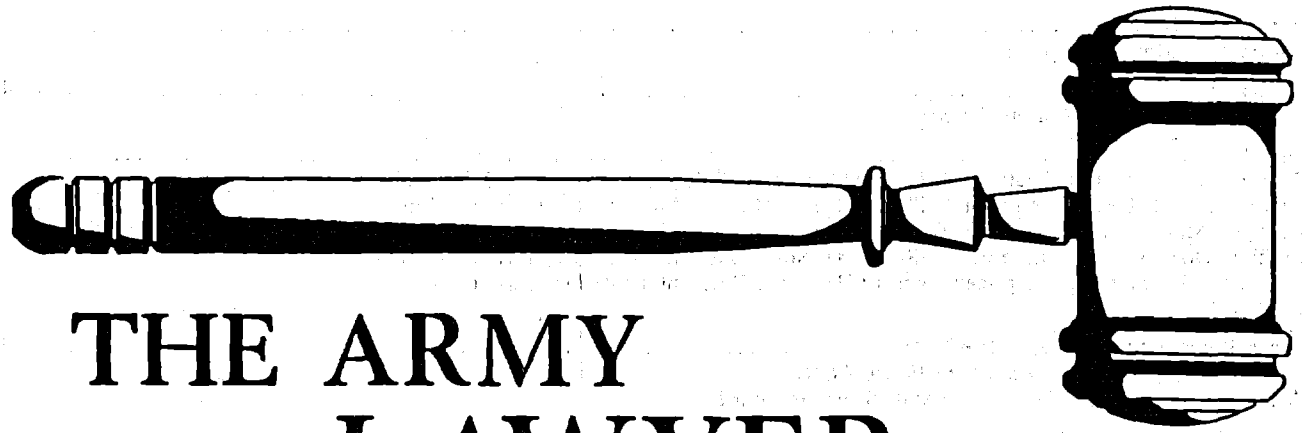
LEGAL ASSISTANCE



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-204

December 1989

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The Army Lawyer (ISSN 0364-1287)

Editor
Captain Matthew E. Winter

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

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

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

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

REPLY TO
ATTENTION OF

DAJA-CL

12 OCT 1989

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Appearance of USACIL Examiners as Witnesses at Courts-Martial

1. The US Army Criminal Investigation Command Crime Laboratories (USACIL) continue to receive requests for the appearance of laboratory examiners less than 10 working days prior to the requested appearance date contrary to the directive contained in Army Regulation 195-2. There are both personal and professional reasons for the notice requirement. Examiners need to prepare before they appear in court and the notice is intended to allow them preparation time.

2. Scheduling of trials involves delicate coordination between trial counsel, defense counsel, and the military judge; sometimes short notice is unavoidable. However, we can do better.

3. The requirement for 10 working days notice is imposed by regulation and must be followed. Failure to observe this requirement reduces the quality and availability of the services provided by the laboratory examiners. I expect you to closely monitor your counsel and ensure that the notice requirement is met.

William K. Suter

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

Memorandum of Law: Executive Order 12333 and Assassination

In 1977 President Gerald R. Ford promulgated Executive Order 11905, which provided, in part, that "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Each successive administration has repromulgated this prohibition. The Reagan Administration Executive Order 12333 containing the prohibition on assassination has been continued without change by President Bush. None of these executive orders defined the term "assassination." In the process of rewriting U.S. Army Field Manual 27-10, The Law of War, the following memorandum was prepared to explain the term in the context of military operations across the conflict spectrum.

DAJA-IA (27-1a)

MEMORANDUM OF LAW

SUBJECT: Executive Order 12333 and Assassination

1. Summary. Executive Order 12333 prohibits assassination as a matter of national policy, but does not expound on its meaning or application. This memorandum explores the term and analyzes application of the ban to military operations at three levels: (a) conventional military operations; (b) counterinsurgency operations; and (c) peacetime counterterrorist operations. It concludes that the clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in EO 12333 or by international law.

2. Memorandum Purpose. The purpose of this memorandum is to explore "assassination" in the context of national and international law to provide guidance in the revision of U.S. Army Field Manual 27-10, *The Law of War*, consistent with Executive Order 12333. This memorandum is not intended to be, and does not constitute, a statement of policy.

3. a. *Assassination in General*. Executive Order 12333 is the Reagan Administration's successor to an Executive Order renouncing assassination first promulgated in the Ford Administration. Paragraph 2.11 of Executive Order 12333 states that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." The Bush Administration has continued Executive Order 12333 in force without change. Neither Executive Order 12333 nor its predecessors defines the term "assassination."

Appendix A contains a number of definitions from recognized sources that were considered in development of this memorandum. In general, assassination involves murder of a targeted individual for political purposes.

While assassination generally is regarded as an act of murder for political reasons, its victims are not necessarily limited to persons of public office or prominence. The murder of a private person, if carried out for political purposes, may constitute an act of assassination. For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro*, though an act of murder for political purposes, would not constitute an assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature. [1] Finally, the killing of Martin Luther King and Presidents Abraham Lincoln, James A. Garfield, William McKinley and John F. Kennedy generally are regarded as assassination because each involved the murder of a public figure or national leader for political purposes accomplished through a surprise attack.

b. Assassination in Peacetime. In peacetime, the citizens of a nation — whether private individuals or public figures — are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation. Article 2(4) of the Charter of the United Nations provides that all Member States

> shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purpose of the United Nations.

Peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political purposes, and in some cases (as cited above) also require that the act constitute a covert activity, particularly when the individual is a private citizen. Assassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it.

c. Assassination in Wartime. Assassination in wartime takes on a different meaning. As Clausewitz noted, war is a "continuation of political activity by other means." *On War* (Howard and Paret, eds. [1976]), p. 87. In wartime the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether

[1] *Covert operations* are defined as "operations which are planned and executed so as to conceal the identity of or permit plausible denial by the sponsor. They differ from clandestine operations in that emphasis is placed on concealment of identity of [the] sponsor rather than on concealment of the operation." In contrast, low visibility operations are defined as "Sensitive operations wherein the political/military restrictions inherent in covert and clandestine operations are either not necessary or not feasible; actions are taken as required to limit exposure of those involved and/or their activities. Execution of these operations is undertaken with the knowledge that the action and/or sponsorship of the operation may preclude plausible denial by the initiating power." JCS Pub. 1, *Dictionary of Military and Associated Terms* (1 June 1987).

lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in the hostilities. See Grotius, *The Law of War and Peace* (1646), Bk. III, Sec. XVIII(2); Oppenheim, *International Law* II (H. Lauterpacht, ed,, 1952), pp. 332, 346; and Berriedale, 2 *Wheaton's International Law* (1944), p. 171.

The term *assassination* when applied to wartime military activities against enemy combatants or military objectives does not preclude acts of violence involving the element of surprise. Combatants are liable to attack at any time or place, regardless of their activity when attacked. Spaight, *War Rights on Land* (1911), pp. 86, 88; U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), para. 31. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support; or functioning as staff planners. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such. Nor does the prohibition on assassination limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, a single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one *vis-a-vis* another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination.

Likewise, the death of noncombatants ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful. Civilians and other noncombatants who are within or in close proximity to a military objective assume a certain risk through their presence in or in proximity to such targets; this is not something about which an attacking military force normally would have knowledge or over which it would have control.

The scope of assassination in the U.S. military was first outlined in U.S. Army General Orders No. 100 (1863). Paragraph 148 states

> *Assassination.* The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. . . .

This provision, consistent with the earlier writings of Hugo Grotius *(Cf.* Bk. III, Sec. XXXVIII(4)), has been continued in U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), which provides (paragraph 31):

> (Article 23b, Annex to Hague Convention IV, 1907) is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'

The foregoing has endeavored to define *assassination* in the sense of what the term normally encompasses, as well as those lawful acts carried out by military forces in time of war that do not constitute assassination. The following is a discussion of assassination in the context of specific levels of conflict.

3. Conventional War. As noted in the quote from paragraph 31 of U.S. Army Field Manual 27-10, assassination in the context of a conventional war consists of "outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.' "

This prohibition complements the proscription on denial of quarter contained in article 23d, Annex to Hague Convention IV (1907). (The prohibition on denial of quarter makes it illegal to refuse to accept an enemy's surrender under any circumstances, or to put to death those who surrender or who are *hors de combat.*) However, neither proscription precludes the attack of enemy combatants with the intent to kill rather than capture so long as those who endeavor to surrender are availed that opportunity where circumstances permit. This is not always possible. The death of an enemy combatant who endeavors to surrender while caught in the center of the kill zone of an infantry ambush normally would not be a violation of either proscription, for example. Neither would the killing of an enemy soldier who, in the midst of an assault by his unit, has a change of heart and throws down his weapon, raises his hands, and dies in a hail of bullets put out by the defending unit repelling the enemy attack. The test is one of reasonableness.

As previously noted, enemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack. Such attacks do not constitute assassination unless carried out in a "treacherous" manner, as prohibited by article 23(b) of the Annex to the Hague Regulations (Hague Convention IV) of 1907. While the term "treacherous" has not been defined, as previously noted in this memorandum it is not regarded as prohibiting operations that depend upon the element of surprise, such as a commando raid or other form of attack behind enemy lines.

Thus, none of the following constitutes assassination, although the term has been applied loosely (and incorrectly) to the first two:

> 18 November 1941: Commando raid by No. 11 Scottish Commando at Bedda Littoria, Libya, to kill German Field Marshal Erwin Rommel.
>
> 18 April 1943: USAAF P-38 fighter aircraft intercept and down Japanese aircraft carrying Admiral Osoruku Yamamoto over Bougainville, killing Admiral Yamamoto.
>
> 30 October 1951: U.S. Navy airstrike kills 500 senior Chinese and North Korean military officers and security forces attending a military planning conference at Kapsan, North Korea.

Traditionally, soldiers have an obligation to wear uniforms to distinguish themselves from the civilian population. Law of war sources prior to World War II suggested that the prohibition on killing or wounding "treacherously" referred to soldiers disguising themselves as civilians in order to approach an enemy force and carry out a surprise attack. That concept was thrown into disarray during World War II by the reliance on partisans by all parties to that conflict. While frequently characterized as an assassination, the 27 May 1942 ambush of SS General Reinhard Heydrich by British SOE-trained Czechoslovakian partisans is representative of the practice of each party to the conflict employing organized resistance units to carry out attacks against military units and personnel of an occupying power. [2]

Reliance upon organized partisan forces changed state practice and, accordingly, the law of war. Coordinated British and U.S. revisions of their respective post-World War II law of war manuals reflected this change. For example, the following underlined sentence was added to paragraph 31 of FM 27-10:

> (Article 23b, Annex to the Hague Convention IV, 1907) is construed as prohibiting assassination. . . . *It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*

The annotations to FM 27-10 state that the underlined sentence was inserted "so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons." The deliberate decision by many nations to employ surrogate guerrilla forces in lieu of or in conjunction with conventional military units to fight a succession of guerrilla wars since 1945 has served to raise further doubts regarding the traditional rule.

While state practice suggests that the employment of partisans is lawful, that is, would not constitute assassination, a question remains regarding the donning of civilian clothing by conventional forces personnel for the purpose of killing enemy combatants. However, in the one known case of such practice during World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts. [3]

Another unresolved issue concerns which civilians may be regarded as combatants, and therefore subject to lawful attack. While there is general agreement among law of war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant. Appendix B places members of the civilian population into four distinct categories. Those who do not participate in the hostilities always are immune from intentional attack. The remaining three categories have been defined by one group of experts as follows:

> War effort: all national activities which by their nature and purpose would contribute to the military defeat of the adversary.
>
> Military effort: all activities by civilians which objectively are useful in defense or attack in the military sense, without being the direct cause of damage inflicted, on the military level.
>
> Military operations: movements of attack or defense.

There is a lack of agreement on this matter, and no existing law of war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or "quasi-combatants" and thereby subject to attack generally has been a policy rather than a legal matter. The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of limited segments of the civilian population with each nation's conduct of military operations and vital support activities.

Three points can be made in this respect. (a) Civilians who work within a military objective are at risk from attack during the times in which they are present within that objective, whether their injury or death is incidental to the attack of that military objective or results from their direct attack. Neither would be assassination. (b) The substitution of a civilian in a position or billet that normally would be occupied by a member of the military will not make that position immune from attack. (c) Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation's war effort than that person's service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation's national security or war aims. Thus, more than 90% of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves. Attack of these individuals would not constitute assassination. [4]

---

[2] A degree of confusion exists, as Heydrich was characterized by the British law of war manual as the "civilian" governor in Czechoslovakia. While Heydrich's predecessor, Konstantin von Neurath, was a civilian, Heydrich's position as a uniformed officer in the SS, a military organization, clearly made him a combatant.

[3] Had he been captured by the Germans, he would have been subject to trial and execution as a spy.

[4] While a civilian head of state who serves as commander-in-chief of the armed forces may be a lawful target (and his or her attack therefore would not constitute an act of assassination), as a matter of comity such attacks generally have been limited. As previously stated, the death of an individual incidental to the attack of a military objective would not constitute assassination.

4. Counterinsurgency. Guerrilla warfare is particularly difficult to address because a guerrilla organization generally is divided into political and guerrilla (military) cadre, each garbed in civilian attire in order to conceal their presence or movement from the enemy. Appendix C illustrates a division of the "civilian" population in an insurgent environment.

Just as members of conventional military units have an obligation to wear uniforms in order to distinguish themselves from the civilian population, civilians have an obligation to refrain from actions that might place the civilian population at risk. A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination.

The wearing of civilian attire does not make a guerrilla immune from lawful attack, and does not make a lawful attack on a guerrilla an act of assassination. As with the attack of civilians who have combatant responsibilities in conventional war, the difficulty lies in determining where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem, and one of the most heated debates arising during and after the U.S. war in Vietnam surrounded this issue. [5] As with conventional war, however, ultimately the issue was settled along policy rather than legal lines. If a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be assassination.

5. Peacetime operations. The use of force in peacetime is limited by the previously-cited article 2(4) of the Charter of the United Nations. However, article 51 of the Charter of the United Nations recognizes the inherent right of self defense of nations. Historically the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities. For example:

— 1804-1805: Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill [6] the Barbary pirates.

— 1916: General "Blackjack" Pershing led a yearlong campaign into Mexico to capture or kill the Mexican bandit Pancho Villa following Villa's attack on Columbus, New Mexico.

— 1928-1932: U.S. Marines conducted a campaign to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino.

— 1967: U.S. Army personnel assisted the Bolivian Army in its campaign to capture or kill Ernesto "Che" Guevara.

— 1985: U.S. Naval forces were used to force an Egypt Air airliner to land at Sigonella, Sicily, in an attempt to prevent the escape of the *Achille Lauro* hijackers.

— 1986: U.S. naval and air forces attacked terrorist-related targets in Libya in response to the Libyan government's continued employment of terrorism as a foreign policy means.

Hence there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security.

The Charter of the United Nations recognizes the inherent right of self defense and does not preclude unilateral action against an immediate threat.

In general terms, the United States recognizes three forms of self defense:

a. Against an actual use of force, or hostile act.

b. Preemptive self defense against an imminent use of force. [7]

c. Self defense against a continuing threat. [8]

A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed

---

[5] Extended civil litigation between Sam Adams and General William C. Westmoreland failed to resolve this issue, illustrating its complexity.

[6] In the employment of military forces, the phrase "capture or kill" carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual(s) in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ (e.g.) an airstrike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.

[7] *See, e.g.*, U.S. Navy Regulations (1973), article 0915, which states in part that force may be used "to counter either the use of force or an immediate threat of the use of force," or JCS SM 846-88 (28 October 1988), Peacetime Rules of Engagement for U.S. Forces, pp. I-4 and I-5, which define hostile intent.

[8] The last has been exercised on several occasions within the past decade. It formed the basis for the U.S. Navy air strike against Syrian military objectives in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day. It also was the basis for the air strikes against terrorist-related targets in Libya on the evening of 15 April 1986. This right of self defense would be appropriate to the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision.

response by U.S. military forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force. [9]

6. Summary. Assassination constitutes an act of murder that is prohibited by international law and Executive Order 12333. The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy. Its intent was not to limit lawful self defense options against legitimate threats to the national security of the United States or individual U.S. citizens. Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.

W. HAYS PARKS
Chief, International Law Branch
International Affairs Division

Appendix A

General Definitions

While none is entirely satisfactory, the following definitions of *assassinate* or *assassination* were considered in the formulation of this memorandum.

The Oxford English Dictionary (1933) defines *assassination* as "the taking of the life of anyone by treacherous violence, especially by a hired emissary, or one who has taken upon him to execute the deed," and *assassin* as "one who undertakes to put another to death by treacherous violence. The term retains so much of its original application as to be used chiefly of the murder of a public personage, who is generally hired or devoted to the deed, and aims purely at the death of his victim."

Webster's Third New International Dictionary of the English Language (1976) defines *assassination* as "1. To murder (a usually prominent person) violently. . . . 3. to injure, wound, or destroy, usually unexpectedly and treacherously." Under the term *kill*, that dictionary defines *assassination* as "implies the killing of a person in governmental or political power."

Webster's Ninth New Collegiate Dictionary (1984) utilizes the same definition for *assassination* as the larger volume, quoted above, but defines the term under *kill* as applying to "deliberate killing openly or secretly, often for political purposes."

The Random House Dictionary of the English Language (2nd edition, 1987), defines *assassinate* as "to kill suddenly or secretly, especially a politically prominent person; murder premeditatedly and treacherously."

The Oxford Companion to Law (1980) defines *assassination* as "the murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people from political motives, e.g. the assassination of President Kennedy."

Black's Law Dictionary (5th edition, 1979) defines *assassination* as "murder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murderer by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons. . . ."

Black's Law Dictionary (4th edition, 1951) explains the distinction between *murder* and *homicide* by defining the latter as ". . .the act of a human being in taking away the life of another human being. . . . Homicide is not necessarily a crime. It is a necessary ingredient of the crime of murder, but there are cases in which homicide may be committed without criminal intent and without criminal consequences, as, where it is done. . .in *self-defense*. . . . [emphasis supplied]."

A recent law review article defines *assassination* as "the intentional killing of an internationally protected person." Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 Virginia Journal of International Law (Spring 1987), p. 655; though limiting it to a class of individuals such as diplomats and other statesmen, who are protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (28 U.S.T. 1975, T.I.A.S No. 8532, 1035 U.N.T.S. 167 [1973]).

Historical analyses of assassination contain similar definitions. For example, one source defines *assassination* as

> . . .the sudden, surprising, treacherous killing of a public figure, who has responsibilities to the public, by someone who kills in the belief that he is acting in his own private or the public interest. McConnell, *The History of Assassination* (1969), p. 12.

Another analysis defines *assassination* as

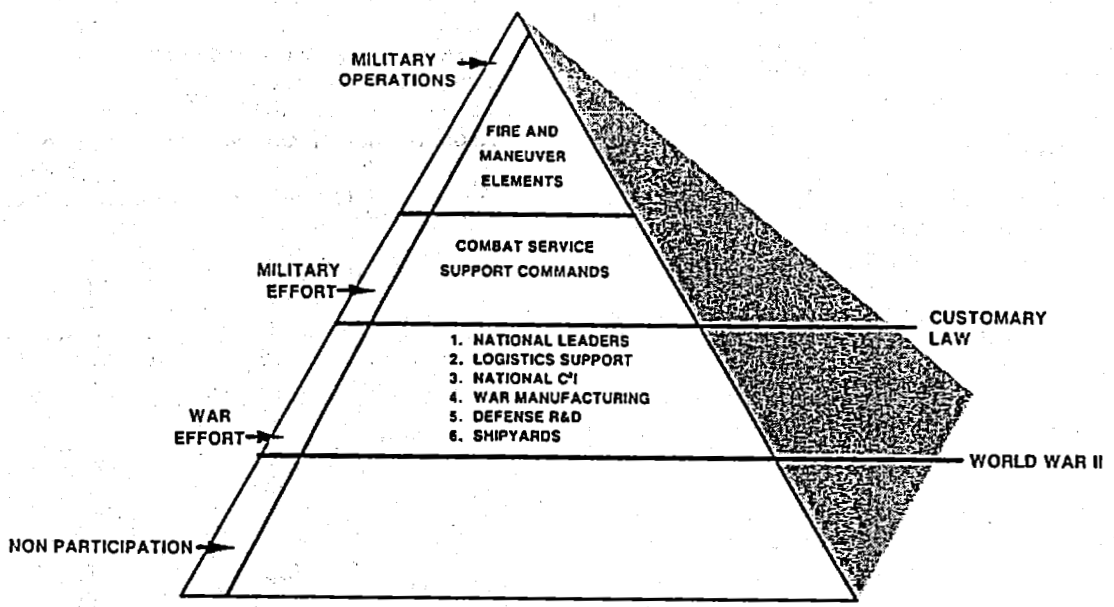
> . . .those killings or murders, usually directed against individuals in public life, motivated by political rather than personal relationships. Havens, Leiden, and Schmitt, *Assassination and Terrorism: Their Modern Dimensions* (1975), p. 4.

On the other hand, other scholars have declined to define the term. See, for example, Bell, *Assassins!* (1979), p. 22; and Ford, *Political Murder* (1985), pp. 1, 46, 196, 301-307.

[9] In a conventional armed conflict, such individuals would be regarded as unprivileged belligerents, subject to attack, but not entitled to prisoner of war protection or exemption from prosecution for their crimes. Employment of military force against terrorists does not bestow prisoner of war protection upon members of the terrorist organization.

Appendix B

CIVILIANS IN CONVENTIONAL WAR



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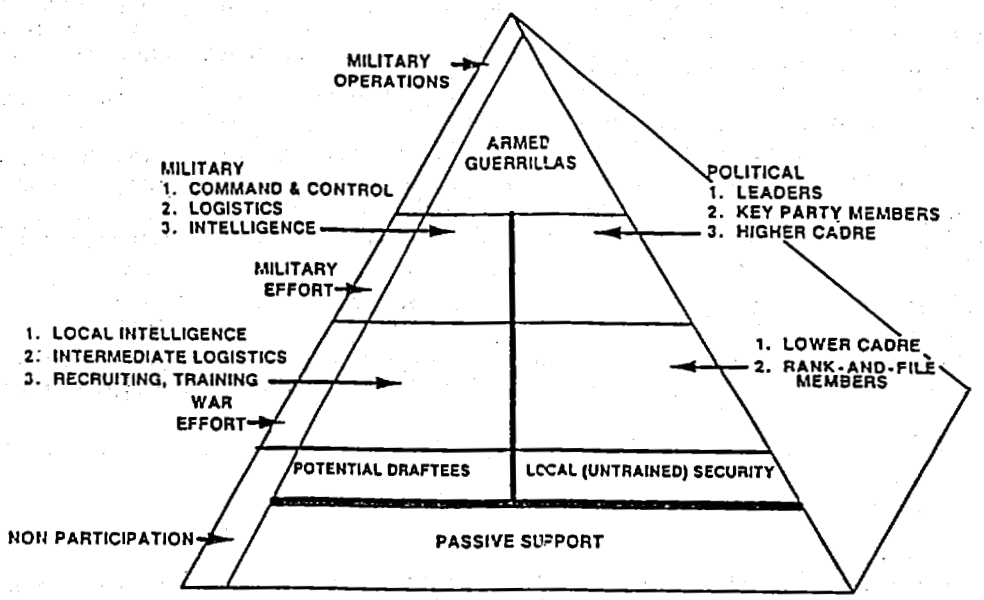
Appendix C

REVOLUTIONARY WAR



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The Commercial Activities Process—Lessons Learned

CPT Christopher N. Patterson
Installation Judge Advocate, Vint Hill Farms Station

Introduction

The installation contract attorney must deal with a myriad of sensitive and often complex procurement issues. Nowhere is the contract attorney's attention more necessary than in the commercial activities process. The attorney must take a proactive approach to ensure that the entire process is conducted properly. Continuous involvement by the attorney is the best defense against a protest and is a proven method of ensuring a quality solicitation package.

The government's policy is to rely upon the private enterprise system to the maximum extent possible. Of course, this reliance on the private enterprise system must be consistent with the effective and efficient accomplishment of governmental programs. In the past, the Army has relied upon the commercial activities program to achieve these economies. [1] In this era of austerity and fiscal restraint, it is likely that the commercial activities program will continue to be one of this administration's weapons to combat excessive governmental spending. The purpose of this article is to identify several potential problem areas in the commercial activities process and to provide suggestions to attorneys who may encounter similar issues.

The commercial activities process involves competition between the government and industry to provide the most efficient and economical services to the government. The Army's commercial activities program is characterized by a two-pronged process. One prong functions as a typical acquisition under the direction of a contracting officer. Requirements are identified, statements of work are drafted, decisions are made about contract type, solicitations are issued to industry, and offers are received and evaluated. This process culminates in the selection of a source that best satisfies the government's minimum needs. The second prong of this process, operating simultaneously with the first prong, is what distinguishes the commercial activities process from other procurement programs. While the contracting officer is developing the solicitation, the activity under study will take the same work statement, develop a management study that includes its "most efficient organization," and prepare an in-house cost estimate for the required services. After factoring in specific cost differentials, this in-house cost estimate is then compared to the best-qualified industry proposal to determine whether the service will be performed by government employees or by employees of an independent contractor.

References

OMB Circular A-76

The attorney must have a working knowledge of OMB Circular A-76 and its supplement, which are issued by the Executive Office of the President, Office of Management and Budget. [2] The supplement to OMB Circular A-76 establishes federal policy regarding commercial activities and includes implementing instructions, guidance about drafting performance work statements, procedures for conducting management reviews of in-house organizations, and instructions for developing cost comparisons of in-house and contract performance costs.

The supplement requires that existing commercial activities be "continually monitored to ensure that performance is satisfactory and cost effective." [3] The government is under a duty to review all non-exempt in-house activities every five years [4] and must reexamine contracted-out commercial activities for cost effectiveness. Accordingly, the attorney must pay particular attention to the termination of existing commercial activity periods. [5] Once an activity has been contracted out, the government often assumes that the function will always remain in the hands of industry. This is not necessarily true. An in-house workforce may be able to perform the activity in question more economically. As such, it is extremely important to conduct a review of whether the function should remain contracted out. Additionally, if in-house performance is not possible, the contracting office must maintain adequate documentation to that effect in the resolicitation file.

Army Regulation 5-20

Army Regulation 5-20 implements the commercial activities program. It includes guidance on the attorney's role during inventories, activity reviews, cost studies, management studies, acquisition planning, and final decisions. The regulation also discusses certain labor consequences of the commercial activities program, in-

[1] Army Reg. 5-20, Commercial Activities Program, para. 1-5 (20 Oct. 1986) [hereinafter AR 5-20]. In fact, the government policy of relying upon the private sector for goods and services traces its origin to the Eisenhower administration. *See also* Private Sector Cost Comparisons, GAO/GGD-87-30, B-223693 (31 Dec. 1986).

[2] Office of Management and Budget Supplement OMB Circular No. A-76 (Revised), Performance of Commercial Activities (Aug. 1983) [hereinafter Supplement, A-76].

[3] Supplement, A-76, chap. 1, para. C.3.a.

[4] Supplement, A-76, chap. 1, para. C.1.c.; AR 5-20, para. 1-8r(2).

