evaluators. These evaluators are handpicked by the contracting agency and usually have specialized technical skills appropriate for each specific performance risk assessment. As members of the contracting officer's team, they are responsive to the shifting needs of the agency throughout source selection, and their assessment tends to be tailored to the precise needs of the contracting officer.

If properly conducted, the past performance evaluation and the preaward survey will supplement each other and provide a more complete picture of an offeror than either one could by itself. Accordingly, the General Accounting Office (GAO) has held that in negotiated procurements, it is permissible for the government to include a responsibility-related factor such as past performance among the technical criteria used during proposal evaluations.<sup>1</sup>

## Using Extrinsic Data

There are three fundamental questions that frequently arise during past performance evaluations. First, can the government use data outside of an offeror's proposal (extrinsic data) to evaluate past performance? Second, must the government allow the offerors to see and/or rebut that extrinsic data? Third, does the government assume a duty to seek out extrinsic data to correct problems it identifies in an offeror's proposal?

### *Can the Government Use Extrinsic Data to Evaluate Past Performance?*

The government clearly has the right to consider information outside of an offeror's proposal to evaluate past performance, provided such action is consistent with the ground rules set forth in the solicitation.<sup>2</sup> While the best practice is to clearly advise offerors of one's intent to consider extrinsic data, the General Accounting Office (GAO) has permitted such consideration even when the solicitation is not clear. In one case agency evaluators were permitted to consider their own personal knowledge of an offeror's past performance

<sup>1</sup> BTH Service Industries, Inc., Comp. Gen. Dec. B-224392.2 (2 Oct. 1986), 86-2 CPD ¶ 384; Wickman Spacecraft and Propulsion Co.; Comp. Gen. Dec. B-219675 (20 Dec. 1985), 85-2 CPD ¶ 690. These cases also hold that the Certificate of Competency procedures will not apply to deficient technical proposals from small businesses even though such deficiencies are responsibility-related. *But see* Sanford and Sons Co., Comp. Gen. Dec. B-231607 (20 Sept. 1988), 88-2 CPD ¶ 266.

<sup>2</sup> Western Medical Personnel, Inc., Comp. Gen. Dec. B-227991 (28 Sept. 1987), 87-2 CPD ¶ 310; Engineers International, Inc., Comp. Gen. Dec. B-224177 (22 Dec. 1986), 86-2 CPD ¶ 699; Schneider, Inc., Comp. Gen. Dec. B-214746 (23 Oct. 1984), 84-2 CPD ¶ 448.



because the solicitation required offerors to submit their references to the government.<sup>3</sup> In another case the "experience" factor was sufficient to authorize evaluators to consider the contractor's record of past contract performance.<sup>4</sup>

*Must the Government Allow the Offerors to See and/or Rebut the Extrinsic Data Gathered During the Evaluation Process?*

Generally speaking, the government is not required to allow offerors to review and rebut the references it receives.<sup>5</sup> GAO has held that offerors should understand that the government may contact these reference sources and consider their opinions without further investigation into the accuracy of the information.<sup>6</sup> To the extent that the extrinsic data gives rise to "deficiencies," however, the government has the normal duty to disclose such deficiencies along with any others found during the evaluation process to those offerors within the competitive range for negotiations.<sup>7</sup> Otherwise GAO could rule that the negotiations were not meaningful.

In any event, the government should take every reasonable measure to ensure the accuracy of the data relied upon during the performance risk assessment. It is obviously unfair to reject a proposal based solely upon information that is later determined to be inaccurate or erroneous. Consequently, negative or derogatory data should be corroborated before it forms the sole basis for rejection of a proposal. The best practice is to give offerors the benefit of the doubt in this area, at least until such time as they have had an opportunity to comment on the perceived deficiency during negotiations.

*If the Solicitation Calls for Consideration of Extrinsic Data, Does the Government Assume the Duty to Collect Such Data to Cure Problems It Sees in an Offeror's Proposal?*

The evaluation of a contractor's past performance does not relieve the contractor of its burden of proving

the technical acceptability of its proposal.<sup>8</sup> The government is under no obligation to seek out extrinsic data to cure deficiencies contained in a proposal, even where the government's solicitation states that it will look outside of an offeror's proposal. Typically, protestors try to argue that had the agency looked, it would have observed good performance that would have offset deficiencies contained in the proposal. GAO has held, however, that such language in a solicitation puts offerors on notice that extrinsic data could be considered and that the government has no duty to cure an offeror's proposal problems.<sup>9</sup>

Nevertheless, the government must not unreasonably disregard an offeror's references. In one case GAO sustained a protest where the government relied solely upon its own extrinsic data and failed to even consider inconsistent data submitted by the offeror.<sup>10</sup>

**Three Special Rules**

Technical evaluators are often reluctant to express opinions that are not easily subject to objective proof. Past performance evaluations accentuate this problem. Performance risk assessments are based largely upon subjective perceptions and opinions of past events. Evaluators are understandably reluctant to rely upon such data because it is not clearly verifiable.

Past performance assessments are afforded great deference at GAO. GAO has ruled that it will not substitute its judgment for that of the agency because it is the government's perception of past performance that counts and not the contractor's.<sup>11</sup> But there are three special rules that must be followed: 1) the data must be relevant; 2) its significance must not be exaggerated; and 3) it must not inject undue bias into the evaluation process.

*Relevancy*

Basic fairness dictates that the government utilize extrinsic data that reasonably relates to the proposed

<sup>3</sup> Western Medical Personnel, Inc., Comp. Gen. Dec. B-227991 (28 Sept. 1987), 87-2 CPD ¶ 310.

<sup>4</sup> See cases cited *supra* note 1. See also Engineers International, Inc., Comp. Gen. Dec. B-224177 (22 Dec. 1986), 86-2 CPD ¶ 699; Schneider, Inc., Comp. Gen. Dec. B-21476 (23 Oct. 1984), 84-2 CPD ¶ 448.

<sup>5</sup> See cases cited *supra* note 1. See also Schneider, Inc., Comp. Gen. Dec. B-21476 (23 Oct. 1984), 84-2 CPD ¶ 448.

<sup>6</sup> Kirk-Mayer, Inc., Comp. Gen. Dec. B-208582 (2 Sept. 1983), 83-2 CPD ¶ 288. See also cases cited *supra* note 1; Schneider, Inc., Comp. Gen. Dec. B-21476 (23 Oct. 1984), 84-2 CPD ¶ 448.

<sup>7</sup> Cosmodyne, Inc.; Goulds Pumps, Inc.; Prosser-East Division, Purex Corp.; Comp. Gen. Dec. B-216258, B-216258.2, B-216258.3 (19 Sept. 1985), 85-2 CPD ¶ 304.

<sup>8</sup> Intelcom Support Services, Inc., Comp. Gen. Dec. B-225600 (7 May 1987), 87-1 CPD ¶ 487. See also Del-Jen, Inc., Comp. Gen. Dec. B-216589 (1 Aug. 1985), 85-2 CPD ¶ 111.

<sup>9</sup> Douglas County Aviation, Inc.; Hawley and Powers Aviation, Inc.; Hemet Valley Flying Service; Comp. Gen. Dec. B-213205.2, B-213205.3, B-213205.4 (27 Sept. 1985), 85-2 CPD ¶ 345; The Management and Technical Services Company, a Subsidiary of General Electric Company, Comp. Gen. Dec. B-209513 (23 Dec. 1982), 82-2 CPD ¶ 571; Ridgeway Electronics, Inc., Comp. Gen. Dec. B-199557 (13 Jan. 1981), 81-1 ¶ CPD 21; Comten-Compress, Comp. Gen. Dec. B-183379 (30 June 1975), 75-1 CPD ¶ 400; Campbell Engineering, Inc., Comp. Gen. Dec. B-231126 (11 Aug. 1988), 88-2 CPD ¶ 136.

<sup>10</sup> Univox California, Inc., Comp. Gen. Dec. B-210941 (30 Sept. 1983), 83-2 CPD ¶ 395. See also Decision Sciences Corp., Comp. Gen. Dec. B-183773 (21 Sept. 1976), 76-2 CPD ¶ 260; Inlingua Schools of Languages, Comp. Gen. Dec. B-229784 (5 Apr. 1988), 88-1 CPD ¶ 340. GAO has ruled that it was proper for the government to downgrade a proposal received from a new company that had no related experience. See Wickman Spacecraft and Propulsion Co., Comp. Gen. Dec. B-219675 (20 Dec. 1985), 85-2 CPD ¶ 690.

<sup>11</sup> Engineers International, Inc., Comp. Gen. Dec. B-224177 (22 Dec. 1986), 86-2 CPD ¶ 699. Caution is advised in ADPE acquisitions that are subject to the protest jurisdiction of the General Services Administration Board of Contract Appeals (GSBCA). Unlike GAO, this board has held that it would not necessarily defer to the procuring agency's determinations. Instead it would determine de novo whether the agency had conducted the source selection properly. Lanier Business Products, Inc., GSBCA No. 7702-P, 85-2 BCA ¶ 18,033; Litton Systems, Inc.; Varian Associates, Inc.; Comp. Gen. Dec. B-229921.1; B-229921.2; B-229921.3; B-229921.4; B-229921.5 (10 May 1988), 88-1 CPD ¶ 448.

acquisition.<sup>12</sup> There should be a reasonable, albeit indirect, connection between the past contract and the proposed contract. Otherwise, reliance upon past performance as a projection of future performance could be fundamentally flawed.

A key aspect of relevancy is recency. The government should use the most current and accurate information available when making past performance assessments. GAO sustained a protest because the government had evaluated past performance by examining *only* the annual official appraisal of the contractor's performance and had disregarded the more current quarterly assessments. The government unsuccessfully argued that the quarterly assessments fluctuated and were not the best gauge of performance.<sup>13</sup> GAO disagreed, pointing out that the contractor appeared to have cured the deficiencies from the last annual appraisal in their quarterly assessments.

#### *Exaggerated Weight*

The government must not unduly exaggerate the importance of past performance by double counting it in the evaluation process. The most common example is where past performance is first evaluated separately as an evaluation factor and then as a sub-element of all, or some, of the other factors. GAO has held that the government can treat past performance either way, but not both.<sup>14</sup>

A second example occurs when both past performance and experience are to be evaluated. Experience is a broad concept describing the general areas of corporate involvement, whereas past performance is the offeror's specific track record in a given area. The government can evaluate both the offeror's experience and past performance, but it would be improper to exaggerate the significance of past performance by first evaluating it separately and then again as an aspect of experience.<sup>15</sup> A proposal might describe how the company has ten years experience in electronic warfare, employs several renown experts in that field, and has over \$100 million in related defense contracts. Past performance can be evaluated either separately or together with such experience, but not both.

#### *Bias*

Contractors expend large sums of money preparing proposals and are entitled to have those proposals fairly evaluated by impartial evaluators. Contracting officers, on the other hand, have the duty to award contracts only to responsible contractors and are entitled to consider a contractor's past performance. To what extent may an evaluator lawfully consider his precon-

ceived notions about a particular contractor during the evaluation of his proposal? The legal test is simpler to state than to apply. Generally, an evaluation is improper where there is evidence of prejudicial partiality or bad faith on the part of an evaluator. Drawing the line between innocuous preconceived notions and improper bias is somewhat more difficult and requires elaboration.

It is natural for technical personnel to have acquired subjective opinions about certain contractors over the years. In fact, this experience is of considerable value to the contracting officer, who must rely upon the considered judgment of his or her advisors. In the normal situation, such opinions assist an evaluator in making an accurate and informed opinion of a contractor's capability by focusing attention on suspected strong or weak areas. Clearly, in such cases there is no improper bias.

At the other extreme, however, an evaluator will occasionally hold such a strong opinion about a particular contractor that his vision becomes clouded to such an extent that nothing contained in that contractor's proposal will alter the evaluator's preconceived notions. Clearly, bias has played an improper role in the evaluation. If the evaluator's opinion of a particular firm is unalterably negative, then that contractor will have been constructively debarred from contract award no matter what improvements it has made in its method of operation.

These extreme situations reveal that improper bias results not necessarily from the existence of preconceived notions of evaluators, but rather from the prejudicial effect such notions have upon the evaluation. For example, if an evaluator with a strong negative feeling about a particular company consciously and effectively sets those notions aside, objectively evaluates that company's proposal, and accurately notes deficiencies in that proposal, then there is no improper bias or bad faith, notwithstanding the existence of strong negative preconceptions. If an evaluator believes that he cannot control his preconceived notions in such a manner, he must remove himself from the evaluation committee.

In summary, an evaluation is the product of improper bias or bad faith when an evaluator's preconceived notions inhibit his or her ability to objectively and fairly evaluate the merits of a proposal. Furthermore, protests establishing improper bias will be sustained if a contractor's competitive position was prejudiced or unfairly influenced by such bias to any significant degree.<sup>16</sup> Evaluators should therefore maintain an open mind concerning the merits of all proposals and should use their preconceived notions only as a basis for asking

<sup>12</sup> See cases cited *supra* note 1. See also *Schneider, Inc., Comp. Gen. Dec. B-214746* (23 Oct. 1984), 84-2 CPD ¶ 448.

<sup>13</sup> *New Hampshire-Vermont Health Service, Comp. Gen. Dec. B-189603* (15 Mar. 1978), 78-1 CPD ¶ 202.

<sup>14</sup> See cases cited *supra* note 8. See also *The Management and Technical Services Company, a Subsidiary of General Electric Company, Comp. Gen. Dec. B-209513* (23 Dec. 1982), 82-2 CPD ¶ 571; *The Center for Education and Manpower Resources, Comp. Gen. Dec. B-191453* (7 July 1978), 78-2 CPD ¶ 21.

<sup>15</sup> See cases cited *supra* note 8. See also *The Management and Technical Services Company, a Subsidiary of General Electric, Comp. Gen. Dec. B-209513* (23 Dec. 1982), 82-2 CPD ¶ 571; *Mutual of Omaha Insurance Company, Comp. Gen. Dec. B-201710* (4 Jan. 1982), 82-1 CPD ¶ 2.

<sup>16</sup> *Ackco, Inc., Comp. Gen. Dec. B-184518* (14 Sept. 1976), 76-2 CPD ¶ 239; *Optimum Systems, Inc., Comp. Gen. Dec. B-187560* (31 Aug. 1977), 77-2 CPD ¶ 165.

relevant and meaningful questions. If deficiencies are discovered, they should be specifically documented.

The danger of injecting bias into the evaluation process is heightened by the use of information outside of the contractor's proposal, such as opinions of contracting, technical, and pricing personnel who have previously dealt with the offerors. Evaluators who hear both positive and negative reports of past performance may find it difficult, if not impossible, to objectively evaluate the merits of the contractor's proposal.

One safeguard against injecting undue bias into the evaluation during past performance assessments is the use of a separate evaluation panel to obtain and review extrinsic information. GAO has approved the government's use of separate evaluation panels for this purpose.<sup>17</sup>

### Summary

The government can and should evaluate the past performance of competing offerors by using information that is both contained in the proposals and gathered from outside sources. The solicitation should clearly advise offerors that the government intends to consider data outside of the proposals, that offerors continue to carry the burden of proving the technical acceptability of

their proposals, and that the government is under no obligation to seek out extrinsic information to cure deficiencies contained in proposals. While the government need not permit offerors to comment on the data collected, it must disclose deficiencies to offerors within the competitive range for negotiation.

The extrinsic data must be relevant, recent, and accurate. The government should not exaggerate the importance of past performance by double counting it in the evaluation process. To safeguard against injecting undue bias into the evaluation, it is a good practice to separate those evaluators who gather and assess past performance data from those evaluators who assess the merits of the competing proposals.

GAO will give great deference to the agency's perception of a contractor's past performance, provided that the government follows the ground rules set forth in the solicitation and reasonably considers the contractor's data. In the final analysis, a thorough assessment of past performance will help the government identify the relative risks associated with the competing proposals to enhance the negotiation process, ensure that awards are made to good performers, and identify areas requiring special attention during contract administration.

<sup>17</sup> New Hampshire-Vermont Health Service, Comp. Gen. Dec. B-189603 (15 Mar. 1978), 78-1 CPD ¶ 202. See also The Center for Education and Manpower Resources, Comp. Gen. Dec. B-191453 (7 July 1978), 78-2 CPD ¶ 21; Ridgeway Electronics, Inc., Comp. Gen. Dec. B-199537 (13 Jan. 1981), 81-1 CPD ¶ 21.

## USALSA Report

*United States Army Legal Services Agency*

*The Advocate for Military Defense Counsel*

### DAD Notes

#### **An Error in the Military Judges' Benchbook?**

Instructional errors have pretty tough hides on appeal. If the error involves an instruction that the Manual<sup>1</sup> requires the judge to give, failure to object generally will not eviscerate the error on appeal.<sup>2</sup> Relief on appeal, however, is hardly as sweet as relief at trial. For clients accused of a drug offense, success at trial could depend on a single line in the standard instruction on entrapment.

The Military Judges' Benchbook<sup>3</sup> is not a source of law. Its pronouncements have no more authority than the sources upon which its authors rely.<sup>4</sup> Erroneous instructions are bound to turn up as the authors misin-

terpret their source, the source itself is in error, or the law changes.

The instruction on entrapment<sup>5</sup> contains an error--apparently the result of the authors' misinterpretation of the instruction's source. The instruction artfully presents the entrapment issue as a matter of balancing "the accused's resistance to temptation against the amount of government inducement," with the focus on "the accused's latent predisposition . . . to commit the offense." This paragraph ends, though, with a thumb on the scales, tipping the balance against drug defendants and shifting the focus back to the government's inducement: "[T]he latitude given the government in inducing the criminal act is considerably greater in contraband cases than would be permissible as to other crimes."<sup>6</sup>

<sup>1</sup> Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

<sup>2</sup> See *United States v. Taylor*, 26 M.J. 127, 128-29 (C.M.A. 1988)(dicta).

<sup>3</sup> Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982) [hereinafter Benchbook].

<sup>4</sup> Cf. *id.*, Forward, para. 2.

<sup>5</sup> Benchbook, para. 5-6 (C1, 15 Feb. 1985).

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



The source of the instruction is *United States v. Vanzandt*.<sup>7</sup> The line about contraband cases comes from a paragraph in the opinion that reads:

One last caution should be stated: The latitude given the Government in "inducing" the criminal act is considerably greater in contraband cases (drugs, liquor)—which are essentially "victimless" crimes<sup>FN14</sup>—than would be permissible as to other crimes, where commission of the acts would bring injury to members of the public. It would appear that, in giving such latitude, courts recognize that the Government needs more leeway in detecting and combating these illicit enterprises.<sup>8</sup>

Footnote 14 quotes two Supreme Court cases, *United States v. Russell*<sup>9</sup> and *United States v. Hampton*<sup>10</sup>. As the quotations and the cases make clear, the excerpt from *Vanzandt* does not relate to the defense of entrapment, but to the related claim that the government's inducement deprived appellant of due process.<sup>11</sup>

A key difference between the entrapment defense and the due-process claim is that the due-process determination is a legal question that the judge decides, using, in part, the policy considerations that the excerpt and the cited Supreme Court cases express.<sup>12</sup> Such broad policy considerations, however, have no place in the factfinding process as it relates to the entrapment defense.

Counsel should object to the instruction. It improperly injects a discriminatory policy into the panel's deliberative process. It has nothing to do with the defense of entrapment. It is only one factor for a judge—not a jury—to weigh in determining whether an official inducement has deprived an accused of a constitutional right. A policeman's inducement prior to trial probably will not deprive a drug defendant of a due-process right, but the judge who pushes this policy on the factfinder at trial certainly will. CPT Brian D. Bailey.

## The Accused's Right to Discovery:

### What is Material Evidence?

It is well established that the prosecution's failure to produce material evidence within its control, favorable to the defense, is a deprivation of due process requiring reversal on appeal.<sup>13</sup> The question in each case is, what is "material evidence"? In *United States v. Hart*<sup>14</sup> the Army Court of Military Review set forth standards for testing on appeal the materiality of evidence not produced at trial. Expanding on the suggestion of the Court of Military Appeals in *United States v. Eshalomi*<sup>15</sup> that article 46 of the Uniform Code of Military Justice (UCMJ)<sup>16</sup> affords the military accused more generous discovery than the civilian accused, the Army court outlined standards for materiality. First, the use of perjured testimony or equivalent prosecutorial misconduct or neglect is material unless failure to disclose the information would be harmless beyond a reasonable doubt, regardless of the good or bad faith of the prosecution. Second, when information has been specifically requested by the defense, failure to disclose it is material unless the failure to disclose would be harmless beyond a reasonable doubt. Finally, failure to disclose all other information, whether pursuant to a possible regulatory disclosure requirement, a standing request, or a general request, is material only if there is a reasonable probability that, had the evidence been disclosed, the result at trial would have been different.<sup>17</sup>

In *Eshalomi* the Court of Military Appeals applied the Supreme Court's standard in *United States v. Bagley*<sup>18</sup> to the military. In *Bagley* the Supreme Court stated that the use of perjured testimony is material unless failure to disclose it would be harmless beyond a reasonable doubt, but that the "reasonable probability" test for materiality was "sufficiently flexible" to cover the "no request," "general request," and "specific request" situations.<sup>19</sup> The Court of Military Appeals noted that,

<sup>7</sup> 14 M.J. 332 (C.M.A. 1982).

<sup>8</sup> *Id.* at 344.

<sup>9</sup> 411 U.S. 423 (1973).

<sup>10</sup> 425 U.S. 484 (1976).

<sup>11</sup> *Vanzandt*, 14 M.J. at 345. The respondent in *Russell* and the petitioner in *Hampton* conceded their predisposition to commit the drug offenses for which they were convicted, but argued that the police involvement was so outrageous as to deny them due process. *Hampton*, 425 U.S. at 489; *Russell*, 411 U.S. at 427-28, 430.

<sup>12</sup> *Vanzandt*, 14 M.J. at 343 n.11.

<sup>13</sup> See *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>14</sup> ACFM 8702407 (A.C.M.R. 13 Jan. 1989).

<sup>15</sup> 23 M.J. 12 (C.M.A. 1986).

<sup>16</sup> 10 U.S.C. § 846 (1982). Article 46 reads, in pertinent part, that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

<sup>17</sup> *Hart*, slip op. at 4.

<sup>18</sup> 473 U.S. 667 (1985).

<sup>19</sup> *Id.* at 682. The Court defined "reasonable probability" as a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

although *Bagley* states the constitutional minimum, Congress, through article 46 of the UCMJ, intended that military defendants have more generous discovery. Therefore, the court stated that when defense-requested information is withheld by the prosecution, the government arguably should be forced to bear a heavier burden than that constitutionally required by *Bagley*. The court, however, did not decide that issue because it was able to decide the case using the "reasonable probability" standard.<sup>20</sup>

Although the Army court in *Hart* defined a higher standard to which the prosecution would be held for specific defense-requested information withheld, that court also decided the case at hand in the context of a general request for information. Trial defense counsel had not specifically requested any of the withheld information. The government in that jurisdiction normally provided the defense with all pertinent information without any defense request. It was up to the trial counsel to decide what information was pertinent. The Army court treated this practice as a general request for information by the defense and therefore analyzed whether there was a reasonable probability that, had the evidence been disclosed, the result would have been different.<sup>21</sup> The Army court found that the result would not have been different and that the evidence therefore was not material.<sup>22</sup>

Although the military accused has greater discovery rights than a civilian, it is up to the trial defense counsel to specifically request possible exculpatory material from the government in order for the client to take advantage of these greater rights. Therefore, defense counsel should be careful to specifically request evidence that may exist, even if the general practice in the jurisdiction is for the government to send pertinent information to the defense as a matter of course. Not only does this ensure that defense counsel is really receiving all information that may be useful in building the case, it also subjects the government to a higher standard on appeal should the

evidence not be produced at trial. CPT Patricia D. White.

### A New Look at Punishment: Federal Sentencing Guidelines

On January 18, 1989, an 8-1 majority of the Supreme Court of the United States held that the controversial Federal Sentencing Guidelines are constitutional.<sup>23</sup> More specifically, the Supreme Court declared the Sentencing Reform Act of 1984<sup>24</sup> to be a constitutional delegation of legislative power from Congress to "an expert body located within the Judicial Branch."<sup>25</sup> The Supreme Court's approval of the Sentencing Guidelines may be an important beginning for the military defense counsel, who may now rationally argue that the military judge should consider the Guidelines' limitations when an accused is convicted of a "clause 3" offense under article 134 of the Uniform Code of Military Justice.<sup>26</sup>

If an accused is convicted of a "clause 3" offense and that offense is not "closely related" to an offense under the U.C.M.J., the accused faces a maximum punishment of confinement as specified in the federal statute.<sup>27</sup> By looking to the federal statutory scheme for punishment, defense counsel may successfully argue that the maximum punishments determined in the Sentencing Guidelines apply. As an example, defense counsel may be able to reduce a maximum sentence of confinement from fifteen years to three months.<sup>28</sup> It is certainly more beneficial for defense counsel to argue that according to the Sentencing Guidelines the accused should be sentenced to no more than three months' confinement, than it is for counsel to pose a generalized sentence appropriateness argument to the sentencing authority, who possesses unlimited discretion to confine the accused for up to fifteen years.

In proposing that the military judge follow the Sentencing Guidelines, the defense counsel can base the argument on the Sentencing Reform Act itself. The United States Sentencing Commission was formed to

<sup>20</sup> *Eshalomi*, 23 M.J. at 24.

<sup>21</sup> *Hart*, slip op. at 4-5.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Mistretta v. United States*, 44 Crim L. Rep. (BNA) 3061 (1989).

<sup>24</sup> 18 U.S.C. §§ 3551-3559 (1982 and Supp. IV 1986) and 28 U.S.C. §§ 991-998 (1982 and Supp. IV. 1986). The act established the United States Sentencing Commission, which in turn promulgated the Sentencing Guidelines. See United States Sentencing Commission's Sentencing Guidelines and Policy Statements, with amendments (May 1, 1988), reprinted in 41 Crim. L. Rep. (BNA) 3087-3190.

<sup>25</sup> *Mistretta*, 44 Crim. L. Rptr. (BNA) at 3075.

<sup>26</sup> Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ]. "Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act [18 U.S.C. § 13 (1982)]." Manual for Courts-Martial, United States, 1984, Part IV, para. 60(c)(1) [hereinafter MCM, 1984]. "Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132." MCM, 1984, Part IV, para. 60(c)(4)(b).

<sup>27</sup> R.C.M. 1003(c)(1)(B)(ii). A dishonorable discharge and forfeiture of all pay and allowances is also permissible when the federal statute authorizes confinement for one year or more; a bad-conduct discharge and forfeiture of all pay and allowances if the statute authorized confinement for six months or more; and if the authorized confinement is less than six months, then only forfeiture of two-thirds pay for the period of confinement is permitted. *Id.*

<sup>28</sup> Using this example, an accused convicted of uttering counterfeit money (a violation of 18 U.S.C. § 472 (1982)) faces a maximum sentence of 15 years and a \$5,000.00 fine. Under the Sentencing Guidelines, this offense carries a "base offense level" of 9 (§ 2B5.1(a)). Assuming that the accused passed less than \$2,000.00 in counterfeit money (resulting in no increase of the base level—§2B5.1(b)(1)), had "minimal" participation in the scheme (resulting in a decrease of the base level by 4—§ 3B1.2(a)), "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense," (resulting in a decrease of the base level by an additional 2—§ 3E1.1(a)), and possesses no prior convictions (resulting in no increase—Chapter Four), he would face a sentence to confinement for zero to three months (because his Offense Level is now 3 and he is in Criminal History Category I—Chapter Five (Sentencing Table)).

establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing [as set forth in 18 U.S.C. § 3553(a)(2)]; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentence disparities [and] (C) reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process.<sup>29</sup>

Most importantly, the Commission, consistent with Titles 18 and 28 of the United States Code, “shall promulgate and distribute to all courts of the United States” guidelines and policy statements “for use of sentencing court in determining the sentence to be imposed in a criminal case.”<sup>30</sup> Therefore, it could be argued at trial that a court-martial, finding an accused guilty of a “clause 3” offense, is bound to follow the Sentencing Guidelines.<sup>31</sup>

A logical basis for this argument also exists. For an accused to be convicted for committing a crime under the federal statute, all elements of that federal statute must be proven. Likewise, a conviction of a federal statute carries with it the sentence limits imposed by Congress on that statute. It follows, then, that any court, prosecuting a violation of a federal statute is bound to follow those sentencing limits imposed by Congress.<sup>32</sup>

Furthermore, military courts, at least when operating in a “clause 3” context, should be recognized as “courts of the United States.”<sup>33</sup> It is commonly said by mem-

bers of the military bar and bench that a court-martial conviction is a “federal conviction.” Courts-martial essentially follow the same rules of evidence.<sup>34</sup> In one of its seminal opinions, the Court of Military Appeals has stated that it believes its congressionally-intended role is, “in so far as reasonably possible, to place military justice on the same plane as civilian justice.”<sup>35</sup>

Therefore, military judges should be urged to follow the Sentencing Guidelines for “clause 3” violations of article 134, UCMJ, a statute in which Congress has not specified any particular punishment, and in which the President has directed that the federal law will control. Without a doubt, criticism of the Sentencing Guidelines is widespread throughout the federal bench and bar, as well as within the military justice community.<sup>36</sup> In an appropriate case, however, an enterprising trial defense counsel may be able to overcome such speculative criticism with relevant, persuasive argument that, at least in his client’s case, the confinement parameters established by the Sentencing Guidelines should be applied by the court. CPT Brian D. DiGiacomo.

