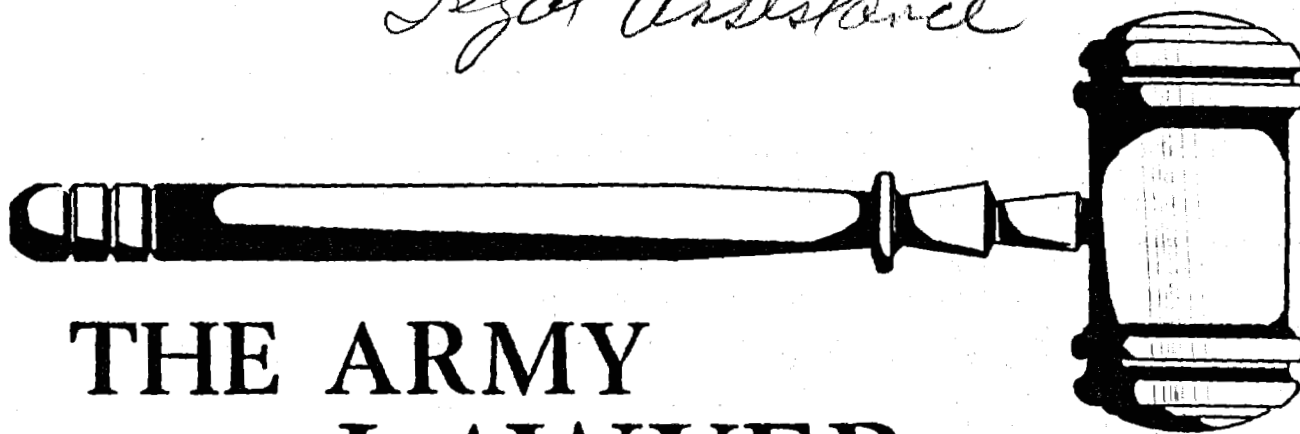


Legal Assistance



THE ARMY LAWYER

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Editor

Captain Matthew E. Winter

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Unauthorized Absences

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Introduction

"Of all the varied punitive articles within the UCMJ, Article 86, AWOL, seems to be the mainstay of the military lawyer's practice."¹ Few judge advocates in today's Army would agree with the preceding quotation, yet it was the lead sentence to an article published by a well-respected Army judge advocate as recently as 1974.² Indeed, unauthorized absence offenses have historically been a "mainstay" in the United States' military courts.³ Just under one-half of all the Army's World War I prosecutions and more than half of the Army's World War II prosecutions involved unauthorized absences.⁴ About eighty percent of the Navy's World War II prosecutions were for unauthorized absences.⁵

While no stranger in military appellate and trial courts, the law relating to unauthorized absence offenses is not firmly established and is often difficult to apply. Moreover, with periodic legislative changes and the inevitable automation of personnel accountability procedures, the prognosis is for more changes and challenges in the future.

The Unauthorized Absence Offenses

Introduction

Ordinarily, when one thinks of unauthorized absence, generic words like "AWOL" or "desertion" come to mind. Of course, there are several types of unauthorized absence offenses. The Uniform Code of Military Justice lists three different ways to "desert" within the meaning of article 85.⁶ Some unauthorized absence offenses focus on the subject's geographical location whereas others focus on the subject's state of mind. The unauthorized absence offenses are stated in articles 85, 86, and 87, UCMJ. In this section, each of the unauthorized absence offenses will be discussed and distinguished from related offenses.

Article 86(1)—Failure to Repair

Elements of the Offense

Article 86(1), UCMJ, states the offense of failure to go to an appointed place of duty or "failure to repair." There are three elements to the offense: 1) that a certain authority appointed a certain time and place of duty; 2) that the accused knew of that time and place; 3) that the accused, without authority, failed to go the appointed place of duty at the time prescribed.

"A Certain Time and Place"

The gravamen of this offense is that the soldier failed to go to a specific place of duty. The "certain time and place of duty" must be specifically alleged and proven. Thus, a specification that lists only the accused's unit or subunit is not a specific place of duty and is fatally defective.⁷ Notwithstanding the specificity requirement, the case law suggests that the specific place may be inferred even though it is not stated. In *United States v. Sturkey*⁸ the court said in dicta that the appointed place of duty referred to a place such as "kitchen police, reveille formation, or first floor of a barracks rather than a broader general place of duty such as a command, a post or a unit."⁹ Clearly, "kitchen police" and "reveille formations" are not descriptions of places, but are descriptions of activities that occur at readily identifiable places. Similarly, in *United States v. Atchinson*¹⁰ the court found that "company formation" was sufficiently specific to state an offense under article 86(1). Of course, the best practice for counsel is to specifically describe in the specification the place to which the accused failed to go.

Just as the place of duty must be specific, so must the time. In *United States v. Zammit*¹¹ the specification averred that the accused failed to report for duty at 0630 rather than 1630. Based upon the nature of the offense, the court reversed, finding the error was not "insubstantial."

*This article was written while the author was an instructor in the Criminal Law Division, TJAGSA.

¹ Lederer, *Absence Without Leave—The Nature of the Offense*, *The Army Lawyer*, Mar. 1974, at 4.

² Then Captain Fredric I. Lederer was an instructor in the Criminal Law Division, The Judge Advocate General's School, Army. Professor Lederer is currently teaching at the William and Mary School of Law.

³ See generally A. Avins, *The Law of AWOL* (1957).

⁴ *Id.* at 34.

⁵ *Id.*

⁶ Uniform Code of Military Justice art. 85, 10 U.S.C. § 885 (1982) [hereinafter UCMJ].

⁷ *United States v. Sturkey*, 50 C.M.R. 110 (A.C.M.R. 1975). The place of duty described in the specification was "3d Platoon, Company C, 3d Battalion, 6th Infantry."

⁸ *Id.*

⁹ *Id.* at 111.

¹⁰ 13 M.J. 798 (A.C.M.R. 1982).

¹¹ 14 M.J. 554 (N.M.C.M.R. 1982).

"Actual" v. "Constructive" Knowledge

The 1984 Manual for Courts-Martial, as amended by Executive Order 12550,¹² provides that service members must have actual knowledge of the time and place of their duties in order to be convicted of violating article 86(1). In *United States v. Gilbert*,¹³ however, an Air Force board stated that the accused could have either "actual or constructive knowledge" of the appointed time and place of duty. The "constructive knowledge" provision was specifically included in the 1969 Manual for Courts-Martial¹⁴ and appeared in the 1984 Manual¹⁵ as well. In the 1985 amendments to the Manual,¹⁶ however, the drafters specifically deleted the reference to "constructive knowledge." In the Analysis to the Manual the drafters said that their purpose in deleting the "constructive knowledge" language was to clarify the requirement "that the accused must have in fact known of the time and the place of duty to be guilty of a violation of Article 86(1)."¹⁷ In place of the "constructive knowledge" language, the drafters substituted a provision that actual knowledge could be proven by circumstantial evidence. While the drafters characterized this change as a "clarification," deleting the reference to "constructive knowledge" represents a substantial change in what the drafters believed the substantive law should be.

The cases upon which the drafters relied were cases in which constructive knowledge was found to be an unacceptable form of proving missing movement in violation of article 87 and disobeying a lawful order in violation of article 92(2). There were no cases requiring actual knowledge for article 86(1) violations. The only case discussed in the Analysis that pertained to a violation of article 86(1) was the *Gilbert* case, in which the board approved proof of knowledge by "actual or constructive knowledge" in article 86(1) offenses. The difference between "constructive knowledge" and proof of actual knowledge by circumstantial evidence is not merely a matter of semantics. A suspect has constructive knowledge when, by the exercise of ordinary care, he or she would have known of the time and place of duty. In short, an accused could be convicted for negligence under the "constructive knowledge" standard.

What is the effect of the drafters' deletion of "constructive knowledge" from the Manual and their declaration that actual knowledge is required? Clearly, only Congress can legislate offenses and article 86 has not been amended; it appears in the current Manual exactly as it appeared in the 1969 and original 1984 Manuals. Counsel may argue that the 1969 Manual and original 1984 Manual correctly stated the law and may argue further, as did Judge Latimer, that "[t]he doctrine of constructive knowledge or notice, as it is often called, is not a stranger to the law. . . . There is nothing fundamentally wrong or unfair about requiring servicemen to acquaint themselves with the rules under which they must live in peace or survive in war."¹⁸

While a sound argument may be made that "constructive knowledge" may still suffice to prove an article 86(1) offense, the drafters' view that actual knowledge is required represents the better position. As stated at the outset, article 86(1) is a criminal sanction to be used when soldiers fail to go to their appointed duty. Implicit in the obligation to promptly go to one's place of duty is that the soldier knows where that duty is. If a "constructive knowledge" standard is employed in article 86(1) offenses, then the conduct being punished is the soldier's failure to find out where and when the duty is, not the failure to go to the appointed duty. If the conduct to be proscribed is the soldier's failure to find out what the appointed duty is, then the soldier should be prosecuted for that failure under article 92, dereliction of duty.¹⁹

Failure to Comply With an Order to Report: Unauthorized Absence or Disobedience ?

The legal obligation to report to one's appointed place of duty is an obligation that must be imposed by an appropriate authority. Because the obligation is imposed by competent authority, when should the failure to repair be considered a violation of article 92(2), failure to obey a lawful order? Usually, an order to report to an appointed place of duty is imposed generally. Clearly, failure to report to a duty that was appointed by a standing order should be treated as a failure to repair, not failure to obey an order. Thus, failure to report to morning formation on time, notwithstanding the com-

¹² Executive Order 12550 was signed by President Reagan on February 19, 1986. The order is referred to in this article as the 1985 Amendments to the 1984 Manual.

¹³ 23 C.M.R. 914 (A.F.B.R. 1957).

¹⁴ Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 165 [hereinafter MCM, 1969].

¹⁵ Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

¹⁶ The 1985 amendments were included in Executive Order 12550.

¹⁷ MCM, 1984, art. 86 analysis, app. 21, at A21-87 (citing *United States v. Chandler*, 48 C.M.R. 945 (C.M.A. 1974); *United States v. Stabler*, 15 C.M.R. 125 (C.M.A. 1954)).

¹⁸ *United States v. Curtin*, 26 C.M.R. 207, 214-15 (C.M.A. 1958) (Latimer, J., concurring in part and dissenting in part). See also Avins, *supra* note 3, at 99.

¹⁹ UCMJ art. 92(3) provides: "Any person subject to this chapter who . . . (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct." The "constructive knowledge" issue is also presented by article 92(3). It is clear from the analysis to the 1984 MCM that the drafters were of the opinion that the accused must have actual knowledge of his or her duties before he or she could be convicted of a dereliction of duty offense. In 1986 the Manual was amended by Executive Order 12550, Feb. 19, 1986, to specifically include a provision that permitted constructive knowledge. See MCM, 1984, Part IV, para. 16b(3)(b) and 16c(3)(b). To the extent that the 1986 amendment purports to change the law (rather than express the drafters opinion) it should be viewed with caution. As stated above, executive orders cannot change substantive law as enacted by Congress.

mander's standing order to report for morning formation every morning at 0600, is failure to repair, not failure to obey an order. Similarly, the platoon sergeant's order to report to the motor pool would constitute the kind of standing order that would give rise to a failure to repair offense as opposed to failure to obey. Lurking somewhere between failure to repair and failure to obey an order is a grey zone. Of course, the significance of how the offense is characterized is very important because of the much greater maximum punishment that may be imposed for failure to obey an order.²⁰ In *United States v. Baldwin*²¹ the accused was enrolled in two classes at the post's education center. On October 30 and 31 the accused skipped class. When the commander found out, he called the accused to his office and told him specifically that his place of duty from 8:00 to 10:00 A.M. was at the education center and that he was to report back to the first sergeant or the orderly room after every class. Baldwin failed to report to the first sergeant on 2 November and was charged and convicted of knowingly failing to obey a lawful order in violation of article 92(2). The 1969 Manual contained a provision that said if the facts of a disobedience case support a conviction for a less serious offense than disobeying an order, the maximum punishment would be limited to that of the lesser offense.²² The 1984 Manual has a similar provision.²³ Relying on this language in the 1969 MCM, the court found that the accused "did no more than fail to go to an appointed place of duty."²⁴ The sentence was adjusted accordingly.

The problem with rigid application of this principle is that many accused soldiers who are deserving of more severe punishment may avoid it. For example, if a commander gives a soldier a direct order to report to the latrine for extra duty and the soldier stands in mute defiance of the order, surely the maximum punishment should not be limited to that permitted for failure to repair. Yet rigid application of the principle here under discussion would limit the punishment to the punishment for failure to repair because these facts do establish the offense of failure to repair. The correct solution to this problem seems to present itself upon analysis of the conduct each criminal sanction is intended to proscribe. As indicated earlier, article 86(1) sanctions the failure to

report to duty in a timely fashion to ensure the orderly completion of the unit's mission.

Article 92(2) is a tool designed to instill discipline and ensure that subordinates obey the lawful orders of competent authority. In the hypothetical example above, the gravamen of the soldier's offense is not the failure to go to the place of duty, but, more seriously, the flaunting of authority. In *United States v. Landwehr*²⁵ and *United States v. Pettersen*²⁶ the Court of Military Appeals agreed that the nature of the offense should determine whether the offense is punished as a simple failure to repair or as the more serious offense, failure to obey. In *Pettersen* the court said, "The accused's defiance of the orders and his intention to remain in unauthorized absence status amounts to 'a direct attack on the integrity of any military system.'"²⁷

Article 86(2)—Going From an Appointed Place of Duty Elements of the Offense

For the most part, the principles that apply to article 86(1), failure to go to an appointed place of duty, apply equally to article 86(2), leaving one's place of duty. The elements of the offense are: 1) that a certain authority appointed a certain time and place of duty; 2) that the accused knew of that time and place; and 3) that the accused went from the appointed place of duty after having reported to such place.

"Actual" v. "Constructive" Knowledge

As with article 86(1) offenses, the offense of going from an appointed place of duty contemplates a specific duty place rather than a unit, post, or camp. The history of article 86(2) also tracks the history of article 86(1) on the issue of "knowledge." The 1969 Manual and the original 1984 Manual provided that soldiers could be convicted if they had actual knowledge or reasonable cause to know that they should remain at their appointed place of duty for a specific time. The drafters of the 1985 amendments to the Manual amended the Manual provision to require actual knowledge.²⁸

Aggravated Forms of the Offense

An aggravated form of leaving one's place of duty occurs when the duty is that of a guard, watch, or

²⁰ The maximum punishment in the 1984 MCM for failure to obey an order is a bad-conduct discharge, reduction to E-1, forfeiture of all pay and allowances, and confinement for six months. The maximum punishment for failure to repair is confinement for one month, reduction to E-1, and forfeiture of 2/3 of one month's pay. MCM, 1984, Part IV, para. 10e & 16c.

²¹ 49 C.M.R. 814 (A.C.M.R. 1975).

²² MCM, 1969, para. 127c, n. 5.

²³ MCM, 1984, Part IV, para. 16c.

²⁴ *Baldwin*, 49 C.M.R. at 815.

²⁵ 18 M.J. 355 (C.M.A. 1984). The commander ordered a soldier to return to work after an improperly protracted break. The soldier did not return to work at all. The military judge did not err in failing to tell the court members that the maximum punishment was limited to that authorized for a simple failure to repair.

²⁶ 17 M.J. 69 (C.M.A. 1983). A sergeant went to the AWOL soldier's off post quarters to try to talk the accused into returning to duty. When the accused said he did not plan to return, the sergeant gave the accused a direct order to return, which the accused disobeyed. The conviction for the AWOL and for disobeying the order was proper. The order was not issued merely for the purpose of increasing the potential punishment.

²⁷ 17 M.J. at 72 (quoting *United States v. Nixon*, 45 C.M.R. 254, 260 (1972) (Darden, C.J., dissenting)).

²⁸ See *supra* text accompanying notes 12-19.

special duty section. The offense is further aggravated when the accused leaves his or her guard, watch, or special duty section with an intent to abandon it. "Duty section" in this connection has a special meaning; it refers to a group of personnel designated to remain on a vessel or within the confines of a command at times when personnel strength is below normal in order to ensure the safety of the vessel or command.²⁹ The intent to abandon "connotes an intent by the accused at the inception of or during his unauthorized absence to divorce himself from all further responsibility for the particular duty of watch or guard theretofore imposed upon him."³⁰

There are several ambiguities concerning this aggravated form of the offense. First, in the 1984 Manual for Courts-Martial, the offense is characterized as an aggravated form of article 86(3), absence without leave.³¹ While it may be a purely academic point, characterizing the offense as an aggravated form of article 86(2) more accurately reflects the gravamen of the offense. Article 86(2) concerns itself with leaving a particular appointed duty before being relieved; the offense involves geography. An intentional absence under article 86(3) concerns itself with the complete "shaking off of military control without permission;"³² the offense involves removal from military control. Leaving guard or a watch involves leaving a specific geographical place of duty; it does not necessarily manifest a shaking off of military control.

Another ambiguity is whether this aggravated form of unauthorized absence occurs only when an accused leaves guard or watch or whether it also applies when the accused fails to go to guard or watch duty. The 1984 Manual describes the aggravating condition as "(d) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific offense)."³³ From the language of the Manual, it appears to be irrelevant whether the absence occurs as the result of a "failure to go" or a "going from" the guard or watch. Nevertheless, the increased maximum punishment should apply only when an accused leaves a guard or watch after having first assumed that duty. By leaving watch, a soldier endangers the

safety and security of that which he or she was assigned to guard or watch. If the soldier fails to report altogether, the soldier's superiors may be inconvenienced and may have to find some other person to take the guard or watch, but the safety or security of the mission is not as seriously compromised.

Article 86(3)—Absence Without Leave

Elements of the Offense

Perhaps the most commonly litigated unauthorized absence is most often referred to as AWOL or UA. The elements of the offense are: 1) that the accused absented himself or herself from his or her unit, organization or place of duty at which he or she was required to be; 2) that the absence was without authority of anyone competent to give him or her leave; and 3) that the absence was for a certain time.³⁴ Although intentional absences are not distinguished from unintentional absences in the UCMJ, the circumstances surrounding the absences are the proper subject matter for consideration in reaching an appropriate punishment. Intentional absences involve the "shaking off of military authority."³⁵ Unintentional absences are in most cases simple failures to repair that have turned into an AWOL offense because of the protracted period of the absence. Both the intentional and unintentional unauthorized absence involve the nonperformance of military duties, a "physical avoidance." Intentional absences include an accompanying "shaking off" of authority, or "mental abandonment."

"Unit, Organization, or Place of Duty"

The "unit, organization, or place of duty" refers to an affiliation with an identifiable military component, not to a geographical area. While there is case law to the contrary,³⁶ applying this concept of "unit, organization, or place of duty," an accused could be present in the area of his unit, organization, or place of duty and still be AWOL if he or she has "shaken off" military control.³⁷ Soldiers hiding from superiors may be AWOL even though they never leave the unit area.³⁸ In *United States v. Self*³⁹ the mere casual presence of an AWOL

²⁹ See Dept. of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-16 (1 May 1982) [hereinafter DA Pam 27-9].

³⁰ *United States v. Kukola*, 7 C.M.R. 112 (A.B.R. 1952); see also DA Pam 27-9, para. 3-16.

³¹ MCM, 1984, para. 10c(4).

³² Avins, *supra* note 3, at 40.

³³ MCM, 1984, para. 10c(4).

³⁴ In a recent case a court held that a term of unauthorized absence, which began before a scheduled authorized leave, was not interrupted by the authorized leave. *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989). Therefore, the accused could providently plead guilty to a term of AWOL that included the period of authorized leave.

³⁵ Avins, *supra* note 3, at 40.

³⁶ *United States v. Wargo*, 11 M.J. 501 (N.M.C.M.R. 1981). Wargo was assigned to the legal hold barracks waiting for his ship to return to port. He would sleep in the barracks at night and go to the library during the day to avoid performing any duties. The court said: "A member of the armed forces can not be absent from his unit when in fact he is present, albeit 'casually.'" *Id.* at 504.

³⁷ See generally Avins, *supra* note 3, at 55.

³⁸ *Id.*

³⁹ 35 C.M.R. 557 (A.B.R. 1957).

soldier at the military installation did not terminate his AWOL.⁴⁰

"Unit" as referred to in article 86(3) is a military element such as a company or battery. "Organization" refers to a larger command consisting of two or more units. In *United States v. Vidal*⁴¹ the Army Court of Review found that the United States Army was an "organization." In *Vidal* the accused was sent home to await orders for a new assignment. The new orders, placing him in a specific unit, never came. Therefore, while Vidal belonged to no unit from which he could be absent, he was absent from an organization, the Army.⁴²

The "place of duty" referred to in article 86(3) is a general place of duty such as a command, quarters, station, base, camp, or post.⁴³ It may also include a specific branch of the service.⁴⁴ It does not refer to a specific place of duty as in article 86(1) or 86(2) offenses.

Pleading AWOL Offenses

The first element of the offense of AWOL is "that the accused absented himself or herself for his or her unit, organization or place of duty at which he or she was required to be." In *United States v. Kohlman*⁴⁵ the specification simply alleged that the accused, a member of a specified unit, absented himself "from the Base Retraining Flight, 806th Air Base Group, located at Lake Charles Air Force Base, Louisiana."⁴⁶ There was no averment that such location was "the accused's unit, organization or other place of duty at which he was required to be."⁴⁷ The court said that, even though the specification put the accused on notice, the specification was fatally defective because it failed to allege an essential element of the offense. Relying on *Kohlman* defense appellate counsel in *United States v. Willis*⁴⁸ argued that omission of the words "at which he was required to be" rendered the AWOL specification fatally

defective. The Coast Guard Court of Military Review rejected that argument. The court said that this language was not an element of the offense. The specification alleged that the accused was absent without authority, named the unit from which he was absent, named the location of the unit, and specified the length of the absence. The court correctly said: "Clearly these allegations encompass all the elements of the offense of unauthorized absence."⁴⁹

In the law of pleadings, one seemingly unyielding rule was chiseled into granite: failure to allege "without authority" in an AWOL specification was a fatal defect.⁵⁰ That rule has been shaken. In *United States v. Watkins*⁵¹ the Court of Military Appeals upheld a conviction based on an AWOL specification that failed to contain the magic language, "without authority." Three factors were obviously central to the court's decision. First, the accused entered a guilty plea and admitted each and every element of the offense. Second, from the providence inquiry it was apparent that the accused was not misled; he understood the offense. Finally, the issue was not raised until the case reached the Court of Military Appeals; the court said it would view post-trial challenges of this type with "maximum liberality."⁵²

AWOL specifications must also correctly allege the unit from which the accused is absent. Problems in this area most often arise when a soldier goes AWOL in the course of a permanent change of station (PCS). In *United States v. Walls*⁵³ the accused was assigned to the 355th Tactical Fighter Wing. His orders directed him to sign in at the Central Base Personnel Office (CBPO) of the 803d Combat Support Group, which provided support to the 355th Tac Wing. The specification alleged that the unit from which the accused absented himself was the CBPO, 803d Support Group. The trial judge entered findings of guilty by exceptions and substitutions, finding the accused AWOL from the 355th Tactical Fighter Wing. The appellate court reversed. Quoting

⁴⁰ The *Self* case deals with the issue of termination of AWOL, but supports the rationale that one's physical presence at a unit is not the critical factor. Rather the focus should be on the "shaking off" of authority and the accompanying nonperformance of duty. See also *United States v. Jackson*, 2 C.M.R. 96 (C.M.A. 1952) (casual presence at installation does not terminate AWOL where accused failed to disclose his absentee status); *United States v. Norman*, 9 C.M.R. 496 (A.B.R. 1953); *United States v. Johnstone*, 8 C.M.R. 401 (A.B.R. 1953).

⁴¹ 45 C.M.R. 540 (A.C.M.R. 1982).

⁴² See also *United States v. Brown*, 24 C.M.R. 585 (A.F.B.R. 1957) (Air Force is an "organization" within the meaning of article 86(3)).

⁴³ *United States v. Price*, 1 M.J. 552 (A.F.C.M.R. 1975); *Brown*, 24 C.M.R. 585.

⁴⁴ *Id.*

⁴⁵ 21 C.M.R. 793 (A.B.R. 1956).

⁴⁶ *Id.* at 794.

⁴⁷ *Id.* (emphasis in original).

⁴⁸ 7 M.J. 827 (C.G.C.M.R. 1979).

⁴⁹ *Id.* at 830.

⁵⁰ In *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986), Judge Cox said: "It has been black-letter law in the military since *United States v. Fout*, 3 U.S.C.M.A. 565, 13 C.M.R. 121 (1953), that a specification under Article 86 is fatally defective if it does not allege that the absence was 'without authority.'" *Watkins*, 21 M.J. at 209. See also *United States v. Torrence*, 42 C.M.R. 892 (A.C.M.R. 1970).

⁵¹ 21 M.J. 208 (C.M.A. 1986).

⁵² *Id.* at 210.

⁵³ 1 M.J. 734 (A.F.C.M.R. 1975).

United States v. Rosen,⁵⁴ the court said that proper designation of the unit serves to both identify and *limit* the offense charged. Because the accused in this case was not assigned to the unit alleged, a fatal variance existed, which could not be cured by the military judge's findings by exceptions and substitutions.

The duration of the absence must be proved in order to determine the maximum punishment for the offense.⁵⁵ It is not uncommon for the trial counsel to have an imprecise knowledge of exactly when the accused left and returned from AWOL. Not surprisingly, several cases have addressed trial courts' attempts to "fix" specifications at trial.

Minor amendments to a specification may be made at trial.⁵⁶ Increasing the maximum punishment of an offense, however, is not a minor amendment. Hence, the duration of an AWOL may not be enlarged to increase the punishment.⁵⁷ Indeed, one appellate court has said the trial court had "no right" to amend a specification to increase the length of the AWOL by six days, even though the amendment had no effect whatsoever on the maximum permissible punishment.⁵⁸

AWOL as a Continuing Offense

The first element of the offense of AWOL alleges the inception or beginning date of the absence. The third element of the offense of AWOL is that the accused was absent for a certain period of time. These elements dealing with time and duration present the most confounding problems of proof and legal theory in AWOL offenses.

Military courts have frequently repeated that AWOL is not a continuing offense. The offense is completed when the accused goes absent without authority and the duration of the absence serves only as a matter in aggravation. This notion of AWOL as a continuing offense has so often been repeated⁵⁹ by appellate courts that it has taken on a sort of unassailable quality

independent of the underlying feasibility or logic of it. Commentators have argued that this idea that an AWOL is an "instantaneous" offense is flawed.⁶⁰ Nevertheless, the courts persist in their loyalty to the notion that AWOL is not a continuing offense. To the extent that the offense of AWOL is not committed on a daily basis after the accused has become absent, it is not a "continuing" offense. But clearly the continuous avoidance of military duties constitutes the gravamen of the offense, and in that sense the offense does continue to have an impact on the military. Moreover, notwithstanding the courts' single-minded acceptance of the "not a continuous offense" dogma, the courts routinely disregard their own principle when exigencies of proof dictate—usually by accepting an estimated inception date in the absence of specific information.⁶¹

There are two principle reasons why AWOL has been characterized as an instantaneous rather than a continuing offense. First, it is argued, if AWOL is a continuing offense, soldiers may be subject to unreasonable multiplication of charges or trials; they could be charged with a new offense every day, every hour, or every minute that they remained away from their place of duty.⁶² Second, if it is a continuing offense, the government could circumvent the statute of limitations by selecting an inception date for charging within the period of the statute even though the accused initially went AWOL outside the period of the statute.⁶³

Neither of these reasons for the rule stands up to close scrutiny. First, with regard to unreasonable multiplication of offenses or multiple trials, the rules on multiplicity and former jeopardy would prevent the government from making two or three or four charges or trials out of one course of conduct. Indeed, the parts of the fifth⁶⁴ and sixth amendment⁶⁵ that protect against multiplicity and double jeopardy are certainly more convincing restrictions on unfair charging practices than some fiction about AWOL's not being a continuous

⁵⁴ 45 C.M.R. 728 (A.F.C.M.R. 1972).

⁵⁵ *United States v. Lynch*, 47 C.M.R. 498 (C.M.A. 1972); *United States v. Simmons*, 3 M.J. 398 (C.M.A. 1977).

⁵⁶ Rule for Courts-Martial 603, MCM, 1984, provides that amendments that "add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses" are *not* minor changes.

⁵⁷ *United States v. Krutzing*, 35 C.M.R. 207 (C.M.A. 1965).

⁵⁸ *United States v. Turner*, 23 C.M.R. 674 (C.G.B.R. 1957).

⁵⁹ See, e.g., *United States v. Rodgers*, 1 M.J. 20 (C.M.A. 1970); *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989); *United States v. Newton*, 11 M.J. 580 (N.M.C.M.R. 1980); *United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976).

⁶⁰ See Lederer, *supra* note 1, at 8; Avins, *supra* note 3, at 69. Captain Lederer suggests that it would be more accurate to describe AWOL as a "course of conduct." Mr. Avins suggests that it would be more accurate to say that AWOL is not a "renewed offense" rather than to say it is not a "continuing offense."