[5] Service contracts shall not exceed five years in duration. Federal Acquisition Reg. 17.204(e) (1 Apr. 1984) [hereinafter FAR]. For those existing CA contracts that are about to expire, the attorney should closely monitor the process and ensure that the time limitations are not breached. *See* 41 U.S.C. § 353(d) (1982).

cluding reduction-in-force planning [6] and the employees' right of first refusal. [7] Accordingly, the attorney should ensure that the civilian personnel officer is included as a member of the installation commercial activities team.

Initial Responsibilities

Drafting Performance Work Statements (PWS)

The performance work statement describes all functional and performance characteristics of the work, including the location of the work, the units of work, the quantity of work units, and the quality and timeliness of the work units. [8] The attorney must be involved in the drafting of the PWS. The ideal approach is to have the activity's brightest and most technically competent employees draft the PWS, but this does not always occur. Furthermore, the drafters of the PWS are often the same employees who stand to lose their jobs to the private sector through the commercial activities process. As a result, the final product is often convoluted and incomplete. To alleviate this problem, the attorney should actively review portions of the PWS *before* its inclusion in the solicitation. The attorney should recommend the use of a team approach. Procurement, resource management, legal, and technical expertise should all be used to devise a PWS that clearly defines required tasks and that takes into account the materials available to accomplish those tasks.

The attorney should educate the workforce that the commercial activities process is designed to achieve maximum efficiency, not to eliminate government jobs. Essentially, the more efficient government services become, the more likely the activity will remain in-house. To that end, employees must be aware that the greater the effort they place on drafting the PWS, the greater the probability that the government will prevail. If, however, the activity is contracted out, the attorney should inform the employees that they have a right of first refusal of employment. [9]

Review of the PWS should focus on the following items: 1) whether it is written using proper grammar and sentence structure; 2) whether it is easy to understand; 3) whether the primary tasks are written as end products and are represented in a performance mode; 4) whether there are specific conditions or constraints that are placed on the contractor; and 5) whether there are any other special considerations that need to be considered, such as time of operations, post regulations, use of equipment, and environmental considerations. The attorney should review all technical exhibits to verify that they are consistent with the requirements contained in the PWS and to ensure that all regulations are properly referenced. The PWS must be objective and concise, and it must clearly identify required tasks and expected performance standards. Periodic review of the PWS prior to the final solicitation package permits discovery and correction of problem areas without significantly delaying the process. The attorney should consult the OFPP guide to writing performance work statements. [10] This guide provides a systematic approach to drafting performance work statements.

Avoiding Conflicts

The attorney is often called upon to attend in-progress reviews of a particular activity, give advice regarding the development of the PWS, interpret regulations and policies, and discuss with the activity under study about how they may become more efficient. The attorney's primary role, however, is as adviser to the contracting officer regarding the solicitation. [11] The commercial activities process may create conflicting situations. The attorney must not become exposed to any portion of the management study, including the most efficient organization. [12] Exposure to the management study would taint the entire process and could result in a successful protest.

Commands may want to support the commercial activities process with two legal advisers, one to provide advice on in-house preparations and one to advise the contracting officer. Manpower constraints, however, often require that one attorney provide all these services. In those instances, the attorney must be aware of potential conflicts of interest. [13] The attorney's goal should be to facilitate the development of a thorough solicitation package that will allow industry to compete with the government to provide the most cost effective services. The attorney is not prohibited from giving general advice to those parties preparing the management study. The attorney should respond to these inquiries to the maximum extent possible so that problems may be resolved early in the process.

Developing the Solicitation Package

Determining Contract Type

It is extremely important for the attorney to be involved in the decision about contract type. The government's objective must be to "negotiate a contract type and price that will result in reasonable contractor risk

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[6] AR 5-20, para. 3-2.

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

[8] Supplement, A-76, chap. 2, para. B; AR 5-20, para. 4-10.

[9] FAR 52.207-3, "Right of First Refusal of Employment," must be incorporated in all solicitations that may result in a conversion from in-house performance to contract performance. *See* FAR 7.305(c).

[10] Office of Federal Procurement Policy, A Guide for Writing and Administering Performance Statements of Work for Service Contracts (Oct. 1980).

[11] Army Federal Acquisition Reg. Supp. 1.697 (12 Jan. 1989) [hereinafter AFARS].

[12] *See* AR 5-20, para. 4-6e(1).

[13] Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, para. 1.7 (Dec. 1987).

and provide the contractor with the greatest incentive for efficient and economical performance." [14] All relevant factors should be considered when making this decision. [15]

A commonly preferred contract type is cost-plus-award-fee. [16] This contractual arrangement accommodates mission growth and permits the government to highlight areas of the PWS that need special attention. The cost-plus-award-fee uses monetary awards to encourage exceptional contractor performance. It is important to realize, however, that mission growth and associated cost increases require heightened contract administration awareness.

If the activity under study has accurately defined work requirements and has gathered workload data, cost-plus-award-fee may not be the best contract choice. A firm-fixed-price contract [17] may be more appropriate. With a firm-fixed-price contract, costs are specifically defined, contract administration is facilitated, and cost growth may be more readily controlled. Unfortunately, firm-fixed-price contracts may lack the flexibility of cost-plus-award-fee contracts.

Conversion to firm-fixed-price requires that detailed historical workload data be included in the solicitation so offerors understand the level of performance the government expects. Whether it is accomplished in-house or by contractor, there is always a requirement to gather data for future cost comparisons. The PWS should require the contractor to gather historical workload data over the term of the contract. Without this data, the government would be hard pressed to demonstrate any factual basis to support a determination to return the activity in-house.

Examining Technical Exhibits

The attorney plays a critical role in developing a solicitation package. The attorney must ensure that there has not been any subtle manipulation of data within the solicitation package. All technical exhibits should be checked for accuracy. The review should include a check to ensure that all government furnished property is listed and that the supply and material lists accurately reflect the activity's consumption level. The attorney should not permit the activity to place more material requirements into the technical exhibits than are actually required. Excess requirements in the technical exhibits would lead industry to bid on more requirements than would the in-house activity. The net result of this, of course, would be to drive up industry's total price and ultimately provide the in-house activity with an unfair competitive advantage in the cost comparison. The attorney must carefully scrutinize workload representations to ensure they accurately represent historical workload. It is important that the attorney guard against inflation of this data.

Cost Savings Techniques

The attorney is required to review the solicitation for legal sufficiency. [18] If the attorney has participated in drafting the PWS and has examined the technical exhibits for accuracy, this may be a time to "fine tune" the solicitation package with cost savings techniques. For example, if the contract is cost-plus-award-fee, the attorney should consider the use of self-imposed ceilings (or caps) for contractor-proposed general and administrative rates, as well as for base and award fee rates. The theory of self-imposed caps is that each offeror will establish his or her own rates, balancing competitive standing with other offerors against profit motive. Caps should be reflected in the bid schedule for the base and each option year, and they should not be subject to change or negotiation over the term of the contract. The anticipated result of these caps is that offerors will reduce their rates to competitive levels, resulting in a cost savings for the government.

Evaluation Criteria

The solicitation must identify all the evaluation factors and significant subfactors that will be considered in awarding the contract and should indicate their relative weights. [19] The government has a great deal of flexibility in developing evaluation criteria and should select and appropriately weigh evaluation criteria that will lead to achieving the government's minimum needs. These provisions, usually embodied in Section M, [20] are designed to provide each offeror an equal opportunity to compete for award. Cost or cost realism should be included as one of these criteria. [21] Evaluations must be based upon those enumerated evaluation criteria in the solicitation. [22] To ensure fairness, any changes to the evaluation procedures or criteria must be disclosed to offerors. Any deviation from the enumerated evaluation criteria or any failure to disclose evaluation factors to all offerors can result in a successful protest. [23]

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[14] FAR 16.103(a).

[15] FAR 16.104.

[16] FAR 16.305. *But see* Comp. Gen. Report B-230646, Army Procurement, where GAO held that Fort Benjamin Harrison's Commercial Activity Study should be redone or updated. GAO opined that where sufficient data exists to forecast costs associated with a particular proposed commercial activity, a fixed price contract type should be used.

[17] FAR 16.202.

[18] AFARS 1.690.

[19] FAR 15.406-5(c).

[20] Standard Form 33, as prescribed by FAR 53.214(c); FAR 15.406-5(c).

[21] Comp. Gen. Dec. B-213726 (6 June 1984), 84-1 CPD ¶ 605; Comp. Gen. Dec. B-185558 (26 Aug. 1976), 76-2 CPD ¶ 186; FAR 15-605(c).

[22] FAR 15.608(a).

[23] *See, e.g.*, Comp. Gen. Dec. B-202762 (5 Jan. 1982), 82-1 CPD ¶ 8.

Government Furnished Property

The government may provide the contractor with a certain amount of property that the contractor will use to accomplish the job. The use of government furnished property by contractors may generate unforeseen risks to the government. Unless the contract states otherwise, contractors are responsible and liable for government property in their possession. [24] Contractors may assume greater liability for loss or damage to government property than that contemplated by government property clauses, [25] but it is rare that a specifically tailored provision is included in the contract. Instead, the government typically includes provisions holding the contractor liable only for damage or loss in those instances where the contractor has acted with willful misconduct or lack of good faith. [26] The Army's general standard of liability for lost or damaged property is negligence or willful misconduct. [27] Therefore, there are situations where a contractor has negligently damaged government property, but the government is unable to obtain reimbursement because it cannot show willfulness or bad faith. To alleviate this problem, the attorney may wish to include a specific provision, perhaps in Section H of the solicitation, to curtail the costs of lost or damaged government property. The following clause may be appropriate:

> *Contractor Responsibility and Liability.* The contractor shall, upon receipt, become responsible for the condition, serviceability and accountability for all government furnished property as stipulated in FAR subpart 45.5. The government will make adjustments for fair wear and tear. Pursuant to the express terms of this contract, the contractor shall be responsible and liable for all loss or damage to government furnished property based upon findings of negligence or willful misconduct as determined through Reports of Survey processed IAW AR 735-5. Upon a finding of negligence or willful misconduct on the part of the contractor, and/or contractor employees, the contracting officer shall review the Report of Survey IAW AR 735-5, paragraph 13-23, and make a final determination. The contracting officer will formally furnish a copy of his or her determination to the contractor. Should the contracting officer determine that restitution is owed to the government, he or she will promptly issue to the contractor a written request (demand) for payment within 30 days. Should the contractor fail to make timely restitution, the contracting officer shall make adjustments to subsequent contractor invoices.

The Evaluation Process

Source Selection Boards

The source selection evaluation board is an organization composed of personnel from various functional and technical disciplines that evaluates proposals in accordance with solicitation criteria. In broad terms, the source selection evaluation board's objectives are to impartially, objectively, and thoroughly evaluate proposals; to provide an official record of the evaluation process; to provide the contracting officer with recommendations and rationale concerning competitive range determinations; and to provide the source selection authority with meaningful findings that are clearly and succinctly presented and that facilitate the selection decision by the source selection authority.

The source selection evaluation board must be insulated from outside sources. The members of the board should not be exposed to the management study or to the most efficient organization. [28] The attorney should expect to actively participate with the source selection evaluation board. In fact, the attorney may be called upon to serve on an intermediate group called the source selection advisory committee. This group reviews the source selection evaluation board report and makes recommendations directly to the source selection authority. If there is no source selection advisory committee in existence, the attorney should consider establishing one. Members may include the contracting officer, chairman of the source selection evaluation board, chairman of technical evaluations, chairman of cost evaluations, and legal counsel.

Source Selection Plan

The source selection evaluation board is responsible for preparing a source selection plan [29] prior to the issuance of the solicitation. The source selection plan, consisting of two parts, should be drafted to meet the objectives of each individual acquisition. The first part should describe the organization, membership, and responsibilities of the source selection evaluation board. The second part of the source selection plan should include a description of acquisition strategy, a detailed statement of the evaluation factors and their relative importance, a description of evaluation methodology, and a schedule of significant milestones. It is critical that the source selection plan mirror the evaluation criteria set forth in the solicitation. Most of the information contained in the second part of the source selection plan is considered source selection sensitive and must be protected from unauthorized disclosure. The attorney plays a significant role in safeguarding this information.

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[24] FAR 45.103(a).

[25] FAR 45.103(c).

[26] FAR Part 45 and FAR 52.245-5(g)(2)(iv) (usually incorporated by reference).

[27] Army Reg. 735-5, Basic Policies and Procedures for Property Accounting, para. 14-15 (15 Feb. 1988).

[28] AR 5-20, para. 4-6e(1).

[29] FAR 15.612.

Standards of Conduct

Prior to evaluating proposals, the attorney should brief all members concerning the standards of conduct for Department of Army personnel. [30] The briefing, which must be documented in the source selection plan, should stress to all participants the requirement to avoid any appearance of or actual conflicts of interest. [31] Members should be counseled that financial interests or affiliations with potential offerors may create such conflicts. In all cases, before appointment and after receipt of proposals, members must execute disclosure statements to reveal such interests and affiliations. Those individuals identified as having actual or potential conflicts of interest should be relieved from participating in the selection process.

Board members must also be counseled about the rules prohibiting the release of acquisition information. [32] Source selection information typically includes confidential, technical, commercial, and financial information. Federal law prohibits disclosure of such information. [33] Practically all other information received or generated during the source selection process, including the number and identity of offerors, may, if prematurely disclosed, provide a potential contractor with an unfair competitive advantage, reflect favoritism, and taint the selection process.

The attorney should advise members not to discuss the acquisition with anyone outside the board, including their supervisors and superiors. Members should execute statements saying they understand the prohibitions against unauthorized disclosure of information and will not disclose any aspect of the acquisition with anyone who does not have a need to know. An individual with a need to know is one who is an identified member of the source selection evaluation board or who is otherwise approved by the source selection authority to receive source selection information. [34] The attorney may want to provide a similar briefing to members upon completion of the evaluation process to help preserve these confidences.

Recent Procurement Integrity Provisions

Recent developments demonstrate congressional concern for integrity within the procurement process. The Office of Federal Procurement Policy Act Amendments of 1988 [35] require that, as a condition to serving as a procurement official, such persons shall certify that they are familiar with what is considered prohibited conduct by procurement officials and that they will not engage in any such prohibited conduct. [36] Further, procurement officials will immediately report any possible violations to the contracting officer. [37] Procurement officials are considered to be those DA employees who have participated personally and substantially in conducting Army procurements. [38] This definition would encompass any employee who has participated in:

a) development of acquisition plans;

b) development of specifications, statements of work or purchase descriptions, and requests;

c) development of solicitation or contractual provisions;

d) evaluation or selection of a contractor; or

e) negotiation or award of a contract or modification to a contract.

Prohibited conduct includes the acceptance of future employment; [39] receiving directly or indirectly any money, gratuity, or other item of value from a competing contractor; [40] and disclosing any proprietary or source selection information to other than authorized individuals. [41]

The attorney should ensure that all individuals associated with the acquisition execute a certification. The certifications should be maintained in the procurement file. [42] Failure to comply with these provisions may result in civil and criminal penalties, [43] as well as contractual and administrative sanctions. [44]

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

[31] AR 600-50, para. 2-1c.

[32] AR 600-50, para. 2-1q.

[33] 5 U.S.C. § 552(a) (Supp. V 1987); *see also* Army Reg. 340-17, Release of Information and Records from Army Files (1 Oct. 1982).

[34] FAR 15.612(e).

[35] 41 U.S.C.A. § 423 (West Supp. 1988).

[36] 41 U.S.C.A. § 423(j)(2) (West Supp. 1988).

[37] *Id.*

[38] 41 U.S.C.A. § 423(n)(3)(A) (West Supp. 1988).

[39] 41 U.S.C.A § 423(b)(1) (West Supp. 1988).

[40] 41 U.S.C.A. § 423(b)(2) (West Supp. 1988).

[41] 41 U.S.C.A. § 423(b)(3) (West Supp. 1988).

[42] 41 U.S.C.A. § 423(d)(5) (West Supp. 1988).

[43] 41 U.S.C.A. § 423(h) and (i) (West Supp. 1988).

[44] 41 U.S.C.A. § 423(f) and (g) (West Supp. 1988).

Avoiding Delay

Upon receiving proposals, the source selection evaluation board should begin evaluating offers against the stated criteria in the request for proposals. The attorney should not perform the actual technical evaluation, but should remain available to answer questions and provide interpretations of law and regulations. The attorney must also remain alert to several procedural obstacles that may arise during this evaluation process. If there are changes or clarifications to the solicitation after issuance of the solicitation but prior to the closing date, the solicitation should be amended expeditiously. [45] While amendments caused by changing labor rates, specifications, and quantities are common, they should be minimized to keep the source selection evaluation board from duplicating effort. For example, if the board is close to completing evaluations of all proposals and an amendment is required, such an amendment may create significant changes in the offerors' proposals, thus requiring the board to begin the evaluation process again. If possible, all changes should be consolidated into one amendment. By doing so, the board may efficiently evaluate proposals and reduce the total time needed to reach a recommended selection.

Competitive Ranges

Competitive range determinations are made by the contracting officer. The competitive range includes all proposals that have a reasonable chance of being selected for award. [46] The attorney must ensure, however, that there is an approved business clearance memorandum before any competitive range determinations are made [47] and before negotiations are conducted. The business clearance memorandum consists of two parts (pre- and post negotiations) and serves as a historical record of the acquisition, memorializing significant facts considered by the contracting officer. The pre-negotiation business clearance memorandum sets forth all the significant details of the proposed acquisition and the course of action the contracting officer intends to pursue. [48] The post negotiation business clearance memorandum sets forth negotiation results and should be approved after negotiations [49] but *prior* to the contracting officer's request for best and final offer from those offerors remaining in the competitive range. [50]

The attorney should make sure the contracting officer provides written notification to all rejected offerors as soon as possible. [51] Failure to notify unsuccessful offerors in a timely fashion may generate needless protests. [52]

Negotiations

Upon establishing a competitive range, it may be necessary to conduct negotiations and discussions with offerors to advise them of deficiencies in their respective proposals and to afford them an opportunity to revise or modify proposals. [53] The board may send letters through the contracting officer to the offerors that point out errors, omissions, or clarifications (EOC's). These letters may raise the issue of whether EOC's constitute written discussions within the meaning of the FAR. [54] Although inquiries to clarify minor uncertainties and irregularities in the initial proposal generally are not considered discussions within the context of negotiations, [55] the attorney should carefully scrutinize all EOC's sent to offerors.

Should the evaluation process lead to oral discussions with offerors remaining within the competitive range, the attorney will play an important role in the preparations for such discussions. While it is the responsibility of the contracting officer to control the discussions, the attorney should become familiar with the subjects to be discussed. Discussions should focus on those areas of the proposal that are deficient, ambiguous, or that could be construed as mistakes. [56] The contracting officer must not attempt to create proposals that are "clones" of the government's estimate or other proposals. [57] Discussions should remain relatively general to avoid improper coaching.

The "team" approach may prove effective in conducting negotiations. While the government speaks through the contracting officer with "one voice," it is helpful to have members of the source selection evaluation board present at the briefings in order that the "one voice" may speak intelligently about the nuances of the acquisition. A technical expert, a cost analyst, and a legal counsel should be present. This team should possess the capability to respond to any of the offeror's questions.

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[45] FAR 15.410.

[46] FAR 15.609(a).

[47] AFARS 1.691.

[48] AFARS 1.691(a).

[49] AFARS 1.691(b).

[50] FAR 15.611.

[51] FAR 15.609(c); 15.1001(b); Comp. Gen. Dec. B-219643 (18 Nov. 1985), 85-2 CPD ¶ 563.

[52] *See, e.g.*, Comp. Gen. Dec. B-233102 (24 Jan. 1989), 89-1 CPD ¶ 68.

[53] *See, e.g.*, Comp. Gen. Dec. B-207285 (6 Jun. 1983), 83-1 CPD ¶ 604; 51 Comp. Gen. 102 (1971).

[54] FAR 15.610.

[55] *See* Comp. Gen. Dec. B-196371 (22 July 1980), 80-2 CPD ¶ 50; Comp. Gen. Dec. B-206881 (14 May 1982), 82-1 CPD ¶ 461.

[56] FAR 15.610(c).

[57] Comp. Gen. Dec. B-228260.2 (5 Feb. 1988), 88-1 CPD ¶ 112.

If the contracting officer is uncomfortable with discussing technical details of an offeror's proposal, another approach to negotiations is to conduct the briefing from a script. This approach controls the information that will be disclosed and permits the attorney and technical advisers to review the script to preclude the release of unauthorized or erroneous acquisition information. A script also allows the contracting officer to dictate the length of the briefing. The contracting officer should allow adequate time for questions, although the longer discussions go beyond the script, the greater the risk that source selection information will be disclosed inadvertently.

A memorandum of negotiations should be prepared and placed into the post business clearance memorandum. The contracting officer should make certain all offerors understand that the purpose of the discussions is to point out deficient areas of their proposals, and not to "clone" their proposals to the government's estimate. If resources are available, it may be beneficial to have all negotiations transcribed by a court reporter or stenographer. The purpose of this transcription is to have documentation available to rebut contractor allegations that the government misled offerors by statements made during oral negotiations.

The attorney must be vigilant to prevent the release of source selection information that would provide a competitive advantage to one offeror. Negotiations should be scheduled far enough apart so offerors do not meet each other at the contracting office door. Contractor sign-in registers should be kept hidden so that offerors do not inadvertently learn the number and identity of other offerors.

Evaluating Past Performance

Many solicitations require offerors to list installations where similar services have been performed. An investigation of past performance and cost experiences should be conducted of each offeror. This information may prove invaluable to the source selection evaluation board, especially if the board is attempting to verify cost data or proposed quality and productivity enhancement programs. In negotiated procurements, the government may want to consider including past performance as one of the enumerated evaluation criteria in the solicitation. Past performance evaluations are specific endeavors that seek to identify the degree of risk associated with each offeror—that is, will the offeror do the job successfully? If properly conducted, past performance evaluations provide a more complete picture of an offeror. The government has the right to use data outside of the proposals to evaluate past performance so long as the use is consistent with the ground rules set forth in the solicitation. [58] The best practice is for contracting officers to clearly advise offerors in the solicitation that they intend to consider such outside data.

Decision

Source Selection

When the evaluations have been completed, the source selection evaluation board chairman should prepare a written report of the results. The chairman should also give an oral presentation of the results to the source selection advisory committee. It is the source selection advisory committee's responsibility to prepare a comparative analysis of the merits of competing proposals. The committee may, if requested by the source selection authority, recommend a source for selection. While the source selection authority has broad discretion in making the formal source selection, the decision must be consistent with the evaluation criteria, the weighting scheme, and the basis for award in the solicitation. To assist the source selection authority, the attorney should be prepared to discuss protest consequences and ramifications regarding the selection. [59]

Cost Comparison

The selected source is then compared against the in-house estimate to determine who will perform the required services. In sealed bid procedures this is accomplished by opening the government's bid after all other bids have been opened and recorded. [60] The cost comparison is computed between the government's bid and the apparent low bidder. [61] With negotiated procurements the source selection authority's selection is compared against the in-house cost estimate. [62] In both cases cost comparison computations are conducted by the contracting officer and the preparer of the in-house estimate. [63] These computations must be reviewed and verified by a qualified person from an impartial and independent activity. [64]

The actual computation is a line-by-line cost comparison of in-house versus contract performance costs using procedures set forth in the Cost Comparison Handbook of the supplement to OMB Circular A-76. [65] Cost differentials that provide the government a competitive advantage have been built in the cost comparison

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[58] Comp. Gen. Dec. B-227991 (28 Sep. 1987), 87-2 CPD ¶ 310; for more information on this subject, see Femino, *Evaluating Past Performance*, The Army Lawyer, Apr. 1989, at 25.

[59] FAR Subpart 33.1.

[60] AR 5-20, para. 4-32a(2).

[61] *Id.*

[62] AR 5-20, para. 4-32b.

[63] AR 5-20, para. 4-32a(2) and b(4).

[64] *Id.*

[65] Supplement, A-76, Part IV; the actual cost comparison form is at illustration 5-1.

process. [66] The most significant cost differential is a cost margin equal to ten percent of personnel-related costs. This margin favors the status quo in commercial activities under study. [67] A cost margin equal to ten percent of the in-house personnel costs is added directly to the cost of contracting on the cost comparison form. [68] This cost margin is added to compensate for such things as losses in production, temporary decreases in efficiency and effectiveness, and temporarily reduced operational capacity that may result when converting to contract. [69] The attorney should emphasize this advantage to the workforce.

Whatever the result of the cost comparison, the initial decision will not become final until all protests and appeals have been resolved, [70] at which time either the contractor will be authorized to commence work, or, if no contract is awarded, the solicitation will be cancelled. [71] Should the decision be to keep the activity in-house, implementation of the most efficient organization must be initiated within one month of the cancellation of the solicitation and must be completed within six months. [72] The attorney must ensure that these milestones are met in order to expeditiously achieve the economies of the most efficient organization.

Debriefings

Following formal source selection and contract decision, the contracting officer must promptly notify unsuccessful offerors in writing that their proposals were not selected for award. [73] Acquisitions of this nature require that all unsuccessful offerors be provided a debriefing upon request. [74] As with negotiations, the "team" approach should be used to provide support to the contracting officer for these debriefings. The debriefing should be given using a script, with copies provided to the unsuccessful offerors. The debriefing should focus on the government's evaluation of deficient areas in the proposal and must avoid point-by-point comparisons with the government's estimate or other proposals. [75] Limit the length of the debriefing, but provide ample time for questions. Again, should resources be available, it is helpful to transcribe all debriefings.

Conclusion

It is government policy to achieve economy and enhanced productivity through the commercial activities process. This process is highly structured, yet fraught with potential problems. In order to preserve efficiency, effectiveness, and integrity, participants must adhere to all laws and regulations guiding these acquisitions. The attorney plays a critical role in the process by ensuring that the participants are aware of their responsibilities. The most effective means of achieving the commercial activities goal is early and proactive involvement on the part of the contract attorney.

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[66] Supplement, A-76, Part IV, chap. 5, para. E.

[67] Supplement, A-76, Part IV, chap. 5, para. E.2.

[68] Supplement, A-76, Part IV, chap. 4, para. A.

[69] *Id.*

[70] AR 5-20, para. 4-32a(4) and b(9).

[71] AR 5-20, para. 4-32b(9); *see* AFARS 5.303 for announcement procedures for sealed bid acquisitions.

[72] AR 5-20, para. 4-35c; *see also* Supplement, A-76, Part I, chap. 2, para. E.5.

[73] FAR 15.1001.

[74] FAR 15.1003.

[75] FAR 15.1003(b).

Admitting Co-Conspirator Declarations

Major Thomas J. Umberg, USAR

Introduction

In order to demonstrate the purpose, scope, object, and membership of a conspiracy, it is often necessary to rely on statements made by conspirators in furtherance of the conspiracy. Prior to the introduction into evidence of these co-conspirator declarations, the proponent (usually the prosecutor) must lay a proper foundation. This foundation must establish by a preponderance of the evidence that a conspiracy existed and that the declaration was made in furtherance of the established conspiracy. The United States Supreme Court recently held that courts may now consider the statements themselves when determining whether a conspiracy existed. [1]

Laying the Factual Predicate for Admitting Declarations of Co-Conspirators

Military Rule of Evidence 801(d)(2)(E) is substantially the same as Federal Rule of Evidence 801(d)(2)(E) and provides, in pertinent part, as follows:

> (d) *Statements which are not hearsay.* A statement is not hearsay if:
>
> . . . .
>
> (2) *Admission by party-opponent*: The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

For a statement to be admissible pursuant to Military Rule of Evidence 801(d)(2)(E) as a statement of a conspirator, the proponent must meet a two-pronged test: 1) the proponent must prove the existence of a conspiracy; and 2) the proponent must show that the statement was made in furtherance of the conspiracy. [2] The first prong of this test may be met by demonstrating the likelihood of either an illegal agreement or an illegal association between the declarant and the defendant. [3] Proving the existence of a conspiracy becomes more complex, however, when the statement offered by the proponent under Rule 801(d)(2)(E) is also offered to prove the predicate fact of the existence of a conspiracy.