#### Service of Completed Record of Trial on Defense Counsel Equated to Service on Accused

Does the time for submitting post-trial clemency matters begin to run after the authenticated record of trial and the staff judge advocate’s (SJA) recommendation have been served upon the trial defense counsel or, instead, only when the record has been served upon the

<sup>29</sup> 28 U.S.C. § 991 (b)(1) (1982 and Supp. IV 1986). Admittedly, this philosophy may contrast with military practice. Compare Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook, para. 2-59 (1 May 1982) (C1, 15 Feb. 1985) (adding “preservation of good order and discipline in the military” as a sentencing policy) and 18 U.S.C. § 3551(a) (1982 and Supp. IV 1986) (“a defendant who has been found guilty of an offense described in any Federal statute, other than . . . the Uniform Code of Military Justice, shall be sentenced in accordance with this chapter so as to achieve the purposes set forth in [18 U.S.C. § 3553(a)(2)]”). In trying to reconcile the differences in philosophy, it is suggested that preservation of good order and discipline is adequately served by other, uniquely military sentencing options (i.e., the issuance of a punitive discharge and imposition of forfeitures, a reprimand, hard labor without confinement, or reduction in rank), and that the portion of the sentence relating to confinement serves the “other” sentencing policies recognized by both civilian and military justice systems.

<sup>30</sup> 28 U.S.C. § 994(a) (1982 and Supp. IV 1986).

<sup>31</sup> Despite the fact that the Sentencing Guidelines mandate sentence limits for judge-alone sentencing (as is the federal practice), an accused’s forum selection should have little impact on defense counsel’s proposal to follow the guidelines. If the accused elects trial by military judge alone, defense counsel may argue that the Sentencing Guidelines directly apply to the military judge’s sentence, and that failure to apply the guidelines is grounds for reversal on appeal. See 18 U.S.C. § 3742 (1982 and Supp. IV 1986). Even if an accused is sentenced by members, however, trial defense counsel may, in an appropriate case, be able to successfully request an instruction that the federally-recognized limits of confinement for the stated offense will apply. Such an instruction may be directory (i.e., that the maximum period of confinement for the subject offense is that stated in the Sentencing Guidelines), or the instruction may be phrased in terms of matters in extenuation and mitigation (admitted into evidence as a relevant sentencing matter or as a subject of judicial notice), and used to give the members a sense of what the accused would face in civilian court for this civilian offense.

<sup>32</sup> For that matter, defense counsel may attempt to extend this rationale to all offenses under the UCMJ that have a federal counterpart (i.e., not strictly “military offenses”).

<sup>33</sup> In this vein, it is suggested that the term “courts of the United States” are “courts organized under the laws of the United States.” *United States v. Runkle*, 122 U.S. 543, 555 (1887). The nature of a court-martial sentence has been described as “a criminal judgement of a court of the United States.” 1 The Military Justice Act of 1983 Advisory Commission Report at 40 (1984). Neither Titles 18 or 28, United States Code, define what is meant as a “court of the United States” for purposes of 28 U.S.C. § 994(a). It is generally recognized, however, that a court-martial derives its power from article I of the Constitution, whereas federal district courts are article III courts.

<sup>34</sup> See MCM, 1984, Mil. R. Evid.; UCMJ art. 36(a). As the United States Court of Military Appeals Committee opined, “In many instances [the military justice system] now mirrors the practice in federal criminal trials.” United States Court of Military Appeals Committee Report at 3 (Jan. 27, 1989).

<sup>35</sup> *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951) (the court went on to catalogue “military due process rights”).

<sup>36</sup> As a general proposition, “adoption of the federal sentencing structure is not feasible, nor appropriate for the military.” Vowell, *To Determine An Appropriate Sentence: Sentencing In The Military Justice System*, 114 Mil. L. Rev. 87, 174-75 (1986). See also Schwender, *Sentencing Guidelines for Courts-Martial: Some Arguments Against Adoption*, *The Army Lawyer*, Aug. 1988, at 33. But see Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, *The Army Lawyer*, July 1988, at 26.

accused? <sup>37</sup> This question has recently been addressed by two different panels of the Army Court of Military Review. <sup>38</sup> It is extremely important to know when post-trial matters must be submitted, because failure to submit matters to the convening authority in a timely fashion waives the accused's right to do so <sup>39</sup> and may also affect the disposition on appeal of issues relating to the post-trial submissions.

In *United States v. Euring* <sup>40</sup> the accused was tried and sentenced on May 25, 1988. The military judge authenticated the record of trial June 17, 1988. On July 5, 1988, the trial counsel attested that he had transmitted by certified mail a copy of the record of trial to the accused at Fort Knox, Kentucky. On September 7, 1988, the accused signed a certificate acknowledging his receipt of the record. The trial defense counsel, however, had been served with the record of trial and the SJA recommendation on July 8, 1988. The defense counsel's request for an extension until July 28, 1988, to submit post-trial matters was granted, but a petition for clemency was not actually filed until August 1, 1988. The convening authority took action on August 10, 1988.

On appeal an issue was raised based on *United States v. Hallums* <sup>41</sup> regarding the adequacy of the record establishing the convening authority's consideration of the clemency matters. Rather than deciding that issue directly, the Army court sought to moot the question by finding that the submission was untimely and that, even if the convening authority may have in fact considered the document, he was not as matter of law required to do so. Thus, the Army court was saying that the record of trial need not confirm an action that the convening authority was not obligated to do. As a consequence of the Army courts' approach to the *Hallums* issue, however, the *Euring* opinion provides guidance on the

issue of timeliness of post-trial submissions. The ultimate issue in the *Euring* case was whether service on July 8, 1988, upon the trial defense counsel, or September 7, 1988, upon the accused commenced the running of the period to submit post-trial matters. If the ten-day period did not begin to run until the appellant was actually served, post-trial submissions need not have been submitted until September 17, 1988. In this latter situation, the submissions of August 1, 1988, would have been timely and should have been considered by the convening authority before action, with appropriate annotation or confirmation of that fact in the record of trial (per *Hallums*).

Appellant's argument in *Euring* relied upon the specific language contained in R.C.M. 1105 which states "service on the accused" not "service on the trial defense counsel." Rejecting this argument, the Army court held that the word "accused" as it is used in R.C.M. 1105 is not intended to have the literal meaning it does in article 54 of the Uniform Code of Military Justice (UCMJ). <sup>42</sup> The opinion quoted *United States v. Derksen* <sup>43</sup> and cited the congressional mandate set forth in article 60(b) of the UCMJ as ultimately implemented by R.C.M. 1105 and 1106. <sup>44</sup> The *Euring* court also referenced article 38, UCMJ, and R.C.M. 502 <sup>45</sup> and opined that an attorney-client relationship does not terminate at the end of the court-martial but continues, thus creating an affirmative obligation on the trial defense counsel to ensure that the accused's rights are upheld in post-trial matters. <sup>46</sup>

The *Euring* decision also distinguished the service needed to fulfill R.C.M. 1104 <sup>47</sup> from that which is required under R.C.M. 1105 and 1106. Although each rule uses the word "shall," the court interpreted the President's intent for promulgating the respective rules

<sup>37</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105(c)(1) [hereinafter R.C.M.], provides that after a sentence is adjudged in any court-martial, the accused may submit matters under this rule within the later of ten days after a copy of the authenticated record of trial or, if applicable, the copy of the recommendation of the staff judge advocate or legal officer is served on the accused. If the accused shows that additional time is required to submit such matters, the convening authority may, for good cause, extend the ten day period for not more than twenty days.

<sup>38</sup> Compare *United States v. Euring*, ACMR 8801186 (A.C.M.R. 13 Jan. 1989), with *United States v. Moore*, 27 M.J. 656 (A.C.M.R. 1988).

<sup>39</sup> R.C.M. 1105(d)(1) states that failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters.

<sup>40</sup> ACMR 8801186 (A.C.M.R. 13 Jan. 1989).

<sup>41</sup> 26 M.J. 838 (A.C.M.R. 1988).

<sup>42</sup> UCMJ art. 54. Article 54(d) provides that "[a] copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated."

<sup>43</sup> 24 M.J. 818 (A.C.M.R. 1987) (legislative history of article 60, UCMJ, indicated that the framers of the article intended that service upon the accused for purposes of the article was satisfied by service on the accused's counsel).

<sup>44</sup> Article 60(b), UCMJ, provides that the accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and sentence. Except in a summary court-martial case, such a submission shall be made within 10 days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of the staff judge advocate or legal officer. UCMJ art. 60(d) states that the recommendation of the staff judge advocate shall be served on the accused.

<sup>45</sup> UCMJ art. 38(c)(1) states that the defense counsel may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review. R.C.M. 502(d)(2) designates the broad duties of the defense counsel: "[d]efense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged."

<sup>46</sup> See *United States v. Cannon*, 23 M.J. 676, 678 (A.C.M.R. 1986) (the burden is on the trial defense counsel to advise the convening authority of any clemency recommendations and failure to do so may raise an issue of inadequacy of counsel); *United States v. Davis*, 20 M.J. 980, 982-83 (A.C.M.R. 1985) (Congress intended that the responsibilities for presenting post-trial submissions to rest primarily with defense counsel).

<sup>47</sup> R.C.M. 1104(I)(A) states that the trial counsel shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated.

differently. To support this distinction, the court reasoned that the accused has an absolute right to have a copy of the record of trial and that right originates from article 54, UCMJ, which does not provide for constructive service. The wording in R.C.M. 1105 requires actual service upon the accused, but permits substitute service upon the accused's defense counsel when actual service is impracticable. Accordingly, *Euring* reasoned that constructive service is adequate to fulfill both R.C.M. 1105 and 1106 and sufficient to trigger the waiver rules of R.C.M. 1105(d)(1).

The *Euring* decision should be read in conjunction with an opinion decided two months earlier by a different panel of the Army court. In *United States v. Moore*<sup>48</sup> the certificate of service, signed by the trial defense counsel, referred only to service of the SJA recommendation. It was silent as to service of the record of trial, authenticated or otherwise, upon trial defense counsel. The certificate of service was accomplished in accordance with R.C.M. 1106(f).<sup>49</sup> The accused was not served with his authenticated copy of the record until September 10. Post-trial submissions were submitted by the defense counsel on September 18. The *Moore* panel of the Army court rejected the government's assertion of waiver, even though post-trial matters were submitted eight days after the acknowledged due date, by holding that the ten-day period would not end until September

20, because the appellant had not in fact been served until September 10, and substituted service of the authenticated record had not been made on trial defense counsel.<sup>50</sup> *Moore* interpreted the language in R.C.M. 1105 and 1106 literally, requiring actual service upon the accused or, in the alternative, substituted service upon the trial defense counsel in order to trigger the waiver rule.<sup>51</sup>

It is important for trial defense counsel to apply the *Euring* interpretation that service of the record of trial and SJA recommendation on the accused will not provide extra time to submit post-trial matters. The ten-day period should be presumed to commence with the service upon the trial defense counsel, not upon the accused if that service occurs first. Post-trial representation must be conducted as carefully and adequately as was provided at trial, and trial defense counsel must ensure that the client's rights are upheld. The Army Court of Military Review has held that the primary responsibility in post-trial matters is upon the defense counsel and failure to fulfill these responsibilities could lead to accusations of inadequacy of counsel.<sup>52</sup> Therefore, it is incumbent upon the trial defense counsel to either submit post-trial matters within ten days of receipt of the trial record and SJA recommendation, or obtain an extension of time,<sup>53</sup> or face waiver of the accused's right to submit such matters. CPT Pamela J. Dominisse.

<sup>48</sup> 27 M.J. 656 (A.C.M.R. 1988).

<sup>49</sup> R.C.M. 1106(f)(1) requires a copy of recommendation to be served on counsel for the accused and 1106(f)(3) requires the staff judge advocate to provide accused's counsel with a copy of the record of trial upon request. Hence, R.C.M. 1106 does not require service of the record of trial, authenticated or otherwise, in order to trigger the ten day time period to submit post-trial matters.

<sup>50</sup> *Cf. United States v. Thompson*, 26 M.J. 512, 513 n.3 (A.C.M.R. 1988) (service of unauthenticated record on counsel does not constitute service under R.C.M. 1104(b)(1)).

<sup>51</sup> The emphasis in *Moore* was on the lack of acknowledgement in the record of trial of substituted service upon trial defense counsel. Conversely, the emphasis in *Euring* was on the constructive service of the authenticated record of trial upon trial defense counsel. The Army court in *Moore* held that the absent substituted service upon trial defense counsel the 10-day period will not begin to run until actual service upon the accused, whereas, the Army court in *Euring* held service upon trial defense counsel constituted constructive service, and actual service upon accused or substituted service upon trial defense counsel was not necessary to commence the running of the ten day time period to submit post-trial matters.

<sup>52</sup> 23 M.J. at 678; *but see United States v. Lohrman*, 26 M.J. 610, 612 n.3 (A.C.M.R. 1988). In *Lohrman* the court held that the trial defense counsel's failure to respond to the erroneous recommendation of the staff judge advocate was not ineffective assistance because appellant was not deprived of a fair trial.

<sup>53</sup> The *Euring* decision failed to address an alternative argument of appellate defense counsel that the court had misconstrued the actual request for extension of time and had failed to grant the full 30 days that had in fact been requested. Care should be taken to obtain written approval for additional time and to clearly specify the latest date post-trial matters must be submitted.



*Trial Judiciary Note*  
**Annual Review of  
Developments in Instructions**

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During the past year the results of a significant number of appellate cases have been determined by the resolution of instructional issues. This article is a review of some of the most important of those cases.

**Offenses**

In *United States v. Mance*<sup>1</sup> the Court of Military Appeals exhaustively considered the knowledge requirements inherent in the crimes of possession and use of illegal drugs.<sup>2</sup> The court held that in order to be found guilty of wrongful possession and use of an illegal drug, the accused must be aware of the presence of the drug alleged and must also be aware of its contraband nature.<sup>3</sup> These knowledge elements must be the subject of instructions.<sup>4</sup> "[T]o be complete an instruction on wrongful possession or wrongful use of controlled substances, should include specific reference to the two types of 'knowledge' which are required to establish criminal liability."<sup>5</sup>

Therefore, the military judge should instruct the court members that, in order to convict, the accused must have known that he had custody of or was ingesting the relevant substance and also must have known that the substance was of a contraband nature, regardless of whether he knew its particular identity. The judge must give this instruction even absent a defense request.<sup>6</sup>

The court did not specify how the instruction must be given, although it appears that the instructional requirement can be satisfied in at least one of two ways. First, the requisite knowledge can be incorporated into the definitions of possession or use and wrongfulness. Thus, an instruction that "an accused may not be convicted of

possession of a controlled substance if the accused did not know that the substance was present under the accused's control"<sup>7</sup> is sufficient guidance for the awareness of the presence element of the offense of wrongful possession.

Similarly, the instructional requirement for the corresponding element of a wrongful use offense might be satisfied by an instruction that "an accused may not be convicted of use of a controlled substance if the accused did not know that he ingested the substance."<sup>8</sup>

The awareness of the contraband nature element is properly instructed on when the members are informed that "use (possession) of a controlled substance is not wrongful if it was used (possessed) without knowledge of the contraband nature of the substance."<sup>8</sup>

A second method is to instruct on the knowledge elements *qua* elements. Thus, the awareness of the presence element would be satisfied by instructing "that the accused knew that he possessed (used) (*state the name of the substance*)."<sup>9</sup> The awareness of the contraband nature element would be satisfied by the instruction "that the accused knew that the substance he possessed (used) was of a contraband nature."<sup>9</sup>

Although *Mance* requires revision of the existing instructions with regard to the elements of drug offenses, it leaves undisturbed the inferences that may be drawn from the discovery of illegal drugs and the instructions applicable to the inferences.<sup>10</sup> "[T]he military judge may also instruct the court members that the presence of the controlled substance authorizes a *permissive inference* under appropriate circumstances that the accused had the type of knowledge required to establish 'posses-

<sup>1</sup> 26 M.J. 244 (C.M.A. 1988).

<sup>2</sup> Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (Supp. III 1985) [hereinafter UCMJ].

<sup>3</sup> *Mance*, 26 M.J. at 253-54.

<sup>4</sup> When no such instruction is given, prejudicial error requiring reversal is committed. *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988).

<sup>5</sup> *Mance*, 26 M.J. at 254.

<sup>6</sup> *Id.* at 256.

<sup>7</sup> Dep't of Army, Pam. 27-9, *Military Judges' Benchbook*, para. 3-76.1, ch. 1 (15 Feb. 1985) [hereinafter *Benchbook*].

<sup>8</sup> See *Benchbook*, para. 3-76.4. In *Mance* the judge instructed *inter alia* "Use of a controlled substance is not wrongful if it was done without the knowledge of the contraband nature of the substance." *Mance*, 26 M.J. at 248. The court held that the instruction was sufficient to satisfy the knowledge of contraband nature element. Since "the members could not have concluded that appellant knew the contraband nature of the substance that he had used without being aware that appellant also had to have known that he had ingested the substance," the court found the instruction sufficient for the knowledge of awareness element. *Id.* at 256. The court indicated, however, that if evidence of unknowing ingestion had been presented, additional instructions would have been required.

<sup>9</sup> The knowledge of contraband nature element instructions may not be necessary in all cases. If the accused "knows the identity of a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance in this regard is immaterial because ... ignorance of the law is no excuse." *Mance*, 26 M.J. at 254. In these cases it would seem that knowledge of the contraband nature would not be an element of the offense.

<sup>10</sup> See generally *Benchbook*, paras. 3-76.1 to 3-76.4.

sion' or 'use' as well as the type of 'knowledge' required to establish 'wrongfulness.'<sup>11</sup>

Permissive inferences were again addressed by the Supreme Court.<sup>12</sup> In *Yates v. Aiken*<sup>13</sup> the Court held that an instruction that "malice is implied or presumed from the use of a deadly weapon" is more than a permissive inference. Rather, it is a presumption that has the effect of relieving the prosecution of part of its burden of proof.<sup>14</sup> As such, it is improper.

More than a quarter century ago, the Court of Military Appeals charged law officers (now military judges) with the responsibility of giving members "lucid guideposts to the end that they may knowledgeably apply the law to the facts as they find them."<sup>15</sup> "When a definition of terms is required for a proper understanding of the issues involved, it is the responsibility of the presiding officer to instruct the court members with extreme precision."<sup>16</sup> Several recent cases have emphasized this facet of the military judge's responsibilities.

In *United States v. Fayne*,<sup>17</sup> a case described as "a domestic dispute that escalated into a court-martial,"<sup>18</sup> the accused was charged with harassment of his estranged wife and housebreaking with intent to commit harassment. The court found that harassment was a crucial element of these offenses and that the failure to define the term rendered the instructions inadequate.

In *United States v. Billig*<sup>19</sup> a Navy surgeon was charged *inter alia* with five specifications of involuntary manslaughter arising out of open heart surgeries. One of the major issues in the case was the standard of care required of cardiothoracic surgeons. No clear definition of this standard emerged from the evidence. Nevertheless, the military judge instructed that in determining whether the accused's conduct amounted to gross or simple negligence or neither, the members should consider whether the accused's conduct was consistent with the care, skill, and proficiency that is commonly exer-

cised by the ordinarily careful, skillful, and prudent board-certified cardiothoracic surgeon. Further, the judge instructed that the accused had a duty to conform to this standard, that any violation of the standard was negligence, and that any gross departure from the standard amounted to gross negligence.<sup>20</sup> The instructions did not make any reference to the acts alleged in the specifications. The court held that the instructions were deficient and stated that the concept of "departure from the standard of care" had no real definition. A proper instruction would have informed the members that if they found that the alleged acts occurred, they would then have to determine whether they constituted simple<sup>21</sup> or gross negligence. Because such guidance was not given, the convictions could not stand.

The need for clear guidance to court members was considered by the Court of Military Appeals in *United States v. Burnett*.<sup>22</sup> The military judge found that the civilian defense counsel should be held in contempt. The judge paraphrased article 48<sup>23</sup> for the members and instructed that they must determine if the counsel should be held in contempt. The president inquired as to what constituted contempt and the judge replied that it was "[a]ny disorder or disrespect to the Court committed in the presence of the Court."<sup>24</sup> The court found this instruction to be deficient because it gave no real definition of the term contempt and allowed the members to go beyond the statutory definition.<sup>25</sup>

In *United States v. Harper*<sup>26</sup> a panel of the Army Court of Military Review held that a judge erred when he changed an element of the crime to more closely mirror the evidence. The accused was charged *inter alia* with taking indecent liberties with minors by showing them pornographic video tapes. The accused placed the tapes in a VCR and started the machine, but he was not in the room with the children when they watched the tape. The military judge believed that the physical presence of the accused was not necessary for the

<sup>11</sup> *Mance*, 26 M.J. at 256 (emphasis in original).

<sup>12</sup> See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

<sup>13</sup> 108 S. Ct. 534 (1988).

<sup>14</sup> Apparently malice was an essential element of the capital murder statute in issue. The statute is not set out in the opinion.

<sup>15</sup> *United States v. Smith*, 33 C.M.R. 3, 6 (C.M.A. 1963).

<sup>16</sup> *United States v. Sanders*, 34 C.M.R. 304, 311 (C.M.A. 1964).

<sup>17</sup> 26 M.J. 528 (A.F.C.M.R. 1988).

<sup>18</sup> *Id.* at 530.

<sup>19</sup> 26 M.J. 744 (N.M.C.M.R. 1988). History may well record ancillary matters in this case as a bedrock for increased powers and prestige of the Court of Military Appeals. See *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

<sup>20</sup> The applicable instructions are set out in the opinion. *Billig*, 26 M.J. at 759.

<sup>21</sup> Instructions on the lesser included offense of negligent homicide were given. UCMJ art. 134; see *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979).

<sup>22</sup> 27 M.J. 99 (C.M.A. 1988).

<sup>23</sup> UCMJ art. 48.

<sup>24</sup> *Burnett*, 27 M.J. at 103.

<sup>25</sup> Hopefully in the near future, military law will abandon its anachronistic contempt procedure. See *id.* at 107.

<sup>26</sup> 25 M.J. 895 (A.C.M.R. 1988).

commission of the crime charged, and he did not instruct the members that the physical presence of the accused was a necessary element. Instead, he substituted an element that essentially required that the showing of the tape was done with the accused's consent and with the knowledge of its pornographic content.<sup>27</sup>

The appellate court found that the offense of indecent liberties can be accomplished by the "performance of indecent acts and the use of indecent language over an audio-visual system."<sup>28</sup> The court held, however, that the acts required the physical presence of the accused. Because the instructions did not require the members to find this element, the court set aside the finding.

The opinion is difficult to accept. It cites *United States v. Knowles*<sup>29</sup> as requiring the physical presence of the accused, although that case merely held that the communication of indecent language over the phone was not the taking of indecent liberties with a minor. "The offense ... requires greater conjunction of the several senses of the victim with those of the accused than that of hearing a voice over a telephone wire."<sup>30</sup> If the accused had placed the tape in the VCR, turned it on, and then remained stationary and silent in the same room as the children, presumably the court would have found that all the elements of the crime had been established. In such a situation, the accused's presence would have added nothing to what occurred. It makes no sense to make criminality depend on presence, when that presence adds nothing to the sum total of what actually occurred.

It also appears that the court concentrated on one particular element and may not have "seen the forest for the trees." Clearly, as the court recognized,<sup>31</sup> the showing of pornographic video tapes to minors is conduct prejudicial to good order and discipline. Therefore, instead of reversing the conviction, the court should have affirmed a conviction for the accused's criminal conduct that was proven and properly in-

structed on. If the conduct was not technically indecent liberties, it certainly was a violation of article 134.<sup>32</sup> Essentially, the court misperceived the issue; it was not whether a crime occurred, but rather what label to place on that crime. As such, the real issues were the maximum punishment and whether the crime committed was closely related to one already listed in the Manual for Courts-Martial.<sup>33</sup>

One other matter should be considered. As listed in the Manual<sup>34</sup> and the Benchbook,<sup>35</sup> the missing element is that the accused committed the act in the presence of the person (victim).<sup>36</sup> The forbidden act cannot be the act of inserting a tape into a VCR or turning on a VCR.<sup>37</sup> The act must necessarily be the scenes portraying sexual intercourse and sodomy. Those scenes were shown to the children involved. Therefore, the acts were in the presence of the person.

In *Harper* the military judge attempted to tailor the instructions to the evidence and to the actual crime under consideration. Even if his departure from the Manual and Benchbook instruction was somewhat inartful, he did not incorrectly instruct the members.

#### Lesser Included Offenses

It is a well-established principle of military law that the military judge must properly instruct members on all lesser included offenses reasonably raised by the evidence. Indeed, so important is this duty that it arises *sua sponte* under appropriate circumstances, even without a defense request. . . . It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. . . . Instead, the instructional duty arises whenever "some evidence" is presented to which the fact finder might "attach credit if" they so desire.<sup>38</sup>

The *sua sponte* duty to instruct on lesser included offenses that are raised by the evidence was again considered by the Court of Military Appeals in *United*

<sup>27</sup> The instructional element is set out in the opinion. *Id.* at 897.

<sup>28</sup> *Id.* at 897.

<sup>29</sup> 35 C.M.R. 376 (C.M.A. 1965).

<sup>30</sup> *Id.* at 378.

<sup>31</sup> *Harper*, 25 M.J. at 397.

<sup>32</sup> See generally *United States v. Williams*, 26 M.J. 606 (A.C.M.R. 1988), where a different panel of the court stated that it is "the nature of the act taken as a whole" that determines whether a crime has occurred. 26 M.J. at 608. See also *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988); *United States v. Sadinsky*, 34 C.M.R. 343, 346 (C.M.A. 1964) ("the critical inquiry ... was whether the act was palpably and directly prejudicial to the good order and discipline of the service").

<sup>33</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(c)(1)(B) [hereinafter MCM, 1984] provides that the maximum punishment for offenses not specifically listed in the Manual will be determined *inter alia* by the maximum punishment for a closely related offense that is listed.

<sup>34</sup> MCM, 1984, Part IV, para. 87.

<sup>35</sup> Benchbook, para. 3-156.

<sup>36</sup> Both the Manual and the Benchbook provide that the liberties must be taken in the physical presence of the child. This requirement is more likely a restatement of law and not an attempt to prescribe an element.

<sup>37</sup> Possibly these acts constituted an attempt to commit indecent liberties with a minor in violation of article 80. *Cf.* *United States v. Presto*, 24 M.J. 350 (C.M.A. 1987); *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987).

<sup>38</sup> *United States v. Jackson*, 12 M.J. 163, 166-67 (C.M.A. 1981). See also *United States v. Staten*, 6 M.J. 275 (C.M.A. 1979); *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979); *United States v. Clark*, 2 C.M.R. 107 (C.M.A. 1952).



*States v. Wilson*.<sup>39</sup> After an initial violent confrontation, the accused departed, obtained a bunk adaptor, and returned to the scene. He then struck the victim with the bunk adaptor. The victim died, and the accused was tried for premeditated murder.

During the article 39a<sup>40</sup> session on instructions, the defense requested instructions on the lesser included offense of involuntary manslaughter, claiming the accused did not have the intent to kill or do great bodily harm. The judge inquired whether the defense meant involuntary manslaughter "by culpable negligence," and the defense answered affirmatively. The judge then stated that the evidence did not raise any issue of culpable negligence, and he refused to instruct on involuntary manslaughter. The court reversed, holding that although the evidence did not raise any issue of culpable negligence, the evidence did raise the issue of whether the accused acted with the intent to kill or commit great bodily harm. Because the accused's intent was in issue, the evidence raised the question of whether the accused killed while perpetrating an offense directly affecting the person.<sup>41</sup> Accordingly, the lesser included offense of involuntary manslaughter was raised by the evidence, but on a theory other than culpable negligence. Because no instruction on this offense was given, the conviction could not stand.<sup>42</sup>

#### Defenses

In *United States v. Taylor*,<sup>43</sup> a case that initially appears to have significance only to the accused, the Court of Military Appeals took the opportunity to

reexamine the issue of when instructions on affirmative defenses are required.<sup>44</sup> The court found that there was a parallel between instructions on lesser included offenses and instructions on affirmative defenses, and the court determined that the requirements for instructions are the same.<sup>45</sup> Therefore, when some "evidence raising an affirmative defense to which a military jury may attach credit if it desires"<sup>46</sup> is presented, the military judge has a *sua sponte* duty to instruct on that defense. Moreover, the failure to instruct on such a defense is error that is not waived by the absence of a defense request for an instruction.<sup>47</sup>

The mistake of fact instruction was at issue in *United States v. Turner*.<sup>48</sup> The accused, an Army Captain, was charged *inter alia* with larceny of two automobile engines that were alleged to be military property. Essentially, the accused claimed that he obtained the engines from a PLL clerk at no cost,<sup>49</sup> stating that he was told that the engines were not military property and that he thought the clerk had authority to give him the engines. The military judge refused to give a defense requested mistake of fact instruction because the evidence did not show that the accused believed he was obtaining abandoned property. The court held that the judge erred because abandonment was not necessary to establish mistake.

