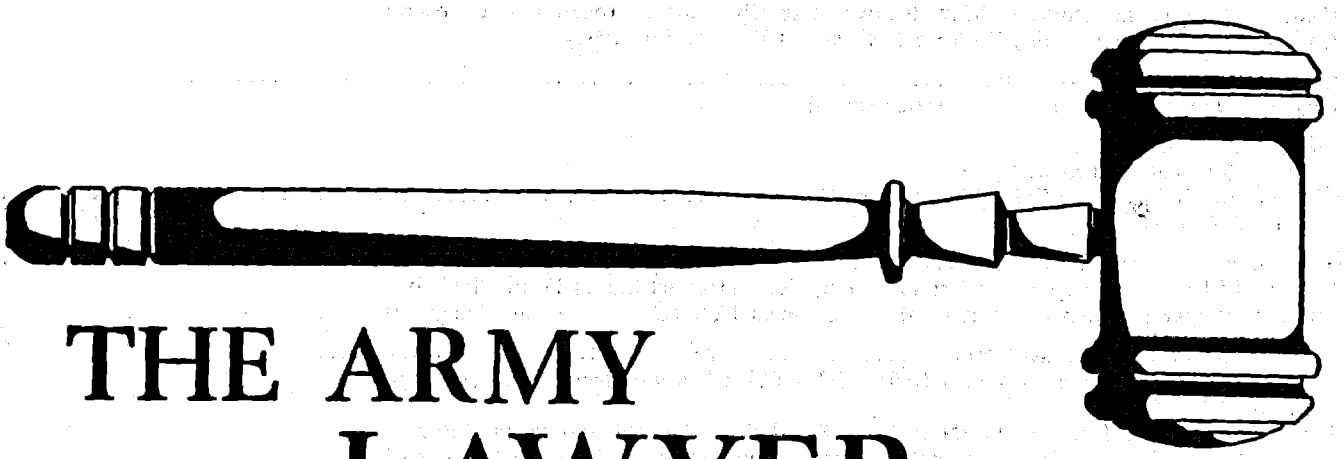

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-199

July 1989

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The Army Lawyer (ISSN 0364-1287)

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Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Union Security in the Federal Sector

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Introduction

A decade has passed since passage of the Civil Service Reform Act (CSRA), [1] the first comprehensive statute governing labor-management relations in the federal sector. [2] As with many federal statutes that undertake the difficult and complex task of regulating the conflicting demands and needs of various organizational and collective entities, the CSRA's early experience has led to many calls for reform. These have dealt with matters as diverse as the scope of management rights, the conduct of collective bargaining, the status of grievance procedures, and the proper role of independent agencies in policing federal sector labor relations. [3] In addition to these areas, one of the most intriguing, and potentially divisive, reform targets concerns the issue of union security. The current provisions of the CSRA provide that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." [4] This means that no federal employee who is a member of a bargaining unit represented by a union [5] will be required to join a union, or to pay fees to a union, to cover the union's representational costs.

The initial House of Representatives version of the CSRA read differently, however, and would have allowed such fees for nonmembers. Nevertheless, the House gave in to the Senate on this issue; the latter body, relying on precedents set by the earlier executive orders governing federal sector labor relations (which did not permit these fees), and a belief that individual choice should govern such matters, proposed the provisions which are in force today. [6]

Despite this legislative resolution, the debate over federal sector union security has not subsided during the intervening years. In June 1988 several federal sector union leaders and officials, citing a depletion of union resources stemming largely from the costs of representational duties, called for CSRA amendments authorizing the payment of mandatory fees by all bargaining unit members. Kenneth Blaylock, then President of the American Federation of Government Employees, stated:

> Ten years of experience have revealed certain basic flaws and inequities in the original design of the [CSRA]. First and foremost was the failure to provide a service and representation fee provision to account for the substantial and financially burdensome contract negotiation, administration, and enforcement that the law mandated that the union provide to nonmembers. [7]

Mr. Blaylock's successor, John Sturdivant, continued this plea in a September 7, 1988, interview with the *Washington Post*. After citing AFGE's troubling debt structure (over $1.5 million owed to the AFL-CIO), Mr. Sturdivant reiterated his union's interest in amendments to the CSRA which would permit some form of mandatory representation fee. [8] In addition to these federal sector union leaders, several members of Congress have joined in the calls for reform. [9]

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* This article was completed in partial satisfaction of the requirements of the 37th Judge Advocate Officer Graduate Course.

[1] Pub. L. No. 454, 92 Stat. 111 (1978) (codified as amended at various sections of 5 U.S.C. (1982) [hereinafter "CSRA"]).

[2] Prior to 1978 federal sector labor relations were governed by a system of executive orders, the first one issued by President Kennedy in 1962. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63). This order was revised by Executive Order Number 11,495, 3 C.F.R. 861 (1966-70), and amended by Executive Order Numbers 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-75).

[3] *See* The Brookings Institution, The Unfinished Agenda for Civil Service Reform: Implications of the Grace Commission Report 69-101 (1985); Bureau of Labor-Management Relations (U.S. Dept. of Labor), U.S. Labor Law and the Future of Labor-Management Cooperation 2-76 (1987).

[4] 5 U.S.C. § 7102 (1982).

[5] Under the CSRA, the Federal Labor Relations Authority (FLRA) determines the appropriateness of a proposed grouping of federal employees insofar as that grouping constitutes a unit amenable to exclusive representation by a union. In making this determination, the FLRA considers the extent to which the employees in the proposed unit have "a clear and identifiable community of interest" and whether treating the employees as a unit "will promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a)(1) (1982). Bargaining units often contain several thousand federal employees and, should the union win a representation election conducted within the unit, all employees therein will be represented exclusively by the union in bargaining with agency management. Because union membership is not required of any employee, however, the size of the bargaining unit will almost invariably exceed the number of employees who actually become union members.

[6] H.R. Rep. No. 1403, 95th Cong, 2d Sess. 41 (1978), *reprinted in* Comm. on Post Office and Civil Service, Legislative History of the Civil Service Reform Act of 1978, at 377-79.

[7] *Title VII of the Civil Service Reform Act of 1978: Hearings Before the Subcommittee on Civil Service, House Committee on Post Office and Civil Service*, 100th Cong., 2d Sess. 85 (June 8, 1988) (statement of Mr. Blaylock) [hereinafter *Hearing*]. *See also id.* at 141 (statement of Mr. Pierce, President, National Federation of Federal Employees) (characterizing lack of mandatory fees as one of "the most glaring inequities of the [CSRA];" *id.* at 177-78 (statement of Mr. Murphy, General Counsel, National Association of Government Employees) (arguing that lack of mandatory fees promotes "nonmembership and . . . is unfair to workers who pay").

[8] *Managing a Microcosm of America: New President Sturdivant Calls Finances 'No. 1 Enemy' of AFGE*, Washington Post, Sep. 7, 1988, at A16, col. 1.

[9] *See Hearing, supra* note 7, at 1-2, 186 (statements of Rep. Schroeder, Rep. Clay).

In response to this renewed interest in federal sector union security, opposition voices have entered the fray. For example, in an October 6, 1988, *Wall Street Journal* editorial, Professor John Baird of the California State University at Hayward argued forcefully against such an amendment to the CSRA. Characterizing federal sector union security as an unconstitutional denial of freedom of association, as well as a reform promising little benefit for federal sector labor relations, Professor Baird called on national political leaders to resist demands for change. [10]

With these polar positions as background, this article will examine the debate over union security in the federal sector. It first discusses the general nature of security clauses, and the arguments for and against their presence in the federal sector. It then outlines the constitutional implications of any proposed reforms in this area, in particular the first amendment issues of freedom of association and freedom of religion. The article concludes that the calls for reform have some merit because the current law, which allows federal employees the choice of whether to pay union dues (i.e., an open shop), cannot be reconciled with the federal sector union's duty to represent fairly those employees regardless of their status as dues payers. Thus, either some form of fee arrangement should be permitted or the union's duty of fair representation should be either eliminated or modified. This article will discuss and evaluate these alternatives in turn.

Security Clauses in General

Types of Clauses

Although union security provisions can assume many forms, they primarily include the closed shop, the union shop, the agency shop, fair share clauses, and maintenance of membership agreements. [11] A closed shop agreement requires that an employee become a union member before employment and remain a member thereafter. Although the closed shop was the dominant form of union security in the United States for several decades, it was outlawed in the private sector in 1947 by the Taft-Hartley Act, [12] largely to remedy, as the Supreme Court termed it, "the most serious abuses of compulsory unionism." [13] Largely because of this history, the closed shop has never had a significant presence in the public sector. [14]

A union shop agreement requires that an employee become a member of the union within a stipulated period after being hired, or after the effective date of the collective bargaining agreement, whichever is later. In the private sector, the Taft-Hartley Act specifically permits the negotiation of union shop agreements unless they are prohibited by state right-to-work legislation. [15] These agreements are also present in the public sector. [16] Contrasted with union shop provisions, maintenance of membership agreements do not require that employees initially become union members. They do require, however, that once an employee becomes a union member, he must remain a member as a condition of employment. Maintenance of membership agreements are legal in the private sector, subject again to state right-to-work laws. [17] Although only a few states specifically permit maintenance of membership agreements in their public sector labor relations schemes, [18] such clauses are presumably lawful in states that permit public sector union shop clauses.

Unlike the union shop or maintenance of membership agreements, agency shop provisions do not require that employees become, or remain, members of the union as a condition of employment. Rather, if the employee chooses not to join the union, he must pay a fee, usually an amount approximating union dues, as a condition of

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[10] Baird, *One Moral Right Unions Don't Have*, Wall St. J., Oct. 6, 1988, at 18, col. 4. *See also Hearing*, *supra* note 7, at 74 (statement of Claire Freeman, Deputy Assistant Secretary of Defense (Civilian Personnel Policy), opposing union security agreements in the federal sector).

[11] *See generally* K. Hanslowe, D. Dunn & J. Erstinly, Union Security in Public Employment: Of Free Riding and Free Association 4 (1978); H. Edwards, R. Clark & C. Craver, Labor Relations Law in the Public Sector 443-44 (2d ed. 1979).

[12] 29 U.S.C. § 158(a)(3) (1982).

[13] NLRB v. General Motors Corp., 373 U.S. 734, 740 (1963). In its report on the amendment, the Senate Committee noted: "Numerous examples were presented to the Committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947).

[14] Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. Ind. & Com. L. Rev. 993, 1005-06 (1976).

[15] 29 U.S.C. § 158(a)(3) (1982). To date, 21 states have enacted broad right-to-work guarantees. All expressly forbid compulsory union membership as a condition of employment. *See* Ala. Code §§ 25-7-30 to -36 (1975); Ariz. Rev. Stat. Ann. §§ 23-1301 to -1307 (1983); Ark. Stat. Ann. § 11-3-303 (1987); Fla. Stat. Ann. § 447.17 (West 1984); Ga. Code Ann. §§ 34-6-23 to -28 (1988); Idaho Code §§ 44-2001 to -2011 (Supp. 1988); Iowa Code Ann. §§ 731.4,.5 (West 1979); Kan. Const. Art. 15, § 12; La. Rev. Stat. Ann. §§ 23.981-987 (West 1985); Miss. Code Ann. § 71-1-47 (1972); Neb. Rev. Stat. § 48-217 (1988); Nev. Rev. Stat. Ann. §§ 613.230 to -300 (Michie 1986); N.C. Gen. Stat. §§ 95-78 to -83 (1988); N.D. Cent. Code §§ 34-01-14 (1980); S.C. Code Ann. § 41-7-10 to -90 (Law. Co-op. 1986); S.D. Codified Laws Ann. §§ 60-8-3 to -8 (1978); Tex. Rev. Civ. Stat. Ann. arts. 5156a, 5154g, 5207a (Vernon 1987); Tenn. Code Ann. §§ 50-1-201 to -204 (1983); Utah Code Ann. §§ 34-34-1 to -17 (1988); Va. Code Ann. §§ 40.1-58 to -69 (1986); Wyo. Stat. §§ 27-7-108 to -115 (1987). Of these 21 so-called "right-to-work states," a majority also prohibit the exaction of agency or service fees (Alabama, Arkansas, Georgia, Iowa, Louisiana, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Utah, Virginia, and Wyoming). Application of these restraints to both public and private employers prevents the negotiation of union security agreements. Under 5 U.S.C. § 7102, this is essentially the regime now governing federal sector labor relations.

[16] *See e.g.*, Alaska Stat. § 23.40.110(b)(1) (1988) (state and local government employees); Ky. Rev. Stat. § 345.050(1)(c) (1983) (firefighters); Me. Rev. Stat. Ann. tit. 26, § 1027(3) (1988) (university employees); Vt. Stat. Ann. tit. 21, § 1726(8) (1987) (municipal employees); Wash. Rev. Code Ann. § 41.56.122 (Supp. 1989) (state civil service).

[17] 29 U.S.C. § 158(a)(3) (1982). *See supra* note 15.

[18] *See, e.g.*, Cal. Govt. Code § 3540.1(i)(1) (West 1980); Pa. Stat. Ann. tit. 43, § 1101.705 (Purdon 1988).

employment. Usually, the employer simply deducts the fee from the employee's wages, much as he would other withholdings. Such agreements are permitted under the NLRA, as amended by the Taft-Hartley Act, but are prohibited by most states with right-to-work laws. [19] In the public sector, several states permit agency shop agreements. [20]

A fair share agreement is a variation of the agency shop. It requires that the employee, as a condition of employment, pay a proportionate share of the cost of collective bargaining, but not the cost of other union activities. [21] Several states authorize this type of agreement. [22]

These latter two provisions, the agency shop and fair share fees, can be combined into one term, the service fee arrangement. Under such arrangements, all bargaining unit members are required as a condition of employment to pay a service fee but are not required to be members of the union. The service fee amount is equal to either union dues or the actual (pro rata) costs of the union's services. [23] Although it is not absolutely clear from the current debate, it is likely that current advocates of federal sector union security want the CSRA amended to allow either the agency shop or fair share fees.

Arguments in Favor of Union Security in the Federal Sector

Proponents of union security agreements advance two basic arguments in favor of them: the enhancement of labor peace and stability, and the need to eliminate the problem of free riders. The first contention, the need to stabilize labor relations, arises from the prospect that absent security provisions, unions must constantly campaign and posture to hold onto, or expand, their present membership. As one commentator describes it, unions without security arrangements

> must demonstrate that they can "get something" for their members. They are driven to making excessive demands . . . in negotiations and in processing unwarranted grievances as a tactical means of holding their constituency. Similarly, they find it advantageous to disparage management and to portray it as unmindful of employees' interests as a means of convincing workers of their need for a union. If union membership were made a simple condition of employment, the unions argue, it would be less necessary to engage in such propaganda, which admittedly has a harmful effect on the bargaining relationship. [24]

Thus, a union without the financial stability associated with security agreements may assume an inordinately militant stance toward management to rally more support from bargaining unit members. Proponents of union security further argue that when unions do not have to use their resources to recruit and to retain members, they can commit their limited funds to the more constructive aspects of bargaining and contract administration. [25] Although an employer who does not wish to deal with any union, either stable or unstable, may not be moved by these concerns, the preamble to the CSRA specifically provides that "collective bargaining in the civil service [is] in the public interest." [26] Given this policy emphasis, proponents of union security would argue, measures which enhance the ability of federal sector unions to engage in constructive collective bargaining deserve serious consideration.

In addition, union security advocates contend that it is more difficult for rival unions to unseat an incumbent organization when all employees in the bargaining unit are paying at least the equivalent of dues or fair share costs. Thus, not only will management be free of the problems associated with recurring turnover in unions, but the incumbent union will also be less pressured to outdo a potential "out" union by becoming unduly strident and intransigent in its dealings with management. [27] Again, the congressional policy in favor of constructive collective bargaining relationships in the federal sector lends some support to this contention.

Notwithstanding these labor peace and stability contentions, perhaps the most cogent argument for federal sector union security is the one concerning so-called "free riders." It is congressional policy that federal sector collective bargaining "safeguards the public interest and contributes to the effective conduct of public business." [28] In addition, federal sector agencies must bargain in good faith with a view toward arriving at collective agreements with unions representing their employees. Thus, federal employees benefitting from these agreements have some obligation to lend financial support to the union that expended its resources to win

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[19] *See supra* note 15.

[20] *See e.g.*, Cal. Govt. Code § 3540.1(i)(2) (West 1980); Mich. Comp. Laws Ann. § 423.210(1)(c) (West 1978); N.J. Stat. Ann. § 34.13A-5.5 (West 1988); N.Y. Civ. Serv. Law § 208(3) (McKinney 1983); R.I. Gen. Laws § 36-11-2 (1984).

[21] Edwards, *supra* note 11, at 444.

[22] *See e.g.*, Hawaii Rev. Stat. § 89-4 (1985); Mass. Gen. Laws Ann. ch. 150E, § 12 (West 1982); Or. Rev. Stat. § 243.672(c) (1986); Wis. Stat. Ann. § 111.70(2) (West 1988).

[23] Zwerdling, *supra* note 14, at 1008-09.

[24] N. Chamberlain & D. Cullen, The Labor Sector 173-74 (1971).

[25] Zwerdling, *supra* note 14, at 1012.

[26] 5 U.S.C. § 7101(a) (1982).

[27] *See* Hartley, *The Framework of Democracy in Union Government*, 32 Cath. U.L. Rev. 13, 99 (1982); Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 Lab. L.J. 697, 699 (1978).

[28] 5 U.S.C. § 7101(a)(1)(A),(B) (1982).

these benefits. As one commentator has termed it, the public sector union serves a public purpose. Thus, even though certain employees may object to specific union policies or positions, the union still protects all employees by organizing them into a collective entity more able to bargain effectively with management than would any single employee or faction of employees. Requiring bargaining unit employees to pay for this service is akin to all citizens being taxed for the costs of government programs even though there may be individual objections to these programs. [29] Accordingly, proponents of union security maintain there is nothing inequitable in requiring employees who benefit from the strength of a collective unit to pay some of the costs needed to sustain that collective unit.

Aside from these arguments, the problem of free riders in the federal sector becomes even more acute when one considers the federal sector union's duty of fair representation. That duty is set forth in section 7114(a)(1) of the CSRA, which states:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents *without discrimination and without regard to labor organization membership.* [30]

A union's failure to discharge this statutory duty is an unfair labor practice. [31] The U.S. District Court of Appeals for the District of Columbia Circuit considered fair representation in the federal sector in *National Treasury Employees Union (NTEU) v. Federal Labor Relations Authority*. [32] At the time of the case, NTEU represented roughly 120,000 bargaining unit employees throughout the federal government, including the Customs Service. Of these, almost 65,000 were dues paying union members. NTEU employed 40 national office attorneys whose duties included providing representation to employees in grievance and arbitration proceedings. Since these attorneys were too few to handle every employee grievance, the union frequently provided alternative representation in the form of local union officers and stewards. [33]

Limited funding eventually prompted the NTEU to adopt a policy of providing attorney representation only to dues payers. The policy limited non-dues paying employees to representation by local union officials. The Customs Service filed an unfair labor practice charge against NTEU, alleging discriminatory standards of representation by the union based solely on the employee's status as a union member. The Federal Labor Authority agreed, finding the NTEU representation policy to be a breach of the union's duty of fair representation and therefore an unfair labor practice. [34]

On appeal, NTEU argued that its duty of fair representation was synonymous with "adequate representation" and that it discharged this duty with respect to nonmembers by providing the services of competent local union officials. Moreover, the union also argued that the provision of attorneys was an internal union benefit that need not be extended to nonmembers. [35]

Rejecting both arguments, the D.C. Circuit observed that the duty of fair representation did not establish an objective standard of "adequate representation" that delineates a minimum threshold beyond which the union may discriminate based on union membership. Rather, the court reasoned, the duty of fair representation allows a union to adopt "virtually *any* nonarbitrary standard for providing representation of individual employees, so long as the standard adopted is applied in a nondiscriminatory manner with respect to all unit employees, i.e., members and nonmembers alike." [36] The court also did not see where attorney representation could be construed to be a mere benefit of union membership. When such representation "pertains directly to enforcement of the fruits of collective bargaining," the union, "as exclusive bargaining agent," may not limit such representation to union members.[37]

Although it was undoubtedly a correct result under the current provisions of the CSRA, the D.C. Circuit's opinion in *NTEU v. FLRA* also highlights the federal sector union's problem of free riders. Because the union, as exclusive representative, incurs a legal obligation to represent fairly all members of the bargaining unit, simple reciprocity would seem to require that those who receive the benefits of union representation pay a fair share of its cost. This concern is particularly acute in individual employee grievance and arbitration cases where the employee, though not a dues payer, still has a

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[29] Zwerdling, *supra* note 14, at 1011-12. Perhaps the most strident expression of the traditional union attitude toward free riders came from former American Federation of Labor president Samuel Gompers: "Nonunionists who reap the rewards of union efforts, without contributing a dollar or risking the loss of a day, are parasites. They are reaping the benefits of union spirit, while they themselves are debasing genuine manhood." 12 American Federationists 221 (1905), *cited in* Comment, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 Wis. L. Rev. 134 n.6.

[30] 5 U.S.C. § 7114(a)(1) (1982) (emphasis added).

[31] *Id.* at § 7116(b)(8); *see* AFGE Local 987 & Nedra Bradley, 3 F.L.R.A. No. 115 (1980).

[32] 721 F.2d 1402 (D.C. Cir. 1983).

[33] *Id.* at 1404.

[34] *Id.* at 1404-05.

[35] *Id.*

[36] *Id.* at 1406 (emphasis in original).

[37] *Id.* at 1406-07.

right of union representation equal to that of his dues paying fellow employees. Because of the expense of such proceedings, the potential depletion of union resources can be staggering. [38] The only recourse may be the union's forced retreat into a standard of representation which, though sharply diluted in effectiveness because of scarce resources, would be the same for all employees. Such representation is hardly what one envisions for federal sector employees in a system where collective bargaining and the fair resolution of employee grievances are thought to be of the utmost importance.

Arguments Against Union Security in the Federal Sector

Although the arguments for union security can be persuasive, particularly to union leaders and labor relations professionals, the counterarguments also carry considerable weight. Indeed, they were presumably enough to convince Congress not to allow security clause provisions when it enacted the CSRA.

First, opponents of union security agreements may concede that union security clauses enhance labor stability by strengthening the position of the incumbent union. Nevertheless, while stability in labor relations is a laudable goal, so too is the opportunity for choice. Thus, the work place may be better served when incumbent unions are put to a political test by all bargaining unit members. As opposed to policing the individual union leaders themselves, an option generally available under internal union rules, this argument focuses upon putting the union itself to the test by making it face the chance of being replaced. A union with steady access to funding may be impervious to such control. Therefore, a union should have to win financial support by being an effective bargaining agent, and be subject to a real threat of ouster if it fails in this regard. This may be more in the public interest than a security clause that makes a dues collector out of the employer and a soft, entrenched incumbent out of the union. [39]

Second, a key component of employment in the federal sector, indeed throughout the public sector, is the principle of merit. This essentially means that positions in the federal service should be filled on the basis of an applicant's ability. Indeed, the CSRA itself, in setting forth the statute's concept of merit principles, states that "[r]ecruitment [in the federal service] should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and *selection should be determined solely on the basis of relative ability, knowledge, and skills.*" [40] The statute further states that "[e]mployees should be retained on the basis of the adequacy of their performance." [41] Because actual or constructive union membership has no relationship to the employee's successful performance of the job, federal merit principles indicate it should not be a basis for acquiring or keeping federal employment. [42]

Third, opponents of union security also argue that conditioning public employment on the payment of fees for a union is an improper restraint on the individual freedom of employees. Indeed, to many, the entire debate over union security turns on the interests of individual autonomy versus majority rule. [43] This debate is largely political and turns on individual views of the value of exclusive representation, and its frequent subordination of individual interests for the perceived good of the majority. Although a cohesive, democratically-controlled union can serve as a necessary counterweight to a unified management structure which might otherwise adopt a "divide and conquer" strategy to weaken employees, union security opponents see the countervailing costs in terms of lost individual autonomy as simply too high.

Finally, in addition to this political dimension of the debate, opponents of union security have also argued that state-coerced support of unions is an infringement on an objecting employee's constitutional freedoms of speech and association. [44] In essence, individuals have a right to be free from state-sponsored pressure to join an organization they otherwise would not join. Such would be the case where a public employee who, under a union shop agreement, is required to join the union as a condition of employment. Moreover, even where the employee is not required to actually join the union, but only to pay a service fee (under either an agency shop or fair share agreement), it can be argued that paying dues has the effect of forcing the equivalent of union membership. In this sense, the employee's right of association, in addition to protecting him from government coercion to join a union, similarly protects him from having to provide financial support to one. Thus, despite the generally political overlay of the union security debate, this constitutional dimension of the issue eventu-

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[38] According to data compiled by the Federal Mediation and Conciliation Service for fiscal year 1981, an arbitrator's average fee was $988.76, his or her average per diem was $299.62, and his or her average expenses were $141.55. Excluding the costs of attorney fees and other expenses borne separately by the parties, total arbitration charges averaged $1132.31 in FY 1982. *See* Garret, *Arbitration—As the Parties See It*, in Proceedings of the Thirty-Seventh Annual Meeting, National Academy of Arbitrators 29, 42-44 (1983).

[39] *See generally* New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education, Vol 3, App. 13C, 10-16 (1972), *reprinted in* Edwards, *supra* note 10, at 445-46.

[40] 5 U.S.C. § 2301(b)(1) (1982) (emphasis added).

[41] *Id.* at § 2301(b)(6).

[42] *But see* Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 187-89 (1975); Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 Lab. L.J. 697, 698 (1978) (arguing that public sector merit principles can be, and are, frequently subordinated to other public policy goals and that such policy goals could include the positive aspects of union security).

[43] *See generally* Note, *Public Sector Labor Relations: Union Security Agreements in the Public Sector Since Abood*, 33 S.C.L. Rev. 521, 523 (1982).

[44] *See generally* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (characterizing the right of association as a "basic constitutional freedom" that is closely allied to freedom of speech and a right which like free speech, "lies as the foundation of a free society").

ally demanded resolution, a task undertaken by the Supreme Court in *Abood v. Board of Education*. [45]

The Constitutional Issues

In *Abood* a Michigan statute authorized agency shop provisions in local school district collective bargaining agreements. Once the local teachers' union and school board agreed to these provisions, teachers had either to pay a service charge equal to union dues or be discharged. The Detroit School Board reached such an agreement with the local union, prompting several teachers to challenge the statute, alleging that it infringed upon their freedom of association. [46]

After the case made its way through the Michigan courts, the Supreme Court granted certiorari and considered for the first time whether the agency shop agreement violated the first amendment rights of government employees who objected to the use of their money to support a public sector union. In an opinion written by Justice Stewart, the Court first acknowledged that compulsory support of a collective bargaining entity does impinge upon an employee's first amendment rights. "An employee may very well have ideological objections to [many] activities undertaken by the union," the Court reasoned, or "might have economic or political objections to unionism itself." [47] Nevertheless, relying on the authority of earlier private sector decisions involving the constitutionality of union security provisions, [48] the Court concluded that "such interference as exists is constitutionally justified by a legislative assessment" that union security agreements contribute to labor peace and stability. [49] The Court also acknowledged the problems "free riders" can create for a union charged with a duty of fair representation. Equitably allocating the costs of such representation, the Court stated, justified some infringement of an otherwise protected right of association. [50] In the Court's view, the same government interests that justified agency shop agreements in the private sector, thus infringing those employees' right of association, justified similar impingement upon the rights of public employees. [51]

While generally supporting the constitutionality of agency shop agreements in the public sector, the Court also held that the first amendment prohibited the use of compulsory fees for political or ideological purposes to which the employee objects. Such purposes are separate from the interests of collective bargaining and fair representation, the Court concluded, and forcing a dissenting employee to contribute to the advancement of political causes he does not believe in is therefore an unjustifiable infringement on the right of association. [52] The Court observed, however, that the identification of activities related to collective bargaining could be rather difficult in the public sector because of the overlap between collective bargaining issues and political issues. Because there was no record on this issue, nor any briefing or argument by the parties concerning which activities were related to collective bargaining, [53] the Court declined to "define a dividing line." [54]

Although *Abood* left open several difficult issues, particularly the distinction between collective bargaining activities and political activities, it answered the basic constitutional issue regarding the permissibility of union security agreements in the public sector. In this light, it is somewhat puzzling to read commentaries such as those by Professor Baird. Although acknowledging the Court's result in *Abood*, he strongly implies that the case will not apply in the federal sector because the labor peace and stability rationale that the Court relied upon does not apply to a federal work force that has no right to strike. [55]

This conclusion is incorrect in several respects. First, the Michigan statutory scheme of public sector labor relations in effect at the time of *Abood* included a

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[45] 430 U.S. 209 (1977).

[46] *Id.* at 213.

[47] *Id.* at 222.

[48] *Id.* at 222-23. The cited cases were: Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) (holding that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work," does not violate the first amendment); International Association of Machinists v. Street, 367 U.S. 740 (1961) (allowing payment of fees for representation purposes but holding that union's use of exacted fees for political purposes violated the Railway Labor Act).

[49] *Id.* at 222-23.

[50] *Id.*

[51] *Id.* at 225. The majority position here drew a sharp response from Justice Powell, joined by Chief Justice Burger and Justice Blackmun, in a separate concurring opinion that reads for the most part like a dissent. He specifically objected to the majority's position that the public sector agency shop was not fully subject to first amendment constraints. Seeing little comparison with the private sector cases dealing with the issue, Justice Powell termed public sector collective bargaining as "inherently political" because of the public issues it necessarily addresses. In this light, public sector unions were no different, for constitutional purposes, from political parties. Because the Court would not hesitate to strike down a statute compelling a government employee to contribute to a political party, Justice Powell reasoned, a similar result is required where the forced contribution goes to a public sector union. *Id.* at 244-64.

[52] *Id.* at 235-36.

[53] *Abood* reached the Court after a judgment on the pleadings and thus presented no evidentiary record. *Id.* at 235-36.

[54] *Id.* at 236.

[55] Baird, *supra* note 10. *See* 5 U.S.C. § 7116(b)(7) (1982) (prohibition against strikes in the federal sector); PATCO v. FLRA, 625 F.2d 547 (D.C. Cir. 1982).

provision prohibiting public sector unions from striking. [56] Thus, the cited factual distinction between *Abood* and the federal sector simply does not exist. Moreover, even if the presence or absence of the right to strike is a valid distinction, Professor Baird's position undervalues the other aspects of labor stability traditionally associated with union security provisions, particularly reduced pressure on the incumbent union to raise membership funds through increased militancy. [57] These concerns, cited by the Court in *Abood* and by the state legislatures which have permitted public sector agency shops, carry similar force in the federal sector and would likely sustain agency shops in the latter. Finally, Professor Baird's argument ignores the *Abood* Court's other basis for its decision: the need to distribute equitably the costs of exclusive representation in a system requiring the union to represent fairly all bargaining unit employees. As outlined earlier, this is perhaps the most compelling argument for security clause agreements. [58] Because the federal sector union's duty of fair representation is theoretically no less stringent than that of other public sector unions, the reasoning in *Abood* would appear to sustain the constitutionality of agency shops in the federal sector. [59]

Although resolving the basic freedom of association issue, *Abood* left unaddressed another lingering problem of the public sector agency shop—the accommodation of religious objectors to union dues. Before 1972 courts usually rejected challenges to the payment of service fees on religious grounds. The government interest in allowing security clauses was deemed to outweigh any infringement of religious beliefs. In *Gray v. Gulf, Mobile & Ohio, R.R.*, [60] for example, the Fifth Circuit affirmed a lower court ruling against a Seventh-day Adventist fired for the non-payment of union fees even though his religious beliefs required that he neither join nor financially support a labor union. Relying on the Supreme Court's decisions in *Railway Employees Department v. Hanson* and *International Association of Machinists v. Street*, [61] the court observed that the employee had never been asked to adopt the tenets or doctrines of the union and had been offered the option of paying dues without joining the union. These circumstances, considered along with the government interest in union security, overrode the individual's free exercise rights. [62]

The landscape carved out by these decisions was altered drastically in 1972, however, when Congress amended Title VII of the Civil Rights Act of Act of 1964 [63] by adding section 701(j). Although the original enactment of Title VII banned discrimination by both employers and unions because of religion, [64] section 701(j) created an affirmative duty to accommodate the religious beliefs of employees unless doing so would create an undue hardship. [65] The Equal Employment Opportunity Commission (EEOC) and virtually every appellate court addressing the issue have interpreted

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[56] *Abood*, 430 U.S. at 229 (citing Mich. Comp. Laws § 423.202 (1970)).

[57] *See supra* notes 24-27 and accompanying text.

[58] *See supra* notes 28-37 and accompanying text. In fact, by the time the Court decided Ellis v. Brotherhood of Railway Employees, 466 U.S. 435, 437 (1984), it was citing only the "free rider" problem as the essential state interest justifying the agency shop's infringement on associational rights. Labor peace and stability concerns were not even mentioned by the Court in that opinion.

