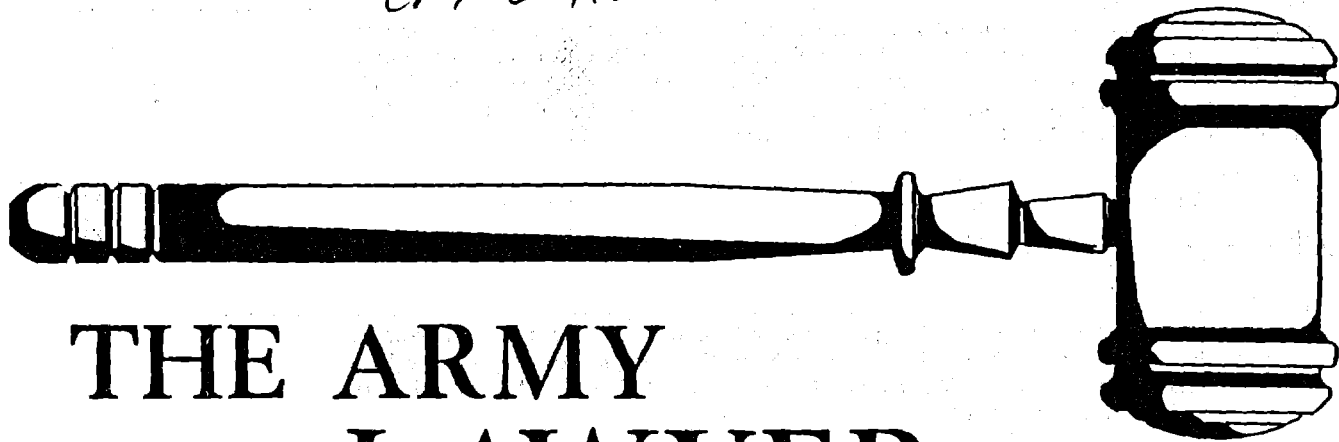


CPT O'KEEFE



# THE ARMY LAWYER

Headquarters, Department of the Army

---

Department of the Army Pamphlet 27-50-200

August 1989

Table of Contents

TJAG Policy Memorandum 89-3 .....	3
<b>Articles</b>	
Role of the Judge Advocate in Special Operations..... <i>Major Gary L. Walsh</i>	4
Constitutional Tort Actions Against Federal Officials After <i>Schweiker v. Chilicky</i> ..... <i>Major John Paul Woodley, Jr.</i>	10
<b>USALSA Report</b> .....	15
<i>United States Army Legal Services Agency</i>	
The Advocate for Military Defense Counsel	
DAD Notes .....	15
Extraordinary Writs: Filing the Petition for a Writ; Preserving the Issue: Entry of Conditional Guilty Pleas; Mounting a Constitutional Challenge on Article 125; <i>United</i> <i>States v. Horner</i> Revisited	
Trial Defense Service Note .....	21
Discovery Under Rule for Courts-Martial 701(e)—Does Equal Really Mean Equal? <i>Captain James A. Nortz</i>	
Trial Judiciary Note.....	30
<i>United States v. Vega: A Critique</i> <i>Lieutenant Colonel Patrick P. Brown</i>	
Contract Appeals Division—Trial Note .....	32
Hindsight—Litigation That Might Be Avoided <i>Major R. Alan Miller</i>	
Regulatory Law Office Note.....	34
Reducing the Cost of Electricity	
<b>TJAGSA Practice Notes</b> .....	35
<i>Instructors, The Judge Advocate General's School</i>	
Criminal Law Notes.....	35
Marriage, Divorce, and the UCMJ; Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman; An Order to "Disassociate" Held to Be Lawful; Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties; Self-Defense Need Not Be Raised by the Accused's Testimony	

Legal Assistance Items.....	41
Real Property Note (New Regulations Proposed for VA Home Loan Guaranty Program); Tax Notes (Basis to Be Used on Sale of Mutual Fund Shares; IRA Rollover Distribution Taxable in Year Received); Professional Responsibility Note (Attorney Held Not Liable for Client's Suicide); Consumer Law Notes (Airline Litigation; Tax Refunds for H&R Block Customers; Fair Debt Collections Practices Act)	
Claims Report.....	46
<i>United States Army Claims Service</i>	
Actionable Duty Based on Military Regulations <i>Joseph H. Rouse</i>	
Claims Notes.....	48
Personnel Claims Note ("Broken" Appliances and "Scratched" Furniture); Personnel Claims Recovery Note (Carriers' Denial of Liability Because the Loss or Damage Was Not Indicated at Delivery); Affirmative Claims Notes (Recovery Against Military Members; Installment Payments)	
Guard and Reserve Affairs Item.....	49
<i>Judge Advocate Guard and Reserve Affairs Department, TJAGSA</i> Reserve Component Quotas for Resident Graduate Course	
CLE News.....	50
Current Material of Interest.....	54

---

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

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

*The Army Lawyer* is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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

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

*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

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.



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



REPLY TO  
ATTENTION OF

DAJA-IM

21 JUN 1989

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: JAGC Automation Standards - Policy Memorandum 89-3

1. References.

- a. DAJA-IM letter, subject as above, 11 April 1986.
- b. DAJA-IM letter, Legal Automation Army-Wide System (LAAWS) Software, 5 January 1989.

2. In January 1989, we distributed version 2.0 of LAAWS software, including revised legal assistance and claims modules and a copy of Enable software, version 2.15. These products are the current JAGC software standards. Earlier standard software products including Displaywrite, dBase, Supercalc, Basic, and Hayes Smartcom are no longer JAGC standards. All our offices should now be using the current JAGC software packages in their daily legal support mission.

3. The LAAWS legal assistance software module represents The Judge Advocate General's opinion of the appropriate format for most legal assistance documents. Having such a standardized system will improve our operations worldwide because it provides job continuity to our attorney and administrative personnel regardless of where assigned. If you have to tailor a document to meet specific client needs, you should avoid altering the LAAWS source files for doing so will completely remove the standard document from your system. The program contains a word processing feature specifically to allow such tailoring without modifying the essence of the data base.

4. Needless to say, we are always looking for a better way to serve our clients. I encourage you to send us your comments and suggested improvements to the standard LAAWS Legal Assistance Module so that we can continue to enhance the software through regular updates. Substantive law suggestions should be forwarded to the Administrative & Civil Law Division, TJAGSA. Software procedural suggestions should be forwarded to LTC Brunson, Chief, Information Management Office, OTJAG.

*William K. Suter*

WILLIAM K. SUTER  
Major General, U.S. Army  
The Assistant Judge Advocate General

# Role of the Judge Advocate in Special Operations

Major Gary L. Walsh  
Instructor, International Law Division, TJAGSA

## Introduction

War is not what it used to be. Although the United States still faces and prepares to counter the threat of conventional conflicts, it is much more likely that the United States will become involved in unconventional conflicts. These conflicts are just short of conventional war on the so-called "spectrum of conflict." They have been variously categorized as low-intensity conflicts,<sup>1</sup> military operations short of war,<sup>2</sup> and unconventional conflicts.<sup>3</sup> The military operations that fall within these categories include: supporting resistance movements;<sup>4</sup> countering insurgencies against constituted governments; combating terrorism; peacekeeping; and peacetime contingency operations. Special operations forces will most likely be used to perform these missions. Indeed, the formation of a new Department of Defense agency<sup>5</sup> and a new unified combatant command,<sup>6</sup> both dedicated to special operations, indicates that special operations forces will play a significant role in any future conflict in which the United States may be involved. This article will focus on some of the legal issues associated with special operations and on the role of the judge advocate in this arena.

## Forces

The Army's special operations forces currently consist of Special Forces, Ranger, psychological operations, civil

affairs, and special operations aviation units. These units are organized under the 1st Special Operations Command (SOCOM). The 1st SOCOM, commanded by a major general, is located at Fort Bragg, North Carolina.

The four active component Special Forces groups are located at Fort Lewis, Washington (1st Group); Fort Campbell, Kentucky (5th Group); Fort Bragg, North Carolina (7th Group); and Fort Devens, Massachusetts (10th Group). Each of these brigade-equivalent units, with the exception of 5th Group, has a battalion permanently deployed in its theater of operation. The four missions of Special Forces are: 1) foreign internal defense (FID);<sup>7</sup> 2) unconventional warfare (UW);<sup>8</sup> 3) strategic reconnaissance;<sup>9</sup> and 4) strike operations.<sup>10</sup>

The Ranger Regiment has its headquarters and one battalion at Fort Benning, Georgia. Two additional battalions are located at Hunter Army Airfield, Georgia, and Fort Lewis, Washington. The Rangers are the Army's experts in the conduct of strike operations and special light infantry operations.

The Army's only active component psychological operations and civil affairs units are located at Fort Bragg, North Carolina.<sup>11</sup> The 4th Psychological Operations Group has four battalions, each of which is oriented to a specific region of the world. The 96th Civil Affairs Battalion is organized with four regionally-oriented com-

<sup>1</sup> Dep't of Army, Field Manual 100-20, Military Operations in Low-Intensity Conflict (Coordinating Draft), at 1-12 (Jan. 1988) [hereinafter FM 100-20].

<sup>2</sup> Swain, *Removing Square Pegs from Round Holes: Low-Intensity Conflict in Army Doctrine*, Military Review, Dec. 1987, at 13.

<sup>3</sup> Sarkesian, *The Myth of U.S. Capability in Unconventional Conflicts*, Military Review, Sept. 1988, at 12.

<sup>4</sup> This support to resistance forces would be in the context of an international armed conflict. The support of rebel forces in an insurgency, or an internal armed conflict, is viewed by many international legal scholars as illegal intervention in the internal affairs of another state. See generally Vincent, *Nonintervention and International Order* 281-326 (1974).

<sup>5</sup> The Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD-SO/LIC) was established by Congress through the Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. § 136(b)(4) (Supp. V 1987). The ASD-SO/LIC is the principal civilian adviser to the Secretary of Defense on special operations and low-intensity conflict matters. The current ASD-SO/LIC is Ambassador Charles Whitehouse.

<sup>6</sup> Established on April 16, 1987, the formation of the United States Special Operations Command (USSOC) was directed by an amendment to the Goldwater-Nichols Act. The original bill directed a study to determine the need for such a command. A later rider on the Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, directed that the command be established. The command's principal function is to prepare special operations forces to carry out assigned missions. All active and reserve special operations forces of the armed forces stationed in the United States are assigned to USSOC. The command is located at MacDill Air Force Base, Florida, and is commanded by General James J. Lindsay.

<sup>7</sup> Foreign internal defense operations are performed in remote, urban, or rural environments during peacetime and wartime to promote national and regional stability. These operations involve the development and use of political, economic, psychological, and military powers of a government to prevent or defeat an insurgency. U.S. Army Training and Doctrine Command, Pam. 525-34, Operational Concept for Special Operations Forces, at 7 (26 July 1984) [hereinafter TRADOC Pam 525-34].

<sup>8</sup> Unconventional warfare operations are essentially the reverse of foreign internal defense operations. Unconventional warfare operations exploit the military, political, economic, or psychological vulnerabilities of an enemy. Special operations forces do not create a resistance movement, but rather exploit an existing movement by providing support and advice to indigenous resistance forces. TRADOC Pam. 525-34, at 8.

<sup>9</sup> In a strategic reconnaissance operation, a small team is infiltrated deep into enemy-held territory. This team is equipped with specialized radio equipment that is exceptionally difficult to detect, despite frequent reporting. Normally, the theater commander would control the strategic reconnaissance elements. TRADOC Pam. 525-34, at 11.

<sup>10</sup> Strike operations include raids or ambushes, seizure of key facilities, interdiction of major lines of communications, and recovery operations. TRADOC Pam. 525-34, at 14.

<sup>11</sup> Approximately 78% of the Army's psychological operations assets and 97% of the civil affairs assets are in the Army Reserve. Command Brief, 1st SOCOM, 21 Oct. 1988.

support agreements. Failure to be aware of and comply with these legal and policy demands could result in embarrassment for the commander, at best, or a criminal investigation and prosecution, at worst.

A special operations commander should be provided legal advice by a judge advocate who knows not only the applicable law, but also the business of his client. The judge advocate must have a working knowledge of the force structure, missions, doctrine, and tactics of the special operations forces he advises. This knowledge may come from prior service in special operations units, from special operations training (e.g., Special Forces or Ranger training), or from working closely with the commanders and staff of the unit. Just as important, the special operations legal advisor must have access to information in order to effectively do his job. He should possess a Top Secret clearance, as a minimum, and should be eligible for access to Sensitive Compartmented Information.

### **The Role of the Legal Advisor to Special Operations Forces**

#### *Advising the Commanders and Staff*

The principal function of any command judge advocate is to provide advice on legal matters to the commander and his staff. Accordingly, commanders and staff are accustomed to soliciting and receiving advice from the judge advocate on traditional legal matters, such as military justice and administrative law. These same individuals are much less likely to envision the judge advocate as a staff expert on operational law, however. As a result of this fact, the judge advocate must convince commanders and staff members that he is a force multiplier and can assist in the accomplishment of the mission.

The judge advocate should advise the special operations forces commander and his staff of the Joint Chiefs of Staff requirement that a legal advisor provide advice during joint and combined operations and attend planning sessions for all joint and combined exercises.<sup>20</sup> The judge advocate should also inform these individuals of the Forces Command (FORSCOM) requirement that an operational law advisor review all operations plans and orders.<sup>21</sup> Additionally, and very importantly, the judge advocate should advise the commander and his staff that DA policy requires that judge advocates be consulted throughout the planning process.<sup>22</sup>

While these actions are important, the most effective step that the judge advocate can take is to establish his credibility. Because of the sensitivity of the missions with which they are tasked, the commanders and staff of

special operations forces units are necessarily very guarded in their relationships with individuals outside the unit. In order to advise his clients effectively, the judge advocate must be accepted as a member of the unit. He must foster a close working relationship, particularly with the command's operations and intelligence staff, by demonstrating that he is knowledgeable, willing to help, and can be trusted. This requires the judge advocate to participate in the traditional staff functions, such as meetings, briefings, and ceremonies. The judge advocate must also be prepared to perform such nonlegal duties as range safety officer, jumpmaster on airborne operations, or officer-in-charge of the night shift in the Tactical Operations Center during deployments. The judge advocate should also make an effort to observe or participate in the training of the soldiers he supports. By engaging in these types of activities, the judge advocate will accomplish two objectives. First, he will gain a better understanding of the mission of the unit and the capabilities and personalities of the soldiers and their leaders. Second, the judge advocate will demonstrate to the command and staff that he is a soldier, as well as an attorney, and that he can carry his own weight as a member of the unit. At the same time, the judge advocate must guard against the danger of losing sight of the fact that he is an attorney with a specific obligation and responsibility—to dispense objective and well-reasoned legal advice. He must not fall into the "can do" syndrome that ultimately ill-serves the commander.

#### **Law of War Training**

All special operations forces soldiers must receive law of war training commensurate with their duties and responsibilities.<sup>23</sup> This training must address not only the conventional legal issues that arise in armed conflict, but the situations peculiar to special operations as well. The following discussion addresses those issues most often raised by special operations forces soldiers during law of war training sessions.

#### *Use of the Enemy's Uniform*

Special operations forces, particularly Special Forces, may be tasked with a mission that requires them to infiltrate territory controlled by the enemy. The team that receives the mission may consider wearing the uniform of the enemy to ease its infiltration of, and operation within, enemy territory. Thus, these soldiers must be advised of the very narrow circumstances under which they may disguise themselves in the enemy's uniform and the ramifications resulting from their being captured in this uniform. Article 23f of the 1907 Hague

<sup>20</sup> Memorandum for the Joint Chiefs of Staff 59-83, subject: Implementation of the DOD Law of War Program, 1 June 1983. This memorandum also requires that legal advisors be immediately available to provide advice concerning law of armed conflict compliance during joint and combined operations and to review all plans, rules of engagement, directives, and other joint documents.

<sup>21</sup> Message, Forces Command, 291400Z Oct. 84, subject: SJA Review of Operations Plans. This message also requires operational law advisors to make direct liaison with the operations officers of FORSCOM units and to be available to participate in all exercises. The operational law advisor is to be considered as a member of the operations team.

<sup>22</sup> DA Policy Letter, *supra* note 16.

<sup>23</sup> *Id.*

panies. This battalion is capable of providing general support to the tactical commander and can provide expertise in refugee control, disaster relief, and civic action.

The Special Operations Aviation Group is located at Fort Campbell, Kentucky, with a subordinate unit stationed at Hunter Army Airfield, Georgia. This group conducts specialized aviation operations in conjunction with other special operations forces. These operations include infiltration and extraction of forces, resupply, armed escort, reconnaissance, and airborne command and control.

### Missions

One of the unique characteristics of special operations forces is their flexibility. These forces may be employed for a wide variety of missions, ranging from tactical to strategic. The vast scope of special operations is evidenced in its official definition:

Operations conducted by specially trained, equipped, and organized DOD forces against strategic or tactical targets in pursuit of national military, political, economic, or psychological objectives. These operations may be conducted during periods of peace or hostilities. They may support conventional operations, or may be prosecuted independently when the use of conventional forces is either inappropriate or infeasible.<sup>12</sup>

Special operations are typically conducted after theater commanders or other appropriate authorities<sup>13</sup> receive taskings issued by the National Command Authority. Because of the sensitivity and urgency of certain missions, the first requirement for special operations may be in peacetime, followed later by contingency and wartime requirements.<sup>14</sup>

The peacetime missions of special operations forces include: assisting foreign governments or other elements of the U.S. Government; training, advising, and supporting foreign military and paramilitary forces through security assistance programs; supporting foreign internal defense operations; terrorism counteraction; conducting show of force operations; and conducting humanitarian operations.<sup>15</sup>

The wartime missions of special operations forces include: foreign internal defense; unconventional warfare; strategic and tactical reconnaissance; strike operations; strategic and tactical psychological operations;

civil affairs support of general-purpose forces; civil administration; and special light infantry.<sup>16</sup>

### DA Policy on Special Operations

Special operations often do not fit neatly into the legal framework that supports conventional military operations. Nevertheless, the unique nature of special operations missions and the frequent need to conduct these missions in a discreet fashion do not exempt these operations from the requirement to comply with domestic and international law. In this regard, there are no special rules for special operations.

The Department of Army (DA) policy on special operations recognizes the very special, often sensitive, and extremely complex role played by special operations forces in peace and war.<sup>17</sup> Nevertheless, DA requires that all Army special operations comply with United States law, national policy, Department of Defense directives, and Army regulations. This requirement exists regardless of whether special operations are conducted during an international or non-international conflict or during peacetime.<sup>18</sup> Recognizing the need for legitimacy in special operations, DA requires that a judge advocate be consulted throughout the operational planning process "in order to ensure that special operations plans comply with United States law and to provide maximum protection to special operations personnel in the event of their capture or detention."<sup>19</sup>

### The Need for a Legal Advisor to Special Operations Forces

Army special operations forces currently receive operational law support from the staff judge advocate, 1st SOCOM. Additionally, a judge advocate is assigned to each Special Forces group, the Psychological Operations group, and the Ranger regiment. These attorneys are responsible for providing the legal advice that a special operations unit commander requires to perform his assigned mission.

Special operations missions are politically sensitive, particularly in a peacetime or low intensity conflict environment; therefore, the area of special operations is fraught with potential legal pitfalls. The commander must consider not only the effect of traditional law of war requirements on his operation, but also the requirements of domestic United States law, such as security assistance and intelligence statutes, and international law in the form of mutual defense treaties and host nation

<sup>12</sup> Joint Chiefs of Staff Publication No. 1, Dictionary of Military and Associated Terms, at 339 (1 June 1987) [hereinafter JCS Pub 1].

<sup>13</sup> The commander-in-chief (CINC) of the unified combatant command in whose geographic area the activity or mission is to be conducted will exercise command over the mission. Nevertheless, the President or the Secretary of Defense may direct that the CINC of the U.S. Special Operations Command exercise command of a selected special operations mission. 10 U.S.C. § 167(d) (Supp. V 1987).

<sup>14</sup> TRADOC Pam. 525-34, at 3.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> Letter, HQ, Dep't of Army 525-86-1, subject: DA Policy on Special Operations, 10 July 1986 [hereinafter DA Policy Letter]. While this letter expired on 10 July 1988, it continues to reflect Army policy.

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

<sup>19</sup> *Id.*

Regulations<sup>24</sup> prohibits the improper use of the enemy's uniform. The difficult issue, however, is that of determining a *proper* use of the enemy's uniform. It is well settled that wearing the enemy's uniform while engaged in actual combat is unlawful.<sup>25</sup> Nevertheless, the enemy's uniform may be used by soldiers to facilitate movement into and through the enemy's territory.<sup>26</sup> The soldier and his commander must recognize that, if the soldier is captured while wearing the enemy's uniform, he will very likely be denied the status of a prisoner of war.<sup>27</sup> While it is U.S. policy that the enemy's uniform may be used properly for infiltration of an enemy's lines,<sup>28</sup> article 39 of Protocol I to the Geneva Conventions prohibits this and most other uses of the enemy's uniform.<sup>29</sup> Thus, an enemy nation, party to Protocol I, may consider the use of its uniform by U.S. forces as a war crime.

### *Handling Prisoners of War*

One question that is frequently asked during law of war training concerns the proper disposition of prisoners of war captured by a special operations forces team while on a mission deep in enemy territory. This question evidences a legitimate concern, as several of the wartime special operations missions would require special operations forces to operate in enemy territory, often for extended periods of time. These special operations forces teams would likely be small in number, usually twelve or fewer soldiers. A team on one of these deep penetration missions that captures an enemy soldier would be substantially disadvantaged. It would have to dedicate one or two members to guard the prisoner, an action detracting from the team's primary mission. Moreover, the prisoner would undoubtedly hamper the movement of the team and increase the likelihood of the team's detection by the enemy. It is often suggested that

the "field solution" to the problem is to shoot the prisoner. This, of course, would constitute a grave breach of the Geneva Convention for Prisoners of War,<sup>30</sup> and U.S. doctrine clearly states that prisoners of war cannot be killed under such circumstances.<sup>31</sup> Given this fact, the judge advocate must propose a credible solution. The following courses of action, with their obvious advantages and disadvantages, may be discussed in an effort to force special operations forces personnel to consider how they might realistically deal with this issue within the bounds of the law.

—Evacuate the prisoner of war, prior to completing the mission, to an existing prisoner of war camp under United States control. This course of action contemplates an ability to procure, through operational channels, some sort of transportation out of the area of operations.

—Bind or confine the prisoner and gag him in order to suppress sound. Depending on the size of the unit and the mission, the prisoner could be left under guard or moved with the unit during the conduct of the mission.

—Release the prisoner of war. The enemy soldier would then have to find his way back to his own forces. If wounded, medical care should be provided, as available, and the enemy soldier should be left where he would be found.<sup>32</sup>

### *Assassination*

As part of the wartime missions of strike operations and unconventional warfare, special operations forces may be required to attack tactical or strategic targets deep in enemy territory. It is possible that one of these targets may be a specific member of the enemy force. Would the killing of a specific enemy constitute assassi-

<sup>24</sup> Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 939 [hereinafter 1907 Hague Regulations], reprinted in Dep't of Army, Pam. 27-1, Treaties Governing Land Warfare, at 5 (Dec. 1956)

<sup>25</sup> 2 H. Lauterpacht, Oppenheim's International Law 429 (7th ed. 1952).

<sup>26</sup> T. Lawrence, The Principles of International Law 445 (1895). The rule is generally accepted that "troops may be clothed in the uniform of the enemy in order to creep unrecognized or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assault." *Id.*

<sup>27</sup> Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 74 (July 1956) [hereinafter FM 27-10] states: Members of the armed forces of a party to the conflict . . . lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.

<sup>28</sup> *Id.* para. 54.

<sup>29</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. Article 39 prohibits the "use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations." Though the United States has determined that it will not ratify Protocol I (see Letter of Transmittal from President Ronald Reagan to the Senate of the United States (Jan. 29, 1987)), and does not endorse article 39 as customary international law, this provision nevertheless illustrates the fact that U.S. personnel who are captured wearing the uniform of the enemy may well be denied prisoner of war status.

<sup>30</sup> Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, art. 13, prohibits any unlawful act causing death of a prisoner.

<sup>31</sup> FM 27-10, para. 85, states:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.

<sup>32</sup> G. Dickey, Treatment of Prisoners of War 3 (Sept. 11, 1984) (unpublished staff study).

nation or would it be a lawful method of waging war? Special operations planners and operators must be able to distinguish between the lawful and unlawful killing of the enemy. Thus, the judge advocate must be capable of providing advice concerning the domestic and international legal proscriptions against assassination.

Executive Order 12,333 states that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."<sup>33</sup> Article 23b of the Hague Regulations of 1907 essentially prohibits assassination in wartime by outlawing the "treacherous wounding or killing" of the enemy.<sup>34</sup> Although no definition of assassination exists that is sufficiently precise to provide definitive guidance to special operations planners or operators, Department of Army guidance states that article 23b does not prohibit an attack on individual soldiers or officers of the enemy, wherever they may be located.<sup>35</sup> Through law of war training, the judge advocate must emphasize to special operations forces that combatants are subject to attack at any time or place, regardless of their activity when attacked. An individual combatant can be targeted lawfully whether he or she is directly involved in hostilities, providing logistical support, or acting as a staff planner.

As an illustration of this point, the judge advocate may refer to an excellent World War II historical example. A British commando party conducted a raid on the headquarters of Field Marshall Irwin Rommel's African Army at Beda Littoria, Libya, in 1943. The operation was carried out by military personnel in uniform, and the objective was the seizure of Rommel's operational headquarters, including his own residence, and the capture or killing of enemy soldiers therein.<sup>36</sup> The British Manual of Military Law cites this operation as an attempt to kill a specific enemy that complies with article 23b of the Hague Regulations.<sup>37</sup>

### Reviewing Operations Plans

The judge advocate in a special operations unit must review each of the operations, contingency, and exercise plans affecting his unit. As many of these plans will call for the unit to support a larger conventional operation, the judge advocate must understand the tasks of the special operations unit. If the unit has already developed a plan to support that of the higher headquarters, the judge advocate should review this plan for compliance with the law of war, United States law, national policy,

Department of Defense directives, and Army regulations. If the unit is in the process of developing a supporting plan, the judge advocate should become a part of this process. He must convey to the operations officer that the provision of legal input as the plan is being developed is much more effective and less time consuming than a belated review of the completed product.

The judge advocate must review all aspects of the operation. A review that extends only to the "mission" and "execution" paragraphs of the plan will very likely fail to analyze a myriad of legal issues contained in a number of other paragraphs and annexes to the plan. For example, the medical annex to an exercise plan may not address the legal issue of introducing narcotic medications into an allied country. Experience indicates that the best tool available to assist the judge advocate in conducting an exhaustive review of these plans is the "OPLAN Checklist," published by the International Law Division of The Judge Advocate General's School. This checklist, developed by the Headquarters Marine Corps Law of War Reserve Augmentation Unit, follows the format of the Joint Operations Planning System.

### Unique Special Operational Legal Issues

#### Combined Exercises

Special operations forces train extensively for their wartime missions by exercising with host country armed forces overseas. Army special operations forces conducted thirty-three combined exercises at the direction of the Joint Chiefs of Staff during FY 88.<sup>38</sup> Special operations forces also participated in an additional twenty-five combined exercises during this same period.<sup>39</sup> These combined exercises afford special operations forces with an excellent opportunity to train in the regions of the world to which they are slated to deploy in "real world" situations.

The judge advocate must be aware of the legal issues presented by exercises. Perhaps the most important of these issues is the jurisdictional status of U.S. forces training in a host country. A peacetime stationing arrangement may exist between the U.S. and host country that establishes this jurisdictional status. If there is no such agreement, however, the judge advocate must take the necessary steps to secure one. He must first determine who within the appropriate unified command has been delegated the authority to negotiate interna-

<sup>33</sup> Exec. Order No. 12,333, § 2.11, 3 C.F.R. 200, 213 (1982), reprinted in 50 U.S.C. app. § 401 at 44, 50 (1982).

