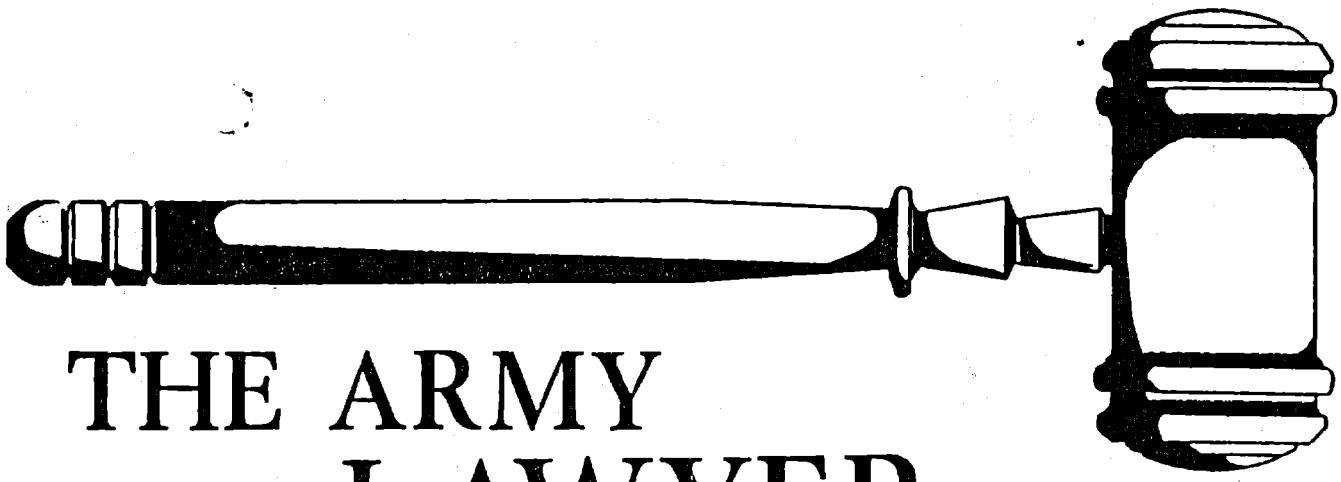

# THE ARMY LAWYER

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

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

REPLY TO
ATTENTION OF

DAJA-ZX

8 March 1989

MEMORANDUM FOR COMMANDANT, TJAGSA

SUBJECT: ALLS Purchase of Legal Research Tools for SJA Libraries

1. A common concern of Staff Judge Advocates that I visit throughout the world is their law library. I share their concerns about the space the library requires, getting the proper books for their particular library, posting the publications they receive and keeping the books they have in good repair and in their library. Additionally, many SJA's are concerned about what research materials they could take with them during mobilization.

2. Commercial companies are developing new ideas for legal research where large volumes of text are stored on small optical discs. In keeping with the JAGC emphasis on innovation, and considering the needs of SJA's, I believe these new legal research tools may have beneficial applications to our practice. Accordingly, I want you to evaluate the concept of the Army Law Library Service replacing the books and publications currently in our libraries with one of these new compact legal research tools.

3. Your evaluation should include but not be limited to the following: a cost-benefit analysis; what court decisions, regulations and administrative opinions are available; what SJA's need; what must be done to make the optical discs available to all offices in the field; and a recommendation whether ALLS should adopt this concept. If we adopt this concept, I envision a field test of 6-12 months before full implementation. We also need milestones to achieve these objectives.

4. This concept should be added to any five year plan for the Army Law Library Service. Due to the long range implications of this tasking, I ask you to add it to your list of items for the Quarterly Review and Analysis. POC for this tasker is the Executive.

Hugh Overholt

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

# Standards of Conduct: A Primer—The Command Ethics Program

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*This article is the first in a series that will discuss standards of conduct in the Army. It proposes a Command Ethics Program that may be implemented at every installation. Subsequent articles will analyze recurring problems and discuss post-employment restrictions.*

## Introduction

Army Regulation 600-50 [1] prescribes the standards of conduct required of all Department of the Army (DA) personnel. It incorporates rules, restrictions, and guidance from Executive Order 12674, [2] the Ethics in Government Act of 1978, [3] and Department of Defense Directive 5500.7. [4] Additionally, it includes some restrictions that are applicable only to DA personnel. [5] AR 600-50 sets forth the minimum acceptable standards for DA personnel, who are expected to conduct themselves in a manner that will promote continued public confidence in the integrity of the United States Government. [6] Any violation of these standards may be the basis for adverse administrative action or criminal prosecution. [7]

To ensure that all DA personnel are aware of and comply with these standards, AR 600-50 requires every command to have an ethics training program. [8] In compliance with AR 600-50's requirement for a semiannual reminder, many installations currently address standards of conduct twice a year. [9] Although this may meet the minimum requirements of AR 600-50, a good ethics program operates throughout the year. Ethics training programs seek to avoid problems through education and awareness. The purpose of this article is to outline the responsibilities, educational requirements, recurring problems, and reporting requirements that should be addressed in every ethics training program. [10] Every program should go beyond the legal issues and address the professional conduct required of soldiers and officers. [11]

## Command Ethics Program

### *The Players*

A successful Command Ethics Program (CEP) must coordinate the efforts of various installation activities into a comprehensive program that reaches all areas of the installation/command. Although ethics is everyone's responsibility, certain individuals have specific duties.

#### *Installation Commanders*

The ethics training program is a command program, and the senior commander has the ultimate responsibility to make certain that the objectives of the program are met. This includes the regulatory requirements discussed below and the overall objective of ensuring that all DA personnel are aware of and abide by the values of professional Army ethics. [12] Senior commanders, in conjunction with their ethics counselors (EC), must regularly evaluate their ethics training programs. [13]

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*The authors are jointly responsible for the Standards of Conduct instruction provided by The Judge Advocate General's School, U.S. Army, and serve as the Ethics Counselors for TJAGSA.

[1] Army Reg. 600-50, Personnel-General: Standards of Conduct (28 Jan. 1988) [hereinafter AR 600-50].

[2] Exec. Order No. 12,674, 54 Fed. Reg. 15,159, Principles of Ethical Conduct for Government Officers and Employees, was signed by President George Bush on April 12, 1989. It revoked Exec. Order No. 11,222, 30 Fed. Reg. 6469 (1965) and Exec. Order No. 12,565, 51 Fed. Reg. 34,437 (1986).

[3] Ethics in Government Act of 1978 (as amended), Pub. L. No. 95-521, 92 Stat. 1824 (1978).

[4] Dep't of Defense Directive 5500.7, Standards of Conduct (May 6, 1987) [hereinafter DOD Dir. 5500.7].

[5] For example, AR 600-50, paragraph 2-2*c*(8)(c), prohibits field grade officers from accepting seat upgrades while in uniform. This prohibition is not in DOD Dir. 5500.7 and does not apply to the other services.

[6] AR 600-50 at 1 (Summary).

[7] *Id.* para. 1-1.

[8] AR 600-50, para. 1-6*b*, refers to "command ethics training programs" but does not specify the structure or scope of such programs. The authors believe that every command (division level and above) and installation should have an ethics program designed to actively promote compliance with AR 600-50 as required by paragraph 12d of the Article 6 Inspection Checklist, *reprinted in* The Army Lawyer, January 1989, at 3.

[9] AR 600-50, para. 1-6*b*. The authors' experiences and conversations with judge advocates and commanders in the field support this conclusion.

[10] The authors recognize that each command ethics program (CEP) must be tailored to meet the needs of the organization. The issues discussed in this article are not meant to be all inclusive, but are representative of the types of issues that should be addressed in the development of every CEP.

[11] Dep't of Army, Field Manual 100-1, The Army, at 22-24 (29 Aug. 1986) [hereinafter FM 100-1].

[12] Dep't of Army, Pam 600-3, Commissioned Officer Professional Development and Utilization, para. 1-8 (30 Apr. 1986) [hereinafter DA Pam. 600-3].

[13] AR 600-50, para. 1-6*b*.

### *Ethics Counselor*

The EC is the second most important player in the CEP. All Army staff agencies, field operating agencies, separate activities, installations, and commands authorized a general officer commander must designate an EC in writing. [14] The EC may advise and counsel DA personnel on standards of conduct issues, but may not represent any individual or establish an attorney-client relationship. [15] In evaluating the CEP, the EC should consult and coordinate with other staff principals to ensure that the specific requirements of AR 600-50 are met. The responsibility for assessing and resolving standards of conduct violations begins with the EC. [16]

### *Director of Contracting*

As the focal point of all contracting activities on the installation, the director of contracting is responsible for making certain that all contracting activities are accomplished in accordance with applicable acquisition regulations. [17] This involves maintaining the integrity of the contracting system by protecting advance procurement information [18] and by establishing a system to ensure that DA personnel are not knowingly doing business with present or former military or civilian personnel who are violating regulatory or statutory restrictions. [19]

### *Civilian Personnel Officer*

The civilian personnel officer should be responsible for the initial standards of conduct training of all new civilian employees. [20] The civilian personnel officer and the EC regularly review civilian positions to determine if the duties require the filing of a Statement of Affiliations and Financial Interests (DD Form 1555). [21]

### *Inspector General/Military Law Enforcement Officials*

The responsibility for investigating suspected violations on the installation is shared by the inspector general and law enforcement officials. [22] When investigating any complaint involving alleged violations of AR 600-50, it is important that the inspector general consult with the EC. [23] Law enforcement officials, to include military police and members of the Criminal Investigation Command, are responsible for the prompt investigation of alleged criminal violations of standards of conduct.

### *Adjutant General*

The adjutant general is responsible for the recruitment, retention, training, retirement, and discharge of military personnel. [24] The standards of conduct training required by AR 600-50, which includes the initial training of new recruits and pre-retirement briefings, [25] should be accomplished in conjunction with the adjutant general's inprocessing and outprocessing of military personnel.

### *Subordinate Commanders/Supervisors*

All commanders and supervisors share the responsibility of ensuring that the personnel under their supervision are aware of and comply with the requirements of AR 600-50. The supervisory personnel must be sensitive to the missions and jobs of their subordinates that require special training in standards of conduct. [26]

### *Educational Requirements*

The key to success in the standards of conduct area is avoidance through education. To accomplish this, AR 600-50 requires DA personnel to receive standards of

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[14] *Id.* para. 2-9. AR 600-50 does not require Ethics Counselors (EC) to be attorneys; however, the Assistant Judge Advocate General for Military Law, in a memorandum dated 3 February 1989, stated that all EC's must now be licensed attorneys. This change will be included in the next revision of AR 600-50. Every EC should have the following publications available: AR 600-50; DAJA-AL 1988/2666, Reference Guide to Prohibited Activities of Military and Former Military Personnel (updated annually); The Ethics Counselor, published periodically by the Office of the General Counsel, Department of the Army; and the Ethics Newsgram, published by the Office of Government Ethics.

[15] *Id.* para. 2-9*d*(3).

[16] *Id.* para. 2-11.

[17] For example, Federal Acquisition Regulation, subpart 1.602-2 (22 Feb. 1988), outlines the responsibilities of contracting officers in general.

[18] AR 600-50, para. 2-1*g*, requires that only duly designated agencies release advance acquisition information. The Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 27(c), prohibits the unauthorized release of proprietary or source selection information. This legislation is effective 16 May 1989.

[19] AR 600-50, para. 2-1*m*.

[20] *Id.* para. 1-6*a*(1) requires an entry to be made on the civilian personnel orientation checklist after the initial briefing. Consequently, the briefing should be done during the civilian personnel officer's normal inprocessing of new personnel.

[21] *Id.* para. 3-2*a*.

[22] *See generally* Army Reg. 20-1, Inspector General Activities and Procedures: Assistance, Inspections, Investigations, and Follow-up, Chapter 5 (16 Sept. 1986) [hereinafter AR 20-1]; Army Reg. 190-30, Military Police: Military Police Investigations, para. 3-14 (1 June 1978) [hereinafter AR 190-30]; and Army Reg. 195-2, Criminal Investigations: Criminal Investigation Activities, para. 1-5*b*(1) (30 Oct. 1985) [hereinafter AR 195-2].

[23] AR 20-1, para. 5-9*b*, requires reports of investigation prepared by the inspector general to be coordinated with the local staff judge advocate. Based on this requirement, it is reasonable to require standards of conduct complaints to be coordinated with the EC.

[24] DA Pam 600-3, para. 42-1. These duties are also shared by the G-1.

[25] AR 600-50, para. 1-6.

[26] *Id.* para. 1-6*a*(2) requires briefings to be tailored to the duties of DA personnel. For example, briefings to personnel that go TDY frequently should stress the restrictions on accepting benefits incident to official travel.

conduct briefings when they enter government service, semiannually thereafter, and prior to departing government service. [27]

*Initial Orientation*

Military and civilian personnel must receive a briefing within sixty days of entering government service. The U.S. Army Training and Doctrine Command (TRADOC) or the appropriate service school briefs military personnel. Normally this is accomplished at the same time other mandatory briefings are given. Unfortunately, a similar procedure does not exist for civilian personnel. Management and supervisory officials have the responsibility to brief new civilian personnel. [28] Every CEP should include a procedure to ensure that all new civilian employees receive their initial briefings within sixty days of beginning work; this can be done as part of the regular inprocessing. For example, a judge advocate could routinely visit the civilian personnel office to conduct the briefings.

For officers and civilian employees the initial orientation must include an oral briefing and an opportunity to review the regulation. For enlisted personnel the only requirement is that they be orally briefed, although making a copy of the regulation available for review is recommended. All the briefings should include a general overview of AR 600-50 and should be tailored to concentrate on the problem areas most likely to be encountered by DA personnel in their new employment. [29]

There are a variety of methods for conducting the initial orientation. Commands may use videotapes and training films, but the tapes must be reviewed regularly to ensure that the content keeps up with the frequent changes to the regulation. Information papers can effectively highlight particular problem areas. Copies of the regulation may be distributed. A live presentation is the most effective method of presenting the information and the easiest to tailor to a particular audience. [30]

*Semiannual Reminders*

AR 600-50 requires commands to educate DA personnel semiannually on the provisions of the regulation. Twice a year, they must be reminded of the importance of avoiding problems and must be advised of recent developments in standards of conduct. [31] There are many ways to accomplish the semiannual review, and variety will add to the success of the CEP. [32] Judge advocates familiar with AR 600-50 could provide one-hour classes, and all DA personnel could be required to attend. A standards of conduct presentation could be taped, reproduced, and distributed on the installation for viewing at times convenient for commanders and supervisors. The presentation should highlight changes to the regulation as well as review the basic provisions of AR 600-50. [33] Any publication on the installation that receives wide dissemination to both military and civilian personnel may be used for the semiannual reminder. This includes posters, command bulletins, command letters, installation newspapers, and television broadcasts. [34]

An effective technique is the use of programmed instruction incorporated into a computer program. The information presented should be similar to that covered in a live presentation, but the format would be unique and individuals could accomplish the training at their convenience. [35]

Routing a copy of AR 600-50 through an office is a very common method of satisfying the requirements of the regulation and may meet the minimum requirement for a semiannual review. Due to its complexity, however, people seldom actually review the entire regulation. An information paper highlighting the changes and reviewing basic prohibitions should be circulated along with the regulation. [36]

*Education of Departing Personnel*

Officers and civilians who are terminating service with the Department of the Army have an affirmative obligation to review the post-employment restrictions that

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[27] AR 600-50, para. 1-6.

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

[29] *Id.* para. 1-6*a*.

[30] *Id.*

[31] *Id.* para. 1-6*b*.

[32] A good program should outline the methods to be used for the semiannual review over a period of two or three years. Many resources are available to assist JA's in developing a program. For example, the Department of Defense Inspector General published a pamphlet, Defense Ethics, A Standards of Conduct Guide for DOD Employees, IGDG 5500.8, January 1989; the Office of Government Ethics published a handbook, How to Keep Out of Trouble, OGE 6, March 1986 (may be revised in the spring of 1989); and the Office of the General Counsel, Department of the Army, published a handbook, Conflicts of Interest and Other Financially-Related Activities of Army Civilian Personnel, January 1988. All contain excellent discussions that may be tailored for installation use.

[33] For example, the Office of Government Ethics has created a videotape entitled *Public Service, Public Trust*. *See* the Ethics Newsgram, Vol. 5, No. 2 (May 1988), for information on ordering a copy of the videotape.

[34] If this method is used, the importance of the information should be highlighted by the use of bold print, colored text, or other attention-getting techniques.

[35] A computer-assisted program of instruction on Standards of Conduct is currently being developed at TJAGSA.

[36] All significant changes to AR 600-50 are incorporated in the Summary of Change printed at the beginning of the regulation.

apply to them. [37] Commanders must ensure that personnel who intend to leave public service receive a briefing that explains the restrictions on negotiating for employment. In addition, four to six months prior to terminating government service, departing personnel must receive a briefing on post-employment restrictions. All personnel ending service with the Army must be given an opportunity to review a copy of AR 600-50 during their outprocessing. [38] Officers and civilian employees also receive a copy of the post-employment restrictions contained in Figure 1-1, AR 600-50. [39] A judge advocate, preferably the EC, should be available to answer any additional questions for departing personnel. [40]

An effective way to meet these requirements is to provide an information paper on negotiating for employment and post-employment restrictions to all personnel contemplating departing government service. [41] The paper should include extracts from the regulation and list a point of contact at the SJA office to answer questions. In addition, a judge advocate should attend the command's pre-retirement briefings and explain both negotiating for employment and post-employment restrictions.

### *Recurring Standards of Conduct Issues*

There are problems in the standards of conduct area that recur at every installation. The CEP must address these problems.

#### *Gifts to Superiors*

The presentation of gifts to superiors on special occasions is a military tradition. The general rule prohibits the donation, solicitation, and acceptance of such gifts unless they meet the following criteria: 1) the gift must be given on a special occasion; 2) the total value of the gift may not exceed $180.00 in U.S. retail value; 3) the gift must be of a sentimental nature; and 4) the contributions must be voluntary. [42] The criteria are easily met, yet violations continue to occur. When a regulatory violation occurs it must be reported to the EC and the violator's supervisor. [43]

This problem should be avoided. The CEP should provide for an ad-hoc gift committee composed of the EC and other representatives from the command. This committee could review all proposals for gift giving on the installation before donations are requested. [44]

#### *Gifts from Foreign Governments*

Gifts from foreign governments should also be addressed in the ethics program. [45] The guidance on accepting such gifts is similar to accepting gifts from subordinates. Additionally, the recipient must make a detailed record of the circumstances. [46] If the gift exceeds $180.00 in U.S. retail value, it becomes property of the United States Government and must be forwarded to HQDA within sixty days for use or disposal. [47] The CEP should clearly state the rules, particularly the record-keeping requirements. After the record is reviewed by the EC, a file copy should be maintained locally. Standards of conduct briefings to DA personnel deploying to foreign countries, visiting foreign countries, or working with foreign officials should include detailed instructions on the processing of foreign gifts.

#### *Benefits Incident to Official Travel*

To encourage business, most airlines, hotels, and rental car companies offer benefits to travelers that use their services. The general rule is: if the travel of DA personnel is official, the benefits belong to the United States Government. [48] There are complex exceptions to this general rule, [49] and individuals must clearly understand them. Frequent travelers should receive regular briefings and should be kept abreast of any changes to the rules. This may be accomplished by including a provision in the CEP requiring that an information

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[37] AR 600-50, para. 5-2*a*.

[38] *Id.* paras. 1-6*c* and 5-2*b*.

[39] *Id.* para. 1-6*c*(2).

[40] *Id.* para. 5-2*b*.

[41] *See* DAJA-AL 1988/2666, Reference Guide to Prohibited Activities of Military and Former Military Personnel (16 Sept. 1988), Chapters 2 and 3, for a discussion of these restrictions. This publication is revised annually.

[42] AR 600-50, para. 2-3*a*, outlines the restrictions on accepting gifts and donations. Gifts to immediate family members of the superior are treated as gifts to the superior. The DA restrictions on accepting gifts are more narrowly drawn than DOD Dir. 5500.7, which allows gifts of "a reasonable value under the circumstances."

[43] AR 600-50, para. 2-10.

[44] Coordination among these individuals will ensure that collection procedures are truly voluntary, that gifts do not exceed $180.00 in value, that they are of a sentimental nature, and that none of the individual gifts combined constitute a single gift that exceeds $180.00.

[45] Army Reg. 672-5-1, Military Awards (18 Apr. 1988), Chapter 7, Section III [hereinafter AR 672-5-1]. *See also* 5 U.S.C. § 7342 (1982) for the statutory basis of this regulation.

[46] *Id.* para. 7-13*a* requires the record to include the circumstances surrounding the presentation, the date and place of the presentation, the identity of the foreign government, the name and title of the donor, and a brief description of the gift and its appraised retail value.

[47] AR 672-5-1, para. 7-13*b*. *See also* para. 7-15 for disposition of unauthorized gifts and para. 7-13 for special rules on the acceptance of gifts of medical treatment, educational scholarships, and travel and travel expenses.

[48] AR 600-50, para. 2-2*c*(8).

[49] *Id.* para. 2-2*c*(8) and (9).

paper on the rules be attached to each set of travel orders.[50]

Several commands have now initiated mandatory programs designed to capture many travel benefits.[51] These programs should be a part of the CEP. They can be formal programs managed by installation personnel or informal programs managed by the individual with periodic reporting requirements.

### *Off-Duty and Post-Employment Restrictions*

AR 600-50 contains several restrictions on the employment of DA personnel off duty and after they depart government service. Off-duty employment may not interfere with official duties or bring discredit upon the United States Government.[52] Post-employment restrictions apply to departing DA personnel as soon as they begin to negotiate for employment and may continue to apply permanently.[53] The key to avoiding problems in these areas is to ensure that commanders and supervisors are aware of any intention by subordinates to seek off-duty or post-government service employment. To accomplish this, the CEP may require that supervisors approve off-duty employment and that DA personnel notify their superiors prior to seeking post-government employment. Supervisors must ensure that soldiers and employees understand the applicable restrictions.

### *Contacts with DOD Contractors*

The relationship between DA personnel and DOD contractors is tightly controlled. To avoid problems, DOD contractor personnel must be identified, and the DA personnel dealing with them must be knowledgeable of the restrictions. Contractors may be identified by implementing a registration procedure in the CEP. The registration procedure should be designed to identify individuals entering the installation as contractors or potential contractors and should ensure that they are not in violation of any post-employment restrictions.[54] The procedure can be as formal as requiring a registration form to be filled out upon entry,[55] or as informal as requiring only a brief screening interview.

In addition to identifying DOD contractors, the CEP should include training of installation contracting personnel. The training should emphasize the restrictions on the following: 1) the use of insider information;[56] 2) the unauthorized release of acquisition information;[57] and 3) post-government employment.[58]

### *Recurring Reporting Requirements*

### *Standards of Conduct Violations*

All DA personnel have an affirmative responsibility to report suspected standards of conduct violations by other DOD personnel to the local EC. If criminal conduct is suspected, additional reporting and investigation may be required. If no criminal conduct is involved, the EC must coordinate with the appropriate commander or supervisor to resolve the conflict.[59] The CEP should require that standards of conduct briefings to DA personnel include the following information: 1) the reporting procedures; 2) the steps in resolving actual

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[50] The following are sample paragraphs that may be included in the information paper:

*Benefits Incident to Official Travel*

a. Travel coupons, tickets, promotional items and other benefits received by DA personnel from airlines, rental car companies, and hotels wholly or partly as the result of official travel are government property and may not be retained except as noted below.
b. Acceptance of promotional items or items offered for customer relations purposes valued at less than $10 and offered to other similarly situated travelers is permissible.
c. Bumping—overbooked flights.
   (1) If the traveler voluntarily gives up his seat, he or she may keep the money or ticket if a later flight does not interfere with the performance of duty or increase the cost to the government.
   (2) If the traveler is involuntarily bumped, the money or ticket becomes U.S. property.
d. Travel upgrades (airline seat, rental car, and hotel room) may be accepted under circumstances where they are generally available to the public, unsolicited, and not the result of preferential treatment, improper influence, or favoritism. Examples of travel upgrades that can be accepted include:
   (1) If offered as a membership benefit of a frequent flyer/traveler program where the upgrade is solely a result of membership (bonus points may not be used).
   (2) If offered as the result of overbooking, overcrowding, or for customer relations purposes.
   (3) NOTE: Field grade officers and above may never accept an upgrade while in uniform.
e. Bonus points.
   (1) Travelers cannot keep bonus points received for official travel and use them for personal travel.
   (2) Bonus points may be applied toward official travel.
   (3) Membership in frequent flyer/traveler programs is encouraged by DA for the benefit of the government. The burden is on the member to keep personal and official travel separate.

[51] For example, Army Materiel Command, Fort Rucker, and Fort Benning have initiated programs that require DA personnel who go TDY regularly to be members of frequent flyer programs.

[52] AR 600-50, para. 2-6.

[53] *Id.* para. 2-1*o* and chapter 5.

[54] *Id.* para. 2-1*m*.

[55] A sample registration form was published in The Ethics Counselor, Issue No. 3, Aug. 1988.

[56] AR 600-50, paras. 2-1*e* and 5-3*a*.

[57] *Id.* para. 2-1*g*. The implementation of the Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, will change some of the procedures concerning the release of acquisition information.

[58] *See generally* AR 600-50, chapter 5. Office of Federal Procurement Policy Act Amendments of 1988 have added additional post-employment restrictions and these changes will be incorporated in the next revision of AR 600-50.

[59] *Id.* paras. 2-10 and 2-11. Additional guidance on reporting suspected violations is contained in The Ethics Counselor, Issue No. 2, Apr. 1988.

conflicts or apparent conflicts; [60] and 3) the name and office phone number of the EC.

### *Disclosure Reports*

AR 600-50 requires a variety of reports to be filed depending upon the duties, responsibilities, and grade of the individual. Generally, the EC, in conjunction with the commander or supervisor, is responsible for ensuring that the appropriate individuals are identified and that the reports are properly prepared and filed. The required reports include: the Confidential Statement of Affiliations and Financial Interests (DD Form 1555), the Executive Personnel Financial Disclosure Report (SF 278), the Statement of Employment—Regular Retired Officers (DD Form 1357), and the Report of DOD and Defense Related Employment (DD Form 1787). [61]

### *Confidential Statement of Affiliations and Financial Interests (DD Form 1555)*

Many individuals on the installation may be required to file a DD Form 1555, but the following two categories are the ones usually encountered by most EC's. The first consists of commanders and deputy commanders, below the pay grade of 0-7, of major installations and activities. The second is made up of DA personnel classified as GS-15 (or comparable) and military personnel below the pay grade of 0-7 who in the exercise of their judgment with regard to official advice may affect the economic interests of a non-federal entity. [62]

Individuals required to file a DD Form 1555 must, if possible, file an initial report prior to the assumption of duties. They must then file annually by 31 October, reporting all affiliations and financial interests as of 30 September of the same year. The completed forms will be submitted to the individuals' supervisors for review and approval; the supervisors, within 15 days, will forward the forms to the EC for final review, approval, and filing. [63]

The supervisor of civilian employees, in conjunction with the EC and the personnel officer, will review new job descriptions and those that have been substantially changed to decide if a DD Form 1555 must be filed. As a part of the military rating process, the rating officer, in conjunction with the EC, will determine if the rated officer is required to submit a DD Form 1555. DA personnel required to submit a DD Form 1555 will have the filing requirement noted in their civilian job description (DA Form 374) or Officer Evaluation Report Support Form (DA 67-8-1), as appropriate. [64] Every CEP must include a system that requires review of both military and civilian positions on a regular basis. [65] After the initial review of all positions has been completed, the best time for subsequent reviews is prior to the annual evaluation. [66]

### *Executive Personnel Financial Disclosure Report (SF 278)*

General officers, Senior Executive Service personnel, and GS employees in grades classified as GS-16 and above must file an SF 278. [67] AR 600-50 requires the SF 278 to be filed on various occasions by senior personnel, but the reports most frequently encountered on the installation are assumption and annual reports. [68] Individuals promoted to the pay grade of 0-7 or assuming those duties (frocked) must file an SF 278 within thirty days of assuming the duties of a general officer. All general officers must file an annual SF 278 through their EC to their immediate supervisor by 15 April of each year. The SF 278 is reviewed by the immediate supervisor and his or her EC prior to forwarding to Headquarters, Department of the Army, to arrive there by 15 May. [69]

The SF 278 is a complex form that requires a comprehensive disclosure of property interests, income, liabilities, and financial transactions. [70] The ultimate responsibility to file the report rests with the individual; however, the CEP should require that the reports be completed, reviewed, and forwarded. The SF 278 must be made available for public review upon request, and this may occur prior to review by HQDA. [71] Consequently, the EC must make every effort to ensure that the reports are accurate, complete, and timely.

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[60] *Id.* para. 2-11.

[61] *See generally* AR 600-50, chapters 3, 4, and 5.

[62] AR 600-50, para. 3-1.

[63] *Id.* para. 3-4.

[64] *Id.* para. 3-2.

[65] Additional guidance on the review of military and civilian positions for filing of DD Forms 1555 was included in The Ethics Counselor, Issue No. 3, Aug. 1988.

[66] For military personnel, this should be done at the time of the face-to-face interview required by DA Form 67-8-1. For civilian personnel, it should be done during the discussion at the beginning of each evaluation period.

[67] AR 600-50, para. 4-1.

[68] AR 600-50, para. 4-3 requires other reports, including nomination reports, termination reports, and reports by USAR and ARNG general officers who serve more than sixty days in a covered position during the calendar year.

[69] AR 600-50, paras. 4-3, 4-5, and 4-6. Note that the words "arrive at" were omitted from para. 4-3c(1), AR 600-50, according to The Ethics Counselor, Issue No. 2, Apr. 1988.

[70] A copy of SF 278 is located at Figure 1-4, AR 600-50. The copy reproduced in AR 600-50 does not include Schedule D.

[71] AR 600-50, para. 4-8.

*Statement of Employment—Regular Retired Officers (DD Form 1357)*

Every retired RA officer must file a DD Form 1357 within sixty days after retirement. [72] The DD Form 1357 is filed with the Commander, United States Army Finance and Accounting Center. Retirees must file a revised DD Form 1357 within thirty days if the information reported is no longer accurate. If the retired officer is employed by the Federal Government, a copy of the SF 50, Notification of Personnel Action, must be included in the initial filing. The filing and review of DD Form 1357 is not the responsibility of the local command or installation. The CEP should, however, make sure that retiring RA officers are aware of the requirement to file and provided any necessary assistance in completing the form. [73]

*Report of DOD and Defense Related Employment (DD Form 1787)*

Certain former officers and employees must file a DD Form 1787 if, during the two years after separating, they are employed at a rate of $25,000 or more per year by a contractor who during the year preceding employment was awarded at least $10,000,000 in DOD contracts. This applies to military personnel with at least ten years of active service who served in the pay grade of 04 or above and civilian personnel who were paid at the minimum rate for a GS-13 at any time in the three years prior to separating. [74] Officers and employees currently employed by DA must file a DD Form 1787 if, in the two years prior to entering government service, they were employed by a $10,000,000 DOD contractor and were paid at a rate of $25,000 per year. [75]

Current DA officers and employees required to file a DD Form 1787 must do so within thirty days of entering government service. Former officers and employees required to file must file an initial DD Form 1787 within ninety days of beginning employment with a DOD contractor and must file an amended report any time their duties change significantly within two years. [76] For current DA personnel, the DD Form 1787 must be filed with the EC at their duty stations. Former DA personnel should file the report with the EC at their last duty stations. The responsibility for reviewing and forwarding DD Forms 1787 rests with the EC. [77] The CEP must include guidance to guarantee that the forms are properly processed and that any conflicts are resolved. [78]

## Conclusion

The program outlined above is a comprehensive approach to the monitoring and enforcement of standards of conduct on DA installations. Substantial work will be required to initiate and implement a good CEP, but increased emphasis will yield many benefits. A CEP that operates effectively will increase the awareness of all DA personnel and result in fewer violations. The few violations that do occur will be promptly reported and resolved. Failure to promptly report and resolve violations in the past has led to allegations that undermine the public's trust. Congress's response has been to add to the already complex legislation in this area. [79] If current standards are vigorously enforced, new legislation may not be necessary, and the public's trust in the integrity of the government will be enhanced.

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[72] *Id.* para. 5-5*b*. The instructions for completing the DD Form 1357, located at Figure 1-2, AR 600-50, incorrectly state that the form must be filed within thirty days.

[73] AR 600-50, para. 5-5*b*.

[74] *Id.* para. 5-8*a*(1).

[75] *Id.* para. 5-8*a*(2).

[76] *Id.* para. 5-8*c*.

[77] *Id.* The filing requirements in para. 5-8*c*(4) and (5), AR 600-50, are no longer accurate. The original form should be forwarded to HQDA (DACF-FSR), Hoffman I, Room 1408, Alexandria, VA 22331-0521. *See* The Ethics Counselor, Issue No. 3, Aug. 1988.

[78] The reporting requirements discussed are the most common post-employment actions requiring EC involvement, but the list is not exhaustive. For example, 10 U.S.C. § 2397b, as implemented by AR 600-50, para. 5-3*c*, requires MACOM EC's to prepare a letter upon request for retired DA personnel within thirty days advising them of the applicability of § 2397b to their post-government service employment.

[79] The Post Employment Restrictions Act of 1988 (H.R. 5043) was passed by Congress. The legislation would have substantially broadened existing post-employment restrictions. President Reagan vetoed H.R. 5043 on 25 November 1988. Exec. Order No. 12,668, 54 Fed. Reg. 3,979 (1989) was signed on 25 January 1989 and created the President's Commission on Federal Ethics Law Reform. The Commission reviewed all federal ethics laws, orders, and policies and made 27 recommendations for legislative, administrative, and other reforms on 9 March 1989.