⁶¹ See *United States v. Harris*, 45 C.M.R. 364 (C.M.A. 1972) (The accused was convicted of an AWOL specification that alleged an inception date of December 3. When he took action on the case, the convening authority followed the SJA's advice and changed the inception date to January 2. The appellate court found insufficient evidence to support the convening authority's action and further amended the inception date to January 9, the DFR date.) See also *United States v. Daly*, 15 M.J. 739 (N.M.C.M.R. 1983) (The accused was charged with an offense with an inception date of September 9, but admitted leaving three days earlier on September 6. His plea to an offense with an inception date of Sept. 9 was found provident.); *United States v. Brock*, 13 M.J. 766 (A.F.C.M.R. 1982); *United States v. Porter*, 12 M.J. 949 (N.M.C.M.R. 1982).

⁶² See *United States v. Daly*, 15 M.J. 739 (N.M.C.M.R. 1983).

⁶³ See *United States v. Newton*, 11 M.J. 580 (N.M.C.M.R. 1980).

⁶⁴ U.S. Const. amend. V.

⁶⁵ U.S. Const. amend. VI.

offense. Secondly, earlier courts' concern about government tinkering with charge sheets to avoid the statute of limitations has been virtually swept away by current events.⁶⁶ In the past, the statute of limitations began to run the instant the accused went AWOL. If charges were not received by the officer exercising summary court-martial jurisdiction within two years of that date, prosecution was barred by the statute of limitations even though the accused was still absent; absence did not toll the running of the statute. In the Military Justice Amendments of 1986,⁶⁷ article 43, the statute of limitations, was amended. The amendment extends the period of the statute to five years and, more significantly, tolls the statute during periods of unauthorized absence. This legislation ends any lingering need to say that AWOL is not a continuing offense.

Saying that AWOL is not a continuing offense serves no good purpose; indeed, it creates more problems than its defenders claim it solves. It is well established that if the government can only prove the termination date and not the inception date of an AWOL, the accused can be convicted for a one-day AWOL—the termination date.⁶⁸ If the act of leaving is the completed offense, how can we logically convict soldiers for the “instantaneous offense” of absenting themselves on the day they returned? Similarly, the instantaneous offense notion is logically inconsistent with the permissible practice of using the “Dropped from the Rolls” (DFR) date as the inception date.⁶⁹ The continuous offense analysis also conflicts with the principle that a shorter period of AWOL is a lesser offense of a longer period of AWOL, and strains accepted rules on fatal variance.⁷⁰ No ill purpose would be served by abandoning the “instantaneous offense” dogma. By recognizing AWOL for what it is, a course of conduct, there would be no need to stretch logic when pleading and proving inception and termination dates.

Detention by Civilian Authorities

The offense of AWOL is committed if the accused is absent without authority; there is no requirement that the accused intended to be absent. Indeed, the accused may want to return to the unit, but is prevented from

doing so. Nevertheless, the accused's absence must be through some fault of the accused. This section will explore the ramifications of absences resulting from arrest and trial by civilian authorities.⁷¹

Soldiers who are arrested by civil authorities and are unable to return to their unit will be deemed AWOL if they are subsequently convicted. If they are subsequently acquitted, however, the absence will not be considered unauthorized.⁷² Adjudications of delinquency for minor offenders constitute convictions for purposes of this rule. The reason for the different treatment of soldiers who are convicted as opposed to those who are acquitted goes back to the issue of fault. Soldiers who commit willful misconduct are at fault for their absence from duty when the misconduct results in their arrest and incarceration. By the same token, soldiers who are found not guilty are deemed to be free from fault for absences that were occasioned by their arrests and pretrial incarceration. If a soldier is arrested and subsequently convicted while on authorized leave, the absence becomes unauthorized only after the leave expires.⁷³ If the soldier is delivered to civilian authorities for trial pursuant to article 14,⁷⁴ however, the absence is *with* authority and the soldier is not AWOL even if ultimately convicted.⁷⁵ If the soldier escapes from civilian confinement and does not return to military control, however, he or she is AWOL.⁷⁶

In many cases the accused is arrested but never prosecuted. The case may be dismissed or otherwise disposed of in a manner that is not the equivalent of a conviction. In these cases, the government has the option of establishing an AWOL if the underlying offense that resulted in the accused's absence can be proven. In this area the law is not at all settled.⁷⁷ Two particularly perplexing issues pertain to the burden of proof and the consideration of excluded evidence.

For example, three soldiers are involved in a bar room fracas downtown. They are thrown in the county jail for two days and then released. The county does not intend to prosecute. Should the government be required to prove that the three soldiers were guilty of assault and battery or creating a public disturbance *beyond a reason-*

⁶⁶ See *United States v. Jones*, 26 M.J. 650 (A.C.M.R. 1988).

⁶⁷ National Defense Authorization Act for 1987, Military Justice Amendments of 1986, Pub. L. 99-661.

⁶⁸ *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976).

⁶⁹ *United States v. Gallow*, 43 C.M.R. 720 (A.C.M.R. 1971) (DFR entry in morning report sufficient to establish the inception date as the date of the DFR entry).

⁷⁰ See generally *Lederer*, *supra* note 1.

⁷¹ Restraint by civilian authorities may raise the defense of impossibility. This defense is discussed later in more detail. See *infra* text accompanying notes 136-152.

⁷² MCM, 1984, para. 10c(5).

⁷³ *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

⁷⁴ UCMJ art. 14 provides that the Secretary may prescribe regulations for the delivery of soldiers accused of civilian offenses to civilian authorities for trial.

⁷⁵ *United States v. Northrup*, 31 C.M.R. 73 (1961); *United States v. Clinkscales*, 45 C.M.R. 693 (A.C.M.R. 1972).

⁷⁶ *United States v. Allen*, 28 C.M.R. 840 (A.B.R. 1952).

⁷⁷ See generally *United States v. Sprague*, 25 M.J. 743 (A.C.M.R. 1987) (accused's plea of guilty to AWOL found provident even though civil incarceration that prevented his return to military control did not result in conviction for misconduct).

able doubt? Or should the government only have to prove that the soldiers were at fault for their two-day absence, that is, that the county had *probable cause* for incarcerating them based upon the fracas?

What happens when a soldier is arrested on drug charges and incarcerated for thirty days pending a hearing at which the judge excludes the evidence (illegal search) and dismisses charges? Should the government be precluded from prosecuting the AWOL because the evidence supporting the underlying offense was suppressed?

The answers to these questions have not been resolved. One may argue that the underlying cause of the absence, which raises the defense of impossibility, must be proven beyond a reasonable doubt. Thus, the government becomes involved in a mini-trial to prove one element of the AWOL offense; it must prove the underlying offense.

The better analysis, however, is that the government need only prove *fault* beyond a reasonable doubt. Under the law, a soldier may be convicted of AWOL for relying on a known unreliable source of transportation; the degree of fault seems at least as great when a soldier engages in conduct that could reasonably result in incarceration. Thus, in the case of the bar room brawlers, the government need only prove beyond a reasonable doubt that the soldiers' two-day absence was their fault—that the county had probable cause to arrest and incarcerate them based on the brawl. If the soldiers raise the affirmative defense of self-defense, the government should be required to rebut the defense by evidence beyond a reasonable doubt.

The distinction between proving probable cause beyond a reasonable doubt and rebutting the defense of self-defense beyond a reasonable doubt represents a substantial shift in the government's burden. Nevertheless, such a shift in the burden of proof is logically sound. The issue is fault. If the government establishes probable cause to arrest and incarcerate beyond a reasonable doubt, the soldier should be convicted of AWOL. If the accused raises the defense of self-defense, which would indicate the absence of fault, the government should be required to prove the fault, i.e., the absence of self-defense, beyond a reasonable doubt.⁷⁸

In the case of the drug offender, the evidence clearly demonstrates that the civilian authorities were justified in holding the soldier for the drug offense; they had probable cause. Even though the charges were dismissed, the government should be able to introduce testimony about the illegally seized drugs to prove that the absence was the fault of the accused. The reason is that the illegally obtained evidence is not being used to prove the accused possessed drugs, but to show that the civilian authorities had probable cause to arrest and detain the accused for the thirty days preceding the hearing. The accused was properly and lawfully detained based upon

the charges. It is this absence from military duty that is the basis of the AWOL charge.

The exclusionary rule prevents the government from using *evidence* that is directly or derivatively obtained from an unlawful search or seizure. Testimony explaining the basis of the detention does not equate to the introduction of illegally seized "evidence." The drugs, even though they may have been illegally seized, support the probable cause determination that resulted in the accused's pretrial confinement. While no courts have ruled on this specific issue, extending the exclusionary rule to nonevidentiary matters appears to be an excessive interpretation of the fourth amendment.

Should the accused deny ownership of the drugs and claim that the incarceration was unwarranted, the government should be required to prove beyond a reasonable doubt that the drugs were the property of the accused and the incarceration was the result of the accused's misconduct. Again, the issue is "fault," and the government must prove fault beyond a reasonable doubt.

The troubling aspect of the argument offered above is that soldiers *acquitted* by a civilian trial could be prosecuted for AWOL provided the civilian authorities had probable cause for their arrest and detention. Logically, a soldier may very well have been at fault for his or her absence even though the misconduct does not result in a conviction. The accused may have *provoked* a fight or possessed drugs under circumstances in which the laws of a particular jurisdiction require acquittal notwithstanding fault. Strictly as a matter of policy, the existing rule precluding prosecutions for AWOL's in cases resulting in an acquittal should remain intact; it would appear unfair to convict a soldier for unauthorized absence after he or she was acquitted of the offense that was the underlying reason for the absence. The same appearance of unfairness does not exist when a soldier is convicted for an AWOL caused through the fault of the soldier simply because the civilian authorities decline prosecution or are barred from prosecution because of a technical violation of the soldier's constitutional rights.

Clearly, the issues raised in these hypothetical cases are subject to debate. Notwithstanding the thousands of AWOL cases that have been litigated, these issues remain undecided.

Termination of Periods of AWOL (and Desertion)

The termination date of an AWOL or desertion is important because it affects the maximum punishment that may be adjudged. Generally, an AWOL is terminated when the accused returns to military control. A return to military control, however, may occur even though the accused has not physically returned to a military post or installation. An AWOL is terminated when a soldier surrenders to military authorities who are informed of or should have reason to know of the

⁷⁸ This requirement is consistent with the military rule that, except for the defense of lack of mental responsibility, once a special defense (like self-defense) is raised the prosecution has the burden of proving beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b); see *United States v. Hurst*, 49 C.M.R. 681 (A.C.M.R. 1974).

soldier's absentee status.⁷⁹ Military authorities may not refuse to take affirmative steps to exercise control over an AWOL soldier who has undertaken steps to surrender.⁸⁰ If, however, an accused surrenders to military control and then takes actions to thwart that control by disobeying a lawful order, the AWOL does not terminate.⁸¹

When a suspect is in civilian confinement, the AWOL terminates when civilian authorities notify military authorities that the accused is in their control and make the accused available to military control.⁸²

Desertion *Elements of the Offense* *The Basic Offense*

The UCMJ lists three different circumstances that result in the offense of desertion. In the final analysis, however, there are only two forms of desertion.⁸³ The most common type of desertion exists when a member of the armed forces goes or remains absent from his or her unit, organization, or place of duty with the intent to remain away permanently. The elements of the offense are: 1) that at a certain time and place the accused absented himself or herself from or remained absent from his or her unit, organization, or place of duty; 2) that the accused remained absent for a certain period of time; 3) that the absence was without proper authority from anyone competent to give leave; and 4) that the accused intended at the time of the absence or at some time during the absence to remain away permanently. This type of desertion is identical to an article 86(3) unauthorized absence except that it includes the element of intent to remain away permanently.

The second type of desertion is committed when a member of the armed forces quits his or her unit, organization, or place of duty with the intent to avoid hazardous duty or to shirk important service. "Hazardous duty" or "important service" does not include routine training exercises. Generally, this offense arises when soldiers absent themselves to avoid combat or missions in hostile territory. For example, absence to

avoid infantry service in Vietnam during the Vietnam war was an absence to avoid "hazardous duty or important service."⁸⁴ On the other hand, being an accused at a special court-martial⁸⁵ or serving a thirty-day sentence to the brig⁸⁶ is not important service for purposes of article 85.

Article 85a(3) seemingly creates an offense of desertion when a member of the armed forces, without being separated from his or her branch of service, enlists or accepts an appointment in another branch of the armed forces without fully disclosing the fact that he or she has not been regularly separated or enters any foreign armed service without authority of the United States. In *United States v. Huff*,⁸⁷ however, the Court of Military Appeals said that article 85a(3) did not create a substantive offense, but merely sets out a method of proving an absence with intent to remain away permanently.⁸⁸

Article 85b applies to desertion by officers. Desertion is committed by a commissioned officer if, after the tender of a resignation but before its acceptance, the officer quits his or her post or proper duties without leave and with the intent to remain away permanently. As with article 85a(3), this desertion provision probably does not create a separate substantive offense, but merely sets out a method of proving intent.

Aggravated Forms of the Offense

An aggravated form of desertion is established by proving the additional element that the absence was terminated by apprehension. Proof of this element increases the maximum confinement from two years to three years.⁸⁹ This aggravating factor applies to all forms of desertion except absence with intent to avoid hazardous duties or shirk important service; the maximum confinement for this type of desertion is already five years.⁹⁰ An accused may be convicted of the aggravated offense of desertion terminated by apprehension even though the apprehension was by civilian authorities for a civilian offense.⁹¹

⁷⁹ *United States v. Jackson*, 2 C.M.R. 96 (C.M.A. 1952); *United States v. Gudatis*, 18 M.J. 816 (A.F.C.M.R. 1984).

⁸⁰ *United States v. Raymo*, 1 M.J. 31 (C.M.A. 1975); *United States v. Reeder*, 46 C.M.R. 11 (C.M.A. 1972).

⁸¹ *United States v. Patterson*, 14 M.J. 608 (A.F.C.M.R. 1982).

⁸² *United States v. Zammit*, 16 M.J. 330 (N.M.C.M.R. 1982).

⁸³ See *United States v. Huff*, 22 C.M.R. 37 (C.M.A. 1956).

⁸⁴ *United States v. Moss*, 44 C.M.R. 298 (A.C.M.R. 1971).

⁸⁵ *United States v. Walker*, 26 M.J. 886 (A.F.C.M.R. 1988).

⁸⁶ *United States v. Wolff*, 25 M.J. 752 (N.M.C.M.R. 1987).

⁸⁷ 22 C.M.R. 37 (C.M.A. 1956).

⁸⁸ See also *United States v. Johnson*, 17 C.M.R. 297 (C.M.A. 1954).

⁸⁹ MCM, 1984, Part IV, para. 9e(2)(a).

⁹⁰ MCM, 1984, Part IV, para. 9c.

⁹¹ *United States v. Fields*, 32 C.M.R. 193 (C.M.A. 1962); *United States v. Babb*, 19 C.M.R. 317 (C.M.A. 1955); but see *United States v. Washington*, 24 M.J. 527 (A.F.C.M.R. 1987) (apprehension by civilian police for civilian charge does not prove accused was returned to military control involuntarily for purposes of terminating desertion by apprehension).

Intent in Desertion Cases

The intent to remain away permanently need not coincide with the accused's initial absence. The offense of desertion is complete if the accused forms the intent to remain away permanently at any time during the absence.⁹² The government need not prove the precise time that the intent to remain away permanently was formulated. Proof of intent may be by circumstantial evidence. Factors tending to prove this intent include the length of the absence, actions and statements of the accused, and method of termination.⁹³ Length of the absence alone is insufficient to establish the intent to remain away permanently.⁹⁴

On the other hand, the intent to remain away permanently may be established even when the absence was for a very short duration providing other factors support the government's proof of intent. Thus, in *United States v. Maslanich*⁹⁵ the accused was convicted of desertion even though he was apprehended only a few hours and a few miles from his base after he had escaped from confinement. Moreover, the accused's declaration that he intended to return does not preclude conviction for desertion. In *United States v. Condon*⁹⁶ the accused testified that he intended to return to duty. This evidence was overcome by evidence that the accused remained away from his organization for six years, that his absence was terminated by apprehension, that he used a false or assumed name during his absence, that he was close to a military installation but did not attempt to turn himself in, and that he was not in possession of military identification.

Pleading Considerations

As with unauthorized absence offenses, the courts are relaxing formerly rigid rules on pleadings. In *United States v. Lee*⁹⁷ the Navy-Marine Corps court found that failure to include the language "without authority" in a desertion specification did not render the specification invalid. The court noted that the "without authority" language had no special historic significance. Adopting the *Sell* test,⁹⁸ the court found the specification contained language from which every element of the offense could be inferred and thus protected the accused against a second trial for the same offense. In this case the court

found that the words "absent in desertion" clearly imported a want of authority for the absence. Less than a month later, another panel of the Navy-Marine Corps court reached the same conclusion in *United States v. Ermitano*.⁹⁹ In *Ermitano* the court held that "without authority" could be implied from "desertion." Indeed, the court went even further in saying that the "plain meaning" of the word desertion includes three elements: 1) absence; 2) without authority; and 3) with the intent to remain away permanently.

Missing Movement

Elements

There are two types of missing movement offenses: 1) missing movement through *design*; and 2) missing movement through *neglect*. Each type of the offense has four elements: 1) that the accused was required in the course of duty to move with a ship, aircraft, or unit; 2) that the accused knew of the prospective movement of the ship, aircraft, or unit; 3) that the accused missed the movement of the ship, aircraft, or unit; and 4) that the accused missed the movement through design or neglect.¹⁰⁰

Movement

The type of movement contemplated under article 87 is significant in terms of duration, distance, and mission. It does not include practice marches of short duration nor does it include minor changes of location of a unit.¹⁰¹

Article 87 was included in the UCMJ as an aggravated form of article 86. Article 87 was specifically included because of the frustration and serious interference with an organizational entity's ability to perform its function when a soldier or sailor failed to show up for duty just before his ship or unit sailed or moved to a combat zone.

Now the experience of World War II was such that in a large number of cases persons who left without authority, did so just about the time that their ship was to sail or their unit was to move.

⁹² MCM, 1984, Part IV, para. 9c(1)(c)(i).

⁹³ See *United States v. Therasse*, 17 M.J. 1068 (A.F.C.M.R. 1984); *United States v. Mackey*, 46 C.M.R. 754 (N.C.M.R. 1972) (Evidence of 26 month absence while on orders for a war zone coupled with evidence of apprehension a long distance from his unit was sufficient to establish the element of intent to remain away permanently.); *United States v. Balagtas*, 48 C.M.R. 339 (N.C.M.R. 1972) (Evidence of two-year absence terminated by apprehension and of previous absences sufficient to establish intent to remain away permanently even though the accused was in the vicinity of his assigned unit and retained a military identification card.).

⁹⁴ See *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

⁹⁵ 13 M.J. 611 (A.F.C.M.R. 1982).

⁹⁶ 1 M.J. 984 (N.C.M.R. 1976).

⁹⁷ 19 M.J. 587 (N.M.C.M.R. 1984).

⁹⁸ See *United States v. Sell*, 11 C.M.R. 202 (C.M.A. 1953).

⁹⁹ 19 M.J. 626 (N.M.C.M.R. 1984).

¹⁰⁰ MCM, 1984, Part IV, para. 11b.

¹⁰¹ MCM, 1984, Part IV, para. 11c(1).

It is considerably more serious for a man to be absent at that time than to be absent under other circumstances.¹⁰²

The significance of missing a movement, therefore, is that an entire unit may suffer because an integral part of the unit—a part the unit was counting on—failed to make the movement.¹⁰³ The Army court in *United States v. Gillchrest* explained the impetus behind article 87 as follows:

The seriousness of the offense results from the disruption of scheduling and movement of an integrated, cohesive, perhaps self sufficient and interdependent group of military men that may well have been trained to perform as a unit. Some of the members of the crew or unit could possess particular skills, e.g., communications, demolition, navigation, or supply, the absence of which would cripple or destroy the integrity and effectiveness of the unit.¹⁰⁴

Recent cases have addressed the propriety of charging a service member under article 87 when he or she misses a Permanent Change of Station (PCS) flight. It seems that a PCS movement is not the kind of movement contemplated by the drafters of the UCMJ and certainly is not the kind of movement contemplated by the court in *Gillchrest*. The cases, however, have reached an opposite result.

In *United States v. Graham*¹⁰⁵ the court upheld a conviction where the accused failed to make a Military Airlift Command (MAC) flight upon which he had a reservation. The flight was from Frankfurt, West Germany, to the United States and was in conjunction with a PCS. The first argument before the court was that article 87 applied only to movement of organizational entities. The court noted that article 87 was formulated just after World War II when it was far more common for individuals to move as parts of larger units. It was not as common for individuals to make long-distance movements. The court recognized that since the Vietnam conflict, it had become more common practice to leave

units in place and send individual replacements. Unfilled unit vacancies create the kinds of problems for units that warranted the adoption of the more severe form of punishment provided under article 87. Thus, the court found that changing times dictated a different application of article 87. The conviction was affirmed.

Shortly after the *Graham* decision the Court of Military Appeals considered the "missing movement" issue in a slightly different context. In *United States v. Gibson*¹⁰⁶ the accused was given a commercial airline ticket to return to his duty station after he had returned from an AWOL status. He was convicted (pursuant to his plea of guilty) of a violation of article 87. The Court of Military Appeals reversed. The court said that the "foreseeable disruption" to naval operations caused by his failure to make the particular flight is not of such magnitude as to require the more severe punishment afforded by the application of Article 87."¹⁰⁷

Most recently, in *United States v. Blair*¹⁰⁸ the Army court upheld a missing movement conviction when the accused, through neglect, failed to make his reservation on a charter flight on a PCS from Korea to the United States. In this case, the court said it made no difference whether the flight was military, chartered, or commercial.

Nevertheless, missing movement is more than a mere AWOL. The cases continue to look for some element of disruption of the soldier's unit. "Hard and fast rules relating to the duration, distance and mission of the 'movement' are not appropriate but rather those factors plus any other concomitant circumstances must be considered collectively, in order to evaluate the potential disruption of the unit caused by a soldier's absence."¹⁰⁹

Knowledge of the Movement

The accused must have actual knowledge of an impending movement in order to be convicted of "missing movement."¹¹⁰ It is not required, however, that the accused know the exact hour or even the day of the

¹⁰² Testimony of Mr. Larkin, Assistant General Counsel, Office of the Secretary of Defense, Hearings Before a Subcommittee of the House Armed Services Committee on the Uniform Code of Military Justice, 81st Cong., 1st Sess. 1258, quoted in *United States v. Gillchrest*, 50 C.M.R. 832 (A.C.M.R. 1975).

¹⁰³ Accordingly, missing the move, rather than the particular mode of travel, is the gravamen of the offense. *United States v. Smith*, 26 M.J. 276 (C.M.A. 1988).

¹⁰⁴ *Id.* at 834.

¹⁰⁵ 16 M.J. 460 (C.M.A. 1983).

¹⁰⁶ 17 M.J. 143 (C.M.A. 1984).

¹⁰⁷ *Id.* at 144.

¹⁰⁸ 24 M.J. 879 (A.C.M.R. 1987), *pet. granted*, 26 M.J. 53 (C.M.A. 1988).

¹⁰⁹ *United States v. Smith*, 2 M.J. 567 (A.C.M.R. 1976) (Failure to go with unit on 12 mile "move" to an exercise was not "missing movement."); *See also United States v. Redmond*, 43 C.M.R. 577 (A.C.M.R. 1970) (Failure to return to combat zone in Vietnam with one's unit is "missing movement."); *United States v. Deshazor*, 34 C.M.R. 566 (A.B.R. 1964) (Failure to accompany unit when it was transferred from Fort Campbell, Kentucky, to California was "missing movement.").

¹¹⁰ MCM, 1984, Part IV, para. 11c(5).

movement.¹¹¹ Knowledge of the pending movement may be shown by either direct or circumstantial evidence.¹¹²

Through "Design" or Through "Neglect"

There are two forms of missing movement: missing movement through design and missing movement through neglect. "Through design" means intentionally. The Manual for Courts-Martial says that missing movement through design "requires specific intent to miss the movement."¹¹³ This definition of "design" was not included in the 1969 Manual.¹¹⁴ Indeed, the language, which first appeared in the 1984 MCM, came from a 1952 Navy case.¹¹⁵ Unfortunately, the "specific intent" language *could* be construed as requiring proof that the accused went AWOL for the specific purpose of avoiding a movement. The motive for the absence should be deemed irrelevant to the offense (except as a matter of extenuation or aggravation). Thus, if a soldier knew that his unit was preparing to embark on a major movement and went AWOL to visit his girlfriend just before the movement, he should be found guilty of missing movement through design even though the absence was not motivated by an intent to miss the movement.¹¹⁶

Missing movement by design is a more serious offense than missing movement through neglect. The maximum punishment for missing movement by *design* is a dishonorable discharge, total forfeitures, confinement for two years, and reduction to E-1, but the maximum punishment for missing movement by *neglect* is a bad-conduct discharge, total forfeitures, confinement for one year, and reduction to E-1.¹¹⁷

"Through neglect" means that the accused missed a movement because he or she failed to exercise due care or did some act without giving due consideration to foreseeable consequences of the act.¹¹⁸ Thus, going AWOL and going 1,200 miles away from one's duty post is the kind of act that foreseeably results in missing a scheduled movement.¹¹⁹

¹¹¹ *Id.*; United States v. Gibson, 17 M.J. 460 (C.M.A. 1984).

¹¹² MCM, 1984, Part IV, para. 11c(5); United States v. Chandler, 48 C.M.R. 945 (C.M.A. 1974).

¹¹³ MCM, 1984, Part IV, para. 11c(3).

¹¹⁴ See MCM, para. 166.

¹¹⁵ In the analysis to article 87 (MCM, 1984, Appendix 21, para. 11) the drafters indicated that their definition of "design" was based on United States v. Clifton, 5 C.M.R. 342 (N.B.R. 1952).

¹¹⁶ *But see* United States v. Mitchell, 3 M.J. 645 (N.C.M.R. 1977), wherein the court upheld a conviction for missing movement though neglect where the accused went AWOL 1,200 miles from his post. The court said that the accused should reasonably have foreseen that he might get arrested and thereby prevented from making the movement.

¹¹⁷ MCM, 1984, Part IV, para. 11e(1).

¹¹⁸ See MCM, 1984, Part IV, para. 11c(4).

¹¹⁹ United States v. Mitchell, 3 M.J. 641 (A.C.M.R. 1977).

¹²⁰ See, e.g., United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1970) (The court appears to confuse the defenses of duress and necessity.).

¹²¹ UCMJ art. 43(d), 10 U.S.C. § 843(d) (1950) (amended 1986).

¹²² UCMJ art. 43(e) & (f), 10 U.S.C. § 843(e) & (f) (1950) (amended 1986).

¹²³ UCMJ art. 43(b) 1950, 10 U.S.C. § 843(b) (1950) (amended 1986).

Defenses

Introduction

Several affirmative and special defenses may be asserted in unauthorized absence offenses.¹²⁰ There are three defenses, however, that warrant special consideration as they pertain to unauthorized absence offenses. The three defenses are: 1) the statute of limitations; 2) impossibility; and 3) physical inability.

Statute of Limitations

Introduction

Interposition of the statute of limitations used to be a more common defense than it is today. The reason that the statute of limitations is no longer a major problem area is that article 43, the UCMJ's statute of limitations, was amended in 1986. The amendment made two major changes. First, the period of the statute of limitations was increased to five years; previously the period of the statute for AWOL was only two years. Secondly, and most significantly, the amendment included a provision that tolled the running of the statute during periods of unauthorized absences. Prior to 1986 the statute of limitations began and continued to run during periods of unauthorized absence unless the accused was outside the territorial limits of the United States¹²¹ or the absence occurred in time of war.¹²² The statute was tolled, as it is under the present UCMJ provision, when charges were received by the officer exercising summary court-martial jurisdiction.¹²³ As a result, the government had to prepare an AWOL packet, which included a charge sheet, forward the packet to the summary court-martial convening authority, file the packet with the appropriate military personnel agency, and then wait for the accused to return to military control. Of course, if a soldier was AWOL for more than two years, the government had to retrieve the packet and establish that the charge sheet had been received by the summary court-martial convening authority within the period of the statute.

Not surprisingly this resulted in several problems. In many cases the AWOL packet was not properly forwarded, the charge sheet was lost, or the charge sheet contained errors that could not be amended by a new preferral. These problems have been virtually eliminated by the 1986 amendment to article 43, but counsel must be aware of pre-1986 law because it still applies to soldiers who went AWOL prior to the effective date of the amendment. The case law discussed below would also be applicable in the unlikely event that the statute of limitations became an issue in a post-1986 AWOL offense.