The opinion is significant because it demonstrates that even if the evidence raising a defense is of dubious credibility,<sup>50</sup> as long as a panel can attach some credit to it, the judge must instruct on the defense.<sup>51</sup> In

<sup>39</sup> 26 M.J. 10 (C.M.A. 1988). See also *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988).

<sup>40</sup> UCMJ art. 39a.

<sup>41</sup> Voluntary manslaughter (UCMJ art. 119a) and all the forms of murder (UCMJ art. 118) that were in issue in this case require as an essential element that the accused have either the intent to kill (premeditated murder, unpremeditated murder) or the intent to commit great bodily harm (unpremeditated murder, voluntary manslaughter). An individual who unlawfully kills without having the intent to kill or commit great bodily harm may be convicted of involuntary manslaughter by culpable negligence (UCMJ art. 119(b)(1)), of involuntary manslaughter by killing while perpetrating certain offenses directly affecting the person (UCMJ art. 119(b)(2)), or of negligent homicide (UCMJ art. 134).

<sup>42</sup> The defense may, for tactical reasons, waive instructions on certain lesser included offenses. See *United States v. Pasha*, 24 M.J. 87, 91 (C.M.A. 1987); *United States v. Mundy*, 9 C.M.R. 130, 133-34 (C.M.A. 1953). See also *United States v. Johnson*, 49 C.M.R. 256 (A.C.M.R. 1974).

<sup>43</sup> 26 M.J. 127 (C.M.A. 1988).

<sup>44</sup> The alleged instructional defect in this rape case was the absence of an instruction on mistake of fact as to consent. The court held that no evidence reasonably raised the issue. *But cf.* *United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988).

<sup>45</sup> It is not a new idea that the tests for determining when lesser included offenses and affirmative defenses should be the subject of instructions are the same. The Court of Military Appeals stated the proposition in its first term. *United States v. Ginn*, 4 C.M.R. 45, 49 (C.M.A. 1952).

<sup>46</sup> *United States v. Simmelkjaer*, 40 C.M.R. 118, 122 (C.M.A. 1969).

<sup>47</sup> Left unanswered by this and other decisions of the Court of Military Appeals is the question of whether an accused may, for tactical reasons, request that certain affirmative defenses technically raised by the evidence *not* be instructed on. Since the tests for determining when to instruct on lesser included offenses and affirmative defenses are similar and have common statutory roots, UCMJ art. 51(c), it would appear that an accused should be able to waive such instructions—at least to the same extent that he may waive instructions on lesser included offenses. See *supra* note 42.

<sup>48</sup> 27 M.J. 217 (C.M.A. 1988). See generally *Benchbook*, para. 5-11.

<sup>49</sup> The engines were installed in the accused's van. After the first replacement engine was installed, it failed and a second engine replaced it. The accused acknowledged that it would have cost between two and three thousand dollars to have one engine replaced by AAFES. The accused stated he paid 1100 Deutsch Marks for labor to the individuals who installed the engines.

<sup>50</sup> *Turner*, 27 M.J. at 222 (Cox J., concurring).

<sup>51</sup> See *United States v. Stewart*, 43 C.M.R. 140, 145 (C.M.A. 1971); *United States v. Bermudez*, 47 C.M.R. 68, 72 (A.F.C.M.R. 1973).

essence, the issue of credibility is a decision for the members.

In *Mathews v. United States*<sup>52</sup> the Supreme Court considered the requirement for an entrapment instruction when the accused denies some of the elements of the crime charged. Mathews, a government official, was indicted for bribery.<sup>53</sup> He claimed that although he accepted money from a government contractor, it was a personal loan unrelated to his government position. He wanted his attorney to argue that if the jury found that he had the intent to commit the crime, then they should consider whether he was entrapped.

The trial and appellate courts ruled that entrapment could not be asserted and that no entrapment instruction would be given as long as the accused denied the elements of bribery. The Supreme Court reversed, holding that it is not necessary to admit the elements of the underlying crime in order to be entitled to an entrapment instruction. Moreover, "as a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."<sup>54</sup> The holding is sound and consistent with military law. The evidence determines the necessity for instructions. As long as the evidence raises an issue as to a recognized defense, an instruction must be given.<sup>55</sup> In *United States v. Eckhoff*<sup>56</sup> the Court of Military Appeals joined the Army,<sup>57</sup> Navy-Marine Corps,<sup>58</sup> and Air Force<sup>59</sup> Courts of Military Review in holding that it is error to give an instruction that declares that a profit motive vitiates an entrapment defense.

## Evidence

In *United States v. Thomas*,<sup>60</sup> a case tried prior to the effective date of the Military Rules of Evidence,<sup>61</sup> the Court of Military Appeals declared that evidence of uncharged misconduct that is inextricably related in time and place to the offense charged need not be the subject of sua sponte limiting instructions. The court also held, however, that when admissible uncharged misconduct is not so related, "the judge has some obligation to give an instruction on [uncharged misconduct,] at least in the absence of a defense request to the contrary."<sup>62</sup>

In *United States v. McIntosh*<sup>63</sup> the Court of Military Appeals, without referring to *Thomas*, applied the *Thomas* rule. The accused was charged with graft. The government presented counseling statements that referred to letters of indebtedness pertaining to the accused.

The court opined that the counseling statements were admissible to show that the accused was placed in a position where he needed to raise money in order to prevent adverse command action and they therefore portrayed a motive for the offense. The court determined that the statements could not be used as evidence of the accused's indebtedness. An instruction limiting the use of the statements was required. Because no such instruction was given,<sup>64</sup> the court found error.

The court did not make any reference to Military Rule of Evidence 105,<sup>65</sup> which requires military judges, upon request, to instruct on the limited purpose of evidence. Apparently, the court is determined to maintain at least some responsibility for the military judge to raise the issue sua sponte rather than placing the full responsibility on the defense counsel.<sup>66</sup>

<sup>52</sup> 108 S. Ct. 883 (1988).

<sup>53</sup> 18 U.S.C. § 201(g) (1982).

<sup>54</sup> *Mathews*, 108 S. Ct. at 887.

<sup>55</sup> The defendant's position was not totally inconsistent. Even if it was, the necessity for instructions would remain. Although an accused might be entitled to instructions on inconsistent defenses, the attorney and client who advocate inconsistent positions are almost ensuring a conviction. For example, alibi and self-defense may be raised by the evidence. Advancing and advocating both defenses in the same case, however, would inevitably lead to the conclusion that the defense lacks credibility. Thus, even though the defense has a right to instructions on inconsistent defenses, the exercise of the right would almost surely result in a Pyrrhic victory. Accordingly, in most cases it is incumbent upon the defense counsel to present his case in such a way as to avoid inconsistent defenses—especially if the inconsistent defenses are based on inconsistent facts.

<sup>56</sup> 27 M.J. 142 (C.M.A. 1988).

<sup>57</sup> *United States v. Myers*, 21 M.J. 1007 (A.C.M.R. 1986).

<sup>58</sup> *United States v. Eckhoff*, 23 M.J. 875 (N.M.C.M.R. 1987). The Navy panel held that although the instruction was erroneous it did not rise to the level of plain error. See *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). The Court of Military Appeals found plain error and reversed.

<sup>59</sup> *United States v. O'Donnell*, 22 M.J. 911 (A.F.C.M.R. 1986).

<sup>60</sup> 11 M.J. 388 (C.M.A. 1981).

<sup>61</sup> The effective date of the Military Rules of Evidence was 1 September 1980. At least one court has opined that *Thomas* represents the law as it exists today. *United States v. Dagger*, 23 M.J. 594 (A.F.C.M.R. 1986).

<sup>62</sup> *Thomas*, 11 M.J. at 392.

<sup>63</sup> 27 M.J. 204 (C.M.A. 1988).

<sup>64</sup> From reading the opinion it is difficult to discern whether the instructional infirmity was a complete failure to address the uncharged misconduct or whether it was a failure to limit the counseling statements to the accused being placed in a position of needing to obtain money to avoid adverse command action.

<sup>65</sup> Mil. R. Evid. 105.

<sup>66</sup> See also *United States v. Billig*, 26 M.J. 744, 758 (N.M.C.M.R. 1988).

The instructional responsibility of the military judge when inadmissible evidence is presented was considered in *United States v. Evans*.<sup>67</sup> After admitting evidence of an out-of-court identification, the military judge properly determined that the evidence was hearsay and excluded it.<sup>68</sup> He instructed the members to disregard it, told them why it was inadmissible, and asked if the members had any questions about his instruction.<sup>69</sup> The court found that the instruction was sufficient, but stated that it would have been preferable to ask each member if he or she could follow the instruction and obtain an affirmative response from each member.

The court's preference is unsettling. It does not take into account the practical dynamics of a military courtroom. The military judge is looking at the members when he or she gives the curative instruction and then asks if they all understand. The judge can tell from the body language of the members whether his message is understood and accepted. If he discerns a problem, it should be expected that he will inquire further. Moreover, the accused and defense counsel are present. If they are not satisfied, it should be incumbent on them to ask for further relief. When they do not, appellate courts should presume the instructions were understood and followed.

Even more disquieting is the apparently open-ended requirement that the members be asked if they will follow the judge's instructions. The court does not explain why this special interrogation is created for this inadmissible evidence in this situation. Nor does the court explain why there is no requirement for individual questioning of court members as to whether they understand the elements, affirmative defenses, or the concept of reasonable doubt.

In sum, the court's preference for individual questioning of court members is unnecessary, and when viewed against the panoply of instructions not requiring such questioning, is inconsistent. The better course is to rely upon the good sense and presence of the military judge.

Curative instructions were considered in at least two other cases. In *United States v. Palumbo*<sup>70</sup> a CID agent

testified that the accused invoked his rights and declined to be interviewed. The military judge immediately instructed the members to disregard the statement, explained that it could not be considered for any purpose, and stated that the accused has a right to speak to an attorney. He also stated that the right to remain silent "protects and may be invoked by those completely innocent of an offense."<sup>71</sup> Finally, he obtained affirmative responses from the members that they understood and could follow his instructions. The instruction was held sufficient.<sup>72</sup>

A similar result was obtained on the same day in *United States v. Rath*.<sup>73</sup> The accused was charged with sodomy upon a minor. During the trial an expert witness opined that the alleged victim was truthful. The military judge instructed the members to disregard the testimony. The court held that the instruction was proper and sufficient.

In *United States v. McLaurin*<sup>74</sup> the Court of Military Appeals held that when identification is a primary issue in a case an instruction detailing factors to be considered on the issue of identification should be given if requested.<sup>75</sup> The court also approved the use of a model inter-racial identification instruction.<sup>76</sup>

Two Air Force cases during the last year analyzed the meaning of *McLaurin*. In *United States v. Conner*<sup>77</sup> two individuals of one racial group identified the accused, a member of another race, as the perpetrator of a larceny. The defense requested an inter-racial identification instruction but none was given. The court reversed, holding that when such an instruction is asked for, it must be given. This is so even where the evidence indicates an immediate and unequivocal identification of the accused.

The meaning of identification was discussed in *United States v. Beaver*.<sup>78</sup> There the victim initially identified her assailant as a black man named Keith, 5'9" tall, and weighing 190 pounds. At trial, nine months later, she identified the accused as the assailant, although he was 6'3" tall, weighed over 210 pounds, and his friends claimed he used the name Philly.<sup>79</sup> The identification

<sup>67</sup> 27 M.J. 34 (C.M.A. 1988).

<sup>68</sup> An FBI agent testified that Karen Cobb identified the accused prior to trial. This evidence would have been admissible and non-hearsay under Mil. R. Evid. 801 (d)(1) if, as proffered by the government, Karen Cobb would have testified with respect to the identification. After admitting the FBI agent's identification testimony it was determined that Karen Cobb would not testify. At that point the FBI agent's testimony became inadmissible hearsay.

<sup>69</sup> The instruction is set out in the opinion. *Evans*, 27 M.J. at 38.

<sup>70</sup> 27 M.J. 565 (A.C.M.R. 1988).

<sup>71</sup> *Id.* at 568.

<sup>72</sup> See also *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987).

<sup>73</sup> 27 M.J. 600 (A.C.M.R. 1988).

<sup>74</sup> 22 M.J. 310 (C.M.A. 1986).

<sup>75</sup> A model instruction is set out in the appendix to the opinion. *Id.* at 313-14.

<sup>76</sup> A model instruction is set out in a footnote. *Id.* at 312-13, n.2.

<sup>77</sup> 26 M.J. 674 (A.F.C.M.R. 1988).

<sup>78</sup> 26 M.J. 991 (A.F.C.M.R. 1988).

<sup>79</sup> The accused's first name is Keith.

issue was strongly litigated. The military judge instructed that identification had to be proven beyond a reasonable doubt and that the identification should be considered in view of the opportunity to observe, the passage of time, and other factors. The judge refused to give a defense requested instruction that highlighted the inconsistent descriptions and called identification the most important issue in the case.

The court affirmed, holding that, for instruction purposes, a description of an assailant is not an identification of the individual. Accordingly, no *McLaurin* type identification instruction was required. Further, the court found that the instructions adequately covered the identification issue and opined that it would have been improper to instruct that identification was the most important issue in the case.

#### Procedure

In *United States v. Shroeder*<sup>80</sup> the accused was convicted of felony murder,<sup>81</sup> which is punishable by a mandatory life sentence. On appeal he argued that because the Code<sup>82</sup> and the Manual<sup>83</sup> required that at least three-quarters of the members concur in the sentence, he could not be convicted unless at least three-quarters of the members concurred in the findings of guilty. Thus, he argued the military judge erred when he instructed that only two-thirds of the members need concur in a finding of guilty.

The court rejected the argument and held that "the language of the Code and of the Manual is clear and in all cases requires only a two-thirds vote to convict--unless a death sentence is mandatory or, if not mandatory, is actually adjudged."<sup>84</sup>

In *United States v. Santiago-Davila*<sup>85</sup> the military judge gave instructions on the offenses, defenses, and other matters and then permitted counsel to present final argument.<sup>86</sup> The court noted the procedural aberration with a footnote that referred to Rule for Courts-Martial 920. That rule requires that instructions on findings be

given after argument by counsel. Although the reference by the court is enigmatic, the most reasonable interpretation is that the court prefers that judges follow the Manual and instruct on findings after argument by counsel.<sup>87</sup>

#### Sentencing

The effect of a punitive discharge instruction has been the subject of much recent attention. The standard instruction provides that a punitive discharge is a severe punishment that deprives the individual of substantially all veterans and service benefits.<sup>88</sup> In *United States v. Soriano*<sup>89</sup> the Court of Military Appeals held that it was error to instruct that a punitive discharge was anything less than a severe punishment. Later, an Air Force Court of Military Review panel held that it was proper to distinguish the effects on veteran's benefits of a bad conduct discharge adjudged by a special court-martial from that imposed by a general court-martial.<sup>90</sup> Thus, it held that it was proper to instruct that the agency concerned decides if it will award benefits to an individual who receives a bad-conduct discharge adjudged by a special court-martial.<sup>91</sup>

Subsequently, an Army panel<sup>92</sup> held that, at a general court-martial, it was error to instruct that a bad conduct discharge deprives the recipient "of many benefits administered by the Veterans Administration and the Army establishment."<sup>93</sup> It stated that the effect of a bad conduct discharge adjudged by a general court-martial is essentially the same as that of a dishonorable discharge. Therefore, a correct instruction states that either punitive discharge deprives the individual of *substantially all* benefits.

Six months later a sister panel of the Army Court<sup>94</sup> held that a completely new look must be given to the standard instruction. It determined that the loss of veterans benefits ensuing from a punitive discharge only applies to the benefits accruing for the term of service from which discharged.<sup>95</sup> Thus, there is no loss of

<sup>80</sup> 27 M.J. 87 (C.M.A. 1988).

<sup>81</sup> UCMJ art. 118(4).

<sup>82</sup> UCMJ art. 52 (b)(2).

<sup>83</sup> R.C.M. 1006 (d)(4)(B).

<sup>84</sup> *Shroeder*, 27 M.J. at 90-91.

<sup>85</sup> 26 M.J. 380 (C.M.A. 1988).

<sup>86</sup> Presumably, the military judge gave the procedural instructions for deliberations and voting after closing arguments.

<sup>87</sup> Article 36, UCMJ, authorizes the President to promulgate rules of trial procedure. R.C.M. 920 is such a rule, and absent unusual circumstances the military judge is not permitted to deviate from its requirements.

<sup>88</sup> Benchbook, para. 2-37.

<sup>89</sup> 20 M.J. 337 (C.M.A. 1985).

<sup>90</sup> *United States v. Hopkins*, 25 M.J. 671 (A.F.C.M.R. 1987).

<sup>91</sup> The pertinent portion of the instruction is set out in the opinion. *Id.* at 672-73.

<sup>92</sup> *United States v. Harris*, 26 M.J. 729 (A.C.M.R. 1988).

<sup>93</sup> *Id.* at 734 (emphasis added).

<sup>94</sup> *United States v. Lenard*, 27 M.J. 739 (A.C.M.R. 1988).

<sup>95</sup> See 38 U.S.C. § 3103 (1982).

veterans benefits from any prior term of service for which the accused received a discharge under honorable conditions. Consequently, the panel suggested that a new standard instruction be drafted that indicates the limitation on the loss of benefits.<sup>96</sup>

In *United States v. Wheeler*<sup>97</sup> the Court of Military Appeals was disturbed that despite evidence reflecting the twenty year career of the accused, the sum total of the sentencing instructions covered only the maximum punishment and the mechanics of voting. Because it found the instructions to be grossly deficient, it attempted to present a "definitive approach to the issue of the law officer's responsibility."<sup>98</sup> The court required "the law officer to delineate the matters which the court-martial should consider in its deliberations."<sup>99</sup> Thus, the law officer had a duty "to tailor his instructions on the sentence to the law and the evidence."<sup>100</sup> The court recommended that the instructions refer to the need to consider the background and character of the accused, his record in the service for good conduct and efficiency and other traits that characterize a good soldier, the plea of guilty, and other matters.<sup>101</sup>

The message of *Wheeler* was to some extent clear—the sentencing instructions must give specific guidance. The opinion was ambiguous, however, with respect to one instructional matter. There was no actual statement directing the law officer to marshal and summarize the specific evidence. Subsequently, in its official publications, the Army took the position that such marshaling of the evidence was necessary. The 1969 Military Judges' Guide stated that military judges will specify the relevant evidence.<sup>102</sup> Later, the Benchbook indicated the type of evidence the military judge "may summarize."<sup>103</sup> Despite this guidance, the issue ambiguously left open in *Wheeler* remained unresolved.<sup>104</sup>

In *United States v. Smith*<sup>105</sup> the Army Court of Military Review attempted to provide the answer. The accused pleaded guilty to rape and presented evidence that he was intoxicated when he committed the crime. The military judge refused a defense request that he

instruct that intoxication was a mitigating factor. Moreover, he did not "tailor that portion of his instruction to identify specific matters that the members should consider in deciding on a sentence."<sup>106</sup>

The court expressed its strong preference that the instructions be tailored to the evidence and assumed without deciding that the failure to give the requested instruction was error. Nevertheless, based on all the evidence, it found no grounds to reverse.

The court's decision is a mixed blessing. Its preference that the instructions specifically mention the evidence that should be considered is welcome. It is unwise, however, to combine an instruction stating that intoxication is a mitigating factor into a requirement for tailoring the instructions, i.e. marshaling and summarizing the evidence. Tailoring the evidence to instruct that the members should consider that the accused was under the influence of alcohol at the time of the incident should be required. It is not "tailoring," however, to draw a legal and factual conclusion that being intoxicated is mitigation. Whether that evidence is mitigating or even aggravating is for the members to decide. Notwithstanding the unfortunate confusion of the defense requested instruction with the concept of tailoring, the opinion clearly sets forth guidance for military judges. Marshaling and summarizing the evidence is proper and preferred.

*United States v. Wilson*<sup>107</sup> presented another facet of the concept of tailoring. The accused was charged with premeditated murder. He defended on self-defense and was convicted of unpremeditated murder. During sentencing the defense requested an instruction indicating the members could consider evidence of provocation. The judge denied the request stating it would be an invitation to reopen the findings. The Court of Military Appeals disagreed. It held that provocation not amounting to a defense is a proper matter to consider on sentencing and that the requested instruction should have been given.<sup>108</sup>

<sup>96</sup> *Lenard*, 27 M.J. at 740 n.1. The court did not submit its own instruction.

<sup>97</sup> 38 C.M.R. 72 (C.M.A. 1967).

<sup>98</sup> *Id.* at 74.

<sup>99</sup> *Id.* at 75.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 76.

<sup>102</sup> Dep't of Army, Pam. 27-9, Military Judges' Guide, para. 8-5 (May 1969).

<sup>103</sup> Benchbook, para. 2-37. In *Wheeler* the court cited Dep't of Army, Pam. 27-9, Military Justice Handbook, the Law Officer, Appendix XXXIII (April 1958), as a model for tailoring sentence instructions. The model instruction neither required nor suggested that the evidence be marshaled or summarized.

<sup>104</sup> The Manual for Courts-Martial is similarly ambiguous. See R.C.M. 1005(e)(4) discussion.

<sup>105</sup> 25 M.J. 785 (A.C.M.R. 1988).

<sup>106</sup> *Id.* at 789.

<sup>107</sup> 26 M.J. 10 (C.M.A. 1988).

<sup>108</sup> This case differs from *Smith* in several ways. First, provocation is always a mitigating factor. The extent to which it is mitigating depends on the weight given to the evidence by each individual court member. Intoxication, while at times mitigating, can also be an aggravating factor. Whether it is mitigating or aggravating is a matter for the members to decide. It is not a legal question for the judge. Second, unlike the instruction proposed in *Smith*, the requested instruction did not put a label on the evidence.

In *United States v. Fisher*<sup>109</sup> the Court of Military Appeals held that the failure to give the effect of a guilty plea instruction is not error unless the instruction is requested. In *United States v. Williams*<sup>110</sup> the Army Court of Military Review opined that where the accused pleads guilty after the last prosecution witness testifies, he is not entitled to the instruction even if requested.<sup>111</sup>

Instructions relating to the collateral consequences of a particular sentence concerned the court in *United States v. Griffin*.<sup>112</sup> The accused, a Technical Sergeant (E-6), was convicted of a rape committed while he was on terminal leave pending retirement. The trial counsel requested that the court be instructed that if the accused is reduced, but not given a punitive discharge, his retirement pay will be calculated at the pay grade from which he was reduced.<sup>113</sup> The defense did not object and the instruction was given.<sup>114</sup> A number of other questions relating to retirement were asked by the members.<sup>115</sup> Ultimately, the military judge instructed that determinations concerning retirement would be made by the Secretary of the Air Force. On appeal the accused claimed that it was error to give the requested instruction concerning retired pay.

Initially, the court affirmed its long standing rule that court members should not concern themselves with the collateral consequences of a sentence.<sup>116</sup> When the issue arises it is proper to instruct that the subject is not germane to sentence deliberations. If the accused agrees, however, the members may be informed of some collateral consequences. The court noted that the defense did not object to the trial counsel's requested instruction, and noted that neither the trial counsel nor the defense counsel objected to the member's questions or the judge's responses. Moreover, the effect of a sentence on

retirement benefits is a direct, not a collateral, consequence of a sentence. Additionally, during his argument the defense counsel referred to the effect of a punitive discharge upon retirement benefits. Finally, the court stated that unless it is plain error, an error in sentence instructions is waived in the absence of an objection. The court found that the instructions did not constitute plain error and affirmed.

The holding of the case is that the instructions did not constitute plain error. All the judges<sup>117</sup> agreed, however, that the effect of a sentence on retirement benefits is a direct not a collateral consequence and may be the subject of instructions. Nevertheless, trial judges should be extremely careful when giving such instructions.<sup>118</sup>

Six months later, in *United States v. Murphy*,<sup>119</sup> Judge Cox, who wrote the Court's opinion in *Griffin*, stated that the earlier case held that "an accused should be sentenced without regard to the collateral administrative consequences of the sentence in question."<sup>120</sup> Accordingly, it was proper to refuse to admit an extract of an Air Force regulation governing eligibility for entry into a retraining unit.<sup>121</sup>

Similarly, it is improper to instruct the members concerning the effect of service regulations on eligibility to remain on active duty. In *United States v. Walk*<sup>122</sup> the military judge instructed concerning a witness who testified that service regulations directed that individuals involved with drugs be separated.<sup>123</sup> The judge attempted to clarify the testimony. He instructed that such an individual is not generally retained in the service and that the members should rely on their own understanding of the regulation and not upon that of the witness. Finally, he offered to procure a copy of the regulation for the members.<sup>124</sup>

<sup>109</sup> 21 M.J. 327 (C.M.A. 1986).

<sup>110</sup> 26 M.J. 644 (A.C.M.R. 1988).

<sup>111</sup> The instruction was not requested.

<sup>112</sup> 25 M.J. 423 (C.M.A. 1988).

<sup>113</sup> See 10 U.S.C. § 1401a(f) (1982). Arguably such an instruction would have a tendency to encourage members to give a punitive discharge as part of the sentence in order to insure a permanent effect on retirement benefits. The Code has now been amended by the National Defense Authorization Act for Fiscal Year 1989, to provide that if an individual is reduced by a sentence of a court-martial, the computation of retired pay will be based on the grade in which the individual is retired.

<sup>114</sup> The instruction is set out in the opinion. *Griffin*, 25 M.J. at 424.

<sup>115</sup> The questions are set out in the opinion. *Id.*

<sup>116</sup> See *United States v. Quesinberry*, 31 C.M.R. 195 (C.M.A. 1962). See also *United States v. Black*, 24 M.J. 600 (A.F.C.M.R. 1987); *United States v. Noonan*, 21 M.J. 763 (A.F.C.M.R. 1986).

<sup>117</sup> Judge Cox wrote the opinion in which Judge Sullivan concurred. Chief Judge Everett concurred in the result and stated, "In my view, it is quite appropriate for the sentencing authority ... to consider the collateral consequences of various sentencing alternatives. Therefore, it is permissible for a judge to instruct on these consequences." 25 M.J. at 425.

<sup>118</sup> See *Griffin*, 25 M.J. at 424, 425.

<sup>119</sup> 26 M.J. 454 (C.M.A. 1988).

<sup>120</sup> *Id.* at 457.

<sup>121</sup> Under the applicable regulations an accused could not have been sent to the Air Force retraining squadron if he had more than 18 months of approved confinement remaining to be served.

<sup>122</sup> 26 M.J. 665 (A.F.C.M.R. 1987).

<sup>123</sup> The witness testified concerning the accused's potential for rehabilitation. See R.C.M. 1001(b)(5).

<sup>124</sup> The instruction is set out in the opinion. *Walk*, 26 M.J. at 665-66.



The court reversed. It held that it was error to introduce command policies regarding the appropriateness of sentence into a court-martial<sup>125</sup> and that the error is compounded when the introduction is in the form of instructions.<sup>126</sup>

In *United States v. Onart*<sup>127</sup> the court summarily held that it was error to instruct that monetary penalties were more severe than confinement. All instructions must be given on the record in open court. Accordingly, when the president exits the deliberation room during delibera-

tions and asks if a general discharge may be adjudged, it is improper to answer, even when the accused and counsel are present.<sup>128</sup>

In *Lowenfield v. Phelps*<sup>129</sup> the Supreme Court held that a hung jury instruction that tells the jury members to consider the views of the other members is neither coercive nor improper.<sup>130</sup> The instruction is very similar to the Benchbook instruction,<sup>131</sup> and there is strong authority for the legal sufficiency of that instruction.

<sup>125</sup> See *United States v. Allen*, 43 C.M.R. 157 (C.M.A. 1971); *United States v. Estrada*, 23 C.M.R. 99 (C.M.A. 1957); *United States v. Fowle*, 22 C.M.R. 139 (C.M.A. 1956); *United States v. Myers*, 14 M.J. 527 (A.F.C.M.R. 1982).

<sup>126</sup> It is also error to instruct that it is against Air Force policy to adjudge forfeitures in an amount between two-thirds pay per month and total forfeitures. *United States v. Myers*, 25 M.J. 573 (A.F.C.M.R. 1987).

<sup>127</sup> 26 M.J. 315 (C.M.A. 1988).

<sup>128</sup> *United States v. Higerd*, 26 M.J. 848 (A.C.M.R. 1988). The military judge correctly answered in the negative and the appellate court properly determined that no prejudice occurred.

<sup>129</sup> 108 S. Ct. 546 (1988).

<sup>130</sup> The instruction is set out in the opinion. *Id.* at 549.

<sup>131</sup> Benchbook, para. 2-57.