# The Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone

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## Introduction

Falsification offenses constitute one of the most diverse groups of offenses under the Uniform Code of Military Justice (UCMJ). [1] As a result of this diversity, it is often difficult to find "common ground" among the various falsification offenses; for example, there is little similarity between the elements of perjury and the elements of a false official statement. [2] In addition to the diversity of elements, another "line of demarcation" between various falsification offenses is the varying applicability of the two-witness rule, a centuries-old evidentiary rule that continues to sabotage unsuspecting trial counsel. [3] This rule, simply stated, requires that the falsity of allegedly perjured testimony or sworn statements be proven by the testimony of two independent witnesses or by the testimony of one witness supported by corroborating evidence. [4] It is unclear, however, exactly which offenses are included within the scope of the rule's application or how effective the rule is in actual practice.

## Origins of the Rule

The two-witness rule has often been termed "synthetic" or "quantitative," because it goes not to admissibility, as is the case with most rules of evidence, but rather to the burden of production of the evidence. [5] The net effect of the rule is that, in the absence of any of the rule's exceptions, the government's case will fail if the prosecution uses only one witness to prove one of the offenses that mandate application of the two-witness rule. [6] The rule is "an almost unique exception to the general rule that evidence which is sufficient to convince the jury of the defendant's guilt beyond a reasonable doubt is sufficient to sustain a conviction." [7]

The two-witness rule has Old Testament antecedents and originally was designed to protect the innocent from the potentially fickle finger of a single accuser. [8] Over the centuries the rule has evolved into a mechanism to protect witnesses from malicious or false prosecution for perjury, [9] thus encouraging them to testify more freely.

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[1] A general listing of falsification offenses under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ] includes, but is not limited to, UCMJ art. 83 (fraudulent enlistment, appointment, or separation); UCMJ art. 107 (false official statement); UCMJ art. 115 (malingering by feigning illness, physical disablement, mental lapse, or derangement); UCMJ art. 121 (larceny or wrongful appropriation by fraud or false pretense); UCMJ art. 123 (forgery); UCMJ art. 131 (perjury, both in the form of giving false testimony and subscribing a false statement); UCMJ art. 132 (frauds against the United States, including making a false oath) and a panoply of offenses under UCMJ art. 134 (including false pass offenses, false swearing, obtaining services under false pretenses, altering public records, and subornation of perjury).

[2] Perjury (UCMJ art. 131) and false swearing (UCMJ art. 134) differ significantly in their elements because the former requires that the allegedly false statement must be given during the course of a judicial proceeding, and the false statement must be material. Despite these differences, trial attorneys often attempt to use the two offenses interchangeably. *See* United States v. Gomes, 11 C.M.R. 232, 237 (C.M.A. 1953); United States v. Kennedy, 12 M.J. 620, 622 (N.M.C.M.R. 1981). False swearing is generally held *not* to be a lesser included offense of perjury. United States v. Smith, 26 C.M.R. 16 (C.M.A. 1958); *Kennedy*, 12 M.J. at 622. *Contra* Manual for Courts-Martial, United States, 1984, Part IV, para. 57d [hereinafter MCM, 1984], wherein false swearing *is* specifically cited as a lesser included offense to perjury. Prior to 1984, false swearing was not specifically listed as a lesser included offense to perjury. Manual for Courts-Martial, United States, 1969 (Rev. ed.), app. 12 [hereinafter MCM, 1969].

[3] The primary offenses to which the two-witness rule has been applied by the MCM, 1984, are perjury, UCMJ art. 131; false swearing, UCMJ art. 134; and subornation of perjury, UCMJ art. 134. The rule apparently has been judicially extended to making a false oath under art. 132. It has also been applied to statutory perjury under UCMJ art. 134; but whether that offense continues to be valid is uncertain.

[4] United States v. Jordan, 20 M.J. 977 (A.C.M.R. 1985).

[5] 7 Wigmore, Evidence, § 2032 (Chadbourn rev. 1978).

[6] United States v. Johnson, 8 C.M.R 358 (A.B.R. 1952). This proposition has been restated as follows:

> The requirement of corroborative evidence to substantiate a witness' testimony to the falsity of another's oath is consistent with the law's presumption of the innocence of an accused until proven guilty. The contradictory evidence of one witness alone is not sufficient, since it merely establishes an equilibrium. Additional weight, therefore, is necessary to turn the proof against the defendant. In addition, if there is but one witness to prove the allegations of falsity, it amounts to the word of one person being placed against the word of another, and it necessarily remains doubtful where the truth lies.

60A Am. Jur. 2d *Perjury* § 98 (1988).

[7] United States v. Nessanbaum, 205 F.2d 93, 95 (3d Cir. 1953).

[8] 7 Wigmore, *supra* note 5, at 326 n.6. For example, Deut. 17:6 states that "[a]t the mouth of two witnesses or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death."

[9] United States v. Weiler, 323 U.S. 608, 609 (1944). An additional basis for the rule was "societal indignation over the effect of perjury on the judicial process, indignation which often enacted harsh penalties disproportionate to the materiality of the falsity." United States v. Tunstall, 19 M.J. 824, 825 (N.M.C.M.R. 1984).

The rule enables witnesses to testify knowing "that they will not be subject to prosecution for perjury simply because an equally honest witness may well have a different recollection of the same events." [10]

Originally the rule was given very wide application. The rule applied to virtually every attempt to prove a fact, not just to proving a particular type of offense. From its Biblical antecedents, the rule became part of Roman law, and by the time of Emperor Constantine, the Romans had adopted a general rule that no material point could be sufficiently proven by just one witness alone. [11]

The rule next crept into canon law, which developed a complex system of varying the number of required witnesses depending upon the circumstances of a given case. For example, Wigmore reported that in some instances up to forty-four witnesses were required as proof against a cardinal. [12] The underlying premise remained the same, however: a single witness was simply insufficient.

As ecclesiastical law influenced the evolution of both civil law on the European continent and common law in England, this "two heads (or at least, mouths) are better than one" rule was well established by the 1500's. At about this time, however, the English common-law courts broke with their ecclesiastical counterparts and, with the notable exception of perjury offenses, the common-law courts rejected the numerical system of requiring more than one witness. [13] Wigmore credits the change to the unique nature of the common-law courts where jurors served as witnesses themselves and there was an "indefinite and supplementary quantity of evidence existing in the breasts of the jurors." [14]

Perjury continued to require application of the two-witness rule, primarily because of the forum in which those cases were initially charged in England. Perjury cases were originally heard in the Court of the Star Chamber, which was based on civil or ecclesiastical law. When the Star Chamber was abolished in 1640 the common-law courts simply adopted in its entirety the civil law practice of requiring two witnesses for perjury cases. [15]

Early American courts adopted the English practice of requiring more than one witness for perjury. In *United States v. Wood* [16] the United States Supreme Court noted that

> in cases where oral testimony of a single witness is relied upon to establish the falsity of a defendant's statement under oath, there is merely one oath contradicting another. Since both are presumptively entitled to credit, the jury was thought to have no sufficient basis for preferring the testimony of the witness over the oath of the defendant. [17]

In modern times the two-witness rule has been criticized as an anachronism. [18] Prosecutors argue that, rather than imposing a unique rule for perjury offenses, the same basic rules should be applied for all crimes. They have argued that the rule raises "an unjustifiable barrier to convictions for perjury." [19] They have also argued "quality over quantity," emphasizing that the ultimate measure of testimonial worth should be the credibility of the witness or witnesses, not the number of witnesses testifying.

Proponents of the rule (primarily the defense bar) argue that although the rule does tend to burden the prosecution, it ultimately benefits society because it protects innocent witnesses from the risks of undue harassment or conviction in perjury prosecutions. [20] As the United States Supreme Court noted in *United States v. Weiler*, [21] lawsuits "frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions." [22] For these reasons *United States v. Weiler* continues to be the Supreme Court's strongest affirmation of the two-witness rule.

### History of the Rule in Courts-Martial

Military law has long supported the requirements of the two-witness rule. Winthrop, in noting the requirement for two witnesses in regard to false muster offenses, states that the reason for the rule is the same as the common-law rule for perjury.

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[10] United States v. Marchisio, 344 F.2d 623, 665 (2d Cir. 1965).

[11] 7 Wigmore, *supra* note 5, at 325.

[12] *Id.* at 326.

[13] The practice of counting witnesses survived later in the American colonies than in England. *Id.* at 333 n.22.

[14] *Id.* at 334-36.

[15] *Id.* at 360.

[16] 39 U.S. (14 Pet.) 430 (1840).

[17] *Id. construed in Nessanbaum*, 205 F.2d at 95.

[18] 7 Wigmore, *supra* note 5, at 361.

[19] United States v. Weiler, 323 U.S. 608 (1944).

[20] *Id.* at 609.

[21] 323 U.S. 608 (1944).

[22] *Id.* at 609.

> Were there but one witness as to the allegation of guilty knowledge, it might with fairness be claimed that his testimony was counterbalanced by the official act or statement of the officer in the muster or roll: at least one other witness is therefore properly required to a conviction, beyond a reasonable doubt, of the accused. [23]

Over the past sixty years each Manual for Courts-Martial has included the rule in some manner, in each instance placing the rule under the discussion to perjury. The rule's language in the 1928 Manual for Courts-Martial, U.S. Army, provided the foundation for the current rule. The 1928 version stated as follows:

> The testimony of a single witness is insufficient to convict for perjury without corroboration by other testimony or by circumstances which may be shown in evidence tending to prove the falsity. Documentary evidence is especially valuable in this connection; for example, where a person is charged with a perjury as to facts directly disproved by documentary or written testimony springing from himself with circumstances showing the corrupt intent; or where the testimony with respect to which perjury is charged is contradicted by a public record proved to have been well known to the accused when he took the oath. [24]

The rule was amended only slightly in the 1951 Manual for Courts-Martial, wherein it read as follows:

> The falsity of the allegedly perjured statement cannot, without corroboration by other testimony or by circumstances tending to prove such falsity, be proved by the testimony of a single witness. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath, or if it appears that the documentary evidence was in existence before the statement was made and that such evidence sprang from the accused himself or was in any manner recognized by him as containing the truth. In such a case, it may be inferred that the accused did not believe the allegedly perjured statement to be true. [25]

One of the earliest applications of the 1951 version of the two-witness rule was under a prosecution for conduct unbecoming an officer and gentleman founded on allegations that the accused, Coast Guard Lieutenant Commander Gomes, had made certain false statements orally and in writing to FBI agents. [26] The Court of Military Appeals ruled that if the act charged as conduct unbecoming an officer and gentleman also constitutes a separate offense, then the particular requirements for proving the separate offense must be met in order to establish the charge of conduct unbecoming an officer and gentleman. [27] Thus, by 1953 the Court of Military Appeals had not only endorsed the two-witness rule, but had extended it into certain article 133 offenses where the underlying offense, if charged under its respective article, would have required application of the rule.

The rule underwent no major change in the 1969 Manual for Courts-Martial. In that version it read as follows:

> The falsity of the allegedly perjured statement cannot, except with respect to matters which by their nature are not susceptible of direct proof, be proved by circumstantial evidence alone, nor can the falsity of the statement be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath or if it appears that the documentary evidence sprang from the accused himself—or had in any manner been recognized by him as containing the truth—before the allegedly perjured statement was made. [28]

### The Current Rule

The current restatement of the rule is, like its antecedents, found under the discussion to perjury. The 1984 Manual for Courts-Martial states the following:

> (c) Proof. The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused—or had in any manner been recognized by

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[23] Winthrop, Military Law and Precedents 553 (2d ed. reprint 1920).

[24] A Manual for Courts-Martial, U.S. Army, 1928, para. 149 [hereinafter MCM, 1928].

[25] Manual for Courts-Martial, United States, 1951, para. 210 [hereinafter MCM, 1951].

[26] The accused was charged under the Manual for Courts-Martial, United States Coast Guard, 1949. He was tried in 1952, after the effective date of the 1951 MCM. The Court of Military Appeals applied the two-witness rule as contained in the 1951 Manual.

[27] *Gomes*, 11 C.M.R. at 232.

[28] MCM, 1969, para. 210.

the accused as containing the truth—before the allegedly perjured statement was made. [29]

It is very obvious from the Manual that the two-witness rule applies to perjury offenses, but how far afield from perjury does the rule extend? The Manual also applies the rule to subornation of perjury offenses. [30] Beyond that, however, the further one goes from common-law perjury, the more tenuous the connection to the two-witness rule. Nowhere under the discussion for false swearing in paragraph 79 of Part IV is the two-witness rule specifically mentioned; instead, the discussion to false swearing simply refers the reader back to the paragraph that discusses perjury. The reference is nothing more pointed than "*See* paragraphs 57(c)(1), c(2)(c), and (c)(2)(e) concerning 'judicial proceeding or course of justice,' proof of the falsity, and the belief of the accused, respectively." [31] It would not be difficult for the unwary reader to overlook application of the two-witness rule in false swearing cases.

It would be even easier to overlook the rule's application to making a false oath under article 132. [32] Nowhere does the Manual state that the rule applies to making a false oath, but the Military Judges' Benchbook contains a two-witness instruction for false oath offenses. [33]

The Benchbook's instruction for statutory perjury [34] also contains a proposed instruction for the two-witness rule, but statutory perjury is no longer an offense directly discussed under article 134 in the 1984 Manual. [35] An examination of the Benchbook's listing of the elements of statutory perjury shows it to be a hybrid between common-law perjury and false swearing. Common-law perjury requires that the false testimony occur in a judicial proceeding or course of justice, which is not required for statutory perjury. Statutory perjury also required that the allegedly false statement be material, an element that is not required for false swearing. Thus, prior to 1984 false testimony could be charged under a three-tiered group of offenses, depending upon the site of the testimony and the materiality of the statement. Whether or not statutory perjury continues to exist as an offense is uncertain, [36] but if it does still exist, then the two-witness rule would appear to apply.

### *"Inclusio Unius Est Exclusio Alterius"* [37]

This extension of the two-witness rule to some, but not all, falsification offenses is one of the most baffling issues of the rule. If the rule applies to false swearing and perjury, why should it not apply to false official statement offenses? [38] If it applies to making a false oath, why should it not apply to fraudulent enlistment cases where the applicant takes an oath as to the information contained in his enlistment contract? [39]

It is unclear why the rule was extended to only some of the falsification offenses. Perhaps the drafters and the appellate courts thought it best to retain the rule, but rigidly apply it solely to perjury and those offenses

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[29] MCM, 1984, Part IV, para. 57c(2)(c).

[30] *Id.*, Part IV, para. 98c, which states as follows: "*See* paragraph 57c for applicable principles." 7 Wigmore, *supra* note 5, at 371, notes that one argument why the rule should not apply to subornation of perjury is because that offense does not pit "oath against oath."

[31] MCM, 1984, para. 79c(1). This is consistent with the references contained in previous manual. MCM, 1969, para. 213f(4), simply referred the reader back to the "last two paragraphs of the discussion of perjury in 210," which is the same language found in MCM, 1951, para. 213d(4).

[32] Any person subject to this chapter . . .
(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof . . . (b) makes any oath to any fact or to any writing or other paper knowing the oath to be false . . . shall, upon conviction, be punished as a court-martial may direct.
UCMJ art. 132.

[33] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-117 (1 May 1982) (C2, 15 Feb. 1982) [hereinafter Benchbook].

[34] *Id.* para. 3-169, which references MCM, 1969.

[35] Statutory perjury has suffered a tortuous history over the past sixty years. At one point the offense bore more resemblance to making a false oath in conjunction with a claim than it did to false testimony. In MCM, 1928, perjury was a violation of Article of War (A.W.) 93, para. 149i. False swearing and statutory perjury were both brought under A.W. 96 in MCM, 1928, para. 152c. The sample specification for statutory perjury in the 1928 Manual showed an allegation that an accused in a claim for family allowance, compensation, or insurance (including under the war risk insurance act) willfully and unlawfully made a statement as to a material fact that the accused knew to be false. There was no requirement that the false statement have been made under oath. MCM, 1928, para. 152c. Prior to 1951, the Navy and Marine Corps had no formal offense of statutory perjury per se; instead, false swearing was a violation of "scandalous conduct" under Naval Courts and Boards, 1937, para. 59 [hereinafter Naval Courts and Boards], whereas perjury was a violation of Naval Courts and Boards, para. 115.
Statutory perjury underwent a dramatic character change in the 1951 Manual. The sample specification then alleged that an accused, *under oath*, knowingly made a false statement as to a material matter before a board of officers or a court of inquiry. MCM, 1951, app. 6, no. 159 (emphasis added); United States v. Griffiths, 18 C.M.R. 354 (A.C.M.R. 1954). This specification remained the same in the next version of the Manual. MCM, 1969. app. 6, no. 169.

[36] Although the 1984 Manual, in listing sample specifications, omitted statutory perjury altogether, the argument could be made that the offense is still chargeable under article 134. The elements of false swearing and statutory perjury as they are set out in the Benchbook (paras. 3-149 and 3-169, respectively) are identical, with the exception that statutory perjury requires that the statement be material. Interestingly enough, the most recent Table of Maximum Punishments to list both false swearing and statutory perjury reveals that false swearing carried maximum confinement of only three years compared to statutory perjury's five year maximum. MCM, 1969, para. 127c (C7). Does statutory perjury still exist? If a witness before an administrative discharge board hearing made a false statement, under oath, as to material matter, could he still be charged with statutory perjury and face a possible maximum sentence that included five years' confinement?

[37] "The inclusion of one is the exclusion of the other."

[38] UCMJ art. 107.

[39] UCMJ art. 83.

immediately within its penumbra. [40] At any rate, the Manual only applies the rule to the primary offenses of perjury, subornation of perjury, and false swearing. Because the rule was secondarily extended to article 133 violations based on false swearing in *United States v. Gomes*, [41] the rule would also be secondarily extended to article 133 violations based on perjury, subornation of perjury, and making a false oath under article 132. Presumably, the rule would also apply at trials for attempts to commit these offenses. [42]

Federal law offers little guidance as to why the rule applies to only certain falsification offenses. The two-witness rule unquestionably applies in perjury prosecutions under 18 U.S.C. § 1621 [43] and to subornation of perjury under 18 U.S.C. § 1622. [44] The following section of the code, 18 U.S.C. § 1623, specifically states that the rule does not apply to false declarations before a grand jury or court. [45] In fact, the very purpose of the change to section 1623 was to avoid the two-witness rule. [46]

The two-witness rule also does not apply to federal prosecutions under 18 U.S.C. § 1001, [47] which is the analogous federal offense to making a false official statement. [48] Because the Court of Military Appeals has concluded that a close relationship exists between article 107 and 18 U.S.C. § 1001, the court often looks to federal case law pertaining to 18 U.S.C. § 1001 to assist them in interpreting article 107. [49] Therefore, it is highly unlikely that there will be a judicial extension of the two-witness rule to article 107.

Other than the 18 U.S.C. § 1001/article 107 dichotomy just discussed, the use of the federal code as a basis for analyzing the rule's application in the federal courts is hampered by the even greater diversity of federal falsification offenses, many of which do not exist under military law. [50] It is important to note, however, that federal courts have put the burden of eliminating the two-witness rule onto legislative shoulders. [51]

### The Exceptions

Although the two-witness rule places an extra obstacle before the government in proving certain falsification cases, the obstacle is by no means insurmountable. First, in many instances the government will have more than one witness to prove the falsity of a statement. Additionally, a single witness is sufficient where that witness directly contradicts the accused's statement *and* is supported by direct or circumstantial [52] corroborating evidence tending to prove the falsity of the accused's statement. This is a relatively light burden for the government to bear because the level of proof needed for corroboration is simply whether or not the independent evidence is inconsistent with the innocence of the accused. [53]

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[40] One may speculate that the reason why the two-witness rule does not apply to false official statement offenses under article 107 is that the false statement need not be made under oath. Therefore, the sanctity of the oath has not been violated. Also, a false statement under oath that is made to effectuate an enlistment need not be made under oath to constitute a violation of article 83. Furthermore, neither of these are general common-law crimes.

[41] 11 C.M.R. 232 (C.M.A. 1953).

[42] Perjury under article 131, making a false oath under article 132, and false swearing and subornation of perjury under article 134 each list attempts under article 80 as lesser included offenses.

[43] Weiler v. United States, 323 U.S. 606 (1945); United States v. Gross, 511 F.2d 910 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975).

[44] Stein v. United States. 337 F.2d 14 (9th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965).

[45] Section (e) of 18 U.S.C. 1623 (1982) states: "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." Additionally, the rule does not apply to subornation of perjury of false declarations. United States v. Gross, 511 F.2d 910 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975).

[46] United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). *See also* United States v. Hamilton, 348 F. Supp. 749 (D. Pa. 1972). The removal of the two-witness rule from this section was not met with universal acclaim. United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). In *Isaacs* the claim was made that removal of the rule violated the sixth amendment, but the court dismissed this theory by stating that the rule was not of constitutional dimensions. In fact, the government's decision to charge under section 1623 instead of 1621 purely to avoid the two-witness rule requirement has been held not to be a denial of due process or equal protection. United States v. Andrews, 370 F. Supp. 365 (D. Conn. 1974).

[47] Fisher v. United States, 254 F.2d 302 (9th Cir.), *cert. denied*, 358 U.S. 895 (1958); United States v. Killian, 246 F.2d 77 (7th Cir. 1957); Todorow v. United States, 173 F.2d 439 (9th Cir.), *cert. denied*, 337 U.S. 925 (1949). *See also* Annotation, *United States Agency—Falsifying Fact*, 93 A.L.R.2d 730 (1964).

[48] United States v. Hutchins, 18 C.M.R. 46 (C.M.A. 1955). The language of 18 U.S.C. § 1001 (1982) reads as follows:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[49] United States v. Jackson, 26 M.J. 377, 399 (C.M.A. 1988).

[50] For example, there are some 25 sections in the United States Code where perjury is cited, in addition to the sections previously discussed.

[51] "The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been satisfactory in practice." United States v. Weiler, 323 U.S. 610 (1945).

[52] Circumstantial evidence alone is generally insufficient to prove the falsity of an allegedly perjured statement, except in respect to matters "which by their nature are not susceptible of direct proof." MCM, 1984, para. 57c(2)(c). Circumstantial evidence is allowed for corroboration, however. *See* United States v. Guerra, 32 C.M.R. 463 (C.M.A. 1963).

[53] United States v. Jordan, 20 M.J. 977, 979 (A.C.M.R. 1985) (citing United States v. Buckner, 118 F.2d 468, 469 (2d Cir. 1941)).

Two more exceptions, both of which are based on the accused's acknowledgement of particular types of documents, are contained within the rule's explanation in the current Manual. Paragraph 57c(2)(c) of Part IV of the 1984 Manual expressly states that documentary evidence directly disproving the truth of the allegedly perjured statement need not be corroborated in either of the following two situations: 1) if the document is an official record shown to have been well known to the accused when he or she took the oath; or 2) if the documentary evidence originated from the accused or had in some manner been acknowledged or recognized by the accused as containing the truth, before the allegedly perjured statement was made. Such documentary evidence may include a stipulation of fact entered into by an accused at a court-martial, even where the government has required the accused to enter into the stipulation of fact as a condition to a pretrial agreement. [54]

The Court of Military Appeals has further held that the rule is satisfied by the testimony of one witness who directly contradicts the accused's statement, combined with the accused's subsequent confession to acts that he denied in the previous statement. [55] The same is true for prior testimony that the accused later confesses was false. [56]

### *United States v. Tunstall*

Another exception applies to cases where one witness "bootstraps" the testimony of another on unrelated facts in order to satisfy the two-witness requirement. In *United States v. Tunstall* [57] the Court of Military Appeals permitted this maneuver where the alleged false statement involved two or more relatively independent facts.

Contrary to his pleas, PFC Tunstall was found guilty at a special court-martial, military judge alone, of stealing a portable cassette stereo [58] and false swearing under articles 121 and 134, respectively. The statement that Tunstall was alleged to have falsely made was substantially as follows: "I did not steal any stereo, I did not sell a stereo to GARCIA." [59]

At trial, one witness testified that he had seen Tunstall empty-handed in the vicinity of the larceny victim's cubicle. The witness then saw Tunstall running from the direction of the victim's cubicle with a stereo unit under his arm. Finally, the witness testified that he had watched Tunstall run into an adjacent barracks building with the stereo unit still under his arm. Another witness, Private Garcia, testified that he lived next door to Tunstall and that Tunstall had sold him the stereo unit later that evening in the barracks. Garcia also testified that he later hid the unit in a false overhead in his room, which was where investigative agents ultimately recovered the unit. The government also relied on a stipulation of the victim that the unit found in the false overhead was actually the unit missing from his cubicle when he returned from liberty the next morning.

Both the Navy-Marine Corps Court of Military Review [60] and the Court of Military Appeals sustained the conviction. The latter court relied on Pringle's direct contradiction of Tunstall's statement as to stealing the stereo and Garcia's contradiction of the sale of the stereo unit. Because the false official statement was divisible into two distinct segments or facts (that is, the theft and the sale), the court noted that, where the alleged false oath relates to two or more facts and one witness contradicts the accused as to one fact and another witness as to another fact, the two witnesses corroborate each other as to whether the accused swore falsely. The combined testimony was sufficient to uphold the conviction. [61]

### Instructions

Instructing panels as to the applicability and scope of the two-witness rule has proven to be fertile ground for reversal, especially in the days of non-lawyer judges. The Military Judges' Benchbook [62] makes specific provision for the two-witness rule in its proposed instructions for perjury under article 131, [63] false swearing under article 134, [64] making a false oath under article 132, [65] and subornation of perjury [66] and statutory perjury under article 134. [67]

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[54] United States v. Jordan, 20 M.J. 977 (A.C.M.R. 1985).

[55] United States v. Clayton, 38 C.M.R. 46 (C.M.A. 1967).

[56] United States v. Moye, 14 C.M.R. 720 (A.C.M.R. 1954).

[57] 24 M.J. 235 (C.M.A. 1987).

[58] This is the "Case of the Purloined Boom Box" because the owner of the portable cassette stereo was actually a Private Boom.

[59] 19 M.J. 824, 825 (N.M.C.M.R. 1984).

[60] *Id.*

[61] 24 M.J. 235, 237.

[62] Benchbook, para. 3-169.

[63] *Id.* para. 3-113 (C2).

[64] *Id.* para. 3-149 (C1).

[65] *Id.* para. 3-117 (C2).

[66] *Id.* para. 3-170 (C2).

[67] *Id.* para. 3-169.

The Benchbook includes the proposed perjury instruction as a note with the direction that "when an instruction on corroboration is requested or otherwise *appropriate* the military judge should carefully tailor the following to include only instructions applicable to the case." [68] The proposed instruction for false swearing is included as a note with the direction that "when an instruction on corroboration is requested or otherwise *advisable*, the military judge should carefully tailor the following to include only instructions applicable to the case." [69] This is also the language used in the instructions for false oath, [70] statutory perjury, [71] and subornation of perjury. [72] It appears that "appropriate" and "advisable" should be treated as interchangeable.

Must a judge give these instructions sua sponte? The answer appears to be in the negative. [73] If instructions are given, however, then those instructions must accurately state the law and must be tailored to the facts of the case. For example, the military judge should not give that portion of the instruction dealing with documentary evidence if no such evidence was presented in the case.

Also, where the evidence on a false swearing charge consists of one contradictory witness and the corroboration of that witness's testimony by pretrial statements of the accused, it would be incorrect for a military judge to give the instructions pertaining to any of the following: proof by two witnesses; proof by one otherwise corroborating witness; or proof by documentary evidence directly disproving the truth of the allegedly false statement. [74] Instructing on evidence that was not introduced in the case is not only extraneous, but may be sufficiently misleading to cause a panel to convict an accused solely on the contradictions between the accused's statements. [75]

## Conclusion

The two-witness rule remains a trap for unsuspecting or lazy counsel (and judges). It will be a rare case where a trial counsel does not have sufficient evidence to circumvent the rule, but such instances are possible. Trial counsel must be alert to the scope of the rule's application to the particular offenses discussed earlier. Defense counsel cannot afford to overlook the rule either; not only must defense counsel be alert to whether the government has met its burden of proof under the rule, but they must also request instruction on the rule in appropriate cases. Finally, the trial judge who gives an instruction on the two-witness rule must carefully tailor it to the facts of a specific case.

The rule shows no sign of disappearing altogether, but its effect has been significantly weakened by the regulatory recognition of several exceptions and by the interpretation of the rule by the appellate courts. Nevertheless, the rule is like a sleeping dog rudely awakened: no bark, but potentially lots of bite.

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[68] *Id.* para. 113 (C2) (emphasis added).

[69] *Id.* para. 3-149 (C1) (emphasis added).

[70] *Id.* para. 3-117 (C2).

[71] *Id.* para. 3-169.

[72] *Id.* para. 3-170 (C2).

[73] United States v. White, 34 C.M.R. 426 (C.M.A. 1964). Although denial of a defense request for the corroboration instruction is error, it is not error to fail to give the instruction in the absence of the request. United States v. Crooks, 31 C.M.R. (C.M.A. 1962). State and federal case law suggests the contrary. *See* Am. Jur., *supra* note 6.

[74] United States v. Clayton, 38 C.M.R 46 (C.M.A. 1967).

[75] *Id.*

# USALSA Report

*United States Army Legal Services Agency*

## *The Advocate for Military Defense Counsel*

## DAD Notes

### Informal Psychiatric Evaluations: Counsel Beware

Often an informal arrangement develops between the trial counsel and the trial defense counsel concerning the psychiatric evaluation of the accused under Rule for Courts-Martial 706. [1] The accused is referred to a single psychiatric practitioner for an evaluation analogous to that required by R.C.M. 706(c)(2) with the understanding that a full sanity board will be convened should any question arise as to the mental capacity or mental responsibility of the accused. Counsel should be aware, however, that they may have to live with those informal findings and that the conversations between the accused and the psychiatrist may not be privileged.

The standard applied to requests for a sanity board pursuant to R.C.M. 706 is that a request for a sanity board is to be granted if the motion is not frivolous and is in good faith. [2] In *United States v. Jancarek*, however, the court held that the examination by a physician who had completed her psychiatric residency training was an adequate substitute for a psychiatric evaluation pursuant to R.C.M. 706. The court affirmed the military judge's ruling denying the defense counsel's request for further evaluation. The physician had examined the accused after an alleged suicidal gesture for which the accused was hospitalized. Although the physician was unaware of defense counsel's difficulties in communicating with the accused, she discovered that the accused was to appear in court to face court-martial charges and specifically evaluated his capacity to communicate coherently with his attorney. She found that capacity to be unimpaired. [3]

In *United States v. Kish* the Army Court of Military Review, in dicta, observed that an examination by a psychiatric social worker was an inadequate substitute for psychiatric evaluation by a full sanity board. [4]

> The psychiatric social worker who saw appellant was not a psychiatrist, as paragraph 121 contemplates, nor was he shown to have similar expertise in the detection or evaluation of mental diseases and defects. Moreover, there was no showing that the psychiatric social worker who saw appellant attempted to perform a forensic mental examination of the sort contemplated by paragraph 121. [5]

The court in *Kish* held that the military judge's denial of appellant's request for a sanity board was error and declined to apply wavier based on appellant's guilty plea. The court, however, held that appellant's providence inquiry constituted a withdrawal of the earlier request and negated the factual assertions on which it was based. Accordingly, the Army court affirmed the findings and sentence. [6]

In practice, the trial defense counsel should be aware that any initial psychiatric evaluation may deny the client a subsequent examination by a full sanity board pursuant to R.C.M. 706. Additionally, in *United States v. Toledo* [7] the Court of Military Appeals held that no privilege existed to preclude a psychiatrist from testifying about the truth and veracity of the defendant who he had examined solely at the request of the defense counsel. Although *Toledo* does not discuss informal evaluations as a substitute for formal sanity boards, it is a closely-related area that counsel should be aware of.

In those cases where informal evaluations have already been conducted, trial defense counsel should argue that their request for further examination is not frivolous, that it is made in good faith, and that the initia' examination was not an adequate substitute for a sanity board. If the examination was performed by anyone other than a psychiatrist or clinical psychologist, counsel should put the qualifications of the examiner on the record. Finally, counsel must be prepared to obtain an independent psychiatric examination of the accused if it become necessary to dispute the evaluation of the initial examiner. Trial defense counsel must establish a record to gain appropriate appellate relief for a denial of a request for a sanity board pursuant to R.C.M. 706. CPT Jay S. Eiche.

### Article 32 Investigations: Recent Decisions Hurt the Defense

The Court of Military Appeals and the Army Court of Military Review have recently handed the government two substantial victories involving article 32 investigations. [8] Specifically, the Court of Military Appeals held that the article 32 testimony of a witness who

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 706 [hereinafter R.C.M.].

[2] United States v. Nix, 36 C.M.R. 76, 79, 80 (C.M.A. 1965), *construing* Wear v. United States, 218 F.2d 24, 26 (D.C. Cir. 1954); United States v. Jancarek, 22 M.J. 600, 602, (A.C.M.R. 1986); United States v. Kish, 20 M.J. 652, 655 (A.C.M.R. 1985).

[3] *Jancarek*, 22 M.J. at 604.

[4] *Kish*, 20 M.J. at 655 n.6.

[5] *Id.*

[6] *Id.* at 656.

[7] 25 M.J. 270 (C.M.A. 1988).

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

was unavailable for trial was admissible at a court-martial. [9] The Army Court of Military Review upheld the validity of placing a partition between the accused and a child-witness at an article 32 hearing so that the witness could testify without knowing that the accused was present. [10]

In *United States v. Conner* the Court of Military Appeals held that neither the confrontation clause nor hearsay rules precluded the use of article 32 testimony at trial if two factors are met. [11] First, the witness must be unavailable for trial. Second, the article 32 testimony must be transcribed verbatim. The court held that generally the requirements set forth in Military Rule of Evidence 804(b)(1) [12] of "opportunity" and "similar motive" to cross-examine are satisfied. The article 32 testimony is admissible at trial even if trial defense counsel chooses not to cross-examine the witness.