Past military practice has forbidden the use of the proffered statements to prove that a conspiracy exists. This practice was often referred to as "bootstrapping." In *United States v. LaBossiere* [4] the accused was charged with conspiracy to commit larceny of government property. The government attempted to prove LaBossiere's connection to the conspiracy through the statements of a non-testifying co-conspirator. The *LaBossiere* court rejected the government's argument that these statements may themselves be used to establish the existence of a conspiratorial agreement. [5] The court reiterated its holding in *United States v. Mounts*: [6] "It would be faulty and circuitous reasoning with a vengeance to permit the questioned declaration itself to furnish the essential basis for its own guaranty." [7]

Twenty-one years later, in *United States v. Ward*, [8] the court reaffirmed its holding in *United States v. Alvarez* [9] and held that the statements themselves could not be "used to show this illegal concert of action." Similarly, the Navy-Marine Court of Military Review observed in *United States v. Scott* [10] that, while a literal reading of Military Rule of Evidence 801(d)(2)(E) does not seem to require independent evidence of the conspiracy as a condition precedent to the admission of the co-conspirator statements, the analysis to the rule cites Manual for Courts-Martial 1969 (Rev.), paragraph 140, which required proof of independent evidence. [11]

The continuing vitality of *United States v. Ward* [12] and its progeny is now questionable in light of the 1987 United States Supreme Court decision in *Bourjaily v. United States*. [13] In *Bourjaily* a Federal Bureau of Investigation informant tape-recorded a telephone conversation with Angelo Lonardo. Lonardo had agreed to find an individual to distribute cocaine. In this conversation, Lonardo told the informant that he had a "friend" (petitioner William Bourjaily) who had some questions

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[1] Bourjaily v. United States, 107 S. Ct. 2775 (1987).

[2] United States v. Kellet, 18 M.J. 782, 784 (N.M.C.M.R. 1984), *petition denied*, 20 M.J. 143 (C.M.A. 1985).

[3] United States v. Ward, 16 M.J. 341, 352 (C.M.A. 1983).

[4] 32 C.M.R. 339 (C.M.A. 1962).

[5] *Id.* at 339.

[6] 2 C.M.R. 20 (C.M.A. 1951).

[7] *Id.* at 25.

[8] 16 M.J. 341, 352 (C.M.A. 1983).

[9] 584 F.2d 694, 696-99 (5th Cir. 1978).

[10] 24 M.J. 578, 585 n.3 (N.M.C.M.R. 1987).

[11] United States v. Duffy, 49 C.M.R. 208 (A.F.C.M.R. 1974); *see also* United States v. Scott, 24 M.J. 578, (N.M.C.M.R. 1987), which held that declarations of co-conspirators "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy . . . . Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence." 24 M.J. at 585 (citing Glasser v. United States, 315 U.S. 60, 74 (1942).

[12] 16 M.J. 341 (C.M.A. 1983).

[13] 107 S. Ct. 2775 (1987).

about the cocaine. In a later phone conversation between the informant and Bourjaily, the informant described the quality and price of the drugs. The informant later arranged with Lonardo for the sale to occur in a specified parking lot where Lonardo would transfer the drugs from the informant's car to Bourjaily's. At trial, the prosecution introduced Lonardo's telephone statements regarding Bourjaily's participation in the transaction. The defense objected and contended that the defendant was being denied the right to confront Lonardo. The defense argued that, because Lonardo was legally unavailable to testify, the court could look only to independent evidence of the conspiracy to determine if a conspiracy existed and could not consider the statements that were the subject of the determination. In the defense's view, without Lonardo's statement there was insufficient evidence of the conspiracy and Lonardo's statement should therefore be inadmissible.

When the Supreme Court decided *Bourjaily* and rejected these arguments, it resolved two lingering issues concerning the admissibility of statements of co-conspirators. First, the Court held that the statements themselves could be used by the government to meet the burden of demonstrating the existence of a conspiracy. [14] Second, the Court held that trial courts need only be convinced by a preponderance of the evidence that a conspiracy existed as a condition precedent to the admission of co-conspirator statements. [15]

Although various circuits and the military courts had previously split on these issues, [16] the unambiguous language of *Bourjaily* settled any dispute about the "bootstrapping" issue: "We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy." [17] Likewise, the Court resolved any question as to the requisite quantum of proof required to establish a conspiracy: "We hold that when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence." [18]

A pre-*Bourjaily* treatise on the Military Rules of Evidence, the *Military Rules of Evidence Manual*, held the view that bootstrapping ought not to be permitted. [19] According to the authors of the *Manual*, it would be unfair to hold a person responsible for the statements of others allegedly made in furtherance of a conspiracy without independent evidence that a conspiracy existed. The Supreme Court has obviously not adopted this view and has answered all questions, at least in federal court, about whether the statements themselves can be used to determine the existence of a conspiracy. [20]

Although the Supreme Court left open the question of whether the court could have relied *solely* upon the co-conspirator's statements, [21] the better practice is to introduce additional independent evidence of the conspiracy to provide the court with a firm basis to conclude by a preponderance of the evidence that a conspiracy existed. Moreover, recent post-*Bourjaily* decisions have held that the government must still produce some evidence independent of the proffered statements to establish the existence of the conspiracy and the defendant's connection to the conspiracy. [22]

The military appellate courts have yet to address *Bourjaily* in the context of the Military Rules of Evidence. In view of their reluctance to permit bootstrapping in the past, the approach adopted by the Ninth Circuit Court of Appeals, which requires some independent evidence in addition to the conspirator's statements to prove the establishment of a conspiracy, appears to be the likely course for the military appellate courts.

While it now appears that the proffered statements may be considered by the trial court in making its preliminary determination, the existence of a conspiracy remains a preliminary question of fact that must be resolved by the trial court. [23] Accordingly, Military Rule of Evidence 104(a) requires that the admissibility of the

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[14] The Supreme Court also held that, to the extent that Glasser v. United States, 35 U.S. 60 (1942), and United States v. Nixon, 418 U.S. 83 (1974), stand for the proposition that the courts cannot look to the statements themselves in making a preliminary factual determination under Rule 801(d)(2)(E), they have been superseded by Federal Rule of Evidence 104(a).

[15] *Id.* at 2779.

[16] *See* Means v. United States, 469 U.S. 1058 (1984); United States v. Ward, 16 M.J. 341 (C.M.A. 1983); United States v. Martorano 561 F.2d 6 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

[17] *Bourjaily*, 107 S. Ct. at 2781.

[18] *Id.* at 2779.

[19] S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 618 (2d ed. 1986).

[20] One post-*Bourjaily* military law commentator has criticized the *Bourjaily* decision and suggested that Military Rules of Evidence 104 and 801(d)(2)(E) continue to require independent evidence in order to admit a non-testifying co-conspirator's statement. Borch, *The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change*, 124 Mil. L. Rev. 163, 192 (1989).

[21] *Bourjaily*, 107 S. Ct. at 2781-82.

[22] United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Zavala-Serra, 853 F.2d 1512, 1515 (9th Cir. 1988); United States v. Silverman, 861 F.2d 571, 578 (9th Cir. 1988) ("[W]hen the proponent of the co-conspirator's statement offers no additional proof of defendant's knowledge of and participation in the conspiracy, the statement must be excluded from evidence. Where, on the other hand, some additional proof is offered, the court must determine whether such proof, viewed in light of the co-conspirator's statement itself, demonstrates by a preponderance of the evidence that defendant knew of and participated in the conspiracy.").

[23] *Bourjaily*, 107 S. Ct. at 2778.

predicate facts of evidence be resolved by the military judge alone.

If the predicate fact of a conspiracy can be demonstrated to the trial court, the next step in the establishment of the evidentiary foundation is to demonstrate that the statement was made "in furtherance of a conspiracy." Whether a statement was made "in furtherance of a conspiracy" depends upon the declarant's intent in making the statement, not upon whether the statement does in fact further the purpose of the conspiracy. [24] Thus, a statement by a co-conspirator need not have been made to another member of the conspiracy to be admissible. In fact, a statement made to an undercover government agent may be sufficient. [25]

The following statements are among those that have been held to be in furtherance of a conspiracy:

1) statements made to keep a person abreast of the conspirator's activities, to induce continued participation in the conspiracy, or to allay fears; [26]

2) narrative statements by persons involved in the conspiracy that assured the witness that a conspiracy existed; [27]

3) statements regarding the processing of the drugs, their costs, and funding for the transactions; [28]

4) statements related to the concealment of the criminal enterprise; [29]

5) statements made to induce enlistment or further participation in the groups's activities; [30]

6) statements made to prompt further action by the conspirators; [31]

7) statements made to a friend regarding the framework of the conspiracy for the purpose of enlisting the individual in the conspiracy; [32] and

8) statements made to reassure the buyer of narcotics that the conspiracy is still in effect and to prevent him from leaving before the sale is made. [33]

Procedural Considerations in Establishing the Factual Predicate

After the proponent of a co-conspirator statement has marshalled the evidence necessary to establish the existence of the conspiracy and is satisfied that the statement is in furtherance of the conspiracy, the next issue to consider is the appropriate procedure for establishing the factual predicate. In trial before a military judge alone the order of proof is inconsequential; should the proponent fail to establish the existence of the conspiracy, the court may disregard the statements offered under Rule 801(d)(2)(E). In trials before members, however, the order of proof is a pivotal tactical decision that must be made before trial.

The safest and preferred method of determining whether the statements offered in evidence will ultimately be admissible is to request an article 39a session. [34] Because this hearing is conducted outside the presence of the members, the proponent may present all of the evidence, including the actual statements, in order to lay the factual predicate. This method ensures that the court members will not be exposed to inadmissible statements and therefore minimizes the risk of mistrial. The disadvantage of this method is that it requires the proponent to try his or her case twice—once before the military judge alone and once before the members.

Another less time-consuming but equally prudent method of laying the factual predicate is to present the necessary evidence establishing the conspiracy and then to request a hearing outside the presence of the members immediately prior to the introduction of the declaration. This method of proof, however, may require the proponent to call the witnesses in an illogical order and may result in confusion among the members.

For example, a government-infiltrated drug conspiracy usually terminates at the time of the drug-money exchange. If the conspirators are present at the time of this prearranged exchange, the evidence would be presented in reverse chronological order, beginning with a description of the exchange and continuing backwards until the first meeting of the participants. Once the court has heard the evidence of the exchange itself (e.g., who brought the money and drugs to the exchange location, who performed counter-surveillance, who displayed the money and drugs, who departed with the money and drugs), the court may then properly conclude that a conspiracy existed. After that preliminary finding is made, all the other statements leading up to the exchange would then be admissible.

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[24] *Zavala-Serra*, 853 F.2d at 1512.

[25] United States v. Taylor, 802 F.2d 1108, 1116 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1809 (1987).

[26] United States v. Crespo de Llano, 830 F.2d 1006, 1017 (9th Cir. 1987).

[27] United States v. Cambino-Valencia, 609 F.2d 603, 612 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980).

[28] United States v. McGuire, 608 F.2d 1028, 1032-33 (5th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1982).

[29] United States v. Goins, 593 F.2d 88, 92 (8th Cir.), *cert. denied*, 444 U.S. 827 (1979).

[30] United States v. Yarbough, 852 F.2d 1522, 1535 (9th Cir. 1988).

[31] *Id.* at 1535.

[32] United States v. Dorn, 561 F.2d 1252, 1256-57 (7th Cir. 1977).

[33] United States v. Layton, 720 F.2d 548, 557 (9th Cir. 1983).

[34] United States v. Kellet, 18 M.J. 782, 784 (N.M.C.M.R. 1984).

An additional method of proof is to request that the court permit the government to introduce the declarations of the alleged co-conspirators on the basis of the government's proffer that the necessary foundation connecting the accused to the conspiracy will be forthcoming. This technique avoids the redundancy of presenting the same evidence to both the military judge alone and again to the members. Should the proponent not be able to lay the factual predicate, however, there is a large likelihood of mistrial. This method should only be employed when the prosecution is certain of its proof of the factual predicate.

Conclusion

Co-conspirator declarations are essential in unmasking a criminal association. *Bourjaily v. United States* [35] now permits prosecutors to use the proffered statements themselves to establish by a preponderance of the evidence that a conspiracy exists. The preferred procedure for the introduction of co-conspirator declarations is to ask the military judge to make a preliminary determination of the existence of the conspiracy prior to trial or prior to the time the statements are offered into evidence.

[35] 107 S. Ct. 2775 (1987).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Rehabilitative Potential Evidence: Cracks in the Foundation

Since the Court of Military Appeals decision in *United States v. Horner* [1] concerning rehabilitative potential, a number of court decisions have sought to establish the permissible limits in presenting this type of evidence. [2] These cases have addressed the type of foundation necessary to support a witness's opinion that an accused lacks rehabilitative potential. [3] Recently, in *United States v. Nixon*, [4] the Army Court of Military Review addressed this issue of foundational sufficiency. In *Nixon* the accused pleaded guilty to cocaine and marijuana use, possession, and distribution offenses. [5] During sentencing, the accused's company commander testified, over defense objection, that the accused had no rehabilitative potential. In making this statement, the commander referred to the accused's "drug problem." The defense counsel objected to the testimony on the grounds that it was based on the results of an illegally obtained urinalysis result. [6] The military judge sustained the objection to the statement concerning appellant's drug problem, but allowed the commander's opinion concerning rehabilitative potential to stand. [7]

In holding that the military judge erred, the Army court noted that two principles were involved. First, "a proper foundation must be laid by establishing that the witness has a personalized opinion based on the accused's character and potential." [8] Second, "an accused's sentence may not be based on constitutionally impermissible considerations." [9] The court found that, where the

[1] 22 M.J. 295 (C.M.A. 1986).

[2] *See, e.g.*, United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989) (testimony regarding whether accused would retain security clearance not relevant to rehabilitative potential); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989) (Rule for Courts-Martial 1001(b)(5) does not permit testimony to effect that accused has no potential for continued service in the military); United States v. Wingart, 27 M.J. 128 (C.M.A. 1988) (Rule for Courts-Martial 1001(b)(5) does not authorize the introduction of extrinsic evidence of uncharged misconduct to show lack of rehabilitative potential); United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989) (accused's absence from court-martial could be considered as evidence of rehabilitative potential).

[3] *See, e.g., Ohrt*, 28 M.J. at 304; United States v. Barber, 27 M.J. 885 (A.C.M.R 1989).

[4] 29 M.J. 505 (A.C.M.R. 1989).

[5] *Id.* at 506.

[6] *Id.* at 507. The urinalysis complained of was conducted on the basis of an order from the accused's battalion executive officer. The sample tested positive for marijuana. The sole basis for the order to submit a sample appears to be that appellant failed to sign out on a five-day pass and had therefore been listed as AWOL. *Id.*

[7] *Id.*

[8] *Id.* (citing *Ohrt*, 28 M.J. 301); *see Barber*, 27 M.J. 885.

[9] *Id.* at 508 (citing United States v. Tucker, 404 U.S. 443 (1972); Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982)). *Tucker* involved previous convictions which were invalid because the defendant had not been represented by counsel. *See* United States v. Alderman, 46 C.M.R. 298 (C.M.A. 1973) (summary and special court-martial convictions improperly admitted where no evidence accused had been represented by counsel). *Cardwell* concerned a confession obtained in violation of the fifth amendment. *See also* Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968) (evidence seized in violation of fourth amendment could not be considered by sentencing judge).

information relied on by the witness was obtained in violation of the Constitution, the government could not make use of it as a foundation for the witness's opinion concerning the accused's rehabilitative potential. [10] The court placed the burden on the government to establish that the witness's foundation for the opinion consisted of sufficient constitutionally permissible evidence. [11]

In light of *Nixon*, defense counsel should thoroughly interview potential witnesses before trial to ascertain the basis of their opinions and to determine whether the foundation is supported by impermissible evidence similar to that found in *Nixon*. In trials before members, counsel should, where appropriate, use motions *in limine* to prevent such testimony. [12] Where counsel discover for the first time on cross-examination that the witness's opinion is based on constitutionally impermissible evidence and the testimony has already been heard by the members, counsel should move to strike the testimony relating to rehabilitative potential and request an instruction to disregard. In judge alone trials, defense counsel should object and move to strike the testimony to ensure that waiver will not be applied on appellate review. [13]

The Army court's opinion in *Nixon* adds an additional weapon to the defense counsel's arsenal when confronting rehabilitative potential evidence. As a result of that decision, defense counsel may argue that the witness's opinion as to rehabilitative potential is inadmissible, because the foundation relies primarily on constitutionally impermissible evidence. [14] By thoroughly interviewing witnesses, using motions *in limine*, and making timely objections and motions to strike, defense counsel may be able to limit the introduction of unfavorable rehabilitative potential evidence. Captain Timothy P. Riley.

Give Your Client Some Credit

If your client is subjected to civilian pretrial confinement at the request of the military, he or she may be entitled to additional administrative credit for the time served. Rule for Courts-Martial 305(i) requires review of pretrial confinement by a neutral and detached officer within seven days of imposition. The penalty for noncompliance is one day credit for each day of confinement served as a result of noncompliance. [15] Recently, in *United States v. Ballesteros* [16] the Court of Military Appeals ruled that the R.C.M. 305(i) seven-day clock begins running when a soldier is confined in a civilian jail for a military offense (normally AWOL or desertion) and there is notice to and approval of military authorities. [17]

Specialist Ballesteros was apprehended by Texas authorities as a military deserter on 22 June 1987. Military police from Fort Sam Houston, Texas, were notified and arrangements were made for continued civilian incarceration until Ballesteros could be transferred to military control. On 29 June 1987 he was transferred to confinement at Fort Sam Houston. On 1 July 1987 he was transferred to the confinement facility at Fort Sill, Oklahoma, and on 10 July 1987 he was released to the Fort Ord, California, confinement facility. On 15 July 1987 a military magistrate at Fort Ord conducted the required R.C.M. 305(i) review and approved continued confinement. [18]

The Army Court of Military Review concluded that the R.C.M. 305(i) clock did not begin running until after Ballesteros was turned over to military authorities. [19] The Army court denied his request for R.C.M. 305(k) additional administrative credit for the seven days served in civilian confinement and the first six days served at Fort Sam Houston and Fort Sill. [20] In order to support its decision that the R.C.M. 305(i) clock did not start running until Ballesteros was transferred to military control, the Army court emphasized the administrative difficulties associated with full compliance with R.C.M.

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[10] In essence, the court found a parallel prohibition against "backdooring" otherwise inadmissible evidence, as is often seen in cases involving documentary evidence. *See, e.g.*, United States v. Brown, 11 M.J. 263 (C.M.A. 1981); United States v. Delaney, 27 M.J. 501 (A.C.M.R. 1988). The court's use of the term "impermissible," without further explanation, is unfortunate. The violation in obtaining the evidence in *Nixon* may have rendered the evidence constitutionally *inadmissible*, but consideration of the underlying misconduct (drug use) in sentencing may not necessarily be constitutionally *impermissible*. Civilian cases suggest that such a distinction may be significant in some instances. *See, e.g.*, Satterwhite v. Texas, 108 S. Ct. 1792, 1797 (1988); Ritter v. Smith, 726 F.2d 1505, 1518-1519 (11th Cir. 1984). For the sake of consistency, this note will use the term "impermissible."

[11] *Nixon*, 29 M.J. at 508.

[12] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 906(b)(13) [hereinafter MCM, 1984, and R.C.M. 906(b)(13), respectively].

[13] *Compare Horner*, 22 M.J. 295 (defense counsel preserved error by motion to strike) *with* United States v. Smith, 23 M.J. 714 (A.C.M.R. 1986) (error in permitting rehabilitative potential testimony based solely on offense waived where no defense objection).

[14] Necessarily left for determination in each particular case is how much independent, constitutionally permissible evidence is necessary to permit the witness to state an opinion.

[15] R.C.M. 305(k).

[16] 29 M.J. 14 (C.M.A. 1989).

[17] *Id.* at 16.

[18] *Id.* at 15.

[19] 25 M.J. 891 (A.C.M.R. 1988).

[20] *Id.* at 894. At trial Ballesteros received 23 days credit for pretrial confinement (including time spent in the civilian facility) pursuant to United States v. Allen, 17 M.J. 126 (C.M.A. 1984). He requested an additional 23 days credit before the Army court for a violation of R.C.M. 305. *Ballesteros*, 25 M.J. at 892.

305 when an accused is not actually under military control. [21]

The Court of Military Appeals disagreed with the Army court and granted Ballesteros an additional six days R.C.M. 305(k) credit. The Court of Military Appeals held that the R.C.M. 305(i) clock began to run at the time civilian confinement was imposed, because there was notice to and approval of military authorities. The court implicitly rejected any assertion that it is too difficult to conduct a magistrate review or that full compliance with the rule is not possible when the soldier is not under military control. This interpretation is supported by both the plain language of R.C.M. 305 and the analysis of the rule, which provide for informal review without the personal appearance of the accused through written documents and telephone calls. [22]

The Court of Military Appeals' decision in *Ballesteros* is also significant because of the method the court applied to compute the remedial R.C.M. 305(k) credit due an accused subjected to illegal pretrial confinement as a result of *untimely* R.C.M. 305(i) compliance. The court concluded that R.C.M. 305(k) credit begins to accumulate "from the day the magistrate hearing should have been held." [23] In *Ballesteros* the magistrate hearing should have been held on 28 June 1987 (the seventh day of confinement, counting the day he entered confinement). The court awarded Ballesteros R.C.M. 305(k) credit beginning the day after the hearing should have been held (29 June). [24]

Therefore, the decision of the Court of Military Appeals effectively denies an accused credit for the first seven days of unreviewed pretrial confinement when the government holds an untimely magistrate hearing. [25] Note, however, that this is not the case for computing credit when the government completely fails to conduct a hearing, at least with respect to those cases involving restriction tantamount to confinement. In *United States v. Gregory* [26] the Army Court of Military Review granted R.C.M. 305(k) credit beginning from the first day of restriction. In that case the government failed to conduct any magisterial review (as opposed to the untimely compliance in *Ballesteros*). [27]

The practical lessons to be learned from *Ballesteros* are the following: 1) the R.C.M. 305(i) clock begins to run the day an accused is confined for a military offense with notice to and approval by military authorities; and 2) for instances of *untimely* R.C.M. 305(i) compliance, R.C.M. 305(k) credit begins to accrue the day after the magistrate hearing should have been held. Nevertheless, defense counsel should be aware that R.C.M. 305(k) credit begins to accrue from the first day of restriction for instances of *complete noncompliance* in restriction tantamount to confinement cases. [28]

Defense counsel are also reminded that clients subjected to oppressive pretrial confinement or to pretrial confinement as a result of bad faith on the part of the government may ask the military judge for additional administrative credit above and beyond the R.C.M. 305(k) day-for-day credit. [29]

To avoid possible waiver of the issues on appeal, defense counsel must raise all matters concerning credit for illegal pretrial confinement and illegal restriction tantamount to confinement both at trial where relief was denied and in R.C.M. 1105 and 1106 submissions to the convening authority. Once detailed to represent a client, defense counsel should immediately ascertain from the client the nature and dates of any pretrial confinement or restriction he or she may have been subjected to. This is especially true in cases involving charges of desertion or long term AWOL terminated by apprehension and any case involving possible restriction tantamount to confinement. Alert defense counsel may be able to provide their clients tangible relief by requesting additional R.C.M. 305(k) credit for such time served. Captain James Kevin Lovejoy.

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[21] *Ballesteros*, 25 M.J. at 893.

[22] R.C.M. 305(f) analysis, at A21-15, provides:
The rule is designed to afford the services considerable flexibility in dealing with such situations. The distance between the prisoner and defense counsel should not pose a serious problem for the defense. They can communicate by telephone, radio, or other means. . . . Moreover, since the initial review may be accomplished without the presence of prisoner or defense counsel, the defense counsel may submit appropriate written matters without personal contact with either the prisoner or the reviewing officer.

[23] *Ballesteros*, 29 M.J. at 16.

[24] Awarding credit beginning the day after the hearing should have been held is consistent with other day-for-day computation issues. *See* R.C.M. 707(b)(1); United States v. Schilf, 1 M.J. 251 (C.M.A. 1976); United States v. Manalo, 1 M.J. 452 (C.M.A. 1976) ("the day of the event is to be excluded while the last day of the period is to be included" in computing days for speedy trial purposes); United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (the first day of restriction tantamount to confinement shall not be included for administrative credit).

[25] *See* United States v. DeLoatch, 25 M.J. 718, 719 (A.C.M.R. 1987) (remedy required by R.C.M. 305(k) is an administrative credit against sentence adjudged for any confinement served *as a result of* such noncompliance; first six days of confinement, during which no review was required, were not confinement that resulted from noncompliance with the review requirement).

[26] 21 M.J. 952 (A.C.M.R. 1986).

[27] *Id.* at 958. *See also Ballesteros*, 25 M.J. at 893 n.4 ("in such circumstances, all pretrial confinement is presumably served as a result of noncompliance with one or more provisions of R.C.M. 305").

[28] Still left to be resolved is the computation of R.C.M. 305(k) credit for instances of actual pretrial confinement, where the government fails to comply with the review procedures of R.C.M. 305. An argument by analogy to the restriction situation may be persuasive, and the accused should be able to obtain credit from the first day of confinement.

[29] *See* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983) ("where pretrial confinement is illegal for several reasons and the military judge concludes the circumstances require more appropriate remedy, a one-for-one day credit limit is not mandated").

Collateral Effects Evidence is Inadmissible

The Court of Military Appeals recently decided two cases dealing with the admissibility of evidence about the collateral effects of a court-martial. In *United States v. Henderson* [30] defense counsel sought to introduce evidence during the sentencing phase of the court-martial about the loss of potential retirement benefits. In *United States v. Antonitis* [31] the government introduced evidence during sentencing regarding the probable loss of the accused's security clearance as a result of her misconduct in order to reflect that the accused had little rehabilitative potential. The Court of Military Appeals ruled in both cases that such collateral evidence was inadmissible. Although the *Antonitis* rule will apply in all cases, *Henderson* is fact-specific and does not appear to prevent defense counsel from offering such evidence in appropriate cases.