<sup>34</sup> Hague Regulations of 1907, *supra* note 23. Article 23b states that it is forbidden to "kill or wound treacherously individuals belonging to the hostile nation or army."

<sup>35</sup> FM 27-10, para. 31, construes article 23b of the Hague Regulations as prohibiting assassination but not "attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."

<sup>36</sup> J. Ladd, *Commandos and Rangers of World War II* 120 (1978). The mission was unsuccessful. The raiding force infiltrated some 125 miles from the coast of Libya in miserably wet weather, only to attack the wrong target. The headquarters turned out to be a supply troops' center, and Rommel, as far as it is known, had never visited it. Very few of the 53-man raiding force were able to escape and evade back to allied lines. The commander of the force was posthumously awarded the Victoria Cross.

<sup>37</sup> Manual of Military Law, Part III, § 15 n.2 (1958).

<sup>38</sup> Telephone interview with Mr. John Knabb, Exercise Division, G-3, 1st Special Operations Command (May 31, 1989).

<sup>39</sup> *Id.*



tional agreements.<sup>40</sup> In making this determination, the judge advocate should first contact the Unified Command's legal advisor.

After determining the negotiating authority for the Unified Command, the judge advocate must request, through command channels, that this authority conclude an agreement setting forth the jurisdictional status of U.S. forces within the host country. If possible, the negotiating official should seek some form of diplomatic immunity for U.S. forces. Though the host nation may not extend complete criminal and civil immunity to the deploying special operations forces personnel, it may agree to grant these soldiers the same privileges and immunities accorded the administrative and technical staff of the U.S. embassy.<sup>41</sup> If the host nation does not consent to this type of diplomatic immunity, the negotiating official should attempt to obtain a foreign criminal jurisdiction arrangement similar to that contained in the NATO SOFA.<sup>42</sup> This type of arrangement will provide at least some jurisdictional protection and procedural safeguards for the deploying special operations forces.

The agreement with the host nation should also address a number of other relevant issues, to include: entry and exit requirements; customs and taxes; environmental laws; the security of U.S. forces; and logistical support to be provided by the host nation.

The judge advocate must also review all proposed training, construction, and humanitarian assistance and civic action (HCA) activities that are to occur during the course of the exercise, in order to ensure that these activities comply with existing statutory and regulatory requirements. Legislation exists that provides DOD with greater flexibility in conducting such activities during combined exercises,<sup>43</sup> but particular care must be taken to differentiate carefully between legitimate exercise-related activities and activities that are more properly conducted under security assistance programs. Only by attending all exercise planning sessions can the judge advocate ensure that all exercise activities remain within the scope of U.S. law.

#### *Security Assistance Missions*

Special operations forces, particularly the Special Forces, often are tasked to send Mobile Training Teams (MTT's) overseas to conduct security assistance training. The judge advocate must review the proposed mission in order to ensure that the jurisdictional status of the team

members has been addressed. Typically, the mission will be conducted as a Foreign Military Sales case under the Arms Export Control Act.<sup>44</sup> The Foreign Military Sales Letter of Offer and Acceptance should spell out the status of the team members while they are in the host country. Mobile Training Team members will probably be accorded the same privileges and immunities that are provided to the administrative and technical staff of the U.S. embassy. The judge advocate should therefore refer to the operative bilateral agreement between the U.S. and the host nation in order to determine the extent of these privileges. If the Letter of Offer and Acceptance does not address the jurisdictional status of U.S. forces, the judge advocate should contact the Security Assistance Training Management Office at Fort Bragg, North Carolina, or the Security Assistance Training Field Agency at Fort Monroe, Virginia, for assistance.

While the Mobile Training Team is in the host country, it will operate under the control of the Unified Command responsible for that area of the world. The CINC exercises this control through the U.S. Military Mission in the host country. Nevertheless, the team may operate in a field environment far removed from the U.S. embassy or consulate. The team members must therefore be aware of the sensitive and visible nature of their mission. For this reason, the judge advocate should thoroughly brief the Mobile Training Team concerning the laws and customs of the country to which they deploy. This briefing takes on particular importance if team members have not previously deployed to this country.

The Mobile Training Team may deploy to a country experiencing low intensity conflict. In this situation, team members must be advised of the Arms Export Control Act prohibition against engaging in combat-related activities.<sup>45</sup>

#### *Targeting*

Strike operations are among the wartime missions assigned to special operations forces. As a result, these forces may be required to attack tactical or strategic targets. These missions are normally developed through a formal procedure by which a unified command provides a target folder to the special operations unit. This unit then analyzes the target and prepares a plan of execution, returning the plan to the Unified Command or forwarding it to a higher command for approval.

<sup>40</sup> The Chairman of the Joint Chiefs of Staff has the authority to negotiate and conclude international agreements, pursuant to Dep't of Defense Directive 5530.3, International Agreements (June 11, 1987) [hereinafter DOD Dir. 5530.3]. The Chairman of the Joint Chiefs of Staff has further delegated this authority to the commanders-in-chief of the unified commands.

<sup>41</sup> Under article 37(2) of the Vienna Convention on Diplomatic Relations (22 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95), members of the administrative and technical staff of an embassy are entitled to complete criminal immunity and civil immunity for those acts committed in an official capacity.

<sup>42</sup> See generally Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. VII, 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67.

<sup>43</sup> For discussion of the legislation relating to combined exercises, see International Law Division, The Judge Advocate General's School, U.S. Army, The Operational Law Handbook, chap. 3, sec. III C (Feb. 1989).

<sup>44</sup> 22 U.S.C. §§ 2751-2796c (Supp. V 1987).

<sup>45</sup> Section 21(c)(1) of the Arms Export Control Act prohibits U.S. personnel from performing any duties of a combatant nature, including duties related to training and advising, that may result in their becoming involved in combat activities.

The special operations unit's targeting committee requires the assistance of a legal advisor in developing the target folder to ensure that the plan complies with both domestic and international law. While the plan likely will have received a legal review at the Unified Command, much time can be saved by having a judge advocate involved in the formulation of the plan at the special operations unit level. Thus, the judge advocate must be an active member of his unit's targeting committee.

### Civil Affairs

Civil affairs units support both conventional and special operations units.<sup>46</sup> These civil affairs assets provide the commander with advice and assistance concerning civil-military operations. Civil affairs are especially critical to those special operations that depend on the support of the local populace for their success, such as foreign internal defense and unconventional warfare operations.

The judge advocate should contact the civil affairs units that support his special operations unit for each

<sup>46</sup> TRADOC Pam. 525-34, para. 6-3.

operation and exercise plan. He should then determine how the civil affairs units plan to support his unit and whether these units have their own legal staff. Regardless of whether the civil affairs units possess in-house legal assets, the special operations judge advocate must be prepared to advise his commander on the legal aspects of civil affairs.

### Conclusion

Special operations are politically sensitive, particularly in a peacetime or low intensity conflict environment; therefore, this area is fraught with potential legal pitfalls. Failure to address these issues can jeopardize U.S. relations with an ally or result in a loss of public and congressional support for a program vital to U.S. national security interests. The special operations commander needs the legal advice necessary to enable him to avoid these pitfalls, and DOD policy requires that he be provided with this advice. This is the mission of the special operations legal advisor.

## Constitutional Tort Actions Against Federal Officials After *Schweiker v. Chilicky*

Major John Paul Woodley, Jr., USAR

### Introduction

Since the landmark Supreme Court decision in *Bivens v. Six Unknown Federal Narcotics Agents*<sup>1</sup> a substantial amount of litigation has taken place in which the plaintiffs seek to impose personal liability on federal officials for alleged deprivations of constitutional rights. The Supreme Court has repeatedly been called upon to define the scope of the *Bivens* constitutional tort action and to refine the nature of the defenses and immunities that federal officials may use to insulate themselves from personal liability for actions taken in the course of their official duties.

*Schweiker v. Chilicky*<sup>2</sup> is the Court's most recent attempt to define the appropriate limits of the *Bivens* action. This article will explore the background and holding in *Schweiker v. Chilicky* and the implications of that holding for attorneys charged with defending federal officials in constitutional tort actions.

### Historical Background

A brief overview of the development of the constitutional tort action is necessary to an understanding of the significance of *Schweiker v. Chilicky*.<sup>3</sup> In *Bivens* the plaintiffs complained of an unlawful search and seizure carried out by federal law enforcement officials. They sought money damages from the individual law enforcement officials as compensation for a violation of their fourth amendment right to be free from unreasonable searches and seizures. The Supreme Court held that the plaintiffs could maintain such an action because they had no other remedy to vindicate their important constitutional rights.

In *Butz v. Economou*<sup>4</sup> the Court extended the rationale of *Bivens* to apply to fifth amendment due process rights, and in *Carlson v. Green*<sup>5</sup> the Court expanded constitutional tort doctrine to embrace the eighth amendment as well. The cases that followed *Bivens* recognized

<sup>1</sup> 403 U.S. 388 (1971).

<sup>2</sup> 108 S. Ct. 2460 (1988).

<sup>3</sup> For an excellent discussion on the historical development of constitutional tort actions, see Euler, *Personal Liability of Military Personnel for Actions Taken in the Course of Duty*, 113 Mil. L. Rev. 137 (1986).

<sup>4</sup> 438 U.S. 478 (1978).

<sup>5</sup> 446 U.S. 14 (1980).

two broad areas of limitations on constitutional tort actions. The first area recognized that certain officials in certain contexts should enjoy either absolute or qualified immunity from suit. Absolute immunity was extended to the President<sup>6</sup> and to judges, prosecutors, and their administrative agency equivalents.<sup>7</sup> Qualified immunity is an affirmative defense in which the official must establish that his conduct did not violate a clearly established statutory or constitutional right.<sup>8</sup> If the official can establish this proposition as a matter of law prior to trial, the *Bivens* action will be dismissed.

The second area of limitation on constitutional tort actions is that the Supreme Court has declined to imply a private right of action under the constitution in certain contexts in which there exist "special factors counselling hesitation."<sup>9</sup> In *Chappell v. Wallace*<sup>10</sup> the Court held that the unique disciplinary structure of the military establishment constituted a "special factor" that made it inappropriate for the Court to permit enlisted military personnel to maintain a *Bivens* action against their superior officers.

Another such "special factor" is the existence of a statutory remedy for the wrong underlying the complaint. Because the constitutional tort action has no statutory basis, the Supreme Court has expressed reluctance to extend its scope into areas in which Congress has provided remedial safeguards, even though those remedies may not appear to be as broad or effective as a constitutional tort action.

In *Bush v. Lucas*<sup>11</sup> the Supreme Court held that federal civil servants could not maintain a *Bivens* action against their supervisors for alleged violations of their first amendment right to freedom of expression. The alleged violation in *Bush* involved an adverse action taken against the plaintiff in his civil service employment, and the plaintiff could and did avail himself of the remedies provided by Congress under the Civil Service Reform Act. The Court held that the existence of a comprehensive system of remedies under the civil service regulations was a special factor that militated against the Court's implying a right of action under

*Bivens* in matters covered by the federal civil service laws.

Earlier, in *Brown v. General Services Administration*,<sup>12</sup> the Supreme Court held that Title VII of the Civil Rights Act of 1964, as amended,<sup>13</sup> was the *exclusive* remedy for unlawful discrimination in federal employment. Title VII provides a comprehensive scheme of administrative remedies for discrimination, culminating in a civil action in federal district court in which the aggrieved employee's agency head, in his or her *official* capacity, is the appropriate defendant. The Supreme Court in *Brown* held that to permit a plaintiff to challenge discrimination in federal employment by any vehicle other than Title VII would effectively undermine the comprehensive scheme established by Congress to remedy such discrimination, and so found that Congress intended that Title VII be an exclusive remedy. The federal courts have consistently applied *Brown* to dismiss constitutional tort actions based on unlawful discrimination in federal employment.<sup>14</sup>

Even after *Bush v. Lucas*, however, there remained a broad range of areas in which federal officials could be sued under *Bivens* for alleged due process violations, even in the area of federal employment. In *Sonntag v. Dooley*<sup>15</sup> the Seventh Circuit found a right of action under *Bivens* for a retired federal employee who alleged that her supervisors had engaged in a campaign of harassment calculated to induce her to retire and so waive her civil service due process protections. While it is now well settled that the Merit Systems Protection Board has jurisdiction to hear cases of constructive discharge arising in the federal civil service, it was not so clear in 1981. The Seventh Circuit found that the plaintiff had no administrative remedy whatever under the civil service regulations and held that she was entitled to maintain her action under *Bivens*.<sup>16</sup>

In *Kotarski v. Cooper*<sup>17</sup> a civilian employee of the Navy brought suit under *Bivens* alleging that his supervisors violated his first amendment right to free speech and his constitutional privacy rights when they demoted him during his one-year probationary period following

<sup>6</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1972).

<sup>7</sup> *Butz*, 438 U.S. 478 (1978).

<sup>8</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>9</sup> *Carlson*, 446 U.S. at 18.

<sup>10</sup> 462 U.S. 296 (1983).

<sup>11</sup> 462 U.S. 367 (1983).

<sup>12</sup> 425 U.S. 820 (1976).

<sup>13</sup> 42 U.S.C. §§ 2000e-2000e-17 (1982).

<sup>14</sup> See *Clemente v. United States*, 766 F.2d 1358, 1364 n.7 (9th Cir. 1985); *White v. General Services Administration*, 652 F.2d 913, 917 (9th Cir. 1981).

<sup>15</sup> 650 F.2d 904 (7th Cir. 1981).

<sup>16</sup> Sonntag's claims against her three supervisors were the subject of a jury trial in the United States District Court for the Northern District of Illinois in 1985. The jury found for the defendants on her *Bivens* claim but awarded Sonntag \$1000 against one of the defendants on a pendent defamation claim. Sonntag exchanged this judgment for an agreement on the part of the United States not to press its claim against her for costs expended on behalf of the defendants who prevailed.

<sup>17</sup> 799 F.2d 1342 (9th Cir. 1986), *vacated and remanded*, 108 S. Ct. 2861 (1988).

promotion to a supervisory position. The Ninth Circuit held that the plaintiff's probationary status excluded him from nearly all of the procedural safeguards of the civil service regulations and that the procedure available through a complaint to the Office of the Special Counsel, Merit Systems Protection Board, was not adequate to provide a "meaningful remedy."<sup>18</sup> Thus, the Ninth Circuit allowed the plaintiff's *Bivens* action to proceed.

In *McIntosh v. Weinberger*<sup>19</sup> the Eighth Circuit stated that *Bush* did not preclude a *Bivens* action against an Army civilian personnel officer who allegedly destroyed documents relating to a pending Title VII action, thus depriving the plaintiffs of due process. The Eighth Circuit, citing *Kotarski*, held that neither Title VII nor the civil service regulations provided a constitutionally adequate remedy for the violation alleged by the plaintiffs. In the absence of such an adequate remedy, the Eighth Circuit affirmed a substantial jury award against the civilian personnel officer in his individual capacity under *Bivens*.

Several cases decided by the Court of Appeals for the District of Columbia Circuit also reflected a view that, where the federal civil service regulations did not provide substantial due process remedies for alleged deprivations of constitutional rights in the context of federal employment, the employee's right to maintain a *Bivens* action against the offending federal officials in their individual capacities remained intact after *Bush*.<sup>20</sup>

While these cases focused on the inadequacy of the remedy provided by Congress to redress constitutional violations in the context of federal employment, the Fourth Circuit in *Pinar v. Dole*<sup>21</sup> focused instead on congressional intent. The Fourth Circuit's view was that where Congress had established some remedial scheme, the courts should not create a *Bivens* remedy, even when the remedial procedures were extremely limited. Thus, the remedial scheme established by Congress for the federal civil service was adequate to preclude creation of a *Bivens* remedy, even though the only recourse for an employee whose temporary promotion is terminated is to file a complaint with the Office of the Special Counsel.

In *Hallock v. Moses*<sup>22</sup> an Army civilian employee sought damages against her supervisors for engaging in a campaign of harassment and retaliation because she filed a valid employee grievance and spoke out in opposition to unlawful acts. This campaign followed the employee's reinstatement in her position after successfully challeng-

ing her removal through an administrative grievance. The Eleventh Circuit, citing *Bush*, found that this is exactly the type of dispute anticipated by Congress when it enacted the Civil Service Reform Act (CSRA). Because Congress had established complaint procedures for such disputes, the Eleventh Circuit declined to impose liability for damages upon federal officials in this context.

These decisions led to substantial confusion and uncertainty as to the degree of protection from potential *Bivens* liability enjoyed by federal officials under *Bush*. Only a more definitive statement by the Supreme Court of the principles underlying the *Bush* decision could help to dispel this uncertainty. Fortunately, the Court issued that statement in *Schweiker v. Chilicky*.<sup>23</sup>

#### *Schweiker v. Chilicky*

In 1980 Congress amended the Social Security Act<sup>24</sup> to establish a "continuing disability review" process which required the states to review Social Security disability determinations at least once every three years. James Chilicky, Dora Adelerte, and Spencer Harris were recipients of Social Security disability benefits that were terminated under the continuing disability review process in the State of Arizona. Their benefits were subsequently restored on appeal by a federal administrative law judge.

In August 1982 Chilicky, Adelerte and Harris filed suit against Richard Schweiker, then Secretary of Health and Human Services, John Svahn, the Social Security Commissioner, and William R. Sims, Arizona Director of Disability Determinations, in the United States District Court for the District of Arizona. The lawsuit sought, among other relief, money damages against these officials for their alleged violations of the plaintiffs' fifth amendment rights in their implementation and administration of the continuing disability review process. All other relief sought by the plaintiffs was essentially rendered moot by the subsequent actions of Congress and the courts in dealing with complaints arising from the continuing disability review process. What remained for consideration were the plaintiffs' claims that they were entitled to money damages under *Bivens* against Schweiker, Svahn, and Sims.

On October 16, 1984, the district court dismissed the action, holding that the three officials were entitled to qualified immunity for their actions in implementing the continuing disability review process because their actions did not violate any clearly established statutory or constitutional rights of which a reasonable person should have known.<sup>25</sup> The Ninth Circuit agreed with the

<sup>18</sup> *Kotarski*, 799 F.2d at 1348.

<sup>19</sup> 810 F.2d 411 (8th Cir. 1987), *vacated and remanded sub nom.* *Turner v. McIntosh*, 108 S. Ct. 2861 (1988).

<sup>20</sup> See *Doe v. U.S. Department of Justice*, 753 F.2d 1092, 1118 n.2 (D.C. Cir. 1985) (Wald, J., dissenting in part) (excepted service employee); *Williams v. IRS*, 745 F.2d 702, 705 (D.C. Cir. 1984) (excepted service employee); *Borrell v. U. S. International Communications Agency*, 682 F.2d 981, 989-90 (D.C. Cir. 1982) (probationary employee).

<sup>21</sup> 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

<sup>22</sup> 731 F.2d 754 (11th Cir. 1984).

<sup>23</sup> 108 S. Ct. 2460 (1988).

<sup>24</sup> 42 U.S.C. §§ 401-405 (1982).

<sup>25</sup> *Chilicky v. Schweiker*, 796 F.2d 1131, 1134 (9th Cir. 1986).

conclusion of the district court, but held that the district court's opinion did not dispose of all of the defendants' alleged violations, and so they remanded the case for further proceedings.<sup>26</sup> The Supreme Court granted certiorari<sup>27</sup> on the question of whether a *Bivens* action should be permitted for alleged due process violations in the denial of social security benefits.

Speaking for a six-member majority on the Supreme Court, Justice O'Connor reviewed the development of constitutional tort litigation and reaffirmed the vitality of the basic holding of the *Bivens* case. She noted, however, that the more recent Supreme Court opinions in the area have shown a cautious approach to suggestions that the *Bivens* claim be extended into new contexts.<sup>28</sup>

In a key paragraph clarifying the Supreme Court's views on the scope of the *Bivens* remedy, Justice O'Connor focused on Congress's intent to provide a remedy for constitutional violations and not on the perceived adequacy or inadequacy of the remedy provided. She wrote:

In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.<sup>29</sup>

Justice O'Connor then reviewed the administrative structure and procedures of the Social Security Act and the actions taken by Congress to remedy problems in the administration of the continuing disability review process. She noted that Congress, while providing for administrative and judicial review of denials of disability claims, had not provided for monetary relief in damages against any official committing alleged constitutional violations in the course of the consideration of any claim. If Congress wanted to give claimants the right to maintain actions for damages against offending officials in their individual capacities, it had adequate opportunity to do so. Where Congress did not make such a remedy available, the courts should not step in and create such a remedy. The adequacy or inadequacy of the remedy actually provided by Congress is itself a question not for the courts, but for Congress to decide.

Thus, the Supreme Court found that the failure on the part of the Congress to provide a specific remedy for constitutional violations in the context of denials of

claims for social security benefits was not inadvertent. Therefore, the Court decided that it was not appropriate for it to fashion a *Bivens* remedy in the face of what it perceived as an affirmative decision by Congress that such a remedy was not appropriate. In his dissenting opinion, Justice Brennan points out that the legislative history relied upon by the majority in reaching this conclusion is by no means clear and explicit. It amounts to little more than an indication that some members of Congress were aware of the fact that some claimants had been improperly denied benefits under the continuing disability review process, but did not provide special relief to those claimants in the reform legislation passed in 1984.<sup>30</sup> Nevertheless, this was enough of an indication that congressional inaction was not inadvertent to convince the Supreme Court that it should not imply a *Bivens* remedy in this context.

#### The Aftermath of *Schweiker v. Chilicky*

At the time the Supreme Court decided *Schweiker v. Chilicky*, petitions for writs of certiorari to the Supreme Court were pending in both *Kotarski v. Cooper* and *McIntosh v. Weinberger*. On June 27, 1988, three days after the opinion in *Schweiker v. Chilicky* was announced, the judgments of the Courts of Appeals in both of these cases were vacated and the cases were remanded for further consideration in the light of *Schweiker v. Chilicky*.

On November 18, 1988, the Eighth Circuit reversed the judgment against Edward O. Turner after reconsideration in light of *Schweiker v. Chilicky*.<sup>31</sup> The Eighth Circuit examined the legislative history of the Civil Service Reform Act and noted that Congress specifically referred to constitutional violations as one of the prohibited personnel practices that were covered by the complaints procedure to the Office of the Special Counsel. The Eighth Circuit was also influenced by the unanimous *en banc* decision of the District of Columbia Circuit in *Spagnola v. Mathis*.<sup>32</sup>

In *Spagnola* the District of Columbia Circuit considered *Bivens* actions by two federal employees who claimed that they had been denied employment opportunities in the federal civil service in retaliation for exercise of their first amendment rights to free speech. The only avenue of redress for either of these employees under the Civil Service Reform Act (CSRA) was to petition the Office of Special Counsel alleging a "prohibited personnel practice." Two panels of the District of Columbia Circuit split on whether a *Bivens* action was authorized under these conditions, and the Court scheduled the matter for rehearing *en banc*.

<sup>26</sup> *Id.* at 1139.

<sup>27</sup> 108 S. Ct. 64 (1987).

<sup>28</sup> *Schweiker*, 108 S. Ct. at 2467.

<sup>29</sup> *Id.* at 2468.

<sup>30</sup> *Id.* at 2469 (Brennan, J., dissenting).

<sup>31</sup> *McIntosh v. Turner*, No. 85-2086 (8th Cir., November 18, 1988).

<sup>32</sup> 859 F.2d 223 (D.C. Cir. 1988) (*en banc*).

On rehearing *en banc*, the District of Columbia Circuit unanimously held that *Schweiker v. Chilicky* read together with *Bush v. Lucas* precluded a *Bivens* remedy for federal employees against their supervisors for constitutional claims within the ambit of the CSRA. Analysis of the legislative history of the CSRA indicates that Congress specifically intended that the Office of Special Counsel take action against any supervisor who it determined had violated an employee's constitutional rights. Under these circumstances, the omission of a damage remedy for constitutional violations in the context of federal personnel actions was not an inadvertent omission by Congress. Thus, *Schweiker v. Chilicky* teaches that the federal courts should decline to imply a *Bivens* remedy in this context. The District of Columbia Circuit was careful to point out, however, that equitable relief against federal agencies and officials (in their official capacities) would still be available to vindicate the constitutional rights of federal employees.<sup>33</sup>

In January 1989 the Ninth Circuit followed suit on remand in *Kotarski v. Cooper*,<sup>34</sup> reversing its earlier holding that a *Bivens* action could be maintained by a probationary employee whose only remedy was a complaint to the Office of Special Counsel. Citing both *McIntosh* and *Spagnola*, the Ninth Circuit held that where Congress had provided "some mechanism" for appealing constitutional violations, its failure to provide damages cannot be held to be inadvertent. Therefore, no *Bivens* remedy should be implied under the rule in *Schweiker v. Chilicky*.

At this time, each of the federal courts that has considered the applicability of *Schweiker v. Chilicky* to *Bivens* actions by federal employees against their superiors for actions relating to civil service employment has held that no constitutional tort action for damages will be implied in these cases. The Fourth, Eighth, Ninth, Eleventh, and District of Columbia Circuits have all adhered to this view, and it appears unlikely that a contrary line of authority will develop.

#### Defending *Bivens* Claims After *Schweiker v. Chilicky*

What are the implications of *Schweiker v. Chilicky* for the federal litigation attorney? The attorney charged with defending a *Bivens* claim against a federal official involving a matter relating to federal civil service employment must first recognize that any *Bivens* claim is brought against a federal official in his or her *individual* capacity. Therefore, the first step in defending a *Bivens* claim is to request and obtain authorization for the representation through the Department of Justice, using the appropriate agency procedures. The United States Attorney in the district in which the action is brought will have the primary responsibility for defense of the federal official sued under *Bivens*, but the attorney from the official's agency will often have an important role in the representation as well.

Immediate steps must be taken to remove *Bivens* actions brought in state courts to the appropriate United

States District Court. Federal agency attorneys and United States Attorneys are generally more familiar with federal court practice than with state court practice, and federal courts generally have greater expertise in dealing with the federal questions involved. Also, the Federal Rules of Civil Procedure provide more flexible rules on summary judgment than are found in many state civil procedure codes. Time is of the essence in filing a petition for removal, which must be filed within thirty days of the receipt by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action is based.<sup>35</sup>

There are two primary procedural devices for defeating a *Bivens* claim that is foreclosed by the rule in *Schweiker v. Chilicky*: 1) the motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure; and 2) the motion for summary judgment under Rule 56. The 12(b)(6) motion is appropriate when the initial pleading itself shows that the plaintiff has a specific avenue of relief prescribed by Congress for the complaint. If it is necessary to go beyond the pleadings to demonstrate the existence of such an avenue for relief, it will be necessary to file a motion for summary judgment supported by documents and affidavits.

The fundamental inquiry in *Bivens* actions after *Schweiker v. Chilicky* is whether or not Congress has established an avenue of relief for constitutional violations occurring in the administration of a particular federal program, and, if Congress has not done so, was its failure to act inadvertent. Thus, the attorney defending against a *Bivens* claim must examine the statutes that define the federal program and the regulations promulgated to implement the program to find the appropriate avenue of relief the plaintiff should employ. This analysis actually assumes that a constitutional violation has occurred, because under Rule 12(b)(6) the allegations of the complaint will be assumed to be true, and under Rule 56 a dispute as to any material fact will preclude summary judgment.

The defending attorney must carefully study the statutory scheme established by Congress and scrutinize the legislative history of the federal program in question. If it appears that Congress was mindful that administration of the program could involve allegations of constitutional wrongs and has established a mechanism for consideration of such complaints and some redress for those found to be valid, the rule in *Schweiker v. Chilicky* will protect the individual federal official involved from personal tort liability under *Bivens*. Even if no specific avenue of relief has been established, the *Bivens* claim may be defeated if it can be shown that Congress's failure to act was not inadvertent.

The attorney defending a federal official against a *Bivens* claim should not rely on one theory. The defenses of qualified immunity and failure to exhaust administrative remedies should also be raised where appropriate, and a motion for summary judgment that addresses the

<sup>33</sup> *Id.* at 229-30.