The court listed several exceptions to the rule of admissibility. First, if the defense requests information from the government for use at the article 32 for cross-examination purposes and the information is withheld and not made available to the defense, the article 32 testimony might not be admissible at trial. [13] Second, any restrictions placed on defense counsel's ability to cross-examine may preclude use of the article 32 testimony at trial. The court held that defense counsel should be "allowed to cross-examine the witness without restriction on the scope of cross-examination" at the article 32 hearing. [14] Finally, if subsequent to the article 32 hearing, "significant new information" becomes available to the defense that would have "changed markedly" tactics or significantly helped to impeach the witness, the defense counsel *may* be able to argue that the article 32 testimony should not be admissible at trial. The court indicated, however, that "in most cases, the former testimony will be admissible even if, after the pretrial hearing, the defense has acquired additional information that might have been used in questioning the witness." [15]

If trial defense counsel senses that a witness may not be available at trial, counsel must rethink the role of cross-examination at the article 32 investigation. The scope of the cross-examination should not be limited to discovery. Trial defense counsel should consider impeaching the witness as if they were at trial. As a tactical matter, trial defense counsel may prefer to defer cross-examining for impeachment purposes until trial so as not to reveal the defense's theory of the case. The *Conner* decision, however, indicates that the defense may pay dearly for a tactical decision not to impeach. If the witness is unavailable for trial, the testimony will be admissible at the court-martial without the defense having used the opportunity to confront the witness with impeachment evidence.

In *United States v. Bramel* the Army Court of Military Review rendered another decision dealing with article 32 investigations. The accused in *Bramel* was charged with forcible sodomy of a child under sixteen years of age. The child's mother indicated that the child would not testify in the presence of the accused. Trial counsel, therefore, utilized a partition at the article 32 hearing so that the child could testify without knowledge of the accused's presence. The accused could hear, but not see, the child. The investigating officer instructed all persons present at the article 32 hearing not to make the presence of the accused known to the child. Trial defense counsel was allowed to view the child as he testified. The Army Court of Military Review held that the use of the partition was acceptable.

*Bramel* gives the government a useful tool in child abuse cases. Many children find it difficult to face the abusing adult, often a parent or relative, and recite the episodes of abuse. To help alleviate the child's fear, the government can now place a barrier between the child and the accused at the article 32 hearing and prevent face-to-face confrontation. Furthermore, the government can arrange the article 32 investigation so that the child is not even aware of the accused's presence. Although the government will not be allowed to use a partition at trial, [16] the government can use the article 32 proceeding to build the child's confidence in his or her ability to testify at trial. Furthermore, if the child is then unavailable at trial, the government could argue that the article 32 testimony is admissible in light of the *Conner* decision.

Recent court decisions have added substantially to the government's ability to use article 32 hearings to its advantage. The *Conner* decision may force trial defense counsel to cross-examine a government witness at the article 32 hearing as if at trial, thereby revealing the defense case. The *Bramel* decision allows the government to avoid face-to-face confrontation between a child-witness and an accused until trial, and thereby perhaps build the child's confidence and solidify his or her testimony.

Trial defense counsel should be familiar with the *Conner* and *Bramel* decisions and adjust their pretrial tactics accordingly. Whether or not counsel actually change tactics, they should be aware of the risks now associated with UCMJ article 32 hearings that *Conner* and *Bramel* have created. CPT Gregory B. Upton.

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[9] United States v. Conner, 27 M.J. 378 (C.M.A. 1989).

[10] United States v. Bramel, ACMR 8701207 (A.C.M.R. 22 Feb. 1989).

[11] 27 M.J. at 379.

[12] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804(b)(1) [hereinafter Mil. R. Evid. 804(b)(1)].

[13] *Id.* at 390.

[14] *Id.* at 389.

[15] *Id.* at 390. *See also* United States v. Hubbard, 28 M.J. 27, 32 (C.M.A. 1989).

[16] Coy v. Iowa, 108 S. Ct. 2798 (1988).

### Revenge by a Co-Accused—A Derivative Use of Immunized Testimony

In *United States v. Boyd* [17] the Court of Military Appeals reaffirmed the long standing principle that the government cannot make any use of an accused's prior compelled testimony given under a grant of use immunity. The court also highlighted a variation on this theme which all trial defense counsel should be wary of—revenge by a co-accused. To raise the issue at trial, an accused "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that *all* of the evidence it proposes to use was derived from legitimate independent sources." [18] Therefore, if a government witness is motivated, at least in part, to testify against your client because of your client's prior compelled testimony under grant of use immunity, the government simply cannot make use of that witness's testimony. [19] As succinctly put forth by Chief Judge Everett in his concurring opinion in *Boyd*:

> If A testifies against B in a criminal trial which results in B's conviction, it is quite foreseeable that, in turn, B will provide investigators with evidence that is damaging to A. The motive for doing so may be revenge or a desire to curry the favor of law-enforcement officials and thereby obtain a reduction in sentence. Consequently, the Government's burden is heavy in showing that the evidence later provided by B is not the product of A's testimony and therefore inadmissible under the rule established in *Kastigar v. United States*, 406 U.S. 441 (1972). [20]

Defense counsel should be aware that whether a government witness's subjective state of mind and decision to cooperate and testify is directly or indirectly derived from an accused's prior immunized testimony against that witness is a question of fact which requires an evidentiary hearing. [21] At this hearing, the military judge need not accept as true a reassurance from the prospective government witness that he or she is not motivated to testify against the accused because of the prior immunized testimony. [22]

Trial defense counsel with a client who has previously testified under a grant of use immunity against another accused should always question the motivation of that individual returning to testify against your client as a government witness. In addition, a friend or relative of such a witness may also be motivated by revenge to testify for the government. In such a case, defense counsel should raise the immunity issue and force the government to meet its heavy burden. [23] Further, trial defense counsel should request specific findings if the military judge finds the government did meet its burden. Counsel can thereby ensure the full litigation of the issue that can then be thoroughly reviewed for error on appeal. CPT Jeffrey J. Fleming.

### The *Hendon* Rule

When error is committed at trial, is it correct to conclude that no prejudice as to the sentence occurred simply because the trial was a guilty plea with a pretrial agreement and the sentence adjudged was less than the limits contained in the quantum portion of the pretrial agreement? The following language will frequently appear in an appellate court's decision:

> Appellant's own sentence proposal is a reasonable indication of its probable fairness to him and thus appellant suffered no prejudice. See *United States v. Hendon*, 6 M.J. 171 (C.M.A. 1979). [24]

Citing *Hendon* for this proposition is misplaced, as an examination of *Hendon* reveals. *Hendon* is a split decision with all three judges of the Court of Military Appeals writing to express their views. Judge Cook's lead opinion contains the frequently cited passage. Judge Perry wrote to concur only in the result (which was to affirm), *but* Judge Perry went on to state:

> I expressly disassociate myself from that portion of the lead opinion which, in actuality, tests the appellant's contentions for prejudice by comparing the adjudged sentence against the offer of the appellant in the negotiations with the convening authority for a pretrial agreement. To me, this linkage is irrelevant as well as inappropriate in this inquiry. [25]

Chief Judge Fletcher concurred in part and dissented in part. His concurrence was on an issue not related to the frequently quoted language. In fact, Chief Judge Fletcher stated: "Thus I consider the announced sen-

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[17] 27 M.J. 82 (C.M.A. 1988).

[18] United States v. Kastigar, 406 U.S. 441, 462-63 (1972) (emphasis added); *see also* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).

[19] *Boyd*, 27 M.J. at 86.

[20] *Id.* (Everett, C. J., concurring).

[21] *Id.* at 85-86.

[22] United States v. Kurzer, 534 F.2d 511, 517 (2d. Cir.), *on remand* 422 F. Supp. 487, 489-90 (S.D.N.Y. 1976) (On remand, the district court refused to attach any credibility to the government witness's assertion that he was in no way motivated to testify against the defendant by the defendant's prior immunized testimony against him.).

[23] *Boyd*, 27 M.J. at 84-85. "As a result of this heavy burden, 'only the exceptional case can be tried after a grant of testimonial immunity.'" United States v. Zayas, 24 M.J. 132, 137 (C.M.A. 1987) (quoting United States v. Rivera, 1 M.J. 107, 11 n.6 (C.M.A. 1975)), *quoted in Boyd*, 27 M.J. a 84-85.

[24] *See* United States v. Gilbert, 25 M.J. 802 (A.C.M.R. 1988).

[25] *Hendon*, 6 M.J. at 175.

tence on its face prejudicial to the appellant and would overrule the lower court's affirmance in this regard." [26]

Therefore, the often quoted language is not an opinion of the court. It is the personal belief of one judge, and the other judges dissented to it.

The so-called "*Hendon* Rule" also ignores the realities that confront an accused in having his offer to plead guilty accepted. It is more realistic to conclude that the quantum portion in an offer to plead guilty is the minimum that the convening authority will accept in exchange for guilty pleas. This reality is specifically now recognized by the Court of Military Appeals. In *United States v. Kinman* [27] Chief Judge Everett stated:

> However, in military practice a pretrial agreement only sets a ceiling and does not constitute an affirmation by an accused that the sentence is appropriate. Indeed, the sentence provided in the agreement may only be the lowest ceiling that an accused can obtain in return for his guilty plea. Despite the guilty plea, an accused usually attempts to "beat the deal"; and a defense counsel has an obligation to try to induce the court-martial to adjudge a more lenient sentence than that prescribed in the pretrial agreement. Furthermore, unlike typical civilian practice, the military judge usually is not even informed of the sentence contained in the pretrial agreement, so that he may in no way be influenced by that agreement in seeking to adjudge an appropriate sentence. [28]

Thus, it appears the current majority of the Court of Military Appeals has also disassociated itself with Judge Cook's "*Hendon* Rule." [29]

In submitting the quantum portion limits of the pretrial agreement, the client is not expressly agreeing that the limit is fair. The client is only agreeing to a "ceiling." Trial defense counsel can assist in making this clear. Specific language disavowing approval of the limit as appropriate punishment and indicating it is only the "ceiling" that was negotiated might be placed in the offer to plead guilty; or, if the government rejects such language in the "negotiation" process, then the trial defense counsel should be prepared to make it a matter of record at trial. CPT Thomas A. Sieg.

[26] *Id.*

[27] 25 M.J. 99 (C.M.A. 1987).

[28] *Id.* at 101.

[29] *Id.* at 104 (Cox, J., dissenting).

## *Government Appellate Division Notes*

## *Batson v. Kentucky*: Analysis and Military Application

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### Introduction

In *Batson v. Kentucky* [1] the United States Supreme Court held that a defendant does not have to show a systematic racially discriminatory use of peremptory challenges in order to prove purposeful racial discrimination in his case. Rather, the defendant can make a prima facie showing based solely on the facts and circumstances of his case. This prima facie showing raises an inference of purposeful racial discrimination and requires the prosecution to articulate a neutral explanation for the use of the challenge. The trial court must then determine if the defendant has established purposeful racial discrimination. [2] In *Batson* the Supreme Court examined the long struggle to remove racial discrimination from the courtroom and recognized that the constitutional rights of the defendant, as well as those of the excluded juror, outweigh any importance in allowing the government to have the racially discriminatory use of the peremptory challenge. The Court concluded:

> By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. . . . [I]n view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we insure that *no citizen is disqualified from jury service because of his race.* [3]

The Court also ruled that "equal protection guarantees the defendant that the state will not exclude members of his race . . . on account of race, or on the false assumption that members of his race as a group are

[1] 476 U.S. 79 (1986).

[2] *Id.* at 83.

[3] *Id.* at 88-90 (emphasis added).

not qualified to serve as jurors." [4] Herein lies the true interest that *Batson* seeks to protect.

## Case Synopsis

At trial, James K. Batson, a black defendant, was accused of second-degree burglary and receiving stolen goods. There were four blacks on the venire. [5] During voir dire examination the prosecutor used four of his five peremptory challenges to excuse all four blacks. The defense counsel then moved to discharge the jury [6] on the grounds that the prosecutor's use of peremptory challenges violated Batson's sixth amendment right to a jury drawn from a cross-section of the community and his fourteenth amendment right to equal protection. The trial judge ruled that the prosecutor and defense counsel could use their peremptory challenges to strike whomever they wanted and denied the defense counsel's motion. Batson was subsequently convicted by an all white jury. On appeal, the Supreme Court of Kentucky rejected Batson's constitutional claims. The Kentucky court followed *Swain v. Alabama* [7] on the equal protection claim. *Swain* held that defendants had to show a long standing pattern of racially discriminatory challenges by the prosecutor in order to prove that the prosecutor had discriminated.

In *Swain*, despite evidence of record that: 1) prosecutors in Talladega County, Alabama, had always used peremptory challenges to exclude blacks from petit juries; and 2) no black had ever served on a petit jury in a criminal trial in Talladega County, the Court determined that the record "does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County." [8] The Court determined that there is a presumption that the prosecutor uses his peremptory challenges in a fair and impartial manner. Therefore, for a defendant to prove that the prosecutor had violated the equal protection clause of the fourteenth amendment the defendant had to show a consistent pattern of discrimination.

The *Swain* Court recognized that "a state's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the equal protection clause." [9] This principle has been "consistently and repeatedly" reaffirmed. [10] Although the Court acknowledged that there is no constitutional right to the peremptory challenge, [11] it still chose to protect it by placing a heavy burden on anyone opposing a peremptory challenge.

*Batson* clearly states that its holding is based on the equal protection principles of the fourteenth amendment. [12] *Batson* disagrees with but does not overrule the equal protection portion of *Swain* and holds that *Batson* established a prima facie violation of the equal protection clause.

Justice Powell, writing for the majority in *Batson*, announced that the equal protection principle applied by the Court was first articulated in *Strauder v. West Virginia* [13] : "The State denies a black defendant equal protection . . . when it puts him on trial before a jury from which members of his race have been purposely excluded." [14] Recognizing that the defendant does not have a right to a jury composed of persons of any particular race or a cross section of racial groups in the community, Justice Powell insisted that the equal protection clause guarantees the defendant the right to be tried by a jury selected pursuant to nondiscriminatory criteria. [15]

The Court noted that the same rationale underlying attacks on the discriminatory procedures used in venire selection [16] similarly invalidated discriminatory peremptory challenges because the Constitution prohibits all forms of purposeful racial discrimination in the selection of jurors. Such racial discrimination, the Court reasoned, denies the defendant the very protection a jury trial was intended to secure, namely the right to be tried by peers who have been indifferently chosen. [17] By

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[4] *Id.* at 86.

[5] "To come; to appear in court. Sometimes used as the name of the writ for summoning a jury, more commonly called a 'venire facias.' The list of jurors summoned to serve as jurors for a particular term. A special venire is sometimes prepared for a protracted case." Black's Law Dictionary 712 (5th ed. 1979).

[6] "To release or dismiss the jury." *Id.*

[7] 380 U.S. 202 (1965).

[8] *Swain*, 380 U.S. at 224.

[9] The fourteenth amendment to the United States Constitution provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. *Swain*, 380 U.S. at 204 (citing *Ex parte* Virginia, 100 U.S. 339 (1879)); Gibson v. Mississippi, 162 U.S. 565 (1895) (citations omitted).

[10] *Swain*, 380 U.S. at 204.

[11] *Id.* at 219.

[12] *Batson*, 476 U.S. at 84 n.4.

[13] 100 U.S. 303 (1880).

[14] *Batson*, 476 U.S. at 83–86.

[15] *Id.*

[16] *Id.* at 93–99. *See, e.g.*, Casteneda v. Partida, 430 U.S. 482, 494–95 (1977).

[17] *Id.* at 86–87.

allowing the exclusion of a juror because of his race, the state also unconstitutionally discriminates against the excluded juror. [18]

Justice Powell determined that the equal protection principle as announced in *Strauder* had never been questioned. [19] In focusing on the evidentiary burden required of a defendant making a claim of purposeful discrimination, Justice Powell points out that *Swain* had attempted to protect the peremptory nature of the challenge because of its importance as a means of achieving a qualified and unbiased jury. Justice Powell recognizes that the equal protection clause places certain limits on the right to challenge veniremen. Because lower courts had been interpreting *Swain* as requiring proof of repeated exclusion of a particular minority over a number of cases, *Batson* found that the prosecutor was virtually immune from constitutional scrutiny under the equal protection clause. As a result, the heavy evidentiary burden placed on the defendant under the *Swain* rationale was inconsistent with the "strict scrutiny" equal protection standards developed since *Swain*. [20]

These strict scrutiny cases show that the equal protection clause prohibits governmental acts that burden rights or deny benefits because of arbitrary classifications. [21] If based on race or national origin, a classification is termed "suspect" and will be upheld only if that classification is necessary to achieve an end so compelling that it justifies the limitation of fundamental constitutional values. [22]

*Batson* indicates that it should be read together with the Supreme Court's Title VII equal protection cases. [23] These cases provide a good picture of the procedural requirements of *Batson* at the trial level, [24] and set out the analysis to be applied to a claim of racial discrimination and a prima facie case of discrimination. Once the prima facie case is proved, the burden shifts to the prosecutor to articulate a legitimate, nondiscriminatory reason for his acts with regard to the challenged juror. The prosecutor's burden is one of production rather than persuasion. If the prosecutor carries this burden of production, the presumption raised by the prima facie case is rebutted and the accused must persuade the court that reasons for the challenge were pretextual.

The prosecutor does not have to persuade the court that he or she was actually motivated by the proffered reasons. It is sufficient that the prosecutor raise a genuine issue of fact as to whether he discriminated. In trying to prove pretext, the defense can demonstrate that the proffered reasons were not the true causes for the prosecutor's peremptory challenge either by persuading the court that a discriminating reason motivated the prosecutor or by showing that the prosecutor's proffered explanation is unworthy of credence.

The *Batson* requirements for proving discriminatory purpose in the prosecutor's use of peremptory challenges parallel those articulated in cases addressing discriminatory purpose in the selection of the venire. [25] Therefore, the *Batson* standard allows the defendant to establish a prima facie case of discrimination solely on evidence of the prosecutor's action at his trial. In response to the dissenters' criticism [26] that the peremptory challenge is now a challenge for cause and that lower courts will have difficulty determining a prosecutor's pretextual explanation, Justice Powell stated that this decision will not undermine the usefulness of the challenge, but will be enforceable and practical and will strengthen the perception of fairness in the criminal justice system by eliminating discrimination in the selection of the venire. [27]

Justice White, who had voted with the majority in *Swain*, concurred with the majority in *Batson*. He explained his change in position from *Swain* by noting the continued widespread use of the peremptory challenge for racially discriminatory purposes, despite *Swain*'s warning that the equal protection clause limits such discrimination by the states. He points out, however, that "much litigation will be required to spell out the contours of the Court's equal protection holding." [28]

### Procedures

Under *Batson* the ultimate burden of persuasion lies with the defendant. The Supreme Court has not determined what standard of proof a defendant must meet. The Supreme Court did state, however, that a defendant may establish a prima facie case of discrimination by showing: 1) that he is a member of a cognizable racial

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[18] *Id.*

[19] *Id.* at 86-90.

[20] *See Casteneda*, 430 U.S. at 494-95; Washington v. Davis, 426 U.S. 229, 241-42 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972).

[21] *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 521-801 (3d abr. ed. 1986); L. Tribe, American Constitutional Law 991-1028 (1977).

[22] J. Nowak, R. Rotunda & J. Young, *supra* note 21, at 530.

[23] *Batson*, 476 U.S. at 94 n.18.

[24] *See* U.S. Postal Services Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[25] *See supra* notes 16 and 20.

[26] *Batson*, 476 U.S. at 93-98.

[27] *Id.* at 96-98.

[28] *Id.* at 100 (White, J., concurring).

group and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire; 2) that he is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate; and 3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. [29] These factors create the inference of purposeful racial discrimination, which the prosecutor may rebut. The defendant no longer needs to show a pattern of past discrimination by the prosecutor. A defendant may now make a prima facie case of discrimination in jury selection solely by introducing evidence concerning his particular case at trial. [30]

Establishment of a prima facie case creates a presumption of discrimination and shifts the burden of production to the state to come forth with neutral explanations. [31] The Court emphasized that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause and that prosecutors may not rebut the prima facie case of discrimination by declaring that the challenged jurors would be partial to the defendant because of their shared race. The prosecutor cannot rebut the defendant's case merely by denying that he had a discriminatory motive or by affirming his good faith in individual selections. If the prosecutor's rebuttal is successful, however, the defendant is required to demonstrate that the state's explanations are merely pretextual. [32]

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates *a prima facie case of discrimination against black jurors.* [33]

The trial court then will have the duty to determine if the defendant has established purposeful discrimination. [34] The Court notes that a finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court. [35] This is especially appropriate, because the trial judge's findings will depend on an evaluation of credibility. [36]

The Supreme Court declined to formulate specific procedures to be followed upon a defendant's timely objection to a prosecutor's challenges. [37] The trial court had flatly rejected the objection without requiring the prosecutor to give an explanation. The Supreme Court therefore remanded Batson's case for further proceedings consistent with its findings to determine if the prosecutor had discriminated. Finally, the Supreme Court stated that "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." [38]

### The Neutral Explanation

A judgment as to the validity of the state's "neutral explanation" presents the trial judge with a particularly troubling and difficult task. [39] By their very nature, peremptory challenges require subjective evaluations of veniremen by counsel. Counsel must rely upon perceptions of attitudes based upon demeanor, gender, ethnic background, employment, marital status, age, economic status, social position, religion, and many other fundamental background facts. There is, of course, no assurance that the perceptions drawn within the limited context of voir dire will be totally accurate. [40]

*Batson* declares unacceptable only those perceptions based upon race. A court must determine from the totality of the circumstances whether an articulated neutral explanation is an excuse for improper discrimination. The harm of such practices extends beyond the excluded juror, to undermine the public confidence in the fairness of the criminal justice system. [41]

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[29] *Batson*, 476 U.S. at 96.

[30] *Id.* at 95-98.

[31] *Id.* at 96-98.

[32] *Id.* at 96.

[33] *Id.* at 96 (emphasis added).

[34] *Id.* at 97.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 98.

[38] *Id.* at 99.

[39] *Id.* at 96.

[40] *Id.* at 123-26.

[41] *Id.* at 87-88.

In *United States v. Chalan* [42] the U.S. Court of Appeals for the Tenth Circuit observed:

> The striking of a single juror of defendant's race may not always be sufficient to establish a prima facie case. However, using the reasoning as articulated in *Batson* "that a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case," we hold this was done in the instant case even though we are here concerned with only a single juror. Our conclusion comports with the notion that peremptory challenges constitute a practice particularly susceptible to racial discrimination. [43]

The *Batson* Court noted that "exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." [44] The question that *Batson* seeks to determine is whether a juror is excluded because of race, not whether the jury composition was dramatically changed. [45]

Justice Marshall, concurring with the majority in *Batson*, asserts that even when a defendant established a prima facie case of discrimination, trial courts face the difficult problem of determining the prosecutor's motive. [46] The prosecutor may easily give a facially neutral reason for his action. Justice Marshall determined that discrimination might take a more subtle approach. Even though findings related to discrimination largely turn on evaluation of credibility and "a reviewing court ordinarily should give those findings great deference," [47] the Court in *Batson* has shown that it will scrutinize the record and require an adequate justification by the prosecutor. Besides, the Supreme Court in *Batson* did not overrule *Swain*; therefore, if prosecutors are able to fabricate facially neutral explanations for their discriminatory uses of the peremptory challenge, then they will develop a consistent pattern of discrimination that will still be prohibited by *Swain*.

## Application to the Military

### Fifth Amendment Analysis–Military Due Process

In recent years, the military has been at the forefront of society in addressing the problem of discrimination based on race. This is critical in a profession based on the principles of unit cohesiveness and integrity. To allow the exclusion of minorities from an essential decisionmaking process of our armed forces on the basis of discrimination would result in an erosion of the cohesiveness and integrity of our armed forces and render the court-martial process unfair.

It can be persuasively argued that the applicability of *Batson* to the military court-martial was decided by the Supreme Court in *Griffith v. Kentucky*, [48] in which the Court ruled that *Batson* applied retroactively to all cases, state and federal. There has been considerable discussion, however, as to whether soldiers are entitled to due process and equal protection rights with regard to the selection of court members.

In *United States v. Daigle* [49] and *United States v. McClain* [50] the United States Court of Military Appeals addressed the issue of discrimination in the selection of court members on the basis of improper criteria and determined that it "threatens the integrity of the military justice system and violates the Uniform Code." The United States Court of Military Appeals has stated that "[t]he time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." [51] In this regard, the Court of Military Appeals has noted:

> Under the Fifth and Sixth Amendments to the United States Constitution, persons in the armed forces do not have the right to indictment by grand jury and trial by petit jury for a capital or infamous crime. . . . However, courts-martial are criminal prosecutions, and those constitutional protections and rights which the history and text of the Constitution do not plainly deny to military accused are preserved to them in the service. . . . Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts. [52]

Thus, the military accused is entitled, through his right to due process and equal protection, to rely upon the equal protection principles articulated in *Batson*. [53]

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[42] United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987).

[43] *Id.* at 1314 (citation omitted).

[44] *Batson*, 476 U.S. at 84.

[45] United States v. Moore, 26 M.J. 692, 718 (A.C.M.R.), *pet. granted*, 27 M.J. 413 (C.M.A. 1988).

[46] *Batson*, 476 U.S. at 105–07.

[47] *Id.* at 98.

[48] 479 U.S. 314 (1987). *See also* United States v. Carter, 25 M.J. 471 (C.M.A. 1988).

[49] 1 M.J. 139, 140 (C.M.A. 1975).

[50] 22 M.J. 124 (C.M.A. 1967).

[51] United States v. Tempia, 37 C.M.R. 249, 253 (C.M.A. 1967).

[52] United States v. Crawford, 35 C.M.R. 3, 6 (C.M.A. 1964) (citations omitted).

[53] *Moore*, 26 M.J. at 719.

### The Army Court of Military Review Approach to *Batson*

In *United States v. Moore* [54] Specialist Four Harold Moore, a black, was charged with attempted murder, attempted wrongful appropriation of private property, operating a motor vehicle while drunk, wrongful appropriation of government property, wrongful appropriation of private property, robbery, and aggravated assault. After voir dire, the trial counsel made a peremptory challenge against a member of the court, Major Junior Harris, Jr. Because Major Harris was black, defense counsel requested that the military judge inquire whether the challenge was for any impermissible discriminatory purpose and cited *Batson*.

The military judge reviewed the *Batson* decision and ruled that it did not impose a requirement on the government to disclose its reasons for a peremptory challenge in a court-martial. The military judge ruled that, even if *Batson* did apply to military trials, its requirements were not satisfied under the facts of this case. The military judge did not require the trial counsel to disclose the reason for the challenge, but gave him the option to do so. The trial counsel declined.

The Army Court of Military Review, sitting *en banc*, held that "the basic principles of the *Batson* decision [are] fully applicable to trials by court-martial." [55] The Army court determined, however, that "[a]pplication of the specific *procedural formulation* enunciated in *Batson* to trials by court-martial is neither required nor practicable, due to the substantial legal and systemic differences between courts martial and civil criminal prosecutions." [56] The Army court's rationale for its conclusion is based on the principle that soldiers have no right to trial by jury under the sixth amendment; therefore, procedural rules designed to protect that right cannot apply to trials by court-martial, even if they are based on the fifth amendment. Additionally, the court concluded that the limitation to one peremptory challenge per side at trials by court-martial prevents their use as a method for "selecting the petit jury," [57] whether it is to exclude a segment of society or to ensure that the jury is impartial.

The Army court examined article 25 of the Uniform Code of Military Justice (UCMJ), [58] which limits the criteria by which panel members may be selected to age, education, training, experience, length of service, and judicial temperament. Race is not a criterion in the selection of court-members and certainly is not a proper criterion for exclusion. Military panel members are selected by the convening authority on a best qualified basis. Therefore, race may not "be allowed to raise its ugly banner as a criterion for" [59] peremptory challenges. The court concluded that "[a]ccordingly, there is no logic in permitting the prosecutor, through the use of his peremptory challenge, to do what the convening authority, in the selection of panel members, cannot." [60]

The court then established a per se rule to account for the difference in military and civilian criminal practice. [61] Hence, where the accused is a member of a racial minority and the government peremptorily challenges a member of the court-martial panel who is the same race as the accused and the accused objects, the government must provide a neutral explanation for the challenge. The explanation is required, notwithstanding the absence of defense evidence supporting the objection and without regard to the merits of any defense evidence.

### The Court of Military Appeals' Approach to *Batson*

Subsequent to the Army court's decision in *Moore*, the Court of Military Appeals in *United States v. Santiago-Davila* [62] applied the constitutional standards of *Batson* to court-martial practice. Sergeant Santiago-Davila, a Hispanic, was tried at Darmstadt, Germany, by a general court-martial composed of officer and enlisted members. He was charged with wrongfully distributing marijuana, wrongfully possessing marijuana, and violating a drug paraphernalia regulation. When the court was assembled, five officers and five enlisted members were present. Two of the members, Captain Garcia and Sergeant First Class Rivera-Sanchez, had Hispanic surnames. After preliminary instructions to the members, the military judge commenced voir dire with some general questions, which primarily elicited negative answers.

The civilian defense counsel's voir dire determined that Captain Garcia had six years of military service, that he grew up in northern New York, and that he was the assistant operations and training officer of an engineer battalion. Sergeant First Class Rivera-Sanchez had nineteen years in the service, was raised in Puerto Rico, and was a platoon sergeant for an air defense battery. Three members of the panel had previously served on courts-martial, but Garcia and Rivera-Sanchez had not. Captain Garcia originally indicated that he would be compelled to adjudge a discharge if the accused was convicted of distribution, but upon clarifi-

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[54] 26 M.J. 692 (A.C.M.R. 1988).

[55] *Moore*, 26 M.J. at 698.

[56] *Id.* at 699 (emphasis in original).

[57] *Id.*

[58] Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (1982) [hereinafter UCMJ].

[59] *Crawford*, 35 C.M.R. at 21 (Ferguson, J., dissenting).

[60] *Moore*, 26 M.J. at 698.

[61] *Id.* at 700–01.

[62] 26 M.J. 380 (C.M.A. 1988).

cation of the question he indicated that he could consider the full range of punishment.

After completion of voir dire, there were no challenges for cause exercised by either side, but the government peremptorily challenged Sergeant First Class Rivera-Sanchez. The defense objected and, citing *People v. Wheeler*, [63] a California Supreme Court decision, requested that the bench inquire into the government's seemingly discriminatory use of the peremptory challenge. In the absence of any apparent basis from the voir dire, either collective or individual, the defense believed that the military judge should inquire about the challenge.

The government contended that the defense was relying on a state court decision that presupposes a different system than in the military and that there was no evidence to suggest discrimination. The trial counsel stated that if the military judge decided to inquire he would provide an answer. The military judge informed the trial counsel that he would not make an inquiry, but the trial counsel was free to state something for the record. The trial counsel declined and the military judge then ruled: "Well, I know of no authority to inquire of the Government other than what you have provided the court, and I will abide by the Manual for Courts-Martial [R.C.M. 912(g)(1)] and not inquire of the defense or Government of the basis of their peremptory challenge." The United States Army Court of Military Review affirmed the trial court decision.

The Court of Military Appeals determined that *Batson*, which was decided after Sergeant Santiago-Davila's court-martial, is not based on a right to a representative cross-section on a jury pursuant to the sixth amendment, but, instead, on an equal protection right to be tried by a jury from which no "cognizable racial group" has been excluded. [64] The court concluded that this right to equal protection is a part of due process under the fifth amendment and "so it applies to courts-martial, just as it does to civilian juries." [65]

Even though *Batson* was decided after Santiago-Davila's trial, the *Santiago-Davila* court followed *Griffith v. Kentucky*, [66] where the Supreme Court applied *Batson* retroactively to trials preceding its rendition. The Court of Military Appeals went on to state: "Furthermore, even if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice." [67]

The Court of Military Appeals notes that there are three differences between a sixth amendment right to "a representative cross-section of the population" on a jury panel and an equal-protection right that no "cognizable racial group" be purposely excluded: [68] 1) only a member of the excluded group can assert an equal-protection violation; 2) only the exclusion of racial classes can be challenged under *Batson*; and 3) *Batson* has no immediate effect upon the defense use of peremptory challenges in a racially discriminatory manner.

The Court of Military Appeals apparently gave the terms "minorities" and "a cognizable racial group" a broad definition. [69] Despite the military practice of allowing only one peremptory challenge and considering the fact that only one of two persons with Hispanic surnames was removed, the court stated "we do not believe it decisive that a prosecutor runs out of his peremptory challenges before he can exclude all the members of a particular group." [70]

Of special importance to the court in reaching its conclusion was the "absence of anything in the voir dire or elsewhere in the record which clearly indicates to us some reason other than race which led to trial counsel's peremptory challenge of Sergeant First Class Rivera-Sanchez." [71] The court speculated that Rivera-Sanchez's grade or years of service may have induced the trial counsel to challenge him; but the court thought it to be unlikely "since it is our impression that prosecutors usually prefer senior court members." [72] The court found that "the Manual's provision that no reason be disclosed for peremptory challenges must yield to *Batson*." [73]

The court determined that the underlying principles and the procedural formulation enunciated in *Batson* are fully applicable to the military court-martial system. Like the Supreme Court in *Batson*, United States Court of Military Appeals in *Santiago-Davila* leaves military judges to "deal with this issue whenever it arises," [74] without giving them a specific procedural formulation to follow.

In his concurrence to the majority decision in *Santiago-Davila*, Judge Cox opined that he would adopt

[63] People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

[64] *Santiago-Davila*, 26 M.J. at 390.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 390 n.9.

[69] *Id.* at 390-91.

[70] *Id.* at 391.

[71] *Id.*

[72] *Id.* at 392.