In *Antonitis* trial counsel had the accused's company commander testify that the accused, a sergeant first class who worked in the intelligence field, needed a top secret security clearance to perform her job. The commander also testified that, because of the court-martial conviction, the accused would probably lose her security clearance. In testifying in this manner, the commander implied that she should not be allowed to remain in the service at all, because she would not be eligible for the requisite security clearance. The Court of Military Appeals rejected the government's argument on appeal that the evidence was "offered to demonstrate a relationship between the *offense* and the mission of the military intelligence school or the intelligence community" of which the accused was a part. [32] The court also rejected the government's argument that the loss of the security clearance was relevant to the accused's rehabilitative potential under Rule for Courts-Martial 1001(b)(5). [33] In this regard, the court cited *United States v. Ohrt*, [34] which sets out the rule on admissible rehabilitative potential testimony and states that such testimony must be "based upon an 'assessment of . . . [the accused's] character and potential.' " [35] In *Antonitis* the court went on to state that the fact "[t]hat some administrative rule or security officer might deny appellant authorization to work with classified materials is not relevant to whether she possessed the requisite character and will to become a responsible member of the military community." [36] The court concluded that "[m]ilitary sentences are not based on their administrative consequences; rather it is the reverse." [37]

On the same day the Court of Military Appeals decided *Antonitis*, it decided *United States v. Henderson*. In *Henderson* trial defense counsel sought to introduce evidence of the collateral effects that a punitive discharge or reduction in rank would have on the accused, a sergeant first class with seventeen years of service. The evidence in question reflected the financial impact of such actions on the accused's potential retirement benefits. The Court of Military Appeals ruled that the evidence was inadmissible because "the impact upon appellant's retirement benefits was not 'a direct and proximate consequence' of the bad-conduct discharge." [38] The court based its decision on the fact that the accused was more than three years from retirement and would have had to reenlist to be eligible to retire. "Therefore, the judge was within his discretion in finding that estimates of appellant's benefits loss were so collateral as to be confusing and, thus, inadmissible." [39] Defense counsel should note, however, that the military judge did allow defense counsel to argue to the members that appellant would suffer such a loss if punitively discharged. The military judge simply would not allow extrinsic evidence to prove the potential amount of the loss, nor would he instruct on such facts.

The reason the Court of Military Appeals ruled the evidence inadmissible in both *Antonitis* and *Henderson* was that it found the evidence to be truly "collateral." The Court of Military Appeals did state, however, "that administrative consequences of a sentence are not *per se* collateral, whether propounded by the defense or the prosecution." [40] Therefore, in cases similar to *Henderson*, such evidence should be introduced if the accused is actually retirement eligible. [41] Defense counsel should also request specific instructions on the loss of retire-

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[30] 29 M.J. 221 (C.M.A. 1989).

[31] 29 M.J. 217 (C.M.A. 1989).

[32] *Antonitis*, 29 M.J. at 220 (emphasis in original); *cf.* United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982), *pet. denied*, 15 M.J. 165 (1983) (where a drug offense *directly* affected crew integrity of a missile crew, then testimony regarding the impact of the offense and its effect on military mission is admissible).

[33] *Antonitis*, 29 M.J. at 220.

[34] 28 M.J. 301 (C.M.A. 1989).

[35] *Id.* at 304 (quoting United States v. Horner, 22 M.J. 294, 296 (C.M.A. 1986)).

[36] *Antonitis*, 29 M.J. at 220.

[37] *Id.*

[38] *Henderson*, 29 M.J. at 222 (citing United States v. Griffin, 25 M.J. 423, 424 (C.M.A.), *cert. denied*, 108 S. Ct. 2849 (1988)).

[39] *Id.*; *see also* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 403; United States v. Quesinberry, 31 C.M.R. 195 (C.M.A. 1962).

[40] *Henderson*, 29 M.J. at 223.

[41] In *Henderson* the Court of Military Appeals stated, "[I]n reality, the impact of an adjudged punishment on the benefits due an accused who is *eligible* to retire is often the single most important sentencing matter to that accused and the sentencing authority." *Henderson*, 29 M.J. at 222 (quoting *Griffin*, 25 M.J. at 424 [emphasis in original]). *Henderson* thus reaffirmed *Griffin* and the distinction between a retirement eligible accused (evidence admissible) versus a retirement ineligible accused (inadmissible).

ment benefits. Further, defense counsel should be alert to such collateral effect evidence as that introduced in *Antonitis* and should object to its introduction based upon *Ohrt*, *Horner*, and *Antonitis*. CPT Gregory A. Gross.

Pretrial Confinement: Ensure Your Client Gets the Credit He or She is Due

An accused pending court-martial is often placed in pretrial confinement. Frequently, however, that confinement is not discussed in any detail at the court-martial. Rule for Courts-Martial 305 [42] provides the mechanism for putting a soldier in pretrial confinement. [43] A magistrate's hearing is required within seven days to review the adequacy of the probable cause and the necessity of continuing confinement. [44] The reviewing officer may extend the time period to ten days for good cause. [45]

If the soldier is not properly placed in pretrial confinement or if the magistrate's hearing is not conducted in a timely manner, the soldier is entitled to credit against the sentence to confinement. [46] This credit is in addition to the *Allen* [47] credit for time actually spent in pretrial confinement. Unfortunately, R.C.M. 305 does not specify a trial procedure for ensuring that a soldier placed in pretrial confinement is given the proper sentence credit.

A number of recent cases have addressed the issue and established differing guidelines for counsel to follow. *United States v. Hill* [48] placed the burden on the government; *Hill* held that when pretrial confinement is announced at trial, normally at the commencement of the sentencing phase when trial counsel reviews the data on the charge sheet, trial counsel should then inform the military judge whether a magistrate reviewed pretrial confinement within seven days of imposition. The military judge should then determine any issue regarding the magistrate's review and, if it was not conducted in a timely or proper manner, fashion the correct remedy as set forth in R.C.M. 305(k). [49]

A totally different approach was taken in *United States v. Snoberger*. [50] Sergeant Snoberger alleged that he was entitled to additional administrative credit for pretrial confinement in the absence of any evidence of record that the government complied with the procedures of R.C.M. 305(h) and (i). The Army court held that the issue was waived by trial defense counsel's failure to raise it at trial. [51]

In *United States v. Shelton* [52] the accused was in pretrial confinement at Fort Sill for seven days before he was returned to his unit at Fort Carson. The magistrate's hearing was conducted at Fort Carson on the thirteenth day. The trial defense counsel raised the issue of untimely review of the pretrial confinement and the Army court found that the issue was not waived. [53] The court stated that the military judge and both counsel bear the responsibility for determining at the trial level whether the magistrate's review was timely and whether the magistrate followed the requirements of R.C.M. 305. [54] Thus, *Shelton* implies that the judge and the trial counsel have a *sua sponte* duty to surface this issue at trial and determine what credit is due under R.C.M. 305(k).

United States v. Kuczaj [55] is the most recent case on this issue. Its message is very simple: "[A]n affirmative showing of compliance with Rule 305(i) is not required of the government in the absence of challenge by the accused." [56] The Army court held that there is no

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[42] R.C.M. 305.

[43] R.C.M. 305(h)(2)(B) states:

> Requirements for confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:
> (i) An offense triable by a court-martial has been committed;
> (ii) The prisoner committed it; and
> (iii) Confinement is necessary because it is foreseeable that:
> (a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or
> (b) The prisoner will engage in serious criminal misconduct; and
> (iv) Less severe forms of restraint are inadequate.

[44] R.C.M. 305(i)(1).

[45] R.C.M. 305(i)(4).

[46] R.C.M. 305(k).

[47] United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

[48] 26 M.J. 836 (A.C.M.R. 1988).

[49] *Hill*, 26 M.J. at 838.

[50] 26 M.J. 818 (A.C.M.R. 1988).

[51] *Snoberger*, 26 M.J. at 821. *Snoberger* was distinguished from *Hill* by the court because the facts regarding the pretrial confinement and the magistrate's review were in the record of trial in *Hill*, but were not in the record of trial in *Snoberger*.

[52] 27 M.J. 540 (A.C.M.R. 1988).

[53] *Id.* at 543.

[54] *Id.* at 542 n.4.

[55] ACMR 8802249 (A.C.M.R. 22 Sept. 1989).

[56] *Kuczaj*, slip op. at 2.

requirement that proof of compliance with R.C.M. 305(i) affirmatively appear in the record. Under *Kuczaj*, it is incumbent upon an accused (trial defense counsel) to affirmatively assert governmental noncompliance with R.C.M. 305. Failure to raise the issue at trial *waives* the issue on appeal. [57]

This split in opinion by different panels of the Army Court of Military Review has not yet been resolved. [58] In the meantime, *Kuczaj* puts the burden squarely on trial defense counsel's shoulders to ensure that R.C.M. 305 has been followed. If there are any irregularities with the imposition of pretrial confinement or the magistrate's review, trial defense counsel must bring it to the military judge's attention. When discussing the data on the front page of the charge sheet during sentencing, all parties to the court-martial should state when confinement began, when the magistrate's hearing was conducted, whether there is an issue with the review, and the number of days credit an accused should be given for pretrial confinement. Both counsel and the military judge should state for the record whether they are in agreement with the number of days credit given to the accused. Because the issue of R.C.M. 305(k) credit may no longer automatically be preserved on appeal, trial defense counsel should ensure that their clients get the credit they are due at the trial. CPT Robin K. Neff.

[57] *Id.*

[58] The matter has been petitioned in a case to the Court of Military Appeals, but no decision on a grant of review has yet been made.

Government Appellate Division Note

The Article 63 Windfall

Captain Randy V. Cargill

Government Appellate Division

Introduction

The practice of military criminal law includes the art of plea bargaining. Accused soldiers, knowing that they are guilty and realizing that the government can prove their guilt, often initiate pretrial agreements. Thus begins a process that more often than not results in an agreement between the accused and the convening authority. [1] Typically, the heart of the agreement is the convening authority's promise to limit the accused's punishment in exchange for the accused's promise to providently plead guilty and thereby forego various rights. At trial, each side, guided by the considerations that led to the pretrial agreement, is interested in preserving the agreement. [2]

After trial, however, this convergence of interests disintegrates. The convening authority remains interested in preserving the agreement. Indeed, the convening authority has no choice, as the accused can force compliance. [3] Generally speaking, however, the accused is not interested in preserving the pretrial agreement. The accused, through counsel, examines the record of trial in detail, searching for matters inconsistent with guilt. Seizing upon any perceived inconsistencies, the accused often claims that the military judge failed to resolve inconsistencies and erred in accepting the plea of guilty. [4] Because these "inconsistencies" usually arise during the providence inquiry or during the accused's testimony on sentencing, the accused's argument is that the breach of the pretrial agreement—the failure to providently plead guilty at trial—requires reversal of the conviction on appeal.

Why does the accused search for and direct attention to this breach of the pretrial agreement? What can be done to eliminate the windfall an accused gains when he or she successfully argues that the plea of guilty, entered pursuant to a pretrial agreement, was improvident? This article answers the first question and explores possible answers to the second question.

[1] In 1987, for example, 68.6% of the general courts-martial and 66.7% of the BCD special courts-martial were guilty plea cases. Clerk of Court Note, *Military Justice Statistics*, The Army Lawyer, Feb. 1988, at 54.

[2] As Chief Judge Everett observed in United States v. Kazena, 11 M.J. 28, 34 n.3 (C.M.A. 1981) (Everett, C.J., concurring in the result):

> Our requirements are so strict that time and again it is obvious from the records of trial that the defense counsel is making every possible effort to meet those requirements because he considers that his client has made a good bargain and he does not wish the benefits thereof to be lost by the military judge's refusal to receive the pleas of guilty.

[3] The accused, of course, must comply with his or her part of the agreement or show detrimental reliance on the government's promises. *See generally* Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983); Santobello v. United States, 404 U.S. 257 (1971).

[4] Uniform Code of Military Justice article 45(a), 10 U.S.C. § 845(a) (1982) [hereinafter UCMJ] pertinently provides that "[i]f an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he pleaded not guilty." Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910 [hereinafter MCM, 1984, and R.C.M. 910 respectively] implements article 45(a) by establishing the procedural steps a military judge must follow before accepting a plea of guilty. The military judge, pursuant to R.C.M. 910(e) and (h)(2), must ensure that the plea of guilty has a factual basis by questioning the accused and must resolve matters inconsistent with guilt. *See generally* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

Article 63 and the Decision to Appeal

The short and complete explanation for why an accused directs attention to this breach of the pretrial agreement is found in article 63, UCMJ, and its implementing Rule for Courts-Martial. Article 63 provides that, at a rehearing on identical charges, "no sentence in excess of or more severe than the original sentence may be imposed." Additionally, in situations where the original sentence was in accordance with a pretrial agreement, the maximum sentence is dictated by the pretrial agreement, provided the accused pleads guilty at the rehearing. If the accused pleads not guilty, the maximum sentence is the adjudged sentence. Rule for Courts-Martial 810(d) implements article 63 and mirrors its language. The discussion to the rule states that "[t]he members should not be advised of the basis for the sentence limitation under this rule," implying that the members should be instructed that the maximum punishment is the adjudged sentence or the sentence set by the pretrial agreement, as applicable.

The effect of these provisions is to make an appeal by the accused virtually risk-free. The accused knows that, whatever the outcome of the appeal, his or her punishment will not be increased. This fact alone is sufficient incentive to pursue an appeal. The incentive becomes even stronger when the accused realizes that the military judge will instruct the panel that the maximum punishment is that dictated by article 63. [5] Thus, not only is the accused assured that the sentence will not be increased following a successful appeal, but the accused has a justifiable hope that it will be decreased. It is not surprising, therefore, that an accused would appeal a conviction, even where the appeal centers on the accused's breach of the pretrial agreement.

Indeed, the incentive to appeal a conviction is strongest in a case involving a pretrial agreement. If the accused benefited from the pretrial agreement at trial (the negotiated sentence was less than the adjudged sentence), the accused can plead guilty at the rehearing and attempt to beat the deal again. Of course, the accused will argue that he or she should not receive the "maximum sentence," pointing out the mitigating effect of the plea of guilty. Alternatively, depending on the disparity between the negotiated sentence and the adjudged sentence, the accused may choose to plead not guilty at the rehearing. If the accused beat the deal at trial, the alternative of pleading not guilty at the rehearing may be more attractive. [6] Finally, the accused can always initiate a new, more favorable pretrial agreement. Presumably, all of the considerations that initially led the government to accept a pretrial agreement will still be present. Additionally, the passage of time and its detrimental affect on the memory and availability of witnesses may create stronger incentives for the government to accept a pretrial agreement. Simply put, the accused has nothing to lose and everything to gain by pursuing an appeal, especially where the appeal follows a guilty plea with a pretrial agreement.

The Windfall

As the above discussion should make clear, the accused who successfully appeals a conviction following a plea of guilty entered pursuant to a pretrial agreement gains a significant windfall. The accused retains the benefit of the agreement — the security of the sentence limitation set by the pretrial agreement — but the accused is free either to abide by the agreement or to disregard it. Whatever the choice, the accused's position at a rehearing is much better than the accused's position at trial. How does the accused manage to get into this position? The accused violates the pretrial agreement by failing to providently plead guilty. [7]

All of this leads to the question of what can be done to eliminate this windfall. [8] One answer is to prevent the possibility of a windfall by ensuring at trial that any inconsistencies are recognized and resolved. [9] There are two problems with this approach. First, it does not always work. Despite the efforts of trial counsel and military judges, accused soldiers continue to successfully attack convictions following pleas of guilty based on "inconsistencies" that were not resolved. Second, that approach does not address the waste of judicial resources spent on resolving the frequent and usually unsuccessful [10] attempts by accused who claim that their

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[5] *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-37, note 1 (C1, 15 Feb. 1985) [hereinafter Benchbook].

[6] Significantly, the accused's statements made during the providence inquiry at the first trial generally will not be admissible if the accused withdraws the plea at the rehearing. *See* MCM, 1984, Mil. R. Evid. 410 [hereinafter Mil. R. Evid. 410]; United States v. Heirs, 29 M.J. 68, 69 (C.M.A. 1989).

[7] To be sure, the appellate court reverses the conviction because the *military judge* erred in accepting the improvident plea of guilty. As noted, however, the plea is improvident, almost always, because the *accused* raised a matter inconsistent with guilt. As Judge Cox observed in United States v. Penister, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J., concurring), "[o]ne aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is 'inconsistent with the plea,' more often than not it is an effort by the accused to justify his misbehavior."

[8] The premise of the question is that elimination of the windfall is desirable. I believe it is manifestly unfair that an accused should profit from his breach of the pretrial agreement. The equity doctrine of "clean hands" and the fundamental contract principle that one should not benefit from his breach of a contract are consistent with this view.

[9] Cargill, *The Providence Inquiry: Trial Counsel's Role*, The Army Lawyer, June 1988, at 42.

[10] Every counsel who has worked in the Government Appellate Division has a favorite providence of the plea claim. Mine is the case of a soldier who, after an argument with his wife during which he was scratched on the neck with a knife, got a bigger knife (seven-inch blade), stabbed his retreating wife in the back (breaking the knife off at the hilt), got another knife, and used it to slit his wife's wrists. The soldier pleaded guilty to unpremeditated murder and, as a result of the pretrial agreement, was spared five additional years' confinement. On appeal, he argued that his plea of guilty was improvident because the military judge failed to resolve the raised defense of, among other things, "adequate provocation."

guilty pleas were improvident. [11] What is needed is an approach that eliminates either the windfall or the means to pursue the windfall.

Eliminating the Windfall

As noted, article 63 and its implementing Manual provisions are directly responsible for the windfall an accused gains by successfully appealing his or her conviction. The simplest way to eliminate the windfall is to eliminate article 63. This would place the successful military appellant in the same position as individuals who successfully appeal other federal convictions. In the federal courts, new trials (rehearings) proceed as if no trial had previously taken place. [12] Unless there is proof of vindictiveness by the sentencing judge or an unrebutted presumption of such vindictiveness, [13] the sentence at the rehearing is not limited by the sentence at the first trial. [14] Moreover, where the first sentence followed a guilty plea, no presumption of vindictiveness applies if the same judge increases the sentence following an unsuccessful not guilty plea. [15] Repealing article 63 would eliminate the windfall it creates for military accused and would eliminate the extraordinary advantage a military accused has over persons tried in the federal courts.

Elimination of this advantage makes perfect sense when one considers that it is not a necessary consequence of differences between the military system of criminal justice and the federal system of criminal justice. To be sure, article 63 was originally enacted because of a fundamental difference between the military and federal systems: the provision for automatic, *nonwaivable* review of convictions contained in article 66, UCMJ. The drafters were concerned that, if the accused had no choice about pursuing an appeal, an increase in punishment following a successful appeal would violate the double jeopardy clause. The Senate Report specifically notes that increased punishment is permissible in the federal courts because the accused is deemed to have waived any double jeopardy claim by electing to appeal. Waiver, the Report notes, does not apply in the military context, where the appeal proceeds regardless of the accused's desires. [16] In 1983, however, Congress permitted all military accused (except those sentenced to death) to waive or withdraw appellate review. [17] Thus, the military accused is now, with a limited exception, [18] in the same position as persons tried in the federal courts. Each has a choice about whether to pursue an appeal. There is no reason to attach different consequences to that choice. The military accused, like his or her federal counterpart, should be deemed to have waived any double (former) jeopardy or due process claim by pursuing an appeal. The waiver specifically applies to any claim regarding increased punishment at a rehearing, except an allegation that the sentencing authority vindictively increased the punishment.

In short, repealing article 63 eliminates the windfall created by overturned convictions following pleas of guilty entered pursuant to pretrial agreements. Additionally, it is consistent with Congress's elimination of nonwaivable appellate review. For that reason, one would expect that Congress would be receptive to a proposal to eliminate article 63. The legislative process,

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[11] Additionally, that approach does not address the erosion of public confidence in the military justice system created when an accused unequivocally admits each element of the offense, enters into a detailed stipulation of fact regarding the offense, and does not allege on appeal that he is in fact not guilty or that the plea was involuntary, yet succeeds on appeal because the military judge failed to resolve an "inconsistency." Then Chief Judge Suter appropriately commented on this scenario when he stated: "[T]his case represents the epitome of legal hair splitting. It is this type of judicial frolicking that erodes confidence in criminal law, military or civilian. The findings and sentence should be affirmed. It would be shocking, especially to the appellant, to do otherwise." United States v. Epps, 20 M.J. 534, 537 (A.C.M.R. 1985) (Suter, C.J., dissenting), *amended in part, reversed in part and remanded*, 25 M.J. 319 (C.M.A. 1987).

[12] Of course, the accused may not be tried for an offense of which he was acquitted. Also, if the accused was convicted of a lesser offense of the originally charged offense, the accused may only be tried following appeal of the lesser offense. *See* Green v. United States, 355 U.S. 184 (1957).

[13] In North Carolina v. Pearce, 395 U.S. 711, 726 (1969), the Court held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for him doing so must affirmatively appear" on the record. Otherwise, a presumption arises that the increased sentence was imposed for a vindictive purpose. The presumption must be rebutted by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* The *Pearce* presumption does not apply in a situation where a second jury, unaware of the first sentence and not shown to be vindictive, increases the sentence. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

[14] *See, e.g.*, Stroud v. United States, 251 U.S. 15 (1919) (sentence to death following reconviction of first degree murder did not violate double jeopardy clause even though Stroud was sentenced to life imprisonment at first trial).

[15] In Alabama v. Smith, 109 S. Ct. 2201 (1989), the Court reasoned that the presumption should not apply, because a contested case develops more sentencing information than a guilty plea case.

[16] S. Rep. No. 486, 81st Cong., 1st Sess. 19-20 (1949). In his testimony prior to enactment of the Code, Professor Morgan made the point that allowing an accused to waive review would make article 63 unnecessary. He stated:

> [I]f we change this [to allow for increased sentences at rehearings] we ought to provide some statement to the effect that the accused who had been found guilty shall be presumed to have applied for a review and new trial, unless he definitely waives the matter of record within so many days after the conviction or something of that sort. Then, you could put it on exactly the same basis as the civilian [courts].

Uniform Code of Military Justice: Hearings Before a Subcommittee of the Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st Sess. 321-322 (1949) (testimony of Professor Edmund M. Morgan, Jr.).

[17] Article 61, UCMJ, 10 U.S.C. § 861, *amended by* Pub. L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983).

[18] Under article 69(b), UCMJ, cases in which the appellant has waived appellate review or withdrawn an appeal are still subject to review in the Office of The Judge Advocate General. The Judge Advocate General may take corrective action, to include ordering a rehearing because of "newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." In the circumstance where a rehearing is ordered following article 69(b) review, the article 63, UCMJ, limitations on sentence apply. If article 63 is repealed, its provisions could be incorporated into article 69 to cover this situation. Note that article 64, UCMJ, provides for review by a local judge advocate.

however, is not predictable. Nor is it typically expeditious. What is needed is a method of eliminating the windfall despite article 63. The remainder of this article is devoted to discussing this formidable task.

Eliminating the Means to Pursue the Windfall

A plea of guilty automatically waives several fundamental constitutional rights. As the military judge advises the accused before accepting a plea of guilty, the plea waives the right against self-incrimination, the right to a trial of the facts, and the right to confront and cross-examine witnesses. [19] In addition, an accused may waive many other rights as part of a pretrial agreement. For example, an accused may waive the right to an article 32, UCMJ, investigation; the right to trial by members; the right to the personal appearance of witnesses; and the right to object to matters contained in an agreed upon stipulation of fact. [20] An accused, acting on the belief that a pretrial agreement is to his or her advantage, may include provisions in the agreement that, standing alone, are to the accused's disadvantage. The pretrial agreement, therefore, is the logical vehicle for eliminating the article 63 windfall. The challenge is how to draft a pretrial agreement provision that eliminates the windfall *and* withstands scrutiny by the courts. Two possibilities will be discussed.

Waiver of Appellate Review

Because the article 63 windfall is possible only after a successful appeal, the most effective way to eliminate the windfall is to provide for waiver of appellate review as part of the pretrial agreement. The reasoning is simple. If an accused can waive appellate review without inducement and for whatever reason the accused deems sufficient, the accused should be permitted to waive review where the accused gets something in return for the waiver and where the accused determines that this is in his or her best interest. In other words, the accused should be permitted to determine whether appellate review is a fair price to pay for the benefits of a pretrial agreement.

This reasoning has caused most civilian courts that have considered the issue to permit waiver of appellate review as part of plea bargains. [21] The following passage from an opinion of the Supreme Court of New Jersey is representative:

> It is obvious that a pronouncement by this court of the flat illegality under any circumstances of an agreement by a defendant to waive an appeal would operate substantially to cut down the incentive of prosecutors in many cases to offer what particular defendants and their attorneys might regard as worthwhile inducements to forego that right. Discouragement of plea negotiation to that extent does not appear to us consistent with sound judicial policy. [22]

Will military courts take a similar view? Regrettably, the answer is "no." First, Rule for Courts-Martial 705(c)(1)(B) expressly prohibits a term or condition in a pretrial agreement that "deprives the accused of . . . the complete and effective exercise of post-trial and appellate rights." [23] Undoubtedly, the courts will enforce this rule. [24] Second, even aside from Rule for Courts-Martial 705, the Court of Military Appeals has already expressed its disapproval of a pretrial agreement provision that chilled the exercise of appellate rights. In *United States v. Mills* [25] the court determined that a complicated provision, which kept the accused from benefiting from article 63 by deferring clemency action until after completion of appellate review, was not enforceable because it "tend[ed] to inhibit the exercise of appellate rights." [26] Central to the court's holding was its view that the provision was inconsistent with "automatic review which is unparalleled elsewhere." [27]

One might argue that, because appellate review in the military may now be waived and is no longer "unparalleled elsewhere," the court might take a different view if presented with the issue again. That seems unlikely. In a recent opinion addressing the validity of a pretrial agreement provision, the court, in the context of denouncing "publicly unacceptable" pretrial agreement provisions, warned that "[w]e will also intercede against

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[19] Benchbook, para. 2-10 (15 Feb. 1985); *see* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[20] *See generally* R.C.M. 705(c)(2); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (waiver of article 32, UCMJ investigation); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (waiver of right to trial by members); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (waiver of personal appearance of witnesses); United States v. Glazier, 26 M.J. 268 (C.M.A. 1988) (waiver of objection to matters in stipulation of fact).

[21] *See* Gwin v. State, 456 So.2d 845 (Ala. Crim. App. 1984); Staton v. Warden, 398 A.2d 1176 (Conn. 1978); People v. Nichols, 493 N.E.2d 677 (Ill. App. Ct. 1986); Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky. 1986); State v. McKinney, 406 So.2d 160 (La. 1981); Cubbage v. State, 498 A.2d 632 (Md. 1985); State v. Gibson, 348 A.2d 769 (N.J. 1975); People v. Smith, 142 A.D.2d 195, 535 N.Y.S.2d 732 (N.Y. App. Div. 1988); State v. Perkins, 737 P.2d 250 (Wash. 1987); *cf.* Barnes v. Lynaugh, 817 F.2d 336, 340 (5th Cir. 1987) ("Constitution provides no succor" to defendant who validly waives right to appeal). *Contra* State v. Ethington, 592 P.2d 768 (Ariz. 1979); People v. Harrison, 191 N.W.2d 371 (Mich. 1971).

[22] State v. Gibson, 348 A.2d 769, 775 (N.J. 1975).

[23] *See also* R.C.M. 1110(c). "No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review."

[24] The rule is consistent with the legislative history of article 61. *See* S. Rep. No. 98-53, 98th Cong., 1st Sess. 22-23 (1983).

[25] 12 M.J. 1 (C.M.A. 1981).

[26] *Id.* at 4.

[27] *Id.*

attempts to inhibit the exercise of appellate rights" and cited *Mills* for this proposition. [28] To be sure, this is dictum. But it is strong dictum, and given the court's paternalism in the area of policing the plea bargaining process, [29] it is highly doubtful that a waiver of appellate review provision would survive scrutiny.