"In Time of War"

Under article 43(a), UCMJ, the statute of limitations is tolled in "time of war." The drafters of the statute did not define "in time of war," however. The issue became critical during the nation's involvement in Korea and Vietnam. Only Congress is given the constitutional authority to declare war and, of course, there was no official declaration of war against either North Korea or North Vietnam. Nevertheless, the military courts ruled that both conflicts were "in time of war" for purposes of the statute of limitations. Hostilities in Korea were "in time of war" until the armistice was signed on February 27, 1953.¹²⁴ Hostilities in Vietnam were "in time of war" beginning November 3, 1964,¹²⁵ and ending on January 27, 1973.¹²⁶

Pleading Considerations

As indicated earlier, charges must be sworn and received by the officer exercising summary court-martial jurisdiction within the period of the statute.¹²⁷ Major amendments to the charges cannot be made after the running of the statute.¹²⁸ Minor amendments, however, are permissible.¹²⁹ Adding an end date to an AWOL specification is considered a minor amendment, even though to do so arguably increases the maximum punishment from a one-day AWOL, the inception date

charged, to a much longer AWOL which carries a much greater maximum punishment.¹³⁰ Major and minor amendments are discussed further at R.C.M. 603.¹³¹

The Burden of Proof

The burden of proving that the statute of limitations was properly tolled is on the government when it appears that the statute has run.¹³² The accused may waive the statute of limitations defense, but only if he or she knowingly waives the defense with full knowledge of the privilege it affords.¹³³ Indeed, the military judge has the duty, *sua sponte*, to inform the accused of his or her rights under the statute when it appears that the period of the statute has run.¹³⁴ If the accused is charged with desertion, for which there is a five-year statute of limitations, but convicted of the lesser offense of AWOL, for which there was a two-year statute of limitations, the military judge must advise the accused of the right to assert the defense in open court if it appears that the statute of limitations for the lesser offense has run.¹³⁵

Impossibility and Inability

Introduction

The defenses of impossibility and physical inability often arise in AWOL cases when a soldier is unable to return to duty through some unforeseen circumstance that is no fault of his or her own.¹³⁶ Thus, an accused who becomes ill while on leave and is therefore unable to return to duty in a timely fashion may assert the defense of physical inability.¹³⁷ By the same token, if floods, tornadoes, earthquakes, or unforeseen severe storms prevent a soldier from returning to duty in a timely fashion, the soldier may assert the defense of impossibility. The key issues in the impossibility and inability defenses turn on whether the misadventure or catastrophic event was foreseeable and on whether the soldier took reasonable measures to return after a misadventure. In the final analysis, the issue is fault.

¹²⁴ United States v. Shell, 23 C.M.R. 110 (C.M.A. 1957).

¹²⁵ United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968).

¹²⁶ United States v. Robertson, 1 M.J. 934 (N.C.M.R. 1976); United States v. Reyes, 48 C.M.R. 832 (A.C.M.R. 1974).

¹²⁷ UCMJ art. 43(b); United States v. Johnson, 3 M.J. 623 (N.C.M.R. 1977).

¹²⁸ United States v. Arsneault, 6 M.J. 182 (C.M.A. 1979).

¹²⁹ United States v. Arbic, 36 C.M.R. 448 (C.M.A. 1966). *But see* United States v. Shell, 23 C.M.R. 110 (C.M.A. 1957); United States v. Busbin, 23 C.M.R. 125 (C.M.A. 1957); United States v. Hutzler, 5 C.M.R. 661 (A.B.R. 1951); United States v. Gardenshire, 5 C.M.R. 620 (A.B.R. 1951).

¹³⁰ United States v. Reeves, 49 C.M.R. 841 (A.C.M.R. 1975).

¹³¹ Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 603 [hereinafter R.C.M.].

¹³² United States v. Morris, 28 C.M.R. 240 (C.M.A. 1959).

¹³³ United States v. Troxell, 30 C.M.R. 6 (C.M.A. 1960).

¹³⁴ United States v. Brown, 1 M.J. 1151 (N.C.M.R. 1977).

¹³⁵ R.C.M. 907(b)(2)(B); United States v. Jackson, 20 M.J. 83 (C.M.A. 1985); United States v. Cooper, 37 C.M.R. 10 (C.M.A. 1966); United States v. Wiedemann, 36 C.M.R. 521 (C.M.A. 1966).

¹³⁶ MCM, 1984, Part IV, para. 10c(6).

¹³⁷ United States v. Amic, 22 C.M.R. 304 (C.M.A. 1957) (The accused became ill and went to see a doctor. He didn't see the doctor, but did see the doctor's brother-in-law who gave him pills and recommended a few days of rest. Based upon this evidence, the defense of physical inability was raised and the accused was entitled to an instruction); United States v. Irving, 2 M.J. 967 (A.C.M.R. 1976) (conviction set aside where trial judge did not resolve the defense of physical inability raised by the defense during a plea of guilty.).

Remedial Action by the Accused

Mishaps, vehicle failures, and acts of God may prevent soldiers from returning or reporting to their duty stations in a timely fashion. Such misfortunes raise the defense of impossibility, but do not perfect it. After the unanticipated event occurs, the focus shifts back to the accused to see what reasonable steps he or she took to return to duty notwithstanding the unanticipated event. Thus, if a soldier is robbed while legitimately away from his place of duty and is unable to return to duty because of the robbery, the defense of impossibility is available.¹³⁸ If after being robbed, however, the soldier makes no attempt to return to duty and does not contact his unit, the defense may fail.¹³⁹ If one's automobile unexpectedly breaks down and prevents the soldier from returning to duty on time, the soldier may claim the defense of impossibility. If, on the other hand, the soldier could have returned to duty in a timely fashion, but elected to remain with the automobile, the defense is not available.¹⁴⁰

Foreseeable Consequences

If circumstances make a timely return to duty impossible, but the circumstances were foreseeable, the defense of impossibility is not available. Moreover, negligence is not an excuse. Thus, if a reasonable person should have foreseen circumstances making the timely return to duty impossible, the defense is not available. In *United States v. Mann*¹⁴¹ the accused got on the wrong flight and was financially unable to finance his return flight. The defense of impossibility was not available because the circumstances giving rise to the impossibility were created by the accused's own negligence. Similarly, the defense is not raised by an accused's claim that he "lost" his wallet (and failed to return during the grace period provided), because the testimony did not suggest that the loss was "through no fault of his own."¹⁴²

Impossibility Due to Civilian Confinement

As discussed above,¹⁴³ the viability of the defense of impossibility due to civilian confinement depends on

whether the accused is ultimately convicted by civilian authorities and on the accused's status at the time of the detention. If a soldier is in a "present for duty" status at the time of confinement by civilian authorities, the period of confinement will be considered unauthorized absence only if the accused is convicted¹⁴⁴ or, when charges are dismissed, if the military proves the underlying offense that resulted in the confinement.¹⁴⁵ A "conviction" includes an adjudication of delinquency¹⁴⁶ and a civil contempt order.¹⁴⁷ Indeed, in *United States v. Sprague*¹⁴⁸ the defense of inability was not available to an accused who was placed in jail for failing to make rent payments after he had told the judge he would, even though he was guilty of no criminal misconduct.

If the accused is turned over to civilian authorities pursuant to article 14, however, the absence is not "unauthorized" even if the accused is subsequently convicted.¹⁴⁹

If the accused was AWOL at the time of arrest and confinement by civilian authorities, he or she remains in an AWOL status until returned to military authority, even if the arrest results in an acquittal.¹⁵⁰

Finally, when an accused is in an authorized leave status and is arrested, confined, and subsequently convicted by civilian authorities, the period of unauthorized leave begins at the termination of the period of authorized leave.¹⁵¹ Termination of an unauthorized absence due to confinement is discussed above.¹⁵²

Conclusion

Two factors are critical to the success of any armed force: its service members must be present for duty, and they must be disciplined to ensure that they perform their duties well. Criminal sanctions for violations of the unauthorized absence offenses are critical to ensure both of these ends—presence for duty and discipline.

In time of peace the number of criminal prosecutions for unauthorized absence offenses understandably declines because the seriousness of a peacetime AWOL is

¹³⁸ *United States v. Mills*, 17 C.M.R. 480 (N.C.M.R. 1954).

¹³⁹ See *United States v. Bermudez*, 47 C.M.R. 68 (A.C.M.R. 1973). (In *Bermudez* the accused claimed he was robbed. He claimed that he attempted to borrow money to return to duty, but made no effort to contact military authorities or civilian agencies. He was AWOL approximately one year. The defense of inability was not available.)

¹⁴⁰ *United States v. Kessinger*, 9 C.M.R. 262 (A.B.R. 1952).

¹⁴¹ 12 C.M.R. 367 (A.B.R. 1953).

¹⁴² *United States v. Williams*, 21 M.J. 360 (C.M.A. 1986).

¹⁴³ See *supra* text accompanying notes 71-76.

¹⁴⁴ MCM, 1984, Part IV, para. 10c(5).

¹⁴⁵ *Id.*

¹⁴⁶ *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

¹⁴⁷ MCM, 1984, Part IV, para. 10c(5).

¹⁴⁸ 25 M.J. 743 (A.C.M.R. 1987).

¹⁴⁹ MCM, 1984, Part IV, para. 10c(5).

¹⁵⁰ *United States v. Grover*, 27 C.M.R. 165 (C.M.A. 1958); *United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974).

¹⁵¹ *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

¹⁵² See *supra* text accompanying notes 77-80.

not as great. What would be a criminal prosecution for AWOL in time of war becomes a nonjudicial punishment proceeding or administrative action in time of peace. Nevertheless, presence for duty and discipline are as essential to an army's peacetime mission as they are to the wartime mission. Moreover, this is one area of the law for which judge advocates are solely responsible. Federal and state decisions offer no guidance on the law of AWOL as they do with other matters.

The law applying to unauthorized absence offenses covers an extremely broad range of issues with which the military practitioner must be acquainted. Moreover, several areas of the law remain unsettled and invite aggressive litigation and innovative approaches. AWOL may not be a "mainstay" of the military lawyer's practice in today's Army, but it remains a very important subject. Ask any commander.

Application and Use of Post-Traumatic Stress Disorder as a Defense to Criminal Conduct

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Introduction

Although America's participation in Vietnam concluded over fifteen years ago, the struggle continues for many veterans. In one form or another, an estimated one million Vietnam veterans suffer from Vietnam Stress Syndrome, an illness more properly referred to as Post Traumatic Stress Disorder (PTSD).¹ Some of these veterans claim that PTSD caused them to commit serious crimes, and they are raising the issue of PTSD in defense or mitigation at trial. While most of the early trials involving PTSD were in the state and federal district courts, this novel defense has now appeared in a few courts-martial.

PTSD Described

PTSD is not new, just newly discovered. It wasn't until 1980 that PTSD was officially recognized as a distinct disorder by the American Psychiatric Association;² in past years the disorder may have been called "shell shock" or "battle fatigue." Spurred by the recent interest in PTSD, historian-psychologists now speculate on its effect on soldiers in the Trojan War,³ World War II,⁴ and other conflicts.

PTSD can most succinctly be defined as "a disorder which may be suffered following a traumatic event which is outside the normal realm of human experiences."⁵ Such a traumatic event can be man-

made, which would include wars and accidents, or it can result from a natural disaster. Even though a person may experience an extremely traumatic event, called a "stressor," there is no reason to assume that he or she will develop PTSD; in fact, most people do not. It has been suggested that the key factors in determining whether a person will develop PTSD are the past experiences of that individual and how well he or she deals with stress. These past experiences include a person's family background, socio-economic status, and education.⁶ Other sources believe that the likelihood of developing PTSD is determined by the amount of combat the veteran was exposed to and whether the veteran had a transition period between his return from Vietnam and his discharge from the military.⁷ For those individuals who do develop PTSD, there is usually a delayed onset; the disorder begins only after the stressor is removed or terminated and there is a period of relief.⁸ This delayed onset makes diagnosis difficult, because most sufferers of PTSD are unaware of their problem.⁹ The sporadic nature of the disorder, frequent memory loss, and a tendency by victims to rationalize their behavior combine to further conceal the malady.¹⁰ When PTSD does surface, it is likely to have been triggered by the person's experience of a situation reminiscent of the original trauma.¹¹ For the Vietnam veteran, the stimulus could be something as benign as the sound of a helicopter or the smell of diesel fuel.¹²

¹ P. Wolf, CBS Reports: The Wall Within 2 (1988).

² Auberry, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 Marq. L. Rev. 647, 649 (1985).

³ Brotherton, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 New Eng. L. Rev. 91, 92 (1981).

⁴ Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for a Controversial War*, 29 Wm. & Mary L. Rev. 415, 418-19 (1988).

⁵ Delgado, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 Loy. L.A.L. Rev. 473, 476 (1985).

⁶ Brotherton, *supra* note 3, at 102.

⁷ Delgado, *supra* note 5, at 479-80.

⁸ Brotherton, *supra* note 3, at 100.

⁹ Auberry, *supra* note 2, at 652.

¹⁰ *Id.* at 652-53.

¹¹ Brotherton, *supra* note 3, at 101.

¹² Davidson, *supra* note 4, at 429.

Fortunately, most manifestations of PTSD do not result in criminal conduct. The majority of PTSD victims relive their trauma in recollections or recurrent dreams. In the more acutely afflicted there may also be a tendency toward guilt, increased irritability, impulsive behavior,¹³ and depression.¹⁴ PTSD has also been suggested as a major cause for the abnormally high rate of suicides among Vietnam veterans.¹⁵

It is the most extreme manifestation of PTSD that results in the commission of the violent acts that have come to be associated with PTSD. This is the "dissociative state"—the flashback—in which the person unconsciously reenacts the traumatic episode.¹⁶ Frequently, the Vietnam veterans who claimed to be in a dissociative state at the time of the crime testified that they thought that they were back in Vietnam, shooting at the enemy. Unfortunately, it was frequently a bystander or police officer that was "mistaken" for the Viet Cong.

Just how prevalent dissociative states are among PTSD sufferers is in dispute. Some researchers claim it is the rarest form of PTSD and occurs only in extreme cases;¹⁷ others clearly believe that it is the most common form.¹⁸ In any event, the dissociative state seems to have become the *sine qua non* of PTSD,¹⁹ and the number of defendants seeking acquittal because of its alleged effects has steadily increased since 1980.

The Problem of Credibility

Defense counsel's approach to the use of PTSD depends not only on the facts of the case, but also on their perception of PTSD. Commentators view the application of PTSD in different ways. Some sources consider PTSD to be an exculpatory defense in its own right.²⁰ Others refer to it as a mental disorder that may be considered as a mitigating factor in sentencing, as

grounds for a new trial, or as the basis for an insanity defense.²¹ When merged with an insanity defense, a PTSD defense is most successful in those jurisdictions that have adopted the American Law Institute test for insanity.²² Under this test the PTSD veteran could be judged insane, even though he was able to appreciate the wrongfulness of his act.²³ If the same veteran is tried in a state using the *M'Naghten* test, he has the greater burden of proving that he did not understand the wrongfulness of his act or the nature and quality of his act.²⁴ In the federal courts limitations placed upon the insanity defense have, in effect, reinstated the *M'Naghten* test.²⁵

The defense can meet the burden of either test if he can convince the jury that he was in a true dissociative state. As many cases illustrate, however, this can be very difficult to prove.²⁶ An apparently normal looking defendant sitting in a courtroom may have trouble convincing a jury that his actions were compelled by his experiences in another country fifteen or twenty years ago.²⁷ Evidence of past drug abuse or propensities for violence will diminish a defendant's credibility, even though the defendant can argue that these traits are other manifestations of PTSD.

Prosecutors are generally eager to discredit and ridicule alleged "flashbacks." In *State v. Sturgeon*²⁸ the defendant shot four people in a house during what he claimed was a flashback to Vietnam. Charged with first degree murder, Sturgeon testified that he felt threatened and consequently "assumed what we call in Ranger battalion 'tactical assault mode' and engaged in responsive shooting." The prosecutor's closing argument ridiculed the defendant's claim, stating: "Ladies and gentlemen, we've got the Rambo defense going here. He assumed the 'tactical defense position'—give me a

¹³ Delgado, *supra* note 5, at 476.

¹⁴ Auberry, *supra* note 2, at 655.

¹⁵ P. Wolf, *supra* note 1, at 2.

¹⁶ Davidson, *supra* note 4, at 421.

¹⁷ Delgado, *supra* note 5, at 476.

¹⁸ Auberry, *supra* note 2, at 655.

¹⁹ *Id.* at 651.

²⁰ Brotherton, *supra* note 3, at 103.

²¹ Delgado, *supra* note 5.

²² The ALI test provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Model Penal Code § 4.01, Proposed Official Draft (May 4, 1962), quoted in *United States v. Frederick*, 3 M.J. 230, 234 (C.M.A. 1977).

²³ *Id.* at 483.

²⁴ Brotherton, *supra* note 3, at 105.

²⁵ Davidson, *supra* note 4, at 427.

²⁶ Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C.L. Rev. 305, 307 (1984).

²⁷ Davidson, *supra* note 4, at 432.

²⁸ Case No. CR86-O187 (Cir. Ct. Jackson County, Mo., Jan. 1988).

break!"²⁹ The jury convicted the defendant. The defendant's credibility in *State v. Felde*,³⁰ a classic and frequently cited case involving an alleged PTSD dissociative state, was also subjected to an acerbic attack by the prosecutor. In 1978 Wayne Felde, already imprisoned for an earlier homicide, escaped from a prison and was captured by a rookie police officer. After being placed in the rear of the patrol car, Felde pulled a concealed handgun and shot the officer to death. Felde adopted a PTSD-based insanity defense and stated that he believed that he had been captured by the North Vietnamese when he shot the police officer. According to trial testimony, Felde stated "I saw flashes, flashes like incoming rounds hit, like firecrackers, hearing machine guns, I heard machine guns, I heard rifle fire, I heard more explosions and I couldn't move."³¹ In his closing argument the prosecutor did not deny the possibility that Felde had PTSD, but he argued that Felde knew exactly what he was doing: "That man pulled the trigger four times because that man didn't want to go back to prison." Referring to a picture of the slain officer's patrol car, the prosecutor continued: "Does this look like a foxhole or a cave, or does this look like a ride back to the penitentiary? Does this look like a war scene at night or does this look like a police car with a siren on top on a four lane highway in Shreveport, Louisiana? That's a ride back to the penitentiary! Does this look like anything you see in Vietnam? Or does this look like a ride back to the penitentiary?"³² While the members of the jury demonstrated a genuine concern for the plight of Vietnam veterans such as Felde, they did not believe in his inability to distinguish right from wrong under the *M'Naghten* test; they sentenced him to death. On March 15, 1988, Felde was electrocuted in the Louisiana State Penitentiary.³³

In only one reported military case has the defendant claimed to be in a dissociative state. In *United States v. Garwood*³⁴ the celebrated Marine deserter, Robert Garwood, was charged with treasonous conduct following his return from Vietnam in 1979. Garwood claimed that while in North Vietnamese captivity he was brutalized so extensively that he went into a dissociative state, rendering him insane by military standards. The government presented contradictory psychiatric evidence and Garwood was convicted; he did not raise the issue on appeal.³⁵

The natural skepticism with which prosecutors view PTSD defenses is probably due in large part to its high potential for fabrication. Only the defendant knows for sure what was running through his mind during the course of his criminal conduct. Armed with the knowledge that evidence of PTSD is largely circumstantial and faced with a long prison term or even death if convicted, the temptation is obvious. On occasion, instances of falsified PTSD are discovered. In *People v. Lockett*³⁶ the defendant, charged with eighteen counts of robbery, pleaded not guilty by reason of PTSD-based insanity. Lockett was subsequently examined by several psychiatrists who confirmed his claims of PTSD. Apparently convinced that the defense had a winning argument, the state accepted a plea bargain. Only afterwards did prosecutors obtain and review Lockett's service records. One can only imagine their surprise when they discovered that this "traumatized" combat veteran had never served in Vietnam and, in fact, had spent his entire term of service as a clerk at Randolph Air Force Base, Texas.

The case with which a savvy defendant can fake PTSD symptoms has been recognized by medical researchers,³⁷ and there are documented instances in which a defendant's plan to fake PTSD to avoid conviction was frustrated only by his own indiscretion.³⁸ To overcome the hurdle of credibility, defense attorneys have devised some imaginative tactics.

PTSD Defense Strategy

Despite the credibility issues associated with PTSD cases, there have been some notable successes by defendants who claimed that their alleged crimes were committed while they were in a dissociative state. When coupled with an insanity plea, innovative defense tactics have sometimes provided the evidence that a jury needs to believe a defendant's testimony about flashbacks. There is still, of course, a strong need for the standard psychiatric evidence from qualified experts. The cutting edge, however, is often provided by defense counsel's use of video tapes of counseling sessions, testimony from the defendant's fellow soldiers, and films with graphic scenes of combat.³⁹ Probably the most effective evidence available to the defense is the testimony of the defendant's Vietnam comrades and commanders. Their ability to corroborate in graphic detail the defendant's

²⁹ Kansas City Times, Jan. 15, 1988, at 1B.

³⁰ 422 So. 2d 370 (La. 1982).

³¹ *Id.* at 378.

³² *Id.* at 388.

³³ Kansas City Star, Mar. 15, 1988, at 1A.

³⁴ 16 M.J. 863 (N.M.C.M.R. 1983), *aff'd*, 20 M.J. 148 (C.M.A.), *cert. denied*, 474 U.S. 1005 (1985).

³⁵ 20 M.J. 148 (C.M.A. 1985).

³⁶ 121 Misc. 2d 549, 468 N.Y.S.2d 802 (N.Y. Sup. Ct. 1983).

³⁷ Menefee, *The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights"?*, *The Army Lawyer*, Feb. 1985, at 1, 24-25.

³⁸ *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983).

³⁹ Davidson, *supra* note 4, at 437.

testimony can be invaluable.⁴⁰ Jury selection is also a key factor in planning a PTSD defense. One defense theory suggests that persons who were of draft age during the Vietnam War or who had family or friends in that age group make desirable jurors, irrespective of their particular acceptance of PTSD.⁴¹ In *State v. Mann*⁴² the defense attorney carefully crafted his PTSD insanity defense around the defendant's Vietnam service, from choosing a jury with strong feelings about the Vietnam War, to tracking down two of the defendant's former commanding officers and persuading them to testify about the ordeals of the war. Facing a long prison term for three counts of attempted murder, Mann was acquitted on the first ballot.

In other cases the defense has tried to depict the horrors of war by showing or attempting to show Army training films and segments from such popular films as "Apocalypse Now" and "The Deer Hunter."⁴³ There are limitations, however. The judge in *State v. James*⁴⁴ ruled against the admission of a commercially produced film on the grounds that the defendant did not appear in the film, that the film did not portray combat in which the defendant participated, and that the film's potential prejudicial effect outweighed its potential probative value.

If the defense can shock the jury with its testimony and films of the Vietnam War, there is some chance that a PTSD insanity defense will succeed because, as one expert put it, a mental illness resulting from combat "requires less of a 'leap of faith' on the part of the jury based upon expert opinion than do some other psychological disorders."⁴⁵

There is no doubt that a PTSD-based insanity defense has worked best when the alleged crime was spontaneous and unpremeditated—the hallmarks of the dissociative state. When the crime appears to have been premeditated and the motivation looks like old fashioned greed, the cases show that the chances of success diminish.⁴⁶ Still, there are examples when PTSD has been successfully used by defendants charged with seemingly premeditated crimes, such as narcotics smuggling and tax fraud.⁴⁷ An

unusual contrast is presented by the cases of *United States v. Krutshewski*⁴⁸ and *United States v. Tindall*.⁴⁹ Krutshewski and Tindall were both helicopter pilots in Vietnam who, after their return, formed a very profitable drug smuggling operation. At separate trials each defendant claimed to have experienced the classic dissociative state. Tindall testified that his drug smuggling flight from Morocco to Massachusetts "in many ways represented another mission."⁵⁰ Tindall's defense strategy also concentrated on how his everyday life had been adversely affected by his missions in Vietnam and his guilt when he "realized he was slaughtering innocent civilians."⁵¹ Despite the similarities of the crimes and the defenses, Krutshewski was convicted and Tindall was acquitted. Perhaps the biggest factor in Tindall's acquittal was the skill of his defense counsel and his deft handling of the emotional baggage left over from the Vietnam War. As he described it, "you play off the collective guilt of the country over Vietnam. And it works everywhere. In rural, red-neck areas, people are patriotic. And in the urban areas, they're guilt-ridden over the war."⁵²

Post-Trial Use of PTSD

If a jury is unmoved by a PTSD defense, it is possible that the judge will be more sympathetic and consider it as a mitigating factor in sentencing. If probation is not an option, defense counsel can argue for an alternative sentence with heavy emphasis on treatment and counseling.⁵³ To support such a request, it is prudent to point out the likely lack of treatment available for veterans sent to prison. To date there have been a few cases in which defendants with PTSD have successfully obtained lenient sentences, although one theory is that PTSD is less of a factor than the nature of the crime and the defendant's success in rehabilitation.⁵⁴

A major problem exists with those Vietnam veterans convicted of crimes before the benchmark year of 1980, when PTSD was officially recognized by the American Psychiatric Association. Presumably, these veterans did not have the opportunity to raise PTSD as a defense to

⁴⁰ Erlinder, *supra* note 26, at 333-34.

⁴¹ *Id.* at 334.

⁴² Case No. 82-CR-310 (Cir. Ct. Door County, Wis., Dec. 1982).

⁴³ Menefee, *supra* note 37, at 21.

⁴⁴ 459 So. 2d 1299 (La. Ct. App. 1984).

⁴⁵ Auberry, *supra* note 2, at 662.

⁴⁶ *United States v. Lake*, 709 F.2d 43 (11th Cir. 1983); *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1982); *United States v. Krutshewski*, 509 F. Supp. 1186 (D. Mass. 1981).

⁴⁷ Davidson, *supra* note 4, at 423.

⁴⁸ 509 F. Supp. 1186 (D. Mass. 1981).

⁴⁹ Case No. 79-376 (D. Mass., Sept. 19, 1980).

⁵⁰ Brotherton, *supra* note 3, at 112 (1981).

⁵¹ Menefee, *supra* note 37, at 21.

⁵² Auberry, *supra* note 2, at 664.

⁵³ *Id.* at 671.

⁵⁴ Delgado, *supra* note 5, at 500.

their charges. Similarly, some Vietnam veterans were represented after 1980 by attorneys who were unfamiliar with PTSD and consequently did not raise it as an affirmative defense during trial.⁵⁵ As information on PTSD has spread, many incarcerated veterans have sought new trials and claimed newly discovered evidence or ineffective assistance of counsel.⁵⁶

Thus far, most such efforts at obtaining a new trial have been unsuccessful.⁵⁷ One example of the problems encountered is *United States v. Stone*.⁵⁸ Stone was charged and convicted of a particularly brutal rape in 1973. At his trial he relied on an insanity defense based on "combat fatigue" and, in 1981, submitted a motion for new trial based on PTSD. The motion was dismissed as untimely, as was Stone's claim for back allowances and benefits.⁵⁹

If a defendant altogether fails to raise an insanity defense at trial and subsequently claims PTSD-based insanity on appeal, he could find himself in the "Catch-22" situation faced by the defendant in *State v. Serrato*.⁶⁰ Serrato did not plead insanity at his trial for murder, presumably because he did not realize at the time that he might be suffering from PTSD. He was convicted and his motion for a new trial was denied, in part, because of his lack of diligence in discovering new evidence. In his appeal Serrato argued that his lack of diligence in claiming PTSD-based insanity was a result of the disorder's impairment. Unmoved, the Louisiana Supreme Court affirmed the conviction, concluding that Serrato's evidence would not have changed the verdict.

One of the few military cases to raise the PTSD defense on appeal also involved a failure to raise it as a defense at trial. The defendant in *United States v. Correa*⁶¹ was convicted in a 1984 court-martial for assault with a dangerous weapon, communication of a threat, disobedience, and larceny. During the trial, Correa's civilian counsel did not raise the issue of mental responsibility or PTSD. About one year after his conviction, Correa was diagnosed as suffering from PTSD. On appeal Correa argued that, in light of his earlier exemplary and distinguished conduct, the military judge erred by failing to inquire into his sanity and that the subsequent diagnosis of PTSD should result in the dismissal of the charges and specifications against him. The issue, as framed by the Army Court of Military

Review (ACMR), was whether Correa's post trial evaluations raised the issue of his mental responsibility. The court carefully noted that the defendant's behavior and service record prior to the criminal activity were more than satisfactory and that his testimony during trial was "lucid, detailed, rational and coherent."⁶² Taking this as evidence of Correa's apparent sanity during trial, the court discounted the diagnosis of PTSD, noting that none of the evaluations indicated that the defendant lacked "substantial capacity to appreciate the criminality of his conduct or to conform his conduct" as a result of PTSD.⁶³ The court went on to detail Correa's past drinking problems and concluded that his criminal behavior was a direct consequence. The ACMR concluded that the diagnosis of PTSD was "insufficient to raise the issue of insanity" and affirmed the verdict.

Another Army case with many parallels to *Correa* is *United States v. Hagen*.⁶⁴ Hagen was an Army non-commissioned officer convicted of larceny, conspiracy, and selling government explosives and ammunition. Like SSG Correa, SGT Hagen's PTSD was not diagnosed until nearly a year after conviction. As in *Correa*, the ACMR did not dispute Hagen's claim of PTSD, but affirmed the conviction. The court was convinced of the defendant's sanity because the evidence, like that in *Correa*, included observations of the defendant's coherent testimony and unimpaired memory at trial.

One author has recently criticized the *Correa* decision, claiming that the court did not understand the PTSD defense and placed too much emphasis on the defendant's alcohol abuse. If the ACMR recognized alcohol abuse as one of the symptoms of PTSD, it did not say so. According to the critic, the court's decision "ignores the current thinking regarding PTSD."⁶⁵ Still, this tough approach seems to be the trend. Although there are instances when relief has been granted to defendants seeking to raise PTSD for the first time on appeal, the great majority have been unsuccessful.⁶⁶

The Outlook for the PTSD Defense

Use of PTSD as a defense to criminal conduct is now widespread throughout state and federal courts, with no sign of slowing down. Although some legal critics warn that too enthusiastic an acceptance could be likened to

⁵⁵ Erlinder, *supra* note 26, at 340.

⁵⁶ Auberry, *supra* note 2, at 673.