[73] *Id.*

[74] *Id.*

the per se rule articulated by the *en banc* Army court in *Moore*. [75] He determined that the *Moore* opinion suggests that trial counsel should give the convening authority credit for having wisely selected as members those who are best qualified pursuant to article 25, UCMJ. Trial counsel should not peremptorily challenge members of an accused's race unless there is good reason to do so. In Judge Cox's view, sound trial practice would suggest that a peremptory challenge be used sparingly and only when a challenge for cause has not been granted. He concluded that if the grounds for a challenge for cause are on the record, *Batson* will most likely be satisfied.

### The *Batson*, *Moore*, and *Santiago-Davila* Dilemma

The *Batson*, *Moore*, and *Santiago-Davila* opinions create a complex dilemma for military judges and counsel groping to apply the law of *Batson* to cases at trial. The courts have left trial judges with many unanswered questions, such as: 1) May trial counsel cite to extra-record facts in his explanation, based on his personal and professional knowledge?; [76] 2) What is the defense function with regard to litigating the sufficiency of trial counsel's explanation?; [77] 3) May the trial counsel be cross-examined with regard to his explanation?; [78] 4) Are mixed motives, i.e., one discriminatory and one race-neutral motive permissible?; [79] 5) May the government object to the racially motivated use of a peremptory challenge by the defense, as *Batson* concerns relate to discrimination against jurors and due process?; [80] 6) What quantum of evidence elevates the prima facie showing of discrimination to a showing of purposeful discrimination?; [81] and 7) May post-trial affidavits be used by trial counsel to articulate a neutral explanation? [82]

The court in *Moore* did not regard the lack of individual voir dire of the challenged member as an inference of discriminatory intent. [83] The Court of Military Appeals in *Santiago-Davila* determined, however, that the absence of anything in the voir dire that clearly indicates some reason other than race that led to trial counsel's peremptory challenge was of special importance. [84] It should be noted that the military judge in *Moore* did consider *Batson* and determined that a prima facie case of discrimination had not been established. [85] The military judge in *Santiago-Davila* made no such finding. [86]

In *Batson* the Supreme Court stated "we express no view on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." [87] In *Santiago-Davila*, however, the United States Court of Military Appeals concluded that *Batson* has no immediate effect upon the defense's use of the peremptory challenge in a racially discriminatory manner. [88]

The courts have yet to draw a distinction between the assertion of a prima facie case, which is rebuttable, and a showing of purposeful discrimination. This distinction is important due to the drastic remedies which result from a showing of purposeful discrimination. Such a showing would obligate the trial court to deny the challenge and seat the challenged member and, in cases on appeal, such a showing would require dismissal. The defense and the courts have often wrongly concluded that a showing of purposeful discrimination is made by the mere fact that the accused and the challenged member are of the same race. While such an assertion is sufficient to invoke the *Batson* procedure, it is not sufficient for a judge, in light of all the relevant circumstances, to rule that a showing of purposeful discrimination has been made.

While applying the *Moore* procedure to ensure compliance with *Batson* principles, the court ordered that the trial counsel provide an affidavit explaining the basis for his peremptory challenge. [89] The use of an ex parte

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[75] *Id.* at 393.

[76] *See* United States v. St. Fort, 26 M.J. 764 (A.C.M.R. 1988) (trial counsel makes reference to prior contacts with member).

[77] *See* United States v. Benvit, 21 M.J. 579 (A.C.M.R. 1985) (R.C.M. 912(b) hearing procedure on selection and excusal of members).

[78] *See* United States v. Hagen, 25 M.J. 78, 85 (C.M.A. 1987); United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987).

[79] *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265–66 (1977); United States v. Bradford, 25 M.J. 181 (C.M.A. 1987).

[80] *See* Alabama v. Cox, 531 So. 2d 71, *cert. denied*, 109 S. Ct. 817 (1989). (State of Alabama seeks to apply *Batson* to the defense challenge).

[81] *See* United States v. Davis, 809 F.2d 1509 (11th Cir. 1987) (seven of nine black venire persons were challenged, and court ruled removals were not racially motivated). *See also* United States v. David, 803 F.2d 1567 (11th Cir. 1987) (striking a single black juror violates *Batson* even if other black jurors are seated).

[82] *See* United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987) (court accepted prosecutor's affidavit at face value).

[83] *Moore*, 26 M.J. at 702 n.12.

[84] *Santiago-Davila*, 26 M.J. at 391.

[85] *Moore*, 26 M.J. at 702.

[86] *Santiago-Davila*, 26 M.J. at 392 n.14.

[87] *Batson*, 476 U.S. at 89 n.12.

[88] *Santiago-Davila*, 26 M.J. at 390 n.9.

[89] *Moore*, 26 M.J. at 702–03.

affidavit is an acceptable appellate practice under these circumstances and may even be obligatory. [90] In addition, it is not the affidavit of an "affected litigant." Rather, it is an affidavit by an individual trial attorney expressing a personal subjective decision. [91] Therefore, an affidavit is the most efficient means to resolve *Batson* issues now on appeal.

In *Santiago-Davila* the United States Court of Military Appeals determined that because no government affidavit by trial counsel was submitted, [92] it had no opportunity to decide under what circumstances an affidavit might suffice to disprove an intent to exclude based on race, or whether an accused could be provided an opportunity to cross-examine the prosecutor. The court, therefore, remanded the case and ordered a limited hearing on the reasons for the peremptory challenge by the prosecution.

### Practice Points

The peremptory challenge, with regard to its racially motivated use, is no longer peremptory, but a quasi-challenge for cause. The Supreme Court concluded that the prosecutor's explanation need not rise to the level of a challenge for cause, but failed to articulate an evidentiary standard for lower courts to follow. Therefore, it is imperative that counsel use voir dire to litigate a *Batson* issue. Voir dire can establish the discriminatory use of the peremptory challenge or rebut the prima facie inference of discrimination and permit counsel to challenge members more intelligently. Rule for Court-Martial 912 provides procedures, consistent with the *Moore* per se approach, by which *Batson* challenges can be litigated. [93]

The timing of a *Batson* objection appears to be crucial, for the issue of racially motivated peremptory challenges cannot be raised for the first time on appeal. [94] Waiver was not applied, however, where a civilian defense counsel objected after challenged members were notified, excused, and had withdrawn from the courtroom. [95]

Peremptory challenges should be used consistent with the Constitution. Inasmuch as *Batson* is predicated on fourteenth amendment equal protection grounds and is applied in the military through fifth amendment due process grounds, *Batson* can be strengthened by allowing the government to object to a racially motivated challenge by the defense. This procedure will enforce the equal protection mandate of *Batson*, and ensure that no soldier is disqualified from service as a court member because of race.

Administratively, there will be no additional burden placed on the court-martial process, because there will be no more time lost in arguing *Batson*-based peremptory challenges than is currently spent on arguing challenges for cause. If *Batson* issues are not raised at trial, they are waived. *Batson* can work in the military so long as counsel are aware of the pitfalls. [96]

It is obvious that the *Batson* issue will provide a basis for considerable litigation in its application to the courts-martial process. The military appellate courts have set the course for trial judges to ensure that military justice is free from the taint of racial discrimination and that it remains a fair criminal law system in all respects.

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[90] *See Crawford*, 35 C.M.R. at 23-24 (Ferguson, J., dissenting).

[91] *Moore*, 26 M.J. at 702 n.15.

[92] *Santiago-Davila*, 26 M.J. at 392-93 (the court ordered a limited hearing pursuant to United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967)).

[93] *Moore*, 26 M.J. at 713 (Lymburner, J., concurring in part and dissenting in part).

[94] *See* Bowden v. Kemp, 793 F.2d 273 (5th Cir. 1986); People v. Ortega, 156 Cal. App. 3d 63 (1984); Hamilton v. Georgia, 351 S.E.2d 705 (Ga. App. 1986).

[95] United States v. Shelby, 26 M.J. 921, 923 (N.M.C.M.R. 1988).

[96] *See* United States v. Guthrie, 25 M.J. 808, 810 (A.C.M.R. 1988) ("To avoid needless appellate issues and the attendant risk of reversal on appeal, an experienced prosecutor will weigh the factors involved that will, in many cases, counsel a prudent course of action. . . .").

# First *Lee*, Now *Williams*: Has The Shield of the Privilege Against Self-Incrimination Become a Sword?

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## Introduction

Some military law practitioners consider *United States v. Lee* [1] to be the worst decision by the Court of Military Appeals in its 1988 term. At first glance, this label might appear to be somewhat of an overstatement; *Lee* could be viewed simply as a decision regarding the protection of a soldier's article 31 rights. The Court of Military Appeals concluded that SPC Lee was suspected of violating United States Forces Korea (USFK) Regulation 27-5 (which prohibits blackmarketing-related activities) at the time he was questioned about possible violations of the regulation. Because of his status as a suspect, the court held that he should have been informed of his article 31 rights prior to being questioned. An in-depth review of the *Lee* opinion reveals that the "worst case" label was not a result of the factual issue actually resolved in *Lee*, but rather because of the many issues that were not resolved.

## *Lee*: A Synopsis

Contrary to his pleas, SPC Lee was found guilty of violating USFK Regulation 27-5 by transferring duty free goods to unauthorized persons and by failing to show continued possession or lawful disposition of duty free goods or controlled items. [2] On review, the Court of Military Appeals granted on the following issue:

> Whether paragraph 17b (2) and (3) of USFK Regulation 27-5 which requires an accounting of controlled items upon request, and for violations of which appellant was convicted, are promulgated contrary to congressional intent expressed in 10 U.S.C. § 831(a) and are unconstitutional per se in violation of the Fifth Amendment privilege against self-incrimination. [3]

The facts were essentially as follows. The commander of SPC Lee's military police company testified that he had received a letter from the ration control officials stating that appellant had purchased a large number of items. He summoned SPC Lee, read the letter to him, and told him he should show the presence or whereabouts of the items because the provost marshal's office felt there was some abuse and had asked the commander to determine if any abuse had occurred. The commander stated that he did not suspect appellant of any crime at that time because of the lack of credibility in the ration control branch and his high opinion of appellant; therefore he did not advise appellant of his rights under article 31, UCMJ. The commander directed a lieutenant to conduct an administrative inspection regarding the listed items and sent two military police investigators along with the lieutenant. SPC Lee was unable to account for approximately half the items he had purchased. Consequently, he was read his rights. He waived his rights and made a statement regarding his unlawful disposition of the items purchased. [4]

The trial judge concluded that SPC Lee was not a suspect at the time he was questioned. The Court of Military Appeals found this to be plain error and made the following three findings: 1) "[c]learly, appellant was a suspect for the military police at the time of this request"; 2) "[t]he military police's employment of the commander to indirectly subvert appellant's right against

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[1] 25 M.J. 457 (C.M.A. 1988)

[2] Paragraph 17*a* states:

17. RATION CONTROL AND PURCHASE PRIVILEGES.

a. Personnel will not:

(1) Sell, transfer, donate, pledge, pawn, loan, bail, rent, or otherwise dispose of any duty-free goods to any person not authorized duty-free import privileges under the US-ROK SOFA or other US-ROK agreements. In a prosecution under this subparagraph, it is an affirmative defense that the defendant transferred the item in conformance with USFK Reg. 643-1 and 643-2.

USFK Reg. 27-5 (July 9, 1982). *See also* para. 17*a*(1), USFK Reg. 27-5 (March 1, 1980), which is virtually identical.

Paragraph 17b states:

b. Personnel will:

(1) Upon request of the unit commander, military law enforcement personnel, responsible officer, or store security personnel, present and/or surrender their or their dependents' ration control plate, letter of authorization purchase record, or documents used in selling.

(2) Upon request of the unit commander, military law enforcement personnel, or responsible officer, present valid and bona fide information or documentation showing the continued possession or lawful disposition (by serial number if manufactured with one) of any controlled item as listed in USFK Reg. 60-1, regardless of where or how acquired, brought into Korea duty-free.

(3) Upon request of the unit commander, military law enforcement personnel, or responsible officer, present valid and bona fide information or documentation showing the continued possession or lawful disposition of any item acquired in or brought into Korea duty-free that is not a controlled item and that costs more than $35.00.

(4) Give the anvilled [sic] purchase record to the cashier, military police, or other authorized person before exiting the USFK facility in which the purchase was made.

USFK Reg. 27-5 (1982). Paragraph 17*b*, USFK Reg. 27-5 (1 March 1980), is virtually identical except for an additional phrase at the end of (3).

[3] United States v. Lee, 22 M.J. 378 (C.M.A. 1986) (order granting review).

[4] *Lee* at 458-59.

self-incrimination was unlawful"; and 3) "it was plain error for the military judge to fail to consider whether the military police exploited this commander to evade the requirements of Article 31 and the Fifth Amendment." [5] Judge Sullivan specifically noted that the "broad question" regarding the constitutionality of the regulation need not be reached.

The *Lee* decision consists of the opinion of the court by Judge Sullivan, a concurring opinion by Chief Judge Everett, and an opinion by Judge Cox, concurring in part and dissenting in part. The relevant portions of the three judges' positions regarding the per se constitutionality of the regulation can be summarized as follows:

*Judge Sullivan*: This regulation appears to require the production of incriminatory information and the punishment of those who fail to produce it. Can the government explain how the regulation can do this and still be constitutional?

*Judge Everett*: This regulation appears to let treaty obligations trample upon constitutional rights. It is, therefore, unconstitutional.

*Judge Cox*: The government has a legitimate right to require this information and punish a failure to provide the information.

In dicta, each of the three judges gave their respective views regarding the balance between the privilege against self-incrimination and the government's right to regulate activity. Additionally, the judges addressed the issue of how the privilege and the right affect the regulation's constitutionality. The judges' differences appear to result from different perspectives and from a failure to clearly recognize and differentiate distinct areas of lawful governmental regulation. Unfortunately, constitutional questions were not reached in the holding and most of the discussions concerning the regulations were relegated to dicta.

The regulatory issue was approached by all three judges from the perspective that *Lee* involved a clash between the government's right to regulate versus the privilege against self-incrimination and that one of the two, the right or the privilege, must be given priority over the other. The result was a chaotic opinion, dozens of cases remanded, and an Army Court of Military Review response in *United States v. Williams* [6] that could have a severe impact upon the government's ability to regulate overseas and, consequently, upon certain benefits provided to soldiers overseas.

This article focuses on the failure of the judges to recognize the legitimate area of co-existence between the governmental right to regulate *and* the individual privilege against self-incrimination. It further attempts to pinpoint the breakdown in analysis that began with the inconsistencies in the *Lee* opinion and persists, with additional penumbras, in *Williams*. The primary focus will be Judge Gilley's opinion in *Williams*, where he concurred in part and dissented in part. [7]

### The Immediate Impact of *Lee*

As a direct result of the issues raised in *Lee*, the Court of Appeals remanded twenty-seven Army cases, summarily disposed of at least three other Army cases, [8] and remanded numerous Air Force and Navy cases that involved similar regulations. [9] In the remand orders, the Court of Military Appeals first directed the courts of military review to review the cases "in light of *United States v. Lee*." Additionally, the court stated: "We further believe it would be most appropriate for that court, preferably en banc, to decide other issues concerning the interpretation, application, and constitutionality of the service regulation involved." [10]

### The Long-Range Impact of *Lee*: *United States v. Williams*

The impact of *Lee* was readily apparent on November 30, 1988, when the Army Court of Military Review (ACMR) issued its en banc decision in *Williams*, an opinion that combined two cases that were selected as representative of the twenty-seven remanded cases. The confusion in the three-opinion *Lee* case is again reflected in the three-opinion *Williams* case. What was merely dicta in *Lee*, however, is now "law." This new law reflects a substantial amount of flawed legal analysis and has resulted in a severe encroachment on an area of legitimate governmental regulation. The net result is that this new law could severely affect the government's ability to maintain an appropriate standard of living for soldiers stationed overseas.

After reviewing the *Lee* decision, one could conclude that no possible compromise exists between the differing positions adopted by Chief Judge Everett and Judge Cox. The *Williams* decision further reinforces this, as it consists of the opinion of the court by Judge Kane with seven judges concurring, a concurrence in part and dissent in part by Judge Gilley with one judge concurring, and a dissent by Judge Smith with two judges

[5] *Id.* at 460-61.

[6] 27 M.J. 710 (A.C.M.R. 1988).

[7] *Williams*, 27 M.J. at 726-29. This article will not deal with the question of whether the issues were waived on appeal due to the unconditional guilty pleas entered in each of the twenty-seven remanded cases. Lee was the only appellant in the cases discussed who pled not guilty.

[8] United States v. Fernau, 26 M.J. 217 (C.M.A. 1988), United States v. Jeter, 26 M.J. 217 (C.M.A. 1988), and United States v. Valree, 26 M.J. 217 (C.M.A. 1988), are the three cases which were summarily disposed by the Court of Military Appeals. All three were guilty pleas and are factually similar to the cases which were remanded. Nothing in the summary dispositions clarifies why these cases were treated differently than the 27 remanded cases.

[9] The Air Force and Navy have similar regulations in the Philippines and Japan respectively. For two Air Force Court of Review decisions which involved the comparable naval regulation (USCINCPAC REF PHIL INSTRUCTION 4066.7R, 4 APR 1988), see United States v. Jones, 26 M.J. 632 (A.F.C.M.R. 1988), and United States v. Hilton, 26 M.J. 635 (A.F.C.M.R. 1988), *remanded*, 27 M.J. 323 (C.M.A. 1989).

[10] United States v. Williams, 26 M.J. 170 (C.M.A. 1988) (summary disposition).

concurring. These various opinions, like those in *Lee*, reflect diametrically opposed viewpoints regarding the balance between the privilege against self-incrimination and the government's regulatory need for information.

Judge Gilley's opinion is the only one of the six opinions in the *Williams* and *Lee* cases that clearly outlines and differentiates between two areas of government regulation that have been recognized by the United States Supreme Court. In recognizing this distinction, Judge Gilley has avoided the pitfalls that befell the other five legal analyses in the court's opinions. Judge Gilley has provided the legal "thread" to mend the analytical holes in the *Lee* opinion. His analysis indicates that the various concerns of the judges in *Lee* may not be as diametrically opposed as they initially appear. Significantly, Judge Gilley's opinion is the only opinion that recognizes the full extent of government's legitimate right to regulate in this area.

If the majority opinion in *Williams* is accepted as correct, there is an immediate negative impact upon the government's current system of providing certain goods to soldiers overseas while satisfying the host country's blackmarketing concerns, in that the government has lost an effective tool in Korea. Of even greater significance is the potential blow to the government's legitimate right to require such regulatory accountings. First, regarding the immediate impact in Korea, the *Williams* decision has created the anomalous situation where the government can require innocent soldiers who are not suspects to account for controlled items they purchase but cannot enforce the same accountability requirement against soldiers who instead choose to blackmarket and then refuse to comply with the accountability requirement by invoking their privilege against self-incrimination.

The accounting requirement applies, at least initially, to all persons given the privilege to buy rationed goods in Korea. The requirement is that they produce, upon request, information or documentation to establish their continued possession or lawful disposition of the goods. This is, as Judge Gilley points out in his *Williams* opinion, the functional equivalent of requiring the soldier to keep records to satisfy the request for the information or documentation reflecting their possession or lawful disposition of any controlled items purchased. This requirement is significant because our agreement with the Republic of Korea is the only reason that the United States is able to make these goods available to our soldiers free from Korean customs and taxes. Our agreement is contingent upon our taking measures to ensure that the privileges are not abused. The accountability requirement has been one of the key measures enacted to prevent widespread abuse of the privilege. Ironically, the *Williams* decision protects abusers who fail to account from being punished for that failure. Unfortunately, the potential long range impact of *Williams* on the government right to regulate could be underestimated because, in the short range, the abusers in Korea may still be prosecuted for blackmarketing and for purchasing goods in excess of prescribed limits. What the *Williams* majority has done is to hold that the government's need for certain general information from a general group of people can be thwarted by a few members of that group who commit a separate and subsequent crime that directly results in the required information becoming impossible to produce and therefore placing the offender in a position of being unable to comply with the accountability requirement. This is a serious encroachment upon an area of regulation that has been recognized as legitimate in the statutory realm by the United States Supreme Court. This encroachment is likely to have an even greater impact if applied beyond the Korea forum, in areas where alternatives are not so readily available.

### Before *Williams*

Soldiers in Korea cannot enter military exchanges until they are issued ration control cards. Before the cards are issued, the system is designed so that soldiers are supposed to be briefed about exchange privileges during their mandatory in-processing. Because certain items are exempt from substantial Korean taxes and customs, the soldiers are informed that those items cannot be transferred by sale or gift to persons who are not authorized the possession of customs-exempt items. Essentially this class of unauthorized people includes everyone except persons employed by the United States Government or dependents of such employees. As part of the in-processing, the soldiers are supposed to be informed that certain items of high monetary value and/or high blackmarket value are "controlled," meaning they can only be purchased in limited quantities.

The intent of these limitations is simple: provide the soldiers access to personal conveniences and necessities while respecting the host country's legitimate concerns. Purchases of high value "controlled" items are recorded, and only certain quantities may be purchased during the soldiers' tours in Korea. Other items of lesser market value and lesser blackmarket value are controlled by limiting the quantities that may be purchased at one time.

Many exchange items are unavailable on the Korean economy or are prohibitively expensive because of Korean custom fees and taxes. These items are available to soldiers only as a result of efforts by the United States, via our treaty agreement for Korean customs exemptions.[11]

Soldiers are responsible for accounting for these items—either by showing literal possession, a valid bill of sale to a person authorized possession of duty- or tax-free items, a mail receipt to a legitimate recipient in the United States, valid or bona fide information, or by some other reasonable means.[12] In short, the regulation permitted possession of property otherwise not available, but placed minimal restrictions on possession in order to satisfy the legitimate concerns of the Republic of Korea.

[11] Facilities Use Areas and the Status of Forces in Korea, Articles IX, paragraphs 8 and 9, XIII, and XIV.

[12] United States v. Battle, 20 M.J. 827 (A.C.M.R.), *petition denied*, 21 M.J. 317 (C.M.A. 1985); United States v. Lindsay, 11 M.J. 550 (A.C.M.R.), *petition denied*, 11 M.J. 361 (C.M.A. 1981).

### After *Williams*

The *Williams* decision does not change the accounting requirement. The *Williams* decision protects the black-marketing soldier from one of the enforcement mechanisms available, because soldiers cannot be successfully punished for failing to account.

As a direct result of *Williams*, an anomaly is created. A soldier who purchases items is accountable for them. Therefore, presume that this soldier is now selected and told to account for the controlled items. If the soldier has kept or lawfully disposed of the items, possession and disposition must be shown. If the items have been blackmarketed, a result of *Williams* is that the soldier can "plead the fifth" and face no criminal penalties for failing to account. This is where the *Williams* majority opinion breaks down. It lets the blackmarketeer say: "even though the accounting you asked for was not incriminating when I came under coverage of the requirement, because I have now caused the information to become incriminating, I can refuse to account and invoke my privilege against self-incrimination to protect me from being punished for my failure to account." In brief, the offender receives double protection. The right to refuse to turn over incriminating information is legitimately invoked, and the offender can now use the crime of blackmarketing as a shield to avoid punishment for his or her separate offense of failing to account.

Five of the six separate opinions in *Lee* and *Williams* err in their automatic presumption that the privilege against self-incrimination can be used to avoid punishment for violating the accountability requirement. This approach is an overly broad application of the privilege. The privilege against self-incrimination is an exception, as the majority opinion in *Williams* notes. [13] Therefore, the first logical step in any analysis is to determine whether the exception is applicable. The only opinion that takes this approach is Judge Gilley's.

### The "Required Records" Doctrine: The Rationale that Works

To determine whether the privilege against self-incrimination was applicable, Judge Gilley looks first to the nature and extent of the regulation. He correctly determines that there are basically two types of governmental regulations that require information from individuals, regulations of general application and regulations of selective application. [14] The Supreme Court has held that the privilege against self-incrimination does not apply to those of general application, although it does apply to those of selective application. Judge Gilley concludes that the regulation in question is of general application and, therefore, the privilege does not serve as a sword to counter punishment for a failure to provide the information requested.

Judge Gilley's conclusion is based upon the "required records" doctrine. The Supreme Court has formulated a three-part requirement that such regulations of general application must meet in order to legitimately require individuals to keep such records. "[F]irst, the regulatory provisions require the keeping and preserving of records; second, the records have 'public' aspects because they are reasonably related to an authorized government function; and third, the requirement is not directed toward a 'selective group inherently suspect of criminal activities.' " [15]

In a careful analysis, Judge Gilley concludes that USFK Regulation 27-5 met the second criterion in that the regulation serves a valid public purpose, i.e., soldiers would not enjoy these property rights without the exemption from Korean custom laws. The exemption was granted contingent upon some reasonable controls. The non-specific accounting provided "a beneficial flexibility" while avoiding "oppressive . . . Big Brother" restrictions; the means of accounting, by information or documentation, was analogous to the "required records" of *Shapiro v. United States*. [16] Therefore, the first criterion was also met. Because the regulation covered all soldiers buying these goods in Korea, not just a group inherently suspect of criminal activities, the third criterion was also satisfied. Having confirmed that all three criteria were met, Judge Gilley concludes that the regulation is a legitimate regulation of general application and is constitutional.

Having deduced that the regulation itself is constitutional, Judge Gilley concludes by noting that "though the disclosure requirement was constitutionally permissible, [the appellant] could have claimed a substantive fifth amendment and article 31 privilege that for him to disclose would result in self-incrimination." [17] Judge Gilley concluded that the appellant did not assert his privilege at that time and therefore waived it.

This conclusion is consistent with the "required records" doctrine. Indeed, the regulation cannot force the production of incriminating information. If the regulation's requirement meets all of the Supreme Court's criteria for the "required records" doctrine, then a soldier can be legitimately prosecuted for failing to comply with the regulation by not maintaining the required records. The soldier is not being denied any legitimate privilege against self-incrimination and can use the privilege to shield any information in his or her possession. The soldier is simply not excused from the unrelated violation of the records requirement.

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[13] *Williams*, 27 M.J. at 721.

[14] *Id.* at 726-27 (citing Shapiro v. United States, 335 U.S. 1, 17 (1948) and Marchetti v. United States, 390 U.S. 39, 57 (1968)).

[15] *Id.* at 727 (citing Shapiro v. United States, 335 U.S. 1 (1948)).

[16] For an opinion that contains a clear definition of regulations of general application, see *Marchetti*, which distinguishes between the regulation of general application in *Shapiro* and the regulations of specific application in *Marchetti*, Haynes v. United States, 390 U.S. 85 (1968), and Grosso v. United States, 390 U.S. 62 (1968).

[17] *Williams*, 27 M.J. at 728-29 (footnote omitted).

On its face, this may appear illogical. It is apparent that this is not an easy concept; five of the six opinions in *Williams* and *Lee* failed to address the issue. Additionally, the Supreme Court cases that address either general or specific regulations often do not clearly differentiate between the two. [18] The key to the distinction lies in the rationale behind the privilege against self-incrimination. In its most basic form, the privilege against self-incrimination is intended to prevent suspects from being forced to provide evidence against themselves. The "required records" doctrine is a totally separate concept. If the government has a need for information and the person who has that information is not a suspect at the time that the record keeping enures, the individual cannot claim a right to violate the regulation's information requirement without risk of penalty, as long as the regulation is appropriate and reasonable. In other words, the individual can always refuse to offer information that is incriminating, but must at least answer to his or her failure to comply with the regulation. The only exception to this rule is where the records requirement is not appropriate or reasonable.

The situation in *Shapiro*, a case relied upon by Judge Gilley, is illustrative. The government had an interest in regulating the prices of fruit and produce during World War II and consequently enacted the Emergency Price Control Act. Shapiro wished to enjoy the benefits of the right to sell these goods, but wanted to reserve the right to claim a privilege against self-incrimination to avoid any penalty when he abused the right. The Supreme Court held that Shapiro could not enjoy such privileges, and they based their decision on the doctrine of "required records."

Under the Emergency Price Control Act, essentially anyone could sell produce, *if* they agreed to obey the price controls. At the time Shapiro came under the coverage of the Act he was clearly not a suspect; until he was covered by the statute, he could not even sell fruit or produce. In order to be given the privilege of selling these goods, he agreed to comply with the Emergency Price Control Act. Shapiro had four choices: 1) sell the goods and knowingly disobey the price controls without keeping records, therefore risking punishment for disobeying the records requirement and for his additional violations; 2) sell the goods, knowingly disobey the price controls, and keep records of his illegal sales, therefore risking punishment when he was required to turn over the required records; 3) sell the goods and obey the price controls; or 4) simply choose not to sell the goods. The key is that Shapiro was not forced to incriminate himself by virtue of the statute. He chose the second option and subjected himself to the risk of being prosecuted for violating the price controls if he subsequently decided to break the law and turn over the records. He knowingly made this choice.

The statute covered all persons selling fruit and produce; it was not focused on persons who had already violated the Emergency Price Control Act. No one covered by the Act was a suspect when they first became subject to the records requirement. Shapiro was well aware of the information he needed to provide before he *later decided* to commit a violation. Before he committed his violation, none of the information that the Act required was incriminatory. After he violated the price controls, he could no longer comply with the regulation without incriminating himself. This is the "required records" doctrine boiled down to its purest form.

Because Shapiro was already subject to the records requirement well before he had committed any crime, the Supreme Court refused to allow him to use the privilege as a sword. It is this focus of regulations of general application that differentiate them from regulations of selective application. Unfortunately, the various opinions in *Lee* and *Williams* erroneously grouped *Lee* and *Williams* with cases dealing with regulations of selective application. [19]

When Judge Gilley found that USFK Regulation 27-5 is a regulation of general application, he was essentially concluding that the appellant, like Shapiro, had several choices: 1) he could buy goods at the exchange, black-market them, and risk punishment for violating the accountability requirement when the government asked him to account for their whereabouts; 2) he could buy goods and keep or dispose of them properly; or 3) he could simply not buy goods. Like the Supreme Court in *Shapiro*, Judge Gilley correctly concluded that the appellant had not been forced to incriminate himself, and that is the only protection offered by the privilege against self-incrimination.

### Where the Other Opinions Faltered

1. *Judge Cox, Concurring in Part and Dissenting in Part*

Judge Cox's end result is closest to that of Judge Gilley. Like Judge Gilley, he believed the regulation to be constitutional. He also believed that the information requested by the regulation was not incriminating. Unlike Judge Gilley, Judge Cox failed to distinguish how the "required records" doctrine provided the legal rationale to support his conclusion; instead, he apparently presumed that the privilege against self-incrimination "applied." In this regard, he was severely hampered in his attempt to reach the correct result because he started with a premise that provided no sound analytical route to his desired conclusion.

Judge Cox noted that the information requested was not incriminating if the soldier obeyed the regulation. In noting this, although he did not specifically articulate it, he was pointing out that this regulation was one of general application, i.e., it was not simply "zeroing in" on suspects. Not having distinguished between such cases as *Shapiro* and *Marchetti* and, consequently, the required records doctrine, he was unable to support his legal conclusion.

Initially, Judge Cox correctly assumed that the required records were not incriminatory when first required by the regulation; however, Judge Cox then

[18] *See supra* note 16.

[19] *See Lee*, 25 M.J. at 465 (Everett, C. J. (concurring)) for one example.

erroneously concentrated on explaining how the government could require the production of information that later became incriminating. His analysis failed with his efforts to distinguish the information or documentation as being nontestimonial in nature. He was apparently attempting to make this distinction because the privilege against self-incrimination only applies to information or documentation of a testimonial nature. He was hindered by the fact that the information or documentation required by this regulation is not easily explained away as being nontestimonial.

Judge Gilley provides the best rationale for Judge Cox's result in *Lee*. Judge Gilley's analysis indicates that the correct focus is not on whether the government can require the production of incriminating information; under our Constitution, such production clearly cannot be forced. Rather, the correct focus is on the right of the government to require general information that is not incriminating and to subsequently punish an unjustified failure to maintain this information. The "required records" doctrine of *Shapiro* is what clearly establishes that a subsequent crime that renders the required information incriminatory does not protect the offender from prosecution for failing to account.

2. *Judge Everett, Concurring*

Judge Everett's primary concern is the government's international obligations overriding individual rights: "[t]he treaty in Korea does not displace the privilege against self-incrimination." [20] Apparently, in his view, USFK Regulation 27-5 was promulgated to enforce Korean customs laws. Although he does not use the specific terms, he essentially concludes that this regulation is aimed primarily at people who have violated Korean customs laws and that it was established for the sole purpose of obtaining incriminating information, i.e., it is a regulation of selective application.

Judge Everett fails to consider the logical underlying basis for such an agreement. In other words: why would the United States have so freely agreed to help the Koreans enforce their customs laws? The logical answer is that the goal of the United States was to obtain a special exemption from Korean customs for goods for United States military employees in Korea. The resulting limited cooperation in enforcing Korean customs laws is simply the United States' promise not to abuse the exemption that was granted by Korea. Ironically, the treaty provisions most likely resulted from an attempt to obtain substantial benefits for all service members in Korea, not as an overt attempt to deal with treaty obligations as if they were more important than individual constitutional rights.

Ultimately, SPC Lee was charged with failing to present the required information, as well as blackmarketing. Chief Judge Everett apparently was concerned by the fact that, because Lee was not informed of his rights before the request to account, he was not aware that he could have simply failed to respond at all to the request. After Lee had failed to account and was read his rights, Chief Judge Everett apparently felt that the rights did not have the same impact because, in Lee's mind, he was already "caught" and might as well talk.