Waiver of Right to Challenge Factual Basis of Guilty Plea

> I am guilty of (the offense) and waive my right to challenge the factual basis of my plea of guilty. I stipulate that there is a factual basis for my plea of guilty and waive any claim that matters inconsistent with my guilt were raised and not resolved at trial.

This provision is tailored to address the most recurring source of the article 63 windfall in guilty plea cases—the failure to resolve matters inconsistent with guilt. The provision avoids the prohibition on a waiver of appellate review. Will the provision survive judicial review? The answer to that question turns on answers to the following questions. First, does the provision violate the Constitution? Second, does the provision violate a statute, Manual provision, or Army regulation? Third, does the provision violate public policy?

Constitution

The Supreme Court has expressed its approval of plea bargaining [30] and consistently rejected challenges to the constitutionality of the plea bargaining process. [31] While the Court has warned that "not every conceivable plea bargaining system or particular plea bargain would be constitutional," [32] there is little doubt that an agreement to waive issues related to the factual basis for a plea of guilty would pass constitutional muster. In *Menna v. New York* [33] the Court, citing three guilty plea cases, stated: "The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." In *North Carolina v. Alford* [34] the Court held that an accused can plead guilty despite protestations of innocence when the accused intelligently concludes that his or her interests require a guilty plea and that the record strongly evidences guilt.

These cases demonstrate the Court's deference to the accused's decision to plead guilty. The accused who voluntarily and intelligently admits "in open court that he committed the acts charged" can be convicted on that basis alone. [35] No inquiry into possible defenses or resolution of matters inconsistent with guilt is required. Furthermore, no factual basis for the plea of guilty is constitutionally required, [36] except in the limited circumstance where that basis is necessary to support a plea of guilty accompanied by assertions of innocence—an *Alford* plea. Because the suggested waiver provision applies only where the accused has pleaded guilty and admitted each element of the offense, it does not violate the Constitution. [37]

Other Law

Does a statute, Manual provision, or regulation prohibit the suggested waiver provision? No. To be sure, article 45(a), UCMJ, requires rejection of a guilty plea when the accused raises inconsistent matters after entering the plea. As the court recently noted in *United States v. Clark*, [38]

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[28] United States v. Jones, 23 M.J. 305, 307 (C.M.A. 1987). Even Judge Cox, who apparently would permit pretrial agreement terms suggested by the government, stated that a waiver of appellate review provision would be improper. *Id.* at 308 (Cox, J., concurring in the result).

[29] *See generally* Smith, *Waiver of Motions in Pretrial Agreements*, The Army Lawyer, Nov. 1986, at 10.

[30] *See, e.g.*, Santobello v. United States, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.").

[31] To cite an extreme example, consider Bordenkircher v. Hayes, 434 U.S. 357 (1978). The Court held that the due process clause of the fourteenth amendment is not violated where a prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if he does not plead guilty to the original charges.

[32] Corbitt v. New Jersey, 439 U.S. 212, 225 n.15 (1978).

[33] 423 U.S. 61, 62-63 n.2 (1975).

[34] 400 U.S. 25 (1970).

[35] Brady v. United States, 397 U.S. 742, 748 (1970).

[36] Fed. R. Crim. P. 11(f) states that the court "should not enter a judgment upon [a plea of guilty] without making such inquiry as shall satisfy it that there is a factual basis for the plea." This requirement, however, is not constitutionally mandated. Smith v. Scully, 614 F. Supp. 1265 (S.D.N.Y. 1984), *affirmed*, 779 F.2d 37 (2d Cir. 1985). In McCarthy v. United States, 394 U.S. 459 (1968), the Court held that a trial judge's failure to follow the requirements of Rule 11 required reversal. The Court emphasized that it did not reach McCarthy's constitutional arguments (*id.* at 464), but noted that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466. The suggested waiver provision does not prevent an accused from claiming that his plea was involuntary because the military judge failed to explain the charges and failed to ensure that the accused understood the explanation.

[37] The waiver provision does not prevent the accused from claiming that his plea was involuntary or not intelligently made. The accused is only barred from claiming that he is in fact not guilty after he has pleaded guilty and admitted each element of the offense as described to him by the military judge. Of course, trial counsel should continue to make full use of a stipulation of fact to establish a factual basis for the plea and should continue to alert the military judge to inconsistencies raised by the accused.

[38] 28 M.J. 401 (C.M.A. 1989).

> [u]nder the express language of Article 45, a military judge cannot allow a guilty plea to stand if the defense offers 'inconsistent' matters, even though clearly the accused and his counsel have made a sound tactical judgment that, in light of the evidence available to the prosecution, such a plea would be in the accused's best interest. [39]

Article 45, however, does not bar waiver of the right to claim on appeal that the military judge either failed to resolve inconsistent matters or failed to ensure that the plea was factually based. Thus, just as article 32 is not a bar to inclusion of waiver of its requirements as part of a pretrial agreement, [40] article 45 is not a bar to waiver of its requirements as part of a pretrial agreement.

Public Policy

The final question is whether the waiver provision violates public policy. The question itself is necessitated by a series of Court of Military Appeals decisions that have analyzed pretrial agreement provisions in terms of public policy. [41] In *United States v. Jones*, [42] for example, the court "granted review to determine whether this provision [waiver of right to challenge the legality of a search and an out-of-court identification] violates the 'public interest.'" Most recently, the court granted review to determine whether a particular pretrial agreement provision "was contrary to public policy and statute and was void, rendering the findings and sentence invalid." [43]

Predicting whether the court will void a provision on the ground that it is contrary to public policy is extremely difficult for two reasons. First, the question whether a provision "has a tendency to be injurious to the public or against the public good" [44] turns on one's concept of the public good—hardly an immutable principle of law and certainly not a predictable one. Second, the court's test for determining whether a provision violates public policy is unsatisfactory. In *Jones* the court stated that a provision violates the "public interest" if it is not "a freely conceived defense product shown to have voluntarily originated from" [45] the accused. Later in the opinion, however, the court comments that the defense counsel's choice to include the provision did not violate "any public norm." [46] The implication is that even provisions initiated by the defense must not violate a "public norm." Unfortunately, the court has not defined the term. [47]

It is against this vague backdrop that the suggested waiver provision must be analyzed. Assume that the provision is suggested by the defense and that this fact is established on the record. Does the provision violate the public interest? The best defense argument (on appeal, of course) is that it does, because it insulates from appellate review issues related to factual guilt. One could point out that the article 45(a) safeguards are aimed at furthering the public's interest in ensuring that innocent people are not convicted. [48] Additionally, one could argue that eliminating the issue of factual guilt is inconsistent with that interest. The best counterargument is that the provision serves the public's interest in finality of convictions [49] and is not a significant departure from the requirements of article 45(a). The mission of article 45(a) is to ensure that a plea of guilty is not accepted "unless the accused admits doing the acts charged." [50] The Rule for Courts-Martial 910 procedures and the *Care* requirements are aimed at ensuring that this happens. Thus, raised defenses must be resolved by "specifically ask[ing] the accused whether he has reviewed the evidence with his counsel and determined that it is inadequate to afford him an 'effective legal defense.'" [51] Additionally, accused soldiers must state under oath what actions they took that render them guilty. [52] In each instance, the individual accused makes the decision and that decision determines whether the plea is accepted. The waiver provision, in effect, is a

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[39] *Id.* at 406.

[40] *See supra* note 20.

[41] *See supra* note 29.

[42] 23 M.J. 305, 306 (C.M.A. 1987).

[43] Order Granting Petition for Review, No. 61678/AR, United States v. Gibson, ACMR No. 8800401, 28 M.J. 265 (C.M.A. 1989).

[44] Black's Law Dictionary 1041 (5th ed. 1979); *see also id.* at 1106 (definition of public interest).

[45] *Jones*, 23 M.J. at 306.

[46] *Id.* at 307.

[47] Perhaps a cryptic answer is found in Chief Judge Everett's comment that "[a]s long as the trial and appellate processes are not rendered ineffective and their flexibility is maintained, . . . some flexibility and imagination in the plea-bargaining process have been allowed by our Court." United States v. Mitchell, 15 M.J. 238, 241 (C.M.A. 1983) (Everett, C.J., concurring) (citation omitted).

[48] *Cf.* United States v. Schaffer, 12 M.J. 425, 428 (C.M.A. 1982), where the court notes that "the military judge's ascertainment from the accused of his personal version of the facts which lead him to believe that he is guilty helps assure that the plea bargaining process does not result in the conviction of innocent persons."

[49] *See generally* Kuhlmann v. Wilson, 106 S. Ct. 2616, 2626-2627 (1986) (describing the state's interest in finality).

[50] *Uniform Code of Military Justice: Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1053 (1949).

[51] United States v. Johnson, 25 M.J. 553, 554 (A.C.M.R. 1987) (citation omitted).

[52] An accused could plead guilty even though he could not remember what he did, provided "he was convinced of his guilt based on reliable evidence." United States v. Penister, 25 M.J. 148, 152 (C.M.A. 1987) (citations omitted).

statement by the accused that any error the military judge may commit in ensuring that the accused is guilty is harmless, because the accused is in fact guilty. Put another way, the accused would have confirmed his or her guilt if asked the correct questions at trial.

Would this provision outrage the public? More to the point, would the Court of Military Appeals decide that this provision violates the public interest? Judge Cox, who has stated his belief that article 45(a) does not require an accused to "admit unequivocally each and every element of an offense," [53] almost certainly would answer the question in the negative. As to Chief Judge Everett and Judge Sullivan, it is impossible to predict their response. Each has contributed to the trend away from paternalism and toward allowing the accused, with the advice of counsel, to determine what is in his or her best interest. Whether this trend will extend to the suggested waiver provision is, of course, an open question. I believe it is worth a try.

Conclusion

Article 63 is the source of a significant windfall for the military accused. Its existence explains why an accused goes to great lengths, to include directing attention to his breach of a pretrial agreement, to overturn a conviction or sentence on appeal. This article has described the windfall and discussed ways to eliminate it, with a focus on cases with pretrial agreements. In 1983 Congress paved the way for elimination of the article 63 windfall by making appellate review waivable. In his congressional testimony, William H. Taft, IV, then General Counsel to the Secretary of Defense, described elimination of nonwaivable review as a step in the direction of conforming the military justice system to the civilian justice system. He stated that "[w]hether we should go the whole way, go just part of the way, or not permit the waiver at all, is a question we have resolved by taking a step in that direction." [54] Repealing article 63 is the logical next step.

[53] *Id.* at 153 (Cox, J., concurring).

[54] *Military Justice Act of 1982: Hearings Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services*, 97th Cong., 2d Sess. 71 (1982) (testimony of William H. Taft, IV, General Counsel of Department of Defense).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Court of Military Appeals Decides AIDS-Related Cases

Introduction

During the past few months, the United States Court of Military Appeals has decided three cases that address important AIDS-related issues. These cases provide the latest judicial guidance for military trial and appellate practitioners and judges concerning the legality of using the Uniform Code of Military Justice [1] to respond to misconduct by soldiers with the AIDS virus. [2]

United States v. Woods

In *United States v. Woods* [3] the accused was charged with violating the general article [4] under a reckless endangerment theory for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus. The court limited its opinion to whether the specification [5] stated an offense under the UCMJ. [6] The court wrote, "Our analysis is limited to the *elements* of

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

[2] For a summary and discussion of earlier military cases having AIDS related issues, see TJAGSA Practice Note, *AIDS Update*, The Army Lawyer, Mar. 1989, at 29; *see also* Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, The Army Lawyer, Dec. 1988, at 4; Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, The Army Lawyer, Jan. 1988, at 17.

[3] 28 M.J. 318 (C.M.A. 1989).

[4] UCMJ art. 134.

[5] The specification was as follows:
Specification: In that Hospitalman Robert A. Woods, U.S. Navy, Naval Medical Clinic, Norfolk, Virginia, on active duty, in or around Virginia Beach, Virginia, sometime between 14-28 November 1987, then knowing that his seminal fluid contained a deadly virus (Human T-cell Lymphotropic Virus 3) capable of being transmitted sexually, and having been counseled regarding infecting others, an act that he knew was inherently dangerous to others, and that death or great bodily harm was a probable consequence of the act, and that was an act showing wanton disregard of human life, did engage in unprotected (without the utilization of a condom or other device to protect the partner from contamination) sexual intercourse with Seaman [C _____] U.S. Navy, such conduct being prejudicial to the good order and discipline in the Armed Forces.
Woods, 28 M.J. at 318.

[6] The court wrote: "We do not here decide whether the knowing transmission of a deadly, infectious disease may constitute the basis for other offenses under the Code." *Id.* at 320 n.2. The court likewise specifically declined to reach whether a "safe-sex" order could be properly enforced as a violation of the UCMJ and what the maximum punishment would be for the reckless endangerment offense charged against the accused. *Id.*

the offense alleged and whether the allegations, if proved, would establish the necessary *elements* of an offense." [7]

In resolving this issue, the court applied a two-part test for determining whether the specification alleged an offense within the broad ambit of article 134. First, the court considered whether the accused's alleged act "was palpably and directly prejudicial to good order and discipline of the service—this notwithstanding that the act was not otherwise denounced." [8] The court found that the specification adequately alleged conduct which, if established, could serve as a basis for the factfinder to conclude that the accused's conduct violated the general article. The court, noting that the accused's sexual partner was another service member, concluded that "[t]he military and society at large have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty." [9]

Second, the court required that the accused be on "fair notice from the language of . . . [the] article that the particular conduct which he engaged in was punishable." [10] The court observed in this regard that all service members receive detailed instruction pertaining to article 134 upon entering the military and again after six months of service. [11] Moreover, the specification at issue alleged that the accused received counselling regarding his HIV positivity, the methods of transmitting the disease, and the potential consequences of engaging in unprotected intercourse. [12] Based upon this instruction and counselling, the court concluded that the accused had fair notice of the illegality of his conduct.

Woods is significant for two other reasons. First, the court found the specification to be adequate despite the absence of traditional words of criminality, such as "wrongfully" or "unlawfully." Although the court instructed that the better practice would have been to include such language, [13] the court's decision in *Woods* is consistent with its recent willingness to view specifications with greater tolerance. [14] Second, the court found that the specification alleged an offense, even absent an allegation that the accused's sex partner was not informed by the accused of his HIV positivity. This result suggests that consent by the accused's partner will not operate generally as a defense to unprotected intercourse. It also indicates that the failure to follow either aspect of "safe-sex" practices—using barrier protection and informing potential sex partners of one's HIV positivity—can independently support a conviction under article 134.

United States v. Womack

In *United States v. Womack* [15] the accused was convicted of disobeying a "safe-sex" order in violation of article 90. [16] The order given to the accused provided, *inter alia*, that the accused: 1) must inform all present and future sexual partners of his infection; 2) must avoid transmitting the infection by taking affirmative steps to protect his sexual partners from contacting his blood, semen, urine, feces, or saliva; and 3) must refrain from any acts of sodomy or homosexuality as proscribed by the UCMJ, regardless of whether his partner consents. [17] Sometime after receiving this order, the accused performed fellatio upon a male airman who was sleeping. The accused did not inform the airman of his infection, did not ensure that barrier protection was used, and did not obtain the airman's consent. He was ultimately tried and convicted of violating the three cited portions of the "safe-sex" order. [18]

The court first observed that a military order must be a clear and specific mandate to do a particular act. [19] Moreover, the court wrote that the "order must be worded so as to make it specific, definite, and certain, and it may not be overly broad in scope or impose an unjust limitation of personal rights." [20] The court found that the order given to the accused was specific, definite, and certain. Additionally, the court found that the accused had actual knowledge of the order and had fair

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[7] *Id.* (emphasis in original).

[8] United States v. Sadinsky, 34 C.M.R. 343, 346 (C.M.A. 1964).

[9] *Woods*, 28 M.J. at 319-20 (citing National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1396 (1989)).

[10] *Woods*, 28 M.J. at 319 (quoting Parker v. Levy, 417 U.S. 733, 755 (1974)).

[11] UCMJ art. 137.

[12] *See supra* note 5.

[13] *Woods*, 28 M.J. at 319 n.1.

[14] *See, e.g.*, United States v. Brecheen, 27 M.J. 67 (C.M.A. 1988) (specifications sufficient to allege drug related offenses in a guilty plea case where the word "wrongful" was omitted); United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (AWOL specification sufficient in a guilty plea case where the words "without authority" were omitted); *see also* United States v. Bryant, 28 M.J. 504 (A.C.M.R. 1989) (failure to allege "wrongful" in the specification of a contested drug case was not a fatal defect).

[15] 29 M.J. 88 (C.M.A. 1989).

[16] UCMJ art. 90.

[17] *Womack*, 29 M.J. at 89.

[18] *Id.* at 89-90.

[19] *Id.* at 90 (citing United States v. Beattie, 17 M.J. 537 (A.C.M.R. 1983)).

[20] *Womack*, 29 M.J. at 90 (citing United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972); United States v. Wysong, 26 C.M.R. 29 (C.M.A. 1958)).

notice of what conduct was prohibited. Accordingly, the order was not vague as applied to the accused. [21]

Additionally, the court addressed whether the order interfered with constitutionally protected, private affairs of the accused. The court first noted that forcible sodomy is not constitutionally protected conduct. [22] In addition, privacy rights and expectations operate differently in military society. The armed forces may, therefore, constitutionally prohibit or regulate conduct that is elsewhere permitted. [23] The court concluded that the restrictions imposed by the "safe-sex" order were constitutionally permitted, consistent with this precedent.

United States v. Stewart

In *United States v. Stewart* [24] the accused was convicted of aggravated assault [25] by knowingly exposing a female victim to the AIDS virus by repeatedly having unprotected sexual intercourse with her. [26] An expert witness testified at the accused's court-martial that the victim had contracted the AIDS virus by having sexual intercourse with the accused and that the victim had a thirty to fifty percent chance of dying of AIDS. [27]

The court found that the evidence supported the accused's conviction for aggravated assault under the theory of a means likely to produce death or grievous bodily harm. The court concluded that a thirty to fifty percent chance of death resulting from the battery inflicted by the accused was sufficient to make AIDS a "natural and probable consequence" of the accused's conduct. The court, however, did not indicate at what point the chance of death would be too remote to support a conviction for aggravated assault upon this theory. The court likewise did not decide whether unprotected sexual intercourse with no evidence of transmission of the disease to the victim could constitute an assault.

Conclusion

This trio of cases answers many questions concerning the extent to which the military justice system can be used to respond to AIDS-related misconduct. At least three offenses—aggravated assault, disobedience, and reckless endangerment—are potentially available to punish service members who engage in dangerous behavior. Some of these options may be used even where there is no evidence of transmission of the infection. The Court of Military Appeals has said that the UCMJ can be used to punish and deter conduct that spreads AIDS.

Several questions also remain unanswered. At what point does the chance of transmission become so remote as to not support a conviction for aggravated assault or reckless endangerment? Will a disobedience offense be constituted where the accused's sexual partner is a civilian who is not directly associated with the military? What is the maximum punishment for a reckless endangerment offense? How do multiplicity rules apply to these charges? Although these issues remain unresolved, these recent cases have gone far in establishing and clarifying the role of the military justice system in dealing with the deadly disease of AIDS. MAJ Milhizer.

Reserve Jurisdiction: C.M.A. Clarifies an Issue

Under *Solorio*, [28] the military obtains court-martial jurisdiction over a person when the individual has military status. *Solorio* did not answer all questions regarding the exercise of court-martial jurisdiction. One area left unaddressed was: "When does a reservist, who is called to active duty for training, acquire sufficient military status so that the active components can exercise jurisdiction over the reservist?" In *United States v. Cline* [29] the United States Court of Military Appeals answered this question.

The facts in *Cline* indicate that the accused was a member of the Air Force Reserve who had received orders to report for two weeks of active duty training. [30] The orders indicated that Staff Sergeant Cline was to report for duty at 0500 hours on 25 April. At a later unit briefing, however, the reporting time was orally

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[21] The court noted, as it had in *Woods*, 28 M.J. at 319-20, that the military and society at large have a compelling interest in having service members remain healthy and capable of performing their duty. *Womack*, 29 M.J. at 90. The "safe-sex" order, therefore, relates to a valid military purpose. *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 14c(2)(a)(iii) [hereinafter MCM, 1984, Part IV, para. 14c(2)(a)(iii). The court also wrote that the accused was not entitled to relief on the basis that the order might be overly broad in some hypothetical situations (for example, where his sexual partner was a civilian having no connection to the military) when the order, as applied to the accused, has an obvious military connection. *Womack*, 29 M.J. at 91 (citing Brockett v. Spokane Arcades, 472 U.S. 491 (1985); Parker v. Levy, 417 U.S. 733 (1974)).

[22] *Womack*, 29 M.J. at 91 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[23] This permitted governmental intrusion can include forced inoculation against disease (United States v. Chadwell, 36 C.M.R. 741 (N.B.R. 1965); United States v. Jordan, 30 C.M.R. 424 (A.B.R.), *pet. denied*, 30 C.M.R. 417 (C.M.A. 1960)); prohibiting certain cadre-trainee associations (United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 31 (C.M.A. 1982)); and proscribing fraternization (United States v. Johanns, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985)).

[24] 29 M.J. 92 (C.M.A. 1989).

[25] A violation of UCMJ art. 128.

[26] *Stewart*, 29 M.J. at 93.

[27] *Id.* at 93-94.

[28] Solorio v. United States, 483 U.S. 435 (1987).

[29] 29 M.J. 83 (C.M.A. 1989).

[30] *Id.* at 84.

changed to 1600 hours on 25 April. [31] At 0830 hours on 25 April, Staff Sergeant Cline sold marijuana to an undercover informant from the Office of Special Investigations. This misconduct formed the basis for his court-martial for wrongful distribution of marijuana. [32] Because his conduct occurred prior to the reporting time for his active duty, Staff Sergeant Cline argued that he was not subject to court-martial jurisdiction.

The Air Force Court of Military Review held that court-martial jurisdiction existed and based its decision on the distinction between duty status and duty service. Although Staff Sergeant Cline's duty service was not to begin until his reporting time of 1600 hours on 25 April, the court held that his duty status (the necessary prerequisite for court-martial jurisdiction) began at 0001 hours on 25 April, when his pay and entitlements began. [33]

The Court of Military Appeals' opinion examined the statutory language of article 2 of the Uniform Code of Military Justice [34] to determine when military status began for various individuals subject to armed forces jurisdiction. Because Staff Sergeant Cline was a member of the Air Force Reserve, the court found that he was not: 1) a volunteer, who acquires military status from the time of his or her muster or acceptance into the armed forces; 2) an inductee, who obtains military status at the time of actual induction into the armed forces; or 3) a national guardsman, who acquires status only when in federal service. The court held that Staff Sergeant Cline, a reservist ordered to active duty training, fell within article 2's coverage of "other persons lawfully called or ordered into, or to duty in or for training in the armed forces." [35] Article 2 indicates that such persons become subject to military jurisdiction "from the dates when they are required by the terms of the call or order to obey it." [36] Interpreting this provision of article 2, the court held that Staff Sergeant Cline became subject to UCMJ jurisdiction on the date he was obliged to obey the order to appear for training—that date being 25 April. Because 25 April began at 0001 hours, the court held that UCMJ jurisdiction existed from that time on, even though the reporting time was not until 1600 hours on 25 April. [37]

Practitioners should be aware that *Cline* concerns only reservists who are called to active duty training (ADT). Although the case should pertain also to reservists called to perform annual training (AT), counsel must be cognizant of jurisdictional rules regarding reservists performing inactive duty training (IDT). While *Cline* involved the interpretation of "other persons" within article 2(a)(1), reservists performing IDT are specifically mentioned in article 2(a)(3) and are subject to the UCMJ only "while on inactive duty training." [38] Yet undecided is the interpretation of this language. Does it cover the reservist traveling to his or her scheduled IDT? Does the military acquire jurisdiction over the IDT reservist at 0001 hours on the date of the IDT? Current guidance on jurisdiction over reservists performing IDT consists solely of the language in article 2(a)(3) and in Army regulatory guidance, which states that "[j]urisdiction continues during periods such as 'lunch breaks' between unit training assemblies or drills on the same day and may continue overnight in situations such as an overnight bivouac." [39] The lesson to learn from *Cline* is that, when processing charges against members of the Reserve components, counsel need to determine the status under which the reservists are training and should ensure their amenability to the UCMJ. MAJ Holland.

Fleeing Apprehension is Not Resisting Apprehension

In *United States v. Harris* [40] the Court of Military Appeals decided that fleeing apprehension did not constitute the military offense of resisting apprehension. [41] In so doing, the court did more than merely clarify the scope of an offense under the UCMJ: the court decided an issue not necessary to the resolution of the case and signaled to trial and appellate practitioners that they may have to look beyond the definition of offenses as set forth in the Manual for Courts-Martial [42] to accurately determine the actual limits of a punitive article of the UCMJ.

The accused in *Harris* was observed by a military policeman (MP) speeding through a red light during the early morning hours at Fort Riley, Kansas. [43] The MP turned on his emergency lights and siren and gave chase, pursuing the accused off-post to a trailer park in the

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[31] *Id.*

[32] *Id.*

[33] United States v. Cline, 26 M.J. 1005, 1007 (A.F.C.M.R. 1988).

[34] 10 U.S.C. § 802 (1982).

[35] United States v. Cline, 29 M.J. 83, 85-86 (C.M.A. 1989).

[36] UCMJ art. 2(a)(1).

[37] 29 M.J. at 86.

[38] UCMJ art. 2(a)(3).

[39] Army Reg. 27-10, Legal Services: Military Justice, para. 21-2(a) (16 Feb. 1989).

[40] 29 M.J. 169 (C.M.A. 1989).

[41] A violation of UCMJ art. 95.

[42] MCM, 1984.

[43] *Harris*, 29 M.J. at 170.

civilian community. [44] There the accused abandoned his vehicle and fled into a wooded area, despite the MP shouting "Hold it, Military Police." [45] A short while later the MP apprehended the accused while the latter tried to sneak into his trailer. The accused offered no resistance at this time. [46]

The accused was charged, *inter alia*, with resisting apprehension in violation of article 95. [47] This offense has three elements:

a) That a certain person attempted to apprehend the accused;

b) That said person was authorized to apprehend the accused; and

c) That the accused actively resisted the apprehension. [48]

With respect to the first element, the MP testified that his "original intent had been to make an administrative stop, rather than an apprehension"; that only after the stop would he "have decided whether to apprehend" the accused; and that "he did not consider the action before arriving at the trailer park to be part of the apprehension." [49] The Court of Military Appeals observed in this regard "that for the crime of resisting apprehension, there must have been a 'specific intent' on the part of the person attempting" [50] to effect an apprehension. [51] The court found that the MP's testimony did not establish that he had entertained this requisite intent. Accordingly, the accused's conviction was not supported by the evidence. [52]

The court went on to consider whether, as a matter of law, fleeing from apprehension can constitute resisting apprehension. The court acknowledged that the Manual provides that the nature of the "resistance must be active, such as assaulting the person attempting to apprehend *or flight*." [53] The court, however, took a contrary position. Relying on the legislative history to the UCMJ, [54] analogy to state statutes, [55] legal scholars such as Professor Perkins, [56] and the Model Penal Code, [57] the court held that resisting apprehension under article 95 is not constituted when an accused merely flees from an attempted apprehension.