<sup>34</sup> 866 F.2d 311 (1989).

<sup>35</sup> 28 U.S.C. § 1446(b) (1982).

merits of the plaintiff's claims may also be available. It is advisable from a policy standpoint to create a record that shows that the federal official's actions have not been taken with a callous disregard for the constitutional rights of the plaintiff.

Finally, if a motion to dismiss or a motion for summary judgment in a *Bivens* action are denied by the district court, the defending attorney should seek an interlocutory appeal to the appropriate Circuit Court of Appeals.<sup>36</sup> The expense and disruption caused by a trial on the merits of a *Bivens* claim are of serious concern to the government, and every avenue should be explored in an effort to resolve such cases short of trial. Even if the defense position on the *Schweiker v. Chilicky* issue or the issue of qualified immunity is ultimately vindicated by the appellate process, the personal impact of a substantial money judgment in a *Bivens* action on the federal official concerned may be devastating.

<sup>36</sup> 28 U.S.C. § 1292(b) (Supp. V 1987).

## Conclusion

The Supreme Court's decision in *Schweiker v. Chilicky* has greatly limited the scope of constitutional tort actions against federal officials in their individual capacities. Subsequent decisions by the District of Columbia Circuit, the Eighth Circuit, and the Ninth Circuit have arguably eliminated the specter of *Bivens* liability for federal officials involved in civilian personnel matters. Attorneys charged with the responsibility for defending federal officials against allegations of constitutional violations have a duty to be aware of these developments and to be prepared to use these decisions to channel future constitutional tort allegations into the appropriate remedial avenues.

## USALSA Report

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

### DAD Notes

#### Extraordinary Writs: Filing the Petition for a Writ

This is the fourth and final note in a series discussing extraordinary writs.<sup>1</sup> This note will provide information on how to draft and file a writ.

#### Format and Content

Before drafting a pleading, read the pertinent rules of practice and procedure for the court in which the writ will be sought. The Court of Military Appeals and Army Court of Military Review Rules of Practice and Proce-

dures may be found in the Military Justice Reporters and in the United States Code.<sup>2</sup>

The content of a petition for extraordinary relief is essentially the same whether the writ is for one of the courts of military review or for the Court of Military Appeals.<sup>3</sup> The petition should include the following nine sections: 1) caption; 2) procedural history of the case, including whether prior actions have been filed or are pending for the same relief in this or any other court, and the disposition of such case; 3) statement of facts necessary to understand the issue presented; 4) statement of the issue; 5) the specific relief sought; 6) the jurisdictional basis for the relief sought and the reasons why the relief cannot be obtained during the ordinary course of

<sup>1</sup> 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; DAD Note, *Extraordinary Writs: Is it a "Writable" Issue?*, The Army Lawyer, July 1989, at 23; see also Peppler, *Extraordinary Writs in Military Practice*, 15 Advocate 80 (1983); DAD Note, *Putting on the Writs: Extraordinary Writs in a Nutshell*, The Army Lawyer, May 1988, at 20.

<sup>2</sup> Court of Military Appeals Rules of Practice and Procedure, 10 U.S.C.A. foll. § 867 (West 1983) [hereinafter C.M.A. Rules] (the most recent changes have not been published). The 1983 Court of Military Appeals Rules with the 1987 amendments are not printed in the Military Justice Reporters. The Court of Military Review Rules of Practice and Procedure (Army Reg. 27-13, Military Justice, Court of Military Review Rules of Practice and Procedure (12 July 1985)) can be found in 22 M.J. at CXXVII (1986) [hereinafter C.M.R. Rules] and 10 U.S.C.A. foll. § 866 (West 1983 & Supp. 1989). Counsel may obtain copies of the rules of the respective courts by telephoning the Clerk's office at Army Court of Military Review (703) 756-2040 or the Court of Military Appeals (202) 272-1448.

<sup>3</sup> See C.M.A. Rule 27 and C.M.R. Rule 20. Note, if your petition does not conform to the guidance prescribed in the rules, it will be returned without any action by the courts.

<sup>4</sup> See also Army Court of Military Review's Internal Operating Procedures 7-2(a)(C1, 30 July 1985) [hereinafter A.C.M.R. IOP]. The caption of a petition for extraordinary relief must include the type of writ sought, the name of the petitioner, and the name of each respondent. An individual petitioner must be identified by grade or title, name, service number (SSN), and military organization. Each individual respondent, such as a military judge, convening authority, or other official from whom relief is sought, shall be identified by name, grade, and official title.

appellate review; <sup>5</sup> 7) the reason why the writ should be granted; 8) a copy of any pertinent parts of the record of trial and all exhibits related to the petition if reasonably available and transmittable at or near the time the petition is filed; <sup>6</sup> and 9) although not required, we suggest that you include the following paragraph: "Petitioner further requests that pursuant to article 70, UCMJ, The Judge Advocate General appoint appellate defense counsel to represent (him)(her) in any proceedings concerning this petition before either the U.S. Army Court of Military Review or the Court of Military Appeals."<sup>7</sup>

A brief addressing all legal issues raised by the petition must be filed in support of the petition for writ. <sup>8</sup> An exception to this rule is for writs submitted *in propria personia*. <sup>9</sup> A certificate of filing must accompany the writ and brief. <sup>10</sup> It should expressly state how delivery was made to the respondent and the court, i.e., mail, facsimile, electrical message, or hand delivery.

The petition and supporting brief must be legible, relevant, and concise. Petitions for extraordinary relief (to include the supporting brief) that are filed with the Army Court of Military Review must include an original and two copies. <sup>11</sup> For the Court of Military Appeals, an original and four copies must be delivered to the court. <sup>12</sup> The documents must be typewritten and double-spaced on white paper 8.5 by 11 inches in size. <sup>13</sup> The original and copies to be filed with the Army Court of Military Review must be prepared for prong fastening with two holes punched at the top, centered on two-and-three-quarter-inch centers. <sup>14</sup> Each pleading must be signed by an attorney of record. <sup>15</sup>

### Time Requirements

While the Army Court of Military Review does not establish time limits for filing, the Court of Military Appeals requires that a petition for extraordinary relief be filed "no later than 20 days after the petitioner learns of the action complained of."<sup>16</sup> It is important to note, however, that this time limitation does not apply to a petition for a writ of habeas corpus. <sup>17</sup>

### Considerations Before Filing

A writ may be filed either at the Army Court of Military Review or at the Court of Military Appeals. <sup>18</sup> Be aware that a writ does not automatically stay the trial. If you expect to file, you should ask the trial judge for a continuance. If you anticipate a denial of your request from the trial judge, prepare your writ petition, brief, and a formal request for stay of proceedings by the appellate court in advance. If the judge denies a motion for continuance pending disposition of the petition for a writ, ask for a recess and immediately transmit your pleadings electronically to the appellate court and advise the Defense Appellate Special Actions Branch of the situation.

### Filing

You can mail your pleadings or send them by electrical message or facsimile. It is important to note that, although you may use message or facsimile for copies, you must mail the originals and submit an affidavit stating that you mailed them. <sup>19</sup> If you transmit by message, your message must contain the complete petition in the final format, including signature blocks. The

<sup>5</sup> See generally *United States v. Harper*, 729 F.2d 1216, 1221 (9th Cir. 1984); DAD Note, *Extraordinary Writs: Is it a Writable Issue?*, *The Army Lawyer*, July 1989, at 23.

<sup>6</sup> C.M.A. Rule 8; C.M.R. Rule 20(b).

<sup>7</sup> C.M.A. Rule 17; C.M.R. Rule 10. See also *Peppler supra* note 1, at 83. If this paragraph is not included, Defense Appellate Counsel would be limited to the act of delivering the petition to the court and would be powerless to appear before the court on your case (unless so ordered by the court itself).

<sup>8</sup> C.M.A. Rule 27(a)(3); C.M.R. Rule 20(e).

<sup>9</sup> *Id.*

<sup>10</sup> C.M.A. Rule 39(c); C.M.R. Rule 20(a).

<sup>11</sup> A.C.M.R. IOP 7-1.

<sup>12</sup> C.M.A. Rule 37.

<sup>13</sup> A.C.M.R. IOP 3-1(b); C.M.A. Rule 37.

<sup>14</sup> *Id.* at 3-1(g).

<sup>15</sup> C.M.R. Rule 6 states: "All formal papers shall be signed and shall show, typewritten or printed, the signer's name, address, military grade (if any), and the capacity in which the paper is signed." C.M.A. Rule 38 also requires that the papers "bear the signature of at least one counsel who is a member of the Court's Bar and is participating in the case." The Rule states, however, that if the counsel is not a member of the Court's Bar, the papers shall be received as if the counsel were a member, and the counsel shall have 30 days to apply for admission or move to appear *pro hac vice*.

<sup>16</sup> C.M.A. Rule 19(d).

<sup>17</sup> *Id.*

<sup>18</sup> See *Peppler, supra* note 1, at 84.

<sup>19</sup> C.M.A. Rule 27(a)(6) states "the message should contain the verbatim text of the petition, and will state when counsel placed the written petition and brief in the mail addressed to the court and all named respondents." If using fax or electronic mail, it is suggested that you only submit documents less than 25 pages. For anything in excess of 25 pages, use an overnight express mail service. Otherwise, the communication center may not be able to process your document in a timely manner.



message should indicate that the original copy has been signed.

The petitions should be sent to the following addresses:

#### Army Court of Military Review

Mailing Address: U.S. Army Court of Military Review  
ATTN: Clerk of Court (JALS-CCR)  
U.S. Army Legal Services Agency  
Nassif Building (Rm. 204)  
Falls Church, Virginia 22041-5013

Message: CUSA Judiciary//Falls Church VA// JALS-CCR

Fax No: Autovon 289-2040; Commercial (202) 756-2040

#### Court of Military Appeals

Mailing Address: U.S. Court of Military Appeals  
Clerk of Court  
450 E. Street, N.W.  
Washington, D.C. 20442-0001

Message: Not available at this time.<sup>20</sup>

Fax No: Not available at this time. Fax to the Defense Appellate Special Actions Branch at the number below.

#### Defense Appellate Division

Mailing Address: U.S. Army Legal Services Agency  
Defense Appellate Division  
(JALS-DA)  
ATTN: Branch 4—Special Actions  
Nassif Building (Room 201)  
Falls Church, VA 22041-5013

Message: Not available.

Fax No: Autovon 289-2040; Commercial (202) 756-2040

#### Conclusion

To expedite the filing of your writ, follow the rules of court exactly. If in doubt, contact the Special Actions Branch or the Clerk of the Court at either the Army Court of Military Review or the Court of Military Appeals. Captain Cynthia G. Wright.

#### Preserving the Issue: Entry of Conditional Guilty Pleas

In general, a plea of guilty results in waiver of all pretrial and evidence related issues, except for jurisdictional issues. Rule for Courts-Martial 910(a)(2) creates an exception to the rule by allowing, under appropriate circumstances, the entry of conditional pleas.<sup>21</sup> Entry of a conditional plea requires the consent of the govern-

ment and the approval of the trial judge. In addition, the accused must request in writing the right to preserve an issue for further review and leave to withdraw the plea of guilty should he or she prevail on that issue. A conditional plea is a useful tool where the only real issue with respect to an offense will be determined by a pretrial motion.

This technique for preserving issues was commended for consideration by trial defense counsel in the recently decided case of *United States v. Negron*.<sup>22</sup> In *Negron* the lawfulness and constitutionality of an order was raised for the first time on appeal. The order in question required the accused to forewarn prospective sex partners that he had been diagnosed as being infected with the human immuno-deficiency virus (HIV) and required him to wear a condom when having sexual relations. The court considered the lawfulness of the order, notwithstanding the fact that the issue had not been raised at trial; however, the court pointedly compared *Negron* to the Air Force case of *United States v. Womack*,<sup>23</sup> in which the lawfulness of an identical order had been litigated and properly preserved at the trial level.

The constitutionality of the order was upheld by both the Army and the Air Force Courts of Review. While recognizing an expectation of privacy in certain aspects of sexual activity (specifically, within the context of a marital relationship), the court in *Negron* held that the privacy expectation was subordinate to the duty on the part of any society to safeguard the health and safety of its members. In *Negron*, as in *Womack*, the order was not to forego sexual relations entirely, but to practice "safe sex" by warning prospective partners and by taking precautionary measures to prevent the spread of a disease. Therefore, it was narrowly drawn to effect a valid health and welfare purpose.

*Negron* focused on the Army's authority to regulate sexual conduct that would, under normal circumstances, be lawful. The reference to a conditional guilty plea was merely tangential; however, the court's cautionary footnote should not be ignored by trial defense counsel who wish to preserve an issue for appeal.

The utility of entering a conditional guilty plea is demonstrated by two Air Force cases in which the accuseds sought to raise on appeal the admissibility of urinalysis test results. In *United States v. Forbes*<sup>24</sup> the accused had attempted to preserve the issue of admissibility by entering a conditional plea of guilty to a single specification alleging wrongful use of marijuana. Nevertheless, the failure to make and litigate a motion to suppress the evidence deprived the appellate court of any basis on which to rule; therefore, that court refused to consider the issue. In comparison, in another case when the basis for suppression had been fully litigated and the

<sup>20</sup> The Court of Military Appeals does not possess the capability for direct receipt of electronic messages. Your pleading should be transmitted to the Defense Appellate Division by some other method; appellate counsel will file it in the appropriate place.

<sup>21</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910(a)(2) [hereinafter R.C.M.].

<sup>22</sup> ACFM 8801150 (A.C.M.R. 28 April 1989).

<sup>23</sup> 27 M.J. 630 (A.F.C.M.R. 1988).

<sup>24</sup> 19 M.J. 953 (A.F.C.M.R. 1985).

accused had entered conditional pleas of guilty, the appellate court considered the issue.<sup>25</sup>

Trial defense practitioners should be aware that it is possible to preserve an issue without subjecting a client to unnecessary risk at sentencing. Counsel must strictly adhere to the dictates of R.C.M. 910(a)(2), which require: 1) obtaining the approval of the judge and the government; 2) making a proper and timely motion to litigate the issue prior to entry of pleas; 3) fully litigating the issue in order to establish a complete evidentiary record for review; and 4) entering a written request for permission to withdraw the plea of guilty if the accused should prevail on that issue. An issue correctly preserved is not waived by subsequent admissions of guilt during the providence inquiry and in the stipulation of fact. An attempt to preserve an issue via negotiation in the pretrial agreement may not be successful.<sup>26</sup>

There is no right to enter a conditional guilty plea. Its purpose is to conserve judicial and governmental resources; therefore, defense counsel should be prepared to show both the government and the judge that the issue is dispositive.

A conditional plea is neither automatic nor appropriate in all instances; however, under the proper circumstances, the conditional plea refutes the adage that "you can't have your cake and eat it too." Captain Paula C. Juba.

#### Mounting a Constitutional Challenge on Article 125

In *Bowers v. Hardwick*<sup>27</sup> the Supreme Court of the United States ruled that the right to privacy inherent in the Constitution does not guarantee homosexuals the right to engage in consensual sodomy. The Court specifically framed the issue and its opinion in terms of homosexual sodomy. In light of this emphasis and the strong dissent of four Justices in *Bowers*, the constitutionality of statutes criminalizing *heterosexual* consensual sodomy is an open question. Given the right facts, trial defense counsel could lay the groundwork for a possible

Supreme Court appeal by raising at trial the constitutionality of the military's sodomy statute.<sup>28</sup>

In *Bowers* the majority framed the issue as whether the Constitution confers a fundamental right on homosexuals to engage in sodomy.<sup>29</sup> To answer the issue, the Court focused on the history of anti-sodomy statutes in Anglo-American law. The four dissenting Justices, however, framed the issue as whether the right to privacy guaranteed by the Constitution confers on all citizens the right to make fundamental decisions about their intimate sexual relations with each other.<sup>30</sup>

The Army Court of Military Review has specifically addressed the constitutionality of article 125 in several cases.<sup>31</sup> In *United States v. Scoby*<sup>32</sup> the accused engaged in consensual heterosexual fellatio in a barracks room. He and his partner were separated from the other occupants of the room, who were in bed but not asleep, by a partial cement partition. The Army court held that article 125 was proper and did not infringe on the constitutional right to privacy, but the court did not comment on its rationale for the holding.

The Army court cited military necessity as a rationale for article 125 in *United States v. McFarlin*.<sup>33</sup> In *McFarlin* the accused was a staff sergeant in charge of a group of trainees, and his partner was one of the trainees. Citing the Supreme Court's language in *Roe v. Wade*,<sup>34</sup> the Army court noted that a compelling state interest may justify limiting the personal right to privacy. Military necessity may be such a compelling state interest. The Army court stated that "generations of leaders have learned that sexual liaisons with subordinates are fatal to discipline in any organization."<sup>35</sup> Therefore, the governmental interest in military efficiency was sufficient to justify limiting soldiers' freedom to form superior/subordinate sexual relationships.<sup>36</sup>

Consistent with this rationale, military courts have upheld article 125 in cases where the facts raise questions of military discipline.<sup>37</sup> These cases clearly indicate that the best case for mounting an attack on article 125

<sup>25</sup> See *United States v. Shepherd*, 24 M.J. 596 (A.F.C.M.R. 1987).

<sup>26</sup> See *United States v. Mallett*, 14 M.J. 631 (A.C.M.R. 1982).

<sup>27</sup> 106 S. Ct. 2841 (1986).

<sup>28</sup> Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1982) [hereinafter UCMJ]. The Army Court of Military Review recently held that there is no constitutionally protected privacy right to freely engage in consensual, private, intimate heterosexual relations. *United States v. Negron*, ACMR 8801150 (A.C.M.R. 28 Apr. 1989). The issue is open to challenge, though, and properly framing the issue at trial is the first step.

<sup>29</sup> *Bowers*, 106 S. Ct. at 2843.

<sup>30</sup> *Id.* at 2848-51.

<sup>31</sup> The Air Force Court of Military Review has impliedly accepted the constitutionality of article 125 when the court addressed a "safe sex" order in an HIV case. *United States v. Womack*, 27 M.J. 630 (A.F.C.M.R. 1988).

<sup>32</sup> 5 M.J. 160 (A.C.M.R. 1978).

<sup>33</sup> 19 M.J. 790 (A.C.M.R. 1985).

<sup>34</sup> 410 U.S. 113 (1973).

<sup>35</sup> *McFarlin*, 19 M.J. at 792.

<sup>36</sup> *Id.*

<sup>37</sup> See *United States v. Taylor*, 21 M.J. 840 (A.C.M.R. 1980) (homosexual sodomy between two service members); *United States v. Jones*, 14 M.J. 1008 (A.C.M.R. 1982) (notwithstanding the finding of guilty of consensual sodomy, the sodomy of one soldier by another occurred during a violent attack); *United States v. Linnear*, 16 M.J. 628 (A.F.C.M.R. 1983) (fellatio occurred between two service members in the snack bar of the post exchange).

would be one in which the accused is charged with committing consensual sodomy with a civilian who has no military connection and where the act took place off-post in a private home or somewhere that the couple could have had a reasonable expectation that they would not be observed.<sup>38</sup> To lay the foundation for the motion to dismiss the specification based on the unconstitutionality of the statute, trial defense counsel should ensure that facts advantageous to the accused are part of the record. If applicable, the record should indicate the following: that the offense was committed with a civilian with no connection to the military; that the offense occurred off-post and in a private place; that the accused was off duty; and that the parties are married to each other. If this information is not included in the specifications, trial defense counsel can get the information into the record through an offer of proof, a stipulation with the government, a request for a bill of particulars, or through the testimony of the accused that is given for the limited purpose of the motion.

It would be unusual if a case with these facts were to happen and were to be prosecuted. Nevertheless, article 125 allows for a prosecution in this situation. A motion by trial defense counsel would begin building a record for appellate review of an important issue in constitutional law and the law of privacy. Captain Patricia D. White.

#### *United States v. Horner* Revisited

In 1986 the Court of Military Appeals issued its decision in *United States v. Horner*.<sup>39</sup> The primary holding in *Horner* was that the function of a witness during the sentencing phase of a court-martial "is to impart his/her special insight into the *accused's* personal circumstances."<sup>40</sup> The court determined that a sentencing witness's opinion of the accused's rehabilitation potential could not be based solely on the offenses that the accused had been found guilty of committing. The Army Court of Military Review recently revitalized *Horner* in *United States v. Barber*<sup>41</sup> and *United States v. Scott*,<sup>42</sup> and the Court of Military Appeals addressed the issue in *United States v. Ohrt*.<sup>43</sup>

In *Barber* the accused pleaded guilty to three offenses of violating blackmarketing regulations in Korea. During the sentencing phase of the court-martial, the division command sergeant major testified about the crime of blackmarketing and its effects in the command. He admitted that he barely knew the accused and that he knew nothing about the particular offenses that the accused had committed. The command sergeant major testified that it was necessary to stop blackmarketing and that the judicial system needed to send a "clear message that it is going to deal with the problem."<sup>44</sup>

In *Barber* the trial defense counsel had made a motion in limine to exclude the testimony of the command sergeant major. The military judge denied the motion. The trial defense counsel then requested an article 39(a) session<sup>45</sup> to question the command sergeant major. This request was also denied.<sup>46</sup>

The Army court held that there had been a violation of the principles of *Horner*.<sup>47</sup> The court stated:

It is improper to allow witnesses to testify that in their opinion, certain offenses should be dealt with harshly by courts-martial in order to curb the occurrence of similar offenses in the future. . . . Witnesses are to impart their "special insight into the *accused's* personal circumstances" and not to tell the court what in their opinion will prevent further criminal conduct.<sup>48</sup>

Based upon the error, the court decided that a sentence rehearing was necessary.<sup>49</sup>

In *Scott* the accused was convicted of carnal knowledge. The defense presented several exhibits and ten witnesses during the sentencing phase of the court-martial. The defense witnesses all recommended retention and testified that the accused had excellent rehabilitative potential.<sup>50</sup> In rebuttal the prosecution called the accused's battalion commander. The battalion commander admitted that he had no personal knowledge of the accused's duty performance, but stated that he had been told the accused's duty performance was adequate. Defense objected to the testimony, but the objection was

<sup>38</sup> The Supreme Court has stated that the right to privacy in sexual matters is not dependent on whether the parties are married. 431 U.S. 678, 687 (1976).

<sup>39</sup> 22 M.J. 294 (C.M.A. 1986).

<sup>40</sup> *Horner*, 22 M.J. at 296 (emphasis in original).

<sup>41</sup> 27 M.J. 885 (A.C.M.R. 1989).

<sup>42</sup> 27 M.J. 889 (A.C.M.R. 1989).

<sup>43</sup> 28 M.J. 301 (C.M.A. 1989).

<sup>44</sup> *Barber*, 27 M.J. at 887.

<sup>45</sup> UCMJ art. 39(a).

<sup>46</sup> *Barber*, 27 M.J. at 886.

<sup>47</sup> *Id.* at 888.

<sup>48</sup> *Id.* (citing *Horner*, 22 M.J. at 296 (emphasis in original)).

<sup>49</sup> *Id.*

<sup>50</sup> *Scott*, 27 M.J. at 890.

overruled.<sup>51</sup> During direct examination of the battalion commander, the trial counsel asked:

Q: What if the entire chain of command came in here and said that he was the best soldier they ever saw?

A: Fine and good, but I don't want him representing the Army based on the offense or in the community.<sup>52</sup>

During cross-examination of the battalion commander, the following question was asked and answered:

Q: Right, I agree. I agree, and that's what he's here for. But my question is your opinion that he should not be in the Army, would not want him in your unit is based strictly upon this offense.

A: Based on the offense I do not want him in the unit representing the Army or in the community.<sup>53</sup>

The Army Court of Military Review held that the battalion commander's opinion was based on the offenses, and that, in light of *Horner*, the military judge should have stricken the testimony. The court reassessed the sentence<sup>54</sup> and disapproved the bad-conduct discharge.<sup>55</sup>

The lessons to be learned are that trial defense counsel must: 1) interview the witnesses that the prosecutor will likely call during aggravation; 2) ensure that he or she knows the basis for the witness's opinions; 3) be prepared to make a motion in limine to prevent witnesses from testifying if they lack a proper foundation; and 4) consider requesting an article 39(a) session to test the basis of the witnesses's testimony.

When analyzing these issues, counsel should consider the definition of "potential for rehabilitation" that the Court of Military Appeals provided in *Horner*.<sup>56</sup> The court referred to *Webster's Third New and International Dictionary, Unabridged 1914 (1981)* for guidance.<sup>57</sup> Webster's defines rehabilitation as:

[T]he action or process of rehabilitating or of being rehabilitated: . . . the process of restoring an individual (as a convict, mental patient, or disaster victim) to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining or through relief, financial aid, or other constructive measure.

"Rehabilitate," in turn, is defined as:

[T]o restore (as a delinquent) by a formal act or declaration to a former right, rank, or privilege lost

or forfeited: . . . to restore to a useful and constructive place in society through social rehabilitation.

The court acknowledged that "rehabilitation" can refer to a return to a particular status (for court-martial purposes, a return to being a soldier) or simply a return to society.<sup>58</sup> The Court of Military Appeals stated that in their view "potential for rehabilitation" was consistent with Webster's more expansive definition because the sentencing function encompasses more than whether or not a particular accused should be restored to duty.<sup>59</sup>

Trial defense counsel must continue to be vigilant and ensure that *Horner* violations do not occur. Trial defense counsel must try to persuade military judges to accept the definition of "potential for rehabilitation" that the Court of Military Appeals provided in *Horner*. This can be accomplished by interviewing the government's aggravation witnesses as early as possible. If the witness is a "potential for rehabilitation" witness, trial defense counsel must determine whether the witness's opinion is directed towards a return to society in general or a return specifically to the military. If the witness's opinion is directed towards the military and is based on matters impermissible under *Horner*, *Barber*, and *Scott*, then trial defense counsel should make a motion in limine to exclude the testimony. This can be done on two grounds: 1) it violates *Horner*; or 2) it is simply a back-door method for the witness to recommend a punitive discharge, which is impermissible.

Even if the witness's testimony is admissible under *Horner*, counsel should try to gain an advantage by emphasizing the distinctions under *Horner* about types of rehabilitation. Counsel should also ensure that the witness addresses the prospects for rehabilitation in society in general. Almost all witnesses will concede that rehabilitation at some level is always possible, except perhaps for the most hardened criminals (not, by the way, the usual sort of military accused). This line of questioning should only be attempted, however, after the defense counsel determines that the witness will concede this distinction.

In conclusion, trial defense counsel should ensure that all aggravation witnesses have the proper foundation for their rehabilitation testimony. Once they testify, defense counsel should cross-examine the government witnesses using the more expansive definition of "potential for rehabilitation" that was discussed in *Horner*. Captain Thomas A. Sieg.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 891.

<sup>53</sup> *Id.*

<sup>54</sup> See *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

<sup>55</sup> *Scott*, 27 M.J. at 891.

<sup>56</sup> *Horner*, 22 M.J. at 295-96.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 296.

<sup>59</sup> *Id.*; *Ohrt*, 28 M.J. at 306-07.

## Trial Defense Service Note

### Discovery Under Rule for Courts-Martial 701(e)—Does Equal Really Mean Equal?

Captain James A. Nortz  
Kitzingen Branch Office, U.S. Army Trial Defense Service

You have just been detailed as defense counsel for an accused whose case was investigated by the Army's Criminal Investigation Command (CID). After charges are preferred,<sup>1</sup> you visit the CID office and ask to see your client's case file. The CID agent responsible for the investigation responds that, although CID has no reason to prevent the defense from inspecting the file, the trial counsel has instructed CID not to permit such defense access until the trial counsel authorizes it. Annoyed by what appears to be an unnecessary interference with the accused's discovery rights, you locate the trial counsel and ask why the government is not permitting the defense to examine the CID file. The trial counsel responds that he will not permit review of the CID file until you make a formal discovery request under Rule for Courts-Martial (R.C.M.) 701(a)(2).<sup>2</sup> During subsequent discussions, you learn the trial counsel either has not yet looked at the CID file or, if he has examined it, the file contains no information that the government has a legitimate reason to withhold.<sup>3</sup> Instead, the trial counsel wants the defense to submit a R.C.M. 701(a)(2) discovery request because he wants to "control the flow" of evidence from the CID and any other governmental entities to the defense. The trial counsel may also desire an opportunity to exercise reciprocal discovery rights under R.C.M. 701(b)(3)<sup>4</sup> or R.C.M. 701(b)(4).<sup>5</sup> If you respond by quoting R.C.M. 701(e), which provides that "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence,"<sup>6</sup> the

trial counsel's response may be "equal doesn't mean equal."