Chief Judge Everett's concern is quite legitimate. Nothing in the "required records" rationale, however, should trigger the Chief Judge's concerns. If a soldier is clearly suspected of the offense of blackmarketing and violating a regulation, the soldier is never forced to "volunteer" incriminating information. Because the regulation is one of general application, i.e., not focused upon persons suspected of having committed a crime, any person falling under its coverage can be ordered to comply with the accountability requirement of presenting information or documentation of their bona fide possession or disposition of the rationed items. This is the situation that Judge Cox was apparently referring to when he mentioned the lawful order analogy in his opinion in *Lee*. Essentially, the soldier's subsequent activity after coming within the accountability requirement does not render the requirement/order any less valid. Therefore, he can always be legally asked to comply with the accountability provision. Once a soldier fails to account, however, the soldier must be given the opportunity to invoke his or her privilege against self-incrimination. This would be accomplished by reading article 31 rights immediately following any negative response to a request to account. The distinction, slight but nevertheless crucial, is that the soldier is punished for failing to comply with the accounting requirement. The offense is complete upon the soldier's failure to account. By remaining silent, the soldier lawfully withholds incriminating information, but the punishment is not keyed by this silence. The soldier has enjoyed the full extent of protection offered by the privilege against self-incrimination, but has not been allowed to use it as a shield from the prior regulatory offense.

Chief Judge Everett's opinion in *Lee* does not distinguish between regulations of general application and those of selective application. Chief Judge Everett recognized that a regulation may properly require that records be maintained of business transactions, and he cited *Shapiro* in support. The *Shapiro* Court, however, defined the scope of permissible regulatory authority in much broader terms than the limited statement of regulatory authority mentioned by Chief Judge Everett. Judge Gilley's opinion focuses on the full scope of *Shapiro*, as explained in *United States v. Wilson*. [21]

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[20] *Id.* at 464.

[21] 221 U.S. 361 (1911). The United States Supreme Court noted:

> [T]he physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege . . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

*Wilson*, 221 U.S. at 380.

3. *Judge Kane,* Williams *Majority Opinion*

a. *The "Mere Possibility of Self-Incrimination" Penumbra*

The majority opinion in *Williams* contains a lengthy analysis of the regulation's similarity to other regulations of selective application. [22] The majority determined that the regulation is not similar because it is essentially regulatory and does not focus on a highly selective group inherently suspect of criminal activity. [23] The court developed a new penumbra with its conclusion that there is only the mere possibility of self-incrimination. [24] This finding apparently results from the majority's analogy to *California v. Byers*. [25]

There are many similarities between USFK Regulation 27-5, the statute in *California v. Byers*, and the statute in *Shapiro*. All are in an essentially regulatory and noncriminal area. None are directed at a "highly selective group inherently suspect of criminal activities." [26] There are two important features, however, that clearly distinguish *California v. Byers* from *Williams* or *Shapiro*: 1) from whom records are required; and 2) when they are required.

The statute in *Byers* required anyone involved in an automobile accident that resulted in damage to stop and provide their name and address. The Supreme Court noted that most accidents occur without creating criminal liability. [27] Significantly though, some accidents do create criminal liability. Therefore, some people, from the moment they are covered by the provision (i.e., they have an accident), have already committed an offense. This group of people apparently concerned the California Supreme Court, for that court subsequently held that the privilege protected a driver who "reasonably believes that compliance with the statute will result in self-incrimination." [28]

The United States Supreme Court reversed the California Supreme Court and held that the privilege did not apply to the compelled information because disclosing one's name and address is not "evidence of a testimonial or communicative nature." [29] Notably, because of the crucial distinction between cases like *Byers* and cases like *Shapiro*, the Supreme Court in *Shapiro* made no similar analysis of whether the information required was testimonial. Under the regulatory scheme discussed in *Shapiro*, no one had committed any crime when he or she came under the coverage of the statute. As previously discussed, no one is forced into a situation where they must reveal incriminating information or be punished for failing to do so. Under the regulations in *Shapiro* and *Williams*, the offenders made their choices. The offenders in *California v. Byers* did not have this choice. They were brought under the scope of the statute's reporting requirement solely by virtue of the already existent situation, the accident. Therefore, they rightfully could avoid any penalty for failing to produce incriminating testimony. The quirk in *Byers* is that the United States Supreme Court held that the information that was required in *Byers* was nontestimonial and that offenders could be punished for failing to produce that nontestimonial information. Therefore, the statute was upheld.

Unfortunately, the *Byers* rationale does not fit neatly into the USFK regulatory situation. The information required by the USFK regulation cannot be simply dismissed as nontestimonial and noncommunicative. Significantly, under *Shapiro*'s "required records" doctrine, such a determination is both irrelevant and unnecessary. Having selected the *Byers* rationale, however, the *Williams* majority was put in a more difficult position when they similarly concluded that soldiers could withhold incriminating information. Because the majority could not declare the required information to be nontestimonial, as the United States Supreme Court had in *Byers*, they were forced to conclude that blackmarketing soldiers can avoid the penalty for failing to produce documentation or information.

b. *The* Williams *Majority's "Documentation is Not Documentation" Penumbra*

The majority's treatment of *Shapiro* provides the premise for a unique viewpoint of USFK Regulation 27-5's information requirement. The majority specifically noted that the regulation "only requires personnel to 'present valid and bona fide information *or* documentation.' " [30] The majority then concluded that "no record or document keeping requirement can be reasonably inferred from this paragraph even were we to interpret its language with aggressive liberality. The very fact that the provision is worded in the disjunctive implies that no record keeping requirement is intended by the regulation." [31]

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[22] *Williams*, 27 M.J. at 716 (citing United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971); Leary v. United States, 395 U.S. 6 (1969); Haynes v. United States, 390 U.S. 85 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Albertson v. Subversive Activities Control Board (SACB), 382 U.S. 70 (1965)). *Accord*, Bannister v. United States, 446 F.2d 1250, 1264 (3d Cir. 1971).

[23] *Id.* at 717.

[24] *Id.* at 718.

[25] *Id.*

[26] California v. Byers, 402 U.S. 424, 430 (1971) (citing Albertson v. SACB, 382 U.S. 70, 79 (1965) and Marchetti v. United States, 390 U.S. 39, 47 (1968)).

[27] *Byers*, 402 U.S. at 431.

[28] *Byers*, 402 U.S. at 426-27 (citing the California Supreme Court's opinion).

[29] *Id.* at 432 (citing Schmerber v. California, 384 U.S. 757, 764 (1966)).

[30] *Williams*, 27 M.J. at 722 (emphasis added).

[31] *Id.*

This holding is diametrically opposed to any prior case discussion by the Army Court of Military Review regarding this regulation. None of the other opinions written in *Lee* or *Williams* reflect this position. The bottom line is that the *Williams* majority has concluded that it is beyond reason to believe that a requirement to produce "information or documentation" could in any way be read as a requirement for "documentation" or as a requirement to keep records to satisfy the subsequent request for information or documentation. The majority follows up this holding with the inexplicable conclusion that if the appellant *had* any records of his blackmarketing, "the privilege would protect production of such records as business records rather than permit their production as required records." [32] The majority provided no discussion of their rationale underlying their assertion that the required documentation or information somehow becomes business records.

The basis for the various contradicting positions assumed by the majority apparently lies in their failure to distinguish between the differing legal rationales underlying several Supreme Court cases. For example, the majority's citation in *Williams* at page 720 gives the appearance that no distinction was made between the "testimonial" exception to the privilege against self-incrimination in *Byers*; the regulation of illegal "selective application" in *Albertson v. SACBV*, [33] where the privilege provides complete protection; and the tax return requirements of *Sullivan*, [34] where the privilege provides only partial protection. This meshing of cases that relied upon differing legal premises occurs throughout the majority opinion.

### Conclusion

The "required records" doctrine provides the legal "thread" that could mend the analytical holes in the *Lee* opinion. Analysis of Judge Cox's opinion reveals that Judge Cox would likely be amenable to such a rationale. Further, the required records doctrine appears to answer the question that was of crucial importance to Judge Sullivan, i.e., why are there no self-incrimination problems with the regulation? Finally, Judge Gilley's rationale offers an explanation of the need for the regulation that was either rejected or overlooked by Chief Judge Everett; an explanation, which if accepted, should allay the Chief Judge's concerns that the regulation "takes rights away" from the military that are enjoyed by private citizens. More importantly, application of the required records doctrine protects the soldiers' constitutional rights as well as ensuring that the government can continue to maintain an equitable standard of living for soldiers residing overseas.

[32] *Id.*

[33] 382 U.S. 70 (1965).

[34] 274 U.S. 259 (1927).

## Sequestration of Witnesses— Recent Developments Regarding Military Rule of Evidence 615

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### Introduction

During the course of every trial, it is likely that prospective witnesses will not be permitted to hear the testimony of other witnesses. The exclusion of witnesses, otherwise known as sequestration, is governed by Military Rule of Evidence 615. [1] The purpose of this note is to briefly discuss that rule and highlight recent developments concerning the application of the rule.

### Background

At common law prospective witnesses could not be present in the courtroom during the testimony of other witnesses. This practice was designed to prevent the collusion or unconscious melding of stories. In addition, by preventing one witness from hearing the testimony of another witness, any inaccuracies in testimony would be exposed. [2]

The common law practice of sequestration is codified by Federal Rule of Evidence 615 and Military Rule of Evidence 615. An examination of the advisory committee's note reveals that the committee was concerned about whether sequestration is a matter of discretion for the trial judge or whether it is a matter of right. [3] Given the language of Federal Rule of Evidence 615 and Military Rule of Evidence 615, it is clear that both rules take the latter position. This right to sequestration, however, is limited by three exceptions.

[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 615 [hereinafter Mil. R. Evid. 615].

[2] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 611 (4th ed. 1986 & Supp. 1988).

[3] *Id.* at 620.

### The Rule

Military Rule of Evidence 615 provides:

> At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order sua sponte. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. [4]

Given the language of the rule, either party, or the military judge sua sponte, may require all prospective witnesses to absent themselves from the courtroom during the testimony of other witnesses. Witnesses may not be excluded, however, during arguments, instructions, or ministerial aspects of a proceeding. [5]

Military Rule of Evidence 615 allows three exceptions to sequestration. Under the first exception, the accused is permitted to remain in the courtroom throughout the proceedings. [6] This exception is governed by the accused's sixth amendment rights and not the Military Rules of Evidence. [7] The second exception to sequestration allows the prosecutor to designate a member of the armed services or an employee of the United States as a representative of the government. [8] Although this exception is not often used in military practice, it appears that the federal courts permit an agent's presence during long and complex trials or where the trial concerns specialized subject matters. [9] This allows the government to be better prepared to meet the uncertainties of litigation. [10]

The third and most important exception for courts-martial purposes allows a person whose presence is shown by a party to be essential to the presentation of that party's case to remain in the courtroom. [11] According to a prominent commentator on the Military Rules of Evidence, "this determination is made by the trial judge after balancing the party's need for the witness and the type of assistance the witness will provide against the public policy considerations giving rise to the sequestration rule." [12] Military counsel will find that this exception is often used in connection with the testimony of expert witnesses.

Of these three exceptions to sequestration, the third is the one that most frequently becomes an issue during the trial process. Not surprisingly, it is this particular aspect of Military of Evidence Rule 615 that receives attention at the appellate level. The most recent decision regarding the third exception comes from the Court of Military Appeals in *United States v. Gordon*. [13]

### *United States v. Gordon*

In *Gordon* the government moved to allow a prospective expert witness in toxicology to remain in the courtroom during the testimony of another government witness. The military judge overruled defense counsel's objection to the expert's presence at the counsel table. On appeal, the issue was whether the military judge abused his discretion under Military Rule 615 by allowing the government's expert witness to remain in the courtroom during the testimony of another witness. The Court of Military Appeals held that the military judge had not abused his discretion.

The question of whether experts could remain in the courtroom was originally addressed by the Court of Military Appeals in the case of *United States v. Croom*. [14] The court used the *Gordon* decision to refresh counsel's understanding of the application of *Croom* and Military Rule of Evidence 615. [15] As a result, *Gordon* represents a synopsis of the court's views regarding the sequestration of witnesses.

It is clear that experts are permitted in the courtroom in order to assist the trier of fact in understanding complicated evidence. [16] Therefore, it may be necessary for an expert to hear the testimony of other witnesses during trial in order to obtain facts necessary to formu-

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[4] Mil. R. Evid. 615.

[5] S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 577 (2d ed. 1986 & Supp. 1988).

[6] Mil. R. Evid. 615(1).

[7] *See* Geders v. United States, 425 U.S. 80 (1976).

[8] Mil. R. Evid. 615(2).

[9] *See In re* United States, 584 F.2d 666 (5th Cir. 1978).

[10] S. Saltzburg, L. Schinasi, & D. Schlueter, *supra* note 5, at 578.

[11] Mil. R. Evid. 615(3).

[12] S. Saltzburg, L. Schinasi, & D. Schlueter, *supra* note 5, at 578.

[13] *See* United States v. Gordon, 27 M.J. 331 (C.M.A. 1989).

[14] *See* United States v. Croom, 24 M.J. 373 (C.M.A. 1987). In *Croom* the Court of Military Appeals held that the military judge could permit psychiatric experts for the government to remain in the courtroom during the testimony of other witnesses. The presence of the experts would enable them to be more fully apprised of testimony upon which they would base their opinions.

[15] *Gordon*, 27 M.J. at 332.

[16] Mil. R. Evid. 702. Rule 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understood the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

late an expert opinion. [17] Under such circumstances, the expert is an "essential witness" who should be permitted to remain in the courtroom unless it would prejudice the opposing party. [18]

In *Gordon* the Court of Military Appeals also recognized that lay witnesses need not be excluded from the courtroom. The court stated:

> There are circumstances, of course, where even a lay witness need not be excluded from the courtroom under this rule. If that witness is a government witness, the military judge would be wise to make findings of "essentiality," particularly when faced with a defense objection. Likewise, exclusion of a defense witness claimed to be essential, whether that witness be a lay person or an expert, should be accompanied by findings of "nonessentiality." [19]

Under this expansive view of Military Rule of Evidence 615, the balancing of "essentiality" becomes the focal point of any controversy. Both trial counsel and defense counsel must ensure that the record is complete concerning their arguments for and/or against essentiality. This will not only be useful at the trial level, but will also protect both parties at the appellate level. Finally, counsel and military judges must ensure that the record reflects the military judge's reasons for granting or denying any motions. [20]

### Conclusion

*United States v. Gordon* provides that both expert and lay witness may remain in the courtroom where their "essentiality" is successfully argued by counsel. In spite of this seemingly expansive interpretation of the third exception to Military Rule of Evidence 615, counsel should not attempt to overextend this exception. Judge Sullivan has already stated that he disagrees with the majority opinion in *Gordon* to the extent it suggests a broader rule. [21] Nevertheless, it is becoming increasingly obvious that certain witnesses should remain in the courtroom. Although sequestration is still a right in the traditional application, *Gordon* may open the door to further limitation of that right.

[17] Mil. R. Evid. 703. Rule 703 provides that
the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[18] *Gordon*, 27 M.J. at 332. The Court of Military Appeals notes in *Gordon* that "concerns for military due process provide for expert assistance in appropriate cases." *Id.* at 332. *See also* United States v. Garies, 22 M.J. 288 (C.M.A.), *cert. denied*, 479 U.S. 985 (1986).

[19] *Gordon*, 27 M.J. at 333.

[20] *Id.* In *Gordon* the Court of Military Appeals complimented the military judge for articulating his reasons on the record for allowing the expert to remain at trial counsel's table during the testimony of other witnesses.

[21] *Gordon*, 27 M.J. at 333.

## *Trial Defense Service Notes*

# Defense Cross-Examination: What To Do When the Prosecutor Finally Stops Asking Questions

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### Introduction

The trial counsel has just walked his witness through a well-rehearsed dialogue, and the witness has just pointed to the accused and announced, "Yes, that's the man." The trial counsel nods knowingly and turns to the defense table with the fatal challenge, "Your witness." Rising like a tiger, the defense counsel stalks his prey, asks a few seemingly innocent questions, then suddenly begins to slash apart the direct testimony. The witness crumbles, recants, and makes a full confession. The master of defense cross-examination reports another acquittal.

The scene has been played a hundred times on television. Court members—at least the ones who learned as children that the cavalry always saves the day and justice always triumphs over evil—expect it. Defense counsel dream of it. Trial counsel fear it. In the world of real courtrooms, however, government witnesses usually stick to their stories, despite the intensity and skill of cross-examination or the truth or falsity of their testimony. Although prosecution witnesses rarely confess and exonerate the accused, effective cross-examination remains the trial advocate's best friend. [1] This article reminds counsel of the reasons for conducting a cross-

[1] Defense counsel must vigorously assert the right to cross-examine prosecution witnesses. *See* Davis v. Alaska, 419 U.S. 308 (1974), for consideration of some sixth amendment confrontation issues. A defense counsel should not let the judge cower him into "moving on" if there is a relevant point to be reached. *See* Mil. R. Evid. 611 (concerning control, scope, and manner of cross-examination). Counsel should not be timid in extending the scope of cross-examination to its outer limits.

examination, suggests how to cross-examine, and warns when not to cross-examine. [2]

### Why Should I Ask The Other Guy's Witness Any Questions?

Well, it will help my case. Yes, and so would a good alibi and twelve character witnesses, but they are not always available. Asking questions of the opposition's witness may be dangerous and filled with uncertainty, but it is ripe with potential gain. My first rule of cross-examination is: Be sure you know why you are asking the question. If you cannot identify a purpose, then just say, "No questions."

### The Purposes of Cross-Examination

Cross-examination is generally thought of as an attack on the witness or on the witness's testimony. A defense counsel tries to show that the witness is not telling the truth because of some motive or bias, or occasionally because the witness is the type of person who just lies. Often the counsel wants to show that the witness is unable to recall accurately the events he or she is describing.

Cross-examination may also be used in a positive way to present the defense theory of the case or to prepare the judge and court members for the testimony of defense witnesses. Anticipation of the defense case (the image of the surprise witness charging through the courtroom doors at the last minute) can turn the focus away from the prosecution. When asking questions on direct or cross-examination, keep in mind the defense theory of the case. While alternative or inconsistent defense theories may be desirable in a particular case, asking a witness questions that apply to one defense theory but conflict with another will confuse and disturb most court members. If you must present conflicting theories, give the court members notice of your theories ahead of time and figure out a very good sales pitch.

In one example of how to muddle defense theories through cross-examination, a civilian defense counsel grilled a gunshot victim concerning the aggressive actions the victim had taken that could have provoked the shooting. The cross-examination was brilliant, except that the primary defense theory was alibi, not self-defense! When the accused testified that he was somewhere else at the time of the shooting, the court members tuned him out and did not believe his alibi witness (the accused's girlfriend); the cross-examination of the victim had already indicated that the defense lawyer did not have faith in his own theory or witnesses.

Counsel may also cross-examine a witness to clarify testimony. Even a rehearsed witness (prosecution puppet) can give unclear testimony, and counsel never can be sure what the court members *think* they heard. If the story is useful to the defense, take some time to get it straight. If the story favors the prosecution, or if general confusion is the defense goal, either let the direct testimony stand alone or emphasize the disoriented points on cross-examination and argument.

Defense counsel are often criticized for asking too many questions. Some people allege that defense counsel ask questions solely to pad the record and convince an appellate court that the counsel has provided zealous representation. It may even appear that counsel ask questions merely to hear themselves talk. Defense counsel should know, however, that court members expect counsel to do and say certain things. Facts are not just punched into a computer to decide cases. The performance of counsel greatly influences how court members—who are very uncomputer-like in their deliberations—view the facts and apply the law in a case. Court members will wonder why the witness was not cross-examined. Was it because the testimony was simply too compelling? Defense silence may emphasize the prosecution testimony. The defense counsel may need to ask a few questions just to break up the rhythm of the prosecution, although objecting during direct examination is a more timely method of slowing down the prosecution steamroller. If they are fortunate, defense counsel can judge from experience or from the court members' reaction to the direct testimony when it is better to stand up and ask a few innocuous questions or when a confidently stated "No questions" will minimize the damage.

### The Risk of the Wrong Question

Along with considering the potential value of asking questions, counsel must be aware of the risks of cross-examination. Defense counsel always want to get favorable evidence from a prosecution witness that they can aggressively emphasize on closing argument. The problem is that counsel never really know what the witness is going to say, even if the witness is well-coached and friendly. Given the opportunity, a hostile witness will provide severely damaging testimony. Friendly, hostile, and neutral witnesses can all open the door to evidence that is unknown to the prosecutor or which the prosecutor cannot directly introduce. Testimony adverse to the defense may have a greater effect if it comes in through defense cross-examination. If, on balance, the risks appear too great, defense counsel should consider exploiting useful points raised in the witness's direct testimony through another witness or through a liberal closing argument.

Going over the same ground on cross examination that was covered on direct bolsters the testimony unless the defense is able to chip away at some essential part of it. Rarely can a witness be shaken, especially if he or she is truthful, by simply having the witness repeat the testimony again and again. Before trial, counsel prepare their witnesses for testifying, evaluate their likely performance, and try not to put witnesses on the stand who will fall apart on cross-examination. On the other hand, some witnesses still have trouble getting through direct testimony, and their nervous or evasive appearance invite

[2] *This article does not feature a detailed discussion of the Military Rules of Evidence, which would apply to cross-examination issues. Counsel, however, must have a fundamental understanding of the technical procedures in asking questions, introducing evidence, and making objections in order to successfully conduct cross-examination.*

cross-examination. Because their testimony is so damaging and cannot be overcome by any other evidence, a few witnesses must be cross-examined, even if it requires "blind questioning," without particular inconsistencies or illogical statements to target.

The following case provides a good example of successful blind cross-examination (unfortunately, by the prosecutor). Virtually no evidence existed to support a rape charge other than the victim's testimony. The defense had created more than reasonable doubt and had successfully introduced the defense theory of consensual sex through cross-examination of the alleged victim. In preparing the accused to testify, the defense counsel had formed the opinion that his client's weasel-like appearance and propensity to pop-off could make him a dangerous, self-destructive witness. The defense counsel believed he could explain his client's failure to testify. He could contend, "My client may be guilty of adultery, but not rape." He could argue that the accused would not testify because he must avoid incriminating himself on an uncharged adultery offense.

The defense plan was never tested. After watching the victim's disjointed testimony, the accused demanded to tell his story on the witness stand, insisting that the court members would believe him and not the victim. His direct testimony was unexpectedly quick and clean, with no apparent holes in his story. Patiently starting the cross-examination in a calm, almost sympathetic voice, the trial counsel first had the accused repeat his version chronologically. Then, when the trial counsel began to jump from one portion of the story to another, the accused became creative and "improved" on his testimony. When questioned about these new details, he produced implausible explanations. Beads of sweat actually ran down his forehead and he turned away from the court members (forgetting the instructions of his counsel), with his eyes darting like pinballs to the defense table in a plea for help. But it was too late. A life-long experience of talking his way out of trouble had failed the accused.

### What Should I Do Before I Ask Any Questions?

I remember attending a Saturday class in law school, one of those seminars conducted on the morning of a football game so that practicing attorneys could attend the seminar for CLE credit, then go to the game and write-off their travel expenses. On this occasion, four fairly well-known criminal trial lawyers were responding to questions, mostly from law students eager for inside information. Three of the panel members offered some illustrative tips from cases they had tried. The fourth panel member, whom I recall as being Vincent Bugliosi, the prosecutor of the Manson family, had not said much. One of the law students, ignoring the important fact that it was nearing time for the kickoff, kept pressing Bugliosi for his secret guide to success. Finally, Bugliosi said, "Look, the whole key is preparation, preparation, preparation." He was right. Although some cases are probably won without much preparation because of bad facts or a bad prosecution, most achievements in the courtroom come from preparation before trial. Thorough preparation for cross-examination is essential.

Every witness that may be called by the prosecution must be interviewed. Before the interview, review any statements the witnesses have made, note the portions that hurt or help the defense case, and spot the places where you can unravel their stories. Let a prospective prosecution witness tell his story, then ask questions without highlighting the defense areas of interest or alerting the witness to the inconsistencies, unless the witness is likely to change his story in a way favorable to the defense when confronted with the variance. Count on the witness running to the prosecutor to repeat every question and answer. Lock the witness into favorable testimony by getting a signed statement, if you can, that unequivocally helps the defense. One counsel has the witness go in another room to write out the statement by himself, then asks him to fill in at the bottom of the statement any useful part that is missing. [3] After you have talked to the witness, compare his story with previous statements. It may be advisable to do some investigation to verify the story and then conduct a second interview.

The final steps in preparation are to identify points for cross-examination and plan how to effectively draw these out from the witness. Write out complete questions or use topic headings and sentence fragments. No matter which method is employed, counsel should carefully listen to the witness and avoid making detailed notes. The questions or sentence fragments that have been prepared for cross-examination should be set out in a convenient way to make a quick note or mark tying them to the witness's in-court testimony.

### How Am I Going To Get What I Want From The Witness?

The way a question is asked can be as important as what is asked in communicating an idea to court members. Some quasi-experts in public speaking contend that the delivery and form of questions should fit the counsel's natural style. What they are really advising is that a speaker is likely to struggle through a presentation given in an unaccustomed manner. The idea is to become accustomed, through practice and improvement, to the style that is most successful for the individual.

Many lawyers develop habits of language and gesture that others would avoid or find objectionable. Some counsel successfully effect an image, e.g., the honest country lawyer, who speaks slowly but carries a sharp wit. Many counsel employ a dramatic pause or facial expression to emphasize a point, provided they can assuage the dark side of judicial temperament. Ordinarily, all counsel should be polite and courteous in asking questions and respectful in responding to attempts by the prosecutor and judge to limit defense cross-examination.

[3] Defense counsel are cautioned that highly detailed statements and multiple statements given by defense witnesses make them similarly susceptible to cross-examination by the prosecutor.

One veteran civilian lawyer began almost every sentence with "let me ask you this," or "isn't it a fact that" and ended most others with "now isn't that true." Some judges object to this form of questioning, considering it an attempt by the lawyer to give evidence. Others might use a preface or closing phrase to control the witness, get a simple "yes" or "no", and reduce the witness's opportunity to explain his answer. [4] The same veteran civilian lawyer also habitually incurred the wrath of the judge by commenting after an adverse response, "is that so?" or "really?", and matching his comment with a very skeptical smile. Counsel should try to break habits that detract from their case and keep the habits that, within the bounds of law and ethics and notwithstanding the objections of a judge, help their case.

Cross-examination always requires the counsel to listen to the witness. Some counsel are so intent on asking their prepared questions, or are so engaged in thinking about their next question that they fail to hear and consider the witness's response. Counsel should be flexible and ready to depart from prepared questions, depending on new opportunities and hazards revealed by the witness's response.

Most defense counsel know that cross-examination should be controlled through leading questions. Facts favorable to the defense can be loaded into the question to suggest a response, so that it appears the facts are true or, at least, so that the witness seems to agree with those facts. Unhappily, some counsel stuff so many facts into the question that it becomes difficult to follow. Others try to trick or belittle the witness with an involved question. A defense counsel will quickly lose the faith of court members if the members believe the counsel is being unfair to the witness.

A witness (usually a victim or a government snitch) may claim he cannot understand the question. A witness may also answer in a way that is unresponsive to the question. Commanders and first sergeants often answer questions in this way to explain or justify their actions. Do not try to brow-beat the witness into answering the question; military judges will never let the defense go that far. Defense counsel can ask the judge to direct the witness to answer the question, but this can look like counsel wants to bully the witness or cut-off his answer. The better practice is to ask the question in another way; this signals the court members that the defense counsel is trying to work with the witness. If the witness persists in refusing to answer the question, the point gets across to the court members, who do not like an uncooperative, belligerent witness any more than they like an uncooperative, belligerent counsel. Then, in obvious exasperation, counsel can request that the judge direct the witness to be responsive. If counsel is fortunate, the question will be clear enough that the judge will not reply, "frankly, counsel, I'm not sure myself what you are asking."

The best question is one that is easy to understand and concentrates on one point. Court members can also follow the questioning better if they know the general subject area for a series of questions. One technique that has been suggested for helping the court members know where the counsel is going is to use topic headings or sentences to introduce a particular subject. [5] Without boring the court with a lot of irrelevant questions, bring out foundational facts gradually to arrive at a major point. Seemingly unimportant questions can be used to lead a hostile witness to a favorable point before he sets his guard. Where a witness seems to be telling the story in a rote manner, try moving back and forth from one part of the story to another during cross-examination. Witnesses who recite carefully prepared lines may also have trouble if counsel have them refer to diagrams or charts that were not used during the direct examination.

Special considerations also apply to cross-examination of certain types of witnesses. As an entire article (or book) could be written on each of these types, the following will highlight only a few points.

### Eyewitnesses

Issues for eyewitness identification include how the witness could see, hear, taste, or feel what he or she is describing. Counsel usually spot the physical condition issues—how much time to observe, how far away, lighting, weather, and the physical condition of the witness—but sometimes fail to fully develop the issues. Lead the witness slowly through what was observed and what was not observed so that court members can visualize what happened as if a camera had recorded the event.

In his first defense case one counsel had a client who was nearly six feet seven inches tall. The client was accused of participating in a "night of terror" in which a group of soldiers randomly committed seven separate assaults on other soldiers. The night had been very dark, it was the victims' first week in the Army, and most of them were scared senseless.

All of the witnesses had noticed the extreme height of one of the attackers (in their words, "the tallest man I ever saw"), that he was a black man, and that he was wearing fatigue clothing, but only one witness could be more precise. In court the first victim turned to face the accused when asked to describe the tall man who had attacked him. The defense counsel immediately objected, and ultimately the judge ruled that the witnesses could not look at the accused until they had described their attacker and been cross-examined on the description. When the defense counsel cross-examined the witnesses, he purposefully stood behind the prosecutor. After some encouragement by the defense counsel, two of the witnesses agreed that the tall man looked very much like the prosecutor and was about his height. The witnesses admitted that they had talked to the prosecutor on several occasions for lengthy periods of time, whereas they had only observed their assailant for a few moments. The prosecutor was black but only about 5'11" and a lot heavier than the accused. One witness was so frustrated in his inability to describe his attacker that he

[4] E. Imwinkelried, Evidentiary Foundations 5 (1980).

[5] Bender, *Cross-Examination Techniques*, The Champion, June 1988, at 7.

had to be admonished by the judge to stop sneaking glances at the accused. Largely as a result of the cross-examination, the accused was acquitted of six of the seven assaults. [6]

Watch out for identification issues that seem obvious defense winners. Physical frailties or handicaps may actually make the witness stronger, more sympathetic, or more protective of his or her opinion.

*"Don't you wear eyeglasses because you can't see very well and a hearing aid because you are almost deaf?"*

*"Yes, but with my glasses my vision is 20-20, and I didn't need to hear what that fellow was saying to know he was trying to kill the other one."*

The chances of such an unpleasant response can be avoided by a good pretrial interview. The interview and some investigation may also turn up less obvious problems with the witness's ability to observe.

Counsel often focus on the particular event being described—the argument in the barracks hallway, the transfer of the drug package—and fail to consider that other things were probably going on at the time that would reasonably draw attention away from the event. Some things get a high level of the witness's attention, such as a man pointing a large pistol in the witness's face. On the other hand, where the witness is threatened, he may focus on only certain details and ignore others. A witness looking down the barrel of a .44 Magnum might remember the weapon extraordinarily well and yet fail to observe and recall anything about the color of the assailant's eyes, hair, shirt, or shoes.

In addition to determining what a witness cannot remember, counsel should consider why a witness can describe the event in so much detail. More than one witness has had his memory solidified by suggestions from other witnesses, police, prosecutors, and, occasionally, even defense counsel. If the crime scene is important, find out if the witness has gone back to the scene since the event. Cross-examination should bring out all the reasons the positive identification is tainted and why the witness's description comes not from what he observed, but from what he pieced together later from other sources.

Be skeptical of witnesses who have exceptional memories or powers of observation. Under immunity from prosecution, a female trainee testified that the accused, a cadre NCO, had persuaded her to go to a motel off-post. According to the trainee, she spent only a brief time in the motel room, where she had sexual intercourse with the NCO, before she realized her mistake and returned to the barracks. The trainee, who had left the barracks without authority, was caught by a CQ trying to slip in the back door. Several days later (after the NCO selected her for weekend clean-up duty), the trainee told her company commander about the affair.

The trainee claimed to be an innocent victim, led astray by the accused NCO. Having learned from other soldiers that the trainee actually had a less pristine reputation, the defense counsel began cross-examination by asking her if she was certain of the date, time, and other details. Yes, she was sure. Had she been nervous when she was at the motel? Yes, she had been very nervous. Was she certain she was with the NCO at the motel, or could it have been some other man? She was positive (the trial counsel had suggested she use words like "positive," "certain", and "definitely"), because she had never been at the motel except for the one time with the NCO. Of course, the trainee did not know that the defense would call one of her associates, who would admit to going to the motel with her on one other occasion.

Gradually, the defense counsel began to ask the trainee more questions about the motel room. Anxious to prove that she had been at the motel, the witness described the motel room in great detail, from the color of the drapes, rug, and walls, to the type of television and paintings on each of the four walls. Wasn't it true that she had gone to the motel on several occasions with different men? No, she again insisted that she had been there only that one time. The last question: Wasn't it true that she had actually gone to the motel to study the room to support her pack of lies, to get out of trouble for being AWOL, and to get back at the NCO for pulling her pass privileges? No, she denied it all. In closing argument, the defense counsel asked the court members to consider how the trainee could have observed and remembered so much about the motel when she was so nervous, was supposedly there for such a short time, and was presumably busy while in the room. Another acquittal.

### Biased Witnesses

Victims, accomplices, and informants are ripe targets for cross-examination. [7] Counsel should be sure the court members are aware of the bias and appreciate the effect the bias could have on the truthfulness or accuracy of the testimony. Witnesses who have a motive to get even with the accused will either lie or exaggerate. Witnesses with immunity or some kind of government bargain will distort the truth to their benefit. Friends and relatives of a victim, who want to be honest and truthful, may unconsciously let their bias influence their testimony.