Three additional observations are worth noting with respect to the *Harris* decision. First, the court clarifies that, despite its opinion in *Harris*, military authorities are not powerless in dealing with persons who flee from a policeman who is attempting to apprehend them. Authorized commanders can promulgate punitive regulations to address such misconduct, [58] and pertinent state statutes may be assimilated to prosecute service members who flee from apprehension. [59] These instructive comments by the court are consistent with its repeated willingness to provide guidance to trial practitioners regarding how they may respond to important appellate

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[44] *Id.* The chase was conducted at speeds of 75 miles per hour in a 45-mile-per-hour zone. Also, a witness testified that the siren could be heard from as far as a mile away, and the MP stated that, at times, he closed to within 15 to 20 feet of the accused while in pursuit. *Id.*

[45] *Id.*

[46] *Id.*

[47] UCMJ art. 95 provides:
Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

[48] MCM, 1984, Part IV, para. 19(b)(1).

[49] *Harris*, 29 M.J. at 170.

[50] *Id.* at 171 (citing United States v. Baker, 22 B.R. 131, 135 (1943)). Accordingly, a policeman must intend to apprehend the occupant of a vehicle he is stopping to have the requisite intent for this crime. *Harris*, 29 M.J. at 171 (citing Smith v. State, 739 S.W.2d 848, 850 (Tex. Cr. App. 1987)). The court held that the accused's intent is also relevant to the crime of resisting apprehension, in that the accused must be aware that a person was attempting to apprehend him. *Id.*

[51] The UCMJ defines apprehension as "the taking of a person into custody" by a person in authority. UCMJ art. 7; *see also* MCM, 1984, Rule for Courts-Martial 302(a)(1) [hereinafter R.C.M.].

[52] The court acknowledged that the MP's
testimony is somewhat implausible for, typically, a military policeman in hot pursuit at high speeds with siren on and lights blazing intends to apprehend the person whom he is pursuing. We must, however, take the record of trial as we find it; and it does not contain the necessary evidence of specific intent on the part of the military policeman.
Harris, 29 M.J. at 171.

[53] MCM, 1984, Part IV, para. 19c(1)(c) (emphasis added). The court observed also that the preceding Manuals defined "resisting apprehension" in a similar fashion, as did a prominent commentator on the UCMJ. See the authorities cited in *Harris*, 29 M.J. at 171-72.

[54] *See Harris*, 29 M.J. at 172 (and the authorities cited therein).

[55] *See* Tennessee v. Garner, 471 U.S. 1, 10 n.9 (1985).

[56] R. Perkins, Criminal Law 554 (3d ed. 1982).

[57] *See* Commentary to § 242.2, American Law Institute *Model Penal Code and Commentaries* 214 (1980).

[58] *See* UCMJ art. 92.

[59] *See* Assimilative Crimes Act, 18 U.S.C. § 13 (1982); *see also* United States v. Kline, 15 M.J. 805 (A.C.M.R. 1983), *aff'd on other grounds*, 21 M.J. 366 (C.M.A. 1986).

decisions clarifying the scope of offenses under the UCMJ. [60]

Second, and perhaps consistent with its willingness to provide such guidance, the court in *Harris* focused much of its attention on an issue that was not necessary to the resolution of the case. [61] The court, and particularly Chief Judge Everett, has not hesitated to discuss the limitations of crimes and defenses under military law, even when such discussion is only *obiter dictum*. For example, in *United States v. Jackson* [62] the court held that providing false *or misleading* information to a law-enforcement agent conducting an official investigation can constitute a false official statement in violation of article 107 of the UCMJ. [63] As the statement at issue in *Jackson* was in fact false, [64] the court's conclusion that article 107 can be violated by information that is merely misleading is dicta. Similarly, in *United States v. Byrd* [65] Chief Judge Everett wrote that the military must recognize the defense of voluntary abandonment as an affirmative defense to an attempt under article 80, UCMJ. [66] This is likewise dicta, as both Chief Judge Everett and Judge Cox concluded that the accused had not performed an overt act sufficient to establish the accused's guilt—an act that went beyond mere preparation. [67] Regardless of whether one favors the use of dicta to provide guidance, [68] trial and appellate practitioners must carefully analyze the decisions of the Court of Military Appeals to ascertain where the court's holding stops and the dicta begins.

Third, the court has again alerted trial and appellate practitioners that they must look beyond the language of the Manual to determine the scope of crimes and defenses under military law. [69] This concept is consistent with the statutory limitations upon presidential authority imposed by the UCMJ [70] and the court's general willingness to enforce those limitations. [71] The important implications of this concept are obvious: practitioners are not limited to merely interpreting the definitions of crimes and defenses as reflected in the Manual, but are free to litigate the underlying correctness of those definitions and explanations. This flexibility may benefit trial and government appellate counsel (as where the scope of article 107 was expanded in *Jackson* [72]), or trial and appellate defense counsel (as in the *Harris* case, where the scope of article 95 was limited so as not to include fleeing from apprehension.) MAJ Milhizer.

Preserving Defense Motions *in Limine* — Not So Clear in the Military

In *United States v. Cofield* [73] the defense counsel moved *in limine* to prevent a summary court-martial conviction from being used either to impeach the accused if he testified on the merits of the case or for aggravation during the sentencing phase of the court-martial. The military judge denied the defense motion and, because of the adverse ruling on the motion, the accused did not testify on the merits. [74] Notwithstanding the failure of the accused to testify, the court held that it could review the military judge's ruling. [75] Under similar

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[60] *See, e.g.*, United States v. Mervine, 26 M.J. 482, 486 n.4 (Everett, C.J., concurring) ("[m]ilitary prosecutors may also be able to deal with some new types of theft and commercial fraud by use of the third clause of Article 134 to incorporate relevant provisions of title 18, which has in recent years been amended from time to time to deal with new conditions"); *see generally* TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29, 31.

[61] As the court found that the evidence was insufficient as a matter of law and fact to establish that the MP had the requisite specific intent to apprehend as required by article 95, it was unnecessary for the court to consider whether fleeing from apprehension could constitute resistance from apprehension.

[62] 26 M.J. 377 (C.M.A. 1988).

[63] *Id.* at 379; *see generally* TJAGSA Practice Note, *The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ*, The Army Lawyer, Nov. 1988, at 38, 39-40.

[64] The accused claimed that she last saw a friend suspected of murder weeks previously, when she had actually seen him earlier that same day. *Jackson*, 26 M.J. at 378.

[65] 24 M.J. 286 (C.M.A. 1987).

[66] *Id.* at 292-93 (opinion of Everett, C.J.). Judge Sullivan did not participate in the decision, and Judge Cox, while concurring in the result and admitting that he "was very impressed with the Chief Judge's learned opinion," declined to join the opinion because of his "reservations about making substantive law on a guilty-plea record." *Id.* at 293 (opinion of Cox, J.).

[67] *See* MCM, 1984, Part IV, para. 4b(3).

[68] *See generally* K. Llewellyn, The Common Law Tradition: Deciding Appeals 299-300 (1960).

[69] For example, the court, as noted previously, has expanded the scope of article 107 (false official statement) (*Jackson*, 26 M.J. 377 (C.M.A. 1988)), and created the defense of voluntary abandonment (*Byrd*, 24 M.J. 286 (C.M.A. 1987)), contrary to prior military law as reflected in the Manual.

[70] *See* UCMJ arts. 36 and 56.

[71] *E.g.* Ellis v. Jacob, 26 M.J. 90, 92 (C.M.A. 1988) (President may not change substantive military law to eliminate the defense of partial mental responsibility). *But see* United States v. Jeffress, 28 M.J. 409 (C.M.A. 1989) (President may provide guidance requiring a more restrictive definition of kidnapping under a "pure" UCMJ article 134 theory).

[72] 26 M.J. 377 (C.M.A. 1988).

[73] 11 M.J. 422 (C.M.A. 1981).

[74] *Id.* at 423-32.

[75] *Id.* at 431.

facts in civilian jurisprudence, the Supreme Court subsequently concluded that a defendant who did not testify at trial was not entitled to a review of the trial court's ruling that denied the defendant's motion *in limine* to prohibit the use of a prior conviction for impeachment purposes. [76] Although one would assume that the military would follow the Supreme Court's decision, this may not be the case.

Recent decisions from the Court of Military Appeals have hinted that *Cofield* may have continued vitality, despite a contrary pronouncement by the Supreme Court. In *United States v. Gamble*, [77] while discussing a defense motion *in limine* to exclude uncharged misconduct, the court expressed doubt that the Supreme Court intended to limit the reviewability of a trial court's ruling on a motion *in limine* regarding uncharged misconduct. The court indicated that "[i]n any event, court-martial practice need not follow every aspect of Federal criminal practice." [78]

More recently, in *United States v. Chambers* [79] the court reviewed a defense motion *in limine* in a rape case to exclude the expected testimony of a witness who had been the victim of a rape charge on which the accused had been acquitted at a prior court-martial. Again, because of the trial judge's adverse ruling (albeit only partially adverse), the accused elected not to testify at his court-martial. [80] The Court of Military Appeals indicated in a footnote [81] that, on the facts of *Chambers*, it need not determine the continued validity of *Cofield*. It appears that the Court of Military Appeals is waiting for the right case to come along so that it can review the issue of whether an accused must testify to preserve a motion *in limine* in those cases where the motion concerns a prior conviction to be used for impeachment. Until the court clarifies this issue, defense counsel would be well-advised, when confronted with an adverse ruling on a motion *in limine*, to indicate on the record that they are specifically relying on *Cofield*. This should preserve the issue for appeal, even if the accused does not testify. MAJ Holland.

Legal Assistance Items

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

Family Law Note

Former Spouses' Act Update

While there have not been any truly startling developments recently in the treatment of military retired pay, a few decisions are worth reviewing. For example, the *Andrews v. Andrews* [82] case afforded the Massachusetts Appeals Court an opportunity to confirm what had long been suspected; military retired pay is divisible in the Commonwealth. The Massachusetts legislature had given courts very broad power to divide property upon divorce [83].

Ironically, the *Andrews* trial court did not subject the husband's military retired pay to equitable distribution; instead, it treated the pension as a stream of income and awarded the wife a share as alimony. She appealed this decision, seeking to receive "her share" as property. After reviewing the facts of the case, the appellate court upheld the trial judge's decision concerning alimony, but it also explicitly noted that the judge could have assigned a portion of the pension to the wife as property.

Nevada law has seen some turbulent times and two important decisions. In 1987 the State legislature enacted a statute that conferred broad power for courts to reopen and retroactively modify virtually *any* divorce decree that failed to divide military retired pay. [84] This short-lived provision was repealed in 1989, however. [85] Soon thereafter, the Nevada Supreme Court clarified its position concerning reopening divorce decrees to divide retired pay. In *Taylor v. Taylor* [86] the justices ruled that the doctrine of *res judicata* bars a former spouse from seeking to partition military retired pay where a "property settlement [that omits mention of this asset] becomes a judgment of the court." This is a somewhat unusual stance for a community property state to take, but courts in a few other states also have declined to allow former spouses a second chance at litigating the division of retired pay.

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[76] Luce v. United States, 469 U.S. 38 (1984).

[77] 27 M.J. 298 (C.M.A. 1988).

[78] *Id.* at 307.

[79] 29 M.J. 76 (C.M.A. 1989).

[80] *Id.* at 77.

[81] *Id.* at 77 n.4.

[82] 27 Mass. App. Ct. 759, 543 N.E.2d 31 (1989).

[83] Mass. Gen. L. ch. 208, § 34 (1987).

[84] Nevada Former Military Spouses Protection Act, Nev. Rev. Stat. § 125.161 (1987).

[85] *See* Senate Bill 11, enacted as 1989 Nev. Stat. 34, effective March 20, 1989.

[86] 775 P.2d 703 (Nev. 1989).

On the other hand, Nevada's position on vesting is not so unusual. In *Gemma v. Gemma* [87] the State supreme court ruled that pensions are community property and subject to division, whether or not they are vested at the time of the divorce. This case involves a civilian pension, but there is no basis to distinguish military retired pay from its holding.

Gemma has additional significance, as well. The State supreme court used it to announce adoption of what may be called the "California Rule" [88] regarding former spouse elections on receiving his or her share of retired pay. Thus, not only can Nevada courts divide pension benefits that a retiree actually receives, but they also can award a former spouse the right to receive monthly payments from the employee's current income when the employee continues working past the point of retirement eligibility. These monthly payments represent the former spouse's interest in the retired pay the employee would receive if he or she retired as soon as possible. In the military context, this means that a former spouse can begin receiving a share of "retired pay" upon the soldier's completion of twenty years' service, even if the soldier remains on active duty.

A 1989 decision places South Dakota squarely in the group of states that allow military retired pay to be treated as marital property. Again, this is no surprise, because several earlier decisions presaged the result. [89] In *Gibson v. Gibson*, [90] however, divisibility became a certainty. The case actually involves a pension for a member of the Air National Guard, but the court called this benefit "a military pension" and cited active duty retirement pay cases to support its conclusion of divisibility. [91] The justices expressly noted that "state courts have jurisdiction over military retirement benefits, and military pensions are not treated differently than other pensions in determining marital assets." [92]

The last case of note does not deal with military retired pay, but it announces a result that is surprising enough to bear mentioning. In *Rodak v. Rodak* [93] the Wisconsin Court of Appeals held that *all* of a pension constituted marital property and was subject to equitable distribution, including the portion that was earned *before* the marriage. The fact that a significant fraction of the civilian pension in this case is attributable to employment before the marriage may have an impact on how the retired pay should be divided, but it does not control whether all of it is divisible. The decision is based on Wisconsin's statutory scheme, which implicitly includes in the marital estate all property that the parties own at the time of divorce, except that which was acquired, either prior to or during the marriage, by gift, bequest, devise, or inheritance. [94] This case demonstrates how a review of statutory provisions may be fruitful when the parties cannot agree on how retired pay should be divided. MAJ Guilford.

Real Property Note

Relief From Liability on VA Home-Loan Guarantees

There have been a number of recent inquiries regarding possibilities for relief for veterans from recovery by the Department of Veterans Affairs (VA) on home-loan guarantees. When a veteran obtains a VA loan from a lender, the VA guarantees repayment of the loan up to $36,000.00. [95] At the time the veteran obtains the loan, VA requires that the veteran execute an agreement promising to indemnify the VA for any loss it incurs due to the guarantee. Should a loss eventually be experienced, the VA has two theories of relief. It can recover from the veteran on a direct contractual theory due to the indemnification agreement, or the VA may seek recovery from the veteran as subrogee to the lender's claim to the extent that the VA has paid the lender under the guarantee.

While a key advantage to VA loans is that they are assumable, the mere fact of an assumption does not release the veteran from further liability to the lender under the promissory note or to the VA under the guarantee. Rather, the new owner becomes a second source of payment to the lender and the VA, but the veteran also remains liable for repayment of the note. Because the veteran remains liable for repayment of the note and payment to the VA for any losses of VA under the guarantee, it is critically important that the veteran keep both the lender and the VA advised of the veteran's current address until the loan is repaid in full or a release from further liability is obtained.

The veteran may apply for and obtain a release from further liability from the VA by submitting a request for release at the time that the loan is being assumed. [96] To obtain the release, the VA will require that: 1) the veteran not be in default on the loan at the time of the

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[87] 778 P.2d 429 (Nev. 1989).

[88] *See In re* Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980). The *Luciano* court ruled that a former spouse may elect to receive an awarded share of retired pay when the employee becomes retirement eligible, whether or not the employee actually retires at that point.

[89] Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984).

[90] 437 N.W.2d 170 (S.D. 1989).

[91] *See Hautala*, 417 N.W.2d 879; *Moller*, 356 N.W.2d 909.

[92] 437 N.W.2d at ____ .

[93] 442 N.W.2d 489 (Wis. Ct. App. 1989).

[94] Wis. Stat. § 767.255 (1987).

[95] 38 U.S.C. § 1803(B) (1982).

[96] 38 U.S.C. §§ 1804(f), 1814 (1982).

application; 2) the purchaser who is to assume the loan agrees to "assume and pay" the loan; and 3) the purchaser meet VA's standards of credit worthiness. If those three tests are met, the VA may release the veteran.

With regard to the second test, the contract should specifically provide that the purchaser agrees to assume and pay the loan that is guaranteed by the VA. To avoid the doctrine of merger, the contract should also include a non-merger clause such as "the representations, covenants, and warranties contained in the agreement shall survive the execution and delivery of the deed and will not be merged therein." This clause should preserve the covenant to assume and pay the mortgage as an enforceable obligation. As a matter of practice, however, and because it may later be important to the VA, the covenant should be included in the warranty deed. Additionally, it would be a good idea to prepare a separate assumption agreement for the buyer to execute at closing.

When the VA grants a release from liability, the veteran avoids the VA-related problems that can arise from a buyer's subsequent default. Unfortunately, the veteran may face other difficulties when a buyer subsequently defaults on an assumed loan. If a foreclosure ensues and it results in a greater deficiency than the VA guaranty will pay for, in most cases the lender may still seek recovery from the veteran. This is so unless the veteran also obtained a release from the lender at the time of the loan assumption.

What if the veteran did not request a release from the VA when he or she sold the property? An application for release still may be submitted after closing, and VA may grant the relief. The more difficult question arises when the veteran did make a request at the time of the assumption and the buyer's subsequent default results in a foreclosure. Can the VA still grant a release? The answer is yes, under either of two theories. First, the veteran may apply for relief from liability under 38 U.S.C. § 1817(b). This statute permits the VA to release the veteran from liability generally when the VA would have granted a release if requested at the time of the sale. In other words, VA will apply the three-part test cited above when determining whether to grant the relief. From experience, it appears that the VA may require that the covenant to "assume and pay" the loan appear in a recorded warranty deed (though a contract with a non-merger clause or a separate assumption agreement should be equally enforceable and therefore sufficient). Additionally, practical experience teaches that the VA is more willing to grant relief if the new purchaser made all payments required on the loan for the first two years after purchasing the property from the veteran. These tests, however, do not appear in the statute.

Even if the assumption language was omitted from the contract and deed, or if the purchasers obviously were not credit worthy, or if they defaulted immediately, the veteran still may be able to obtain relief under a second theory. Congress has conferred discretionary power on the VA to release a veteran from liability under VA loan guarantees. The applicable statute provides as follows:

> With respect to any loan guaranteed, insured, or made under Chapter 37 of this title, the Administrator may waive payment of an indebtedness to the Veterans' Administration by the veteran . . . , or his spouse, following default and loss of the property, where the Administrator determines that collection of such indebtedness would be against equity and good conscience. [97]

Under what circumstances might the veteran be able to persuasively argue that collection would be against "equity and good conscience"? Perhaps the best possibility would be when the veteran was deprived of notice of the foreclosure proceedings. Two cases have so indicated.

In *United States v. Whitney* [98] a federal district court precluded the VA from recovering from the veteran the VA's loss under a VA loan guaranty. In *Whitney* the veteran had sold his home to a purchaser without obtaining a release of liability from the VA. The purchaser defaulted a few years later and the lender foreclosed. Neither the lender nor the VA provided the veteran with notice of the foreclosure as was required under New York law. *Whitney* held that the mortgage was a property interest entitled to protection of due process, which imposed a requirement under federal law to take actions reasonably calculated to notify Whitney of the foreclosure. [99] This rationale is based on cases determining that due process requires notice reasonably calculated to give notice to the party affected. [100] The court concluded:

> But in cases such as this one, where the veteran has long since transferred the property to a third party who has fallen behind in the payments, the veteran cannot be held liable under a perpetual guarantee agreement for the outcome of a foreclosure proceeding as to which he was provided no adequate notice . . . [T]he constitutional guarantee of due process of law forbids it, and justice cries out against it. [101]

Whitney was an easy case for the court, because of the absolute requirement of New York law to give notice, which neither the lender nor the VA did. The court indicated, however, that because the VA regulations did

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[97] 38 U.S.C. § 3102(b) (1982).

[98] United States v. Whitney, 602 F. Supp. 722, 732 (W.D.N.Y. 1985). *See also* United States v. Murdock, 627 F. Supp. 272 (N.D. Ind. 1986).

[99] 602 F. Supp. at 734.

[100] *See* Mennonite Board of Missions v. Richard C. Adams, 462 U.S. 791 (1983).

[101] *Whitney*, 602 F. Supp. at 735.

not express any notice requirements for the VA, federal law imposing notice requirements would apply and require reasonable efforts to provide notice. [102] Thus, the court found that where the lender had not given notice, the VA had a separate requirement under federal law to give notice. [103]

In 1987 Congress amended 38 U.S.C. § 1832 to add the following new subsection:

> Upon receiving a notice pursuant to paragraph (1) of this subsection, the Administrator shall
>
> (1) provide the veteran with information and to the extent feasible, counsel regarding-
>
> (I) alternatives to foreclosure as appropriate . . . ; and
>
> (II) what the Veterans Administration's and veteran's liabilities would be with respect to the loan in the event of foreclosure; and
>
> (2) advise the veteran regarding availability of such counseling. [104]

While it appears that no cases have addressed the effect of this amendment, it is arguable that, for foreclosure occurring after the effective date of this amendment, veterans have a statutory basis for asserting that VA had an obligation to notify them of the default and to provide counseling.

Accordingly, the veteran may be able to obtain relief on an equitable argument that the VA did not give the required notice. Lack of notice can injure the veteran by precluding him or her from exercising rights to cure the deficiency prior to a foreclosure sale and to redeem the property for the foreclosure sale price during the redemption period. Merely being notified of the foreclosure and being allowed to participate in it can also be significant, because the veteran may be able to find a buyer for the property and avoid the "fire sale" that frequently results from foreclosures.

When arguing that the VA should have given notice, the VA may respond that it could not have notified the veteran for lack of a current address. In reply to that argument, the veteran can assert that the VA's legal duty was to take measures reasonably calculated to actually give notice to the veteran. [105] Frequently the VA requires as part of the application process that the veteran complete a form that includes the name and address of the veteran's next of kin. [106] The veteran can persuasively argue that the VA requires this form in recognition of the fact that veterans are likely to move frequently and because the VA wants a more permanent address to facilitate future communications. [107] This is especially true when the veteran is still on active duty, in which case an argument could be made that the VA should have attempted to notify the veteran through military channels such as the Army worldwide locator. As noted earlier, the veteran will be in a better posture if the veteran can demonstrate that he or she had advised the VA of address changes and that the VA had a current address during the time of the foreclosure.

As a last note, when applying for relief, it is generally prudent to argue both bases for relief. While the equitable argument for relief under 38 U.S.C. § 3102(b) may seem strongest in a particular case, the VA may find it easier to grant a release under 38 U.S.C. § 1817, because it does not require the agency to admit fault. MAJ Mulliken.

Consumer Law Note

Fair Debt Collection Practices Act

Debt collectors who have little knowledge or regard for laws governing their collection efforts often contact commanding officers of debtors who are in the military. Consequently, legal assistance attorneys frequently advise these soldiers after their commanders have begun asking questions about the debts involved. What can legal assistance attorneys do to assist clients in these circumstances?

Any analysis of debt collection issues should begin with the Fair Debt Collection Practices Act (FDCPA). [108] The FDCPA allows a debt collector to contact third parties and request their help in collecting a debt in two instances only. The debtor must have consented to the contact or the debt collector must have a court order permitting such a contact. The Department of Defense (DOD) considers third parties to include commanding officers. DOD regulations [109] prohibit contact with commanding officers, absent consent or a court order. Army regulations [110] also contain the same restriction on debt collection activities.

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[102] *Id.*

[103] Except as may be required pursuant to 38 U.S.C. § 1832 (a)(4)(A), this is not to say that the VA would be required to give a separate notice when the veteran had received a notice from the lender. Even if the VA were said to have a separate and distinct requirement for notice, it is unlikely that a court would preclude the VA from collecting under the guarantee for lack of a separate VA notice. The court might find that there was no prejudice, because the veteran had received actual notice from the lender.

[104] 38 U.S.C § 1832(a)(4)(A) (Supp. V 1987).

[105] *See Mennonite Board of Missions*, 462 U.S. 791.

[106] This form is entitled Report of Home Loan Process to an Automatic Basis, though other forms may also be required and obtain an address of the next of kin.

[107] VA seems to find veterans when it wants to collect on the guarantee, and VA's success in finding the veteran for collection purposes may be persuasive in arguing that the VA could have found the veteran during the foreclosure if it had tried to.

[108] 15 U.S.C. §§ 1692 - 1692o (1982 & Supp. V. 1987).

[109] 32 C.F.R. § 43a.5(e) (1988).

[110] Army Reg. 600-15, Personnel General: Indebtedness of Military Personnel, paras. 1-7*a*, 4-4*k* (14 Mar. 1986).

The Federal Trade Commission (FTC), which has responsibility for application and interpretation of the FDCPA, applies the FDCPA in a manner consistent with DOD regulations. In a recent informal staff letter, the FTC informed an attorney that, if he was in the business of collecting debts, he could not contact an airman's commanding officer. [111] The FTC noted that the FDCPA limits contact with employers to communications necessary to enforce a specific remedy, such as attachment or garnishment. As a practical matter, most debt collectors contact someone in the debtor's chain of command to enlist the commander's help in collection efforts. The FTC staff letter recognized that the debt collector had the latter, impermissible purpose in contacting the debtor's commander. The FTC warned the debt collector that, if he contacted the commander, the contact would violate the FDCPA. The FTC also warned that the contact could be an unfair, deceptive, and abusive collection practice.

The Ninth Circuit recently held that a debt collector's letter, which threatened to begin a "complete investigation . . . concerning [the debtor's] employment and assets" unless the collector received payment within 48 hours, violated the FDCPA. [112] The court agreed with the debtor that the letter was a threat to contact the debtor's employer and was an impermissible action. The court rejected the debt collector's argument that the letter was just a warning that lawful information would be obtained from the employer. The court held that the letter actually suggested that the debt collector intended to subject the debtor to an embarrassing inquiry directed to the employer.

Legal assistance attorneys should be aggressive in responding to improper debt collector contacts with commanding officers. They should immediately notify debt collectors in writing that such contacts are in violation of the FDCPA. Attorneys should also send an information copy of the warning letter to the FTC, [113] to the state attorney general's office, and to any consumer protection office found in the local telephone directory. To protect clients who have been disadvantaged by the improper contacts, attorneys should contact the commanders involved and explain the impropriety of the debt collectors' actions. Army Regulation 600-15 prescribes the proper course of action for commanders in these situations. All commanders should have access to the regulation and understand its provisions.

A key concept that is frequently misunderstood by laymen is the difference between a *creditor* and a *debt collector*. Attorneys should verify that commanders understand that debt collectors are in the business of collecting debts for others and, unlike creditors, are subject to the restrictions of the FDCPA. Although the FDCPA does not preclude creditors from contacting third parties such as commanders, some states have consumer protection laws controlling or prohibiting these contacts. Consequently, legal assistance attorneys should also be familiar with local state law concerning debt collection.

Consumer remedies for violation of the FDCPA include civil actions for actual damages, statutory (punitive) damages of up to $1000.00, and attorneys' fees and court costs. In determining the amount of damages, courts look to the frequency, persistence, and nature of the debt collector's noncompliance as well as the extent to which the noncompliance was intentional. MAJ Pottorff.

Estate Planning Note

An Update On Living Wills

Since 1976, forty states and the District of Columbia have enacted living will statutes. [114] Several additional

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[111] Bath informal FTC staff letter (May 28, 1987).