### Government Appellate Division Note

#### "In His Opinion"—A Convening Authority's Guide to the Selection of Panel Members

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#### Introduction

The selection of court members involves two primary areas of consideration: 1) the nominating process, and 2) detailing by the convening authority. The focus of this article is on the detailing of court members by the convening authority.<sup>1</sup>

Article 25(d)(2) of the Uniform Code of Military Justice (UCMJ)<sup>2</sup> governs the convening authority's discretion with respect to panel selection. Article 25(d)(2) states that "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, *in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."<sup>3</sup>

The words "in his opinion" imply that the selection of a panel is committed to the sound discretion of the convening authority. Moreover, the Army Court of Military Review in *United States v. Cunningham*<sup>4</sup> held that the acts of a convening authority in the selection of court members are accorded a presumption of legality, regularity, and good faith, and also held that the burden of establishing an improper selection is on appellant. In *United States v. Hodge*<sup>5</sup> the court said that in order to overcome the presumption, the appellant must show by clear and convincing evidence that the convening authority violated article 25, UCMJ. Given the presumption of regularity and the amount of evidence needed by appellant to overcome that presumption, how can a convening authority go wrong?

<sup>1</sup> A model procedure to select court members is described in Schwender, *One Potato, Two Potatoes . . . A Method to Select Court Members*, *The Army Lawyer*, May 1984, at 12. For a discussion of defense challenges arising from SJA involvement in the selection of court members, see Teller, *Issues Arising From Staff Judge Advocate Involvement in the Court Member Selection Process*, *The Army Lawyer*, Feb. 1988, at 47. A discussion of defense challenges to the court member selection process is contained in Morgan, *Best Qualified or Not? Challenging the Selection of Court-Martial Members*, *The Army Lawyer*, May 1987, at 34.

<sup>2</sup> Uniform Code of Military Justice art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982) [hereinafter UCMJ].

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> 21 M.J. 585, 586 (A.C.M.R. 1985); *pet. denied*, 22 M.J. 275 (C.M.A. 1986).

<sup>5</sup> 26 M.J. 596, 599 (A.C.M.R. 1986).

As a general rule, the application of improper criteria—criteria other than those contained in article 25—is absolutely prohibited, and the courts will carefully scrutinize panel selections to determine whether they were made to obtain members “best qualified for the duty” or for some other reason. The only exception to this general rule is the cross-section representation principle, which is a court-created exception that allows convening authorities to appoint black and female panel members in order to achieve panel compositions that more closely represent the racial and sexual composition of the military community.<sup>6</sup>

### Applying Article 25 Criteria

Strict application of article 25 criteria (age, education, training, experience, length of service, and judicial temperament) can result in selection of panels comprised, mainly or entirely, of senior ranking panel members. Convening authorities can easily justify the selection of such members by stating that they are best qualified to serve by reason of any or all of the article 25 criteria. Naturally, this result engenders the contrary argument that the senior, well educated members are more likely to impose heavier punishments than young, less educated court members, and, therefore, convening authorities who select senior ranking panel members are

doing so in order to “pack” the court and thereby aid the prosecution. The military appellate courts have been unwilling to entertain such speculation on the social psychology of such panels. Instead, the courts have chosen to look at the intent of the convening authority in selecting senior ranking members, and they have upheld selections that are based upon the criteria contained in article 25, UCMJ.<sup>7</sup>

Although the selection of senior ranking panel members was upheld when it was based upon the criteria contained in article 25, UCMJ, the court rejected both a fixed policy to exclude certain ranks from court membership<sup>8</sup> and the selection of senior ranking panel members in order to obtain a court membership that is more favorable to the prosecution.<sup>9</sup>

### Applying the Cross-Section Representation Exception to Article 25 Criteria

The “cross-section representation” exception to article 25 was created to allow convening authorities to select panels more representative of the racial and sexual composition of the military community, should they so desire.<sup>10</sup> This “representation” requirement is found in the sixth amendment of the United States Constitution and requires that civilian juries be drawn from a representative cross-section of the community.<sup>11</sup>

<sup>6</sup> See *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964) (The convening authority purposely selected a black panel member in a case where the accused was black. The court upheld the selection over a defense challenge that was based on the right to equal protection of the laws guaranteed by the fifth amendment of the United States Constitution. The court found no violation of the fifth amendment where there is purposeful inclusion of a racial minority on a jury and stated that the fifth amendment protects against purposeful exclusion.); see also *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (The court held that if appellant were a female whose case had been referred for trial and the convening authority had appointed female members, the rationale of *Crawford* would apply.).

<sup>7</sup> See *Crawford*, 35 C.M.R. at 12 (The court found it to be permissible for the convening authority to refer first to the ranks of senior noncommissioned officers for prospective enlisted court members where it was established that the only purpose in looking to the senior noncommissioned ranks was to obtain persons possessed of proper qualifications to judge and sentence an accused, and there was no evidence of any desire or intention to exclude any group or class on irrelevant, irrational, or prohibited grounds.); see also *United States v. Green*, 43 C.M.R. 72 (C.M.A. 1970) (The court upheld the selection of senior commissioned officers.); *United States v. Cunningham*, 21 M.J. 585, 587 (A.C.M.R. 1985) (The court upheld the legitimacy of selecting panel members in leadership positions, stating that “the preference for and the intentional inclusion of those in leadership positions as court members did not invalidate the selection process.”); *United States v. Carman*, 19 M.J. 932 (A.C.M.R. 1985). The *Carman* court stated:

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

*Id.* at 936.

<sup>8</sup> *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (A fixed policy to exclude all lieutenants and warrant officers from selection for membership on a general court was rejected.). The evidence established that the convening authority had a fixed policy to exclude all lieutenants and warrant officers from selection for membership on a general court-martial. The evidence further establishes that members were selected not because they actually possessed the qualities enumerated in Article 25(d)(2) but solely because they had the senior rank deemed desirable for a particular court-martial. As the evidence shows, requests for members were made “in terms of numbers and grade.” When a subordinate commander was asked to submit a nominee, he was not advised to screen the nominee for the statutory qualifications; nor did the staff judge advocate advise the convening authority of those qualifications when the nominee's name was submitted to him for appointment to a court-martial.

*Id.* at 141.

<sup>9</sup> *United States v. McLain*, 22 M.J. 124 (C.M.A. 1986) (The case was reversed where the selection of a panel consisting of senior ranking members was made with a view towards obtaining a court membership less disposed to lenient sentences.). The court stated:

One such prohibited purpose is to provide a court-martial membership that will achieve a particular result as to findings or sentence. In this case, the exclusion of lower rank enlisted members as well as the replacement of junior officer members were done in order to obtain a court membership less disposed to lenient sentences. This purposeful conduct was inconsistent with the spirit of impartiality contemplated by Congress in enacting Article 25 of the Code and with the limitation on command influence contained in Article 37.

*Id.* at 132.

<sup>10</sup> *United States v. Santiago-Davila*, 26 M.J. 380, 389 (C.M.A. 1988) (There is no requirement that a court-martial panel be representative. In fact, article 25 contemplates that a court-martial panel will not be a representative cross-section of the military population.).

<sup>11</sup> *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

The Court of Military Appeals held in *United States v. Crawford*<sup>12</sup> that a convening authority might use a criterion not specified by article 25, UCMJ, in order to have a more representative panel. The second case that suggested that a convening authority might use such a criterion is *United States v. Smith*,<sup>13</sup> which involved the selection of female panel members in a "sex case." The Court of Military Appeals found constitutional error because the convening authority's stated "predilection"<sup>14</sup> toward ensuring that female court members sit on cases involving males accused of sex crimes was found to be improperly motivated by an intent to "achieve a particular result as to findings or sentence," rather than to provide the accused or other males accused of sex crimes with a more representative court-martial panel.<sup>15</sup> In *Smith* the "unique experience" of females was *only* relevant in cases involving sex offenses.<sup>16</sup> Such intent to manipulate the court-martial process is prohibited.

While rejecting the purposeful selection of female panel members under those facts, the court stated that "if appellant were a female whose case had been referred for trial and the convening authority had appointed female members" such selection would be upheld.<sup>17</sup>

#### The Appearance of Impropriety

The courts have found prejudice even when there is only the *appearance* that a convening authority is selecting the members to favor the prosecution.<sup>18</sup> Officer panels and standing enlisted panels are easy targets for a claim of "appearance of impropriety," particularly where many senior ranking members have been selected or where a narrow range of rank is represented. This is true even though article 25 does not require that all ranks be represented on a court-martial panel<sup>19</sup> and even though there is no requirement that a convening

authority choose a panel member from a certain rank within a certain time period.<sup>20</sup> Obviously, if court-martial panels have been selected prior to the referral of a particular case, the convening authority is less vulnerable to a claim of "handpicking."

#### A Practical Guide for Convening Authorities

Convening authorities must always be aware of the strong judicial aversion to any act that either appears to be motivated by an intent to manipulate the panel selection process in order to achieve results more favorable to the prosecution (i.e., more convictions, harsher sentences),<sup>21</sup> or that gives the appearance that members were handpicked to favor the prosecution.<sup>22</sup>

A summary of the case law discussed herein clearly establishes the following guidelines:

1. Selection of a panel comprised mainly or entirely of senior ranking members is permissible if the selection is made by strict application of article 25, UCMJ, criteria, *but* fixed policies to exclude certain ranks from court membership and the selection of senior ranking members with the intent to obtain a court membership less disposed to lenient sentences are prohibited.
2. The purposeful selection of black or female panel members in cases where an accused is black or female is permissible if it is made with the intent to select a more representative panel to try the accused, *but* the selection of black or female members in certain *categories* of cases will be viewed as an attempt to affect the outcome of the case and, therefore, is prohibited.

Although strict application of article 25, UCMJ, criteria may result in the selection of senior ranking panel members, such selections are not mandated by

<sup>12</sup> *Crawford*, 35 C.M.R. at 13; see also *supra* note 6.

<sup>13</sup> *Smith*, 27 M.J. at 249.

<sup>14</sup> *Id.* at 248.

<sup>15</sup> *Id.* at 249.

<sup>16</sup> *Id.* at 250.

<sup>17</sup> *Id.* at 249. See also *supra* note 6.

<sup>18</sup> See *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960) (Seven of the nine members of the court had primary duty assignments involving some aspect of crime prevention, detection, or control. One member stated he would apply a majority rule in weighing the testimony of expert witnesses as to the accused's mental responsibility. The president of the court, a lawyer, did not consider a plea of temporary insanity appropriate in a premeditated murder case and intervened during the voir dire examination of the court members to rehabilitate the testimony of a fellow member.) Cf. *United States v. Carman*, 19 M.J. 932 (A.C.M.R. 1985) (The court upheld the panel selection where leadership qualities were used to select court members. The court also noted "the failure of the voir dire or any other part of the trial record to reflect an inelastic attitude or lack of judicial temperament on the part of any court member.").

<sup>19</sup> See *Crawford*, 35 C.M.R. at 12 ("All enlisted persons may be eligible for membership on courts-martial, but not all enlisted ranks must, or for that matter can, be represented on any one court-martial.").

<sup>20</sup> See *United States v. James*, 24 M.J. 894 (A.C.M.R. 1987) (The accused failed to establish that the convening authority improperly selected court members, even though no lieutenants or warrant officers appeared as court members on any orders during the one year period that the convening authority had been in command. The court noted that some lieutenants and warrant officers had been nominated, considered, and selected as alternates.).

<sup>21</sup> See *McClain*, 22 M.J. at 131 (It is not the impact, but the intent behind the selection of court members that made the selection process incompatible with article 25.). See also *Smith*, 27 M.J. at 242 (The convening authority's action to include female court members on court-martial involving sexual misconduct was intended to achieve a particular result as to findings and sentence.).

<sup>22</sup> See *supra* note 16.

article 25, and all ranks must at least be considered for selection.

Although convening authorities may select black or female panel members to serve on cases where an accused is black or female, the sixth amendment does not require them to do so. The constitutional requirement that does apply is the right to equal protection of the laws.<sup>23</sup> Equal protection is a right that attaches to all accuseds, civilian and military alike. In the military context, equal protection prohibits a convening authority from purposely excluding soldiers from a court-martial panel because of their race, sex, national origin, age, or religious preference.

In practical terms, this means that "standing" officer and enlisted panels (panels selected in advance and usually for a specified term) are constitutionally acceptable. The selection of these "standing" panels must be based on the application of article 25 criteria to nominating lists from which no potential members were

excluded from consideration on improper grounds (i.e., rank, race, sex, national origin, age, or religious preference). Subsequent to the proper selection of such "standing" panels, there is no requirement for a convening authority to review the membership of a panel on a case-by-case basis and purposely change the composition thereof so that members of the same race or sex of an accused are represented on a particular court-martial.

### Conclusion

A proper selection process, in which a convening authority appoints members based solely upon the requirements of article 25, UCMJ, or upon a desire to make the panel more representative, is essential in maintaining a military justice system that is fair and equitable to all parties. Selections made by a convening authority that are based upon a sincere application of these standards will meet any challenge.

<sup>23</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

## Trial Counsel Forum

### Piercing the Judicial Veil: Judicial Disqualification in the Federal and Military Systems

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#### Introduction

Do prejudicial trials exist in today's "fair and just" society? Unfortunately, they do. Trial counsel can help minimize the problem by ensuring that the rules for disqualifying judges are properly followed. The Rules for Courts-Martial and the United States Code provide guidance concerning when judges should be required to

recuse themselves. In the military justice system Rule for Courts-Martial (R.C.M.) 902 governs the disqualification of military judges.<sup>1</sup> This rule requires military judges to disqualify themselves in proceedings in which the judge's impartiality might reasonably be questioned.<sup>2</sup> In the federal court system the applicable rules are 28 U.S.C. § 455 (Disqualification of Justice, Judge, or Magistrate) and 28 U.S.C. § 144 (Bias or Prejudice of Judge).<sup>3</sup>

<sup>1</sup> R.C.M. 902—Disqualification of Military Judge.

(a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accused, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

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

<sup>3</sup> 28 U.S.C. §§ 144, 455 (Supp. II 1984). Section 144 provides, in pertinent part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Section 455 provides:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Careful examination of these rules reveal that they almost mirror each other. Additionally, many states have adopted portions of the language found in 28 U.S.C. § 455.<sup>4</sup>

There is a plethora of case law on judicial disqualification in the military and federal systems. The two systems can be compared in three areas: 1) the disqualification of a judge who has a personal prejudice or bias towards the case at bar; 2) the disqualification of a judge based upon a previous association with the defendant's case; and 3) the disqualification of a judge whose previous legal employment could affect the outcome of the defendant's case.

#### Personal Bias or Prejudice: Military Law

R.C.M. 902(b) states:

A military judge shall . . . disqualify himself or herself . . . [if] the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.<sup>5</sup>

The military decisions discussing the disqualification of a judge for personal prejudice or bias are fact specific.<sup>6</sup> Many of the decisions regarding disqualification of military judges are decided under the veneer of R.C.M. 903, the rule on the accused's election of the composition of courts-martial.<sup>7</sup> Whether a judge is able to preside with members present will often hinge on whether the judge may sit at all. For that more basic question, R.C.M. 902 provides the answer.

One of the most recent cases pertaining to a judge's disqualification for prejudice or bias is *United States v.*

*Sherrod*.<sup>8</sup> In *Sherrod* the court convicted appellant of, *inter alia*, burglary, battery on a child under the age of sixteen, and indecent acts upon a child.<sup>9</sup> One of the burglaries occurred next door to the military judge's quarters, and the judge disclosed that he knew these neighbors. Furthermore, the judge's daughter had a close relationship with the young girl who was the victim of the indecent act. The judge had driven the girls to various places, including a ski trip.<sup>10</sup>

Counsel questioned the judge's view of this latter victim's credibility if she testified. The judge replied that he was "convinced in his own mind [he] would not attach any more significance to her testimony on any factors than [he] would to any other witness."<sup>11</sup> The accused made a fruitless challenge for cause against the military judge.

Despite that challenge, appellant felt so constrained to avoid a court-martial with members that he requested a trial by judge alone.<sup>12</sup> The judge denied the request, reasoning that the presence of members would dissipate any appearance of partiality, as the members would resolve the factual questions and the judge would determine the legal questions.<sup>13</sup>

The Army Court of Military Review held that the military judge erred when he failed to recuse himself from the case. The court concluded, however, that the appellant had not been prejudiced and affirmed appellant's conviction.<sup>14</sup> The Court of Military Review reasoned that there was no prejudice because of the professional and fair manner in which the military judge handled his judicial duties.<sup>15</sup>

(b) He shall also disqualify himself in the following circumstances:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
  - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
  - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) Is a party to the proceeding, or an officer, director, or trustee of party;
    - (ii) Is acting as a lawyer in the proceeding;
    - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
    - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

<sup>4</sup> Some states still have unique provisions for the disqualification of judges. See, e.g., N.Y. Jud. Law § 14 (McKinney 1983) and Cal. Civ. Proc. Code Ann. § 170 (West 1982).

<sup>5</sup> R.C.M. 902(b)(1).

<sup>6</sup> See, e.g., *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987).

<sup>7</sup> R.C.M. 903.

<sup>8</sup> *United States v. Sherrod*, 22 M.J. 917 (A.C.M.R. 1986), *rev'd*, 26 M.J. 30 (C.M.A. 1988).

<sup>9</sup> *Sherrod*, 22 M.J. at 917.

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

<sup>11</sup> *Id.* at 919.

<sup>12</sup> *Sherrod*, 26 M.J. at 30, 31.

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

<sup>14</sup> *Id.* at 31-32.

<sup>15</sup> *Sherrod*, 22 M.J. at 923.

The Court of Military Appeals agreed that the judge was disqualified under R.C.M. 902 because of the appearance of bias. The Court of Military Appeals disagreed with the Army court, however, on the issue of prejudice.<sup>16</sup> By deeming it prudent to sit with members, the trial judge demonstrated the ready appearance of bias. The Court of Military Appeals held that because the judge was disqualified under R.C.M. 902, the members could not provide an adequate safeguard against the bias.<sup>17</sup> The court said:

[W]e hold that when a trial judge is *disqualified*, all the judge's actions from that moment on are void—except for those immediately necessary to assure the swift and orderly substitution of judges. . . . If a judge is disqualified to sit as judge alone, he is also disqualified to sit with members.<sup>18</sup>

*Sherrod* makes interesting points, but it also raises interesting questions. The Court of Military Appeals decision indicates that judges apply different standards under R.C.M. 902 and R.C.M. 903. A judge who meets the criteria for disqualification under R.C.M. 902 can no longer preside over the case. The R.C.M. 902 criteria will, to some extent, "spill over" to the R.C.M. 903 determination. The court goes on to recognize, however, that in some cases a military judge, citing the interests of justice espoused by the commentary to R.C.M. 903, may deny the request for trial by judge alone, even though the judge is not required to recuse himself under R.C.M. 902. The court does not require the judge to apply the R.C.M. 902 criteria in reaching the R.C.M. 903 decision. Nevertheless, judges should not be allowed to use R.C.M. 903 as a tool to circumvent R.C.M. 902.

#### Personal Prejudice or Bias: Federal Case Law

Reviewing the federal case law regarding recusal of a judge for personal prejudice or bias reveals that it is also fact-specific. Federal decisions rely on 28 U.S.C. § 455 to decide whether a judge should be disqualified when the judge raises the issue *sua sponte*. Counsel may raise questions concerning recusal under 28 U.S.C. § 144 when the "judge before whom the matter is pending has a personal bias or prejudice either against himself or in favor of any adverse party."<sup>19</sup> Both sections concern themselves with the same basis for recusal. Case law in

either section provides insight into interpretation of the term "bias or prejudice."

In *United States v. Thompson* appellant was convicted of Selective Service violations.<sup>20</sup> The defense filed affidavits indicating that the judge had communicated to another attorney his bias toward cases involving violations of the Selective Service Act.<sup>21</sup> The bias pertained to a standard sentence that the judge imposed regardless of the extent or nature of the violation. At the trial the judge denied a motion for recusal.<sup>22</sup>

On appeal, the United States Court of Appeals for the Third Circuit looked at 28 U.S.C. § 144 to determine whether the judge's failure to recuse himself affected the accused's right to a fair trial.<sup>23</sup> Applying a reasonable man standard, the court held:

[W]e believe a reasonable man would conclude on the facts stated therein that the district judge had a special bias against defendant as one of those convicted of violating the Selective Service laws. The affidavit alleges the judge has stated he sentences all those convicted of violations of those laws to at least thirty months in jail no matter how "good" they are.<sup>24</sup>

In *United States v. Alabama*, a racial discrimination case involving the public education system in Alabama, the appellant challenged the judge under 28 U.S.C. § 144 and 28 U.S.C. § 455.<sup>25</sup> The defendant filed an affidavit asserting, *inter alia*, that Judge Clemons was prejudiced because of his representation of black plaintiffs in race discrimination actions. The judge denied the motion and presided over the case.<sup>26</sup>

The United States Court of Appeals for the Eleventh Circuit concluded that Judge Clemons' prior representation of plaintiffs in civil rights actions did not warrant disqualification. The United States Court of Appeals held that "a judge is not required to recuse himself merely because he holds and has expressed certain views on a *general* subject."<sup>27</sup> The United States Court of Appeals reasoned that all judges come to the bench with a variety of viewpoints and associations. Thus, Judge Clemons properly denied the recusal motion for personal bias or prejudice. The judge was disqualified, however, on other grounds.<sup>28</sup>

<sup>16</sup> *Sherrod*, 26 M.J. at 33.

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

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

<sup>19</sup> 28 U.S.C. § 144 (Supp. II 1984).

<sup>20</sup> *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973).

<sup>21</sup> *Id.* at 528.

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

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

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

<sup>25</sup> *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 2857 (1988).

<sup>26</sup> *Alabama*, 828 F.2d at 1539.

<sup>27</sup> *Id.* at 1543 (emphasis added).

<sup>28</sup> See *infra* text accompanying note 62.



## Comparison

Both the civilian and military system are fact-specific. The various factual settings prevent the establishment of clearly defined rules. Generally, the broadest statement that may be made is that both systems decide disqualification questions by a reasonable person standard.

### Judge's Previous Association with the Case: Military Law

Much of the military and federal case law discussing disqualification of judges involves situations where the judge has had some association with the defendant's case in a previous judicial proceeding. Generally, there is a heavier burden on the party moving for disqualification of a judge in these circumstances. The military case law strongly discourages the disqualification of judges involved in companion or co-accused cases. To illustrate the difficulty counsel may have in disqualifying a judge who presided over a companion or a co-accused's case, it is necessary to look at two recent cases.

In *United States v. Elzy* appellant requested a trial by judge alone.<sup>29</sup> The military judge disclosed the fact that he had presided as the judge in a co-accused's trial. In that proceeding the co-accused pleaded guilty to the charges, including a charge of conspiracy to distribute drugs. He named appellant as a co-conspirator.<sup>30</sup>

Would a reasonable person suspect partiality because of the judge's knowledge of the co-accused's case? In *Elzy* neither counsel challenged the judge. On appeal the appellant asserted that the judge should have recused himself *sua sponte*.<sup>31</sup> The Court of Military Appeals held that there were no allegations of personal bias and that the judge's failure to recuse himself did not result in prejudice.<sup>32</sup>

Recall the military and federal decisions discussing bias or prejudice. In those decisions the court applied a reasonable person standard. In decisions involving a judge's previous association with the case, the military courts found this standard unworkable. For the judge in *Elzy* to be disqualified, a reasonable person would have to believe that: 1) the judge had concluded there was a conspiracy; 2) the judge, having accepted the co-accused's plea, had concluded that he was truthful; and 3) the judge, therefore, formed an opinion. The military

courts, however, hold that knowledge gained by a judge in a judicial capacity does not require the judge to recuse himself. This is further illustrated in *United States v. Wiggers*.<sup>33</sup>

In *Wiggers* the defense made a timely challenge of the judge because he had received mendacious testimony from the co-accused in another trial. The judge denied the challenge, asserting:

[I]t does not promote judicial efficiency, nor the public image of our court-martial process, for me to recuse myself so that you can have another judge traveling a distance of at least 100 miles, from either Stuttgart or Nuernberg, the nearest location of another judge, in order for this case to proceed by judge alone.<sup>34</sup>

The United States Army Court of Military Review affirmed the judge's ruling. Because the military judge's determination that SPC Gomersall was mendacious was based upon what the judge *had heard in court* during SPC Gomersall's court-martial and was not based on any out-of-court knowledge of SPC Gomersall's truth and veracity, the judge's bias or prejudice was judicial, not personal, in nature.<sup>35</sup>

### Judge's Previous Association With the Case: Federal Law

In federal case law, like military case law, there is a heavy burden on the moving party to demonstrate the need for a judge to recuse himself because of his association with a companion case or other proceeding that may have an effect on the case at bar. Like *Wiggers*, the federal courts opine that testimony learned in a judicial proceeding is not grounds for a judge's disqualification. The premier example is *United States v. Giorgi*.<sup>36</sup>

*Giorgi* involved an arson-for-profit scheme and the submission of false claims. On the second day of trial the defense counsel entered the courtroom and found extra security measures.<sup>37</sup> The judge asserted that his decision to increase security measures was based on knowledge acquired during a previous plea hearing of the accused for the theft of some vans.<sup>38</sup> The defense challenged the impartiality of the judge, maintaining that the judge's actions demonstrated a judicial predisposition against the accused. The judge denied the challenge.<sup>39</sup>

<sup>29</sup> *United States v. Elzy*, 22 M.J. 640 (A.C.M.R. 1986), *aff'd*, 25 M.J. 416 (C.M.A. 1988).

<sup>30</sup> *Elzy*, 25 M.J. at 416, 419.

<sup>31</sup> *Id.* at 417.

<sup>32</sup> *Id.* at 419.

<sup>33</sup> *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987).

<sup>34</sup> *Id.* at 590.

<sup>35</sup> *Id.* at 592 (emphasis added).

<sup>36</sup> *United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988).

<sup>37</sup> After the noon recess, counsel returned to the courtroom and found that extra security measures, in addition to the usual metal detectors and x-ray machines, had been instituted. Guards stopped, frisked, and searched all those entering the courtroom. *Id.* at 1033.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1033.

The First Circuit acknowledged that the appearance of a fair and an impartial trial had demonstrable value. Because the trial judge's actions and opinion resulted from facts learned in a judicial proceeding, however, the judge properly denied the challenge.<sup>40</sup>

*United States v. Partin* further illustrates this point.<sup>41</sup> The judge heard seven separate, but related trials, with seven different accuseds. The defense maintained that it was improper for the same judge to preside over the separate trials of alleged co-conspirators. The trial judge ruled otherwise.<sup>42</sup>

The United States Court of Appeals for the Fifth Circuit agreed with the judge's decision not to recuse himself. That court indicated that a trial judge would be disqualified from presiding over a companion case only when personal bias was shown, notwithstanding the fact that the rules state that disqualification shall occur when impartiality "might" reasonably be questioned.<sup>43</sup>

Like the military courts, the federal courts find that the legislative intent and reasonable person standards are unworkable in cases involving knowledge gained in a judge's judicial capacity.<sup>44</sup>

### Reasoning

There may be practical reasons why the courts have been so inclined to make it harder to disqualify a judge who has presided over a co-accused's case. The most obvious reason is judicial economy. In many areas the court dockets are crowded and the number of judges available to hear cases is at a bare minimum.<sup>45</sup> The question remains, however, whether judicial economy is a sufficient reason to negate the justice system's duty to ensure a fair and just trial. In an ideal world, the answer would be "no." In an imperfect world, expedient answers may sometimes prevail. Thus, the military and federal decisions allow the practical considerations to triumph, even when the judge may be partial to one of the parties.

### Once a Lawyer Not Always a Lawyer

Another area where the disqualification of judges is an issue is where the judge's previous legal employment

could affect the outcome of the defendant's case. Before exploring the case law, however, it is necessary to show how such cases arise.

The nature of the military justice system is such that it is possible for attorneys to be involved with the accused in more than one legal capacity. The officer may be the staff judge advocate one month, and the military judge the next. Although this does not occur regularly, it occurs often enough to present case law on the topic.

Overall, the military case law indicates that judges need not recuse themselves when they had only acted in an administrative capacity in their prior dealings with the accused. This is exemplified in both *United States v. Edwards*<sup>46</sup> and *United States v. Burrer*.<sup>47</sup>

In *Edwards* the appellant asserted that the military judge erred by not disqualifying himself. The military judge had acted as the convening authority's legal officer at the time the offenses occurred, although he had not been involved in the referral process.<sup>48</sup> He stated that he had been the convening authority's legal officer at the inception and termination of the first three unauthorized absences charged and that he had no memory of the appellant and had not formed an opinion about the appellant.<sup>49</sup>

The government maintained that military judges should not be disqualified if the prior relationship to a case was solely administrative. Further, the government asserted that R.C.M. 902 requires a military judge's active participation in the processing of a case before he or she is disqualified. Here, the government maintains the judge did not "act" on the case.<sup>50</sup> The United States Navy-Marine Corps Court of Military Review agreed with the government's contentions and held that the judge properly denied the motion to be disqualified.<sup>51</sup>

Similarly, in *Burrer* the military judge disclosed that he had originally been appointed as the article 32 investigating officer<sup>52</sup> and had held a session with appellant where he advised appellant of his right to counsel. The military judge had recessed the article 32 investigation to permit the accused the right to request individual military counsel. The judge held no further

<sup>40</sup> *Id.* at 1035.

<sup>41</sup> *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977).

<sup>42</sup> *Id.* at 637.

<sup>43</sup> *Id.* at 639.

<sup>44</sup> See 28 U.S.C. § 455 (Supp. II 1984).