⁵⁷ Delgado, *supra* note 5, at 495.

⁵⁸ 472 F.2d 909 (5th Cir. 1973), *cert. denied*, 449 U.S. 1020 (1980).

⁵⁹ *Stone v. United States*, 4 Cl. Ct. 250 (1984).

⁶⁰ 424 So. 2d 214 (La. 1982).

⁶¹ 21 M.J. 719 (A.C.M.R. 1985), *pet. denied*, 22 M.J. 378 (C.M.A. 1986).

⁶² 21 M.J. 719, 721 (A.C.M.R. 1985).

⁶³ *Id.*

⁶⁴ CM 445028 (A.C.M.R. 25 June 1985) (unpub.), *aff'd*, 25 M.J. 78 (C.M.A. 1987).

⁶⁵ Davidson, *supra* note 4, at 433.

⁶⁶ Delgado, *supra* note 5, at 495.

"opening Pandora's Box" ⁶⁷ or creating a "G.I. Bill of Criminal Rights," ⁶⁸ most scholarly journals support it as a legitimate legal defense and encourage its use when appropriate. ⁶⁹

It is a little surprising that the military, with thousands of Vietnam combat veterans still in its ranks, has thus far produced very few reported court-martial cases involving PTSD. Neither *Garwood*, *Correa*, nor *Hagen* is a classic PTSD case, which would consist of a violent, spontaneous act committed by a Vietnam combat veteran while in an alleged dissociative state. *Correa's* crime included a spontaneous, violent act, but he did not claim to have been in a dissociative state, nor did he raise a PTSD-based insanity defense at trial. *Hagen*, on the other hand, was charged with crimes of a much more premeditated nature. He did not raise a PTSD insanity defense at trial and never claimed to have been in a dissociative state. The only one of the three to raise PTSD as a defense at trial and claim to have been in a dissociative state was *Garwood*. Unfortunately, his dissociative state and criminal conduct was so atypical of those normally associated with PTSD that *Garwood* is of little use in predicting the future success of a PTSD defense in the military.

The growing popularity of the PTSD defense among Vietnam veterans has also inspired others to attempt to expand its frontiers. In a recent Iowa case a World War

II Army veteran charged with a double murder unsuccessfully used the PTSD insanity defense, claiming that his PTSD resulted from his time spent as a prisoner of the Japanese. ⁷⁰ Meanwhile, a series of decisions by the Kansas Supreme Court allowed a Wichita woman charged with murdering her husband to introduce evidence of "battered woman syndrome," another subcategory of PTSD. Acquitted in less than ninety minutes after a nine day trial, she was the third Kansas wife to successfully use a PTSD defense in only eighteen months. ⁷¹

Innovative attorneys have even managed to find uses of PTSD in civil litigation. After the recent *Challenger* shuttle disaster, a Morton Thiokol engineer who told investigators about problems with rocket booster seals sued his employer for defamation. Charging that Morton Thiokol punished him for testifying truthfully before the Rogers Commission, the plaintiff also claimed to be disabled from "PTSD and the depression caused directly by the disaster." ⁷²

Whether or not a person accepts PTSD as a valid defense to criminal conduct, its use will no doubt continue, especially by Vietnam veterans who are tried in state or federal courts. Undaunted by its rejection in many trials, sincere Vietnam veterans will still carry its banner.

⁶⁷ Brotherton, *supra* note 3.

⁶⁸ Menefee, *supra* note 37, at 27.

⁶⁹ Davidson, *supra* note 4, at 439; Erlinder, *supra* note 26, at 345; Delgado, *supra* note 5, at 510; Auberry, *supra* note 2, at 673.

⁷⁰ Kansas City Times, July 3, 1987, at 3A.

⁷¹ Kansas City Times, Sept. 5, 1987, at 1A.

⁷² Kansas City Times, Jan. 29, 1987, at 5A.

USALSA Report

United States Army Legal Services Agency The Advocate for Military Defense Counsel

DAD Notes

Extraordinary Writs

The Special Actions Branch of the Defense Appellate Division has noticed a recent upsurge in the number of counsel interested in extraordinary relief for their clients.¹ Counsel have generally sought the same type of guidance and advice. This note will answer some frequently asked questions.²

What is a Writ?

The All Writs Act³ provides that "the Supreme Court and all courts established by act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As courts established under article I, section 8, clause 14, of the Constitution, the Court of Military Appeals and the various courts of military review have the power to issue extraordinary writs.⁴ Accordingly, an extraordinary writ is a potential means of obtaining immediate appellate review in certain situations when there has been an adverse decision or ruling by a military judge or other authority in the court-martial process.

What Types of Writs Are There?

There are four commonly used writs in military practice: mandamus, prohibition, habeas corpus, and error coram nobis.⁵ A writ of mandamus directs a party to take some type of action. A writ of prohibition either directs a party to cease doing an act or prohibits a party from performing in an intended manner. A writ of habeas corpus directs the release of a petitioner from some form of illegal confinement. A writ of error coram nobis is a review of a court's prior judgment based upon a substantial error of fact. While these four writs are most common, there is nothing particularly significant about how the writs are characterized, as the courts will

construe them according to the actual relief requested. Counsel are thus not limited to the four enumerated writs.⁶

How Are Writs Used?

Petitions for extraordinary relief have been applied to every phase of court-martial proceedings. The military courts have received petitions for extraordinary relief on a wide range of issues. The following examples, which illustrate the potential variety of issues, are recent cases considered by the military appellate courts.⁷ In *Crawford v. Mollison*⁸ the Court of Military Appeals denied a petition for extraordinary relief in the nature of a writ of mandamus and writ of prohibition. The court held that the military judge did not abuse his discretion in setting a trial date during civilian defense counsel's overseas vacation. In *Woodrick v. Divich*⁹ the Court of Military Appeals granted petitioner's writ of prohibition and enjoined the court-martial until proceedings in the civilian courts could be completed. In *Burt v. Schick*¹⁰ the Court of Military Appeals granted petitioner's writ-appeal and reversed the Army Court of Military Review's decision denying a request for extraordinary relief. The court held that the exercise of extraordinary writ jurisdiction to rule on a double jeopardy issue was appropriate; the court dismissed all charges.

In *Kempfer v. Chwalibog*¹¹ petitioner had received his discharge certificate and, it was argued, *in personam* jurisdiction was therefore lacking; the Army Court of Military Review denied petitioner's writ of mandamus requesting dismissal of all charges. In *Blake v. Overholt*¹² the Army court denied a petition for a writ of mandamus directing The Judge Advocate General to vacate the findings and sentence of petitioner's summary court martial. Finally, the Army Court of Military

¹ The Special Actions Branch (Branch 4) of the Defense Appellate Division may be contacted telephonically at Autovon 289-2195 or commercial (202) or (703) 756-2195.

² Two good starting points are: Pepler, *Extraordinary Writs in Military Practice*, 15 *The Advocate* 80 (1983); Winter, *Putting on the Writs: Extraordinary Writs in a Nutshell*, *The Army Lawyer*, May 1988, at 20.

³ 28 U.S.C. § 1651(a) (1982).

⁴ See *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *United States v. Frischolz*, 36 C.M.R. 306 (C.M.A. 1969); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

⁵ C.M.A. Rule Prac. and Proced. 4(b)(1); C.M.R. Rule Prac. and Proced. 2(b).

⁶ See *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988) (extraordinary relief in nature of an injunction); *Collier v. United States*, 42 C.M.R. 113 (C.M.A. 1970) (petition for appropriate relief).

⁷ See Pepler, *supra* note 2; Winter, *supra* note 2, for digests of earlier decisions.

⁸ 26 M.J. 233 (C.M.A. 1988).

⁹ 24 M.J. 147 (C.M.A. 1987).

¹⁰ 23 M.J. 140 (C.M.A. 1986).

¹¹ ACMR MISC 8900184 (10 Mar. 1989) (unpub.).

¹² ACMR MISC 8700941 (14 May 1987) (unpub.), *pet. denied*, 25 M.J. 161 (C.M.A. 1987).

Review has denied a request for a writ of mandamus directing a military judge to exclude from evidence petitioner's Human Immunodeficiency Virus laboratory test results.¹³

When Will the Court Grant the Writ?

The Court of Military Appeals has recently provided some insight on that court's philosophy on writs. In *United States Navy-Marine Corps Court of Military Review v. Carlucci*¹⁴ and *Unger v. Ziemniak*¹⁵ Chief Judge Everett related the historical application of the All Writs Act in the military courts. Over the past twenty years the military courts have strengthened their ability to grant extraordinary relief "when a court-martial is being conducted in violation of the accused's rights under the Constitution or the Uniform Code of Military Justice."¹⁶ While the Court of Military Appeals promotes the power of military courts to grant extraordinary relief as enhancing "the 'integrated' nature of the military court system,"¹⁷ the court also states that extraordinary writ jurisdiction is to be "exercised sparingly."¹⁸ Because the Court of Military Appeals is viewed for most purposes as the "supreme court of the military courts-martial system,"¹⁹ it is logical to conclude that the Army Court of Military Review would adhere to a similar philosophy. If anything may be concluded from such statements and the foregoing cases, it is that the military appellate courts will exercise their writ jurisdiction only in extraordinary circumstances when necessary to enhance the military justice system and to protect the rights and interests of a petitioner that cannot be adequately vindicated during the course of normal appellate review.²⁰ The most important point for counsel is that the term "extraordinary" in "extraordinary writ" means just that—extraordinary relief is granted only rarely and then only when no other action can or will protect the petitioner's interest. Captain W. Renn Gade.

Limitations on Rebuttal Evidence at Sentencing

Military sentencing procedures are not designed to duplicate federal sentencing practice, and there are well defined limits in military law as to matters that may be properly presented.²¹ In *United States v. Wingart*²² the Court of Military Appeals explained the limits of rebuttal and surrebuttal when evidence is solicited by the sentencing authority. The opinion of the court also forecloses the use of Military Rule of Evidence 404(b)²³ as a medium by which to offer aggravation evidence.

In *Wingart* the accused pled guilty before a judge alone to having committed indecent acts upon a female under sixteen years of age. The defendant was a master sergeant in the Air Force with approximately seventeen years of service. In presenting his case in aggravation, trial counsel decided against presenting the accused's Airman Performance Reports (APR's) as allowed under Rule for Courts-Martial 1001(b)(2).²⁴ Trial counsel was concerned that his presentation of this evidence would thereafter preclude him from offering other evidence attacking the defendant's character. As the court noted, a "prosecutor cannot offer 'rebuttal' to his own evidence."²⁵ Wary of trial counsel's impending ambush, defense counsel did not present any favorable evidence and elected only to have the accused make an unsworn statement. At this point, the military judge was noticeably frustrated and ordered the admission of these APR's on his own initiative. Both government and defense counsel challenged the *sua sponte* actions of the military judge, but their objections were overruled. Once the Sword of Damocles was released, however, trial counsel brought the accused's ex-wife to the stand in rebuttal of the evidence of good character solicited by the military judge. The ex-wife related that three years earlier she had discovered photographic slides on the night stand adjacent to the accused's side of the bed. The slides were of a former neighbor, a young girl who

¹³ *Sergeant v. Saynisch*, ACMR MISC 8702234 (19 Nov. 1987) (unpub.); *Stewart v. Naughton*, ACMR MISC 8702520 (23 Nov. 1987) (unpub.).

¹⁴ 26 M.J. 328 (C.M.A. 1988).

¹⁵ 27 M.J. 349 (C.M.A. 1989).

¹⁶ *Id.* at 353.

¹⁷ *Id.* (quoting *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976)).

¹⁸ *Unger*, 27 M.J. at 355. However, in both *Unger* and *Carlucci*, the Chief Judge refers to Professor Cooper's suggestion that "the Court of Military Appeals should be more liberal than other courts in exercising its extraordinary-writs jurisdiction." *Id.* at 355 n.12; see also *Carlucci*, 26 M.J. at 331 n.5.

¹⁹ *McPhail*, 1 M.J. at 460.

²⁰ Which of these factors weighs most heavily, or whether they stand on equal footing, is not clear.

²¹ See Gonzalez, *A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense?*, *The Army Lawyer*, Sept. 1988, at 37.

²² 27 M.J. 128 (C.M.A. 1988).

²³ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid.].

²⁴ "Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's . . . character of prior service. Such evidence includes copies of the reports reflecting past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15." Manual for Courts-Martial, 1984, Rule for Courts-Martial 1001(b)(2) [hereinafter R.C.M.].

²⁵ 27 M.J. at 131 (citing R.C.M. 1001(d)).

was an Air Force dependent, and depicted various stages of undress and provocative poses. Both the testimony and the slides were admitted into evidence against the accused as evidence in rebuttal and as matters in aggravation under R.C.M. 1001(b)(4).²⁶

In finding that the "rebuttal" evidence was improperly considered, the Court of Military Appeals did not take issue with the authority of the military judge or members to request these APR's or any similar matters. The reports of good military character, however, were not matters presented by the defense and could not be the subject of rebuttal by the government.²⁷

Although the opinion noted that the rules of evidence may be relaxed as to rebuttal or surrebuttal under R.C.M. 1001(d), this provision is only applicable after the defense has in fact elected to present matters under such relaxed rules of evidence. More importantly, such relaxed rules of evidence relate only to "authenticity or reliability" and will not be permitted to extend the permissible scope of evidence.²⁸

The Court of Military Appeals also addressed the other theory of admissibility (i.e., the slides and related testimony were admissible as proper aggravation evidence under R.C.M. 1001(b)(4)).²⁹ In ruling on the objection below, the military judge had found that "the photographs demonstrate that the accused has a sexual appetite for children."³⁰ Obviously, the military judge was ruling that this evidence was also admissible on sentencing because it could have been used to prove intent, knowledge, or absence of mistake in a contested case.³¹

After considering prior precedent and the intent behind the Manual, the court in *Wingart* concluded that R.C.M. 1001(b)(4) did not authorize the "admission of evidence of uncharged misconduct merely because under

some circumstances that evidence might be admissible in a contested case."³² The court stated that evidence admissible under Mil. R. Evid. 404(b) was of no consequence to the determination of an appropriate sentence. The governing standard is Mil. R. Evid. 401.³³ For evidence presented pursuant to R.C.M. 1001(b)(4), relevance means that there must be some purpose for its reception "other than to show that the accused is predisposed to commit the crime."³⁴ In other words, the evidence must prove something more than that the accused is willing to commit the crime or engage in other criminal activity for the sake of being nefarious. Basically, the sentencing authority must be reasonably informed about the severity of the crime, what the accused might have done, or was prepared to do to perpetuate the crime.³⁵ The purpose of R.C.M. 1001(b)(4) has never been to measure the relative evil of the individual involved. Judgments of goodness or badness are to be made or inferred from personnel records, prior records of punishment, convictions, or permissible opinion testimony.

Finally, the court also noted that R.C.M. 1001(b)(5)³⁶ does allow inquiry into specific instances of conduct on cross-examination, but that rule of procedure does not permit extrinsic evidence for the purpose of demonstrating the extent of an accused's rehabilitative potential.³⁷ Instead, R.C.M. 1001(b)(5) is designed to allow those individuals with special insight to communicate their beliefs as to an accused's rehabilitative potential.³⁸ Inquiry into specific acts of conduct is allowed only to test the validity of that insight.

The erroneous admission of the evidence in *Wingart* was not harmless. Despite the fact that the proceedings against the accused were conducted by military judge alone, the Court of Military Appeals nonetheless concluded that the reception of this evidence was prejudicial

²⁶ "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offense of which the accused has been found guilty." R.C.M. 1001(b)(4).

²⁷ Testimony of witnesses called by the sentencing authority were likewise not subject to government rebuttal. *Wingart*, 27 M.J. at 133.

²⁸ *Id.* at 134.

²⁹ *Id.* at 131.

³⁰ *Id.* at 134.

³¹ See Mil. R. Evid. 404(b).

³² *Wingart*, 27 M.J. at 135.

³³ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.

³⁴ *Wingart*, 27 M.J. at 136.

³⁵ Hence the term "directly related" to the offenses so that the sentencing authority can determine the aggravated nature of the crime committed. Of course, any evidence that meets the relevance test described above must also be tested under Mil. R. Evid. 403. For example, a drug dealer with a cache of automatic weapons in his trunk could expect to have his possession of these contraband items used against him during sentencing because he may have been willing to resort to violence in order to be successful in his criminal endeavors. The drug dealer, however, who possesses a sealed crate of automatic weapons for shipment to some third party, should not find this evidence used against him because his possession of contraband items at the time of the sale bore no relation to the charged offense.

³⁶ R.C.M. 1001(b)(5) read as follows:

Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

³⁷ *Wingart*, 27 M.J. at 136.

³⁸ See *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986).

error. This was true even though the military judge specifically limited his consideration of the evidence to the issue of the accused's rehabilitative potential.³⁹

In limiting consideration of these extrinsic matters, the court cautioned that R.C.M. 1001 is not meant to emulate the federal presentence report.⁴⁰ Analogies to federal practice should be kept in perspective. Only in recent history has the affirmative presentation of aggravation evidence been allowed in military jurisprudence. Viewed from that perspective, aggravation evidence, may appear today to more greatly resemble the federal presentence process, but in reality, as *Wingart* aptly demonstrates, presentencing in the military remains tightly controlled by its adversarial nature. Moreover, under *Wingart*, trial defense counsel has significant ability to control the course of presentencing proceedings and the nature of evidence presented. Captain Ralph L. Gonzalez.

The Absent Accused: Gone But Not Forgotten

In some cases defense counsel may be faced with representing an accused who is *in absentia*. The Military Judges' Benchbook⁴¹ does not contain a standard instruction for this situation. The most frequently used instructions are formulated from the Navy Court of Military Review's decision in *United States v. Minter*⁴². In *Minter* the Navy court addressed the issue concerning what instructions should be given to members when the military judge has found that an accused is voluntarily absent from trial, such that the court-martial may proceed with the accused *in absentia*. In holding that it was error to inform the members that the military judge had found the accused's absence to be voluntary and unauthorized, the Navy court proposed an instruction that provided in pertinent part:

In this regard you are advised that you are not permitted to speculate as to why the accused is not present in court today. . . . You may neither impute to the accused any wrongdoing generally, nor impute to him any inference of guilt as respects his non-appearance here today. Further, should the accused be found guilty of any offense presently before this tribunal, you must not consider the

accused's non-appearance before this tribunal in any manner when the court closes to deliberate upon the sentence to be adjudged.⁴³

Despite its broad pronouncement that an accused's absence from his court-martial could not be considered in any manner when determining a sentence, the Navy court subsequently found in *United States v. Chapman*⁴⁴ that a military judge could consider an accused's unauthorized absence from trial as a matter during sentencing as relevant to his lack of rehabilitative potential.

In a recent decision, *United States v. Denney*,⁴⁵ the Army Court of Military Review extended that holding to sentencing by members.⁴⁶ In *Denney* the accused was tried *in absentia* by a court composed of officer members. During sentencing, the trial counsel offered into evidence, over defense objection, a Department of the Army Form (DA) 4187 reflecting that the accused absented himself without leave after arraignment. The Army Court of Military Review held that the DA 4187 was admissible as a personnel record of the accused pursuant to Rule for Courts-Martial 1001(b)(2).⁴⁷ More importantly, however, the court found that the accused's misconduct was already before the members due to the "conspicuity" of the accused's absence; therefore, the consideration of this evidence on sentencing was not dependent upon its admission under any subsection of R.C.M. 1001 because it was not a "new matter" being offered by the prosecution.⁴⁸ The court held that because there is a reasonable probability that an accused's obvious absence will be considered as proof of guilt, the military judge has a *sua sponte* duty to instruct the members that it cannot be so considered. Further, the military judge has a *sua sponte* duty to restrict the use of the evidence in sentencing deliberations by instructing the members that use of the evidence must be limited to determining rehabilitative potential.⁴⁹

To the extent that the Army Court of Military Review views an accused's absence as representing misconduct to the members, the Army court's decision is at odds with the Navy court's decision in *Minter*. *Minter* held it was error to tell the members that the accused's absence was found by the military judge to be voluntary and unauthorized and that the error could be avoided by simply

³⁹ R.C.M. 1001(b)(5).

⁴⁰ *Wingart*, 27 M.J. at 136-37.

⁴¹ Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982) [hereinafter Benchbook].

⁴² 8 M.J. 867 (N.C.M.R. 1980).

⁴³ *Minter*, 8 M.J. at 869.

⁴⁴ 20 M.J. 717 (N.M.C.M.R. 1985), *aff'd*, 23 M.J. 226 (C.M.A. 1986) (summary disposition).

⁴⁵ 28 M.J. 521 (A.C.M.R. 1989).

⁴⁶ The Navy court in *Chapman* stated in *dicta* that court members may consider an unauthorized absence for the same purpose. *Chapman*, 20 M.J. at 718.

⁴⁷ *Denney*, 28 M.J. at 525. The court did not consider absences from trial aggravating *per se* such that this type of evidence would generally be admissible under R.C.M. 1001(b)(4). The court additionally commented with favor on the military judge's rejection at trial of R.C.M. 1001(b)(5) as a basis for introduction of the misconduct. *Id.* at 524.

⁴⁸ *Id.* at 524.

⁴⁹ *Id.*

advising the members that the accused had chosen to waive his right to be present in court.⁵⁰ The proper instruction suggested in *Minter* is prefaced with the following explanation:

Under the law applicable to trials by court-martial, various circumstances may exist whereby a court-martial can proceed to findings and sentence, if appropriate, without the accused being present in the courtroom. I have determined that one or more of these circumstances exists in this case.⁵¹

This is consistent with R.C.M. 804, which recognizes that an accused may be properly absent by express waiver, if there is no objection.⁵² Thus, an accused's conspicuous absence from his trial will not lead to an inference of misconduct if the members are properly instructed at the outset. It is important for defense counsel to recognize that, if the government is unable to produce evidence admissible pursuant to R.C.M. 1001, the absence can only be considered for sentencing if it is already before the members, and this will not be the case in those instances where the military judge uses the *Minter*-type instruction.

When the accused's unauthorized absence is brought to the attention of the members, defense counsel should ensure, consistent with *Minter* and *Denney*, that the proper instructions are given. This normally includes an instruction that the absence may not be used as proof of guilt when determining findings.⁵³ Additionally, when trial counsel offers the accused's absence as a matter in aggravation, this should include an instruction to the effect that the absence may not be used as the basis for increased punishment, but is strictly limited to a role in determining rehabilitative potential. Further, trial defense counsel may wish to advance a *Minter*-based request for preliminary instructions that the accused's absence is merely a waiver of the right to appear, that the accused's absence is, thus, not really a matter "before the members," and, consequently, that the absence should not be considered for any purpose during sentencing. This approach is based on *Minter*, however,

and is not supported by *Denney*, which indicates that the absence is, in essence, automatically before the members regardless of R.C.M. 1001.

In addition to requests for instructions, defense counsel should consider presenting evidence to the members concerning the possible involuntariness of the accused's absence. Whether the absence is voluntary for the purposes of proceeding with the court-martial is a preliminary matter normally determined by the military judge out of the presence of the court members.⁵⁴ Therefore, the members are not usually in a position to assess the weight of the government's evidence concerning the voluntariness of the absence. Consequently, although the members may consider the absence as it reflects on rehabilitative potential, defense counsel may try to convince the members not to do so by re-litigating during sentencing the nature and cause of the absence.⁵⁵

There is a real possibility that an accused who is absent from his or her court-martial will be punished by the members for the absence. Defense counsel can ensure that their clients are not impermissibly punished under these circumstances if they: 1) are aware of the ways in which an accused's absence may come to the attention of members; 2) request appropriate instructions; and 3) litigate the voluntariness of the absence before the members when appropriate. Captain Timothy P. Riley.

Quillen Revisited

On December 6, 1988, in *United States v. Quillen*,⁵⁶ the Court of Military Appeals applied the exclusionary rule of article 31(d)⁵⁷ to statements taken by a store detective of the Army-Air Force Exchange Service (AAFES) without a prior article 31(b)⁵⁸ rights advisement. Ten days later, on December 16, 1988, the government petitioned for reconsideration, arguing that the opinion significantly misapprehended the law regarding whether an individual is "subject to this chapter" within the meaning of article 31,⁵⁹ and that the holding represented a serious and unwarranted threat to effective law enforcement in the military.⁶⁰ The government

⁵⁰ *Minter*, 8 M.J. at 869.

⁵¹ *Id.*

⁵² R.C.M. 804(b)(2) discussion.

⁵³ In some instances this may not be the case. The absence may be admissible during the findings portion of the trial to establish a matter relevant pursuant to Mil. R. Evid. 404(b). See *United States v. Denney*, 28 M.J. at 524 n.2; see generally *United States v. Wingart*, 27 M.J. 128, 134-35 (C.M.A. 1988).

⁵⁴ This was the case in *Denney*. See 28 M.J. 524 n.1. See also R.C.M. 804 discussion (burden to establish voluntary absence is on government by preponderance of the evidence).

⁵⁵ *Cf. United States v. Warren*, 13 M.J. 278 (C.M.A. 1982) (members may consider accused's mendacity as indication of rehabilitative potential if they conclude that accused did lie and that the lie was willful and material); Mil. R. Evid. 304(e)(1) and (2) (military judge may receive statement into evidence if found voluntary by preponderance of the evidence; however, defense counsel shall be permitted to present evidence and judge shall instruct members to give statement such weight as it deserves). Nothing in R.C.M. 804 appears to require that the issue be litigated out of the presence of the court members. Defense counsel may desire to request that the government establish the voluntary absence in the members' presence in the interest of judicial economy, if the absence is to be offered by the government as a matter to be considered by the members on sentencing.

⁵⁶ 27 M.J. 312 (C.M.A. 1988).

⁵⁷ Uniform Code of Military Justice art. 31(d), 10 U.S.C. § 831(d) (1982) [hereinafter UCMJ].

⁵⁸ UCMJ art. 31(b).

⁵⁹ UCMJ art. 31.

⁶⁰ Appellate Government Division, United States Air Force, submitted an *amicus curiae* brief in support of this proposition.

argued that the AAFES store detective in question was not working at the behest of the military authorities, in furtherance of the military's duty to investigate crimes at base exchanges, or as an agent of the military for purposes of investigating crimes at base exchanges. Additionally, the government argued that the court's decision created a dangerous precedent, converting every civilian employee of the military with some duty to safeguard property or funds into an agent of the military for article 31 purposes.

On February 27, 1989, the Court of Military Appeals denied the petition for reconsideration, holding that they had not "overlooked or misapprehended" any point of law or fact, and rejecting the argument that their

decision created any broad rule applicable to other government employees or in other contexts outside the particular fact situation described in the original opinion.⁶¹

In light of the court's rejection of the government's petition for reconsideration, trial defense counsel should consider arguing that *Quillen* applies to similar situations of interrogations by civilian employees who have a duty to notify and cooperate with military authorities. Although the Court of Military Appeals has indicated that *Quillen* is limited to its facts, it certainly is precedent of the court that is available to be argued and applied in other similar circumstances. Captain Lauren B. Leeker.

⁶¹ *United States v. Quillen*, Dkt. No. 56,616/AR, (C.M.A. 27 Feb. 1989).

Government Appellate Division Notes

Government Appeals: A Trial Counsel's Guide

Captain John J. Hogan

Government Appellate Division

Introduction

Article 62, UCMJ,¹ and Rule for Courts-Martial 908,² authorize the government to pursue interlocutory appeals of adverse rulings by military judges in courts-martial empowered to adjudge punitive discharges. Until the Military Justice Act of 1983³ amended article 62, UCMJ, the government had no statutory right to appeal adverse rulings at the trial level.⁴ By comparison, government appeals had been a long-standing practice in federal criminal prosecutions.⁵ The legislative history of article 62, UCMJ, indicates that Congress intended the provision to parallel 18 U.S.C. § 3731, which provides for government interlocutory appeals in federal criminal cases.⁶ As a result of the similarity between the two statutes, the military appellate courts have turned to federal decisions construing 18 U.S.C. § 3731 for guidance in applying the provisions of R.C.M. 908.⁷

Although the article 62, UCMJ, appeal has been a part of military practice for almost five years, such appeals are not frequent in Army court-martial practice. Nevertheless, experience has shown that the trial counsel's efforts at trial, more so than subsequent efforts by government appellate counsel, are critical to the ultimate success of the government appeal. Accordingly, the

purpose of this article is to assist trial counsel in understanding the procedural requirements of R.C.M. 908 and regulatory requirements of Army Regulation 27-10⁸ and to provide a digest of the case law that has developed in this area.

What May Be Appealed

The provisions of subsection (a)(1) of article 62, UCMJ, and subsection (a) of R.C.M. 908, which are identical, state:

In a trial by court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

The threshold requirements address the type of proceeding from which a government appeal may be taken. The government may only appeal from a proceeding in

¹ Uniform Code of Military Justice, article 62, 10 U.S.C. § 862 (Supp. IV 1986) [hereinafter UCMJ].

² Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908 [hereinafter R.C.M.].

³ Pub. L. No. 98-209, 97 Stat. 1393 (1983).

⁴ Dep't of Army, Pam. 27-173, Trial Procedure, para. 23-2 (15 Feb. 1987) [hereinafter DA Pam. 27-173].

⁵ Cooley & Scott, *The Role of the Prosecutor in Government Appeals*, *The Army Lawyer*, Aug. 1986, at 38, 39-40.

⁶ S. Rep. No. 53, 98th Cong. 1st Sess. 23 (1983).