Some witnesses will actually admit bias against the accused or admit having lied in the past, but will say on the witness stand, "I am telling the truth now." That kind of response from the admitted or convicted liar is good for the defense, because it shows that the witness chooses when to be truthful, with the choice arguably determined by when it is to the witness's benefit. Very little can be gained by arguing with such a witness about why he would tell the truth one time and not another

[6] The accused was found guilty of the seventh assault where the victim had identified the name tag on the tall man's fatigues and the name tag, coincidentally, matched the name of the accused.

[7] *See* Mil. R. Evid. 608(a) (character), 608(b) (conduct), 608(c) (bias), 609 (prior convictions), and 613 (prior inconsistent statements).

time; often this will merely provide the witness with an extended opportunity to come up with a plausible excuse. Just make sure the potential for testimonial lies gets in the mind of the court members and then remind them about it in the closing argument.

For inconsistent statements, after laying a proper foundation directing attention to the statement, counsel can ask the witness to tell the court which statement is true. Counsel should have already placed the witness in such a position that it would be impossible to explain the inconsistency. Stress the importance of the previous statement by asking if it was under oath (if it was) and who was present when it was made. If the document relied upon has substantial information adverse to the accused, do not introduce it into evidence. Once a document goes back to the deliberation room, court members may give it more weight than live testimony, reading it over in detail (including all the bad history about your client). Although inconsistent statements are probably the most frequent and effective means of attacking a witness's testimony, do not dwell on minor inconsistencies. Unless a useful point is made, court members will think that the defense counsel and accused are merely annoying the witness and wasting the members' time.

### Children and Female Witnesses

Children, and some female victims of violent crimes, cannot be ruthlessly attacked, because they evoke sympathy from the court members. [8] It is possible, without offending the members, to portray the child witness as someone who tells "fibs" to gain attention or other favors; the child can be cross-examined on previous stories that the child has told to others. Evasive demeanor or confused testimony, beyond that normally attributable to children who are talking in front of strangers, may discredit the accusations.

When a child testifies clearly, however, court members give the testimony extra weight. In one case, during cross-examination, the defense counsel had led the child to wrongly identify both the judge and the trial counsel as being present when she was abused. Indeed, she would have likely agreed that everyone in the courtroom had been present. But when the defense counsel (going one question too far) asked the child if all of them had not performed the specific act of sexual abuse on her, she said, "oh no, only that man (pointing to the accused) did that to me."

### Police Witnesses

Law enforcement witnesses, such as CID agents and MP's, can be difficult to cross-examine. Occasionally, one will be so obviously biased or hostile that the court members will discount his testimony. Inexperienced police witnesses, especially young MP's, will sometimes be unprepared for their testimony or will testify too forthrightly. Most of the time, however, CID and MP witnesses will have one story that they will blandly repeat for the defense cross-examination. Many court members will give police witnesses special deference. Others will hold them to a higher standard. Voir dire, rumors, or instinct may tell counsel how a court member will judge the credibility of a police witness.

Defense can often find actions that the CID or MP witness should have taken according to their own standard procedure, regulations, law, or out of just plain decency and fairness to the accused. Did the witness follow the procedures and regulations published by his agency? Argue that the short-cuts stamped guilt on the wrong man. Did the witness give a proper rights warning? Focus on the method of questioning. How long did he question the accused? Argue that it took too much or too little time. Why did he fail to write everything down that the accused said? Focus on selective recording. Emphasize the fact that police witnesses may demonstrate a prosecutorial slant in the way both the questions and the answers are written down. Did the witness investigate other leads, or did he stop working when the accused was apprehended? Even if the courts do not require the police to preserve evidence that is only potentially useful to the defense or to pursue other leads, counsel can still argue that the real criminal is getting away and that better investigation would have shown the innocence of the accused. Court members are suspicious of police who only do half the job.

### Experts

Cross-examination of an expert witness should include an inquiry into why the expert reached particular conclusions and why the expert's opinion should matter. [9] In particular cases, questions will challenge the qualifications of the expert, what evidence or technical sources the expert's testimony was based on, and how the test or study was conducted. The expert's qualifications and source of opinion should not be an issue if the opposing counsel has done his job in selecting and preparing a valid expert. In order to cut costs, trial counsel may try to use witnesses who are not really experts or who are testifying outside their area of expertise.

Be careful not to reinforce the expert's credibility by going back over his qualifications or direct testimony unless you clearly see a reasonable gain. Some experts appear overly pompous, too sure of themselves, or obvious prosecution tools. For these witnesses, only a few questions should be asked to show that, unlike most mortals, they have never made and never will make a mistake.

### When Do I Sit Down?

At the top of the hill, hopefully. Everyone wants to end on a high note, but most counsel still ask one or more unnecessary questions. The "Columbo" approach of remembering one last important question, "oh yeah, I almost forgot. . .," sometimes works, but not every

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[8] Some witnesses get special legal protection limiting cross-examination and presentation of other evidence. *See, e.g.*, Mil. R. Evid. 412 (rape shield). In a nonconsensual offense case, the defense must show the relevance of the victim's past behavior which outweighs the danger of unfair prejudice, give notice of intention to introduce specific instances of the victim's past sexual behavior, and make an offer of proof.

[9] *See* Mil. R. Evid. 701 (nonexpert opinions) and 702, 703 (expert opinions).

cross-examination can end with a dramatic revelation. Get the witness to state one final inconsistency, confirm an important inconsistency already covered, or offer one more illogical, unbelievable explanation, then sit down. If you are discrediting the witness, get him to confirm how honest, innocent, and fair he is. Do not drag the questioning out, hoping that the witness will give you a great tag line on which to end.

### Conclusion

Defense counsel can develop the defense theory and disassemble the prosecution through cross-examination of witnesses. Before conducting cross-examination, defense counsel must weigh the likely gain against the risk, then prepare through interview, investigation, and planning. The manner of cross-examination should be designed to clearly communicate the facts that the defense wants the court members to hear, while giving the witness little room to evade the question or respond in a way damaging to the defense. After a successful cross-examination, the trial counsel may be able to salvage some of his witness's testimony on redirect, but the patchwork often serves to highlight the holes in his case. Cross-examination is most effective when the defense counsel knows why he is asking questions, knows how to ask the questions, and knows when not to ask the questions.

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## Fraternization After *Clarke*

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### Introduction

On 9 November 1987, a panel of the Army Court of Military Review (ACMR) announced its decision in *United States v. Clarke.* [1] In that decision, while acknowledging that the prior law may have been uncertain, [2] the court announced that "[i]n the future, . . . the noncommissioned officers are on notice that fraternization with enlisted subordinates is an offense punishable under the provisions of Article 134, UCMJ." [3] This represented a drastic break from prior law in which the offense of fraternization was considered to be applicable only to officers. [4] The court's holding in *Clarke* opened up new opportunities for prosecutors and created new challenges for defense counsel. This article will discuss one approach to defending noncommissioned officers who are being prosecuted for fraternization under article 134. This article will not attempt to present a thorough analysis of the history of the law of fraternization, [5] nor will it attempt to suggest an approach to NCO fraternization cases that are charged under article 92. [6] This article will be limited to the new issues raised by the *Clarke* case.

### History of Fraternization

#### *Pre-UCMJ*

The prohibition against fraternization began as a result of the separation of social classes. [7] In the British Army fraternization was punished under an article that prohibited conduct that was "to the Prejudice of good Order and Military Discipline." [8] The American Army, under the leadership of General George Washington, began shifting from the social class basis for the custom to one based on the need to maintain good order and discipline. [9] Most cases prior to the 1950 UCMJ were charged under the predecessors to articles 133 and 134, and the reported cases are almost exclusively officer cases. [10]

#### *UCMJ: 1950-1984*

The UCMJ does not mention fraternization. Prior to 1984, the Manual for Courts-Martial (MCM) did not use the word fraternization in any of the suggested specifications. Thus, the word 'fraternization' rarely showed up in any reported cases. [11] Nevertheless, fraternization was

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[1] 25 M.J. 631 (A.C.M.R. 1987).

[2] *Id.* at 635.

[3] *Id.*

[4] *See* United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984).

[5] For a comprehensive review of the history of fraternization, see Carter, *Fraternization*, 113 Mil. L. Rev. 61 (1986).

[6] One article dealing with an approach to cases in which an NCO is charged under article 92 is Davis, *"Fraternization" and the Enlisted Soldier: Some Considerations for the Defense*, The Army Lawyer, Oct. 1985, at 27.

[7] *See generally* Carter, *supra* note 5, at 62-64.

[8] *See* Carter, *supra* note 5, at 64-65.

[9] Carter, *supra* note 5, at 66-67. *See also* Letter 600-84-2, HQDA, 23 Nov. 84, subject: Fraternization and Regulatory Policy Regarding Relations between Members of Different Ranks, at Enclosure 1 [hereinafter HQDA Letter].

[10] *See* Carter, *supra* note 5, at 67-74.

[11] Carter, *supra* note 5, at text accompanying notes 141-52.

defined in the case of *United States v. Free.* [12] The 1984 MCM adopted this definition and the standards enunciated in *United States v. Pitasi* [13] for the new fraternization offense under article 134. [14] This offense specifically required as one of its elements that the accused be a commissioned or warrant officer. [15]

### *1984 MCM Through* Clarke

Both prior to the 1984 MCM, and for the period up until the *Clarke* case, it was almost universally accepted that fraternization was an officer offense and that NCO's had to be charged under article 92 or some other article. This was recognized in materials from The Judge Advocate General's School, [16] articles in the *Military Law Review* [17] and *The Army Lawyer*, [18] and most importantly, in case law. [19] It was explicitly noted in the *Stocken* case, where ACMR held that "[a]bsent an otherwise lawful regulation prohibiting such behavior between a noncommissioned officer and an enlisted member of a lower grade, the appellant's conduct does not constitute the offense of fraternization, nor has it ever been an offense under military law." [20] When viewed in this context, it is even more apparent that the *Clarke* case was an abrupt departure from prior law. Therefore, it is necessary to thoroughly understand the *Stocken* and *Clarke* cases and the differences between them.

### *The* Stocken *Case*

SSG Albert Stocken was charged with two specifications of wrongfully fraternizing with female privates, by socializing with them, drinking alcoholic beverages and smoking marijuana with them, and by having sexual intercourse with one of them. [21] In *Stocken* the ACMR reviewed and analyzed prior case law on fraternization and concluded that 1) "[a]ll other published cases regarding the conviction of a noncommissioned officer for fraternization were prosecuted under Article 92;" [22] and 2) "[a]ll other reported cases holding fraternization to be an offense involve officer accused." [23] The court then noted that some regulations, such as Army Regulation 600-20, Army Command Policy and Procedures, provided no guidance concerning what constituted fraternization, as they were non-punitive in nature. [24] This led the court to the conclusion that fraternization was not an NCO offense.

### *The* Clarke *Case*

Sergeant Michael F. Clarke was found guilty of two specifications of indecent acts, assault with intent to commit sodomy, and nonconsensual sodomy. [25] He had originally been charged with rape, but was found guilty of the lesser included offense of indecent acts. At trial the military judge mingled the instructions for indecent acts with those for fraternization. [26]

On appeal to the ACMR the issues presented concerned the mingled instructions [27] as well as some other issues not pertinent to this article. The issue of fraternization as an enlisted offense was not joined on appeal by either party and was not an issue before the court for disposition. [28] The issue did not go to the Court of Military Appeals for its consideration either. Therefore, enlisted fraternization under article 134 is an issue ripe for appellate discussion. [29]

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[12] 14 C.M.R. 466 (N.B.R. 1953).

[13] 44 C.M.R. 31 (C.M.A. 1971).

[14] Manual for Courts-Martial, United States, 1984, Article 134 (Fraternization) analysis, app. 21, at A21-101 [hereinafter Article 134 (Fraternization) Analysis].

[15] Manual for Courts-Martial, United States, 1984, Part IV, para. 83b(1).

[16] Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law: Nonjudicial Punishment, Crimes & Defenses, & Confinement & Corrections at 2-27 (Aug. 1985). The discussion of the law of fraternization flatly states that "[t]he offense of fraternization in the MCM does not apply to senior enlisted persons," and cites the *Stocken* case. The deskbook goes on to state that NCO's must be charged under article 92 of the UCMJ for violating an applicable regulation or policy letter.

[17] Carter, *supra* note 5, at 117. "Only an officer may commit the criminal offense of fraternization under this specification."

[18] Davis, *supra* note 6, at 28. "The new Article 134 offense applies only to officers. . . ."

[19] *See infra* text accompanying notes 22-23.

[20] *Stocken*, 17 M.J. at 829-30.

[21] *Id.* at 828.

[22] *Id.*

[23] *Id.*

[24] *See id.* at 829. The court stated that "[s]uch guidance to individual service members, commanders and supervisors adds nothing to military criminal law," and cited United States v. Tenney, 15 M.J. 779, 781 (A.C.M.R. 1983), which discussed the effect of non-punitive regulations.

[25] *Clarke*, 25 M.J. at 632.

[26] *Id.* at 634. The instruction given by the judge read as follows: "[t]he accused . . . committed a certain indecent act with, then, Private [P] by engaging in sexual intercourse in the accused's military barracks with a military subordinate. . . ."

[27] *Id.*

[28] Phone call to CPT Keith W. Sickendick of the Defense Appellate Division, USALSA.

[29] *Id.* To the best of anyone's recollection, there have been no cases since *Clarke* where an NCO was found guilty of fraternization under article 134.

### *Analysis of the* Clarke *Decision*

It is not clear from the language in *Clarke* if the ACMR was treating fraternization as a lesser included offense of one of the specifications of indecent acts. Because fraternization offenses contain elements that are not included in the offense of indecent acts, [30] this would seem unlikely. Yet, after stating that the prior law on fraternization was unclear as a result of the *Stocken* decision, the court stated that "[b]ecause of the uncertainty concerning notice . . . we believe the interests of justice dictate that the finding of guilty of the offense in question be set aside." [31] This was unnecessary, as the court had already held that there was substantial prejudice to the appellant because of the confusion from the mingling of the instructions. [32] Because of this, and based on the analysis that follows, the announcement concerning enlisted fraternization is dicta.

It is even more evident that the language in *Clarke* is dicta when one considers the posture of the case and the effect of article 66 of the UCMJ.

The ACMR is an article I court. [33] As such, it has only the powers and authority granted to it by congress, via the UCMJ. [34] Article 66 of the UCMJ states that "[i]n a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority." [35]

The Court of Military Appeals has endorsed this view of the limited authority of the Courts of Review. In *United States v. Kelly*, 14 M.J. 196 (C.M.A. 1982), the court, citing article 66, held that with respect to matters that were not approved by the convening authority, a court's views "must be viewed as dicta, which only have advisory effect." [36] The court then went on to state its reluctance to give advisory opinions. [37]

The *Clarke* case is a perfect example of the application of article 66 and the *Kelly* case. Because enlisted fraternization was not a part of the findings as approved by the convening authority, the ACMR had no power to act with respect to that issue. Its opinion is only dicta and must be given appropriate weight as such.

There are further problems with the ACMR's analysis in *Clarke*. In making its announcement, the court stated that "[w]hile *Stocken* represented the law before 1 August 1984, its principle . . . was replaced with the adoption of the 1984 Manual." [38] This conclusion, however, is not supported by the language in the *Stocken* decision. In *Stocken* the court knew of the language in the forthcoming 1984 Manual and specifically commented on it. In footnote 5 of the decision, the court stated: "Paragraph 83 of the Draft Proposed Revision of the Manual for Courts-Martial . . . unequivocally states that one of the elements of the offense of fraternization prosecuted as a violation of Article 134 is that the accused was a commissioned or warrant officer." [39] Thus, the court appeared convinced that the intent of paragraph 83 was to create an offense for officers only, with the traditional remedies for NCO conduct remaining unchanged.

In *Clarke* the court relied on the language in the analysis to the 1984 Manual to support its conclusion. [40] The court's reliance on that language to support its conclusion was misplaced.

The court relied on the phrase: "This paragraph is not intended to preclude prosecution for such offenses" [41] to conclude that prosecution of NCO's under article 134 was intended by the drafters. Nonetheless, that phrase can also be read to mean that the government was not precluded from continuing its prior practice of prosecuting enlisted soldiers under article 92. This reading is even more logical when one reads the language in the explanation to paragraph 83 in Part IV itself. There, subparagraph 1 talks about the offense in terms of officers only. [42] Sub-paragraph 2, entitled *Regulations*, states that regulations may govern the conduct of enlisted persons of different ranks and that violations of those regulations may be punished under article 92. [43] Thus, it is clear from the words of the Manual itself that fraternization is an officers-only offense and that the words in the analysis must be read in that light.

The court placed undue emphasis on the analysis to support its conclusion. The introduction to the analysis

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[30] *See* MCM, 1984, Part IV, paras. 83 and 90.

[31] *Clarke*, 25 M.J. at 635.

[32] *Id.* at 634.

[33] U.S. Const. art. I, § 8.

[34] *Id.*

[35] Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (1982) [hereinafter UCMJ].

[36] *Kelly*, 14 M.J. at 200.

[37] *Id.*

[38] *Clarke*, 25 M.J. at 634.

[39] *Stocken*, 17 M.J. at 830 n.5.

[40] *Clarke*, 25 M.J. at 634. The court quoted the Analysis as follows: "Relationships between senior officers and junior officers and between noncommissioned and petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline. This paragraph is not intended to preclude prosecution for such offenses." Article 134 (Fraternization) Analysis at A21-101.

[41] *Id.*

[42] MCM, 1984, Part IV, para. 83c(1).

[43] MCM, 1984, Part IV, para. 83c(2).

itself states that "[t]he analysis is intended to be a guide in interpretation," [44] and cautions that "primary reliance should be placed on the plain words of the rules." [45] In discussing the relationship between judicial decisions and the analysis, the drafters state that "[n]othing in this introduction should be interpreted to suggest that the placement of a matter in the [Analysis], rather than the rule, is to be taken as disapproval of the precedent or as an invitation for a court to take a different approach." [46] Therefore, it is unsound to use a comment in the analysis as a justification to reverse a prior judicial decision.

In deciding that the drafters of the Manual had intended that NCO's should be prosecuted under paragraph 83, the court ignored a clear movement by the Department of the Army to isolate the criminal offense of officer fraternization from other improper relationships. In a fraternization policy letter published in November 1984, after the implementation of the 1984 Manual, the Secretary of the Army stated that the term 'fraternization' relates to the specific offense under article 134 for officer-enlisted relationships [47] and that the term 'fraternization' is to be used only to refer to that offense. [48] The enclosure to the letter re-emphasizes this and further states that "[w]e must begin to discipline ourselves to distinguish the criminal offense of 'fraternization' from the Army's regulatory policy regarding relationships between servicemembers of different rank." [49] In a final rebuttal to the notion that fraternization has evolved to include enlisted soldiers, the letter adds: "It is important to note that the custom on fraternization has always been directed at *and limited to* officer-enlisted relationships." [50]

The regulation that covers improper relationships, AR 600-20, Army Command Policy and Procedures, further reflects this separation between the officer offense of fraternization and other improper relationships. In a section dealing with those relationships, it states that "[r]elationships . . . between officers and enlisted soldiers, are prohibited by the customs of the Service and may constitute the offense of fraternization under the provisions of Article 134." [51] Thus, the regulation asserts Department of the Army policy that fraternization is an officer offense and that other relationships are to be evaluated in accordance with the standards set forth in the regulation. It is also interesting to note that the last update to AR 600-20 was published in 1988, which is after both the *Stocken* decision and the 1984 Manual.

Despite this analysis, any deficiencies in the logic of the *Clarke* decision are worthless to the trial defense counsel unless they can be translated into success at the trial level. Therefore, the next section will cover strategies that can be used to defend an NCO charged with fraternization.

## Defending an NCO Fraternization Case

### *Motion To Dismiss*

The basic premise of the motion to dismiss is that the charge of fraternization fails to state a criminal offense. The first step is to establish that the opinion in the *Clarke* case is dicta, as discussed above. As dicta, it is advisory only and has limited weight in subsequent trials. The ACMR itself has stated that "[g]enerally, the doctrine of stare decisis does not attach to such parts of a court's opinion as are dicta." [52] The concerns cited by the court are that other issues that are not properly before the court may not have been argued or considered fully, [53] which is precisely what happened in the *Clarke* case. [54]

The next step is to assert that *Stocken* is still the law. Because it was a holding of the court and was never *overruled* by the holding in any subsequent decision, it remains the law and trial courts are bound to follow it. As stated by the Court of Military Appeals, "[a]bsent a contrary decision by this court, a determination of a rule of law by a service Court of Military Review is controlling authority for all courts-martial in that service." [55] The final step is to tie together the first two arguments by concluding that the announcement in *Clarke* is dicta, does not have the force of law, and cannot overrule *Stocken*.

Another argument that can be made is that the court exceeded its authority under article 66 by improperly legislating and creating new law. "Only Congress can define crimes or establish affirmative defenses." [56] The

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[44] Analysis Introduction, app. 21, at A21-3, para. b(2).

[45] *Id.*

[46] *Id.*

[47] HQDA Letter, *supra* note 9, para. 2.

[48] *Id.*

[49] *Id.* at encl. 1.

[50] *Id.* (emphasis added).

[51] AR 600-20, Personnel—General: Army Command Policy, para. 4-16 (30 Mar. 1988).

[52] United States v. Taylor, 5 M.J. 669, 670 (A.C.M.R. 1978). *See also* Green v. United States, 355 U.S. 184 (1957).

[53] *Id.* at 670.

[54] Phone conversation with CPT Keith W. Sickendick of the Defense Appellate Division. The issue of enlisted fraternization was neither briefed nor argued by either side.

[55] United States v. Gutierrez, 11 M.J. 122, 122 (C.M.A 1981).

[56] Dep't of Army, Pam. 27-173, Trial Procedure, para. 1-3a (15 Feb. 1987).

courts of review can only interpret the law, not create new law. This power is beyond even the reach of the President. [57] By creating a new offense of enlisted fraternization, the court overstepped its bounds. In summary, the argument to present is that *Stocken* is the only valid law concerning enlisted fraternization and *Clarke* does not overrule it.

If the motion is denied, defense counsel should request that the military judge make specific findings in order to preserve the issue for appeal. [58] At a minimum, defense counsel should ask the judge to make specific findings on the following: 1) whether the opinion in *Clarke* is dicta; 2) whether the decision in *Stocken* is a holding of the court; and 3) whether *Clarke* overruled *Stocken*.

Final grounds for a motion to dismiss would be that there has been a due process violation [59] based on insufficient notice that the conduct charged was criminal. Although article 134 itself has been upheld by the Supreme Court in spite of challenges that it was void for vagueness, [60] one must still examine the nature of the offense charged. The challenge would usually be that the accused did not have sufficient notice as to what conduct was proscribed. [61] With respect to fraternization, the Court of Military Appeals has held that "fundamental fairness and fifth amendment due process require a service member to be on notice as to what conduct is forbidden before he may be prosecuted under . . . Article 134." [62] In the *Johanns* case [63] the court applied this doctrine of notice to conclude that, in the absence of a custom prohibiting the conduct of the accused in that case, [64] the accused had not been put on notice that his conduct was potentially criminal.

Trial defense counsel should first argue that there is no long-established Army custom prohibiting NCO's from fraternizing with lower ranking enlisted soldiers. The first enclosure to the HQDA Letter contains language indicating that the custom prohibiting fraternization has always been directed at and limited to officers. Next, argue that despite the announcement in *Clarke* NCO's have had no more notice than they had before *Clarke*. As evidence of this, have other NCO's prepared to testify that they have not taken part in any classes, briefings, or instruction on any changes in the conduct that is expected of them. Specifically ask them whether they knew of the *Clarke* decision and its application to them. In summary, a due process argument should focus on the state of the law up until *Clarke* and the lack of any notice since *Clarke*.

## Trial Tactics

If the judge refuses to dismiss the charge, then the defense counsel must convince the fact-finder that the offense has not been committed. The defense counsel must take the initiative away from the prosecutor and set the terms for the definition of the offense.

First, ask the judge to take judicial notice of AR 600-20. [65] Paragraph 4-14 covers relationships of superiors and subordinates. Paragraph 4-14a specifically covers three situations where a relationship may be improper and the command should take action. [66] The basis for admission is that article 134 is imprecise and open to wide interpretation. Thus, the members will need guidance concerning what relationships are considered prejudicial to good order and discipline. [67]

Another argument for admitting the guidelines set forth in AR 600-20 is that one of the factors for an article 134 offense is that the conduct breached a custom of the service. [68] The members are not expected to be historians and will need evidence concerning the custom on fraternization. This should also be used as an argument for admitting the HQDA letter on fraternization and all of the enclosures. Argue that these materials are relevant because they will assist the trier of fact in determining whether there is such a custom, whether such a custom has been breached, and whether this conduct was prejudicial to good order and discipline.

Once these materials are admitted, the defense counsel can argue to the members that the government has failed to meet its burden to prove that there is a long-standing custom against NCO fraternization. If the military judge is going to instruct on the elements of fraternization as found in paragraph 83 of the Manual (except for changing the word 'officer' to 'NCO'), then argue that an essential element is that there be a custom against

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[57] United States v. Johnson, 17 M.J. 251, 252 (C.M.A. 1984).

[58] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 905(g) [hereinafter R.C.M.].

[59] U.S. Const. amend. V. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

[60] *See* Parker v. Levy, 417 U.S. 733 (1974).

[61] *Id.* at 774-75.

[62] United States v. Mayfield, 21 M.J. 418, 420 (C.M.A. 1986) (citing United States v. Johanns, 20 M.J. 155 (C.M.A. 1985)).

[63] *Id.*

[64] In *Johanns* CPT Johanns had carried out sexual liaisons with three female enlisted airmen. The court concluded that there was no long-standing custom or tradition in the Air Force prohibiting officers from fraternizing with enlisted members. One should note, however, that this custom is well-established for Army officers.

[65] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 201, covers the procedures for requesting judicial notice.

[66] The three situations noted are when the relationships: 1) cause actual or perceived partiality or unfairness; 2) involve the improper use of rank or position for personal gain; or 3) create an actual or clearly predictable adverse impact on discipline, authority, or morale.

[67] The final element of all article 134 offenses is that the conduct be prejudicial to good order and discipline. The explanation discusses various factors that may be considered, but gives no precise examples. *See* MCM, 1984, Part IV, para. 60c.

[68] MCM, 1984, Part IV, para. 60c(b).

NCO fraternization. [69] Using the HQDA letter, demonstrate that the *only* custom is against officer fraternization. Next, use both the DA letter and AR 600-20 to argue that the standard for enlisted fraternization is different than that for officer fraternization and that the adverse effects listed in paragraph 4-14 of AR 600-20 [70] are now the standard for enlisted fraternization. Emphasize that there is also a difference between conduct that is unprofessional or unwise and conduct that is criminal. Additionally, the conduct must be compared with the conduct described in AR 600-20. Finally, argue that your client's conduct did not have the adverse effects listed in AR 600-20 and thus has not risen to the standard required for criminality. [71]

Finally, employ the words from the instruction on fraternization to emphasize that the focus of the offense is on actual or perceived impact, not potential or presumed impact. Phrases that are in the past tense, such as "compromised the chain of command," [72] "undermined good order," [73] and "has been prejudicial" [74] establish that it is not the relationship itself, but the impact that is the offense.

In summary, the existing law gives the trial defense attorney several opportunities to argue that, while a particular relationship may have been improper, it was not criminal. Because in most cases your client will have already been removed or relieved, argue that the proper action has already been taken.

### Conclusion

The decision in the *Clarke* case is dicta and does not bind any lower courts. *Stocken* is still the law governing fraternization and is consistent with subsequent DA policy. Fraternization is an offense only for officers, and NCO's must still be charged under article 92, assuming that there is a regulation that prohibits the offending conduct. Even if NCO relationships can be charged under article 134, the standard is different than that for officers. It requires clear adverse impact as described in AR 600-20.

[69] *See* MCM, 1984, Part IV, para. 83b (4).

[70] The thrust of this provision of the regulation is that a relationship is not improper unless one of the three adverse conditions exists. Therefore, any relationship that falls short of having that impact is not improper.

[71] The author is convinced that admission of both the HQDA letter and AR 600-20 is essential to an NCO fraternization case. In a recently completed trial, both were admitted and used in argument to the jury. The result was an acquittal for a first sergeant who was living with and having sex with a female specialist in his company. The government had put on no evidence of actual or perceived impact.

[72] Dep't of Army, Pam 27-9, Military Judges' Benchbook, para. 3-152.1b (1 May 1982) (C1, 15 Feb. 1985).

[73] *Id.*

[74] *Id.*

## Contract Appeals Division—Trial Notes

## Hindsight—Litigation That Might Be Avoided

*Major Edward J. Kinberg*
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This is part of a continuing series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on how to avoid litigation or develop the facts in order to ensure a good litigation posture.

### Problem

A company commander on your post recently designed a seven day special training program for problem soldiers. The program requires the participants to begin their day at 0500 during the week and at 0600 on weekends. The commander intends to run the program at least twice a month. He has run into a snag, however, in implementing the program. The schedule requires participating soldiers to eat breakfast at 0430 on weekdays and at 0530 on weekends, but the dining facilities on the post, which are run by civilian contractors, do not open for breakfast until 0500 on weekdays and 0700 on weekends. Commanders may arrange earlier opening times for "special events/requirements"; however, it is fairly costly to do so. Consequently, the commander asked the contracting officer for a copy of the contract so he could review it himself to see if there was some cheaper way to get the dining facility open earlier.

Upon reviewing the contract, the commander discovered that the contract required the dining facilities to open at 0430 on weekdays and 0530 on weekends. When he asked the contracting officer about this he was told that the command had never enforced that requirement. After his discovery, the commander told several of his friends that the dining facility contract required the contractor to open for breakfast at 0430 on weekdays and 0530 on weekends. As a result, several other commanders decided to begin their days earlier. The group then approached the contracting officer and asked him to direct the contractor to comply with the hours set out in the contract.

The contracting officer was reluctant to require the earlier hours because they had never been required in the

past. He felt, however, that the terms of the contract were clear and that he had no choice but to enforce the strict requirements of the contract. Consequently, he directed the contractor to start opening all of the post dining facilities at 0430 on weekdays and 0530 on weekends. The contractor agreed to comply with this requirement but said he intended to submit a change claim because, in his opinion, the explicit terms of the contract had been modified by a long term "course of dealing." Several weeks later, the contractor submitted a claim demanding a 20% increase in the contract price because of the change in hours. The contractor did not submit any financial data in support of its claim.

The contracting officer has referred the matter to you for legal advice. You have conducted a thorough investigation into the matter and discovered the following facts: [1]

1. The dining facilities at your post have been operated by civilian contractors for the last fifteen years.

2. When the original contract was drafted, the command included a provision requiring contractors to serve breakfast at 0430 on weekdays and 0530 on weekends. That requirement was not enforced the first year the contract was awarded because the post commander had established a unified training schedule that did not allow any of the units on post to eat breakfast before 0500 on weekdays and 0700 on weekends. That practice remained in place until the present controversy erupted.

3. The contract is recompeted every three years (it is a one year contract with two one year options; the options have always been exercised in the past). There has always been a large group of bidders. None of them have ever objected to the opening hour requirements in the contract nor raised any questions concerning the opening hours.

4. The present contractor has had the contract for the last twelve years. It has always started breakfast service at 0500 on weekdays and at 0700 on weekends.

5. While several different contracting officers have administered this contract over the years they all knew of the "late" opening practice. You have not been able to find evidence that any of the contracting officers ever objected to the late opening practice.

You are inclined to deny the claim for three reasons. First, you are really bothered by the fact that the contractor bid on the contract without stating that it did not intend to comply strictly with the terms of the contract. [2] You believe this gave the contractor an unfair competitive advantage and that the contractor should not be entitled to benefit from such inside knowledge. Second, you believe that the fact that the government failed to enforce an explicit contract term in the past does not prevent the government from enforcing that term now. After all, the contractor offered to comply with the explicit terms of the solicitation when it submitted its bid, therefore there is no reason it cannot now be required to comply with those terms. Third, the contractor has failed to provide any cost data to support its claim. As such, you do not believe that the contractor has established any cost impact as a result of the "corrected" opening hours.

## Solution

### *Introduction*

This example involves three separate issues. The first concerns the integrity of the bidding process, the second involves interpretation of contract terms, and the third involves the distinction between the quantum and entitlement portion of a claim. Each area will be discussed separately.

### *Integrity of the Bidding Process*

While incumbent contractors may have an advantage in bidding on a contract, they must bid on the same terms and conditions as all of the other bidders. This does not appear to be the case in this example. Your contractor seems to have had special knowledge that may have given it an unfair advantage in the competition (and may explain why it has won the contract for the last four times). If any of the other bidders discover that the government did not intend to require strict compliance with the terms of the solicitation, they may file a post award protest. [3] While it is impossible to change the events that have already occurred, future problems can be avoided by including a clause in each solicitation that states that the bidder is not aware of any course of dealings or other practices that would modify any of the terms of terms of the solicitation.

### *Contract Interpretation*

This case presents a unique issue in that there is no problem with ambiguous or conflicting contract terms. Rather, the contractor is claiming that the explicit terms of the contract do not apply. The Armed Services Board of Contract Appeals uses two similar doctrines to resolve such issues: "estoppel" and "course of dealing." The application of either doctrine can prevent the govern-

[1] While this problem involves post-level contracting, the same issues arise at Army Materiel Command (AMC) organizations. Legal counsel at such organizations should consider the issues raised herein when reviewing contractor claims of constructive change to drawings or specifications.

[2] In Rodan Commercial Contractors, Inc., ASBCA No. 34853, 88-2 BCA ¶ 20,579, the board held that the government had a right to require strict compliance with specifications even if the requirements are unnecessarily stringent.