#### Introduction

After returning empty-handed from the CID office, the defense attorney's initial inclination may be to prepare a multi-page discovery request pursuant to R.C.M. 701(a)(2). This approach, however, will not necessarily guarantee ready access to the client's CID file, because defense discovery rights under R.C.M. 701(a)(2) arise only after service of charges under R.C.M. 602.<sup>7</sup> If charges have just been preferred, it may be several days, weeks, or, in some cases, months before the government refers the case to trial. Consequently, even if a discovery request is submitted, the trial counsel may delay making a reply for quite some time. If the trial counsel does decide to respond to a R.C.M. 701(a)(2) discovery request prior to service of charges, he is not required to do so expeditiously or completely. By restricting defense access to the CID file in this way, the trial counsel maintains considerable control over the pace of defense investigative efforts as well as defense access to potentially crucial evidence.

Such pervasive government controls over access to evidence present problems for the defense that are far more grave than a minor inconvenience or hinderance. In military criminal practice, time is often of the essence. Witnesses frequently become unavailable on short

<sup>1</sup> This article focuses on defense discovery rights accruing after preferral of charges (Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307 [hereinafter R.C.M.] and notification to the accused of charges (R.C.M. 308).

<sup>2</sup> R.C.M. 701(a)(2).

<sup>3</sup> Information the government may have legitimate reasons to withhold from the defense includes: classified information (Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 505 [hereinafter Mil. R. Evid.]); information detrimental to the public interest (Mil. R. Evid. 506); information concerning the identity of informants (Mil. R. Evid. 507); and the work product of the trial counsel and his or her assistants or representatives (R.C.M. 701(f)). Note the instances where the government is permitted to withhold information from the defense are exceptions to the general rule of full disclosure. See generally Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 analysis, app. 21, at A21-29 [hereinafter R.C.M. 701 analysis]. In addition, even when the government withholds evidence from the defense by invoking one or more of the above privileges (except for trial counsel work product) the government is required to ensure severable portions are disclosed to the defense. See Mil. R. Evid. 505, 506, and 507.

<sup>4</sup> R.C.M. 701(b)(3) states:

If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the government, the defense, on the request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

<sup>5</sup> R.C.M. 701(b)(4) states:

If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall (except as provided in R.C.M. 706 and Mil. R. Evid. 302) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are within the possession, custody, or control of the defense which the defense intends to introduce as evidence in the defense case-in-chief at trial or which were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

<sup>6</sup> R.C.M. 602 states: "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."

<sup>7</sup> R.C.M. 602 states: "The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon the accused a copy of the charge sheet."

notice.<sup>8</sup> By delaying defense access to evidence, the trial counsel may severely jeopardize an accused's ability to defend his case. Once information unknown to the defense is lost, its existence and potential value to the accused's case may never be known. In such situations, the defense may have no opportunity to seek appropriate judicial remedies to protect the accused's fundamental rights.<sup>9</sup> These factors make the game of "controlling the flow"<sup>10</sup> a serious obstacle to adequate and timely defense preparation for trial.<sup>11</sup>

It is difficult to believe that rules that were expressly designed to "eliminate gamesmanship" in the discovery process<sup>12</sup> permit the government to engage in the type of conduct described above. A careful analysis of the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial demonstrates that "controlling the flow" is inappropriate and impermissible. This article discusses the propriety of this government tactic and suggests several possible defense responses.

#### Discovery Under R.C.M. 701(a)(2) and 701(e)

"Control the flow" proponents assert that R.C.M. 701(a) grants the trial counsel the authority to act as the sole conduit through which evidence flows from the government to the defense. This belief rests on the sentence in R.C.M. 701(a), which specifies: "Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense- . . ." <sup>13</sup> The "infor-

mation or matters" specified in R.C.M. 701(a)'s provisions encompass virtually every conceivable type of evidence that the government could possess.<sup>14</sup> Consequently, "control the flow" advocates conclude that if the trial counsel desires to do so, he or she may, without any other justification or claim of privilege, limit the defense's opportunity to inspect evidence in the government's possession by requiring the defense to seek access to such evidence through the trial counsel via the mechanisms provided in R.C.M. 701(a). The provision often cited as the primary mechanism by which the defense requests an opportunity to inspect evidence in the government's possession<sup>15</sup> is R.C.M. 701(a)(2), which states:

After service of charges, upon request of the defense, the government shall permit the defense to inspect:

- (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and
- (B) Any results or reports of physical or mental examinations, and of scientific tests or experi-

<sup>8</sup> Although trial counsel have an obligation under R.C.M. 701(a)(6) to disclose to the defense, "as soon as practicable," the "existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment," this requirement does not eliminate the necessity for the defense to gain immediate access to evidence. If the trial counsel does not take the time to look at all of the evidence in the government's possession at an early stage in the proceedings and interview all potential witnesses, the trial counsel will not be in a position to disclose potentially exculpatory information in a timely manner. Moreover, even if the trial counsel diligently inspects all of the evidence in the government's possession and interviews all potential witnesses prior to or very shortly after charges are preferred, he may not recognize evidence crucial to the defense because he is not aware of the defense strategy, or of its relation to other information known only to the defense. Only the defense counsel is capable of efficiently sorting through government evidence to locate crucial information.

<sup>9</sup> For a discussion of judicial remedies available to the accused in the event evidence in the government's control is lost or destroyed, see R.C.M. 703(f)(2). See also *United States v. Garriss*, 22 M.J. 288 (C.M.A. 1986); *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986).

<sup>10</sup> The phrase "control the flow," as used here, is intended to refer only to the activities of trial counsel who restrict or delay the defense's opportunity to inspect obviously discoverable evidence in the government's possession by forcing the defense to file discovery requests or perform other acts as a prerequisite to obtaining access to evidence. It does not refer to restrictions placed upon defense access to evidence that are based upon genuine claims of privilege, such as those provided in Mil. R. Evid. 505, 506, and 507. See *supra* note 3.

<sup>11</sup> Neither defense discovery rights under R.C.M. 405(f) at a pretrial investigation ordered pursuant to Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ], nor the defense right to demand production of evidence under R.C.M. 703(f) can solve the problem caused by trial counsel who attempt to "control the flow" of evidence to the defense in this way. In many cases the defense needs to see evidence in the CID case file before an article 32 investigation, if for no other reason than to determine whether to waive the article 32 investigation. For cases in which article 32 investigations are not ordered, the defense has no opportunity to use a pre-trial investigation as a discovery vehicle. Although the defense has a right pursuant to R.C.M. 703(f) to demand the production of evidence in every case before or after service of charges, it is virtually impossible for the defense to exercise this right to obtain evidence that it has not seen. R.C.M. 703(f) requires any defense request for production of evidence include a "list . . . of evidence to be produced and . . . a description of each item sufficient to show its relevance and necessity." R.C.M. 703(f)(3). Obviously, it would be difficult, if not impossible, for a defense counsel to list and describe items in a file he has not been permitted to inspect. Even if the defense counsel could make a request sufficient to satisfy the rule's requirements, because the request must be forwarded through the trial counsel, (R.C.M. 703(f)(3)), the trial counsel would still control defense access to evidence.

<sup>12</sup> See R.C.M. 701 analysis at A21-29.

<sup>13</sup> R.C.M. 701(a).

<sup>14</sup> The types of evidence encompassed by R.C.M. 701(a) include: papers accompanying charges, convening orders, sworn or signed statements relating to an offense charged (R.C.M. 701(a)(1)); documents, tangible objects, reports (R.C.M. 701(a)(2)); the names and addresses of the witnesses trial counsel intends to call at trial (R.C.M. 701(a)(3)); prior convictions of the accused offered on the merits (R.C.M. 701(a)(4)); information to be offered at sentencing (R.C.M. 701(a)(5)); and evidence favorable to the defense (R.C.M. 701(a)(6)).

<sup>15</sup> R.C.M. 701(a) has six subsections. R.C.M. 701(a)(1), (3), (4), and (6) obligate the trial counsel to disclose evidence at various junctures in the discovery process without a defense request. R.C.M. 701(a)(5) requires the trial counsel, upon defense request, to permit the defense to inspect evidence and obtain notification of the names and addresses of witnesses trial counsel intends to call at the presentencing proceedings. R.C.M. 701(a)(2) is the only R.C.M. 701(a) subsection that allows the defense to seek access to a wide variety of evidence in the government's possession.

ments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.<sup>16</sup>

"Control the flow" proponents argue that R.C.M. 701(a)(2) implies that the defense has no right to inspect the "information or matters" defined by the rule until after charges are served on the accused.<sup>17</sup> Furthermore, if the defense seeks to inspect such "information or matters," it must do so by making an appropriate request to the trial counsel pursuant to R.C.M. 701(a)(2).

Such sweeping restrictions on defense access to evidence in the government's possession conflicts directly with R.C.M. 701(e), which states:

Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

The interpretation of R.C.M. 701(a)(2) by "control the flow" advocates denies the defense the "equal opportunity" to inspect evidence that R.C.M. 701(e) guarantees all parties.<sup>18</sup> Surprisingly, no case law directly addresses this apparent conflict.<sup>19</sup>

In the absence of judicial precedent, the best way to resolve this apparent discrepancy between R.C.M. 701(a)(2) and R.C.M. 701(e) is to apply basic rules of statutory construction.<sup>20</sup> Using that methodology, the interpretation of R.C.M. 701's subsections must at the very least: 1) be consistent with the plain meaning of the rule's language;<sup>21</sup> 2) be constructed in such a way that creates the most harmony and the least inconsistency;<sup>22</sup> and 3) be consistent with the drafters' intent and the UCMJ provisions upon which it is based.<sup>23</sup>

Application of these rules of statutory construction to R.C.M. 701(a)(2) and R.C.M. 701(e) will facilitate a better understanding of their intended purpose and permit a careful evaluation of the propriety of "controlling the flow."

#### Plain Meaning—R.C.M. 701(a)(2)

The starting point for the analysis of any rule is to look within its "four corners"—at what the language says and does not say. R.C.M. 701(a)(2) plainly states that, after service of charges, the trial counsel must permit the defense to inspect specified categories of "information or matters" if the defense requests such an inspection. Its provisions only apply after two conditions are met: 1) charges are served; and 2) the defense requests the right to inspect certain evidence in the government's possession. R.C.M. 701(a)(2), therefore, has no application prior to service of charges for either the defense or the prosecution. It simply does not define pre-service discovery. It is therefore inappropriate for trial counsel to insist that the defense file a discovery request under R.C.M. 701(a)(2) prior to service of charges.

Notwithstanding its limited scope, "control the flow" advocates often argue that R.C.M. 701(a)(2) defines defense discovery rights prior to service of charges by implication. They insist that R.C.M. 701(a)(2) implies that the trial counsel is the sole conduit through which evidence in possession of the government must flow to the defense before and after service of charges. Under the guise of interpreting R.C.M. 701(a)(2), this approach defies its "plain meaning" and vastly expands its scope. R.C.M. 701(a)(2) does not say the trial counsel is the sole conduit through which all evidence known to or in the possession of the government must pass before reaching the defense counsel, either before or after service of charges. It does not declare that the trial counsel has the authority to direct the CID or other government agencies to withhold discoverable information or matters from the defense counsel before or after service of charges. Nor does it provide that the defense

<sup>16</sup> R.C.M. 701(a)(2).

<sup>17</sup> Charges are not served upon the accused until after a case is referred to trial. See R.C.M. 602. In many jurisdictions, this may not occur until many weeks after charges are preferred.

<sup>18</sup> R.C.M. 103(16) states:

Party, in the context of parties to a court-martial, means: (A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and (B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

Because R.C.M. 308 refers to a person as an "accused" upon notification of charges, a suspect becomes a "party" to a court-martial upon notification to the accused of charges under R.C.M. 308. A defense counsel becomes a party to a court-martial upon being detailed as defense counsel to an accused. Consequently, defense discovery rights under Rule 701(e) begin upon notification to the accused of charges under R.C.M. 308.

<sup>19</sup> A search for cases dealing with the conflict between "control the flow" advocates' interpretation of R.C.M. 701(a)(2) and R.C.M. 701(e) failed to identify any that dealt specifically with this issue.

<sup>20</sup> Although the President prescribes the Rules for Courts-Martial, basic rules of statutory construction may be employed to determine the President's intent. See *United States v. Leonard*, 21 M.J. 67, 69 (C.M.A. 1985) (citing 1A Sutherland, Statutes and Statutory Construction § 31.06 (4th ed. 1985 Revision)).

<sup>21</sup> W. Statsky, *Legislative Analysis and Drafting* (2d ed. 1984); *United States v. Johnson*, 3 M.J. 361 (C.M.A. 1977) (citing Sutherland, Statutes and Statutory Construction § 46.05 (4th ed. 1973)).

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

<sup>23</sup> *Id.*

has no discovery rights prior to service of charges. Moreover, R.C.M. 701(a)(2) contains no express prohibition against the defense obtaining information or matters in the government's possession on its own initiative without seeking the trial counsel's assistance. If the drafters truly intended R.C.M. 701(a)(2) to have such a profound and pervasive effect on defense discovery rights, they certainly would have done so with clear and precise language, rather than by implication.

Nevertheless, proponents of the opposing view argue that if the defense counsel has a right to inspect information or matters referred to in R.C.M. 701(a)(2) without going through the trial counsel, then why does the rule require the defense to make a request for the information to trigger the government's obligation to permit defense inspection of such information or matters? "Control the flow" advocates may contend there is no logical answer to this question. They are convinced that the premise upon which it is based (that the defense has an independent right to inspect evidence) must be false. They conclude that R.C.M. 701(a)(2) prescribes the only means available to the defense to obtain access to the information or matters listed in that rule. Their reasoning, however, is flawed. A logical answer does exist to the rhetorical question posed above.

R.C.M. 701(a)(2) expressly authorizes the defense to ask the trial counsel to help it "fish" for information or matters "in the possession, custody, or control of military authorities." Even if the defense has an independent right to inspect the information or matters listed in R.C.M. 701(a)(2), on many occasions the defense may be unaware of the existence or location of such evidence. An independent right to inspect information or matters in the government's possession would be a hollow one if no means was provided to determine its existence and location. Obviously, if the defense counsel wants the trial counsel to disclose certain items or information, the defense counsel must tell the trial counsel that he or she needs assistance and must specify what items or information are sought. This is the reason that a defense request is necessary to trigger discovery rights under R.C.M. 701(a)(2). The drafters' analysis of R.C.M. 701(a)(2) provides additional support for this interpretation.

Where a request is necessary, it is required to trigger the duty to disclose *as a means of specifying what must be produced*. Without the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession. A request should indicate with reasonable specificity what materials are sought.<sup>24</sup>

<sup>24</sup> R.C.M. 701 analysis at A21-30 (emphasis added).

<sup>25</sup> "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 400 (1950), cited in W. Statsky, *Legislative Analysis and Drafting* 76 (2d ed. 1984).

<sup>26</sup> W. Statsky, *Legislative Analysis and Drafting* 76 (2d ed. 1984).

<sup>27</sup> *Id.*

<sup>28</sup> See *supra* note 3.

<sup>29</sup> *Id.*

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

The requirement in R.C.M. 701(a)(2) that the defense make a request to trigger rights under that rule does not support the conclusion that the defense has no independent right to inspect such information or matters prior to making a request.

Another means of determining the "plain meaning" of a rule is to identify its purpose or objective.<sup>25</sup> This method of analysis is sometimes referred to as "the mischief rule"<sup>26</sup> because the provision's plain meaning is sought by discerning what "mischief" the drafters of the rule intended to remedy.<sup>27</sup>

Assuming R.C.M. 701(a)(2) was intended to authorize the trial counsel to "control the flow" of R.C.M. 701(a)(2) information or matters to the defense, both before and after service of charges, it is difficult to discern what "evil" or "mischief" the drafters of the rule intended to prevent. "Control the flow" advocates might argue the rule prevents the "evils" of defense discovery of information in the CID file of which the trial counsel is unaware or that the government has a legitimate reason to withhold from the defense.

Trial counsel who are truly concerned about such "evils" can readily avoid them by reviewing evidence in the government's possession before charges are preferred and determining if information is included for which the government can justify a refusal to disclose.<sup>28</sup> In the vast majority of cases, this task can be accomplished by simply reviewing the CID case file. Such a pre-preferred review of evidence could be done at the same time the trial counsel reviews the file to determine what charges to recommend for referral. If the trial counsel discovers privileged information during this pre-preferred review, he or she can take appropriate steps to ensure that the government's interests are protected by asserting an appropriate privilege.<sup>29</sup> Furthermore, other government agencies in possession of evidence relevant to a case are also permitted to protect the government's interests by claiming privileges any time the defense seeks access to evidence in their possession.<sup>30</sup> These procedures are adequate to safeguard the government's legitimate needs for non-disclosure.

#### Plain Meaning—R.C.M. 701(e)

R.C.M. 701(e) is devoid of obvious ambiguity. It provides:

Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and to inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.



It is difficult to imagine clearer or more unequivocal language. In R.C.M. 701(e), the phrase "equal opportunity" means equal opportunity in time, place, and manner. Any other interpretation defies the R.C.M.'s plain language. Had the drafters desired, they could have modified the phrase "equal opportunity" in a number of ways. For example, they could have written "reasonably equal opportunity" or "equal opportunity, after service of charges," or they could have left out the word "equal" altogether. The rule does not qualify the phrase "equal opportunity." Because its application is unlimited, R.C.M. 701(e) should be construed broadly to apply to all "parties," both before and after service of charges.<sup>31</sup> Furthermore, because the R.C.M. makes no distinction regarding types of evidence, it encompasses both inculpatory and exculpatory evidence.<sup>32</sup>

By providing the defense an "equal opportunity" to interview witnesses and inspect evidence, before or after service of charges, R.C.M. 701(e) gives the defense the right to launch an independent evidentiary "fishing expedition" without the trial counsel's knowledge or consent.<sup>33</sup> R.C.M. 701(e) also establishes a simple test for determining where the defense can "fish" for evidence. If a government agency, in possession of information that may be relevant to the case, would permit the trial counsel to inspect such evidence, it must also permit access by the defense unless the agency can cite some lawful authority to deny such access.<sup>34</sup> Moreover, by expressly forbidding either party from "unreasonably imped[ing] the access of another party to a witness or evidence," R.C.M. 701(e) also expressly prohibits the trial counsel from telling the defense counsel where he can and cannot "fish" unless the trial counsel can cite some lawful authority for doing so.<sup>35</sup> By providing both parties an equal opportunity to interview witnesses and inspect evidence, R.C.M. 701(e)

puts the trial counsel and the defense counsel on an even footing so they may both readily obtain information vital to preparing their trial strategies.

### Harmony

The principle of harmonious construction presumes "the legislature had a definite purpose in every enactment, and it is the construction that produces the greatest harmony and least inconsistency which must prevail."<sup>36</sup>

The assertion that R.C.M. 701(a)(2) authorizes trial counsel to "control the flow," before or after service of charges, must be discarded because such an interpretation of R.C.M. 701(a)(2) conflicts directly with the broad scope of R.C.M. 701(e). It denies the defense the equal opportunity to inspect evidence and interview witnesses that R.C.M. 701(e) expressly guarantees. This construction is anything but "harmonious." "Control the flow" advocates insist there is no conflict because "controlling the flow" does not "unreasonably impede" the access of the defense to evidence. They argue the defense has an "equal opportunity" to inspect evidence so long as it complies with R.C.M. 701(a)(2). This requirement, however, is unreasonable on its face because it delays defense access to discoverable evidence in the government's possession until after a case is referred for trial and charges are served. Even if the trial counsel is willing to honor a R.C.M. 701(a)(2) request prior to service of charges, it is unreasonable for trial counsel to impose on the defense such a prerequisite to inspection of discoverable evidence without some lawful authority for doing so. Absent a claim of privilege,<sup>37</sup> trial counsel has no such authority. Moreover, there is certainly nothing reasonable about forcing the defense to depend upon the trial counsel's benevolence in permitting inspection of all available evidence in a timely manner.

<sup>31</sup> See *supra* note 18.

<sup>32</sup> *United States v. Kern*, 22 M.J. 51 (C.M.A. 1986); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). In *Kern* and *Garries*, the Court of Military Appeals interpreted the language of UCMJ article 46 which directs that "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." In both cases, the court indicated since this language "makes no distinction as to types of evidence, an accused is entitled to have access to both exculpatory and inculpatory evidence." *Kern*, 22 M.J. at 51; see also *Garries*, 22 M.J. at 293. Because R.C.M. 701(e)'s language is patterned after and virtually identical to the language in article 46, (see R.C.M. 701(e) analysis at A21-30.), it is fair to say that R.C.M. 701(e) also grants an accused equal access to both exculpatory and inculpatory evidence. *But see United States v. Trimper*, 26 M.J. 534 (A.F.C.M.R. 1988).

<sup>33</sup> *United States v. Enloe*, 35 C.M.R. 228 (C.M.A. 1965). In *Enloe* the Office of Special Investigation (OSI) (the Air Force equivalent of the Army's Criminal Investigation Command (CID)) issued a regulation prohibiting defense counsel from conducting private interviews of OSI agents. It required defense counsel desiring to interview OSI agents to submit a request through the local judge advocate to the district commander. Once such a request was approved, the trial counsel or some other government agent was required to be present during the interview. The regulation further provided "the agent or District Commander may terminate [an interview] when he desires or refuse to answer any questions he deems irrelevant or harassing." *Enloe*, 35 C.M.R. at 230. It also authorized "District Commanders to deny these requests if, in their judgment, the interview will result in a 'fishing expedition' or embarrassment to the agent or OSI." *Id.* The Court of Military Appeals ruled the OSI regulation was invalid as being inconsistent with the UCMJ and the Manual for Courts-Martial. *Id.* at 234. The court based its ruling in part on article 46 and MCM, 1951, para. 42. *Id.* In so doing, it stated "in light of the provisions of the Manual and the Code regarding equality of access to witnesses and evidence and the lack of need for the consent of opposing counsel to pretrial interviews of witnesses, it is beyond the authority of the United States to impose itself between the witness and the defense counsel and require, as a condition of granting such interviews, that a third party be present." *Id.* The court went on to say "[a]s the usual purpose of out-of-court interviews is to determine the substance of the witness' knowledge concerning the incidents charged, it is necessarily a 'fishing expedition'." R.C.M. 701(e) is based upon the same UCMJ and MCM provisions upon which the *Enloe* court made its decision. R.C.M. 701(e) analysis at A21-30. Because R.C.M. 701(e) makes no distinction between a party's "equal opportunity" to inspect evidence and interview witnesses, if defense is authorized to conduct a "fishing expedition" for evidence by interviewing potential witnesses, it is also authorized to conduct such an expedition when looking at documentary and other types of evidence.

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

<sup>35</sup> *Id.*

<sup>36</sup> *United States v. Johnson*, 3 M.J. 361, 362 (C.M.A. 1977) (citing Sutherland, *Statutes and Statutory Construction* § 46.05 (4th ed. 1973)).

<sup>37</sup> See *supra* note 3.

This conflict cannot be resolved merely by dismissing R.C.M. 701(e) as a drafters' error or as excess baggage. As the rule of construction cited above states, "it must be presumed that the legislature [in this case the President] had a definite purpose in every enactment."<sup>38</sup> Nor can this conflict be resolved by attributing greater weight to R.C.M. 701(a)(2) than R.C.M. 701(e). Because both provisions are separate and equal subsections of R.C.M. 701, they must be presumed to define discovery rights of parties with equal authority. The only way to resolve this conflict is to reject the implication that R.C.M. 701(a)(2) authorizes the trial counsel to "control the flow."

By accepting the "plain meaning" of R.C.M. 701(a)(2) and rejecting the implication that it permits the trial counsel to "control the flow," the two subsections of R.C.M. 701 become mutually complementary. They can then easily be construed to work in harmony to accomplish the drafters' stated goals of promoting "full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure."<sup>39</sup> While R.C.M. 701(e) grants the defense the opportunity to conduct an independent investigation, R.C.M. 701(a)(2) provides an additional right to request governmental disclosure of any evidence in the government's possession that the defense's independent investigation was unable to uncover. The only limitations on defense access to government-controlled evidence would be those imposed by restrictions on defense access to privileged information, when a specific privilege is claimed by an appropriate government agency.<sup>40</sup> Unlike the interpretation of R.C.M. 701 that is proposed by "control the flow" advocates, there is nothing mysterious or strained about this construction of the rule. It flows naturally from a fair reading of R.C.M. 701's provisions.

#### The Drafters' Intent and the UCMJ

Any interpretation of a Rule for Courts-Martial must, at the very least, be consistent with the drafters' intent and the UCMJ article upon which the rule is based.<sup>41</sup> Fortunately, R.C.M. 701's drafters made no secret of their intent. In their analysis of R.C.M. 701, they state that "[t]he rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure (See e.g., Mil. R. Evid. 301; Section V) and to eliminate 'gamesmanship' from the discovery process."<sup>42</sup> The drafters then specify why R.C.M. 701 was designed to provide for "broader discovery than is required in Federal practice."<sup>43</sup>

Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgments about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truthfinding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before the trial is essential.<sup>44</sup>

In addition to being contrary to R.C.M. 701(a)(2)'s plain meaning and conflicting with R.C.M. 701(e), an interpretation of R.C.M. 701(a)(2) that permits "controlling the flow" is also completely contrary to the drafters' express intent. It is inconceivable that drafters who desired to "provide broad discovery at an early stage" would have intended R.C.M. 701(a)(2) to permit the trial counsel to impede defense access to unprivileged information or matters until after charges are served and the defense submits a formal discovery request. The drafters' analysis of R.C.M. 701(a) makes it quite clear they never intended trial counsel to use this provision to impede in any way defense access to evidence. In their analysis of R.C.M. 701(a), the drafters declare: "When obviously discoverable materials are in the trial counsel's possession, trial counsel should provide them to the defense without a request." Moreover, one of the drafters' express intentions was to eliminate "gamesmanship." When a trial counsel denies the defense immediate access to unprivileged evidence he or she does so for one reason--to gain tactical advantage. This advantage may be simply to delay defense access to evidence, or to account for evidence the defense receives from any governmental entity, or to force the defense to file a discovery request so the trial counsel can possibly exercise reciprocal discovery rights. This practice is classic "gamesmanship" and is precisely what the drafters expressly intended to eliminate.

Even if the drafters had wished to write R.C.M. 701 in a way that denied the defense equal access to evidence, the congressional mandate that authorized the President to promulgate the rule would bar such an effect.<sup>45</sup> R.C.M. 701 is based upon authority granted to the President in UCMJ articles 36 and 46.<sup>46</sup> Article 36

<sup>38</sup> Johnson, 3 M.J. 361.

<sup>39</sup> R.C.M. 701 analysis at A21-29.

<sup>40</sup> See *supra* note 3.

<sup>41</sup> W. Statsky, *supra* note 26.

<sup>42</sup> R.C.M. 701 analysis at A21-29.

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

<sup>44</sup> *Id.*

<sup>45</sup> Article 46 contemplates that the President would promulgate regulations providing the defense with the required 'equal opportunity.' "United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986).

<sup>46</sup> *Id.*

authorizes the President to prescribe rules for pretrial, trial, and post-trial procedures.<sup>47</sup> Article 46 outlines the broad framework within which the President may prescribe regulations concerning the discovery process.<sup>48</sup> Article 46 states: "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."<sup>49</sup> Therefore, the congressional mandate upon which R.C.M. 701 is based required the President to design a discovery system that ensures both the trial and defense counsel an "equal opportunity to obtain witnesses and other evidence."<sup>50</sup> A fair reading of R.C.M. 701 demonstrates that the President fulfilled UCMJ article 46's mandate.