<sup>45</sup> *United States v. Di Lorenzo*, 429 F.2d 216, 221 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971).

<sup>46</sup> *United States v. Edwards*, 20 M.J. 973 (N.M.C.M.R. 1985).

<sup>47</sup> *United States v. Burrer*, 22 M.J. 544 (N.M.C.M.R. 1986).

<sup>48</sup> *Edwards*, 20 M.J. at 974.

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

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

<sup>51</sup> *Id.* at 976.

<sup>52</sup> *Burrer*, 22 M.J. at 545.

proceedings as the investigating officer and had no knowledge of the evidence or of the identity of the witnesses. Neither counsel challenged the judge.<sup>53</sup>

On appeal, the United States Navy-Marine Corps Court of Military Review held that the judge's previous involvement as an investigating officer in the case was minimal and that the judge had no bias or predisposition.<sup>54</sup>

As these cases demonstrate, the case law recognizes the problems within the judicial system and allows for a narrower interpretation of R.C.M. 902 in such instances.

### The Federal Decisions

There have been similar holdings in the federal justice system. One of the most interesting cases involved Justice Rehnquist's refusal to recuse himself.<sup>55</sup> Petitioners had challenged Army surveillance of anti-war protestors and moved to disqualify Justice Rehnquist because he had defended the surveillance program before a Senate Committee while he was the Assistant Attorney General in the Nixon administration. Justice Rehnquist, in a memorandum opinion, stated that he did not feel obliged to disqualify himself.<sup>56</sup> He asserted that he did not play an advisory role in the case. He added that opinions of law and policy were both necessary and inevitable, and public expression of such opinions alone were not a sufficient basis for disqualification.<sup>57</sup>

Similarly, in *United States v. Alabama*, both Auburn University and the state Superintendent of Education moved to disqualify Judge Clemons on the grounds, *inter alia*, that the views expressed by Judge Clemons as a political figure and member of the state Senate mandated his disqualification.<sup>58</sup> Like the military case law, the court in *Alabama* opined that a judge who has held public office should not be disqualified from a case because of the strong views that were announced while in office. In dicta the court expressed the view that the system breeds lawyers to move in and out of public service, and the burden on the moving party for recusal should be heavier.<sup>59</sup>

In *United States v. Gipson* the federal courts stood steadfastly to their decision not to disqualify judges

whose previous legal capacity might affect the case at bar.<sup>60</sup> In *Gipson* the judge was a United States Attorney at the time the defendant was convicted of an offense similar to the one at bar.<sup>61</sup> Appellant maintained that recusal was necessary under section 455 because the judge was "of counsel" when the case was filed.<sup>62</sup> The court reasoned that the words "of counsel" and "participated" had different connotations. Here, the judge did not "participate" in the appellant's previous case, because participation connotes activity, and the judge was not active in the case.<sup>63</sup>

### Comparison

The cases in the federal and military system indicate that the judge must, in some way, have actively played a role that created a bias either against or in favor of the accused. Both justice systems realize that simply disqualifying judges because of some previous legal capacity, without actual involvement, does not serve judicial economy.

### Conclusion

The Rules for Courts-Martial and the United States Code require the disqualification of judges when their impartiality might reasonably be questioned. The federal and military courts apply a reasonable person standard when the facts indicate personal bias or prejudice. When the facts indicate that a judge obtained knowledge from a companion case, both systems hold that recusal is not necessary. Whenever the facts are based on the judge's association with the accused in a previous legal capacity, recusal will be required if the judge was active, either for or against the accused, while in that previous legal capacity.

If a trial counsel truly seeks justice, he or she must know when to challenge a judge and when to oppose or join a defense challenge. Trial counsel should analyze judicial challenges within a framework similar to the one this article has employed. Is the challenge based on personal bias, previous association with the case, or previously held office or position? The answer to that question will direct counsel to the correct standard to apply and will assist them in meeting the needs of justice.

<sup>53</sup> *Id.* at 545-46.

<sup>54</sup> *Id.* at 548.

<sup>55</sup> *Laird v. Tatum*, 408 U.S. 1 (1972), *reh. denied*, 409 U.S. 901 (1973).

<sup>56</sup> *Laird v. Tatum*, 909 U.S. 824 (1977) (mem.).

<sup>57</sup> *Id.* at 834-36.

<sup>58</sup> *United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 2857 (1988).

<sup>59</sup> *Id.* at 1544.

<sup>60</sup> *United States v. Gipson*, 835 F.2d 1323 (10th Cir. 1988), *cert. denied*, 108 S. Ct. 2038 (1988).

<sup>61</sup> *Id.* at 1325.

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

<sup>63</sup> *Id.* at 1326.

## Contract Appeals Division Note

### Flawed GSBICA Decision Departs from GAO Precedent in Defining Discussions

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A recent decision by the General Services Board of Contract Appeals (GSBCA) concerning what constitutes discussions demonstrates that board's willingness to ignore principles of procurement law established by the General Accounting Office (GAO).<sup>1</sup> The decision also highlights the difficulty that contract attorneys have in ascertaining whether the GSBCA's departure from established principles marks a conscious choice to develop new principles of formations law, or whether it is simply an indication that the board is having difficulty grasping and applying the previously established principles.

In *Federal Systems Group, Inc.*<sup>2</sup> the National Archives and Records Administration had issued a request for proposals for maintenance of automatic data processing equipment (ADPE). After receiving the protester's proposal, the agency wrote a letter stating that "[a]fter review of your Technical Proposal, the following areas require clarification in order to complete the evaluation process." The letter then identified and described five areas that needed to be addressed. The protester responded by letter titled "Clarifications in Response to the Referenced Amendment." After reviewing the letter, the contracting officer determined that the offeror was technically unacceptable and excluded it from the competitive range.

The protester filed an agency-level protest against its exclusion and, when that was denied, filed a protest with the board. In a flawed decision, the GSBCA found that the agency had failed to hold discussions with the protester, and the board granted the protest on that basis.

The Federal Acquisition Regulation (FAR) requires contracting officers conducting negotiated procurements to "conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range."<sup>3</sup> There is a general requirement that such discussions be "meaningful," that is, that they reason-

ably put offerors on notice of certain types of weaknesses and deficiencies in their proposals.<sup>4</sup>

At certain points in the negotiated procurement process, it may become necessary to determine whether the contracting officer has engaged in discussions—"meaningful" or not—with any offeror. One example of when this would be important would be if the contracting officer wished to award a contract on the basis of initial proposals; this can be done only if *no* discussions have been held. Up until this decision, it had been fairly easy to determine what constitutes "discussions."

"Discussions," as defined by the FAR 15.601, consist of any communication, whether written or oral, that involves information essential for determining the acceptability of a proposal or that provides the offeror an opportunity to revise or modify its proposal. In a long line of decisions, the General Accounting Office (GAO) has held that virtually any communication with an offeror that rises above the level of clarifying minor clerical errors constitutes "discussions" under this definition.<sup>5</sup> In this situation, where the protester clearly provided substantive information regarding its proposal to the agency, there is little doubt that the GAO would have found that this exchange between the agency and the protester constituted discussions.

Yet, without discussing a single GAO decision, the GSBCA found that the exchange between the protester and the agency described above did not "rise[] to the level of discussions as that term is understood in the FAR."<sup>6</sup> The board found that the agency's actions "fail[ed] . . . as an effort at initiating written discussions" because: 1) "the areas described [in the agency's letter] are not described in such a way as to indicate that actual deficiencies exist;" 2) "nothing in the [agency's] letter . . . indicates that revision of [protester's] proposal was expected or would be permitted;" and 3) "the record contains no evidence" that all offerors were made aware that discussions were being opened or that offerors were invited to submit best and final offers

<sup>1</sup> For another recent instance where the board departed from established GAO principles, see *BH & Associates*, GSBICA No. 9209-P, 88-1 BCA ¶ 20,340, in which the board declined to follow the GAO's rule that where an amendment to a solicitation fails to state the time for receipt of bids, the time is the same as that stated in the original solicitation. Instead, the board held that the time for receipt of bids in that situation would be 4:30 p.m. local time. As a result of this decision, it is now possible to imagine a situation where the GAO would find a proposal late and order the agency to reject it while the GSBCA would find the same proposal timely and require the agency to accept it.

<sup>2</sup> GSBICA No. 9699-P, 1988 BPD ¶ 292.

<sup>3</sup> Fed. Acquisition Reg. 15.610(b) [hereinafter FAR].

<sup>4</sup> See, e.g., *Price Waterhouse*, Comp. Gen. Dec. B-220049 (16 Jan. 1986), 86-1 CPD ¶ 54 at 6, *aff'd on reconsideration*, B-220049.2 (7 Apr. 1986), 86-1 CPD ¶ 333 ("such discussions must be meaningful"); see generally Rollins, *A Contract Lawyer's Guide to the Requirement for Meaningful Discussions in Negotiated Procurements*, 122 Mil. L. Rev. 221 (1988).

<sup>5</sup> See, e.g., *McManus Security Systems*, Comp. Gen. Dec. B-231105 (21 July 1988), 88-2 CPD ¶ 68 at 4; *Concord Electric Company*, Comp. Gen. Dec. B-230675 (25 May 1988), 88-1 CPD ¶ 501; *Corporate America Research Associates*, Comp. Gen. Dec. B-228579 (17 Feb. 1988), 88-1 CPD ¶ 160; *Motorola, Inc.*, Comp. Gen. Dec. B-225822 (17 June 1987), 87-1 CPD ¶ 604 at 3.

<sup>6</sup> *Federal Systems Group, Inc.*, GSBICA No. 9699-P, 1988 BPD ¶ 292 at 6.

(BAFO's).<sup>7</sup> This determination marks a notable departure from GAO precedent, and a close examination of the board's rationale shows it to be seriously flawed.

The board's decision exhibits a preoccupation with formalized indicia and newly-generated "notice" requirements at the expense of a more appropriate inquiry into whether the offeror actually submitted information to the agency that was essential to the evaluation of its proposal or that changed its proposal—the only substantive definition of discussions appearing in FAR 15.610. For instance, the board's concern that the agency's letter did not label its questions as "deficiencies" ignores numerous GAO decisions stating that agencies are not required to use talismanic phrases in their discussions<sup>8</sup> and has no immediately apparent relevance to the issue of whether the protester's response contained information essential to evaluating its proposal. The board's reasoning appears to be that the failure to label the discussion questions as "deficiencies" would mean that offerors would not be on notice that the information is essential to evaluating their offers.

From a purely factual standpoint one might question the reasonableness of the board's concern. The agency's letter stated that the information was "necessary to complete the evaluation process"—surely sufficient notice to any offeror. Indeed, the GAO has generally presumed that any time an agency discusses a matter with an offeror, it is on notice that the agency has concerns about the offeror's proposal. In any event, the board never explains from whence it derives such a "notice" requirement, which does not appear to be a part of FAR 15.610. Instead of inquiring whether the protester submitted information to the agency, the board becomes sidetracked on the (previously) irrelevant issue of whether the protester was on "notice" that discussions were taking place.

Similarly, the board's second point—that the agency's letter did not provide notice to the offeror that it could change its proposal—seems both excessively formalistic and unrelated to the actual requirements of FAR 15.610. The board essentially infers that because the protester was not told it could "change" its proposal it did not do so—a quite extraordinary leap in logic. If the issue is whether discussions occurred, then the critical inquiry should be whether the letter submitted by the protester actually constituted changes to its proposal—a question simply ignored by the board.

Next, the board states that it is "fundamental to Government procurement that when a decision is made to open discussions, this fact is made known to all offerors participating in the procurement." The board provides no citation in support of this "fundamental" principle, which does not appear in the FAR. In any event, one would think that the letter itself, with its

questions regarding the offeror's proposal, would be sufficient notice to the offeror that discussions were being opened.

Finally, the board found relevant the fact that there was no indication that best and final offers were requested from offerors. This linkage between whether there was a request for best and final offers and whether discussions were held with the protester is nothing short of mystifying. The protester was eliminated from the competitive range as technically unacceptable after initial discussions. There is no indication in the record that the procurement had even reached the BAFO stage when the protester filed its protest. Nor does FAR 15.611, cited by the board, require a request for BAFO's to accompany all discussion requests; it requires a request for BAFO's only at the close of discussions, and there is no evidence in this decision that discussions with the other offerors had closed before the protester was eliminated from the competitive range.

What is more disturbing than the flaws inherent in the board's reasoning is the complete absence from this decision of any reference to GAO decisional law. The GAO has, over the years, developed an extensive body of decisional law regarding both what constitutes discussions and when discussions are "meaningful." Both the agency and the protester discussed some of these decisions in the briefs they submitted to the board. Yet the board's decision does not contain a single discussion of or citation to a GAO decision. It neither offers to follow GAO standards, nor explicitly rejects the applicable GAO standards, nor attempts to explain why the GAO standards were not applicable to this set of facts. It is as if the GAO did not exist.

Such an attitude is symptomatic of a greater problem—the unfortunate fact that the board seems to place no value on contributing to a stable and predictable body of federal contracts law. For instance, in *BH & Associates*<sup>9</sup> the board noted that it "simply decline[d] to follow the basic rationale of the Comptroller General decisions." Nowhere in that decision does the board indicate that stability or predictability of the law are factors worthy of its consideration.

Nor has the GSBCEA been internally consistent in the weight given to GAO decisions. In *E.D.S. Federal Corporation*<sup>10</sup> the GSBCEA considered the exact question of whether discussions had occurred and cited a GAO decision in determining that they had not. Thus, government lawyers appear to be faced with a situation in which some judges will rely on GAO decisions while other will not—a type of legal Russian roulette that is difficult to accept.

Moreover, the *Federal Systems* decision raises serious questions about the board's understanding of formations

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

<sup>8</sup> See, e.g., *Associated Chemical and Environmental Services*, Comp. Gen. Dec. B-228411.3 (10 Mar. 1988), 88-1 CPD ¶ 248, in which the agency sent the offerors lists of written questions and requested a "letter of clarification" back from the offerors. The GAO had no problem in finding that meaningful discussions had been held. That these communications constituted discussions under the FAR was simply taken for granted.

<sup>9</sup> GSBCEA No. 9209-P, 88-1 BCA ¶ 20,340.

<sup>10</sup> GSBCEA No. 9600-P, 1988 BPD ¶ 234 at 8.

law and its ability to understand the full ramifications of the new principles it fashions. For instance, this decision apparently stands for the proposition that the receipt of substantive information from an offeror regarding its proposal does not "rise to the level" of discussions as that term is used in the FAR, so long as the agency has not invoked the required "magic words."

Suppose that the agency had sent its letter to the protester and received the protester's letter back, then decided to award a contract to the protester on the basis of initial proposals. Under the Competition in Contracting Act of 1984<sup>11</sup> an agency may award a contract on the basis of initial proposals only where it has not held discussions. Under the rule of law set down in this decision, the agency may go ahead and award a contract on the basis of initial proposals, yet it is difficult to believe that the board would be prepared to approve an award to the protester under those circumstances.

In addition, the board erroneously reached the issue of whether discussions were held without ever considering the threshold issue of whether discussions were required. Under FAR 15.610, discussions need only be held with offerors in the competitive range. There is simply no requirement that discussions be held with offerors properly excluded from the competitive range.<sup>12</sup> Yet there is no indication in the decision or in the statement of facts submitted by the agency to the board (and provided to the author) that the protester was ever in the competitive range. In fact, the "clarifications" that the board found did not constitute discussions were used to eliminate the protester from the competitive range. Why, then, did the board grant the protest on a finding that the agency had failed to hold discussions?

If the board had simply found that discussions had been held it could have more logically granted the protest. A case could be made that once discussions are opened with an offeror, even before a competitive range determination, those discussions must be "meaningful." The board could simply have found that by opening discussions before the competitive range was determined, the agency bound itself to conduct comprehensive discussions with the protester. The board could then have held that the discussions which occurred were not sufficiently "meaningful," although even in that case there is every indication in the record that the discussions held were comprehensive enough to satisfy the GAO's standard for meaningful discussions.

Because the board itself found that no discussions, "meaningful" or otherwise, had been held with the protester prior to the competitive range determination, it is difficult to see from where the board derived a requirement that the agency conduct discussions with the

protester. The board almost seems to create a new requirement that *all* offerors be included "in the competitive range for at least one round of effective discussions."<sup>13</sup> In summary, this decision leaves the contract lawyer with the impression that the board was unable to differentiate among several distinct concepts and issues of government contracts formations law, namely: what constitutes discussions; what constitutes "meaningful discussions"; when discussions are required; and when an offeror may properly be excluded from the competitive range.

From a more practical standpoint, what does this decision mean for contract lawyers? Whatever its flaws—and they are many—it is a decision we will have to live with unless the GSBICA itself recognizes that the decision cannot be allowed to stand. From a purely technical standpoint, this decision requires contract lawyers involved in ADPE procurements to ensure that discussions with offerors meet the formal indicia outlined by the board. Of the concerns expressed by the board, it is probably most important (and most reasonable) that contracting officers specifically use the word "discussions" in their communication with offerors, and that they specifically advise offerors that they are being given the opportunity to revise their proposals in response to these discussions.

The decision has broader implications, however. This decision shows yet again that lawyers and contracting officers involved in ADPE procurements simply cannot rely on principles of procurement law developed by the GAO except for those few that have been explicitly adopted by the GSBICA. They must be intimately familiar with GSBICA decisions as well. For those issues not yet addressed by the GSBICA, of which there are many, the decision shows that we have no way of knowing what the "law" will be.

For lawyers who try cases at the GSBICA, the decision means something equally vexing. This decision highlights the fact that the board is not used to dealing with principles of formations law and apparently does not have the time to educate itself in the extremely short time span given it to decide protests. Yet it is willing to ignore decades of GAO decisional law in order to enunciate its own legal standards without carefully analyzing the ramifications of those standards. For that reason, government trial attorneys cannot rely on the board's intrinsic knowledge of the applicable legal principles in making their case. Rather, trial attorneys must also make their best efforts to educate the board concerning the widely accepted standards of formations law as well as the inherent reasonableness of those standards.

<sup>11</sup> 41 U.S.C. § 253B(d)(1)(B) (Supp. III 1985).

<sup>12</sup> See, e.g., *California Microwave, Inc.*, Comp. Gen. Dec. B-229489 (24 Feb. 1988), 88-1 CPD ¶ 189; *Imagineering Systems Corp.*, Comp. Gen. Dec. B-228434.2 (4 Feb. 1988), 88-1 CPD ¶ 109 at 3.

<sup>13</sup> *Federal Systems Group, Inc.*, GSBICA No. 9699-P, 1988 BPD ¶ 292 at 7. What may really underlie the board's decision may be a conclusion that the protester was improperly excluded from the competitive range because it had a reasonable chance for award. Such an analysis was not, however, articulated in the board's decision.



# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Notes

### Being An Accused: "Service," But Not "Important Service"

Two recent decisions by the military's appellate courts are instructive for defining "service" and "important service" under the Uniform Code of Military Justice. Taken together, these cases stand for the proposition that, although being an accused at a court-martial constitutes military duty or "service" for purposes of malingering, it does not amount to "important service" as required for the offense of desertion.

In *United States v. Johnson*<sup>1</sup> the accused was convicted of malingering in violation of article 115.<sup>2</sup> The accused's conviction was based on his failed attempt to commit suicide by heroin overdose.<sup>3</sup> His purpose for attempting suicide was to avoid prosecution for an earlier drug offense.<sup>4</sup>

To establish the accused's guilt for malingering, the government was required to prove not only that the accused intentionally injured himself,<sup>5</sup> but also that he

did so to avoid "work, duty, or service."<sup>6</sup> The Court of Military Appeals acknowledged that the accused's presence for purposes of "prosecution" did not fit neatly into one of these enumerated categories.<sup>7</sup> The court nonetheless found that "duty or service" included court appearances for purposes of investigation or trial.<sup>8</sup> Moreover, the court concluded that, even in the absence of formal charges, "duty or service" can be established for purposes of article 115 when the likelihood of a trial or formal investigation is great.<sup>9</sup>

But is such service "important service"? About three months prior to the *Johnson* decision, the Air Force Court of Military Review answered this question in the negative in *United States v. Walker*.<sup>10</sup> The accused in *Walker* was convicted of desertion with intent to shirk important service in violation of article 85.<sup>11</sup> The "important service," as charged, was the accused's pending trial by special court-martial for larceny and false swearing.<sup>12</sup>

The Air Force court first observed that the Manual did not expressly address whether an accused's presence

<sup>1</sup> 26 M.J. 415 (C.M.A. 1988).

<sup>2</sup> Malingering is defined as follows:

Any person subject to this chapter who for the purpose of avoiding work, duty, or service—  
(1) feigns illness, physical disablement, mental lapse or derangement; or  
(2) intentionally inflicts self-injury;  
shall be punished as a court-martial may direct.

Uniform Code of Military Justice art. 115, 10 U.S.C. § 915 (1982) [hereinafter UCMJ].

<sup>3</sup> The accused purchased heroin at the Frankfurt Railway Station, locked himself in a latrine stall, and injected what he believed to be a lethal quantity of the drug. *Johnson*, 26 M.J. at 417. He was later found unconscious by a railway employee and taken to a hospital, where he recovered without serious injury. *Id.* This was the accused's second attempt to commit suicide; about two weeks earlier, he had tried to hang himself with an electrical cord in a latrine at a military police station. *Id.* at 416.

<sup>4</sup> *Id.* at 416-18. Two days prior to the accused's first suicide attempt, he was apprehended for possessing heroin and the paraphernalia to use it. *Id.* at 416.

<sup>5</sup> Manual for Courts-Martial, 1984, Part IV, para. 40b(2) [hereinafter MCM, 1984]; accord *Johnson*, 26 M.J. at 417.

<sup>6</sup> MCM, 1984, Part IV, para. 40(b)(3); accord *Johnson*, 26 M.J. at 417.

<sup>7</sup> *Johnson*, 26 M.J. at 418.

<sup>8</sup> *Id.* In *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959), the court observed: "Loosely speaking, confinement in the brig may be the antithesis of military service, but a person apprehended for an offense has a duty to go there and remain until released by proper authority." *Id.* at 178. The Navy Board of Review has noted similarly that a service member who is facing charges has a duty to appear for pretrial and trial proceedings and must remain at court until released by competent authority. See *United States v. Guy*, 38 C.M.R. 694, 695 (N.B.R. 1967).

<sup>9</sup> *Johnson*, 26 M.J. at 418. The court analogized this situation to circumstances where a service member anticipates he will be sent out on a hazardous combat patrol, and therefore intentionally injures himself before he has actually received the order to report to his organization. *Id.*

<sup>10</sup> 26 M.J. 886 (A.F.C.M.R. 1988).

<sup>11</sup> Desertion is defined, in part, as follows:

(a) Any member of the armed forces who . . .  
(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; . . .  
is guilty of desertion.

UCMJ art. 85.

<sup>12</sup> *Walker*, 26 M.J. at 887-88. The accused was suspected of stealing about \$100.00 to \$125.00 from a unit coffee fund. *Id.* at 887. He had earlier provided a sworn statement denying any involvement in the theft. *Id.* Larceny and false swearing charges were preferred, referred to trial by special court-martial, and served upon the accused based on this misconduct. *Id.* The accused left the local area after being advised of the possible maximum punishment for these offenses and visiting the area defense counsel. *Id.* He was found in his off-post quarters about three weeks later and returned to military control. *Id.*

at his court-martial constituted "important service."<sup>13</sup> The court noted also that desertion by shirking important service has historically been charged in connection with war and combat related misconduct.<sup>14</sup> Indeed, only one previous case, *United States v. Wolff*,<sup>15</sup> concerned a charge of avoiding "important service" involving the military justice system. In *Wolff* the court held "as a matter of law that serving ordinary brig time as a result of a summary court-martial conviction for unauthorized absence does not constitute 'important service' as envisioned by Congress when it enacted Article 85, UCMJ."<sup>16</sup>

The Air Force court reached a similar conclusion in *Walker*, "find[ing it] difficult to think of a situation where an accused's presence at his or her own trial could be . . . characterized" as constituting important service.<sup>17</sup> The court observed that portions of the judicial process, including trial after arraignment, can be conducted in the accused's absence.<sup>18</sup> Although the court decided that the accused's presence at his court-martial was not "important service," it nonetheless reaffirmed the UCMJ's crucial role in maintaining discipline in the armed forces.<sup>19</sup> MAJ Milhizer.

### Housebreaking Includes More Than Breaking Into a House

The everyday meaning of certain words may be changed in unexpected ways when used as part of a legal term or phrase. Some words, such as "accident," are much more limited when employed as a legal term of art

than they are in the vernacular.<sup>20</sup> Other words assume a more expansive meaning when used as part of legal terminology. As two recent Army Court of Military Review cases illustrate, the crime of housebreaking, owing to a surprisingly expansive definition of the term "structure," includes a wide variety of misconduct that might seem beyond the scope of that offense.

Article 130 of the Uniform Code of Military Justice provides: "Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."<sup>21</sup> Although the common meaning of the word "structure" is extremely broad,<sup>22</sup> the Manual for Courts-Martial defines "building" and "structure," as used in connection with housebreaking, more narrowly:

"Building" includes a room, shop, store, office, or apartment in a building. "Structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an inclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.<sup>23</sup>

Consistent with this language, a limited definition of structure has evolved in the decisional law that restricts the term to only those structures used for habitation or storage.<sup>24</sup>

<sup>13</sup> The Manual provides:

"Hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power, in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily "hazardous duty or important service." Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

MCM, 1984, Part IV, para. 9c(2)(a).

<sup>14</sup> *Johnson*, 26 M.J. at 888; e.g., *United States v. Willingham*, 10 C.M.R. 88 (C.M.A. 1953); *United States v. Shull*, 2 C.M.R. 83 (C.M.A. 1952) (important service includes overseas transfer for duty in combat areas during the Korean War); see *United States v. Merrow*, 34 C.M.R. 45 (C.M.A. 1963) (icebreaker duty during Operation Deep Freeze); *United States v. Deller*, 12 C.M.R. 165 (C.M.A. 1965) (basic training when a mandatory prerequisite to combat duty in the Korean War); cf. *United States v. Wimp*, 4 C.M.R. 509 (C.G.B.R. 1952); *United States v. Herring*, 1 C.M.R. 264 (A.B.R.), *pet. denied*, 1 C.M.R. 99 (C.M.A. 1951) (sea and foreign duty are per se important).

<sup>15</sup> 25 M.J. 752 (N.M.C.M.R. 1987).

<sup>16</sup> *Id.* at 754.

<sup>17</sup> *Walker*, 26 M.J. at 889; see *Deller*, 12 C.M.R. at 168.

<sup>18</sup> *Id.* at 889 n.5 (citing Rules for Courts-Martial 405(h)(4), 802(d), 804, and 1104(b)(1)(c)).

<sup>19</sup> *Walker*, 26 M.J. at 889 (citing *United States v. Van Steenwyk*, 21 M.J. 795, 801 (N.M.C.M.R. 1985)); see also *Parker v. Levy*, 417 U.S. 733, 743-45 (1974); *O'Callahan v. Parker*, 395 U.S. 258, 281-83 (1969) (Justice Harlan, dissenting); MCM, 1984, Part I (Preamble), para. 4; Congressional Floor Debate on the Uniform Code of Military Justice, Dept. of Navy, Pam 9ND-P-1978, at 262.

<sup>20</sup> See generally TJAGSA Practice Note, *The Defense of Accident: More Limited Than You Might Think*, *The Army Lawyer*, Jan. 1989, at 45.

<sup>21</sup> UCMJ art. 130.

<sup>22</sup> For example, Webster's Dictionary defines "structure" as "something constructed or built," and lists as examples laboratories, dams, buildings, highways, roads, railroads, and excavations. Webster's Third New International Dictionary of the English Language Unabridged 2267 (14th ed. 1961). "Structure" has been characterized as being "one of the broadest words in the English language." Legal and Legislative Basis, Manual for Courts-Martial, 1951, at 228 (citing *Favro v. State*, 39 Tex. Cr. Rep. 452, 46 S.W. 192 (1932)); see *People v. Moyer*, 635 P.2d 553, 555 (Colo. 1981); see also *Watson Industries, Inc. v. Shaw*, 235 N.C. 203, 69 S.E.2d 505, 509 (1952).

<sup>23</sup> MCM, 1984, Part IV, para. 57c(4). Compare housebreaking to burglary; the latter proscribes breaking into the dwelling house of another. UCMJ art. 130; see MCM, 1984, Part IV, para. 55c(5).

<sup>24</sup> See *United States v. Breen*, 36 C.M.R. 156 (C.M.A. 1966) (individual locker not a "structure" for purposes of housebreaking); *United States v. Hall*, 30 C.M.R. 374 (C.M.A. 1961) (railroad car is a "structure" for purposes of housebreaking); *United States v. Taylor*, 30 C.M.R. 44 (C.M.A. 1960) (aircraft not a "structure" for purposes of housebreaking); *United States v. Gillin*, 25 C.M.R. 173 (C.M.A. 1958) (automobile not a "structure" for purposes of unlawful entry).