⁷ See, e.g., *United States v. True*, 26 M.J. 771 (N.M.C.M.R. 1988), *rev'd*, 28 M.J. 1 (C.M.A. 1989).

⁸ Army Reg. 27-10, Legal Services: Military Justice, para. 13-3 (16 Jan. 1989) [hereinafter AR 27-10].

which a military judge presides over a court-martial empowered to adjudge a punitive discharge.

There are two types of orders or rulings that may be the basis for appeal under article 62, UCMJ, and R.C.M. 908. The first type terminates the proceedings as to a charge or specification. The most common ruling in this category is dismissal pursuant to a pretrial motion to dismiss based on lack of jurisdiction,⁹ denial of speedy trial,¹⁰ statute of limitations,¹¹ or failure to state an offense.¹²

Until the recent decision by the Court of Military Appeals in *United States v. True*,¹³ it was unclear whether a military judge's order to abate a proceeding qualified for appellate review under article 62, UCMJ.¹⁴ In *True* the accused submitted, prior to arraignment, a request for an expert witness, which was later redesignated as a request for expert investigative assistance. In response, the government offered four alternative experts, none of whom, according to the military judge, matched the stature or qualifications of the expert specifically requested. The military judge granted the defense request to employ the expert. The government moved for reconsideration, but the military judge reaffirmed his ruling. When the government stated that the convening authority refused to pay the fee for the expert's services, the military judge, upon defense request, abated the proceedings.¹⁵ On appeal, the Navy-Marine Corps Court of Military Review held that the military judge's abatement order was not the proper subject of a government appeal and denied the appeal. The Navy court reasoned that because abatement was neither a termination of the proceedings nor an exclusion of material evidence within the meaning of article 62(a), UCMJ, the court lacked jurisdiction to entertain the appeal.¹⁶ The Judge Advocate General of the Navy certified the issue to the Court of Military Appeals.¹⁷

Judge Sullivan, writing for the court, held that the abatement order was "the functional equivalent of a ruling of a military judge which terminates the proceedings' under Article 62(a)" and was, therefore, a proper subject for a government appeal.¹⁸

The second type of order or ruling that may be the basis for appeal under article 62, UCMJ, and R.C.M. 908 excludes evidence that is substantial proof of a fact material in the proceedings. The most common ruling in this category is the suppression or exclusion of evidence under the Military Rules of Evidence.¹⁹ For example, cases in this category include orders for the exclusion or suppression of urinalysis test results,²⁰ human immunodeficiency virus (HIV) test results,²¹ illegal drugs seized in a command authorized search,²² and an accused's confession.²³ The denial of a government-requested continuance to produce a material witness does not constitute the exclusion of evidence and is therefore not subject to appeal under article 62, UCMJ.²⁴

Article 62, UCMJ, and R.C.M. 908 prohibit appeals from orders or rulings that are, or amount to, findings of not guilty as to a charge or specification. The order or ruling and the attendant circumstances must be closely scrutinized to determine whether a government appeal is prohibited under this provision. The primary concern is that the order or ruling does not fall within the scope of the double jeopardy clause of the Constitution and its corresponding UCMJ provision, article 44.²⁵

Procedure

When the military judge issues an appealable ruling or order, trial counsel may request a continuance of no more than seventy-two hours.²⁶ During the seventy-two hour continuance, the general court-martial convening authority or the staff judge advocate must decide

⁹ *United States v. King*, 27 M.J. 327 (C.M.A. 1989); *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985), *aff'd*, 21 M.J. 251 (C.M.A. 1986), *aff'd* 483 U.S. 435 (1987).

¹⁰ *United States v. Bradford*, 24 M.J. 831 (N.M.C.M.R. 1987), *aff'd*, 25 M.J. 181 (C.M.A. 1987).

¹¹ *United States v. Frage*, 26 M.J. 924 (N.M.C.M.R. 1988), *aff'd*, *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988).

¹² *United States v. Woods*, 27 M.J. 749 (N.M.C.M.R. 1988); *United States v. Ermitano*, 19 M.J. 626 (N.M.C.M.R. 1984).

¹³ *United States v. True*, 28 M.J. 1 (C.M.A. 1989) (Everett, C.J., dissenting).

¹⁴ *True*, 26 M.J. 771 (N.M.C.M.R. 1988).

¹⁵ *True*, 28 M.J. at 2.

¹⁶ *True*, 26 M.J. at 772-73.

¹⁷ *True*, 28 M.J. at 2.

¹⁸ *Id.*

¹⁹ Manual for Courts-Martial, 1984, Mil. R. Evid. [hereinafter Mil. R. Evid.].

²⁰ See, e.g., *United States v. Pollard*, 26 M.J. 947 (C.G.C.M.R. 1988), *aff'd*, 27 M.J. 376 (C.M.A. 1989); *United States v. Valenzuela*, 24 M.J. 934 (A.C.M.R. 1987).

²¹ *United States v. Morris*, 25 M.J. 579 (A.C.M.R. 1987).

²² *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985).

²³ See, e.g., *United States v. Yates*, 23 M.J. 575 (N.M.C.M.R. 1986), *aff'd*, 24 M.J. 114 (C.M.A. 1987).

²⁴ *United States v. Browsers*, 20 M.J. 542 (A.C.M.R. 1985), *rev'd*, 20 M.J. 356 (C.M.A. 1985).

²⁵ See *id.* at 549-52.

²⁶ R.C.M. 908(b)(1); *Browsers*, 20 M.J. at 551.

whether to file a notice of appeal.²⁷ Upon authorization, the trial counsel files, pursuant to R.C.M. 908(b)(3), a written notice of appeal with the military judge. The notice of appeal must be filed within seventy-two hours of the ruling or order.²⁸ Failure to file timely notice is fatal to the government's right to appeal.²⁹ The notice of appeal must identify the ruling or order to be appealed and the charges and specifications affected. The trial counsel must certify that the appeal is not taken for the purposes of delay. If the order or ruling appealed is one that excludes evidence, the trial counsel must also certify that the excluded evidence is substantial proof of a fact material in the proceeding.³⁰ Additionally, the certificate of notice of appeal must reflect the date and time of the military judge's ruling or order from which the appeal is taken and the date and time of service on the military judge.³¹

It is unclear what effect, if any, a request for reconsideration pursuant to R.C.M. 905(f) will have on the government's right to appeal under the provisions of article 62, UCMJ, and R.C.M. 908. Neither the Army regulation, the Manual, nor the UCMJ addresses the interrelationship of these provisions. Moreover, the case law provides scant guidance on the issue. Prior to requesting reconsideration of an order or ruling, trial counsel should contact Branch IV, Government Appellate Division, United States Army Legal Services Agency. Coordination with government appellate counsel will ensure that a complete factual record is established and that all alternative legal theories are presented to the military judge in the event a government appeal is pursued.

Service of the written notice of appeal on the military judge stays the trial proceedings until the matter is disposed of by the Army Court of Military Review. The proceedings may continue, however, as to any charges and specifications not affected by the ruling or order under appeal. In the military judge's discretion, other motions may be litigated. When the trial has not reached the merits, charges may be severed upon the request of all the parties or upon the request of the accused, if appropriate under R.C.M. 906(b)(10). If the trial on the merits has begun but has not been completed, the military judge may, in his or her discretion, grant a party's request to present further evidence on the merits of the charges and specifications unaffected by the appeal.³²

Upon written notice to the military judge, the trial counsel must also cause a verbatim record of trial to be prepared. The record must be sufficiently complete to the extent necessary to resolve the issues appealed. The record must be prepared in compliance with R.C.M. 1103(g) (number of copies), (h) (security classification), and (i) (examination by the parties), and must be authenticated pursuant to R.C.M. 1104(a). The military judge or the Army Court of Military Review may direct that additional parts of the proceeding be included in the record.³³

After the written notice of appeal is served on the military judge, the trial counsel must promptly forward the appeal to the Chief, Government Appellate Division, United States Army Legal Services Agency. The appeal packet must include: 1) a statement of the issues appealed; 2) the original and three copies of the verbatim record of trial (only those portions of the record that relate to the issue to be appealed) or, if the record has not been completed, a summary of the evidence; and 3) a copy of the certificate of notice of appeal served on the military judge.³⁴ The appeal packet must reach the Chief, Government Appellate Division, within twenty days from the date written notice of appeal is filed with the trial court.³⁵

After coordination with the Assistant Judge Advocate General for Military Law, the Chief, Government Appellate Division, will decide whether to file the appeal with the Army Court of Military Review and will notify the trial counsel of this decision.³⁶ Under the internal operating procedures of the Army Court of Military Review, the Chief, Government Appellate Division, has twenty days after receiving the packet to decide whether to pursue the appeal. If no appeal is pursued, the Government Appellate Division will notify the convening authority or staff judge advocate of the reasons for the decision. If the appeal is not filed, the trial counsel must promptly notify the military judge and the defense.³⁷

Appellate Proceedings

On appeal, the parties are represented by counsel from the Government and Defense Appellate Divisions of the United States Army Legal Services Agency. Government counsel are expressly directed by both article 62(a)(3), UCMJ, and R.C.M. 908(c)(1) to "diligently" prosecute the appeal. Whenever practicable, the Army Court of

²⁷ AR 27-10, para. 13-3a.

²⁸ UCMJ art. 62(a)(2); R.C.M. 908(b)(3).

²⁹ *United States v. Mayer*, 21 M.J. 504, 505-06 (A.F.C.M.R. 1985).

³⁰ R.C.M. 908(b)(3).

³¹ AR 27-10, para. 13-3b.

³² R.C.M. 908(b)(4).

³³ R.C.M. 908(b)(5).

³⁴ R.C.M. 908(b)(6); AR 27-10, para. 13-3c.

³⁵ AR 27-10, para. 13-3c.

³⁶ AR 27-10, para. 13-3a.

³⁷ R.C.M. 908(b)(8).

Military Review is required to give an appeal filed by the government priority over all other pending proceedings.³⁸

In deciding government appeals, the Army Court of Military Review may act only with respect to matters of law.³⁹ The court cannot utilize its fact-finding authority under article 66(c), UCMJ.⁴⁰ Therefore, trial counsel must ensure that the facts are developed sufficiently during trial to enable the court to rule on the issues subject to appeal. Likewise, to facilitate review of the issues on appeal, it is essential that the military judge render findings of fact and conclusions of law pursuant to R.C.M. 905(d).

Following a decision by the Army Court of Military Review, the Clerk of Court will notify the military judge and the convening authority, who are required to cause the accused to be notified promptly.⁴¹ After the decision, the accused may petition for review by the Court of Military Appeals, or The Judge Advocate General may certify the question to the Court of Military Appeals.⁴²

If the decision is adverse to the accused, the accused must be notified of the decision and of the right to petition the Court of Military Appeals for review within sixty days. The accused may be notified orally on the record at the court-martial or in writing in accordance with R.C.M. 1203(d).⁴³ In either case, the trial counsel must forward to the Clerk of Court a certificate that the accused was so notified, specifying the date and method of notification.⁴⁴

If the appellate decision permits it, the trial may proceed as to the affected charges and specifications, pending further review by the Court of Military Review or the Supreme Court. Either court may order the proceedings stayed pending further appellate review.⁴⁵

Practice Considerations

As discussed above, the Army Court of Military Review is constrained from utilizing its fact-finding authority under article 66(c), UCMJ.⁴⁶ Anything less than a complete and thorough factual record will undermine the government's efforts to prevail on appeal of the issues in dispute. In Judge Cox's words, "it is not

for the appellate courts to launch a rescue mission" when the government fails to establish a proper record.⁴⁷

The best approach is to establish the factual framework by presenting all reasonably available evidence that supports prosecution offers of proof on any and all contested issues. This approach should reduce the chance that a trial court will arrive at factual findings adverse to the government. A fully developed factual record will also provide the information needed by the appellate courts, who may be inclined to find a legal error based on the trial judge's assessment of the facts.⁴⁸

During litigation the trial counsel should advocate the broadest number of theories reasonably possible. This may not only persuade the trial court, but may also provide an alternative theory or basis for argument on appeal in the event the government's primary theory at trial is unsuccessful.⁴⁹

When feasible, trial counsel should furnish the trial court with a trial brief identifying the government's position on the facts and setting out the applicable principles and case law upon which the government relies.⁵⁰

Conclusion

While government appeals have been infrequent in Army court-martial practice and many trial counsel do not have an opportunity to participate in a government appeal, all trial counsel should be aware of the statutory and regulatory provisions governing the process. This article is offered as a starting point; however, trial counsel are encouraged to consult immediately with Government Appellate Division when involved in a potential government appeal. Close cooperation between trial counsel and government appellate counsel will ensure the best possibility for success in any government appeal.

Case Digest

In the almost five years that the government appeals process has been a part of military practice, a variety of cases have been decided. Among them is the United States Supreme Court's decision in *Solorio v. United*

³⁸ UCMJ art. 62(b); R.C.M. 908(c)(2).

³⁹ *Id.*

⁴⁰ UCMJ art. 62(b).

⁴¹ AR 27-10, para. 13-3d.

⁴² R.C.M. 908(c)(3).

⁴³ *Id.*

⁴⁴ AR 27-10, para. 13-3d.

⁴⁵ R.C.M. 908(c)(3).

⁴⁶ UCMJ art. 62(b).

⁴⁷ *United States v. Burris*, 21 M.J. 140, 145 (C.M.A. 1985).

⁴⁸ *Cooley & Scott*, *supra* note 5, at 45.

⁴⁹ *Id.*

⁵⁰ *Id.*

States,⁵¹ which originated as a government appeal of the trial court's dismissal for lack of subject matter jurisdiction. The following case digest is categorized by subject matter to enable trial counsel to review the issues appealed to date under the provisions of article 62, UCMJ, and R.C.M. 908. These cases provide a starting point from which trial counsel may research and analyze future government appeals pursued under article 62, UCMJ, and R.C.M. 908.

Abatement Order

United States v. True, 26 M.J. 924 (N.M.C.M.R. 1988), *rev'd*, 28 M.J. 1 (C.M.A. 1989).

AIDS

United States v. Woods, 27 M.J. 749 (N.M.C.M.R. 1988).

United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987).

Amendment of Charges

United States v. Blair, 21 M.J. 981 (N.M.C.M.R. 1986).

Confessions

United States v. McClelland, 26 M.J. 504 (A.C.M.R. 1988).

United States v. St. Clair, 19 M.J. 833 (N.M.C.M.R. 1984).

Corroboration of Accused's Confession

United States v. Yates, 23 M.J. 575, (N.M.C.M.R. *aff'd*, 24 M.J. 114 (C.M.A. 1987).

United States v. Podusczak, 20 M.J. 627 (A.C.M.R. 1985).

Defective Preferral

United States v. Frage, 26 M.J. 924 (N.M.C.M.R. 1988), *aff'd*, *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1989).

Defective Pretrial Advice

United States v. Harrison, 23 M.J. 907 (N.M.C.M.R. 1987).

Denial of Continuance

United States v. Browers, 20 M.J. 542 (A.C.M.R. 1985), *rev'd*, 20 M.J. 356 (C.M.A. 1985).

Failure to State an Offense

United States v. Ermitano, 19 M.J. 626 (N.M.C.M.R. 1984).

Hearsay

United States v. Mayer, 21 M.J. 504 (A.F.C.M.R. 1985).

Immunized Testimony

United States v. Tucker, 20 M.J. 602 (N.M.C.M.R. 1985).

Jencks Act

United States v. Derrick, 21 M.J. 903 (N.M.C.M.R. 1986).

Jurisdiction

1. Service Connection

a. *United States v. Abell*, 23 M.J. 99 (C.M.A. 1986).

b. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985), *aff'd*, 21 M.J. 251 (C.M.A. 1986), *aff'd*, 483 U.S. 435 (1987).

c. *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986).

d. *United States v. Scott*, 24 M.J. 578 (N.M.C.M.R. 1987).

2. Personal Jurisdiction

a. *United States v. King*, 27 M.J. 327 (C.M.A. 1989).

b. *United States v. Howard*, 19 M.J. 795 (A.C.M.R. 1985), *rev'd*, 20 M.J. 353 (C.M.A. 1985).

c. *United States v. Moore*, 22 M.J. 523 (N.M.C.M.R. 1986).

Mental Responsibility—Burden of Proof

United States v. Mahoney, 24 M.J. 911 (A.F.C.M.R. 1987).

Remand for New Pretrial Investigation

United States v. Penn, 21 M.J. 907 (N.M.C.M.R. 1986).

Search and Seizure

United States v. Postle, 20 M.J. 632 (N.M.C.M.R. 1985).

Speedy Trial

United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988).

United States v. Bradford, 24 M.J. 831 (N.M.C.M.R. 1987), *aff'd*, 25 M.J. 181 (C.M.A. 1987).

United States v. Turk, 22 M.J. 740 (N.M.C.M.R. 1986), *aff'd*, 24 M.J. 277 (C.M.A. 1987).

United States v. Burris, 20 M.J. 707 (A.C.M.R. 1985), *rev'd*, 21 M.J. 140 (C.M.A. 1987).

United States v. Leonard, 20 M.J. 589 (N.M.C.M.R. 1985), *aff'd*, 21 M.J. 67 (C.M.A. 1985).

United States v. Fowler, 24 M.J. 53 (A.F.C.M.R. 1987).

United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987).

United States v. Ivester, 22 M.J. 933 (N.M.C.M.R. 1986).

United States v. Harvey, 22 M.J. 904 (N.M.C.M.R. 1986), *rev'd*, 23 M.J. 280 (C.M.A. 1986).

⁵¹ 483 U.S. 435 (1987).

United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986).

United States v. Harrison, 22 M.J. 535 (N.M.C.M.R. 1986).

United States v. Jones, 21 M.J. 819 (N.M.C.M.R. 1985).

United States v. Harris, 20 M.J. 795 (N.M.C.M.R. 1985).

United States v. Kuelker, 20 M.J. 715 (N.M.C.M.R. 1985).

Uncharged Misconduct/Mil. R. Evid. 404(b)

United States v. Peterson, 20 M.J. 806 (N.M.C.M.R. 1985).

Urinalysis

United States v. Pollard, 26 M.J. 947 (C.G.C.M.R. 1988), *aff'd*, 27 M.J. 376 (C.M.A. 1987).

United States v. Horton, 25 M.J. 482 (C.M.A. 1987) (summary disposition).

United States v. Valenzuela, 24 M.J. 934 (A.C.M.R. 1987).

United States v. Rodriguez, 23 M.J. 896 (A.C.M.R. 1987).

United States v. Austin, 23 M.J. 592 (A.C.M.R. 1985).

United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985).

United States v. Lewis, 19 M.J. 869 (A.F.C.M.R. 1985).

United States v. Hilber, 22 M.J. 526 (N.M.C.M.R. 1986).

United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984).

United States v. Quillen: The Status of AAFES Store Detectives

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Introduction

In *United States v. Quillen*¹ the United States Court of Military Appeals held that an Army and Air Force Exchange Service (AAFES) store detective was required to advise a shoplifting suspect of his article 31, UCMJ,² rights prior to questioning him in a custodial setting.³ This article seeks to demonstrate that in light of the relevant case law, Judge Cox's dissent in the case, and the court's denial of the government's petition for reconsideration, *Quillen* does not establish a per se rule that AAFES store detectives are state actors for fourth and fifth amendment purposes.

Federal Case Law Regarding Private Searches

In *Burdeau v. McDowell*⁴ certain incriminating documents were taken from an office by private individuals.⁵ These documents were then given to the United States

Department of Justice, which sought to use them in a prosecution involving fraudulent use of the mails.⁶ The United States Supreme Court held that the fourth amendment did not apply to the seizure of the documents, because the papers had been obtained by private individuals without any government involvement.⁷ Further, the fifth amendment did not prevent the government from seeking to obtain the rest of the documents from the private party who held them, because the accused was not being forced to testify against himself.⁸ On the basis of *Burdeau* the Court has consistently allowed the admission of evidence derived from private searches,⁹ even if the searches were unreasonable.¹⁰ For a search to be private it must be conducted by individuals who are neither government agents nor acting "with the knowledge or participation of any government official."¹¹ In this regard, the Court has held that it is not determinative that the person conducting the search

¹ 27 M.J. 312 (C.M.A. 1988).

² Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

³ *Quillen*, 27 M.J. at 315.

⁴ 256 U.S. 465 (1921).

⁵ *Id.* at 473.

⁶ *Id.* at 474.

⁷ *Id.* at 475.

⁸ *Id.* at 475-76. For a comprehensive description of the historical development of pre-constitutional search and seizure law in Great Britain and the colonies, see *Boyd v. United States*, 116 U.S. 616, 623-30 (1886). See also *Bacon v. United States*, 97 F. 35 (8th Cir. 1899).

⁹ *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).

¹⁰ *Walter v. United States*, 447 U.S. 649, 656 (1979).

¹¹ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

was not a law enforcement official. For example, a search for contraband by a school official will not be considered "private."¹² Although the Court has noted that private security personnel are generally just that, it has also observed:

It is common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs, or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto.¹³

In this vein, the Court has found the actions of a private security guard to constitute state action in cases where the guard was deputized by the local sheriff pursuant to a county ordinance and acted in that official capacity.¹⁴ The Court also determined it to be state action where a private detective, licensed by the state as a special police officer, was accompanied by a city police officer during the former's coercive interrogation of suspects.¹⁵ In their application of the Supreme Court's reasoning in *Burdeau* and its progeny, the various courts of appeals have consistently found that actions taken by private security guards in pursuance of their employers' interests implicated neither the fourth nor the fifth amendments. In *United States v. Koenig*¹⁶ a security officer for a common carrier opened a suspicious package and found plastic bags containing cocaine inside of it.¹⁷ The Seventh Circuit Court of Appeals rejected appellant's argument that the security officer was "acting as a *de facto* instrument or agent of the government at the time of the search,"¹⁸ finding no evidence of government influence upon the officer.¹⁹ Similarly, in the fifth

amendment context, the Eighth Circuit Court of Appeals has upheld the admission of incriminating statements made to bondsmen without the benefit of *Miranda*²⁰ warnings. Although the bondsmen were special deputy sheriffs appointed pursuant to a state statute, the court found they were acting in a private capacity on behalf of their employer when they took appellant into custody.²¹

State Case Law With Regard To Private Searches by Store Detectives

Under the common law, merchants who reasonably suspected customers of shoplifting were allowed to briefly detain such individuals to investigate.²² The basis of this rule is simply the "purely private right and self-interested right to protect [one's] property."²³ Many states have codified this principle and have explicitly given shopkeepers and their agents the authority to ask suspects to provide identification, to reasonably inquire whether suspects have unpurchased merchandise in their possession, to summon law enforcement officials, and to detain suspects until law enforcement officials arrive.²⁴ Courts in these states have found that the authority to detain under these provisions does not cause such detentions to be made under the color of state law, and therefore no constitutional rights of the suspects are implicated.²⁵ State courts have recognized, however, that the actions of private security personnel may take on the imprimatur of state action for fourth and fifth amendment purposes in certain situations. In many states the actions of private security personnel will be brought within the ambit of state action if the acts are instigated by, or conducted at the request of, law enforcement officials.²⁶ Many courts have also held that

¹² *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

¹³ *Labor Board v. Jones & Laughlin Corp.*, 331 U.S. 416, 429 (1947) (citation omitted).

¹⁴ *Griffin v. Maryland*, 378 U.S. 130, 137 (1964).

¹⁵ *Williams v. United States*, 341 U.S. 97, 98-99 (1951).

¹⁶ 856 F.2d 843 (7th Cir. 1988).

¹⁷ *Id.* at 845.

¹⁸ *Id.* at 846.

¹⁹ *Id.* at 847. See *United States v. Harless*, 464 F.2d 953 (9th Cir. 1972) (search of an attache case by hotel security guard); *United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978) (search of an apartment by apartment complex security director).

²⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²¹ *United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir.), *cert. denied*, 469 U.S. 931 (1984). See *United States v. Birnstihl*, 441 F.2d 368 (9th Cir. 1971) (statement made to a private security guard); *United States v. Antonelli*, 434 F.2d 335 (2d Cir. 1970) (statements made to a private dock guard).

²² W. Prosser, *Handbook on the Law of Torts* 121-23 (4th Ed. 1971); *Restatement (Second) of Torts* § 120A (1965).

²³ *People v. Zelenski*, 24 Cal.3d 357, 368 n.10, 155 Cal. Rptr. 575, 581 n.10, 594 P.2d 1000, 1006 n.10 (1979).

²⁴ See Cal. Penal Code § 490.5 (West 1988); Ill. Rev. Stat., ch. 38, par. 16A-5 (1988); N.Y. Gen. Bus. Law § 218 (McKinney 1985); Ohio Rev. Code Ann. § 2935.041 (Page 1987); Or. Rev. Stat. § 131.655 (1984); Pa. Stat. Ann. tit. 18, § 3929(d) (Purdon 1980).

²⁵ *Zelenski*, 24 Cal. 3d at 368, 155 Cal. Rptr. at 581, 594 P.2d at 1006; *People v. Raitano*, 81 Ill. App. 3d 373, 377-78, 401 N.E.2d 278, 280-81 (Ill. App. Ct. 1980); *People v. Frank*, 52 Misc. 2d 266, 267, 275 N.Y.S.2d 570, 572 (N.Y. Sup. 1966); *State v. Bolan*, 27 Ohio St. 2d 15, 18, 271 N.E.2d 839, 841-843 (Ohio 1971); *State v. Jensen*, 83 Or. App. 231, 234-35, 730 P.2d 1282, 1283 (Or. App. 1986); see *Weyandt v. Mason's Stores, Inc.*, 279 F. Supp. 283, 287 (W.D. Pa. 1968). The California Supreme Court in *Zelenski* ultimately found that the store detectives in that case were acting as more than just private citizens when they arrested the appellant, and therefore the California exclusionary rule applied to their actions. *Zelenski*, 24 Cal. 3d at 368, 155 Cal. Rptr. at 581, 594 P.2d at 1005-06. This decision was legislatively overruled in 1982 when the California Constitution was amended to prohibit the exclusion of illegally seized evidence unless exclusion was required by the United States Constitution. *People v. Geary*, 219 Cal. Rptr. 557, 560 (Cal. Ct. App. 1985) (in denying review, the California Supreme Court ordered that the opinion not be officially published).

²⁶ *Jensen*, 83 Or. App. at 233, 730 P.2d at 1283; *State v. Keyser*, 117 N.H. 45, 47, 369 A.2d 224, 225 (1977).

constitutional restrictions will apply to the activities of private security personnel when their actions are performed "under the mantle of state law,"²⁷ such that they appear to be acting as public law enforcement officials. Accordingly, evidence derived from nominally private interrogations and searches by private security detectives has been suppressed when a licensed "special" police officer was involved,²⁸ when the private security guard's actions went beyond merely protecting property and were highly coordinated with the actions of law enforcement agents,²⁹ and when law enforcement agents assisted in taking a suspect into custody and were in the immediate vicinity at the time of questioning by the store detective.³⁰ Courts have found no state involvement in cases where police were merely present,³¹ or had provided store guards with certain forms and instruction pertaining to fingerprinting,³² or where store detectives were required to be licensed as such by the municipality.³³

Ever increasing use is being made of security personnel by the private sector, and in many areas they have assumed roles traditionally exercised by the police with regard to law enforcement.³⁴ Thus, it has become more difficult to determine when security personnel are acting as law enforcement officials instead of merely protecting the property of their employers.³⁵ New York and California courts in particular have expressed concern that the constitutional rights of suspects may be infringed upon by poorly-trained store employees acting beyond the scope of their private security function.³⁶ Courts in both states have indicated that they would apply the exclusionary rule to evidence derived from

private interrogations and searches in which it was proven that physical or psychological coercion had been applied to suspects.³⁷

Federal and Military Case Law with Regard to Searches by Exchange Store Detectives

Federal courts have only addressed the status of military exchange detectives within the context of tort actions. In an action brought under the Federal Tort Claims Act,³⁸ the Fifth Circuit Court of Appeals held that sovereign immunity with regard to the acts of military exchange security personnel had not been waived.³⁹ As it interpreted the statute, exchange security guards were not among the "investigative or law enforcement officials" whose acts were covered by 28 U.S.C. § 2680(h) because they had no power "to execute searches, seize evidence, or make arrests."⁴⁰ Various district courts have considered the status of exchange security guards in actions brought under the Civil Rights Act⁴¹ and state common law tort theories. In *Stordahl v. Harrison*⁴² a Virginia district court found that the limited detention to which exchange security personnel had subjected appellant did not give rise to a constitutional tort in light of a shopkeeper's traditional right to detain suspects for a reasonable length of time to protect and secure his or her goods.⁴³ By virtue of sovereign immunity, state tort actions for false imprisonment and assault by exchange personnel have been similarly unsuccessful where the exchange employees were acting within the scope of their security function.⁴⁴ In *United States v. Volante*⁴⁵ the Court of Military Appeals considered a search of a soldier's locker by a Marine Corps Exchange

²⁷ *Jensen*, 83 Or. App. at 233, 730 P.2d at 1283; see *Staats v. State*, 717 P.2d 413, 416 (Alaska Ct. App. 1986).

²⁸ *People v. Smith*, 82 Misc. 2d 204, 368 N.Y.S.2d 954, 958 (N.Y. Crim. Ct. 1975).

²⁹ *People v. Elliot*, 131 Misc. 2d 611, 617, 501 N.Y.S.2d 265, 270 (N.Y. Sup. Ct. 1986).