[59] The problem of defining the scope of permissible collective bargaining expenditures and impermissible political expenditures might persist, however. As noted previously, the Court in *Abood* declined to provide a test, thus precipitating strong debate, and extensive litigation, over precisely where the line should be drawn. Not surprisingly, proponents of union security in the public sector argue that all but the most obviously partisan political expenditures (e.g. contributions to a particular candidate or political party) should be considered costs not associated with collective bargaining. *See generally* Comment, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 Wis. L. Rev. 134 (arguing for a broad definition of collective bargaining costs). The rationale for this approach stems from the inherently political nature of collective bargaining in the public sector, and the fact that many of the subjects negotiated at the bargaining table are also the focus of lobbying efforts at higher levels of government. In the federal sector, for example, a local union may seek to negotiate with a local installation over implementation of civilian drug testing and, at the same time, lobby congressional leaders in order to obtain favorable legislation on the same drug testing issue. Indeed, the Court in *Abood* noted that a collective bargaining agreement itself may require approval at higher levels of government and that activities traditionally viewed as political—such as legislation affecting public employees—may become an integral part of the collective bargaining process. *Abood*, 431 U.S. at 236.

On the opposing side, those seeking to limit the effects of union security will argue that only the actual costs of negotiation and contract administration, the true core of the collective bargaining relationship, can be forced. In support, this side can cite the acknowledged infringement on constitutional rights the agency shop causes and thus the need to narrowly tailor the effects of this infringement to cover only the most essential aspects of collective bargaining.

Thus, as with the issue of union security itself, what constitutes a permissible expenditure of service fees depends largely upon one's perspective of the appropriate role of unions in the public sector vis-a-vis those employees who believe they can do without the help of a union. While the Supreme Court shed some light on the issue in Ellis v. Brotherhood of Railway Employees, 466 U.S. 435, 448 (1984), it should also be susceptible to legislative or regulatory control. In other words, were Congress to permit agency shop agreements in the federal sector, this grant of authority could also come with certain constraints affecting expenditures of objecting employees' fees.

[60] 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

[61] These are the same cases relied upon by the Supreme Court in *Abood* in upholding agency shop agreements in the face of freedom of association challenges. *Supra* note 48 and accompanying text.

[62] *Gray*, 429 F.2d at 1072. *See also* Linscott v. Millers Falls Co., 440 F.2d 14, 17-18 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); Hammond v. United Paperworkers & Paperworkers Union, 462 F.2d 174 (6th Cir. 1972), *cert. denied*, 409 U.S. 1028 (1972).

[63] 42 U.S.C. §§ 2000e-2000e-17 (1982).

[64] *Id.* at § 2000e-2(a)(1), (2)(c).

[65] The section states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or a prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e-(j).

section 701(j) as creating an obligation to accommodate employees who have religious objections to supporting unions through security clauses. [66] Moreover, in what was termed and effort to "reconcile the National Labor Relations Act [NLRA] with Section 701(j) of the Equal Employment Opportunity Act," [67] Congress amended section 19 of the NLRA to require accommodation in the private sector of religious objectors to union dues. [68]

Given these developments in the private sector, it is likely that any congressional allowance of security clauses in the federal sector would also include provisions regarding religious accommodation similar to those found in the NLRA. Indeed, given the virtually identical weight accorded the policy arguments for union security in the public and private sectors, combined with the roughly equal force Title VII has in each sector, it is difficult to imagine Congress sanctioning different standards for religious accommodation. [69]

Proposals

As described earlier, the choice of adopting union security provisions in the federal sector is largely political and raises many of the same issues as faced by management-labor relations schemes devised in the private sector and various state public employment settings. The stark choice between individual freedom of choice and the enhancement of stable, effective collective bargaining (and fair representation) is a difficult one and will not be resolved easily. Nevertheless, since the original consideration of this issue when the CSRA was first enacted, experience has shown the problems the open shop has created for federal sector unions charged with a statutory duty of providing fair representation for each employee in the bargaining unit. In short, the law of the open shop, particularly the problem of free riders it creates, is at war with the law governing the duty of fair representation. As currently structured, the system gives too much incentive for employees not to join unions and pay dues because, under the duty of fair representation, the quality of representation they receive will be the same whether they pay or not. This quirk in the law has been made even worse as a result of Merit Systems Protection Board rulings requiring employees who have an otherwise statutory right of appeal to use grievance-arbitration procedures if they are available. [70] Given the undoubted costs of providing effective representation, and the documented depletion of union resources which follows, something has to give. To alleviate this internal statutory conflict, therefore, the CSRA should be amended either to redefine the union duty of fair representation or to authorize union security agreements (presumably the agency shop, as sanctioned in *Abood*). [71] These proposals will be analyzed in turn.

Amending the Duty of Fair Representation

In the absence of legislation authorizing security provisions, Congress could amend the current statutory duty of fair representation to allow unions, at their option, to refrain from representing a bargaining unit member who does not pay dues in any matter affecting the employee personally apart from other members of the unit. [72] This situation would arise most frequently in individual grievances stemming from either disciplinary actions or other management actions alleged to affect an employee's individual conditions of employment. Such an amendment would have the beneficial effect of reducing union expenses, both in time and personnel, in

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[66] EEOC Guidelines on Discrimination on Account of Religion, 29 C.F.R. 1605.2(d)(2) (1982); Int'l Ass'n of Machinists v. Boeing, 833 F.2d 165 (9th Cir. 1987); McDaniel v. Essex Int'l Inc., 696 F.2d 34 (6th Cir. 1982); Nottelson v. Smith Steel Workers, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981). Perhaps to dispel persistent concerns over the problems of free riders, both the EEOC and the courts view favorably the objecting employee's contribution to charity of a sum equal to the proposed service fee. EEOC Guidelines, *supra*; *IAM v. Boeing*, 833 F.2d at 167.

[67] H.R. Rep. No. 496, 96th Cong., 1st Sess. 2, *reprinted in*, 1980 U.S. Code Cong. & Admin. News 7158, 7159.

[68] 29 U.S.C. § 169 (1982). The amended exception requires objecting employees to pay a sum equal to union fees to a qualified charity.

[69] Some unions have argued that section 701(j) violates the establishment clause of the first amendment. Relying on Estate of Thornton v. Caldor, 472 U.S. 703 (1985), a case where the Court struck down on establishment clause grounds a Connecticut statute that provided employees the absolute right to refuse to work on their Sabbath, unions argue that section 701(j)'s weighing in favor of religious objectors to dues is no different from a statute weighing in favor of Sabbath observers. Addressing these contentions in International Association of Machinists v. Boeing, 833 F.2d 165 (9th Cir. 1987), the Ninth Circuit concluded that since the statute at issue in *Thornton* made no account of the interests of the employer or the other employees, it was distinguishable from section 701(j), which is not cast in terms of absolute accommodation. The latter, unlike the Connecticut statute, speaks in terms of accommodations which do not impose an undue hardship on the employer. Given this flexibility of application, therefore, section 701(j) does not exhibit the constitutional defect noted by the Court in *Thornton*. *Id.* at 171. The Ninth Circuit's opinion here will likely be followed by other courts, especially in light of the court's recognition of language in *Thornton* specifying that the case not be read "as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are . . . invalid." 472 U.S. at 711 (O'Connor, J., concurring).

[70] *See* Sirkin v. Dept. of Labor, 16 M.S.P.R. 432 (1983) (reductions in force); Lovshin v. Dept. of Navy, 16 M.S.P.B. 14 (1983) (denial of within grade step increase).

[71] Of the two proposals, amendment of the duty of fair representation is the one most likely to receive serious congressional attention. As noted, union security in the federal sector was a subject of rather intense negotiation at the time the CSRA was enacted, and the matter was resolved in favor of individual choice. *See supra* note 6 and accompanying text. Conversely, there is little evidence in the legislative history of the CSRA that Congress paid any attention to the implications of the statutory duty of fair representation it was enacting. *See* Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 368-69 (1987) (noting the dearth of legislative history on the subject). Given this historical vacuum, reform advocates may find this area the most promising one for reform. This is particularly true in light of the intense opposition they will undoubtedly encounter on the union security issue. *See Public Sector Labor Relations*, *supra* note 43, at 528 n.51 (noting original lobbying efforts against federal sector union security by the National Right to Work Committee).

[72] *See* District Personnel Manual, Ch. 25, § A, Item 13 (District of Columbia ordinance allowing public sector parties to negotiate provisions excusing union from representing bargaining unit employees who refuse to pay fair share fee) (cited in Edwards, *supra* note 11, at 476).

representing an employee who has contributed no financial assistance in meeting those expenses. Thus, the age-old problem of the free rider disappears, at least in those cases where the expenses incurred by the union are most directly traceable to the free rider. [73]

Such a change to the statutory duty of fair representation will present problems of its own, however. A non-dues paying bargaining unit member with no right of union representation may have little protection at all when presenting grievances because it is the union, not the individual employee, who controls invocation of arbitration, the ultimate step in the grievance process. [74] Thus, a non-paying employee will have no right to have his case presented before a neutral adjudicator since the union holds the key to that forum. The union, having no duty to represent such an employee, may never turn the key. Consider further that the non-paying employee may have no alternative statutory right of appeal [75] or may have lost that right because of the presence of a collective bargaining agreement. [76] Thus, because bargaining unit members, whether union or non-union, also have no right of access to agency grievance procedures, [77] the ultimate effect of such a proposal may be to deny a non-dues paying employee in the bargaining unit any avenue to challenge adverse actions. Although most of these actions may be of a relatively minor nature, they will also be frequent. The result may well be a situation where employees are routinely unprotected from arbitrary and capricious actions by agency officials. This, in turn, may lead to due process challenges, the non-dues payer arguing that he is being deprived of a property interest without being afforded an opportunity to be heard. [78]

There could be several ways to deal with this problem. First, Congress could open agency grievance procedures to non-dues paying bargaining unit members in those cases where the member has no other forum (i.e., those cases where there is no statutory right of appeal). While this would alleviate due process concerns in minor disciplinary cases, it would be no solution where the case involves, for example, alleged collective bargaining agreement violations affecting the individual. In those cases, there is no reason to presume that agency officials should, or could, be given any authority to act as interpreter of a contract they negotiated or ratified, especially when the employee is seeking what amounts to an admission by the agency that it willfully violated the contract. Therefore, as a second alternative, Congress could amend the union duty of fair representation without totally absolving the union of representational responsibilities. In other words, Congress could statutorily overrule the D.C. Circuit's opinion in *NTEU v. FLRA*. [79] Henceforth, unions would still owe a duty of representation to all bargaining unit employees, but in individual cases that duty could vary according to the employee's status as a dues payer. For example, as the NTEU attempted to argue in its case, only dues payers would receive the assistance of an attorney during grievances while all other bargaining unit members would receive the assistance of local union officials. In the latter cases, the union would be held to a standard of "adequate representation," the standard rejected by the D.C. Circuit as contrary to the statute.

Finally, should Congress determine that such a bifurcated standard of union representation is undesirable, or too much at odds with the union's status as exclusive representative, it could amend the CSRA to require that non-dues paying employees pay the reasonable costs of processing grievances (i.e., attorney time, arbitrator fees, transcripts, etc.) in their individual cases. Unlike the proposal to remove the duty of fair representation altogether, this proposal addresses due process concerns. Additionally, unlike the proposal to dilute representation efforts in certain cases, this proposal maintains a uni-

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[73] Federal sector unions may continue to argue that this individual is a free rider to the extent he still benefits from the more general collective bargaining activities of the union (*e.g.*, contract negotiation, lobbying on employment issues) without paying. This is certainly true but absent a pro rata allocation of these costs (in other words, an agency shop or fee sharing), the union will not be able to receive payment. In essence, this proposal reflects a compromise in an open shop setting, one that absolves the union of a strict duty of fair representation in situations where that duty most directly conflicts with the free rider—the free rider's individual grievance.

[74] 5 U.S.C. § 7121(b)(3)(C) (1982).

[75] Under the CSRA, a bargaining unit employee may, in certain cases, choose to pursue either the negotiated grievance procedure or the statutory appeals procedure before the Merit Systems Protection Board (MSPB). For example, removals, reductions in grade, and suspensions beyond 14 days are appealable to the MSPB by eligible employees regardless of bargaining unit status. 5 U.S.C. § 7721(d),(e). Once made, however, the employee's choice of forum is irrevocable. An employee who invokes the MSPB procedures controls his own case and is largely free from union influence. Moreover, since the MSPB procedure does not implicate collective rights, courts have held there is no union duty of fair representation in that forum. American Federation of Government Employees v. Federal Labor Relations Authority, 812 F.2d 1326 (10th Cir. 1987); National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (D.C. Cir. 1986). In cases involving lesser adverse actions, however, the bargaining unit member's sole recourse will be grievance procedures. For a more complete discussion of choice of forum issues, see Moore, *Where to Challenge an Agency Action*, in Federal Civil Service Law And Procedures Ch. 4 (Bussey ed. 1984).

[76] *See supra* note 70.

[77] Office of Personnel Management (OPM) regulations require most executive branch agencies having positions in the competitive service to establish an agency grievance system. 5 C.F.R. 771.203 (1988). Absent a statutory right of appeal, or a collective bargaining agreement, employee grievances are handled through this system. 5 C.F.R. 771.205-206 (1988). When an employee is a member of a collective bargaining unit, however, the grievance-arbitration procedure covering that unit must be used, absent a statutory right of appeal.

[78] Arnett v. Kennedy, 416 U.S. 134 (1974).

[79] *Supra* notes 32-37 and accompanying text.

form duty of fair representation that is consistent with the union's status as exclusive representative. [80]

If the Agency Shop is Allowed

Should Congress eventually determine that the union security clause, like collective bargaining in general, is in the public interest, some cautionary notes are in order. Certain states, in sanctioning public sector union security provisions, have mandated that once a labor union is certified as exclusive representative, an automatic service charge can be withheld from nonmembers. No bargaining between the unions or the agency over the matter is envisioned. [81] Although the benefit to public sector unions is obvious, such a provision would be inadvisable in the federal sector. First, it must be remembered that for the past decade under the CSRA, and before that under the various executive orders, federal sector labor relations existed under the open shop only. Federal sector unions were elected and undertook their exclusive representative duties with full knowledge that the dues they received from bargaining unit members would be voluntary. More importantly, the same members who voted for the union did so understanding the voluntariness of such payments. With this history, making dues mandatory by statutory fiat may well serve to undermine the very member support from which the union derives its claim to exclusive representative status. Thus, any federal legislation on union security should make this issue negotiable, thereby holding federal sector unions accountable to their bargaining unit members with respect to whether provision for such payments should even be sought. [82]

Although this accountability to bargaining unit members, taken alone, is probably enough reason to make agency shop provisions negotiable only, there is another reason why Congress should refrain from mandating dues withholding. The presence of negotiable agency shop provisions would serve to give management, at no cost to the general taxpayer or management rights, added leverage at the bargaining table. In essence, if agency management officials determined they were going to bargain strenuously on this issue, they may be able to extract significant concessions from the union, particularly in areas concerning administrative efficiency. What comes to mind directly are provisions governing the use of official government time for representation duties, currently the single major subsidy provided by the government for federal sector unions. [83] The nature and extent of these provisions are largely negotiable, [84] and could provide fertile area for compromise and trade-offs. Obviously, making fee withholding mandatory would deprive management of this leverage because there would be little remaining over which to bargain.

Once it is recognized that agency shop provisions should only be negotiable, another issue arises concerning the level at which these negotiations should take place. Under one scheme, negotiations could occur at the national level between the agency and the national union; it would cover all installations and activities within the agency that also have the national union's local chapters. For example, Headquarters, Department of the Army, would negotiate an agency shop agreement with AFGE that would cover all AFGE locals within the Army.

While a single negotiating session such as this would provide both administrative ease and uniformity of practice, delegating these negotiations to the installation or activity level would be far preferable. As noted earlier, twenty-one states have enacted legislation that forbids union security clauses in labor contracts. [85] While a federal statute authorizing union security provisions in federal sector labor agreements would preempt such legislation on supremacy grounds, federal preemption may not be the last word in these so-called "right-to-work" states. As explained previously, both sides of the union security debate are armed with forceful, cogent arguments for their positions. The debate has evolved over the years and individual opinions on the subject have been shaped largely by respective attitudes toward unionism on one side and individual autonomy on the other. A complex interplay of social, economic, and religious factors have pushed certain individuals and certain sectors of the country in sharply different directions on this issue.

Federal agencies and unions, if ever faced with the possibility of negotiating agency shop agreements, should not be oblivious to these circumstances. In a "right-to-work" state, the local federal employees, many of whom are likely to be long-time residents, may have

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[80] The only real objection to such a proposal centers on equal protection concerns. It could be argued that making some employees pay the costs of their grievances, and excusing others based solely on their status as union members, violates equal protection. Although colorable, such an argument is likely to fail. In the first place, its proponents will have a difficult task establishing that such a classification is suspect. In other words, official distinctions based on a person's payment of service fees to a union are simply not the same as official distinctions based on race. *See generally* Tribe, American Constitutional Law 1436-42, 1466-73 (2d. ed. 1988). As such, the former situation will not demand the strict scrutiny of classifications demanded by the latter. In fact, such a classification will, in all likelihood, need only meet the rational basis test. *Cf.* City of Charlotte v. Local 668, Int'l Ass'n of Firefighters, 426 U.S. 283 (1976) (applying rational basis test to city's refusal to withhold dues owed to union, Court finds no equal protection violation in light of city's concerns over administrative burden). This should not be a difficult burden for the government to carry in light of the problems caused by the presence of free riders, particularly in cases where the union's costs are traceable to the free rider.

[81] *See, e.g.*, Conn. Gen. Stat. Ann. § 5-280 (West 1988); Haw. Rev. Stat. § 89-4 (1985); (mandating fair share agreements). N.Y. Civ. Serv. Law § 208(3) (McKinney 1983); R.I. Gen. Laws § 36-11-2 (1984) (requiring agency shops).

[82] This aspect of the federal sector union security debate has received surprisingly little attention to date, especially in light of the profound implications it may carry for federal sector unions elected under the premise that dues would be voluntary. In this sense, whether the provision of an agency shop could do more harm than good for federal sector unions is a matter worthy of serious consideration for those advocating such change.

[83] 5 U.S.C. § 7131(c) (1982).

[84] Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89 (1983).

[85] *See supra* note 15.

definite views on the subject of mandatory dues withholding. Unless negotiations occur at the local level, however, it is possible that their values and concerns will never be brought to bear on the process. Thus, only local union leaders, those directly accountable to the local membership, would be truly responsive to local bargaining unit members on this potentially divisive issue. The alternative, a possibility of having an agency shop provision forced from above by agency headquarters and national unions, could prove extremely harmful to civilian employee morale at many installations. Thus, local negotiation of these agreements will be the best policy, even if it leads to varying practices across the agency.

Conclusion

As stated previously, the CSRA is now over ten years old and, in light of perceived problems in its application, is becoming a target for legislative reform. Should Congress decide that certain changes are in order for federal sector labor-management relations, it is likely that union security, as it interplays with the union duty of fair representation, will be one of the subjects given close attention. This article has presented an outline of the arguments bearing on this debate, an assessment of the need for reform, and an evaluation of proposals which might surface in the future. Given the potential this subject has for altering the manner in which federal agencies conduct labor relations, legislative developments in this area deserve careful attention.

Bite Mark Evidence: Making an Impression in Court

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Since prehistoric man first discovered that the mouth could be used for speaking as well as eating, he has tended to use it for lying his way out of trouble. . . . [T]he criminal may "lie through his teeth," though the teeth themselves cannot lie. Murderers, rapists, thugs and vicious sadists have gone to the gallows, or the cells, because they forgot that irrefutable fact. [1]

Introduction

Bite mark evidence is being used in state criminal trials with increasing frequency and effectiveness. Indeed, without bite mark evidence, many violent state crimes could not be prosecuted successfully. Unfortunately, the science of forensic odontology [2] is seldom used in military criminal trials. One reason may be that bite mark evidence is often overlooked or improperly preserved by inexperienced military crime investigators. The result is that valuable incriminating evidence—in some cases the only incriminating evidence—is lost forever. Even when bite mark evidence is properly preserved, military trial attorneys are often unfamiliar with how such evidence can be used in court, in part because bite mark identification theory is seldom taught in law school evidence or trial practice courses.

This article will provide an overview of bite mark evidence. The article will briefly trace the history of forensic odontology, review the basic theory behind bite mark identification, describe some common bite mark comparison techniques, and conclude with guidance on how to preserve bite mark evidence at the crime scene and effectively use that evidence in courts-martial.

Historical Overview of Forensic Odontology

Dentists have long been able to identify human remains by comparing a deceased's dentition [3] to existing dental records. One of the most famous examples of forensic dentistry occurred during the Revolutionary War, when Dr. Joseph Warren, a general in Washington's army, had a Boston dentist construct a special silver-ivory dental bridge for him. When the general was later killed in the Battle of Bunker Hill and buried in an unmarked grave, that same Boston dentist was called upon to identify the general by the unusual bridgework he had constructed for him earlier. The dentist was none other than Paul Revere. [4]

By the 1970's, dentists were being asked to compare bite marks on crime victims to the dentition of known suspects. [5] Despite a lack of uniform procedures and no

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* The author wishes to acknowledge the assistance of CPT Donald Curry, who provided some of the materials used to prepare this article. This article was completed in partial satisfaction of the requirements of the 37th Judge Advocate Officer Graduate Course.

[1] Furness, *A General Review of Bite-Mark Evidence,* 2 Am. J. Forensic Med. & Path. 49, 52 (1981).

[2] Forensic odontology, also known as forensic dentistry, involves the application of dentistry to the law. Specifically, it is that branch of odontology which deals with the proper handling of dental evidence and the proper evaluation and presentation of dental findings. P. Giannelli & E. Imwinkelried, Scientific Evidence 369 n.1 (1986).

[3] A dentition is a set of teeth of an individual. Humans acquire two sets of teeth during their lifetime. There are four different types of teeth: incisors, cuspids (canines), bicuspids (premolars), and molars. An adult dentition comprises 32 teeth. Each tooth has five surfaces: occlusal, mesial, distal, buccal, and lingual. A. Moenssens, F. Inbau & J. Starrs, Scientific Evidence in Criminal Cases 746 (3d ed. 1986).

[4] A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 748-49. Forensic dentistry also played a significant role in the identification of the bodies of Adolf Hitler, Eva Braun, and Lee Harvey Oswald. *Id.* Dental identification predates fingerprinting. L. Luntz & P. Luntz, Handbook for Dental Identification 146, 148 (1973).

[5] *See, e.g.,* People v. Marx, 126 Cal. Rptr. 350 (Cal. Ct. App. 1975); People v. Milone, 356 N.E.2d 1350 (Ill. App. Ct. 1976).

recognized program to teach comparison techniques, some dentists were nevertheless willing to make bite mark comparisons and testify in court concerning their conclusions. Surprisingly, the evidence was declared admissible in every state court in which it was offered and led to many convictions. [6]

Despite the early success of bite mark evidence in court, the introduction of such evidence was not without its critics. [7] As a result of that criticism, the odontology section of the American Academy of Forensic Sciences (AAFS) received a report in 1977 from its committee on recommended methods of bite mark comparison. In 1980 the AAFS appointed a committee to develop bite mark standards. The next year, the American Board of Forensic Odontology (ABFO) voted to undertake a similar task. Eventually, the two organizations formed a joint committee, which finally issued bite mark guidelines in 1984. [8] The reliability of those guidelines has since been documented. [9] The ABFO guidelines are now used by all forensic odontologists to enhance the uniformity and quality of bite mark analysis.

Theory of Bite Mark Comparison

The theory behind bite mark comparison is that no two dentitions are identical. Every adult has thirty-two teeth, each with five anatomic surfaces, for a total of one hundred and sixty combinations. [10] In addition, a person's teeth can have a number of individual characteristics, caused by restorations, prosthesis, decay malposition, malrotation, spacing, arrangement, wear patterns, breakage, fillings, and bite relationship. These characteristics add a great number of additional variables to the comparison equation. [11]

In a 1984 statistical study of human dentition, the uniqueness of human dentition was demonstrated. [12] The study found that the probability of finding two sets of dentition with six teeth in the same position is 1 in 1.4×10^{13}. Finding an accurate match of five teeth would assure that no one else in the world's population had the same dentition. [13] But although the uniqueness of human dentition is seldom questioned today, [14] forensic odontologists still face two major problems in making accurate bite mark comparisons: distortion of the receiving surface during biting, and distortion of the bite mark itself when reproducing it for comparison purposes.

First of all, skin is very elastic and is a poor receiving surface. Bite marks in the skin tend to change their shape and size over time due to bleeding, swelling, and shrinking of the wound area. [15] Bite marks left in foodstuffs and other materials can also change their size and shape, depending on the hardness and consistency of the material. [16] In addition, a bite mark is often not an accurate representation of the teeth that caused the impression because of the bite dynamics involved. For example, skin can get dragged or stretched between the teeth prior to the bite impression, and multiple teeth marks can become superimposed on one another. [17] Furthermore, the bite mark will usually only include a limited number of the assailant's teeth. Thus, the forensic odontologist seldom has a complete, undistorted bite mark to examine.

Secondly, even if a relatively undistorted bite mark is left behind by a criminal, an inexperienced crime scene investigator may distort that bite mark when attempting to reproduce it for later comparison to a suspect's dentition. For example, if photographs of the bite mark are not taken perpendicular to the bitten surface, some distortion on the outer edges of the photographed bite can result. [18] Even when a bite mark impression (mold) is made directly from the victim's skin, distortion may

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[6] *See generally* A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 756-62; P. Giannelli & E. Imwinkelried, *supra* note 2, at 379-82.

[7] *See* Note, *The Admissibility of Bite Mark Evidence,* 51 S. Cal. L. Rev. 309 (1978) (advocating that bite mark evidence no longer be admissible in court pending establishment of standards of admissibility by a committee of forensic odontologists). In People v. Milone, 356 N.E.2d 1350 (Ill. App. Ct. 1976), the bite mark evidence produced at trial was later soundly criticized by many prominent forensic odontologists, some of whom believed that Milone did not make the bite in question. A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 758 n.24 and 759 n.28.

[8] *See* American Board of Forensic Odontology, Inc., *Guidelines for Bite Mark Analysis,* 112 J. Am. Dental A. 383-87 (1986) [hereinafter 1984 ABFO Guidelines]. The ABFO Guidelines do not mandate any specific method of bite mark analysis.

[9] Rawson, Vale, Sperber, Herschaft & Yfantis, *Reliability of the Scoring System of the American Board of Forensic Odontology for Bite Marks,* 31 J. Forensic Sci. 1235 (1986).

[10] P. Giannelli & E. Imwinkelried, *supra* note 2, at 370.

[11] *Id.* Even identical twins have been shown to have different dentitions. *See* Sognnaes, Rawson, Gratt & Nguyen, *Computer Comparison of Bitemark Patterns in Identical Twins,* 105 J. Am. Dental A. 449 (1982).

[12] Rawson, Ommen, Kinard, Johnson & Yfantis, *Statistical Evidence for the Individuality of the Human Dentition,* 29 J. Forensic Sci. 245 (1984).

[13] Teeth were considered to be in the same position if they were plus or minus 1 mm for center point and plus or minus 5 degrees angle difference. *Id.* at 252.

[14] The validity of bite mark evidence is still not accepted by everyone today. *See* Wilkinson & Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow,* 12 W. St. U. L. Rev. 519 (1985).

[15] A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 753-55.

[16] *Id.*

[17] *Id.* at 754; Barbenel & Evans, *Bite Marks in Skin–Mechanical Factors,* 14 J. Forensic Sci. 235 (1974).

[18] Armed Forces Institute of Pathology, *24th Annual Course in Forensic Dentistry* 163-68 (Oct. 1987) [hereinafter AFIP 24th Annual Course]. *See also* Herschaft, Sperber & Dowell, *Analysis of Photographic Distortion in Bite Marks: A Report of the Bite Mark Guidelines Committee,* 31 J. Forensic Sci. 1261 (1986).

result if the mold material shrinks during the hardening process. [19] As a result of the above problems, the forensic odontologist may not have an accurate bite mark model for comparison purposes.

Techniques of Bite Mark Comparison

Despite the distortion problems described above, an experienced forensic odontologist can achieve impressive results with today's bite mark comparison techniques. While a detailed analysis of the various bite mark comparison techniques is beyond the scope of this article, a basic overview of the area will be helpful to counsel who are unfamiliar with forensic odontology.

All bite mark comparison methods involve essentially three steps: 1) registration of the bite mark and the suspect's dentition; 2) comparison of the dentition and the bite mark; and 3) evaluation of the points of similarity or dissimilarity.

Registration

Registration of the bite mark by photography is the most common method of preservation and is used in almost every case. The photographs can be taken using black and white, color, infrared, or ultraviolet film. The photographs are taken with a rigid linear scale in the picture so the photographic image of the bite mark can later be enlarged to life size. A mold is also taken of the suspect's dentition and that is also photographed and enlarged to life size. In addition to making a complete dental mold of the suspect's teeth, some odontologists also have the suspect bite into several pieces of wax or other material for later comparison purposes. [20]

In addition to photography, a deep bite mark may be "lifted" from the victim's skin by spreading a compound into the bite mark area and letting it harden. [21] Somewhat related to the above technique is one of "dusting" the bite mark in much the same fashion as a fingerprint and then lifting the bite impression from the skin. [22] This latter technique is less desirable, as the resulting model is only two dimensional.

Comparison

Once the bite mark and accused's dentition are registered, points of similarity can then be identified by using one or more of the following techniques: transparent overlays; direct comparison of photographs; direct comparison of three dimensional models; or direct comparison of bite mark photographs with the suspect's dental models. [23]

Other less common comparison techniques involve the use of computer enhancement of bite mark photographs, scanning electron microscopy, contour maps of the bitten area, and transillumination. [24] This latter technique allows the presence of subcutaneous hemorrhage to be visualized and photographed without having to cut through the bite mark. It is therefore particularly useful when the bite was inflicted perimortem or was a "weak" bite. [25]

Evaluation

A forensic odontologist will evaluate points of similarity using the 1984 ABFO guidelines. [26] These guidelines essentially consist of a number of comparison categories, each of which is assigned a range of point values. It is relatively easy for the odontologist to conclude that a dentition did not make the bite, because only one unexplainable inconsistency is required. [27] It is more difficult to state that a dentition definitely made the bite in question, and the odontologist's findings may therefore range from "reasonable dental certainty" that the accused made the bite to merely that the bite is "consistent with" the accused's dentition. [28] Because no minimum number of points of similarity have been established by the ABFO, [29] it is important to remember that the forensic odontologist's ultimate conclusions are subjective, despite his use of standardized ABFO guidelines.

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[19] *See* Williams, Jackson & Bergman, *An Evaluation of the Time Dependent Dimensional Stability of Eleven Elastomeric Impression Materials,* 52 J. Prosthetic Dentistry 120 (1984). *See generally* Benson, Cottone & Sperber, *Bite Mark Impressions: A Review of Techniques and Materials,* 33 J. Forensic Sci. 1238 (1988).

[20] *See* Sperber, *Bite Mark Evidence in Crimes Against Persons,* 50 F.B.I. L. Enforcement Bull. 16 (1981); West, Billings & Friar, *Ultraviolet Photography: Bite Marks on Human Skin and Suggested Techniques for the Exposure and Development of Reflective Ultraviolet Photography,* 32 J. Forensic Sci. 1204 (1987). *See generally* E. Imwinkelried, Scientific and Expert Evidence 732-47 (2d ed. 1981); AFIP Annual Course, *supra* note 18, at 189-95.

[21] Benson, Cottone & Sperber, *supra* note 19; Souviron, Mittleman & Valor, *Obtaining Bite Mark Impressions (Mold) from Skin,* 51 F.B.I. L. Enforcement Bull. 8 (1982).

[22] Rao & Souviron, *Dusting and Lifting the Bite Print: A New Technique,* 29 J. Forensic Sci. 326 (1984).

[23] *See* E. Imwinkelried, *supra* note 20, at 742-47; P. Giannelli & E. Imwinkelried, *supra* note 2, at 374.

[24] *Id. See also* Dorion, *Transillumination in Bite Evidence,* 32 J. Forensic Sci. 690 (1987).

[25] *Id.* at 690-91.

[26] 1984 ABFO Guidelines, *supra* note 8.

[27] E. Imwinkelried, *supra* note 20, at 747; P. Giannelli & E. Imwinkelried, *supra* note 2, at 375-76.

[28] *Id. See also* E. Imwinkelried, *supra* note 20, at 752. In some earlier state cases, experts testified to degrees of certainty other than the above two, such as "high probability." *Id.* Even in the more recent trial involving serial killer Theodore Bundy, the bite mark identification was made "to a high degree of probability." *See* Bundy v. State, 455 So.2d 330 (Fla. 1984).

[29] *See* 1984 ABFO Guidelines, *supra* note 8. In state bite mark cases, the experts have made comparisons using as few as 8 and as many as 54 points of comparison. P. Giannelli & E. Imwinkelried, *supra* note 2, at 376 n.31.