In 1986 the Army Court of Military Review considered the meaning of the term "structure" in *United States v. Cahill*.<sup>25</sup> The accused in *Cahill* broke into an Army and Air Force Exchange Service (AAFES) delivery van that was parked next to the Furniture Mart at Schofield Barracks, Hawaii.<sup>26</sup> Although the van was empty at the time, the court found that "by its very physical configuration it could have been and, undoubtedly, was normally used by AAFES to store or secure property."<sup>27</sup> The court observed further that because the van was sealed with a wire band, it resembled a storage facility or structure more than a vehicle used merely for conveyance.<sup>28</sup> The court also noted that as the break-in occurred only a few days before Christmas, the van's use as a storage facility for an expanded holiday inventory was likely.<sup>29</sup> Based upon these facts, the court was satisfied that the delivery van in *Cahill* fell within the definition of structure as used under article 130.<sup>30</sup>

But what if a vehicle was normally not used for storage, was not banded by a wire, and was broken into about six months before Christmas? This was the situation faced by the Army Court of Military Review about a year later in *United States v. Demmer*.<sup>31</sup> The accused in *Demmer* broke into a "Running Chef" mobile snack truck parked behind the main AAFES Exchange at the Lucius D. Clay Kaserne, Garlstedt, Germany.<sup>32</sup> The accused gained entry by yanking off the truck's rear door handle.<sup>33</sup> Apparently no wire banding was used to secure the vehicle, and the incident took place in late June.<sup>34</sup>

The court described the truck as being a "hybrid" between a common vehicle and a storage structure.<sup>35</sup> At times the truck was used as a snack wagon; it was driven from site to site, where customers personally selected

merchandise for purchase.<sup>36</sup> On these occasions the truck could not be termed a "structure" as intended by article 130.<sup>37</sup> The court also found, however, that at other times the snack wagon was used to store the same merchandise until it could be used again for selling.<sup>38</sup> During these intervening periods, when securing the merchandise was the vehicle's primary function, it would constitute a "structure" for purposes of housebreaking.<sup>39</sup> The court concluded that "the character of the inclosed truck's use at the time of the unlawful breaking and entering must determine whether the vehicle qualifies as a structure within the meaning of Article 130, UCMJ."<sup>40</sup> As the accused's misconduct occurred at around 0330 when the snack wagon was parked and not open for business, it was found to be a "structure" for purposes of a housebreaking charge.<sup>41</sup>

Whether the rationale in *Demmer* can be extended further is not clear. Does the trunk or glove compartment of a parked car constitute a storage compartment of an enclosed vehicle?<sup>42</sup> Are mobile homes or campers to be treated differently than station wagons or sedans?<sup>43</sup> Is a vehicle segregable—can some parts of it be set aside for storage while others are simultaneously open to the public? While these and other issues remain unsettled, the decisional law makes clear that housebreaking includes a whole range of misconduct in addition to breaking into another's home. MAJ Milhizer.

#### Using MRE 404(b) to Prove Intent

##### Introduction

The admissibility of extrinsic act evidence under Military Rule of Evidence (Rule) 404(b)<sup>44</sup> is often hotly

<sup>25</sup> 23 M.J. 544 (A.C.M.R. 1986).

<sup>26</sup> *Id.* at 545. The accused used a tire iron to break a wire band securing the truck. *Id.*

<sup>27</sup> *Id.* at 547.

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

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

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

<sup>31</sup> 24 M.J. 731 (A.C.M.R. 1987).

<sup>32</sup> *Id.* at 732.

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

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

<sup>35</sup> *Id.* at 733.

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

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

<sup>38</sup> *Id.*

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

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

<sup>41</sup> *Id.*

<sup>42</sup> See *Gilllin*, 25 C.M.R. 173 (C.M.A. 1958).

<sup>43</sup> See generally *California v. Carne*, 471 U.S. 386 (1985).

<sup>44</sup> Mil. R. Evid. 404(b) (Other crimes, wrongs, or acts). "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

contested at courts-martial. Whenever a prosecutor uses extrinsic act evidence against the accused there is the potential for unfair prejudice.<sup>45</sup> Indeed, both the Supreme Court and the Court of Military Appeals require judges to conduct a Rule 403<sup>46</sup> balancing test prior to admitting extrinsic evidence against an accused.<sup>47</sup>

The key to determining whether extrinsic acts evidence will be admitted is the *purpose* for which the evidence is offered. This is true for two reasons. First, the purpose for the evidence determines how similar the extrinsic act must be.<sup>48</sup> The courts operate with a sliding scale of similarity. Evidence of motive requires the least similarity and evidence of modus operandi requires the most.<sup>49</sup> Some purposes for extrinsic act evidence are named in the rule itself, but the list is not all inclusive.<sup>50</sup> The similarity requirement is often clouded by the use of the shotgun approach to admissibility. Under this approach, every enumerated and at least one unnamed but imagined reason for admissibility are offered. While appellate courts have been highly critical of this approach,<sup>51</sup> proponents of this type of evidence continue to use the shotgun. Regardless of the labels attached to extrinsic act evidence, the evidence often shows nothing more than an accused's propensity to engage in certain acts.<sup>52</sup> Second, the purpose for which the evidence is offered allows the military judge to determine whether the issue is really in dispute. When the issue is disputed and the evidence is identified, the military judge will be in a better position to assess both the probative value and potential for unfair prejudice.<sup>53</sup> Again, enter the shotgun. The proponent is more likely to hit a contested issue when the offer is not focused. A problem can arise, however, when the proponent has offered the evidence for more than one legitimate reason, but the trial judge

only allows the evidence for a particular purpose. The problem is that the judge may choose the wrong purpose and review on appeal will be limited to the purpose selected by the trial judge.

The Court of Military Appeals (CMA) has recently addressed the issue of extrinsic act evidence to show intent in *United States v. Gamble*.<sup>54</sup> *Gamble* does not provide us with all the answers in this area, but does identify more questions for future resolution.

#### *United States v. Gamble*

First Lieutenant Donald Gamble was convicted of rape, forcible sodomy, and conduct unbecoming an officer by wrongfully having sexual intercourse with a soldier's fiancée.<sup>55</sup> Gamble mounted a consent defense, but not until after a defense motion *in limine* failed to exclude testimony concerning an alleged prior, unrelated, and uncharged indecent assault.<sup>56</sup> The government offered the extrinsic act testimony during its case in chief and it was admitted for the limited purposes of showing Gamble's intent and modus operandi.<sup>57</sup> Gamble successfully challenged the admissibility of the extrinsic act evidence before the Court of Military Appeals. The court held that the evidence was not relevant for the purposes admitted, and if it were relevant, it should have failed the Rule 403 balance test.<sup>58</sup> The court proceeded to address the apparent confusion exhibited by courts in dealing with extrinsic act evidence and the issue of when such evidence may become relevant and therefore, admissible.<sup>59</sup>

The court in *Gamble* favorably cited the Military Rules of Evidence Manual's explanation<sup>60</sup> regarding intent as a purpose for admitting extrinsic act evidence.

<sup>45</sup> S. Saltzburg, L. Schinasi, & D. Schleuter, *Military Rules of Evidence Manual* 361 (2d ed. 1986).

<sup>46</sup> Mil. R. Evid. 403 (Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Federal Rule of Evidence 403 is identical to Military Rule of Evidence 403.)

<sup>47</sup> *Huddleston v. United States*, 108 S. Ct. 1496 (1988); *United States v. White*, 23 M.J. 84 (C.M.A. 1986).

<sup>48</sup> *United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984).

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

<sup>50</sup> *United States v. Rosa*, 705 F.2d 1375 (1st Cir. 1983) (consciousness of guilt); *United States v. Hunter*, 21 M.J. 240 (C.M.A. 1986) (defense rebuttal).

<sup>51</sup> *Brannan*, 18 M.J. at 185.

<sup>52</sup> *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983) (In indecent assault charge, possession of magazines depicting explicit homosexual activities admissible to demonstrate intention to gratify sexual desires.); *United States v. Lips*, 22 M.J. 679 (A.F.C.M.R. 1986) ("The possession of graphically posed photographs showing women being sexually and physically abused is a clear indication of the appellant's emotional penchant for sexual aberration."); *United States v. LeProwse*, 26 M.J. 652 (A.C.M.R. 1988) (Evidence of possession of a list of bisexuals, *Gym* magazine, and four paperback books was admissible as they "suggest that the appellant was an individual inclined to seek sexual gratification by observing deviant behavior.").

<sup>53</sup> S. Saltzburg, L. Schinasi, & D. Schleuter, *supra* note 2, at 362.

<sup>54</sup> 27 M.J. 298 (C.M.A. 1988).

<sup>55</sup> *Id.* at 298-99.

<sup>56</sup> *Id.* at 300.

<sup>57</sup> *Id.* at 301-02. The government offered the evidence to show intent, plan, preparation, and absence of mistake regarding the charged acts. The military judge admitted the evidence to show intent and modus operandi, but only instructed on modus operandi.

<sup>58</sup> *Id.* at 299.

<sup>59</sup> *Id.* at 304-05.

<sup>60</sup> S. Saltzburg, L. Schinasi, & D. Schleuter, *supra* note 45, at 362.

In many cases intent will be an element of the government's case, but the kind of act that the accused committed is almost always an intentional act. In such a case, it is wise for the court to decline to admit evidence of other acts to prove intent until the defendant has an opportunity to put on evidence. If the defendant challenges intent, then on rebuttal the prosecution can offer the evidence of the other acts. Where intent is more clearly in issue in a case, evidence of other crimes need not be held in reserve.<sup>61</sup>

As already stated, the issue in *Gamble* was whether the alleged victim had consented. The court had long before determined that if consent is the issue in a rape trial, evidence of similar extrinsic acts by the accused is not admissible.<sup>62</sup> The court went on to state that it "doubt[ed] that the evidence about the [extrinsic act] had much relevance in proving *Gamble's* 'intent' during the incident with [the alleged victim]."<sup>63</sup> At this point, the court indicated in a footnote that where extrinsic act evidence is offered for the purpose of showing intent, the issue must be controverted, and that such evidence could not normally be presented during the government's case in chief to show intent "including specific intent where the evidence of such intent is sufficient to go to the jury when the prosecution rests, and the defendant so acknowledges."<sup>64</sup> Additionally, unless the defense through "opening statement, or other comparable indication, [shows] that intent is a controverted issue,"<sup>65</sup> extrinsic act evidence must be used only in rebuttal. In *Gamble* the court's holding simply found a lack of relevance for the extrinsic act evidence; a lack of relevance because the purpose for which it was admitted—intent—was not in dispute.<sup>66</sup>

The conclusions regarding extrinsic act evidence offered on the issue of intent, which the court seems to endorse in a footnote,<sup>67</sup> are unnecessarily broad for the resolution of the case and overstate the case for general exclusion of this type of evidence. Courts have allowed extrinsic act evidence of an accused's intent to be introduced in cases requiring proof of specific intent.<sup>68</sup> The government's interests are not sufficiently protected if the defense can preclude extrinsic act evidence on the issue of intent by agreeing there is enough evidence to go

to the jury on that issue. "[T]he defendant is not permitted unilaterally to remove intent as an element of the crime charged which the government must prove beyond a reasonable doubt."<sup>69</sup> The government has the burden to prove each element of the offense beyond a reasonable doubt and to only allow a minimum amount of evidence on any element is unreasonable. How much evidence is enough to prove an element beyond a reasonable doubt? To have enough evidence to go to the jury only requires that the evidence, together with all reasonable inferences and applicable permissible presumptions, could reasonably tend to establish the element of intent.<sup>70</sup> If the government were required to rest its case after each element had been proved to this meager standard, a lot of relevant, convincing, and otherwise admissible evidence would be excluded and the justice system would surely suffer.

If extrinsic act evidence is allowed where the charged crime requires proof of specific intent, the purpose for Rule 404(b) can still be preserved. The trial judge "can prevent the evasion of Fed.R.Evid. 404(b)'s (and likewise Military Rule 404(b)'s) restriction that other crimes not be admitted to prove the bad character of the defendant so as to suggest that the defendant was living up to his reputation in the crime currently charged."<sup>71</sup> The trial judge also must consider the Rule 403 balance test. In *Gamble* the court was therefore too broad in its endorsement of such a limiting rule where specific intent is an element of the crime charged.

The case that the Court of Military Appeals cited<sup>72</sup> in endorsing this limiting view of Rule 404(b) is instructive in showing how trial courts will have to use their discretion to determine whether to admit extrinsic evidence on the issue of intent. Defendant Thompson was a passenger in a car driven by Copeland. Copeland was charged with possession of eight tin foil packets of P.C.P.-laced marijuana with the intent to distribute. The drugs were found on his person. Thompson was charged with possession of twenty-seven tin foil packets of the same drug with the intent to distribute. The drugs were found under the passenger seat of the car.

Contrasting the comparative positions of Copeland and Thompson provides a possible framework for ana-

<sup>61</sup> *Gamble*, 27 M.J. at 304 (citations omitted).

<sup>62</sup> *United States v. Woolery*, 5 M.J. 31 (C.M.A. 1978).

<sup>63</sup> 27 M.J. at 304-05.

<sup>64</sup> *Id.* at 305 n.3.

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

<sup>66</sup> The evidence may have been relevant for another purpose under Rule 404(b) but the court was not so instructed. *Id.* at 308 n.7.

<sup>67</sup> See *supra* note 64 and accompanying text.

<sup>68</sup> *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States v. Liefer*, 778 F.2d 1236 (7th Cir. 1985); *United States v. Draiman*, 784 F.2d 248 (7th Cir. 1986); *United States v. Brantley*, 786 F.2d 1322 (7th Cir. 1986); *United States v. Webb*, 625 F.2d 709 (5th Cir. 1980); *United States v. Miller*, 725 F.2d 462 (8th Cir. 1984).

<sup>69</sup> *United States v. Draiman*, 784 F.2d 248, 254 (7th Cir. 1986).

<sup>70</sup> R.C.M. 917.

<sup>71</sup> *Draiman*, 784 F.2d at 254.

<sup>72</sup> *Thompson v. United States*, 546 A.2d 414 (D.C. 1988).

lyzing the admissibility of extrinsic act evidence on the issue of intent. Where specific intent is an element of a charged offense, the judge should look to the plausibility of the defense contesting the issue, considering the posture of the case, the likelihood of the defense being raised, and the strength of other evidence to show intent.<sup>73</sup> The plausibility of the defense contesting intent in Copeland was significant. Because the drugs were found on his person, if he pled not guilty his only likely defense was lack of intent. The relatively small amount of drugs found on Copeland's person could be consistent with personal use. There being no further evidence on intent, the strength of the non-extrinsic act evidence going to intent was weak. Striking a balance in Copeland's case yields a plausible, highly likely use of the defense of lack of intent. Evidence in the case going to Copeland's intent was weak and therefore, if Copeland had been involved in prior drug transactions, the evidence may have properly been admitted.

In Thompson's case the plausibility of the defense was minimal considering the other two factors. Thompson's charges were based on drugs found under the passenger seat where he was seated in Copeland's car. His likely defense is that he was not the owner of the drugs. Intent is not a likely issue. The other evidence of intent, the relatively large amount of drugs, is very strong. Striking a balance in Thompson's case is even easier than in Copeland's case. The issue is neither plausible nor likely, and the government's burden on the intent element can be met without resorting to extrinsic act evidence on the merits. The holding in both *Gamble* and *Thompson*, that extrinsic act evidence on the issue of intent during the government's case in chief should have been excluded at trial, is warranted under the facts of each case. The problem is that future courts may read the dicta in each case too broadly, reach the same conclusion for the wrong reasons, and place an unfair burden on the government.

Finally, the court in *Gamble* indicated that the prior uncharged indecent assault may have been admissible to show absence of mistake, but because the military judge had not instructed on that purpose, the trial judge's ruling admitting the evidence could not be salvaged.<sup>74</sup> This result is ironic because the court does not favor the shotgun approach to admissibility and further, absence of mistake was one of the original purposes for which the government offered the evidence.<sup>75</sup> While disfavoring the shotgun approach and having evidence admitted for all relevant and permissible purposes are not mutually exclusive positions, the two may sometimes be in conflict. Proponents of extrinsic act evidence want to focus the trial judge's inquiry, but it is important to have evidence used for all available purposes. *Gamble* is an example where this approach may have been helpful.

If the evidence is admitted for one improper purpose and one proper purpose, the case may be salvaged on appeal. Proponents must therefore not be intimidated. Offer evidence for all permissible purposes and ensure that members are properly instructed. Judges should be skeptical when proponents offer this evidence for more than one purpose under Rule 404(b) because counsel, in their zeal to get this damaging evidence before the court, are often unable to articulate a particular legitimate purpose. Judges must therefore determine whether there are multiple legitimate purposes or whether counsel has resorted to the shotgun approach, thereby hoping to hit upon some way to get the evidence admitted.

### Conclusion

The *Gamble* case reflects an appropriate limited view of the admissibility of extrinsic act evidence on the issue of intent. This limited view is not appropriate in all cases, however, and the military judge should determine, on a case-by-case basis, whether extrinsic act evidence of intent should be admitted. Judges should also entertain the offer of evidence under Rule 404(b) for more than one purpose, admit the evidence for all legitimate purposes, and instruct accordingly. The shotgun approach should be avoided, but where multiple uses are appropriate, appellate courts will be better able to support the trial judge's conclusions. MAJ Wittman.

### *United States v. Hill: When the Defense Speaks, the SJA Must Respond*

Before a convening authority may take action under R.C.M. 1107 on a record of trial by general court-martial or special court-martial that includes a sentence to a bad conduct discharge, the convening authority's staff judge advocate (SJA) or legal officer must provide a recommendation to the convening authority.<sup>76</sup>

R.C.M. 1106(d) details the form and content of the recommendation. Generally, the SJA need not address legal errors in the court-martial or respond to the defense rebuttal to the post-trial recommendation under R.C.M. 1106(f).<sup>77</sup> The Manual provides an exception to this general rule when an accused alleges legal error in an R.C.M. 1105 submission. Under R.C.M. 1105, after a sentence is adjudged the accused can submit any written matters to the convening authority that might reasonably tend to affect his decision. This includes the right to submit errors affecting the legality of the findings or sentence. When an accused alleges this type of legal error, the staff judge advocate's recommendation "shall state" whether the convening authority should take corrective action on the findings or the sentence.<sup>78</sup>

<sup>73</sup> *Id.*

<sup>74</sup> 27 M.J. at 305 n.7.

<sup>75</sup> See *supra* text accompanying notes 51 and 57.

<sup>76</sup> R.C.M. 1106(a). See also R.C.M. 1107 concerning convening authority discretion to act on findings and sentence.

<sup>77</sup> R.C.M. 1106(d)(4).

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



Problems arose, however, when the defense's post-trial submissions were confusing, i.e., when it was not clear whether the defense was submitting matters under R.C.M. 1105 or R.C.M. 1106(f), or when the defense submitted matters in rebuttal to the post-trial recommendation that were asserting legal errors in the trial and not in the recommendation. Was the SJA required to respond? The Court of Military Appeals resolved these issues in *United States v. Hill*.<sup>79</sup>

*United States v. Hill*

In *United States v. Hill* the military judge found the accused guilty of several drug offenses and sentenced him to a dishonorable discharge, confinement for five years, total forfeitures, and reduction to the lowest enlisted grade.<sup>80</sup> After authentication of the record of trial, the staff judge advocate prepared the R.C.M. 1106 recommendation for approval of the findings and sentence.<sup>81</sup> The military defense counsel acknowledged receipt of the recommendation and signed "I understand that I have an opportunity to rebut, correct, or challenge any matter I deem erroneous, inadequate, misleading, or to comment on any other matter, and that my comments will be appended to the post-trial recommendation."<sup>82</sup>

The military defense counsel provided a two-page memorandum of "matters submitted pursuant to R.C.M. 1105/1106."<sup>83</sup> The military defense counsel requested that the convening authority review certain testimony, set aside some of the findings, and reduce the sentence. The staff judge advocate did not comment upon the defense submitted memorandum or otherwise supplement his advice, but forwarded it to the convening authority along with the original recommendation. The convening authority approved the sentence as adjudged.<sup>84</sup>

The issue on appeal was whether the staff judge advocate erroneously failed to reply to the legal issues raised by Hill in his post-trial submission.<sup>85</sup> The Court of Military Appeals held that the staff judge advocate was required to respond to *any* allegations of legal error submitted by the defense after service of the recommen-

ation but within the time authorized by R.C.M. 1105(c)(1).<sup>86</sup>

In reaching this conclusion, the Court of Military Appeals noted that although a staff judge advocate is not required in the first instance to review a case for legal errors and the convening authority is not required to examine the record for legal errors, both the accused and the government benefit when errors are corrected at the lowest level.<sup>87</sup> With this in mind, the court determined that when Hill's military defense counsel submitted the memorandum, it did not matter if the staff judge advocate's post-trial recommendation under R.C.M. 1106 was already written. The staff judge advocate was required to supplement his recommendation to respond to the allegations of legal error.<sup>88</sup>

The Court of Military Appeals reasoned that defense counsel would not have been allowed ten days from service of the staff judge advocate's recommendation under R.C.M. 1105(b) if it was not contemplated that defense counsel could raise errors after the recommendation's service upon the accused. Because defense counsel may raise R.C.M. 1105 matters even though the recommendation is already written, R.C.M. 1106(f) then requires the staff judge advocate to comment upon alleged legal errors.<sup>89</sup>

The Court of Military Appeals continued by holding that a staff judge advocate's failure to comply with R.C.M. 1106(d), "in most instances" will be prejudicial and will require a remand of the record to the convening authority for compliance with R.C.M. 1106(d).<sup>90</sup> The court reasoned that remand will: 1) protect an accused from prejudice; 2) "assure future compliance by staff judge advocates;" and 3) "not be onerous for the government."<sup>91</sup>

The Court of Military Appeals established that once it is determined that a staff judge advocate has not complied with R.C.M. 1106, the burden will be on the government to establish that the "defense allegation of legal error would not foreseeably have led to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority."<sup>92</sup>

<sup>79</sup> *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988). Appended to the end of this of this note is the timeline for post-trial processing in the instant case.

<sup>80</sup> UCMJ art. 112a.

<sup>81</sup> *Hill*, 27 M.J. at 294.

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

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 296.

<sup>87</sup> *Id.* at 294.

<sup>88</sup> *Id.* at 295.

<sup>89</sup> *Id.* Note that the court recognized that the staff judge advocate's recommendation could contain legal errors that defense counsel should be allowed to comment upon.

<sup>90</sup> *Id.* at 296.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* See R.C.M. 1105(b)(1).

In *Hill* the Court of Military Appeals reviewed the defense submitted "memorandum." The court held that reading the memorandum in a light most favorable to the accused, any legal error raised by the defense would not have resulted in a favorable comment by the staff judge advocate or any corrective action by the convening authority.

### Conclusion

The Court of Military Appeals' warning is clear. If an accused alleges legal error within the R.C.M. 1105(c) time periods, the staff judge advocate must respond. It does not matter if the accused alleges error prior to or after the staff judge advocate writes the post-trial recommendation, nor does it depend on the form in which the legal error is raised.<sup>93</sup>

If the staff judge advocate does not provide the required response, the Court of Military Appeals will be quite willing to correct the error through remand.<sup>94</sup> The burden will be on the government to establish that a defense allegation of error would not foreseeably have led to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority.<sup>95</sup> MAJ Williams & CPT Cuculic.

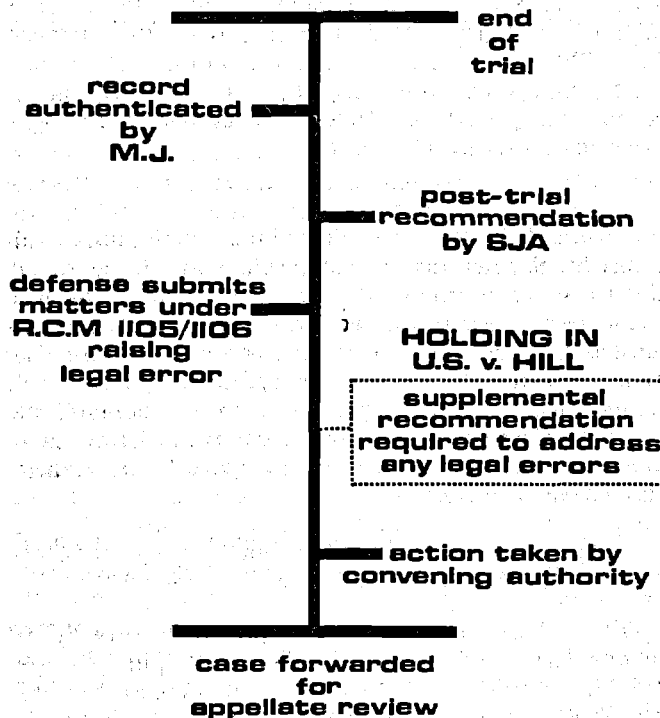
### Legal Assistance Items

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*.

#### Reserve Components and Legal Assistance

At a recent Reserve Component/Active Component Workshop conducted by the Office of the Staff Judge Advocate, Fifth Army, a number of attorneys requested clarification on two recurring questions about the legal assistance program and members of the Reserve components. The first issue concerns the scope of legal assistance for Reserve component soldiers, and the second involves the limitations on a government attorney

## TIMELINE OF United States v. Hill



representing a client for a fee in the attorney's private capacity after the initial contact arose when the attorney was acting in his or her military capacity. This note discusses these issues.

The simple answer to the first question is that Reserve component soldiers who are not on active duty are not authorized to receive legal assistance.<sup>96</sup> This rule applies at weekend drills and during organizational meetings that may occur during the week.<sup>97</sup> Even when these soldiers are ordered to active duty, their entitlement to legal assistance is limited to emergency cases if the active duty period is less than 30 days.<sup>98</sup>

There is some confusion on this point, and it seems to stem from two sources. First, TJAG Policy Letter 84-1<sup>99</sup> discussed "legal assistance" services for Reserve component soldiers. Many judge advocates understood this directive to mean that the Army's legal assistance program encompasses Reserve component soldiers in much the same way that it benefits active duty soldiers. This interpretation ignores paragraph 2 of the Policy

<sup>93</sup> *Id.* at 295.

<sup>94</sup> Note the warning provided by Judge Cox in his concurring opinion. *Hill*, 27 M.J. at 297 (Cox, J., concurring).

<sup>95</sup> For a recent application of *United States v. Hill* see *United States v. Strom*, CM 8702860 (A.C.M.R. 19 Jan. 1989), in which the A.C.M.R. held that a post-trial petition for clemency did not allege legal error and therefore did not require comment by the staff judge advocate.

<sup>96</sup> See Army Reg. 27-3, Legal Services: Legal Assistance, para. 1-8 (1 Mar. 1984) [hereinafter AR 27-3].

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*, para. 1-8b(3).

<sup>99</sup> Dep't of Army, Office of the Judge Advocate General, Reserve Component Legal Assistance, Policy Letter 84-1 (16 Feb. 1984), reprinted in *The Army Lawyer*, Mar. 1984, at 2.

Letter, however, which stated that "legal assistance [for Reserve component soldiers] . . . is limited to . . . military administrative matters . . . [and] readiness."<sup>100</sup> Thus, Policy Letter 84-1 clearly did not extend the full range of active duty legal assistance services to Reserve component soldiers.<sup>101</sup>

The confusion arising from Policy Letter 84-1 can be resolved in an even more definitive manner; it has been completely superseded by Policy Memorandum 88-1.<sup>102</sup> This latter directive authorizes and encourages Reserve judge advocates to provide premobilization legal preparation (PLP) for Reserve soldiers and their families, and it further clarifies that "PLP is not part of the Army Legal Assistance Program."<sup>103</sup> This is the only reference to the term "legal assistance" in the entire Memorandum, and its omission elsewhere is quite purposeful. The intent is to show that the PLP program is separate from the legal assistance program. Thus, no current guidance issued by Headquarters, Department of the Army, provides for legal assistance to Reserve component soldiers who are not on active duty.

The second source of misunderstanding about the need to provide legal assistance for Reserve component soldiers arises from the nature of the PLP program itself. Reserve judge advocates are called upon to counsel soldiers about personal affairs and to prepare wills and powers of attorney,<sup>104</sup> and this sounds a great deal like a legal assistance practice. It does not follow, however, that Reserve soldiers become entitled to the full range of legal assistance services that are authorized under Army Regulation 27-3.<sup>105</sup> As Policy Memorandum 88-1 notes, the PLP program does indeed have elements in common with legal assistance,<sup>106</sup> but neither the Memorandum nor any other directive creates a legal assistance program for Reserve component soldiers.

Thus, there is only one Army legal assistance program, governed by Army Regulation 27-3, and reservists who are not on active duty are not included within the group of authorized clients. They can, however, receive premobilization legal counseling and preparation, including wills and powers of attorney, under the PLP program.

Three subsidiary questions tend to arise from this discussion. The first one is, "Why is there no legal assistance for Reserve component soldiers?" Several considerations influence this policy, including the facts that: reservists are more fully integrated into local communities than are active duty soldiers, and it is reasonable to expect them to seek assistance from the same sources as their neighbors; reservists have easier access to legal resources in the location of their domicile than active duty soldiers; and reservists' military duties are such that it is not beneficial to the government to dedicate limited resources to such services (indeed, just the opposite may be true; if legal assistance were available, some soldiers would spend more time in the judge advocate's office than drilling with the unit). The most important reason, however, is the one that many Reserve component judge advocates have themselves repeatedly stated: legal assistance is not part of the mission for most Reserve units, and thus they are not staffed to perform legal assistance. Time spent providing personal legal advice is time that is not available for the judge advocate's own training and mission accomplishment. Given these considerations, the policy decision is that Reserve component soldiers are not entitled to legal assistance.