R.C.M. 701 simply does not permit the trial counsel to play the game of "control the flow." Such gamesmanship is inconsistent with the plain meaning of R.C.M. 701(a)(2), in direct conflict with R.C.M. 701(e), and is antithetical to both the drafters' intent and UCMJ article 46. It is also inconsistent with the discovery provisions of the ABA Standards for Criminal Justice.<sup>51</sup> The game of "control the flow" is based on a tortured and erroneous construction of R.C.M. 701 that perverts its express meaning and violates its spirit.

#### Possible Defense Responses

Defense counsel practicing in jurisdictions where the government routinely engages in some form of "control

the flow" should consider implementing some of the following initiatives to assert more completely legitimate defense discovery rights.<sup>52</sup>

#### Education and Diplomacy

The best way to begin changing longstanding attitudes about "controlling the flow" is to inform the trial counsel that R.C.M. 701 and UCMJ article 46 permit the defense an "equal opportunity" to inspect evidence and delaying defense access to evidence during the early stages of a case unnecessarily undermines this right and interferes with timely defense preparation for trial. When using this approach, it is important to remember that diplomacy is the key. Ultimatums or threats are not likely to succeed in loosening the government's grip on evidence. One way you may attempt to persuade the trial counsel to abandon "control the flow" practices is to point out the many advantages gained by granting unhindered access to evidence in the government's possession. These may include: 1) reduced processing time for cases; 2) fewer discovery requests; 3) speedier defense investigations; 4) fewer defense delays; and (5) earlier decisions regarding plea and forum. In addition, when approaching the government concerning this issue, remember there are more players involved than just the trial counsel and local CID agents. An approach to the chief of criminal law, the deputy staff judge advocate, the staff judge advocate, or the CID regional legal advisor<sup>53</sup> may also be productive.

<sup>47</sup> UCMJ art. 36 states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

<sup>48</sup> UCMJ art. 46 states:

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. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

<sup>49</sup> *Id.*

<sup>50</sup> See *supra* note 45.

<sup>51</sup> The game of "control the flow" conflicts with Standard 11-1.1 of the ABA Standards for Criminal Justice (2d ed. 1980) which addresses procedural needs prior to trial. Standard 11-1.1 states:

(a) Procedures prior to trial should:

- (i) promote an expeditious as well as a fair disposition of the charges, whether by diversion, plea, or trial;
- (ii) provide the accused with sufficient information to make an informed plea;
- (iii) permit thorough preparation for trial and minimize surprise at trial;
- (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
- (v) eliminate as much as possible the procedural and substantive inequities among similarly situated defendants; and
- (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings.

(b) These can be served by:

- (i) full and free discovery,
- (ii) simpler and more efficient procedures; and
- (iii) procedural pressures for expediting the processing of cases. Delaying defense access to information in the government's possession merely for the purpose of gaining tactical advantage is certainly not consistent with the objectives in this ABA Standard.

<sup>52</sup> Suggested strategies are listed in the order in which they should be tried.

<sup>53</sup> Judge advocates are assigned to CID regions to provide legal advice on such matters. If the defense counsel can persuade the CID legal advisor that there are ways CID can protect its interests without necessarily prejudicing the defense, he may be instrumental in initiating a policy that permits the defense equal access to evidence. By persuading the legal advisor, the defense may obtain equal access to CID materials without resorting to protracted litigation.

### Take it to the Judge

If diplomatic efforts to educate and persuade fail, the only recourse is to present the issue to a military judge in an article 39(a) session.<sup>54</sup> Getting the judge to order the government to stop its "control the flow" tactics, however, may be difficult. If the trial is preceded by an article 32 investigation, that hearing affords the defense an opportunity to obtain virtually all of the discoverable evidence in the government's possession prior to referral by making a request for production under R.C.M. 405(f) and (g).<sup>55</sup> When the evidence is produced, you should request that the hearing be continued until you have time to review the evidence and prepare for the hearing. If the delay is granted and speedy trial becomes an issue, you should assert that the delay in the article 32 was caused by the government's refusal to grant your pre-investigation discovery request. You should emphasize that the government refused your request for tactical reasons. If your request for delay is denied, as is most likely, you must scour the evidence to find something that would alter the outcome of the article 32 if you had known about it before the article 32. You must then move for a new article 32 investigation, offer into evidence or make an offer of proof of the evidence you discovered, and articulate a reasonable probability that the recommendations of the investigating officer would have been more favorable if you had produced that evidence. This approach should also be used for any derivative evidence.

The ideal case to litigate issues relating to R.C.M. 701(e) is one that is likely to be contested at a special court-martial empowered to adjudge a bad-conduct discharge. Because there is usually no article 32 hearing prior to referral of charges to this level of court, defense discovery rights under R.C.M. 701(e) and UCMJ article 46 prior to service of charges are crucial to defense preparation for trial. Given the importance of R.C.M. 701(e) discovery rights in a trial not preceded by an article 32 investigation, the military judge is likely to be more sympathetic to the defense than he or she would be if the defense had other means to gain access to such evidence prior to service of charges.

Regardless of the type of case selected to litigate the issue, the defense must carefully build a record to set the stage for motion practice. While there are many ways to accomplish this, the particular method chosen may depend upon the manner in which the government impedes defense access to evidence. One approach is to take the following steps immediately after charges are preferred:

<sup>54</sup> UCMJ art. 39.

<sup>55</sup> R.C.M. 405(f)(10) states: "At any pretrial investigation under this rule the accused shall have the right to . . . (10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule." The pertinent part of R.C.M. 405(g) reads as follows:

Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

R.C.M. 405(g)(1)(B).

<sup>56</sup> It may be difficult to demonstrate specific prejudice arising from denial of access to material that the defense has not reviewed. Nevertheless, in almost every case in which the government attempts to "control the flow," the defense counsel can argue the government has denied his client effective assistance of counsel by unnecessarily delaying or impeding defense access to evidence material to trial preparations.

(1) Type a written request to CID to inspect the CID case file pursuant to defense access rights under article 46 and R.C.M. 701(e).

(2) Present the written request to the agent responsible for the investigation. If the agent approves the request and permits full access to the CID file, there is no need to litigate.

(3) If the CID agent disapproves the request, ask the agent to indicate in writing the reasons for disapproving it and the authority upon which he or she is relying. Also ask the agent to specify in writing what steps are required to obtain access to the CID file and whether the trial counsel is also subject to these procedures.

(4) If the steps required of the defense vary from those required of the trial counsel in a way that denies the defense an equal opportunity to inspect the CID file, then the issue can be litigated after referral.

(5) To preserve the issue until the article 39(a) session, do not comply with the procedural steps required by the government as a precondition for defense access. If the defense accedes to the government's demands, the CID case file may be disclosed, but the issue will likely be moot.

(6) Once the case is referred for court-martial, immediately request an article 39(a) session to litigate the issue.

(7) Prepare a brief that states the facts, presents arguments, and lists a detailed chronology of events. Include the written request made to CID and the associated denial as enclosures to the brief.

(8) At the article 39(a) session, move under R.C.M. 906 for a court order directing the trial counsel and the CID to cease and desist from impeding defense access to evidence under the government's control.

(9) Establish a record by presenting witnesses or a stipulation describing the government's denial of defense requests to inspect evidence and the specific basis of those denials. This step is essential, not only to give the trial judge an idea of what happened, but also as preparation for an appeal if the motion is denied. Appellate courts will not necessarily accept a counsel's representations as sufficient to establish a record. The defense should provide specific examples of prejudice suffered by the client as a direct consequence of denial of timely access to the CID file.<sup>56</sup>

(10) While arguing the motion, be especially careful to explain that the defense is not moving simply for

production of the CID file. Instead, the objective is to obtain a judicial ruling on the legality of the government's restrictions on defense access to the CID file. If the judge thinks that the defense is merely moving for the immediate production of the CID file, the judge may either grant that motion or instruct the defense counsel to file an appropriate discovery request, without ruling on the underlying legality of the government's actions. Emphasize that the goal is not to obtain sanctions against the government,<sup>57</sup> but to obtain a ruling prohibiting the government from unreasonably impeding defense access to evidence.

(11) If the judge concludes that the government has unlawfully impeded defense access, go to CID and ask once more to see the case file. If, however, the judge finds the government acted lawfully in restricting defense access to evidence, then the defense must preserve the issue for appeal by filing an immediate discovery request to obtain access to the CID file. Failure to make this request may result in a finding by appellate judges that the issue is moot because the defense waived its discovery rights.

Repetition of these steps in a number of cases is more likely to convince appellate judges that the issue merits review and may cause the government to reconsider its policy of routinely impeding defense access to evidence before service of charges. Litigating this issue on a regular basis may be more trouble for the government than the marginal benefits gained from efforts to "control the flow."

#### *Keep the Pressure On*

In conjunction with the strategies discussed above, the defense should take several other steps to make the game of "controlling the flow" more costly for the government. First, refuse to play "control the flow" games in every case in which the defense can afford to do so. Second, insist that the entire CID file be produced at

every article 32 investigation along with any other evidence routinely withheld by the government. Third, after referral of charges, routinely make comprehensive R.C.M. 701(a)(2) discovery requests and consistently seek sanctions for any governmental failures to respond fully or in a timely manner. If all defense counsel throughout the jurisdiction take these steps, the government may well conclude that the game of "controlling the flow" is more trouble than it is worth and abandon the tactic altogether.

#### **Conclusion**

Discovery procedures that eliminate gamesmanship from the trial process and facilitate equal access to evidence best serve the interests of justice and the accused. At a minimum, efforts by trial counsel to "control the flow" of evidence to the defense after referral of charges often slow the process of bringing an accused to trial by unnecessarily disrupting the timing and sequencing of defense preparations for trial. R.C.M. 701(a)(2) does not specify that the defense must obtain all discoverable evidence in the government's possession from the trial counsel, nor does it prescribe the only available avenue for defense access to such evidence. On the contrary, it must be read in conjunction with R.C.M. 701(e). These subsections are mutually complementary and were designed to promote the broadest possible discovery rights by all parties to courts-martial. In those limited instances where the government can assert a legitimate privilege to justify nondisclosure, alternative means are readily available to ensure reasonable control over defense access to such privileged information. Although the interaction between subsections (a)(2) and (e) of R.C.M. 701 admittedly is a difficult issue to get before the trial judge, defense counsel serving in jurisdictions where the government engages in "control the flow" tactics must be sensitive to those cases that provide an appropriate setting for litigating the full scope of R.C.M. 701(e).

<sup>57</sup> The only sanction the defense may be interested in pursuing is an appropriate continuance to inspect the case file and to follow any leads discovered in it. Further sanctions may be necessary if the defense counsel discovers evidence that demonstrates the client's interests were seriously prejudiced by delay in gaining access to the file.

## Trial Judiciary Note

### United States v. Vega: A Critique

Lieutenant Colonel Patrick P. Brown  
Military Judge, Third Judicial Circuit

In *United States v. Vega*<sup>1</sup> the accused pleaded guilty to carnal knowledge and sodomy with a child. The trial counsel moved in limine to prevent the defense from cross-examining the victim concerning her prior sexual activities with two boy friends and to prevent any extrinsic evidence of such matters. The trial judge ruled that the defense could present evidence about the accused's "knowledge or belief, on the night of the offenses, about the victim's prior sexual acts and her character for chasteness,"<sup>2</sup> but the judge would not allow evidence about the accuracy of such knowledge and belief.

Citing *United States v. Johnson*,<sup>3</sup> the Army Court of Military Review (ACMR) in *Vega* held that Military Rule of Evidence 412 applies to carnal knowledge, even though consent is not an element.<sup>4</sup> Military Rule of Evidence 412, however, by its express language, applies only to "nonconsensual sexual offenses," and Military Rule of Evidence 412(e) clearly defines such an offense as "a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense." The Air Force Court of Military Review in *Johnson* "categorically" rejected the defense assertion that Military Rule of Evidence 412 did not apply to carnal knowledge or indecent acts with a child. In so doing, the court did not engage in any convoluted or sophistic reasoning, but simply stated that "[i]t is the type of offense contemplated by Military Rule of Evidence 412(e), which was intended to be broader in its application than the federal rule. . . . It simply makes no sense to deny children the same protection given adults by the rule."<sup>5</sup>

The drafters' analysis, cited by the *Johnson* court for the proposition that the military rule was intended to be broader in application than the federal rule, indicates that the rule no longer applies only to the crimes of rape and assault with intent to commit rape,<sup>6</sup> but now applies to all "nonconsensual sexual offenses."<sup>7</sup> This expansion of the rule was supposedly to meet the needs of the military, although nowhere in the analysis do the drafters suggest that the rule is to apply to sexual

offenses such as carnal knowledge or consensual sodomy that do not meet the definition contained in Military Rule of Evidence 412(e). *Johnson*, therefore, is an inadequate basis for completely discarding the limitations set forth in Military Rule of Evidence 412. Of course, children are not denied the protections of the rule, but the minor participant in a consensual sex act is not protected by this particular rule.

The essential finding by the ACMR in *Vega* was that evidence about the victim's reputation or prior sexual encounters is not relevant to determining an appropriate sentence. The *Vega* court acknowledged that the accused could present evidence "to explain the circumstances surrounding the commission of the offense"<sup>8</sup> as provided in Rule for Courts-Martial 1001(c)(1)(A), but the court did not seem to consider any other category of evidence that might be offered on sentencing. Matters in extenuation and mitigation are not so limited. In *United States v. Fox*,<sup>9</sup> cited by the ACMR for the proposition that Military Rule of Evidence 412 also applies to the sentencing portion of the trial, the Court of Military Appeals clearly held that "the defense, as well as the Government, may present evidence on sentencing regarding the impact of the offense on the victim so all the repercussions of the crime can be understood by the sentencing authority."<sup>10</sup> Nothing in the *Fox* decision suggested that such evidence could only be offered by the defense to rebut government evidence, as the ACMR seems to require.<sup>11</sup>

In *Vega* the ACMR quoted the language from paragraph 45(c), part IV, Manual for Courts-Martial, United States, 1984, that

[i]t is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.<sup>12</sup>

<sup>1</sup> 27 M.J. 744 (A.C.M.R. 1988).

<sup>2</sup> *Id.* at 746.

<sup>3</sup> 17 M.J. 517 (A.F.C.M.R. 1983).

<sup>4</sup> 27 M.J. at 746.

<sup>5</sup> 17 M.J. at 519.

<sup>6</sup> Fed. R. Evid. 412.

<sup>7</sup> Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 412 analysis, app. 22, at A22-34 [hereinafter Mil. R. Evid. 412 analysis].

<sup>8</sup> 27 M.J. at 747.

<sup>9</sup> 24 M.J. 110 (C.M.A. 1987).

<sup>10</sup> 24 M.J. at 113.

<sup>11</sup> See 27 M.J. at 747-48.

<sup>12</sup> *Id.* at 747.

The court restricts this last sentence, however, to evidence of the accused's knowledge and belief: "This provision should not be read as a blanket statement of inclusion. The defense still must convince the military judge that the accused's knowledge or belief serves to explain the circumstances surrounding the offense."<sup>13</sup> In so restricting the language of this provision, the court seemingly applied the words "ignorant or misinformed" to the prior chastity of the female, as well as to her age.

The language quoted from paragraph 45 was carried forward without change from the Manual for Courts Martial, United States, 1951, paragraph 199b, and was not restrictively interpreted in the past. In *United States v. Shields*<sup>14</sup> the accused had a complaint similar to Vega's; the accused claimed that the law officer had disallowed, in extenuation, evidence of the prior unchaste character of the alleged "victim" of the carnal knowledge. The Board had no difficulty with such a question: "One need look no further than the Manual to conclude that . . . [e]vidence of such matters (prior unchaste character) should . . . be considered in determining an appropriate sentence."<sup>15</sup> In so ruling, the Board apparently interpreted the provision of paragraph 199b as having two parts, relevant to sentencing but not to findings: first, "that the accused is ignorant or misinformed as to the true age of the female;" or second, "that she (the female) was of prior unchaste character."

As interpreted by the *Shields* court, the provisions of paragraph 45(c) seem to be a statement that evidence about the female's prior unchaste character is relevant to sentencing in a case of carnal knowledge. If so, then the application of Military Rule of Evidence 412 to such a case is error.<sup>16</sup> The interpretation in *Shields* appears to be more consistent with the literal construction of the paragraph than the interpretation of the provision by the *Vega* court. The *Shields* interpretation also seems to be more supportive of the concept that information about the victim, as well as the accused, is relevant to the determination of an appropriate sentence in such a case.<sup>17</sup> A rape victim's prior sexual activity is normally

not relevant to sentencing, because "an unchaste woman has just as much right to be protected from nonconsensual sexual assaults or abuse as a chaste woman."<sup>18</sup> Accordingly, information of this nature would add nothing to the sentencing decision.<sup>19</sup> The same reasoning does not necessarily apply, however, to the offense of carnal knowledge. It is certainly true that a prostitute can be raped and her occupation would not affect the nature of the offense nor her right to be protected from it. On the other hand, however, if a minor child was a prostitute, her occupation *would* be relevant to a decision concerning the severity of the offense of carnal knowledge committed by one of her customers and to a determination of an appropriate sentence.

Military Rule of Evidence 412, by its very terms, does not apply to the offenses of carnal knowledge or consensual sodomy, and paragraph 45(c), part IV, Manual for Courts-Martial, United States, 1984, establishes the sentencing relevance of the female's prior sexual character in a carnal knowledge case. The ACMR's reasoning in *Vega*, therefore, is faulty. Nevertheless, none of this is to say that the court's ruling was incorrect. Even though certain evidence may be relevant under paragraph 45(c), Military Rule of Evidence 403 requires that the evidence be examined to ensure that "its probative value" is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members."<sup>20</sup> Further, Military Rule of Evidence 303 prohibits asking a question of any person if the answer "is not material to the issue and may tend to degrade that person." The use of the term "material" indicates that something more than the broad relevance defined in Military Rule of Evidence 401<sup>21</sup> is needed, and the term may be interpreted to require the evidence to be significant to the presentation of the case or of some substantial value to the proponent's case.<sup>22</sup> The drafters' analysis of this rule clearly indicates their opinion that evidence of prior sexual activity tends to degrade the witness.<sup>23</sup> A reasonable application of these two rules might very well have produced the same result in this case, without any need to distort the language of the Manual.

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

<sup>14</sup> 40 C.M.R. 546 (A.B.R. 1969).

<sup>15</sup> *Id.* at 548. At the time of the *Shields* decision, paragraph 153b of the MCM, 1951, permitted the admission of evidence of the prior sexual activity of the victim of any sexual crime, whether rape or carnal knowledge, in order to impeach the victim's testimony, and permitted evidence as to the prior sexual activity of a rape victim to infer consent. Nevertheless, the Board in *Shields* clearly relied on the provisions of paragraph 199b, not the language of paragraph 153b.

<sup>16</sup> See *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983). "Military Rule of Evidence 412 is primarily a rule of relevance." *Id.* at 29 (Everett, J., concurring).

<sup>17</sup> See *United States v. Fox*, 24 M.J. 110 (C.M.A. 1987); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) discussion [hereinafter R.C.M. 1001(b)(4) discussion].

<sup>18</sup> 24 M.J. at 113.

<sup>19</sup> *But see United States v. Schlegel*, 7 M.J. 773 (A.C.M.R. 1979).

<sup>20</sup> *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985), establishes that Military Rule of Evidence 403 applies to sentencing evidence as well as evidence offered on the merits of the case.

<sup>21</sup> See Mil. R. Evid. 412 analysis at A22-9.

<sup>22</sup> See *Black's Law Dictionary*, Revised Fourth Edition: "MATERIAL EVIDENCE. Such as is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case. . . . 'Materiality,' with reference to evidence does not have the same signification as 'relevancy.'"

<sup>23</sup> MCM, 1984, A22-9.

## Contract Appeals Division—Trial Note

### Hindsight—Litigation That Might Be Avoided

Major R. Alan Miller

Trial Attorney, Contract Appeals Division

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

#### Problem

The post contracting officer has forwarded another solicitation for your review. This solicitation is for the shelf stocking services at the post commissary. Your review reveals that the solicitation is legally sufficient with the exception of one major item. The amount that the contractor will be paid is based upon the actual number of cases of grocery items stocked per month. The solicitation contains an estimate of the number of cases to be stocked per month, upon which the bidders are expected to base their bids. You note that the solicitation contains the Variation in Estimated Quantities clause, as you previously recommended to the contract specialist on one of your visits to the contracting office. You also notice that the estimated amount of cases to be stocked has not changed from the previous contract. You consider that to be a potential problem because the previous contractor has filed a claim with the contracting officer for an equitable adjustment of the contract price due to a faulty estimate in the previous contract. The government's estimate of the cases to be stocked per month in the previous contract was grossly inflated, and the contractor claims that it suffered increased costs because of a negligently prepared estimate. You wonder why the contracting officer has used the *same* estimate for this solicitation as she did for the previous contract.

Your investigation reveals that the actual number of cases stocked per month under the previous contract is substantially lower than the estimate contained in this new solicitation. You also learn that the contracting officer used the same estimate for the new contract because she was afraid that, by using a lower estimate in this solicitation, she would somehow prejudice the government's position in regard to the claim under the previous contract. She thought that using the lower estimate in this new solicitation would appear as an admission of fault in preparation of the estimate contained in the previous contract.

#### Analysis

Unfortunately, the contracting officer's belief in this example is one that is all too commonly held by contracting personnel in the field. While the origin of this misconception is unknown, it may stem from a common-sense-type argument: If the government changed the estimate in this subsequent solicitation and all other factors have remained basically the same, then the estimate contained in the previous contract *must* have been faulty. Thus, the argument goes, by subsequently lowering the estimate, the government is admitting that its previous estimate was in error. This argument has indeed been used by many contractors.<sup>1</sup> Fortunately for the government, that argument has been soundly rejected by the courts and boards. In its most recent decision on the issue, the Armed Services Board of Contract Appeals (ASBCA) stated: "As to [contractor's] argument that changes in the follow-on contract's specifications in this area prove that the instant contract was ambiguous, such is not the state of the law."<sup>2</sup> In fact, rather than penalize the government for attempting to rectify previous problems by correcting a new solicitation, the courts and the ASBCA have virtually sanctioned corrective actions by the government.<sup>3</sup> While the case law in this area largely addresses the issue of ambiguous specifications, amendment of the estimate in this example is analogous.

#### The Solution

You should tell the contracting officer that she should use an estimate that more accurately reflects the figure that can be expected by the contractor. Not only should it have no effect on the present claim before her for decision (or any appeal before the ASBCA), but it may well prevent future claims under the new contract.

#### The Claim

The next action on your desk is the contracting officer's request for advice on a proposed settlement of the claim under the previous shelf stocking contract for the commissary. As noted above, the government's estimate was much higher than the actual figures. Your investigation has concluded that the estimate was negligently formulated and that it would be most advantageous to settle the claim. The contractor claims that it should be paid the amount it would have been paid if

<sup>1</sup> *Martin Lane Co., Inc. v. United States*, 193 Ct. Cl. 203, 432 F.2d 1013 (1970); *Harris System International, Inc.*, ASBCA No. 33280, 88-2 BCA ¶ 20641; *Emerald Maintenance, Inc.*, ASBCA No. 29540, 86-3 BCA ¶ 19044; *American Drafting and Laminating Co.*, ASBCA No. 23648, 82-1 BCA ¶ 15687 (contractor argued that subsequent amendment of contract specifications proved that the clause in question was ambiguous).

<sup>2</sup> *Harris*, 88-2 BCA at 104,339 (citing *Martin Lane*, 193 Ct. Cl. at 204).

<sup>3</sup> "[C]larification in a subsequent procurement of language which has theretofore given rise to disagreement is only wise." *Martin Lane*, 193 Ct. Cl. at 218. "Clarification in a subsequent procurement of language which has given rise to a disagreement is only prudent." *Emerald Maintenance*, 86-3 BCA at 96,178.



the estimate had reflected the actual figures. The contractor explains that it factored its fixed costs against the estimated number of cases to be stocked when preparing its bid, figuring to recover a certain amount of the fixed costs with every case stocked. The contractor argues that it relied to its detriment on the estimate as representative of the amount of cases to be stocked; therefore, the estimated figure should be the basis of its recovery. The contracting officer is not sure what standard should apply to the claim.

### Analysis

Having resolved the issue of entitlement, you must now look to the question of quantum: What standards should be applied to reach a fair and equitable compensation for the contractor? The contractor's argument is at least logical on its face. Had the estimate been more accurate, the contractor would have been paid more under the contract. Because the estimate was formulated negligently, the government should bear the cost impact.

Depending on the nature of the contract, faulty estimate claims have been held compensable under the Changes clause<sup>4</sup> or under the Differing Site Conditions clause.<sup>5</sup> The presence of the Variation in Estimated Quantities clause in the contract is irrelevant when there is a finding that the estimate was not formulated with due care.<sup>6</sup> Accordingly, the limitation contained in that clause would not restrict recovery for the contractor.

Given the above, the facts set out in the example support compensation under the Changes clause. Generally, the amount of adjustment is based on the difference in cost due to the varied amount, not a complete

repricing of the work based on actual costs for the difference.<sup>7</sup> In a case that is very similar to the example, where the contractor was paid based upon the number of pieces of laundry processed, the ASBCA stated:

Where . . . the Government has negligently over estimated . . . the contractor is entitled to an equitable adjustment based on any increased costs of performing . . . plus reasonable profit on the work performed.<sup>8</sup>

While the board did characterize its finding on quantum as a "jury verdict," it compensated the contractor based upon the difference between its actual costs at the decreased volume and the costs it would have incurred had the estimate been correct. By compensating the contractor in such a manner, the board recognized that as volume decreased, the contractor's costs increased.<sup>9</sup>

### The Solution

Your advice to the contracting officer should be that she needs more information upon which to make her decision. Because the contractor has the burden of proving that it incurred additional costs as a result of the inaccurate estimate,<sup>10</sup> she should tell the contractor to submit the cost data in support of its claim. She should then proceed to analyze the costs in light of the actual figures as compared to what the costs would have been if the estimate had been accurate. In that way, the contracting officer can assure herself that the contractor is really being compensated only for the "changed" work; in this example, the lower volume of cases stocked.

<sup>4</sup> *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 397 F.2d 826 (1968); *Crown Laundry and Dry Cleaning*, ASBCA No. 28889, 85-2 BCA ¶ 18003.

<sup>5</sup> *United Contractors v. United States*, 177 Ct. Cl. 151, 368 F.2d 585 (1966).

<sup>6</sup> *Womack v. United States*, 182 Ct. Cl. 399, 389 F.2d 793 (1968).

<sup>7</sup> *Pied Piper Ice Cream*, ASBCA No. 20605, 76-2 BCA ¶ 12,148.

<sup>8</sup> *Crown Laundry and Dry Cleaners, Inc.*, ASBCA 31900, 86-3 BCA ¶ 19,112.

<sup>9</sup> The board also included G&A and profit in the recovery. *Crown Laundry*, 85-2 BCA at 96,611.

<sup>10</sup> *R.W. Contracting, Inc.*, ASBCA No. 24627, 84-2 BCA ¶ 17,302.

## Regulatory Law Office Note

### Reducing the Cost of Electricity

Some military installations may have an opportunity to reduce the future cost of electricity by increasing their allocation of hydro-electric power from Western Area Power Administration (Western) or other federal power marketing agencies. Such electricity has a cost that is a mere fraction of the cost of power from most utilities. Unfortunately, however, this source of electricity is rarely available and usually involves federally-owned hydro-electric projects.

When such inexpensive electricity does become available, the federal power marketing agency providing the power will usually institute a proceeding soliciting applications for allocations of that power. The solicitation would appear in the *Federal Register*. Federal facilities such as Army installations may receive a statutory preference in the allocation process.