Getting Bite Mark Evidence Into Court

Bite mark evidence is most commonly used in cases of homicide, assault, rape and sexual assault, and child abuse, although it may help solve other nonviolent crimes as well. [30] Indeed, where the victim is deceased, did not see the attacker, is unwilling to cooperate with the prosecution, or is too young to testify effectively in court, bite mark evidence may be the only means of proving the case.

Examining the Crime Scene and Victim

After the report of a violent crime that may involve bite mark evidence, the first order of business is a careful (but expeditious) processing of the crime scene. The crime scene should be thoroughly inspected for food, cigar butts, cigarette holders, pencils, chewing gun, or any other materials that may contain bite marks left by the suspect. [31] Crime scene investigators must be especially careful in handling food containing bite marks, as any disturbance of the evidence will make later comparison difficult or impossible. When in doubt, the investigator should secure the crime scene and leave the food items undisturbed until a forensic odontologist can be located.

The victim's entire body should also be carefully examined by a qualified medical examiner, as bite marks on victims are often overlooked. In fact, one source estimates that only five percent of bite marks on the human body are detected. [32] Women are most commonly bitten on the breasts, arms, and legs, while males are most commonly bitten on the arms and shoulders. [33] If one bite mark is found, the examiner should look for more, as approximately forty percent of bite mark cases involve multiple bites. [34] Time is also a critical factor. Studies have shown that bite marks only last three minutes to three days on a live victim and about twenty-four hours on a dead victim. [35] Also, bite marks on the face seem to disappear faster than on the arms, while bites on males disappear faster than on females. [36] Nevertheless, there are exceptions to the above time limits, [37] and infrared or ultraviolet photography may detect a bite mark that is no longer visible to the human eye. [38] Of course, if a suspect is apprehended, he or she should also be examined for possible defensive bites.

Processing the Bite Mark

If bite mark evidence is found, a great many problems can be avoided by bringing in a qualified forensic odontologist immediately. There are only about eighty-five board certified forensic odontologists in the United States, but one can be located rather quickly by contacting the American Board of Forensic Odontology. [39] If one is available, he or she can process the bite mark evidence. If one is not readily available, local dentists and CID investigators will have to process the evidence, as outlined below.

The first priority should be to swab the bite mark for a saliva sample. [40] This step is critical, but is often overlooked. If possible, the bite swabbing (and a control swabbing) should be done by a medical examiner or trained forensic technician. In addition, saliva swabbings and blood samples should be obtained from the victim and any suspects. Because eighty percent of the population are "secretors," the suspect's blood type may be identifiable from the saliva in the bite mark. [41] This alone may identify the assailant or at least corroborate the bite mark findings of the forensic odontologist.

After a careful swabbing of the bite mark, it should be immediately photographed, using a 35mm or larger format camera with both black and white and color film. The film's ASA should be no higher than 100, and the pictures should be taken with the largest f stop possible (e.g. f16 or larger). [42] If possible, infrared or ultraviolet photographs should also be made, as they

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[30] *E.g.*, Doyle v. State, 263 S.W.2d 779 (Tex. Crim. App. 1954) (burglar left a piece of partially eaten cheese at the crime scene, resulting in his later identification and conviction).

[31] Bite marks can be left at the crime scene in almost any substance. *See, e.g., id.*; Sperber, *Chewing Gum: Valuable Evidence in a Recent Homocide,* 47 F.B.I. L. Enforcement Bull. 28 (1978); Simon, *Successful Identification of a Bite Mark in a Sandwich,* 2 Int'l J. Forensic Dentistry 17 (1974).

[32] Souviron, Mittleman & Valor, *supra* note 21.

[33] Vale & Noguchi, *Anatomical Distribution of Human Bite Marks in a Series of 67 Cases,* 28 J. Forensic Sci. 61 (1985).

[34] *Id.*

[35] *See* A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 753-54 (citing Dinkel, *The Use of Bite Mark Evidence as an Investigative Aid,* 19 J. Forensic Sci. 535 (1973-74)).

[36] *Id.*

[37] *See, e.g.*, People v. Marx, 126 Cal. Rptr. 350 (Cal. Ct. App. 1975) (where the victim's bite mark was so deep as to be clearly visible after exhumation of the body approximately seven weeks after burial).

[38] West, Billings & Friar, *supra* note 20; AFIP 24th Annual Course, *supra* note 18, at 189-93.

[39] American Board of Forensic Odontology, P.O. Box 669, Colorado Springs, CO 80901; telephone (719) 596-6006.

[40] A good technique for properly swabbing a bite mark is described in Mittleman, Stuver & Souviron, *Obtaining Saliva Samples from Bitemark Evidence,* 49 F.B.I. L. Enforcement Bull. 16 (1980). One expert recommends that some orienting photographs be taken of the body and the bite mark area before the bite mark is ever swabbed for saliva. Sperber, *supra* note 20, at 17.

[41] *Id.*; E. Imwinkelried, *supra* note 20, at 739. A "secretor" reveals his or her blood type (ABO) in saliva, tears, perspiration, and seminal fluid. *Id.* Bacteria in the saliva swabbing may also tell the forensic odontologist something about the attacker's oral hygiene and economic status.

[42] *See generally* AFIP 24th Annual Course, *supra* note 18, at 161-68.

may reveal old bite marks (several days to six months) that are otherwise invisible to the naked eye. [43] In all cases, the camera should be mounted on a tripod and placed perpendicular to the bite surface. Photographs should be taken of each arch if the bite is on a curved surface to decrease the chance of photographic distortion. [44] A rigid scale (e.g., the ABFO Scale No. 2) and a circular reference of known size should be placed in some of the pictures for later comparison purposes. [45] The light source should be held at various positions around the bite mark to ensure at least one photograph has good contrast. For both live and dead victims, a series of photographs should be taken of the bite mark over time, because the bite may become more defined as swelling and hemorrhaging subside. [46] The photographs should have the date and time indicated on them for later reference. It is important to remember that you can never take too many photographs.

If a suspect is known, a mold of his or her dentition should be taken by a qualified dentist. The suspect should also register the bite into pieces of dental wax. That same dentist may also be able to make a mold of a deep bite mark on the victim's skin by carefully spreading a special dental impression material into the bite and lifting the mold off the skin once it has hardened. [47] If the victim is dead, the dentist should also make a dental mold of the victim's teeth in order to rule out any bites as being self-inflicted. Finally, the dentist may want to consider excising the bite mark on a dead victim and preserving it for later reexamination. This is a difficult technique that may result in distortion of the bite mark, but may be worth a try. [48] Needless to say, the chain of custody for all of this evidence must be carefully maintained.

Evaluating the Evidence

Once all the dental molds, wax impressions, photographs, and other evidence are obtained, you are ready to turn them over to an expert for evaluation. Although any dentist could possibly make a bite mark comparison and testify in court, no trial counsel should risk using anyone who is not a board certified [49] forensic odontologist. The nearest one can be located by contacting the ABFO. [50] In addition, counsel should ensure that the convening authority has authorized sufficient funds ahead of time to pay for the expert's services. [51] The evaluation and report, subsequent interviews, preparation of training aids, and later testimony in court are all likely to be billed separately.

Once you have the forensic odontologist's report, it should be immediately given to the defense as discovery, along with a copy of all photographs and access to all dental models and other evidence. Remember also that *United States v. Broadnax* [52] requires that the government provide notice to the defense of the intent to use reports containing subjective expert testimony and to produce the expert if so requested by the defense.

Preparing for Trial: Knowing the Law

In preparing for your day in court and a possible defense objection to the use of bite mark evidence, trial counsel should be thoroughly familiar with the only reported military case concerning bite mark evidence: *United States v. Martin*. [53] In *Martin* a Marine corporal's wife was found dead in her family quarters at Camp Pendleton, California, the apparent victim of strangulation. She also had a pronounced bite mark on her left cheek, which was later identified by a forensic

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[43] West, Billings & Friar, *supra* note 20, at 1210. Reflective ultraviolet photography can be especially helpful when the attacker receives a defensive bite from the victim and then is not apprehended for several weeks, during which time the bite mark may have healed and disappeared to the unaided eye.

[44] *See* AFIP 24th Annual Course, *supra* note 18, at 163-68. One source suggests that distortion is not a significant problem as long as the entire bite mark can be observed from one viewing angle. Herschaft, Sperber & Dowell, *supra* note 18, at 1267.

[45] The ABFO scale no. 2 is a new scale for bite mark photography that can allow for the correction of distortional errors due to improper camera angle. *See* Hyzer & Krause, *The Bite Mark Reference Scale - ABFO No. 2,* 33 J. Forensic Sci. 498 (1988). The scale is not without its critics. *See* Ebert, *The Bite Mark Reference Scale,* 33 J. Forensic Sci. 301 (1988). If no scale was used or the camera angle was improper, the photographs may still be usable. Bernstein, *Two Bite Mark Cases With Inadequate Scale References,* 30 J. Forensic Sci. 958 (1985).

[46] A series or photographs every 24 hours over a 5-day period is recommended. Sperber, *Bite Mark Evidence, supra* note 20, at 18. A deceased victim's body should never be embalmed before it has been thoroughly examined and photographed by a forensic odontologist, as embalming tends to "wash out" the bite mark. E. Imwinkelried, *supra* note 20, at 751.

[47] For a detailed description of the proper impression technique, see Souviron, Mittleman & Valor, *supra* note 21; Benson, Cottone & Sperber, *supra* note 19. When there is a deep depression in the skin from a bite, a bite mold can make an excellent three dimensional visual aid for the jury.

[48] The technique is described in AFIP 24th Annual Course, *supra* note 18, at 192. Basically, the bite area is excised, tacked carefully to plywood, moistened in saline and frozen in a sealed poly bag. Transillumination of the excised sample may also yield additional evidence. *See* Dorion, *Transillumination, supra* note 24.

[49] The basic requirements to become a board certified forensic odontologist include: a preliminary dental degree (D.D.S. or D.M.D.), specialized training from an institution acceptable by the ABFO, two years of practical experience in the field to include being active with institutions such as Medical Examiners' or Coroners' Offices, participation in at least 25 autopsies, participation in three significant dental identification cases, the accumulation of 1000 qualification points, and the successful completion of an examination administered by the ABFO. A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 762-63. In at least one state court case, however, the court ruled a dentist was qualified to make a bite mark comparison, even though it was the first comparison he had ever made. *See* Niehaus v. State, 265 Ind. 655, 359 N.E.2d 513 (1977), *cert. denied,* 434 U.S. 902 (1977).

[50] *See supra* note 39. Westlaw also has a forensic sciences directory that lists experts in forensic odontology. To enter the data base, type: db fsd.

[51] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(d) [hereinafter R.C.M.].

[52] 23 M.J. 389 (C.M.A. 1987).

[53] 9 M.J. 731 (N.C.M.R. 1979), *aff 'd,* 13 M.J. 66 (C.M.A. 1982).

odontologist as matching her husband's dentition. The bite mark evidence was admitted at trial over defense objection. Upon appeal, the court of military review held that "bite-mark identification has reached a sufficient level of scientific reliability as to be admissible as evidence before a court-martial." [54] To be admissible, the proponent of the evidence must establish the following: 1) the scientific acceptance and reliability of the method used; 2) the credentials of the expert that qualify him to render an opinion; and 3) that the correct scientific procedures were used in this case. [55] If a board certified forensic odontologist is brought into the case early to process and evaluate the bite mark evidence (as was done in *Martin*), the above test should not be difficult to satisfy.

The court in *Martin* also held that the dental examination and mold made of the accused's teeth did not amount to a statement requiring article 31 rights warnings, was not a search within the meaning of the fourth amendment, and was not testimonial or communicative within the meaning of the fifth amendment. [56] Other issues not addressed by the court, however, should be anticipated by trial counsel in future bite mark cases. For example, the court in *Martin* did not address whether the examination of the accused's teeth is a critical stage of the proceeding that requires counsel to be present. [57] Other courts faced with that issue have held that it is not a critical stage. [58] Additionally, it is unclear how Military Rule of Evidence 312 applies to the taking of a dental mold from an accused. [59] The rule allows intrusions into body cavities only under certain conditions, some of which require probable cause or a reasonable suspicion. In most cases, the government will already have some other evidence giving them probable cause to arrest a particular soldier, so the subsequent dental examination of that soldier should not raise a problem under Military Rule of Evidence 312. Nevertheless, trial counsel should be aware of the above rule and the possibility that dental examinations made after a questionable apprehension could be ruled inadmissible.

Some state cases may be useful to a trial counsel with bite mark evidence. For example, some state courts have allowed counsel to argue "consciousness of guilt" when a suspect has tried to change his dentition after a crime involving bite marks or when a suspect has refused to submit to a dental examination. [60] Military trial counsel faced with similar facts should use these cases as authority for making similar arguments.

Preparing for Trial: Knowing Your Expert

In addition to knowing the case law above, trial counsel should also thoroughly prepare their expert witnesses for their day in court. An experienced forensic odontologist will probably have foundation questions and responses already available from their previous testimony. For those who have not been in court, counsel should formulate foundation questions that will establish the three-pronged test in *Martin*. [61] Counsel should also familiarize the expert with military courtroom procedures and the questions that may be asked.

Visual aids are particularly important in making the odontologist's comparison understandable to a jury. Large scale photographs with transparent overlays of the accused's teeth that were found to match the victim's bite marks are probably the easiest to use and enter into evidence. In the *Martin* case a video tape with "voice-over" comments from the odontologist was also used very effectively. By employing two cameras, one focused on the bite mark and the other on dental models, and by using mixing equipment, the teeth were made to "appear" on the bite mark and then "disappear" as often as was necessary for the viewer to become oriented with the comparison presented by the forensic

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[54] *Martin*, 9 M.J. at 737.

[55] *Id.* at 737-38. The court of military review in *Martin* used the *Frye* test in determining that bite mark evidence was admissible. *Id.* at 737. Upon review of the case by the Court of Military Appeals, that court noted that Military Rule of Evidence 702 may broaden the *Frye* test. 13 M.J. at 68 n.4. For a good analysis of Military Rule of Evidence 702 and its effect on the *Frye* test, see Wittman, *Out of the Frye Pan Into the Fire*, The Army Lawyer, Oct. 1987, at 11. Some state courts will judicially notice the general reliability of bite mark evidence. *See* People v. Middleton, 429 N.E.2d 100, 101 (N.Y. 1981).

[56] *See Martin*, 9 M.J. at 738-40.

[57] The right to counsel attaches only in critical stages of the prosecution's gathering of evidence against the defendant. United States v. Wade, 388 U.S. 218 (1967). The Court in *Wade* cited "fingerprints, blood samples, clothing, hair, and the like" as examples of mere preparatory steps. *Id.* at 227. Dental examinations and the taking of dental impressions would probably also fall into the mere preparatory category and not require the presence of counsel.

[58] *See, e.g.*, State v. Howe, 386 A.2d 1125 (Vt. 1978); United States v. Holland, 378 F. Supp. 144 (E.D. Pa. 1974), *aff'd*, 506 F.2d 1050 (3d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975); People v. Milone, 356 N.E.2d 1350 (Ill. App. Ct. 1976); State v. Asherman, 478 A.2d 227 (Conn. 1984). *See also* United States v. Culver, 44 C.M.R. 564 (A.F.C.M.R. 1971), holding that a dental examination does not require the presence of counsel. *Culver* is cited with approval in *Martin*, 9 M.J. at 739.

[59] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 312(c) [hereinafter Mil. R. Evid.], entitled "Intrusions into Body Cavities," states: "A reasonable nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible." Subsection (b) allows visual examinations of the body only as part of: an inspection or inventory under Mil. R. Evid. 313, a search under Mil. R. Evid. 314(b) and (c) if there is a reasonable suspicion that evidence of a crime is concealed on the body of the person to be searched, searches within jails under Mil. R. Evid. 314(h), searches incident to lawful apprehension under Mil. R. Evid. 314(g), emergency searches under Mil. R. Evid. 314(i), and probable cause searches under Mil. R. Evid. 315.

[60] *E.g.*, State v. Turner, 633 S.W.2d 421 (Mo. Ct. App. 1982). In *Turner* the defendant had new tooth fractures shortly after becoming aware that impressions would be taken of his teeth. The court held that the defendant's conduct in fracturing his teeth evinced a consciousness of guilt and was admissible for that reason. *Id.* at 424.

[61] *See supra* text accompanying note 55. For sample bite mark foundation questions, see 25 Am. Jur. Proof of Facts, *Identification of Tooth Marks*, 765 (1970 & Supp. 1987).

odontologist. [62] The Criminal Law Division at The Judge Advocate General's School has a copy of the video tape used in the *Martin* case.

It is also important for trial counsel to thoroughly interview the odontologist and know exactly what he or she can (and cannot) testify to. For example, most forensic odontologists who have examined a bite mark will be able to testify to one or more of the following: whether the bite is human or animal; whether it is the upper or lower arch and which teeth are present in the bite; whether the bite was made by a child or an adult; the dental hygiene, approximate economic status, sex, and race of the assailant (or victim); the approximate time of death; the position of the victim and assailant at the time of the bite; whether a suspect did not make the bite; and whether the bite is consistent with the accused's dentition. [63]

Although the above information will be helpful in identifying a particular suspect and proving that the suspect had physical contact with the victim, counsel should also determine what other information the forensic odontologist can provide from his examination of the bite wound. For example, a forensic odontologist will often be able to offer an opinion as to the amount of force required to make the bite mark in question and the resulting pain to the victim. [64] Such testimony can be extremely valuable in establishing intent to inflict grievous bodily harm or to disprove any defense theory that the victim's bites were accidental or consensual.

Counsel should also prepare the odontologist for the inevitable cross-examination by the defense. The defense is likely to highlight one or more of the following areas: the expert's lack of experience; the shortcomings of the comparison method used (e.g., bite marks are three dimensional while photographs used for comparison purposes are only two dimensional); improperly taken photographs or dental molds could have resulted in distortion and inaccurate findings; skin is a poor and easily distorted receiving surface; forensic odontology is not a recognized specialty by the American Dental Association; [65] there are no classified bite mark characteristics on file for large segments of the population as there are for fingerprints; [66] and the most obvious, bite mark analysis is ultimately subjective. Furthermore, trial counsel should realize that the defense can almost always find someone who will dispute the findings of the government's forensic odontologist, although the 1984 ABFO guidelines should help reduce the great disagreement between these experts that was experienced in the 1970's. [67]

Tips for the Chief of Criminal Law: Be Proactive, Not Reactive

Although bite mark evidence can be an effective tool in solving crimes of violence, its effectiveness depends in large part on the preparedness of the local prosecutor and CID offices. A delay of only a few hours in processing some bite mark evidence may mean that the evidence is lost forever. Therefore, the local chief of justice should take steps to ensure that the installation is ready ahead of time for a bite mark case. In particular, the chief of criminal law should accomplish the following:

1. Obtain a list of board certified forensic odontologists from the ABFO [68] and identify the odontologist nearest your location.

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[62] E. Imwinkelried, *supra* note 20, at 747. The prosecution in *Martin* used as their expert Dr. Norman Sperber, one of the most prominent forensic odontologists in the United States today. He is currently the Chief Forensic Odontologist for San Diego and Imperial Counties, California. He can be contacted at: 3737-A Moraga Avenue, San Diego, CA 92117 (619-273-1133). *See also* Sperber, *Trial Aids and the Role of the Forensic Odontologist,* 44 F.B.I. Bull. 27 (1975).

[63] *See generally* E. Imwinkelried, *supra* note 20, at 728-33; Glass, Andrews & Jones, *Bite Mark Evidence: A Case Report Using Accepted and New Techniques,* 25 J. Forensic Sci. 638 (1980); S. Keiser-Nielsen, *Forensic Odontology,* Toledo L. Rev. 633, 646-47 (Summer 1969); Burns & Maples, *Estimation of Age from Individual Adult Teeth,* 20 J. Forensic Sci. 343 (1976); Haines, *Racial Characteristics in Forensic Dentistry,* 12 Med. Sci. & L. 131 (1972); Holt, *Forensic Odontology - Assistance in a Problem of Identity,* 21 J. Forensic Sci. 343 (1981); Owsley & Wells, *Misclassification Probability of Dental Discrimination Functions for Sex Determination,* 28 J. Forensic Sci. 181 (1983).

[64] At a general court-martial in 1986 at Fort Lewis, Washington, Dr. Peter Hampl, a forensic odontologist, testified concerning bite mark evidence. Dr. Hampl testified that the accused's bite had penetrated all layers of the victim's skin in some places, which would have required tremendous force and would have resulted in unbearable pain. This opinion was based on Dr. Hampl's experience at a previous forensic odontology convention, during which forensic dentists bit themselves (and in some cases each other) in order to study the resulting marks and determine the force necessary to inflict such marks. During the course of these experiments, no person was able to withstand enough pain to bite through his own skin. Such testimony can be helpful in showing the accused's intent to inflict grievous bodily harm and to highlight the viciousness of the accused's attack. In some cases, the technique of transillumination may also help the forensic odontologist estimate the approximate amount of force used to make the bite. *See* Dorion, *supra* note 24, at 695-96.

[65] A. Moenssens, F. Inbau & J. Starrs, *supra* note 3, at 752 n.6; AFIP 24th Annual Course, *supra* note 18, at 2.

[66] In 1985, the American Dental Association announced plans to establish the American Dental Information System and a related micro disk program. Vale, *The Role of the Practicing Dental Professional in Forensic Dentistry,* Cal. Dental A. J. 12 (Mar. 1986). California is also beginning to create a dental identification system. *Id.* at 15. Unfortunately, bite mark characteristics on large segments of the population have not been developed as yet.

[67] *See, e.g.,* People v. Milone, 356 N.E.2d 1350 (Ill. App. Ct. 1976) (three experts testified for the prosecution and four testified for the defense, all with different conclusions); People v. Smith, 468 N.E.2d 879 (N.Y. 1984), *cert. denied,* 105 S. Ct. 1226 (1985) (four experts testified for the prosecution and three testified for the defense, with the defense experts concluding that the mark in question was not a bite mark at all). Even in *Martin,* the government's prominent forensic odontologist was opposed by a defense expert, who reached contrary conclusions regarding the bite mark in question.

[68] *See supra* note 39.

2. Organize a bite mark identification and processing class for trial counsel and CID agents, using a local coroner, doctor, or forensic odontologist as the instructor.

3. Ensure your local CID office has a good quality 35mm (or larger) camera with tripod, a good rigid scale (e.g., the ABFO Scale No. 2), and a sufficient supply of black and white and color film. Investigate the possibility of infrared and reflective ultraviolet photography as well. All of these materials should be organized into a bite mark processing kit and should be kept readily available at the CID office.

4. Obtain a copy of the outline for the 25th Annual Course in Forensic Dentistry, sponsored by the Armed Forces Institute of Pathology. [69] It contains many good tips for inexperienced people who find themselves processing a bite mark crime scene. Other sources on processing bite mark evidence cited in this article should also be obtained, if possible. [70]

5. Obtain a copy of sample foundation questions for a forensic odontologist. These may be available from the ABFO or from Dr. Norman Sperber, who testified for the government in the *Martin* case. [71]

6. Finally, construct a list of other government experts that may be available to give advice on short notice when you are faced with a bite mark case. Two such experts are detailed in the footnote below. [72]

Conclusion

Forensic odontology is fast becoming a common and effective tool in the government's arsenal against crime. It is especially useful in violent crimes where the victim is dead, unable to identify the assailant, unwilling to cooperate with the prosecution, or too young to testify.

Trial counsel should alert crime scene investigators to the importance of thorough inspections for bite mark evidence in all violent crimes. Once such evidence is found, counsel should make sure it is carefully processed. By effectively using the science of forensic odontology, trial counsel can successfully prosecute difficult violent crimes that would otherwise go unsolved and unpunished.

[69] Further information and materials can be obtained by contacting: AFIP, Forensic Dentistry Division, Washington, D.C. 20306-6000 (AVN 291-2679) (202-576-2679). The chairman is COL Brent Koudelka.

[70] It is recommended that the chief of criminal law obtain, as a minimum, a copy of the AFIP 24th Annual Course, *supra* note 18, and the AFIP 25th Annual Course, *supra* note 69. In addition, a good bite mark evidence library should include a copy of the sources listed *supra* at notes 3, 9, 12, 21, 40, and 53.

[71] *See supra* note 62.

[72] The only forensic odontologist on active duty is COL William Morlang, presently a consultant to the Air Force Assistant Surgeon General for Dental Services. COL Morlang is not available to testify, but may be available to give advice in cases. His address is: 9317 Gloxinia Drive, San Antonio, TX 78218. Counsel can also contact COL Brent Koudelka, whose address and phone number are listed *supra* note 69. He is not a forensic odontologist, but can provide helpful advice and information.

Additionally, the author assisted Captain Thomas M. Ray in the prosecution of a premeditated murder case at Fort Lewis, Washington (United States v. Ellis Jones, CM 449207 (A.C.M.R. 2 Oct. 1987) (unpub.). During the case bite mark evidence was presented, in addition to evidence in the areas of serology, hair and fiber analysis, blood spatter analysis, fingerprinting, and psychiatry. Captain Ray is now assigned as a defense counsel at Camp Casey, Korea. The author is assigned to the Administrative Law Division, Office of The Judge Advocate General. Both counsel are available to advise others by telephone concerning the prosecution or defense of a bite mark case. (The admissibility of the bite mark evidence in the above case was not challenged at trial or on appeal. Thus, *Martin* is still the only reported military bite mark case.).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Production of Witnesses

In a recent Army Court of Military Review decision, *United States v. Brown*, [1] the court examined issues regarding trial defense counsel requests for witness production. Specialist Brown was tried and convicted of three specifications of possession and distribution of cocaine, in a trial that was essentially a credibility contest between the accused and a criminal investigator who had made all three of the alleged drug buys alone and without any supervision. [2] Six days before trial, Brown's trial defense counsel gave the trial counsel oral notification about witnesses the defense needed at the court-martial. [3] Defense counsel did not submit a written request until three days before trial. Two days before trial, the trial counsel denied the request, stating that defense counsel had failed to provide a sufficiently detailed synopsis of the witnesses' expected testimony as

[1] 28 M.J. 644 (A.C.M.R. 1989).

[2] *Id.* at 649.

[3] *Id.* at 645.

required by Rule for Courts-Martial 703. [4] Later that same day, trial defense counsel amended his original list to include a more detailed synopsis of expected testimony. Not until the day of trial did trial counsel tell trial defense counsel that the requested witnesses would not be at the court-martial. [5]

At an article 39(a) session, [6] trial defense counsel raised a motion to require production of witnesses, pursuant to R.C.M. 703. [7] The military judge ruled that the request was untimely and that the government made "some due diligence to act on the request," although the military judge failed to actually obtain the factual basis supporting his ruling on due diligence. [8] Another reason the military judge considered the request to be untimely was that the requested witnesses were located in a state other than the one where the court-martial was taking place. [9] The military judge made this statement despite the fact that the out-of-state location of the material witnesses was only a two-to-three hour drive from the trial location. [10] After denying trial defense counsel's motion, the military judge suggested that the defense might want to request a continuance. Trial defense counsel made such a request for the purpose of securing the witnesses. The military judge asked for an offer of proof as to why the witnesses were necessary, and then promptly denied the motion. He based that decision upon the government's willingness to stipulate to the witnesses' expected testimony and his belief that the testimony of two of the requested witnesses would be cumulative with the testimony of witnesses who were already present for the court-martial. Despite trial defense counsel's request for specific findings on denial of the witness production request, the military judge made none, and simply noted that a request made on 13 June for witnesses to be produced for a trial to be held on 16 June was not timely. [11]

The Army court found that the military judge erred and that the error was prejudicial, and the court set aside the findings of guilty and the sentence. In reaching that conclusion, the court presented an extensive analysis of the law on witness production. First, the court examined the sixth amendment right to compulsory process in obtaining witnesses. [12] The sixth amendment right entails an inquiry into relevancy and materiality of the expected testimony. While military necessity or various personal circumstances relating to the requested witnesses may be proper criteria to determine when the testimony can be presented, the "sole factor" to consider in determining whether a witness will testify at all is materiality of the expected testimony; however, if the testimony would be cumulative with that of other witnesses, then a witness need not be produced. [13]

The court then quoted from *United States v. Tangpuz* [14] and listed the factors that must be considered in order to determine whether an accused may insist on the presence of a witness. The court noted, however, that the list is not exhaustive and also pointed out that the military judge retains the discretion to order production. [15] Timeliness of the request for witness production may be considered in the military judge's determination. Although no specific time is set out, the test for timeliness is whether the request is delayed unnecessarily until such a time as to interfere with the orderly prosecution of the case. [16] The Army court found that the military judge erred in denying the witness request, noting that the witnesses were from appellant's unit only three hours away and that the trial defense counsel had notified trial counsel *orally* six days before trial, which should have put trial counsel on alert that a formal, written request would be forthcoming. [17]

The court then analyzed whether the witnesses were material or cumulative, and found that one of the witnesses, a sergeant, not only would have testified about appellant's good military character, but also had observed appellant lend money to the undercover government agent. [18] Specialist Brown had testified that he had possession of marked government funds because they were part of the money that the investigator used to

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[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(c)(2)(B)(i) [hereinafter R.C.M.].

[5] *Brown*, 28 M.J. at 645.

[6] Uniform Code of Military Justice, art. 39(a), 10 U.S.C. §839(a) (1982).

[7] *Brown*, 28 M.J. at 644-45.

[8] *Id.* at 645 n.4.

[9] *Id.* at 645.

[10] Appellant was tried at Fort Dix, New Jersey, and the witnesses, members of his unit, were at Carlisle Barracks, Pennsylvania. The parties stipulated at trial as to the travel time between the two locations. *Id.* at n.5.

[11] *Brown*, 28 M.J. at 646.

[12] *Id.* at 646.

[13] *Id.*

[14] 5 M.J. 426 (C.M.A. 1978).

[15] *Brown*, 28 M.J. at 646 and n.8. The court cited to United States v. Combs, 20 M.J. 441, 442-43 (C.M.A. 1985), and R.C.M. 1001(e) for a determination of whether a witness is material with regard to deciding an appropriate sentence.

[16] *Brown*, 28 M.J. at 647 (quoting United States v. Hawkins, 19 C.M.R. 261, 268 (C.M.A. 1955)).

[17] *Id.*

[18] *Id.* at 648.

repay a loan from appellant. [19] Additionally, the sergeant would have corroborated the fact that the investigator was "constantly loitering around the supply room and badgering appellant during duty hours." [20] The other requested witnesses, a staff sergeant and a civilian supervisor, may have given somewhat cumulative testimony with that of the sergeant, but they also would have testified that the investigator was counselled several times to stay away from appellant. The investigator testified that he was only counselled one time to keep away from appellant. Furthermore, the staff sergeant and civilian supervisor would have testified about appellant's character based on their daily observations of him, a perspective that the other witnesses did not have. [21]

Finally, the court emphasized that an accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. [22] Furthermore, and more importantly for trial defense counsel, if the military judge abuses his discretion in refusing to grant a request for production of witnesses, stipulating to the expected testimony of those witnesses will not waive the error. [23]

Submitting witness production requests well in advance of trial is always best. When faced with a "last minute" situation, however, the lessons of *Brown* are to call the trial counsel immediately and give him or her as much information as you can about the witnesses desired. Next, put your request into writing as soon as possible and make certain that the requirement of R.C.M. 703(c)(B)(2)(i) for a proper synopsis is met. If your witnesses still are not produced at trial, ensure that the record reflects the number of hours away your witnesses are by ground or air transportation, and direct the military judge's attention to *Brown*. Be prepared to argue materiality, relevancy, and why the testimony is not cumulative. Finally, keep in mind that one of the bases upon which the Army court rejected the government's "cumulative" argument was that the nonproduced witnesses based their opinion of the accused on daily observation of his character. [24] This is the kind of argument that can be made for many witnesses who are in an accused's chain of command when the accused's character is an issue in the case. CPT Lida A. S. Savonarola.

Military Rule of Evidence 404(b) and Collateral Estoppel

If an accused is tried and acquitted of an act, can the government in a subsequent court-martial introduce evidence of that act to prove, *inter alia*, intent, identity, or *modus operandi* pursuant to Military Rule of Evidence (M.R.E.) 404(b)? [25] The answer is "yes" if a state court acquitted the accused; the answer is "maybe" if a court-martial acquitted the accused of the prior acts.

In *United States v. Cuellar* [26] the accused was charged with indecent acts with a female under sixteen years of age. The victim, the accused's niece, stayed overnight at the accused's home. One night, the accused allegedly committed an indecent act upon the sleeping victim by rubbing her stomach, unbuttoning and unzipping her pants, and placing his hands near her vagina. The victim awoke and left the room.

At trial, the government called four young females who testified that the accused had sexually molested them while they were guests at his home. Two of the young females testified as to acts of molestation for which the accused had been tried and acquitted by a Virginia criminal court. The military judge ruled that collateral estoppel [27] did not preclude the two females from testifying about the acts. The Court of Military Appeals affirmed, finding that different sovereigns were involved and, thus, there was no identity of parties, a prerequisite of collateral estoppel. A criminal acquittal by one sovereign (Virginia) does not bind the trial conduct of a different sovereign (United States Government). In short, under *Cuellar*, collateral estoppel will not render inadmissible M.R.E. 404(b) evidence of bad acts even though the accused has been acquitted by a state court.