Does this mean that judge advocates must curtly tell those who ask questions to go away? Not exactly. Suppose a soldier who is contemplating a divorce asks about the divisibility of Reserve component retired pay. After cautioning the inquirer that there is no military legal assistance available for this problem, the judge advocate could advise that such pensions generally are divisible under state law and that the soldier should consult with a family law attorney for a fuller exploration of the matter. Or, suppose that during a drill a soldier seeks advice on what to do with a troublesome new car. After the same cautionary statement about legal assistance, the judge advocate could explain that the state has a lemon law and that the soldier might want to retain an attorney or discuss the matter with a consumer protection office. In either case, the judge advocate could even suggest that the person see a specific attorney for assistance.<sup>107</sup> The idea here is to point the soldier in

<sup>100</sup> *Id.*, paras. 2, 2a, & 2b.

<sup>101</sup> Para. 4 of Policy Letter 84-1 pointed out that "premobilization counseling . . . is separate and distinct from the legal assistance role." Premobilization counseling was further addressed in Dep't of Army, Office of the Judge Advocate General, Legal Assistance for Reserve Component Personnel, Policy Letter 86-9 (8 July 1986), which "reemphasize[d] and expand[ed] the policy found in TJAG Policy Letter 84-1." Essentially, Policy Letter 86-9 did two things; it stressed that premobilization legal counseling "should be provided [by Reserve component judge advocates] to the maximum extent that resources permit," and it also authorized Reserve component soldiers who are on orders for OCONUS training to receive "mobilization legal assistance" from active duty legal assistance attorneys. In the latter regard, Policy Letter 86-9 explicitly created a narrow exception to the limitation on legal assistance for Reserve component soldiers that is embodied in AR 27-3, para. 1-8.

<sup>102</sup> Dep't of Army, Office of The Judge Advocate General, Reserve Component Legal Preparation, Policy Memorandum 88-1 (4 Apr. 1988), para. 1, reprinted in *The Army Lawyer*, May 1988, at 3. Policy Memorandum 88-1 also supercedes Policy Letter 86-9, discussed in note 101, *supra*. The newer Memorandum does retain the exception for "premobilization legal assistance" for Reserve component soldiers who are on orders for OCONUS training.

<sup>103</sup> *Id.*, para. 2a.

<sup>104</sup> *Id.*, para. 4.

<sup>105</sup> AR 27-3.

<sup>106</sup> *Id.*, para. 2a.

<sup>107</sup> Such advice, of course, would have to be in compliance with the Rules of Professional Conduct for Lawyers. See Dep't of Army, Pamphlet 27-26, Legal Services - Rules of Professional Conduct for Lawyers, Rules 1.5(f) & 1.5(g) and comments to Rule 1.8 (31 Dec. 1987).

the right direction, perhaps by talking briefly about the law, without giving legal advice.

Reserve judge advocates have another concern in this area, and it is malpractice. If premobilization preparation is not part of legal assistance, are the attorneys still covered by the military legal malpractice statute<sup>108</sup> when they draft wills and powers of attorney? The answer is an unequivocal "Yes." First, Policy Memorandum 88-1 clearly states that "All RC personnel acting within the scope of this policy letter are encompassed by 10 USC 1054 with regard to legal malpractice suits."<sup>109</sup> Moreover, the malpractice statute extends to *all* military attorneys (and paralegals) acting within scope of employment, not just those working in legal assistance. No special certification as a legal assistance attorney is necessary to qualify for malpractice protection.<sup>110</sup>

The second major issue at the Fifth Army Workshop involves potential clients who first speak to a Reserve judge advocate in the attorney's military capacity. The starting point for analyzing this matter is the Rules of Professional Responsibility for Lawyers.<sup>111</sup> Rule 1.5(f) provides that:

A lawyer who has initially represented a client concerning a matter as part of the attorney's official Army duties shall not accept any salary or other payment as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity.<sup>112</sup>

Comments to this rule clarify that it also prohibits a military attorney from referring a client to the law firm for which the attorney works in private practice (at least regarding matters that first arose in an official context).<sup>113</sup> This applies even if some other attorney in the firm will actually serve the client.<sup>114</sup>

Does Rule 1.5 apply where a reservist asks about a personal legal problem during a drill period but the attorney properly declines to give legal advice? Although the attorney has not "represented" the soldier as a "client," policy considerations dictate that Rule 1.5 be observed in such a case. As a practical matter, the

soldier sought to establish an attorney-client relationship, and this is enough to invoke the limitations on referrals, including self-referrals.

A number of Reserve judge advocates have commented that this interpretation is too broad, and it may work to the soldier's disadvantage. They ask, "Why must I refer a soldier who wants me to represent him in my private capacity to another attorney just because of the fortuity that he first discussed the matter with me while we were attending a drill?" While this question has some merit, it must be balanced against the policy considerations that stand behind Rule 1.5. First, all who are concerned (military attorneys, soldiers, and members of the public) must clearly understand that no military attorney receives any supplementation of salary or other compensation for the performance of official duties. Soldiers, by and large, do understand this precept, and they expect military attorneys to represent them without cost. Second, and in view of the soldier's expectations, any subsequent representation for a fee takes on conflict-of-interest overtones.<sup>115</sup>

The Reserve judge advocate has two options when a soldier seeks personal legal advice in an official setting. First, the attorney can refer the soldier to another counsel (whose practice is not related to the judge advocate's) or a bar referral office. Alternatively, the attorney can seek an exception to policy to allow representation in his or her private capacity.<sup>116</sup> Such an exception could be favorably considered in a case with all the following factors: the judge advocate has not advised or represented the soldier on the matter in question in his or her capacity as a government attorney; the client and the judge advocate have an existing professional, social, or other relationship outside their military association; the client initiated the request for representation in the attorney's private capacity; and the client clearly understands that the representation will be in the attorney's private capacity for a fee. Requests for exceptions to policy should be submitted through the Reserve component chain of supervision to the Guard and Reserve Affairs Department at The Judge Advocate General's School.<sup>117</sup>

<sup>108</sup> 10 U.S.C. § 1054 (Supp. V 1987).

<sup>109</sup> Policy Memorandum 88-1, *supra* note 102, para. 9.

<sup>110</sup> *See id.* paras. 3 & 9.

<sup>111</sup> Rules of Professional Conduct for Lawyers, *supra* note 107.

<sup>112</sup> *Id.*, Rule 1.5(f).

<sup>113</sup> Rules of Professional Conduct for Lawyers, *supra* note 107, at 9.

<sup>114</sup> *See id.*

<sup>115</sup> *See* Rules of Professional Conduct for Lawyers, *supra* note 107, at 13-14. The conflict of interest arises because it may appear that the attorney has used his or her official status to solicit the client.

<sup>116</sup> If the soldier is an authorized legal assistance client, there is a third option. The attorney could serve the client in a Special Legal Assistance Attorney capacity and receive retirement points for the time spent helping the soldier. For example, suppose a Reserve soldier is on orders for OCONUS training and is therefore eligible for "mobilization legal assistance," but his or her estate planning needs are too complex to be addressed under the PLP program. A Reserve judge advocate could treat the soldier as any other client in his or her private practice and develop a tailored will and trust package. The attorney's compensation would be retirement points. For further information regarding appointment as a Special Legal Assistance Attorney, see AR 27-3, para. 1-6b(2)(c).

<sup>117</sup> The U.S. Army Judge Advocate General's School, Attention: Guard and Reserve Affairs Department, 600 Massie Road, Charlottesville, VA 22903-1781.

In summary, there is no authorization for extending legal assistance services to Reserve component soldiers who are not on active duty, but at the same time these soldiers are entitled to receive premobilization legal preparation from Reserve component judge advocates, including counseling, wills, and powers of attorney. Additionally, Reserve component attorneys must be very circumspect in undertaking to represent, in their private capacities, soldiers who first speak to them about legal problems while the attorneys are acting in their official capacities. MAJ Guilford.

#### Consumer Law Notes

##### *"Referral Sales" Plans May Be Fraudulent*

A plan under which a consumer's obligation to buy goods or services is contingent upon the procurement of prospective customers is called a referral sales plan. Such plans are often considered fraudulent because there is always a limited number of purchasers for a given product or service in a given geographic area. Consequently, it is mathematically impossible for most purchasers to qualify for the promised discounts by finding new referrals. Several states have outlawed such schemes.<sup>118</sup>

In *Chapel Hill Spa Health Club, Inc. v. Goodman*<sup>119</sup> the Court of Appeals of North Carolina recently interpreted the state's statutory prohibition<sup>120</sup> broadly, holding that a retail installment contract for the sale of a health spa membership was void because it was executed simultaneously with a renewal agreement that made the cost of renewal contingent on the number of prospective club members the buyer referred to the spa. In that case, Goodman entered into a purchase agreement for a 2-year club membership from Chapel Hill Spa Health Club, making a down payment of \$50 and agreeing to make twenty-four monthly payments of \$34.03. A club representative separately executed a written offer to renew the membership annually (following the initial two years) at a cost of \$120 per additional year. This renewal offer was accompanied by an oral promise that for every prospective customer Goodman brought to the club, she would receive a \$20 discount on the renewal price.

Although Goodman referred several prospects to the club and received the promised renewal discount certificates, she failed to make her monthly payments under the purchase contract. When the club sued her for the unpaid amounts, Goodman defended on the basis that the contract was void because it violated North Carolina's statutory prohibition against referral sales. The magistrate to whom the case was originally referred and the district court to which Goodman appealed apparently agreed with the club's contention that only the renewal offer fell within the definition of "referral sale" because the sales contract made no mention of the referral

agreement. The Court of Appeals reversed, finding that the renewal offer and the accompanying oral referral agreement fell squarely within the prohibition of the statute, applying the general rule of contracts that all contemporaneously executed instruments relating to the subject matter of the contract are construed together.

##### *Sears Corrects Advertising Practices . . . Again*

Although consumers rarely question the advertising practices of major retailers with national reputations, assumptions favoring such firms are sometimes misplaced. Sears, previously involved in negotiations with the National Association of Attorneys General when it falsely advertised foreign-made goods as "made in America,"<sup>121</sup> was recently sued by the New York City Department of Consumer Affairs for numerous deceptive and/or misleading practices. While Sears initially counter-sued the City and alleged that its consumer protection rules were overbroad and unconstitutional, in January 1989 Sears dropped the counter-suit and agreed: 1) to pay the City \$10,000; 2) to stop advertising a range of discounts (using language such as, "save 15% to 30% or more") without disclosing the basis from which the reduction was taken; and 3) to refrain from advertising an offer as "limited" when in fact it is not limited (Sears ran carpet cleaning advertisements urging consumers to call before a stated deadline expired, but ran these ads over a 3-month period with new deadlines specified in each ad).

##### *Geographically Limited Car Warranties*

Car buyers are often admonished to review the terms of limited warranties carefully and are particularly alerted to limits on the warranty's duration and the mechanical parts covered. Unfortunately, legal assistance attorneys serving overseas may be seeing clients whose warranties contain another type of limitation: a clause limiting the warranty's application to vehicles registered and normally operated within the fifty United States and the District of Columbia. Although such clauses have to date been reported only in Mitsubishi warranties, other dealers may be including such limiting language. Particularly with the advent of extended warranties lasting up to five years, the obvious impact of such a clause is to terminate warranty protection once the buyer ships the car overseas. Legal assistance attorneys should use post publications to alert potential buyers to look for such limitations. (Information for this note was provided by CPT Pamela Stahl, Office of the Staff Judge Advocate, VII Corps.)

##### *Bogus Lithographs Still Under Investigation*

A lengthy investigation has recently resulted in a multi-count fraud indictment against the Center Art Gallery in Honolulu for the sale of bogus lithographs that they claimed were by famous artists, including

<sup>118</sup> See, e.g., Iowa Code Ann. § 714.16(2)(b) (West 1979); Mass. Gen. Laws Ann. ch. 271, § 6A (West 1970); Minn. Stat. Ann. § 325 F.69(2) (West Cum. Supp. 1989); Ohio Rev. Code Ann. § 1345.02(D) (Anderson 1979).

<sup>119</sup> 90 N.C. App. 198, 368 S.E.2d 60 (1988).

<sup>120</sup> N.C. Gen. Stat. § 25A-37 (1988).

<sup>121</sup> Legal Assistance Items, *Sears Advertises Goods "Made In America"*, *The Army Lawyer*, Jan. 1987, at 43.

Salvador Dali and Marc Chagall.<sup>122</sup> Anyone who may have purchased a counterfeit lithograph from any of the Center Art Gallery shops in Hawaii should contact the United States Attorney in Honolulu.

### Real Property Note

#### *Arizona Supreme Court Decision Frees Homeowners From Personal Liability for Most Loans Secured by the Home*

A recent Arizona Supreme Court case, *Baker v. Gardner*,<sup>123</sup> has upset the longstanding assumption that the holder of a note secured by a deed of trust on residential property has the option to waive the security of the deed of trust and bring an action on the entire unpaid balance of the obligation. The Court's broad holding in the case will have serious impact on lenders as well as other holders of residential real property deeds of trust.

In *Baker* a second deed of trust secured a carryback promissory note given by the buyer Gardner to the seller Baker representing part of the purchase price of the home. Gardner defaulted on both the mortgage company's loan and the carryback note. The mortgage company issued notice of a trustee's sale under its senior deed of trust. Because he was concerned that the proceeds of the sale would not be sufficient to satisfy Gardner's obligation under the second deed of trust, Baker elected to sue on the underlying promissory note under a statutory provision<sup>124</sup> requiring a mortgage holder to either foreclose his lien or sue on the underlying debt.

The trial court accepted Gardner's claim that the Arizona "anti-deficiency" statute<sup>125</sup> precluded an action to recover any difference between the amount obtained by the sale and the amount of the indebtedness. The Court of Appeals reversed the trial court and Gardner appealed to the Arizona Supreme Court.

The Arizona Supreme Court agreed with Gardner that Baker did not have the opportunity to waive the security and sue on the note. The court broadly concluded that the Arizona "anti-deficiency" statute has "abolish[ed]"

the personal liability of those who give trust deeds encumbering properties of two and one half acres or less, and used for single-family or two-family dwellings."<sup>126</sup> The scope of the court's decision is broad enough to apply the statute to most residential deeds of trust.

The Arizona court reviewed the law in several other states having similar deficiency statutes and found California<sup>127</sup> and North Carolina<sup>128</sup> decisions supporting its interpretation of the statute. The court found only one case holding that a creditor can maintain an action on the note notwithstanding the existence of a statute abolishing deficiency judgments.<sup>129</sup> (This note was prepared from information provided by MAJ Maurice Portley, USAR.)

### Tax Notes

#### *NAFI Wages Do Not Qualify For Foreign Earned Income Exclusion*

The Tax Court recently sustained the Internal Revenue Service's (IRS) position that Nonappropriated Fund Instrumentality (NAFI) employees working overseas are not entitled to the foreign earned income exclusion.<sup>130</sup> The Tax Court held that NAFI's constitute instrumentalities of the United States and therefore its employees are ineligible for the foreign earned income exclusion.<sup>131</sup>

Under I.R.C. § 911, workers who earn foreign income abroad may elect to exclude up to \$70,000 per year from their gross income.<sup>132</sup> To qualify for the exclusion, a U.S. citizen working abroad must make his or her tax home in a foreign country and satisfy either the "bona fide" residence test or the physical presence test. The bona fide residence test is satisfied if the taxpayer resides in a foreign country for an uninterrupted period that includes a full tax year.<sup>133</sup> A taxpayer can satisfy the physical presence test by residing outside the United States for 330 full days out of any period of 12 consecutive months.<sup>134</sup>

Even if these tests are met, however, wages paid to soldiers and other government employees are not treated as foreign earned income.<sup>135</sup> Despite this prohibition,

<sup>122</sup> For additional information, see Legal Assistance Items, *Fraudulent Sales of "Dali" Prints*, The Army Lawyer, Oct. 1988, at 51; and Legal Assistance Items, *Chagall or Charlatan?*, The Army Lawyer, Sept. 1987, at 63.

<sup>123</sup> 57 U.S.L.W. 2399, 24 Ariz. Adv. Rep. 8 (Dec. 20, 1988).

<sup>124</sup> Ariz. Rev. Stat. Ann. § 33-722 (1974).

<sup>125</sup> Ariz. Rev. Stat. Ann. § 33-814(E) (1974) (subsequently renumbered as Ariz. Rev. Stat. Ann. § 33-814(F) (West Supp. 1988)).

<sup>126</sup> *Baker*, 24 Ariz. Adv. Rep. at 11.

<sup>127</sup> See *Spangler v. Memel*, 7 Cal. 3d 605, 498 P.2d 1055, 102 Cal. Rptr. 807 (1971). California's statute differs from the Arizona statute, however, in that it requires only that a creditor first exhaust the security before bringing an action on the debt. Cal. Civ. Proc. Code § 726 (West 1980).

<sup>128</sup> See *Ross Realty v. First Citizens Bank & Trust*, 296 N.C. 366, 250 S.E.2d 271 (1979).

<sup>129</sup> *Page v. Ford*, 65 Or. 450, 131 P. 1013 (1913).

<sup>130</sup> *Matthews v. Commissioner*, 92 T.C. 21 (1989).

<sup>131</sup> I.R.C. § 911 (West Supp. 1988).

<sup>132</sup> I.R.C. § 911(a) (West Supp. 1988).

<sup>133</sup> I.R.C. § 911(d)(1)(A) (West Supp. 1988).

<sup>134</sup> I.R.C. § 911(d)(1)(B) (West Supp. 1988).

<sup>135</sup> I.R.C. § 911(b)(1)(B)(ii) (West Supp. 1988).



NAFI employees working in West Germany argued that the statement in the Conference Report for the Economic Recovery Tax Act of 1981 indicating that § 911 applies to "teachers at certain schools for U.S. dependents who are not employees of the U.S." extended § 911 coverage to: 1) persons considered employees of overseas nonappropriated fund activities; and 2) independent contractors of overseas nonappropriated fund activities.

The Tax Court rejected the NAFI employee's claim by finding that NAFI's constituted agencies of the United States and further ruled that the taxpayers were employees and not independent contractors. In a small measure of good news for the NAFI employees involved in the case, the Tax Court declined to impose negligence penalties because they exercised good faith in claiming the exclusion.

The IRS has begun an investigation of individuals who have been classified as government employees and have claimed the foreign earned income exclusion. So far over 1000 audit reports have been initiated as a result of this IRS review.

Overseas civilian government workers may qualify for the earned income credit if they are independent contractors under common law rules. Taxpayers will be considered independent contractors by the IRS if they are not subject to the control of the employer. If the employer maintains the right to control both the method and the result of the services provided, however, the individual will be considered an employee. Further guidance in determining whether a taxpayer qualifies as an independent contractor is contained in IRS Publication Number 539, Employment Taxes. MAJ Ingold.

#### *Tax Court Holds That Part-Time Home Qualifies as a Principal Residence*

Can a home be considered a principal residence for purposes of deferring gain even though the taxpayers only occupied the home for several months each year? The Tax Court recently faced this issue in *Thomas v. Commissioner*<sup>136</sup> and resolved it in favor of the taxpayers.

As in most cases involving I.R.C. § 1034 rollover issues, the facts in *Thomas* were quite involved. In 1971 the taxpayer's mother gave the taxpayer, Thomas, Illinois farm property containing a home and other buildings. For the next few years, Thomas's mother continued to live in the farmhouse while Thomas and his family lived in an apartment in a nearby town. The Thomas family grew larger, so in 1974 the family moved into the large farmhouse, sharing it with Thomas's mother.

The following year, Thomas purchased a lot in Florida. The family moved into an apartment while they built a new home on their lot. The Thomas family moved into the new Florida home and occupied it for six months from late 1976 to April 1977. In April 1977 Thomas moved his family back to the Illinois farmhouse. In October 1977 Thomas purchased and moved into a new home in Florida and, one month later, sold his first Florida home. In June 1978 Thomas sold the Illinois farm property, realizing a gain of over \$181,000.

During the entire time the Thomases lived in Florida, they kept furniture and their pets at the Illinois farm. Moreover, Thomas occasionally returned to Illinois on business trips and stayed in the farmhouse on all of these trips. The facts indicated that during the time the Illinois farm property was owned by Thomas, he lived in Florida for approximately half of the year and in Illinois for half of the year.

The Tax Court concluded that Thomas could defer the gain realized on the sale from the Illinois property under § 1034.<sup>137</sup> The court noted that Thomas satisfied one of the requirements of § 1034 by purchasing and occupying a replacement residence, the new home in Florida, within the statutory replacement period of 18 months.<sup>138</sup>

The further requirement under § 1034, that the "old residence" qualify as the taxpayer's principal residence, presented a more difficult issue for the court. According to regulations implementing § 1034, whether a home qualifies as a principal residence "depends upon the facts and circumstances of each case, including the good faith of the taxpayer."<sup>139</sup>

The Tax Court noted that the term "principal" as used in § 1034 means the taxpayer's chief or main place of residence. Although there is no requirement that the taxpayer actually occupy the former home when it is sold,<sup>140</sup> failure to occupy this property can make the status of the property as a principal residence more uncertain.

The court cited several factors to help determine whether a property qualifies as a principal residence when a taxpayer lives in more than one place:

- (1) the amount of time spent at one residence as opposed to another;
- (2) whether the taxpayer abandoned the residence with the intent not to return and his nonuse of the property was substantial from the time he left the property; and
- (3) whether a temporary rental of a residence was necessitated because of an adverse real estate market as opposed to converting a residence into a nontemporary rental for the production of income.<sup>141</sup>

<sup>136</sup> 92 T.C. 13 (1989).

<sup>137</sup> I.R.C. § 1034 (West Supp. 1988).

<sup>138</sup> The applicable statutory replacement period when Thomas sold the Illinois farm property was 18 months. I.R.C. § 1034 (West Supp. 1978). This period has subsequently been extended to two years. Note that the replacement residence requirement is satisfied if the taxpayer purchases and occupies the new home within either two years *before* or after the sale of the old home. In *Thomas* the taxpayers bought and lived in their new home nine months before they sold their former home.

<sup>139</sup> Treas. Reg. § 1.1034-1(c)(3)(i).

<sup>140</sup> See, e.g., *Clapham v. Commissioner*, 63 T.C. 505 (1975); *Houlette v. Commissioner*, 48 T.C. 350 (1967).

<sup>141</sup> *Thomas*, 92 T.C. at 3874.

The Tax Court applied these factors to the case and concluded that Thomas's Illinois property constituted his principal residence even though he only lived in the home for about half the time during the four years preceding the sale. Significant facts leading to this conclusion were that Thomas returned to the Illinois home every three weeks, during all of his trips to Illinois, that Thomas stayed exclusively in the farmhouse, and that Thomas's total time in Florida was divided among three separate residences. The court cited several additional factors to support its conclusion that the Illinois property and not the Florida property was the Thomas's principal residence: the Thomases filed Illinois state income tax returns as full-time residents, their sole place of business was in Illinois, and Mrs. Thomas was a registered Illinois voter, carried an Illinois driver's license, and contributed to and attended a church in Illinois.

This case is significant for several reasons. First, it gives taxpayers who temporarily leave a personal residence support for maintaining that the home should be considered a principal residence even though they have purchased and occupied a new home during intervening years. It also demonstrates that, in dual home cases, traditional indicia of domicile will be given great weight in determining which of the two residences should be considered the taxpayer's main home. Thus, taxpayers who temporarily leave a home can increase the chances that it will subsequently be viewed as a principal residence by continuing indicia of domicile throughout the period of absence. MAJ Ingold.

#### *Call For Help On Form 911*

The IRS has issued an appropriately numbered form, Form 911, Application for Taxpayer Assistance Order to Relieve Hardship, to be used when a taxpayer expects to incur a substantial hardship because of the way the IRS is administering the tax laws. The new form requests the Taxpayer Ombudsman or his designee to review the case.

The new form should not be used to contest the merits of tax liability. Taxpayers who disagree with the amount of taxes assessed by the IRS should consult IRS Publication Number 1, "Your Rights As A Taxpayer," for guidance on contesting an assessment.

The IRS will suspend enforcement action while it is reviewing a Form 911 application. Moreover, the IRS will toll any applicable statute of limitations while a decision regarding the application is being made.

#### **Estate Planning Notes**

##### *LAAWS Will Program For Texas Domiciliaries*

The first version of the new Legal Automation Army Wide System (LAAWS) was distributed to the field in January 1989. This initial version of LAAWS contains a generic "all states" personal representative appointment clause. Because this clause may not be sufficiently

specific to take advantage of unique state laws, it may occasionally be necessary to modify or entirely replace it.

Attorneys should consider editing this clause when drafting wills for Texas domiciliaries. Texas allows testators to select a form of independent administration that permits the executor to probate an estate quickly and inexpensively and avoid the often onerous judicial supervision associated with normal probate proceedings.<sup>142</sup> Texas independent administration requires the executor to probate and record the will with the court and file an inventory, appraisal, and list of claims.<sup>143</sup> After these documents are approved by the court, no further court proceedings are required. Despite the simplified procedure, the independent executor has all of the power and authority granted executors in other types of estate administration.<sup>144</sup>

The language of the testator's will must clearly show an intention to create independent administration. One form that attorneys may consider using to accomplish this appointment is as follows:

I appoint \_\_\_\_\_ of \_\_\_\_\_ to be Independent Executor of this will, to serve (with) (without) bond, and I direct that no action shall be had in the County or Probate Court in relation to the settlement of my estate other than the probating and recording of this will and the return of the statutory inventory, appraisal, and list of claims of my estate.

I vest my Independent Executor with full power and authority to sell, lease, encumber, or otherwise dispose of or convert any or all of my estate in such manner as it may deem fit, it being my desire that, subject only to the terms of this will, my Independent Executor shall have full power and authority to do all things reasonably necessary for the settlement of my estate.

Another sample form to create independent administration can be found in The Judge Advocate General's School, U.S. Army, ACIL-ST-272, Legal Assistance Wills Guide 4-202 (1987).

The LAAWS program will be periodically updated and improved to offer legal assistance attorneys the finest product possible. Users can help to improve the quality of future versions of this program by sharing their views and making suggestions for improvement. Comments concerning the LAAWS program should be forwarded to: Office of The Judge Advocate General, Information Management Office, DAJA-IM, ATTN: MAJ Dale Marvin, Washington DC 20310-2200. (The foregoing information and clause concerning Texas independent administration were provided by MAJ Joe Hely, USAR.)

<sup>142</sup> Texas Prob. Code Ann. § 145 (Vernon 1980).

<sup>143</sup> Texas Prob. Code Ann. § 145(b) (Vernon 1980).

<sup>144</sup> Texas Prob. Code Ann. § 145(h) (Vernon 1980).

### *Court Reduces Scope of SBP Social Security Offset*

In a case that could have a potentially significant impact on the military retirement community,<sup>145</sup> a U.S. District Court held that Survivor Benefit Plan (SBP) payments to a beneficiary should not be reduced by social security benefits based on the beneficiary's work history. The decision could affect all SBP participants who elected to participate in the program before October 1, 1985.

One of the two plaintiffs in the case, Mrs. Lantz, began receiving SBP payments after her husband's death in 1985. In addition to the SBP annuity, Mrs. Lantz received social security payments based on her own work history. Her SBP monthly payments were reduced by an amount equal to the widow's benefit attributable to her husband's military earnings even though she was not entitled to or receiving a widow's benefit based on her husband's military social security earnings. Mrs. Lantz did not qualify for these payments under social security law because the old age benefit she received as a result of her own work history exceeded the widow's benefit she would receive.<sup>146</sup>

Mrs. Lantz contended that the government was improperly taking a social security offset on her SBP payments based on the widow's benefit attributable to her husband's military earnings that she was not receiving. Although the court conceded that the statute could be interpreted two ways, it ultimately agreed with Mrs. Lantz' interpretation.<sup>147</sup>

The court concluded that the offset should not be applied to reduce payments unless the surviving spouse is "entitled to widow or widower benefits."<sup>148</sup> A widow

or widower is not entitled to these payments, according to applicable social security statutes, where his or her own old age benefits exceed the widow or widower benefit he or she would receive. Accordingly, the court ordered the government to reimburse plaintiff Lantz for all amounts it wrongfully withheld from her SBP payments.

The court in *Miller* went on to provide a strong incentive for other SBP participants and beneficiaries to bring suit against the government by holding that service members who chose to participate in SBP have a contract with the government. The statutes that define the SBP are the terms of the contract and both participants and beneficiaries have standing to sue in court to enforce the contract.