Absent an application, the Army will not receive an allocation of this cheaper electricity. Many competing entities, including privately-owned electric utilities, will make applications for an allocation of power. Energy officers and facility engineers may need the assistance of their lawyers both in preparing the installation's application for a requested allocation of power and in drafting comments to respond to the federal power marketing agency about proposed allocations. For instance, Western has proposed an allocation and sale of surplus power from the Navajo Generating Station related to the operation of the New Waddell Dam, scheduled to occur on or about 15 October 1992. In that proposed allocation Western has proposed that one million watts of capacity be allocated to the Army at Yuma Proving Ground. Six other Army installations have such allocations of Western power. Western has also proposed allocations for Luke and Davis-Monthan Air Force Bases. See 54 Fed. Reg. 20,634 (1989).

The major problem faced by an installation seeking an allocation is interconnection between the source of the electricity and the installation. When the power owned by one entity is delivered through the transmission lines of one or more intervening parties, the intervening parties are said to be providing "wheeling" of the power. While some installations may be served directly by transmission lines of a federal power marketing agency, most are served by intermediate utilities. These utilities may have no legal duty to provide wheeling service; however, they may find it advantageous to do so.

There is no statutory requirement for mandatory wheeling of electricity. The Federal Energy Regulatory Commission (FERC) has a policy favoring voluntary wheeling agreements. As a condition precedent to approval of a recent merger, FERC required the utility to agree to wheel power for some utility customers. See *Utah Power & Light Company, PacifiCorp, Merger*, FERC Docket No. EC88-2-004, 46 FERC 61,086, 27 Jan. 1989. Contracts and tariffs providing for wheeling must be filed by utilities with the FERC. The Commission has exercised jurisdiction to regulate the level of rates charged for wheeling services. Absent an initial agreement by a utility to wheel power, however, the FERC will not presently prescribe a wheeling rate.

Some utilities have entered into contracts in the past to wheel power for military installations. The Defense Depot at Ogden, Utah, has an agreement with a delivering utility and a FERC regulated wheeling rate. Some years ago, Pacific Gas and Electric Company (PG&E) entered into Contract No. 2948A, in which they agreed to wheel Western power to "preference customers" at numerous delivery points in central and northern California. Should additional sources of Western electricity become available, some installations may have wheeling agreements in place that could be used more fully.

Where an installation has an allocation of federal power generating capacity and receives delivery of that energy from an intervening utility, there is a question about whether that capacity might be counted in establishing the installation's eligibility as a "partial requirements" customer of the intervening utility under a FERC-regulated wholesale rate. The partial requirement power rates are sometimes more attractive than the full requirement FERC rates. Because wheeling power is largely by voluntary agreement, there is little precedent on such ancillary issues at this time. If changes occur in the wholesale electric power market in a fashion similar to changes that have occurred in the natural gas industry, many such issues may arise.

In accordance with AR 27-40, the Regulatory Law Office (JALS-RL) should be advised of the intent of an installation to apply to a federal power marketing agency requesting an allocation of electricity. Additionally, the Regulatory Law Office should be informed of any wheeling agreements or changes in wheeling rates requiring action before the FERC.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Notes

### Marriage, Divorce, and the UCMJ

Two recent decisions by the Court of Military Appeals address the impact of state marriage and divorce law on criminal charges that are brought under the Uniform Code of Military Justice.<sup>1</sup> On first reading, these cases may appear to reach inconsistent results concerning the question of how a state law determination on the validity of a marriage or divorce should be treated for purposes of a military criminal prosecution. Upon closer examination, however, the cases can be harmonized and a useful analytical approach for addressing such issues does emerge.

In the first case, *United States v. Allen*,<sup>2</sup> the accused was convicted, *inter alia*, of larceny and making false official statements concerning his marital status. The evidence showed that the accused's wife filed for divorce about two years after she and the accused were married.<sup>3</sup> Her grounds were that she and the accused lived apart for over one year, which is recognized as a basis for divorce under North Carolina law. The accused did not contest the divorce, and it was granted by a North Carolina trial court. The couple later reconciled and lived together as husband and wife for over a year. After a later separation, the accused's wife complained to the accused's commanding officer that the accused was receiving BAQ payments at the married rate, even though he was divorced. The accused was charged with larceny and with making false statements concerning his marital status.<sup>4</sup> After the article 32<sup>5</sup> investigation but before trial, the accused asked the North Carolina court that granted the divorce decree to set it aside as being fraudulently obtained. The action was based on the wife's article 32 testimony that she and the accused lived together during the year preceding her filing for divorce. The North Carolina court agreed with the accused and issued a decree declaring the accused's divorce void *ab initio*.<sup>6</sup> Based on this divorce-revocation decree, the accused sought at his court-martial to have the charges against him dismissed. He argued that, because he was

never divorced under the applicable state law, his statements that he was married were not false and, therefore, he did not illegally obtain funds. The military judge denied the motion and recognized the North Carolina court's divorce decree, but not the later decree revoking the divorce.<sup>7</sup>

The Court of Military Appeals disagreed and reversed the accused's conviction for larceny and the false official statements. The court held that the North Carolina decree voiding the earlier divorce decree *ab initio* was entitled to full faith and credit and that the effect of the divorce-revocation decree on the acts done by the parties prior to the decree was a question of state law.<sup>8</sup>

About six months later the Court of Military Appeals decided *United States v. Bolden*.<sup>9</sup> In *Bolden* the accused was convicted, *inter alia*, of larceny and conspiracy to commit larceny. One basis for these charges was that the accused conspired with and aided another airman who entered a "sham" marriage.<sup>10</sup> The sham marriage was arranged so the airman could live off post and obtain certain financial benefits. In connection with this scheme, the accused suggested that the airman marry his (the accused's) girlfriend under the following terms: the marriage not be consummated; the airman and the accused's girlfriend not live together or go out socially; the airman pay the accused's girlfriend monthly support; and the airman rent an apartment in which the accused had a half interest. The airman agreed, and he and the accused's girlfriend thereafter obtained a marriage license and participated in a wedding ceremony before a state official. Although the couple never lived together, the airman apparently believed they were lawfully married and accordingly applied for and received military benefits based on his putative marriage.<sup>11</sup> The military judge instructed that, even if a marriage is recognized under Alaskan state law, a "sham" marriage would nonetheless be void because of public policy and would not be valid. The judge let the court members decide the factual question of whether the airman's putative marriage to the accused's girlfriend was valid or was a "sham."<sup>12</sup> The members apparently found the marriage

<sup>1</sup> 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

<sup>2</sup> 27 M.J. 234 (C.M.A. 1988).

<sup>3</sup> The marriage was apparently rocky, as the accused and his wife separated and reconciled several times. *Allen*, 27 M.J. at 235.

<sup>4</sup> *Id.*

<sup>5</sup> UCMJ art. 32.

<sup>6</sup> *Allen*, 27 M.J. at 235.

<sup>7</sup> *Id.* at 235-36.

<sup>8</sup> *Id.* at 238-39.

<sup>9</sup> 28 M.J. 127 (C.M.A. 1989).

<sup>10</sup> 28 M.J. at 128. The second, independent basis for these charges involved overstated rent in connection with the "sham" marriage. *Id.* at 129.

<sup>11</sup> *Id.* at 128.

<sup>12</sup> *Id.* at 129.

to be invalid and convicted the accused of larceny and conspiracy.<sup>13</sup>

The Court of Military Appeals affirmed the accused's conviction on the alternative bases found at trial, including the "sham" marriage rationale. The court held that, even if the marriage was valid under Alaska law, congressional intent rather than state law controls whether the airman—and indirectly the accused—lawfully received military benefits based on the airman's marriage.<sup>14</sup> The court, relying on federal precedent interpreting an immigration statute,<sup>15</sup> found that the congressional intent was to provide military benefits to a service member and spouse who live together as husband and wife and have a good faith belief that they are married.

The Court of Military Appeals distinguished its decisions in *Bolden* and *Allen* as follows:

The situation here [in *Bolden*] is different from that in *United States v. Allen*, 27 MJ 234 (CMA 1988). There the Government never contended that the servicemember and the purported spouse had entered into a sham marriage. Instead, the issue was whether two married persons had been validly divorced. We concluded that Congress intended for the court-martial to be bound by a judicial determination of the validity of the divorce, which had been made by a court of the state having jurisdiction over the marital *res*. Under the circumstances in *Allen*, it would have been unfair to ignore state matrimonial law in assessing the criminal liability of the accused servicemember. On the other hand, there is nothing unfair in imposing criminal liability on a servicemember who seeks to obtain allowances from the Government by entering into a fake marriage; and, in light of *Lutwak*, we are convinced that Congress meant to impose such liability.<sup>16</sup>

The proper interpretation of the preceding paragraph—specifically the meaning of the term "unfair"—is not entirely clear. Has *Allen* been limited strictly to its facts by the *Bolden* decision?<sup>17</sup> Is fairness an independent basis for deciding whether to credit state law determinations concerning marriage and divorce?<sup>18</sup> Has

the court decided to credit all state law determinations about divorce but not concerning marriage, presumably because there is no divorce analogue to a "sham" marriage?

Although all these interpretations are arguably suggested, the best way to reconcile *Allen* and *Bolden* is to focus on congressional intent. Although military courts have traditionally given full faith and credit to state court determinations concerning marriage and divorce,<sup>19</sup> this willingness to credit state law has never been absolute. Indeed, as recognized by the court in *Allen*: "The failure of the [military] judge to decide this question in light of applicable North Carolina statutes and case law, absent some prevailing federal interest properly proven, was . . . legal error."<sup>20</sup> Such a prevailing federal interest, though not proven or apparent in *Allen*, was found by the court in *Bolden*; i.e., the congressional intent not to provide monetary benefits to a service member based on a "sham" marriage, regardless of whether it is recognized by state law.<sup>21</sup> Viewed in this light, "unfairness" could arise if a military accused was not permitted to rely on a state law determination concerning his marriage or divorce, absent a countervailing federal interest. "Unfairness" could also occur where the accused did not have the requisite *mens rea* for an offense; for example, where the accused's marriage is valid under state law but is a "sham" in fact, provided the accused has no knowledge of the "sham."<sup>22</sup> This interpretation of *Allen* and *Bolden* reconciles these decisions with a consistent analytical basis and provides trial practitioners with a useful way of interpreting and applying these cases. This analysis also recasts the unorthodox language concerning "unfairness" in the familiar terms of congressional intent and *mens rea*. MAJ Milhizer.

#### Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman

Last year the Court of Military Appeals decided two cases<sup>23</sup> that helped clarify the range of behavior that constitutes conduct unbecoming an officer and gentleman.<sup>24</sup> These cases involved types of misconduct that have traditionally been the subject of article 133 charges: dishonesty, immoral acts, and inappropriate

<sup>13</sup> *Id.* at 128-29. The other basis was the overstated rent.

<sup>14</sup> *Id.* at 129-30.

<sup>15</sup> See *Lutwak v. United States*, 344 U.S. 604 (1953) (interpreting the War Brides Act).

<sup>16</sup> *Bolden*, 28 M.J. at 130-31.

<sup>17</sup> The court writes, "under the circumstances of *Allen*." *Id.* at 130.

<sup>18</sup> In the quoted paragraph, the court in *Bolden* seems to speak of fairness and congressional intent as being separate bases for deciding whether to credit state law. *Id.* at 130-31.

<sup>19</sup> See *United States v. Richardson*, 4 C.M.R. 150, 156 (C.M.A. 1952); see also *United States v. Patrick*, 7 C.M.R. 65 (C.M.A. 1953); *United States v. Rohrbaugh*, 2 C.M.R. 756 (A.F.B.R. 1952).

<sup>20</sup> *Allen*, 27 M.J. at 239 (emphasis supplied) (footnote omitted).

<sup>21</sup> *Bolden*, 28 M.J. at 130.

<sup>22</sup> This situation could arise, for example, if the airman in *Bolden* was unaware of the accused's and the accused's girlfriend's scheme, and thus "innocently" entered into a valid but "sham" marriage without his knowledge.

<sup>23</sup> *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988); *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

<sup>24</sup> UCMJ art. 133.

behavior with enlisted members.<sup>25</sup> With its more recent decision in *United States v. Lewis*,<sup>26</sup> the court has considered the application of article 133 to less conventional conduct by an officer. Although the nature of the accused's behavior in *Lewis* may have been unorthodox, the court's opinion is nonetheless consistent with precedent and follows sound principles of military law. Several aspects of the decision, however, merit further discussion.

First Lieutenant Lewis was assigned to the same battery as Lieutenant Medina.<sup>27</sup> The battery commander considered Medina's leadership and technical skills to be deficient, and he asked all commissioned officers in the unit to assist Medina in improving his professional performance.<sup>28</sup> As characterized by the court, the accused "exploited this opportunity by charging his brother officer certain fees for instructions on platoon leadership. [The accused] received over \$2,000 for tutoring the junior officer for about 2 to 3 hours a week for a period of 5 months."<sup>29</sup>

The accused was charged under article 133 for charging Medina for the tutoring.<sup>30</sup> Interestingly, the accused's behavior in *Lewis* not only fell outside the range of misconduct traditionally reached by article 133, but also technically complied with the "letter" of battery commander's request. Despite these facts, the Court of Military Appeals affirmed the accused's conviction for conduct unbecoming an officer and a gentleman.

The court found that the accused's behavior severely discredited him as an officer.<sup>31</sup> The accused's conduct thus satisfied one of the two prerequisites for a violation of article 133. The second prerequisite, that the behavior seriously compromises the officer in his personal capacity as a gentleman,<sup>32</sup> was not expressly addressed by the court. Nevertheless, the nature of the accused's conduct clearly demonstrates that this second requirement of article 133 was also satisfied.

Although the accused's misconduct is in many ways an unusual basis for an article 133 charge, the result in *Lewis* is not unprecedented. Financial irregularities can, in appropriate circumstances, constitute a violation of article 133. The determining factor, as in all article 133 cases, is whether the behavior seriously compromises the officer's standing both in his official capacity as an officer and in his personal capacity as a gentleman. Thus, while merely loaning money to a subordinate is not necessarily punishable under article 133,<sup>33</sup> loaning money to a subordinate and charging usurious interest rates amounts to conduct unbecoming an officer and a gentleman.<sup>34</sup> The court's decision in *Lewis* is consistent with this precedent.

Moreover, the accused's behavior in *Lewis* is not innocent merely because he complied with the "letter" of the commanding officer's request. An officer may technically comply with an order and nonetheless engage in unbecoming conduct. For example, a commander's order to a subordinate officer to ensure that a unit pass a comprehensive inspection would not be justification for that officer to wrongfully appropriate equipment or to falsify training logs. If the officer's conduct is both personally and professionally discrediting—the gravamen of an article 133 charge—then he is guilty of conduct unbecoming an officer and a gentleman regardless of a superior's orders or requests.<sup>35</sup>

The testimony of witnesses was the principal method of proving the unbecoming nature of the accused's conduct in *Lewis*. Several officers testified that the accused had dishonored and disgraced himself as an officer by charging Medina for the tutoring.<sup>36</sup> In *Guaglione*, on the other hand, similar witness testimony was helpful to the defense.<sup>37</sup> While *Lewis* and *Guaglione* thus indicate that such testimony is admissible to prove or defend against an article 133 charge, the evidentiary rationale supporting admissibility of the testi-

<sup>25</sup> For a discussion and analysis of *Guaglione* and *Norvell*, see TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, The Army Lawyer, Feb. 1989, at 62.

<sup>26</sup> 28 M.J. 179 (C.M.A. 1989).

<sup>27</sup> The court's opinion does not indicate whether Lieutenant Medina was a First Lieutenant or a Second Lieutenant.

<sup>28</sup> *Lewis*, 28 M.J. at 180.

<sup>29</sup> *Id.*

<sup>30</sup> The specification read in part that the accused did "wrongfully charge Stephen P. Medina \$2,000.00 for tutoring in Platoon Leader Skills, which act constituted conduct unbecoming an officer and a gentleman." *Id.*

<sup>31</sup> *Id.* (citing *United States v. Giordano*, 35 C.M.R. 135, 141 (C.M.A. 1964); *United States v. West*, 16 C.M.R. 587 (A.F.B.R.), *pet. denied*, 20 C.M.R. 398 (C.M.A. 1954); W. Winthrop, *Military Law and Precedents* 716 n.46 (2d ed. 1920 Reprint)).

<sup>32</sup> The Manual for Courts-Martial, United States, 1984, Part IV, para. 59c(2) [hereinafter MCM, 1984] provides:

Conduct violative of [article 133] is action or behavior in an official capacity, which, in dishonoring the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring and disgracing the officer personally, seriously compromises the person's standing as an officer.

See also *Parker v. Levy*, 417 U.S. 733, 753 (1974); *Giordano*, 35 C.M.R. at 139-40.

<sup>33</sup> *United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983).

<sup>34</sup> *Giordano*, 35 C.M.R. 135 (C.M.A. 1964).

<sup>35</sup> See generally Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 916(d) [hereinafter R.C.M.] (obedience to orders as a special defense).

<sup>36</sup> *Lewis*, 28 M.J. at 180.

<sup>37</sup> *Guaglione*, 27 M.J. at 272.

mony and the limits upon it are not entirely clear. If such testimony is the witness's opinion based upon personal observation regarding the impact of the accused's behavior on the unit or community, it would seem to satisfy the requirements for admissibility under Military Rule of Evidence 701.<sup>38</sup> Subject to appropriate balancing by the military judge,<sup>39</sup> such testimony could be admitted to prove or defend against a charge under article 133. Indeed, this type of evidence may be the best or the only way to establish the accused's guilt.<sup>40</sup> If the witness instead gives an opinion about the effect of the charged misconduct in the abstract—that is, as an "expert" on the character or impact of such conduct generally—this would not seem to satisfy the requirements for admissibility under Military Rule of Evidence 702.<sup>41</sup> Expert opinion or testimony regarding generalities, such as the likely or predictable impact of the accused's actions, would not assist a panel of experienced members who were selected on the basis of article 25<sup>42</sup> criteria. Witness testimony regarding the ultimate issue—whether the conduct was unbecoming an officer and a gentleman—would likewise be unhelpful and therefore not admissible.<sup>43</sup> MAJ Wittman and MAJ Milhizer.

### An Order to "Disassociate" Held to Be Lawful

Military law has over time wrestled with questions about the breadth and scope of lawful orders or regulations. In older cases the Court of Military Appeals

affirmed convictions for the failure to obey an order to remove a "friendship or love" bracelet<sup>44</sup> and for violating a regulation prohibiting loans between subordinate or superiors.<sup>45</sup> In 1988 the Coast Guard Court of Military Review found an order not to consume alcoholic beverages to be unlawful under the circumstances.<sup>46</sup> Even more recently, the courts of review have affirmed several convictions of service members who have the AIDS virus for disobeying the so-called "safe-sex" order.<sup>47</sup> The Court of Military Appeals, in its latest opinion addressing this issue, found that an order to a female officer to provide a urine sample under direct observation was not per se unlawful.<sup>48</sup>

One of the most recent reported cases to address the scope of conduct that can be the subject of a lawful order is *United States v. Wine*.<sup>49</sup> The accused in *Wine* separated from his wife in September 1987. A couple who lived across the street at the same Air Force base separated five months later. The accused thereafter began seeing his neighbor's estranged wife.<sup>50</sup> The accused and this woman soon became romantically involved, which resulted in numerous domestic disturbances on the base. Security police responded on several occasions and the first sergeants of both airmen had to become involved. The accused's first sergeant later unsuccessfully counselled the accused to end the relationship. Finally, the first sergeant gave the accused an oral order to disassociate himself from his neighbor's wife. Ultimately, this order was reduced to writing, signed by the first sergeant, and acknowledged by the accused.<sup>51</sup>

<sup>38</sup> Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 701 [hereinafter Mil. R. Evid.] provides:

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

<sup>39</sup> See Mil. R. Evid. 403.

<sup>40</sup> In addition, the trial counsel could offer documentary or other evidence of a custom violated by the accused's conduct and could be entitled to an instruction regarding a permissive inference; i.e., if the government proves certain predicate facts (the charged misconduct), the fact finder may infer it was unbecoming an officer and a gentleman.

<sup>41</sup> Mil. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>42</sup> UCMJ art. 25.

<sup>43</sup> See Mil. R. Evid. 704(b).

<sup>44</sup> *United States v. Wartsbaugh*, 45 C.M.R. 309, 313-15 (C.M.A. 1972); see also *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

<sup>45</sup> *United States v. McClain*, 10 M.J. 271 (C.M.A. 1981).

<sup>46</sup> *United States v. Roach*, 26 M.J. 859 (C.G.C.M.R. 1988) (*en banc*). On 29 July 1988, the Judge Advocate General of the United States Coast Guard filed a certificate for review on the issue of the legality of the order. *Roach*, 27 M.J. 166 (C.M.A. 1988). On 12 August 1988, the accused cross-petitioned the court. *Roach* 27 M.J. 181 (C.M.A. 1988). On 30 January 1989, the court denied the cross-petition and set the certified question for oral argument. *Roach*, 28 M.J. 137 (C.M.A. 1989).

<sup>47</sup> *United States v. Dumford*, ACM 27212 (A.F.C.M.R. 3 May 1989); *United States v. Negron*, 28 M.J. 775 (A.C.M.R. 1989); *United States v. Womack*, 27 M.J. 630 (A.F.C.M.R. 1988); see generally Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, *The Army Lawyer*, Dec. 1988, at 4.

<sup>48</sup> *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

<sup>49</sup> 28 M.J. 688 (A.F.C.M.R. 1989).

<sup>50</sup> *Id.* at 689.

<sup>51</sup> *Id.* at 690. The order provided in pertinent part:

1. On 9 August 88, you were given a verbal order by your First Sergeant (MSgt David E. Fitzmorris) in the presence of MSgt Danny McLemore, acting First Sergeant for the 4 EMS, to disassociate yourself with Patsy McBride, dependent wife of Sgt Dennis McBride.

2. You are not to have any contact with Patsy McBride or allow her to enter, visit, or occupy your quarters at any future time.

*Id.* This order was signed by the accused's first sergeant and the accused acknowledged receipt and understanding of the order in writing.

The accused pleaded guilty, *inter alia*, to one specification of violating this order.<sup>52</sup> During the providence inquiry, the accused told the military judge that he "did not contest the lawfulness of the order in any way," and his defense counsel stated that "no legal defense to the charge had been disclosed during his investigation."<sup>53</sup> The accused nonetheless raised the legality of the order on appeal, contending that it was vague and overbroad.<sup>54</sup>

A useful methodology for assessing the lawfulness of the order in *Wine* has been suggested by the author in the context of evaluating the "safe-sex" order for soldiers with AIDS:<sup>55</sup>

The lawfulness of virtually any order can be ascertained by examining four prerequisites: 1) the order must relate to a military duty; 2) the source of the order (e.g., the issuing individual) must have authority to issue the order; 3) the order must be directed specifically to a subordinate; and 4) the order must be an understandable, specific mandate to do or not to do a specific act.<sup>56</sup>

As to the first prerequisite, the concept of "military duty" has been given an expansive definition under military law. The Manual speaks broadly in terms of accomplishing a military mission or promoting morale, discipline, or usefulness of the command.<sup>57</sup> Given the repeated on-base disturbance and the associated involvement of the security police and two first sergeants as a result of the accused's affair, the military nexus for the order seems apparent.

Where an order imposes restrictions on the personal rights of an individual, it must be sufficiently limited in scope so as not to unnecessarily interfere with those rights, while still accomplishing the military purpose.<sup>58</sup> The court in *Wine* construed the order to disassociate to be operative only while the other woman remained married.<sup>59</sup> If the order is construed as being also limited to adulterous or other types of "association" that would foreseeably tend to cause disturbances on post—an issue

not directly addressed by the court in *Wine*—then the order would be sufficiently limited in scope to constitute a legal order.<sup>60</sup> Of course, some types of association between the accused and the woman—for example, their mutual participation in a religious service or a blood drive—would clearly be beyond the scope of a lawful order. Even if the order would be overly broad as to some hypothetical situations, it would nonetheless be lawful in cases where a clear military nexus is shown and where it is not unnecessarily intrusive.<sup>61</sup>

The second prerequisite—that the source of the order have authority to issue it—is clearly met, as the accused's first sergeant occupies such a position, and the accused had actual knowledge of his status as a superior noncommissioned officer.<sup>62</sup> The evidence shows that the third prerequisite—that the order be directed specifically to the subordinate—is likewise obviously satisfied.<sup>63</sup>

The final prerequisite is that the order be an understandable, specific mandate to do or not to do a specified act or acts.<sup>64</sup> Had the accused contested his guilt, a factual issue may have arisen regarding whether the order satisfied this requirement for specificity. Indeed, the precise meaning of "disassociate," as used in the context of the order, is not readily apparent. Moreover, whether the second paragraph of the order (not to have any contact with the woman or allow her to enter, visit, or occupy the accused's quarters) defines "disassociate," emphasizes a portion of the included conduct, or imposed an additional restriction is not obvious. Because the accused pleaded guilty pursuant to a searching providence inquiry and thus necessarily indicated that the order required specified conduct on his part, this factual question is not at issue in *Wine*.

As *Wine* and other recent cases indicate, the scope of conduct potentially subject to a lawful military order is becoming a topic of increasing importance. Trial practitioners must understand the pertinent legal analysis and its many applications by the military's appellate courts in order to properly resolve similar issues in future cases. MAJ Milhizer.

<sup>52</sup> *Id.* at 689.

<sup>53</sup> *Id.* at 690.

<sup>54</sup> *Id.* at 689.

<sup>55</sup> See Milhizer, *supra* note 47, at 5.

<sup>56</sup> *Id.* (footnotes omitted).

<sup>57</sup> MCM, 1984, Part IV, para. 14(c)(2)(a)(iii); see *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

<sup>58</sup> See *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988) (order not to drink alcohol until 21 years old); *United States v. Alexander*, 26 M.J. 796 (A.F.C.M.R. 1988) (order not to write any checks); *Roach*, 26 M.J. 859 (C.G.C.M.R. 1988) (*en banc*) (order not to consume alcohol).

<sup>59</sup> *Wine*, 28 M.J. at 690.

<sup>60</sup> See generally *United States v. Dykes*, 6 M.J. 744 (N.C.M.R. 1978).

<sup>61</sup> See generally *Parker v. Levy*, 417 U.S. 733, 752-57 (1974).

<sup>62</sup> See MCM, 1984, Part IV, para. 14c(2)(a)(ii) and (2)(e); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963).

<sup>63</sup> See MCM, 1984, Part IV, para. 14c(2)(b).

<sup>64</sup> See *id.*, Part IV, paras. 14c(2)(c) and (d). Compare *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982) (order to "settle down" was not a positive command), with *United States v. Mitchell*, 20 C.M.R. 295 (C.M.A. 1955) (order to "leave out of the orderly room" was a positive command).

## Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties

Three years ago, in *United States v. Scott*,<sup>65</sup> the Court of Military Appeals affirmed an accused's conviction for taking indecent liberties with a child under sixteen years of age.<sup>66</sup> The charged conduct included one occasion where the accused showed two young girls a pornographic magazine containing pictures of nude women.<sup>67</sup> More recently, in *United States v. Orben*,<sup>68</sup> the court made clear that taking indecent liberties by showing photographs is not limited to the displaying of pornographic magazines. The court stated in *Orben* that showing pictures of nude persons to a child may constitute taking indecent liberties, regardless of whether the photograph is pornographic.<sup>69</sup> As the court wrote, "even displaying to a child a nude body on an anatomical chart or pictures of nude aborigines in the *National Geographic* magazine might constitute taking indecent liberties."<sup>70</sup> To constitute the offense, the accused's actions must be accompanied by a specific intent to gratify his lust or sexual desires or those of the child.<sup>71</sup> This specific intent requirement can be demonstrated by both the behavior and language of the accused.<sup>72</sup>

Implicit in the court's opinion in *Orben* is the notion that physical touching between the accused and the victim is not required for the offense of taking indecent liberties.<sup>73</sup> The accused's acts must, however, take place within the physical presence of the child.<sup>74</sup> This requirement of "within the physical presence" is different than the comparable requirement for proving an indecent act with an adult.<sup>75</sup> This latter offense, though not requiring physical touching, has a requirement that the accused and the other person mutually "participate" in the

act.<sup>76</sup> In many cases, the failure to prove such participation will nonetheless result in the accused's conviction of the less severe offense of indecent exposure.<sup>77</sup> This offense requires willful,<sup>78</sup> public<sup>79</sup> exposure under indecent circumstances,<sup>80</sup> but does not require participation on the part of the victim.