What if the government desires to introduce evidence of bad acts for which the accused was acquitted by a court-martial? The Court of Military Appeals has addressed this issue, although it has not been definitively

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] One interesting argument the government put forth in its pleadings and during oral argument at the Army Court of Military Review was its view that the testimony of the nonproduced witnesses was cumulative *with that of the appellant* as to both why the appellant was in possession of the marked funds and as to the appellant's character. The court rejected this reasoning during oral argument.

[25] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid.].

[26] 27 M.J. 50 (C.M.A. 1989). The court originally decided *Cuellar* on 28 September 1988. On 28 March 1989, the court significantly amended the decision. The original decision, and not the amended decision, is printed in West Publishing Company's paperback supplement to the Military Justice Reporter. The amended decision, of course, reflects the current status of the law and is the subject of this writing. All citations to *Cuellar* are to the amended decision.

[27] Collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436 (1970).

resolved. In *United States v. Hicks* [28] Judge Cox opined that collateral estoppel would not block the admissibility of otherwise admissible M.R.E. 404(b) evidence of bad acts, even if the accused had been acquitted of the acts by a court-martial. Chief Judge Everett concurred in the results because the issue had not been raised or developed at trial, and because the accused failed to establish that the court-martial acquittal necessarily decided that he was innocent of the prior misconduct. [29] Chief Judge Everett has thus left open the possibility that if the accused satisfied the elements of collateral estoppel, evidence of bad acts for which the accused was acquitted by a court-martial would not be admissible. In short, under the current state of the law, collateral estoppel may bar the admission of otherwise admissible M.R.E. 404(b) evidence of bad acts for which the accused has been acquitted by a court-martial.

Bad acts evidence often plays a pivotal role in a court-martial. Collateral estoppel potentially may provide a mechanism for excluding otherwise admissible bad act evidence, if a court-martial has acquitted the accused of the bad act. Until the Court of Military Appeals resolves the issue, trial defense counsel should argue collateral estoppel as a bar to admissibility. Collateral estoppel will not, however, bar the admissibility of evidence of a bad act for which a state court has acquitted the accused. CPT Gregory B. Upton.

Extraordinary Writs: Is it a "Writable" Issue?

This note is one of series of notes prepared by attorneys of the Special Actions Branch, Defense Appellate Division. It attempts to answer questions that are frequently asked by trial defense counsel contemplating the filing of a petition for extraordinary relief before the military appellate courts. [30] Whether an issue is "writable" is the question most frequently asked by trial defense counsel when they call the Special Actions Branch.

Prognostication as to the likelihood of the success of a petition for extraordinary relief is complex, requiring a three prong analysis of the facts and circumstances giving rise to the desire to petition. The filing of a petition for a writ should always be considered by trial defense counsel as a means for vindicating the interests of an aggrieved client. Therefore, when counsel recognizes that a client's rights or interests are about to be infringed upon, counsel should undertake this three prong analysis to determine whether a petition for extraordinary relief is likely to succeed. Early analysis permits timely coordination with the Special Actions Branch, allows for the development of a proper record, and avoids the waste of resources expended by pursuing a meritless petition. Counsel must consider: 1) whether the issuance of a writ could be characterized by the appellate court as being in aid of its jurisdiction; 2) whether the substantive issue underlying the petition for relief should be decided in favor of the petitioner; and 3) whether the circumstances are such as to warrant extraordinary relief.

A court authorized to issue writs may do so only when "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [31] The United States Court of Military Appeals and the courts of military review are authorized to issue writs. [32] The Court of Military Appeals has rejected arguments by the government that for purposes of the All Writs Act, the jurisdiction of the court is limited to the appellate review of cases. [33] The court takes an expansive view of its role as the "Supreme Court of the Military" and has stated that while there may be limits to its authority, "as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority." [34] The limits have never been clearly defined and so long as the court can find a link to the Uniform Code of Military Justice, the threshold jurisdictional requirement seems to be satisfied. [35] Therefore, if counsel can reasonably argue that the client is aggrieved by the action of some court or person purporting to act under the Uniform Code of Military Justice, the first prong of the analysis has been satisfied, *i.e.*, the military appellate courts would have writ jurisdiction.

The second prong of the analysis is whether, if a petition is filed, the petitioner should win on the underlying substantive issue. The purpose of most writs is to compel a person or court to do an act to vindicate the interests of a petitioner or to cease doing an act which is harmful to those interests. Generally, the underlying substantive issue is whether the person or court acting or failing to act is exceeding the scope of

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[28] 24 M.J. 3 (C.M.A. 1987). Counsel should note that the *Hicks* decision is entitled an "Opinion" as opposed to an "Opinion of the Court." The distinction is critical. An "Opinion" only reflects the view of the author. An "Opinion of the Court" is the law as interpreted by the Court of Military Appeals as a whole. *Hicks* is a two-judge opinion, with each judge writing a separate opinion.

[29] *See Hicks*, 24 M.J. 10; *Cuellar*, 27 M.J. at 54 (for a discussion of Chief Judge Everett's concurring opinion in *Hicks*).

[30] *See* DAD Note, *Extraordinary Writs*, The Army Lawyer, June 1989, at 23; DAD Note, *Extraordinary Writs: Creating a Record*, The Army Lawyer, July 1989, at 24; *see also*, Peppler, *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.

[31] All Writs Act, 28 U.S.C. § 1651(a) (1982).

[32] *See* Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); United States v. Frischolz, 36 C.M.R. 306 (C.M.A. 1966); Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979).

[33] *See* McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

[34] *Id.* at 463.

[35] *See e.g.*, *McPhail*, 1 M.J. 457; Dobzynski v. Green, 16 M.J. 84, 89-92 (Everett, C.J., dissenting); United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988).

discretionary power or jurisdiction by acting or failing to act. The discretion to act or not act extends to erroneous decisions to act or to not act. A writ is appropriately issued only when action or inaction exceeds the legitimate boundaries of discretionary power. [36] Therefore, in order to prevail on the petition for a writ, counsel must be able to demonstrate that, with regard to the underlying substantive issue, the military judge, convening authority, or other person or court erred in the exercise of authority and that action exceeded the scope of discretionary power. [37] If this showing cannot be made, the court petitioned for relief will have no need to act. Counsel should recognize that an extraordinary writ is generally not a means by which to change or "move" the law, but rather a means to enforce the law. As indicated below, however, the presence of a novel or recurring [38] issue may enhance the likelihood of success. Thus, counsel may try to present their case as one requiring the application of existing precedents or rules to a new problem or in a situation not frequently encountered before.

Even if counsel concludes that a matter is within the writ jurisdiction of a court and that the petitioner may prevail on the underlying substantive issue, the petition for writ will fail if the court petitioned concludes that under the circumstances extraordinary relief is not appropriate. While no military court has specifically enumerated the criteria that control this decision, a review of the military cases reflects an approach similar to that adopted in the federal courts petitioned for writs of mandamus. Five specific factors or considerations can be identified: 1) the petitioner has no other adequate means to attain the relief he or she desires, such as direct appeal; 2) the petitioner will be damaged or prejudiced in a way not correctable on appeal if the writ does not issue; 3) the action of the trial court is clearly erroneous as a matter of law; 4) the trial court action is a recurring error or manifests a persistent disregard of the rules of evidence or procedure; and 5) the trial court action concerns new and important problems or issues of law of first impression. [39] These factors are only an aid to determining whether an issue is "writable." If counsel cannot reasonably apply one to the matter at hand, the chances that a writ will issue are slim. Even if all the factors reasonably apply, however, there is no guarantee a writ will issue—the odds in favor of a petition for extraordinary relief being granted are merely increased.

Trial defense counsel must critically evaluate their case before deciding to file a petition for extraordinary relief. Counsel should always consider that an extraordinary writ is a means to enforce the law and not to "move" it. Further, an extraordinary writ is not a substitute for ordinary appellate review. Captain Keith W. Sickendick.

Extraordinary Writs: Creating a Record

Introduction

The purpose of this note is to provide a checklist for trial defense counsel to use when trying to develop a record to support an extraordinary writ to the military appellate courts. [40]

The best way to prepare a "writable" issue is to muster all the facts (both favorable and unfavorable), thoroughly research the legal issue, and contact the Special Actions Branch at Defense Appellate Division [41] prior to trial. [42] By anticipating that the trial judge will deny the request for relief, counsel can best develop a sufficient record to support invocation of the appellate courts' extraordinary writ jurisdiction. Keep in mind that the goal in requesting extraordinary relief is to demonstrate that there is no other adequate means to obtain the relief and that, absent the relief, prejudice will result that is not correctable in the course of an ordinary appeal. [43]

To Establish a Record

Prove the facts with hard evidence or enter into a stipulation of fact with trial counsel disposing of all possible factual issues. Do not rely on uncontested "offers of proof;" offers of proof are not evidence. [44] The Court of Military Appeals has admonished counsel

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[36] *See* United States v. Wade, 15 M.J. 993, 995-97 (N.M.C.M.R. 1983) (citing Will v. United States, 389 U.S. 90 (1967)); *see also* Jones v. Commander, Naval Air Force, U.S. Atl. Fleet, 18 M.J. 198, 202-03 (Everett, C.J., dissenting); *Carlucci*, 26 M.J. at 328; *Dettinger*, 7 M.J. at 220.

[37] *See, e.g.*, Thomas v. Edington, 26 M.J. 95 (C.M.A. 1988); Frage v. Edington, 26 M.J. 927 (N.M.C.M.R. 1988), *aff'd*, Frage v. Moriarty, 27 M.J. 341 (C.M.A. 1988).

[38] *See, e.g.*, Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

[39] Bauman v. United States District Court, 557 F.2d 651, 654-55 (9th Cir. 1977); *see also* United States v. Harper, 729 F.2d 1216, 1221-22 (9th Cir. 1984).

[40] *See* All Writs Act, 28 U.S.C. § 1651(a) (1982); *see also* Pepper, *Extraordinary Writs in Military Practice*, 15 The Advocate 80 (1983), and Winter, *Putting on the Writs: Extraordinary Writs in a Nutshell*, The Army Lawyer, May 1988, at 20.

[41] 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. Although appellate counsel can provide advice, they cannot participate in the litigation until the matter is before the appellate courts.

[42] Actually, the All Writs Act does not require that there be a trial.

[43] United States v. Harper, 729 F.2d 1216, 1221 (9th Cir. 1984) (citing Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977)). The Court of Military Appeals has yet to set out the specific factors to be considered by the court, but the *Harper* case sets out five factors: 1) no other adequate means to attain relief; 2) prejudice resulting in a way not correctable on appeal; 3) lower court ruling is clearly erroneous; 4) lower court ruling is an oft-repeated disregard of the rules; and 5) lower court ruling raises new and important problems or issues of first impression. The factors are more fully discussed in a separate note. *See* DAD Note, "*Extraordinary Writs: Is it a Writable Issue?*", The Army Lawyer, July 1989, at 23.

[44] *See* United States v. Eastman, 20 M.J. 948, 950 (A.F.C.M.R. 1985)("Absent a stipulation by the parties, an offer of proof is not evidence and cannot properly be used to establish a foundation for the admissibility of evidence."); *see also* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 103(a)(2).

to "rely at trial only on stipulations or sworn testimony to provide the factual basis for resolution of motions regarding admissibility of evidence." [45] Stipulations of fact are superior to stipulations of expected testimony.

Set out a timeline demonstrating the sequence of specific events whenever dates are essential to resolution of the legal issue. Counsel should include the timeline in the stipulation of fact, where possible, but may move for its admission as an appellate exhibit. [46]

Demonstrate the exhaustion of other available or applicable remedies. For example, two trial defense counsel in the Federal Republic of Germany recently referred to the denial of article 138 complaints [47] to demonstrate the exhaustion of remedies where charges had not yet even been referred to court-martial. The writs sought appointment of German lawyers to represent two soldiers before the German government—prior to the time that the Germans had decided to retain or waive jurisdiction—in potential capital cases. [48] Although the writs were ultimately denied, they stood a greater likelihood of success because counsel had affirmatively demonstrated that they had no other adequate means to attain the relief and would be damaged or prejudiced in a way not correctable on appeal.

Argue, and show by direct evidence, if possible, that failure to grant relief will result in prejudice that is not correctable in the ordinary course of an appeal. In the case of the writs from Germany, the counsel were able to show that appointment of the German lawyer was essential prior to the time the German government made its decision to retain or waive jurisdiction. Relief on appeal would have been inadequate.

Seek the admission of relevant documentary or demonstrative evidence. For example, counsel litigating *in personam* jurisdiction, based on a mistakenly-issued discharge certificate, would need to admit not only the discharge certificate, but also the final pay form and Department of Defense Form 214 (Certificate of Release or Discharge from Active Duty). [49] Where possible, the clerical personnel involved should testify regarding their authority to generate discharge documents.

Cite the applicable rule of law, and request that the military judge follow the rule, or alternatively, recognize an exception in your case. Expressly state whether the issue is one of first impression, involves an oft-repeated issue, or raises new and important problems. Where the military judge's ruling may have been based on one of two different legal theories, trial defense counsel should request that the judge clarify his holding on the record. In other words, pin the military judge down on the legal basis or authority used to deny relief at the trial level. Request that the military judge provide specific findings of fact whenever the motion depends on resolution of factual issues. The Manual for Courts-Martial requires the judge to do so. [50] If the military judge makes a finding that is incorrect or omits an essential finding, counsel may choose to request reconsideration and point out the error on the record. [51] A military judge has no *sua sponte* duty to reconsider an earlier ruling. [52]

Request that the military judge hold the trial in abeyance pending action on the extraordinary writ by the military appellate courts.

In summary, there are a number of steps which counsel should take in pursuing an extraordinary writ. By preparing the issue well in advance of its litigation at trial and by following the steps discussed herein and shown in the checklist printed below, trial defense counsel will have a better chance of successfully invoking extraordinary writ jurisdiction and obtaining relief. The goal in establishing a sufficient record to support the writ is to demonstrate the lack of other adequate means of relief and to show harm that cannot be remedied in the ordinary course of an appeal. CPT Jon W. Stentz.

Checklist for Extraordinary Writs

1. Investigate and research the issue thoroughly, and contact the Special Actions Branch as far in advance of trial as possible.

2. Prove facts:

a. Call all relevant witnesses to testify, or provide the court with stipulations of expected testimony.

b. Enter into a stipulation of fact with trial counsel disposing of all possible factual issues.

c. Set out a timeline demonstrating the sequence of specific events.

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[45] United States v. Scott, 22 M.J. 297, 300 n.1 (C.M.A. 1986); *see also* United States v. Means, 24 M.J. 160 (C.M.A. 1987); United States v. Davis, 22 M.J. 651, 653 n.3 (A.C.M.R. 1986) (where the Army court discussed the necessary elements of an offer of proof).

[46] In United States v. Robinson, 26 M.J. 954 (A.C.M.R. 1988), *pet. granted*, 28 M.J. 155 (C.M.A. 1989), the Army court demonstrated its concern for timelines by appending a chronology of events to its opinion concerning speedy trial. The *Robinson* decision did not involve an extraordinary writ, but might have, based on the issue of first impression presented.

[47] *See* Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1982); Army Reg. 27-10, Legal Services: Military Justice, chapter 20 (16 Jan. 1989).

[48] The Federal Republic of Germany has no death penalty.

[49] 10 U.S.C. § 1168 (1982); United States v. Cole, 24 M.J. 18, 22 (C.M.A.), *cert. denied*, 108 S. Ct. 97 (1987) (citing United States v. Howard, 20 M.J. 353 (C.M.A. 1985)); *see also* United States v. Garvin, 26 M.J. 194 (C.M.A. 1988). None of these cases was an extraordinary writ petition. In Kempfer v. Chwalibog, CM 8900184 (A.C.M.R. 10 Mar. 1989) (unpub.), the Army court summarily denied an extraordinary writ on this precise issue.

[50] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 905(d) [hereinafter R.C.M.] ("[w]here factual issues are involved in determining a motion, the military judge shall state the essential findings on the record").

[51] *See* R.C.M. 905(f).

[52] United States v. Viola, 26 M.J. 822, 827 (A.C.M.R. 1988).

d. Move for the admission of relevant documentary or demonstrative evidence.

3. Demonstrate exhaustion of other remedies, by stipulation of fact if possible.

4. Demonstrate prejudice that is not correctable in the ordinary course of an appeal.

5. Cite the applicable rule of law, and request that the military judge follow the rule or recognize an exception.

6. Request specific findings of fact and a clear explanation of the basis for any rulings of law.

7. Request that the military judge hold matters in abeyance pending action on the extraordinary writ.

Government Appellate Division Note

Developments in the Duty to Disclose Evidence Favorable to the Accused: *United States v. Hart*

Captain Patrick D. O'Hare
Government Appellate Division

Introduction

Military law has traditionally been viewed to provide "a much more direct and generally broader means of discovery than is normally available" in a civilian prosecution. [1] The extensive discovery rights of an accused and the disclosure requirements for the government devolve from a wide range of sources, including basic notions of due process, case law, the Uniform Code of Military Justice, [2] the Manual for Courts-Martial, [3] the Rules of Evidence, [4] and various ethical provisions. [5] Unfortunately, a discussion of all such authority is beyond the scope of this article. [6] The focus of this article is on how the constitutional and military due process models differ with regards to disclosure requirements of exculpatory evidence and the significance of that difference for the military practitioner.

In *United States v. Hart* [7] the Army Court of Military Review held that the failure by the government "to disclose information *specifically requested* by the defense is material unless failure to disclose it would be harmless beyond a reasonable doubt." [8] That standard is new and meaningfully more stringent than the analogous standard which the Supreme Court has found to be necessary to assure due process in the trials of nonmilitary defendants. In so concluding, the Army Court of Military Review reiterated that "Congress has provided more generous discovery for military than for civilian accused." [9] That observation was based upon and was consistent with the recent decision by the Court of Military Appeals in the case of *United States v. Eshalomi.* [10]

As befits a standard that significantly exceeds the minimum required to assure constitutional due process,

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[1] United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962); United States v. Mougenel, 6 M.J. 589, 591 (A.F.C.M.R. 1978), *pet. denied*, 6 M.J. 194 (C.M.A. 1979).

[2] 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ]. The statutory basis for discovery in the military is article 46, UCMJ, 10 U.S.C. § 846 (1982), which provides, in part, that: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 701(a)(6) governs disclosure by the trial counsel of evidence favorable to the accused. The Rules for Courts-Martial also require disclosure of the identity of the accuser (R.C.M. 308), the report of the article 32 investigation (R.C.M. 405), information concerning the mental examination of the accused (R.C.M. 706(c)(3)(B)), and Jencks Act material (R.C.M. 914).

[4] Manual for Courts-Martial, United States, 1984, Military Rules of Evidence [hereinafter Mil. R. Evid.]. Among the Military Rules of Evidence that impose disclosure duties on the trial counsel, Mil. R. Evid. 304(d)(1) requires that prior to arraignment, the prosecution must disclose the contents of all oral or written statements, "made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." Similarly, Mil. R. Evid. 311(d)(1) requires disclosure of all evidence seized from the person or property of the accused that the government intends to offer against the accused at trial. Mil. R. Evid. 321(c)(1) requires disclosure of all evidence of prior identification of the accused at a lineup or by other process which the government intends to offer into evidence at trial.

[5] Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 3.8 (Dec. 1987), discusses the "Special Responsibilities of a Trial Counsel." Rule 3.8(d) specifically provides that a trial counsel shall:

> Make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation.

[6] For a discussion of those provisions, and others, see Dep't of Army, Pam. 27-173, Legal Services: Trial Procedure, ch. 12 (15 Feb. 1987); *see also* Dean, *Discovery—The Foundation of Due Process*, The Army Lawyer, May 1983, at 14, 17-18.

[7] 27 M.J. 839 (A.C.M.R.), *pet. granted*, No. 61,928/AR (C.M.A. 21 Apr. 1989).

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

[9] 27 M.J. at 842.

[10] 23 M.J. 12 (C.M.A. 1986).

the Army court based its holding upon article 46, UCMJ, and Rule for Courts-Martial (R.C.M.) 701. The underpinnings of the decision resound, therefore, in "*military* due process." [11] It is necessary to discuss the development of the Supreme Court's treatment of non-disclosure of exculpatory evidence in order to appreciate the developmental significance of the *Hart* decision.

Background

In *Brady v. Maryland*, [12] a premeditated murder case, the defendant's defense counsel made a request to review the extrajudicial statements of the co-accused. One statement was withheld by the prosecution. In it, the co-accused admitted to the actual homicide. [13] The Supreme Court held that:

> The suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution. [14]

The Supreme Court viewed the *Brady* decision as a continued extension of *Mooney v. Holohan*, [15] which had concluded that due process was violated by the "deliberate deception of the court and jury by the presentation of testimony known to be perjured." [16] That rationale had been invoked previously to encompass the knowing use of perjured testimony, the deliberate suppression by state authorities of evidence favorable to the defendant, [17] and to the inaction of a state that permitted false evidence to go uncorrected even when the state did not solicit such evidence. [18]

The *Brady* decision made the materiality of exculpatory evidence a critical inquiry, but did not decide the question of how "material" evidence was to be defined or whether the *Brady* rule was applicable to situations where no request for evidence had been made. Those questions were answered in *United States v. Agurs*. [19] In *Agurs* the Supreme Court again addressed the question of the constitutional duty of the prosecution to disclose evidence, but in that case no specific request for evidence had been made. [20] *Agurs* was a murder prosecution, and the defense theory was one of self-defense. [21] The prosecution did not disclose, nor did the defense request, the victim's record of violent crimes. [22]

The Court of Appeals reversed, [23] holding that the evidence was material and that a different verdict might have resulted had the evidence been received. [24] The Supreme Court reversed. [25] In its analysis the Supreme Court identified "three quite different situations" in which the *Brady* rule arguably applies, [26] and formulated a different standard to determine the materiality of evidence in each of the three situations.

The first situation involved the prosecution's use of testimony that the prosecutor knew or should have known was perjured. In that circumstance, a conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." [27]

The second situation occurred where the prosecution withheld specifically requested evidence. In that case the conviction would be set aside where the evidence was material, and "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." [28]

In the third situation the defense has made no request, or makes only a general request for exculpatory

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[11] In United States v. Clay, 1 C.M.R. 74, 77 (C.M.A. 1951), the Court of Military Appeals stated that "military due process" was not grounded in the rights and privileges of the Constitution, but in "the laws as enacted by Congress." That description fits the *Hart* case. For a full discussion of the concept and its applications, see Chute, *Due Process and Unavailable Evidence*, 118 Mil. L. Rev. 93, 116-18 (1987).

[12] 373 U.S. 83 (1963).

[13] *Id.* at 84.

[14] *Id.* at 87.

[15] 294 U.S. 103 (1935).

[16] *Id.* at 112.

[17] Pyle v. Kansas, 317 U.S. 213, 215-16 (1942).

[18] Napue v. Illinois, 360 U.S. 264, 269 (1959). *See generally* United States v. Bagley, 473 U.S. 667 (1987).

[19] 427 U.S. 97 (1976).

[20] *Id.* at 101.

[21] *Id.* at 100.

[22] *Id.*

[23] 510 F.2d 1249 (D.C. Cir. 1975).

[24] 427 U.S. at 102.

[25] *Id.*

[26] *Id.* at 103. The three situations included: 1) "where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," 427 U.S. at 103 (footnote omitted); 2) where there is a "pretrial request for specific evidence," *id.* at 104; and 3) "the case in which [no request or] only a general request for '*Brady* material' has been made," *id.* at 107.

[27] *Id.* at 103.

[28] *Id.* at 104. This second situation is exemplified by the *Brady* case. The Supreme Court also noted that "[w]hen a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.* at 106.

evidence. [29] In that circumstance the proper standard of materiality for prosecutorial nondisclosure was less stringent then in the other situations for two apparent reasons. First, unlike a specific request, a general request provides a prosecutor with no better notice than no request at all. [30] Second, the appropriate standard reflects the Court's "overriding concern with the justice of the finding of guilt." [31] Because a defendant must be convicted by proof beyond a reasonable doubt, the Court concluded that it follows that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." [32] The nondisclosure, therefore, must be evaluated in the context of the entire record. [33]

In *United States v. Bagley* [34] the Supreme Court discussed the standard of materiality to be applied where a prosecutor failed to disclose requested evidence that could have been used to impeach a government witness. [35] In *Bagley* the defense attorney specifically requested disclosure of any "deals, promises or inducements" made to government witnesses in exchange for their testimony. [36] The government answered that there were no such inducements and failed to disclose contracts that guaranteed payment to two witnesses for services and information. [37]

The Supreme Court first held that impeachment evidence fell within the *Brady* rule [38] because it is evidence favorable to an accused. The principal opinion then discussed the *Agurs* formulation of the *Brady* rule and reformulated the test in *Agurs* by adopting a standard announced in *Strickland v. Washington*. [39] The principal opinion stated:

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [40]

The case was remanded [41] over strong dissents by Justice Marshall, [42] with whom Justice Brennan joined, and Justice Stevens, [43] who had authored the majority decision in *Agurs*.

The preceding opinions were analyzed by the Court of Military Appeals in *United States v. Eshalomi*. [44] The principal opinion [45] noted that, while *Bagley* may describe the minimal constitutional requirements of disclosure, higher standards for courts-martial may be prescribed by Congress or the President. [46] The court concluded that Congress intended to provide such standards through its promulgation of article 46 and that the

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[29] The Court concluded that there was no significance between cases in which there has been no request at all and cases where there has been a general request for exculpatory matter. *Id.* at 107.

[30] *Id.* at 106-07.

[31] *Id.* at 112 (footnote omitted). The Court specifically rejected the proposition that the standard of materiality " should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial" as opposed to the significance of the evidence to the issue of guilt or innocence. *Id.* at 112 n.20.

[32] *Id.* at 112.

[33] *Id.* (footnote omitted).

[34] 473 U.S. 667 (1985). Justice Blackmun authored the principal opinion, in which Justice O'Connor fully joined. Justice White was joined by the Chief Justice and Justice Rehnquist in a brief opinion that joined in Parts I and II of the principal opinion and concurred in the result. 473 U.S. at 685. Justice White's concurrence agreed that the "reasonable probability" test was sufficiently flexible to cover all instances of prosecutorial nondisclosure of favorable defense evidence, but saw no reason "to elaborate on the relevance to the inquiry of the specificity of the defense's request a disclosure." *Id.*

[35] *Id.* at 669.

[36] *Id.* at 669-70.

[37] *Id.* at 670-71.

[38] *Id.* at 676-77 (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

[39] 466 U.S. 668 (1984). In *Strickland* the Court explained that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, *quoted in Bagley*, 473 U.S. at 682 n.13. The Court also referred to United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), where it had held that due process is violated by government deportation of defense witnesses "only when there is a reasonable likelihood that the testimony could have affected the judgement of the trier of fact." *Id.* at 874, *quoted in Bagley*, 473 U.S. at 681. Neither *Strickland* nor *Valenzuela-Bernal* involved the government's nondisclosure of exculpatory evidence.

[40] *Bagley*, 473 U.S. at 682. The Court acknowledged that the more specifically the defense requests certain evidence, the more reasonable it is for the defense to assume from nondisclosure that the evidence does not exist and to make pretrial and trial decisions on the basis of that assumption. Those possibilities were not viewed as necessitating a different standard of materiality. *Id.* at 682-83.

[41] 473 U.S. at 684. On remand, Bagley's conviction was reversed. Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986).

[42] 473 U.S. at 667.

[43] *Id.* at 709.

[44] 23 M.J. 12 (C.M.A. 1986).

[45] The principal opinion was written by Chief Judge Everett. Judge Cox separately concurred, and Judge Sullivan did not participate.

[46] 23 M.J. at 24.

President had done so through his promulgation of the past and current Manuals for Courts-Martial. [47] The court noted that, in view of the generous statutory and regulatory provisions for discovery, "it might be argued that, when defense requested information is withheld by the prosecution, we should impose a heavier burden on the Government to sustain a conviction than is constitutionally required by *Bagley*." [48] In *United States v. Hart* that suggestion was fully adopted.

United States v. Hart

The *Hart* case was a contested general court-martial. An officer and enlisted panel convicted the accused of disorderly conduct, assault by intentional infliction of grievous bodily harm, and maiming. [49] Before the Army Court of Military Review, the appellant contended for the first time that the maiming offense could not stand "because the trial counsel withheld exculpatory and other material evidence from the defense." [50]

Facts

The maiming occurred during the evening at an establishment called the Crystal Palace Cafe. [51] The victim was intoxicated and had a fight with a person who was subsequently identified as the accused. The victim identified the accused at trial in an equivocal manner, but the accused was identified "with great certitude" [52] by three other witnesses. The accused defended on the basis of alibi. [53] Several friends of the accused testified that, although they were present at the Crystal Palace that night, they did not see accused. [54] The accused totally denied involvement. [55]

In the jurisdiction where the trial occurred, the government routinely provided all pertinent information to the trial defense counsel without requiring a defense request. [56] The trial defense counsel acknowledged receipt of a draft of the criminal investigation report shortly after the crime occurred, but did not receive the final report with its attachments. [57] The trial counsel indicated in an affidavit submitted to the Army Court of Military Review that he believed the final draft had been sent to the defense counsel. [58] Trial counsel acknowledged that he was aware that the victim had failed to identify the accused in a photographic array conducted between the interim and final investigative reports, but thought that he did not have to disclose that information because he did not plan to introduce it. [59]

The Court's Holding

The Army court began its analysis with the *Eshalomi* decision and identified the "touchstone" for review of cases of prosecutorial nondisclosure as materiality. [60] The court noted that the Court of Military Appeals had observed, without deciding, that article 46 or R.C.M. 701 "may impose stricter standards for nondisclosure of information to the defense" than were announced in *Bagley*. The court stated that there was no logic in concluding that article 46 or the Manual for Courts-Martial deleted materiality as a requirement. [61] It followed, therefore, that if there was to be a more generous discovery for the military accused, it must be expressed in terms of a more demanding standard of materiality

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[47] *Id.* For a fuller discussion of article 46, UCMJ, and the applicable provisions of the Manual for Courts-Martial, United States, 1969 (Rev. ed.) and the current Manual, see Chute, *Due Process and Unavailable Evidence*, 118 Mil. L. Rev. 93, 119-24 (1987).

[48] The court did not reach the question of whether a heavier burden should be imposed to sustain a conviction when the government withholds specifically requested information. The court concluded that reversal was required in *Eshalomi* even under the "reasonable-probability" test described in *Bagley*. 23 M.J. at 24.

[49] 27 M.J. at 839.

[50] *Id.* at 840.

[51] *Id.*

[52] *Id.* In addition, "[t]wo of the witnesses were reluctant to come forward because they feared reprisal." 27 M.J. at 840.

[53] *Id.*

[54] *Id.* One of the witnesses apparently resembled the accused and had been mistaken for him on other occasions. He testified he was confronted by friends of the victim and accused of having committed the maiming. *Id.* He did not identify any government witnesses as being among that group.

[55] In rebuttal, a criminal investigator testified that while the accused initially denied involvement, he later telephoned and admitted responsibility for the maiming based upon the reports of friends. The accused testified in surrebuttal that he had made the call, but had not acknowledged responsibility for the maiming. 27 M.J. at 840.

[56] *Id.* at 842.

[57] *Id.* at 840-41. The Army court stated:
> Specifically, [the trial defense counsel] did not receive statements of one defense and two other potential witnesses, laboratory reports concluding that the maimer did not leave a chemical identifier on the ear, and information that [the victim] did not identify anyone as his assailant from a photographic lineup that included the appellant.

[58] *Id.*

[59] *Id.* at 841. Trial counsel apparently relied on Mil. R. Evid. 321(c)(1), which *requires* disclosure of identification evidence the government intends to offer into evidence at trial. However, the specific failure of the victim to identify the accused, at least in a case like this where alibi and identification are the crucial issues, would appear to have an independent, exculpatory character, thereby necessitating its disclosure pursuant to article 46, UCMJ, and R.C.M. 701(a)(6).

[60] 27 M.J. at 841. In that context the Army court reviewed the several scenarios discussed in the *Agurs* decision, and the "restatement" of the materiality standard in *Bagley*. *Id.*

[61] *Id.*

than is required by constitutional due process to assure a fair trial. [62] The Army court then prescribed the governing standards of materiality for prosecutorial nondisclosure in military trials.