³⁰ *People v. Jones*, 419 N.Y.S.2d 447, 450, 393 N.E.2d 443, 446 (N.Y. 1979).

³¹ *Staats*, 717 P.2d at 417.

³² *People v. Johnson*, 101 Misc. 2d 833, 837, 422 N.Y.S.2d 296, 300 (Nassau Cty. Dist. Ct. 1979).

³³ *United States v. Lima*, 424 A.2d 113, 118 (D.C. 1980).

³⁴ *Elliot*, 131 Misc. 2d at 613-14, 501 N.Y.S.2d at 267.

³⁵ *Elliot*, 131 Misc. 2d at 614, 501 N.Y.S.2d at 268.

³⁶ *Elliot*, 131 Misc. 2d at 615, 501 N.Y.S.2d at 268; *In re Deborah C.*, 177 Cal. Rptr. 852, 855, 635 P.2d 446, 448 (Cal. 1981).

³⁷ *Johnson*, 101 Misc. 2d at 838, 422 N.Y.S.2d at 301; *In re Deborah C.*, 177 Cal. Rptr. at 856, 635 P.2d at 450. *But see* note 22, *supra*.

³⁸ 28 U.S.C. § 2680(h) (1982) waives federal sovereign immunity for claims arising out of torts such as false arrest and false imprisonment by investigative or law enforcement officials of the United States Government. Such personnel are defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

³⁹ *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir.), *reh. denied*, 564 F.2d 98 (1977).

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 1983 (1982) provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."

⁴² 542 F. Supp. 721 (E.D. Va. 1982).

⁴³ *Id.* at 723-24.

⁴⁴ *Sanders v. Nunley*, 634 F. Supp. 474, 477-78 (N.D. Ga. 1985); *Plourde v. Ferguson*, 519 F. Supp. 14, 17-18 (D. Md. 1980).

⁴⁵ 16 C.M.R. 263 (C.M.A. 1954).

steward.⁴⁶ Although the court assumed for purposes of its analysis that "a search by the head of a government facility has sufficient color of officiality to come within the meaning of a search by 'persons acting under the authority of the United States,'" it noted that the evidence before the law officer established that the search had been conducted for a private purpose and without official sanction.⁴⁷ The court upheld the law officer's overruling of a defense objection as to the admission of evidence derived from the search and found his ruling to be supported by substantial evidence.⁴⁸

The Air Force Court of Military Review has specifically addressed the status of military exchange detectives in several opinions. In *United States v. Pansoy*⁴⁹ the Air Force court found an AAFES detective's search of certain boxes in the possession of a suspected shoplifter to have been private in nature, and therefore not subject to the exclusionary remedy of Military Rule of Evidence 311.⁵⁰ In reaching its decision the Air Force court noted that military exchanges perform parallel functions to private stores and that exchange employees are "paid with self-generating non-appropriated funds, rather than Congressionally approved funds."⁵¹ In view of the limited powers of detention and questioning exercised by AAFES detectives,⁵² the Air Force court found the detective's primary purpose to be the protection of the AAFES system and its customers from pilferage, "and not [the] ferret[ing] out [of] crime for government prosecution."⁵³ In *United States v. Jones*⁵⁴ the Air Force court reaffirmed its holding in *Pansoy* and found that an AAFES detective was not required to advise a military suspect of his article 31, UCMJ, rights.⁵⁵ Similarly, in *United States v. Wynn*⁵⁶ the Air Force court found that AAFES detectives acted in a private capacity in the exercise of their function. Testimony as to a suspected shoplifter's silence when confronted by an

AAFES detective was therefore properly allowed at trial as an admission by silence to a private party.⁵⁷

The Scope of *United States v. Quillen*

The majority opinion in *Quillen* relied upon several factors in reaching its determination that an article 31, UCMJ, rights advisement was necessary in that case. First, the court noted that post exchanges had been found to be integral parts of the Department of Defense, that post exchanges were controlled by post commanders, and that the purpose of the exchanges was to provide the necessities of life to soldiers at affordable prices.⁵⁸ Accordingly, the position of AAFES store detective "was not private, but governmental in nature and military in purpose."⁵⁹ As Judge Cox noted in his dissent, however, the actual relationship of AAFES with the military organization on post is attenuated, and under the applicable regulations AAFES is much more "an instrument of the United States rather than an instrument of the military."⁶⁰ Thus, article 31, UCMJ, should be inapplicable to the activities of AAFES security personnel.⁶¹

The majority opinion also found that AAFES store detectives acted "at the behest of military authorities and in furtherance of their duty to investigate crime at base exchanges."⁶² Noting that the pertinent service regulations placed the "responsibility for prosecution of alleged criminal acts in base exchanges" with military authorities, the majority found that the managers of exchanges assisted the post command in its fulfillment of this duty by filing reports on crime at exchanges with "the appropriate military officers."⁶³ Further, the majority opinion noted that exchange detectives are tasked with developing information for those reports, and are required to detain suspects for further questioning by the military police.⁶⁴

⁴⁶ *Id.* at 265.

⁴⁷ *Id.* at 693 (citation omitted).

⁴⁸ *Id.*

⁴⁹ 11 M.J. 811 (A.F.C.M.R. 1981).

⁵⁰ *Id.* at 814.

⁵¹ *Id.* at 813.

⁵² *Id.* at 813 n.5.

⁵³ *Id.* at 813.

⁵⁴ 11 M.J. 829 (A.F.C.M.R. 1981)

⁵⁵ *Id.* at 831.

⁵⁶ 23 M.J. 726 (A.F.C.M.R. 1986), *rev'd on other grounds*, 26 M.J. 232 (C.M.A. 1988).

⁵⁷ *Id.* at 729.

⁵⁸ 27 M.J. at 314.

⁵⁹ *Id.* (citing *Standard Oil of California v. Johnson*, 316 U.S. 481, 484-85 (1942)).

⁶⁰ 27 M.J. at 316 n.1 (Cox, J., dissenting).

⁶¹ *Id.*

⁶² *Id.* at 314-15.

⁶³ *Id.*

⁶⁴ *Id.* at 315.

The regulations pertinent to the duties of post exchange detectives show the limited nature of their coordination with military law enforcement officials. Although exchange managers are required to promptly report shoplifting incidents to the appropriate law enforcement authorities,⁶⁵ AAFES personnel can only participate in a prosecution "to the extent of providing testimonial/documentary evidence unless cleared through the AAFES General Counsel's Office."⁶⁶ The police involvement in the activities of AAFES personnel is so tangential that it is similar to the degree of coordination one might expect between completely private individuals and law enforcement agents with regard to a shoplifting offense.⁶⁷ Further, although the court distinguished *Solomon*⁶⁸ on the basis that "[w]hether an exchange detective is an investigative or law enforcement officer for purposes of 28 U.S.C. § 2680(h) is a considerably more narrow question than one posed for this review under Article 31,"⁶⁹ the analysis in *Solomon* accurately shows the limited nature of AAFES security guards' "police" powers.⁷⁰

The majority opinion also considered the exchange detective's particular actions with regard to the appellant in *Quillen* to be important in deciding that an article 31, UCMJ, rights advisement was warranted in that case. Specifically, the store detective stopped appellant, identified herself, showed appellant her detective's badge, and requested that the appellant identify himself.⁷¹ After conversing briefly with appellant, the detective escorted him to a manager's office, where she detained him during the interrogation. While it is obvious that the detective's actions "were anything but casual,"⁷² it is likewise true that the procedure followed by the exchange detective in *Quillen* was no different than the procedures used by private store detectives in the civilian sector that were found not to constitute state action.⁷³ Further, even the most concerned state courts would not require the exclusion of evidence derived from private

searches unless actual physical or psychological coercion were proved by the defendant.⁷⁴

The Court of Military Appeals also found it to be of great significance that questioning of appellant did not occur at the original stop but after he was escorted to the manager's office by store employees. Furthermore, he was not simply asked to produce his receipt for the merchandise, a practice to which we have no objection to on constitutional or codal grounds.⁷⁵

In his dissent, Judge Cox professed his confusion at the majority's reliance on the situs of the interrogation, noting that traditionally,

[u]nder Article 31, custody is of no legal consequence. If it was wrong to ask [appellant] questions in the office, it was wrong to ask him questions at the door. However, where the questions are asked is not relevant under Article 31.⁷⁶

Unlike his civilian counterpart, a military suspect may be entitled to two different rights warnings prior to questioning by law enforcement officials. When questioned by military personnel, or civilian investigators in certain circumstances,⁷⁷ a military suspect must be advised of the nature of the offense of which he is suspected, his right to remain silent, and "that any statement made by him may be used against him in a trial by court-martial."⁷⁸ This rights warning was "designed to insulate a service member from the subtle pressures of rank or duty to respond to an incriminating question,"⁷⁹ and the place of questioning is therefore of little significance in triggering its application.⁸⁰ When placed in conditions of custodial interrogation, however, military suspects must also be advised of their "right to the presence of an attorney, either retained or appointed," in addition to their right against self-incrimination and the possibility that any statements

⁶⁵ See Army Reg. 60-2-1/Air Force Reg. 147-14, Army and Air Force Exchange Service (AAFES) Operating Policies, para. 7-3 (1 Aug. 1984).

⁶⁶ Exchange Service Manual (ESM) 16-1 (Ch. 14, June 1984), para. 6-27.

⁶⁷ See *Zelenski*, 24 Cal. 3d 357, 155 Cal. Rptr. 575, 594 P.2d 1000.

⁶⁸ 559 F.2d 309.

⁶⁹ *Quillen*, 27 M.J. at 314 n.2.

⁷⁰ *Supra* note 37.

⁷¹ *Quillen*, 27 M.J. at 315.

⁷² *Id.*

⁷³ *Jensen*, 83 Or. App. 231, 730 P.2d 1282; *Raitano*, 81 Ill. App. 3d 373, 401 N.E.2d 278.

⁷⁴ *Johnson*, 101 Misc. 2d at 838, 422 N.Y.S.2d at 301; *In re Deborah C.*, 177 Cal. Rptr. at 856, 635 P.2d at 450.

⁷⁵ 27 M.J. at 315. The premise of Judge Sullivan's citations in support of this proposition appears to be that "[t]he mere fact that [the store detective] initiated or conducted these inquiries did not make appellant a suspect or the inquiry a search for criminal evidence." *United States v. Lee*, 25 M.J. 457, 459-60 (C.M.A. 1988). The appellant in *Quillen*, however, became a suspect before he even left the post exchange. 27 M.J. at 313.

⁷⁶ *Id.* at 317 (Cox, J., dissenting).

⁷⁷ *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981); *United States v. Penn*, 39 C.M.R. 194, 199 (C.M.A. 1969).

⁷⁸ UCMJ art. 31(b).

⁷⁹ *United States v. Jones*, 19 M.J. 961, 967 (A.C.M.R. 1985), *aff'd*, 26 M.J. 353 (C.M.A. 1988).

⁸⁰ *United States v. Lewis*, 12 M.J. 205, 207 (C.M.A. 1982).

could be used against them at courts-martial.⁸¹ If an AAFES store detective is "in a very real and substantial sense . . . an instrument of the military,"⁸² such that her custodial interrogation of a military suspect requires an article 31, UCMJ, advisement, logic would appear to dictate that the additional rights contained in a *Tempia* advisement also be given.

Conclusion

Quillen's abrupt departure from military case law with regard to the status of AAFES store detectives, the

application of article 31(b), and the language of the court's denial of the government's petition for reconsideration⁸³ indicate that *Quillen's* holding should be restricted to its particular facts. The substantial amount of contrary federal and state case law makes such treatment all the more desirable. *Quillen*, therefore, should not be read as establishing a per se rule that the actions of AAFES store detectives implicate constitutional rights, but instead as confirming federal case law that such cases are to be determined by a factual examination on a case-by-case basis.⁸⁴

⁸¹ *United States v. Tempia*, 37 C.M.R. 249, 257 (C.M.A. 1967) (quoting *Miranda*, 384 U.S. 436).

⁸² *Quillen*, 27 M.J. at 314.

⁸³ In its order dated 27 Feb. 1989, the court rejected "the suggestion in the [government's] briefs that this case can be construed to establish a broad rule applicable to other government employees or in other contexts outside the particular fact pattern described in the original opinion," _____ M.J. _____ (C.M.A. 1989).

⁸⁴ *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987).

Clerk of Court Note

SOME OPTIMIS(TIC) FAX: Communicating with the office of the Clerk of Court, U.S. Army Judiciary. Telephone numbers for the Clerk of Court are listed on page 10 of the 1988-89 JAGC Personnel and Activity Directory. (For faster service, be sure to call the correct branch.) We are not limited to the telephone and electronic messages (message address: CUSAJUDICIARY FALLS CHURCH VA//JALS-CC). You can also use E-mail or facsimile transmission.

Our E-mail address for those using the Defense Data Network is FULTON@PENTAGON-OPTI.ARMY.MIL. This facility is particularly useful for sending corrections to a JAG-2 Report or a Court-Martial Case Report.

Our FAX facility is the Military Traffic Management Command communications center, which serves USA JUDICIARY, USALSA, and other tenants of the Nassif Building at Bailey's Crossroads. The telephone number is (Autovon) 289-2040 or (Commercial) (703) 756-2040. We have received some petitions for extraordinary relief by this means. The petition should be limited to ten pages. An accompanying brief that would cause the ten-page total to be exceeded should be sent by mail.

MORE ABOUT CHRONOLOGY SHEETS. DA Message DAJA-CL 071730Z April 1989, subject: "Record of Trial Chronology Sheet" should lay to rest some myths concerning the DD Forms 490 and 491 Chronology Sheets and produce a more meaningful quarterly workload and processing time report. We take this occasion

to answer some additional questions that pop up now and then.

First, the date the "[r]ecord [is] received by the convening authority:" (line 8) is the date the staff judge advocate office received an *authenticated* record so that the process leading to the convening authority's action could begin. It is *not*, for example, the later date on which the SJA may have carried the record in to the convening authority in person.

Second, when the "[t]otal authorized deduction" shown on the line above line 7 is deducted from the running total shown on line 6 in the column headed "Cumulative Elapsed Days," so that the number shown on line 7 is the *net* elapsed days to sentence or acquittal, the subsequent cumulative totals on lines 8 (and 9, if applicable) reflect the same deduction. That is, they are cumulative from line 7, not line 6.

Third, the reason why a Chronology Sheet must be completed in GCM cases terminated before findings, such as for Chapter 10 discharge, even though those cases are not included in our processing time report, is that some information for the ACMIS data base is found only in the Chronology Sheet and not in the military judge's Court-Martial Case Report.

Fourth, in those cases terminated before findings, the date of the convening authority's "action" is the date your initial promulgating order bears. It is not the date the charges were withdrawn or the administrative discharge approved.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Army Court of Military Review Finds That You Can Conspire With an Idiot

In *United States v. Tuck*¹ the Army Court of Military Review considered whether a military accused can be guilty of conspiracy when his co-conspirator was not culpably involved. Relying on the "unilateral" theory of conspiracy, the court affirmed the accused's conspiracy conviction without regard to the mental capacity of the accused's sole co-conspirator.

The accused in *Tuck* pleaded guilty, *inter alia*, to conspiracy to distribute lysergic acid diethylamide (LSD).² During the providence inquiry the accused stated that the conspiracy occurred in a hospital mental ward.³ He described his alleged co-conspirator as being "a nut" and a "professional mental case."⁴ The accused contended on appeal that because his sole co-conspirator lacked the requisite mental capacity to commit a crime, no conspiracy as defined by military law could have existed.⁵

Conspiracy is proscribed for the military by article 81, Uniform Code of Military Justice.⁶ The first element of conspiracy is that "the accused entered into an agree-

ment with one or more persons to commit an offense under the code."⁷ Neither the UCMJ nor the Manual specifically addresses the requisite mental capacity, if any, of these co-conspirators.⁸

The accused's position in *Tuck*, however, is supported by earlier military decisional law. In *United States v. Duffy*,⁹ for example, the accused was convicted of conspiracy to commit premeditated murder.¹⁰ The Army Court of Military Review, consistent with the "bilateral" theory of conspiracy, found that "[w]hen one is alleged to have conspired with but one other person and that person is afflicted with a condition that negates mental responsibility at the pertinent time, conviction for conspiracy is sustainable neither by the precedents nor in logic."¹¹ The same analysis was applied by the Court of Military Appeals in *United States v. LaBossiere*,¹² where the court held that "there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities."¹³ As the Army court observed in *Duffy*, "[t]he logic [of these results] is simply that conspiracy being a corrupt agreement, an offense joint by nature, guilt of conspiracy must be shared between at least two conspirators as a

¹ 28 M.J. 520 (A.C.M.R. 1989).

² *Id.* at 521.

³ *Id.*

⁴ *Id.*

⁵ *Id.* Indeed, as the question of the co-conspirator's mental capacity was raised during the providence inquiry, the evidence need not show that the co-conspirator was in fact legally insane. Instead, the military judge, according to the accused, had the *sua sponte* duty to either resolve this inconsistency with the plea, or enter a plea of not guilty on the accused's behalf. See *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983).

⁶ UCMJ art. 81, 10 U.S.C. § 881 (1982) [hereinafter UCMJ].

⁷ *Id.*; see Manual for Courts-Martial, United States, 1984, Part IV, para. 5b(1) [hereinafter MCM, 1984]. Article 81 provides:

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. The elements for conspiracy are set forth in the Manual as follows:

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MCM, 1984, Part IV, para. 5b.

⁸ The Manual's discussion of co-conspirators is limited to the following:

Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed. *Id.*, Part IV, para. 5c(1).

⁹ 47 C.M.R. 658 (A.C.M.R. 1973).

¹⁰ *Id.* at 660.

¹¹ *Id.* at 661 (citing *Regee v. State*, 9 Md. App. 346, 264 A.2d 119 (1970), and *United States v. Cascio*, 16 C.M.R. 779 (A.F.B.R. 1954) (dictum), *pet. denied*, 18 C.M.R. 333 (C.M.A. 1955)). Of course, the military courts had long recognized that all parties to a conspiracy need not be subject to the UCMJ. *E.g.* *United States v. Rhodes*, 29 C.M.R. 551 (C.M.A. 1960) (co-conspirator was a foreign national).

¹² 32 C.M.R. 337 (C.M.A. 1962)

¹³ *Id.* at 340.

condition of the existence of guilt of any one conspirator." ¹⁴

This "bilateral" theory of conspiracy was later rejected by the Court of Military Appeals in *United States v. Garcia*. ¹⁵ The accused in *Garcia* was convicted of conspiracy to commit larceny. ¹⁶ One month later his only alleged co-conspirator was acquitted of the same conspiracy charge. ¹⁷ Breaking with precedent, ¹⁸ the Court of Military Appeals affirmed the accused's conspiracy conviction in *Garcia*. ¹⁹ In applying the "unilateral" theory of conspiracy, the court decided that the acquittal of the accused's co-conspirator would "not serve to avoid his conviction [of conspiracy] in the absence of some compelling reason of record in the other cases." ²⁰

The decisions in *Garcia* and *Tuck* address the concern that the criminal law needs to proceed against a person because of his criminal disposition, regardless of the state of mind held by others. ²¹ This concern is reflected in the Model Penal Code, which provides that a person's liability for conspiracy is not dependent upon whether his co-conspirators are mentally responsible. ²² Although the civilian courts have not always followed the "unilateral" theory of conspiracy, ²³ the trend is toward accepting the "unilateral" theory's approach of assessing

the *mens rea*, and thus the guilt, of co-conspirators independently.

As recognized by the court in *Tuck*, conspiracy, even under the "unilateral" theory, still requires the involvement of more than one person. ²⁴ At least one person besides the accused would need the requisite mental capacity to form an agreement even if the other lacked the requisite capacity to commit the underlying crime. The "unilateral" theory would likewise have no effect upon the military's requirement to apply Wharton's Rule to conspiracy charges. ²⁵ Moreover, conspiracy still requires an agreement to commit an act prohibited by the UCMJ ²⁶ and an overt act independent of the agreement (which occurs either contemporaneous with or after the agreement). ²⁷ Even though much of the military law pertaining to conspiracy is thus unchanged by the "unilateral theory," this approach nonetheless modifies the law of conspiracy in several important respects of which military criminal lawyers should be aware. MAJ Milhizer.

Forgery and Legal Efficacy

Forgery, as proscribed by article 123, UCMJ, ²⁸ can be committed in two distinct ways: 1) by making or altering; and 2) by uttering. ²⁹ Both types of forgery

¹⁴ *Duffy*, 47 C.M.R. at 661.

¹⁵ 16 M.J. 52 (C.M.A. 1983).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *E.g.* *United States v. Nathan*, 30 C.M.R. 398 (C.M.A. 1961).

¹⁹ *Garcia*, 16 M.J. at 57.

²⁰ *Id.* The court did indicate that "[i]n the future, the conviction of an individual conspirator in a separate trial will be considered to ensure that the evidence supports beyond a reasonable doubt his complicity in the conspiracy . . ." *Id.* (footnote omitted).

²¹ See generally Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 936 (1959).

²² Model Penal Code § 5.04(1) (proposed official draft 1962) provides:

Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or

(b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

²³ Compare *Regle v. State*, 9 Md. App. 346, 264 A.2d 119 (1970) (conspiracy conviction reversed where only other co-conspirator insane) and *Commonwealth v. Benesch*, 290 Mass. 125, 194 N.E. 905 (1935) (conspiracy conviction reversed where only other co-conspirator did not have corrupt motives) with *Garcia v. State*, 394 N.E.2d 106 (Ind. 1979) ("unilateral" theory of conspiracy applied).

²⁴ *Tuck*, 28 M.J. at 521.

²⁵ Wharton's Rule provides that when an offense requires two or more culpable persons acting in concert, conspiracy is not constituted where the agreement exists only between the persons necessary to commit the offense (e.g., duelling, bigamy, incest, adultery, and bribery). See MCM, 1984, Part IV, para. 5c(3); *United States v. Crocker*, 18 M.J. 33 (C.M.A. 1984).

²⁶ MCM, 1984, Part IV, paras. 5b(1) and 5c(3). The agreement, however, need not be in any particular form. See generally *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987); *United States v. Jackson*, 20 M.J. 68 (C.M.A. 1985).

²⁷ See generally *United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986); *United States v. Kauffman*, 34 C.M.R. 63 (C.M.A. 1963). The overt act may amount to only "mere preparation." *United States v. Choat*, 21 C.M.R. 313 (C.M.A. 1956).

²⁸ UCMJ art. 123.

²⁹ UCMJ art. 123 provides:

Any person subject to this chapter who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct.

require as an element of proof that the writing or signature have legal efficacy.³⁰ The Manual defines legal efficacy in relation to the effect of the writing or signature: "The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt."³¹ The requirement for legal efficacy has long been enforced by the military's appellate courts.³²

The Court of Military Appeals, in *United States v. Thomas*,³³ recently addressed the question of legal efficacy in connection with a forgery charge. The court found that a false credit reference, commonly known as a "Commanding Officer's Letter," could not be the subject of a forgery.³⁴ The court determined that the document lacked legal efficacy and thus could not support a forgery charge even though the accused intended to use it to obtain a loan.³⁵

Several forgery convictions were reversed by the Army Court of Military Review, most in unpublished opinions, in the aftermath of *Thomas* because of the failure to prove legal efficacy.³⁶ In addition, commentators have

reminded trial counsel of the need to establish legal efficacy in forgery cases.³⁷

Despite all of this recent notoriety, however, forgery convictions continue to be reversed because of the government's failure to prove legal efficacy. In *United States v. Walker*,³⁸ for example, the Army Court of Military Review reversed the accused's forgery conviction because his "forgery of another soldier's signature on the latter's military identification card . . . did not impose a legal liability on the other soldier."³⁹ Similarly, in *United States v. Vogan*,⁴⁰ the Army Court of Military Review reversed the accused's conviction of forgery because the anvil cards (a document used for monitoring rationed goods), which were the subject of the forgery charge, lacked legal efficacy.⁴¹

The message should now be clear—although a wide range of documents can be the proper object of a forgery,⁴² legal efficacy remains a necessary element of proof. Where legal efficacy is clear on the document's face, such as check,⁴³ proving legal efficacy should not be particularly complicated. Counsel must nevertheless look behind the document to ensure that it imposes an

³⁰ The MCM, 1984, Part IV, para. 48b, sets forth the elements of both types of forgery. The second element of both types of forgery, as reflected below, impose the legal efficacy requirement.

(1) *Forgery—making or altering.*

- (a) That the accused falsely made or altered a certain signature or writing;
- (b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and
- (c) That the false making or altering was with the intent to defraud.

(2) *Forgery—uttering.*

- (a) That a certain signature or writing was falsely made or altered;
- (b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;
- (c) That the accused uttered, offered, issued, or transferred the signature or writing;
- (d) That at such time the accused knew that the signature or writing had been falsely made or altered; and
- (e) That the uttering, offering, issuing or transferring was with intent to defraud.

Id.

³¹ MCM, 1984, Part IV, para. 48c(4).

³² See, e.g., *United States v. Diggers*, 45 C.M.R. 147 (C.M.A. 1972) (forged military order to obtain approval of travel request had legal efficacy); *United States v. Phillips*, 34 C.M.R. 400 (C.M.A. 1964) (carbon copy of allotment authorization form lacked legal efficacy); *United States v. Farley*, 29 C.M.R. 546 (C.M.A. 1960) (false insurance applications lacked legal efficacy); *United States v. Noel*, 29 C.M.R. 324 (C.M.A. 1960) (form similar to a letter of credit had legal efficacy); *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957) ("Request for Partial Payment" letter had legal efficacy); *United States v. Strand*, 20 C.M.R. 13 (C.M.A. 1955) (letter lacked legal efficacy); *United States v. Jedele*, 19 M.J. 1987 (A.F.C.M.R. 1985) (bankcard charge slip had legal efficacy); *United States v. Gilbertsen*, 11 M.J. 675 (N.M.C.M.R. 1981) (suspect's rights acknowledgement form lacked legal efficacy); *United States v. Schwarz*, 12 M.J. 650 (A.C.M.R. 1981), *aff'd*, 15 M.J. 109 (C.M.A. 1983) (allotment form had legal efficacy); *United States v. Benjamin*, 45 C.M.R. 799 (N.C.M.R. 1972) (prescription form had legal efficacy).

³³ 25 M.J. 396 (C.M.A. 1988).

³⁴ *Id.* at 401-02.

³⁵ *Id.*

³⁶ E.g., *United States v. Ross*, 26 M.J. 933 (A.C.M.R. 1988) (prescription lacked legal efficacy); *United States v. Hart*, ACMR 8800211 (A.C.M.R. 9 Sep. 1988) (unpub.) (ration control anvil cards lacked legal efficacy); *United States v. Grayson*, ACMR 8702884 (A.C.M.R. 27 July 1988) (unpub.) (honorable discharge certificate, certificate of achievement, and certificate for participation in tank gunnery competition lacked legal efficacy); *United States v. Smith*, ACMR 8702513 (A.C.M.R. 29 June 1988) (unpub.) (application forms for Armed Forces Identification Cards lacked legal efficacy).

³⁷ E.g., Brinks, *Legal Efficacy: Fundamental Elements In Forgery Cases*, *The Army Lawyer*, Jan. 1989, at 36.

³⁸ 27 M.J. 878 (A.C.M.R. 1989).

³⁹ *Id.* at 879.

⁴⁰ 27 M.J. 883 (A.C.M.R. 1989).

⁴¹ *Id.* at 884.

⁴² See *supra* note 32.

⁴³ See MCM, 1984, Part IV, para. 48c(4).

actual or apparent liability on another. In other cases counsel must allege and prove, or be prepared to dispute, extrinsic facts that establish legal efficacy.⁴⁴ Counsel must also consider alternative charging and lesser included offenses in a trial for forgery where legal efficacy may be at issue.⁴⁵ As with most offenses, forgery cases can often be won or lost before the accused ever sets foot in the courtroom, depending upon the foresight and pretrial investigation of the counsel involved. MAJ Milhizer.

Now the "Road is a Tad Wider"⁴⁶ for Government Appeals

Introduction

Article 62, UCMJ,⁴⁷ provides the prosecution with the ability to appeal certain adverse rulings by the military judge. It was created to cure a severe inequity in the military justice system that often left the government without a remedy no matter how erroneous the ruling of a military judge. Nevertheless, article 62 was not created to give the government parity with the accused in the appellate process.⁴⁸ Accordingly, in the almost five years of the existence of the government appeal, article 62 and Rule for Courts-Martial 908⁴⁹ have been strictly construed against the government. As Judge Cox noted in *United States v. Burris*, the role of the appellate courts in these cases is not to launch a rescue mission for failing cases.⁵⁰

Consistent with this rationale, the scope of the government appeal is narrowly limited to the two statutory bases for appeal. An appeal can only be taken on: 1) an order or ruling that terminates the proceedings with respect to a charge or specification; or 2) an order or ruling that excludes evidence.⁵¹ For example, in *United States v. Browers*⁵² the Court of Military Appeals (COMA) rejected the denial of a continuance as an appealable ruling, because it did not "exclude evidence" or "otherwise terminate the proceedings," despite the fact that the effect of the ruling in *Browers* was to force

the government to go to trial with no witnesses.⁵³ Later, in *United States v. Penn*,⁵⁴ the judge's order for a new article 32 investigation was held to be nonappealable because the Air Force Court of Military Review, citing *Browers*, strictly construed the scope of R.C.M. 908. Again, the effect of the ruling was dismissal of the charges because of speedy trial problems. Strict construction, however, is no longer the rule.