Trial practitioners should be aware of the interrelationship of and differences between these offenses and their respective elements of proof. Issues regarding these matters can often arise at trial, especially in connection with lesser included offenses and the military judge's instructions thereon. The ability to recognize, sort through, and distinguish among these offenses could spell the difference between success and failure at a court-martial. MAJ Milhizer.

## Self-Defense Need Not Be Raised by the Accused's Testimony

In *United States v. Rose*<sup>81</sup> the Court of Military Appeals reversed the accused's conviction for aggravated assault<sup>82</sup> because of the military's judge's refusal to instruct on self-defense. The court emphasized that the military judge must instruct on all special defenses raised by the evidence, regardless of the source or form of that evidence.

The accused in *Rose* became involved in a fight with another soldier outside a night spot at Fort Carson.<sup>83</sup> Several witnesses and the accused testified that the accused was struck first from behind by the purported victim.<sup>84</sup> A government witness testified further that the accused thereafter retreated while brandishing a broken bottle to ward off the other soldier.<sup>85</sup> Other witnesses recalled that immediately after the fight, the accused

<sup>65</sup> 21 M.J. 345 (C.M.A. 1986).

<sup>66</sup> UCMJ art. 134; MCM, 1984, para. 87.

<sup>67</sup> *Scott*, 21 M.J. at 347, 349.

<sup>68</sup> 28 M.J. 172 (C.M.A. 1989).

<sup>69</sup> *Id.* at 174.

<sup>70</sup> *Id.*

<sup>71</sup> See *United States v. Johnson*, 35 C.M.R. 587 (A.B.R. 1965).

<sup>72</sup> *Orben*, 28 M.J. at 174-75.

<sup>73</sup> *United States v. Brown*, 13 C.M.R. 10 (C.M.A. 1953).

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

<sup>75</sup> UCMJ art. 134; MCM, 1984, Part IV, para. 90c.

<sup>76</sup> See *United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987); *United States v. Murray-Cotto*, 25 M.J. 784 (A.C.M.R. 1988).

<sup>77</sup> UCMJ art. 134; MCM, 1984, Part IV, para. 88; see *United States v. Burbank*, 37 C.M.R. 955 (A.F.B.R. 1967).

<sup>78</sup> See *United States v. Stackhouse*, 37 C.M.R. 99 (C.M.A. 1967); *United States v. Manos*, 25 C.M.R. 238 (C.M.A. 1958).

<sup>79</sup> See *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R. 1963).

<sup>80</sup> See *United States v. Coune*, 46 C.M.R. 200 (C.M.A. 1973).

<sup>81</sup> 28 M.J. 132 (C.M.A. 1989).

<sup>82</sup> Specifically, assault with the intentional infliction of grievous bodily harm. UCMJ art. 128; MCM, 1984, Part IV, para. 54b(4)(b).

<sup>83</sup> *Rose*, 28 M.J. at 133.

<sup>84</sup> *Id.* at 135.

<sup>85</sup> *Id.*



stated that he had acted in self-defense when he stabbed the victim with the broken bottle.<sup>86</sup>

The accused testified at trial, however, that he did not recall speaking about acting in self-defense following the fight. Indeed, the accused offered no testimony at all regarding whether he had any belief that he was in danger of death or grievous bodily harm.<sup>87</sup> He instead testified that he had lost his memory after being hit by the other soldier and did not remember any of the ensuing events.<sup>88</sup> The evidence showed that the accused had been drinking heavily prior to the altercation.<sup>89</sup>

The military judge refused to give the defense-requested instruction on self-defense. This refusal was premised on the accused's failure to testify that he believed he was in danger of death or grievous bodily harm.<sup>90</sup> In essence, the military judge required that, at least when the accused decides to testify, the accused personally present some evidence as to each element of self-defense before an instruction on the defense was required.

The Court of Military Appeals correctly disagreed. Although the defense has the burden of production for all special defenses including self-defense,<sup>91</sup> military law does not mandate any form or source for such evidence. Thus, although the testimony of the accused alone can be sufficient to raise a defense, even if contradicted by other evidence,<sup>92</sup> such testimony is not required. As the Manual provides: "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense."<sup>93</sup>

The court in *Rose* found that the accused's belief he was in danger of death or grievous bodily harm was raised by the circumstantial evidence of the case and could be inferred from the accused's conduct and statements.<sup>94</sup> The accused's testimony about these mat-

ters was therefore not necessary to raise self-defense. The court further noted that the accused's testimony that he did not recall his state of mind prior to the stabbing did not contradict the requisite state of mind for self-defense.<sup>95</sup> Accordingly, the accused's testimony did not, as a matter of law, defeat the defense's position at trial that it had met its burden of production by other evidence.

An additional point is implicit in the court's opinion in *Rose*—the threshold for raising a special defense, such as self-defense, is extremely low. Military law requires only that some evidence be presented as to each element of a special defense for it to be raised.<sup>96</sup> Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused.<sup>97</sup> In deciding whether a defense is raised, the military judge is not to evaluate the credibility or prejudge the evidence and preclude its introduction before the court members.<sup>98</sup> As *Rose* clearly teaches, military judges should instruct on all special defenses that are raised, even in the absence of testimony by the accused in support of the defense and regardless of whether the judge is personally convinced that the accused is guilty. MAJ Milhizer.

## Legal Assistance Items

### Real Property Note

#### *New Regulations Proposed for VA Home Loan Guaranty Program*

The Department of Veterans Affairs (VA) has published proposed amendments<sup>99</sup> to its regulations for processing assumptions of VA guaranteed home loans. The proposed amendments implement requirements contained in the Veterans' Home Loan Program Improvements and Property Rehabilitation Act of 1987.<sup>100</sup>

The 1987 law restricts the assumability of VA guaranteed loans for which commitments were issued on or

<sup>86</sup> *Id.* at 133, 135.

<sup>87</sup> See generally *id.* at 133-35.

<sup>88</sup> *Id.* at 133.

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

<sup>90</sup> *Id.* at 135.

<sup>91</sup> R.C.M. 916(b). This rule is consistent with civilian jurisdictions, which always place the burden of production on the defense. See 2 P. Robinson, *Criminal Law Defenses* 99 (1984).

<sup>92</sup> E.g. *United States v. Goins*, 37 C.M.R. 396 (C.M.A. 1967); see, e.g., *United States v. Evans*, 38 C.M.R. 36, 40-42 (C.M.A. 1967).

<sup>93</sup> R.C.M. 916b discussion.

<sup>94</sup> *Rose*, 28 M.J. at 135.

<sup>95</sup> Compare *Rose*, 28 M.J. 132 (C.M.A. 1989), with *United States v. Regalado*, 33 C.M.R. 12, 17 (C.M.A. 1963) (accused's testimony contradicted self-defense).

<sup>96</sup> *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983).

<sup>97</sup> *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *Goins*, 37 C.M.R. 396 (C.M.A. 1967).

<sup>98</sup> *United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982).

<sup>99</sup> 54 Fed. Reg. 25,469 (to be codified at 38 C.F.R. § 4200).

<sup>100</sup> 38 U.S.C. § 1814 (Supp. V 1987). The changes made to the loan program by the Act were discussed in a previous legal assistance note. See Legal Assistance Items, *Changes Made to VA Home Loan Program*, *The Army Lawyer*, May 1988, at 52.

after March 1, 1988. Under the new law a lender may allow a buyer to assume a VA loan only if three criteria are satisfied: 1) the loan must be current; 2) the buyer must be found creditworthy; and 3) the buyer must be obligated by contract to purchase the property and assume full liability for repayment of any unpaid balance.<sup>101</sup> If all three criteria are met, the veteran is released from all liability to the VA on the assumed loan.

The new law contains provisions for appealing to the Administrator a determination not to allow a buyer to assume a loan.<sup>102</sup> The Administrator has the authority to approve the assumption of the loan if all three criteria have been met. Moreover, even if the buyer does not qualify from a credit standpoint, the Administrator may approve the assumption if the transferor is unable to make payments on the loan and has made reasonable efforts to find a qualified buyer.<sup>103</sup>

The proposed amendments to the VA regulations provide that a lender may charge either the purchaser or the seller of property a fee not to exceed the lesser of \$300.00 and the actual cost of required credit reports or a maximum charge prescribed by state law.<sup>104</sup> Additionally, a fee of one-half of one percent of the loan balance must be paid to the Department of Veterans Affairs by the person assuming the loan.<sup>105</sup>

The penalty is stiff for attempting to circumvent the provisions of the new law by agreeing to private financing arrangements. Under the new law a lender holding a VA loan may demand immediate and full payment of principal and interest if residential property secured by a guaranteed VA loan is transferred without notifying the lender.<sup>106</sup>

The amendments identify certain transfers that will not trigger the right of a lender to accelerate payments. Under the proposed amendment, a holder may not accelerate a loan in any of the following circumstances: the creation of a lien subordinate to the lender's security instrument; the transfer upon the death of a joint tenant; the transfer to a relative upon the death of the owner; the granting of a leasehold interest under three years without an option to purchase; the transfer to a

spouse or children in joint tenancy; or the transfer to a spouse incident to a divorce.<sup>107</sup>

The new restrictions on VA loans will help many veterans avoid financial hardships by releasing them from liability on assumed loans. The stringent underwriting requirements and the assessment of assumption fees will, however, reduce the flexibility that veterans formerly enjoyed in allowing buyers to assume their VA loans. To ensure that borrowers receive notice of the new restrictions, lenders must include a conspicuous warning in loan instruments that VA loans are not assumable without the approval of the VA or its agents. Legal assistance offices should also include information on the new rules in their preventive law programs. MAJ Ingold.

### Tax Notes

#### *Basis to Be Used on Sale of Mutual Fund Shares*

Taxpayers are often stymied by the complexities in computing tax liability on mutual fund distributions. A recent tax court decision highlights the fact that significant tax savings can be lost by failing to understand and implement the alternative methods available for determining the basis for mutual fund shares.<sup>108</sup>

The overriding tax issue facing mutual share owners is what basis to use for their shares when the shares were purchased at different times and dates and only part of the total number of shares are sold. If the taxpayer can "adequately identify" which shares are being sold, the basis is the actual cost of the shares.<sup>109</sup> The adequate identification requirement is satisfied if the owner designates the securities to be sold as those purchased on a particular date and at a particular price.<sup>110</sup>

Often, however, a taxpayer is unable to determine exactly which shares have been sold. In this case, treasury regulations permit the use of two optional accounting methods to determine the basis for the shares sold. The first option, designated as the "single category method," groups all shares in one category regardless of the holding period.<sup>111</sup> The other option, called the "double category method," divides all shares by their holding period.<sup>112</sup> Once a taxpayer has elected to use

<sup>101</sup> 38 U.S.C. § 1814(a)(1) (Supp. V 1987).

<sup>102</sup> 38 U.S.C. § 1813(a)(3) (Supp. V 1987).

<sup>103</sup> 38 U.S.C. § 1814(a)(4)(B) (Supp. V 1987).

<sup>104</sup> 54 Fed. Reg. 25,475 (to be codified at 38 C.F.R. § 34.4312).

<sup>105</sup> 54 Fed. Reg. 25,475 (to be codified at 38 C.F.R. § 36.4312(e)(2)). The assumption fee is one percent of the total loan amount if the home securing the VA loan is a manufactured or mobile home.

<sup>106</sup> 38 U.S.C. § 1814(b) (Supp. V 1987).

<sup>107</sup> 54 Fed. Reg. 25,469 (to be codified at 38 C.F.R. § 36.4308(c)(1)).

<sup>108</sup> Hall v. Commissioner, 92 T.C. 64 (1989).

<sup>109</sup> Treas. Reg. § 1.1012-1(c)(3)(i) (as amended in 1980).

<sup>110</sup> Hall v. Commissioner, 92 T.C. 3081, 3085 (1989) (citing Helvering v. Rankin, 295 U.S. 123, 129 (1935)).

<sup>111</sup> Treas. Reg. § 1.1012-1(e)(4) (as amended in 1980). Under this method, the cost or other basis of each share is the total cost of all shares in the account at the time of the sale, divided by the number of shares in the account.

<sup>112</sup> Treas. Reg. § 1.1012-1(e)(3) (as amended in 1980).

one of the average basis methods, he or she must continue to use that method for all accounts managed by the same regulated investment company.

If neither of the averaging alternatives are selected and the taxpayer cannot adequately identify the shares sold, income tax regulations require that the basis be allocated on a first-in-first-out (FIFO) method.<sup>113</sup> Taxpayers usually find that the use of the FIFO method generates higher income tax liability than the other methods.

The taxpayer in *Hall v. Commissioner*<sup>114</sup> began investing in a regulated mutual fund in 1975. By the end of 1981 he owned over 45,000 noncertificate shares. On several occasions in 1982 the taxpayer sold a total of about 15,000 shares for \$24,000.

The taxpayer reported the sale of these shares on his 1982 income tax return using the last-in, first-out (LIFO) method to determine the basis for the shares sold. This method resulted in a short-term gain of \$10,000 and a long-term loss of \$4,700. The Internal Revenue Service (IRS) determined, however, that the taxpayer should have used the FIFO method because he was not able to identify which shares were actually sold. Under the FIFO method the taxpayer realized a gain of \$156,000.

The Tax Court agreed with the IRS position that the FIFO method should have been used. The court found no evidence that at the time of the sale the taxpayer designated which shares of stock he was selling. He never told his broker the date the shares were purchased or the price he paid for them; therefore, he failed to meet his burden of establishing an adequate identification of the specific shares sold. The court opined that, while a taxpayer with adequate records can choose the basis he wants to apply, there is no valid reason "to permit a stock trader to wait until the end of the year to allot specific sales to his general inventory of stocks in such a manner as to be most beneficial to him taxwise."<sup>115</sup> The taxpayer also failed to elect to use either of the two optional averaging methods permitted under the regulations. Accordingly, the court concluded that he was required by regulation to use the FIFO method.

The court also rejected the taxpayer's contention that the adequate identification requirement does not apply to noncertificate mutual fund shares. The court noted that the adequate identification rule expressed in the regulation refers generally to stock and does not make reference to certificate or noncertificate shares of stock.

The key to maximizing tax savings on the sale of mutual funds is to keep an accurate and complete record

of all mutual fund shares and to elect the most favorable method for determining basis. Although this requires some extra work and discipline, the tax savings should make it worthwhile. A worksheet for keeping track of mutual fund shares and more information on the tax consequences of selling mutual funds can be found in IRS Publication Number 564, *Mutual Fund Distributions*. MAJ Ingold.

#### *IRA Rollover Distribution Taxable in Year Received*

The Internal Revenue Code permits a taxpayer to receive a distribution from an Individual Retirement Account (IRA) without incurring the penalty for early distribution if the proceeds withdrawn are reinvested in another IRA within sixty days.<sup>116</sup> If the taxpayer fails to rollover the distribution, the amounts withdrawn must be included in income and are subject to the ten percent penalty for early withdrawal.<sup>117</sup>

In a recent Tax Court case,<sup>118</sup> a taxpayer received distributions from his IRA in late 1984 and failed to reinvest them in another IRA account. He argued that the distributions should have been taxable to him in tax year 1985 because that was when the sixty day rollover period expired.

The Tax Court applied the general rule that IRA distributions are taxable in the year received and rejected the taxpayer's position. To obtain any tax benefit from the IRA rollover provision, the court ruled, the IRA distribution must actually be paid into another account within sixty days.

Some taxpayers also face unexpected tax liability by overlooking the limitation that only one tax-free IRA rollover is allowed per year.<sup>119</sup> Amounts distributed from an IRA within one year from the receipt of a previous tax-free distribution must be included in income and are subject to the penalty for early withdrawal. This rule applies even if the previous distribution was reinvested in another IRA within sixty days. MAJ Ingold.

#### **Professional Responsibility Note**

##### *Attorney Held Not Liable for Client's Suicide*

Suppose your client becomes despondent over the progress of his case and takes his own life. May his estate sue you for failing to recognize his mental condition and take steps to prevent the suicide? According to a United States District Court, the answer is no, but the estate may nevertheless maintain a suit for emotional distress caused to the client for your negligence in failing to secure his timely release from incarceration.<sup>120</sup>

<sup>113</sup> Treas. Reg. § 1.1012-1(c)(3)(i) (as amended in 1980).

<sup>114</sup> 92 T.C. 64 (1989).

<sup>115</sup> *Id.* at 3087.

<sup>116</sup> I.R.C. § 408(d)(3) (West Supp. 1989); Treas. Reg. § 1.408-1(c)(6) (as amended in 1980).

<sup>117</sup> I.R.C. § 72(t) (West Supp. 1989).

<sup>118</sup> *Welander v. Commissioner*, 92 T.C. 3009 (1989).

<sup>119</sup> I.R.C. § 408(d)(3)(B) (Supp. III 1985).

<sup>120</sup> *Snyder v. Baumecker*, 706 F. Supp. 1451 (D. N.J. 1989).

In *Snyder v. Baumecker* the client was charged with several traffic violations. He entered a plea of not guilty and remained in custody pending the posting of bail. During his incarceration, he became severely depressed and exhibited abnormal and potentially destructive behavior. He was placed under the care of a psychiatrist and was kept under close watch by correction officers. These efforts were unsuccessful, however, and the client took his own life.

The administratrix of the client's estate sued the client's attorney and various government officials, claiming that the client's death was the direct result of their "negligent supervision and deliberate and callous indifference to his medical needs."<sup>121</sup> The plaintiff specifically alleged that the attorney negligently delayed the prosecution of the case, failed to visit the client during his period of incarceration, and refused to render assistance until his fees had been paid. According to the plaintiff's complaint, the attorney's negligent representation led to the client's prolonged incarceration and was a direct cause of his emotional distress and eventual suicide.

The court held that, as a matter of law, an attorney's duty to represent his client zealously does not include the duty to foresee and prevent his client's suicide.<sup>122</sup> According to the court, suicide is generally regarded as an intervening act that is not foreseeable and cannot be proximately caused by a person's ordinary negligence. Although an exception to this rule is recognized for health care professionals, the court determined that attorneys generally lack "the professional skills needed to diagnose a client's mental state or to determine the proper response to that mental state."<sup>123</sup>

The court also concluded that public policy militated against imposing liability on an attorney for a client's suicide. The court believed that exposing attorneys to potential unexpected and unfair liability would have a deterrent effect on the willingness of attorneys to represent despondent clients.

While attorneys may not be liable for a client's suicide, they are not entirely immune from suit under this factual setting. The court held that attorneys could be sued on a theory of legal malpractice for damages for emotional distress suffered by a client as a result of the loss of liberty.<sup>124</sup> The court noted, however, that plaintiffs have the heavy burden of proving that "but for" the negligence, the client would have been released from custody.

A related and sometimes controversial issue confronting attorneys representing despondent clients is whether attorneys may disclose confidential information such as a suicide threat to mental health care professionals and other third parties. The general rule of confidentiality set forth in the Army Rules of Professional Conduct is that attorneys shall not disclose any information relating to the representation of a client.<sup>125</sup> If the suicide threat is unrelated to the representation of a client's legal situation, the Army Rule does not preclude disclosure.

Even if the suicide threat stems from a client's legal difficulties, it should be disclosed to appropriate third parties. The Army Rules mandate disclosure of otherwise confidential information if the client intends to commit prospective criminal conduct likely to result in imminent death or substantial bodily harm.<sup>126</sup> The requirement for mandatory disclosure will turn, therefore, on whether attempted suicide is viewed as a criminal offense. The Court of Military Appeals has recently held that an attempt to commit suicide constitutes the offense of malingering under the Uniform Code of Military Justice (UCMJ).<sup>127</sup> Accordingly, the Army Rules of Professional Conduct require attorneys to disclose suicide threats made by members of the military. For civilian clients the requirement for mandatory disclosure will turn on whether attempted suicide is viewed as a criminal offense under local law.

An argument could be made that, although attempted suicide constitutes an offense, a completed suicide is not a punishable offense under the UCMJ; therefore, suicide threats cannot be disclosed under the Rules if they relate to the representation of a client. While this argument may be correct from a literal interpretation of the rule, it fails to take into account the spirit of the Rules, which is to require disclosure of confidential information to prevent future bodily harm and death. Army attorneys are specifically encouraged in the Preamble to the Rules to exercise professional and moral judgment guided by the basic principals underlying the Rules to resolve difficult ethical issues such as this.<sup>128</sup> Because the spirit of the Rules is clearly to require disclosure of information to prevent substantial bodily harm or death, Army attorneys should disclose threats to commit suicide and information concerning aberrational behavior likely to result in a client's suicide attempt.

Despondent clients present a rare but formidable challenge to attorneys. By using good professional judgment within the framework of the Army Rules, attorneys should be able to meet this challenge and uphold the best interests of their clients. MAJ Ingold.

<sup>121</sup> *Id.* at 1454.

<sup>122</sup> *Id.* at 1464. Two other jurisdictions have reached this same conclusion. *McLaughlin v. Sullivan*, 123 N.H. 335, 461 A.2d 123 (1983); *McPeake v. Cannon*, 553 A.2d 439 (Pa. Super. 1989).

<sup>123</sup> *Snyder*, 706 F. Supp. at 1463.

<sup>124</sup> *Id.* at 1464. *Accord* *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987); *Lawson v. Nugent*, 702 F. Supp. 91 (D. N.J. 1988).

<sup>125</sup> Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Army Rule 1.6 (31 Dec. 1987) [hereinafter Army Rules].

<sup>126</sup> Army Rule 1.6(b).

<sup>127</sup> *United States v. Johnson*, 26 M.J. 415 (C.M.A. 1988).

<sup>128</sup> Preamble, Army Rules.

## Consumer Law Notes

### *Airline Litigation*

Four states have recently filed suits against air carriers in attempts to enjoin allegedly deceptive advertising practices. According to the May 1989 *Consumer Protection Report*, published by the National Association of Attorneys General (NAAG), California, Kansas, New York, and Texas are attempting to use state law to enforce NAAG guidelines on airline advertising. The Kansas Attorney General, for example, sued TWA for advertising a \$202 fare to London. This fare was actually unavailable because it was based on purchase of a round trip ticket costing more than double the advertised rate. Several attorneys general have also alleged that some prices in airline advertisements do not include mandatory charges such as security and customs fees and international departure taxes. In addition to TWA, the attorneys general also identified Pan Am as allegedly engaging in deceptive advertising.

### *Tax Refunds for H&R Block Customers*

The May 1989 *Consumer Protection Report* also warns that the Kentucky Attorney General is suing H&R Block for violating an agreement to return the fees that H&R Block charged customers who participated in its electronic "Rapid Refunds" tax filing program. According to the Kentucky Attorney General, over 15,000 customers signed up for "Rapid Refunds" and did not get proper service from H&R Block. H&R Block has further compounded its problems by failing to refund electronic filing fees to customers within thirty days. H&R Block had previously agreed to the thirty day refund schedule in an Assurance of Voluntary Compliance that it entered into with the Kentucky Attorney General. Kentucky seeks a \$10,000 penalty for violating its Consumer Protection Act, a \$25,000 penalty for each late refund of electronic filing fees, and an injunction

requiring H&R Block to immediately refund filing fees of "Rapid Refunds" customers.

### *Fair Debt Collections Practices Act (FDCPA)*

Legal assistance clients routinely receive demand letters from debt collectors, including some letters from attorneys purporting to be simply agents of creditors. Legal assistance attorneys should scrutinize these letters to ensure they adhere to the FDCPA. The FDCPA defines "debt collector" as "any person who uses any instrument of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due . . . another."<sup>129</sup> This definition is broad enough to include attorneys who collect debts on an occasional basis only. A recent case illustrates how the FDCPA currently applies to attorneys as well as conventional debt collectors.

In *Crossley v. Lieberman*<sup>130</sup> attorney Arnold Lieberman represented a discount company that held a mortgage on sixty-eight-year-old Mary Crossley's home. The court held that Lieberman's demand letters to Crossley, along with debt collection activities on behalf of other creditors, were sufficient to make Lieberman a debt collector for purposes of the FDCPA.

The court further held that Lieberman violated the FDCPA by falsely implying that a mortgage foreclosure case against Crossley was already in litigation. Although Pennsylvania law required thirty days notice before accelerating a mortgage obligation, Lieberman threatened to take action within one week of his first letter. His letter also violated Pennsylvania law by failing to apprise Crossley of her right to cure. The court determined that Lieberman's letter was intended to frighten Crossley into paying her debt, and accordingly, upheld the district court's award of \$2000.00 in actual and additional damages to Crossley. MAJ Pottorff.

<sup>129</sup> 15 U.S.C. § 1692(a) (1982).

<sup>130</sup> 868 F.2d 566 (3d Cir. 1989).

# Claims Report

United States Army Claims Service

## Actionable Duty Based on Military Regulations

Joseph H. Rouse

Deputy Chief, Tort Claims Division

Liability under the Federal Tort Claims Act (FTCA) is predicated on the United States being sued as a private person under the law of the state where the tort occurred.<sup>1</sup> Accordingly, duties created by federal regulations should not give rise to a FTCA claim unless analogous duties exist under state law.<sup>2</sup> Even so, because post regulations typically deal with many aspects of community life, many courts have construed these regulations to create mandatory duties on the part of government employees who live or work on a military installation. They do this by determining that the purpose of the regulation is to provide protection to members of the public. These courts have applied the principle of *respondeat superior* to hold the United States liable for injuries caused by the breach of regulation-based duties even though the purposes of the regulations are to protect property and to ensure the installation functions in an orderly manner. The purpose of this article is to analyze recent decisions that involve actionable duties created by government regulations.

In *Craft v. United States*<sup>3</sup> the Fifth Circuit held the United States liable when a soldier operating a riding lawn mower between his quarters and the curb lost control of the mower and hit a neighbor's two-year-old child. The soldier had recently purchased the mower at a local civilian hardware store. The court based the duty on an Army regulation and a pamphlet that required occupants of quarters to mow the lawn adjacent to their quarters. The court did not refer to an analogous duty under state law and also specifically rejected the district court's determination that the United States would be liable only if the soldier was performing a task he was hired to perform or required to accomplish under a specific theory of landlord liability or a tenant's negligence. It simply stated that the soldier performed duties on behalf of his master while acting as a repair parts specialist in the motor pool (his primary military duty) and while mowing the lawn at his quarters.

The Ninth Circuit used a similar analysis in *Lutz v. United States*<sup>4</sup> to hold the United States liable for injuries to a child when an airman's failure to control

his dog enabled the dog to attack a neighbor's child. The court based liability on an installation regulation that required all pet owners to control their pets. The base commander testified that violators of the regulation were subject to military discipline. The district court found that because there was no federal benefit in permitting pets to occupy quarters on base, there was no cause of action against the United States.<sup>5</sup> The Court of Appeals rejected this reasoning by equating the regulation to a state law and holding the United States liable on a negligence *per se* theory.

An Arkansas district court took the above reasoning one step further in *Piper v. United States*.<sup>6</sup> The facts in *Piper* were substantially the same as in *Lutz* and the court again employed the principle of *respondeat superior* to find the United States liable for dog bite injuries. The court stated that the airman and pet owner in *Piper* was furthering the government's interest, although the court did not clarify this claim. The court also held that, under Arkansas law, violation of a military regulation was evidence of negligence.

In *Nelson v. United States*,<sup>7</sup> yet another dog bite case, the District Court for the District of Columbia cast aside the *respondeat superior* approach used in *Lutz* and *Piper* and held that an owner's failure to control a pet is not within the scope of his or her employment merely because a military regulation directs pet owners to control their pets on the installation. The court stated that "there seems, moreover to be no principled limit to the reasoning in *Lutz* so that the case would seem to make the government an insurer as to all manner of bizarre incidents."<sup>8</sup> Even so, the court found the United States liable because base officials knew the dog was vicious and failed to remove it from government quarters as required by government regulations. The liability was based on a landowner's duty under D.C. common law and not on the duty imposed by regulation on military security personnel to protect persons on post from vicious animals and other known dangers.