The court first held that where the government employs perjured testimony "or equivalent prosecutorial misconduct or neglect," that use will be material "unless failure to disclose would be harmless beyond a reasonable doubt." [63] The good or bad faith of the prosecution is not a relevant inquiry in that situation. [64] The standard thus described comports with the standard described in *Agurs* [65] and reformulated in *Bagley*. [66]

In the case of a "general request," a "standing request," or disclosure pursuant to a possible regulatory requirement, the Army court also enunciated a standard consistent with the Supreme Court's precedent. In such circumstances failure to disclose information is material only if there is a "reasonable probability that, had the evidence been disclosed, the result would have been different." [67] "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [68]

In the context of a specific request for evidence, however, the military standard is now significantly more demanding than that which is constitutionally necessary to assure a fair trial. Five of the eight Justices who considered the *Bagley* case indicated that the "reasonable probability" test was sufficient to remedy the failure of the prosecutor to disclose evidence where a specific request is made. [69] In *Hart*, however, the Army court held: "[F]ailure to disclose information specifically requested by the defense is material unless failure to disclose it would be harmless beyond a reasonable doubt." [70]

After discussing the evidence in the context of the applicable standard and following the exercise of its fact-finding powers pursuant to article 66(c), [71] the court concluded that there was neither a reasonable probability of other findings in the *Hart* case, nor a reasonable doubt of the guilt of the accused. [72] The findings and sentence were affirmed.

Significance of the Hart Decision

There are sound reasons for maintaining a strict standard of materiality in the context of specific requests for exculpatory evidence. As Justice Blackmun noted in *Bagley*:

> [A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would otherwise have pursued. [73]

Justice Blackmun believed that the "reasonable probability" test formulated in *Strickland* was sufficiently flexible to permit the reviewing court to "consider directly any adverse effect" that nondisclosure might have had on the defendant's case. [74] Article 46, however, assures the same access to evidence for the defense and the prosecution. That higher standard logically requires a more stringent test, and in *Hart* that test has been provided. The *Hart* decision makes clear that in military practice the specificity of a defense request for disclosure of exculpatory evidence is critical to a subsequent determination of materiality. The decision has the potential to change pretrial practice in a narrow but important way.

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[62] *Id.* at 841-42.

[63] *Id.*

[64] *Id.* In *Brady* the Supreme Court indicated that the good or bad faith of the prosecutor was not a relevant inquiry because the central concern is not prosecutorial misconduct, but the avoidance of a trial that is unfair to the accused. *Brady*, 373 U.S. at 87. In *Agurs* the Court noted that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S. at 110. The Supreme Court recently reaffirmed that proposition in Arizona v. Youngblood, 109 S. Ct. 333, 337 (1988), where the Court also noted that the "Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said then that it could have been subjected to tests, the result of which might have exonerated the defendant." *Id.* In that circumstance the Court held that the defendant must show bad faith on the part of police authorities. *Id.*

[65] *Agurs*, 427 U.S. at 103.

[66] *Bagley*, 473 U.S. at 679-80.

[67] *Hart*, 27 M.J. at 842. The court also concluded that the practice of providing the defense with all pertinent information without requiring a request would be treated as a general request for evidence by the defense. *Id.*

[68] *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694).

[69] Justice Blackmun stated that although the defendant has greater potential for injury in the context of a specific request, a separate standard was not required because under the *Strickland* formulation, a "reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." 473 U.S. at 683. This change from emphasis on the notice to the prosecutor given by a specific request to the adverse effect resulting from nondisclosure has not escaped criticism. *See* Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley*, 1986 Duke L.J. 892, 907-13.

[70] 27 M.J. at 842.

[71] 10 U.S.C. § 966(c) (1982).

[72] The Army court applied the reasonable probability test, but also noted its conviction that under the materiality standard most favorable to the accused, failure to disclose the information was harmless beyond a reasonable doubt. 27 M.J. at 842 n.2.

[73] *Bagley*, 473 U.S. at 682, *quoted in Eshalomi*, 23 M.J. at 23.

[74] *Bagley*, 473 U.S. at 683.

The Supreme Court has noted that the failure to respond to a specific request for evidence is seldom if ever excusable, [75] and the *Hart* decision saddles the government with the heavy burden of demonstrating that nondisclosure was harmless beyond a reasonable doubt. In addition to the obvious benefit conferred by a stricter standard of materiality, submission of a specific discovery request, when it is feasible to do so, also alleviates one of the ongoing concerns inherent in unrequested-disclosure cases. In the absence of a specific request, access to exculpatory evidence is in the hands of a biased party. [76] It is obvious that, without an appreciation of the possible defenses in a given case, it may be difficult for a prosecutor to determine what evidence is, in fact, exculpatory. [77]

In most cases there should be no difficulty in concluding whether a request should be described as "general" or "specific." [78] It is clear, for example, that a request for "Brady evidence" or "anything exculpatory" will be treated as a general request. [79] In *Agurs* the Court described the request in *Brady* as specific because "[i]t gave the prosecutor notice of exactly what the defense desired." [80] That observation suggests a distinction on which practictioners may rely, and which was expanded upon in a special concurrence in the case of *Antone v. Strickland*:

> The significant distinction between a general and specific request for *Brady* purposes is that a specific request does not require the prosecutor to make a value judgment as to the exculpatory nature or degree of materiality of the requested information. [81]

Therefore, as a general rule, the less a request permits or requires the trial counsel to evaluate the evidence, the more likely it will be deemed to be specific.

Conclusion

The decision in *Hart* is likely to have a significant impact on pretrial practice in courts-martial. Trial defense counsel have the strongest incentive to formulate discovery requests in specific terms, and trial counsel have an equally compelling incentive to adequately respond to those requests. As the Army court noted, "[b]oth counsel should help ensure that commendable liberal discovery practices are administered properly and reliably." [82]

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[75] *Agurs*, 427 U.S. at 107.

[76] *See* Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391, 394-96 (1984).

[77] *Bagley*, 473 U.S. at 702-03 (Marshall, J., dissenting).

[78] *See generally* Wyrsh and Hunt, *Specific Requests for Exculpatory Evidence After United States v. Bagley*, 55 U.M.K.C. L. Rev. 50 (1986).

[79] *Agurs*, 427 U.S. at 106-07.

[80] 706 F.2d 1534, 1545 (11th Cir. 1983) (Kravitch, J., specially concurring), *quoted in* Wyrsh and Hunt, *Specific Requests for Exculpatory Evidence After United States v. Bagley*, 55 U.M.K.C. L. Rev. 50, 59 (1986).

[81] *Id.* at 106.

[82] *Hart*, 27 M.J. at 842 n.3 (citation omitted).

Clerk of Court Note

Caveats from the Court

The following footnote is quoted from a recent decision of the Army Court of Military Review:

> [W]e note with concern the absence of a staff judge advocate's pretrial advice in the record of trial. There is an addendum to the pretrial advice addressing the Additional Charge and its Specification. The original charges and specifications were referred on 22 December 1987 by Major General ***. The additional charge was referred on 3 March 1988, the same date as the addendum to the pretrial advice, again by MG ***. The staff judge advocate's addendum in pertinent part states: "On 22 December 1988 [sic] you referred the original charges against the accused to trial by general court-martial. *The original pretrial advice is attached. The present offense is in addition to the offenses already referred to trial.*" (Emphasis added.) The staff judge advocate recommended trial by general court-martial and that the additional charge be tried "in conjunction with the original charges and specifications." The convening authority's signed direction states, "All recommendations of the Staff Judge Advocate are (approved)." This absence of a pretrial advice is governed by United States v. Murray, 25 M.J. 445 (C.M.A. 1988), and by the presumption of regularity of official acts. Under the circumstances, there is no prejudicial error. However, we enjoin all staff judge advocates and their administrative personnel to more closely monitor the assembly of records of trial so as to preclude both administrative and potentially substantive errors.

Perhaps no editorial comment by the Clerk of Court is necessary; however, one hopes the reader will understand it was indeed error to omit the pretrial advice from the record of trial and the Court of Military Review was, by that neglect, required to (and did) test the error for prejudice—finding none, in this case.

In another case on the same day, the Court of Military Review also had occasion to renew its criticism of the sloppy practice of stating, in the staff judge advocate's post-trial recommendation, "If the defense counsel submitted a response [to this recommendation], it is attached for your consideration." (If there is no defense response attached in the record, is that because there was none, or has it merely been omitted from the record? And if there was a response, was it in fact submitted to the convening authority?) The Court said:

> We have often criticized the use of this *pro forma* language in post-trial recommendations. *See* United States v. Johnson, 26 M.J. 509, 511 n.2 (A.C.M.R. 1988), *petition denied*, 27 M.J. 286 (C.M.A.); United States v. McClelland, 25 M.J. 903, 905 (A.C.M.R. 1988). . . . We again voice this criticism and urge all involved in the military justice process to correct this type of professional lapse of attention to detail.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Contract Law Notes

Procurement Integrity Provisions of the Office of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act Amendments of 1988 [1] contained certain procurement integrity provisions that were originally scheduled to be effective May 16, 1989. On May 15, 1989, President Bush signed a law delaying the implementation of the new provisions until July 16, 1989, to allow government officials and contractors more time to familiarize themselves with the new requirements. [2] Federal Acquisition Circular (FAC) 84-47 contains the interim rules for implementing these provisions. [3] Except for certain sealed bid procurements, [4] the interim rules apply to all federal agency contracts or modifications [5] awarded on or after the effective date. The procurement integrity provisions contain certification requirements for both government officials and contractors, prohibit certain actions by contractors and government officials during the conduct of an agency procurement, impose postemployment restrictions on government officials and employees, and provide for contractual, administrative, civil, and criminal penalties for violations of the provisions. This note will review selected portions of the interim rules implementing the new procurement integrity provisions. Practitioners are reminded to review the final rules for any changes.

Procurement Officials

The new procurement integrity provisions impose a certification requirement on and prohibit certain action on the part of "procurement officials." A procurement official is any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement. [6] Personal participation is direct participation, to include a supervisor's behavior when he or she actually directs a subordinate. [7] Substantial participation is significant involvement in the matter; based not only on the effort, but also on the importance of the effort. [8] It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. [9]

The definition of a procurement official is broad and includes, but is not limited to, individuals participating in such activities as: the development of acquisition plans; the development of specifications, statements of work, or purchase descriptions/requests; the development of solicitation or contractual provisions; evaluation or selection of a contractor; or the negotiation or award of a contract or modification to a contract. [10] It includes individuals other than contracting officers, such as

[1] 41 U.S.C.S. § 423 (Supp. 1989) amended the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-412 (1982) [hereinafter the Act].

[2] Pub. L. No. 101-28 (1989); 51 Fed. Cont. Rep. 980 (1989).

[3] FAC 84-47 was published at 54 Fed. Reg. 20,488 (1989), with amendments published at 54 Fed. Reg. 21,066 (1989) and 54 Fed. Reg. 22,282 (1989). FAC 84-47 adds section 3.104, entitled Procurement Integrity, to the Fed. Acquisition Reg. (15 May 1989) [hereinafter FAR].

[4] If bids have been opened and award is not made before July 16, 1989, the clauses at FAR 52.203-9 (certificate of procurement integrity for modifications) and 52.203-10 (remedies for violations of the procurement integrity provisions) are not required to be included before making award. The clause at FAR 52.203-9 must be included if applicable. The certificates required by FAR 3.104-9 of competing contractors and contracting officers must be obtained prior to award. 54 Fed. Reg. 22,282 (1989).

[5] FAR 3.104-4(e) defines modification as the addition of new work to a contract, or the extension of a contract which requires a justification and approval.

[6] FAR 3.104-4(h)(1).

[7] FAR 3.104-4(g).

[8] *Id.*

[9] *Id.*

[10] FAR 3.104-4(h)(2).

attorneys conducting legal reviews of procurement actions, engineer personnel drafting specifications, and other individuals drafting statements of work or specifying the government's procurement needs. Job descriptions for civilian employees and duty responsibilities for soldiers should be reviewed and rewritten to clarify any ambiguities concerning whether these individuals are procurement officials. Care must also be exercised to identify other personnel, who during the conduct of a procurement, become procurement officials due to their involvement.

Prohibited Conduct by Procurement Officials

Procurement officials are required to certify [11] that they understand the applicable prohibitions, will not engage in any prohibited conduct, and will report any violations or possible violations of the procurement integrity provisions. [12] There are three specific prohibitions for procurement officials.

Discussing Future Employment or Business Opportunities

The first prohibition precludes procurement officials from knowingly discussing future employment or business opportunities with a competing contractor or its representatives during the conduct of any federal agency procurement. [13] A competing contractor is any entity that is or is reasonably likely to become a competitor for, or recipient of, a contract or subcontract. The term also includes any person (contractor's officers, employees, representatives, agents or consultants) acting on behalf of the competing contractor. [14] The term "competing contractor" includes the incumbent in the case of a contract modification. [15]

Soliciting or Receiving Gratuities

The second prohibition prevents procurement officials from soliciting or receiving any money, gratuity, or other thing of value from a competing contractor or its representatives, [16] except where expressly permitted by Army Regulation 600-50. [17] The phrase "money, gratuity, or other thing of value" includes any gift, favor, entertainment, hospitality, transportation, loan, other tangible items, and any intangible benefits (including discounts, passes, and promotional vendor training) given or extended to or on behalf of government personnel, their immediate families, or households, for which fair market value is not paid by the recipient or the government. [18]

Disclosing Proprietary or Source Selection Information

The final prohibition prevents procurement officials from disclosing any proprietary or source selection information to unauthorized persons. [19] Proprietary information is defined as any information contained in a bid or proposal, cost or pricing data, and any other information submitted to the government by a contractor and designated as proprietary in accordance with law or regulations by the contractor, the head of the agency, or the contracting officer. [20] Information contained in a bid or proposal is considered proprietary information only if the cover page and each relevant page or portion thereof is marked. [21]

Source selection material is information determined by the head of the agency or the contracting officer to be information that would jeopardize the integrity or successful completion of the procurement concerned if disclosed to a competing contractor, and includes information that is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure. [22] It includes information stored in electronic, magnetic, audio, or video formats that is prepared or developed for use by the

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[11] Message, HQ, Dep't of Army, DADA-AL, 121950Z May 89, subject: Implementation of OFPPAA Certification Requirement For Procurement Officials [hereinafter Message], contained the certificate and the written explanation document on the prohibited conduct for procurement officials by FAR 3.104-12(a). See Appendix for the full text of the explanation and the certificate.

[12] FAR 3.104-12(a)(2). Consultants serving as procurement officials are subject to the same certification requirement, FAR 3.104-12(b). FAR 3.104-12(a) requires each Federal agency to develop a procurement ethics program for its procurement officials. In addition to requiring a certification by procurement officials, the program must, at a minimum, also provide a written explanation of the prohibited conduct by procurement officials (see Appendix). FAR 3.104-3(a) imposes corresponding prohibitions for officers, employees, representatives, agents, or consultants of a competing contractor.

[13] FAR 3.104-3(b).

[14] FAR 3.104-4(a)(1).

[15] FAR 3.104-4(a)(2).

[16] FAR 3.104-3(b).

[17] Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel (28 Jan. 1988) [hereinafter AR 600-50].

[18] Paragraph 5 of the written explanation document for procurement officials stated that the provisions of AR 600-50 would apply to this prohibition. For example, AR 600-50, para. 2-2a(2)(a), permits the acceptance of unsolicited advertising or promotional items that are less than $10 in retail value.

[19] FAR 3.104-3(b). This prohibition is in addition to other restrictions on the release of acquisition information, for example: Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), as amended by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-970, §§ 1801-18-4, 100 Stat. 3702, 3207-48 (1986) (codified as amended at 5 U.S.C. § 552 (Supp. V 1987)); FAR 14.211; FAR 15.402(b); and AR 600-50, para. 2-1g. FAR 3-104(c) also prohibits *any person*, who is given authorized or unauthorized access to proprietary or source selection information, from disclosing such information to unauthorized persons during the conduct of any Federal agency procurement.

[20] FAR 3.104-4(j)(1).

[21] FAR 3.104-4(j)(2).

[22] FAR 3.104-4(k)(1).

government to conduct a particular procurement. [23] Source selection information is limited to material marked with the legend "SOURCE SELECTION INFORMATION-SEE FAR 3.104," including copies or extracts so marked or that any recipient knows or should know were made from material so marked. Certain unmarked documents, including copies or extracts, are also considered source selection material, to include listings of offerors and prices, listings of bidders prior to bid opening, source selection plans, technical evaluation of competing proposals, competitive range determinations, rankings (negotiated acquisition), source selection board reports/evaluations, and source selection advisory recommendations. [24]

Procurement officials who leave government service during the conduct of a procurement that is expected to result in a contract or modification in excess of $100,000 must also certify that they understand the continuing obligation not to disclose proprietary or source selection information. [25]

No guidance is included in the interim rules concerning the frequency which procurement officials must execute their certifications. To ensure that new procurement officials execute a certificate, job descriptions for civilian employees and duty responsibilities for soldiers should be annotated to reflect a requirement to execute the certificate as a condition of employment. An annual certification requirement may also be prudent as a means to monitor the execution of procurement official certificates.

The Period During Which the Prohibitions Apply

Having identified those who qualify as procurement officials and the conduct prohibited by the Act, it is also important to know the period during which the prohibitions apply. The prohibitions only apply "during the conduct of an agency procurement." The statutory definition [26] of "during the conduct of a federal agency procurement" has been clarified by the interim rules to provide that the period begins only when an authorized agency official determines that a specific agency need or requirement should be satisfied by procurement action. [27] The procurement period ends with the award, modification, or extension of a contract. [28] Each contract award and each contract modification constitutes a separate procurement. [29]

An understanding of the procurement period is important because the prohibitions apply only during the conduct of a procurement. For example, contacting a competing contractor to discuss job opportunities after the award of a specific procurement would not be a violation of the procurement integrity provisions. Personnel would still be subject to other prohibitions on the use of government information. [30]

Post-Employment Restrictions

In addition to the procurement-specific restrictions, the new procurement integrity provisions also create certain post-employment restrictions for any military or civilian government official or employee who has participated personally and substantially in the conduct of any federal agency procurement, *or* who has personally reviewed and approved the award, modification, or contract extension. [31] An individual meeting the above requirements cannot participate in any manner as an officer, employee, agent, or representative of a competing contractor in any negotiations leading to the award, modification, or extension of a contract for such procurement. [32] In addition, they cannot participate personally and substantially on behalf of the competing contractor in the performance of such contract. The post-employment restrictions apply for two years after the last date on which the individual participated personally and substantially in the conduct of the procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement. [33]

The new procurement integrity provisions' post-employment restrictions are in addition to, and broader than, previous post-employment restrictions set forth in AR 600-50. [34] The previous post-employment restrictions generally prohibited individuals from acting as "personal

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[23] FAR 3.104-4(k)(2).

[24] *Id.* FAR 3.104-5(b) requires that all reasonable efforts be made to mark such materials.

[25] FAR 3.104-6(b).

[26] 41 U.S.C.S. § 423(n) (1) (Supp. 1989) provides that the period begins with the development, preparation, and issuance of a procurement solicitation, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations. FAR 3.104-4(c) (1) incorporates the statutory definition.

[27] FAR 3.104-7. FAR 3.104-7 provides that it should be the earliest of identifiable specific actions, for example: requirements computation at inventory control points; publication of an advance synopsis of an R&D procurement; convening of a formal acquisition strategy meeting; development of an acquisition plan, purchase request or statement of work; development of specifications specifically for the instant procurement; or publication of the agency's intent to develop or acquire systems, subsystems, supplies, or services.

[28] FAR 4.104-4(c)(1).

[29] FAR 3.104-4(c)(2).

[30] See AR 600-50, para. 2-1(e), on the use of inside information for private gain.

[31] FAR 3.104-4(j)(1).

[32] FAR 3.104-3(e)(1).

[33] FAR 3.104-3(e)(2).

[34] For discussion of other postemployment restrictions mandated by various statutes, see AR 600-50, Appendix B.

representatives" of a contractor on a contract, but not from otherwise performing on a contract. With respect to the "negotiation" restriction, the new provisions prohibit not only the representation of a competing contractor in negotiations (personal representation), but also prohibit providing advice or information on negotiation strategies for the specific purpose of influencing negotiations. [35] The new restrictions prohibit any performance on a contract. The term "performance" is not defined, and is only qualified by the requirement that the performance not be personal and substantial.

The new post-employment restrictions create an issue in the Commercial Activities Program (CAP). [36] Under CAP, government employees who are displaced as a result of a conversion to contract performance have the right of first refusal for employment openings under the contract in positions for which they are qualified. [37] During the CAP process, government employees often have, and are encouraged to provide, significant input in the development of contract requirements. The new post-employment restrictions will now prevent those with personal and substantial involvement from exercising this right of first refusal. This issue was apparently not considered in the development of the new restrictions. The final rules should be reviewed to ascertain whether an exception is granted for CAP purposes.

The post-employment restrictions do not apply to all "procurement officials." The definition of procurement officials includes individuals who are "responsible for reviewing *or* approving the procurement." [38] For purposes of the post-employment restrictions, an individual must review *and* approve the acquisition. By use of the word "and" in the post-employment restrictions, Congress deliberately limited the category to which the restrictions would apply. [39]

Notwithstanding the congressional intent, the wording of the restrictions creates an inconsistency. The apparent intent was to require that the involvement in the review and approval of a procurement be both personal and substantial. [40] The interim rules adopt the language of the statute [41] and only require that the involvement be personal. The final rules should be reviewed for clarification of this apparent inconsistency.

Conclusion

Practitioners are cautioned again to review the final rules, which are expected to be issued prior to July 16, 1989, for any changes to the provisions discussed in this note. MAJ Aguirre and 1LT Basnight.

Appendix

CERTIFICATE OF PROCUREMENT OFFICIAL

Subsections (a), (b), (c) and (e) of the Procurement Integrity Provision of the Office of Federal Procurement Policy Act (41 U.S.C. §§ 423(a), (b), (c) and (e)) are as follows:

(a) PROHIBITED CONDUCT BY COMPETING CONTRACTORS.—During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly —

(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency;

(2) offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

(b) PROHIBITED CONDUCT BY PROCUREMENT OFFICIALS.--During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly —

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor;

(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement;

(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(c) DISCLOSURE TO UNAUTHORIZED PERSONNEL.— During the conduct of any Federal agency

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[35] FAR 3.104-6(c). This section defines negotiation strategy as the contractor's approach to the preparation and presentation of its offer and conduct of its negotiations. It also states that providing scientific, technical or other advice unrelated to negotiation strategy is permissible.

[36] *See* Army Reg. 5-20, Commercial Activities Program (20 Oct. 1986) [hereinafter AR 5-20].

[37] AR 5-20, para. 3-4.

[38] FAR 3.104-4(h)(1).

[39] 139 Cong. Rec. 17,073 (1988).

[40] *Id.*

[41] 41 U.S.C.S. § 423(e) (Supp. 1989).

procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(e) RESTRICTIONS ON GOVERNMENT OFFICIALS AND EMPLOYEES.— No Government official or employee, civilian or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—

(1) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or

(2) participate personally and substantially on behalf of the competing contractor in the performance of such contract,

during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

I certify as follows:

1. I have read the foregoing subsections of the Office of Federal Procurement Policy Act (41 U.S.C. §§ 423(a), (b), (c) and (e));

2. I have received a document entitled "Explanation of 41 U.S.C § 423(b), Prohibited Conduct by Procurement Officials;"

3. I am familiar with 41 U.S.C § 423(b), Prohibited Conduct by Procurement Officials;

4. Concerning any Army procurement of property or services in which I qualify as a procurement official pursuant to 41 U.S.C. § 423:

a. I will not engage in any conduct prohibited by 41 U.S.C. § 423(b), Prohibited Conduct by Procurement Officials; and

b. I will immediately report to the responsible contracting officer any information concerning a violation or possible violation of 41 U.S.C §§ 423(a), (b), (c) or (e).

_____

(Signature of the individual and date)

_____

(Typed name of certifying official)

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

EXPLANATION OF 41 U.S.C. § 423(b) PROHIBITED CONDUCT BY PROCUREMENT OFFICIALS

(9 May 1989)

The Procurement Integrity Training provisions of the Office of Federal Procurement Policy Act ("the Act") requires the head of each federal agency to provide its procurement officials with a written explanation of 41 U.S.C. § 423(b) "Prohibited conduct by procurement officials." This document constitutes that written explanation.

Subsection 423(b) of the Act is set forth verbatim in the Certificate which all procurement officials are required to sign as a condition of serving as a procurement official. Essentially, subsection 423(b) of the Act prohibits procurement officials, during the conduct of a procurement, from soliciting or accepting a job or anything of value, or from disclosing source selection or proprietary information.

While many of the terms in subsection 423(b) are self-explanatory, some are not. Therefore, the following questions and answers are provided to explain those terms which may not be self-explanatory.

1. Who is a procurement official?

"Procurement official" means any civilian or military official or employee who has participated personally and substantially in the conduct of the Army procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement. This includes any civilian or military official or employee of the Army who has participated personally and substantially in the following activities:

(i) Development of acquisition plans;

(ii) Development of specifications, statements of work, or purchase descriptions/requests;

(iii) Development of solicitation or contractual provisions;

(iv) Evaluation or selection of a contractor; or

(v) Negotiation or award of a contract or modification to a contract.

A contractor, subcontractor, consultant, expert, or advisor (other than a competing contractor) acting on behalf of, or providing advice to, the Army with respect to any phase of the procurement is considered an employee of the Army for the purposes of this law.

A Government official or employee who has become a procurement official cannot have his or her status as a procurement official changed for purposes of seeking employment with a competing contractor. However, the employment negotiation prohibition in subsection 423(b)(1) does not apply after a Government official or employee leaves Government service.

2. What does "participated personally and substantially" mean?

"Participated personally and substantially" requires active and significant involvement of the individual in

activities directly related to the procurement. To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate "substantially," means that the employee's involvement must be of significance to the matter. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. An employee whose responsibility is the review of a procurement solely for compliance with administrative procedures or budgetary considerations, and who reviews a document involved in the procurement for such a purpose, should not be regarded as having participated substantially in the procurement.

3. What does the phrase "During the conduct of any Federal agency procurement of property or services" mean?

"During the conduct of any Federal agency procurement of property or services" means the period beginning with the development, preparation, and issuance of a procurement solicitation, and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations. Each contract award and each contract modification constitutes a separate procurement, i.e., a separate period during which the prohibitions and the requirements of the Act apply. Activities and conduct that occurred before May 16, 1989, if any, do not violate the Act.

4. What is a competing contractor?

"Competing contractor," with respect to any procurement (including any noncompetitive procurement) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity. "Competing contractor" includes the incumbent contractor in the case of a modification.

5. In the context of Section 423(b), what does "money, gratuity or other thing of value" mean?

"Money, gratuity, or other thing of value," except where expressly permitted by Army Regulation 600-50, means any gift, favor, entertainment, hospitality, transportation, loan, or any other tangible item, and any intangible benefits, including discounts, passes and promotional vendor training, given or extended to or on behalf of government personnel, their immediate families, or households, for which fair market value is not paid by the recipient or the government.

6. For purposes of this law, what is considered "proprietary information?"

"Proprietary information" means:

(i) Information contained in a bid or proposal, or cost or pricing data, that is submitted to the Government by a competing contractor and is marked as proprietary in accordance with applicable law or regulation; or

(ii) Any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer.

Information described above is proprietary only if the cover page and each page or portion thereof that contains proprietary information is marked as proprietary.

Proprietary information *does not include* information:

(i) That is otherwise available without restrictions to the government, a competing contractor, or the public;

(ii) Contained in a bid documents following bid opening; or

(iii) Marked as proprietary but which the contracting officer determines, after consultation with the contractor, would not reasonably be expected to cause the contractor competitive harm if disclosed to other competing contractors.

7. For purposes of this law, what is considered "source selection information?"

"Source selection information" means information determined by the head of the agency or the contracting officer to be information:

(i) The disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(ii) Which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure.

"Source selection information" is information, including information stored in electronic, magnetic, audio or video formats, which is prepared or developed for use by the Government to conduct a particular procurement. It is limited to:

(i) Material marked with the legend "SOURCE SELECTION INFORMATION — SEE FAR 3.104," including copies or extracts so marked, and any copies or extracts that the recipient knows or should know were made from material that was so marked; and

(ii) The following material including copies or extracts thereof, *whether or not marked* with the legend "SOURCE SELECTION INFORMATION — SEE FAR 3.104:"

(a) Listings of offerors and prices;

(b) Listing of bidders prior to bid opening;

(c) Source selection plans;

(d) Technical evaluation plans;

(e) Technical evaluations of competing proposals;

(f) Competitive range determinations;

(g) Rankings (not applicable to sealed bidding);

(h) Source selection board reports and evaluations; or

(i) Source selection advisory board recommendations.

Contractor Claims: It's Never Too Late

The Corps of Engineers Board of Contract Appeals has released a decision that should be reviewed by all contract attorneys. [42] The case concerned a government motion to dismiss an appeal involving a construction contract that had been terminated for default. [43] The government files on the contract revealed some correspondence from the contractor that arguably could have been construed as raising a differing site conditions claim. The contractor failed, however, to raise this as a defense in its response to a show cause notice. [44] The contractor subsequently submitted a claim for differing site conditions approximately two and one-half years after the government's default termination. [45] The government had denied the claim based upon jurisdictional grounds alone, contending that the contracting officer's decision terminating the contractor for default encompassed any and all claims that tended to excuse the default. It reasoned that after the expiration of the appeal period, the contracting officer's decision became final and conclusive and extinguished the contractor's claim. [46] The board framed the issues presented by the appeal as follows:

> 1) Can a contractor's differing site conditions or changes claim survive a termination for default?
>
> 2) Can the Government, by a termination for default COD [contracting officer's decision], properly deny differing site conditions . . . claims which have not yet been submitted to the CO [contracting officer]?
>
> 3) Is there a statute of limitations for the submission of claims to the CO [contracting officer]? [47]

The board held that the differing site conditions claim was not barred by the default termination. It viewed a government claim for default and a contractor claim based on a compensable event as separate claims. The majority opinion discussed several appeals wherein the default terminations were upheld and recovery was allowed for compensable events occurring prior to the default termination. [48] These appeals, however, involved instances where the compensable events had been raised as a defense to the default termination and a timely appeal had been taken from the default termination decision. The board analogized the contractor's claim to a government claim for excess reprocurement costs after a default termination final decision. In such a circumstance, the government claim survives. [49]

The board held that the default termination could not operate as a final decision on the differing site conditions claim. Because the contractor had not submitted its claim as of the date of the termination final decision, the board ruled that the government could not issue a final decision on a prospective claim. The board also noted that the government did not address the contractor's differing site conditions allegations in its show cause notice or its default termination final decision. [50]

With respect to the statute of limitations issue, the board found that there is no such limitation for the filing of a claim. The applicable statute of limitation relates only to the time periods within which a contractor must file an appeal. [51]

There was an extensive dissenting opinion in this decision that took issue with many factual assumptions made by the majority. [52] The dissenting judge would bar the claim because of the contractor's failure to appeal in a timely fashion from the default termination. Upon a default termination, the dissent would require a contractor to proceed under the termination for default clause to protect its rights. Accordingly, the contractor must present all claims in response to the default termination decision. The dissent stated that the majority's position, which allows a contractor to ignore the default termination and present claims in the future, is opening "a pandora's box to late claims and never-ending litigation without finality" [53] and allows the contractor "not only a couple of bites [at the apple], but allows a contractor to keep chewing until it gets to the core." [54]

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[42] Sosa y Barbero Constructores, S.A., *et al*, ENG BCA No. PCC-57 (31 Mar. 1989).

[43] *Id.* at 5.

[44] *Id.*

[45] *Id.* The contractor also submitted a claim for a constructive change due to defective specifications and an "alternative changes" claim for excavation of certain areas, both of which had been denied earlier by the government, as had a claim for wrongful termination. The discussion concerning the differing site conditions claim was discussed interchangeably with the changes claims in the decision. The anlaysis of the differing site conditions claim applies equally to the changes claims made by the contractor.

[46] *Id.* at 6.

[47] *Id.* at 8.

[48] Clay Bernard Systems International, ASBCA No. 25382, 88-3 BCA ¶ 20,856; American Dredging Company, ENG BCA Nos. 2920, 2952, 3168, 72-1 BCA ¶ 9316, *aff'd*, 207 Ct. Cl. 1010 (1975).

[49] Sosa y Barbero Constructores, S.A., *et al*, ENG BCA No. PCC-57, at 8-9 (31 Mar. 1989). Note that the board did not consider this decision to be an exception to the *Fulford* doctrine. *See* Fulford Manufacturing Company, ASBCA Nos. 2143, 2144 (20 May 1955). The contractor dropped its challenge to the default termination prior to the hearing.

[50] Sosa y Barbero Constructores, S.A., *et. al.*, ENG BCA No. PCC-57, at 6 (31 Mar. 1989).

[51] 41 U.S.C. §§ 605(c)(5), 606, 609(a) (1982).

[52] Sosa y Barbero Constructores, S.A., *et al*, ENG BCA No. PCC-57, at 15 (31 Mar. 1989).

[53] *Id.* at 18.

[54] *Id.* at 19.

Because this was a ruling only on the government motion to dismiss, the board did not address whether there was sufficient notice of such a claim or whether the government was prejudiced by this delay in notification. The hearing on the merits may reveal other facts that bar the claim or alter the majority opinion's on the effect of the default termination decision.