[112] Swanson v. Southern Oregon Credit Service, 869 F.2d 1222 (9th Cir. 1988).

[113] The address is: Federal Trade Commission, Bureau of Consumer Protection, Division of Credit Practices, Washington, D.C. 20580.

[114] Alabama Natural Death Act (1981), Ala. Code §§ 22-8A to 22-10 (1984); Alaska Rights of Terminally Ill Act (1986), Alaska Stat. §§ 18.12.010 to 18.12.100 (Supp. 1986); Arizona Medical Treatment Decision Act (1985), Ariz. Rev. Stat. Ann. §§ 36-3201 to 36-3210 (1986); Arkansas Rights of the Terminally Ill of Permanently Unconscious Act (1987), Ark. Stat. Ann §§ 20-17-201 to 20-17-218 (Supp. 1987); California Natural Death Act (1976), Ca. Health & Safety Code §§ 7185 to 7195 (Supp. 1987); Colorado Medical Treatment Decision Act, Colo. Rev. Stat. §§ 15-18-101 to 15-18-113 (Supp. 1986); Connecticut Removal of Life Support Systems Act (1985), Conn. Gen. Stat. §§ 19a-570 to 19a-575 (1987); Delaware Death With Dignity Act, Del. Code Ann. tit. 16, §§ 2501 to 2509 (1983); District of Columbia Natural Death Act of 1981 (1982), D.C. Code Ann. 6-2421 to 6-2430 (Supp. 1986); Florida Life-Prolonging Procedure Act (1984), Fla. Stat. Ann. §§ 765.01 to 765.15 (1986); Georgia Living Wills Act (1984, 1986, 1987), Ga. Code Ann. §§ 31-32-1 to 31-32-12 (1985 & Supp. 1986), amended 1987 Ga. Laws 488; Hawaii Medical Treatment Decisions Act (1986), Hawaii Rev. Stat. §§ 327D-1 to 327D-27 (Supp. 1986); Idaho Natural Death Act (1977, 1986, 1988), Idaho Code §§ 39-4501 to 39-4508 (1985 & Supp. 1986); Illinois Living Will Act (1984, 1988), Ill. Ann. Stat. ch. 110 1/2 §§ 701-10 (Smith-Hurd Supp. 1988); Indiana Living Wills and Life-Prolonging Procedures Act (1985), Ind. Code Ann. §§ 16-8-11-1 to 17 (Burns Supp. 1986); Iowa Life-Sustaining Procedures Act (1985, 1987), Iowa Code Ann. §§ 144A.1 to 144A.11 (West Supp. 1986); Kansas Natural Death Act (1979), Kan. Stat. Ann. §§ 65-28,101 to 65-28,109 (1985); Louisiana Life-Sustaining Procedures Act (1984, 1985), La. Rev. Stat. Ann. §§ 40:1299.58.1 to 40:1299.58.10 (West Supp. 1987); Maine Living Wills Act (1985), Me. Rev. Stat. Ann. tit. 22, §§ 2921 to 2931 (Supp. 1986); Maryland Life Sustaining Procedures Act (1985-1986), Md. Health-General Code Ann. §§ 5-601 to 5-614 (Supp. 1986); Minnesota Adult Health Care Decisions Act (1989), Sen. Bill 28, signed into law March, 3, 1989, Mississippi Withdrawal of Life-Saving Mechanisms Act (1984), Miss. Code Ann. §§ 41-41-101 to 41-41-121 (Supp. 1986); Missouri Life Support Declarations Act (1985), Mo. Ann. Stat. §§ 459.010 to 459.055 (Vernon Supp. 1987); Montana Living Will Act (1985), Mont. Code Ann. §§ 50-9-101 to 50-9-104 (1985); Nevada Withholding or Withdrawal of Life Sustaining Procedures Act (1977), Nev. Rev. Stat. §§ 449.540 to 449.690n (1986); New Hampshire Terminal Care Document Act (1985), N.H. Rev. Stat. Ann. §§ 137-H:1 to 137-H:16 (1986); New Mexico Right To Die Act (1977, 1984), N.M. Stat. Ann. §§ 24-7 to 24-11 (1986); North Carolina Right To Natural Death Act (1977, 1979, 1981, 1983), N.C. Gen. Stat. Ann. §§ 90-320 to 90-322 (1985); Oklahoma Natural Death Act (1985), Okla. Stat. Ann. tit. 63 §§ 3101 to 3111 (West Supp. 1987); Oregon Rights With Respect To Terminal Illness Act (1977, 1983), Or. Rev. Stat. §§ 97.050 to 97.090 (1985); South Carolina Death With Dignity Act (1986, 1988), S.C. Code Ann. §§ 44-77-10 to 44-77-160 (Law. Co-op Supp. 1986); Tennessee Right to Natural Death Act (1985), Tenn. Code Ann. §§ 32-11-101 to

states are considering living will legislation, [115] and a uniform act in the area has been proposed. [116] Moreover, courts in some states have upheld the use of living wills in the absence of specific statutory authority. [117]

Although living will statutes vary from state to state, they typically provide that a competent adult may express in writing his or her wishes concerning whether life-sustaining treatment should be provided or withheld if he or she is no longer able to make treatment decisions. [118] In most states, living wills may be used only to refuse extraordinary, life-prolonging care. Moreover, living wills are effective only to refuse care after a patient has become terminally ill or is in a persistent vegetative state. [119]

Most living will statutes provide a suggested form for the declaration that, in most states, may be changed by the maker. These declarations have an unlimited duration, unless revoked, in every state except California. [120] Nevertheless, these documents should be reviewed periodically to ensure they are consistent with law in this fast developing area.

The living will statutes of eleven states [121] provide a hierarchy of surrogate decisionmakers if no living will has been executed. In addition, thirteen states [122] allow competent adults to name proxy decisionmakers in the living will. Seven states have passed durable power of attorney statutes that specifically authorize individuals to appoint agents to make health care decisions for them. [123] Clients executing durable powers of attorney for health care should consider naming an agent who is not a beneficiary under a will or an intestate heir.

An issue that has not yet been resolved is whether living wills prepared using one state's form will be honored by health care practitioners in another state. Currently, living will laws in only six states [124] address the issue and provide some recognition for living wills executed out of state. Nevertheless, this may not be a significant problem for patients being treated in Army medical treatment facilities, because Army regulations require medical officials to consider the health care desires of competent patients. [125] Living wills declarations conforming to a particular state law should be considered as evidence of a patient's desires by military health care providers and followed as long as the withdrawal of treatment is not otherwise inconsistent with Army policy.

A major source of controversy in the right to die area has been the subject of withholding or withdrawing artificial feeding from terminally ill or permanently unconscious patients. The debate in this area has been conducted not only in the courtroom, but in the state legislatures as well. Twenty-four states address the issue in some way. In thirteen states [126] the administration of medication or the performance of any medical procedure deemed necessary for the comfort and care of the patient may not be withheld or withdrawn. Courts in these states could construe the phrase "necessary to provide comfort and care" narrowly, thus allowing patients the right to forego sustenance that is not necessary for comfort.

32-11-110 (Supp. 1986); Texas Natural Death Act (1977, 1979, 1983, 1985) Tex. Rev. Civ. Stat. Ann. art. 4590h (Vernon Supp. 1987); Utah Personal Choice and Living Will Act (1985), Utah Code Ann. §§ 75-2-1101 to 75-2-1118 (Supp. 1986); Vermont Terminal Care Document Act (1982), Vt. Stat. Ann. tit. 18, §§ 5251 to 5262, and tit. 13, § 1801 (1985); Virginia Natural Death Act (1983), Va. Code §§ 54-325.8: to 54-325:13 (Supp. 1986); Washington Natural Death Act (1979), Wash. Rev. Code Ann. §§ 70.122.010 to 70.122.905 (Supp. 1987); West Virginia Natural Death Act (1984), W. Va. Code §§ 16-30-1 to 16-30-10 (1985); Wisconsin Natural Death Act (1984, 1986), Wisc. Stat. Ann. §§ 154.01 to 154.15 (West Supp. 1986); Wyoming Act (1984, 1987), Wyo. Stat. §§ 35-22-101 to 35-22-109 (Supp. 1987).

[115] Massachusetts, Michigan, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and South Dakota are all considering proposed legislation.

[116] The Uniform Rights of the Terminally Ill Act, §§ 1-18, 9B U.L.A. 609 (1987), amended 9B U.L.A. 21 (Supp. 1988).

[117] *See, e.g.*, John F. Kennedy Hosp. v. Bludworth, 452 So.2d 921 (Fla. 1984); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 64 (1982).

[118] A comprehensive article discussing the differences in state living will statutes is Gelfand, *Living Will Statutes: The First Decade*, 5 Wis. Law. Rev. 737 (1987).

[119] A recent article addressing the types of care that may be withheld in the various states and when the documents are effective to refuse care is Francis, *The Evanescence of Living Wills*, 24 Real Property, Probate, and Trust Journal 141 (1989).

[120] Handbook of Living Laws, Society for the Right to Die, at 15 (1987).

[121] Arkansas, Connecticut, Florida, Iowa, Louisiana, New Mexico, North Carolina, Oregon, Texas, Utah, and Virginia.

[122] Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Texas, Utah, Virginia, and Wyoming.

[123] Cal. Civ. Code §§ 2410 to 2444 (West Supp. 1988); Idaho Code § 39-4505 (Supp. 1988); Illinois Ann. Stat. ch. 110, §§ 801-1 to 801-12 (Smith Hurd Supp. 1988); Nev. Rev. Stat. §§ 449.800 to 449.860 (1987); R.I. Gen. Laws §§ 23-4.10-1 to 23-4.10-2 (Supp. 1988); Utah Code Ann. § 75-2-1106 (Supp. 1988); Vt. Stat. Ann. tit 14, §§ 3451 to 3467 (Supp. 1988). California and Rhode Island's statutes require the use of a specified document form. The durable power of attorney laws in Colorado, North Carolina, and Pennsylvania do not clearly specify whether an agent may be given power to refuse medical treatment.

[124] Alaska, Arkansas, Hawaii, Maine, Maryland, and Montana.

[125] Army Reg. 40-3, Medical Services: Medical, Dental, and Veterinary Care, Chap. 19 (15 Feb. 1985) [hereinafter AR 40-3]. An excellent article setting forth Army policy regarding withdrawal of life sustaining treatment is Woodruff, *Letting Life Run Its Course: Do-Not-Resuscitate Orders and Withdrawal of Life-Sustaining Treatment*, The Army Lawyer, April 1989, at 6.

[126] Arizona, Maryland, New Hampshire, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming.

Seven states [127] specifically state that provision of artificial nutrition and hydration is not a procedure that may be rejected by a patient. On the other hand, four states [128] provide that artificial feeding not needed for comfort may be withheld, and the Alaska declaration form gives individuals the option of rejecting or requesting artificial feeding and hydration.

The United States Supreme Court has agreed to hear a case that may restore some consistency to the various state approaches to this issue. [129] In the first case since *Quinlan* [130] to critically review the legal underpinnings of the right to die, the Court will consider whether Missouri can permissibly require tube feeding to be continued to a patient in a permanent vegetative state.

The lack of precision concerning artificial feeding and hydration in many of the living will statutes has led to inconsistent interpretation in the courts and a concomitant inability to accurately predict how declarations in this area will be treated. Nevertheless, legal assistance attorneys should encourage clients to include their wishes with regard to artificial feeding and hydration in their living wills.

The ultimate question for those executing living wills is whether they will be honored by health care providers. The overriding philosophy of almost all living wills statutes is that a competent patient's wishes must be followed. Under most states' laws, if a physician objects to withholding treatment, the patient must be transferred to another physician who will comply with the declaration. [131] The statutes generally contain provisions for obtaining damages or assessing penalties against a physician who improperly refuses to transfer a patient.

There are several steps attorneys can take to increase the effectiveness of their living wills. The safest, but by no means guaranteed, way to avoid enforcement problems is to use the prescribed statutory forms for clients who reside in states having living wills legislation. [132] If these forms are altered, use clear language to define what treatment is to be withheld or withdrawn and to specify exactly when this should be done.

Living wills should be signed in the presence of two witnesses who are not relatives or beneficiaries. Living wills that bear recent dates will also be likely to carry more weight with health care providers and judges. Finally, clients may also increase the authority of their documents by reviewing them with doctors and hospital officials prior to accepting care or treatment.

Attorneys should advise clients to keep their living wills with other important papers, but not in a safe deposit box. A copy of the living will should be given to members of the client's family and personal physician. Moreover, clients should discuss the contents of their living wills and general health care desires with their family and doctors and should consider choosing a third party as an agent to represent their interests in the event they are not competent at the time these important decisions will be made.

The living wills movement reflects a growing recognition of the right to privacy and freedom of choice in making health care decisions. Legal assistance attorneys will undoubtedly be called upon with increasing frequency to help clients effectively implement these rights. MAJ Ingold.

Administrative and Civil Law Practice Notes

Contracting Out — *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989).

A divided panel of the Court of Appeals for the District of Columbia Circuit has ruled that unions representing Army civilian employees lack standing to challenge the decision to contract out the employees' jobs. The suit stems from a 1987 contract award to Northrup Worldwide Aircraft Services to perform services in Fort Sill's Directorate of Logistics.

The unions sued under the Administrative Procedures Act (APA) to set aside the contracting-out decision and enjoin Northrup from beginning contract performance. Plaintiffs argued that the Army's cost comparison violated the provisions of OMB Circular A-76 and section 1223(b) of the National Defense Authorization Act of 1987. The district court found that plaintiffs lacked standing to sue under either Circular A-76 or section 1223(b). The lower court also held that an agency decision to contract out is not subject to judicial review under the APA.

On appeal, the majority noted that the APA provides standing to persons wronged by agency action "within the meaning of a *relevant statute*." The court held that, because Circular A-76 is not a statute, the circular itself cannot grant standing. The court also examined the two statutes authorizing Circular A-76. It found that neither statute gives federal employees any remedies when they lose their jobs to the private sector. Therefore, the court concluded that plaintiffs' interests are not within the

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[127] Colorado, Connecticut, Georgia, Idaho, Maine, Missouri, and Wisconsin.

[128] Alaska, Arkansas, Montana, and Tennessee.

[129] Cruzan v. Harmon, 706 S.W.2d 408 (Mo. 1989), *cert. granted*, 109 S. Ct. 3240 (1989).

[130] *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976). *Quinlan* was subsequently overruled in part in *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

[131] Thirty-three states provide some requirement for transferring the patient. The statutes differ in whether the physician must transfer or must merely make every reasonable effort to transfer the patient. For a discussion of the various approaches in this are, see Gelfand, *supra* note 118, at 768.

[132] Declaration forms that specifically comply with the state statutes, and a Living Will Declaration form offered to residents of states lacking living will legislation are available from The Society for the Right to Die, 250 West 57th Street, New York, NY 10107. This organization also publishes a Handbook of Living Wills Laws, available for $8.00. A copy of this Handbook will be forwarded to Army legal assistance offices in an upcoming TJAGSA mailout.

"zone of interests" protected by the statutes authorizing the circular.

The majority also held that section 1223(b) of the National Defense Authorization Act of 1987 does not protect plaintiffs' interests. The statute requires cost comparisons to be "realistic and fair." The legislative history of this provision reflects, however, that Congress was trying to remove perceived handicaps and biases *against private contractors* in cost comparisons. The court held that private contractors, not government employees, are the intended beneficiaries of section 1223(b). Accordingly, the court ruled that plaintiffs lacked standing to sue under section 1223(b).

The court of appeals found it unnecessary to reach the question of whether contracting-out determinations are subject to judicial review. Judge Mikva dissented, arguing that the majority read the "zone of interests" standing requirements too narrowly. The dissent also complained that the decision created "a no man's land with no [judicial] review by anybody." Judge Mikva found such a condition "bizarre."

The majority's thorough and well-reasoned opinion should provide excellent precedent to defeat future challenges to contracting-out decisions. CPT Hatch.

Federal Employees Liability Reform and Tort Compensation Act of 1988 — *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989).

On September 26, 1989, a three-judge panel of the Ninth Circuit Court of Appeals ruled that a former Army physician is not immune from suit in his individual capacity for medical malpractice occurring in a foreign country. The court held "that the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) [133] does not bar medical malpractice claims brought against military personnel serving abroad."

The defendant worked in the Army medical facility in Vicenza, Italy. The plaintiffs alleged that the doctor's negligence during the birth of the plaintiffs' son caused massive and permanent brain damage to the child. The district court held that the Physicians Immunity Act, 10 U.S.C. § 1089 (Gonzalez Act), provides the doctor with absolute immunity. The court dismissed the complaint against the doctor, substituted the United States as the defendant, and then dismissed the action under the foreign claims exception to the Federal Tort Claims Act (FTCA). [134]

Congress passed the FELRTCA while the case was pending on appeal. In the Ninth Circuit, the United States abandoned the argument that the doctor was entitled to immunity under the Gonzalez Act and, in supplemental briefs, relied upon the FELRTCA as a basis to affirm the district court's decision. [135] In rejecting the government's argument, the Ninth Circuit found that, because the foreign claims exception to the FTCA bars plaintiffs from recovering against the United States, the FELRTCA does not provide immunity to the doctor.

The Ninth Circuit's opinion threatens the protections extended to Federal workers by the FELRTCA, because the decision is not limited to cases arising overseas. Rather, the court reasoned that, where plaintiffs have no remedy under the FTCA against the United States, the FELRTCA is inapplicable. All claims that are barred against the United States by the statutory exceptions to the FTCA would, under this holding, deprive federal employees of immunity under the FELRTCA and expose them to personal liability.

The Army has urged the Department of Justice to seek further review of the Ninth Circuit's decision. MAJ Battles.

Contract Law Note

Award Fees May Be Disputed

In *Technical Support Services, Inc.* [136] the Armed Services Board of Contract Appeals asserted jurisdiction over a dispute involving an award fee under a firm fixed price award fee contract. Prior to this decision, no board of contract appeals had directly considered a dispute where entitlement to an award fee was at issue. This case is especially timely, because use of award fees in a broad range of contracts was recently authorized by DAC 88-8, 12 June 1989.

The contract in issue in *Technical Support Services* was a fixed price contract to operate a billeting office on an Air Force Base. The contract contained a special award fee provision that made the award fee contingent upon winning an Air Force contest for quality billeting services. When it became obvious that the contractor would not win the contest, the contracting officer unilaterally deobligated funds from the contract. These funds represented potential award fees for contest periods that the contractor had not won or would not win. The contractor appealed the contracting officer's unilateral action. The contractor claimed that he was deprived of the opportunity to earn the $40,000 award fee and claimed entitlement to the entire amount. The contract contained typical language stating that "any dispute over the amount of the award fee is expressly excluded from the operation of the Disputes clause of this contract. The decision of the fee determining official will be final."

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[133] Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, and 2679). The FELRTCA's purpose is to protect Federal employees from personal liability for common law torts committed within the scope of their employment.

[134] 28 U.S.C. § 2680(k) (1982).

[135] The United States altered its position based upon the Eleventh Circuit's decision in *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989), which held that neither the Gonzalez Act nor the FELRTCA provides military physicians with immunity from suit for medical malpractice occurring in foreign countries. The court's opinion in *Smith v. Marshall* reaches the same conclusion.

[136] ASBCA No. 37976, 89-2 BCA ¶ 21,861.

The Air Force asserted that the ASBCA lacked jurisdiction to review any portion of the appeal. The board rejected the Air Force's argument, finding that, although the amount of the award fee was not subject to the disputes clause, the availability of the award fee was. The board then considered the contractor's claim on the merits and rejected it as unsupported.

The board's holding, that availability of an award fee is subject to the disputes clause, has particular importance when changing or terminating award fee contracts. When a change order is issued, the contractor is entitled to an equitable adjustment in the contract price. Normally, an equitable adjustment is equal to the cost of performing the change plus a reasonable profit on those costs. [137] If the contract contains an award fee provision, how does one determine what profit is reasonable? Similarly, when an award fee contract is terminated for convenience, how should the unawarded fee be adjusted in the termination settlement?

In a cost plus award fee contract, the fee normally consists of a fixed base fee and a pool for award fees. Periodically, or at specified milestones, the fee determining official will award some percentage of the available award fee to the contractor based on performance. The unearned award fee will be either removed from the contract or added to an unearned award fee pool for a subsequent award fee determination.

When a cost plus award fee contract is changed, the size of the award fee pool is normally increased or decreased. There is no regulatory guidance on how to calculate the adjustment to the award fee pool or how to adjust previously awarded fee amounts. Normally, the adjustment is mutually agreed to through negotiations. Similarly, there is no regulatory guidance on how to adjust the award fee when a cost plus award fee contract is terminated for convenience. Some locally drafted award fee provisions spell out a mechanism. Where no agreed method exists, however, the size of the award fee must be negotiated. Following the logic in *Technical Support Services*, the size of an adjustment to the award fee pool is disputable if the parties fail to agree on an adjustment. Nevertheless, the size of the award to be made from the pool is not disputable.

How is an award fee pool adjusted when a contract is changed or terminated for convenience? For changed work, one approach is to adjust the fee pool by a percentage of the cost of the change (assuming the contract is not in a loss position). The percentage used should approximate the relationship of the award fee pool to the estimated contract cost at completion. For example, an award fee pool equaling ten percent of the estimated cost at completion should be increased by ten percent of the costs of performing a change. The increase to the pool should then be distributed to the award fee periods in which the changed work is performed.

Another approach is to examine whether the change affected the effort the award fee is designed to promote. For example, in the *Technical Support Services* contract, changes to the specification should not necessarily cause an increase in the award fee, because the fee was a reward for winning the contest. In fact, changes that make the contest easier to win by providing a higher quality of services might logically result in a decreased award fee. This second approach is less mechanical and relies more on the judgment and discretion of the fee determining official. Consequently, the second method is more likely to be disputed.

For convenience terminations, an approach similar to the first method is possible. The contracting officer might reduce the award fee pool to an amount that is approximately the same percentage of actual costs at the time of termination as the original profit was in relation to the estimated costs at completion. Then, a final award fee determination could be made for the unawarded portion of the fee pool.

The lesson to be learned from *Technical Support Services* is that the actual amount of fee awarded may not be subject to the disputes process, but the availability and size of the award fee pool is. Consequently, regardless of the method adopted to adjust the award fee pool, contracting officers and their attorneys should be ready to defend the selected methods in a contract dispute. MAJ Jones.

[137] Pacific Architects and Engineers, Inc. v. United States, 203 Ct. Cl. 499, 491 F.2d 734 (1974).

Claims Report

United States Army Claims Service

Claims Notes

Tort Claims Note

Application of Feres Doctrine to Soldiers on Temporary Disability Retired List (TDRL)

In *Cortez v. United States* [1] the Court of Appeals for the Fifth Circuit ruled that a claim under the Federal Tort Claims Act (FTCA) based on the suicide death of a soldier on the TDRL was not barred by the incident-to-service exclusion contained in *Feres v. United States* [2] . In that case, the deceased had jumped from the eighth floor of an Army Medical Center. The court of appeals overruled the district court dismissal of the action under *Feres* by stating that status on the TDRL is not "active duty" and that "Cortez's death was not caused by a service-connected injury." This decision is contrary to other holdings that members of the Armed Forces on the TDRL are not entitled to sue. [3]

The court of appeals stated that the recent Supreme Court decision in *Johnson v. United States* [4] did not invalidate "the *Brooks/Brown/Parker/Adams* line of cases" in which *Feres* was not applied. It is difficult to detect the common thread perceived by the court of appeals in those decisions, as three of the four soldiers concerned were on leave or pass or off post at the time of their injuries. *Parker v. United States* [5] involved an on-post accident that occurred while the injured soldier was on a four day pass. The court distinguished between leave and pass, ignoring the fact that, in *Feres*, the plaintiff was on leave and getting ready to depart post when his barracks burned down. *Adams v. United States* [6] involved a soldier on leave at home while awaiting the outcome of an appeal of a bad-conduct discharge and who was treated at a Public Health Service facility. *Brooks v. United States* [7] involved a soldier who was not on leave but who was off post. To the contrary, a number of other decisions have applied *Feres* while the member was on leave. [8] Moreover, the Fifth Circuit itself limited *Parker* to "furlough" situations in *Warren v. United States* [9]. Finally, *Brown v. United States* [10] involved a veteran being treated by a VA hospital and bears little resemblance to *Parker*, *Brooks*, and *Adams*. Brown was a civilian being treated for an active duty injury.

A recent effort was made to apply *Feres* to a veteran, retired for disability, who was arrested while attempting to get his military ID card renewed. The claim was that he was subject to recall to active duty and was still receiving military benefits. The Ninth Circuit ruled that there was no basis to apply *Feres*. [11] In other cases the fact that the member is not on active duty did not preclude the application of *Feres*. Inactive reservists being treated for active duty injuries were barred in *Blass v. United States* [12] and *Misko v. United States*. [13] Finally, a member on a delayed entry program was excluded in *Mau v. United States*. [14]

In *Kendrick* the Fourth Circuit attempted to distinguish *Cortez* on the basis that Cortez's suicide was an isolated act, independent of any service-connected injury. Cortez had been placed on the TDRL because of severe mental disorders and was hospitalized several times thereafter for psychotic episodes and suicide attempts. After he cut his wrists, a military ID was found on him. Cortez was taken to an Army hospital, where he jumped to his death. In *Kendrick* the plaintiff had been receiving Dilantin treatment for a seizure associated with

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[1] 854 F.2d 723 (5th Cir. 1988).

[2] 340 U.S. 135 (1950).

[3] Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989); Madson v. United States, 841 F.2d 1011 (10th Cir. 1989); Ricks v. United States, 842 F.2d 300 (11th Cir. 1988); Anderson v. United States, 575 F. Supp. 470 (E.D. Mo. 1983); Hopkins v. United States, Civ. No. CV-82-1978 (E.D.N.Y. 1987).

[4] 107 S. Ct. 2063 (1987) (Coast Guard pilot on a search and rescue mission).

[5] 611 F.2d 1007 (5th Cir. 1980).

[6] 728 F.2d 736 (5th Cir. 1984).

[7] 337 U.S. 49 (1949) (off duty motor vehicle accident).

[8] Lampitt v. United States, 585 F. Supp. 151 (E.D. Mo. 1984) (convalescent leave); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (regular leave); Eisenhart v. United States, Civ. No. 81-738 51 (E.D. Mich. 1982) (regular leave); Uptegreve v. United States, 600 F.2d 1248 (9th Cir. 1979) (regular leave); Herreman v. United States, 332 F. Supp. 763 (E.D. Wis. 1971) (regular leave); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (excess leave while awaiting results of court-martial).

[9] 837 F.2d 950 (5th Cir. 1983).

[10] 348 U.S. 110 (1954).

[11] McGowan v. Scoggins et al., Civ. No. CV-88-0216LKK (9th Cir. 1989).

[12] 545 F. Supp. 102 (N.D.N.Y. 1982).

[13] 453 F. Supp. 513 (D.D.C. 1978).

[14] 733 F.2d 174 (1st Cir. 1984).

a vehicle accident that occurred prior to being placed on the TDRL. His claim was based on overdosing with Dilantin, alleging that its use continued after placement on the TDRL. The Fourth Circuit stressed that the important consideration is when and under what circumstances the negligent act occurs, not when the injury occurs or when the claim becomes actionable. The court supported this analysis by citing to nuclear radiation cases. [15]

Investigation of potential *Feres* cases must be made at the time of occurrence to determine the exact status of the member, the degree of control by the military, and when and under what circumstances the negligent act occurred. While the *Feres* doctrine is obviously as important now as it was at its inception, there is no automatic application under any circumstances (e.g., on post versus off post), and the case law variations demand greater investigation than previously required. Mr. Rouse.