The "social security offset" is one of the least understood aspects of the Survivor Benefit Plan.<sup>149</sup> Under the offset, the SBP annuity is reduced by the amount of the Social Security survivor benefit to which the widow or widower would be entitled based upon the military service of the retiree.<sup>150</sup> This social security offset system only applies to those who elected to participate in the program, or who were retirement eligible, before October 1, 1985. The social security offset was eliminated by the 1985 amendments to the plan and a new "two-tiered" system was adopted. Under this system, widows' and widowers' annuity payments are automatically reduced to 35% percent of the base amount when they reach age 62 without regard to the actual receipt of social security payments. The decision in *Miller* therefore will not have an affect upon SBP participants or beneficiaries who are under the two-tiered system. MAJ Ingold.

<sup>145</sup> *Miller v. Aldridge*, 700 F. Supp. 1565 (D. Wyo. 1988).

<sup>146</sup> See 42 U.S.C.A. § 402(e)(1)(D) (West Supp. 1988).

<sup>147</sup> 10 U.S.C.A. § 1451(e) (West Supp. 1988).

<sup>148</sup> *Miller*, 700 F. Supp. at 1570.

<sup>149</sup> A recent article discussing the offset is Tolleson, *SBP - The Social Security Offset*, *The Retired Officer*, March 1989, at 49.

<sup>150</sup> 42 U.S.C.A. § 1451(e)(3) (West Supp. 1988).

# Claims Report

United States Army Claims Service

## Carrier Liability for Items Missing From Carrier-Packed Cartons

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### Introduction

After a soldier is paid for loss or damage to household goods that occurred during an Army-sponsored move, the Army pursues liability against the private carrier who caused the problem. If the carrier refuses to pay the liability owed in accordance with its contract with the government, the amount due is deducted from future bills presented by the carrier to the United States Army Finance and Accounting Center. This is called an "offset action." If the carrier feels it has been unjustly offset, it may appeal to the United States Army Claims Service. If the carrier fails to obtain satisfaction at this level, it may pursue an appeal to the General Accounting Office (GAO), which is under the aegis of the Comptroller General.

One area of dispute that occurs with great frequency is the issue of carrier liability for packed items missing at delivery. Prior to June 1982 liability was assessed against the carrier whenever there was only one carrier involved and there were items missing from packed cartons on moves under a Government Bill of Lading (GBL). The justification for assessing liability was that the carrier named on the GBL was the one to whom the GBL contract was issued, and that contractor was the one responsible for handling the shipment from the initial packing to final delivery and unpacking. Either that carrier or its agents had control of the shipment for the entire time. In addition, the claimant, by signing DD Form 1842, Claim for Personal Property Against the United States, was stating that he or she was fully cognizant of the serious criminal penalties involved in making a false or fraudulent claim and was thereby affirming that the missing items were tendered to the carrier at origin but were not delivered at destination.<sup>1</sup>

### The Initial Arpin Decision

In June 1982 the Comptroller General overturned this long established policy when it issued a decision in favor of Paul Arpin Van Lines, Incorporated.<sup>2</sup> In *Arpin* the Army contracted with the carrier to pack, transport, and deliver a military household goods shipment. Certain packed items (two Hummel figurines, a television remote

control, a velvet hat, and a telephone) were missing at delivery. When Arpin refused to accept liability for the items, the amount due for the missing items was offset from other monies due the carrier and Arpin appealed.

Arpin contended it should not be held liable for the missing packed items because: 1) there was no evidence that the items were actually tendered; 2) the cartons were sealed and were not tampered with; and 3) the inventory numbers for the missing items had been assigned by a claims examiner.

The Comptroller General sustained Arpin's appeal, indicating that the record failed to establish proof of tender, which was the first element of a prima facie case of carrier liability. The Comptroller General noted:

To establish a prima facie case of carrier liability, the shipper must show: 1) that he tendered the property to the carrier in a certain condition; 2) that the property was not delivered by the carrier or was delivered in a more damaged condition; and 3) the amount of loss or damage. . . . Only then does the burden of proof shift to the carrier to show that it was not liable for the loss or damage.<sup>3</sup>

The Comptroller General further asserted:

Clearly, proof of tender—the first element of a prima facie case—is established when the inventory lists the items that the shipper later claims are lost.... [I]t is advisable for the shipper to insure that the inventory is as detailed as practicable.... Under these circumstances, we believe that allowing the member to establish tender of his household goods on the strength of his unsupported, self-serving acknowledgment places an unreasonable burden on the carrier with regard to its ability to rebut the claim.<sup>4</sup>

### The Request for Reconsideration

All of the military services believed that the *Arpin* decision was unjust and that the Comptroller General did not fully understand the issue or the implications of his decision. Therefore, a joint request for reconsideration

<sup>1</sup> DD Form 1842, Part I, line 8, states:

All documents required are attached hereto, and a detailed list of the property is set forth on the Schedule of Property and made a part of this statement. I have full knowledge of the penalties involved for wilfully making a false, fictitious or fraudulent claim (Section 287 of Title 18, U.S.C., provides a maximum fine of \$10,000 or imprisonment for five years or both).

<sup>2</sup> Ms. Comp. Gen. B-205084 (2 June 1982).

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

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

tion was submitted by the military services to the Comptroller General on December 1, 1982.<sup>5</sup>

The request for reconsideration explained that because the missing items were not large enough to be listed separately on the inventory, they were packed in cartons containing other similar items. These cartons were then listed on the inventory with a general description of their contents, in compliance with Arpin's contractual responsibilities. The request for reconsideration asked how an individual military member could require the carrier to make a more detailed inventory than that required by the carrier's own contract with the government.<sup>6</sup> The carrier's contract merely requires the carrier to identify packed containers by type and cubic foot and give a general description of contents such as "linens, pots and pans, etc."<sup>7</sup>

The request for reconsideration argued that if the military services were to contractually require the carrier to list each item separately, it would require days rather than hours to prepare an inventory and would be cost prohibitive. Unfortunately, according to the *Arpin* decision, unless the shipper proved that a missing item was tendered to the carrier at origin, the shipper could not establish a prima facie case of carrier liability.<sup>8</sup>

The request for reconsideration noted:

The paradox is clear. The inventory, prepared by the carrier in accordance with its Tender of Service, is the sole means available to the shipper for identifying container contents. Obviously, if the documentary proof of tender rests solely within the carrier's control, there results an unconscionable prejudice to the injured shipper, whose statement concerning missing items, albeit signed under oath, is unsubstantiated by the carrier prepared inventory.<sup>9</sup>

The request for reconsideration also argued that a carton delivered sealed does not mean that it has not been opened and resealed. It further contended that the *Arpin* decision would allow the loss of easily pilferable items that were too small to be listed on the inventory.<sup>10</sup>

#### The Comptroller General's Response

On June 8, 1983, the Comptroller General responded to the joint services' request for reconsideration.<sup>11</sup> Although he declined to specifically reverse *Arpin*, the Comptroller General noted that:

We did not intend by our decision to place an onerous burden on the shipper or to require the shipper to offer absolute proof of tender. Rather our reading of the applicable case law, such as *Missouri Pacific Railroad Co. v. Elmore Stahl*, 377 U.S. 134 (1965), led us to the conclusion that where the issue of whether goods were tendered is raised, as was raised by Arpin, the shipper must present at least some substantive evidence of tender as an element of his prima facie case against the carrier. . . .

We did not envision, as the Army seems to conclude, that adequate evidence on behalf of the shipper could be provided only by requiring the carrier to list every household item. Instead we reasoned that the shipper would have personal knowledge of the circumstances surrounding tender and could supply a specific statement concerning the loss rather than merely a general acknowledgment of certain criminal penalties. We believe that applicable case law supports this rationale.<sup>12</sup>

The Comptroller General specifically cited the case of *Trans-American Van Service, Inc. v. Shirzad*<sup>13</sup> as an example of a case in which the shipper furnished sufficient evidence of tender. In *Trans-American* the shipper claimed that twelve items packed by the carrier at origin were missing at destination. The carrier had prepared an inventory in which it listed all of the carrier-packed cartons without indicating which individual items the cartons contained. The carrier denied liability, claiming there was no proof that the missing items were tendered at origin.

The court found there was sufficient evidence of tender, using the following rationale:

Mr. Shirzad did not personally observe each and every item that the movers packed and loaded, so . . . he could not offer direct affirmative evidence that each item . . . was handed over to Trans-American in Maryland. Nevertheless, he did offer an abundance of indirect and circumstantial evidence from which the jury was entitled to conclude that delivery was made.

Mr. Shirzad testified that he and his family went through their Maryland home selecting the items which they wished to ship to Houston and setting these aside in designated areas which they showed to the movers. Although he did not make a written

<sup>5</sup> Request for reconsideration of Comp. Gen. Decision B-205084, submitted on 1 Dec 1982, was jointly signed by the Commander of the U.S. Army Claims Service; the Chief, Claims and Tort Litigation Staff Office of the Judge Advocate General of the Air Force; the Deputy Assistant Judge Advocate General of the Navy; and the Director, Personnel Services Division, Manpower Department, HQ, Marine Corps.

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

<sup>7</sup> DOD Reg. 4500.34R, Appendix A (Tender of Service), para. 54c.

<sup>8</sup> See *supra* note 5.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See *supra* note 5.

<sup>11</sup> Ms. Comp. Gen. B-205084 (8 June 1983).

<sup>12</sup> *Id.*

<sup>13</sup> *Trans-American Van Service, Inc. v. Shirzad*, 596 S.W.2d 587 (Tex. Civ. App. 1980).

inventory of the contents of each box . . . the movers packed, he did remember details concerning the items in question such as how or where they were packed and who packed them. He stated unequivocally that each of the items in question was in good condition when it was given to Trans-American in Maryland . . . .<sup>14</sup>

Shortly thereafter, in 1983, the Chief of the Personnel Claims Recovery Branch, U.S. Army Claims Service, spoke to the attorney at the Comptroller General's office who wrote the response to the request for reconsideration. He asked, in light of the *Trans-American* example that was cited by the Comptroller General, what kind of evidence might be offered to satisfy the requirements of proof of tender in cases where items were missing from carrier-packed cartons. The GAO attorney from the Comptroller General indicated that a statement from the shipper noting the following things would probably satisfy the evidentiary requirements needed to prove tender at origin: 1) that the shipper possessed the missing items prior to the move; 2) that all of the missing items were packed by the carrier; 3) that after the goods were packed the shipper checked all the rooms in the home to make sure nothing was left behind; and 4) that the items were missing at destination.<sup>15</sup>

#### Recent Decisions

In 1987 the issue of carrier liability for missing packed items surfaced again when A World Wide Moving, Incorporated, and Andrews World Forwarders, Incorporated, were offset after their refusal to pay liability for missing items from carrier-packed cartons.<sup>16</sup> Both carriers protested the offset action and appealed to the GAO. In both cases the military shippers had submitted statements describing their losses in terms similar to those that the GAO attorney had indicated would probably be acceptable to establish sufficient evidence of tender.

In the World Wide case the shipper noted on DD Form 1842, Claim for Personal Property Against the United States:

Items on lines #17-26 are found missing. The missing items on my claim, the deep silver knife, the 6 graduated silver and candlesticks, the 2 champagne glasses and the 5 complete sets of BD uniforms and accessories, were items we owned and used prior to our move but were not delivered to us at destination by the carrier. After my household goods were packed at origin, I checked all rooms in

the house to make sure nothing was left behind. All items had been packed by the carrier.<sup>17</sup>

In the Andrews case the shipper submitted a very similar statement. Both shippers acknowledged on DD Form 1842 that they were aware of the criminal penalties involved in making false claims. In both of those cases there was no overt evidence of carton tampering and inventory numbers were provided by the shippers.

In 1988 the GAO denied both carriers' appeals and upheld the Army offset actions.<sup>18</sup> The GAO noted that "it would be an onerous burden on the shipper to require that he offer absolute proof of tender. Further, we held that adequate evidence of tender could be provided by a statement by the shipper showing personal knowledge of the circumstances surrounding tender and the loss."<sup>19</sup> The GAO also upheld the Army contention that the fact that the cartons did not show evidence of tampering does not negate the possibility that someone could have removed the items and then resealed the cartons.<sup>20</sup>

#### Conclusion

After a long uphill fight from 1982 to 1988, it appears that the military will be able to charge a carrier for items missing from packed cartons on GBL moves where one carrier was responsible for the move from beginning to end and the shipper submits a statement detailing the background of the loss. The following statement is one that has been upheld by the GAO as meeting the requirements outlined in the 1983 Comptroller General response to the joint services' request for reconsideration.

The missing items on my claim were items we owned and used prior to our move but were not delivered to us at destination by the carrier. After my household goods were packed at origin, I checked all rooms in the house to make sure nothing was left behind. All items had been packed by the carrier.<sup>21</sup>

Therefore, when missing packed items are involved in a claim, such a statement must be included on Part I of DD Form 1842, Claim for Personal Property Against the United States. If there is insufficient room to include this statement on DD Form 1842, this statement may be written on bond paper, signed, dated, and attached as an enclosure to DD Form 1842. A new DD Form 1842, now in draft, will include a printed version of this statement.

<sup>14</sup> *Id.* at 592.

<sup>15</sup> Telephone conversation between Mr. Sanford V. Lavite, Chief of the Personnel Claims Recovery Branch, U.S. Army Claims Service; and Ms. Margaret McConnell, attorney action officer on Ms. Comp. Gen. B-205084 (8 June 1983).

<sup>16</sup> Offset action by the U.S. Army Finance and Accounting Center was carried out against A World Wide Moving, Inc. (claim of Guy P. Runkle) in July of 1987; and Andrews Forwarders, Inc. (claim of Glenn Myers) in April of 1987.

<sup>17</sup> Claim of Glenn P. Runkle, DD Form 1842 received by the Army on 15 Aug. 1986.

<sup>18</sup> GAO Settlement Certificate Z-2727878(97) 15 April 1988 (A World Wide). GAO Settlement Certificate Z-2729037(47) 15 April 1988 (Andrews).

<sup>19</sup> See *supra* note 17.

<sup>20</sup> See *supra* notes 18-19.

<sup>21</sup> See *supra* notes 18-19. These statements were submitted by claimants Runkle and Myers on either the DD Form 1842 or as an attachment to DD Form 1842 and were used by the GAO to sustain its denial of carrier appeals.



## Claims Notes

### Personnel Claims Notes

#### *Civilian Employees Transferring From One Service to Another*

Civilian employees changing jobs may also be transferring to another service (from the Army to the Navy, for example) and are often entitled to ship property at government expense. By agreement between the military services, the gaining service will accept and process the employee's claim for loss or damage to property during government-sponsored shipment. For example, if a civilian employee was leaving an Army job to take an Air Force job, the gaining service would be the Air Force. This rule is applied without regard to which service funded the shipment or issued travel orders. There is no existing agreement, however, with federal agencies other than the military services. If a claims office of another military service refuses to accept the shipment claim of a civilian employee transferring to that service, the Personnel Claims Branch of U.S. Army Claims Service should be contacted for assistance in resolving the problem. Mr. Frezza.

#### *Shipment Claims by University Personnel*

A number of American universities have overseas campuses located on military installations. Teachers employed by such universities are entitled to shipment of personnel property on a Government Bill of Lading, but they are not proper claimants under the Personnel Claims Act. They are not entitled to compensation under that statute and should be counselled to submit claims directly against the carrier. The travel authorizations for such individuals will indicate the name of the university such as "Boston University" or "University of Maryland," and a job title such as "Associate Professor." The Government Bill of Lading will often indicate the name of the university in block 10. Mr. Frezza.

#### *Installation Transportation Office Inspections*

Installation transportation offices (ITO's) are still required to perform claims inspections at the request of the installation claims office. (Paragraph 6-B2a(2), DOD Reg. 4500-34R (C2, December 1987)). At a minimum, some type of inspection should be performed whenever damage in excess of \$1,000 (exclusive of lost items) is sustained and whenever a particular claimant's credibility is questionable. ITO's may be asked to inspect either at the time the claims office receives the DD Form 1840R or when it receives the claim, depending upon circumstances. The U.S. Army Claims Service views inspections as the only way to hold down claims costs while fully compensating meritorious claimants.

To ensure that inspections are performed in a timely and meaningful manner, claims judge advocates are expected to meet with their transportation counterparts periodically. Close coordination between claims and transportation personnel is essential. The U.S. Army Claims Service has explored the feasibility of a recommendation that ITO quality control inspectors be moved into the claims office. While a few installations have done this with great success, many of the claims offices contacted oppose transferring ITO inspector authoriza-

tions, citing the disruption this would cause in their smooth working relationships with their ITO's.

At installations where the transportation function is being contracted out, however, staff judge advocates are strongly encouraged to explore the utility of shifting inspector assets. Mr. Frezza.

### Tort Claims Note

#### *Recent FTCA Denials*

**Aggravation of Injuries by Medical Malpractice.** An Army civilian employee filed a claim for the aggravation of injuries incurred in the performance of duty as a result of medical malpractice in an Army hospital. The claimant's exclusive remedy, including his remedy for the additional injuries allegedly caused by medical malpractice, is the Federal Employee's Compensation Act (5 U.S.C. 8116(c)). *Balancio v. United States*, 267 F.2d 135 (2d Cir. 1959); *Alexander v. United States*, 500 F.2d 1 (8th Cir. 1974).

**Recreational Use Statute.** A civilian motorcyclist's administrator filed a wrongful death claim when his decedent was killed in a collision with an automobile driven by a spectator entering a motocross course on an Army post. The decedent, a member of a private club, had helped design the course. The State Recreational Use statute barred the claim. The United States, as the landowner, did not engage in intentional, willful, or malicious activity, and no charge was made for the use of the land.

**Slip and Fall.** A civilian delivery man filed a claim for injuries sustained when he fell on icy steps at a post exchange loading dock. The claimant slipped on a piece of cardboard that was allegedly covered with snow. The fall occurred when he was descending steps that he had ascended just prior to the incident. The claim was denied because the delivery man's negligence significantly contributed to his injuries.

**Products Liability.** The decedent's spouse and estate filed wrongful death claims after the decedent died in a traffic collision with an Army two and one half ton truck that crossed the center line as the result of a tire blowout. Investigation revealed that manufacturing defects caused the blowout. The defects could not be detected by visual inspection, the tire had been properly maintained, and the manufacturer had not notified the United States that the tire was defective. The government driver was obeying all traffic laws at the time of the accident and took reasonable action to avoid the decedent's vehicle. The claim was denied because the cause of the death was the defective tire. Mr. Rouse.

### Personnel Claims Recovery Notes

#### *Requesting Government Bills of Lading*

It is sometimes difficult or impossible to obtain a copy of the Government Bill of Lading (GBL) from the claimant or from the origin or destination transportation offices. When the GBL cannot be otherwise obtained, a copy may be requested using DD Form 870, Request for

Fiscal Information Concerning Transportation Requests, Bills of Lading and Meal Tickets, from the U.S. Army Finance and Accounting Center, Transportation Operations Division, Data Research Branch, ATTN: FINCH-GFG, Indianapolis, IN 46249-0611. A separate DD Form 870 must be completed for each GBL requested. Copies of inventories may be requested from the carrier. Field claims offices are reminded that all documents that the claimant cannot provide, particularly NTS exception sheets, should be requested at the time the claim is received to avoid delaying recovery action. Mr. Frezza.

*Carrier Liability for Code 1 Household Goods Shipments From Canada and Mexico*

Soldiers will occasionally ship household goods to or from a location in Canada or Mexico. Such shipments

are listed as Code 1 shipments, but the Military Traffic Management Command has informed the U.S. Army Claims Service that these shipments are shipped under the international tender at a carrier released valuation of \$0.60 per pound per item. As these shipments do not move over water, they cannot be considered Code 4 shipments. Thus, Canadian and Mexican shipments are exceptions to the general rule that Code 1 shipments are Increased Released Valuation (IRV) shipments. Carrier recovery should be pursued on Canadian and Mexican household goods shipment claims at \$0.60 per pound per item, and on the Personnel Claims Management Program they should be categorized as "HH" claims. Offices may annotate such claims as "Canadian" or "Mexican" in the note field. Mr. Frezza.

## Criminal Law Note

*Criminal Law Division, OTJAG*

**Opinion DAJA-CL 1989/5146, 23 February 1989**

The Office of The Judge Advocate General was asked what was the proper procedure to follow when a Record of Proceedings Under Article 15, UCMJ, DA Form 2627, has been lost. The proper procedure is to reconstruct the DA Form 2627, noting in Block 11 that the form represents the reconstitution of validly imposed punishment by the commander and explaining why reconstruction was necessary. It may be necessary to attach a memorandum of the present or imposing commander. A reconstructed DA Form 2627 may be placed in a soldier's personnel files. DAJA-CL 1979/5639.

The facts presented are that a soldier was punished under the provisions of Article 15 by the Battalion Commander. The soldier filed a timely appeal, and the DA Form 2627 was forwarded to the Office of the Staff Judge Advocate for review prior to appellate action. After the DA Form 2627 and allied papers were forwarded to the Installation Commander's office, the paperwork was lost. A month later the loss of the Article 15 was discovered. The new Battalion Commander decided the soldier had therefore never been

punished and it was permissible to once again impose Article 15 punishment. This second Article 15 is the subject of the inquiry.

Paragraph 3-10, AR 27-10 prohibits double punishment under Article 15. "When punishment has been imposed under Articles 13 or 15, punishment may not again be imposed for the same misconduct under Article 15." The date of imposition of punishment is the date that the commander signs items 4 through 6 of the DA Form 2627. Thus, punishment was imposed at the time of the first Article 15 and may not be imposed again.

Filing of the Record of Proceedings Under Article 15 is separate from the imposition of punishment. Although the filing of an Article 15 may have considerable effect on the soldier, it is *not* part of the punishment. In the present case, the soldier has been punished. To record the punishment, a reconstructed DA Form 2627 is used.

This case illustrates the need for the reconciliation log. Paragraph 3-39, AR 27-10, and DA Form 5110-R, are specifically designed to prevent the above situation from occurring.

## Personnel, Plans, and Training Office Note

### Personnel, Plans, and Training Office, OTJAG

The JAGC Command and Staff College (CSC) Advisory Board will convene on 9 June 1989 to recommend officers for attendance at the U.S. Army Command and General Staff College (USACGSC) for Academic Year 1990-91. To be eligible for consideration, judge advocates must:

1) have credit for completing an advanced course (Military Education Level 6); *and*

2) be serving in the grade of major with more than three years time in grade as of 1 October of the academic year in which the course begins (in this case 1 October 1990); *or*

3) be serving in the grade of lieutenant colonel and have less than 182 months of active federal commissioned service as of 1 October of the academic year in which the course begins (in this case 1 October 1990).

Officers who want the Advisory Board to consider new matters may submit them to:

HQDA (DAJA-PT)  
ATTN: MAJ Romig  
Pentagon Room 2E443  
Washington, DC 20310-2206

As only a few judge advocates are selected for this schooling, nonselection does not indicate a lack of promotion potential or value to the Army. Officers not selected are encouraged to complete USACGCS by the correspondence course or USAR nonresident program. Credit for a staff college is a prerequisite for consideration to attend senior service schools and is an important consideration for promotion to higher grades. Information concerning the correspondence course or the USAR nonresident program may be obtained by writing to:

US Army Command and General Staff College  
School of Corresponding Studies  
ATTN: Registrar, ATZL-SWE-M  
Fort Leavenworth, KS 66027

Telephonic inquiries to USACGSC concerning the correspondence course or USAR nonresident program should be directed as follows:

Autovon: 552-extension  
Commercial: 913-684-extension  
Last names beginning with A-E: 5584  
Last names beginning with F-K: 5615  
Last names beginning with L-R: 5618  
Last names beginning with S-Z: 5407

## 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 MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

### 2. TJAGSE CLE Course Schedule

1989

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

July 1989

3-7: ALIABA, Basic Law of Pensions and Deferred Compensation, Boston, MA.

6-7: PLI, 18th Annual Institute on Employment Law, San Francisco, CA.

8-9: MLI, Effective Utilization of Expert Witnesses, San Francisco, CA.

9-14: NJC, Advanced Evidence, Reno, NV.

9-14: NJC, Judicial Writing, Reno, NV.

9-18: MCLE, Trial Advocacy Institute, Springfield, MA.

9-4/8: NJC, General Jurisdiction, Reno, NV.

10-14: ALIABA, Advanced Law of Pensions and Deferred Compensation, Palo Alto, CA.

13: PLI, Securities Arbitration, New York, NY.

14-15: UKCL, Estate Planning, Lexington, KY.

14-16: MLI, Medical Principles for Legal and Insurance Professionals, Lake Tahoe, NV.

15-16: MLI, Medical Malpractice and Risk Management, Lake Tahoe, NV.

16-21: NJC, Constitutional Criminal Procedure, Reno, NV.

16-21: NJC, Current Issues in Civil Litigation, Reno, NV.

16-21: NJC, Law, Ethics and Justice, Reno, NV.

17-21: ALIABA, Modern Real Estate Transactions, Charlottesville, VA.

20-21: PLI, Workshop on Legal Writing, Los Angeles, CA.

23-28: NJC, Special Problems in Criminal Evidence, Reno, NV.

23-30: PLI, Trial Advocacy, New York, NY.

23-4/8: NJC, The Decision-Making Process, Reno, NV.

24-25: PLI, 18th Annual Institute on Employment Law, Chicago, IL.

30-4/8: NJC, Judicial Writing, Reno, NV.

30-4/8: MCLE, Trial Advocacy Institute, Boston, MA.

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

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 January annually
Colorado	31 January annually
Delaware	On or before 31 July 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	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	Beginning 1 January 1989, 24 hours every two years
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*.

#### 5. Army Sponsored Continuing Legal Education Calendar (1 April 1989—30 October 1989)

The following is a schedule of Army Sponsored Continuing Legal Education that is not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAGC officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: CPT Duncan, Heidelberg Military 8459). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972-6342.

### Training

TCAP Seminar  
TDS Workshop (Region I)  
USAREUR Staff Judge Advocate CLE  
TJAGSA On-Site  
TJAGSA On-Site  
Basic Claims Workshop  
TDS Workshop (Region IV)  
TJAGSA On-Site  
TCAP Seminars (USAREUR)

TDS Workshop (Region II)  
TJAGSA On-Site  
TJAGSA On-Site  
TJAGSA On-Site  
USAREUR International Law Trial Observer CLE  
USAREUR International Law/Operational Law CLE  
USAREUR Claims Service Regional Workshop  
TCAP Seminar  
TCAP Seminar  
TCAP Seminar  
USAREUR Branch Office C.J.A. CLE  
USAREUR Contract Law—Procurement Fraud Advisor  
CLE  
USAREUR Staff Judge Advocate CLE  
USAREUR Legal Assistance CLE  
TCAP Seminar  
5th Circuit Judicial Conference  
USAREUR Criminal Law CLE I  
Criminal Law/Chief of Justice CLE  
Criminal Law Trial Advocacy CLE  
Criminal Law CLE II  
USAREUR International Law Trial Observer CLE  
Advance Claims Workshop  
USAREUR International Law CLE

### Location

San Francisco  
Fort Knox, KY  
Heidelberg, Germany  
Louisville, KY  
Chicago, IL  
St. Louis, MO  
Ft. Sam Houston, TX  
New Orleans, LA  
Frankfurt, Germany  
Nuernberg, Germany  
Stuttgart, Germany  
Kaiserslautern, Germany  
Fort Gordon, GA  
Columbus, OH  
Birmingham, AL  
San Juan, P.R.  
Heidelberg, Germany  
Heidelberg, Germany  
Frankfurt, Germany  
East Coast  
Fort Hood, TX  
Fort Bragg, N.C.  
Heidelberg, Germany  
Heidelberg, Germany  
Heidelberg, Germany  
Garmisch, Germany  
Garmisch, Germany  
Fort Carson, CO  
Garmisch, Germany  
Chiemsee, Germany  
Chiemsee, Germany  
Chiemsee, Germany  
Chiemsee, Germany  
Chiemsee, Germany  
Heidelberg, Germany  
Baltimore, MD  
Berchtesgaden, Germany

### Date - 1989

7 April  
12-14 April  
20-21 April  
22-23 April  
22-23 April  
24-27 April  
24-25 April  
28-30 April  
1-2 May  
4-5 May  
8-9 May  
11-12 May  
3-5 May  
6-7 May  
6-7 May  
9-10 May  
11-12 May  
23-26 May  
8-9 June  
11-12 July  
13-14 June  
1-2 August  
4 August  
18 August  
24-25 August  
5-8 September  
12-13 September  
September  
8-13 October  
13 October  
13-16 October  
16-21 October  
19-20 October  
30 Oct-2 Nov  
27 Nov-1 Dec

## 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**
- AD B112101 Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-87-1 (302 pgs).
- AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-87-2 (214 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).
- Legal Assistance**
- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD B116100 Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
- AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
- AD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
- AD B116097 Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
- AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
- AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
- AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
- AD B124120 Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
- AD-B124194 1988 Legal Assistance Update/JAGS-ADA-88-1
- Claims**
- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

**Administrative and Civil Law**

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/ JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/ JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- Labor Law**
- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/ JAGS-ADA-84-12 (321 pgs).

**Developments, Doctrine & Literature**

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)
- Criminal Law**
- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

**2. Regulations & Pamphlets**

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 27-20	Claims	15 Feb 89
AR 34-1	International Military Rationalization, Standardization, and Interoperability	15 Feb 89
CIR 11-88-8	Management Control Plans	31 Dec 89
UPDATE 1	Military Occupational Classification and Structure	1 Feb 89