Six years after the *Lutz* decision, the Ninth Circuit in *Doggett v. United States*<sup>9</sup> again used a base regulation

<sup>1</sup> 28 U.S.C. § 1346(b) (1982); *Richards v. United States*, 369 U.S. 1 (1962).

<sup>2</sup> *United States v. Varig*, 108 S. Ct. 2755 (1984).

<sup>3</sup> 542 F.2d 1250 (5th Cir. 1976).

<sup>4</sup> 685 F.2d 1178 (9th Cir. 1982).

<sup>5</sup> *Id.* at 1181.

<sup>6</sup> 694 F. Supp. 614 (E.D. Ark. 1988).

<sup>7</sup> 838 F.2d 1280 (D.C. Cir. 1988).

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

<sup>9</sup> 858 F.2d 555 (9th Cir. 1988).

to hold the United States liable when security personnel permitted an obviously intoxicated driver to leave the installation. Under California law, policemen owe a duty to the public to prevent known intoxicated drivers from operating their cars. Likewise, a base regulation directed military security personnel to prevent intoxicated persons from operating automobiles. The court's concurring opinion went even further by holding that a sailor's drinking companions, some of whom were noncommissioned officers, also had a duty under the base regulation to prevent him from operating his car.<sup>10</sup> The court did not discuss the impact of this case on the presence of military superiors at the traditional social occasion, which normally includes the consumption of alcohol by most participants.

The Ninth Circuit in *Doggett* relied on the recent Supreme Court decision in *Sheridan v. United States*<sup>11</sup> to impose liability on the United States. In *Sheridan* the Supreme Court used the following rationale to hold the United States liable for injuries caused by a sailor shooting civilians driving on a public road just off base:

By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the government assumed responsibility to "perform [its] good samaritan task in a careful manner."<sup>12</sup>

In *Sheridan* fellow sailors found the assailant in a drunken stupor and attempted to take him to the local hospital emergency room. When he displayed a rifle, the companions ran and did not report the situation to their superiors or the base security police.

The Ninth Circuit recently followed the *Lutz* and *Doggett* decisions by holding the United States liable for injuries to a child caused by two sailors who were trying to start a privately owned vehicle in an on-base residence garage by pouring gas from a coffee can into the car's carburetor.<sup>13</sup> The car backfired and the can and the sailor's arm caught fire. The sailor tripped running out of the garage and accidentally hurled the can into the yard where it struck the child, causing severe burns to her face and neck. A Navy regulation provided that only minor repairs, such as tuneups and oil changes, could be accomplished at quarters on base. In determining that the sailors were acting within the scope of the employment, the court applied California's liberal scope of employment rules by stating that military employment relationship continues even during the employee's off-duty hours.<sup>14</sup> The court easily concluded that the Navy was responsible for damages caused by the sailor's failure to comply with the base fire regulations, which required all personnel to exercise caution in order to reduce fire hazards.<sup>15</sup>

### Conclusion

It is apparent from the above cases that if the purpose of a post regulation is to protect members of the public, either on or off post, the regulation should be precisely drafted to outline the mandatory duties and to clarify who is required to execute those duties. On the other hand, if the purpose is not to protect individual members of the public, the drafter should research state law and narrowly draft the regulation to ensure that it does not create duties that may make the United States liable under the state law *respondeat superior* doctrine.

<sup>10</sup> *Id.* at 566.

<sup>11</sup> 108 S. Ct. 2449 (1988).

<sup>12</sup> *Id.* at 2455 (citing *Indian Towing v. United States*, 350 U.S. 61, 65 (1955)).

<sup>13</sup> *Washington v. United States*, 868 F.2d 332 (9th Cir. 1989).

<sup>14</sup> *Id.* at 334.

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

## Claims Notes

### Personnel Claims Note

#### *"Broken" Appliances and "Scratched" Furniture*

Often, claimants do not describe damages on DD Forms 1840R (Notice of Loss) and 1844 (List of Property and Claims Analysis Chart) with any degree of specificity. A television or other appliance will be listed as "broken" without any indication as to whether the damage was internal or external, and furniture with preexisting damage will be listed as "scratched" without any indication as to the exact nature and location of the damage.

Upon receipt, claims personnel must screen DD Forms 1840R and 1844 to ensure that the claimant has fully described the damage, for example, "television cabinet chipped lower right corner, aerial broken off." Unless this is done, a claimant cannot be counselled adequately about what substantiation is needed.

Failure to screen these documents creates unnecessary difficulties in adjudicating claims and in effecting recovery. Mr. Frezza.

### Personnel Claims Recovery Note

#### *Carriers' Denial of Liability Because the Loss or Damage Was Not Indicated at Delivery*

Frequently carriers attempt to deny liability because the damage and/or loss to household goods shipments were not noted at delivery on DD Form 1840, Joint Statement of Loss or Damage at Delivery.

The Military-Industry Memorandum of Understanding concerning loss and damage rules provides that loss and damage discovered after delivery may be claimed if the DD Form 1840R, Notice of Loss or Damage, is dispatched to the carrier not later than seventy-five days following delivery and a general description of the loss or damage is indicated thereon. Though the shipper is encouraged to list all missing items and obvious damage at delivery (see Claims Note, *The Army Lawyer*, Dec. 1988, at 44), once a claims office is satisfied that loss and damage occurred, liability will be assessed against the carrier.

The following is a suggested response which may be used to rebut carriers denying for this reason.

We cannot accept your denial of liability because the loss or damage was not noted at delivery. The Military-Industry Memorandum of Understanding concerning loss and damage rules provides that, "[f]or later discovered loss or damage, including that involving packed items for which unpacking has been waived in writing, written documentation on DD Form 1840R advising the carrier of later discovered loss or damage, dispatched not later than 75 days following delivery, shall be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt." Since a timely DD

Form 1840R covering the items claimed was dispatched, your company is liable.

Ms. Schultz.

### Affirmative Claims Notes

#### *Recovery Against Military Members*

Recovery attempts should not be made in those cases where persons receiving medical care at government expense were injured by a soldier-tortfeasor who is uninsured. A claim in these cases would be payable from the uninsured soldier's personal funds. This approach is consistent with the rule that the government does not seek indemnification from negligent government employees for the payment of claims to third parties. Exceptions to this general policy will be made when the incident involves aggravating circumstances. The aggravating circumstances should rise to the level of gross negligence. Determinations are made on a case-by-case basis.

If the military tortfeasor has liability or medical payment insurance coverage, a claim should be asserted and recovery pursued to the extent of the policy coverage. The recovery sought in either situation is for the medical care paid for or provided to persons other than the tortfeasor himself and are a direct result of the service member's actions. MAJ Morgan.

#### *Installment Payments*

Medical care and property damage claims should be collected in one lump sum whenever possible. If the debtor is financially unable to pay the debt in one lump sum, the recovery judge advocate may accept payment in regular installments. Installment payments will be required on a monthly basis and their size must bear a reasonable relation to the size of the debt and the debtor's ability to pay. The payments should not extend beyond thirty months. The installment agreements should specify payments of such size and frequency as to liquidate the government's claim in not more than three years. Installment payments of less than \$50 per month should be accepted only if justifiable on the grounds of financial hardship or for some other reasonable cause. The following guidelines apply:

a. The recovery judge advocate will attempt to obtain an executed confess-judgment note from a debtor when the total amount of the deferred installments exceeds \$500.

b. When the recovery judge advocate has agreed to accept payment in regular installments an attempt will be made to obtain a legally enforceable written agreement from the debtor that specifies all of the terms of the arrangement. The debtor should be provided with a written explanation of the consequences of signing the note, and the recovery judge advocate should maintain documentation sufficient to demonstrate that the debtor has signed the note knowingly and voluntarily.

c. The recovery judge advocate will not accept security from the debtor for the deferred payment.



d. The installment agreement should contain a provision accelerating the debt in the event the debtor defaults.

e. Prior to executing an installment agreement, the recovery judge advocate should obtain a financial state-

ment from the debtor who represents an inability to satisfy the government claim in one lump sum.

MAJ Morgan.

## Guard and Reserve Affairs Item

*Judge Advocate Guard & Reserve Affairs Department, TJAGSA*

### Reserve Component Quotas for Resident Graduate Course

The Commandant, TJAGSA, has announced that three student quotas in the 39th Judge Advocate Officer Graduate Course (July 30, 1990 - May 17, 1991) have been set aside for Reserve component JAGC officers. The forty-two week graduate-level course is taught at The Judge Advocate General's School in Charlottesville, Virginia. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. JAGC RC captains and majors with at least five years JAGC experience as of July 30, 1990, are eligible to apply. Officers who have completed the Judge Advocate Officer Advanced Correspondence Course may apply for the resident course.

Each applicant must be nominated by his or her commander or IMA rater. The application packet must include the following:

**Personal data:** Full name (including preferred name if other than first name), grade, date of rank, age, address, telephone number (business and home).

**Military experience:** Chronological list of reserve and active duty assignments.

**Awards and decorations:** List of all awards and decorations.

**Military and civilian education:** Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

**Civilian experience:** Resume of legal experience.

**Statement of purpose:** In one or two paragraphs, state why you want to attend the resident graduate course.

**Letter of Recommendation:** USAR TPU: Military Law Center Commander or Staff Judge Advocate. ARNG: Staff Judge Advocate. USAR IMA: Staff Judge Advocate of proponent office.

**DA Form 1058 (USAR) or NGB Form 64 (ARNG):** These forms must be filled out and be included in the application packet.

**Routing of application packets:** Each packet shall be forwarded through appropriate channels to the Commandant, TJAGSA, ATTN: JAGS-GRA, Charlottesville, VA 22903-1781.

**ARNG:** Through the state chain of command and ARNG Operating Activity Center, ATTN: NGB-AROME, Building E6814, Edgewood Area, Aberdeen Proving Grounds, MD 21010-5420.

**USAR CONUS Troop Program Unit (TPU):** Through MUSARC chain of command, CONUSA SJA, and FORSCOM SJA.

**USAR OCONUS TPU:** Through MUSARC chain of command and MACOM SJA.

**USAR Control Group (IMA/Reinforcement):** Through Commander, ARPERCEN, ATTN: DARP-OPS-JA. All applications must reach TJAGSA NLT December 8, 1989.

**USAR AGR:** Through chain of command and AGR Management Directorate.

**Notification:** Those individuals selected to attend the course will be notified on or about January 10, 1990.

**Funding:** Those officers selected for attendance at the graduate course must be funded by either ARPERCEN, ARNG of home state, or AGR Management Directorate.

## 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

#### November 1989

2-3: ABA, Doing Business with Japan, Los Angeles, CA.

2-3: PLI, Estate Planning Institute, Tampa, FL.

2-3: ALIABA, Failing Financial Institutions, Washington, D.C.  
 2-3: ABA, Legal Opinions, Los Angeles, CA.  
 2-3: LSU, Legislation and Jurisprudence, Monroe, LA.  
 2-3: PLI, Patent Litigation, New York, NY.  
 2-3: ALIABA, The Role of Corporate Counsel in Litigation, Washington, D.C.  
 2-3: BNA, Work and Family, Washington, D.C.  
 5-10: NJC, Advanced Evidence, Reno, NV.  
 5-10: NJC, Special Problems in Criminal Evidence, Reno, NV.  
 5-10: AAJE, The Trial Judge—Common Problems, San Antonio, TX.  
 6-7: NELI, 1990 Affirmative Action Briefing, Washington, D.C.  
 7-10: ESI, Contracting for Services, Washington, D.C.  
 9-10: PLI, Communications Law, New York, NY.  
 9-10: ABA, How to Try a Toxic Tort Case, Washington, D.C.  
 9-10: PLI, Patent Litigation, San Francisco, CA.  
 10-11: PLI, Deposition Skills Training Program, Los Angeles, CA.  
 10-11: LSU, Institute on Real Estate Law, Baton Rouge, LA.  
 10-11: ALIABA, International Human Rights, Washington, D.C.  
 12-17: NJC, Case Management: Reducing Court Delay, Reno, NV.  
 12-17: NJC, Case Management: Reducing Court Delay, Williamsburg, VA.  
 13-14: BNA, Employment Law, Dallas, TX.  
 13-17: GWU, Construction Contracting, Washington, D.C.  
 13-17: ALIABA, Planning Techniques for Large Estate, San Francisco, CA.  
 13-17: PLI, Real Estate Week, New York, NY.  
 14-17: ESI, Contract Negotiation, San Diego, CA.  
 16-17: BNA, Employment Law, San Francisco, CA.  
 16-17: PLI, Litigating the Complex Motor Vehicle "Crashworthiness" Case, New York, NY.  
 16-17: ABA, Medical Staff Services, Dallas, TX.  
 16-17: BNA, Patents, Washington, D.C.  
 16-17: NYUSCE, Personnel Management: Legal Issues, New York, NY.  
 17-18: NCLE, Nebraska Rules of Evidence, Omaha, NE.  
 17-18: LSU, Personal Injury Seminar, Baton Rouge, LA.  
 17-18: ALIABA, Trademarks, Copyrights, and Unfair Competition, Washington, D.C.  
 26-29: NCDA, Child Abuse and Exploitation, Orlando, FL.  
 26-December 1: NJC, Alcohol and Drugs and the Courts, Reno, NV.  
 26-December 8: NJC, Special Court - For Non-Attorney Judges, Reno, NV.  
 26-December 8: NJC, Special Court - For Attorney Judges, Reno, NV.  
 27-29: GWU, Competitive Negotiation Workshop, Washington, D.C.  
 28-December 1: ESI, Operating Practices in Contract Administration, Washington, D.C.  
 30-December 1: PLI, Telecommunications, Washington, D.C.

30-December 1: NELI, Employment Law Conference, New Orleans, LA.  
 30-December 1: ALIABA, How to Handle Tax Controversy at the IRS and in Court, Coronado, CA.  
 30-December 1: ABA, Legal Opinions, New York, NY.  
 30-December 1: BNA, Employment Law, Chicago, IL.  
 30-December 2: ALIABA, Advanced Employment Law and Litigation, Washington, D.C.  
 30-December 2: ALIABA, Fundamentals of Bankruptcy Law, Santa Fe, NM.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.  
 AAJE: American Academy of Judicial Education, 2025 Eye Street, NW., Suite 824, Washington, D.C. 20006. (202) 755-0083.  
 ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.  
 ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348-6230.  
 AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 371-1071.  
 AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.  
 ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.  
 ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.  
 ATLA: Association of Trial Lawyers of America, 1050 31st St., NW., Washington, D.C. 20007-4499. (800) 424-2725; (202) 965-3500.  
 BLI: Business Laws, Inc., 11630 Chillicothe Road, Chesterfield, OH 44026-1928. (216) 729-7996.  
 BNA: The Bureau of National Affairs Inc., 1231 25th Street, NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.  
 CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.  
 CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209. (205) 870-2865.  
 CLEC: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303) 871-6323.  
 CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.  
 DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, Chicago, IL 60611. (312) 944-0575.  
 ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.  
 FB: Florida Bar, 600 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

- FBA:** Federal Bar Association, 1815 H Street, NW., Washington, D.C. 20006. (202) 638-0252.
- FJC:** The Federal Judicial Center, Dolly Madison House, 1520 H Street, NW., Washington, D.C. 20005. (202) 633-6032.
- FP:** Federal Publications, 1120-20th Street, NW., Washington, D.C. 20036. (202) 337-7000.
- GICLE:** The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (404) 542-2522.
- GII:** Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.
- GULC:** Georgetown University Law Center, CLE Division, 25 E Street, NW., 4th Fl., Washington, D.C. 20001. (202) 622-9510.
- GWU:** Government Contracts Program, The George Washington University, National Law Center, T412, 801 22nd Street, NW., Washington, D.C. 20052. (202) 994-6815.
- HICLE:** Hawaii Institute for CLE, UH, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.
- ICLEF:** Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.
- IICLE:** Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.
- ILT:** The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.
- KBA:** Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.
- LSBA:** Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.
- LSU:** Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837
- MBC:** Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.
- MCLE:** Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.
- MIC:** The Michie Company, P.O. Box 7587, Charlottesville, VA 22906-7587. (800) 446-3410.
- MICLE:** Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.
- MLI:** Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.
- MNCLE:** Minnesota CLE, 40 North Milton, Suite 101, St. Paul, MN 55104. (612) 227-8266.
- MSBA:** Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330. (207) 622-7523.
- NCBF:** North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27612. (919) 828-0561.
- NCCLE:** National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.
- NCDA:** National College of District Attorneys, University of Houston, Law Center, University Park, Houston, TX 77004. (713) 747-NCDA.
- NCJFC:** National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.
- NCLE:** Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.
- NELI:** National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.
- NITA:** National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).
- NJC:** National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.
- NJCLE:** New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.
- NKU:** Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41076. (606) 572-5380.
- NLADA:** National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.
- NMTLA:** New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.
- NWU:** Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.
- NYSBA:** New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.
- NYSTLI:** New York State Trial Lawyers Institute, Inc., 132 Nassau Street, New York, NY 10038. (212) 349-5890.
- NYUSCE:** New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.
- NYUSL:** New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.
- OLCI:** Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.
- PBI:** Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.
- PLI:** Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.
- PTLA:** Pennsylvania Trial Lawyers Association, 230 S. Broad Street, 18th Floor, Philadelphia, PA 19102.
- SBA:** State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.
- SBMT:** State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59604 (406) 442-7660.
- SBT:** State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.
- SCB:** South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211-1039. (803) 771-0333.
- SLF:** Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.
- SMU:** Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214) 692-2644.
- TBA:** Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.
- TLEI:** The Legal Education Institute, 1875 Connecticut Avenue, NW., Suite 1034, Washington, D.C. 20530

TLS: Tulane Law School, Tulane University, 6325 Freret St., New Orleans, LA 70118. (504) 865-5900.

UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.

UDCL: University of Denver College of Law, Institute for Advanced Legal Studies, 7039 East 18th Avenue, Room 140, Denver, CO 80220. (303) 871-6125.

UHLC: University of Houston Law Center, CLE, 4800 Calhoun, Houston, TX 77004. (713) 749-3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, Law Building, Columbia, MO 65211. (314) 882-6487.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 SE. Second Avenue, Miami, FL 33131. (305) 372-0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085. (215) 645-7083.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 January annually
Arkansas	30 June annually

<i>Jurisdiction</i>	<i>Reporting Month</i>
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	Reporting requirement temporarily suspended for 1989. Compliance fees and penalties for 1988 shall be paid.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	27 hours during 2 year-period
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

*For addresses and detailed information, see the July 1989 issue of The Army Lawyer.*

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

<b>Contract Law</b>	
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).

AD A174511	<b>Legal Assistance</b> Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
AD B116097	Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B094235	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

### Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).
------------	---

### Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
AD B100235	Government Information Practices/JAGS-ADA-86-2 (345 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B108016	Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).

- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- Labor Law**
- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).
- Developments, Doctrine & Literature**
- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

- Criminal Law**
- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- The following CID publication is also available through DTIC:  
AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

## 2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 25-10	Reduction and Control of Information Transfer in an Emergency (Minimize)	1 May 1989
AR 40-501	Standards of Medical Fitness	15 May 1989
AR 360-5	Public Information	31 May 1989
AR 600-110	Identification, Surveillance, and Administration of Personnel Infected with (HIV)	22 May 1989
AR 621-5	Army Continuing Education System	1 Apr 1989
AR 635-100	Officer Personnel	1 May 1989
AR 635-120	Officer Resignations and Discharges	1 May 1989
CIR 11-89-1	Internal Control Review Checklists	15 May 1989
CIR 11-87-1	Internal Control Review Checklists, Chg. 101	2 May 1989
CIR 11-87-2	Internal Control Review Checklists, Chg. 101	2 May 1989
CIR 11-87-3	Internal Control Review Checklists, Chg. 101	2 May 1989
CIR 11-87-4	Internal Control Review Checklists, Chg. 101	2 May 1989
CIR 11-87-5	Internal Control Review Checklists, Chg. 101	2 May 1989
CIR 11-87-6	Internal Control Review Checklists Army Programs	2 May 1989
CIR 600-8-89-1	Internal Control Review Checklists Military Personnel	15 May 1989
CIR 611-89-1	Implementation of Changes to the Military Occupational Classification and Structure	28 Apr 1989

## 3. Trial Advocacy Video Tapes

Professional judge advocates are constantly improving their trial advocacy skills. The Judge Advocate General's School has numerous video tapes available for reproduction that are beneficial for trial advocates. These tapes ensure that clients (for courts or boards) are receiving the best possible representation. The following is a list of some of the available video tapes:

<u>Number</u>	<u>Title and Synopsis</u>
JA-84-0044C	<i>Direct and Cross-Examination, Parts I and II</i> , Guest Speaker: Mr. Patrick A. Williams of Williams, Donovan, Savage & Associates, Tulsa, Oklahoma, discusses direct examination, cross-examination, and expert witnesses in criminal trials. Taped: Feb 84. Length: Part I, 47:42; Part II, 49:25.
JA-86-0032C	<i>Zingers, Ringers, and Sandbags: Winning Trial Techniques, Parts I and</i>

<u>Number</u>	<u>Title and Synopsis</u>
	<i>II</i> , Guest Speaker: Mr. John Lowe, Attorney, Charlottesville, Virginia, presents an excellent overview of fundamental rules of trial advocacy. Through the use of anecdotes and personal experiences, he teaches the proper method and theory of cross-examination; how to effectively conduct voir dire; theory and practical pointers behind opening statements; and, how to conduct effective direct examination. Taped: Jan 86. Lengths: Part I, 46:49, Part II, 54:00.
JA-88-0056C	<i>Cross-Examination and Advocacy, Parts I and II</i> , Mr. F. Lee Bailey, who got his start as a military defense counsel, addresses the purposes, techniques, and pratfalls of cross examination. His discussion is

<i>Number</i>	<i>Title and Synopsis</i>	<i>Number</i>	<i>Title and Synopsis</i>
	interspersed with teaching points based on cases and situations he has faced. He closes with a lively question and answer session. Taped: Feb 88. Lengths: Part I, 60:00; Part II, 55:00.		discusses speedy trial rules, emphasizing the 120 and 90 day rules of R.C.M. 707. Taped: Aug 88. Length: 44:00.
JA-88-0101C	<i>C.O.M.A. Watch, Parts I and II</i> , Speaker Major Harry Williams, Instructor, Criminal Law Division, TJAGSA, covers the decisions of the Court of Military Appeals since 24 M.J. 1. Significant cases are discussed as well as the judicial outlook of the judges. Taped: Aug 88. Lengths: Part I, 47:00; Part II, 18:00.	JA-88-0110C	<i>Fourth Amendment</i> , Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, provides an up-date and methodology for analyzing fourth amendment issues. His analysis focuses on administrative searches (inspections), expectations of privacy, and consent searches. Taped: Aug 88. Length: 51:00.
JA-88-0103C	<i>Guest Speaker</i> , The Honorable Walter T. Cox, III, Judge, U.S. Court of Military Appeals, discusses developments and trends of the Court. Taped: Aug 88. Length: 47:00.	JA-88-0111C	<i>Fifth Amendment</i> , Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA, covers recent developments in self-incrimination, confessions, and immunity law. Taped: Aug 88. Length: 49:00.
JA-88-0104C	<i>Court-Martial Personnel/Command Control, Parts I and II</i> , Major Gary Jewell, Senior Instructor, Criminal Law Division, TJAGSA, covers recent developments in court-martial personnel and command control. Taped: Aug 88. Lengths: Part I, 39:00; Part II, 44:00.	JA-88-0113C	<i>Sixth Amendment, Parts I and II</i> , Major Sarah Merck, Instructor, Criminal Law Division, TJAGSA, reviews recent sixth amendment decisions concerning an accused's rights to compulsory process, confrontation, and effective assistance of counsel. Special emphasis is placed on the relationship between the confrontation clause and hearsay evidence. Taped: Aug 88. Lengths: Part I, 50:00; Part II, 38:00.
JA-88-0105C	<i>Pleadings and Multiplicity</i> , Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, discusses defective specifications, amending specifications, problems with value, and multiplicity. Taped: Aug 88. Length: 51:00.	JA-88-0114C	<i>Crimes and Defenses, Parts I and II</i> , Captain Eugene Milhizer, Instructor, Criminal Law Division, TJAGSA, covers recent decisions in military offenses, inchoate crimes, substantive offenses, and special defenses. Special emphasis is placed on homicides, sex offenses, drug offenses, and attempts. Taped: Aug 88. Lengths: Part I, 50:00; Part II, 40:00.
JA-88-0106C	<i>Voir Dire and Challenges</i> , Major Patrick Lisowski, Instructor, Criminal Law Division, TJAGSA, discusses developments in the area of military voir dire and challenges. Topics include permissible voir dire questions, causal challenges, rating-chain challenges, victim analysis, knowledge of court members, additional peremptory challenges, and the <i>Batson</i> challenge. Taped: Aug 88. Length: 53:00.	JA-88-0115C	<i>DNA Fingerprinting, Parts I and II</i> , Dr. Robert C. Shaler, Ph.D. covers the use of DNA fingerprinting in criminal trials. Taped: Aug 88. Lengths: Part I, 46:00. Part II, 50:00.
JA-88-0107C	<i>Pretrial Restraint</i> , Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA, covers recent developments in pretrial restraint and sentence credit for pretrial restraint (including <i>Allen</i> credit, <i>Mason</i> credit, credit under R.C.M. 305 as interpreted by <i>Gregory</i> , and credit for violations of Article 13. Taped: Aug 88. Length: 38:00.	JA-88-0117C	<i>Insanity</i> , Major Harry Williams, Instructor, Criminal Law Division, TJAGSA, discusses amendments to the Uniform Code of Military Justice as guided by the Insanity Defense Reform Act as well as significant decisions of the military appellate courts concerning the insanity defense. Taped: Aug 88. Length: 23:00.
JA-88-0109C	<i>Pleas/Pretrial Agreements</i> , Major James Gerstenlauer, Instructor, Criminal Law Division, TJAGSA,		

\*\*\*\*\* Listed below are new trial advocacy video tapes that have recently been added to the TJAGSA Video Tape library. SJA and TDS offices should update their



copies of the TJAGSA *Video Tape Bulletin*, dated April 1989.

**Number**

***Title and Synopsis***

JA-89-0042C

***Opening Statements***, Major Harry Williams, Instructor, Criminal Law Division, TJAGSA, discusses the preparation and presentation of the opening statement for both trial and defense counsel. An example is included. Taped: May 89. Length 35:00.

JA-89-0054C

***Arguments***, Major Craig Wittman, Instructor, Criminal Law Division, TJAGSA, discusses the preparation and presentation of closing arguments for both trial and defense counsel. Taped: Jun 89. Length: 51:30.

These tapes are available through a tape dubbing service. The School does not provide these tapes on loan. The video tape equipment produces only 3/4 inch and 1/2 inch (VHS) video cassettes. Reproductions of programs may be obtained upon request *accompanied by video cassettes of the appropriate lengths*. Tapes must be requested by title and number. Requests and tapes should be forwarded to:

The Judge Advocate General's School, U.S. Army  
ATTN: Media Services Office (JAGS-ADN-T)  
Charlottesville, Virginia 22903-1781

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

...the ... of ...  
...the ... of ...  
...the ... of ...

-----

-----

-----

-----

-----

-----

-----

-----

-----

-----

-----

-----

-----

-----

---

By Order of the Secretary of the Army:

CARL E. VUONO  
*General, United States Army*  
*Chief of Staff*

Official:

**Distribution. Special.**

WILLIAM J. MEEHAN II  
*Brigadier General, United States Army*  
*The Adjutant General*

---

Department of the Army  
The Judge Advocate General's School  
US Army  
ATTN: JAGS-DDL  
Charlottesville, VA 22903-1781

---

SECOND CLASS MAIL  
POSTAGE AND FEES PAID  
DEPARTMENT OF THE ARMY  
ISSN 0364-1287

---

Official Business  
Penalty for Private Use \$300

---