Personnel Claims Notes

Inland Movement of POVs Within Europe

The Commander, U.S. Army Claims Service, Europe (USACSEUR), has asked that we publicize information regarding the inland movement of POVs (IMP) program within Europe. The following important information is of interest to all CONUS claims personnel, who are reminded of their responsibilities under paragraphs 11-33 and 11-35, Army Regulation 27-20. Point of contact for additional information is Mr. Peluso, USACSEUR, Mannheim, at AV 314-380-6540, or ETS 380-6540.

The IMP program was implemented on 15 January 1988. The outbound portion of the program consists of moving POVs by motor transport from locations throughout Germany to the port of Bremerhaven for personnel transferring on a permanent change of station to CONUS. There are approximately 22,000 outbound shipments annually; of these, eighty-eight percent are POVs owned by DA personnel.

USACSEUR has responsibility for asserting demands against motor carriers for loss or damage attributable to the IMP. Of the 1,403 demands settled or outstanding against the IMP contractor through 31 July 1989, only 4 are for outbound shipments; these all involved POVs totally wrecked before reaching Bremerhaven. For POVs actually shipped to CONUS, no recovery actions have been received from any field claims office.

As an ancillary mission to the IMP program, USACSEUR has now assumed responsibility for asserting demands for POV damages caused by stevedore or longshoremen contractors in Bremerhaven. USACSEUR's review is limited to the thirty-five of the forty-six USAREUR claims offices affected by the IMP program. The remaining eleven offices are required to make their own independent determination of stevedore/longshoremen liability IAW AR 27-20, paragraph 11-33. Though USACSEUR is only at the threshold stage in this mission, approximately 200 files have been identified reflecting potential stevedore/longshoremen liability. USACSEUR has contacted the Executive Assistant, MTMC — Bremerhaven Terminal, and the Contracting Officer, Regional Contracting Office — Bremerhaven, and both advise that no claims had ever been received previously from a field claims office.

CONUS staff judge advocates must alert their claims personnel to these claims and to the need to comply with AR 27-20, paragraphs 11-33 and 11-35. It is important that when their claims personnel prepare these POV claims files that they accomplish the following items:

a. The #1 copy of the DD Form 788 is obtained, listing all damage inspections during the transit claim.

b. The DD Form 1844 has all damages claimed listed on a line-by-line basis and that claims payments are itemized for each damage claimed.

c. Claims personnel perform a line-by-line comparison from the DD Form 1844 to the DD Form 788 to determine which parties in the transit chain bear liability for each damage claimed.

d. Demands be prepared for a sum certain and forwarded to USACSEUR if liability involving an IMP contractor or a stevedore/longshoremen contractor in Bremerhaven are identified IAW AR 27-20, paragraphs 11-33 and 11-35. COL Gravelle.

Mobile Home Claims

"Mobile home claim" is another way to say "adjudicator's nightmare." Specific guidance on how to handle these claims will be provided in the new DA Pamphlet 27-162, Chapter 2, paragraph 2-42.

No Chapter 11 claim is compensable if it results from the negligence or wrongful act of the claimant or any of his/her agents or employees. This applies to mobile homes. More specifically, it applies to do-it-yourself (DITY) mobile home moves. When a member hires the carrier to move his or her mobile home, the carrier is an employee of the claimant. Therefore, damage resulting from negligence or mishandling by the carrier or from claimant's failure to adequately prepare the mobile home for shipment is not compensable. A claim for structural defects is also not compensable. In short, DITY mobile home claims are compensable only in the most extraordinary circumstances. Ms. Zink.

Depositing a Personnel Claim in an Overseas APO Mailbox Does Not Constitute Filing

USARCS recently held that depositing a claim in an APO mailbox that is located on an Army installation in a foreign country does not constitute filing the claim and does not toll the statute of limitations. An APO mailbox or facility is considered to be the functional equivalent of a U.S. Postal Service facility. Because claims deposited with the U.S. Postal Service are not considered as timely filed by that action, the same rule applies for claims deposited with an APO. Mr. Ganton.

[15] *See, e.g.*, Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983).

Sales Tax Not Payable if Actual Replacement Cost is Less Than Estimate

On reconsideration, a claimant requested reimbursement of sales tax. Paragraph 11-14, AR 27-20, provides that sales tax is payable if a claimant actually replaces or repairs an item and is obligated to pay the tax. It is not payable if the claimant has merely presented a replacement or repair estimate with the claim.

The claimant had experienced the loss of recently-purchased stereo items from his household goods shipment. He substantiated ownership of the lost equipment and presented a valid estimate in the amount of $2,231 for a turntable, amplifier, equalizer and speakers of the same quality as the missing items. The claims office considered the estimate accurate and appropriate for the time and place of loss and approved the claim.

Following approval of the claim, the claimant purchased a different brand of stereo equipment from a different vendor for $1,159, which included $93 in tax. He demanded reimbursement of the tax, quoting the provisions of Paragraph 11-14. USARCS denied further payment, noting that although the claimant had actually incurred the sales tax, the total cost of replacing the items was far less than he had been reimbursed. Whether due to a "sale" price or purchase of items of lesser quality, the claimant had incurred no out-of-pocket expenses in replacing the items due to the sales tax. As a gratuitous payment statute, 31 U.S.C. § 3721 should not be used to provide a windfall to a claimant. Mr. Ganton.

Management Notes

Electronic Payment Procedures

Over the next several years, a new automated financial system, STANFINS Redesign 1 (SRD-1), will be deployed to the field. Among many new features it provides a capability to pay and pre-certify claims on a computer terminal located in the claims office. Once payment data is entered and certified, a check will be issued and dispatched from the servicing finance activity automatically, normally within one day of certification. Several CONUS installations are now using this new system and have found that it results in faster payments and fewer errors in the claims account system.

Under SRD-1 no paper voucher for a payment need be prepared. Nevertheless, governing regulations require that backup for the payment be furnished to the finance office. To satisfy this requirement, finance officials have agreed to accept a printout of payment data from the field office claims data management programs. A simple print screen of the claim record after the payment transaction data has been entered will suffice for this requirement. A revision of the software has been written that prints out a formatted payment report data sheet with the claims officer's name and other pertinent data included. (See sample below). Offices that are currently using SRD-1 for payments or that will be soon, should notify JACS-BIMO (AV 923-7009) so that they can be provided a copy of the new software. LTC Gibb.

TO: F&AO DSSN 5062 October 11, 1989
FROM: Claims Office Office Code: C03

UNITED STATES ARMY CLAIMS SERVICE,
FT MEADE, MD

Date Claim Filed: September 11, 1989

Claim Number: 89-C03-0086
Amount Claimed: $2,284.99

Payment of claim is approved for amount and payee listed below.

Payee: DOE, JOHN P.

SSN: 123-42-3433

Address: 1234 SHADY LANE, MIDDLETOWN OHIO

Payment Amount: $455.00 Type Payment: PF

Date Payment Recorded in Claim Record: 10/11/89

ROBERT A. FREZZA
Claims Officer/Attorney

Policy Memorandums

On 10 October 1989, Major General Suter signed Policy Memorandum 89-5, initiating the Model Claims Office Program.

The standards in this program encompass all aspects of claims office operations and are more extensive than guidance provided in earlier TJAG policy letters and memoranda dealing with specific claims subjects.

Staff and command judge advocates should now refer to Policy Memorandum 89-5 and its enclosure for guidance on claims office operations in lieu of Policy Letter 86-10 (Tort Claims Management), Policy Letter 87-2 (Army Personnel Claims Program), and Policy Memorandum 89-1 (Army Affirmative Claims Program). COL Lane.

Personnel, Plans, and Training Office Notes

Personnel, Plans, and Training Office, OTJAG

Army Management Staff College

As part of the continuing effort to enhance the career opportunities for civilian attorneys, The Judge Advocate General has sought appropriate Army training for civilian attorneys. As a result of this effort, and based on the recommendation of a PERSCOM Selection Board, the Commandant, Army Management Staff College (AMSC), has selected the following civilian attorney for AMSC Class #90-1 (15 January - 20 April 1990):

Ms. Iris M. Croft (GS-12) - OSJA, Fort Stewart

The following civilian attorneys recently graduated AMSC Class #89-2:

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

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

The Army Management Staff College (AMSC) is a fourteen-week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to the military intermediate service school level. AMSC has moved to Fort Belvoir, Virginia. While classroom space is being renovated, however, AMSC instruction will occur at the Radisson Mark Plaza Hotel, Alexandria, VA. In addition, USAREUR provides the same course in Germany.

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

Class	*Dates of Instruction*	*Perscom Application Deadline*
#90-2	30 Apr-3 Aug 1990	15 Jan 1990
#90-3	10 Sep-14 Dec 1990	31 May 1990

Please note that the listed deadline is the date the application must reach PERSCOM. MACOMs and local civilian personnel offices may establish earlier deadlines for applications to be processed in their commands. USAREUR attorneys are encouraged to apply for attendance at the USAREUR AMSC course.

In addition to the normal application process, attorneys should provide one copy of their application, with an attached endorsement by their supervising staff judge advocate or command legal counsel, to the following address:

HQDA (DAJA-PT)

ATTN: Mr. Buckner

Pentagon Room 2E443

Washington, DC 20310-2206

JAGC Selection Boards

The fiscal year 1990 JAGC selection boards are scheduled as follows:

Board	*Dates*
Command & Staff College Advisory	TBD
Conditional Vol. Indef./Vol. Indef.	15 Apr 90
Graduate Course	TBD Dec 89
Colonel and Captain	30 Jan-2 Feb 90
Major	6-9 Mar 90
Senior Service College and Captain	21-22 Aug 90

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

USAR Tenured JAGC Positions

There are ninety-four tenured JAGC positions in USAR troop program units. These positions include the military law center commander and the senior staff judge advocate positions in ARCOMs and GOCOMs. The Judge Advocate General's approval is required for assignment to any of these positions (AR 140-10, Section VI).

The procedure for filling these positions requires that the unit take action at least nine months prior to the end of the incumbent's tenure. The first step should be to advertise the impending vacancy in unit bulletins or command newspapers and to ensure that qualified IRR members in the area know that they may apply for the position. A list of eligible officers can also be obtained by initiating a Request for Unit Vacancy Fill (DA Form 4935-R). The DA Form 4935-R can be sent to the MUSARC, adjacent MUSARCs, and ARPERCEN (ATTN: DARP-MOB-C). The unit should nominate at least three candidates. The nomination packets should contain a list of all officers considered and a description of the efforts to publicize the vacancy. The following information must be submitted for each officer nominated:

a. Personal data: Full name (including preferred name

if other than first name), grade, date of rank, mandatory release date, age, address, telephone number (business and home), and full length official photograph.

b. Military experience: Chronological list of reserve and active duty assignments and copies of officer evaluation reports for the past five years (including senior rater profile).

c. Awards and decorations: Copies of all awards, decorations, and significant letters of commendation.

d. Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded.

e. Civilian experience: Chronological list of employment. Nature, scope, and extent of responsibilities in current position.

Nominations will be forwarded through the chain of command and command boards, as appropriate, to arrive at TJAGSA (ATTN: JAGS-GRA, Charlottesville, VA 22903-1781) at least six months before the tenure expires. Tenure for these positions is three years and officers selected are expected to serve the full three years. No extensions of the tenure period will be granted unless no other qualified officers are available or unless there will be an adverse impact on the mission of the unit. Officers in the appropriate grade for the assignment have priority. An O-5 will not be selected for an O-6 position if a qualified O-6 is available. Officers will usually have only one tour in the same tenured position. Continual rotation is not permitted, except when no other qualified officers are available.

Senior Reserve Judge Advocate Positions

U.S. Army Reserve Commands

First Army

ARCOM	SJA	Vacancy Due
77 Fort Totten, NY		
79 Willow Grove, PA		
94 Hanscom AFB, PA	LTC(P) G. D. D'Avolio	Mar 92
97 Fort Meade, MD	COL R. G. Mahony	Nov 92
99 Oakdale, PA	COL A. B. Bowden	Sep 90

Second Army

ARCOM	SJA	Vacancy Due
81 East Point, GA	COL K. A. Nagle	Apr 90
120 Fort Jackson, SC	COL J. M. Cureton	(Ext) May 90
121 Birmingham, AL	LTC C. W. Gorham	Dec 91
125 Nashville, TN	COL J. B. Brown	Feb 91

Fourth Army

ARCOM	SJA	Vacancy Due
83 Columbus, OH	COL D. A. Schulze	Sep 90
86 Forest Park, IL	COL M. R. Kos	Feb 91
88 Fort Snelling, MN	COL R. M. Frazee	Sep 91
123 Indianapolis, IN	LTC W. S. Gardiner	Sep 91

Fifth Army

ARCOM	SJA	Vacancy Due
89 Wichita, KS	COL D. J. Duffy	Apr 90
90 San Antonio, TX	COL J. D. Farris	Mar 92
102 St. Louis, MO	COL C. W. McElwee	Jul 91
122 Little Rock, AR	LTC J. S. Arthurs	May 92

Sixth Army

ARCOM	SJA	Vacancy Due
63 Los Angeles, CA	COL A. C. Fork	(Ext Jul 90)
96 Fort Douglas, UT	COL M. J. Pezely	Sep 92
124 Fort Lawton, WA	COL J. L. Woodside	Mar 90

Military Law Centers

First Army

MLC	Commander	Vacancy Due
3 Boston, MA	COL P. L. Cummings	Nov 91
4 Bronx, NY	COL J. P. Cullen	Sep 92
10 Washington, DC	COL W. P. George	Sep 92
42 Pittsburgh, PA	COL A. B. Bowden	Sep 92
153 Willow Grove, PA	COL D. E. Prewitt	Nov 92

Second Army

MLC	Commander	Vacancy Due
11 Jackson, MS	COL J. F. Wood	Aug 91
12 Columbia, SC	COL O. E. Powell, Jr.	(Ext) Sep 90
139 Louisville, KY	COL H. L. Keesee	Jun 91
174 Miami, FL	LTC J. W. Hart	Jul 92
213 Chamblee, GA	COL K. A. Griffiths	Feb 90

Fourth Army

MLC	Commander	Vacancy Due
7 Chicago, IL	COL G. L. Vanderhoof	Feb 91
9 Columbus, OH	LTC M. C. Matuska	May 92
214 Ft Snelling, MN	COL J. M. Mahoney	(MRD) Dec 90

Fifth Army

MLC	Commander	Vacancy Due
1 San Antonio, TX	COL G. Brown	May 92
2 New Orleans, LA	COL M. J. Thibodeaux	Jul 92
8 Independence, MO	COL D. E. Johnson	Nov 90
113 Wichita, KS	COL W. Dillon, Jr.	Feb 92
114 Dallas, TX	LTC G. M. Cook	Sep 91

Sixth Army

MLC	Commander	Vacancy Due
5 Presidio of SF, CA	COL J. A. Lassart	Jul 91
6 Seattle, WA	COL B. G. Porter	Aug 92
78 Los Alamitos, CA	COL D. F. McIlroy	May 90
87 Ft Douglas, UT	LTC R. H. Nixon	Sep 92

Training Divisions

First Army

TNG DIV	SJA	Vacancy Due
76 West Hartford, CT	MAJ H. R. Cummings	Sep 90
78 Edison, NJ	LTC J. P. Halvorsen	Feb 90
80 Richmond, VA	LTC C. T. Mustian	Sep 91
98 Rochester, NY	LTC J. W. Dorn	May 90

Second Army

TNG DIV	SJA	Vacancy Due
100 Louisville, KY	LTC L. R. Timmons	Mar 90
108 Charlotte, NC	LTC A. H. Scales	Dec 90

Fourth Army

TNG DIV	SJA	Vacancy Due
70 Livonia, MI	LTC P. L. Poole	Oct 91
84 Milwaukee, WI	LTC T. G. Van de Grift	Nov 91
85 Chicago, IL	LTC T. J. Benshoof	Aug 90

Fifth Army

TNG DIV	SJA	Vacancy Due
95 Oklahoma City, OK	LTC G. A. Glass	Oct 92

Sixth Army

TNG DIV	SJA	Vacancy Due
91 Sausalito, CA	LTC J. M. Reidenbach	Nov 92
104 Vancouver Barracks, WA	LTC D. C. Mitchell	Oct 89

First Army

GOCOMS	SJA	Vacancy Due
8 MED BDE Brooklyn, NY	LTC J. E. Brown	Nov 92
157 INF BDE (SEP) Horsham, PA	LTC E. D. Barry	Jul 92
187 INF BDE (SEP) Ft. Devens, MA	MAJ F. H. Ayer	Position Closed
220 MP BDE Gaithersburg, MD	MAJ R. A. Mosakowski	Aug 92
300 SPT GP (AREA) Ft. Lee, VA	LTC F. X. Gindhart	Feb 90
310 TAACOM Ft. Belvoir, VA	COL B. Miller	Oct 91
352 CA CMD Riverdale, MD	LTC R. E Geyer	Jul 91
353 CA CMD Bronx, NY	LTC C. T. Grasso	Dec 92
411 ENGR BDE Brooklyn, NY	MAJ J. J. Greene	Apr 89
800 MP BDE Hempstead, NY	MAJ A. P. Moncayo	Apr 90
804 HOSP CTR Bedford, MA	MAJ G. T. O'Brien	Aug 92

Second Army

GOCOMS	SJA	Vacancy Due
3 TRANS BDE Anniston, AL	LTC L. K. Mason	Aug 90
87 MAN AREA CMD Birmingham, AL	MAJ M. E. Sparkman	Oct 90
143 TRANS CMD Orlando, FL	COL B. C. Starling	Jul 90
332 MED BDE Nashville, TN	LTC T. Futrell	Nov 90
335 SIG CMD East Point, GA	COL O. D. Peters, Jr.	May 92
412 ENGR BDE Vicksburg, MS	COL W. M. Bost, Jr.	Jul 90
415 CHEM BDE Greenville, SC	LTC D. K. Warner	
818 HOSP CTR Forest Park, GA	MAJ K. Byers	Feb 92
7581 USAG San Juan, PR	MAJ C. E. Fitzwilliam	(Acting)

Fourth Army

GOCOMS	SJA	Vacancy Due
21 SPT CMD Indianapolis, IN	MAJ C. H. Criss	Apr 91
30 HOSP CTR Ft Sheridan, IL	MAJ J. F. Locallo, Jr.	Nov 88
103 COSCOM Des Moines, IA	LTC T. S. Reavely	Jun 91
300 MP CMD Inkster, MI	LTC P. A. Kirchner	Aug 91
416 ENGR CMD (TDA AUG) Chicago, IL	COL T. A. Morris	Nov 92
416 ENGR CMD Chicago, IL	COL R. G. Bernoski	Apr 90
425 TRANS BDE Ft Sheridan, IL	LTC T. J. Hyland	Jun 92

Fifth Army

GOCOMS	SJA	Vacancy Due
75 MAN AREA CMD Houston, TX	LTC W. H. Sullivan	Aug 92
156 SPT GP Albuquerque, NM	MAJ L. Hill	Acting
321 CA GP San Antonio, TX	LTC R. Kunctz	Jul 91
326 SPT GP Kansas City, KS	LTC M. B. Potter, Jr.	Sep 90
377 TAACOM New Orleans, LA	COL K. F. Sills	Sep 90
420 ENGR BDE Bryan, TX	MAJ T. Podbielski	Aug 89
807 MED BDE Seagoville, TX	MAJ A. C. Olivo	Sep 92

Sixth Army

GOCOMS	SJA	Vacancy Due
2 HOSP CTR Novato, CA	MAJ B. W. Reese	Jul 89
221 MP BDE San Jose, CA	LTC J. H. Hancock	Apr 89
311 COSCOM Los Angeles, CA	LTC G. J. Gliaudys	May 92
319 TRANS BDE Oakland, CA	LTC M. J. Connich	Oct 89
351 CA CMD Mountain View, CA	LTC G. J. LaFave	Apr 90
6211 USAG, Presidio S. F., CA	LTC W. E. Saul	Aug 89

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).

Each year the School offers more than 30 specialized continuing legal education courses. Based on the projected needs of major commands and federal agencies, TJAGSA allocates a number of quotas for each class to various organizations. At least five weeks prior to the start of each course, MACOM and agency quota managers must submit in writing the names and mailing addresses of students who are scheduled to attend. In the event an organization requests additional quotas for a particular course, a waiting list for each course is maintained. Five weeks prior to the start of each course, spaces not filled by the MACOMs or agencies will be reallocated to organizations on the waiting list.

Individuals who show up for courses without quotas will be returned to their home stations.

2. TJAGSA CLE Course Schedule

1990

January 8-12: 1990 Government Contract Law Symposium (5F-F11).

January 22-March 30: 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.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

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

February 1990

1-2: PLI, Environmental Regulation and Business Transactions, San Francisco, CA.

1-3: ALIABA, Qualified Plans, PC, and Welfare Benefits, Scottsdale, AZ.

1-3: PLI, Workshop on Direct and Cross Examination, New York, NY.

2-3: ABA, Consumer Financial Services in the 90's, Washington, DC.

3-9: NITA, Mid-Atlantic Trial Advocacy Program, Philadelphia, PA.

4-9: NJC, Special Court - Basic Evidence, Reno, NV.

4-9: NJC, Alcohol and Drugs and the Courts, Reno, NV.

4-9: NJC, The Court Automation Partnership - NEW, Reno, NV.

5-6: PLI, Institute on International Tax, New York, NY.

5-9: GCP, Cost Reimbursement Contracting, Washington, DC.

6-9: ESI, Competitive Proposals Contracting, Sunnyvale, CA.

8-9: PLI, Cable Television Law, New York, NY.

8-9: ALIABA, Immigration Law, Los Angeles, CA.

8-9: UMLC, Medical Institute for Attorneys, Miami, FL.

8-9: PLI, Preparation and Trial of a Toxic Tort Case, New York, NY.

11-16: NJC, Domestic Violence - NEW, Reno, NV.

11-16: NJC, Drugs & the Courts - NEW, Reno, NV.

11-16: NJC, Traffic Court Proceedings, Reno, NV.

12-14: SLF, Employment Discrimination Short Course, Dallas, TX.

13-16, ESI, Contract Negotiation, Washington, DC.

14-16, PLI, Advanced Antitrust Workshop, Key Biscayne, FL.

14-16: NITA, Deposition Skills Program, Chapel Hill, NC.

16: NKU, Civil Rights Section 1983 Actions, Covington, KY.

16-21: NITA, Advanced Trial Advocacy Program, Hempstead, NY.

18-22: NCDA, Prosecuting Drug Cases, Boston, MA.

18-24: NITA, Midwest Regional Trial Advocacy Program, Chicago, IL.

22-23: PLI, Franchising Business Strategies and Compliance, New York, NY.

22-23: ALIABA, New Dimensions in Securities Litigation, Washington, DC.

22-23: PLI, Preparation and Trial of a Toxic Tort Case, San Francisco, CA.

24-30: PLI, Patent Bar Review Course, New York, NY.

25-29: NCDA, Evidence for Prosecutors, San Francisco, CA.

25-30: NJC, Drinking Driver Cases in High Volume Court, Orlando, FL.

25-30: NJC, Current Issues in Civil Litigation, Orlando, FL.

25-April 6: NJC, Administrative Law - Fair Hearing, Reno, NV.

26-30: GCP, Construction Contracting, Washington, DC.

27-30: ABA, Medical Malpractice, Salt Lake City, UT.

28-30: ALIABA, Pension, Profit-Sharing, and Other Deferred Compensation, San Francisco, CA.

28-30: ALIABA, Legal Problems of Museum Administration, Houston, TX.

30-April 1: NITA, Advocacy Teacher Training Session, Cambridge, MA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1989 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
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.

Contract Law

*AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
*AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86- 1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
*AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
*AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
*AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 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 B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B100212	Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
*AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).

Reserve Affairs

*AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 27-1	Judge Advocate Legal Service	15 Sep 89
AR 70-25	Use of Volunteers as Subjects of Research	25 Sep 89
AR 570-4	Manpower Management	25 Sep 89
AR 600-8	Military Personnel Management	1 Oct 89
AR 750-43	Army Test, Measurement, and Diagnostic Equipment Program	29 Sep 89
AR 930-1	Army Use of USO Services	25 Sep 89
CIR 360-89-1	Annual Meeting of National Service-Oriented Organizations	14 Sep 89
CIR 608-89-1	The Army Family Action Plan VI	18 Sep 89
Pam 700-55	Instructions for Preparing the Integrated Logistic Support Plan	29 Sep 89
UPDATE 14	All Ranks Personnel	18 Sep 89

The Army Lawyer—Indexes for 1989

This edition contains a subject, title, and author index of all articles appearing in The Army Lawyer from January 1989 through December 1989. This index includes lead articles as well as USALSA and Claims Report articles. In addition, there are separate indexes for Policy Letters and Messages from The Judge Advocate General, Opinions of The Judge Advocate General, and Legal Assistance Items. References to The Army Lawyer are by month, year, and page. The December 1988 issue of The Army Lawyer contains a ten year cumulative index of all articles appearing in The Army Lawyer from November 1978 through December 1988.

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ALLS Purchase of Legal Research Tools for SJA Libraries, TJAG Memorandum, 8 Mar. 1989, May 1989, at 3.

Army Affirmative Claims Program — Policy Memorandum 89-1, JACS-PCA, 12 Jan 1989, Mar. 1989, at 3.

Establishment of a Center for Law and Military Operations, TJAG Memorandum, 21 Dec 1988, Apr. 1989, at 3.

JAGC Automation Standards — Policy Memorandum 89-3, DAJA-IM, 21 Jun. 1989, Aug. 1989, at 3.

Malpractice Protection for National Guard Personnel Providing Legal Services — Policy Memorandum 89-2, Apr. 1989, at 4.

Management of Automated Legal Research (ALR) Services — Policy Memorandum 89-4, DAJA-IM, 28 Aug. 1989, Oct. 1989, at 3.

Model Claims Office Program — Policy Memorandum 89-5, DAJA-ZA, 10 Oct. 1989, Nov. 1989, at 3.

Providing Prosecution Services, DAJA-ZD, 30 Nov 1988, Feb. 1989, at 3.

Status of Certain Medical Corps and Medical Service Corps Officers Under the Geneva Conventions, DAJA-IA, Apr. 1989, at 5.

Memorandum of Law: Executive Order 12333 and Assassination, DAJA-IA, Dec. 1989, at .

Index of The Judge Advocate General's Opinions

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Changes in Army Confinement Procedures; Opinion DAJA-CL 1989/5175, June 1989, at 53.

Professional Responsibility Opinion 89-01, OTJAG, June 1989, at 54.

Standards of Conduct—Holiday Inn Government Amenities Coupons, DAJA-AL 1989/1549 (27-1a) (5 May 1989), July 1989, at 47.

NOTE: *The following article was listed incorrectly in the 1978-1988 cumulative index. The correct listing is as follows:*

Legislative and Judicial Developments Under the Uniformed Services Former Spouses' Protection Act, by MAJ Charles W. Hemingway and Emily Daniel, Jan. 1984., at 1.

*U.S. GOVERNMENT PRINTING OFFICE:1989-261-885:00011

By Order of the Secretary of the Army:

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