As a matter of preventive law, this ruling on the motion to dismiss should alert field attorneys reviewing cure notices, show cause notices, and proposed final decisions on default terminations. The field attorney should discuss with the contracting officer any correspondence or discussions with the contractor that could be construed as a changes or differing site conditions claim or other excuse to the default termination. The contract file should also be examined by the attorney to ensure that the contractor has not asserted some justiciable claim. If allegations made by the contractor could reasonably be construed in that light, then the contracting officer should be advised to revise the government correspondence to address those allegations. Otherwise, such potential claims may survive the statutory default appeal period and result in protracted appeals. [55] In order to put to rest such lingering doubts about claims, it is well worth the extra effort to scrutinize closely those files for a "smoking gun!" MAJ Aguirre and MAJ Bean.

Criminal Law Notes

"I Was Only Joking" Not a Defense to "Bomb Hoax" Charge

In *United States v. Pugh* [56] the Court of Military Appeals affirmed the accused's conviction for communicating a "bomb hoax" in violation of article 134, Uniform Code of Military Justice. [57] The court's decision not only clarifies the definition of "malicious" when used in connection with bomb hoax offenses, but recalls a similar rejection of the so-called "innocent purpose" defense for larceny offenses.

The accused in *Pugh*, a well-known practical joker, constructed a fake bomb and placed it on the window ledge of a weapons storage facility in Europe. [58] He then called his friend, a security policeman on duty at the facility, and directed his attention to the mock explosive. [59] Although the evidence diverges as to how long the accused persisted in the "bomb hoax," the uncontroverted facts show that the security policeman eventually pushed a "duress button," which resulted in an alarm being sent forward to the major command. [60] The facts also clearly show that the accused set out to play a practical joke on his friend. [61]

The elements of proof for communicating a "bomb hoax," as set forth in the Manual for Courts-Martial, include the requirement that the communication of the information by the accused be "malicious." [62] When used in connection with a "bomb hoax" offense, the term "malicious" is defined by the Manual as follows: "A communication is 'malicious' if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons." [63]

The court, applying its restrictive standard of review for determining legal sufficiency of the evidence, [64] declined to decide whether such a communication to a security guard at a weapons storage facility in Germany is malicious *per se*. It instead found that a natural and probable consequence of the accused's communication would be that the security policeman would, at a minimum, be concerned for his safety and that of the

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[55] 41 U.S.C. § 605(c)(5), 606, 609(a) (1982).

[56] 28 M.J. 71 (C.M.A. 1989).

[57] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

[58] *Pugh*, 28 M.J. at 71-72. The court's opinion describes in some detail how the fake bomb was manufactured: putty was used to simulate plastic explosives, a battery was secured to it with a safety wire, and aluminum foil was attached to simulate a detonator. *Id.* at 71.

[59] *Id.* at 71.

[60] *Id.*

[61] *Id.* The court noted that in addition to the accused's reputation as a jokester, he was not secretive in constructing the device. *Id.*

[62] The elements of communicating a bomb hoax are:
(a) That the accused communicated or conveyed certain information;
(b) That the language or information concerned an attempt being made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;
(c) That the information communicated by the accused was false and that the accused then knew it was false;
(d) That the communication of the information by the accused was malicious; and
(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
Manual for Courts-Martial, United States, 1984, Part IV, para. 109b(2) [hereinafter MCM, 1984].

[63] *Id.*, Part IV, para. 109c(2).

[64] The court wrote:
The United States Court of Military Appeals determines legal sufficiency of the evidence based on "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 MJ 324 (CMA 1987), citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).
Pugh, 28 M.J. at 72.

area. [65] Thus, regardless of his jocular motives, the accused had the requisite malicious intent for the charged offense. [66]

The defense contention in *Pugh* is similar to the so-called "innocent purpose" defense formerly recognized for larceny [67] offenses. Under prior law, a person would not be guilty of larceny if he or she took another's property for an "innocent purpose"—such as to play a joke or teach them a lesson—even if the individual had the intent to keep the property permanently. [68] The Court of Military Appeals later rejected this defense and found that an "innocent purpose" was not a defense to larceny. [69] The court concluded that "a good or laudable motive does not make an otherwise criminal act innocent." [70] This logic can be applied with equal force to the accused's argument in *Pugh*.

The accused's purpose of playing a practical joke on his friend can, of course, be properly considered as a matter in extenuation by the sentencing authority. [71] Accordingly, although an "innocent motive" may not be interposed to exculpate an accused for communicating a "bomb hoax," it may serve to lessen the punishment for that crime. MAJ Milhizer.

Assault and Mutual Affrays

In *United States v. Winston* [72] the Army Court of Military Review affirmed the accused's conviction of assault with the intentional infliction of grievous bodily harm [73] for his aggressive participation "in an escalating mutual affray." [74] Military trial practitioners must be cautious not to read *Winston* too broadly, however, as self-defense may be authorized in some circumstances, even by one who voluntarily participated in a mutual affray.

Black-letter military law has long recognized that both parties to a mutual affray are guilty of assault. [75] Self-defense or consent generally will not exculpate either combatant, as both are considered to be wrongdoers. [76] Consent will likewise not operate as a defense to assault where the injury is more than trifling or there is a breach of public order. [77]

The right to self-defense may nonetheless be revived during the course of a mutual affray in limited circumstances. In *United States v. Cardwell*, [78] for example, the accused and another soldier became involved in a mutual affray concerning a chicken dinner. [79] Both combatants initially limited their activities to exchanging provocative comments and "medium blow[s]" with their hands. [80] Later during the affray, the accused was grabbed around the throat by his adversary who began choking him. [81] The accused responded by picking up a beer bottle and striking his adversary three times on the head. [82]

The court found that "even a person who starts an affray is entitled to use self-defense when the opposing party escalates the level of conflict." [83] The court concluded that

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[65] *Id.* at 73; *see generally* MCM, 1984, Part IV, para. 43(c)(3)(a); United States v. Owens, 21 M.J. 117 (C.M.A. 1985); United States v. Varraso, 21 M.J. 129 (C.M.A. 1985) (permissible inference is recognized that a person intends the natural and probable consequences of an intentional act).

[66] *Pugh*, 28 M.J. at 73; *cf.* United States v. Marks, 25 M.J. 653 (A.F.C.M.R. 1987) (intentionally holding a flame to the canvas part of a litter was a "deliberate" and "intentional" act, and the fact that the act was without excuse made it "malicious" within the definition of the term as applied to arson as proscribed by UCMJ art. 126). Note that "bomb threat" and "bomb hoax" offenses can be charged either as conduct prejudicial to good order and discipline under UCMJ art 134(1) as in *Pugh*, or as a noncapital federal crime violative of 18 U.S.C. § 844(e) pursuant to UCMJ art. 134(3). *See* United States v. Mayo, 12 M.J. 286 (C.M.A. 1982); United States v. Gilluly, 32 C.M.R. 458 (C.M.A. 1963).

[67] UCMJ art. 121.

[68] *See* United States v. Roark, 31 C.M.R. 64 (C.M.A. 1961).

[69] United States v. Johnson, 17 M.J. 140 (C.M.A. 1984); United States v. Kastner, 17 M.J. 11 (C.M.A. 1983).

[70] *Kastner*, 17 M.J. at 13 (quoting 1 Wharton's Criminal Law 408 (C. Torcia, 14th ed. 1978)).

[71] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(c)(1)(A) [hereinafter R.C.M.].

[72] 27 M.J. 618 (A.C.M.R. 1988).

[73] UCMJ art. 128; *see* MCM, 1984, Part IV, para. 54(b)(2). The court affirmed the accused's conviction for this offense as a lesser included offense of assault with intent to commit murder, of which he was convicted at trial. *See* UCMJ art. 134; MCM, 1984, Part IV, para. 64.

[74] *Winston*, 27 M.J. at 619.

[75] United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966); United States v. Wilson, 19 C.M.R. 19 (C.M.A. 1955); United States v. Henry, 40 C.M.R. 818, 821 (A.B.R. 1969).

[76] *O'Neal*, 36 C.M.R. at 193 (citing Rowe v. United States, 164 U.S. 546, 556 (1896)); *see generally* R.C.M. 916(e)(4).

[77] United States v. Holmes, 24 C.M.R. 762 (A.F.B.R.), *pet. denied*, 24 C.M.R. 311 (C.M.A. 1957); *but cf.* United States v. Rath, 27 M.J. 600, 606-08 (A.C.M.R. 1988) (child may consent to some types of assault).

[78] 15 M.J. 124 (C.M.A. 1983).

[79] *Id.* at 125.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 126; *see* United States v. Acosta-Vargas, 32 C.M.R. 388 (C.M.A. 1962); United States v. Straub, 30 C.M.R. 156 (C.M.A. 1961).

> the forcible strangulation to which the [accused] claims he was subjected by his [opponent] constitutes such an escalation of the conflict as to allow him to use reasonable force to defend against it. In the context of the barracks brawl in which [the accused] was engaged, it was arguable, at least, that [the accused's] use of beer bottle was no more than reasonable force. [84]

Thus, the accused in *Cardwell* could successfully defend against an aggravated assault charge for using the beer bottle, while being guilty of the lesser offense of assault by battery for his initial actions.

As noted earlier, the court in *Winston* similarly found that the accused in that case was involved in an escalating mutual affray. [85] The court, however, characterized the accused's participation in *Winston* as being "aggressive." [86] Although the reported opinion does not discuss the factual circumstances of the case in any detail, the accused's aggressive conduct in *Winston* apparently showed that he willingly participated in, and perhaps even provoked or initiated, the escalation of force. Under such circumstances, this case would be clearly distinguishable from *Cardwell*, and the accused could be properly convicted of an aggravated form of assault. In any event, *Winston* must be read in conjunction with *Cardwell* and not be given an overly broad interpretation. MAJ Milhizer.

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.

Family Law Note

Counseling Clients About Extramarital Sex Prior to Divorce

The client decided some time ago that he wants a divorce. You negotiated a separation agreement, which the parties just signed. The divorce petition cannot be initiated for three more months, however, and as the client leaves your office he asks, "By the way, I guess this means I can start 'dating' again, doesn't it." This scenario is familiar to anyone who regularly counsels clients on marriage and divorce matters; indeed, it raises what may be one of the most recurring issues in domestic relations cases.

The answer to the client's explicit inquiry, of course, is "yes," but the unstated question, "Can I now have sexual relations with the new light of my life?" is more problematic. In addition to legal factors, it involves moral issues that may leave attorneys uncomfortable in formulating a response. Notwithstanding any such awkwardness, counsel have an obligation to provide accurate advice based on the law and practical considerations in the case.

Is sex with other partners permissible while the parties live separate and apart? Because the marriage is not yet terminated, sexual relations with anyone other than a spouse constitutes adultery. This is true whether or not a separation agreement has been executed and regardless of any language it may include about how each party is entitled to live free of interference from the other. Legal assistance attorneys may need to remind clients that they are still married and that the separation agreement does not change that fact.

The adulterous aspect of extramarital relationships triggers a need to analyze applicable criminal provisions. Some states have decriminalized adultery, so for civilian clients the issue of legality turns on local law. Military clients are governed by the Uniform Code of Military Justice as well as civilian law, and article 134 [87] still proscribes adultery. [88] Thus, legal assistance attorneys must advise clients of the potential for nonjudicial punishment or criminal prosecution if they have sexual relations outside their marriage before divorce.

How significant is this risk? The answer depends on the commander's exercise of prosecutorial discretion and the existence of aggravating circumstances. For example, each of the five reported adultery cases since the beginning of 1989 have involved other offenses in addition to the adulterous conduct. [89] This may suggest that clients have little to fear in the way of prosecution simply for adultery, but they should understand that the possibility still lurks in the background. Moreover, the illegality of the relationship could harm the client's professional reputation, perhaps generating adverse comments on an officer or enlisted evaluation report.

Advice to all clients should touch on other, perhaps more immediate, concerns as well. For example, regardless of any agreement between the parties, judges are free to exercise discretion in awarding custody of minor

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[84] *Cardwell*, 15 M.J. at 126.

[85] *Winston*, 27 M.J. at 619.

[86] *Id.*

[87] UCMJ art. 134.

[88] A WESTLAW search of the term "adultery" reveals that 63 cases in the Military Justice Reporter have included this word since the beginning of 1984. Five reported cases since the beginning of 1989 have involved convictions for adultery.

[89] United States v. Negron, CM 8801150 (A.C.M.R. 28 Apr. 1989) (disobeying an order to refrain from unprotected sex and adultery); United States v. Wine, 28 M.J. 688 (A.F.C.M.R. 1989) (failure to obey a lawful order, wrongful use of marijuana, and adultery); United States v. Yates, 28 M.J. 60 (C.M.A. 1989) (false swearing and adultery); United States v. Wilson, 28 M.J. 48 (C.M.A. 1989) (sodomy, assault on a subordinate, adultery, and communicating indecent language); United States v. Torres, 27 M.J. 867 (A.F.C.M.R. 1989) (rape, carnal knowledge, and adultery).

children and parental visitation rights. Even with an agreement in hand, therefore, not all matters that may be important to a client are resolved before the divorce is final. The court will make its decision based on the best interests of the child, and some judges are loathe to place a young child into an adulterer's household.

Similarly, judges have discretion in awarding child support and perhaps alimony. Remember that some members of society, including some judges, condemn all adultery, and virtually no one promotes it as model conduct. Thus, a client who has extramarital sexual relations before divorce runs the risk of raising judicial ire, and this can lead to adjustments in agreed-upon support levels or to other adverse rulings.

The reasons for caution do not turn solely on whims of those in authority, however. Extramarital sexual relationships before divorce can have an adverse affect on the other spouse, perhaps leading to unwanted complications. This risk is especially high if the other spouse did not know of the "other woman" or the "other man" before agreeing to the divorce, but it can arise even if there was full knowledge beforehand. Infidelity typically engenders hurt, embarrassment, and anger, especially when the adultery is public knowledge. A relationship while the divorce is pending can create these feelings, and the risk is that the spouse will seek vindication or revenge.

One way of achieving revenge is to seek adjustment of the division of property based on an allegation that money spent directly and indirectly on the new lover constitutes a wasting of marital assets. A carefully crafted separation agreement can blunt such an attack, but even the agreement may be ineffective if the spouse alleges that the expenditures occurred before the parties signed the agreement.

Another way to obtain vindication would be to seek a divorce based on fault grounds rather than proceed on a no-fault basis. This could entail a lengthy delay, increase legal costs, and lead to a modification or renegotiation of property and support issues. This tactic will not work everywhere, as a few states no longer entertain fault-based divorces; however, st still do. Additionally, in some states the fact of adultery can have a drastic effect on property division and the award of alimony. Thus, clients who have extramarital sexual relations before divorce may be placing themselves at the mercy of precisely the one person they least want to have power over their lives.

One last consideration arises when the client and the spouse have minor children. The divorce will end the marriage, but it will not completely sever the relationship between the parties. They will have to continue to deal with each other on a frequent basis over a period of years, and post-divorce cooperation clearly is in every client's best interests. It is hard to imagine how having an affair before the divorce is complete can have a positive effect on the spouse's feelings for the client, but the possibility that it will poison any spirit of cooperation is readily apparent. The need for future negotiation is inevitable, and negotiating with a friend usually is more fruitful than negotiating with an enemy.

In conclusion, there are several good reasons why clients should not engage in extramarital sexual relations before a divorce is final, and attorneys should be prepared to discuss these matters. All active duty members, and some civilians, must consider the possibility of criminal sanctions. In addition, adultery can injure the client's interests in three more immediate ways. First, it may create a motive for revenge or a need for vindication. Second, it can provide legal grounds for obtaining this revenge or vindication through litigation or forced renegotiation of the separation agreement under a threat of litigation, while weakening the client's position in the litigation or negotiation process. Finally, adultery can extinguish any goodwill the other spouse has for the client, and this may make it more difficult to achieve post-divorce cooperation. These are the considerations that attorneys should discuss with their divorce clients. MAJ Guilford.

Estate Planning Notes

New Law Requires Estate Planning for Foreign Spouses

Congress recently amended the Internal Revenue Code to alter dramatically the estate and gift tax rules for married couples where the transferee spouse is a non-United States citizen or a nonresident alien. [90] The new law affects the availability of the federal estate and gift tax marital deduction for transfers to nonresident aliens and modifies the unified credit for the estates of decedents who are not residents or citizens of the United States. The amendments to the code apply to the estates of decedents dying after November 10, 1988. [91]

Before the changes in the law, individuals could transfer unlimited amounts of property to their spouses free of any transfer tax, regardless of the citizenship or residency status of the transferee spouse, by using the unlimited marital deduction. [92] Foreign spouses could avoid paying federal estate taxes altogether by terminating U.S. residency before death.

To close this loophole, Congress added a new section to the code [93] that disallows marital deductions for gifts made by a U.S. citizen to a non-U.S. spouse. Congress

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[90] I.R.C. §2056(d) (West Supp. 1989), added by section 5033(a), Technical and Miscellaneous Revenue Act of 1988 (hereinafter TAMRA), Pub. L. No. 100-647, § 5033(a), 100 Stat. 3342 (1988). *See generally* Nelson, *TAMRA Creates New Tax Traps For Non-U.S. Citizens*, Trusts & Estates, May 1989, at 41; Lawrence and Kaufman, *Estate Plan of Nonresidents Requires Review*, Trusts & Estates, Feb. 1989, at 38; McCoy, *Estate Tax Treatment of Noncitizens and Noncitizen Spouses*, 14 Probate Notes 323 (1989); Karr, *New Planning Required for Surviving Spouses Who Are Not U.S. Citizens*, J. Tax'n, Mar. 1989, at 140; Belcher, *Client Alert: Congress Severely Restricts Marital Deduction for Nonresident Aliens and Noncitizen Spouses*, Probate and Property Journal, March/April 1989, at 27.

[91] Section 5032(d), TAMRA. The new law also applies to gifts made after July 13, 1988. Section 5033(d), TAMRA.

[92] I.R.C. § 2056 (West Supp. 1989).

[93] I.R.C. § 2523(i) (West Supp. 1989).

softened the impact of the new law, however, by creating a special gift tax exclusion of $100,000 for gifts made to non-U.S. spouses.

An exception to the general rule disallowing the marital deduction for transfers to non-U.S. citizens is granted for property passing to the non-citizen spouse in a "qualified domestic trust." [94] A trust must meet four criteria to qualify as a qualified domestic trust. First, the trust instrument must require that all trustees be individual citizens or domestic corporations. [95] Second, the decedent's surviving spouse must be entitled to all income from the trust, payable at least annually. [96] Third, the trust must meet the requirements of any regulations issued by the Internal Revenue Service prescribing the collection of estate taxes imposed on the trust. [97] Finally, the decedent's executor must irrevocably elect on the estate tax return to qualify the property for the federal estate tax marital deduction. [98]

The new law allows a surviving spouse to transfer property passing outside the decedent's probate estate to a qualified domestic trust and thereby obtain the federal estate tax marital deduction. [99] This transfer must be made before the filing date of the federal estate tax return for the decedent's estate. For some reason, Congress did not permit the surviving spouse to transfer probate property to a qualified domestic trust. Thus, assets transferred directly by will or through intestacy proceedings may not be added to a qualified domestic trust.

Like other marital deduction trusts, a qualified domestic relations trust does not avoid U.S. estate taxes completely, but merely defers them after the death of the first spouse. An estate tax will be imposed on any distribution from a qualified domestic trust, other than income distributions, and also on the value of property remaining in the trust on the death of the surviving spouse. [100] Generally, the tax will be equal to the marginal increase in tax that would have been imposed if the decedent's taxable estate had been increased by the amount distributed. [101]

Congress also changed the tax treatment of jointly-held property between a U.S. citizen and a non-U.S. citizen spouse. Congress reinstated two code provisions to provide that a transfer of property between spouses is not deemed to occur upon the creation of a joint tenancy with right of survivorship. [102] The assumption furnished by code section 2040(b), that each spouse will be considered to have owned one-half of jointly owned property, will not be available, however, if the surviving spouse is an alien. Thus, the problem of proving the contribution of each spouse will arise upon the death of a spouse if the surviving spouse is a non-U.S. citizen. Moreover, upon the termination of the tenancy during the lives of the spouses, a gift will be considered to have been made if the proceeds of the termination received by a spouse exceeds the total consideration furnished by the spouse. [103]

Soldiers with considerable estates should consider making annual gifts to non-U.S. citizen spouses to take advantage of the new $100,000 annual gift exclusion or making testamentary transfers to their spouses in qualified domestic relations trusts. Although most legal assistance attorneys will not have the expertise to draft qualified domestic relations trusts, they must nevertheless carefully consider the impact of the new changes to the code on the estates of every soldier married to a non-U.S. citizen spouse and make appropriate referrals. MAJ Ingold.

Court Refuses to Set Aside Codicil for Mistake of Fact

Legal assistance attorneys are often asked to revise wills to reduce gifts previously made to relatives. A recent case, *Witt v. Rosen*, [104] indicates that courts will be reluctant to second guess testators in these cases, even if they are mistaken about certain facts that motivate them to alter their previous testamentary plans.

In *Witt* the testator signed a will giving two relatives gifts of $15,000 and $20,000. He subsequently executed a codicil revoking the bequests, stating that he had "in the interim made inter vivos gifts" to the relatives. [105] The two relatives appealed an order upholding the codicil. They presented evidence that the decedent had not made the gifts recited in the codicil and argued that the codicil was therefore void due to a mistake of fact.

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[94] I.R.C. § 2056(d)(2)(A) (West Supp. 1989).

[95] I.R.C. § 2956(a)(1) (West Supp. 1989). Thus, a decedent's spouse cannot be the trustee of a qualified domestic trust.

[96] I.R.C. § 2056(a)(2) (West Supp. 1989).

[97] I.R.C. § 2056(a)(3) (West Supp. 1989).

[98] I.R.C. § 2056A(a)(4) (West Supp. 1989).

[99] I.R.C. § 2056(d)(2)(B) (West Supp. 1989).

[100] I.R.C. § 2056A(b)(1) (West Supp. 1989). A qualified domestic trust will also be subject to the general income tax rules governing domestic U.S. trusts.

[101] For an in-depth discussion on the imposition of estate tax on distributions from a qualified domestic trust, see Lawrence and Kaufman, *Estate Plan of Nonresidents Requires Review*, Trusts & Estates, Feb. 1989, at 38.

[102] I.R.C. § 2523(i)(1) (West Supp. 1989).

[103] I.R.C. § 2515 (West Supp. 1989). This issue should not arise in the case of community property because each spouse would be deemed to own one-half interest in the property.

[104] 756 S.W.2d 956 (Ark. 1989).

[105] *Id.* at 957.

The Supreme Court of Arkansas denied the relatives' appeal and applied the rule that a revocation of a testamentary instrument will not be set aside because the facts that induced it are found to be false. The policy for this rule is that determining the intent of a testator after death is too uncertain.

The court acknowledged that some jurisdictions recognize an exception to the rule and will set aside a revocation on a showing of the nonexistence of facts upon which the revocation was based. This exception does not apply, according to the court, when the misstatement is "peculiarly within the testator's knowledge or determination." [106] Thus, if a testator does not rely on others for the facts upon which he revokes a will bequest, a court will not reform the instrument even if there was an actual mistake of fact.

Even though courts are reluctant to reform testamentary instruments, drafters must be alert to the potential for litigation stemming from statements inserted in wills. The drafter of the codicil in *Witt*, for example, could have avoided litigation over the revocation merely by omitting the statement that the testator had made gifts to his relatives. Because testators have the right to disinherit relatives for any or no reason, [107] including in the codicil the reason for disinheriting a relative or changing a prior disposition needlessly creates potential for future litigation. MAJ Ingold.

Real Property Note

Implied Warranty of Habitability Extended To Second Purchaser of Home

Most jurisdictions in this country recognize an implied warranty of habitability and fitness for new homes. [108] In a recent case, *Sewell v. Gregory,* [109] West Virginia joined a growing number of states [110] by extending these implied warranties to subsequent purchasers of homes.

The home builder in the case, Gregory, sold the home to the first owners in 1975. The Sewells purchased the home in 1979 from Gregory, who was acting as the real estate agent for the initial owners. Shortly after moving into the home, a flood caused substantial damage to the home. The defective construction of the home prevented the Sewells from solving the problem, so they sued Gregory, claiming breach of the implied warranty of habitability.

The West Virginia Court of Appeals recited three reasons for recognizing an implied warranty of habitability on the purchase of a new home: the purchase of a home is often the most important transaction in the purchaser's life; buyers do not have the skills necessary to inspect adequately a home; and the builder is in a superior position to prevent problems. [111] According to the court, all three of these reasons apply with equal strength to purchasers of used homes. The court in *Sewell* also rejected the traditional view that privity is an essential component for an action based on breach of contract or warranty.

The court placed several important limitations on the extension of the implied warranty of habitability to subsequent purchasers. First, the extension continues for only a reasonable length of time after construction. Second, the warranty applies only to latent defects that are not discoverable by the subsequent purchaser through reasonable inspection and that become manifest only after purchase.

The court also held that the Sewells could maintain an action against the builder for negligence resulting in latent defects that the purchasers were unable to discover. Although the court acknowledged that other jurisdictions have rejected claims of subsequent purchasers based on negligence, [112] the court believed that the better view [113] is to extend negligence claims to purchasers of used homes because it was entirely foreseeable to the builder that subsequent homeowners would be harmed by negligent construction. MAJ Ingold.

Tax Note

Tax Court Finds Letter Written By Attorney Constitutes An Agreement

A taxpayer recently received more than she bargained for by signing a letter written by her husband's attorney proposing monthly support payments. The Tax Court held that the letter was a written separation agreement within the meaning of the Code and that the support payments were therefore properly characterized as alimony. [114]

Approximately one year after separating from her husband, the taxpayer received a letter from her husband's attorney in which her husband offered to pay her $1,344.35 per month. The letter said that $800.00 was

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[106] *Id.* at 958.

[107] Subject, of course, to a surviving spouse's right to receive a statutory share.

[108] *See generally* Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned By Defective Condition Thereof*, 25 A.L.R. 3d 383 (1969 and Supp. 1988).

[109] 371 S.E.2d 82 (W. Va. 1989).

[110] *See, e.g.*, Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984); Briarcliffe West Townhouse Owners Assn. v. Wiseman Construction Co., 118 Ill. App.3d 163, 454 N.E.2d 363 (1983).

[111] *Id.* at 84 (citing McDonald v. Mianecki, 79 N.J. 275, 287-89, 398 A.2d 1283, 1289-90 (1979)).

[112] *Id.* (citing Nastri v. Wood Brothers Homes, Inc., 142 Ariz. 439, 690 P.2d 158 (1984); Redarowicz v. Ohlendorf, 92 Ill.2d 171, 441 N.E.2d 324 (1982)).

[113] Colorado was the first court to recognize this view in Johnson v. Graham, 679 P.2d 1090 (Colo. 1983).

[114] Azenaro v. Commissioner, 57 T.C.M. (CCH) 684 (1989).

for child support and the remainder was to cover expenses such as electricity and telephone. The taxpayer signed the assent portion of the letter and mailed it back to the attorney. Four years later the parties were divorced.

The Internal Revenue Service (IRS) determined that amounts in excess of child support the taxpayer received during 1983 and 1984 were taxable as alimony payments. The IRS took the position that the letter signed by the taxpayer constituted a separation agreement.

The Tax Court upheld the IRS contention, rejecting the taxpayer's argument that the letter merely represented an offer to negotiate. The court found that the terms of the letter were sufficiently specific even though it provided for modification of the support payments if the husband's financial condition changed and indicated a further need to define the terms of child visitation.

The Tax Court found that agreements do not need to be signed by both parties even though the Code and the regulations refer to agreements that have been "executed." [115] The court could not find any valid reason for precluding an attorney from signing an agreement on behalf of the client.

The decision in this case reflects a sound, practical enlargement of the concept of agreement to include obvious meetings of the minds between taxpayers. Although the meaning of "agreement" under the Code is broad enough to include letters signed by the parties, it still does not encompass payments made solely to comply with service support regulations. Thus, a soldier making support payments to comply with Army regulations [116] must obtain the agreement of the spouse in writing for the support payments to qualify as deductible alimony. MAJ Ingold.

Professional Responsibility Notes

Federal Government Attorneys May Remove State Disciplinary Proceedings to Federal Courts

Attorneys working for the Federal Government should herald a recent decision by the Fourth Circuit [117] that held that federal attorneys may remove state ethics proceedings to the federal courts under the removal statute. [118] The holding in *Kolibash v. Committee on Legal Ethics of the West Virginia Bar* is potentially most significant when Army attorneys comply with applicable Army ethical standards [119] that are inconsistent with the standards of the state in which they are licensed. According to *Kolibash*, if the state brings ethical charges, the removal statute guarantees the attorney access to a federal forum, which will likely be more receptive to a defense based on federal supremacy or preemption.

In *Kolibash* a client complained to the West Virginia bar that the lawyer that represented him during a federal grand jury investigation later participated in the case against him as an Assistant United States Attorney. The bar also accused the attorney's supervisor, the United States Attorney for the Northern District of West Virginia, with professional misconduct in failing to supervise the office properly and to screen for the conflict.

The U.S. Attorney petitioned the federal district court for removal of the state's ethical proceeding. The court refused to remove the case, stating that the licensing of attorneys was a state function.

The Fourth Circuit disagreed with the district court's application of the removal statute. According to the appellate court, the removal statute should be broadly applied to protect federal officers in the performance of their duties. A federal officer has the right to removal under the statute whenever a state suit is initiated for an act performed "under color" of federal office.

Although the court recognized that significant state interests were involved, it nevertheless concluded that policies supporting the doctrine of federal immunity and the removal statute were implicated in the state ethical proceeding against the U.S. Attorney. The court noted that the case involved the extent of the attorney's responsibility for the acts of others and the scope of a federal prosecutor's duty to disclose details of a federal grand jury investigation. State ethical proceedings should not, according to the court, be used to interfere with the duties of federal officers.

The court also rejected the state bar committee's contention that the disciplinary hearing was not removable because it was not a civil or criminal action within the meaning of the statute. [120] In the opinion of the court, the statutory requirements for removal are met if a state investigative body operates in an adjudicative proceeding and subjects a federal officer to its process. MAJ Ingold.

Attorney Has No Duty to Reveal Mistake of Fact to Third Party

Does a government attorney have an ethical duty to correct the factual error of an employee and her attorney which serves as a basis for their settlement proposal with the government? The Sixth Circuit recently addressed this issue in *Brown v. Genessee County* [121] and held that

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[115] I.R.C. § 71(a)(2) (West Supp. 1989); Treas. Reg. § 1.71-1(b)(2) (1960).

[116] Army Reg. 608-99, Personal Affairs: Family Support, Child Custody, and Paternity (4 Nov. 1985).

[117] Kolibash v. Committee on Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989).

[118] 28 U.S.C. § 1442(a) (1982).

[119] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) (hereinafter Army Rules). The comments to Rule 8.5 of the Army Rules provide that Army attorneys must comply with both the Army Rules and the ethical standards of the state in which they are licensed. If there is a conflict in the standards, Army attorneys must comply with the Army Rules.

[120] 28 U.S.C. § 1442(a)(1) (1982).

[121] 872 F.2d 169 (6th Cir. 1989).

the attorney does not have an obligation to correct the unilateral mistake of an opposing party.

Attorneys should be careful not to extend the holding in *Brown* beyond its factual setting. In *Brown* the plaintiff was denied employment by the county due to a diabetic condition. She filed an employment discrimination suit and the county eventually hired her for the position. The plaintiff sued, however, to receive the pay at the wage rate she would have received had she not been improperly denied employment from the outset.

During settlement negotiations, the county asked the plaintiff and her counsel to put her demands in writing. The attorney submitted a proposal that was one wage rate step below what his client was actually entitled to. Although counsel for the county believed that it was probable that plaintiff's counsel misinterpreted the county wage scales, he did not inform them of their mistake.

The district court ordered reformation of the settlement agreement based on the plaintiff's mistake and the fraud of the county. The Sixth Circuit reversed, concluding that, absent some misrepresentation or fraud, there was no duty on the county's attorney to disclose to the plaintiff or her counsel the factual error that he suspected had occurred.

The court believed that the plaintiff's counsel could have easily verified the information from the county through a discovery request. Alternatively, counsel for the plaintiff could have structured the settlement proposal to assure that it was based on the highest possible wage rate to which the plaintiff was entitled. The failure to formulate a proper settlement agreement under these circumstances should not be attributed to the county attorney who had the duty to present the case in the light most favorable to his client. The court concluded that mere non-disclosure of facts pertinent to a controversy do not constitute the fraud necessary for vacating judgment under the Federal Rules of Civil Procedure. [122]

While an attorney's principal duty is to the client, the attorney does have certain obligations to third parties. For example, the Army Rules of Professional Conduct [123] forbids a lawyer, in his representation of a client, from "[using] 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." Moreover, Army Rule 4.1 specifically prohibits an attorney from knowingly making a false statement of material fact or law to a third person. [124]

Despite these specific obligations to third parties, the comment to Army Rule 4.1 clarifies that an attorney generally does not have an affirmative duty to inform an opposing party of a relevant fact. Thus, the Army Rules are consistent with the decision reached in *Brown*.