[3] While the GAO will not generally consider protests against an agency's decision to modify a contract, it will do so when there is an allegation that a modification exceeds the scope of an existing contract. Clean Giant, Inc., Comp. Gen. Dec. B-229885 (17 Mar. 1988), 88-1 CPD ¶ 281. In Avtron Manufacturing, Inc., Comp. Gen. Dec. B-229972 (16 May 1988), 88-1 CPD ¶ 458, the GAO concluded that a change in the operating requirements for a machine was so significant that a new procurement was required. *See also* Defense Technology Corp.; Dept of the Navy — Requests for Reconsideration, Comp. Gen. Dec. B229972 (21 Sept. 1988), 88-2 CPD ¶ 273.

It is interesting to note that the ASBCA would not consider it a problem if the current contractor knew that the strict terms of the solicitation would not be complied with, provided that knowledge arose from a long-standing Course of Dealing. In Moore Electric Company, Inc., ASBCA No. 33828, slip opinion (2 Sept. 1987), the board stated that "to allow one firm to bid on and utilize a cheaper method would indeed be inequitable and unconscionable — absent an overbalancing history or extraordinary circumstances such as found in Gresham & Co. Inc. v. United States, 200 Ct. Cl. 97, 470 F.2d 542 (1972)."

ment from enforcing the explicit terms of a contract. Estoppel prevents the government from enforcing a term when the other party has detrimentally relied on the fact that the term has not been enforced previously. Course of dealing actually results in a constructive change of the explicit terms of the contract. The doctrines differ in two ways. First, estoppel can arise during the course of a single contract whereas course of dealing only occurs when one contractor has had several contracts over several years. Second, estoppel prevents the government from enforcing a specific term; course of dealing actually changes the terms of the contract.

*Estoppel*

The board will only apply the doctrine of estoppel if two prerequisites are established. First, the government must be acting in a proprietary capacity and not in its sovereign capacity. Second, the government representative charged with knowledge of the necessary facts must be acting within the scope of his/her authority. [4] In the present case, there is no question that the government was acting in its propriety capacity (it was simply buying services), and the evidence shows that the contracting officers were aware of the situation. [5] Once the board is satisfied that these conditions exist, it will then examine the facts to see if estoppel is applicable.

Estoppel has four basic elements:

1. The party to be estopped must know the facts.

2. The party to be estopped must have intended that his/her conduct be acted upon or must have acted in such a manner that the party asserting the estoppel has a right to believe it was so intended.

3. The party asserting estoppel must be ignorant of the true facts.

4. The party asserting estoppel must have relied on the other parties conduct to his/her injury. [6]

Because this case involves a relationship that existed over several years and involved several different contracts, the board will probably consider the course of dealing doctrine to be more appropriate than the doctrine of estoppel for resolving this issue.

*Course of Dealing*

In *Gresham & Company v. United States* [7] the Court of Claims ruled:

> It is a proper technique of contract interpretation to give the language the meaning that would be derived by a reasonably intelligent person standing in the parties shoes and acquainted with the contemporaneous circumstances. This is equally true whether defendant has originally written an ambiguity into a contract, or has administered an initially unambiguous contract in such a way as to give a reasonably intelligent and alert opposite party the impression that the contract requirement has been suspended or waived. In the latter case, the requirement cannot be suddenly revived to the prejudice of a party who has changed his position in reliance on the suspended position.

The board will only apply this principle when the same contractor has performed a specific service (or provided a specific item) for a long period of time, and several contracts for the service/item have been awarded to the contractor. [8]

In the present case it appears the board would apply the *Gresham* doctrine. [9] Your contractor has had the dining facility contract for twelve years. During that entire period of time the government has allowed it to open later than the hours specified in the contract. Consequently, the board will find that the terms of the contract have changed and that the contract now requires the contractor to open at the later hours.

Remember that a course of dealing only applies to the parties that were actually involved in the past relationship. It does not apply to other contractors. A new contractor starts with a blank slate as far as the course of dealing doctrine is concerned. A new contractor could not use this doctrine to change the opening hours of the dining facilities because it was not involved in the course of dealing. This is based on the simple principle that there is no contract history that the board may look at to see how the parties treated the provision in question.

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[4] United States v. Georgia-Pacific Company, 421 F.2d 92, 100 (9th Cir. 1970).

[5] While, as a general rule, a contracting officer is the only person authorized to make changes to a contract, the board will stretch this rule to include contracting officer's representatives and quality assurance inspectors. In Gresham & Company v. United States, 200 Ct. Cl. 97, 470 F.2d 542 (1972), the Court of Claims specifically ruled that the knowledge of a quality assurance representative could be imputed to the contracting officer. Basically, the board concluded that the contracting officer "knew or should have known what was happening" and that the government was, as a consequence, bound by the acts of the quality assurance representative.

The ASBCA reached a similar result in two different appeals. In Switlik Parachute Co., Inc., ASBCA No. 17920, 74-2 BCA ¶ 10,970, the board held that the "authority to accept necessarily embraces the authority to reject" and concluded that a change in inspection procedure was binding on the government, even if the contracting officer did not know about it. In Codex Corporation, ASBCA No. 17983, 75-2 BCA ¶ 11,554, the board stated that "the Board is not using the word contracting officer in the narrow sense of the person who signed the contract for the Government but in a broader sense that includes his authorized representatives."

While the scenario set out in this article does not involve "implied authority," it is important to keep that concept in mind when analyzing any claim in which a contractor has alleged a Course of Dealing as the basis for a constructive change to the explicit terms of a contract.

[6] United States v. Georgia-Pacific Company, 421 F.2d 92, 96 (9th Cir. 1970).

[7] 200 Ct. Cl. 97, 470 F.2d 542 (1972) (citation omitted).

[8] *Gresham* involved 15 contracts for an identical item awarded over a two year period, which were in dispute, and 21 contacts over the previous two year period, which were not in dispute.

[9] It is important to keep in mind, however, that the person that allowed the change must have had the authority to do so. The board may conclude that someone other than the contracting officer had the authority to make the change. *See supra* note 4. In this case the contracting officers had actual knowledge of the practice, therefore authority is not an issue.

*Quantum v. Entitlement*

As a general rule, the board will limit its ruling to entitlement. That is, it will consider the facts and circumstances of an appeal and determine who is right. If the board concludes the contractor is correct, it will return the matter to the contracting officer to determine quantum. If the parties cannot agree on quantum, the board may consider that issue as a separate appeal.

If you believe the contractor is entitled to an adjustment in the contract price but has failed to adequately document its costs, you should recommend that the contracting officer issue a final decision admitting the contractor is entitled to an adjustment and directing the contractor to submit its cost claim.

You should not deny entitlement simply because you do not believe the contractor has adequately supported its claim. To do so would result in unnecessary litigation and, in the case of a small business, could expose the command to liability for attorneys fees under the Equal Access to Justice Act. It is important to keep in mind that litigation is very expensive and time consuming. Consequently, a final decision should be limited to the actual issues in dispute.

**Conclusion**

You should recognize the contractor's claim of entitlement. If this matter were presented to the ASBCA, it would likely conclude that the contracting officer knew the dining facilities were opening late for the last twelve years and that the contractor relied on this to its detriment. Consequently, the board would probably rule that the terms of the contract have changed by the course of dealings between the parties. Although you can change the terms of the contract, you must do so under the changes clause. If the contractor has incurred additional costs, you will have to pay them.

You should recommend that the contracting officer advise the contractor that the government agrees that the terms of the contract have been changed, but that the contractor has failed to provide any support for its claimed costs. If the contractor fails to provide any additional data to support its cost claim, you should advise the contracting officer to issue a final decision recognizing entitlement but denying the costs.

# TJAGSA Practice Notes

*Instructors, The Judge Advocate General's School*

## 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*.

### Consumer Law Notes

*Automobiles' "Secret Warranties"*

A "secret warranty" is a manufacturer's warranty coverage of a repair involving a component that has a high failure rate. It is "secret" because the manufacturer does not announce that it has extended the duration or coverage of the warranty; only those aware of the manufacturer's policy or lucky enough to report the problem at the right time to the right person receive the available service.

The April 1989 issue of *Consumer Reports* identifies numerous "secret warranties," including warranties on brakes, steering, transmission, exterior paint, engine blocks, floor pans, timing chain guides, safety belts, oil filters, universal joints, water pumps, cruise control, radiator fan motors, and oil pressure sensors.

*Consumers Try to Win "Big Bucks"*

The Kentucky and California attorneys general are pursuing a company known both as Direct American Marketer Inc. and as Direct American Marketing, a California-based company that has nationally marketed a word puzzle contest called, in various locations, the Big Buck Contest, Money House, Sure Win Jackpot Center, and $25,000 Contest Control Center. The Kentucky attorney general recently obtained an injunction against the company and the California attorney general's pending suit seeks an injunction, restitution, and at least $1 million in civil penalties.

As "participants" in these "contests," consumers receive correspondence indicating that they have won or are tied with three others to win a "first prize" of $12,000 and are instructed to forward to the company $4 to $10 in order to qualify to win this prize. Each letter indicates that the recipient has been specially selected to receive the opportunity to win. In fact they are mass mailings in which everyone receives the same notice and opportunity. The California attorney general has indicated that the solicitations generated over 50,000 entries per week, each containing $4 to $10.

In a separate action, the Missouri attorney general has entered an agreement with The Word Enterprises Inc., the stock of which is solely owned by the International Church of the Word. Pursuant to the agreement, the company agrees to pay a fine and to refrain from mailing solicitations that encourage consumers to participate in illegal pyramid schemes. The attorney general's complaint alleges that the church mailed solicitation packets containing pyramid sales scheme offers to consumers in Missouri and elsewhere, misrepresenting that these offers were legal.

In addition to deceptive mail solicitations such as these, fraudulent telemarketing schemes have continued. Among the telemarketers currently pending investigation or suit are:

1. Sun City Travel of El Paso, Texas, which sold travel certificates to consumers nationwide for $398, falsely representing that the certificates included prepaid, round-trip airfare and hotel accommodations for two, when in fact they provided only one airline ticket and required the consumer to purchase an additional ticket and pay for hotel accommodations through the company's affiliates at inflated prices.

2. United Film Processing, Sunway Enterprises, and Marketing and Research, Inc., all operating out of El Paso, Texas. Suits against all three companies allege that the companies sold travel certificates that led consumers to believe they were receiving "dream vacations" when, in fact, the certificates carried hidden charges and restrictions so onerous as to render the certificates almost unusable.

3. Robert Michael Bennington of Las Vegas, Nevada. The Arizona attorney general filed suit against Bennington alleging the illegal operation of boiler rooms from which calls were made nationwide informing victims that they had won prizes but would be required to pay $189 to $389 for tax and transfer fees in order to receive their prizes. "Winners" were instructed to send the fees via Federal Express to mail drops in Tucson, Arizona. No prizes were received by the victims.

4. American Handicapped Workers of the Northwest, Inc. The Oregon attorney general is seeking $25,000 in fines plus attorneys' fees, alleging that the company's solicitors mislead consumers into buying light bulbs, vitamins, and cleaning products by claiming that they are handicapped, by telling the consumers that the sales will prevent them from requiring charitable contributions or public assistance, and by promising that the sales will benefit charitable causes. The attorney general's office discovered that most of the solicitors were not handicapped, but rather had criminal records, temporary injuries, or drug or alcohol addictions. Investigators additionally found that one mentally handicapped person was fired for working too slowly.

5. National Health Centers, Inc. (NHC), a Florida company, has been enjoined by the Wisconsin attorney general from making misrepresentations to consumers. The attorney general claims that NHC offered "valuable free gifts" to consumers who agreed to buy vitamins. In order to claim the "valuable free gift", which turned out to be a rabbit coat valued at $80, the consumer was required to spend about $300 for vitamins valued at $40.

*Marriott's "Honored Guest Awards" Program*

The Pennsylvania attorney general alleges that Marriott Corporation improperly changed the rules of a promotional program on April 15, 1988, modifying the point schedule according to which participants of the "Honored Guest Awards" program earned free gifts. The program, initiated in 1983, provides points to those who use Marriott hotel and resort facilities, permitting them to redeem the points for dinners, hotel rooms, rental cars, airline tickets, cruises, and other gifts. In response to the attorney general's assertion that Marriott modified the point schedule without adequate notice to participants and improperly devalued the vested program points accumulated by consumers, Marriott agreed to pay a penalty, to pay the costs of the investigation, and to compensate participants who had accumulated 125,000 or more points when the schedule was modified.

*Deceptive Diets*

The advent of summer heralds an increase in the marketing of diet plans and appetite control schemes. Among the most popular plans are those involving "appetite control patches," adhesive patches that promise to cause weight loss by sending signals to the wearer's brain and controlling the appetite when moistened with a few drops of the company's product. Among the "diet product" and related companies recently involved in or currently pending lawsuits initiated by state attorneys general are:

1. Meditrend International, Inc., a San Diego business also operating under the name Bokkie International. Meditrend claims that its diet patch technology is hospital and university tested for safety and effectiveness and has been approved for sale to the public by the Food and Drug Administration. The Missouri attorney general alleges that these claims are false and that the company additionally employs deceptive marketing practices with respect to its subliminal weight-loss audio tapes and its "VIRUShield" products, which supposedly protect the wearer against such viruses as AIDS.

2. New Source, Ltd., a California company that advertises "Le Patch" in Missouri. The Missouri attorney general disputes the company's claims that the patch has been clinically tested for weight reduction effectiveness and that it has been approved by the Food and Drug Administration, and additionally alleges that the sales program constitutes an illegal pyramid scheme. The attorney general's office is seeking restitution and a permanent injunction prohibiting the company from continuing its illegal promotional practices.

3. California Concepts, Inc., doing business as California Concepts Exercise Salon in Vermont, is marketing the Derma Trim diet patch. The Vermont attorney general contends that the company violated the Vermont Consumer Fraud Act by representing in Derma Trim diet patch advertisements that the patch had been approved by the Food and Drug Administration (FDA) while, in fact, the FDA considered the patch to be an illegally marketed drug.

4. Nutrition for Life, Inc., a California corporation that markets a diet control patch, has been charged by the California attorney general with deceptive and unlawful business practices because it has allegedly made unsubstantiated claims of weight loss. In addition, the attorney general's complaint asserts that the company has used scare tactics (such as claiming that regional water supplies were contaminated) to encourage sales of its water purifiers and has raised money through an illegal pyramid investment scheme.

5. Merlin Pharmacals, Inc., of Kansas, sells a diet product called Absorbitol/2000 Diet Pill Plan, which promises to turn a consumer's body into a "fat-burning

frenzy." Advertisements additionally describe the product as the "fastest and most effective way to lose weight modern science has ever invented" and asserts that the consumer cannot help but "melt off" unwanted fat while eating six times a day. The Iowa attorney general's lawsuit alleges that these claims are untrue and misleading.

6. Twin Star Productions Inc., an Arizona company which produces the "Michael Reagan Show," a program marketing Eurotrim Diet patches (manufactured by Am Euro Sciences International, Inc., of Los Angeles). The Missouri attorney general asserts that the "Michael Reagan Show" misleads consumers by appearing to be a standard talk show when it is, in fact, a paid advertisement for Eurotrim Diet patches.

7. Allied International Corporation, doing business as Fat Magnet and as United States Corporation of Carson City, Nevada. The Texas and Missouri attorneys general maintain that this company has failed to obtain required approval by the Food and Drug Administration and has falsely advertised Fat Magnet diet pills in the following ways: by advertising the product as "an amazing new weight loss pill developed and perfected by two prominent doctors at a world famous hospital in Los Angeles; by promising that the pills will cause weight loss with "no dieting" and without changing "normal eating habits" when, in fact, they do not; by accepting consumer payments and failing to deliver the purchased weight loss pills; by telling consumers that the pills are backed by an unconditional money-back guarantee when the defendant has refused to honor consumers' requests for refunds; and by using newspaper advertisements in a manner calculated to deceive consumers that it is part of the text when it is actually a paid advertisement. Lawsuits in both Texas and Missouri seek restitution, permanent injunctions, and civil penalties.

8. Health Care Products, Inc., of Florida, which sells Cal-Ban 3000 with the promise that it will "bond with food, preventing absorption of calories." The Iowa attorney general alleges that there is no reasonable basis for this claim and questions the company's motivation for including the following "warning" in its advertisements: "Because Cal-Ban 3000 is so effective . . . some people tend to overdo it. Do not allow yourself to become too thin. If you start to lose weight too rapidly, reduce your tablet intake or skip a day or two."

9. Consumer Direct, Inc., of Ohio, which sells a diet pill plan promising results within hours, claiming that the product is a "sure-fire" method to lose "up to 20, 40, [or] 80 pounds or more in record time." The attorney general's consumer protection division has filed suit against Consumer Direct alleging that this claim is fraudulent and that the company additionally uses numerous testimonials without disclosing that those providing the testimonials were paid for their statements.

10. Amerdream Corporation, also doing business as Board of Medical Advisors, a Nevada company soliciting business in Wisconsin and elsewhere. The Wisconsin attorney general filed a deceptive advertising lawsuit against the mail order weight loss firm, which allegedly promises $1,000 to consumers who agree to test its diet products and participate in a survey. Once consumers respond, they discover they must buy at least a 2-month supply of diet products for $229 in order to qualify for the $1,000, which is actually a government bond that matures in 27 years.

11. National Dietary Research, Inc., of Washington, D.C., and Florida, sells a diet pill called FS-1 which the Iowa attorney general asserts is ineffective to control weight, notwithstanding the company's claim that the pill will decrease the absorption of calorie-rich dietary fats.

12. Health and Nutrition Laboratories, of Arizona, which allegedly claimed that its "Berry Trim" weight reduction product would convert food into energy rather than fat, has agreed with the Arizona attorney general to stop its claim, to pay a $1,000 fine to the state, and to refund consumer purchases.

## Tax Notes

### *Meal and Travel Expense Deductions for Attending Army Reserve Meetings and Drills Disallowed*

Deductions for meal and travel expenses probably cause more controversy than any other item on a federal tax return. The Tax Court recently addressed a disagreement between an Army reservist (petitioner) and the Internal Revenue Service (IRS) concerning the deductibility of travel and meal expenses incurred while travelling to reserve meetings and drills in other cities. [1]

The reservist was temporarily laid off from his job as a Mental Health Administrator in Massillon, Ohio in early 1983. His only employment after the temporary lay-off was with an Army Reserve unit in Parma, Ohio. He attended drills three nights a month and a meeting on one weekend a month at Parma, which is 57 miles from his home in Massillon.

In late 1983, the petitioner applied for a full-time active duty position at Fort Bragg, North Carolina. He was offered the position and, after he learned that his lay-off as Health Administrator would be permanent, informed his reserve unit in Parma that he was terminating his employment effective December 1983. On his 1983 tax return, he claimed deductions for travel and meal expenses he incurred while traveling to and from Parma.

Under the Code, [2] a taxpayer may deduct all of the ordinary and necessary expenses incurred in carrying on a trade or business. Although service as an employee constitutes a trade or business, commuting expenses between an a taxpayer's residence and an area within the area of his tax home are not deductible. [3]

An exception to this general rule applies if an employee has several jobs or businesses. Under this circum-

[1] Rhodes v. Commissioner, 56 T.C.M. (CCH) 1359 (1989).

[2] I.R.C. § 162(a) (West Supp. 1988).

[3] Treas. Reg. § 1.162-2(e)(1983).

stance, a taxpayer may deduct the expenses of traveling from one job or business to another. [4]

The Tax Court ruled, however, that the petitioner did not fall within this exception because his only employment during the year was with the reserve unit in Parma. The court therefore applied the general rule that "expenses incurred in commuting between one's home and place of business are personal and not deductible." [5]

The petitioner further claimed that his travel expenses were deductible under another exception to the general rule which allows transportation expenses of going to a temporary job beyond the general area of the employee's home. [6] He argued that his job at Parma was temporary because he applied for the full-time position at Fort Bragg and later left the reserve unit.

The Tax Court rejected this argument. They noted that the petitioner was a member of the reserve unit for almost seventeen years and was not seeking to leave unless he found permanent employment elsewhere. Based on all of the facts, the Tax Court found that his employment with the reserve unit was not temporary and, accordingly, held that his travel expenses were not deductible.

Taxpayers falling within one of the exceptions to the rule denying commuting costs should note that unreimbursed employee travel expenses are considered miscellaneous deductions subject to the 2% floor. Taxpayers are allowed to claim all actual expenses attributable to the job or business including gasoline, oil, tires, repairs, insurance, parking fees, and tolls. Alternatively, a taxpayer may merely claim the standard mileage rate method to determine the amount of the deduction. Under this method, the owner may use a standard mileage rate of 24 cents for the first 15,000 miles and 11 cents per mile above 15,000 miles. MAJ Ingold.

### *Tax Court Rules Military Retirement Payments to Ex-Spouse Constitute Alimony*

The Tax Court recently addressed whether military retirement payments made directly to a former spouse constitute taxable alimony. [7] The petitioner in the case, a Texas domiciliary, received a Texas divorce in 1980 from her husband, an Air Force retiree. In their property settlement agreement, the retiree agreed to relinquish his Air Force retirement checks to his wife, intending the payments be used to finance their children's college education costs and to make mortgage payments.

Although monthly retirement payments were sent directly to petitioner through 1983, she did not include any of the payments on her 1983 federal income tax return. The Internal Revenue Service assessed a deficiency bas on her failure to report this source of income and al assessed an addition to tax of 50% of the interest due on the tax.

The Tax Court rejected the petitioner's claim that the retirement payments were her ex-husband's separate property taxable solely to him. Instead, the court determined that, on the basis of Texas community property law, a civilian spouse has a vested interest in one-half of military retirement benefits. [8] Accordingly, one-half of the retirement benefits should have been included in the petitioner's income as her share of the benefits.

The Tax Court went even further and held that the petitioner should have included the remaining one-half of the retirement payments that did not represent community property in income as periodic alimony payments. Although the court recognized that Texas does not permit court-ordered alimony, [9] it nevertheless looked to the facts and circumstances to determine whether the remaining one-half payment of retired pay was alimony under the Code. The decree ordering the payments did not specify a sum certain to be paid in installments nor did it provide for continued installments upon the death of the petitioner. Based on pre-1985 law defining alimony, these periodic payments should therefore have been included in her income as alimony.

The final issue the court considered was whether th IRS properly assessed an addition to tax f negligence. [10] The court found for the petitioner on this issue, noting that an addition to tax for negligence is inappropriate in cases involving complex legal determinations. Because the case involved complicated questions of Texas community property law and the interpretation of a vague divorce decree, petitioner's failure to include the retirement payments in income was not unreasonable. MAJ Ingold.

## Real Property Note

### *"As Is" Clause Is No Defense To Latent Defects*

A significant development in real estate law has been to expand the scope of liability of real estate vendors and their agents if they fail to discover and disclose defects or adverse features of property they are selling. [11]

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[4] Steinhort v. Commissioner, 335 F.2d 496 (5th Cir. 1964); Kistler v. Commissioner, 40 T.C. 657 (1963); Rev. Rul. 55-109, 1955-1, C.B. 261

[5] Rhodes v. Commissioner, 56 T.C.M. (CCH) 1359, 1360 (citing Commissioner v. Flowers, 326 U.S. 465 (1946), and Heuer v. Commissioner, 32 T.C. 947 (1959)).

[6] Rev. Rul. 190, 1953-2 C.B. 303; Tucker v. Commissioner, 55 T.C. 783 (1971).

[7] Denbow v. Commissioner, 56 T.C.M. (CCH) 1397 (1989).

[8] *See* Cearly v. Cearly, 544 S.W.2d 661 (Tex. Civ. App. 1976); Busby v. Busby, 457 S.W.2d 551 (Tex. Civ. App. 1970).

[9] Citing Benedict v. Commissioner, 82 T.C. 573 (1984), and McElreath v. McElreath, 345 S.W.2d 722 (Tex. Civ. App. 1961).

[10] This assessment is based on I.R.C. § 6653(a)(1) (West Supp. 1988).

[11] *See, e.g.*, Eaton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 388 (1984)(requiring real estate agents to undertake diligent inspection and disclosure); Bevins v. Ballard, 655 P.2d 757 (Alaska 1982)(imposing strict liability on an agent for failing to disclose the existence of a material defect).

A recent Montana Supreme Court decision continues this trend by holding that an "as is" clause does not bar recovery from a vendor when a listing agent makes misrepresentations in the written listing of the home. [12]

The plaintiff in the case, Wagner, purchased a home in Bozeman, Montana, after conducting several inspections of the property. The home was listed in a Multiple Listing Service (MLS) as being in "excellent condition" by the property owner's real estate agent. The owner had informed the listing agent that the property did not have any known defects.

After assuming occupancy, plaintiff noted a number of defects in the home. She sued the property owner-vendor to recover damages for misrepresentation, violation of the duty to inspect and disclose defects, and breach of the implied warranty of habitability.

The trial court disallowed recovery for the plaintiff for many of the defects she should have discovered in her personal inspections before purchase. These noticeable defects included an unfinished basement and stairway, misplaced light sockets, cracks in patio pavement, and incomplete heating ducts.

The trial court determined, however, that there were twenty-three other defects that the plaintiff could not have discovered in her inspection. These latent defects included a hazardous chimney, a faulty lawn sprinkler system, and poor ceiling insulation. The trial court held that the vendor failed to exercise reasonable care in communicating to his agents concerning the condition of the property and awarded the plaintiff over $15,000 in damages.

The defendant-vendor claimed that this award was erroneous because the earnest money receipt contained a clause stating that the purchaser agreed to accept the property "as is." Moreover, the defendant argued that another clause specifying that the purchaser enters into the agreement in "full reliance upon his independent investigation and judgment" barred any recovery for the plaintiff.

The Montana Supreme Court rejected both of the defendant's contentions. The court relied on precedent [13] to conclude that an "independent investigation clause" does not preclude justifiable reliance by a purchaser on the misrepresentations of a vendor and his agent. The court also concluded that the "as is" clause did not trigger a higher duty on the plaintiff to inspect the property and did not negate any misconception that she could rely on information supplied by the seller.

The Supreme Court found that the plaintiff could properly recover damages for latent defects against the seller under a theory of negligent misrepresentation. Under this theory, a person who fails to exercise reasonable care in supplying information is subject to liability for pecuniary loss caused to people who justifiably rely on the information. [14] Recovery under this theory is permissible, according to the court, even though the defendant never knowingly supplied false statements.

The nature and extent of a vendor's legal duty to discover and disclose property defects is a matter of state law, so the approach taken in *Wagner* of expanding the seller's liability may not be followed in other jurisdictions. Indeed, this is an evolving area and there is no general uniformity on the extent to which a vendor or an agent is required to inspect and disclose aspects of the property being sold that a purchaser might not find acceptable. [15] MAJ Ingold.

## Estate Planning Note

### *Virginia Enacts The Uniform Transfers To Minors Act*

Virginia recently repealed its version of the Uniform Gifts to Minors Act and replaced it with the Uniform Transfers To Minors Act. [16] The new law took effect on 1 July 1988.

The most significant aspect of the new legislation is that it authorizes transfers by will or trust to custodians for the benefit of minors. [17] The repealed version of the Virginia Uniform Gifts to Minors Act did not authorize testamentary transfers to minors.

Another improvement made by the new Act is that a transferor may now expressly provide for termination of the custodianship when the minor beneficiary reaches the age of twenty-one. [18] This gives a transferor more flexibility than the old law, which required termination of custodianship arrangements when the minor reached age eighteen. The new law also increases the powers of the custodian and expands the types of property that can be transferred.

The scope of the new Virginia Transfers to Minors Act is quite extensive. The Act applies to all transfers in which the transferor, the minor, or the custodian is a resident of Virginia at the time of the transfer. [19] The Act also applies if the custodial property is located in Virginia. A transfer made pursuant to the Act remains subject to the Act despite subsequent changes in the residence of the transferor, the minor, or the custodian, or a change in the location of the property.

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[12] Wagner v. Cutler, 757 P.2d 779 (Mont. 1988).

[13] Parkhill v. Fuselier, 632 P.2d 1132 (Mont. 1981).

[14] Wagner v. Cutler, 757 P. 2d at 783 (citing Restatement of Torts 2d § 552 (1977)).

[15] A recent article exploring the scope of liability and the various legal theories being applied to vendors and agents is Holmen, *Radon-Legal Issues For The Real Estate Agent*, 2 Probate and Property 51 (1988).

[16] Va. Code Ann. § 31-37 through 31-59 (1988).

[17] Va. Code. Ann. § 31-42 (1988).

[18] Va. Code Ann. § 31-45D (1988).

[19] Va. Code Ann. § 37-38 (1988).

The new Act applies to all transfers made after 1 July 1988. Moreover, the Act specifies that it will be applied to validate transfers pursuant to similar laws of other states and to uphold transfers to minors made before the effective date of the Act if such transfers were made without specific statutory authority but now conform to the requirements of the Act.

Legal assistance offices should update their copies of the Legal Assistance Wills Guide to reflect these chan in Virginia Law. [20] MAJ Ingold.

[20] The Judge Advocate General's School, U.S. Army, ACIL-ST-262, Legal Assistance Wills Guide (Jan. 1989). Changes should be made to discussions of Virginia law on page 4-291 and in Appendix L of the Guide.

# Claims Report

*United States Army Claims Service*

## Making Soldiers More Responsible For Their Actions: Voluntary Restitution in USAREUR

*Captain Charles Hernicz*
*Chief, Commissions Branch, USACSEUR*

PFC Ian T. Bright is serving his first Army tour of duty in the 8th Infantry Division in U.S. Army Europe (USAREUR). He is nineteen years old and somewhat impulsive. His platoon sergeant believes Bright could develop into a fine NCO if he would become more responsible and less subject to peer pressure. One Saturday night PFC Bright and a few of his buddies go to a local beer festival. At Bright's suggestion, they decide to travel by streetcar to avoid driving after drinking. After several hours of drinking and eating, they stumble out of the beer tent and head for the streetcar stop. Along the way, one of Bright's buddies says, "watch this," as he kicks the passenger door of a new BMW. Another buddy, not to be outdone, leaps onto the hood of the car and somersaults over the top. Bright is apprehensive, but encouraged by the antics of his buddies and the alcohol, he takes a running start and throws himself onto the trunk of a Mercedes. He jumps up and down on the roof and hood before leaping into the arms of his laughing buddies. Two German policemen are patrolling nearby and hear the noise made by the soldiers. They turn a corner just in time to see Bright jumping off of the Mercedes. All three soldiers deny damaging the BMW, but the police are able to positively identify Bright as the one who damaged the Mercedes.

Unfortunately, incidents such as this are common in USAREUR. When they happen, the victim of the soldiers' off-duty misconduct has several options. Victims may resort to civil litigation to recoup their losses, forcing the soldiers to either hire attorneys and incur additional expenses or attempt to settle the matter themselves. Victims may also be able to file claims directly against the soldiers under article 139, UCMJ; however, most civilians are not aware of this remedy. Claims under article 139, UCMJ, are also limited by a restricted filing period and limits on the type and amount of damages that may be recovered from the soldier. [1]

A victim may also be compensated directly by the United States under the Foreign Claims Act (10 U.S.C 2734) by filing a request for compensation with one of the thirty-five Defense Costs Offices (DCO's) [2] in the Federal Republic of Germany (FRG). Under Article VIII, paragraph 6 of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), the U.S. must consider these requests for compensation of personal injuries and property damage caused by members of the armed forces acting outside the scope of duty. The process is called *ex gratia* (out of grace). Unlike scope damage claims (claims originating from conduct that was within the service member's scope of duty), which are paid in part by the FRG, *ex gratia* claims are paid fully from U.S. Treasury funds. Proper claimants are limited to inhabitants of foreign countries. [3] After receipt of the claim, the DCO forwards the request to the Commissions Branch of USACSEUR for consideration. [4] The Commissions Branch has single service responsibility for processing, adjudicating,

[1] Only claims for property willfully damaged or wrongfully taken may be compensated under the involuntary restitution provisions of article 139 of the Uniform Code of Military Justice, 10 U.S.C. § 939 (1984). *See* Army Reg. 27-20, Claims, para. 9-4 (15 Feb. 1989) [hereinafter AR 27-20]. Paragraph 9-6, AR 27-20, provides that assessments are limited to direct damages and further states that a claim must be submitted within 90 days of the incident unless the special court-martial convening authority acting on the claim determines that good cause has been shown for the delay. Good cause normally exists, however, where the victim is unaware of his or her rights under article 139, or is unaware of the offender's identity.

[2] The DCO's are German administrative agencies created to process claims under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA). In claims arising from acts within the scope of duty, the DCO's investigate, adjudicate, negotiate settlement, and pay claims on behalf of all allied forces in the FRG. The force that caused the damage then reimburses the DCO for an amount specified in the NATO SOFA. For claims based on non-scope misconduct of U.S. service members, the DCO receives the claim, investigates the incident, and then forwards the claim to USACSEUR with a recommendation for disposition. USACSEUR adjudicates the claim de novo under the provisions of the Foreign Clalms Act, U.S.C. § 2734, and AR 27-20, chapter 10.

[3] For a more complete description of proper claimants, see AR 27-20, para. 10-7.

[4] The Commissions Branch consists of a JAG branch chief, three paralegal adjudicators, a claims examiner, and two clerk/translators. The Branch processes approximately 1000 files per year.

and paying all such requests arising in the FRG, Belgium, and France.

In 1985 the Commissions Branch implemented a Voluntary Restitution Program.[5] Under this program, victim restitution is paid by the soldier who caused the damage instead of from U.S. funds. The intended purposes of the program are: 1) to make soldiers more responsible for their own actions; 2) to reduce the expenditure of U.S. funds for soldier misconduct; 3) to involve the command in the compensation process; 4) to assist responsible soldiers in making restitution for damages they have caused; and 5) to enhance host country relations by reconciling claims by local inhabitants against members of the U.S. forces.