*United States v. True*⁵⁵

Navy Recruit Christopher W. True was charged with numerous drug offenses, absence without leave, and perjury. Prior to arraignment, True submitted a request for an expert witness. The expert was requested because two witnesses against the accused admitted that they had been under the influence of drugs. The accused proffered Doctor Ronald Siegel, a psycho-pharmacologist, to explain "the effects on perception, memory and thinking of individuals who use LSD."⁵⁶ The government offered four substitutes, but none of the substitutes had qualifications that were equal to Dr. Siegel's. Consequently, the military judge ordered the employment of Dr. Siegel. The government moved for reconsideration and, when that failed, refused to pay for Dr. Siegel's service. At this point the military judge, on defense request, abated the proceedings. The prosecution then appealed pursuant to article 62, UCMJ. The issue was whether the order to abate was an appealable ruling within the scope of article 62, UCMJ. The Navy-Marine Court of Military Review held that it was not,⁵⁷ but COMA disagreed.

Judge Sullivan, joined by Judge Cox, delivered the opinion of the court. First, looking at the history of article 62, UCMJ, Judge Sullivan noted that although it was different from the civilian's right to appeal under 18 U.S.C. § 3731, Congress intended that article 62 be construed and applied like the federal civilian statute except where military practice dictated a different approach.⁵⁸ Second, he explained that a prudent usage of the statute should not be confused with an unjustified narrowing of the scope of the government's right to

⁴⁴ E.g., *United States v. Addye*, 23 C.M.R. 107 (C.M.A. 1957); *United States v. English*, 25 M.J. 819 (A.F.C.M.R.), *pet. granted*, 27 M.J. 6 (C.M.A. 1988).

⁴⁵ For example, false or unauthorized pass offense under UCMJ art. 134. See MCM, 1984, Part IV, para. 77. Also, attempted forgery may be established, as factual impossibility is not a defense. See generally *United States v. Henderson*, 20 M.J. 87 (C.M.A. 1985); *United States v. Thomas*, 32 C.M.R. 278, 286 (C.M.A. 1962); *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987).

⁴⁶ *United States v. Gipson*, 24 M.J. 246, 252 (C.M.A. 1987).

⁴⁷ UCMJ art. 62.

⁴⁸ *United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985).

⁴⁹ R.C.M. 908.

⁵⁰ 21 M.J. 140, 145 (C.M.A. 1985).

⁵¹ R.C.M. 908.

⁵² 20 M.J. 356 (C.M.A. 1985).

⁵³ *Id.*

⁵⁴ 21 M.J. 907 (N.M.C.M.R. 1986).

⁵⁵ 28 M.J. 1 (C.M.A. 1989).

⁵⁶ *Id.* at 2.

⁵⁷ *United States v. True*, 26 M.J. 771 (N.M.C.M.R. 1988).

⁵⁸ *True*, 28 M.J. at 3.

appeal.⁵⁹ Finally, looking to the order itself, the court found the abatement order was not equivalent to a continuance, thereby distinguishing *Browers*, especially "where intractability has set in and the direction of a dismissal is imminent."⁶⁰ Thus, the court held that the abatement order was the "functional equivalent" of a ruling that terminates the proceedings and was therefore appealable under article 62, UCMJ.⁶¹

Chief Judge Everett dissented. While admitting that this case might be factually distinguishable from *Browers*, the Chief Judge noted that the underlying ruling still did not cause termination of the proceedings. Rather, it was the convening authority's refusal to provide the assistance that caused the abatement.⁶²

Conclusion

The "functional equivalent" test greatly expands the reach of government appeals. Although *United States v. Browers*⁶³ was not overruled, its precedential value is now limited to those cases involving an order for a continuance. The Court of Military Appeals has indicated a willingness to keep the courthouse door open for government appeals and has demonstrated that technical barriers can be overcome. MAJ Williams.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Award for Excellence in Legal Assistance

Early in March of this year, The Judge Advocate General convened a special board to select legal assistance offices for recognition of excellence in providing legal assistance services to soldiers, retired soldiers, and family members. The board evaluated submissions in accordance with the criteria announced in TJAG's previous letter concerning the award⁶⁴ and recommended that twenty-eight legal assistance offices be recognized. This list was forwarded to Major General Overhoff, who approved the board's selections on March 27, 1989.

Congratulations to the personnel from these offices. Each office will receive an award certificate signed by the Army Chief of Staff and The Judge Advocate General. MAJ Guilford.

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 2.

⁶² *Id.* at 6.

⁶³ 20 M.J. 356 (C.M.A. 1985). Interestingly, the Army Court of Military Review created a very similar test in *United States v. Browers*, 20 M.J. 542 (A.C.M.R. 1985). In *Browers* the judge's ruling was examined to see if it had the "effect" of suppressing evidence or terminating the proceedings. COMA, however, rejected the test at that time.

⁶⁴ Letter, Office of The Judge Advocate General, 3 Oct. 1989, subject: The Chief of Staff's Award for Excellence in Legal Assistance.

Small office category:

Carlisle Barracks, PA
U.S. Disciplinary Barracks, Fort Leavenworth, KS

Medium office category:

25th Infantry Division (Light)
82d Airborne Division
Fort Belvoir, VA
U.S. Army Berlin, FRG
Fort Benjamin Harrison, IN
Giessen Legal Center, 3d Armored Division, FRG
Fort Lee, VA
Fort Monmouth, NJ
Munich Branch Office, VII Corps, FRG
U.S. Army South, Panama
Fort Rucker, AL
U.S. Army Garrison, Fort Sam Houston, TX
Fort Sill, OK
U.S. Army SETAF & 5th SUPCOM, Italy
Wiesbaden Branch, V Corps, FRG

Large office category:

1st Infantry Division (MECH), Fort Riley, KS
3d Infantry Division (MECH), FRG
3d Armored Division, FRG
5th Infantry Division, Fort Polk, LA
8th Infantry Division, FRG
XVIII Corps, Fort Bragg, NC
101st Airborne Division, Fort Campbell, KY
Fort Benning, GA
Fort Knox, KY
Fort Leonard Wood, MO
Fort Richardson, AK

Family Law Note

Uniformed Services Former Spouses' Protection Act Update

Today, all states except Alabama are likely to divide military retired pay as marital property in at least some divorce actions (even Alabama courts *consider* military retired pay in setting alimony obligations). Divisibility, however, is not entirely clear in a few jurisdictions. Moreover, a minority of states continue to hold that pensions must be vested before they constitute a form of property that is subject to division. Still, the trend in case law throughout the country appears to be that whether a pension benefit is vested or not merely affects its valuation, not its divisibility.

The following list presents an updated summary of current treatment of military retired pay by all states. It includes information about the vesting issue where there is clear case or statutory authority that delineates the state's position. MAJ Guilford.

Alabama

Not divisible as marital property. *Tinsley v. Tinsley*, 431 So. 2d 1304, 1307 (Ala. Civ. App. 1983) (military pay is not divisible as marital property) (citing *Pedigo v. Pedigo*, 413 So. 2d 1154 (Ala. Civ. App. 1981)); *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979). But note *Underwood v. Underwood*, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); *Phillips v. Phillips*, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband's gross military pay as alimony).

Alaska

Divisible. *Chase v. Chase*, 662 P.2d 944 (Alaska 1983), *overruling Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982). Nonvested retirement benefits are divisible. *Laing v. Laing*, 741 P.2d 649 (Alaska 1987). Note also *Morlan v. Morlan*, 720 P.2d 497 (Alaska 1986) (The trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension; the pension would be suspended if the employee continued working. On appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay. In reaching this result, the court cited the California *Gillmore* decision.).

Arizona

Divisible. *DeGryse v. DeGryse*, 135 Ariz. 335, 661 P.2d 185 (Ariz. 1983); *Edsall v. Superior Court of Arizona*, 143 Ariz. 240, 693 P.2d 895 (Ariz. 1984); *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (*Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (Ariz. 1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes *eligible* to retire, whether or not he or she does retire at that point.

Arkansas

Divisible. *Young v. Young*, 288 Ark. 33, 701 S.W.2d 369 (Ark. 1986). But note *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (Ark. 1986) (military retired pay not divisible where the member had not served twenty years at the time of the divorce, and therefore the military pension had not "vested").

California

Divisible. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *In re Hopkins*, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). Nonvested pensions are divisible. *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Note also *Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33, *cert. denied*, 479 U.S. 1012, 107 S. Ct. 659 (1986) (courts may award a spouse a share of gross retired pay). VA disability payments made in lieu of retired pay probably are divisible. *In re Daniels*, 186 Cal. App. 3d 1084, 231 Cal. Rptr. 169 (1986); but note *In re Costo*, 156 Cal. App. 3d 781, 203 Cal. Rptr. 85 (1984). Military disability retired pay is divisible to the extent it replaces what

the retiree would have received as longevity retired pay. *In re Mastropaolo*, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); *In re Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977). If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes *eligible* to retire, or anytime thereafter, even if the member remains on active duty. *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); *In re Gillmore*, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. *Gallo v. Gallo*, 752 P.2d 47 (Colo. 1988) (vested military retired pay is marital property); *In re Grubb*, 745 P.2d 661 (Colo. 1987) (vested but unmatured civilian retirement benefits are marital property; expressly overrules any contrary language in *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976)); *In re Nelson*, 746 P.2d 1346 (Colo. 1987) (applies *Grubb* in a case involving vested contingent pension benefits—contingency was that the employee must survive to retirement age). Note: notwithstanding the language in the case law, some practitioners in Colorado Springs report that local judges divide military retired pay or reserve jurisdiction on the issue even if the member has not served for twenty years at the time of the divorce.

Connecticut

Probably divisible. Conn. Gen. Stat. § 46b-81 (1986) gives courts broad power to divide property. Note *Thompson v. Thompson*, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible. *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295 (Del. Super. Ct. 1982).

District of Columbia

Probably divisible. *Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986), which held that vested military retired pay can be divided.

Georgia

Probably divisible. *Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed]" that vested and nonvested military retirement benefits

acquired during the marriage are now marital property subject to equitable division," citing *Stumpf* and *Courtney*, and then faced the procedural question presented).

Hawaii

Divisible. *Linson v. Linson*, 1 Haw. App. 272, 618 P.2d 748 (1981); *Cassiday v. Cassiday*, 716 P.2d 1133 (Haw. 1986). In *Wallace v. Wallace*, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a veterinarian in the Public Health Service (and therefore covered by the USFSPA), to begin paying his spouse her share of retired pay as of the date he became eligible to retire, even though he was still working. He objected on appeal that this effectively ordered him to retire, in violation of 10 U.S.C. § 1408(c)(3) (Supp. IV 1986). The court dismissed his argument and affirmed the order.

Idaho

Divisible. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by *Griggs v. Griggs*, 197 Idaho 123, 686 P.2d 68 (1984)).

Illinois

Divisible. *In re Dooley*, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985); *In re Korper*, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). *Korper* points out that under Illinois law a pension is marital property even if it is not vested. In *Korper* the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point). See *In re Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule.

Indiana

Divisible. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage").

Iowa

Divisible. *In re Howell*, 434 N.W.2d 629 (Iowa 1989). The member had already retired in this case, but the decision appears to be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code." (emphasis added).

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987) (effective July 1, 1987).

Kentucky

Divisible. *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"). H.R. 680, amending Ky. Rev. Stat. Ann. § 403.190 (Michie/Bobbs-Merrill 1986), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983). Note also *Campbell v. Campbell*, 474 So.2d 1339 (Ct. App. La. 1985) (court can award a spouse a share of disposable retired pay, not gross retired pay, and court can divide VA disability benefits paid in lieu of military retired pay).

Maine

Divisible. *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987).

Maryland

Divisible. *Nisos v. Nisos*, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law—see *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981)). See also *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible).

Massachusetts

Probably divisible. Mass. Gen. L. ch. 208, § 34 (1987) gives courts broad power to divide the parties' property.

Michigan

Divisible. *McGinn v. McGinn*, 126 Mich. App. 689, 337 N.W.2d 632 (1983); *Giesen v. Giesen*, 140 Mich. App. 335, 364 N.W.2d 327 (1985); *Grotelueschen v. Grotelueschen*, 113 Mich. App. 395, 318 N.W.2d 227 (1982) (the court expressed its dissatisfaction with *McCarty v. McCarty*, 453 U.S. 210 (1981)); *Chisnell v. Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible).

Minnesota

Divisible. *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay. Note also *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. *Powers v. Powers*, 465 So. 2d 1036 (Miss. 1985).

Missouri

Divisible. *Coates v. Coates*, 650 S.W.2d 307 (Mo. Ct. App. 1983); *In re Weaver*, 606 S.W.2d 243 (Mo. Ct. App. 1980); *Daffin v. Daffin*, 567 S.W.2d 672 (Mo. Ct. App. 1978).

Montana

Divisible. *In re Marriage of Kecskes*, 210 Mont. 479, 683 P.2d 478 (1984); *In re Miller*, 37 Mont. 556, 609 P.2d 1185 (1980), *vacated and remanded sub. nom. Miller v. Miller*, 453 U.S. 918 (1981).

Nebraska

Divisible. *Taylor v. Taylor*, 348 N.W.2d 887 (Neb. 1984); Neb. Rev. Stat. § 42-366 (1989) (pensions and retirement plans are part of the marital estate).

Nevada

Probably divisible. *Tomlinson v. Tomlinson*, 729 P.2d 1303 (Nev. 1986) (the court speaks approvingly of the USFSPA in dicta but declines to divide retired pay in this post-divorce case involving a decree from another state). There is no case law directly on point, but Nevada is a community property state. Note also the Nevada Former Military Spouses Protection Act (NFMSPA), Nev. Rev. Stat. § 125.161 (1987) (Military retired pay may be partitioned by Nevada courts after a divorce even if the decree is foreign and even if it is silent on division of military retired pay; the NFMSPA was drafted to overrule the conflict of law portion of *Tomlinson*).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets . . . belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes . . . employment benefits, [and] vested and non-vested pensions or other retirement plans [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution" N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision appears to overrule the earlier case of *Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. *Castiglioni v. Castiglioni*, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); *Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977).

New Mexico

Divisible. *Walentowski v. Walentowski*, 100 N.M. 484, 672 P.2d 657 (N.M. 1983); *Stroshine v. Stroshine*, 98 N.M. 742, 652 P.2d 1193 (N.M. 1982); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). Note also *White v. White*, 105 N.M. 800, 734 P.2d 1283 (N.M. Ct.

App. 1987) (a court can award a spouse a share of gross retired pay). In *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (N.M. Ct. App. 1987), a civilian case, the court cited the California *Gillmore* case approvingly, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire, even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., *Damiano v. Damiano*, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division. See *Lydick v. Lydick*, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); *Gannon v. Gannon*, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation. *West v. West*, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984). In *McDermott v. McDermott*, 474 N.Y.S.2d 221, 225 (N.Y. Sup. Ct. 1984), a civilian case, the court ruled that it can "limit the employee spouse's choice of pension options or designation of beneficiary where necessary, to preserve the non-employee spouse's interest." This suggests that New York courts can order a member to elect SBP protection for a former spouse.

North Carolina

Divisible. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property. In *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd on other grounds*, 319 N.C. 367, 354 S.E.2d 506 (1987), the court suggested that vesting occurs when officers serve for twenty years but not until enlisted personnel serve for thirty years. But in *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the eighteen-year "lock-in" point. Note also *Lewis v. Lewis*, 83 N.C. App. 348, 350 S.E.2d 587 (1986) (a court can award a spouse a share of gross retired pay, but due to the wording of the state statute the amount cannot exceed fifty percent of the retiree's *disposable* retired pay).

North Dakota

Divisible. *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984). Note also *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (a court can award a spouse a share of gross retired pay).

Ohio

Divisible. *Anderson v. Anderson*, 468 N.E.2d 784, 13 Ohio App. 3d 194 (1984).

Oklahoma

Divisible. *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987) (based on a statutory amendment that became effective on 1 June 1987). The state Attorney General had earlier opined that a military pension earned by

years of service is jointly acquired property which is subject to division under Okla. Stat., tit. 12, § 1278 (1988).

Oregon

Divisible. *In re Manners*, 68 Or. App. 896, 683 P.2d 134 (1984); *In re Vinson*, 48 Or. App. 283, 616 P.2d 1180 (1980). Note also *In re Richardson*, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property).

Pennsylvania

Divisible. *Major v. Major*, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Probably divisible. P.R. Laws. Ann. tit. 31, §§ 3642 & 3643, generally concerning pensions. See *Roman Mayol v. Superior Court*, 101 P.R. Dec. 807 (1973); and *Rivera v. Rodriguez*, 93 P.R.R. 20 (1966), for cases involving federal government pensions (although not military pensions).

Rhode Island

Probably divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution.

South Carolina

Divisible. *Martin v. Martin*, 373 S.E.2d 706 (S.C. Ct. App. 1988) (vested military retirement benefits are marital property; also, present cash value determination can be based on gross pension value, as opposed to net pension value; the case is based on a 1987 amendment to state law—see S.C. Code § 20-7-471 (1987)). But note *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during husband's military service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Probably divisible. In *Moller v. Moller*, 356 N.W.2d 909 (S.D. 1984), the court commented approvingly on case law from other jurisdictions that recognize divisibility but declined to divide retired pay because a 1977 divorce decree was not appealed until 1983. As for pensions in general, see *Hansen v. Hansen*, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible). Note *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) defines all vested pensions as marital property. No reported Tennessee cases specifically concern military pensions.

Texas

Divisible. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982). Note also *Grier v. Grier*, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property). Pensions need not be vested to be divisible. *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay.

Utah

Probably divisible. Nonvested civilian pensions are divisible. *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by . . . equitable division. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property."

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. See also *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18 (1987); *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (cases hold that military retired pay is subject to equitable division).

Washington

Divisible. *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973); *In re Smith*, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. *Butcher v. Butcher*, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay).

Wisconsin

Divisible. *Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible); *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983).

Wyoming

Divisible. *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property).

Canal Zone

Divisible. *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978).

Can California Tax APO S.F. Mail Orders?

Soldiers stationed overseas frequently use mail order services to buy things they need, and this can raise interesting sales tax problems. A state can apply its sales tax to mail order purchases delivered to addresses in the state, but it cannot tax sales to customers with addresses outside the state. What about a purchase from a California vendor that is mailed to a soldier who has an APO San Francisco address—does California tax this transaction?

Happily, the answer is no. California's own tax regulations exempt property mailed to members of the Armed Forces through APO and FPO addresses. The exact guidance provided by these regulations is as follows.

Regulation 1620. INTERSTATE AND FOREIGN COMMERCE.

(a) SALES TAX.

(3) SALES PRECEDING MOVEMENT OF GOODS FROM WITHIN STATE TO POINTS OUTSIDE STATE.

(E) Particular Applications.

1. Property Mailed to Persons in the Armed Forces. Tax does not apply to sales of property which is mailed by the retailer, pursuant to the contract of sale, to persons in the armed forces at points outside the United States, notwithstanding the property is addressed in care of the postmaster at a point in this state and forwarded by him to the addressee.

When mail is addressed to Army Post Offices (A.P.O.'s) or Fleet Post Offices (F.P.O.'s) in care of the postmaster, it will be presumed that it is forwarded outside California. The retailer must keep records showing the names and addresses as they appear on the mailed matter and should keep evidence that the mailing was done by him.⁶⁵

This information should be disseminated to soldiers and civilians who receive mail through APO San Francisco so they can establish that they need not pay sales tax for purchases from California vendors.

The background information for this item was furnished by the Chief, Preventive Law & Legal Aid Group, Office of The Judge Advocate General, HQ U.S. Air Force. MAJ Guilford.

⁶⁵ California Board of Equalization, Sales and Use Tax Regulations, Regulation 1620, para. 1620(a)(3)(E) (1970).

⁶⁶ Priv. Ltr. Rul. 8,911,015 (Dec. 15, 1988).

⁶⁷ I.R.C. § 1034 (West Supp. 1988).

⁶⁸ I.R.C. § 1034(h) (West Supp. 1988).

⁶⁹ Rev. Rul. 74-250, 1974-1 C.B. 202.

⁷⁰ I.R.C. § 6013(d)(3) (West Supp. 1988).

Impact of Divorce on Home Rollovers

A recent Private Letter Ruling⁶⁶ highlights the need to consider the impact of Internal Revenue Code section 1034⁶⁷ when advising couples who are contemplating divorce or separation. In the ruling, the IRS determined the proper tax treatment for the gain on the sale of a couple's home when they divorced after the sale and then only the husband reinvested the proceeds in a replacement residence.

Most legal assistance attorneys are familiar with the basic concept of section 1034. Under this provision, taxes on the gain from a sale of a principal residence must be deferred if the proceeds from the sale are reinvested in a replacement principal residence within the prescribed period. For soldiers on active duty, the period is two years before the former home was sold and extending to four years after the home is sold.⁶⁸ The soldier must purchase and occupy the new home during this period in order to qualify for the deferral.

The private letter ruling illustrates that divorce can significantly complicate the application of section 1034. In this case, the couple sold their jointly owned home for \$300,000 and elected to defer the \$150,000 gain on their joint 1983 tax return. The couple were divorced in 1984, and their divorce decree specified that each spouse would be responsible for one-half of any tax due on the gain from the sale. The husband subsequently bought a new home for \$120,000 within the replacement period, but the wife did not purchase a replacement residence.

The deferral provisions of section 1034 apply separately to the gains realized by a husband and wife from the sale of a home if they divorce and subsequently buy and occupy replacement homes.⁶⁹ Accordingly, the IRS concluded that the husband could defer part of his gain from the sale of the first home, but he must report \$30,000 as his share of the recognized gain on the sale of the jointly owned residence in an amended 1983 return. This figure was based on the difference between his share of the adjusted sales price of the old residence (one-half of \$300,000, or \$150,000) and the cost of the new residence (\$120,000).

The IRS added that the amended return must also include all the wife's share of the gain on the sale (\$75,000). The husband pointed out that he could not locate his former wife, and he argued that he should not be required to pay taxes on her share of the gain. The IRS ruled against him, however, and required that the entire \$105,000 of recognized gain be reported on the amended return. This conclusion was based on the rule that spouses are jointly and severally liable for additional tax later found to be owed on a joint return.⁷⁰

Another issue involving divorced or separated couples under section 1034 concerns the "principal residence" requirement. For example, what if a husband and wife separate and only the wife continues to occupy the home? If a divorce agreement specifies that the home is to be sold, will the husband be able to reinvest his share of the proceeds in a new home?

The IRS has provided little guidance on this point. In other contexts, however, the status of the residence at the time of the sale has rigidly controlled the matter.⁷¹ Thus, unless the vacating spouse can establish that he had an intention to return to the home,⁷² he cannot take advantage of the tax deferral benefits of section 1034.

Practitioners who represent divorcing parties should consider the operation of section 1034 on any transaction involving a marital home. For example, if the marital home is to be sold and both parties intend to purchase a new residence, the marital home should be sold prior to separation so that both parties will be able to claim it as their principal residence. Additionally, the separation agreement should address the contingency that one or both of the spouses may not be able to reinvest the gain in a qualifying replacement residence. This can be handled by including a provision that assigns responsibility for any taxes that subsequently become due. On the other hand, if a marital home is to be sold and only one party intends to use the deferral benefits of section 1034, that spouse should be allowed to occupy the old house until it is sold or until a replacement residence is purchased. MAJ Ingold.

Assumption of Note Constitutes a Taxable Event

Intrafamilial property transfers are often made without giving adequate thought to the eventual tax consequences of the transaction. A recent case from the Eighth Circuit, *Juden v. Commissioner*,⁷³ is yet another example of family members who failed to anticipate the tax consequences of a property transfer and, as a result, incurred substantial unexpected tax liability.

In *Juden* the taxpayers borrowed money from an insurance company and secured the note with their land. The taxpayers' children subsequently contracted to purchase the land which still was encumbered by the insurance company's deed of trust. According to the contract for sale, the children agreed to assume the outstanding indebtedness on the promissory note and hold their parents harmless on that note as consideration for the transfer. There was no consideration recited in the deed of trust.

The IRS asserted an income tax deficiency against the taxpayers for the year of the transfer on the basis that a taxable event had occurred. The taxpayers contested this assessment by asserting several contentions supporting the view that a taxable event did not occur. First, the taxpayers argued that because they were not actually discharged from the underlying note, they did not receive sufficient consideration to create an enforceable sales contract. Second, the taxpayers claimed that the contract was not valid because it was executory as to the children since the latter did not actually pay the debt as they had promised to do in the contract for sale. The final argument advanced by the taxpayers was that the contract was void for lack of mutuality because the children were given a restricted annual right to cancel the contract.

The Eighth Circuit relied on a Supreme Court case⁷⁴ to reject the taxpayer's assertion that they did not receive an economic benefit. Under this precedent, a buyer's assumption of a seller's mortgage is considered part of the proceeds or amount realized on a sale whether or not the seller is actually released from the liability.⁷⁵

The court expressed the view that the children became the ultimate obligors for the balance of the mortgage when they entered into the agreement and agreed to assume liability. The taxpayers could enforce this personal liability through state courts, and they therefore received an economic benefit to the extent of the assumption. This was sufficient consideration to support a contract for sale.

The taxpayers' assertion that the contract was void for lack of mutuality because the children had a right to cancel the contract was also unsuccessful. A contract is not invalid, the court concluded, "merely because one party has the right to cancellation while the other does not."⁷⁶

An unusual aspect of the case was that the taxpayers originally reported the transaction as a sale to the IRS, but they later changed their position to assert it was not a sale when the IRS challenged the amount of gain that they claimed. According to the court, taxpayers have less freedom than the IRS to modify positions they have previously adopted regarding tax matters.⁷⁷ As the parties in *Juden* discovered, taxpayers must be prepared to accept the tax consequences of their characterization of a transaction, whether or not they correctly anticipated the result. MAJ Ingold.

⁷¹ See, e. g., *Stucchi*, 35 T.C.M. 1052, T.C. Memo 1976-242 (1976).

⁷² See *Barry V. Commissioner*, 30 T.C.M. 757, T.C. Memo. 1971-179 (Army officer allowed to treat home that he rented out during successive military assignments as principal residence because he intended to return); *Trisko v. Commissioner*, 29 T. C. 515 (1957) (nonrecognition allowed because taxpayer held intention to return). *But see Houlette v. Commissioner*, 48 T. C. 350 (1967) (despite intent to return, taxpayer's home no longer qualified as principal residence when he moved into rental apartment).

⁷³ 865 F.2d 960 (8th Cir.).

⁷⁴ *Crane v. Commissioner*, 331 U.S. 1 (1947).

⁷⁵ Department of Treasury regulations implement this basic holding. See *Treas. Reg. § 1.1001-2(a)(4)(ii)*.

⁷⁶ *Id.* at 903 (citing *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 36-37 (8th Cir. 1975)).

⁷⁷ *Id.* at 902 (citing *Bolger v. Commissioner*, 59 T.C. 760 (1973)).

Retroactive Awarding of LL.M. in Military Law

The Academic Department has received numerous inquiries concerning the awarding of the LL.M. in Military Law to individuals who completed the resident

Graduate Course program prior to TJAGSA's statutory authorization to grant the LL.M. degree. The American Bar Association, the accrediting agency for TJAGSA, does not sanction the retroactive accordation of degrees. Accordingly, TJAGSA cannot retroactively award the LL.M. degree.

Claims Report

United States Army Claims Service

German Tenders of Service

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The cost of doing business in a foreign jurisdiction sometimes entails the purchase of services involving a host nation tariff.¹ This tariff may not always be consistent with policies developed by the Department of Defense or the U.S. Army Claims Service in dealing with the American carrier industry. One such illustration is the use of tenders of service² for household goods shipments moved within the European Theater by German carriers.

German tenders of service pose benefits and problems for transportation and claims personnel. For the installation transportation officer (ITO), the use of tenders instead of contracts enhances the ability to enforce carrier discipline. Under a contract system, a single carrier is awarded a contract annually for each military community. The contractor, in effect, has a monopoly on the military community for the duration of the contract. Poor performance, though documented, seldom leaves the ITO with sufficient measures to discipline the contractor. Suspending the only contractor in the community could result in a severe disruption of service. Terminating a contract for cause could require resolicitation and award, creating an even longer break in service. Using tenders, the ITO has several carriers available to accept a shipment. The availability of competition can result in improved carrier performance and fewer claims. Substandard performance can be effectively disciplined by simply not using the tender of a particular carrier.

For claims personnel, the use of German tenders requires vigilance in the processing of claims. The tenders incorporate portions of the German transportation tariff which requires that the property owner provide written notice of loss or damage within ten days of delivery. The tender permits the notice to be filed at the claims office and allows an additional five days for the claims office to dispatch the notice to the carrier.

If a property owner fails to provide timely notice, AR 27-20, paragraph 11-21a(1) requires the claims judge advocate (CJA) to reduce the amount otherwise allowable by the loss of potential carrier recovery. Because carrier liability under German tenders is limited to Deutsche Mark (DM) 4,000 per van meter,³ a claimant who fails to provide timely notice may forfeit his or her entire claim. CJA's may waive reduction action for good cause only when one of the following circumstances directly contributes to the claimant's failure to give timely notice:

- a. Officially recognized absence resulting in claimant's absence from his or her official duty station for a significant portion of the notice period.
- b. Hospitalization of claimant for a significant portion of the notice period.
- c. Substantiated misinformation concerning notice requirements given to the claimant by government personnel.