Under different circumstances, an attorney may have an affirmative obligation to disclose relevant facts. For example, disclosure is required to correct a statement believed to be true when made by an attorney but subsequently discovered to be false. [125] A duty of disclosure may also arise when a lawyer is obligated by law to reveal information or when the lawyer knows that the client has made misleading or false statements to third parties. [126] Moreover, courts impose a general duty of candor on attorneys when they are dealing with third parties. [127]

Legal assistance attorneys should always balance their duty to zealously represent clients with their obligations to third parties. Although attorneys do not have a duty to disclose relevant facts to third parties, they must avoid misleading third parties and always satisfy the duty of candor that is consistent with accepted standards of honesty, justice, and morality in the legal profession. MAJ Ingold.

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[122] Fed. R. Civ. P. 60(b).

[123] Army Rule 4.4.

[124] Army Rule 4.1 also prohibits a lawyer from failing to disclose a material fact to a third person when necessary to avoid assisting a criminal or fraudulent act by a client.

[125] *See, e.g.*, Dyke v. Zaiser, 80 Cal. App.2d 639, 182 P.2d 344 (Cal. Dist. Ct. App. 1947).

[126] Army Rule 4.1(b). *See also* Matter of Price, 429 N.E.2d 961 (Ind. 1982).

[127] People v. Berge, 620 P.2d 23 (Colo. 1980). In this case, a lawyer was suspended from practice for 90 days in connection with his dealings with the beneficiaries of an estate. The attorney was a major beneficiary under the will and served as the attorney for the personal representative. The attorney sent the heirs a letter along with a notice of a hearing on the petition for probate of the will which provided no information of the size of the estate. He also underlined a statement saying that it was unnecessary for them to be present at the hearing to receive their bequests.

Administrative and Civil Law Note

Digest of Opinion of The Judge Advocate General

(Standards of Conduct—Holiday Inn Government Amenities Coupons). DAJA-AL 1989/1549 (27-1a), 5 May 1989.

Offering customers and potential customers special rates, discounts, upgrades, and coupons is currently one of the most popular advertising techniques for American businesses. This causes a problem for DOD personnel who are prohibited from accepting gratuities from outside sources. In response to a recent request, TJAG provided specific guidance on the acceptance of several gratuities offered by Holiday Inns, Inc.

Holiday Inns, Inc., developed a marketing program that provides official government travelers with coupons for room upgrades, free breakfasts, and discounted dinners. AR 600-50, para. 2-2c(8) contains the rules for acceptance of benefits incident to official travel. TJAG stated that DOD personnel generally may not accept gratuities, reimbursements, and other benefits from outside sources. An exception to this rule is discounts or concessions generally available to all DA military or civilian personnel, provided that the concession is not used to obtain any item for the purpose of resale at a profit (AR 600-50, para. 2-2a(2)(c)). Based on this exception, acceptance of the Holiday Inns, Inc., coupons, to include the room upgrade, is authorized. MAJ McCallum.

Claims Report

United States Army Claims Service

Environmental Claims in the Federal Republic of Germany

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Introduction

With increased public awareness of the environment in the mid-1980's, United States Army Claims Service, Europe (USACSEUR) noted a significant increase in the number of environmental pollution claims filed with Defense Cost Offices [1] (DCO's) in the Federal Republic of Germany (FRG). Currently, USACSEUR maintains claims files on over eighty environmental claims that range in severity from minor fuel spills costing only a few hundred dollars to major problems threatening water supplies to major cities that will cost millions to clean up.

Environmental claims in USAREUR generally fall into one of five categories and most involve pollution of soil and water by hydrocarbon compounds. [2] The five categories are: 1) motorpool or degreasing facilities; 2) laundry and dry cleaning facilities; 3) fuel storage facilities; 4) motor vehicle or aircraft accidents; and 5) an emerging category involving trap and skeet ranges (lead poisoning from expended ammunition).

Under article VIII, paragraph 5, of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), private German citizens, private firms, or local German governmental agencies may file claims with one of thirty-seven DCO's for torts committed by United States forces personnel acting within the scope of their duties. These torts include the negligent operation of United States facilities such as motorpools and fuel storage facilities. When DCO's forward these claims to USACSEUR for certification of involvement by United States forces, USACSEUR must certify those claims where the United States potentially caused or contributed to environmental contamination. Once the certificate is issued, the DCO adjudicates and settles the claim. The United States normally pays seventy-five percent of the cost of the claim, while the Federal Republic of Germany pays twenty-five percent. If a claim is declared "scope-exceptional," USACSEUR has the authority to review the DCO investigative file and approve the settlement amount prior to the DCO making final payment on a claim.

This article analyzes several claims and describes problems facing USAREUR regarding environmental hazards originating on United States installations. These hazards have already begun to threaten the health of thousands of United States and German citizens and have resulted in the creation of a committee chaired by the Judge Advocate, USAREUR, to work toward resolving them. [3]

[1] Defense Cost Offices are administrative claims settlement and finance agencies associated with the Federal Ministry of Finance, Federal Republic of Germany.

[2] Hydrocarbons are organic compounds made up of hydrogen and carbon compounds. Chlorinated hydrocarbons contain chlorine compounds as well. The EPA has found CHC's to be carcinogenic.

[3] This committee, Environmental Claims Coordinating Committee (ECCC) was established in November 1988. Membership consists of representatives from the Office of the Judge Advocate (OJA), United States Army Claims Service, DCSENG Environmental Branch, DSCRM, Community Relations Division, and Government Relations Division.

Pollution Resulting From Motorpool or Vehicle Degreasing Facilities

Case Study on Mannheim-Kaefertal

The most expensive environmental pollution claim facing USACSEUR is the Mannheim-Kaefertal case. It involves soil and water pollution by chlorinated hydrocarbons originating from a motorpool and a degreasing facility. In 1984 German authorities from the city of Mannheim detected high concentrations of trichlorethylene (TCE) in a monitoring well located near Taylor Barracks. This contamination concerned officials because of the hazardous nature of the compound and the threat that it posed to drinking water wells located nearby. German authorities decided to do an environmental study to define the magnitude of the pollution as well as to identify sources of the contamination.

To detect TCE, the Germans implemented a soil-gas sampling program that enabled the authorities to identify "hot spots" of contamination. During the course of this environmental study, high concentrations of TCE and tetrachloroethylene (PCE) were discovered in several areas around both Taylor and Sullivan Barracks in Mannheim. These concentrations were in excess of 900 micrograms per liter.

Environmental regulations that apply to DA activities in the FRG are those Host Nation (HN), DOD, and DA regulations that address environmental protection. German city, state, and federal governments have adopted very stringent ground-water regulations. Some applicable U.S. and HN regulations are AR 200-1, [4] Executive Order 12088, [5] and the German Federal Drinking Water Regulation (Trinkwasserverordnung) [6] that is applicable in the state of Baden-Wurttemburg where Mannheim and Kaefertal are located. The latter specifies a standard of 10 microgram/liter of total chlorinated organic compounds allowed in the drinking water source. Required standards for the cleanup of chlorinated hydrocarbons in the groundwater have not yet been established. Each German state sets its own goals based on regulatory interpretation and local conditions such as hydrology, topography, soil conditions, and population. The cleanup goal for Baden-Wurttemburg is less than 1 microgram per liter total chlorinated hydrocarbons after treatment. [7]

Compounds TCE and PCE are chlorinated hydrocarbons (CHC's), which are synthetic, volatile organic solvents. The EPA has identified these compounds as hazardous wastes and potentially carcinogenic. Industries manufacture these compounds for such uses as degreasers, paint strippers, and dry cleaning agents. One of the primary uses of TCE is as a degreasing solvent. Maintenance shops located on Taylor Barracks formerly used TCE to degrease engine parts. When the German authorities first discovered the TCE and identified maintenance shops on Taylor Barracks as a source, use of these chemicals was discontinued immediately. The compound PCE was detected in lesser concentrations in the groundwater. It is probable that this compound was also used as a degreasing agent at the maintenance shops.

During the past forty years, customers have used these compounds ubiquitously without the knowledge of the harmful side effects. Poor housekeeping, spillage, and improper disposal of these agents were not uncommon. These compounds are heavier than water, have a lower viscosity than water, and are nearly insoluble in it. They can easily penetrate such materials as wood, concrete, asphalt, plastics, and various soil horizons. [8] Because of these properties, it is possible for a spill to move through the soil and into the aquifer as a nearly solid "slug" of pure solvent. [9]

In order to further define the spread of the pollution in the upper aquifer, the Mannheim water authorities contracted an Architect/Engineer (A/E) to prepare a "plume" map in January 1986. A plume, as used here, refers to a stream of detectable pollutants in the underground strata. This plume map identified eleven different trails near Taylor and Sullivan Barracks. These plumes pose a significant hazard to existing German and American drinking water sources. One separate trail was located upgradient [10] from Taylor Barracks and was determined to originate from a former German landfill site. It does not, however, threaten any drinking water supply. A second plume map was done in April 1987 to determine the migration rate of the identified plumes detected earlier and to verify that there were no new sources of pollution. The second plume map indicated that the existing plumes were migrating downgradient towards the military housing area at Benjamin Franklin Village. The German water authorities then contracted with the University of Karlsruhe for a detailed investigation of the problem and a cleanup plan. This study included a thorough investigation of the subsurface geology, hydrogeology, evaluation of soil-gas patterns, evaluation of the pollution plumes by monitoring, and a model of the ground-water flow regime.

The University of Karlsruhe study confirmed that the pollution was still confined in the upper aquifer and that

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[4] Army Reg. 200-1, Environmental Protection and Enhancement (15 June 1982) [hereinafter AR 200-1]. Paragraph 1-8 of this regulation implements Executive Order No. 12088 for all DA activities.

[5] Exec. Order No. 12088, 3 C.F.R. 243 (1978). Paragraph 1-801 of this order requires all federal facilities operating OCONUS to follow applicable environmental pollution control standards of the host country or jurisdiction.

[6] German Federal Drinking Water Regulation (Trinkwasserverordnung), 2 May 1986, effective 1 October 1987.

[7] Zusammenfassung der Werte, UM-Erlass, 8 March 1987 (state regulation on groundwater cleanup).

[8] Soil horizons are soil layers with characteristic physical, chemical, and biological properties.

[9] U.S. Army Environmental Hygiene Agency, Groundwater Consultation No. 38-26-0320-88, Investigation of Chlorinated Hydrocarbons in the Groundwater, USMCA Mannheim, 26 April - 4 May 1988.

[10] The term "gradient" refers to the downvalley slope of a stream channel.

it was migrating downgradient at approximately 180 linear meters per year. Authorities are concerned that the pollution in the upper aquifer might reach a hydrogeologic "window" through which it is able to pass to a lower aquifer, thus contaminating the drinking water supply for the cities of Mannheim and Kaefertal. The University of Karlsruhe study estimated that, unless treatment was begun immediately, the pollution plume would possibly reach the hydrogeologic window by August 1988; this estimate proved somewhat inaccurate, however, as the plume had not reached the window by March 1989.

The state authorities of Baden-Wurttemburg require that groundwater sources contaminated with chlorinated hydrocarbons will be decontaminated by filtering the water through a Granulated Activated Carbon (GAC) filter system. As contaminated water passes through the filter media, the contaminants, such as TCE and PCE, adhere to the surface of the filter media. The filter media must be replaced or refurbished periodically and the contaminated filter media disposed of as hazardous waste. This is an expensive process.

German authorities installed a GAC filtration plant for a relief well northeast of Sullivan Barracks. After the water is filtered through the GAC plant, it is injected back into the ground to form a groundwater dam or artificial dam. This groundwater dam helps to steer the flow of contaminated water away from the suspected hydrogeologic window. The German authorities plan to install another similar GAC filtration plant at Taylor Barracks. Currently, at Taylor Barracks, the Director of Engineering and Housing (DEH) is pumping contaminated water from a relief well directly into the city sanitary sewer system. It has been found that this simple pumping action causes the CHC's to vaporize. This method is not nearly as efficient as GAC filtration and has other drawbacks as well. The water placed into the sanitary sewer system places an increased load on sewage treatment plants and this also propagates the pollution throughout the sewer line network.

The highest costs of operating a GAC filter plant are in the disposal of used filter media. Currently this material is sent to Belgium for refurbishing. Once the material is spent, it is placed into containers and disposed of as hazardous waste. The total projected cleanup claim for construction of the GAC plant at Taylor and Sullivan Barracks, to include installation of relief, injection, and monitor wells, operation and maintenance costs, and testing is approximately $8,333,000 over a seven-year period.

Pollution Resulting From the Operation of Laundry and Dry Cleaning Facilities

Case Study on Bad Kreuznach

Other major sources of chlorinated hydrocarbon pollution are laundry and dry cleaning facilities located on United States installations. The following case is a typical example of CHC pollution (several other cases originating from laundry operations are also pending at USACSEUR). In December 1986 German authorities from the City of Bad Kreuznach detected CHC pollution in a monitor well located near Marshall Barracks, an American installation. The potential widespread contamination to the city's water supply caused tremendous concern to city officials not only because of the threat to the drinking water, but also to water supplies used at spa complexes, which are major economic assets to the area. This city is renowned for its spas and their therapeutic value.

The county government assumed the costs for a detailed study by an A/E to identify the source and the magnitude of the pollution. The A/E study identified the dry cleaning facility on Marshall Barracks as the primary source of the pollution. There were at least ten other sources of pollution identified in this study including several light industrial activities in the area. Although it is almost impossible to quantify the amount of pollution introduced into the ground and ground water by each source, the greatest concentrations were found at Marshall Barracks near the dry cleaning facility.

Faulty dry cleaning equipment caused the CHC compounds to leak out onto the floor of the facility. Due to the physical properties of CHC compounds, vertical migration through the concrete floor and through the soil horizons occurred over an extended period of time.

Because both upgradient and downgradient soil borings indicated the presence of CHC's, the DEH contracted with an A/E to analyze soil and water samples at Rose Barracks near the petroleum, oil, and lubricants (POL) storage area, motor pool area, and the print shop. Rose Barracks is located approximately five kilometers upgradient from Marshall Barracks. It is probable that, due to the historical use of these compounds by U.S. Forces, they will also be detected in significant quantities at Rose Barracks.

City-owned drinking water wells located downgradient from the monitor well were shut down as a precautionary measure. The county government began immediate restoration measures adjacent to the dry cleaning facility by installing a GAC filtration plant. This plant utilizes the principles of "air stripping" and "soil-vapor extraction" to treat the pollution. Air stripping works by dropping the contaminated water over a sealed filter screen which greatly increases the surface area of the contaminated water. Upon contact with air, the CHC's vaporize and the contaminated air is processed through the GAC filter media. This filter media is then "steamed" and thus regenerated. Soil vapor extraction works by placing an air suction apparatus over a hole drilled in the contaminated ground. The air that is sucked out of the ground contains CHC's. That air is then filtered through the GAC filter media before being released into the atmosphere.

The A/E hired by the county also presented a cleanup plan to the county officials that consisted of a series of relief wells along the perimeter of Marshall Barracks. Water drawn from these wells would be filtered through a GAC filter and then injected into the ground to act as a groundwater dam to inhibit the flow of contaminated water towards city owned drinking water wells. The latest estimate for the cleanup of the contaminated water is in excess of $1,100,000.

Pollution Occurring at Fuel Storage Facilities

Case Study on Germersheim

A third category of environmental pollution involves non-chlorinated hydrocarbon pollution of the soil and ground water by POL. A private contractor, building a segment of an autobahn near the Germersheim Army Depot in April 1986, detected extensive POL contamination in the soil. Due to the location of the contamination, U. S. forces involvement was suspected. To minimize the cost of hydrogeologic investigations and to prevent duplication of effort, DEH, city, and county governmental officials agreed to employ a mutually acceptable A/E to identify the source and the magnitude of the pollution. An immediate investigation was launched by the German authorities and, with DEH cooperation, the source of the pollution was identified as a former warehouse on the Germersheim Army Depot.

The exact source of the pollution was an old oil distribution line that had been used to heat the facility. Previously, oil distribution lines located underground fed the oil-fired furnaces located inside the building. These lines ran from oil storage tanks located above ground just outside of the building. Approximately eleven years ago, those oil lines were dug up and repositioned above ground level. Prior to the oil line relocation, a very large leak developed at a welded joint in the oil supply line beneath the warehouse, and a large puddle formed on the floor of the warehouse. The line was repaired and the oil on the floor was disposed of. It is highly probable that this joint had been leaking for an extended period of time.

The A/E found that the upper aquifer near the depot had been contaminated by the POL compounds. Geologic studies further revealed that an impervious clay layer separated this layer from a lower aquifer, which is a drinking water source. The A/E and local officials agreed that the drinking water supply was not immediately threatened, but, given the nature of and the uncertainties involved in the subsurface geology, the POL contaminants needed to be removed or treated.

The A/E proposed two very different methods of treatment. The first method involved a complete soil exchange and was estimated to cost in excess of DM 36,000,000 ($20 million at the current exchange rate). The second method proposed has yet to be tried on a pollution problem of this magnitude. It involves injecting into the soil bacterial agents designed to attack the POL compounds and effectively neutralize them. The DEH recently decided to contract for a pilot program to test this biological approach and evaluate the results. The contract is scheduled to start in March 1989 and will run through the end of the calendar year. At that point, the results of monitoring and sampling should be known. This pilot program is expected to cost $1,000,000, considerably less than the soil exchange option.

Pollution Caused by Motor Vehicle or Aircraft Accidents

Case Study on Landratsamt Neuberg-Schrobenhausen

Vehicle accidents, where fuel is spilled, are another source of hydrocarbon compound pollution. For example, on October 24, 1986, an Army fuel truck containing 4,570 gallons of diesel fuel departed the Neuberg Fuel Depot. As the truck approached a double curve in the road, the driver lost control of the vehicle, and the fuel truck and trailer overturned. Approximately 2000 gallons of fuel spilled onto the ground. A complete soil exchange was accomplished to remove the POL contaminants from the site of the accident. The cost to the U.S. Government of this soil exchange was $10,830.

This type of environmental pollution claim occurs quite frequently. Although each individual claim is relatively inexpensive compared to the previously discussed claims, the frequency of occurrence makes this category of claims very costly. This is particularly true when contaminants penetrate into a relatively high ground water table, a sewer system, or onto crop producing lands.

Pollution Caused by Use of Trap and Skeet Ranges

Case Study of Interessengemeinschaft Geldersheim

The final category of claims involve trap and skeet ranges. In May 1988 USACSEUR received a claim alleging soil pollution by lead pellets of farming fields located outside Conn Barracks in Schweinfurt. The fields lay adjacent to the installation trap and skeet range.

Prior to receipt of this claim, the DEH environmental engineer had learned that the communities of Nuernberg and Neu Ulm had previously experienced problems with soil and water contamination resulting from the operation of their trap and skeet ranges. The DEH in Schweinfurt decided to convert the former trap and skeet range into a softball field and hired an A/E firm to perform a detailed analysis of the range's soil and underlying geology.

The A/E found that a dangerous concentration of soluble lead was contained in the top 30cm of the soil. In spite of the rather high concentrations of soluble lead in the upper 30cm of soil, there had been no penetration of lead into deeper levels of the soil, nor had lead contamination been discovered in the water wells or in the drinking water. The A/E also determined that there was no possible danger to the groundwater supply. The A/E was only allowed to test the soil from the firing line to the perimeter fence located 100 meters from the firing line, and he discovered that the highest levels of lead contamination existed at the 100m distance. Based upon the range estimated for weapons used, it can be assumed that higher levels of lead contamination will be found at a range of 130 to 170 meters from the firing line. At this range, there are farmers' fields currently under cultivation. The A/E recommended testing the soil in this area.

Because the local farmers do not plow deeper than 50cm, it is doubtful that lead will be detected at any greater depth. These fields have always been active, and they produce several crops per year. An analysis of crops for lead or other dangerous mineral concentrations has not yet been undertaken.

The A/E proposed, as an alternative to soil exchange, treating the contaminated soil with approximately three to four kilograms of lime per square meter every two years. This operation would be significantly less costly

than a complete soil exchange. It is estimated that a soil exchange of the top 50cm of soil in the fields adjacent to the trap and skeet range would cost approximately $111,000.

Conclusion

The evolution of environmental problems has demonstrated a need to formulate policy for handling environmental claims at the USAREUR level. In 1987 an informal working group consisting of officers from the International Law Division of the Office of the Judge Advocate, USAREUR; USACSEUR; and the Office of the Deputy Chief of Staff, Engineers, USAREUR, was established. The primary purpose of this group was to initiate an exchange of information between agencies on known environmental problems in the FRG. During the summer of 1988, a review of NATO SOFA environmental claims files revealed that an increasing number of claims required immediate action. Coordination with DCO's and local DEH officials indicated that perceived inaction on the part of USAREUR was resulting in a growing amount of adverse publicity for American forces in Germany. Two cases previously discussed, Bad Kreuznach and Mannheim, came to the forefront because of the imminent health hazards presented to the local populace in those areas.

Initiatives by the USAREUR Judge Advocate resulted in a roundtable discussion in October 1988 that was chaired by The Assistant Judge Advocate General. [11] The purpose of the discussion was to establish policy guidelines for assessing and solving the growing environmental claims problem in Germany. The participants at the roundtable determined that claims originating from pollution generated on United States installations resulting in off-installation damage would be processed on a case-by-case basis under article VIII, paragraph 5 of the NATO SOFA. The roundtable recognized that USACSEUR budget limitations could result in funding problems due to the large number of claims already known to USAREUR authorities. Ultimately, alternate funding sources to pay NATO SOFA environmental claims will probably need to be developed.

Shortly thereafter, the USAREUR Judge Advocate recommended to the Chief of Staff, USAREUR, that a committee be chartered to address current environmental claims problems from a policy standpoint. In November 1988 the Environmental Claims Coordinating Committee (ECCC) was officially commissioned. Committee meetings are an open forum for discussion of policy considerations of proposed action on pending claims and developing pollution problems. [12]

In summary, the environment is becoming as important a public issue today in Germany as it was in the United States in the 1970's. When it comes to public opinion regarding the stationing of United States forces in Europe, environmental problems generated by United States forces must be dealt with positively. With the support of commanders and staff alike, and with the creation of organizations such as the ECCC, USAREUR is moving ahead to confront the problem. USACSEUR has been and will continue to be an integral part of that effort.

Claims Notes

Personnel Claims Notes

Items for Republication

In response to a request for copies of items published locally by field claims personnel, U.S. Army Claims Service has received a number of claims notes and articles. Inasmuch as many of these articles cover the same subject matter, this Service decided to reprint some of them in the *Claims Report* over the next several months, rather than send all of them out as part of a claims publicity packet.

U.S. Armed Forces Claims Service, Korea, submitted the following six items which were written by Captain Thomas M. Alford. These items are run on Armed Forces Korea Network and in local bulletins on a recurring basis, and they can be readily adapted for use at other installations.

"Personnel preparing household goods and hold baggage shipments should be aware of their responsibilities under Chapter 11, AR 27- 20. It is the soldier's responsibility to ensure that the shipment inventory is completely and accurately filled out, especially where pre-existing damage, electronic goods and other expensive items are concerned. Failure to do so may adversely affect reimbursement in the case of shipping damage or loss. For more information call the Armed Forces Claims Service at [ ], or your local claims office."

"Quarters security requires the utmost attention by all personnel, on and off-post. As the weather warms, there is great temptation to leave windows unlocked during the occupant's absence. It is important that all personnel make sure their quarters are secure, and periodically check to ensure window and door locks are in proper working condition. For more information call the Armed

[11] Members include the Assistant Judge Advocate General for Civil Law; Office of the General Counsel, HQDA; the Commander, United States Army Claims Service; the Commander, United States Army Claims Service Europe; and the Chief, Environmental Law Division, OTJAG.

[12] USACSEUR, like so many other agencies, has also turned to automation to help monitor important issues. Environmental claims are no exception. NATO SOFA Claims Branch now maintains a computerized list of current environmental claims and provides this list to members of the ECCC at each meeting. USACSEUR personnel update the list on a bimonthly basis. The USACSEUR civil engineer has begun visiting sites of environmental claims and works closely with local DEH personnel to evaluate claims and to seek potential solutions to existing hazards. In addition to his own active role in the review and certification of environmental claims, the Commander, USACSEUR, has met with representatives from various German agencies to discuss issues on pollution claims. USACSEUR'S role is becoming more and more proactive.

Forces Claims Service at [ ], or your local claims office."

"During the warmer months outdoor activity, especially around the softball fields and golf courses, will increase. Parking a POV near these facilities normally means the owner assumes the risk of damage to the vehicle by stray balls. In such cases the U.S. Government will not reimburse the owner for damage. For more information call the Armed Forces Claims Service at [ ], or your local claims office."

"AR 27-20 requires that bicycles and motorcycles be firmly secured to a fixed, immovable object such as a bike rack, tree, or lamp post. Failure to do so will prevent reimbursement under the Army claims regulations if the bike or motorcycle is stolen. For more information call the Armed Forces Claims Service at [ ], or your local claims office."

"There is a limitation on what property can be shipped inside a POV in connection with a PCS movement. This limitation is set forth in AR 27-20, and the owner assumes the risk of damage or loss for any other property shipped. For a list of the types of property allowed, contact the Armed Forces Claims Service at [ ], or your local claims office."

"Personnel must remember to note all loss or damage to their household goods or holdbaggage on DD Form 1840 or its reverse side as soon as possible after delivery. All damage or loss to shipments *must* be noted on this form, and it must be delivered to the local claims office within seventy days after the shipment is delivered. Failure to do so may result in a reduction of any reimbursement. For more information call the Armed Forces Claims Service at [ ], or your local claims office." COL Gravelle.

New Personnel Claims Forms Available

The December 1988 revision of DD Form 1842 (Claim for Loss of or Damage to Personal Property Incident to Service) and the February 1989 revision of DD Form 1844 (List of Property and Claims Analysis Chart) have been printed and are available from AG Publications in Baltimore through normal distribution channels. These two forms have been printed on 8 1/2 inch by 11 inch paper, and claims offices are now authorized to use 9 1/4 inch by 11 3/4 inch manila folders for personnel claims in accordance with paragraph 15-5a, AR 27-20.

The December 1988 revision of DD Form 1843 (Demand on Carrier/Contractor) has also been approved, and the revised version of this form will be printed as soon as existing stocks of the previous version are used. Mr. Frezza.

Internal Damage to Personal Computers

USARCS is seeing an increasing number of claimants with internal damage to their personal computers in government-sponsored shipment. Sometimes there is evidence, such as broken parts, which shows that this damage is attributable to rough handling and is compensable under the Personnel Claims Act. Often, the evidence indicates that the damage is due to a mechanical defect in the item.

To forewarn potential claimants of this problem, please publish the following claims note in installation newsletters and other publications:

Problems with Shipping Your Personal Computer

Personal computers are delicate items. Quite often, they will malfunction after shipment. Unless internal damage to a computer is shown to be due to rough handling in shipment rather than a defect in the item, neither the government nor a private insurer will pay for the repairs. The only protection against this type of loss would be under a service contract or the manufacturer's warranty. Be advised of the risks involved!

Mr. Frezza.

Management Note

Claims Manual Change 11

In late April 1988 USARCS mailed Change 11 to the Claims Manual to all Claims Manual holders of record. Change 11 contains the following items:

Chapter 1, Personnel Claims, Bulletins #108 (Claims Involving Repair or Replacement Costs in a Foreign Currency) and #109 (Use of Carrier Estimates of Repair) are added. Appendix A (Table of Adjusted Dollar Value) is revised.

Chapter 2, Household Goods Recovery, Bulletin #14 (Forwarding Demands for Centralized Recovery) is added.

Chapter 7, Claims Office Administration, Bulletin #6 (Requesting Return of Files From USARCS), Bulletin #7 (Forwarding Monthly Claims Diskettes), and Bulletin #8 (Carrier Salvage Rights) are added.

Chapter 10, Bulletin #4 (Debugging the Personnel Claims Management Program) is added.

For a listing of all previous Manual changes, see the following editions of *The Army Lawyer*: Mar. 1989, at 47 (change 10); Dec. 1988 (change 9); Aug. 1988, at 52 (change 8); Feb. 1988, at 67 (change 7); Oct. 1987 at 61 (change 6); Aug. 1987, at 67 (change 5); Jun. 1987, at 49 (change 1-4). LTC Wagner.

Labor and Civilian Personnel Law Notes

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

Equal Employment Opportunity

New EEO Regulation

The new version of Army Regulation 690-600 (EEO Complaint Processing) has been approved for publication. The new regulation provides more detailed complaint-processing guidance and requires increased labor counselor coordination. One change requires EEO officers to provide labor counselors with a copy of formal complaints before acceptance or rejection, thus allowing labor counselor input to the decision whether to accept or reject complaints. Other changes require coordination with the labor counselor in all formal settlements and permit labor counselors to express their opinions on the merit of complaints during USACARA factfinding conferences.

Concern was voiced at the 1989 MACOM EEO Officer Conference about labor counselors who do not understand their role in the EEO complaint process. During pre-complaint processing, the labor counselor is obliged to advise the EEO Officer fully and impartially as requested. Only after a formal complaint is filed does the labor counselor's exclusive duty become representation of the command. Even then, the lawyer should recall the fundamentally non-adversarial nature of the administrative process and conduct himself or herself accordingly, consistent with the obligation to zealously represent agency interests. In evaluating cases for settlement, remember that the chance of success must always be weighed against the cost and inconvenience to the command of a lengthy defense.

Alcohol Handicap

The Rehabilitation Act of 1973 does not protect employees who have hidden their alcoholism from their employers. In a recent case an agency removed an employee for failure to provide medical documentation for a non-alcohol related illness. The supervisor had raised the possibility of alcoholism but dropped it for lack of evidence. The agency did not have sufficient indicators to put it on notice of alcoholism, so the protections of the Rehabilitation Act were not triggered. *Fong v. U.S. Department of Treasury*, 705 F. Supp. 41 (D.D.C. 1989).

Attorney Fees

Partial awards of attorney fees in civil actions may be granted to plaintiffs even though the matter is on appeal. In *Brown v. Marsh*, 707 F. Supp. 21 (D.D.C. 1989), the court gave a partial summary judgment to the plaintiff, and the government appealed. While the appeal was still pending, the court held that Brown was entitled to an interim partial attorney fee award. The judge reasoned that a partial award was warranted in order to balance the risks and incentives that lawyers face in taking EEO cases. An interim award to successful plaintiffs would serve as an inducement to attorneys to represent plaintiffs.

Rehabilitation Act Transfers

The First Circuit held in *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989), that the postal service did not violate the Rehabilitation Act by refusing to transfer an employee because the transfer would have violated the seniority rights provisions of a collective bargaining agreement (CBA). In so holding, the First Circuit adopted the rationale of *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987), which held that the requirements to accommodate a handicap cannot defeat the CBA provisions that are not themselves discriminatory.

In another case the MSPB held that a temporary employee has no right to reassignment to competitive positions as an accommodation to his handicap. The appellant was a TAPER (temporary appointment pending establishment of a register) employee. Although TAPER employees are in the competitive service, they do not have competitive status and therefore lack basic eligibility for noncompetitive assignment to a competitive position. *Johnston v. Department of the Navy*, 39 M.S.P.R. 451 (1989).

Affirmative Action

The Deputy Secretary of Defense has removed one obstacle to race or sex-conscious selection practices in support of affirmative action. On the recommendation of the DOD Equal Opportunity Council, the Deputy Secretary of Defense approved the deletion of language in DOD Directive 1440.1 that prohibits "preferential treatment" based *inter alia* on sex or race. Substitute language requires coordination of affirmative action programs with "the cognizant legal offices." The removal of the regulatory obstacle does not avoid the considerable hurdles placed in the way of affirmative action by the Supreme Court.

In the courts the Eleventh Circuit has held that a breach of a voluntarily adopted affirmative action plan (AAP) is not automatically a Title VII violation. Voluntary AAP's are moderate and flexible and do not guarantee preferential treatment for minorities or women in every case. When an AAP is breached, a determination must be made whether intentional discrimination has occurred. *Liao v. Tennessee Valley Authority*, 867 F.2d 1366 (11th Cir. 1989).

Mixed Motive Case Burdens of Proof

The Supreme Court held in *Price Waterhouse v. Hopkins*, No. 87-1167, 1989 WL 40807 (1989), that in mixed motive cases of discrimination, plaintiffs must prove that an unlawful factor (i.e., sex) was a substantial or motivating consideration in an employment decision, although they do not have to prove that "but for" the unlawful factor, a different decision would have been made. If a plaintiff can succesfully show that an unlawful factor was a substantial or motivating consideration, the employer must prove by a preponderance of the evidence that it would have made the same decision

even if the illegitimate factor had not been present. The court held that this scheme of burdens of proof was not patterned after *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in which a plaintiff must prove pretext before the burden shifted to the employer. In footnote 12 of the decision, the Court appears to create this separate scheme for burdens of proof in mixed motive cases.