When the Commissions Branch receives an appropriate *ex gratia* claim from a DCO, it sends a request for voluntary restitution to the responsible soldier's company commander. This letter contains a brief explanation of the program, a description of the basis of the claim, and a request that the commander discuss voluntary restitution with the soldier. Through its claims adjudicators, the Commissions Branch adjudicates the appropriate damages under German law, negotiates settlement with the claimant, executes a settlement agreement, and acts as intermediary in all communications between the claimant and the soldier. The file is processed normally under AR 27-20, except for payment.[6] Instead of being paid from U.S. Treasury funds, the claim is paid by the soldier through the Commissions Branch. If the soldier is willing to pay but unable to muster the entire amount, a periodic payment schedule can be arranged or the soldier can pay a portion of the claim with the remainder paid from U.S. funds.

The Voluntary Restitution Program was initially patterned after article 139 of the UCMJ. Voluntary contribution was sought only from those soldiers who had wrongfully taken or willfully damaged property. The program has since been expanded to include such incidents as assault or grossly negligent acts that cause personal injury. No contribution is sought from a soldier unless the soldier would be liable under German law.

In fiscal year 1988 USACSEUR arranged over $30,000.00 in voluntary restitutions from soldiers. This may not seem like a large amount when compared to the Commissions Branch budget, but it represents contributions in nearly 25% of all *ex gratia* claims in which restitution was sought. Contributions by soldiers are generally limited to $500.00, but most contributions are less than $100.00. Since the inception of the program, each year has shown a marked increase in the dollar amount of voluntary contributions and the percentage of cases in which contribution is made.

Claims officers, trial counsel, and legal assistance attorneys can help commanders maintain discipline, improve troop morale, and maintain good host-country relations by explaining the purposes and procedures of the Voluntary Restitution Program to soldiers, commanders, and victims of non-scope soldier misconduct. Restitution can be a condition in a pretrial agreement, or it can be considered in a commander's decision to suspend punishment under article 15. Participation in the program by soldiers involved in off-duty misconduct can raise their own self-esteem and reestablish a positive image with the command. Restitution by the tortfeasor also nurtures greater respect for Americans among the victims of the misconduct. Whether they are merely foolish like PFC Bright or guilty of an intentional assault, soldiers should compensate the victims of their off-duty misconduct. The Voluntary Restitution Program is devoted to orchestrating these payments.

[5] The Voluntary Restitution Program was approved by the U.S. Army Claims Service as a test program at USACSEUR. The original objective of the program was to arrange voluntary compensation for damages in claims that would have qualified under article 139 but were filed after 90 days had passed (AR 27-20, para. 9-6a. states that "a claim must be submitted within 90 days of the incident out of which the claim arose," although the 90 day time limitation can be waived). The statute of limitations for *ex gratia* requests is two years.

[6] All documents specified by AR 27-20, para. 2-24, are compiled, including voucher, power of attorney, settlement agreement, claim, and other action documents. The file is held in suspense until the soldier completes payment. If the soldier defaults on payment or is otherwise unable to pay, the claim is then forwarded for payment from U.S. funds.

## Claims Notes

### Affirmative Claims Note

*Historic Year for Affirmative Claims in USACSEUR*

During calendar year 1988, U.S. Army Claims Service, Europe's (USACSEUR) Affirmative Claims Branch recovered an all time high of more that $2.5 million in medical care and property damage collections. Another $342,000 was saved by asserting set-offs against pending North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) claims with German Defense Cost Offices. The Affirmative Claims Branch operates as a centralized recovery judge advocate under authority delegated from the USAREUR Judge Advocate for all military services located in the Federal Republic of Germany (FRG). Negotiations are carried out primarily with German insurance companies pursuant to an agreement that recognizes U.S. standing to assert claims and limits the cost of medical care that can be recovered for treatment in the FRG.[1]

In addition to branch personnel increasing the number of demands and frequency of negotiations with German insurance companies, much of the credit for this accomplishment goes to the outside agencies that provide information to USACSEUR. Patient administration divisions of hospitals located throughout the FRG provided daily admission records to USACSEUR to allow tracking of all soldier injuries for possible affirmative claims assertion. Additionally, units and military police pro-

[1] HUK Agreement (January 21, 1971). This agreement provides for recovery of the cost of medical care in cases of claims arising in Germany. The United States agrees to assert such claims on the basis of 62.5% of the hospital daily rates set by the Office of Management and Budget. Amounts in excess of 62.5% of the daily rates are waived.

vided more and better information about traffic accidents involving military vehicles or personal injuries. Finally, judge advocates in the field were helpful in bringing more cases to the attention of the branch. Armed with comprehensive claims files, the Affirmative Claims Branch aggressively pursued recovery collections on behalf of the United States. CPT Michael Romano.

## Personnel Claims Note

### *Initiation of Personnel Claims by Spouses in Time of War*

The *only* proper claimants under the Personnel Claims Act and Chapter 11, AR 27-20, are members of the Active Army, members of the Army Reserve or Army National Guard during periods of active or inactive duty training, civilian employees of the Department of the Army and the Department of Defense, and either survivors or authorized agents of the above. The statutory right to file a personnel claim belongs to the soldier, until the soldier's death, rather than to his or her spouse. Normally, authorized agents of proper claimants must present a valid power of attorney in order to establish their agency authority. This rule is relaxed for spouses, and a spouse may present a claim as the soldier's agent using *either* a letter of authorization *or* a power of attorney, pursuant to Personnel Claims Bulletin 85, Claims Manual (1 October 1985).

Even when a spouse is permitted to file a soldier's personnel claim as the soldier's agent, the payment voucher will only be issued in the soldier's name. This policy preserves a soldier's right to decide the disposition of funds paid on what is statutorily his or her claim. If the spouse has a power of attorney that allows for cashing checks issued in the soldier's name, as well as to file a claim, then the spouse will eventually obtain the claims funds using that power of attorney. Although a letter of authorization does allow a spouse to file a personnel claim, it does not grant the spouse any right to cash a check made out to the soldier, even though such checks can usually be deposited in a joint banking account. Thus, in the event of war or national emergency, a spouse without a carefully drafted power of attorney could suffer financial hardship.

The Legal Assistance module of the Legal Automation Army-Wide System ("LAAWS") (version 2.0, 1 December 1988) contains legal documents designed for a deployment situation, including an emergency special power of attorney. This "Special Power of Attorney (Deployment)" contains a clause that permits the spouse to "receive, endorse, cash or deposit checks payable to the undersigned drawn on the Treasurer or other fiscal officer or depository of the United States." With this or with another special or general power of attorney granting the same authority, the spouse would be able to cash a check issued in settlement of a personnel claim. The "Special Power of Attorney (Deployment)" does not contain specific authorization for the spouse to file a personnel claim as the soldier's agent. Such a clause should be added in the space for insertion of additional clauses to obviate the need for soldiers to write out letters of authorization.

Claims judge advocates need to coordinate closely with their legal assistance counterparts to ensure that the emergency powers of attorney drafted to cover deployments or noncombatant evacuations give spouses the right to file claims and cash checks. The Personnel Claims Act is intended to compensate soldiers for lo incident to service. While still protecting a soldier's r not to give his or her spouse authorization, the claims system should be as responsive to the needs of soldiers and their families in time of war or national emergency as possible. Mr. Frezza.

## Personnel Claims Recovery Notes

### *Carrier Denial of Liability Due to Inherent Vice*

Carriers frequently deny liability, stating that the damage claimed was due to the "inherent vice" of the item. In the vast majority of these cases, this denial is not acceptable because the carrier bears the burden of establishing that the inherent vice existed and that it was the sole cause of the damage. A carrier can rarely meet this burden of proof.

The following suggested response can be used to rebut carrier denials based on inherent vice:

> The mere allegation of inherent vice is insufficient to relieve you of liability. Inherent vice is damage to an item that would have occurred whether the item was moved or not. The burden of proof is on the carrier to establish that inherent vice existed and that it was the sole cause of the damage claimed. You have failed to provide this proof and are fully liable for the damage to this item.

Ms. Schultz.

### *Implementation Dates Affecting Deduction of Lost Potential Carrier Recovery*

Some field claims offices still appear to be having difficulty computing deductions for lost potential carrier recovery when a claimant fails to provide timely notice on a household goods or unaccompanied baggage claim. The following paragraphs recapitulate the various implementation dates that affect deductions of lost potential carrier recovery.

DD Form 1840/1840R procedures. DD Form 1840/1840R procedures were implemented for household goods and unaccompanied baggage delivered on or after the following dates (see Household Goods Recovery Bulletin 5, Claims Manual):

a. CONUS Through Government Bill of Lading (TGBL) shipments delivered on or after 1 October 1985.

b. International Through Government Bill of Lading (ITGBL) shipments delivered on or after 1 December 1985.

c. Direct Procurement Method (DPM) shipments and Local Moves delivered on or after 1 January 1986.

In addition, DD Form 1840/1840R procedures were implemented for direct deliveries out of nontemporary storage (NTS) involving lots placed *into* NTS on or 1 November 1985.

Increased Released Valuation. On Increased Released Valuation (IRV) shipments, the carrier's maximum liability is $1.25 times the net weight of the *entire* shipment

($2.50 for Alaskan shipments) rather than $.60 times the weight of the article (see Household Goods Recovery Bulletin 6, Claims Manual). IRV is only applicable to Codes 1 and 2 shipments (door-to-door household goods shipments moved within CONUS and Alaska) that were *picked up* after the following dates:

a. Intra-state Codes 1 and 2 shipments (shipments moved entirely within a single state) picked up after 1 April 1987.

b. Inter-state Codes 1 and 2 shipments (shipments moved from one state to another) picked up after 1 May 1987.

Note that IRV is not applicable to shipments other than CONUS Codes 1 and 2 shipments (including ITGBL shipments, DPM shipments, and Canadian and Mexican Code 1 shipments). Basic IRV coverage is not marked on the GBL. The soldier can choose to purchase Option 1—Higher Increased Released Valuation coverage, or Option 2—Full Replacement Protection, which are marked on the GBL. Note that claims personnel must *mark* the outside front upper left-hand corner of files involving IRV, Option 1, or Option 2 in *red.*

Lost Potential Carrier Recovery Deductions. Lost potential carrier recovery is deducted whenever a soldier fails to provide timely notice (see Personnel Claims Bulletin 96, Claims Manual). Absent good cause as defined by paragraph 11-21, AR 27-20, for claims which do not involve IRV, *100%* of the actual amount of *potential carrier recovery* is deducted from the amount otherwise payable on an item-by-item basis. For claims that do involve IRV, the following rules apply:

a. For claims *received* by the claims office *on or before* 1 July 1988, *50%* of the lost potential carrier recovery is deducted.

b. For claims *received* by the claims office *after* 1 July 1988, *100%* of the lost potential carrier recovery is deducted from the amount otherwise payable.

Claims personnel must keep these dates in mind in order to properly compute deduction of lost potential carrier recovery. Claims personnel should note the fact that the amount of any deduction for lost potential carrier recovery must be recorded on the computer record for the claim, and that whenever potential carrier recovery is considered but is *not* taken, the reason for this must be recorded on the chronology sheet in the claim file. Ms. Holderness.

**Management Note**

*Certificates of Achievement*

All staff judge advocates are reminded that U.S. Army Claims Service (USARCS) Certificates of Achievement may be awarded to selected personnel serving in judge advocate claims offices worldwide. The certificate provides special recognition to civilian and enlisted personnel who have made significant contributions to the success of the Army Claims Program within their respective commands.

To be awarded the certificate, an employee must:

a. be an enlisted or civilian employee currently serving in a judge advocate claims office;

b. have worked in claims for a minimum of five years (this period may be figured on a cumulative basis and include different assignments or claims positions);

c. be nominated by the staff or command judge advocate, detailing the contributions of the employee that makes him or her worthy of this recognition; and

d. be the only person in an office nominated for a certificate in any calendar year (may be waived in exceptional cases at the request of the nominating official).

Nominations should be addressed to the Commander, USARCS, the approving official for the award of the Certificate of Achievement. Upon approval, the signed certificate will be mailed to the nominating official for presentation at an appropriate ceremony.

The names of the recipients are published in the USARCS Report, which is distributed each year at the JAG CLE. Since May 1987, fourteen claims personnel have been awarded the U.S. Army Claims Service Certificate of Achievement. LTC Wagner.

# Labor and Civilian Personnel Law Notes

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

**Personnel Law**

*Health Care Credentialing Reviewable*

In *Siegert v. Department of the Army*, 38 M.S.P.R. 4 (1988), the MSPB held that it could review the reasons for the revocation of a psychologist's clinical privileges that led to his removal. The board concluded that *Egan v. Department of the Navy*, 108 S. Ct. 818 (1988), which held that the MSPB cannot look behind security clearance revocations, does not apply in other matters. Although OPM declined to seek reconsideration of the decision to remand the case for hearing, the issue may be renewed in *Siegert* or another case. In March the MSPB administrative judge decided in favor of the Army on the merits of the removal.

*No Right to Other Jobs for*
*Employees Who Lose Clearances*

*Egan*, discussed above, stated that the MSPB "may determine . . . whether transfer [of an employee whose

clearance is revoked] to a nonsensitive position was feasible." In January the Court of Appeals for the Federal Circuit held in *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989), that *Egan* did not create a right to another job but only recognized that the board can review the feasibility of transfer when regulations require consideration of alternative employment.

On the same day, the court concluded in *Lyles v. Department of the Army*, 864 F.2d 1581 (Fed. Cir. 1989), that an Army regulation required the Army to find alternative employment. Because the current regulation, AR 380-67, dropped the requirement, commanders and supervisors are now free to remove any employee whose clearance has been revoked, once the Central Clearance Facility issues its final letter of determination.

What if we gratuitously offer a job search? Another companion case, *Skees v. Department of the Navy*, 864 F.2d 1576 (Fed. Cir. 1989, holds that doing so is not reviewable by the board.

*Fourth Circuit Requires Agencies to Offer In-Patient Treatment Before Removal of Alcoholics*

Two Title VII cases decided on 9 March 1989, *Rodgers v. Lehman*, No. 88-2028, and *Burchell v. Department of the Army*, No. 88-2848, established guidelines for dealing with alcoholic employees. Under these new guidelines the employee must be given a "firm choice" between treatment and discipline. Additionally, before removal the employee must have an opportunity to participate in an inpatient program, unless the employee's absence would impose undue hardship on the agency. These cases go further than the MSPB has ever gone and should not be applied in other circuits.

*New Rule About Agency Appeals*

In January the MSPB changed 5 C.F.R. § 1201.117 to require that OPM requests for reconsideration be filed within thirty-five days of the date of service of a final board decision. Contact DAJA-LC immediately when the board incorrectly decides a question that will have a substantial impact on civil service law (*see* 5 U.S.C. § 7703). (A delay in finding out about *Siegert*, discussed above, contributed to OPM's desision not to seek reconsideration.)

*We Can Do Better*

Participants at recent HQDA Management-Employee Relations and Civilian Personnel Officer courses gave labor counselors high marks. Recommendations heard more than once: we should provide a faster "turn around" when reviewing proposed disciplinary actions, and lawyers should not wait until the eleventh hour to review cases prepared for trial by MER.

**Equal Employment Opportunity**

*EEOC "Summary Judgments"*

Under 29 C.F.R. § 1613.218(g), an administrative judge (AJ) may, without a hearing, issue a recommended decision based on the entire record when there are no issues of material fact and the parties have had an opportunity for comment. Consider using this procedure and look to Rule 56 of the Federal Rules of Civil Procedure, as the standard to apply. The availability of this device shows the importance of a complete case file and USACARA investigation.

*Attorney Fee Award Denied to Federal Employee*

Recently, the EEOC upheld the denial of fees to a government employee who was moonlighting as a private attorney, even though the fees were billed as paralegal services performed by the attorney's wife (who was not a federal employee). Employees are precluded by 18 U.S.C. § 205 from representing others for a fee in personnel cases. Violations of this statute should be referred to the attorney's employer and used as a basis to deny fees.

*Limits on Settlements Involving the DOD Priority Placement Program (PPP)*

Concern has recently been voiced that overseas labor counselors are offering settlements involving the PPP without authority. Labor counselors can negotiate settlements that include enrollment in the PPP only if the complainant satisfactorily completes an overseas tour and meets other enrollment conditions. If a complainant is eligibile, an exception to DOD Directive 1400.20 may be negotiated only for the geographic area of registration and for registration when reemployment rights are at the same or higher level than the current overseas job. Only DOD has the authority to approve other exceptions.

**Federal-Sector Labor Law**

*Management-Initiated Grievances*

Too often, management overlooks its rights under collective bargaining agreements (CBA). Recently, Fort Benjamin Harrison successfully grieved derogatory information published by the union in violation of the CBA. Labor counselors should encourage management use of negotiated grievance procedures.

*Negotiability Issues*

In its January decisions in *AFGE, Local 2761 v. FLRA* and *AFGE, Local 2614 v. FLRA* (1989 WL 5969), the D.C. Circuit decided that a command picnic and PX privileges for some employees were negotiable conditions of employment. Looking to the extent and nature of the effect of the practice on working conditions, the court found that the PX privileges had been used to induce employment; had existed for some time; and were important to the employees, who believed that local food products were unhealthy. The picnic was work related because it was command sponsored on agency premises, employees were in a duty status, and because it was also an award ceremony. This decision is important for two reasons: 1) it illustrates the point that you cannot rely on first impressions about whether a particular practice is a condition of employment, and 2) it clarifies past FLRA decisions by holding that in close cases, past practice can be determinative in finding a condition of employment.

**Private-Sector Labor Law**

*Private-Sector Union Access to Intallations*

AR 210-10 permits private-sector unions to conduct union activities connected to the performance of the

government contract that do not interfere with contract performance, violate safety or security regulations, or disrupt operations. Although organizational activities are otherwise permitted, the union may be allowed to distribute organizational literature and authorization cards in nonwork areas during nonwork times.

When a union requests access to the installation, contact union representatives directly and find out the nature of the proposed activity. Any access granted the union consistent with AR 210-10 should be written and should specify appropriate restrictions.

If the union enters for an improper purpose or violates restrictions on access, deny further access (note: AR 210-10 and AFARS 22.101-90 only authorize the installation commander or a contracting officer to deny entry). Because denial may lead to picketing or National Labor Relations Board (NLRB) litigation, report denials immediately to the labor advisor (DAJA-LC). The labor advisor will inform union national headquarters of the reason for denial and seek union agreement to abide by Army restrictions.

Although NLRB representation elections are technically not "union activities," commanders should not ordinarily permit on-post elections without consulting the labor advisor. Unlike federal-sector union elections, private-sector employers may actively oppose union organizational campaigns. To avoid Army involvement in election disputes, they should not be allowed unless they would clearly be in the best interests of the government (e.g., the risk of a dispute is outweighed by the disruption to contract performance caused by forcing the union to hold the election at a site distant from the work place).

### *Wage and Hour Division Ruling on Copeland Act Application*

In January the Administrator, Wage and Hour Division of the Employment Standards Administration, Department of Labor, ruled that the building trades unions' tactic of "job targeting" violated the Copeland "Anti Kickback" Act (18 U.S.C. 874). The practice involves the union reimbursing the employer for portions of the prevailing wage rates paid to employees on federally funded or assisted construction projects. "Job targeting" is intended to help union contractors reduce overall labor costs and become more competitive on projects where nonunion contractors would be bidding. Contracting officers who discover "job targeting" in Army contracts should take appropriate enforcement action under FAR Subpart 22.406.

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# Enlisted Update

## Enlisted Specialty Training

*Sergeant Major Carlo Roquemore*

### Introduction

This is the first in a series of articles that will address the components of career progression for our enlisted and NCO force: training, assignments, experience, and evaluations. This article will focus on training and how it ties in with career progression. Presumably, the more training that soldiers receive the more they are able to sharpen and enhance their skills. With additional training, soldiers become more versatile and are more competitive for certain career enhancing positions, promotions, and other favorable personnel actions. Part of the training process is to complete resident and nonresident courses of study. Presently, the two primary CONUS sites that offer MOS-related training for our enlisted and NCO force are Fort Benjamin Harrison, Indiana, (resident) and The Judge Advocate General's School, Charlottesville, Virginia (resident and nonresident). The proponent for all MOS-related training conducted at Fort Benjamin Harrison is the Adjutant General's School. In addition to AIT for 71D, Fort Benjamin Harrison conducts the Basic Noncommissioned Officer Course (BNCOC), the Advanced Noncommissioned Officer Course (ANCOC), and a two week Reserve/Army National Guard (ARNG) training course. The two week course is designed for Reserve/ARNG personnel who did not receive initial entry training.

Many noncommissioned officers ask, "What do BNCOC and ANCOC entail, and what are the prerequisites for attendance?" BNCOC emphasizes MOS-related and common core tasks that enhance prior training received at the Primary Leadership Development Course (PLDC). Training is aimed at the soldier's first opportunity for supervision. Combat support and combat service support soldiers attend the BNCOC at resident service schools. The Personnel Command (PERSCOM) manages selection using an automated system. This system allows PERSCOM to nominate the best qualified soldiers to attend training. A search of the enlisted master file will provide the system with all the relevant data needed for selection. For both BNCOC and ANCOC, relevant data include skill qualification scores, evaluation reports, time in service, time in grade, completion of PLDC, and compliance with physical fitness and weight standards. The primary source for the quota will be personnel in the grade of E6 and E5, provided that they are not "flagged" from favorable personnel action. ANCOC also stresses MOS-related tasks, but emphasizes tactical and advanced leadership skills and knowledge of the subjects required for training and leading soldiers at the platoon and comparable level. Training is conducted in CONUS service schools. A Department of the Army selection board chooses students annually. PERSCOM controls class scheduling. Soldiers can attend ANCOC

either TDY enroute or TDY and return. Any NCO selected for promotion to sergeant first class who has not previously been selected to attend ANCOC will be scheduled automatically for attendance.

Enlisted specialty training offered at The Judge Advocate General's School includes both resident and nonresident courses.

### Resident Instruction Program

The resident program administered by The Judge Advocate General's School will offer three courses for active Army and Reserve component legal noncommissioned officers in grade E5 and above with a PMOS 71D or 71E. Beginning in 1989-90, The Judge Advocate General's School will provide the facilities and support for all enlisted specialty training (except AIT, BNCOC and ANCOC). Resident course descriptions and prerequisites for attendance appear below:

#### *Law for Legal Noncommissioned Officers Course*

The Law for Legal Noncommissioned Officers Course (512-71D/E/20/30) focuses on Army legal practice with emphasis on the client service aspects of administrative and criminal law. This course builds on the prerequisite foundation of field experience and correspondence course study.

Purpose: To provide essential training for legal noncommissioned officers who work as professional assistants to judge advocates. This course is specifically designed to meet the needs of skill level three training.

Prerequisites: Active Army and Reserve component soldiers in the grade of E5 and E6 with a primary MOS of 71D or 71E, who are working in a military legal office or whose immediate future assignment entails providing assistance to an Army attorney. Students must have served a minimum of one year in a legal position and must have satisfactorily completed the Law for Legal Specialists Correspondence Course not less than sixty days before the starting date of the course.

#### *Senior Legal Noncommissioned Officers Management Course*

The Senior Legal NCO's Management Course (512-71D/E/40/50) focuses on management theory and practice including leadership, leadership styles, motivation, and organizational design. Various law office management techniques are discussed, including the management of military and civilian personnel, equipment, law library, office actions and procedures, budget, and manpower.

Purpose: To provide increased knowledge of the administrative operations of an Army staff judge advocate office and to provide advanced concepts of effective law office management to legal noncommissioned officers. The course is specifically designed to meet the needs of skill level four and five training.

Prerequisites: Active Army or Reserve component senior noncommissioned officers in the grade of E7 through E9 with a primary MOS of 71D or 71E who are currently serving as NCOIC's or whose immediate future assignments are as NCOIC's of staff judge advocate branch offices or as Chief Legal NCO's of installation, division, corps, or MACOM staff judge advocate offices.

### Nonresident Instruction Program

The nonresident course program administered by The Judge Advocate General's School includes four courses that are available to warrant officers, legal specialists, legal noncommissioned officers, and civilian employees. Correspondence course descriptions and prerequisites for enrollment appear below:

#### *Law for Legal Specialist Course*

The Law for Legal Specialists Correspondence Course consists of basic material in the areas of legal research, criminal law, and the organization of a staff judge advocate office.

Purpose: To provide legal specialists with substantive legal knowledge for performing duties as a lawyer's assistant and to provide a foundation for resident instruction in the Law for Legal Noncommissioned Officers Course.

Prerequisites: Enlisted soldiers in grade of E5 or below who have a primary MOS of 71D or 71E (and military members of other services with equivalent specialties) or civilian employees working in a military legal office.

Course content: 3 subcourses, total credit hours: 18. Students must complete the entire course within one year from the date of enrollment.

#### *Administration and Law for Legal Noncommissioned Officers*

The Administration and Law for Legal Noncommissioned Officers Correspondence Course covers basic and advanced material in the areas of legal research, military personnel law, claims, legal assistance, staff judge advocate operations, standards of conduct, professional responsibility, and selected military common skill subjects.

Purpose: To prepare legal noncommissioned officers to perform or to improve technical skills in performing their duties.

Prerequisites: Enlisted soldiers in grade E-6 or above who have a primary MOS of 71D or 71E. Soldiers in grade E-5 or below who have completed the Law for Legal Specialist Correspondence Course are eligible to enroll in this course. Military members of other services with equivalent specialties are eligible for enrollment. Civilian employees are not eligible for this course.

Course content: 13 subcourses, total credit hours: 78. Students must complete the entire course within one year from the date of enrollment.

#### *Army Legal Office Administration*

The Army Legal Office Administration Correspondence Course covers advanced material in civilian personnel law, the law of federal employment, trial procedure (including pretrial and post-trial), and technic common military subjects.

Purpose: To prepare junior and senior noncommissioned officers to perform or to improve their proficiency in

performing the duties of Army legal office administration.

Prerequisites: Enlisted soldiers in grade E-6 or above who have a primary MOS of 71D or 71E and who have completed the Administration and Law for Legal Noncommissioned Officers Correspondence Course. Members of other branches of service and civilian employees are not eligible for this course.

Course content: 16 subcourses, total credit hours: 179. Students must complete 80 credit hours the first year to maintain enrollment and complete the entire course within two years from date of enrollment.

### Military Paralegal Program

The Military Paralegal Program is designed to provide highly technical training that will enable soldiers to perform specialized functions closely related to, but beyond, the normal scope of their duties. The program is a combination of resident and correspondence course studies.

Purpose: To provide Judge Advocate General's Corps warrant officers and noncommissioned officers with the substantive legal knowledge needed to improve proficiency in performing military paralegal duties in criminal law, administrative and civil law, legal assistance, and contract law.

Prerequisites: (1) Applicant must be an Active Army or Reserve Component warrant officer (PMOS 550A), or legal noncommissioned officer in grade E-5 or above who has a primary MOS of 71D or 71E. Applicant must have been awarded primary MOS 550A, 71D or 71E a minimum of three years prior to date of application for enrollment. MOS 550A and 71E may include prior awarding of MOS 71D or 71E when calculating the three year period. Members of other services and civilian employees are not eligible for enrollment in the program at this time.

(2) Applicant must have completed a minimum of two years of college (60 semester credit hours).

(3) Applicant must have completed or received equivalent credit for specialized legal and technical training consisting of a combination of both resident and correspondence courses.

### Resident Requirements

Applicant must have successfully completed the Legal Specialists Entry Course or Legal Specialists Entry Course (Reserve component); and either the Law for Legal Noncommissioned Officers Course or the Legal Administrators Course.

### Correspondence Course Requirements

Applicant must have successfully completed the Law for Legal Specialists Course; and the Administration and Law for Legal Noncommissioned Officers Course or the Army Legal Office Administration Course.

Program content: 13 subcourses, total credit hours: 81. Student must complete the entire program within two years from the date of enrollment.

Enrollment Procedures: Applicants for enrollment in the program will complete DA Form 145, Army Correspondence Course Enrollment Application. The DA Form 145 will then be submitted to the appropriate approval authority for comment as indicated in the May 1988 edition of *The Army Lawyer*.

### Independent Instruction Program

Independent enrollment is available in selected subcourses. An applicant who does not meet the eligibility requirements for enrollment in one of the judge advocate correspondence courses or who wishes to take only selected subcourses may enroll in specific subcourses provided the applicant's duties require the training that may be accomplished by means of such subcourses. Enrollment as an indepedent student requires that the student complete thirty credit hours per enrollment year or the individual subcourse, whichever is less. Selected subcourse titles for enlisted speciality skill development appear below:

JA 02 Standards of Conduct and Professional Responsibility
JA 22 Military Personnel Law and Boards of Officers
JA 23 Civilian Personnel Law and Labor-Management Relations
JA 25 Claims
JA 26 Legal Assistance
JA 36 Fundamentals of Military Criminal Law and Procedure
JA 128 Claims
JA 129 Legal Assistance Programs, Administration, and Selected Problems
JA 130 Nonjudicial Punishment
JA 133 Pretrial Procedure
JA 134 Trial Procedure
JA 135 Post-trial Procedure

**This is the "Year of the NCO." Chief Legal NCO's and other key senior NCO's are reminded that two of our primary functions as noncommissioned officers are to train and take care of enlisted soldiers. Part of that important responsibility is to ensure that soldiers are provided up-to-date information regarding the training that is available to them so they can compete with the best and be the best that they can be. This article should be made available to every legal specialist/NCO and court reporter on active duty and in the Reserve components.**

# Guard and Reserve Affairs Items

*Judge Advocate Guard and Reserve Affairs Department, TJAGSA*

### Reserve Component Officers Selected for Resident Graduate Course

The Judge Advocate General's Corps conducted a selection board on 24 February 1989 to select Reserve component officers for the 38th Judge Advocate Officer Graduate Course to be held at TJAGSA from 31 July 1989 through 18 May 1990. The following officers were selected: Major Nicholas J. Greanias, USAR, 85th Training Division; Captain Sharon C. Hoffman, USAR, IMA to the Guard and Reserve Affairs Department, TJAGSA; and Captain Kaymarie Colaizy, Minnesota ARNG, 47th Infantry Division. Upon successful completion of the forty-two week graduate course, these officers will be awarded a Master of Laws (LL.M.) in Military Law.

### Colonel Compere to Become Chief Judge, USALSA, IMA

Colonel John M. Compere, Commander, 1st Military Law Center, has been selected for the position of Chief Judge, USALSA, IMA. Colonel Compere will occupy the position previously held by Brigadier General Thomas J. O'Brien. His previous Reserve component assignments include service as the deputy and the staff judge advocate of the 90th ARCOM. Colonel Compere served on active duty from August 1966 to August 1971. His judge advocate assignments included tours with the 101st Airborne Division and the 6th Infantry Division at Fort Campbell, Kentucky; with USMACTHAI/JUSMAGTHAI Thailand; and with 4th/5th U.S. Armies at Fort Sam Houston, Texas.

Colonel Compere received a BA from Texas Tech University and a JD from the University of Texas School of Law. His military education includes the JAGC Reserve Component General Staff Course; the JAGC Officer Advanced Course; and the JAGC Officer Basic Course. Colonel Compere is also Airborne qualified.

Among his awards and decorations are the Meritorious Service Medal (1 OLC); Joint Service Commendation Medal; Army Commendation Medal; National Defense Service Commendation Medal; Parachute Badge; Expert Badge (Rifle); Army Reserve Components Achievement Medal (2 OLC); Armed Forces Reserve Medal; and Army Service Ribbon.

# 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 MACOMs. 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. TJAGSA CLE Course Schedule

**1989**

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

**August 1989**

3-4: PLI, Introduction to Qualified Pension and Profit Sharing, Chicago, IL.

6-11: AAJE, The Many Roles of a Judge and Judicial Liability, Palo Alto, CA.

10-11: PLI, Accounting for Lawyers, San Francisco, CA.

10-11: PLI, Non-Qualified Deferred Compensation Plans, Los Angeles, CA.

10-12: PLI, Acquisitions and Mergers, San Francisco, CA.

13-18: AAJE, Constructive and Creative Judicial hange, Colorado Springs, CO.

14-18: ALIABA, Land Use Institute, San Francisco, CA.

17-18: ALIABA, "Superadvanced" Pension-Compensation Program, San Diego, CA.

17-18: PLI, Accountants Liability, Los Angeles, CA.

17-18: PLI, Creative Real Estate Financing, San Francisco, CA.

17-18: PLI, Proof of Damages, New York, NY.

20-25: NJC, Administrative Law: High Volume Proceedings, Reno, NV.

21-23: ALIABA, Colorado Springs Tax Institute, Colorado Springs, CO.

21-25: AAJE, Career Judicial Writing Programs—Appellate, Colorado Springs, CO.

21-25: AAJE, Domestic Relations, Colorado Springs, CO.

27-September 1: NJC, Dispute Resolution, Reno, NV.

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*.

***Please note—new addition for June 1989:**

2-9: NCDA, Executive Prosecutor Course, Houston, TX.

## 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 esources 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 ffect the ability of organizations to become DTIC ers, 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 pps). |
| 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). |

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|---|---|
| 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:

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| AD A145966 | USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs). |

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**2. Regulations & Pamphlets**

Listed below are new publications and changes to existing publications.

| Number | Title | Date |
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| AR 10-72 | Field Operating Agencies of The Judge Advocate General | 20 Feb 1989 |
| CIR 25-89-1 | Maintenance of Equipment for Sustaining Base Information Systems | 21 Feb 1989 |
| CIR 385-89-1 | Army Safety Action Plan A 5-Year Strategy for Army Safety Excellence | 24 Mar 1989 |
| CIR 601-89-1 | Military Physician Ass't Procurement Program, Fiscal Year 1989 | 10 Mar 1989 |
| PAM 25-30 | Index of Army Pubs and Blank Forms | 31 Dec 1988 |
| PAM 350-100 | Extension Training Materials Consolidated MOS Catalog | 15 Feb 1989 |
| PAM 360-402 | Pocket Guide to Egypt | 1988 |
| PAM 608-4 | A Guide for the Survivors of Deceased Army Members | 23 Feb 1989 |

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