Many claimants who fail to provide timely notice may seek to obtain relief by alleging they were not provided proper information by transportation personnel. CJA's and ITO's must work together to develop procedures that ensure clients are properly counseled and that such counseling is documented. The pre-move counselor is the key person. No one else will have the opportunity to ensure that clients are made aware of the limited notice period prior to the move. If a client fails to provide timely notice and alleges that he was not advised of the notice period, claims personnel should request the responsible ITO to produce documentation of client counseling. The absence of documented counseling will be one factor in determining whether substantiated misinformation occurred. All attendant circumstances must be considered.

¹ A tariff consists of rates, rules, regulations, services and charges set for an industry by a governmental body.

² A tender of service is a document providing quotations to the government based on special rates and charges applicable to personal property shipments. Neither party is contractually bound to perform a given transaction or, for that matter, to ever exercise a tender offer.

³ A van meter is approximately 1000 pounds. Most local moves would involve a household goods shipment of five to ten thousand pounds. A five van meter shipment would, therefore, have a maximum carrier liability of DM 20,000. At a conversion rate of DM 1.80 to \$1.00, the maximum carrier liability would be over \$11,000.

Another issue affecting claims administration is the time period to assert a recovery demand on the carrier which is one year from the date of delivery. As the property owner has two years in which to file a claim, some recovery actions will be lost because the claimant filed his claim after the demand period expired. Unlike late notice, no regulatory authority exists to reduce the claimant's award for this loss of potential carrier recovery. When claimants turn in their notice of loss or damage, claims personnel must aggressively counsel them to file their claims early.

One other aspect of the short demand period requires comment. Many claims will be filed late in the demand period. Normal processing and forwarding for centralized recovery could result in the demand being time barred under the tariff. Claims personnel must be

prepared to assert the demand immediately from their office, if necessary, on the same day that the adjudication is completed. Awaiting come-back vouchers from finance or other documentation is not an acceptable excuse for losing the recovery action. If the amount of the claimant's award is known, then the demand can be asserted. Calculations are not required on a line by line basis; merely assert a demand for whatever the claimant is paid.

German tenders of service are a test of initiative for both transportation and claims officers. Close coordination between the CJA and ITO at the community level will ensure client control during the notice period, and vigilance by claims personnel will ensure timely demands.

Claims Notes

1988 Medical Care, Property Damage, and Carrier Recovery Request

In calendar year 1988, over \$12.7 million was collected in medical care and property damage recovery claims by field claims offices under the Army's Affirmative Claims Program. This recovery effort exceeded last year's effort by more than two and one-half million dollars and set an all-time recovery record. The Department of Justice has specifically commended the Army for its 1988 Medical Care recovery effort, which produced the highest annual amount ever collected by an agency under the Medical Care Recovery Act. The medical care recovery program is based upon statutory authority conferred by the Medical Care Recovery Act, which enables the government to recover the reasonable value of medical care furnished by the United States to a person on account of injury or disease incurred under circumstances creating tort liability upon some third person. The property damage program is based on the authority found in the Federal Claims Collection Act, giving the government the right to compensation for damage caused to government property by a third party. The Judge Advocate General has recognized the top ten CONUS claims offices with the highest medical care recovery and the top ten in property damage recovery. Certificates of Excellence have been forwarded to the appropriate commanders of the claims offices listed below:

a. Medical Care Recovery:

U.S. Army Armor Center and Fort Knox-
Brooke Army Medical Center
7th Infantry Division and Fort Ord
III Corps and Fort Hood
I Corps and Fort Lewis
XVIII Airborne Corps and Fort Bragg
4th Infantry Division (MECH) and Fort Carson
U.S. Army Garrison, Fort Meade
101st Airborne Division (AASLT) and Fort
Campbell
USA Field Artillery Center and Fort Sill

b. Property Damage Recovery:

XVIII Airborne Corps and Fort Bragg
7th Infantry Division and Fort Ord
U.S. Army Armor Center and Fort Knox
4th Infantry Division (MECH) and Fort Carson
U.S. Army Garrison, Fort Meade
101st Airborne Division (AASLT) and Fort
Campbell
I Corps and Fort Lewis
5th Infantry Division (MECH) and Fort Polk
USA Transportation Center and Fort Eustis
USA Field Artillery Center and Fort Sill

The increase in fiscal year 1988 carrier recovery totals was not as dramatic as the increase in calendar year 1988 medical care and property damage recovery. Many field claims offices did respond aggressively to concerns by The Judge Advocate General and the General Accounting Office over carrier recovery backlogs. These offices responded strongly, with Fort Sill showing the most marked improvement by eliminating an especially large file backlog in a few months. The hard work of these offices is beginning to appear in the fiscal year 1989 carrier recovery totals. The contributions of these offices, together with the work put in by the offices which have consistently performed in an outstanding manner, is expected to give the Army record carrier recovery in fiscal year 1989.

Because of problems with data entered into the USARCS database and with data reported by the U.S. Army Finance and Accounting Center, the 1988 carrier recovery rankings for CONUS and OCONUS offices were based on timeliness in asserting demands and forwarding files and on local recovery deposited as a percentage of amounts paid. In addition, the incidence of errors noted in files forwarded for centralized recovery was considered. Five CONUS offices and three OCONUS offices were selected for recognition. Certificates of Excellence signed by The Judge Advocate General have been forwarded to appropriate commanders to recognize the claims offices listed below:

a. CONUS—1st Infantry Division (MECH) and Fort Riley

5th Infantry Division (MECH) and Fort Polk
U.S. Army Garrison, Fort McPherson
Fort McCoy
Yuma Proving Ground

b. OCONUS—3rd Armored Division (Giessen Branch)

21st Support Command (Southern Law Center-Karlsruhe Branch)
V Corps, Frankfurt

All claims offices are to be congratulated for their outstanding 1988 achievements. The recovery effort depends upon the dedication of every claims office, large and small, throughout the Army. To each of you who dedicated yourself to serving the Army, we send our thanks for a job well done! COL Gravelle.

Personnel Claims Recovery Note

When Carriers Blame Damage on the Nontemporary Storage Facility

Carriers who pick up household goods shipments from nontemporary storage often blame any damage or loss discovered after delivery on the nontemporary storage facility. A carrier can *only* be relieved of liability for such damage or loss, however, when a valid exception sheet has been prepared at the time of pickup from nontemporary storage. A valid exception sheet must describe the exact damage or loss later claimed, must be signed by a representative of the nontemporary storage facility as well as the carrier's agent, and should list correct inventory numbers.

The following paragraph is a suggested response that may be used to rebut carriers who blame the nontemporary storage facility, but fail to provide adequate proof.

In order to be relieved of liability you must provide a copy of a valid exception sheet prepared at the time of pickup from nontemporary storage. This exception sheet must describe the exact damage or loss being claimed, must be signed by a representative of the nontemporary storage facility as well as your agent, and must indicate appropriate inventory numbers. Any exception sheet prepared after leaving

the nontemporary storage facility is not valid to relieve your company of liability.

Ms. Schultz.

Management Note

Manning Standards

As a result of the General Accounting Office study of DOD's handling of household goods claims and last year's carrier recovery survey, certain defects in Table 551-46 of DA Pamphlet 570-551, Staffing Guide for U.S. Army Garrisons (C10, 1 Aug. 1981) have assumed greater prominence. It is a poorly kept secret that many Army claims offices are inadequately staffed to perform their missions (especially the carrier recovery mission) and that many claims personnel do not have grades commensurate with their responsibilities.

One problem is that the yardstick for staffing levels in Table 551-46 is based upon "claims processed," a term which is not defined. At some installations, this yardstick has been restrictively interpreted to include only claims presented against the United States. USARCS has taken the position that "claims processed" includes potential tort claims investigated, affirmative claims asserted, and carrier recovery claims forwarded for centralized recovery or asserted locally. For example, a household goods shipment claim presented against the United States and the subsequent recovery action against the carrier would be counted as two "claims processed" for manpower purposes. Installations which do not count affirmative claims and carrier recovery demands as "claims processed" are likely to be severely understaffed.

USARCS has proposed changing Table 551-46 to DA. The change would define "claims processed," correct problems with the grading of claims personnel based upon the skill levels outlined in paragraph 2-308, DA Pamphlet 611-201 (1 Feb. 1989 UPDATE), update the description of work performed, and identify positions for a tort claims investigator and a recovery judge advocate in large and medium-sized offices. This initiative, if successful, should help to reduce problems with staffing and grade levels in field claims offices. Mr. Frezza.

Criminal Law Notes

Criminal Law Division, OTJAG

Changes in Army Confinement Procedures

Background

At the direction of the Vice Chief of Staff of the Army (VCSA) in 1986, Army Law Enforcement conducted an examination of what the role and structure of Army corrections should be in the year 2000. One of the proposals from the study, known as Army Corrections in the Year 2000 (ACS 2000), was to develop nine regional confinement facilities (RCF's) from the current

fifteen Installation Detention Facilities (IDF's) located in CONUS. The RCF's would confine minimum and medium custody prisoners with adjudged sentences from one day to three years, as opposed to the current confinement policy of IDF's confining inmates for up to four months. Under the ACS 2000 plan, the U.S. Army Correctional Activity (USACA) at Fort Riley would concentrate primarily on restoring prisoners to duty. The U.S. Disciplinary Barracks (USDB) would continue to exist as the Army's only maximum security prison, but

as a result of the RCF's its prisoner population would be reduced by approximately 200 inmates.

Upon being briefed on the ACS 2000 conclusions, the VCSA directed that Army Law Enforcement test the ability of the IDF's and the installations to handle longer term prisoners prior to implementation of the full plan envisioned by ACS 2000. The ACS 2000 Test Plan was recently approved at Headquarters, Department of the Army, with test plan prisoners being received at two test sites on 15 March 1989.

ACS 2000 Test Plan

The test concept is to take selected prisoners returning from Europe and divert them from their current destinations of USACA or the USDB, to the IDF's at Fort Sill, Oklahoma, or Fort Meade, Maryland, where they will serve the remainder of their sentences unless subsequently transferred to the USDB due to disciplinary reasons.

Under the test plan, Fort Meade will house a maximum of fifteen post-trial test inmates and Fort Sill will house a maximum of thirty test inmates. During the initial phase of the eighteen month test period, the Commander, U.S. Army Confinement Facility, Mannheim, FRG, will select the prisoners who will be diverted to the test facilities. Those selected for diversion must be prisoners who have confinement of less than three years, have nonviolent confining offenses, not be a known security or suicide risk, and have no medical conditions, such as pregnancy, or psychological problems, such as alcohol or drug abuse. Other considerations will include the prisoner's job skills, correctional treatment needs, religious affiliation, and prior association with other inmates.

The test facilities will provide, at a minimum, prisoner employment opportunities, crisis counseling, and computer-based instruction training. The key element in the prisoner's treatment at the RCF is development of a strong work ethic. Prisoners will initially perform duties inside the facility, but as the prisoner demonstrates the necessary level of trust and responsibility, he or she will perform duties outside the facility. Army Law Enforcement has directed the RCF's to focus maximum effort on having the test inmates use their job skills to serve the installation. Education, vocational, and social programs, along with religious and recreational programs, will continue to be an integral part of facility operations.

Objectives of the Test Plan

The primary objectives of the ACS 2000 test plan are: 1) to test the ability of the installation staff to support long term prisoners; 2) to test the ability of the

confinement facility staff to support long term inmates; and 3) to determine the savings to the installation created by the presence of a long term prisoner work force. As for judge advocate involvement, data will be captured from the test installations' staff judge advocate and trial defense service offices by the test RCF's to determine increased workloads for legal assistance, claims, defense counsel services, etc.

How the ACS Test Plan Affects Judge Advocates

In addition to the increased workload at the test installations that may result from confining long term prisoners other than at USACA or the USDB, the plan will primarily affect USAREUR judge advocates. After the convening authority takes action on cases where the adjudged confinement was less than three years and where a clemency copy of the record of trial is required under paragraph 5-31, AR 27-1, staff judge advocates in USAREUR must coordinate with the Mannheim Confinement Facility to determine where the prisoner is located so that the clemency copy of the record may be forwarded to the appropriate confinement facility. Military judges and counsel must also recognize that soldiers sentenced in USAREUR will not automatically come under the past confinement policies of going to the USDB if their sentence is over two years, or to USACA if their sentence is over four months but less than or equal to two years. MAJ Gary J. Holland.

Opinion DAJA-CL 1989/5175

The Office of The Judge Advocate General was asked the proper procedures to follow when a commander desires to vacate the suspension of a previous punishment under Article 15, UCMJ, and also impose punishment under Article 15, UCMJ, for the same misconduct.

A commander may vacate the suspension of punishment only upon finding that the soldier has committed misconduct amounting to an offense under the UCMJ.¹ Any commander may vacate any suspended punishment, provided the punishment is of the type and amount the commander could impose.² Thus, in a situation where the battalion commander imposes the maximum punishment permissible, and the brigade commander suspends all the punishment for a period of time, it would be permissible for a company commander to vacate that part of the punishment that calls for forfeiture equal to 7 days pay (the maximum amount of forfeitures a captain in command of a company may impose). A superior who wants to be the only one who can vacate a punishment that he suspends should withdraw that discretion from his subordinates. This can be done as part of the unit SOP or on a case by case basis.³

¹ MCM 1984, Part V, para. 6a(4). The commander must be "reasonably satisfied" that the soldier committed the offense. Subsequent acquittal at court-martial for the offense does not render the vacation void due to the different standards of proof applied. (DAJA-CL 1983/6076 1 Nov. 83). The vacation of the suspension must occur within the suspension period. If the punishment is suspended until 18 November, a vacation action on 18 November is void as it is not within the suspension period (DAJA-CL 1977/2848 31 Jan. 78) and the misconduct cannot have occurred before the period began to run (DAJA-CL 1978/5074 10 Feb. 78) even if it is not brought to the commander's attention until later (DAJA-CL 1976/2657 13 Jan. 77).

² *Id.*; DAJA-CL 1977/2393 2 Sep. 77. Company commander vacated punishment suspended by battalion commander.

³ AR 27-10, Military Justice, dated 16 January 1989, para. 3-7c.

The soldier should be given notice of the suspension and an opportunity to be heard. If the punishment that is being vacated is of the kind set forth in Article 15(e)(1)-(7),⁴ the soldier should be given the opportunity to appear personally before the commander vacating the punishment.⁵

Vacation of suspended punishments is recorded on a DA Form 2627-2 (Feb. 83)⁶ (the edition of Nov. 82 will be used until exhausted). This form provides, in block 5c and 5d, a place to record that the soldier was given an opportunity to rebut and be present at the vacation hearing. Either the form should record that the soldier was afforded these opportunities, or the form should reflect why it was impracticable not to give the soldier these rights. Staff Judge Advocates should instruct the local MILPO to reject any DA Form 2627-2 that does not clearly meet this requirement. Failure to fill in this section raises questions as to the admissibility of the vacation at a later court-martial,⁷ and may result in the Army Board for the Correction of Military Records invalidating the suspension.

The DA Form 2627-2 is filed in the same manner as the Record of Proceedings Under Article 15, DA Form 2627.⁸ Thus, on the older editions of the form the commander must remember to record in the remarks section whether the Article 15 was filed in the performance or the restricted fiche of the OMPF.

Misconduct resulting in vacation of a suspended punishment may also be the basis for the imposition of another Article 15.⁹ In such a case, the hearing on the present Article 15 may also serve as the hearing necessary to vacate the suspended punishment. However, this must be clearly recorded on the DA Form 2627-2, and the soldier informed of the commander's intent, not only to punish for the present misconduct, but also to use the misconduct as a basis for vacating the previous suspended punishment. The previous punishment is vacated first, then the soldier receives punishment, if any, under the present Article 15. Thus it may appear a soldier was reduced two grades by a company commander, but actually, there are two separate actions taking place.

There is no appeal from a decision to vacate a suspended punishment.¹⁰

⁴ These are the same punishments which, when imposed, require a judge advocate to review the punishment prior to the superior authority acting on an appeal. They are:

- (1) arrest in quarters for more than seven days;
- (2) correctional custody for more than seven days;
- (3) forfeiture of more than seven days pay;
- (4) reduction from E-4 or higher;
- (5) extra duties for more than 14 days;
- (6) restriction for more than 14 days;
- (7) detention of more than 14 days' pay.

⁵ MCM 1984, Part V, para. 6a(4).

⁶ AR 27-10, Military Justice, dated 16 January 1989, figure 3-3.

⁷ United States v Covington, 10 M.J. 64 (C.M.A. 1980); United States v Weber, SPCM #18142 (A.C.M.R. 25 Jan 83).

⁸ AR 27-10, Military Justice, dated 16 January 1989, para. 3-38.

⁹ AR 27-10, Military Justice, dated 16 January 1989, para. 3-25a.

¹⁰ AR 27-10, Military Justice, dated 16 January 1989, para. 3-25a.

Professional Responsibility Opinion 89-01

Professional Responsibility Committee, OTJAG

The Judge Advocate General referred the following question to the Professional Responsibility Committee for an advisory opinion:

Is it unethical for an attorney to threaten criminal prosecution to gain an advantage in a civil matter?

The committee provides this answer to the posed question: A correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled, even if such statement may be construed as a threat, by itself is not a violation of the Army Rules of Professional Conduct for Lawyers. However, as set

forth in Rule 4.4, the motivation and intent of the attorney involved will be a factor in determining whether his or her actions were ethically improper. The means employed by the attorney may not have a substantial purpose to embarrass, delay, or burden the recipient of the communication.

Discussion

The Army Rules of Professional Conduct for Lawyers do not contain the prohibition formerly contained in DR 7-105(A)¹ of the ABA Code of Professional Responsibility.² The Army Rules include the following Rule 4.4:

¹ Threatening Criminal Prosecution.

A) A lawyer shall not present, participate in presenting, or threaten to present, criminal charges solely to obtain an advantage in a civil matter.

² Laverdure, *Threat of Criminal Sanctions in Civil Matters: An Ethical Morass*, The Army Lawyer, Jan. 1989, at 16.

Rule 4.4 Respect for the Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

This rule is identical to the ABA Model Rule, however, in the accompanying comments the Army Rule adds the former wording of Ethical Consideration 7-10:³

The duty of a lawyer to represent the client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Rule 4.4 and its comment support the prior opinions of the Professional Responsibility Committee that a statement of fact, even if it involves a threat of possible criminal sanctions if a civil obligation is not honored, does not violate ethical standards. But intemperate language or personal involvement of the judge advocate is improper conduct and must be avoided.

Judge advocates most often face the situation presented in the posed question when writing letters on behalf of clients who are trying to collect child support from a recalcitrant soldier. May the communication from the legal assistance attorney state that the soldier could be court-martialed for failure to support his family? The question addresses the continued validity of former opinions of The Judge Advocate General. These opinions, using the ABA Code of Professional Responsibility as the applicable standard, found the letters written by judge advocates on behalf of legal assistance clients to be a violation of ethical standards. See *Professional Responsibility*, The Army Lawyer, May 1977, at 11; *Professional Responsibility*, The Army Lawyer, Sept. 1978, at 31.

Examining the letters sent by the judge advocates in the two opinions cited above under the ethical standards of the Army Rules of Professional Conduct, the opinions remain valid. The attorneys in those situations acted inappropriately, not by correctly informing the soldier that failure to support his family or failure to pay a debt could subject him to court-martial, but rather by becoming personally involved and by including intemperate comments in the letters.

In the first letter, after properly stating that "you may be court-martialed under the Uniform Code of Military

Justice for the wrongful failure to support your dependents," the legal assistance attorney went beyond this factual statement by personally interjecting himself in the criminal matter. The letter continued, "I intend to write the strongest letters possible to your entire chain of command, your career branch, and anyone else who conceivably could assert sufficient pressure on you." The Professional Responsibility Committee recommended to The Judge Advocate General that the attorney be issued a letter of reprimand.

In the second letter, the legal assistance officer was attempting to collect a debt for his client. He correctly and factually informed the alleged debtor, "I must inform you of your responsibilities under AR 635-200, Chapter 13 and the fact that you could be eliminated from the service for indebtedness." The letter inappropriately continued, "[You] have shown yourself to be nothing more than a lowly dishonest welsker . . . I will do everything in my power to insure that your actions will have an adverse effect on your military career." The attorney was misinformed; the recipient of the letter had paid the debt. The attorney was given a letter of reprimand.

The recipient of this second letter sought the aid of a legal assistance officer who compounded the situation by an intemperate return letter. This attorney was counseled by his staff judge advocate.

Both of these cases illustrate the importance of avoiding unprofessional and intemperate language and the pitfalls of basing action on unverified information supplied by a client. A statement of an unemotional, correct fact, in a letter to an unrepresented person, is not an ethical violation. The language in AR 608-99, Family Support, Child Custody, and Paternity, 22 May 1987, is proper. The purpose of such a letter is to have the recipient fulfill a moral and legal obligation and not to gain an advantage over disputed facts. The lawyer must not become personally involved. Inappropriate and intemperate language violates Army Rule 4.4.

When communicating with a soldier, as well as with others, the attorney must follow the guidance of Rules 4.3 and 4.4. Usually the soldier to whom the letter is addressed will not be represented by counsel. The legal assistance attorney should not give advice to the unrepresented soldier other than advice to obtain counsel.

Staff Judge Advocates should monitor the letters of legal assistance officers on behalf of their clients. They, and other supervisors, have an ethical obligation to see that the ethical rules are obeyed. Rule 5.1.⁴

³ ABA Model Code of Professional Responsibility, EC 7-10 (1980).

⁴ Rule 5.1 Responsibilities of The Judge Advocate General and Supervisory Lawyers.

a. The Judge Advocate General and supervisory lawyers shall make reasonable efforts to ensure that all lawyers conform to these Rules of Professional Conduct.

b. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to these Rules of Professional Conduct.

Contract Law Note

Contract Law Division, OTJAG

Funding of Replacement Contracts

The Comptroller General recently modified the rule on the availability of funding for replacement contracts. In *Matter of Replacement Contracts*, B-232616 (19 Dec. 1988), the Comptroller General held that funds originally obligated in one fiscal year for a contract that is terminated for convenience in response to a court order (or a determination by other competent authority) that the contract award was improper remain available in a subsequent fiscal year to fund a replacement contract. The requirements are that: 1) the original award was made in good faith; 2) the agency has a continuing *bona fide* need for the goods or services involved; 3) the replacement contract is of the same size and scope as the original contract; and 4) the replacement contract is executed without undue delay after the original contract is terminated for convenience.

The previous rule, set forth in 60 Comp. Gen. 591 (1981), was that funds obligated for a contract in one fiscal year would not remain available to fund a replacement contract in a subsequent fiscal year if the original contract was terminated for the convenience of the government, even if the termination was done to comply with an order of a competent administrative or judicial authority or a recommendation of the GAO. When a government contract is terminated for default, the Comptroller General has consistently ruled that the funds obligated for the original contract are available in a subsequent fiscal year to fund a replacement contract.

The rationale behind the modification to the previous rule appears to be twofold. First, the GAO recognized its inconsistency in dealing with contracts terminated for convenience. In a number of decisions predating 60 Comp. Gen. 591, the Comptroller General allowed replacement contracts to be funded with prior fiscal year funds even when the original contract was terminated for

reasons other than the contractor's default, including several cases involving terminations for convenience.

The other basis for the modification to the prior rule is the Comptroller General's reexamination of the rationale in 60 Comp. Gen. 591 for allowing funds obligated for a contract that is terminated for default to remain available for a replacement contract whether awarded in the same or following fiscal year. The rationale was that an agency could neither anticipate nor control contractor defaults and consequently could not budget for expenditures to replace such contracts. Allowing replacement contracts to be funded with prior fiscal year funds was viewed as facilitating contract administration because it spares agencies from having to request supplemental appropriations to cover unplanned and unprogrammed deficits. This use of funds avoided many administrative problems that cause procurement delays.

The Comptroller General found that this same rationale equally applies when an agency, whose need for the goods or services covered by the original contract remains unchanged, cannot allow the contractor to complete performance because it has subsequently been determined that the contract award was improper. Such situations can neither be anticipated nor controlled. A termination for convenience ordered by a court creates the same problems and uncertainties for agencies in contract administration and budgeting that the decision in 60 Comp. Gen. 591 was intended to alleviate.

While the question presented in the instant case involved an order issued by a federal district court, the Comptroller General concluded that the same principle should also be applied when another competent authority, such as a board of contract appeals or the General Accounting Office, determines that a contract was improperly awarded and should be terminated. Ms. Margaret Patterson.

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

- 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

September 1989

6-8: ESI, Preparing and Analyzing Statements of Work, Washington, DC.

6-8: LEI, Advocacy Skills: Direct and Cross-Examination, Washington, DC.

7-8: ALIABA, Sophisticated Estate Planning Techniques, Boston, MA.

7-9: ALIABA, The Emerging New Uniform Commercial Code, New York, NY.

8: MBC, Head Injury Case Law, Kansas City, MO.

8-9: BNA, Constitutional Law, Washington, DC.

9-10: MLI, How to Read and Use Medical Records and Reports, Boston, MA.

10-15: NJC, Administrative Law: Management Problems of Chief Judges, Reno, NV.

10-October 6: NJC, General Jurisdiction, Reno, NV.

11-15: ESI, Federal Contracting Basics, Washington, DC.

12-14: LEI, Advanced Bankruptcy, Washington, DC.

14-15: PLI, Banking Law and Regulation Institute, New York, NY.

14-15: ALIABA, Health Care in the '90s: Dealing with Competition, Government Regulation, and the Malpractice Crisis, Washington, DC.

14-15: PLI, Estate Planning Institute, San Francisco, CA.

14-16: ALIABA, Deferred Compensation for Tax Exempt and Government Employer, Washington, DC.

15: MBC, Head Injury Case Law, St. Louis, MO.

16-22: PLI, The 47th Patent Bar Review, New York, NY.

17-22: NJC, Capital Cases and Felony Sentencing Problems, Reno, NV.

18: LEI, Writing for Attorneys, Washington, DC.

19-20: LEI, Trial Evidence: A Videotaped Lecture Series by Irving Younger, Stillwater, OK.

19-20: PLI, Institute for Corporate Counsel, New York, NY.

20: LEI, Supervisors' Seminar on Critiquing Legal Writing, Washington, DC.

21-22: PLI, Creative Real Estate Financing, Chicago, IL.

21-22: BNA, EEO, Washington, DC.

21-22: ALIABA, Environmental Law and Real Estate Transactions, San Francisco, CA.

21-22: ABA, Impact of Employee Benefits on Corporate Transactions, New York, NY.

21-22: PLI, Lender Liability Litigation, New York, NY.

21-22: ALIABA, Municipal Solid Waste, Washington, DC.

24-28: NCD, Trial Advocacy, Los Angeles, CA.

24-29: NJC, Evaluating Medical and Scientific Evidence, Reno, NV.

25-26: PLI, Section 1983 Civil Rights Litigation, San Francisco, CA.

25-26: PLI, Secured Creditors and Lessors under Bankruptcy Reform Act, San Francisco, CA.

26-28: LEI, Advocacy Skills: Discovery, Washington, DC.

26-27: ESI, Claims, Terminations, and Disputes, Washington, DC.

27: UMKC, Medical Malpractice, Kansas City, MO.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1989 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 January annually
Arkansas	Annually. Initial reporting period ends June 30, 1990
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	The M.C.L.E. program is suspended prospectively for 1989, until further Order of the Court. Compliance fees and penalties for 1988 shall be paid.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	Last name A-L—initial report January 31, 1990; thereafter each even-numbered year. Last name M-Z—initial report January 31, 1991; thereafter each odd-numbered year.
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually

Wisconsin 31 December in even or odd years
depending on admission
Wyoming 1 March annually

For addresses and detailed information, see the January 1989 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

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

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

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).
XAD B116100 Legal Assistance Consumer Law Guide/ JAGS-ADA-87-13 (614 pgs).
XAD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
XAD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
XAD B116097 Legal Assistance Real Property Guide/ JAGS-ADA-87-14 (414 pgs).
XAD A174549 All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
XAD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
XAD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
XAD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
XAD B114054 All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
XAD B090988 Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
XAD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
XAD B116103 Legal Assistance Preventive Law Series/ JAGS-ADA-87-10 (205 pgs).
XAD B116099 Legal Assistance Tax Information Series/ JAGS-ADA-87-9 (121 pgs).
AD B124120 Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
XAD-B124194 1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/ JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investi-

gations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

<i>Number</i>	<i>Title</i>	<i>Date</i>
AR 25-30	The Army Integrated Publishing and Printing Program	28 Feb 89
AR 27-3	Legal Assistance	10 Mar 89
AR 135-2	Full-Time Support Program	30 Mar 89
AR 135-101	Army National Guard and Army Reserve	10 Mar 89
AR 190-58	Personal Security	22 Mar 89
Cir 385-89-1	Army Safety Action Plan Fiscal Years 1993-A5-Year Strategy For Army Safety Excellence	24 Mar 89
Cir 601-89-2	Army Medical Specialist Corps Active Duty Program, Fiscal Years 1989 and 1990	24 Mar 89
Cir 601-89-3	Medical Service Corps and Veterinary Corps Active Duty Program, Fiscal Years 1989 and 1990	17 Mar 89
Cir 601-89-4	Medical Corps and Dental Corps Active Duty Program, Fiscal Years 1989-1990	24 Mar 89
PAM 350-100	Extension Training Materials Consolidated MOS Catalog	15 Feb 89
PAM 600-2	The Armed Forces Officer	1988

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