Federal Sector Labor Relations

OSHA and Official Time

Collective bargaining agreements (CBA's) frequently limit the amount of official time that union representatives may use. In a recent controversy OSHA considered the impact of CBA's on its regulations in 29 CFR Part 1960, which permit an employee representative to accompany OSHA inspectors. OSHA accepted the Army's explanation that CBA's do not violate the OSHA regulations but rather may limit the official time that an individual can spend on an inspection. The union may substitute an alternate representative if the amount of official time by one union representative is unreasonable. DCSPER Labor Relations Bulletin # 268, 12 Apr. 1989.

Excepted Service Employees

Negotiated grievance procedures may not include a right for excepted service employees who are not preference eligible to have arbitral review of adverse actions. In *Department of the Treasury v. FLRA*, Civil No. 88-1159 (D.C. Cir. May 2, 1989), the court concluded that a proposal to permit grievance arbitration of adverse actions against nonpreference eligible excepted service employees was non-negotiable. The court was persuaded by *United States v. Fausto*, 108 S. Ct. 668 (1988), which held that the Civil Service Reform Act reflected a congressional intent not to permit nonpreference eligible excepted service employees to challenge adverse actions against them. *See also Department of Health and Human Services v. FLRA*, 858 F.2d 1278 (7th Cir. 1988).

Personnel Law Developments

Whistleblower Protection

On 10 April 1989, President Bush signed the Whistleblower Protection Act of 1989. The Act creates the Office of Special Counsel (OSC) as an independent agency (apart from MSPB). Under the new law, employees can pursue their own cases against agencies if OSC fails or declines to take action. It broadens the definition of retaliation to include threats of adverse personnel actions. It further extends protections to an employee who: 1) lawfully assists a fellow employee who is covered by the Act; 2) cooperates with or discloses information to the Inspector General of an agency or to the special counsel; or 3) refuses to obey an order that would violate a law. The Act prohibits OSC from revealing a whistleblower's identity without the individual's consent. One very significant change is that the statute lowers the burden of proof for whistleblower retaliation. Under the new law, OSC or an employee must only show that the whistleblowing was a *contributing* factor in the retaliatory action. The old standard required the employee to prove that the whistleblowing was a *significant* factor. If the "contributing factor" standard is met, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the action even in the absence of the whistleblowing. Labor counselors should call the Labor and Civilian Personnel Law Office whenever they become aware of an inquiry by OSC.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

As part of the continuing effort to enhance the career management and opportunities for civilian attorneys, The Judge Advocate General has sought appropriate Army training for civilian attorneys. As a result, the following Judge Advocate General's Corps civilian attorneys have been selected to attend the Army Management Staff College Class #89-2 (17 July - 20 October 1989):

Mr. Robert A. Frezza (GM-13) - U.S. Army Claims Service

Mr. Kenneth J. Allen (GS-13) - 7th Signal Command & Fort Ritchie

The Army Management Staff College (AMSC) is a fourteen week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training that is analogous to the military intermediate service school level. Beginning with the next class, this course will be conducted at Fort Belvoir, Virginia. In addition, USAREUR provides the same course in Germany.

The Judge Advocate General encourages civilian attorneys to apply for AMSC as an integral part of their individual development plans. Local civilian personnel offices are responsible for providing applications and instructions. Information may also be obtained by contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1353).

Applications for the next AMSC class (#90-1; 15 January - 20 April 1990) must be submitted not later than 1 August 1989. Local civilian personnel offices may establish an earlier date for MACOM processing. USAREUR attorneys are encouraged to apply for attendance at the USAREUR AMSC course.

In addition to the normal application process, attorneys should provide one copy of their application with an attached endorsement by the supervising staff judge

advocate or command legal counsel to the following address:

HQDA (DAJA-PT)
ATTN: MAJ England
Pentagon Room 2E443
Washington, DC 20310-2206

Criminal Law Note

Criminal Law, OTJAG

Chapter 10 Discharges and Reservists

The recent Reserve jurisdiction amendments to the Uniform Code of Military Justice and the related procedures in the Manual for Courts-Martial and in AR 27-10 authorize a reservist to be involuntarily ordered to active duty for only three purposes. These are: 1) to appear as an accused at an article 32 investigation; 2) to appear as an accused at a trial by court-martial; or 3) to receive nonjudicial punishment. There is no authority to order a reservist to active duty for the sole purpose of receiving and processing a request for discharge in accordance with chapter 10, AR 635-200.

Further, AR 635-200 applies only to active Army soldiers. This includes reservists ordered to active duty. There is no regulatory authority that would allow a reservist to voluntarily enter active duty to request such a discharge, nor is there authority that would allow a general court-martial convening authority (GCMCA) to act on a request submitted by a reservist not on active duty. Accordingly, a reservist must be on active duty at the time he submits a chapter 10 discharge and at the time the GCMCA takes action.

GCMCA's should be advised not to involuntarily order a reservist to active duty simply because the defense has indicated that the accused will submit a request for discharge under chapter 10, AR 635-200. Additionally, GCMCA's should not act upon a request for discharge if the reservist submitted the request while not on active duty or if the reservist is not on active duty when the request is presented for decision. It is only after a reservist has been ordered to, and has reported for, active duty for the purposes of court-martial that he or she can submit a request for a chapter 10 discharge.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Criminal Law Functional (On-Site) Training

On 28-30 April, the 122d ARCOM and the 2d Military Law Center hosted functional law training in New Orleans for all trial and defense court-martial teams within the Fifth Army area and for JA's within Fifth Army not serving in JAGSO's who perform criminal law duties. In addition, some JA's not performing criminal law duties who were able to obtain funding also attended. This was the third functional on-site training conducted for Fifth Army JAGSO's since Fifth Army adopted this innovative approach aimed at specific functional subject matter instruction vis-a-vis the more traditional legal instruction given to RC JA's based on their geographical location. The last functional training in AY 89 was conducted 19-21 May in Dallas for contract law teams.

The functional law training provides a program of instruction of sixteen hours and includes instruction by TJAGSA personnel, other active duty judge advocates, and Reserve component judge advocates. It is conducted from Friday afternoon to Sunday noon so that the instruction qualifies as an Army area school (sixteen hours of instruction) and RPA (School) funds may be used. Also, additional Annual Training days were used on a fragmented basis to fund some attendees. Friday is a day of instruction rather than a day of travel only.

During the New Orleans on-site, TJAGSA conducted a satellite broadcast concerning the fourth amendment from Charlottesville, with a telephone hook-up to enable the attendees to ask questions during the instruction. Criminal law instructors, Majors Jewell and Milhizer, made presentations on current criminal issues of interest to RC judge advocates.

Additionally, attendees were given a unique opportunity to hear from Major George Thompson, Office of the Judge Advocate, Headquarters, U.S. Army, Europe, who discussed area jurisdiction and utilization of JAGSO's in the European Theater. This enabled the nearly 200 attendees to learn first-hand how they will be employed. In addition to the Army attendees, there were RC JA's from the other services.

For defense court-martial teams, the Trial Defense Service provided a separate program of instruction focusing on RC defense counsel duties and professional responsibilities. General officer remarks were made by Major General Suter, The Assistant Judge Advocate General, and Colonel (P) Ritchie, USAR Special Assistant to The Judge Advocate General. Dr. Foley from the

Judge Advocate Guard and Reserve Affairs Department, TJAGSA, addressed personnel and policy issues of current interest to RC judge advocates. For those JAGSO personnel in attendance, the on-site provided an opportunity to meet and discuss common functional area issues. MAJ Carazza.

The Judge Advocate General's School Continuing Legal Education (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, and local action officers for The Judge Advocate General's School continuing Legal Education (On-Site) training program for Academic Year (AY) 1990. The Judge Advocate General has directed that all Reserve component judge advocates assigned to the Judge Advocate General Service Organizations (JAGSO's) or the judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135-316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The on-site program features instructors from The Judge Advocate General's School and has been approved for continuing legal education (CLE) credit in most states. Some on-sites also feature instruction by judge advocates from other services and from local civilian attorneys. The civilian bar is invited and encouraged to attend on-site training.

Action officers are required to coordinate with all Reserve component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Limited funding from ARPERCEN is available, on a case-by-case basis, for IRR members to attend on-sites in an ADT status. Applications for ADT should be submitted eight to ten weeks prior to the scheduled on-site to Commander, ARPERCEN, ATTN: DARP-OPS-JA (MAJ Kellum), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR may also attend for retirement point credit pursuant to AR 140-185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists/NCO and court reporter training to run concurrently with on-site training. In the past, enlisted training programs have featured Reserve component JAGC officers and non-commissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison. A model training plan for enlisted soldier on-sites has been distributed to assist in planning and conducting this training.

JAGSO detachment commanders and SJA's of other Reserve component troop program units will ensure that unit training schedules reflect the scheduled on-site training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

Questions concerning the on-site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Major Mike Chiaparas, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (telephone 804/972-6380).

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 90

DATE	CITY, HOST UNIT AND TRAINING SITE	SUBJECT/INSTRUCTOR/GRA REP/RC GO		ACTION OFFICER
7, 8 Oct 89	Minneapolis, MN 214th MLC Thunderbird Motel 2201 E. 78th Street Bloomington, MN 55420	Int'l Law Adm & Civ Law GRA Rep RC GO	MAJ Walsh CPT Hatch LTC Doll COL(P) Ritchie	MAJ Jack Elmquist 431 South 7th Street Minneapolis, MN 55415 (612) 371-9472 or (612) 633-7612
14, 15 Oct 89	Boston, MA 94th ARCOM Hanscom AFB Bedford, MA	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ McCallum CPT Cuculic COL Dowell BG Sherman	LTC Gerald D'Avolio 4 Bancroft Street Lynnfield, MA 01940 (617) 523-4860
27-29 Oct 89	Little Rock, AR 2d MLC TBD	Int'l Law GRA Rep RC GO	LTC Graham MAJ Walsh LTC Gentry COL(P) Compere	COL John C. Hawkins P.O. Box 5969 Texarkana, TX 75505

DATE	CITY, HOST UNIT AND TRAINING SITE	SUBJECT/INSTRUCTOR/GRA REP/RC GO		ACTION OFFICER
28, 29 Oct 89	Philadelphia, PA 153d MLC Willow Grove NAS Willow Grove, PA	Crim Law Int'l Law GRA Rep RC GO	MAJ Warner MAJ Welton Dr. Foley BG Sherman	LTC Robert Wert Box 169D-RD4 Hollow Road Malvern, PA 19355 (215) 569-2416 or (215) 569-5773
11, 12 Nov 89	Detroit, MI 106th JAG Det TBD	Crim Law Contract Law GRA Rep RC GO	MAJ Milhizer MAJ Murphy LTC Doll COL(P) Ritchie	LTC Steven H. Boak 44435 Charnwood Plymouth, MI 48176 (313) 453-6220 or (313) 455-1435
11, 12 Nov 89	New York, NY 77th ARCOM Fordham University School of Law New York, NY	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ McMillion MAJ Lisowski MAJ Chiaparas BG Sherman	LTC Anthony Benedict 1 Eileen Court Suffern, NY 10901 (914) 698-9300 or (914) 357-4290
8-10 Dec 89	San Antonio, Tx 1st MLC TBD	Contract Law GRA Rep RC GO	LTC Norsworthy MAJ McCann COL Dowell COL(P) Compere	MAJ Michael Bowles 8400 Blanco Road San Antonio, TX 78216 (512) 377-0008
6, 7 Jan 90	Los Angeles, CA 78th MLC Marina Del Rey Marriot Marina Del Rey, CA 90291	Int'l Law Adm & Civ Law GRA Rep RC GO	MAJ Welton MAJ Guilford Dr. Foley BG Sherman	LTC Michael Magasin Freeman, Freeman & Smiley 10th House, 1200 Los Angeles, CA 90034 (213) 398-6227 or (213) 559-3642
20, 21 Jan 90	Seattle, WA 6th MLC University of Washington School of Law Seattle, WA	Contract Law Crim Law GRA Rep RC GO	MAJ Aguirre MAJ Lisowski MAJ Chiaparas COL(P) Ritchie	LTC Robert Burke 3300 Columbia Center 701 Fifth Avenue Seattle, WA 98104 (206) 623-3427 or (206) 842-8182
10, 11 Feb 90	Orlando, FL 143d Trans Co TBD	Adm & Civ Law Crim Law GRA Rep RC GO	LTC Merck LTC Naccarato Dr. Foley BG Sherman	TBD
16-18 Feb 90	Austin, TX 5th Army TBD	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ Serene MAJ Merck LTC Doll BG Sherman	MAJ Dennis M. Carazza HQ, Fifth Army AFKB-JA Fort Sam Houston, TX 78234-7000 (512) 221-3542/4329
24, 25 Feb 90	Salt Lake City, UT 87th MLC TBD	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ Ingold MAJ Jewell MAJ Chiaparas BG Sherman	LTC Ruland Gill 87th MLC Bldg. 100 Fort Douglas, UT
3, 4 Mar 90	Nashville, TN 125th ARCOM Vanderbilt Law School	Contract Law Int'l Law GRA Rep RC GO	MAJ Mellies MAJ Walsh LTC Gentry COL(P) Compere	MAJ Robert Washko Room 879 U.S. Courthouse Nashville, TN 37203

DATE	CITY, HOST UNIT AND TRAINING SITE	SUBJECT/INSTRUCTOR/GRA REP/RC GO		ACTION OFFICER
10, 11 Mar 90	Columbia, SC 120th ARCOM	Adm & Civ Law Int'l Law	CPT Dougall MAJ Addicott	MAJ Edward J. Hamilton South Carolina National Bank
	University of South Carolina Law School Columbia, SC	GRA Rep RC GO	Dr. Foley COL(P) Ritchie	101 Greystone Boulevard Columbia, SC 29210 (803) 765-3227
17, 18 Mar 90	Washington, DC 10th MLC Humphreys Hall Fort Belvoir, VA	Crim Law Adm & Civ Law GRA Rep RC GO	MAJ Jewell MAJ Pottorff MAJ Chiaparas COL(P) Ritchie	LTC John F. DePue 10th MLC 550 Dower House Road Washingotn, DC 20315-0320
17, 18 Mar 90	San Francisco, CA 5th MLC 6th Army Conf. Room Presidio of San Francisco	Int'l Law Contract Law GRA Rep RC GO	LTC Graham LTC Norsworthy COL Dowell COL(P) Compere	COL David L. Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030 or (415) 461-3053
30 Mar-1 Apr 90	El Paso, TX 114th MLC TBD	Crim Law GRA Rep RC GO	MAJ Gerstenlauer MAJ Jewell LTC Gentry COL(P) Ritchie	LTC Glyn Cook P.O. Box 2463 Suite 4772-1 Shell Plaza Houston, TX 77252 (713) 241-2425
7, 8 Apr 90	Chicago, IL 7th MLC 4th Army Conference Room Fort Sheridan, IL	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ Bell MAJ Milhizer LTC Doll COL(P) Compere	CPT Kevin Kney 5232 Wilderness Trail Rockford, IL 61114 (815) 226-2891 or (815) 282-9483
5, 6 May 90	Columbus, OH 9th MLC TBD	Int'l Law Crim Law GRA Rep RC GO	MAJ Addicott MAJ Holland COL Dowell COL(P) Ritchie	LTC Michael Matuska 1709 Hansen Avenue Columbus, OH (614) 222-8938 or (614) 267-3374
5, 6 May 90	Jackson, MS 11th MLC Mississippi College School of Law	Adm & Civ Law Crim Law GRA Rep RC GO	MAJ Battles MAJ Merck MAJ Chiaparas COL(P) Compere	CPT Patricia Bennett 180 Commercial Avenue Jackson, MS 39209-3423 (601) 969-1100 or (601) 965-4480

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

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).

September 18-22: 11th Legal Aspects of Terrorism Course (5F-F43).

October 2-6: 1989 Judge Advocate General's Annual CLE Training Program.

October 16-20: 25th Legal Assistance Course (5F-F23).

October 16-December 20: 120th Basic Course (5-27-C20).

October 23-27: 43d Law of War Workshop (5F-F42).

October 23-27: 3d Installation Contracting Course (5F-F18).

October 30-November 3: 100th Senior Officer Legal Orientation Course (5F-F1).

November 6-9: 3d Procurement Fraud Course (5F-F36).

November 13-17: 23d Criminal Trial Advocacy Course (5F-F32).

November 27-December 1: 29th Fiscal Law Course (5F-F12).

December 4-8: 6th Judge Advocate & Military Operations Seminar (5F-F47).

December 11-15: 36th Federal Labor Relations Course (5F-F22).

1990

January 8-12: 1990 Government Contract Law Symposium (5F-F11).

January 16-March 23: 121st Basic Course (5-27-C20).

January 29-February 2: 101st Senior Officer Legal Orientation Course (5F-F1).

February 5-9: 24th Criminal Trial Advocacy Course (5F-F32).

February 12-16: 3d Program Managers Attorneys Course (5F-F19).

February 26-March 9: 120th Contract Attorneys Course (5F-F10).

March 12-16: 14th Administrative Law for Military Installations Course (5F-F24).

March 19-23: 44th Law of War Workshop (5F-F42).

March 26-30: 1st Law for Legal NCO's Course (512-71D/E/20/30).

March 26-30: 26th Legal Assistance Course (5F-F23).

April 2-6: 5th Government Materiel Acquisition Course (5F-F17).

April 9-13: 102d Senior Officer Legal Orientation Course (5F-F1).

April 9-13: 7th Judge Advocate and Military Operations Seminar (5F-F47).

April 16-20: 8th Federal Litigation Course (5F-F29).

April 18-20: 1st Center for Law & Military Operations Symposium (5F-F48).

April 24-27: JA Reserve Component Workshop.

April 30-May 11: 121st Contract Attorneys Course (5F-F10).

May 14-18: 37th Federal Labor Relations Course (5F-F22).

May 21-25: 30th Fiscal Law Course (5F-F12).

May 21-June 8: 33d Military Judge Course (5F-F33).

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 10-13: U.S. Army Claims Service Training Seminar.

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop

3. Civilian Sponsored CLE Courses

October 1989

1-6: NJC, Domestic Violence/Child Witness, Reno, NV.

1-6: AAJE, Search and Seizure, and the Law of Hearsay, Durham, NH.

2-3: PLI, Managing the Medium-Sized Law Firm, New York, NY.

2-3: PLI, Managing the Small Law Firm, New York, NY.

2-6: SLF, Antitrust Law Short Course, Dallas, TX.

2-6: GWU, Contracting with the Government, Washington, DC.

3-6: ESI, Competitive Proposals Contracting, Washington, DC.

4-5: UMLC, Institute on Condominium and Cluster Developments, Miami Beach, FL.

4-7: NELI, Employment Litigation Workshop, Washington, DC.

5-7: ALIABA, Basic Estate and Gift Taxation and Planning, Charleston, SC.

5-7: ALIABA, Pension, Profit-Sharing and Other Deferred Compensation, Washington, DC.

6: UMLC, Institute on Real Property Law, Miami Beach, FL.

7: NCLE, Advising Non-Profit and Tax-Exempt Organizations, Lincoln, NE.

8-11: NCDA, Representing State and Local Government, Ft. Lauderdale, FL.

12-13: PLI, Advanced Construction Claims Workshop, New York, NY.

12-13: PLI, Estate Planning Institute, New York, NY.

12-13: BNA, Individual Employment Rights, Chicago, IL.

12-13: SLF, Labor Law Institute, Dallas, TX.

12-13: ALIABA, Securities Law for Nonsecurities Lawyers, Boston, MA.

13-14: NYUSL, Corporate Tax Planning for Today, New York, NY.

16: BNA, Environmental Risk, Indianapolis, IN.

16: ESI, Truth in Negotiations Act Compliance, San Francisco, CA.

16-17: NELI, 1990 Affirmative Action Briefing, San Francisco, CA.

16-17: PLI, Institute of Banking Law and Regulation, Chicago, IL.

16-17: PLI, Section 1983 Civil Rights Litigation, New York, NY.

16-17: PLI, Securities Litigation, San Francisco, CA.

16-20: GWU, Administration of Government Contracts, Washington, DC.

17-20: ESI, Contract Negotiation, Washington, DC.

17-20: ESI, Contracting for Services, San Francisco, CA.

19-20: NELI, 1990 Affirmative Action Briefing, Seattle, WA.

19-20: ALIABA, Advanced Corporate Tax Planning Techniques, Dallas, TX.

19-20: PLI, How to Prepare an Initial Public Offering, Los Angeles, CA.

19-20: PLI, Immigration and Naturalization Institute, New York, NY.

19-20: LSU, Legislation and Jurisprudence, Lake Charles, LA.

19-20: PLI, Workshop on Legal Writing, New York, NY.

19-20: ABA, Litigation in Aviation, Washington, DC.

19-20: NYUSCE, Personnel Management: Legal Issues, Washington, DC.

19-20: PLI, Product Liability: Warnings and Recalls, San Francisco, CA.

19-20: BNA, Western Government Contracts, San Francisco, CA.

19-20: PLI, Lender Liability Litigation, San Francisco, CA.

19-21: ALIABA, Creative Tax Planning for Real Estate Transactions, Coronado, CO.

22-26: NCDA, Prosecution of Violent Crime, Atlanta, GA.

22-27: NJC, AIDS and Other Tough Medical Cases, Boston, MA.

23-24: PLI, Secured Creditors and Lessors under Bankruptcy Reform Act, New York, NY.

24-27: ESI, ADP Contracting, Washington, DC.

26-27: BNA, Benefits for Tax-Exempts, Washington, DC.

26-27: BNA, Employee Testing, Washington, DC.

26-27: PLI, Litigating the Complex Motor Vehicle "Crashworthiness" Case, San Francisco, CA.

26-27: ALIABA, Uses of Life Insurance in Estate and Tax Planning, Boston, MA.

26-27: ABA, Welfare Plans, Washington, DC.

26-28: ALIABA, Hazardous Wastes, Superfund, and Toxic Substances, Washington, DC.

26-28: ALIABA, Trial Evidence, Civil Practice in Federal and State Courts, San Francisco, CA.

27-28: LSU, Annual Estate Planning Seminar, Baton Rouge, LA.

27-28: PLI, Deposition Skills Training Program, New York, NY.

29-November 1: NCDA, Prosecuting Drug Cases, San Francisco, CA.

29-November 3: NJC, Administrative Law: Advanced, Reno, NV.

29-November 3: NJC, Constitutional Criminal Procedure, Boston, MA.

29-November 10: NJC, Administrative Law: Fair Hearing, Reno, NV.

30-31: NELI, 1990 Affirmative Action Briefing, Chicago, IL.

30-31: ALIABA, Chapter 11 Business Reorganizations, Boston, MA.

30-November 3: GWU, Cost Reimbursement Contracting, Washington, DC.

30-November 3: ESI, Federal Contracting Basics, Reno, NV.

31-November 3: ESI, Contract Pricing, Washington, DC.

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 Requirement

Thirty-three states currently have a mandatory continuing legal education (MCLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt but must declare exemption annually. -Reporting date: on or before 31 January annually.
*Arkansas	Office of Professional Programs Supreme Court of Arkansas 311 Prospect Building 1501 N. University Little Rock, AR 72207	-MCLE implemented 1 March 1989. -12 hours of CLE each fiscal year. -Reporting period ends 30 June 1990 the first year.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 (303) 893-8094	-Active attorneys must complete 45 hours of approved continuing legal education, including 2 hours of legal ethics during 3-year period. -Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3 years. -Reporting date: 31 January annually.
*Delaware	Commission of Continuing Legal Education 831 Tatnall Street Wilmington, DE 19801 (302) 658-5856	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: on or before 31 July every other year.
*Florida	Commission on Continuing Legal Education The Florida Bar 600 Apalachee Parkway Tallahassee, FL 32301 (904) 222-5286 (800) 874-0005 out-of-state	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period, including 2 hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: 10 hours every year.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Active attorneys must complete 12 hours of approved continuing legal education per year, including 2 hours of legal ethics. Modification effective 1 January 1990. Reporting date: 31 January annually.

State	Local Official	Program Description
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period. -Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Indiana Commission for CLE Program State of Indiana 1800 N. Meridian Room 511 Indianapolis, IN 46202 (317) 232-1943	-Attorneys must complete 36 hours of approved continuing legal education within a 3-year period. -At least 6 hours must be completed each year. -Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281-3718	-Active attorneys must complete 15 hours of approved continuing legal education each year, including 2 hours of ethics during 2-year period. -Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 (913) 357-6510	-Active attorneys must complete 12 hours of approved continuing legal education each year, and 36 hours during 3-year period. -Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3793	-Active attorneys must complete 15 hours of approved continuing legal education each year. -Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566-1600	-Active attorneys must complete 15 hours of approved continuing legal education every year, including 1 hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January annually beginning in 1989.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 S. Robert Street Suite 310 St. Paul, MN 55107 (612) 297-1800	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 30 June every 3d year.
*Mississippi	Commission of CLE Mississippi State Bar P.O. Box 2168 Jackson, MS 39225-2168 (601) 948-4471	-Attorneys must complete 12 hours of approved continuing legal education each calendar year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December annually.
*Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635-4128	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 30 June annually.

State	Local Official	Program Description
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442-7660	-Active attorneys must complete 15 hours of approved continuing legal education each year. -Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada 295 Holcomb Avenue Suite 5-A Reno, NV 89502 (702) 329-4443	-Active attorneys must complete 10 hours of approved continuing legal education each year. -Reporting date: 15 January annually.
New Jersey	New Jersey Bar Association 172 W. State Street Trenton, NJ 08608 (609) 394-1101	-1st year, "core" program consisting of 5 subjects must be completed within 2 Skills Course administration cycles following passage of bar exam; 2d year (12-month period commencing on 1st anniversary of bar exam), trial course and administrative law; 3d year (beginning on 2d anniversary of bar exam), 2 comparative basic courses from curriculum of New Jersey Institute for CLE.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., NE Albuquerque, NM 87125	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. -Reporting date: 1 January 1988 or first full report year after date of admission to Bar. -Reporting requirement temporarily suspended for 1989. Compliance fees and penalties for 1988 shall be paid.
*North Carolina	The North Carolina Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733-0123	-12 hours per year including 2 hours of legal ethics. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date 31 January annually.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255-1404	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 1 February submitted in 3-year intervals.
*Ohio	Supreme Court of Ohio Office of Continuing Legal Education 30 East Broad Street Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Active attorneys must complete 24 credit hours in a 2-year period, 2 of which must be in legal ethics. -Active duty military are exempt, but pay a filing fee. -Reporting date: Beginning 31 December 1989 every 2 years.
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Active attorneys must complete 12 hours of approved legal education per year,including 1 hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: On or before 15 February annually.

State	Local Official	Program Description
*Oregon	Oregon State Bar MCLE Administrator CLE Commission 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 (503) 620-0222 1-800-452-8260	-Must complete 45 hours during 3-year period, including 6 hours of legal ethics. -Starting 1 January 1988.
*South Carolina	State Board of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee Washington Square Bldg. 214 Second Avenue N. Suite 104 Nashville, TN 37201 (615) 242-6442	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt. -Reporting date: 31 January.
*Texas	Texas State Bar Attn: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463-1382	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. -Reporting date: Depends on birth month.
Utah	Utah State Bar Association 425 E. First South Salt Lake City, UT 84111 (801) 223-2020	-27 hours during 2-year period, including 3 hours of legal ethics. -Reporting date: effective 31 December 1989.
*Vermont	Vermont Supreme Court Mandatory Continuing Legal Education Board 111 State Street Montpelier, VT 05602 (802) 828-3281	-Active attorneys must complete 20 hours of approved legal education during 2-year period, including 2 hours of legal ethics. -Reporting date: 30 days following completion of course. -Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786-2061	-Active attorneys must complete 8 hours of approved continuing legal education per year. -Reporting date: 30 June annually.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121-2599 (206) 448-0433	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E-400 State Capitol Charleston, WV 25305 (304) 346-8414	-Attorneys must complete 24 hours of approved continuing legal education every 2 years, at least 3 hours must be in legal ethics or office management. -Reporting date: 30 June annually.

State	Local Official	Program Description
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703-3355 (608) 266-9760	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: 31 December of even or odd years depending on the year of admission.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632-9061	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 1 March annually.

5. Army Sponsored Continuing Legal Education Calendar (1 July 1989—1 October 1990).

The following is a schedule of Army Sponsored Continuing Legal Education that is not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Duncan, Heidelberg Military 8459). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: CPT Cuculic, TJAGSA, (804) 972-6342.

TRAINING	LOCATION	DATES
TCAP Seminar	Norfolk, VA	11-12 Jul 89
TCAP Seminar	Ft Bragg, NC	1-2 Aug 89
USAREUR Branch Office CLE	Heidelberg, FRG	4 Aug 89
USAREUR Contract Law - Procurement Fraud Advisor CLE	Heidelberg, FRG	18 Aug 89
USAREUR SJA CLE	Heidelberg, FRG	24-25 Aug 89
USAREUR Legal Assistance CLE	Garmisch, FRG	5-8 Sep 89
TCAP Seminar	Ft Carson, CO	12-13 Sep 89
5th Circuit Judicial Conference	Garmisch, FRG	Sep 89
PACOM CLE	Far East	16 Sep-8 Oct 89
TJAGSA On-Site	Minneapolis, MN	7-8 Oct 89
USAREUR Criminal Law CLE I	Chiemsee, FRG	9-12 Oct 89
USAREUR Criminal Law/Chief of Justice CLE	Chiemsee, FRG	13 Oct 89
USAREUR Trial Advocacy CLE	Chiemsee, FRG	13-15 Oct 89
TJAGSA On-Site	Boston, MA	14-15 Oct 89
USAREUR Criminal Law CLE II	Chiemsee, FRG	16-20 Oct 89
TCAP Seminar	Ft Lewis, WA	17-18 Oct 89
USAREUR International Law Trial Observer CLE	Heidelberg, FRG	19-20 Oct 89
TDS Workshop, Region II	Atlanta, GA	25-27 Oct 89
TJAGSA On-Site	Little Rock, AR	27-29 Oct 89
TJAGSA On-Site	Philadelphia, PA	28-29 Oct 89
Advanced Claims Workshop	Baltimore, MD	30 Oct-2 Nov 89
TDS Workshop, Region I	Fort Meade, MD	31 Oct-3 Nov 89
TJAGSA On-Site	Detroit, MI	11-12 Nov 89
TJAGSA On-Site	New York, NY	18-19 Nov 89
TCAP Seminar	Korea, Hawaii	November 89
TDS Workshop, Region III & IV	Leavenworth, KS	November 89
TDS Workshop, Region V	Treasure Island, CA	November 89
USAREUR International Law CLE	Berchtesgaden, FRG	27 Nov-1 Dec 89
TJAGSA On-Site	San Antonio, TX	8-10 Dec 89
TJAGSA On-Site	Los Angeles, CA	6-7 Jan 90
USAREUR Tax CLE	Ramstein A.F.B.	9-12 Jan 90
Far East Tax CLE	Far East	15-19 Jan 90
TJAGSA On-Site	Seattle, WA	20-21 Jan 90
TJAGSA On-Site	Orlando, FL	10-11 Feb 90
USAREUR Administrative Law CLE	Heidelberg, FRG	12-16 Feb 90

State	Local Official	Program Description	
TJAGSA On-Site		Austin, TX	16-18 Feb 90
TJAGSA On-Site		Salt Lake City, UT	24-25 Feb 90
TJAGSA On-Site		Nashville, TN	3-4 Mar 90
TJAGSA On-Site		Columbia, SC	10-11 Mar 90
USAREUR Contract Law CLE		Frankfurt, FRG	12-16 Mar 90
TJAGSA On-Site		Washington, DC	17-18 Mar 90
TJAGSA On-Site		San Francisco, CA	17-18 Mar 90
TJAGSA On-Site		El Paso, TX	30 Mar-1 Apr 90
TJAGSA On-Site		Chicago, IL	7-8 Apr 90
TJAGSA On-Site		Columbus, OH	5-6 May 90
TJAGSA On-Site		Jackson, MS	5-6 May 90
USAREUR Op Law CLE		Heidelberg, FRG	22-25 May 90
USAREUR Legal Assistance CLE		Heidelberg, FRG	4-7 Sep 90

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
AD B116097	Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B094235	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).

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2. Regulations & Pamphlets

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Number	Title	Date
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AR 40-35	Preventive Dentistry	26 Mar 89
AR 415-16	Army Facilities Components System	17 Mar 89
AR 680-5	Direct Exchange of Personnel Data Between PERSCOM and the SIDPERS (Minimize) (RCS MILPC-27)	1 Mar 89
AR 680-29	Military Personnel, Organization, and Type of Transaction Codes	1 Mar 89
PAM 600-8-1	Standard Installation/Division Personnel System (SIDPERS) Battalion S1 Level Procedures	1 Mar 89
PAM 600-19	Quality of Life Program Evaluation/Minimum Standards	31 May 89
UPDATE 16	Message Address Directory	31 Mar 89

* U. S. GOVERNMENT PRINTING OFFICE:1989-242-777:00006

By Order of the Secretary of the Army:

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